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14 February 2022

By email: [cp21-36@fca.org.uk](mailto:cp21-36@fca.org.uk)

Dear Sir / Madam,

## **Financial Services Consumer Panel response to CP21/36 A new Consumer Duty: Feedback to CP21/13 and further consultation**

The Panel welcomes the opportunity to respond to the FCA's consultation on a new Consumer Duty (NCD). We have long advocated for a duty of best interests in financial services to raise the bar for conduct standards across the industry. The creation of the NCD is the best opportunity to achieve this goal since the FCA was created. However, we are concerned that under the proposals in this consultation, this opportunity will be fundamentally missed.

We are also concerned that the number of coordinated, repetitive industry responses to the first consultation have significantly influenced the policy choices proposed in this second consultation, without the appropriate weight being given to responses from bodies representing consumers and SMEs.

In our view, the proposals in this consultation will fail to significantly raise standards beyond what is required under the existing Treating Customers Fairly (TCF) regime. We welcome the FCA's stated ambition to do this, but believe that the wording, structure and supporting elements, as proposed, mean that the NCD will not deliver on this ambition. We do not believe the NCD, as proposed, will be effective in preventing harm to consumers and SMEs.

We have four key areas of concern:

1. The 'good outcomes' wording for the top line principle is weaker than the 'best interests' wording.
2. The lack of a private right of action critically undermines the incentive for firms to do the right thing.
3. The proposed governance and accountability mechanisms for firms are too weak.
4. The proposed non-Handbook guidance is unclear and inconsistent on what firms need to do that they don't already need to do under TCF.

To address our concerns, the FCA should:

- Use the 'best interests' wording for the Consumer Principle.
- Attach a private right of action to the NCD. In the meantime, the FCA should take steps to achieve the same deterrent effect as a private right of action would achieve.
- Call for the duty to be made statutory, and engage in future opportunities for this to be the case.

- Provide case studies, covering a range of sectors, that show what firms would be required to do differently under the NCD compared to TCF.
- Give a named board-level individual (e.g., a senior independent non-Executive director (NED)) full oversight and personal accountability for compliance with the NCD and strengthen the reporting requirements.

Our concerns are set out in full in response to the consultation questions in Annex A below.

Yours sincerely,

Wanda Goldwag  
Chair, Financial Services Consumer Panel

## **Annex A – responses to questions**

### **Q1: Do you have any comments on the proposed scope of the Consumer Duty?**

We are concerned that by aligning the scope to the various FCA Sourcebooks, consumers and SMEs may find it difficult to find out if they are covered by the NCD and to what extent. This is particularly complicated for SMEs due to the complexities of the regulatory perimeter in this space. The FCA should take this opportunity to simplify and create a single, clear standard for all consumers – individuals and SMEs.

We believe the onus should be on firms to make it clear to consumers when they are protected by the NCD. This should be a key part of complying with the ‘consumer understanding’ outcome. This must be done in such a way that consumers can understand and firms should test this understanding (see our further comments on research and testing under Q5 and Q9 below).

We are pleased to see the FCA making it clear that the NCD will apply to prospective customers. As we said in our response to the previous consultation, we see significant harm caused to prospective customers, such as from misleading or unfairly targeted advertising<sup>1</sup>. Applying the NCD to prospective customers, subject to the improvements suggested throughout this response, should help address this.

The FCA should also make clear how the NCD will apply to firms that do not have Part IV FSMA permissions who are exempt from some areas of current regulation such as the Senior Managers and Certification Regime (SM&CR). It is crucial consumers are clear whether they are protected by the NCD when dealing with these firms, especially payments providers. As we said in our response to the Payments Landscape Review, payments – unlike many other parts of finance – touch every consumer<sup>2</sup> and all consumers need to understand the protections that apply. The FCA needs to set out an equivalent instrument to hold the leadership of such firms to account for delivering against the NCD.

### **Q2: Do you have any comments on the proposed application of the Consumer Duty through the distribution chain and on the related draft rules and non-Handbook guidance?**

We support the proposal for all firms in the distribution chain to be subject to the NCD. This offers the maximum protection for consumers and prevents regulatory arbitrage. As we said in our response to the previous consultation, it must be clear to consumers where they can go if something has gone wrong. Firms in the chain mustn’t pass consumers between each other in order to obscure or avoid liability<sup>3</sup>. This is especially important where firms work together to produce or manufacture a product or service and therefore have a contract between them setting out their respective responsibilities. This contract must result in clarity for consumers.

