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Dear Sir / Madam,

Financial Services Consumer Panel response to CP21/13 A new Consumer Duty

The Panel welcomes the opportunity to respond to the FCA's consultation on a new Consumer Duty. We have long advocated for a duty of best interests in financial services to raise the bar for conduct standards across all sectors of the industry. The FCA's consultation on a new Consumer Duty is a long overdue and welcome step to achieving this.

We fully support the aims and ambition of the FCA's proposals. We agree that the new Duty – if implemented, supervised and enforced effectively – will achieve a much-needed and significant shift in the processes, behaviour and culture of financial services firms across the board. We also agree that the new Duty should be anticipatory in nature and ultimately look to create 'an environment where consumer harm does not occur in the first place'¹. It is difficult to overstate the benefits of this for consumers. Crucially, harm to consumers should largely be prevented and, if harm does occur, it should be much reduced. All consumers, including SMEs and vulnerable consumers, should receive the products and services they need at a fair price. They will be able to trust that firms have their best interests at heart and therefore navigate financial services markets with increased confidence. This has benefits for firms and the industry at large too – good conduct is good business, and reduced misconduct means reduced redress bills. In turn, this would help create a stable, effective and trusted financial services industry that is internationally attractive and competitive. The regulated industry would benefit substantially from such a Duty as it would mark a clear distinction between the regulated and unregulated worlds, while consumers would find it easier to navigate choices – and safeguard themselves from harm. The new Duty also creates a fairer more consumer-focused competitive playing field, especially between new entrants and incumbents, which allows firms to compete and innovate in pursuit of good consumer outcomes.

For the new Duty to succeed, and for these substantial benefits to be realised, the Duty must be owned at Board level, supported by clear personal accountability with a single person accountable for consumer outcomes (and therefore compliance with the Duty) under the Senior Managers & Certification Regime. Firms must move beyond a tick-box approach to compliance and really put consumers at the heart of everything they do. Our hope is that the Boards of financial services firms will have (and will be able to demonstrate they are having) discussions regarding consumer outcomes and the exercise of the new Duty in the same way, and with the same frequency, that they discuss shareholder returns, risk, audit, remuneration, financial performance, strategy etc.

The FCA must also change its approach; moving away from the piecemeal addressing of specific instances of poor conduct and towards a holistic, agile approach that better prevents and addresses consumer harm. Firms and the FCA should be under no illusion that this new Duty will feel different to the current 'treating customers fairly' standard. If

¹ [CP 21/13](#) para 2.21

firms and regulators do not change their approaches, then consumer outcomes will not change and the significant costs of poor conduct - for consumers, firms and the industry as a whole - will continue. To allow this to happen would waste a unique opportunity to improve the consumer protection standard across the board. We are pleased to see the FCA impressing this need for change throughout its consultation paper and believe the changes planned under its Transformation programme² will, if executed successfully, help it to become the more interventionist and agile regulator that it will need to be.

Whilst we recognise the context for, and wholeheartedly support the aims of, the new Duty, we do have concerns about some of the elements in the proposed structure. Our preferred formulation for the overarching Consumer Principle is that **"a firm must act in the best interests of retail clients"**. This creates the strongest, clearest expectation on firms and is most likely to raise the bar for consumer protection to the high standard needed across the industry to deliver the benefits discussed above. However, as currently drafted, the Cross-cutting Rules and Four Outcomes that support the Consumer Principle (collectively referred to as the 'supporting components') are too similar to the existing 'treating customers fairly' standard and so risk diluting the impact of the new Duty. This may encourage some in the industry to think that they are already acting in the best interests of consumers and therefore not seek to make the significant changes which may be required to comply with the new Duty. We therefore encourage the FCA to strengthen these components, for instance by:

- Reducing some of the subjectivity in the Cross-cutting Rules (e.g. "reasonable steps" and "foreseeable harm")
- Re-framing the Four Outcomes in the form of desired consumer objectives, viewed from the consumer perspective (e.g. "consumer understanding" rather than "communication")
- Highlighting the expected conduct standard more clearly, drawing a clear comparison with 'treating customers fairly' in terms of what extra is required.

We believe that the new Duty should be further strengthened by attaching a private right of action. This provides the strongest incentive for industry to raise their conduct standards and comply with the new Duty.

The new Duty must be implemented without delay. There is a significant amount of consumer harm occurring across all sectors of financial services and action needs to be taken urgently. This harm is not only being caused by a few rogue firms, but is also resulting from market-wide practices³. The quicker the new Duty is implemented; the quicker future harm can be prevented or minimised and the quicker consumers, firms and industry at large can realise the substantial benefits. The transition period from the decision to introduce a new Duty to its actual implementation is likely to be confusing for firms and consumers alike. Therefore, we encourage the FCA to make this period as short as possible.

