



## FCA: A new Consumer Duty - Consultation Paper CP21/13

The Institute and Faculty of Actuaries (IFoA) is a royal chartered, not-for-profit, professional body. We represent and regulate over 32,000 actuaries worldwide, and oversee their education at all stages of qualification and development throughout their careers.

### Key points

The IFoA supports the key themes of this consultation – the focus on outcomes, the enabling of better decisions, and the emphasis on judgement over compliance.

Under our Royal Charter we have a duty to promote the public interest, and we therefore welcome the FCA's proposed Consumer Duty, including its emphasis on the needs of vulnerable consumers.

We believe that the practical benefits of the Consumer Duty could include a reduced risk of substantial fines to firms for conduct risk failures, and a reduction in the reputational damage that the financial services market suffers when consumers believe they are taken advantage of. A further benefit is that consumers will be more likely to be engaged with, and use, financial products.

On the wording of the Consumer Duty, we prefer Option 1 (“A firm must act to deliver good outcomes for retail clients”), to Option 2 (“A firm must act in the best interests of retail clients”). Option 1 is aligned with the FCA's stated objective of good outcomes and in our view is easier to understand, as well as expressing a clear change from the current regime.

We think the successful implementation of the proposals will require a change in firms' culture. We suggest that the FCA should change the Overarching Cross-cutting Rules to amplifications of the Consumer Principle. These could be applied more easily than rules to situations that arise in individual product markets. They would also help employees to apply their own judgement to consumer outcomes.

We agree that the Four Outcomes - communications, products and services, customer service, and price and value - are the key elements of the firm-consumer relationship, and we would support issuing guidance notes on some or all of them. For example, a cross-cutting guidance note on Products and Services would be helpful in moving beyond the Treating Customers Fairly (TCF) rules.

We seek greater clarity on whether good outcomes will be regarded as meeting customers' needs, or what they want at a given point, and which should take priority. Some consumers may not like 'good outcomes', preferring 'low prices in the short term', and the proposals may have to allow such customers to insist on bad choices. We hope, however, that the Consumer Duty will lead to a genuine culture change not only in firms' attitudes to consumers but ultimately in consumers' attitudes to what constitutes good outcomes / their best interests.

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## Key points

Our understanding of the proposals is that firms will not have to deliver best outcomes for each individual customer, but should deliver good outcomes (as a minimum) for most consumers. We would like to see greater clarity about the intended thresholds, since the notion – albeit mistaken - of a duty to act in each individual's best interests could make some institutions oppose the proposals.

In relation to the products and services outcome, we would welcome more clarification about whether customers' expectations at purchase should be viewed as the most important factor when those expectations could evolve over time.

To support the intended improvement in cultures and behaviours, we suggest that the FCA should state clearly that it will apply sanctions against individuals for breaches of the Consumer Principle that lead to widespread poor outcomes, and explain how it intends to do so. We think that a much broader group of employees than those in the Senior Managers & Certification Regime should feel liable to sanctions if they fail to support good outcomes. However, for more junior employees sanctions may be inappropriate, and the priority should be to create a culture in which they are comfortable to speak up about breaches.

We do not think that a private right of action (PROA) could operate effectively alongside the Consumer Duty. The Consumer Principle could lose its key function of encouraging employees to use their judgement in assessing consumer outcomes, and instead could become more like a rule, with the courts paying a significant role in its determination.

1. The Institute and Faculty of Actuaries (IFoA) welcomes the FCA's consultation paper CP21/13 'A new Consumer Duty'. We support the key themes of this consultation – the focus on outcomes, enabling better decisions, and the emphasis on judgement over compliance. This response has been prepared with input from several of the IFoA's practice boards, including Finance and Investment, Pensions, Life Insurance, General Insurance and Regulation, as well as from members active in banking.