We support the proposed approach to unregulated activities as this will help ensure consumers are considered in every part of the journey. Making approvers of financial

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<sup>1</sup> For more about the harm caused by targeted digital marketing, see the Panel’s research paper: [https://www.fs-cp.org.uk/sites/default/files/fscp\\_final\\_digital\\_advertising\\_discussion\\_paper\\_20200630.pdf](https://www.fs-cp.org.uk/sites/default/files/fscp_final_digital_advertising_discussion_paper_20200630.pdf)

<sup>2</sup> [https://www.fs-cp.org.uk/sites/default/files/final\\_fscp\\_response\\_hmt\\_payments\\_landscape\\_review.pdf](https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_hmt_payments_landscape_review.pdf)

<sup>3</sup> [https://www.fs-cp.org.uk/sites/default/files/final\\_fscp\\_response\\_cp21-13\\_a\\_new\\_consumer\\_duty\\_20210729.pdf](https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_cp21-13_a_new_consumer_duty_20210729.pdf) p7

promotions subject to the NCD will drive up the standard of financial promotions; an area where there has been significant harm to consumers.

**Q3: Do you have any comments on the proposed application of the Consumer Duty to existing products and services, and on the related draft rules and non-Handbook guidance?**

We are pleased to see the proposals requiring firms to review all existing products. This is a critical element of the NCD which creates the opportunity to vastly improve consumer outcomes and clean up the market. The FCA must supervise firms' product reviews to ensure that the reviews are meaningful and conducted in the spirit of the NCD. The FCA will need to resource intensive supervisory activity in the run-up to implementation to ensure firms are making appropriate decisions. Firms who are doing the wrong thing need to be pulled up early. We would recommend this is reinforced via multi-firm work or a thematic review once the NCD has been implemented.

The FCA must also learn from its previous interventions. We note the approach to product reviews required under the NCD is similar to that which the FCA required of insurance firms during the pandemic. Insurers were expected to consider how coronavirus may have 'materially affected the value' their insurance products delivered to consumers and 'take appropriate action'<sup>4</sup>. However, this often resulted in blanket actions which did not clearly relate to the residual value of the product. It was therefore not possible for consumers to know whether any refund or other offer was fair. We encourage the FCA to learn lessons from this exercise and ensure that the requirements under the NCD deliver better outcomes for consumers.

We do not believe the FCA's proposals in this area amount to retrospective regulation. Once the NCD is in place, firms need to consider consumer outcomes throughout the lifecycle of the product or service, in the face of changing personal circumstances and external and commercial factors. It is right that firms should, at the point of implementation, be in a position where a baseline assessment is complete for all existing products and services.

**Q4: Are there any obstacles that would prevent firms from following our proposed approach to applying the Consumer Duty to existing products and services?**

N/A

**Q5: Do you have any comments on the proposed Consumer Principle and the related draft rules and non-Handbook guidance?**

*Nature of the Consumer Principle*

We continue to believe that the Consumer Principle should be enshrined in legislation. As we set out in our response to the previous consultation, this will ensure that the NCD is given the weight it deserves and allows all supporting regulation to be interpreted in its favour. It would set a single, overarching standard to guide firms and regulators in all that they do<sup>5</sup>. We have repeated our call for this in [our response to HM Treasury's Future](#)

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<sup>4</sup> <https://www.fca.org.uk/publications/finalised-guidance/product-value-and-coronavirus-guidance-insurance-firms>

<sup>5</sup> [https://www.fs-cp.org.uk/sites/default/files/final\\_fscp\\_response\\_cp21-13\\_a\\_new\\_consumer\\_duty\\_20210729.pdf](https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_cp21-13_a_new_consumer_duty_20210729.pdf) p6

[Regulatory Framework Review](#) and would encourage the FCA to call for statutory change when the appropriate opportunity arises.

We believe broader legislative change is needed to support the NCD. For example, we note the FCA's statement that the cross-cutting rules do not negate consumer responsibility and we support the FCA's clear position that consumers can only take responsibility where firms deliver the different aspects of the NCD<sup>6</sup>. But unfortunately, the legislation does not support this position. We therefore wish to reiterate our view that the consumer responsibility principle (s3B(1)(d) FSMA 2000) should be amended so that consumers are only deemed able to take responsibility for their decisions where firms have met their own obligations under the NCD. This reflects the significant and ever-growing (especially with the increasing frequency and scope of digital interactions) power asymmetries between firms and consumers. It also helps create a regulatory framework that properly upholds the aims and objectives of the NCD<sup>7</sup>. The FCA should call on HM Treasury to make this legislative change at the next available opportunity.