Finally, we wish to stress the importance of the consumer stakeholder voice in responding to this consultation and would encourage the FCA to ensure that it is given fair weighting when compared to the much louder voice of industry. This is a pivotal moment for the FCA; consumer trust in financial services is paramount – not just for consumers or for the industry, but for the economy more widely. Industry respondents often have multiple opportunities to share their views (e.g. through individual firm responses and via trade bodies) and are likely to have more resources at their disposal to generate their response. Consumer bodies on the other hand are fewer, less well-resourced and generally do not benefit from collective representation. Although the consumer stakeholder voices will be relatively quieter and fewer in number, their valuable insight is critically important in

² For an overview of the FCA's ambition to change, see Nikhil Rathi's speech '[Transforming to a forward-looking proactive regulator](#)'.

³ See page 4 for more details.

informing any future Duty and therefore should be proactively sought and amplified by the FCA.

Our answers to the questions posed in the consultation are included at Annex A below.

Yours sincerely,

Wanda Goldwag
Chair, Financial Services Consumer Panel

Annex A – responses to questions

Q1: What are your views on the consumer harms that the Consumer Duty would seek to address, and/or the wider context in which it is proposed?

We agree with the FCA’s assessment of how markets can work effectively in the interests of consumers. Our own vision for effective markets, as set out in our [response to HM Treasury’s future regulatory framework review](#), is one where:

1	Firms act in consumers’ best interests
2	Firms which do not, or are unlikely to, act in this way should not be admitted to the market. If they are already in the market, they should be robustly sanctioned or barred.
3	Consumers know when they are (and are not) protected and what “protected” means.
4	Consumers are protected from new and emerging harms because regulation keeps up with technological change and regulators have the ability to act swiftly.
5	Consumers get prompt and commensurate redress when firms don’t meet the best interests standard.
6	Innovation is supported and encouraged insofar as it benefits consumers. New products and services should be appropriate and come with suitable protections.
7	Regulation recognises the wider socio-economic and demographic context it exists in. This includes the diversity of consumers’ lives, their relative skill and knowledge compared to firms, the complexity of products available to them, and the impact of non-financial policies on them.

Unfortunately, this vision is not being realised at present and consumers are suffering harm as a result. We support the FCA’s assessment of the harm it is seeking to address with the new Duty and particularly welcome the inclusion of examples. Importantly, these examples are not limited to isolated incidents of poor conduct by a few rogue firms. Rather, they include market-wide practices such as the loyalty penalty in general insurance and confusing overdraft pricing in high cost credit markets⁴.

A further example can be seen in the personal protection market whereby very few insurers issue an annual benefit statement to the policy holder that explains what product the consumer has, what it does and how to access the benefits it offers. Without this information, consumers cannot assess whether the product they have is offering them fair value and the lack of communication means there is no prompt for them to review or cancel the policy. This is another example of firms exploiting consumers’ inertia. The same is true of occupational protection insurance schemes, with few schemes producing member statements resulting in the poor utilisation by members of what could be very helpful benefits⁵.

⁴ CP 21/13 para 2.13

⁵ <https://www.morganash.com/perch/resources/downloads/proactive-absence-intervention-white-paper-june-2021.pdf>

These examples of widespread poor conduct demonstrate why the new Duty is necessary and why it is necessary to apply it across all regulated retail financial services. Without it, consumer harm will continue as it does at present. This risks consumer losses, significant and unsustainable redress bills, firm failures and an overall loss of confidence in the UK financial services sector.

We strongly support the anticipatory nature of the Duty being proposed by the FCA which will, as the FCA points out, create an 'environment where consumer harms do not occur in the first place'⁶. Preventing harm occurring in the first place should be the starting point for all decisions made by firms and regulators. It will unite firms and regulators behind a common goal and is the best way to maintain orderly, effective markets that consumers can trust. Preventing misconduct will also ultimately reduce the significant redress costs, including the Financial Services Compensation Scheme (FSCS) levy.

In our view, this focus on prevention and shift to a simple, overarching standard is a significant step forward from the current approach to regulation. At present, the FCA tends to respond to harms as and when they arise. This approach results in a large and complex patchwork of rules that is difficult for firms and consumers to understand and unwieldy for the FCA to supervise and enforce. The patchwork of individual rules also inevitably leaves gaps - particularly when new, innovative products enter the market - which firms can exploit either to avoid regulation completely or to engage in conduct which technically is not a breach of the rules, but by the standards of the reasonable person is not right. We have previously referred to this conduct as 'legal but not right'. It includes the market-wide poor practice in insurance and high-cost credit markets referenced above, and the sludge practices the FCA discusses at para 2.11 of the consultation. The pandemic has highlighted further examples. Most notably, consumers trying to claim on their insurance for holidays cancelled because of the pandemic have been passed from banks to insurers and back again in a confusing and frustrating way. This unhelpful 'consumer ping pong' has created an unreasonable barrier to refunds, which for some consumers would have provided much needed financial support. The new Duty will give the FCA the tool it needs to address this 'legal but not right' misconduct.

