

CP21/13: A New Consumer Duty

BSA Response

Restricted
30 July 2021

Introduction

The Building Societies Association (BSA) represents all 43 UK building societies, as well as 6 credit unions. Building societies have total assets of over £448 billion and, together with their subsidiaries, hold residential mortgages over £342 billion, 23% of the total outstanding in the UK. They hold over £316 billion of retail deposits, accounting for 18% of all such deposits in the UK. Building societies account for 38% of all cash ISA balances. They employ approximately 43,000 full and part-time staff and operate through approximately 1,380 branches.

The BSA supports the FCA's desire to ensure that firms consistently focus on consumer outcomes and put customers in a position where they can act and make decisions in their interests. Addressing the harms identified in CP21/13 and the practices arising from them is something with which we agree entirely.

The BSA does not, however, agree with the FCA's proposals for the introduction of a new Consumer Duty. We do not believe that simply introducing a new Consumer Duty is the answer to addressing the harms identified – the FCA needs to provide a better explanation of how these will be better addressed by the introduction of the new duty. CP21/13 does not do this. We do not support either the introduction of a Principle that requires firms to act in consumers' "best interests" or a private right of action. We consider these proposals to be unnecessary, undesirable, premature and are concerned that they may be a reaction to the FCA's own past inability to effectively supervise and enforce. Rather than introducing these proposals at this stage, the FCA should address the issues with the regulatory perimeter that may have in the past inhibited its ability to take the necessary action. The FCA should also continue to concentrate on investing in its own infrastructure, resource and skills and allow the relatively recent SM&CR to fully embed.

Introducing these measures will not effectively address the real issue – firms that continue to act in a way that does not support good customer outcomes.

In our view, certain aspects of the current proposals require further examination. While we explore these in more detail later in this response, in brief:

- 1. Existing Framework:** We question whether introducing another principle, supported by rules and guidance is the right/only solution to address the harms that CP21/13 seeks to address. Given the emphasis that the FCA has been placing on firms focussing on good outcomes over a number of years, firms **should already** have the right intent. They **should already** be "adequately considering the needs of their customers" and "prioritising good consumer outcomes as an objective of their business activities".

That practices continue to cause the harms drawn out in this consultation at a level that the FCA considers requires the introduction of a new consumer duty must call into question the effectiveness of the structure, supervision and enforcement of the current regulatory regime. Why has the FCA not been able to address the practices causing harm through the application, supervision and enforcement of Principles and specific rules designed to prevent that harm occurring, and that the BSA examined in detail in its response to DP18/5?

- 2. Clarity, not additional complexity:** In introducing any new measures, the FCA needs to be extremely clear on what those requirements are, and how they interact with existing legislation and regulation. We comment further on this in relation to unintended consequences. Failure to do so will undoubtedly lead to a lack of clarity for both firms and consumers. Without the detail of the rules themselves, and clarity on whether or not there will be a private right of action, it is very simply not possible for firms to establish the magnitude of the impact, cost and benefit of the proposals.
- 3. Strong & Simple:** We are concerned that additional requirements proposed by this CP could be at odds with current PRA plans for a simplified prudential regime for small banks and building societies. In implementing them, the FCA should also take care to take account of and make sure its proposals are not at odds with the objectives of the Government's Taskforce on Innovation, Growth and Regulatory Reform.

4. **Unintended Consequences:** While the FCA states that the proposals will bring together its consumer protection and competition objectives, we are concerned that there is potential for misalignment. There is a risk that competition among firms is adversely impacted, innovation is stifled, and speculative CMC activity increases. Further, the increased cost of compliance has the potential to drive some participants out of markets, thus limiting consumer choice, and for those that remain, costs may ultimately be borne by consumers. The complexity and “overlap” of the FCA’s current proposals raise the prospect of confusion for consumers and firms alike and without careful drafting would almost certainly lead to further demands on an already stretched Financial Ombudsman Service.
5. **Cost Benefit:** The FCA has not yet provided a full and complete cost benefit analysis to support its proposals. For such a potentially wide reaching range of proposals, with potentially significant system and process changes, the FCA must provide a comprehensive and robust analysis as part of the next stage of the consultation. The CBA must clearly set out the harms being addressed and the benefits it is thought it will bring as a direct result and do so on a complete and objective basis.

