



## Money and Mental Health submission to the FCA consultation on a new Consumer Duty

### Introduction

The Money and Mental Health Policy Institute is a research charity established by Martin Lewis to break the vicious cycle of money and mental health problems. We aim to be a world-class centre of expertise developing practical policy solutions, working in partnership with those providing services, those who shape them, and those using them, to find out what really works. Everything we do is rooted in the lived experience of our Research Community, a group of 5,000 people with personal experience of mental health problems.

In this document, we respond to Questions 1-22, 25 and 26.

### Summary

- We welcome the proposed new consumer duty, and the FCA's intent to use it to raise standards.
- This is likely to be particularly valuable for consumers with mental health problems, who regularly experience worse outcomes when accessing, using and paying for financial products and services, leading to financial and/or psychological harm.
- The cross-cutting rules and outcomes included as part of the duty touch on some of the most important issues for people with mental health problems. Inaccessible customer service and badly designed communication contribute to difficulties that people experiencing common symptoms of mental health problems - like trouble concentrating or using certain communication channels - can face.
- To be successful in delivering the change the FCA states it wishes to see, effective monitoring and enforcement of this new duty will be vital. We look forward to seeing more detail on how this will be carried out in the next iteration of the FCA's plans for the duty, along with further exploration of what key terms like "reasonableness" and "foreseeable" mean in practice.

**Q1: 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?**

We welcome the intent and ambition of the FCA's proposals, in particular the explicit message that these proposals would set a higher level of expectation. We agree with the FCA's analysis that too many firms are not adequately considering the needs of their customers, and that design practices that exploit behavioural biases and vulnerabilities are common, leading to poor consumer outcomes. We believe there is a strong case for intervention, to align firms' incentives with good outcomes for consumers. The clear focus on consumer outcomes is a real strength of the FCA's proposals.

We support the FCA's approach of requiring firms to demonstrate that they are 'getting it right in the first place', which could considerably reduce harm if it is sufficiently supervised and enforced. While the FCA has taken bold action in a number of areas to intervene and mitigate harm, remedial action will always mean that consumers are exposed to harm for longer, while a problem is diagnosed and a remedy is designed and implemented.

**Q2: What are your views on the proposed structure of the Consumer Duty, with its high-level Principle, Cross-cutting Rules and the Four Outcomes?**

We welcome the FCA's approach of setting out a detailed package of measures to give firms clarity about what is expected of them, rather than an abstract principle that could be open to misinterpretation or challenge. As FCA engagement with firms around GC19/3 and GC20/3 demonstrates, although Principle 6 was a long-established principle for businesses, there was considerable demand for guidance to clarify what the regulator expects of firms.

We appreciate the delicate balance that the FCA has to strike, to ensure that this package of measures is flexible and applies to diverse financial services and is also sufficiently clear, so that firms know what is expected of them and the regulator can take enforcement action if they fall short. To achieve this balance we recommend that the FCA focuses on the more subjective terminology in the principle, rules and outcomes, and ensures that it is always well defined with clear guidance on how it should be interpreted. For instance, terms such as "reasonableness", "foreseeable", "properly informed decisions" and "fair value" must all be well understood across the sector.



**Q3: 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 that the consumer duty should apply to firms' dealings with retail clients but not those with professional clients.

**Q4: 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 that the consumer duty should apply to firms that do not have a direct customer relationship, to the extent that their activity influences outcomes for retail customers. The design of products and services has a huge impact on customer outcomes, as emphasised in the FCA's guidance of fair treatment of vulnerable consumers,<sup>1</sup> and as the FCA found in its thematic review of the general insurance distribution chain, decisions made across the distribution chain can have a material impact on consumer outcomes.<sup>2</sup>

To help firms understand this aspect of the proposal, we recommend that the FCA provides additional guidance on how responsibility and liability will be shared between firms working together along a distribution chain.

**Q5: 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?**

We agree with the FCA that different forms of words could deliver the same policy intent, given the level of detail that will sit beneath the consumer principle. However, we favour option one as we feel it is more coherent with the rest of the package that the FCA is proposing.

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<sup>1</sup> FCA. FG21/1 Guidance for firms on the fair treatment of vulnerable customers. 2021

<sup>2</sup> FCA. TR19/2 General insurance distribution chain. 2019.

A key feature of the FCA proposal is its sharp focus on consumer outcomes, and we recommend that this is reflected in the wording of the consumer principle to emphasise that delivering good outcomes should be a primary concern for firms.

