

FCA CONSUMER DUTY – THE FINAL RULES AND START DATES FIRMS NEED TO KNOW

THE FCA PUBLISHED ITS FINAL POLICY STATEMENT AND RULES IMPLEMENTING ITS NEW CONSUMER DUTY AND GUIDANCE ON HOW THE CONSUMER DUTY SHOULD WORK IN PRACTICE.

Firms will need to apply the Duty to new and existing products and services that are open to sale or renewal from 31 July 2023; and to products and services held in closed books from 31 July 2024. However, the FCA says that firms must have their board's approval for an implementation plan by 31 October 2022 and take certain other steps.

In this article, online financial services solicitor Simon Deane-Johns explains the new rules of the Consumer Duty and outlines the steps firms should take to implement the Duty.

NEXT STEPS TOWARD IMPLEMENTATION OF THE CONSUMER DUTY

The FCA expects the implementation of the Consumer Duty to receive board-level attention.

- By 31 October 2022, firms' boards (or equivalent management body) should have approved their plan to implement the Consumer Duty, with evidence they have scrutinised and challenged the plans to ensure they are deliverable and robust. Firms will be asked to share their plans, board papers and minutes with supervisors and be challenged by the FCA on the contents.

- Boards should maintain oversight of their firm's implementation plans to ensure they remain on track, and that work is sufficient to meet the Duty standards, taking a risk based approach and prioritising work that is likely to have the biggest impact on consumer outcomes, and consider completing work ahead of the deadlines where possible.
- At the end of implementation period, boards should assure themselves that their firm is complying with their obligations under the Duty and has identified and remedied any potential gaps.
- Product/service manufacturers should aim to complete their reviews to meet the 'four outcome' rules for existing open products and services by the 30 April 2023, and
 - share with distributors by the end of April 2023 the information necessary for them to meet their obligations under the Duty (e.g. price and value, and products and service outcomes);
 - identify where changes need to be made to existing open products and services to meet the Duty by the end of 31 July 2023.
- Firms must prioritise action to remedy any serious issues they detect that are causing immediate consumer harm; and report to the FCA any significant breaches of any existing rules.
- Firms must inform the FCA if:
 - implementation of the Duty involves considering whether to withdraw or restrict access to products or services in a way that will have a significant impact on vulnerable consumers or on overall market supply.
 - they believe that they will not be able to complete all work necessary to be compliant with the Duty by the deadlines.
- Firms must notify the FCA if they become aware that another firm in the distribution chain is not complying with the Duty; and notify other firms in the distribution chain if the firm thinks they have caused, or contributed to, harm to retail customers.

A NEW PRINCIPLE

The Consumer Duty adds a 12th 'Principle for Business' ("A firm must act to deliver good outcomes for retail customers"). Where the Duty applies, it displaces Principle 6 (A firm must pay due regard to the interests of its customers and treat them fairly) and 7 (A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading).

While this overarching standard of conduct is 'clarified and amplified' through 'cross-cutting rules' and 'four outcomes' (non-exhaustive/exclusive), it must be judged on its own, in terms of what is reasonably expected given the nature of the firm's role and the product or service it offers.

Principles 6 and 7 will continue to be applicable to firms and business activities outside the scope of the Duty, but the FCA believes the explanatory materials related to those Principles may be helpful to firms in considering their obligations where the Duty does apply (e.g. "where a piece of guidance begins with 'in order to treat customers fairly a firm should..."). However,

Principle 12 imposes a higher and more exacting standard of conduct than Principles 6 and 7, so failure to act in accordance with existing guidance on Principles 6 and 7 is likely to breach Principle 12.

CROSS-CUTTING RULES

The 'cross cutting rules' underpinning the Consumer Duty require firms to:

- act in good faith towards retail customers
- avoid foreseeable harm, and
- enable and support retail customers to pursue their financial objectives.

Firms do not have a responsibility to protect customers from all foreseeable harm or risks they understood and accepted. However, firms must detect and address new or emerging sources of harm.