Response to Questions

Question 1: What are your views on the consumer harms that the Consumer Duty would seek to address, and/or the wider context in which it is proposed?

The BSA recognises the harms that the FCA has identified in CP21/13 and agrees that the practices employed by some firms can lead to those harms occurring. We entirely agree that consumers should not still find themselves struggling to make informed or timely decisions, buying inappropriate products and services, incurring greater cost, receiving sub-standard treatment or finding it hard to switch or to get a better deal.

However, these harms and the practices that can lead to them are not new.

For example, the FCA refers to the practice of information being misleadingly presented, or difficult for consumers to understand as being one that continues to cause harm. Ought it not to be possible to address that harm through the effective application and enforcement of Principle 6, Fin Prom rules and the plethora of existing requirements on firms to treat customers fairly? The same could also be said of the other practices referred to in this consultation as leading to the harms which a proposed new duty would be designed to address, namely:

- ✚ Products and services that are not fit for purpose in delivering the benefits that consumers reasonably expect or are not appropriate for the customers they are targeted at and are being sold to
- ✚ Products and services that don’t represent fair value, where the benefits to the consumer don’t reflect the price paid
- ✚ Poor customer service that stops consumers taking timely action to manage their financial affairs and making use of products and services, or increases their costs in doing so.

Alongside the next phase of this consultation, it would be helpful for the FCA to set out clearly:

- 1. How the regulatory toolkit already at its disposal is/has been insufficient to address the practices that it states continue to cause the harms identified, and***
- 2. What has prevented the FCA from intervening through active supervision and enforcement to put a stop to such practices, and***
- 3. How these proposals would enable it to address them more effectively.***

Is the introduction of a proposed Consumer Duty premature or doomed to failure? If these proposals go ahead, we are concerned that they may not address some of the recent issues (such as London Capital & Finance) without changes to the regulatory perimeter and the necessary investment in the FCA’s own infrastructure, supervision and enforcement capability. Unless these issues are tackled, firms that are already falling foul of existing regulatory

requirements will continue with the practices that lead to customer harm. We acknowledge that the FCA itself has already embarked on a transformation programme, and as Charles Randall said in his speech to the 2021 BSA Conference achieving the necessary change will be a “long and difficult task”.

Question 2: What are your views on the proposed structure of the Consumer Duty, with its high level Principle, Cross-Cutting Rules and the Four Outcomes?

While we comment later in this paper on the Principle, Cross-Cutting Rules and Four Outcomes, in terms of overall structure the proposals seem appropriate. Provided, that is, that their application is effectively supervised and enforced, and subject to our other comments in this response.

Clarity will be required at the next stage of this consultation on how the FCA plans to apply the proposed consumer duty in areas where existing legislation/regulation requires firms to apply controls which are designed in such a way as to not always generate good customer outcomes. For example, Proceeds of Crime Act requirements around AML controls and SAR reporting often operate in such a way as to create a poor experience for customers on the basis that detection of criminal money laundering is more important. Similarly, the terms of the Mental Capacity Act can operate in certain areas (Child Trust Funds are an example) to provide necessary protection for the account holder lacking mental capacity, but not always good outcomes for their family.

It is essential that the FCA:

1. Identifies and clarifies circumstances such as this, where providing good outcomes is secondary to applying controls and protections under legislation/regulation.
2. Communicates and engages with other stakeholders where other pieces of legislation take priority over the consumer duty.
3. Establishes a workable policy/approach to supervision of controls and of consumer outcomes.

Question 3: Do you agree or have any comments about our intention to apply the Consumer Duty to firms’ dealings with retail clients as defined in the FCA Handbook? In the context of regulated activities, are there any other consumers to whom the duty should relate?

We agree with the proposals extending to firms’ dealings with retail clients as defined in the FCA Handbook.

