NEAR FINAL DRAFT Response to consultation

FCA CP21/36: A new Consumer Duty

#### About the Investment Association

The Investment Association (IA) champions UK investment management, a world-leading industry which helps millions of households save for the future while supporting businesses and economic growth in the UK and abroad. Our 270 members range from smaller, specialist UK firms to European and global investment managers with a UK base. Collectively, they manage £9.4 trillion for savers and institutions, such as pension schemes and insurance companies, in the UK and beyond. 44% of this is for overseas clients. The UK asset management industry is the largest in Europe and the second largest globally.

#### Executive summary

The IA appreciates the significant opportunity the Consumer Duty (“the Duty”) provides to re-set the approach of all financial services firms to the treatment of retail consumers. We are committed to working with the FCA to ensure its objectives for the Duty are achieved in the context of the investment management industry. While we appreciate investment management has not been at the centre of the thinking behind the draft rules and guidance currently under consultation, the IA would welcome the opportunity to explore with the FCA how the Duty can be better tailored for our industry (which is already subject to a number of FCA rules which aim to ensure good outcomes for retail investors), as well as how it could be used to drive firms to innovate for better outcomes, supported by an agile, data-led regulator.

While we recognise the FCA has not had control over the timetable for consulting upon and passing the final rules and guidance, we are concerned that the speed with which the consultation period has been forced to progress has limited the industry’s time to articulate, and the FCA’s ability to consider, the specific impact of these proposals on the investment management industry. We hope our response will assist the FCA in understanding this perspective in more depth and look forward to collaborating with you to ascertain how the Duty could apply effectively to our industry. We welcome the FCA’s commitment to implementing the Duty on an iterative basis, as well as establishing an ongoing dialogue with this industry.

#### Introduction

The IA welcomes the opportunity to provide a response to the FCA Consultation Paper (CP21/36) on a new Consumer Duty (“the Duty”). With millions of UK citizens increasingly dependent upon financial services firms to deliver effectively for a variety of both long-term and short-term needs, it is essential to ensure that the consumer continues to be put front and centre by firms conducting retail business activities, particularly those advising investors and distributing products manufactured by themselves or others. Various parts of the financial services industry are subject to different requirements, adapted to their business models ranging from execution-only brokers to payment providers. Their clients have widely varying needs, experiences and expectations. The Duty provides a fresh opportunity to clarify how retail customers should be treated and protected across differing financial services contexts.

We support the changes the FCA has already made to the proposed Duty between its first and second consultations – in particular, not to introduce a private right of action at the current time. The FCA’s confirmation that ‘reasonableness’ will be the standard to which firms looking to comply with the Duty must conform is helpful, as is its decision to apply obligations on firms along the product chain proportionately. We recognise the efforts the FCA has already gone to in listening and responding to feedback from our industry following its first consultation last year. We look forward to seeing this continue.

We appreciate that the Duty is being introduced according to a statutory timetable which leaves the FCA little room for manoeuvre. It is also being considered against a backdrop of significant change in the architecture for regulating UK financial services firms. HM Treasury’s Future Regulatory Framework (“FRF”) proposes delegating unprecedented powers to the FCA and PRA[[1]](#footnote-1) to set policy and regulatory rules. This will be coupled with new growth and international competitiveness secondary objectives for both regulators.

The outcomes-based nature of the Duty builds, from a policy perspective, on the FCA’s desire to be a more nimble and agile regulator (supported internally within the regulator by its Transformation programme), with the power and confidence to intervene in real time where it sees actual or potential consumer harm. Broad-textured, outcomes-based rules like those implementing the Duty will require a different style of supervision, involving FCA teams with a deep knowledge of the sector they are overseeing who are able to make judgements on what is or is not reasonable. It is important that policy initiatives such as the Duty are considered holistically. We would like to hear more from the FCA about the role the Duty is intended to play in the FCA’s broader regulatory and supervisory approach.

Firms amass, through their day-to-day business, information about what their customers are looking to achieve and the best way in which to deliver on this. A new approach to consumer protection which encourages a reciprocal dialogue between firms and the regulator, underpinned by a shared commitment to reducing consumer harm, offers significant opportunities. We believe it is important that the FCA resists (as far as possible) the temptation to implement the Duty through a detailed, rule-based approach, at least in so far as it relates to the investment management industry. High-level principles and a close, ongoing dialogue with the industry offers firms the opportunity to take the initiative in tailoring their delivery of the Duty as part of their day-to-day business.

