

United Kingdom: The Consumer Duty – key changes in the final rules

In brief

On 27 July 2022, the FCA published its highly anticipated [final rules and guidance](#) on the new Consumer Duty, ushering in a fundamental cultural shift in the way that regulated firms will approach and serve customers, and starting the countdown clock for implementation plans across the industry.

In a welcome move, the FCA has now confirmed a phased approach to implementation. Firms will need to apply the Consumer Duty to new and existing products and services that are open to sale (or renewal) from 31 July 2023. Firms will have an additional 12 months, until 31 July 2024, to apply the Consumer Duty to products and services held in closed books. Despite this phased approach, boards are expected to have scrutinised and signed off firms' implementation plans by the end of October 2022 so time is tight for firms to agree their approach to implementation.

On the whole, the final Consumer Duty package reflects the proposals set out in the FCA's consultations, with some changes and clarifications made in response to feedback received. Going forward, The FCA expects to build on the guidance as the Consumer Duty is embedded across the industry, including more sector specific guidance over time. In this alert, we highlight some of the significant changes and clarifications that we consider to be most significant. For more detail on the proposals as consulted on, this alert should be read together with our previous alerts of [June](#) and [December 2021](#).

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Scope

The Consumer Duty will apply to FCA-authorized firms which can determine or have a material influence over retail customer outcomes. The FCA has decided to maintain the approach of applying the Consumer Duty in line with the approach in existing sourcebooks, as explained in our [December 2021 alert](#).

Clarifications on scope include:

- **Small and medium enterprises (SMEs).** In response to feedback questioning the proportionality of application to larger SMEs, the FCA has clarified that where SMEs are already protected by the rules under a sectoral sourcebook, the Consumer Duty will also apply.
- **E-money and payment services.** Although some respondents in the e-money and payment services sector said that applying the Consumer Duty to this sector would be disproportionate, the FCA has confirmed that the Consumer Duty will indeed apply, and has included further guidance on application.
- **Outsourcing.** Unless an FCA-authorized outsource provider can determine or has a material influence over retail customer outcomes, it would not be subject to the Consumer Duty. Instead, the outsourcing firm will remain responsible for meeting the relevant aspects of the Consumer Duty.



- **Investment companies.** The Consumer Duty will apply to the manufacture and distribution of investment companies, including investment trusts. However, the FCA recognises that the company structure of investment companies means FCA-authorized firms cannot always ensure issues are resolved.

Application to existing products and services

Respondents expressed a number of concerns relating to the application of the Consumer Duty to existing products and services, arguing that this effectively amounts to retrospective application contrary to the FCA's stated position. While the FCA has not changed its approach, it has introduced additional guidance to clarify expectations, including around the need for firms to consider conditions that applied when products were designed and sold, (including expected costs over the lifetime of the product), what amounts to a vested contractual right, the process firms may wish to follow when reviewing closed-book products, and that the price and value rules apply at the level of the product or service itself rather than for individual customers.

Firms that have already purchased product or service books will be required to review those products or services. Given the difficulty of accessing relevant information and the potential lack of resources and expertise, third-party firms that operate existing product or service books will be expected to use their best endeavours to meet the requirements under the products and services outcome and the price and value outcome.

For future sales, the FCA is introducing rules to require that, in general, a firm selling a product or service book would need to provide information to the firm buying the book to help them comply with the Consumer Duty. Regulated firms buying the book will be required to gather relevant information from the selling firm to be able to comply with the Consumer Duty (for example, in relation to product and service design and value). Unregulated firms buying books will not be subject to the Consumer Duty (although other relevant consumer protection legislation will apply).

The cross-cutting rules

During the consultation period, the FCA had proposed cross-cutting rules that require firms to:

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

In response to feedback received, the FCA has made several clarifications.

Good faith: The FCA has updated its guidance to provide further clarity on what is meant by "good faith".

Foreseeable harm: In its [first consultation](#), the FCA proposed requiring firms to "avoid causing foreseeable harm to customers"; in its [second consultation](#) the FCA shortened this to just say "avoid foreseeable harm". Respondents indicated that this reworded rule could potentially make firms liable for harm outside of their responsibility or control. In response, the FCA has updated this cross-cutting rule to require firms to avoid causing foreseeable harm, further clarifying that a firm could cause foreseeable harm through its action or by failing to act either in its direct relationship with a customer or through its role in the distribution chain.

Enabling customers to pursue their financial objectives: The FCA has updated its guidance to clarify that the Consumer Duty overall does not require firms to carry out activities or services that they are not authorised to undertake.

The "average customer"

The FCA had proposed, as part of the rules on the consumer understanding outcome, requiring firms to ensure that their communications are likely to be understood by the average customer intended to receive the communication. In response to concerns about the lack of clarity on the concept of the "average customer", the FCA has amended the rules to clarify that firms should ensure their communications are likely to be understood by the customers intended to receive the communication.

More broadly, respondents expressed concerns that references in several areas of the proposed rules and guidance to the "average customer" could undermine requirements in relation to the fair treatment of vulnerable consumers. In response, the FCA has amended these references to ask firms to consider the needs of customers in their target market.