## Context

2. The IFoA's approach to this consultation has been influenced by our statutory role as a regulator of our own members. Our response describes the structure of principles, amplifications and guidance that we have established to carry out that role, and which we believe is relevant to the FCA's proposal to establish a Consumer Duty.
3. However, this important consultation also sits in the wider context of the FCA's Business Plan announced earlier in July 2021. The FCA's aspiration is to be more innovative, assertive and adaptive, and the Consumer Duty and consumer outcomes in general are at the heart of this vision.
4. The IFoA is very much engaged with consumer perspectives. Under our Royal Charter we have a duty to promote the public interest. Our public affairs outputs, including consultation responses, all reflect this goal. Those who contribute to these outputs do so as individuals, not as representatives of their employers.

5. In February 2021 the IFoA responded to HM Treasury's Financial Services Future Regulatory Framework Review. We noted there: "One voice that we feel is not sufficiently represented with equal weight in the policymaking and stakeholder engagement process is the voice of the customer, particularly the 'macro' view of society as a whole, and also groups of consumers who tend to experience less positive/more negative impacts from the financial system e.g. younger generations, vulnerable customers, excluded customers, customers with disabilities and those in lower socio-economic circumstances".
6. Recent examples of the IFoA's focus on consumers include the Great Risk Transfer campaign, which has explored the transfer of risks from institutions to individuals over recent years, and how consumers are often ill-equipped to manage those risks. Another example is our forthcoming work on the Poverty Premium in insurance that we are delivering in collaboration with Fair by Design. Through this work we have explored the causes of, extent and impact of the poverty premium in insurance, and how this prevents vulnerable and low-income consumers from accessing the protection insurance provides. We therefore welcome the FCA's proposed Consumer Duty, including its emphasis on the needs of vulnerable consumers.

### **General comments**

7. We think that the proposals outlined in the consultation paper are appropriate and that they are likely to be effective, provided that the intended change in culture can be achieved. The examples of firm practices given in paragraph 2.13, including information which is misleadingly presented, products and services that are not fit for purpose, products and services that do not represent fair value and poor customer service, provide evidence that there is a need for action to augment or replace Principles 6 and 7 and the Treating Customers Fairly (TCF) rules.

### ***Principles, rules and guidance***

8. We believe that good conduct is best set and controlled through a combination of principles, rules and guidance. Principles can be applied at all levels and in all areas, including in situations that could not be envisaged at the outset. Rules are normally easier to police, and can support minimum standards (e.g. road speed limits for drivers), above which principles may require higher standards (e.g. careful driving outside schools). The issuance of guidance means that principles and rules can be shorter, easier to understand and remember, and practical.
9. Our views on the FCA's proposals reflect the IFoA's own experience of using a similar structure in carrying out its function as a professional regulator. Members of the IFoA must comply with The Actuaries Code. This code includes six principles, which are supported by amplifications that clarify specific requirements of the principles for particular issues, and members must comply with both the principles and the amplifications. The fourth principle says that members must comply with all relevant legal, regulatory and professional requirements (i.e. the relevant rules) including professional standards (e.g. Applying Standards to Actuarial Work). In addition, the IFoA has issued guidance on various matters (e.g. Actuarial Software and Calculations).
10. If it is helpful, we will be happy to meet you to discuss how we set and control the conduct of our members, as well as our answers to the consultation questions.