There remains, however, work to be done on the structure and detail of the Duty if the industry is to fully understand how to integrate it in their business practices. As mentioned above, we appreciate that investment managers have not been at the centre of the FCA’s thinking when designing the Duty. As such, we feel it would be helpful to highlight the following overarching points at the outset:

1. The investment management industry is already highly regulated. A wide variety of rules already govern the way in which firms in this industry interact with their clients and investors, both institutional and retail, in addition to the broader TCF regime (which applies to all regulated firms). These include frameworks governing conduct of business (e.g., the best interests rule), financial promotions, conflicts of interest, value assessments and product governance. It is not clear how this existing regime and the new Duty will interact, particularly where a clear distinction cannot necessarily be made between retail and institutional clients (which is often the case for firms in our industry). The Duty proposes a solution to a problem the FCA has not sufficiently articulated in the context of our industry.
2. Building on this, the CP does not articulate the change between what the existing rules require and the FCA’s expectations in relation to firms’ behaviour once the new Duty comes into force. We are keen to understand whether the Duty is seeking to plug gaps within the existing regulatory framework or if it is to act as a holistic principles-based programme. If the latter, it is important to clarify which elements of the current framework will satisfy specific aspects of the Duty and where genuinely new obligations are being introduced – particularly given the very tight implementation timeframe being proposed. There is a danger of confusion (and unnecessary costs) if additional obligations are layered on top of the existing principles and rules, particularly if the FCA cannot clarify where additional obligations may lie.
3. The sums quoted in the cost-benefit analysis (“CBA”) as the cost of implementation and ongoing maintenance of the duty are vast - £2.5bn in one-off costs and millions in ongoing costs – yet there is very little explanation of the benefits this will bring either across the UK financial services industry in general, or in the context of investment managers specifically. Consequently, it is not clear how the costs quoted can be justified.
4. The lack of clarity around the interaction of the Duty with the existing regulatory framework for investment managers also impacts on plans for implementation. It is hard to comment on the feasibility of the proposed implementation period without a clear understanding of the amount of additional work firms will have to undertake to comply. Even if reassured that the current regulatory framework for investment managers will suffice in terms of compliance with specific aspects of the Duty, other elements of the proposals mean the suggested implementation period is very challenging. In addition, the period proposed does not match the FCA’s own estimates of likely cost. An implementation period costing the financial services industry the amount of money the FCA estimates the Duty will require firms to spend to implement would necessarily last years, not months.
5. The IA understands that the FCA wishes to implement the Duty as quickly as possible, so that it has the power to tackle ongoing consumer harm it believes it does not currently have the power to address. Whilst we are sympathetic to the external pressures on the FCA, we do consider that it already has sufficient powers within its current TCF framework to tackle any ongoing consumer harm, and in the context of investment managers, within the various other general and specialistic rules that apply (e.g., PROD, value assessment, COLL and liquidity management rules). The risk of a rushed or unrealistic implementation period is unintended consequences which could then have undesirable outcomes such as limiting consumer access and choice. We would strongly encourage the FCA to lengthen the implementation period ***[Note: TBD – some members were in favour of dropping this paragraph as it might seem defensive to the FCA, and preferred to keep the focus on the practicalities of implementation. However, we note that other members were keen to retain these points. Members to confirm which approach they prefer.]*** as the limited timeframe significantly risks undermining the effective operation of the new Duty.
6. Further, a holistic approach to tackling consumer harm must involve improvements throughout the regulatory lifecycle. This includes:
   1. Enhancing the authorisation process to keep bad actors out of the industry, ensuring new entrants have appropriate capital, liquidity and reserves to cover redress, and effective governance structures and business models that work for consumers.
   2. Effective supervision of the new framework (recognising that regulatory policy is de facto made and imposed through supervision) – involving FCA teams with a strong understanding of the sector they are overseeing who are able to make judgements on what is or is not reasonable.
   3. Effective and swift enforcement that prioritises redress, targeted sectoral interventions where harm is occurring, and efficient deauthorisation of bad actors (something we recognise that the FCA’s Transformation programme is looking to address).