Question 4: Do you agree or have any comments about our intention to apply the Consumer Duty to all firms engaging in regulated activities across the retail distribution chain, including where they do not have a direct customer relationship with the “end-user” of their product or service?

We agree with the principle of applying a consumer duty to all firms, including those with no direct customer relationship with the end user. The FCA should ensure, however, that it properly understands and assesses any potential unintended consequences of this. Is there potential for innovation to be stifled, or for costs to rise, and ultimately be passed on to consumers? The FCA will need to clearly articulate its approach to supervision and enforcement where there are multiple firms in a retail distribution chain. We do not consider that firms should be expected to take responsibility for the duties/compliance of other firms in the chain.

Question 5: What are your views on the options proposed for the drafting of the Consumer Principle? Do you consider there are alternative formulations that would better reflect the strong proactive focus on consumer interests and consumer outcomes we want to achieve?

In relation to both Options, and how they reflect the FCA’s aims for the Principle, we have the following comments:

- In terms of the desire for proactivity, the use of the words “A firm must act...” and which form part of both options would seem on the face of it to require proactivity. We refer, however, to our comments in

response to Question 1, and question (a) why firms would not already be adopting a proactive approach in the face of the FCA's own existing emphasis on outcomes, and (b) if they are not, why the FCA is not holding them to account.

- Both have the potential, with effective supervision and enforcement, to go further than Principle 6.
- The FCA states that the Consumer Duty will give firms more certainty about the standards they expect. On the basis of what we have seen to date, it seems very unlikely that this will be achieved without significantly more work on the part of the regulator, and particularly in light of the fact that subjectivity is at the core of the stated "value" basis.
- We do not see how either proposed Principle would achieve the following aims set out in the CP any/much better than existing principles:
 - ✚ Be able to encompass new developments.
 - ✚ Give firms a clear sense of how to act.
 - ✚ To indicate to firms that they should play a greater and more positive role in delivering good outcomes for consumers.
 - ✚ To reflect the positive and proactive expectation the FCA has of firm conduct.
 - ✚ To reflect the FCA's desire for firms to think more about consumer outcomes and place consumers' interests at the heart of their activities.

In its next consultation, it would be useful for the FCA to fully explain how each proposed principle would act so as to achieve these aims.

We comment as follows in relation to Option 1, which is our preferred Option:

- Throughout the CP and in its rhetoric over the last few years, the FCA has consistently talked about "outcomes". Firms understand that concept, or ought to, and we believe it should therefore form part of any over-arching principle.
- We are not convinced that of itself, the wording would, as the FCA suggests, ensure that firms would not simply focus on processes but also on the impact of their actions on consumers. For that to happen, the Cross-cutting rules and supporting guidance will need to make that requirement clear.
- The CP states that the proposed outcomes (communications etc) are the key ones, and that this form of the Principle would not be limited to delivering those outcomes alone. We consider this appropriate in the context of what is being proposed, and it would be helpful to understand in what way, if any, that would be different for Option 2.
- Requirements as to outcomes to be achieved should be explicitly founded upon expectations that firms must take reasonable steps only so as to ensure objectivity and/or to formulate the duty as being to ensure "fair" (rather than good) outcomes so as to achieve the same end.
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We comment as follows in relation to Option 2, which is not our preferred option, for the reasons set out below:

- The reference to acting in the best interests of retail clients runs the risk of confusion and, particularly when coupled with a private right of action, of introducing a fiduciary duty by the back door.
- Given that the FCA has already said that there are insufficient grounds to ask parliament to make the required changes to primary legislation to introduce a duty of care, why would it seek to do that in this way?
- We do not agree that the reference to best interests conveys the FCA's desire for firms to challenge themselves to do the right thing for consumers. Rather, it is so sweeping as to risk being completely destructive of business. "Best interests" projects all responsibility on firms.
- The FCA states that it does not intend that the words should infer a fiduciary duty/relationship. Simply stating that that is not the intent is inadequate. Introducing such wording could have the unintended consequence of it being interpreted by the FOS or by the courts in such a way, regardless of what the FCA's

intent is. If the FCA's intent is not to create such a duty, and there is a risk of its Principle being interpreted as such, wording that creates any suggestion of this should be avoided.