### ***New Consumer Duty***

11. In our response to DP18/5 Discussion Paper on a duty of care and potential alternative approaches, we supported the concept of a Duty of Care. However, in the previous paper, Question 1.v raised an important point about whether a New Duty, on top of the existing regulations, would reduce complexity and bring greater clarity, or could result in an additional layer of regulation and greater complexity. We much prefer the current proposals for a combination of a Consumer Principle, Overarching Cross-Cutting Rules and the Four Outcomes, with rules and guidance.
12. Looking at the elements of the Consumer Duty Structure (as set out on page 17) in turn:
  - Consumer Principle: We support the concept of a high-level Consumer Principle. Of the two options suggested, we prefer Option 1, as explained in our response to Question 5
  - Overarching Cross-Cutting Rules: We support the concept of a consistent approach across retail product markets, but suggest that consideration might be given to these being amplifications of the Consumer Principle, applicable across all relevant product markets and – unlike rules - capable of being applied to situations that arise in individual product markets. In addition, we suggest that one of the amplifications might be about the need to pay particular attention to vulnerable consumers. We comment on the proposed wording of the cross-cutting rules under Question 6.
  - Four Outcomes: We agree that the Four Outcomes cover the key elements of the firm-consumer relationship, which could lead to good or bad outcomes, and we agree that it is appropriate to have rules for each of these elements. These could be a combination of existing rules (e.g. for mortgages) and new rules (across all relevant product markets). We believe the framework of communications, products and services, customer service, and price and value could apply well to many other industries and their regulators, and we encourage the FCA to promote it more widely.

### ***Change in culture***

13. We support the intended change from compliance with rules to understanding and judgement as to outcomes for consumers. However, it implies a significant change in culture. Although we believe that the need to think about consumer outcomes should make work more interesting and rewarding for employees at all levels and in all areas, experience shows that some people are happy to follow rules rather than to accept responsibility, and that many people do not initially welcome change.
14. We therefore suggest, as mentioned above, that the FCA should change the Overarching Cross-cutting Rules to amplifications of the Consumer Principle. Although this may not seem a significant change, we believe it would make it easier for employees to engage with the concept of outcomes for consumers, and to apply their own understanding and judgement about consumer outcomes. We would also support issuing guidance notes on some, or all, of the Four Outcomes. For example, a cross-cutting guidance note on Products and Services would be helpful in moving beyond the Treating Customers Fairly (TCF) rules.

### ***Consumer psychology***

15. We suggest that, in relation to the second bullet point in the proposed Cross-cutting rules (“enable customers to pursue their financial objectives”), clarity should be provided as to whether firms will have a duty to help customers to achieve good outcomes or to pursue their financial objectives, since these could be in conflict. We note, for example, that customers’ financial objectives could be influenced by consumer psychology including the focus on low prices in the

short term without taking account of contingent charges. For example, at present, a mortgage borrower might opt for a mortgage with a short introductory fixed-rate period because the initial interest payments are the lowest, without taking adequate account of the possibility that interest rates may have to go up to counter a rise in inflation. In 'Our future Mission' (page 33), the FCA explained that consumers buying financial products typically focus on the 'here and now' and that firms, either deliberately or unconsciously, design contracts or sales practices to take advantage of consumer psychology. We request that greater clarity should be provided on the specific point as to whether good outcomes will be regarded as meeting customers' needs, or what they want at a given point, and which of these should override the other if they are not aligned.

### ***Consumer responsibilities***

16. Paragraph 3.15 confirms that "Consumers would remain responsible for decisions they make". We suggest it would be helpful if the behaviour to be expected of consumers, assuming firms have complied with the Consumer Duty, could be described in more detail, to provide clarity on where consumer and firm responsibilities lie.

### ***Sanctions***

17. We support the FCA's objective of bringing about an environment where consumer harms do not occur in the first place (as stated in paragraph 2.21). To stop problems occurring in the first place, it is desirable that employees at all levels (not just those in the Senior Managers & Certification Regime) and in all areas (including external providers of services) feel an obligation to consider the impact of their actions on outcomes for consumers. We therefore make a brief comment on sanctions, although the consultation does not address this topic directly.
18. It is not clear that fines imposed on firms are leading to the desired improvements in the culture of firms or the behaviour of individuals within firms. To support the intended change in culture, we think that employees must believe that the FCA will take effective enforcement action against individuals, not just for breaches of the FCA's rules but also for breaches of the Consumer Principle. However, only one fine has been handed out in five years of operation of the Senior Managers & Certification Regime, and there have been less than a handful of enforcements against the TCF principle, unless rules were also broken. So individuals might think that they are highly likely to 'get away with it'. We therefore suggest that the FCA should state clearly that it will apply sanctions against individuals for breaches of the Consumer Principle that lead to widespread poor outcomes, and explain how it intends to do so. We would be happy to explain how we apply sanctions against members of the IFoA, when it is necessary to do so.
19. Sanctions against junior employees might be considered unfair, given their lack of executive power. An alternative, to ensure the involvement of junior employees, might be to devise a regime in which they had more to gain by speaking up about breaches than by keeping silent to protect their superiors. Sanctions would be applicable to more senior employees for not taking reasonable steps to investigate concerns raised with them, or for treating employees badly because they raise concerns.