#### *Wording of the Consumer Principle*

We are disappointed to see the FCA choose the 'good outcomes' wording for the Consumer Principle over the 'best interests' wording. We remain of the view that the 'best interests' wording sets a higher and clearer standard for firms, and best gets across the anticipatory nature of the NCD. Whichever wording the FCA ultimately uses, it must provide clear guidance to firms about what it means and what is expected of them. Firms must ensure this is understood by all staff, particularly those that have (or design, if digital) the front-line interactions with consumers.

At para 5.22 the FCA recognises scope for confusion about how the 'best interests' wording of the NCD would relate to existing best interest language used in some parts of the Handbook. In our view choosing 'good outcomes' exacerbates this confusion as it appears to create two different standards. The FCA must clarify how this will be resolved: for example, by clarifying that the existing best interest language will be interpreted in line with the NCD.

We recognise that the existence of a 'best interests' standard in these markets has not always prevented consumer harm in the way the NCD seeks to achieve. We encourage the FCA to reflect on the reasons for this. It should then clearly communicate to firms what would be different under the NCD. This would be best done via case studies to demonstrate a range of circumstances and good practice responses across different sectors.

#### *How a reasonable and prudent firm would act*

We note the FCA proposes to introduce the tortious concept of how a reasonable prudent firm would act. It is stated that "rules [would be] interpreted in line with the standard that could reasonably be expected of a prudent firm:

- carrying on the same activity in relation to the same product or service, and

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<sup>6</sup> <https://www.fca.org.uk/publication/consultation/cp21-36.pdf> para 2.34

<sup>7</sup> See [https://www.fs-cp.org.uk/sites/default/files/final\\_fscp\\_response\\_hmt\\_fr\\_fproposals\\_for\\_reform\\_20220209.pdf](https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_hmt_fr_fproposals_for_reform_20220209.pdf)

- with the necessary understanding of the needs and characteristics of its customers”<sup>8</sup>

We have significant concerns about the first bullet point. We believe it would allow for entrenched poor practice in markets to continue as firms (and the FCA) would be judging conduct by the standards of others in the market. For example, when new rules on unarranged overdrafts were introduced in April 2020, interest rates for these products pooled at around 40%. The peer assessment outlined above would allow firms to argue that charging around 40% meets the requirements of the NCD because other ‘reasonably prudent’ firms offering unarranged overdrafts were charging the same rate.

We strongly support the second bullet point above, as it will drive firms to proactively seek insight about their customer base – in terms of understanding their needs and assessing current service. This will enable firms to plan, design and deliver quality services that lead to good outcomes for consumers with a wide range of needs, experiences and abilities. We recommend the FCA clarify that this assessment should include prospective customers (as the NCD applies to both prospective and actual customers).

We also believe that getting the ‘necessary understanding of the needs and characteristics of...customers’ is best done by consumer research and testing. The consultation makes reference to testing in a number of places, but firms will also need to seek opinions, experiences and feedback from consumers to truly understand their needs. We therefore encourage the FCA to refer to ‘consumer research and testing’ throughout. This will encourage firms to take a broader approach. Examples of proactive steps firms could take under this approach include (but are not limited to):

- Developing research and mapping tools looking at consumer needs, journeys and decision making.
- Building stakeholder partnerships with consumer-focussed groups.
- Directly engaging with consumers with a wide range of lived experience (including those who have experienced financial difficulty or display characteristics of vulnerability).
- Monitoring and evaluating customer satisfaction data, feedback and complaints.

**Q6: Do you agree with our proposal to disapply Principles 6 & 7 where the Consumer Duty applies?**

Yes. We believe this will avoid confusion and duplication. As we said in our response to the previous consultation<sup>9</sup>, we believe that the FCA should streamline its Handbook and remove or disapply elements which duplicate, undermine or conflict with the NCD. This includes, but is not limited to, Principles 6 and 7.