- The FCS states that this option would mean that firms need to satisfy themselves that their conduct could reasonably and objectively be said to be in consumers' best interests, and equip them to be able to make decisions in their best interests. Without further clarification in the underlying rules and guidance, we do not agree that the current wording achieves that.

In order to meet the other requirements that the FCA says it is expecting whichever Principle it adopts to deliver, the underlying rules and guidance for whichever is adopted will need to be explicit about expectations in relation to those, namely:

- Firms being responsible for judging whether their conduct serves customer interests and delivers good outcomes.
- That the FCA does not expect firms to go beyond what is reasonably expected given the nature of their role and the product or service they offer.
- Consumers remain responsible for the decisions they make, but firms should consider the impact of their actions on consumers (individually or as a group depending on the circumstances).
- Different individuals or groups of customers may have competing interests and in such cases firms would need to use their judgement in a fair and reasonable way to ensure that outcomes for all customers are in line with the duty's standards.
- The obligation to act in customers' best interests would not replace existing obligations on firms to manage conflicts of interest between customers. For example, firms are already in the position of managing the potentially conflicting interests of savers and borrowers.

Should Option 2 be adopted, the FCA will need to ensure that there is clarity in relation to all of these points.

To support any transition, it would be very helpful for the FCA to provide examples of 'good' and 'poor' practice in particular settings. This is particularly important given the examples of harms quoted in the consultation, which appear to be very specific to narrow segments of retail banking.

Question 6: Do you agree that these are the right areas of focus for Cross-cutting Rules which develop and amplify the Consumer Principle's high-level expectations?

The areas of focus appear to be appropriate in the context of the FCA's stated objectives.

Question 7: Do you agree with these early-stage indications of what the Cross-cutting Rules should require?

Subject to our other comments, the early-stage indications of what the Cross-cutting Rules should require would appear to support the FCA's objectives in developing a Consumer Duty.

The FCA must be clear, however, on whether "all reasonable steps" or "reasonable" steps are required. The headlines in each of the Cross-cutting rules refers to the former, while the detail that follows it suggests the latter. There is a distinction, and the FCA should ensure that it is clear and consistent as to the standard to which it intends to hold firms and individuals accountable.

Question 8: To what extent would these proposals, in conjunction with our vulnerability guidance, enhance firms' focus on appropriate levels of care for vulnerable consumers?

In our view, it ought not to enhance focus. That focus should already be there on the basis of current requirements. We agree that in applying any Principle, it will be important for firms to ensure that they also do so for customers with vulnerable characteristics. However, there is a real danger that its introduction may inadvertently divert firms' focus away from appropriate levels of care for vulnerable customers. That could manifest itself as a result of, for example:

- ✚ Groundless and opportunistic increased litigation, complaints and Claims Management Company activity.
- ✚ Diverting time and resource away from other areas such as maintaining and improving levels of care for vulnerable customers.

In relation to this, and more widely, is it the FCA's intent to issue further guidance on the range of reasonable courses of action it refers to as being likely to be compatible with the Customer Duty? We strongly advocate this.

Question 9: What are your views on whether Principles 6 or 7, and/or the TCF Outcomes should be disapplied where the Consumer Duty applies? Do you foresee any practical difficulties with either retaining these, or with disapplying them?

To some extent, whether Principles 6 or 7, and/or the TCF Outcomes should be disapplied depends on the detail in the material which will underlie any new Principle. The important point in introducing any new principle for both firms and consumers is achieving real clarity over what is expected of firms.

The easiest way to avoid potential future confusion would be for the FCA to be clear on when Principles 6 & 7 are to be disapplied. If Principles 6 and 7 are retained, then it is imperative that the FCA should ensure there is clarity over when they apply, and when the new Consumer Duty is applied. Simply retaining their application in order to maintain the legal status of Handbook Material is not in our view sufficient justification for not undertaking a root and branch review of existing material to assess its applicability. We would like to see this considered as part of the FCA's Cost Benefit Analysis when it is published.

