

A new Consumer Duty

Response to the FCA from
Citizens Advice - February
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Introduction and summary of response

At Citizens Advice, we offer free, independent, and confidential advice and information to anyone who needs it. In the past year, we have supported people with more than 130,000 financial services and financial capability issues.¹ We continue to see clients struggling to manage the consequences of the coronavirus pandemic, with many facing significant financial difficulties, including debt and arrears. In 2021, we helped 70,000 people with debts totalling £693 million, or £6000 on average per person.² We expect the scale of the problem is far larger. The current cost of living crisis, caused by rising energy bills, inflation and reduced benefit payments, is putting even more people in financial risk. Our research shows that even living on a minimal budget, more than 3 million households could be unable to cover basic living costs over this winter.³

In this context, we support the FCA's aim to improve the level of consumer protection in retail financial markets, and welcome the revised proposals for the Consumer Duty. This is a vital opportunity to mitigate against consumer harms and ensure all consumers, including vulnerable consumers, receive effective support. To deliver on these aims, the Consumer Duty needs to be underpinned by clear, unambiguous rules, effective monitoring and proactive enforcement.

Clear, enforceable rules, backed up by examples of good and bad market practises, are essential to ensure firms effectively comply with these new regulations. For example, the loyalty penalty - where firms charge excessive prices to disengaged consumers - has been proactively tackled in the insurance market by the FCA introducing a ban on 'price walking', whereas voluntary commitments in other markets have been less successful in reducing prices for loyal customers.⁴ Clear principles will be especially important in emerging digital markets, as a way to future proof good consumer outcomes in rapidly evolving markets. Any ambiguity in the proposed rules and requirements could create

¹ Citizens Advice, Advice Issue Code data (Pension Wise has been excluded from the total count), 1 Dec 2020 - 31 November 2021.

² Citizens Advice, [£700m debt is 'tip of the iceberg' as cost-of-living crisis grows](#), (January 2022).

³ Citizens Advice, [Three million families facing crisis as cost of living crunch bites](#), (November 2021).

⁴ Citizens Advice, [Finishing the job on the loyalty penalty: the mortgage and mobile handset markets](#), (2021).

uncertainty for firms, and will present a challenge for enforcement action when it is required.

Effective monitoring across existing markets and emerging products is also vital to ensure consumers are not experiencing harm or unequal outcomes. At Citizens Advice we have conducted exploratory research into insurance pricing, which has highlighted the challenges of understanding consumer outcomes in complex and opaque markets, where data collected and decisions made by firms are not transparent. We welcome the Consumer Duty placing a focus on measuring outcomes, and expect this to include using disaggregated data to assess whether vulnerable consumers and consumers with protected characteristics are receiving fair and equal outcomes.

Firms need to understand that these new rules will be enforced. Unfortunately, we have seen that previous attempts to tackle consumer issues through guidance alone have been unsuccessful. For example, the guidance for firms on the fair treatment of vulnerable customers has failed to deliver consistently good outcomes for vulnerable consumers. The Consumer Duty is an opportunity to set a new tone, and go beyond current guidance to create enforceable requirements for firms to deliver good outcomes, particularly for vulnerable consumers.

Ultimately, the Consumer Duty presents an opportunity for a regulatory shift away from the current approach of retrospectively taking action against firms once consumers and their representatives have identified and evidenced harm. We support the intent of the Consumer Duty to proactively identify these problems and focus on prevention. A marker of the new Consumer Duty's success should be both a reduction in consumer detriment, and a reduction in the need for intervention by consumer organisations.

The remainder of our response sets out our insights into the consumer harms targeted by the revised Consumer Duty proposals, and provides further considerations on how the duty can most effectively deliver its aims.