### ***Promoting examples of good practice***

20. The consultation refers to instilling trust in the financial services industry. As a counterbalance to the negativity (rightly) surrounding bad actions, fines and interventions, we encourage the FCA to increase awareness of good behaviours and outcomes by showcasing the value for consumers when things work well. By increasing awareness of the good outcomes already being achieved, the news flow and public discourse is less likely to overemphasise the bad examples.

Improving trust overall will help more consumers to make use of appropriate solutions for them (and achieve their goals) rather than discouraging them from using financial services at all.

## Responses to specific consultation 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?***

21. We believe that events over recent years have highlighted various practices (including those mentioned in paragraph 2.13) that show the need for action. Various reviews by the FCA, including high cost credit and general insurance pricing, have found harm to groups of consumers (as a result of cross-subsidies) and have led to regulatory interventions. This suggests that Principles 6 and 7 and the Treating Customers Fairly (TCF) rules are not adequately effective, despite their good intentions.
22. Previous FCA reviews (such as 'Our future Mission', 2016) have demonstrated the negative consequences that can occur when sight is lost of consumer outcomes. For example, consumers' short-term focus on low prices can lead firms to respond in such a way that cross-subsidies become embedded in the market, leading to the need for regulatory interventions and to possible unintended consequences. The FCA's current focus on consumer outcomes should lead to such problems being identified and addressed at an early stage.
23. In some cases where harm occurred, the FCA could not apply sanctions because firms had not broken any rules or because the matter lay outside the FCA's regulatory perimeter. This does not make sense to affected consumers. We welcome the intention to define the scope of the new Consumer Duty, since this provides an opportunity to avoid exceptions such as those which have arisen in the past.
24. The use of machine learning algorithms can provide benefits for consumers, but poses new risks of harm e.g. as a result of bias in the algorithms. It is not practical to control machine learning algorithms by a set of rules, but assessing the outcomes seems a much better approach. One example is the banking sector, where Open Banking is leading to the development of innovative online banking products and services, and the application of machine learning algorithms to data gathered through Open Banking APIs can enhance this process. However, there are challenges relating to the use of customers' data and to possible bias in the algorithms. The move to outcomes-based regulation may avoid the need for algorithmic decision-making to be 'explainable', a potentially difficult issue discussed by former FCA CEO Christopher Woolard in his speech 'The future of regulation: AI for consumer good'. For this new and evolving area, there could be merit in having a code of conduct. As an indication of what a code might look like, we attach [A Guide for Ethical Data Science](#), written by the IFoA and the Royal Statistical Society.

### ***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?***

25. We support the structure set out in paragraph 3.1: "a Consumer Principle, along with a set of rules and guidance that amplify the Principle and set out the detail of our expectations". We believe a combination of principles and rules is sensible, since rules are easy to police, while

principles can apply across all areas including situations not envisaged at the outset. In addition, using guidance means that rules do not have to be too long and complicated.

26. Our support for the FCA's approach reflects the IFoA's own experience of using a similar structure in carrying out its function as a professional regulator: the Actuaries Code sets out high-level ethical principles, and these are supported by amplifications and by guidance.

**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?**

27. We note that the consultation paper reflects concerns raised in response to the FCA's 'Duty of care' consultation in 2018, which related to retail-facing markets. One advantage of applying these proposals to retail clients is that consumers are likely to understand them. However, we also note the wide spectrum of SMEs, including some which may not fit easily into either the retail or the wholesale/professional category. We encourage the FCA to consider if it would be appropriate for the Consumer Duty to apply to some of these SMEs.