Whilst we support the FCA's view of the harms the Duty would address and the wider context in which it is proposed, there are two elements of the proposal where we urge caution:

- (i) The FCA should avoid an overreliance on consumer responsibility, which risks diluting the substantial benefits offered by the Duty. In our view, consumer responsibility is a problematic concept because it assumes that consumers are *able* to take responsibility for their decisions. We do not believe this is the case - for all the reasons the FCA sets out para 2.11 of the consultation: information asymmetries, power imbalance, exploitation of behavioural biases and opaque decision making by firms. We encourage the FCA to make it clear to firms that the new Duty will require them to demonstrate that they have done everything they can to put consumers in a position where they are able to take responsibility for their decisions.
- (ii) The FCA should avoid encouraging firms to ask themselves what outcomes consumers should be able to expect⁷. The problem with this is that firms may assume that consumers' expectations are set by a product's terms and conditions, when it is a well-known fact that many consumers do not read the terms and conditions and many of those that do cannot understand them. Firms may therefore assume consumers expect certain things which they did not understand or were simply not aware of. This test therefore sets too low a bar

⁶ [CP 21/13](#) para 2.21

⁷ [CP 21/13](#) para 1.2

for conduct standards and will not deliver the uplift in standards the FCA is aiming for. We encourage the FCA to reconsider.

Q2: What are your views on the proposed structure of the Consumer Duty, with its high-level Principle, Cross-cutting Rules and the Four Outcomes?

We believe the new Consumer Duty should sit at the pinnacle of regulation. This ensures that it is given the weight it deserves and allows all supporting regulation to be interpreted in its favour. It sets a single, overarching standard to guide firms and regulators in all that they do. In our view, the best way to achieve this is to enshrine the duty in statute. We recognise that legislative change can take time and, as we have said above, we want the new Duty to be in place as soon as possible. Therefore, the FCA should initially introduce the Duty as proposed via its Handbook, with a view to reviewing the impact of the Duty and then calling for statutory change when the appropriate opportunity arises. For example, HM Treasury's Future Regulatory Framework Review may provide future opportunities for legislative change.

Legislative considerations go beyond the Duty itself. We think additional amendments to existing statutory provisions might be required to avoid confounding the aims of the Duty. For example, the consumer responsibility principle in the Financial Services and Markets Act 2000 (FSMA)⁸ could be amended so that consumers are only deemed able to take responsibility for their decisions where firms have complied with the Duty. Further, legislation might be required if the early operation of the Duty reveals issues at the perimeter which complicate the Duty's operation or interfere with its intended effect.

The Cross-cutting Rules and the Four Outcomes go on to provide more detail to firms on what is expected of them under the new Duty. We recognise the need for clarity to ensure consistent application of the Duty, however, any components supporting the Principle must be carefully designed so as not to dilute the single, overarching standard. The new Principle itself is a significant raising of the bar for all regulated financial services firms beyond the current requirement to 'treat customers fairly' and therefore has the potential to substantially improve consumer outcomes. However, the supporting components as currently proposed are reminiscent of the requirements under the existing regime which, for the reasons set out above, have not been robust enough to prevent or minimise consumer harm. There is also a risk that over-prescribing the Duty allows firms to take a tick-box approach to compliance which will fail to achieve the shift in culture and behaviours that the FCA is looking for.

The new Duty will rightly require firms to fundamentally change their processes, culture and approach. This change must be led from the top down. In our view, the Duty should be made a Board-level responsibility, with a single person accountable for consumer outcomes (and therefore compliance with the Duty) under the Senior Managers & Certification Regime. This would send a clear message that consumer outcomes are as important as the issues that already attract personal accountability (such as audit and anti-money laundering) and therefore Boards should devote appropriate time and resource to discussing them. Firms' Boards should also be encouraged to actively consider the diverse needs of their customer base⁹, which could take the form of consumer panels or focus groups which should cover a range of consumer needs relevant to the firms' business model – including vulnerable and/or high-risk consumers and SMEs, where appropriate. Only by truly understanding the needs of their customers can firms properly comply with the new Duty.