*The IA takes the view that the Duty is a policy response to what is essentially a supervisory issue. We continue to believe that the examples of harm outlined in the CP could have been addressed by more effective supervision (and enforcement) under the current principles, rules and guidance. We would like to understand more about how the FCA sees the new Duty operating within the context of these broader powers.*

When rolling out the TCF initiative, the then FSA engaged in structured meetings with stakeholders, produced guidance on what ‘good’ looked like and rolled out a range of case studies covering different contexts. The IA supports the FCA’s ‘outcomes focused’ approach to the Duty and agrees that too much prescription will rob the Duty of much of its value. For this to work effectively, however, an open dialogue is needed between the industry and the FCA, which enables collaboration through the application of the Duty during the next stage of its development. Given that this regime has not been designed with investment managers in mind, we would request targeted discussions with the FCA, with the intention of generating high-level scenarios or ‘guardrails’ which can guide firms’ approaches as they apply the Duty to their business. As suggested earlier, these could focus in particular upon clarifying:

* The harm the Duty addresses in the context of the investment management industry;
* The interaction of the Duty with the existing regulatory regime for investment managers and the scope for substituted/ deemed compliance where the existing rules are complied with;
* The role of distributors and intermediaries in delivering the Duty; and
* The importance of preserving the competitiveness of ‘UK plc’ following our departure from the EU.

#### Wider Context

1. **Do you have any comments on the proposed scope of the Consumer Duty?**

**Products and services**

“Product” is defined in the draft rules as including any “service carried on in the course of performing a regulated activity”. The regime therefore applies where firms collaborate with other firms in the provision of products or services, if the service provider can materially influence aspects of the design, operation, distribution, target market or performance of a product or service aimed at retail consumers. The boundaries of this are not clear and, whilst similar problems exist under the current PROD rules for products, this will be a new issue in the context of services.

For example, it is not clear if and how the duty should apply to wholesale firms providing advisory or delegated investment management services to a retail fund manager. The advice or the delegated investment management service provided by the wholesale firm has the potential to ‘influence’ outcomes for consumers, yet the wholesale firm will, in the majority of cases, not be involved in the design or manufacture of the product or service provided by the retail fund manager. Alternatively, a firm may be appointed to manage the assets to the investment objective/ policy set by the Manager of the fund, where a firm is acting as an investment manager and in accordance with a legally binding investment management agreement (“IMA”). The firm acting as investment manager would not have any influence other than what it is instructed to do in the IMA by its client. It is our view that firms providing advisory or delegated investment management services are a very different proposition to wholesale firms that actively collaborate with a retail fund manager in the design and delivery of retail products/ services (e.g., by entering into a formal collaboration arrangement). The current drafting of the Duty suggests it would apply in both scenarios – when in fact it would only make sense for it to apply in the latter.

The example set out at para 3.27 of the consultation suggests two opposite scenarios in which firms work together to deliver a product/ service and explains when the Duty would switch on or off. It does not provide guidance on the application (or otherwise) of the Duty to the range of collaboration scenarios that exist in between these. In order for firms to be able to understand how to apply the Duty, we would welcome further discussion with the FCA about how it envisages the Duty operating, and the triggers for its application (in a manner that is appropriate and proportionate to the roles played by the relevant firms), where firms provide services as part of a distribution chain that involves a retail client.

One way to reduce complexity here might be to impose more prescriptive materiality thresholds/ criteria, limiting the Duty’s applicability, or to tighten the definition of “manufacture” in the glossary appropriately. The IA would welcome further dialogue with the FCA on this point.

**Retail vs non-retail**

As drafted, the Duty would apply if a fund is sold, marketed, recommended, offered or provided to just one retail investor, even if the rest of the investors are wholesale/ professionals. There is often a retail customer somewhere in a distribution chain and clearly demarking between the wholesale (where the Duty will not apply) and retail spheres (where it will) is not always simple. It will also be difficult for many firms to distinguish between those aspects of individual products and services which are directed towards retail customers and those that are not*.* Institutional and non-institutional clients have access to and often purchase the same products. Firms may also offer products originally designed for institutional investors to specific types of retail investors (e.g., professional investors and ‘knowledgeable’ retail who are taking professional advice or as part of a discretionary portfolio services). A further example is where firms provide services under the agent as client model, as is often the case in managed portfolio services. In these scenarios, the investment manager treats the agent (e.g., a retail wealth manager/ advisor) as a professional client when providing its services, and is aware that the underlying client is retail but from a regulatory perspective only treats the agent (professional client) as its regulatory client and will also generally only have interactions with the agent. No specific information about the end client currently flows back along the distribution chain. Firms are unclear if and how the Duty would apply here. If it is considered to apply in these scenarios, compliance with the Duty will require a significant uplift and may act as a commercial deterrent for many firms providing such managed portfolio services. They are usually set up to only service professional clients and rely on the fact that the agent interposed in the middle (with the direct relationship and understanding of the end retail client) will be ensuring compliance with retail regulatory requirements.