Question 10: Do you have views on how we should treat existing Handbook material that relates to Principles 6 or 7, in the event that we introduce a Consumer Duty?

The CP suggests that the intent is for the regulator to rely more on the new duty. For that to happen and for firms to be clear on what the expectations are of them, we would suggest that now is the time for the FCA to thoroughly review the existing material supporting Principles 6 and 7 in order to fully assess what remains relevant to the new duty. Doing so now is more likely to result in the creation of a clear and unequivocal environment for firms to operate in and is therefore more likely to ensure that consumers' interests are best served. It seems to us that a regime which operates on the basis that one set of principles may be applied unless another is applicable, is fraught with the risk of confusion and overlap, with firms and consumers unclear where one set of obligations ends and another starts.

Question 11: What are your views on the extent to which these proposals, as a whole, would advance the FCA's consumer protection and competition objectives?

Consumer Protection:

We absolutely agree that there is a need to address the practices that are leading to the harms that have been identified and set out in this consultation, and very much support the FCA taking positive action to address them.

As we point out in the introduction to this response, however, we do not believe that simply exercising these proposals of themselves will greatly advance the FCA's consumer protection objective. For the proposals as a whole to do so will require not only a workable regulatory perimeter, but also the FCA to have an effective approach to supervision and enforcement, supported by a well-resourced and sufficiently skilled workforce. We maintain that firms that really have a desire to achieve good outcomes for their customers will already be doing so, and that those that aren't are likely to require stronger action from the FCA to ensure they meet the required standards.

Competition:

An unintended consequence of the proposals may be to stifle rather than promote competition in consumers' interests. Our members have expressed concern regarding this and the FCA should carefully consider and ensure that it mitigates this risk in its final proposals.

Creating a consumer duty in this form has the potential to lead some firms to avoid more risky types of business as the costs/benefits involved in developing them and getting them to market may not stack up. This is particularly so for small and medium sized firms, and could lead to fewer firms operating in particular markets, with a knock on impact on competition and consumer choice.

Question 12: Do you agree that what we have proposed amounts to a duty of care? If not, what further measures would be needed? Do you think it should be labelled as a duty of care, and might there be upsides or downsides in doing so?

We consider that at point of principle the proposals, through seeking to address practices leading to consumer harm, have the potential to increase the care that firms exhibit towards consumers. In doing so we believe that it does, effectively, amount to a duty of care. We do not, however, as stated above believe that the introduction of such a Principle will of itself address the harms. The FCA has had a wide range of tools available to it which, if used effectively and in conjunction with the relatively recently introduced SM&CR, ought to have allowed the FCA to address these harms before now.

It is unnecessary to label it as a duty of care. What is more important is that if the FCA does proceed with a new principle, that that principle sets clear and enforceable standards that demonstrably address the identified harms.

Question 13: What are your views on our proposals for the Communications Outcome?

While much will depend on the content of the detail to follow this consultation, we broadly support the proposals and agree that:

- The quality of firms' communications can significantly influence the outcome for consumers. Introducing an outcome designed to ensure that communications equip customers to make effective, timely and properly informed decisions is welcome. The emphasis on "equipping" is good to see, and supports comments made by the FCA around the role of the consumer in making good decisions around financial products and services. It is not wholly the responsibility of the firm, which will have discharged its duty by effectively communicating.
- There should be an onus on firms to properly consider customers' understanding. The FCA comments on communications being understandable and enabling customers to evaluate options available to them, and how they relate to their "needs and financial objectives". We welcome the FCA's clarification that this is in respect of the characteristics of the consumers communications are aimed at as a group rather than at an individual level (except where they are providing advice or discretionary services).
- Firms should be expected to tailor information to the channels they are using.
- A balance needs to be struck between achieving legal certainty and bringing information to consumers in an accessible way, and where legal aspects are necessarily complex, then layering communications may be appropriate.
- Requiring firms to take proportionate steps to review, test and adapt communications should help ensure firms do what they can to ensure customer understanding. It would be useful if, in the next stage of the consultation process, the FCA could comment on what factors might influence what is proportionate. For example, review and testing resources are likely to be much more available to larger firms, while smaller organisations may have to adopt different approaches. ***Any guidance that the FCA could provide in relation***

to what they consider to be proportionate in different markets and for simple versus complex products would be welcome.