⁸ FSMA 2000 s1C(2)(d)

⁹ In line with the FCA's approach encouraged in its [discussion paper](#) on diversity and inclusion in the financial sector

Q3: Do you agree or have any comments about our intention to apply the Consumer Duty to firms' dealings with retail clients as defined in the FCA Handbook? In the context of regulated activities, are there any other consumers to whom the Duty should relate?

We agree that the Consumer Duty should be applied to firms' dealing with retail clients as defined in the FCA Handbook.

We encourage the FCA to explicitly state that this includes SMEs (to the extent they are within the perimeter). SME interests are often different to those of individual consumers and not as well understood. Also, in the case of small SMEs, business and personal finances are often blurred, with personal financial services used for business purposes. Therefore, an explicit reference to SMEs will help focus firms (and the FCA) on developing their understanding of SME needs. We further call on the FCA to conduct a mapping exercise of SMEs so that their diverse situations and needs are better understood.

We also encourage the FCA to make it clear that the Duty applies to actual and potential customers. Both actual and potential customers need protecting as harms can occur even before the consumer has entered into a relationship with the firm. One example of pre-sale harm is targeted marketing to consumers of products that are not suitable for them, or which underplay the risks involved. Our [research into digital advertising](#) found that there was potential for targeted advertising to exploit and manipulate consumers who were already vulnerable to harm and that some promotions did not give consumers sufficient information to make an informed decision about the product. Both of these issues could mean consumers buy products that are not right for them, which may lead to harms such as financial loss and an unexpected lack of regulatory protections.

Q4: Do you agree or have any comments about our intention to apply the Consumer Duty to all firms engaging in regulated activities across the retail distribution chain, including where they do not have a direct customer relationship with the 'end-user' of their product or service?

We believe that it is vital that the Consumer Duty applies to all firms across the retail distribution chain. We are aware of some concerns within industry about firms being held responsible and accountable for decisions which they have no control over. However, to avoid gaps in consumer protection, we believe firms *should* have oversight of the distribution chain for all of their products and services and should only enter into agreements with other firms that put consumers at the heart of what they do. We believe this approach is in line with the current rules and guidance on outsourcing in the [SYSC sourcebook](#).

Whilst we support the FCA's intention to apply the Duty across the distribution chain, there are some potential unintended consequences for the FCA to consider. Firstly, the FCA must ensure that firms do not rely on others in the chain to evade or obscure their responsibility for breaches of the Duty. For example, firms should not be permitted to contract their way out of the Duty.

Secondly, if the new Duty is to be actionable, as we believe it should be, the FCA will need to consider how liability is shared between firms in the chain and how it will be clear to consumers which firm they should take action against. Again, firms should not be able to evade or obscure their liability, nor should they discourage consumers from making a claim by unreasonably re-directing the complaint to other firms in the chain. Unfortunately, we have seen firms engage in this sort of behaviour before, such as during the coronavirus pandemic when travel insurers and banks passed consumers between each other when dealing with claims for cancelled holidays.

Finally, the regulatory perimeter may cause difficulties in applying the new Duty across the distribution chain. The Duty will only apply to *regulated* activities and there will be some distribution chains which contain a mixture of regulated and unregulated products, services and firms. For example, there may be a regulated fund in an unregulated trust-based pension, both of which have the potential to cause consumer harm, but only one of which is regulated and so directly subject to the Duty.

Q5: What are your views on the options proposed for the drafting of the Consumer Principle? Do you consider there are alternative formulations that would better reflect the strong proactive focus on consumer interests and consumer outcomes we want to achieve?

We support option 2 for the Consumer Principle - 'A firm must act in the best interests of retail clients' - because:

- It is clearer in its intention than the other options.
- It better communicates the anticipatory, preventative nature of the duty.
- It sends the strongest signal to senior managers and Boards about what is expected of them.
- Using the word 'best' encourages firms to go as far as they can for consumers.
- 'Best interests' is a concept already familiar to some parts of industry – although we would stress that these parts of industry still need to raise their conduct standards¹⁰.

We do not believe that option 1 – 'A firm must act to deliver good outcomes for retail clients' – would have the same effect in practice as option 2. In our view, it is weaker than the best interests formulation because:

- It is not clear what 'act to deliver' means for firms in practice. It appears to suggest firms could fall short of *actually* delivering the good outcomes, as long as they have acted in a way that *could* deliver them.
- 'Good outcomes' is not as strong as 'best interests'.
- The use of 'outcomes' may encourage firms to look to the future and consider eventual outcomes for consumers, whereas 'acting in the best interests' focusses the mind in the present.

We believe the Consumer Principle is the most important element of the new Duty. It sets the single, overarching standard for conduct and represents a step-change from the current standard. We reiterate our view that it must not be diluted by any of its supporting components.