**Q7: Do you agree with our proposal to retain Handbook and non-Handbook material related to Principles 6 and 7 should remain relevant to firms considering their obligations under the Consumer Duty?**

No. Whilst we are pleased to see FCA saying the NCD is a higher standard than the existing regime, and that complying with Principles 6 and 7 would not be enough to

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<sup>8</sup> <https://www.fca.org.uk/publication/consultation/cp21-36.pdf> para 5.13

<sup>9</sup> [https://www.fs-cp.org.uk/sites/default/files/final\\_fscp\\_response\\_cp21-13\\_a\\_new\\_consumer\\_duty\\_20210729.pdf](https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_cp21-13_a_new_consumer_duty_20210729.pdf) p10

ensure compliance with the NCD<sup>10</sup>, we are deeply concerned that the detailed non-Handbook guidance undermines this message.

As it is, the draft non-Handbook guidance does not consistently set a higher standard than TCF. For example, the requirements relating to product targeting, marketing and governance are extremely similar to what is already required by the Product Intervention and Product Governance (PROD) Sourcebook.

In the long term, Principles 6 and 7 material should be reviewed and removed where necessary. We set out the principles that should guide this review in our response to the previous consultation<sup>11</sup>.

**Q8: Do you have any comments on our proposed cross-cutting rules and the related draft rules and non-Handbook guidance?**

We welcome the removal of the 'take all reasonable steps' element as we believe it unnecessarily diluted the cross-cutting rules. We agree with the FCA that this element would have encouraged a focus on tick-box compliance rather than consumer outcomes.

However, our concerns about the other elements of cross-cutting rules 2 and 3 remain. We believe:

- Firms should be required to minimise or prevent harm rather than just avoid it (cross-cutting rule 2). 'Minimise' and 'prevent' are both active words which imply a positive obligation on firms, whereas 'avoid' is passive. Also, as the consultation paper points out, it is impossible to completely avoid harm<sup>12</sup> but firms can do their best to minimise and prevent it based on their insight, knowledge and understanding of both their business and their customers.
- Including the term 'foreseeable' introduces too much subjectivity and invites lengthy debates (cross-cutting rule 2).
- The rules assume that consumers are able to set their own financial objectives which is not always the case (cross-cutting rule 3).

We note that the FCA has retained the concept of reasonableness in several places within the cross-cutting rules, and that it underpins the entire NCD. We are concerned that this fails to establish an objective standard. We recognise reasonableness is an established concept within English common law, however, what is and is not reasonable is frequently the subject of debate. In law, there is an established precedent to support the interpretation of 'reasonable', but no such precedent exists in relation to the NCD. This means that, at least initially, firms would be responsible for determining what is reasonable which could lead to inconsistent outcomes for consumers and lengthy debates with regulators when things may have gone wrong. We also reiterate our concerns about reasonableness being assessed by way of peer comparison as outlined in answer to Q5 above.

We would like the draft rules and guidance to more clearly capture the twin aims of (a) higher minimum standards of conduct and (b) competition above these standards to attract and retain customers and deliver business value. It should be that the only route to sustainable business is through doing right by customers. The minimum standards

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<sup>10</sup> <https://www.fca.org.uk/publication/consultation/cp21-36.pdf> para 5.32

<sup>11</sup> [https://www.fs-cp.org.uk/sites/default/files/final\\_fscp\\_response\\_cp21-13\\_a\\_new\\_consumer\\_duty\\_20210729.pdf](https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_cp21-13_a_new_consumer_duty_20210729.pdf) p10

<sup>12</sup> <https://www.fca.org.uk/publication/consultation/cp21-36.pdf> para 2A.2.9

should not be a long-term target and the FCA should look at including incentives and stipulations for continuous improvement.

**Q9: Do you have any comments on our proposed requirements under the products and services outcome and the related draft rules and non-Handbook guidance?**

Before commenting on the products and services outcome specifically, we wish to make it clear that we do not think the requirements under any of the four outcomes go far enough to drive up standards beyond those already required under TCF. This poses a critical risk to the success of the NCD in achieving the FCA's stated aims.

We note that two of the outcomes (consumer understanding and consumer support) have been renamed in this second consultation to focus on the outcome the FCA wants to see firms delivering to consumers. The product and services outcome could be similarly renamed as '**suitable** products and services'. This would help to focus firms on the clear link between the products and services they offer and the requirement for them to really understand and meet the needs of their customers (both actual and prospective).