This does not remove customers' responsibility for making decisions, or prevent them from making decisions not in their interests, but firms are responsible for establishing an environment in which consumers can act in their own interests. To do so, firms must consider the limited experience, behavioural biases and the impact characteristics of vulnerability can have on customers in the target market "at all stages of the product lifecycle"; monitor their communications to ensure that customers understand them and those communications help customers to make effective decisions; and monitor and regularly review the customer outcomes to ensure that the products and services deliver good outcomes for retail customers. The firm's resulting actions would depend on what is within the firm's control, based on their role and knowledge of the customer.

When supporting a customer to pursue a financial objective, firms are not required to go beyond what could reasonably be expected of the firm delivering their products and services or to carry out activities they are not authorised to undertake.

The Duty (including the cross cutting rules) could apply at both target-market

level (in the product/communications design) and, where a firm is providing a bespoke service or tailored advice or communication, at the individual customer level.

FOUR OUTCOMES

The "four outcomes" relate to:

- the quality of firms' products and services;
- the price and value of products and services;
- consumer understanding; and
- support for consumers.

Generally, firms must consider the needs, characteristics and objectives of customers in their target market, including those with characteristics of vulnerability (visual impairment, suffering bereavement, low financial capability). Firms don't have to adopt an "[inclusive design](#)" methodology but might wish to consider doing so.

The Duty applies in a proportionate way based on the standard that could reasonably be expected of a prudent firm. Firms must consider what is reasonable in the relevant circumstances in relation to the nature of the product, the characteristics of the customers in the target market and the firm's role in relation to the product. Focusing on outcomes avoids a one size fits all approach: where risks are low, less additional action may be required

The FCA considers the activities of a 'prudent firm' to be an objective standard, rather than an excuse to 'level down' to existing low standards and poor practices.

PRICE AND VALUE OUTCOME

The 'price and value' rules aim to ensure "a reasonable relationship between the price a consumer pays for a product or service and the benefits they receive from it". A product or service that meets all of the other elements of the Duty (designed to meet the needs of its target market, transparently sold, consumers are properly supported) is generally much more likely to offer fair value.

Products can breach the Consumer Duty as they age.

Firms must be "confident there is a reasonable relationship, on an ongoing basis, between the price the customer is paying and the benefits of the product or service".

A product or service "is much more likely to offer fair value" if it meets all of the other elements of the Duty when designed and sold because of the benefits received and customers have the information they need about the benefits and limitations of what they are buying to select an alternative product; but a firm must consider the lifetime costs of the product when assessing fair value (e.g. lenders can take account of the costs of providing credit and financing the credit).

If a firm identifies a product that is not fair value, the firm would not amend 'vested contractual rights' but would need to take appropriate action to avoid causing foreseeable harm and provide fair value, e.g. by changing non vested fees or charges, where doing so would not impact on any vested rights; providing additional support or information; or offering forbearance, such as a pause in payments, to help mitigate any harm.

The FCA includes examples in the Guidance of good outcomes and the behaviours.

Firms do not need to quantify non monetary costs and benefits, but must "at least provide qualitative consideration of these factors, especially if these are a significant part of their business models".

A value assessment is not required where the product or service does not have any financial or non financial cost to the consumer (e.g. "debt advice funded through other sources"). But manufacturers of 'free' products or services should still consider whether their customers are 'paying' in non monetary terms, and whether those costs are reasonable in relation to the product's benefits (e.g. lost interest on balances in 'free' current accounts; fees or use of their account data).

Differential pricing is not always harmful, e.g. clear and transparent upfront discounts where the firm can demonstrate that both customers with/without discounts are receiving fair value. The rules do not prevent cross subsidies between products or require cost plus pricing; and they do not prevent firms from selling similar products with different prices across various brands, as long as both are fair value. But continually increasing the prices on renewal for loyal customers ("price walking"), for example, can lead to some consumers making significant overpayments which do not provide fair value and would not satisfy the Consumer Duty.

Firms are not required to duplicate value assessments and are responsible only for the prices they control not to challenge other firm's value assessments. Distributors must ensure charges accruing down the distribution chain do not cumulatively result in the product ceasing to provide fair value. To enable this:

Manufacturers should provide distributors with the results of their value assessment, but they do not have to include sensitive information such as breakdown of firms' margins or risk based pricing. Information shared can be a high level summary of the benefits to the target market, information on overall prices or fees and confirmation that the manufacturer considers that total benefits are proportionate to the total costs.