Q6: Do you agree that these are the right areas of focus for Cross-cutting Rules which develop and amplify the Consumer Principle's high-level expectations?

AND

Q7: Do you agree with these early-stage indications of what the Cross-cutting Rules should require?

¹⁰ For example, some insurers are required to act in the best interests of their customers, however we have still seen poor conduct in the insurance industry such as the loyalty penalty and the poor behaviour of insurers during the coronavirus pandemic, some of which charged the same price, or even more, for a lower degree of cover (e.g. : <https://www.travelweekly.co.uk/articles/395992/whichdemands-probe-into-travel-insurance-covid-cover>)

We understand the need for the FCA to set clear expectations so that firms can make the necessary judgements about what they need to do to meet those expectations. Adding explanatory supporting components such as the Cross-cutting Rules may help with this. However, we do not agree that the Rules as currently drafted develop and amplify the Consumer Principle's expectations.

The Cross-cutting Rules require firms to "take all reasonable steps to:

1. avoid causing foreseeable harm to consumers
2. enable consumers to pursue their financial objectives."

We believe that the use of the phrase 'reasonable steps' unnecessarily dilutes the requirement to act in consumers' best interests and could be interpreted subjectively by firms, allowing them to argue that what they did was reasonable despite a consumer not receiving good value, or otherwise experiencing harm as a result. This subjectivity also makes it difficult for the FCA to enforce against the Rules.

There are further subjective elements in the first Rule that give firms similar opportunity to debate the technicalities of the Rule, rather than the overall compliance with the Duty. For example, much debate could be had about whether the harm was caused by that firm and whether the harm was foreseeable. These debates are likely to be complex, lengthy and obscure the essentially simple assessment of whether or not the firm has done the right thing. Finally, merely requiring firms to 'avoid' causing harm is too weak an obligation; we believe firms should be required to minimise or prevent harm. This Rule should therefore be strengthened so as not to dilute the raising of standards we believe would be achieved by the Principle.

The second of the Rules is also problematic in that it assumes that consumers are able to set the right financial objectives for themselves and know if these objectives are being met. We refer to our earlier discussion of consumer responsibility under Q1 above: the new Duty should require firms to put consumers in a position where they are able to take responsibility for their financial decisions. This should include being able to set their financial objectives and assess whether a firm's offering can help meet them. This second Rule could be strengthened along these lines to make this link between firms' conduct and consumer decision making clearer.

We support the third Cross-cutting Rule which requires firms to act in good faith. This is a familiar concept and sets a clear expectation.

The aim of all elements of the new Duty must be that firms use their time, energy and focus to ensure the delivery of the new Duty to consumers, rather than be distracted by trying to exploit overly complicated and ambiguous wording to their advantage in attempts to avoid the Duty.

Q8: To what extent would these proposals, in conjunction with our Vulnerability Guidance, enhance firms' focus on appropriate levels of care for vulnerable consumers?

We remain a strong supporter of the FCA's [Vulnerability Guidance](#) and welcome the FCA's explicit consideration of how firms' treatment of vulnerable consumers may change as a result of the new Duty. We encourage this focus to be maintained in any final Policy Statement on the new Duty, perhaps with examples of how the Duty can be used to improve outcomes for vulnerable consumers. Linking the vulnerability guidance to the new Duty provides an opportunity to further promote the guidance and increase take up.

We believe that the widespread adoption of an inclusive design approach by financial services firms will make the biggest difference to vulnerable consumers. The new Duty, which requires firms to consider the best interests of all consumers at every stage of what they do – from product and service design, through to delivery and post-contract service – will help to embed this approach. We encourage the FCA to make explicit reference to inclusive design in future communications on the new Duty and in its ongoing engagement with firms on the vulnerability guidance. The FCA should also encourage firms to consult groups representing vulnerable consumers and/or people with lived experience of vulnerability to help inform their inclusive design approach.

Q9: What are your views on whether Principles 6 or 7, and/ or the TCF Outcomes should be disapplied where the Consumer Duty applies? Do you foresee any practical difficulties with either retaining these, or with disapplying them?

AND

Q10: Do you have views on how we should treat existing Handbook material that relates to Principles 6 or 7, in the event that we introduce a Consumer Duty?

We believe that the FCA should streamline its Handbook and remove or disapply elements which duplicate, undermine or conflict with the new Duty. This includes, but is not limited to, PRIN 6 – treating customers fairly. To keep such provisions which, as we have outlined above, clearly have not been strong enough to prevent or minimise consumer harm sends the wrong message to firms. It may lead them to believe that they do not need to make any changes to their conduct in order to comply with the new Duty. It may also inadvertently create a 'backstop' where firms argue they have complied with the new Duty because they have complied with other regulations around the fair treatment of consumers. This would seriously undermine the change the FCA is calling for.