A drawback of option two is that it introduces the concept of ‘best interests’, which could be interpreted as encouraging a paternalistic approach from firms. As recognised in the consultation document, this formulation would also introduce a further layer of complexity, as firms would be expected to consider what could “reasonably” and “objectively” be said to be in a consumer’s best interests. In our view, there is a risk that the level of expectation is less clear under option two, and that this ambiguity could make it harder for the FCA to take enforcement action or for the Financial Ombudsman Service to make decisions about conduct in specific cases. To mitigate this risk, if the FCA does proceed with option two, it should provide precise detail of how these key terms will be interpreted.

**Q6: 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?**

We welcome the proposed cross-cutting rules. They flesh out what is expected under the consumer principle and focus on important areas of conduct: minimising consumer harm, empowering customers and fair conduct/honest dealing. In our view, the impact of these rules will depend on how precise the definition of key terms like “reasonableness” and “foreseeable” is, and also the FCA’s approach to supervision and enforcement.

**Q7: Do you agree with these early-stage indications of what the Cross-cutting Rules should require?**

We support the early-stage indications of what the cross-cutting rules would require.

For the first cross-cutting rule, we recommend that the FCA includes some detail on what sort of processes firms might reasonably be expected to develop, in order to meet this expectation. For example, all large firms might be expected to have a clear process for identifying emerging risks to customers, both from the external environment and internal changes. Firms might also be expected to develop a framework for managing the risk of harm to customers, and to gather data to test this approach over time. The FCA should also clarify how consumer vulnerability should interact with firms’ judgements about foreseeable harm. By definition a vulnerable consumer is someone who is especially susceptible to harm, so considering and responding to the needs of vulnerable customers should be central to firms’ efforts to avoid causing foreseeable harm.

For the second cross-cutting rule, we welcome the clear message that, in general, consumers best understand their own circumstances and financial needs and objectives. This is an important principle that should be emphasised. However, as the FCA recognises, the environment can strongly affect consumer behaviour, particularly the design of products and customer journeys. The FCA should explicitly recognise the role that friction can play here. Firms often uncritically think of low friction customer journeys as positive, but they can facilitate impulsive and unreflective decision-making, often leading to harm. People who experience increased impulsivity during periods of poor mental health can find it particularly difficult to stay in control of financial decisions in low friction environments and are especially vulnerable to harm.<sup>3</sup>

Paragraph 3.26 contains some useful discussion of practical considerations for firms when trying to meet the needs of different consumer groups. The FCA could strengthen this by adding detail on the strengths of an inclusive design approach to meeting the needs of diverse consumers. Firms will always have imperfect information about the needs of their customers, and vulnerability is often transient, affecting different consumers at different times. By adopting an inclusive design approach, even when designing a communication aimed at a specific subset of its customers, firms can ensure that they meet the needs of as many of their audience as possible.

As previously highlighted, we believe that the precise definition of “reasonableness” will be a key determinant of how effective the consumer duty is. As the FCA has explicitly stated it wants the consumer duty to convey a higher level of expectation than under current regulation, the FCA should carefully consider how it will be interpreted legally. The FCA should satisfy itself that what is reasonably expected under these new rules is clearly greater than what is currently expected of firms.

#### **Q8: To what extent would these proposals, in conjunction with our Vulnerability Guidance, enhance firms’ focus on appropriate levels of care for vulnerable consumers?**

A well-designed consumer duty should enhance firms' focus on appropriate levels of care for vulnerable consumers, but the FCA must be explicit about how the new duty relates to vulnerability. FG21/1 explains that the key Principle underpinning the need for firms to take particular care in the treatment of vulnerable consumers is Principle 6. Therefore, if Principle 6 is disapplied the FCA will need to reframe this guidance and explain how it is still relevant for firms.

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<sup>3</sup> Holkar M. Money and Mental Health response to the FCA's call for input on the review into change and innovation in the unsecured credit market (The Woolard Review). 2020. <https://www.moneyandmentalhealth.org/policybriefing/fca-woolard-review-consultation-response/>



There is also a risk that the FCA's work on the consumer duty is seen to supersede the vulnerability guidance and firms deprioritise their work on vulnerability. When communicating about the new consumer duty, the FCA should be clear that the vulnerability guidance should help firms to understand their responsibilities and comply with the new duty.

We are pleased to see the FCA highlight Equality Act compliance in paragraphs 2.42-2.46 and explain how unlawful discrimination relates to FCA regulation. However, we recommend that the FCA clarifies what it expects firms to do in order to demonstrate that any differences in outcomes between consumer groups are compatible with FCA standards. For example, the FCA might expect firms to collect granular data on outcomes for different consumer groups. While we recognise that the FCA is not responsible for enforcing the Equality Act, we recommend that it reminds firms of their responsibilities under the Act alongside any guidance on outcomes for different consumer groups. This would both enable the regulator to fulfil its Public Sector Equality Duty and help financial service firms to understand their responsibilities to vulnerable consumers.