Firms already subject to fair value rules will meet the Duty by complying with those rules, but some firms – such as payment and e money firms – have existing disclosure rules and requirements that do not equate to the price and value outcome, so additional compliance work would be required for e-money and payment institutions.

While denying that elements of the Duty will necessarily raise costs and therefore prices, the FCA states:

Firms selling innovative products at a higher price may still be providing fair value if they offer increased benefits

to consumers. In our view, increased consumer trust and healthier competition would support innovation and encourage new entrants to the market, with firms competing to drive up quality for consumers.

CONSUMER UNDERSTANDING

Firms must not only continue to meet information and disclosure requirements, but also consider the purpose of all their customer communications (conversations with advisers, online, in letters or contracts, individually and as a whole) and the outcomes they are focused on.

As will the Duty generally, the scope of this outcome is determined by a firm's role and authorisations/permissions. A firm which is not authorised to provide advice must equip its customers with information to make effective decisions in a way that does not amount to advice.

The FCA accepts that firms may not be able to directly communicate the availability of new product offerings to customers where the customer has decided to opt out, or has not consented to receive, such communications under the Data Protection Act (and UK GDPR).

Firms do not need to tailor all communications to meet the individual needs of each customer (except on a one to one basis where appropriate), but generally only need to take into account the characteristics of customers in the target market more broadly, including characteristics of vulnerability. Firms must understand their customer base and target market for their products and services. The FCA found that one in seven adults have literacy skills at or below those expected of a 9-to-11 year old and 17.7 million adults (34%) have poor or low levels of numeracy involving financial concepts. So, communications for even a simple product aimed at the mass market must take these characteristics into account and communicate information in a way that supports understanding by

such customers. Communicating about a complex product to a more sophisticated retail target market might reasonably be different.

Characteristics of vulnerability in their customer base or target market, such as inadequate or erratic income, over indebtedness or low savings among potential mortgage customers may mean that the availability of support for customers in financial difficulty should be prominently signposted; or be in a clear way so that consumers with a hearing or visual impairment are able to request communications in a format that meets their needs. Tailored communications may be needed where it becomes apparent to a firm that they require particular information or have a specific characteristic of vulnerability (not generally characteristic of the target market).

Firms should test whether consumers can identify and understand the information needed to make effective decisions and that the approach to testing delivers good outcomes.

When communicating on a one to one basis, it is reasonable to ask the customer if they understand what they have been told and have any further questions.

Firms should apply the same test standards and capabilities to ensure communications are delivering good consumer outcomes as they do to communications designed to generate or maximise sales and revenue. That does not mean all communications must be tested first, but 'where appropriate'.

CONSUMER SUPPORT OUTCOME

Firms must ensure the channels of support (e.g. telephone, email, in branch, text, written, webchat, and video calls) meet the needs of customers, including those with non standard issues and characteristics of vulnerability.

Firms should monitor support, take relevant feedback into account, and

look for signs that may indicate they are not meeting the needs of their customers and take reasonable steps to address any shortfall in their support.

[FCA guidance on the fair treatment of vulnerable customers](#) provides examples of how different vulnerabilities can make certain channels of support unsuitable.

A product with a digital only support offering could meet the needs of a specific tech savvy target market, so an additional non digital full service channel would not be needed, but there are still various factors that need to be considered ensuring the channel delivers good customer outcomes.

Where a person is representing a customer, such as where a power of attorney applies, firms must provide the same level of support to that assistant or representative. But this does not extend to services provided by regulated firms, such as where a mortgage intermediary is dealing with a lender. There the mortgage lender is seen as a 'manufacturer' and the mortgage intermediary a 'distributor' rather than a representative of the customer, and they must not interact in a way that has an adverse effect on the support and outcomes for the customer

NO PRIVATE RIGHT OF ACTION

Controversially, the FCA has not allowed retail customers a private right of action in the courts (PROA) to enforce the Consumer Duty directly against regulated firms because it would 'create asymmetry in our rules' in a way that reduces consumers' access to redress for breaches of the Duty (which assumes that it becomes the only way to seek redress, rather than also allowing referrals of complaints to FOS).