When deciding which elements of the Handbook to remove or disapply, the FCA should consider the following principles:

- Simplicity – the FCA should avoid unnecessary duplication. The new Duty creates a single, overarching standard of care that firms should meet when dealing with consumers.
- Coherence – different parts of regulation, policy and legislation should fit well together. The FCA may therefore need to change (or call for the change of) existing provisions to accommodate and support the new Duty.
- Judgement – firms have a responsibility to exercise judgement about how to deliver the outcomes that regulation is trying to achieve. The FCA should ensure its Handbook and communications are clear on what these outcomes are, but it is for firms to decide what delivering them means in practice. The FCA should avoid over-prescription.

Q11: What are your views on the extent to which these proposals, as a whole, would advance the FCA's consumer protection and competition objectives?

It is difficult to overstate the benefits that the new Duty would deliver in terms of the FCA's consumer protection objective, provided that a) it is not diluted by its supporting components and b) it is effectively implemented, supervised and enforced. We support the FCA sending a clear message to industry that compliance with the new Duty will require a significant shift in behaviour and culture. This will re-focus firms' approach to consider consumers' needs in everything they do which can only lead to better consumer outcomes. As discussed above, the anticipatory nature of the Duty will prevent or minimise consumer harm, which is the strongest and most efficient way for the FCA to meet its consumer protection objective. The new Duty will also give the FCA tools to tackle consumer harm

that it currently can't tackle easily – specifically conduct which is 'legal but not right'. Further, the Duty should allow for more agile supervision and swifter enforcement (see below) which means that where harm does appear to occur, it is addressed more quickly and so ultimately reduced.

With regards to the FCA's competition objective, we are aware of a concern within industry that the new Duty could stifle competition and innovation and therefore threaten the FCA's achievement of its objective to promote competition. We do not accept this view. Rather, we believe the new Duty creates a fairer and more consumer-focused playing field upon which all firms - including new entrants and incumbents - can compete and innovate in pursuit of good consumer outcomes. This creates new opportunities for firms to compete and innovate in consumers' best interests, rather than simply commercial interests, without the risk of 'first mover disadvantage'. The Duty will also mean firms deliver a higher quality of service to meet their customers' needs which will enable them to stand out from their competitors, enhance their reputation and build consumer confidence. The outcome should be a financial services industry which better meets the needs of consumers and is therefore more stable, trusted and attractive to domestic and international investors and clearly distinguishable from the unregulated sector.

Vital to the success of the new Duty in realising the substantial benefits it can offer to consumers, firms and the industry as a whole is a significant shift in the approach of the FCA, particularly in supervision and enforcement. Regulation under the new Duty needs to feel different for firms so that they are motivated to make the necessary changes. Supervision should be less focussed on breaches of individual rules and instead make a holistic assessment of whether the firm is doing the right thing. Firms and senior managers should be asked how they are complying with the new Duty at every interaction they have with the FCA – from authorisation to enforcement or market exit. Where firms fall foul of the new Duty, enforcement must be swift and robust.

We welcome the FCA's Transformation programme which aims to make the regulator more innovative, assertive and adaptive, with a greater focus on measurable outcomes¹¹. We particularly welcome the closer working between Policy and Supervision which should allow the FCA to immediately monitor whether the Duty is achieving its stated outcomes and pick up where adjustments need to be made if necessary.

Q12: Do you agree that what we have proposed amounts to a duty of care? If not, what further measures would be needed? Do you think it should be labelled as a duty of care, and might there be upsides or downsides in doing so?

We support the FCA's assessment that what it has proposed amounts to a duty of care. We believe it should be referred to as a 'duty of best interests' which is the clearest description of what the duty requires of firms.

Q13: What are your views on our proposals for the Communications outcome?

AND

Q14: What impact do you think the proposals would have on consumer outcomes in this area?

AND

¹¹ <https://www.fca.org.uk/news/speeches/transforming-forward-looking-proactive-regulator>

Q15: What are your views on our proposals for the Products and Services outcome?

AND

Q16: What impact do you think the proposals would have on consumer outcomes in this area?

AND

Q17: What are your views on our proposals for the Customer Service outcome?

AND

Q18: What impact do you think the proposals would have on consumer outcomes in this area?

AND

Q19: What are your views on our proposals for the Price and Value outcome?

AND

Q20: What impact do you think the proposals would have on consumer outcomes in this area?