**Q9: 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?**

And

**Q10: 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?**

As a general principle, the FCA should streamline its rules and try to avoid duplication, so that its expectations are as clear as possible for firms. Principles 6 and 7 have not delivered the consistent good outcomes that the FCA wants to see, hence this proposal. As indicated in paragraph 3.37 of the consultation document, the consumer duty would effectively supersede Principles 6 and 7. All of this suggests that Principles 6 and 7 should be disapplied rather than retained.

However, to ensure that valuable aspects of Principles 6 and 7 aren't lost, we recommend that the FCA systematically reviews its handbook material and other guidance that relates to Principles 6 and 7, before disapplying the Principles.

**Q11: What are your views on the extent to which these proposals, as a whole, would advance the FCA's consumer protection and competition objectives?**

If implemented effectively, these proposals should significantly advance the FCA's consumer protection objective. The greater focus on consumer outcomes and the shift to expecting firms to "get it right in the first place" should enable the FCA to take more decisive action against persistent consumer harms and to act faster when new problems emerge.

The impact of these proposals on the FCA's competition objective is less clear. Some aspects of the proposals should advance competition in consumers' best interests. For instance, if the FCA can prevent firms from gaining or retaining customers by exploiting behavioural biases, this would create a more level playing field and reward firms that better meet people's needs. However, there is a risk that a higher level of expectation from the regulator and a greater responsibility on firms to deliver good customer outcomes could discourage innovation. The FCA should not champion innovation for innovation's sake, but should do so to the extent that it delivers products and services that are in consumers' interests and meet their needs. The FCA should monitor the impact of these proposals on innovation and consider how it can best use its tools to encourage innovation.

**Q12: 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?**

Given that 'duty of care' is an established term, but its precise meaning is not consistent across different contexts, it may be simpler for the FCA to use alternative language to describe this package of measures. Already, the FCA has had to caveat its plans, to explain that they do not amount to a fiduciary duty, which highlights the ambiguity of the term. There is a risk that using the term 'duty of care' could create confusion, for both firms and consumers.

**Q13: What are your views on our proposals for the Communications outcome?  
and**

**Q14: What impact do you think the proposals would have on consumer outcomes in this area?**

We welcome the priority given to communications in the proposed framework. For people with mental health problems, inaccessible, unclear communications from firms can be the cause of much distress and can contribute to financial difficulty. The consultation paper's emphasis on communications throughout the entire lifecycle of a product and what, how and when information is provided is therefore welcome and conveys that a holistic view of communications is crucial to delivering better outcomes for consumers.





On how firms communicate, the consultation paper's discussion of different channels helpfully draws attention to their importance. While people with mental health problems are a large and diverse group, our research suggests that a significant proportion have difficulty using at least one form of communication channel.<sup>4</sup> To give customers the best chance of engaging with communications, firms should proactively collect details on preferred communication channels and where possible send information via that route. On when firms communicate, the fluctuating nature of many mental health problems can mean people can struggle to engage when experiencing symptoms. This means firms should not assume that because they have raised an important issue on one occasion that this has been received and understood.

On 'sludge practices', the examples given in paragraph 4.6 can be done intentionally, raising the odds of a customer missing information that may lead them to switch away from the product or service. But firms can also fail to understand how standard communication approaches do not meet the needs of their customers with mental health problems. Regardless of the firm's intention, the outcome can be the same for a customer, which is why the consultation paper's emphasis on raising standards across the board and improving communications specifically is welcome.

The requirement for firms to take vulnerable consumers into account in making sure communication is "reasonably likely to be understood" is a helpful reminder. In any given year, one in four people will experience a mental health problem,<sup>5</sup> and over a lifetime this rises to nearly half the population.<sup>6</sup> However, we do not always know when we are unwell, or receive treatment. Over a third (36%) of people with a common mental disorder have never received a diagnosis.<sup>7</sup> For people in this position, it reduces the likelihood that they will be able to disclose any additional needs to a firm. Similarly, people with diagnosed conditions may not wish to disclose their mental health problem to a firm, or may not know what adjustments are available.<sup>8</sup> It is therefore "reasonably foreseeable" that in any group of customers receiving communications, a proportion will have a mental health problem, whether they know it or not. This means that it is vital that firms take a broad, inclusive approach to their communication, rather than providing simplified messaging or alternative options only to those customers for whom they have a recorded need.