Governance

To make it clear that the annual report is not the only mechanism for governance, accountability and oversight by the board, the FCA has introduced new requirements that the Consumer Duty should be reflected in firms' strategies, governance, leadership and people policies, including incentives at all levels. This includes performance management, pay and bonuses. The FCA will also



consider evidence of individuals’ understanding of and actions taken to comply with the Consumer Duty when considering individuals for approval under the Senior Managers and Certification Regime (SMCR).

Although there are no changes to the FCA's position that the Consumer Duty does not require a single senior manager to be responsible for compliance with all aspects of the Consumer Duty, the FCA has amended the guidance to make clear that firms should have a champion at board level (or equivalent governing body) who, along with the Chair and the CEO, ensures that the Consumer Duty is discussed regularly and raised in all relevant discussions. Further, the FCA has suggested a number of key questions that the champion and Chair should be asking in relation to their governance arrangements and the Consumer Duty:

Culture and Governance	Customer outcomes
<ul style="list-style-type: none"> Does the firm’s purpose (whether publicly articulated or not) align with its obligations under the Consumer Duty? How is it embedded and understood throughout the organisation? How does the organisation’s culture support the delivery of good outcomes for customers? How does the organisation ensure that individuals throughout the organisation – including those in control and support functions – understand their role in delivering the Consumer Duty? Are staff empowered and feel safe to challenge and raise issues where they feel the firm might not be acting to deliver good outcomes for customers? Are those challenges listened to, and where necessary, acted on? Is the Consumer Duty being considered in all relevant discussions such as strategy and remuneration? Are customers outcomes a key lens for Risk and Internal Audit? How is the firm ensuring that its remuneration and incentive structures drive good outcomes for customers? 	<ul style="list-style-type: none"> Is the organisation prioritising acting to deliver good outcomes for customers? Are there any areas of concern? How is the external environment changing, and how will that impact on the organisation’s ability to deliver good outcomes for customers? Has the firm identified the key risks to its ability to deliver good outcomes to customers and put appropriate mitigants in place? How does the firm define good outcomes (over the short, medium and long term) for customers using its products and services? What data does the firm have about its customers and how they use its products? Are there any gaps in the data? What steps is the firm taking to address them? What outcomes are customers getting? Are they getting good outcomes which align with their reasonable expectations? Are certain groups of consumers getting different outcomes, and if so why? What’s driving any adverse outcomes? What actions is the firm taking to improve outcomes? (Who’s accountable for this work, what will improvement look like and when will it happen?)

The FCA expects the first annual report to be considered by the board or equivalent management body within 12 months of the rules coming into force (i.e. by July 2024 at the latest).

Implementation and next steps

As noted above, in response to stakeholder concerns about the challenging nine month implementation period originally proposed the Consumer Duty will now apply from 31 July 2023, and firms will have an additional 12 months (until 31 July 2024) to apply the Consumer Duty to products and services held in closed books. The FCA is taking an assertive approach to the implementation period, and firms should begin to prepare without delay. Firms under portfolio supervision can expect a communication from the FCA later in 2022 on implementation expectations and priority issues. For fixed firms with a dedicated supervision team, the FCA request and regularly review implementation plans.

The FCA expects firms’ boards (or equivalent management body) to have scrutinised and signed off firms’ implementation plans **by the end of October 2022**, and they should maintain oversight of the implementation work to ensure it remains on track and meets the standards of the Consumer Duty. This is a tight timeline and boards will need to work at pace to ensure they can meet the FCA's expectations - firms should expect to be asked to share implementation plans, board papers and minutes with the FCA.

During the implementation period, firms will need to ensure that they grasp and understand the Consumer Duty; perform gap analysis on their policies and processes; make relevant adjustments through change projects on product and service design, price and value, customer support and so on; train their staff and boards on the new requirements; design and implement any required IT system changes; review customer-facing documentation and make necessary changes; and establish processes to monitor and test consumer outcomes.

We're here to help

Our financial services regulatory specialists have prepared a package of training and guidance to help firms with their Consumer Duty implementation and change programmes. We stand ready to assist – to learn more, please contact any of the specialists listed in this alert, or your regular Baker McKenzie contact.



Firms are also expected to review their products and services, and if needed update the contractual terms and conditions of a product or service before it can continue to be sold (or renewed) to new or existing customers following implementation of the Consumer Duty.

Firms which are part of distribution chains will also need to carefully review the Consumer Duty requirements and, in some cases, make complex and costly changes to their arrangements and associated documentation. Manufacturers should complete all reviews and share key information (particularly in relation to the price and value, and products and service outcomes) with distributors **by the end of April 2023**.

While we would expect that firms complying with current requirements under Principle 6 to treat customers fairly are unlikely to be causing significant consumer harm, to the extent that firms identify serious issues causing immediate harm in the course of reviewing products and services against the Consumer Duty standard, these should be remedied as a matter of priority (and, if required, notified to the FCA). In addition, where actions to bring products and services up to standard can be completed more quickly than required by the implementation deadline, firms should consider doing so.

Firms considering withdrawing any products or services due to the Consumer Duty are expected to engage with the FCA in like with their obligations under Principle 11 to identify any potentially significant impacts on consumers.



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