**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?**

28. We agree that the suggested activities should be in scope. These activities would include outsourcing and activities in banking by non-banks including fintechs.

**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?**

29. We prefer Option 1 ("A firm must act to deliver good outcomes for retail clients"), because it is more aligned with the objective of good outcomes that is stated at the outset than Option 2 ("A firm must act in the best interests of retail clients"). For example, 1.2 states that "The Consumer Duty would require firms to ... ask themselves what outcomes consumers should be able to expect from their products and services".
30. We also think that the language of Option 1 is easier to understand for the broad range of people to whom it might apply, and expresses a clear change from the current regime.
31. The phrase 'best interests' in Option 2 seems less accessible, and arguably sounds rather legalistic and archaic. Also, the FCA states that similar wording is already used in its Handbook rules (3.21): we think that the new Consumer Duty should be presented as representing a new approach, not just a re-statement of what was already there before.
32. 'Best' sounds more demanding than 'Good' (despite the clarifications in paragraphs 3.22 and 3.23), and it may be better to avoid it if it could be easily misinterpreted. The notion – albeit mistaken – of a duty to act in each individual's best interests could make some institutions oppose the proposals.

**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?**

33. We think the intention of the proposed cross-cutting rules is sensible. In some cases we believe the exact wording could be reconsidered. For example, the first key behaviour is “Take all reasonable steps to avoid causing foreseeable harm to customers”. Here ‘all’ might be seen as too demanding by some firms. The concept of ‘harm’, and its relationship with good outcomes, is clear from FCA papers over recent years. We agree that the word ‘foreseeable’ is required, to avoid blame for harm from events such as market declines.
34. The second key behaviour is “Take all reasonable steps to enable customers to pursue their financial objectives”. On page 33 of ‘Our future Mission’ (2016) the FCA noted that “Consumers focus on the ‘here and now’”. Given the intention to encourage products that are appropriate for customer groups, we suggest amending the wording from ‘their financial objectives’ to ‘appropriate financial objectives’.
35. This suggests a possible conflict for firms between, on the one hand, helping customers to avoid foreseeable harm and, on the other hand, empowering them to pursue their financial objectives. It raises the question of whether a firm should dissuade a customer from following objectives that it thinks are inappropriate, based on its expertise and experience (see mortgage example in paragraph 15 above).
36. The third key behaviour ‘Act in good faith’ could sound legalistic and archaic. The paragraph that expands on this at the bottom of page 21 uses simpler language which should be clearer: ‘honest’ means telling the truth, ‘open’ means not concealing things, while ‘fair’ refers to the balance between the provider and the customers. Even then, however, they will not all be appropriate in all circumstances – for example ‘honest’ and ‘open’ are appropriate for the Communications Outcome, while ‘fair’ is appropriate for the ‘Price and Value’ Outcome.
37. It might be appropriate to add a cross-cutting rule about vulnerable customers. For example, a judgement about whether pricing is fair or not will be influenced by whether it results in vulnerable customers losing out compared with others. This could occur if there are cross-subsidies that favour better-off customer groups, for example healthier consumers in the case of health insurance.

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

38. We think that the proposed cross-cutting rules are appropriate, as they require firms to be mindful of consumers’ objectives, to protect them from potential harms where possible, and to relate to them honestly.
39. We suggest that there should be an open review of the proposals 12 to 18 months after their introduction, and periodically thereafter.

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

40. As noted under question 6, we suggest adding a cross-cutting rule for vulnerable customers, which would emphasise the FCA’s goal that outcomes for vulnerable customers should match those for other customers. Firms may otherwise believe that it is adequate to narrow the gap between outcomes for vulnerable and non-vulnerable consumers.