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<sup>4</sup> Holkar M, Evans K and Langston K. Access essentials. Money and Mental Health Policy Institute. 2018.

<sup>5</sup> McManus S et al. Adult psychiatric morbidity in England, 2007. Results of a household survey. NHS Information Centre for Health and Social Care. 2009.

<sup>6</sup> Mental Health Foundation. Fundamental facts about mental health. 2016.

<sup>7</sup> McManus S et al. Mental health and wellbeing in England: Adult Psychiatric Morbidity Survey 2014. NHS Digital. 2016.

<sup>8</sup> Holkar M, Evans K and Langston K. Access essentials. Money and Mental Health Policy Institute. 2018.





The expectation that firms “put themselves in their customers’ shoes” is another useful prompt for staff. When those customers have mental health problems, however, this may require more active research and consultation from firms, rather than relying on assumptions, stereotypes or the experiences of a small range of consumers. For instance, the impacts of common mental disorders like depression and anxiety are more widely understood in society than more severe mental illnesses like schizophrenia. Partnering with charities who specialise in these issues is one route through which firms can help their staff to understand how mental health problems can practically affect our ability to engage with our finances and make decisions.

For customers with mental health problems, improved communication from firms should lead to better outcomes. But, as with the other proposals in the consultation paper, the impact of the consumer duty will depend to a large extent on the monitoring and enforcement of the requirements.

**Q15: What are your views on our proposals for the Products and Services outcome?  
and**

**Q16: What impact do you think the proposals would have on consumer outcomes in this area?**

Because of the higher rates of financial difficulty experienced by people with mental health problems, efforts to ensure products and services better meet customers’ needs - rather than solely to profit the firm offering them - are welcome. The emphasis on the design and distribution of products and services is sensible, and will draw firms’ attention once again to the entire lifecycle of creating and managing products.

As with the other proposals, effective monitoring and enforcement will be key to raising standards. Paragraph 4.40e notes that the intention of this outcome is not to discourage firms from offering products to more vulnerable customers. This is an issue that we return to in our response to question 26. While the risk of locking out people with mental health problems seems unlikely to be acute, the FCA should monitor any such unintended consequences closely to ensure that efforts to deliver higher standards do not leave more vulnerable consumers struggling to access vital products and services. The broader issue of access to affordable credit stretches into social policy and is not one the FCA can solve alone. But, as the FCA’s Business Plan 2021/22 sets out, speaking up and alerting partners when risks are spotted beyond its immediate remit and perimeter will be crucial to protecting customers and improving outcomes.

**Q17: What are your views on our proposals for the Customer Service outcome?**



and

**Q18: What impact do you think the proposals would have on consumer outcomes in this area?**

The identification of harms that can arise from poor customer service are once again of particular relevance to people with mental health problems, and we therefore welcome the consultation paper's discussion of them.

Potential overlaps do arise between the customer service outcome and the communications outcome; the idea of how firms communicate with customers (and vice versa) is present in both. For instance, providing customers with the option to choose the communication channel that works best for them is covered under outcome one but also relates to the inconvenience or difficulty of dealing with a firm's customer service processes.

As with the other outcomes, the eventual impact this has will depend to a significant degree on the effectiveness of the monitoring and enforcement carried out by the FCA. The examples of kinds of data that firms should be reviewing - abandoned calls or claims, unusually low volumes of claims or successful claims, or root cause analysis of complaints data - are therefore very useful and cover important areas. Generally speaking, this analysis by firms should attempt to assess the impact on customers with mental health problems, for whom ineffective or inaccessible customer service can be particularly distressing and have severe financial consequences.<sup>9</sup> As noted, not all customers with mental health problems can or will disclose this information to a firm, so other resources such as data on prevalence of mental health problems in the affected populations - for instance using the 2020 Financial Lives survey - could provide a helpful insight.

Paragraph 4.74 links to the FCA's vulnerability guidance. As noted in our response to question 8, the treatment of this guidance is an important issue for future consultations on the consumer duty. That said, with the importance of multi-channel communication options to both outcomes one and three, the FCA could consider strengthening the language around this from "consider providing another channel or channels" to "should".

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<sup>9</sup> Holkar M, Evans K and Langston K. Access essentials. Money and Mental Health Policy Institute. 2018.