It will be important for the FCA to ensure that there is a good balance between prescribed requirements and allowing firms to exercise their judgement. What will be appropriate for larger firms may not be appropriate for smaller ones, or what is right for a firm involved in more complex products may not be for those with a simpler product range. ***It would be useful for the FCA to comment further on that in its next consultation.***

Finally, there can be a tension between achieving good communications as intended and restrictions on what the ICO might consider to amount to marketing activity. If the proposals go ahead, it would assist if the FCA were to liaise with the ICO to achieve greater clarity in guidance in relation to expectations.

Question 14: What impact do you think that the proposals would have on consumer outcomes in this area?

As set out in our opening remarks in this response, we consider that if all firms were operating in line with the FCA's current expectations there ought to be no need to introduce these proposals. If firms properly embrace the spirit of the FCA's proposals, we agree that the environment envisaged by the FCA could be achieved, and that there is potential for competition to be enhanced.

We believe that it is important that the FCA ensures that requirements are not overly prescriptive and are framed in such a way as to afford firms (particularly smaller firms) an element of discretion/the opportunity to exercise judgement. Without that, the cost of introducing additional processes etc could ultimately be passed on to the consumer, or we could see firms withdraw from markets, thus limiting consumer choice and adversely impacting the FCA's own consumer objectives.

Question 15: What are your views on our proposals for the Products and Services outcome?

Again, while much will depend on the content of the detail to follow this consultation, we broadly support the proposals, subject to the following comments:

- The overall aim of ensuring that all products and services that are sold to consumers are fit for purpose, designed to meet consumers' needs and targeted at the customers whose needs they are designed to meet is appropriate. The wording of the proposed outcome is, however, constructed slightly differently to that overall aim. As currently drafted, it refers to products and services being "specifically designed to meet the needs of consumers, and sold to those whose needs they meet". The overall aim referred to above uses the words "targeted at" rather than "sold to". ***It would be helpful for the FCA to clarify whether this should be interpreted as meaning that firms only sell to consumers within an identified target market, and are required to have processes to identify where that might not be the case and address it.***
- In relation to the point that firms should ensure that their products and services do not include features that impose undue costs or risks on the consumer, care will need to be taken in framing these requirements. Some products by their very nature will have costs and risks associated with them, and that fact should be taken account of in the FCA's drafting.
- As regards the relationship between product manufacturers and distributors, the FCA comments that distributors will need to ensure they get all the information needed from the manufacturer. Clarity on where the onus/responsibility sits if "all" the required information is neither provided nor sought would be helpful.

Question 16: What impact do you think the proposals would have on consumer outcomes in this area?

We agree that the proposals, subject to the detail of the requirements as ultimately drafted, have the potential to lead to greater consumer confidence.

Question 17: What are your views on our proposals for the Customer Service outcome?

We agree with the overall objective of ensuring that the customer service provided by firms meets consumers' needs throughout their relationship with the firm, allowing them to realise their benefits and ensure they aren't hindered from acting in their own interests. We recognize the harms and practices that the FCA has identified and agree that they should be addressed.

While we still need to see the detail behind them, we also agree with the proposals to achieve this at point of principle. In particular, we welcome the proposals designed to prevent consumers being exposed to unreasonable additional costs. However, clarity in this area is essential. For example, firms will need to understand the FCA's expectations as to how full lifecycle testing would be evaluated/proven as demands in areas such as this have the potential to require significant changes to current practice.

Question 18: What impact do you think the proposals would have on consumer outcomes in this area?

The FCA wants firms' customer service to work in the interest of consumers, enabling them to deal with the firm confidently. We believe that the proposals have the potential to achieve this. We particularly welcome the proposals to address practices that are designed, for commercial reasons, to deter/inhibit consumers' ability to take particular courses of action in relation to their product or service.