**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?**

41. We would prefer Principles 6 and 7 and the TCF rules to be disapplied for retail customers, to avoid firms having to comply with two different approaches at the same time. Gareth Thomas noted in the FCA's 10 June explanatory webinar on the consultation that TCF has been inconsistent and there is still a high level of consumer harm. The consultation paper makes clear that these proposals go beyond TCF and Principles 6 and 7, e.g. paragraph 3.10 states: "We want the Consumer Principle to set a higher standard than the existing requirement of Principle 6 for a firm to 'pay due regard to the interests of its customers and treat them fairly'. We want it to indicate to firms that they need to play a greater and more positive role in delivering good outcomes for consumers – including those who are not direct customers of the firm."
42. We recognise that Principles 6 and 7 and the TCF rules may be retained for wholesale and professional customers.

***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?***

43. The proposed Consumer Duty is very different in approach to Principles 6 and 7, since it focuses on achieving good outcomes rather than complying with rules, and on understanding and judgement rather than tick-box compliance. It may therefore not be appropriate to continue with the existing handbook material. In any case, we believe the structure of the Principle, cross-cutting rules and outcomes may mean there is less need for rules.

***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?***

44. The proposals should enhance consumer protection. As we have noted some consumers may not like 'good outcomes', preferring 'low prices in the short term'. The proposals may have to allow for such consumers insisting on bad choices, although we hope that the Consumer Duty will lead to a genuine culture change not only in firms' attitudes to consumers but ultimately in consumers' attitudes to what constitutes good outcomes / their best interests.
45. The proposals should lead to more competition in product variants to meet the needs of different customer groups. There may also be more competition on service rather than price.

***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?***

46. In response to the FCA's proposals in DP 18/5 we argued for a duty of care as "a principle, with a supporting standard explaining its application to different products and customer groups". We believe the current proposals go beyond this, with the proposed structure of a principle supported by cross-cutting rules and outcomes.
47. We would not support labelling the proposals as a duty of care, since we suggest that the phrase might sound like legal jargon, to many customers and employees.

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

48. We support the proposals for rules requiring communications to be understandable and helpful for decision-making - including by vulnerable groups. This should apply to all communications, whether in branches, through call centres, online or in print. We welcome the proposals given the IFoA's response to the FCA's 2020 consultation on guidance on fair treatment of vulnerable

customers, in which we suggested that guidance should encourage firms to review their communication processes with a view to improving financial inclusion<sup>1</sup>.

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

49. We welcome the intention for firms to test customers' understanding of communications if appropriate, for example if there is scope for harm if the communication is misunderstood. This may help to address issues such as overuse of jargon, and could improve signposting of key information where documents have to be lengthy for legal reasons.
50. Other possible measures to help achieve the communication outcome would be more standardised language and staff training in clear communications with customers.
51. In relation the products and services, the FCA proposes (paragraph 4.37) an element of responsibility for consumer outcomes across the distribution chain. Regarding communications, we suggest the FCA should consider if there should be an onus on firms to check consistency of customer communications across the whole value chain.

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

52. We agree with the intended outcome that products are designed to meet the needs of customers and sold to those whose needs they meet. We would welcome more clarification about customer expectations, and in particular, whether customers' expectations at purchase should be viewed as the most important factor when those expectations could evolve; and whether the contract that they signed should be what is measured against. Expectations and 'reasonableness' can change over time as market conditions change or the environment shifts<sup>2</sup>. Particularly for long-term products and services, it is important to consider if changes in sentiment (perhaps influenced by the media) should be part of what consumers 'reasonably expect' from a product now, as opposed to their past expectations. Paragraph 2.37 states that the Consumer Duty "would not... apply retrospectively to past business. Nor do we intend to judge practices with the benefit of hindsight". It is not clear if this will apply also to products and services sold after the Duty is in force, if they are considered in years/decades to come when market conditions and/or expectations are likely to have shifted; or whether every tranche will be judged based on conditions at the time of sale.