We would also welcome clarification of how the FCA views the Consumer Duty proposals applying to firms providing investment products and services to professional clients that procure those products and services for the benefit of individuals including retail consumers. For example, professional client pension scheme trustees who receive investment services for the benefit of the (retail consumer) members of a pension scheme. On the black letter of the rules as drafted, it appears that firms providing products and services in such scenarios would not be subject to the Consumer Duty proposals (and rather the pension scheme trustees will be subject to the Duty vis a vis retail consumers). However, the non-Handbook guidance includes several statements which suggest that the FCA expects firms that provide products and services to such professional clients to comply with elements of the Duty, given that the products and services are pertinent to outcomes for individuals who are retail consumers. It would be helpful if the FCA confirmed that it does not envisage firms which provide products and services to professional client pension scheme trustees as being in scope of the proposals.

Additionally, it will not be possible for members to turn the obligations prescribed by the Duty off and on depending on whether the end consumer is a retail or wholesale customer*.* This means that, in practice, firms will have to either significantly restructure the way their products/ services are delivered, or apply the higher standard across the board. This may result in a duplication of internal governance fora (to cover Consumer Duty and non-Consumer Duty business) and collated MI. It could also mean that the CBA under-estimates the costs associated with implementing the regime. The IA would welcome the opportunity to discuss these issues in more detail with the FCA.

We note in the draft rules that the glossary definition of ‘non-retail financial instrument’ contains three conditions; marketing materials must include disclosures that it is only offered to professionals/ eligible counterparties and not intended for retail; the issuer/ distributor has taken reasonable steps to ensure that the offer is only directed to professionals/ eligible counterparties; and a de minimis threshold for the investment of £100,000. This third limb is unnecessary. There are many products in the market that are designed for and sold to professional investors only, which do not have such a high minimum denomination. Limbs one and two should be sufficient to ensure that the investment is not ‘retail’. If a de minimis threshold is to be kept, it should be as an alternative to the first two conditions and should be set at around £40-50,000 to account for the wide variety of products in the market.

**Exclusions**

The exemption from the Duty for non-complex financial instruments will be difficult for firms to navigate in practice. The glossary definition set out in the draft rules relating to the Duty is narrower than the definition of non-complex products under MiFID. For example, non-complex financial instruments under MiFID includes UCITS, but these are not exempt from the Duty. In addition, non-complex financial instruments must be traded on an exchange in the UK. If a firm manufactures an instrument which is traded on a UK exchange, it is exempt from the Duty, however, if that same instrument is traded on a Luxembourg exchange, the Duty will apply. This seems like an odd policy outcome, and we would encourage the FCA to align the exemption for non-complex financial instruments to the MiFID definition, or the very least to extend it to qualifying securities traded on non-UK exchanges.

We would also recommend that investment trusts are treated as non-complex financial instruments (by adjusting the definition of “real economy security”, which currently excludes such products because of the requirement for the share’s returns to be determined based on the actual or anticipated economic performance of the commercial/ industrial activities of the issuer). A share in an investment trust is akin to a share in a commercial company as it is regularly traded and its price is largely determined by trading interests on the exchange. We therefore think it would be appropriate for the exemption to be expanded to cover such products.

We would be interested in understanding what the FCA considers the position to be under the Duty in terms of its application along the distribution chain where the structure deliberately breaks the chain. An example of this is a unit linked fund – in this scenario, the product being manufactured/ distributed by the insurer is the insurance policy, which is then linked to funds managed by third parties, which may not be in scope of the Duty (e.g., if they are overseas based investment managers) and/ or for which the insurer has limited say in the design, features etc.

For similar reasons, we think the definition of non-complex financial instruments should be expanded to cover products such as savings plans and other wrappers, to the extent they give exposure to such non-complex financial instruments. For example, an investor can set up a savings plan with a firm, through which it is able to directly invest non-complex financial instruments (e.g. shares in listed companies). It would be odd then for the savings plan to be brought in scope for investments made in such products, as the end manufacturers/ issuers will not be in scope, and the firm issuing the saving plan itself will have limited ability to influence the design etc. of such products.