**Q19: What are your views on our proposals for the Price and Value outcome?**

and

**Q20: What impact do you think the proposals would have on consumer outcomes in this area?**

We very much welcome the inclusion of price and value as one of the four outcomes. Assessing what fair value means in practice - and when intervention is required - will be a key question for the FCA with regard to this outcome. The considerations identified strike us as being the correct ones to bear in mind, but how this is managed in practice will be crucial. Perhaps more so than the other outcomes, due to commercial sensitivities and the direct impact on a company's revenues, this is likely to lead to difficult decisions. This means that it is difficult to judge whether the proposal - in terms of the wording of the outcome being sought - will have a meaningful impact.

Paragraph 4.89 could also have provided more information on how firms carrying out assessment of the fairness of their pricing will lead to consumers being able to pick the right product for them - with the steps in between these two points being critical.

Paragraph 4.92 discusses firms' charging more for services deemed additional, including enhanced support or assistance. While the needs of people with mental health problems will vary, future consultations and proposed regulation should make clear that this does not mean that products that would particularly benefit this group are more expensive across the board. The types of communications and customer service outlined in outcomes one and three should be considered standard, as requiring customers with protected characteristics to pay more to reach a similar level of outcome would potentially clash with both the FCA's vulnerability guidance and the Equality Act 2010.

How price and value play out for different kinds of customers is another vital consideration, as paragraphs 4.96-4.98 discuss. As noted elsewhere in our response, people with mental health problems can be among those customers who effectively cross-subsidise others who may be less likely to experience financial difficulties. The consultation paper's reminder to firms of their duties under the Equality Act is welcome, although anecdotal evidence suggests this is less of a powerful push to action from firms than clarity from the FCA that this is an issue it will be actively assessing. Paragraph 4.108 returns to this issue and refers to risk profiles but with the reminder of the Equality Act prominent.



One concern, however, would be that customers who do not know that their symptoms amount to a mental health problem, or who choose not to disclose their condition to a firm, are treated as having no vulnerabilities but nonetheless being 'higher risk' and therefore charged more, without risking a breach of the Equality Act. How firms deliver this outcome in practice will therefore require careful monitoring and effective enforcement from the FCA.

The consultation paper says that "some consumers, such as those that shop around or undertake research, will achieve better outcomes than others." While this is superficially fair, the poor communication, product and service design and distribution and customer service that exist across financial services makes this hard to do for many customers. This is especially true for those experiencing symptoms of mental health problems. This is why raising standards across the board will be so vital, with interdependencies between the outcomes.

### **Q21: Do you have views on the PROA that are specific to the proposals for a Consumer Duty?**

As an organisation interested in protecting the rights of consumers with mental health problems, we believe a PROA could provide a useful method through which poorly-behaving firms can be held to account. However, as is evident in the case of the Equality Act, with relatively few cases being taken with regard to the provision of goods and services, the existence of a protection that needs to be enforced by an individual can be relatively ineffective in achieving desired change. This is particularly true for those with mental health problems, for whom the process involved in a PROA may be hugely challenging due to the symptoms of their condition.

That is not to say that a PROA would not be useful, or contribute to improved standards. Being able to hold companies effectively to account can be a powerful tool for change. But with the complexity and expense this can entail, our view is that a sector with a confident, well-resourced regulator effectively monitoring and enforcing sufficiently high standards is the most reliable route to better outcomes for consumers. Private and collective routes to redress, however, should be made easier and more affordable to access.

### **Q22: 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?**

It would have limited influence on our other answers.



**Q25: To what extent would the Consumer Duty bring benefits for consumers, individual firms, markets, or for the retail financial services industry as a whole?**

As noted throughout our responses, we believe that the consumer duty would bring benefits to consumers. This could come in many forms, including financial but also in reduced psychological harm. How much consumers would stand to benefit, however, will ultimately depend on enforcement, and we look forward to seeing further details from the FCA in the next iteration of its plans.

**Q26: What unintended consequences might arise from the introduction of a Consumer Duty?**

There is a possibility that higher expectations of firms lead to higher prices for consumers. But against the current backdrop of harm being caused by poor practice, often to quite vulnerable customers in precarious financial situations, a small increase in costs in some products, services or markets strikes us as an acceptable rebalancing of risk.

As touched on in our response to questions 15 and 16, one risk worth monitoring is that certain markets or types of products and services become less accessible to consumers with mental health problems or other vulnerabilities. In some cases, for instance high-cost credit, this could potentially lead to a position in which such customers are unable to access credit when they need it at short notice. Social policy also has an important role to play in this debate, with no-interest loans and the availability of credit unions an issue raised in the Woolard Review. While this is not an issue for the FCA to solve by itself, the disposition set out in the Business Plan that it will proactively highlight issues it sees emerging should mean that such unintended consequences are made apparent to the government, and particularly HM Treasury.