In terms of the requirements under the products and services outcome, we support the proposed requirements for firms to conduct consumer research and testing with consumers. This is a key part of ensuring consumer needs are met. We would encourage the FCA to closely supervise firms' approach to consumer research and testing to ensure it is meaningful and not treated as a tick-box exercise. For example, it will be important that:

- (i) The range of consumers included in the user research and testing is representative of the firms' actual and target customer base and must include vulnerable customers
- (ii) Consumer research and testing is designed to solicit open feedback and this feedback is fairly considered and acted upon.
- (iii) Consumer research and testing is conducted regularly. Tests should not only be conducted when a product is designed, but also at key points throughout the lifetime of a product and especially when any key changes are made.
- (iv) The needs of minority are not ignored. For example, it should not be enough for firms to say the products and services worked for 51% of consumers.

We would also like to see the FCA making explicit reference to firms taking an inclusive design approach when designing products and services. This is the best approach to ensure that products and services are accessible and easy to use for everyone. It will also help to meet the FCA's stated aims of preventing harm from occurring in the first place. We have previously called for the FCA to be required to have regard to inclusion<sup>13</sup> and we continue to believe this is the case.

**Q10: Do you have any comments on our proposed requirements under the price and value outcome and the related draft rules and non-Handbook guidance?**

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<sup>13</sup> [https://www.fs-cp.org.uk/sites/default/files/final\\_fscp\\_response\\_hmt\\_frf\\_review\\_phase\\_ii\\_20210219\\_v2.pdf](https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_hmt_frf_review_phase_ii_20210219_v2.pdf) p7



As with the previous outcome, we think this could be renamed to focus on the outcome the FCA wants firms to deliver to consumers. We propose it is renamed the 'fair price and value' outcome.

We agree with the overarching view that price should be linked to the overall benefit a product or service offers consumers (the value). But for this to result in better outcomes for consumers, consumers must *know* how price and value are linked so that they can use this to drive their decision making. The FCA should require firms to use their understanding of their target market to show consumers how to consider value. For example, firms could provide a chart of known consumer needs and show which products meet these needs, alongside a headline price. Learnings on how best to represent this could be taken from other sectors (e.g. how food menus show which dishes are suitable for vegetarians, vegans or those needing to avoid gluten) and then tested with financial services consumers. If consumers can clearly see which products meet their needs, they can more easily compare prices and assess overall value.

We support the requirement for firms to assess value on an ongoing basis. We have seen harm caused when consumers remain in products which are no longer suitable for them or no longer meet their needs. There has previously been an overreliance on consumer switching to address this issue and we are pleased to see the FCA requiring firms to take supply-side action and highlight where better value products might be available. The FCA's action on the loyalty penalty in insurance is the most significant example of using such an approach to date and we encourage the FCA to monitor the effectiveness of this intervention and learn any lessons to apply to their supervision of the NCD.

The draft Handbook text in this area could be strengthened. It covers some key issues consumers face, but it fails to provide enough detail to really bottom out how to resolve these. For example, the draft Handbook text recognises the value of personal data but does not set out how firms might demonstrate fair value exchange for that data<sup>14</sup>. Consumers generally do not appreciate the value of their data and there is a risk that this gap in the guidance will perpetuate long-standing power asymmetries, particularly as more and more interactions are now taking place online.

We would also like to see a clear statement that firms should not use terms and conditions to apply material limitations or conditions to the value communicated in higher-level consumer information. The 'small print' should be consistent with headline advertised value.

**Q11: Do you have any comments on our proposed requirements under the consumer understanding outcome and the related draft rules and non-Handbook guidance?**

We are pleased to see this outcome renamed as the 'consumer understanding' outcome. This rightly focusses on the outcome the FCA wants firms to deliver.

Again, we are pleased to see consumer research and testing being required under this outcome, but would refer to the points made in answer to Q5 and Q9 above in this regard. We also note that the FCA does not anticipate testing being used that often. We would challenge this and encourage consumer research and testing to become embedded in standard business practice for all firms. Only by regular, robust research and testing can firms assess whether consumers understand (and are getting fair value from) their products and services.

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<sup>14</sup> <https://www.fca.org.uk/publication/consultation/cp21-36.pdf> para 2A.4.13

We support the FCA's call for retained Consumer Credit Act provisions to be transferred across to the FCA Handbook so that they can be updated. This will help create a framework that consistently supports the aims and objectives of the NCD.

**Q12: Do you have any comments on our proposed requirements under the consumer support outcome and the related draft rules and non-Handbook guidance?**

Again, we support the renaming of this outcome to be focussed on the deliverable outcome.