Draft rule 3.2.8 states Principle 12 and PRIN 2A will not apply to activities to the extent that they are excluded from the protections offered to retail consumers by a rule in COBS, ICOBS, MCOBS, BCOBS, CMCOB, FPCOB PROD or CONC. In the case of marketing/ promotional restrictions, it is not clear how the Duty will then apply to UK regulated firms. For example, under the COBS 4.12 rules, UK regulated firms are restricted from promoting non-mainstream pooled investments to retail investors unless an exemption in COBS 4.12.4 applies. However, our reading of the draft rules suggests that, once that promotion has been made, the Duty would apply to govern the remainder of that firm’s relationship with the retail customer throughout the lifecycle of the product, so it is not clear what benefit this exemption offers. In contrast, an overseas or unregulated firm relying on exemptions under the UK financial promotions and promotion of unregulated collective investment scheme rules would not be caught by the Duty in respect of the sale or any ongoing relationship with the retail consumer. This is the type of subtle distinction which will confuse both firms and retail investors, and risks creating an unlevel playing field that penalises UK-based firms. We consider that this could be simplified (i.e., the activity and ongoing business should either both be exempt from the Duty, or both be covered, for UK regulated firms).

**Geographical scope**

The Duty will apply where either (i) services or (ii) products, are sold, marketed, recommended, offered or provided to retail customers located in the UK, unless another applicable rule or onshored regulation which is relevant to the activity has a different territorial scope (draft PRIN 3.3.1). As regards the latter, the scope of the territorial application of the Duty expands to encompass that set out in the rule/ onshored regulation in question. This means that the Duty is not limited to simply “UK” retail customers, despite the fact that the policy objective of the FCA in respect of the Duty is limited to the UK and that broadening its scope beyond the UK risks making the UK less competitive than its peers as a place to do business.

The IA recommends that the FCA clarify that the Duty will only apply to products intended for the UK retail market. This would confirm that UK investment managers providing portfolio management services to funds that are sold in the EU under a delegation agreement are not in scope of the Duty (although as noted previously, we would argue that the Duty should in any case not apply in these scenarios as the delegate UK investment manager will only be managing the fund based on the investment objectives/ policy set by the fund manager and so will not be manufacturing either the product or a service). This mirrors the approach taken for the RDR rules. This seems to have been the policy intention, but the final draft rules take a broader approach.

We would also argue that the Duty should not apply beyond authorised funds (on a similar basis to the value assessment rules). Funds issued under the Temporary Marketing Permissions Regime (TMPR) or Overseas Funds Regime (OFR) should be descoped. These products are not intended (for the most part) for retail investors (subject to a few exceptions, for example, Investment Trusts, which could be easily managed).

[***Note: TBD with members, this para has been included based on member feedback – we suspect the FCA may push back given that the OFR is aimed at overseas retail funds and most funds that entered the TMPR were retail funds. Additionally, it is worth noting that UK distributors will in any case expect compliance contractually if overseas funds are sold in the UK.***]

1. **Do you have any comments on the proposed application of the Consumer Duty through the distribution chain and on the related draft rules and non-Handbook guidance?**

The IA appreciates the FCA’s intention to impose obligations to consider the well-being of consumers on all firms along the distribution chain. Practically, this presents challenges for investment managers. The Duty will require firms higher up the chain, without end relationships with retail clients, to obtain wide-ranging and detailed data from distributors and others. The IA considers that the way the draft rules and guidance are currently drafted replicates many of the issues inherent in the current PROD rules. The requirement to obtain data across the distribution chain is an important facet of the existing product governance regime, but most investment managers have struggled to get meaningful, or in some cases any, data from distributors under the MiFID II product governance rules. Distributors are not currently subject to obligations to provide information (including under the PROD rules, which in fact only impose obligations on manufacturers to provide information to distributors, and not the other way around) so usually distributors will tell firms that they either do not have to give the information manufacturers need to review target markets and if they do, firms will have to pay for it. This accordingly makes compliance by manufacturers, very difficult.

We note that the reporting obligations will be more extensive between distributors and manufacturers under the Duty. Draft PRIN 2A.3.4(7) goes further than MiFID II/PROD in requiring a manufacturer to ensure that a product is distributed to the identified target market (as the rule in PROD 3.2.1(3) requires firms to take “reasonable steps” to ensure the product is sold to the identified target market). Although the FCA has indicated that a reasonableness standard should be applied to the application of the Duty as a whole, as noted in our response to Question 5 below, this should be specifically called out in the actual rule to avoid confusion. Manufacturers will also need other regular information from distributors going beyond target market sales (e.g., on customer feedback/ complaints) in order to inform product design/ changes.

Under the MiFID II product governance rules, firms’ experience is that where target market reporting does occur, it may only be provided by exception (i.e., where there are sales outside of a target market/ negative target market). Distributors may therefore find it difficult to extend such sales information to cover the full breadth of information required by the Duty (for example, details of vulnerable customers). It would then be problematic for a non-direct retail firm to tailor marketing materials to vulnerable customers and to consider specific vulnerabilities where they do not hold this data and are reliant on distributors to obtain it. There may also be practical issues for manufacturers where the chain is lengthy and they have little or no visibility of the frontline sales teams, who will need to produce and transfer back details of the performance of products and customer outcomes in practice.