Question 19: What are your views on our proposals for the Price & Value outcome?

At point of principle the FCA's proposals appear to support their overall aim of ensuring that products and services are fit for purpose and represent fair value not just by meeting customer needs and objectives, but also because their price represents fair value.

As with the other proposed outcomes, it we will need to see the detailed rules and supporting guidance before being in a position to effectively judge whether or not there are any areas of concern for members.

It is helpful to note that the proposals will not mean that the FCA sets levels at which firms should price their products and services, and that they will not be used as a means of introducing price caps or other price interventions.

Having said that, the proposals appear to have been designed on the basis that fair value is directly linked to benefits being in relation to price alone, which is of course highly subjective. By way of example, Buyer 1 might pay £500 for sunglasses, while Buyer 2 would pay no more than £10. Arguably, both products have the same functional performance yet offer entirely different value due to factors such as fit, availability, ethical manufacture, durability, prescription lenses etc. The same could be said for many financial services products such as mortgages. Ignoring this in framing the fair pricing proposals appears to us to be dangerous, given the potential consequences for firms of the FCA or a litigious customer given a private right of action arguing that "this savings account/mortgage is not reasonable" as I could have bought the "same" elsewhere at a better price".

How does the FCA intend to address this?

Question 20: What impact do you think the proposals would have on consumer outcomes in this area?

It seems inevitable that the proposals will require many firms to re-think how they consider price in the context of value for consumers. That, and the associated record-keeping/audit trail will have an impact on costs. There is, as a result, a risk that firms either choose not to remain in certain markets, and that the proposals have an impact of the development and provision of new products/services, costs are passed on to consumers, or the market for particular products contracts, reducing options for consumers.

We agree that it is appropriate that firms' senior managers should be held to account for the outcome off value assessments.

The FCA's aspiration to ensure that these changes mean that consumers are more confident that products and services are at a price that represents fair value is one that would support the overarching principle. As with the other proposed outcomes, whether or not that is ultimately achieved depends on the detail of the rules and supporting guidance which is to be consulted on at the next phase of this consultation.

Question 21: Do you have views on the PROA that are specific to the proposals for a Consumer Duty?

We do not consider that the creation of a PROA is either necessary or desirable in light of existing remedies available to consumers under DISP and given the recourse to the FOS. We agree that creating a PROA could lead to firms adopting an overly-legalistic approach to their dealings with consumers, and agree with the potential unintended consequences set out in the CP.

The introduction of such a duty means that firms may be required to look to case law to guide practices. This could ultimately completely undermine the FCA's own role, and raises questions for firms as to:

- What extent could they rely on any FCA 'guidance' in their defence of a position.
- What reliance firms could place on the FCA's Principles, Rules and Guidance.
- Calculating the potential knock-on impact on capital costs for firms and the complexity of the capital calculations for conduct risk.
- Increased litigation risk as a result of claims based on information asymmetry, and arguments that they neither got value nor were their interests served. This has the potential to severely adversely impact niche lenders who have sought to provide customers with products that best meet their needs.

Question 22: To what extent would a future decision to provide, or not provide, a PROA for breaches of the Consumer Duty have an influence on your answers to the other questions in this consultation?

Such a decision would have little or no bearing on our responses to this consultation. However, we believe that introduction of a PROA has the potential to exacerbate and magnify many of the concerns noted elsewhere including as to the potential for withdrawal of products and services and/or stifling of innovation as a result of increased risk.

Question 23: To what extent would your firm's existing culture, policies and processes enable it to meet the proposed requirements? What changes do you envisage needing to make, and do you have an early indication of the scale of costs involved?

We are not in a position to comment on this.

Question 24: [If you have indicated a likely need to make changes] Which elements of the Consumer Duty are most likely to necessitate changes in culture, policies or processes?

We are not in a position to comment on this.

Question 25: To what extent would the Consumer Duty bring benefits for consumers, individual firms, markets or for the retail financial services industry as a whole?