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

53. We hope that consumers will have more confidence that products will meet their needs and produce outcomes in line with expectations. Closer alignment between products and consumer needs could save firms money and free up resources to allow them to focus more on innovation. However, some firms may feel this is too exacting a standard, and some may worry that customer need will be judged with hindsight. Guidance could be very helpful in this area.
54. The proposals for products and services require coordinated interaction between firms throughout the value chain, with paragraph 4.37 requiring "each of the firms to take due responsibility for the consumer outcome". While we support this holistic perspective, we note that it may favour vertically integrated firms, or larger firms involved in more of the value chain.

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<sup>1</sup> <https://www.actuaries.org.uk/documents/gc203-guidance-firms-fair-treatment-vulnerable-customers>

<sup>2</sup> This point can affect not only products and services but also other elements of the Four Outcomes, such as perceptions of value.

This could have unintended consequences for innovation and/or the ability of smaller or niche firms to compete effectively (or enter the market), and it may encourage industry consolidation.

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

55. We agree with the importance of tackling what the consultation paper calls 'sludge practices' which can prevent consumers from taking advantage of a product's benefits or from acting in their own interests.
56. Including a customer service outcome is also important to emphasise the significance of service as well as price.

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

57. Rules to require firms to design processes that take account of customer needs are likely to improve customer service, including after-sales service.

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

58. We support the principle that the price of products and services should represent fair value for consumers. This has been the focus of several FCA reviews of specific markets, including DP18/9 'Fair Pricing in Financial Services'.

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

59. We agree that firms should be able to demonstrate why they believe the relationship between price and benefits is reasonable. We believe this process should involve understanding and judgement rather than tick-box compliance. Firms are already familiar with concept of fair value, and previous work can be used to inform the development of guidance on fair pricing.
60. Some firms could be reluctant to support the price and value outcome out of concern that they could not meet the required standard in every situation (see also our answer to Q16). They may also be concerned about being judged on past actions. We believe firms should be allowed some time – but not too much - to make necessary changes to ensure fair value.

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

61. We note the comment, in paragraph 5.1, that different stakeholders have given opposing and equally strong views on the private right of action (PROA). We are not surprised by this comment: we are also aware of a range of views on this matter within the IFoA. So, while respecting the different points of view, we provide some comments on the PROA.
62. We see the Consumer Principle and the PROA as alternative approaches to encouraging firms to deliver good outcomes for consumers, with the Consumer Principle being more of a 'carrot' and the PROA more of a 'stick'. But we do not see how they could work together. The objective of the Consumer Principle is to have a principle above the rules, with a view to encouraging employees at all levels and in all areas to use understanding and judgement rather than 'tick-box compliance' in considering the likely impact of their actions on outcomes for consumers. The objective of the PROA would be to force firms to take effective action to achieve good outcomes,

but its use would lead to the Consumer Principle effectively becoming yet another rule, with the courts paying a significant role in its determination, as mentioned in paragraph 5.16.

63. In expressing a preference between the Consumer Principle and the PRA, we suggest proceeding with the 'carrot' of the Consumer Principle, while holding in reserve the 'stick' of the PROA. Our reasons for our preference are expressed in the next four paragraphs.
64. We think that the Consumer Principle approach, if applied properly, has the potential to achieve the very desirable objective of avoiding problems from occurring in the first place, by engaging employers in areas such as product design and customer communications as well as in the Senior Managers & Certification Regime. But we are not optimistic that the PROA would achieve this objective: fines for PPI mis-selling may have stopped PPI mis-selling, but they did not do so in the first place, and they have not stopped other causes of harm such as the various forms of price discrimination which the FCA has been investigating over recent years.
65. Given the comments in paragraph 3.23 that firms do not have to "deliver the absolute best outcome for each and every customer", we understand that the FCA's objective is to encourage best, or good outcomes for consumers in most (but not necessarily all) cases, although we are not clear whether the intended threshold is best or good (see paragraph 32 above). We assume that the FCA will look for widespread or repeated failures before applying sanctions to individual employees or to firms. However, the PROA approach might have the unintended consequence of enabling any individual who has not enjoyed a good outcome to bring a PROA, possibly with help from Claims Management Companies, as mentioned in paragraph 5.15. This could have the unintended consequence of limiting innovation and/or the provision of products and services where it is difficult to be sure that the outcomes for all individuals will be good.
66. One of the advantages of the Consumer Principle is that it can be applied to situations which could not have been envisaged at the outset. This is particularly important in retail banking, with innovation being enabled by new technologies and Open Banking. The monthly report of the Open Banking Implementation Entity shows the rapid progress being made in delivering new online products and services that offer benefits for consumers. Many of these are based on the application of machine learning techniques to large amounts of data gathered through Open Banking APIs. As mentioned in paragraph 24 above, we think that the good outcomes approach gives a practical way to assess the fairness of machine learning algorithms.
67. The inclusion of a PROA might well cause some firms to oppose the proposals in this Consultation Paper, despite them - in our opinion - making sense without the PROA. We believe that the objective of encouraging better cultures and behaviours in firms is desirable and important, and would prefer firms and the FCA to work together on this as a common objective rather than to engage in what could become an adversarial approach.