Given this, the decision to include a rule requiring distributors to provide manufacturers with relevant sales information in the draft rules (2A.3.22R), combined with a broad definition of ‘distributor’ in the glossary, is helpful. However, the issue still remains with respect to overseas distributors that will not be subject to the Duty or other FCA requirements. That issue can however be appropriately overcome, if the scope of the Duty is restricted to UK consumers only.

The CP also indicates that obligations under the Duty will be applied to firms without direct customer relationships proportionately. The IA welcomes this but would like to understand further the relationship between the degree of influence over consumer outcomes and the extent of the obligations under the Duty that will apply to manufacturers and others without direct customer relationships. We would be grateful for the opportunity to discuss with the FCA some examples, relevant to the investment management industry and unit-linked insurance business, to understand how it sees this working in practice and what a proportionate application might look like.

The IA is concerned that the burden on manufacturers to conduct due diligence on the entire distribution chain, and to continue to monitor outcomes long after a product has passed from them to distributors and front-line sales teams, is disproportionate to the risk of consumer harm or their responsibility for this. Whilst the IA agrees that manufacturers should be responsible for conducting reasonable due diligence upon the distributors with whom they contract, the expectation should be that distributors will, in most circumstances, be responsible in meeting the requirements of the Duty. Otherwise, firms may have to fundamentally rethink their relationship (and the allocation of risk) between manufacturers and distributors, without any clear evidence that doing so will improve consumer outcomes. This redistribution of risk will need to be priced in.

Distributors generally have a far greater ability to impact outcomes for consumers and manufacturers. Their role here is crucial. The IA considers that the draft rules should focus on the new regulatory framework being sufficient to ensure distributors take reasonable steps to comply with their obligations under the Duty, and manufacturers have a clear understanding of what they can expect from their distributors (particularly around the provision of data to manufacturers). This will enable manufacturers to tailor their preparations for the new Duty accordingly.

1. **Do you have any comments on the proposed application of the Consumer Duty to existing products and services, and on the related draft rules and non-Handbook guidance?**

The IA understands that while the CP does not go as far as mandating that firms rewrite the terms of existing products to ensure that they will comply with the Duty, firms will have to assess how these products/ services operate by reference to the cross-cutting rules and outcomes once the new Duty takes effect. The CP asserts that the FCA is not looking to criticise firms for historic decisions about product design and that contracts need not be rewritten (see para 4.9 of the CP). However, there is a concern regarding the implications of a retrospective re-evaluation of the FCA’s expectations at the time these types of products were manufactured and sold, and we would like to understand more about FCA intentions in this area.

We would stress that our concern relates not to the principle of ensuring good outcomes for customers, which we are both supportive of and already working to deliver in a variety of specific ways. In this regard, a critical additional point, particularly with respect to the retail investment fund market, is how the timing and substance of the new Duty relates to existing regulatory requirements aimed at achieving similar outcomes.

Since PS19/4, following the FCA Asset Management Market Study, expectations of UK fund managers have been strengthened and new processes – notably on Value Assessment – put in place. Importantly, there is a major industry focus on legacy (pre-RDR bundled) share classes, aimed at moving customers to better value share classes where appropriate and possible. These processes are already well advanced and the industry needs a better understanding of the FCA’s anticipated interaction between these and the new Consumer Duty.

This has implications for both substance and timing. The FCA should also note that are significant practical difficulties for firms in reviewing their legacy books: for example, being able to ascertain whether an adviser is still due trail commission. The IA has drawn attention to these residual areas that require further action by regulators and has proposed solutions. Imposing a separate timeframe for the Consumer Duty obligation without acknowledging either the existing process of addressing the legacy book or the associated difficulties, will not be most helpful to achieving the shared objectives of regulator and industry.

1. **Are there any obstacles that would prevent firms from following our proposed approach to applying the Consumer Duty to existing products and services?**

The IA has identified aspects of the current regulatory regime which will make it difficult for firms to apply the Duty to existing products and services. The application of the Duty to legacy and closed book clients is a significant issue, as already described in our response to Question 3 above. In particular, firms acting on a non-advisory basis will not have the power to advise clients to move, nor will any firm be able to compulsorily move customers to a product which offers better outcomes as assessed according to the provisions of the new Duty. The IA would welcome further guidance as to how the FCA expects a firm to act in this context in order to comply with the Duty.