We wish to express our especially strong support for the principle that it should be at least as easy to exit a product as it is to enter. This represents a much needed raising of the bar for firms as they have made products, especially credit products, increasingly easier to enter by taking advantage of technological advances but kept barriers to exit in place. New customer journeys in payments and Open Banking pose a particular risk here, as they are designed to make adoption and continuation easy but exit and switching hard.

**Q13: Do you think the draft rules and related non-Handbook guidance do enough to ensure firms consider the diverse needs of consumers?**

The proposals will require firms to consider the needs of consumers, including vulnerable consumers at every stage – from product and service design through to post-contract support. We believe this is consistent with the FCA's guidance on the fair treatment of vulnerable customers, which we support.

As stated in answer to Q9 above, we would like to see the FCA encouraging firms to take an inclusive design approach. This should apply to firms' systems as well as the design and delivery of products and services. Consumers need to interact with firms' systems if they have questions, complaints or want to make changes to their product or service. It is therefore important that these systems are accessible to, and usable by, consumers with a wide range of needs and capabilities.

The FCA might not wish to prescribe *how* the experiences and views of a diverse pool of consumers are brought into the design and improvement process, but they should set a clear expectation that they are, both in the NCD guidance and future proposals relating to diversity and inclusion. Firms should be required to set out how this approach impacts decisions about products and services.

**Q14: Do you have views on the desirability of the further potential changes outlined in paragraph 11.19?**

No comment.

**Q15: Do you agree with our proposal not to attach a private right of action to any aspects of the Consumer Duty at this time?**

No. We continue to believe in the merits of a private right of action (PROA) as set out in our response to the previous consultation, particularly the strong incentive it will provide firms to comply with the NCD (which is acknowledged in the consultation at para 12.18).

We welcome the possibility of the PROA remaining on the table and would encourage the FCA to set a date for when it will review this decision. The FCA should also set out some

criteria which will inform the decision, as this may provide additional incentive to firms to improve their behaviour.

In the meantime, the FCA should consider how it will replicate the benefits of the PROA. This could include but is not limited to:

- (i) Strong senior accountability for compliance with the NCD (see our answer to Q18 below)
- (ii) Clear communication of an assertive approach to supervising compliance with the NCD
- (iii) Mandating the data firms need to collect to monitor compliance with the NCD (see our answer to Q17 below).

We note also the consultation considers the benefits and drawbacks of a PROA for individual consumers but does not adequately consider what the decision not to attach a PROA means for class action. In our previous response we said that the PROA should permit class action to allow for collective redress<sup>15</sup>. This is an important option where there has been widespread misconduct. The FCA notes that consumer bodies can raise super complaints<sup>16</sup> but it is important to bear in mind the limitations on the resources of these consumer bodies.

**Q16: Do you have any comments on our proposed implementation timetable?**

We recognise that if the NCD is to deliver on its aims and objectives, it will require a significant shift in firm behaviour and this transition will take some time. However, outcomes for consumers in financial services need to be improved as soon as possible as harm is happening to consumers now. The FCA should incentivise firms to start preparing for the NCD immediately and not wait until early 2023 to start making all the required changes. Some firms may fear 'first-mover disadvantage' during the transition period, and by encouraging all firms to start preparing as soon as possible the FCA can mitigate this risk and drive-up standards faster. The FCA must also prepare its own resource to monitor firms' preparations.

**Q17: Do you have any comments on our proposed approach to monitoring the Consumer Duty and the related draft rules and non-Handbook guidance?**

We would like the proposals in this area to be strengthened.

It is good to see the Board, or equivalent body, being required to consider a report from the firm on compliance with the NCD. However, the proposals need to be strengthened to have real impact. As we said with regard to the proposals to test products and communications, the FCA needs to ensure this process is meaningful and not just a tick box exercise. We suggest that:

- (a) The report made to the Board is independent.
- (b) The report made to the Board is published. The FCA could usefully apply learnings from the annual Assessment of Value reports required of fund managers which provide important information for investors along with a clear explanation of what action has been taken, or will be taken, if value concerns are identified<sup>17</sup>.

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<sup>15</sup> [https://www.fs-cp.org.uk/sites/default/files/final\\_fscp\\_response\\_cp21-13\\_a\\_new\\_consumer\\_duty\\_20210729.pdf](https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_cp21-13_a_new_consumer_duty_20210729.pdf) p13

<sup>16</sup> <https://www.fca.org.uk/publication/consultation/cp21-36.pdf> para 12.17

<sup>17</sup> <https://www.fca.org.uk/publications/multi-firm-reviews/authorised-fund-managers-assessments-their-funds-value>

- (c) The report and the underlying analysis and data is passed to the FCA. This will support efficient and effective supervision and enable the FCA, under its data strategy, to respond rapidly and pre-emptively to issues arising in individual firms, sectors and markets.