We believe that the Four Outcomes, as currently drafted, undermine the new Consumer Duty. They are not sufficiently challenging and aspirational. This means they are unlikely to inspire the significant uplift in conduct standards across financial services firms that is needed to meet the new, higher bar. The Outcomes are also too reminiscent of the existing requirements under the 'treating customers fairly' principle which, as discussed above, has failed to prevent and minimise consumer harm.

We believe the Outcomes could be strengthened if they were re-worded from the consumer perspective, for example, the Outcome currently called "communications" could be reframed to be about consumer understanding. This will make it clearer what firms are expected to achieve, rather than simply what their inputs and outputs should be.

The FCA should consider adding an Outcome regarding redress. We believe consumers should get prompt and commensurate redress when firms fail to meet the standards expected by the new Duty. The FCA may also wish to consider adding an Outcome, or strengthening the existing Outcomes, on greater transparency for consumers. Transparency is vital for consumers at every stage of their engagement with firms - assessing whether to buy a product, knowing what the product they've bought offers them and knowing when something has gone wrong and they need to get help or complain. Firms should therefore aspire to be as transparent as possible in a way which is useful and easy to understand for consumers.

The Four Outcomes must be measurable so that firms can demonstrate they are delivering each Outcome and the FCA can easily hold firms, and named individuals within firms, accountable. We note the FCA's ambition to be clearer on how it measures its own success, including the setting of strategic overarching outcomes and testing a number of metrics¹². This more outcomes-focused approach to monitoring the FCA's own performance should

¹² <https://www.fca.org.uk/news/speeches/transforming-forward-looking-proactive-regulator>

be extended to its assessment of firms' compliance with all regulation, including the new Duty. As well as ensuring firms are meeting the requirements of the new Duty, this will also allow the FCA to monitor the overall impact of the Duty and assess whether it is delivering the substantial benefits discussed throughout this response.

Q21: Do you have views on the PROA that are specific to the proposals for a Consumer Duty?

The Panel has long advocated for any new Consumer Duty to be actionable and we continue to believe this is the case. Attaching a private right of action provides a strong incentive for industry to raise standards and comply with the new Duty. It concentrates the minds of Boards and Executives, leading to a greater focus on good consumer outcomes. We have seen previous examples of this effect, such as when life insurers were spurred into taking action to monitor distributor quality and raise industry standards as a result of the Consumer Insurance (Disclosure and Representations) Act 2012. This Act shifted the burden for ensuring insurance disclosures were of sufficient quality from the consumer onto the firm.

To be of most value to consumers, the private right of action should permit class action and allow for collective redress. It should also be clear that SMEs as well as individual consumers can make use of the private right of action.

We are aware of concerns that attaching a private right of action to the new Duty would lead to a flood of claims, particularly from CMCs, at significant cost to firms and consumers. However, we do not believe this would be the case. Our [research into the pros and cons of a private right of action](#) found no evidence that this would occur. It is likely that a private right of action would be a last resort for consumers, who would be able to engage with firms' complaints processes first, and then the Financial Ombudsman Service if necessary. The new Duty would also improve firms' own complaint handling processes, making it more likely that disputes are resolved at an early stage, without needing to resort to the private right of action.

Q22: To what extent would a future decision to provide, or not provide, a PROA for breaches of the Consumer Duty have an influence on your answers to the other questions in this consultation?

Our answers to other questions in this consultation are not heavily influenced by a future decision to provide, or not provide, a private right of action. We remain convinced of the substantial benefits of the new Consumer Duty as discussed throughout this response. The private right of action is one of several important methods of ensuring those benefits are delivered.

Q23: To what extent would your firm's existing culture, policies and processes enable it to meet the proposed requirements? What changes do you envisage needing to make, and do you have an early indication of the scale of costs involved?

N/A

Q24: [If you have indicated a likely need to make changes] Which elements of the Consumer Duty are most likely to necessitate changes in culture, policies or processes? 53 CP21/13 Annex 1 Financial Conduct Authority A new Consumer Duty

N/A

Q25: To what extent would the Consumer Duty bring benefits for consumers, individual firms, markets, or for the retail financial services industry as a whole?

We have discussed the substantial benefits of the new Duty for consumers, firms and the financial services industry as a whole throughout our response. We also fully support the FCA's assessment of these benefits set out in para 2.36 of the consultation.

For clarity, we briefly summarise our assessment of the benefits below:

For consumers:

- Harm to consumers (financial and non-financial) is ultimately reduced.
- Consumers can access better quality products that are more suitable for their needs.
- Consumers are more able to understand the range of products and services available to them as firms operate with greater transparency.
- Consumers can navigate the financial services landscape with greater ease as the Duty means firms understand consumers' needs and adopt an inclusive design approach.
- Consumers can engage with financial services with greater confidence and trust, knowing that regulated firms have their best interests at heart.
- Consumers' financial services needs are met consistently.
- Consumers can access the products and services they need at a fair price.