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Responses to individual questions

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

We support the FCA's selection of "A firm must act to deliver good outcomes for retail clients" (Option 1) for the Consumer Principle. This option centres the consumer, and better reflects the ambition that consumers should be empowered to make decisions in their own interests to achieve good outcomes for them as an individual. Emphasising the importance of consumer outcomes should encourage firms to be proactive in meeting the standards set out by the cross-cutting rules and four outcomes. This option also more effectively highlights the need for monitoring throughout the customer journey, to ensure that products and services designed by firms are delivering the outcomes intended.

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

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?

We support the ambition of the Consumer Duty to set higher standards for firms through a new regulatory framework. While we recognise the FCA's decision to disapply principles 6&7 in areas of overlap, it is important that this does not complicate the regulatory picture, and it is clear to firms when each principle applies.

We agree with the decision to retain Handbook and non-Handbook material related to Principles 6 & 7, to support firms' understanding of their obligations, by providing additional detail on particular elements, such as the treatment of vulnerable consumers. We also welcome that draft guidance will set out that the Consumer Principle imposes a higher standard of conduct than Principles 6 & 7, and that existing guidance should not be relied upon to comply with the Consumer Duty. To ensure this is understood by firms, the FCA could provide examples of actions that would previously have been considered compliant with Principles 6 & 7, that would not comply with the Consumer Duty.

Provided this guidance is accompanied by clear, enforceable rules, this approach should support firms to shift towards the new, higher standards set by the Consumer Duty.

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

The new approach and higher expectations set out for firms by the cross-cutting rules recognise the imbalance of information and expertise between firms and consumers, and emphasise the role firms should play in delivering good outcomes for their customers. However, we remain concerned that *how* the rules should be applied is unclear in some places. For example, it is unclear how firms should “act in good faith towards retail customers”, where there is little description of what “good faith” means beyond its connection to the other rules. It is unclear how the FCA expects firms to demonstrate compliance with this rule, and this ambiguity could make it difficult to follow and enforce.

Similarly, the rule against “foreseeable harm” is a positive step, and connects with requirements for firms to assess the diverse needs of their customer base to better support consumers. However, the term “foreseeable” is ambiguous, and it is difficult to understand how the FCA would determine whether a harm was “foreseeable”. While we recognise that it is not the intention of the rule to impose an ‘open-ended duty’ to protect consumers from all potential harms, we remain concerned that firms may justify causing or not preventing harm by arguing that it wasn’t “foreseeable”. For example, we consider that all firms should reasonably expect to have customers who have not disclosed a vulnerability or who become vulnerable suddenly, and should not be able to claim this was unforeseeable. Clarifying this language could help ensure this rule is interpreted and applied consistently by firms. We would also like to see the FCA specifically set out firms’ obligations to adapt to prevent further harm if unforeseeable circumstances arise that put consumers at risk, as was the case during the coronavirus pandemic.

We support the proposed rule to “enable and support retail customers to pursue their financial objectives”, as it places responsibility on firms to provide support throughout the customer journey to ensure good consumer outcomes. To support the amended rule, the FCA should require firms to monitor the impact

of their interventions to ensure they're enabling customers to pursue their financial objectives.

Monitoring will also be key in measuring outcomes for vulnerable consumers, as the FCA have decided against including an additional cross-cutting rule focused on consumers in vulnerable circumstances. While a specific rule could have helped centre the needs of vulnerable consumers throughout, vulnerable consumers are raised in other parts of the Consumer Duty, so there is still potential for the new rules to help improve outcomes for vulnerable consumers. To ensure this, we would like to see more explicit monitoring requirements throughout the Consumer Duty. For example, we would like to see firms explicitly monitoring outcomes comparing different demographics and vulnerable groups in their customer base.

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*?

We welcome the FCA's guidance that firms must consider the needs, objectives and characteristics of their customers when designing products and services, including characteristics of vulnerability. We are particularly pleased to see recognition that these rules should prevent firms designing features to exploit the behavioural biases of consumers in order to create a demand for a product.