Please see our responses to the questions above.

Our members have concerns as to the application of the proposed new principles for an execution only transaction such as an online savings account, and whether the perimeters in relation to a firm's responsibilities around execution only would change as a consequence of the new framework. Clarity around the obligations here for firms and consumers is essential.

Question 26: What unintended consequences might arise from the introduction of a Consumer Duty?

Where we consider that there are specific unintended consequences from the introduction of the duty, we have identified these in our other responses to the questions posed in this consultation.

In addition, the following need to be fully considered and addressed:

1. **Innovation:** There is a risk that the proposals lead to a ‘fear’ of innovation, particularly for smaller firms. This would be a huge loss to the market and those consumers who do not fit into a “standard” box. Small lenders and building societies have been instrumental in creating non-standard products such as self and custom-build; and viewing non-standard lending sympathetically on a case by case basis. It would be unfortunate if these proposals meant an end to or reduction in their ability to provide consumers with this level of individual attention.
2. **Interaction with existing requirements:** There needs to be greater clarity on how the FCA intends the proposals to sit alongside the existing legal and regulatory framework. For example, how does a PROA sit alongside a consumer’s other legal rights (under legislation such as the Consumer Rights Act 2015). Without that knowledge it is difficult to fully assess the impact of the proposals. There is a risk that, if both the Consumer Duty and PROA are introduced, the legal and regulatory implications of a decision (and the litigation risk to individual building societies) could well become more of a driver than the current driver of ensuring they meet their customers’ needs. This would be apposite to the approach taken by many building societies of trying to “serve the underserved”, and would make it much harder to take a pragmatic approach to new product creation.
3. **Potential for Retrospective Application of the requirements:** While the FCA has stressed that this is not its intent, there is a real risk of this for firms. Even if the proposals are categoric on this point, the risk of courts and/or the FOS in particular using them to influence the outcomes of historic events must be overtly addressed.
4. **Progress with Tech solutions:** Many firms have already invested and continue to invest heavily in their end to end digital journey for consumers. Our members have expressed concern at what could be interpreted as negative undertones towards digital, expressed by the FCA at its June 2021 round-table event. ***The FCA should clarify how it expects its proposals to interact with digital solutions to ensure that firms continue to invest time and effort in the areas that will best benefit them and their customers.***
5. **Market Disruption:** There is a risk that the FCA ends up acting as the ultimate arbiter as to what is “fair /reasonable” profit with any excess being transferred under best interest to customers. Such an approach has the potential to significantly disrupt markets. For example, SVR is potentially the most commoditised “product” building societies have. Depending on how they are constructed and implemented, these proposals could lead to only one value assessment and one price for SVR? If so, and the entire building society sector were to have an identical SVR, many less profitable societies could be extremely adversely affected. Such a scenario would most certainly be at odds with the FCA’s competition objectives, disrupt the market and adversely impact customer choice.

Further, many building societies’ mortgage business is generated through intermediaries. These proposals have the potential for artificially driving consolidation in the intermediary market as smaller intermediary firms in particular may struggle to meet the costs of compliance. Again, this outcome would disrupt the market, affect competition and reduce consumer choice.

Question 27: What are your views on the amount of time that would be needed to implement a Consumer Duty following the finalization of the rules? Are there any aspects that would require a longer lead-time?

The proposed timings for implementation are very condensed and are likely to be inadequate for many firms. ***We urge the FCA to provide firms with a longer lead-in time to ensure no disruption to customer service as firms put new processes in place and to avoid firms finding themselves in a position where they may have no option other than to withdraw some services.***

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The Building Societies Association (BSA) is the voice of the UK's building societies and also represents a number of credit unions.

We fulfil two key roles. We provide our members with information to help them run their businesses. We also represent their interests to audiences including the Financial Conduct Authority, Prudential Regulation Authority and other regulators, the Government and Parliament, the Bank of England, the media and other opinion formers, and the general public.

Our members have total assets of over £435 billion, and account for 23% of the UK mortgage market and 17% of the UK savings market.