***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?***

68. If there were to be an intention to provide a PROA at the outset or in the near future, as part of the Consumer Duty, we would have to amend our answers to the other questions in this consultation. As explained above, we see the PROA as an alternative to the proposed Consumer Duty, not as complementary to it.

69. If a PROA were to be introduced at this stage, we would regret that the opportunity to enhance cultures and behaviours had not been taken. However, if the Consumer Duty does not lead to the intended improvement in cultures and behaviours, and in outcomes for consumers, we accept that a PROA may have to be introduced.

**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?**

70. 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?**

71. 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?**

72. Consumers should be more able to take responsibility for their financial affairs, given the greater focus by firms on positive outcomes in all areas. This will improve the economic well-being of consumers. As noted under Q16, by bringing products and services closer to consumer needs, the Consumer Duty could save firms money and thus increase the resources available to them to focus more on innovation.

73. Individual firms may require a change in culture and mindset, from rules to outcomes. They should benefit from a reduced risk of substantial fines for conduct risk failures. A further benefit is that consumers will be more likely to be engaged with, and use, financial products.

74. The new Consumer Duty should eliminate much of the reputational damage from which the financial services market suffers when consumers believe they are taken advantage of - through price, product and/or service.

75. Markets may be segmented, to offer product variants for customer groups. New entrants might focus on specific segments.

76. The retail industry as a whole should become, and benefit from being, more like a profession. For example, roles in retail banking should be more interesting and rewarding.

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

77. Some firms may not welcome the Consumer Duty, for reasons mentioned earlier – concern that they will be expected to get things right every time in terms of products, pricing etc.; concern about retrospective rulings (but a time limit could be set); or fears of price capping (although FCA noted in their recent webinar that they are trying to avoid these).

78. For financial or operational reasons, firms may be unable to satisfy both the short term and long term needs of some consumers. This raises the question as to whether the principles and rules need to be applied on best efforts or only on a reasonable efforts basis.

79. One possible unintended consequence of the new regime is that there could end up being a new set of rules related to outcomes. This could occur if the culture of tick-box compliance over recent years did not change enough.

80. One reason for this could be that sanctions are easier to apply with a rules-based approach, but more difficult if judgement is required.
81. The Consumer Duty might create an expectation that it extends to Environmental Social Governance outcomes, not just the products and services being offered. For example a homeowner could challenge their household insurer for not ensuring flooding was reduced or flood barriers were working.
82. Consumers might make more decisions independently, seeing the Consumer Duty as a safety net.

***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?***

83. Firms will need reasonable (but not excessive) time to adapt to each of the four Outcomes. 'Grandfathering' current practices does not seem a good approach, since the proposals represent a radical change of culture across retail firms.

If you would like to discuss any of the points raised in this response please contact Matthew Levine, Policy Manager ([matthew.levine@actuaries.org.uk](mailto:matthew.levine@actuaries.org.uk)) in the first instance.