We have identified a concerning trend of these exploitative practises being used in a range of markets, including Buy Now, Pay Later platforms and online gambling services.⁵ This trend is driven by firms using ever increasing amounts of consumer data and sophisticated technologies to develop 'nudge and sludge' techniques that can confuse and exploit even savvy consumers. We welcome the FCA's expectation that setting higher standards for firms should enable better and healthier competition and innovation to the benefit of consumers. To ensure this happens in practice, more guidance may be needed to specify how behavioural insights can be used whilst prioritising good consumer outcomes.

As set out above, to ensure the requirement for firms to consider the needs of vulnerable consumers within their target markets is met, there will need to be

⁵ Citizens Advice, [Financial quicksand is popping up everywhere - what is it? And why should we be concerned?](#), (August 2021).

careful monitoring. It is vital that firms understand that there will be consumers with characteristics of vulnerability in any target market.

Vulnerability isn't static; any consumer has the potential to experience increased vulnerability as a result of a life event or income shock. This in part explains why disclosure of vulnerability can be complex, as individuals may not know they need to disclose a life event to a provider. Further, our research into barriers to sharing information about health and disability with essential service providers suggests that there may be a high proportion of consumers who haven't disclosed a health condition or disability.⁶ Therefore, and as outlined below (Q11), stronger guidance is needed to require firms to give full consideration to potential low disclosure rates and to the unpredictable nature of vulnerability when designing products.

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*?

We support the FCA's aims to ensure fair value for consumers. It is important that this includes recognition of the need for cross-market interventions, as market forces alone are not currently delivering fair value. Effective competition within markets can help consumers by driving prices down and encouraging innovation. But as highlighted above (Q9), too many firms instead exploit consumer inertia or cognitive and behavioural biases, rather than striving for innovation and delivering more affordable products.

We welcome the FCA's expectation that firms must pay extra consideration to vulnerable consumers and those with protected characteristics because there is a higher risk of unfair pricing for these consumers. This is especially important where technological innovations are making pricing decisions more complicated and harder to monitor. For example, complex and opaque pricing structures can make it hard for consumers to understand whether they are getting fair value. As technology develops and pricing algorithms provide increasingly complex personalised pricing, there are risks that algorithmic biases entrench unfair prices, in ways that firms, let alone consumers, can struggle to understand. The Centre for Data Ethics and Innovation (CDEI) has found that firms often do not

⁶ Citizens Advice, [Counting on it - Cross sector minimum standards of support for people with mental health problems](#), (2020).

understand their responsibilities in relation to the Equality Act when using algorithmic decision making.⁷ This presents risks, particularly for people with protected characteristics or vulnerabilities, and could mean that these consumers experience worse outcomes are not able to benefit from the legal protections offered by the Equality Act.

To help ensure these risks are mitigated, more detail is needed to explain what sufficient consideration and monitoring looks like. Given the complexity and opacity of pricing mechanisms in many sectors, outcomes based monitoring is likely to be the most effective way to monitor and ensure the fairness of pricing for groups with protected characteristics. The FCA needs to give clearer guidance for firms on how to monitor compliance with the Equality Act and measure any correlations between profit margins and protected characteristics, to test the fair value of products. There should be a regular reporting requirement for firms to share this monitoring data with the FCA.

We are also concerned that the higher standards put in place by the Consumer Duty may introduce new incurred costs around customer support, and that firms may pass these costs onto vulnerable consumers. The assessment of the price a consumer can reasonably expect to pay for the product or service provided is open to interpretation by firms, and the consultation does not specify how firms should understand and reflect on consumers' expectations when setting prices. Firms must not pass on costs for additional support provided to customers, particularly as it's likely that vulnerable consumers - who are most likely to need support, but least able to pay - will bear the brunt of this. The FCA must clearly set out that the higher standards Consumer Duty will not make products unaffordable or lead to vulnerable consumers being excluded from the market.