Products which are identified as not ‘delivering value’ (for example, as a result of the annual Assessment of Value process for UK authorised funds) can already be changed. However, the Duty seems likely to complicate this process, not least by broadening the range of criteria against which historic products will need to be reviewed, and by also significantly broadening the range of products.

The IA considers that the absence of relevant information from distributors is possibly the key barrier to the application of the Duty. Rules applied at the manufacturing level that depend upon information from elsewhere in the delivery chain much be accompanied by the mechanisms to allow them to obtain this information. For some products, the relevant distributor may no longer exist, or may refuse to provide information on the basis that the product is closed to new business. In our view, the obligation on distributors to provide information about consumer outcomes to manufacturers could be amended to provide for this. However, as noted previously, an issue will still remain with respect to overseas distributors that will not be subject to the Duty or other FCA requirements. That issue can however be appropriately overcome, if the scope of the Duty is restricted to UK consumers [Add cross reference to other comment in response].

1. **Do you have any comments on the proposed Consumer Principle and the related draft rules and non-Handbook guidance?**

The IA supports the choice of an outcomes-based formulation of the Consumer Principle. The FCA is clear (see para 5.13 of the CP) that the Duty is underpinned by a concept of reasonableness and that the draft rules and guidance are to be interpreted in line with the standard that could reasonably be expected of a prudent firm. The IA considers that the wording of the Consumer Principle should reflect this, and should be amended to, “a firm must act *reasonably* to deliver good outcomes for retail customers”. This would ensure that the bar is not set at such a high level that no firm can demonstrate their compliance and allows for a proportionate response by firms.

This amendment would not alter the standard to which firms will be held under the Duty - the draft rules confirm (at PRIN 2A 7.1) that reasonableness is the expected standard for firms when complying with Principle 12 and PRIN 2A. Adding a “reasonableness” requirement to Principle 12 would, however, clarify the required standard and make this more visible (including to investors). The FCA has been clear that the Duty is not intended to guarantee a subjectively ‘good’ outcome for every consumer. Without this proposed amendment, the reasonableness standard risks being overlooked or misunderstood by consumers.

The FCA should also clarify that the outcomes firms are obliged to promote in Principle 12 are ‘regulatory’ outcomes. These are assessed separately from a consumer’s own subjective view of the product and its performance. This would assist consumers in understanding that a firm may comply with all aspects of the Duty, yet an individual customer might still suffer what is, for them, a poor *personal* outcome.

1. **Do you agree with our proposal to disapply Principles 6 & 7 where the Consumer Duty applies?**

As the IA understands the proposals, if firms comply with the new Principle 12 and the Consumer Duty, they will necessarily comply with Principles 6 and 7. If so, it seems that it makes little difference from a liability perspective whether the FCA retains or disapplies Principles 6 and 7 where the Duty applies. Principles 6 and 7 will, in effect, represent a minimum standard which firms must meet for non-retail business and may need to be augmented to comply with Principle 12*.*

The fact that the FCA is proposing to disapply Principles 6 and 7 to retail business does seem to imply that it envisages some misalignment between the two. This does pose a concern for investment management firms, who will find themselves operating two regimes for institutional and retail customers - Principle 6 and 7 governing the treatment of the former and the Duty governing treatment of the latter – when most of their products are designed to cater for both. This is difficult for firms to operationalise, for the reasons we have outlined in response to Question 1 above. We ask that the FCA confirm whether it does in fact expect firms to run two separate regimes that have overlap and, if so, how they see this working in practice. Our understanding of this would be better if the FCA were to articulate more clearly the types of behaviours over and above those required by Principles 6 and 7 that will be required to satisfy the Duty.

Running the two regimes concurrently is also likely to confuse consumers. It is quite possible to have a scenario where a firm has a client who conducts some business with a firm that is not subject to the Duty (e.g. advisory services regarding UK listed shares) but does other business with the same firm (e.g., advice on purchasing derivatives over the same UK listed shares under COBS) to which the Duty applies. Whilst this makes sense objectively based on the relative risk profiles of the two activities (derivatives being inherently riskier than deposits) this distinction is going to be difficult for a firm to explain or most consumers to understand. They will, quite reasonably, expect all their interactions with a firm to be governed by the same standards.

If the FCA does intend to retain Principles 6 and 7 for non-retail customers, the IA would welcome discussions with the FCA about how these types of issues can be mitigated in practice.