For firms:

- A simpler, easier to manage and more responsive regulatory regime with a clear focus: acting in the best interests of consumers.
- Potential for increase in new business and greater retention of customers as customers are more satisfied with the service they receive. Firms benefit from the enhanced reputation that comes with doing the right thing.
- Reduced redress costs, including Financial Ombudsman and FSCS costs.
- Ability for regulated firms to distinguish themselves from unregulated firms - compliance with the new Duty is a major attraction, for potential customers and investors, which is only available to regulated firms.
- Ability to compete and innovate on good consumer outcomes in ways that were previously prevented by 'first mover disadvantage'.

For the financial services industry as a whole:

- Greater trust in the industry which leads to more stable markets.
- Strong international reputation, allowing UK plc to be globally attractive and competitive.

Q26: What unintended consequences might arise from the introduction of a Consumer Duty?

We believe that the benefits of the new Consumer Duty significantly outweigh the risks of any unintended consequences. There are several such consequences we have heard mentioned in the debate around the new Duty that we wish to address.

Firstly, some have suggested that the new Duty will exacerbate financial exclusion issues because firms will withdraw from higher-risk parts of the market. We do not think this is likely. The new Duty requires firms to consider the needs of all consumers, including those who may be higher-risk. Firms would therefore need to review their current offering and see if it meets the needs of these consumers. This could result in the removal of high-cost, capital-heavy products and business models which could in turn make under-served segments of the market more economic to address. Further, the new Duty provides firms

with the opportunity to 'reset' and focus on consumer outcomes which may encourage innovation in traditionally underserved areas of the market. We reiterate the call made in a letter we co-signed with 40 other consumer organisations for the FCA to be under a duty or required to 'have regards' to financial inclusion.

Secondly, industry have raised concerns that the new Duty would stifle innovation and competition. As we set out in our answer to Q11 and mention directly above, we think the contrary is true – the new Duty provides new opportunities to innovate and compete on the basis of good consumer outcomes. It levels the playing field, particularly between new entrants and incumbents, and removes first mover disadvantage that may currently be stifling competition and innovation.

Industry have also raised concerns about the increased costs attached to complying with the new Duty, which would ultimately be passed on to consumers. We acknowledge that the significant change required by the new Duty could incur material costs. However, we view these costs as an investment. Better conduct from the beginning will undoubtedly reduce costs later down the line – firms' redress costs will be reduced, they will be less likely to incur regulatory fines, they will pay less to the Financial Ombudsman and the currently unsustainable FSCS levy will be reduced. Firms are also likely to benefit from new and retained custom as a result of their improved treatment of consumers: ultimately, good conduct is good business. We encourage the FCA to emphasise these benefits to firms in future communications about the new Duty.

Finally, we are aware of concerns that the new Duty will further complicate an already complex regulatory landscape. We do not disagree that the current landscape is complex, but we believe that the Duty will have a simplifying effect. It sets a single, overarching standard for firms to comply with – if they are complying with the Duty it is highly unlikely they would be breaching any of the FCA's rules. Firms therefore only need satisfy themselves that they are doing the best for consumers. The Duty will also bring together the currently differing standards applied by the FCA and the Financial Ombudsman Service as the conduct required by the Duty aligns more closely to the Financial Ombudsman's 'fair and reasonable' test. This will provide clarity to firms and consumers alike and should ultimately reduce the number of complaints reaching the Financial Ombudsman. We recognise that there may be some areas of regulation which need to be amended to accommodate the new Duty and would encourage the FCA to resolve any conflicts or ambiguities in time, in line with the principles we set out in our answer to Q10. In the meantime, the FCA should make it clear to firms that compliance with the new Duty is the ultimate expectation.

Q27: What are your views on the amount of time that would be needed to implement a Consumer Duty following finalisation of the rules? Are there any aspects that would require a longer lead-time?

We recognise – and welcome – that the new Duty will require a significant shift in processes, behaviour and culture for both firms and regulators. It will require a lot of work to implement, as it should. The new Duty must be implemented without delay. There is a significant amount of consumer harm occurring across all sectors of financial services and action needs to be taken urgently. This harm is not only being caused by a few rogue firms, but is also resulting from market-wide practices as discussed above. The quicker the new Duty is implemented; the quicker future harm can be prevented or minimised and the quicker consumers, firms and industry at large can realise its substantial benefits. The transition period from the decision to introduce a new Duty to its implementation is likely to be confusing for firms and consumers alike. Therefore, we encourage the FCA to make this period as short as possible.