Additionally, there will be cases where the FCA will need to intervene specifically where market failures, such as the loyalty penalty, continue to occur. To deliver better consumer outcomes and fair value, specific pricing proposals are likely to be needed alongside the Consumer Duty. For example, the FCA should consider whether the (currently paused) proposal to introduce a Single Easy Access rate in cash savings, could be integrated into or alongside the Consumer Duty.

⁷ Centre for Data Ethics and Innovation (CDEI), [Review into bias in algorithmic decision making](#), (2020).

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 welcome the FCA's decision to shift from 'communications' to 'consumer understanding', which highlights the diverse needs of consumers and modes of communication that may be necessary to reach different groups. We share the FCA's view that how information is communicated has a huge impact on consumer understanding, as well as what information is shared.

Designing communication that every consumer understands requires inclusive and accessible modes of communication. The increasing digitisation of services in recent years has left those who are unable to use or access digital platforms behind. Those who are unable to afford internet access, live in rural areas, or who are digitally illiterate, can struggle to access key information about products and services and make informed decisions. To ensure all communications are accessible, firms must be required to ask customers which communication channels they prefer, including a non-digital option, and send their communications via the preferred channel.

Setting the expectation that firms must tailor communications for characteristics including vulnerability is a positive step. Firms need to be flexible in providing direct support for customers with additional communications needs. But tailoring relies heavily on a firm's potentially limited understanding of the needs of a customer base. For example, it may not be apparent when a consumer purchases a product that they are digitally illiterate. Further, many characteristics of vulnerability are transient and complex, which presents additional challenges to tailoring communications. To make sure consumers do not fall through the gaps, communications must be as accessible and inclusive to everyone, as possible at every stage.

Communications from firms should aim to be understood by *all* customers, rather than a firm's interpretation of their *average* customer. Clearer enforceable rules need to be introduced to ensure firms employ this accessible communication design. For example, clear guidance should be provided around presenting information in clear and simple language. As noted by the FCA's research on vulnerability, 1 in 7 adults have literacy skills at or below those

expected of a 9 to 11-year-old. This understanding of reading ages is key to accessible content design, and the government's own guidelines specify that content designers should write for a 9 year old reading age.⁸

Rules to support firms in monitoring, testing and adapting communications are key to improving consumer understanding. But these proposals risk giving too much weight to firm's self assessments of whether testing is satisfactory. The FCA should take a more proactive approach to ensure firms are meeting the aims of the consumer understanding outcome, and make clear that enforcement action will be taken against firms that fail to meet these standards.

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

We support the FCA's reframing of this outcome from customer service to consumer support, because it emphasises the need for support at every stage of the consumer journey, and the diverse support needs of consumers. Customer service and support have a massive impact on whether consumers are able to access essential services.

While firms should be expected to provide an 'appropriate standard of support', the assessment of what is appropriate should not be left to the discretion of firms. Firms already have obligations to treat customers fairly, but this hasn't resulted in consistently good consumer outcomes and sufficient support. Similarly, an overreliance of the principle of reasonableness in regards to support risks giving too much freedom to firms, potentially at the expense of more vulnerable customers. Firms are effectively being asked to mark their own homework, which is unlikely to yield consistently good consumer outcomes.

The FCA needs to set out clear expectations for the support firms should provide, and how they intend to enforce compliance with these rules. This could include specific actions firms should make to meet the basic customer support needs of different customers, such as:

⁸ Government Digital Service, [Content design: planning, writing and managing content](#), (2016).

- Providers should offer at least 2 channels through which all customers can communicate with them, one of which should be a freephone telephone line.
- Providers should train all customer service staff so they are equipped to support those in vulnerable circumstances, e.g. mental ill-health, or domestic violence.
- For customers with reduced cognitive capacity, providers should offer written follow-up when substantive changes are made to the account or contract, or the customer has agreed to take action as a result of the call.