Para 14.22 of the consultation sets out some data firms should consider collecting in monitoring their compliance with the NCD. In addition to the data set out, we encourage the FCA to signal that firms may wish to use external insights (e.g. the number of Financial Ombudsman Service complaints per a set number of customers in their sector) to help them understand their own performance.

The FCA may also need to consider whether its proposed approach to monitoring will allow it to gather the data it needs to see if the NCD is delivering on its aims. The consultation recommends, but does not mandate, data firms should collect. This could pose challenges for the FCA in the future when trying to draw comparisons between firms, or get an overview of compliance in particular sectors. It also limits what the FCA can publish about firms' compliance. We encourage the FCA to consider mandating certain core metrics to allow for timely, transparent assessments of compliance. The FCA should also set out what it considers to be the critical success factors for the NCD. This will ensure firms know what the data they report will be measured against and help to show consumers and wider stakeholders how the NCD is making a difference.

We strongly support the FCA's stated ambition in para 14.29 to 'take a bolder approach to communicating [its] expectations' by making use of case studies and examples of good and poor practice. This will help bring the NCD to life for firms and consumers, helping both parties to recognise potential risks, to understand actions which could be taken to minimise or prevent harm and how to provide effective remedies if something goes wrong. The FCA should be clear in these case studies what is different under the NCD compared to the existing TCF regime. Case studies should be provided across a range of sectors to ensure all firms are able to learn from them.

**Q18: Do you have any comments on our proposal to amend the individual conduct rules in COCON and the related draft rule and non-Handbook guidance?**

In our response to the previous consultation, we called for the NCD to be backed by strong personal accountability. The FCA's proposals need to go further to fully address this.

We believe a named Board-level individual (e.g., a senior independent NED) should be made responsible and accountable for compliance with the NCD. We suggest this individual is not from the compliance department, as this department will be responsible for overseeing compliance on a day-to-day basis. Some of the most successful regulatory regimes, such as the money laundering and client asset regimes, include an element of personal accountability. Attaching personal accountability creates a sense of reputational jeopardy for the individual that should act as an effective deterrent against poor conduct. This will achieve some of the benefits a PROA would have achieved. The FCA should be clear what non-compliance would mean for individuals. For example, it may set out that non-compliance could impact on the results of fitness and propriety assessments for Senior Management Functions (SMF) and result in future applications for SMF positions being refused.

The FCA should take this opportunity to remind Boards and senior managers that the FCA takes into account how they govern firms' unregulated activities in viewing their approach to regulated business. High standards of conduct should be consistent across both regulated and unregulated business, particularly as consumers often do not understand the difference or are misled by financial promotions.

**Q19: Do you have any comments on our cost benefit analysis?**

No comment.

**Q20: Do you have any other comments on the draft non-Handbook guidance?**

We feel that the draft non-Handbook guidance does not consistently set a higher standard than that required by TCF. We have included a non-exhaustive list of areas where this is the case below:

- The guidance uses the average consumer as a benchmark (Appendix 2, para 3.15). This is problematic because firms generally view the average consumer as much more informed, able and willing to engage with financial services than is the case in reality. Indeed, the FCA Occasional Paper on the Ageing Population and Financial services said that 'all too often, products and services appear designed for an 'average' consumer who may not exist'<sup>18</sup>. A prominent example of the firms expecting too much of the 'average' consumer is the continued reliance on terms and conditions, which are widely proven not to be read or understood by consumers. The guidance acknowledges this is the case, but fails to tackle it.
- The content on target markets and product targeting (e.g. see Appendix 2, para 5.10-5.30) is the same as is required currently under TCF and the PROD sourcebook.
- The guidance creates a new standard of "incompatible" without saying what that means or how it relates to "unsuitable" or not meeting "demands and needs".
- The guidance fails to address difficulties around firms' approach to friction (see, for example, the content on unreasonable barriers at Appendix 2 para 8.1).

**Q21: Can you suggest any other examples you consider would be useful to include in the draft non-Handbook guidance?**

No comment.

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<sup>18</sup> <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-31.pdf> p8