Consumer advocates might wonder if a PROA might actually reveal deficiencies in how the FCA supervises the implementation of the Consumer Duty, which is bound to be fraught.

However, the FCA also has the power to require restitution from firms in breach of its rules.

NOT RETROSPECTIVE

The Consumer Duty applies to new and existing products/services and closed book products, and is not retrospective. Actions taken before the Duty comes into force will be subject to the FCA rules that applied at the time.

THE DUTY COVERS ONLY THE PARTS OF FCA RULE BOOKS THAT APPLY TO A FIRM

All the components of the Consumer Duty apply (the Principle, cross cutting rules and the outcome rules) but only to the areas of the firm's activities that are covered by those rules

THE CONSUMER DUTY APPLIES TO NON-CUSTOMERS

The Duty applies to any authorised firm that can 'determine or materially influence' retail customer outcomes, including customers with whom a firm does not have a direct relationship. Therefore, it also applies to firms that can influence material aspects of the product or service design and distribution chain, such as:

- the design or operation of retail products or services, including their price and value;
- the distribution of retail products or services;
- preparing and approving communications that are to be issued to retail customers; and
- customer support for retail customers.

LIABILITY FOR BREACHES OF THE DUTY IN THE DISTRIBUTION CHAIN

The Duty applies only to the extent that a firm is responsible for determining or materially influencing retail customer outcomes in proportion to its role.

Firms have different responsibilities depending on whether they're classed as the manufacturer or distributor of a product or service:

Manufacturers: create, develop, design, issue, operate or underwrite a product or service.

Distributors: offer, sell, recommend, advise on, propose or provide a product or service.

Generally the manufacturer's responsibility is to identify the target market. Distributors may have a specific distribution strategy to supplement the manufacturer's strategy, but it must be consistent with the manufacturer's intended distribution strategy and the identified target market.

Where a firm is already subject to rules on product design or the assessment of value, complying with those rules will also satisfy relevant parts of the Duty.

OUTSOURCING

Unless an FCA authorised outsource services provider can determine or has a material influence over retail customer outcomes, it would not be subject to the Duty. The firm outsourcing the relevant process to the service provider will remain responsible for both the activities of the service provider (as per the systems and controls rules in SYSC 8) and meeting the relevant aspects of the Duty.

UNREGULATED BUT ANCILLARY ACTIVITIES ARE IN SCOPE

Unregulated activities are subject to the Consumer Duty where they are 'ancillary' to a regulated activity, i.e. carried on in connection with it; or held out as being for the purposes of a regulated activity; or necessary for the completion of a regulated activity.

For instance, product design or customer support are not themselves regulated activities but are 'necessary activities linked to regulated activities'.

Selling a separate non financial services product while a regulated activity is performed where completion of the regulated activity does not depend on sale of the unregulated product, would not be ancillary.

The FCA has expressed concerns over explanations by e-money and payment institutions about whether and how customers' funds are protected; and it has concerns that customer support standards fall where support capacity hasn't kept pace with demand, or firms don't understand their complaints handling obligations.

TERRITORIAL SCOPE

Where the chain includes non UK distributors selling to non UK customers, manufacturers should use any available information to support their work under the Duty but would not be expected to obtain information from firms that are not subject to the Duty.

FIRMS BUYING OLD 'BOOKS' OF BUSINESS OR PRODUCTS

The selling firm must provide information to the buying firm to help it comply with the Consumer Duty going forward. Where the buyer has either limited regulatory permissions or which is exempt on certain conditions, the unregulated firm would not be subject to the Duty, but would be bound by general consumer law; and the general standards of conduct anticipated by the Consumer Duty may be relevant to determine any breach.

The buying firm must also gather relevant information from the selling firm to be able to comply with the Consumer Duty, e.g. in relation to product and service design and value.

FOR FURTHER INFORMATION

If you have any questions on the Consumer Duty and how this will impact your firm, please contact Simon Deane-Johns.



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