The new focus on ‘unreasonable barriers’ is helpful, but more examples and guidance are needed to support the understanding of consumers and firms. For example, an example could be given around digital exclusion as a potentially unreasonable barrier. For digitally disenfranchised consumers, accessing consumer support may be challenging if only digital methods of contact are provided. Failing to provide non-digital options should therefore be considered an unreasonable barrier.

The FCA should provide more clarity on how they plan to work with firms to make sure these consumer support rules are followed, and the enforcement action that will be taken if firms fail to comply.

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

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

The new duty presents a crucial opportunity to go beyond existing guidance on vulnerability and to introduce enforceable requirements on firms. As set out above, current guidance alone has not been enough to ensure good outcomes for vulnerable consumers. The transient nature of vulnerability and the range of ways it can impact people must be reflected in the ways that firms design service provision, by integrating flexibility into different stages of the customer journey.

We would encourage explicit reference to diversity and inclusion within each of the main elements of the Consumer Duty. The FCA should require firms to gather and monitor data comparing outcomes for different demographic and vulnerable groups within their customer base. To support this, further rules and

guidance on the interaction between diversity characteristics and existing definitions of vulnerability would be helpful. We would also encourage the FCA to work directly with those with lived experiences and third sector organisations in order to determine whether the Consumer Duty is helping to drive appropriate changes in the customer journey and outcomes for vulnerable consumers.

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?

We understand that the FCA has made the decision not to introduce a private right of action (PROA) through the Consumer Duty. In our response to CP21/13, we set out ways in which a PROA could incentivize firms to act in line with the new Consumer Duty, and provide an important tool alongside enforcement for upholding consumer protection standards. However, we recognise that this will not be an option taken up by many consumers. We also should not expect consumers to take on the legal and financial burden of holding firms to account. Ultimately a PROA is no substitute for effective regulation and enforcement by the FCA. We expect a PROA will not be needed if monitoring, supervision and enforcement of the Consumer Duty are implemented effectively, but would encourage the FCA to reassess a potential PROA at a later date, if it does not appear these measures are ensuring compliance with the Consumer Duty.

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

The new Consumer Duty is being consulted on during a cost of living crisis, and while many are still struggling with the financial and personal effects of the coronavirus pandemic. We believe that the Consumer Duty has the potential to shift market approaches to improving consumer outcomes and reducing consumer harm. The FCA should therefore introduce the new duty as soon as possible, and closely monitor early implementation to ensure it delivers its aims and outcomes.

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

The proposed outcomes-focused approach to monitoring sets out useful expectations for the types of monitoring firms should conduct to ensure good

consumer outcomes. But, the lack of regular reporting requirements significantly limits the effectiveness of the guidance. We agree that the approaches outlined, if enforced, would help firms identify risks to good consumer outcomes and address areas where customers are experiencing poor outcomes. We also acknowledge the challenges in creating a 'one size fits all' set of monitoring rules. But certain rules would be helpful across all markets, such as an explicit requirement to analyse outcomes data for groups with protected characteristics.

The new Consumer Duty is an opportunity to require explicit and specific types of monitoring to address unequal outcomes for vulnerable consumers and groups with protected characteristics. The guidance that "firms would need to satisfy themselves, and be able to evidence to us" that the FCA's standards are met gives too much weight to firms' discretion and governance structures. Firms should not be expected to mark their own homework. We know through extensive research into issues like the loyalty penalty in financial services, and insurance pricing, that current guidance does not prevent consumer harm. We also know that a lack of standardised, disaggregated data collection means there is a lack of useful data for assessing consumer outcomes such as pricing and compliance with the Equality Act.

To help firms understand the new expectations under the Consumer Duty, the FCA should provide guidance on how to monitor outcomes, particularly for groups with protected characteristics within the suggested data, including but not limited to complaints, compliance reports, testing customer experiences, pricing and fees and charges. They should also clearly identify the types of evidence that will be considered acceptable. Specific reporting requirements and enforcement will be needed to ensure the Consumer Duty delivers improved outcomes for consumers.