1. **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?**

The IA considers that the retention of the guidance relating to Principles 6 and 7, whilst simultaneously disapplying both where Principle 12 applies, is problematic. This layering of rules and guidance causes confusion for firms and is also presumably harder for the FCA to supervise. Firms need a single clear set of rules/ guidance governing their obligations towards consumers. Requiring firms subject to the Duty to consider guidance for principles that do not apply, and which are said to represent a lower standard than the operative rules (Principle 12 and PRIN 2A respectively), is unsatisfactory. This must also be considered in the light of the increase in Handbook and non-Handbook material occasioned by the transfer of powers to the regulators under FRF. This is turning the process of navigating regulations into a highly specialist activity, one where it is easy to overlook relevant rules or guidance, which are scattered across FSMA, the Handbook and non-Handbook guidance. There is a real risk of the UK financial services industry losing key messages within a complex and hard to understand suite of rules and guidance. This framework will also become increasingly difficult for the FCA to supervise, requiring more and better trained staff. The IA supports a practical compromise here, but it is important to note that complexity also impacts on the general competitiveness of the UK market.

If the Duty imposes obligations beyond those contained in Principles 6 and 7 (as the FCA asserts it does) then the FCA should not need to retain Handbook and non-Handbook material relating to them where the Duty applies. It should have sufficient material in the Consumer Principle and related rules and guidance to supervise against in the context of firms’ dealings with retail consumers (we accept that the guidance will remain relevant for firms dealing with institutional investors who fall outside of the Duty). If the Principle 6 and 7 Handbook and non-Handbook material is to be retained, then the rules and guidance related to the Duty should cross-reference these. They should also set out clearly when and what different or additional steps firms seeking to comply with the Duty need to take, over and above the steps they would take to comply with the existing TCF framework. There is only merit in retaining the TCF guidance if it provides direction that firms subject to the Duty cannot obtain from other Handbook or non-Handbook material.

We have mentioned above that the investment management industry is already heavily regulated. In many cases, it is inappropriate, or impossible, to separate out retail and non-retail business (the main area where this occurs currently would be in disclosure requirements) and then identify the rules and guidance applying to each. Retaining Handbook and non-Handbook material for principles that have been disapplied, alongside overlapping new rules and guidance for the principle that does apply, makes the regulatory framework impossible to navigate. If the FCA feels that retention of this Principle 6 and 7 guidance is necessary, this could be incorporated into the non-Handbook guidance accompanying the new Principle 12. The IA supports a degree of consolidation as the most practical solution. Complexity and a lack of clarity will inevitably reduce efficiency and increase costs.

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

The FCA takes the position that non-advised (i.e., execution only) sales firms are entitled to assume that a retail customer’s objective is the enjoyment of the product or service they have purchased. In draft 2A.2.16, however, the FCA states that, where a firm becomes aware, or should have reasonably become aware of a specific financial objective sought by a retail consumer, then it should consider how best to support progress towards this. This guidance does not distinguish between advised and non-advised situations. It could be read as contradicting the position for non-advised sales and seems to imply a suitability-like/ advisory standard into non-advised activities that are currently only subject to an appropriateness standard.

A good practical example of the potential issues here would be where an execution only firm is asked by the client if a particular product is suitable for them given their circumstances, which they then describe. The firm is now aware of the client’s objectives and personal circumstances, but making a judgement based on those facts about whether their product is appropriate for the client would constitute a personal recommendation. The firm does not have permission to give advice but the draft rules in PRIN2A (particularly 2A.2.16) now appear to require it to do so. Similarly, if a firm running an investment trust savings plan on an execution only basis becomes aware that a customer is saving for a house purchase, how would the FCA expect the firm to respond to this in the context of the new Duty? We would welcome further discussions with the FCA on these points.

As regards the obligation of a fund manager with respect to investors, most firms operate call centres or via transfer agencies. It is impractical to have staff expected to consider supporting a retail customer’s investment objective where it becomes aware of this in these scenarios – often because the fund investment will have been made with little or no involvement from the fund manager. Without further details and fact finding by qualified personnel, this cannot work and brings a risk that firms provide advice (possibly without holding the appropriate permissions).

1. **Do you have any comments on our proposed requirements under the products and services outcome and the related draft rules and non-Handbook guidance?**

Investment managers conduct business that is subject to the product governance rules set out in PROD, and many of their products are themselves authorised. They have invested significant financial and non-financial resources implementing this regime. PROD, if followed correctly, should provide an evidential provision (s.138C FSMA) to meet the requirements under draft PRIN 2A.3. This means firms already providing an equivalent level of compliance should not need to add another layer of regulation to their approach, but across financial services the introduction of the Duty should level the playing field. The IA welcomes the FCA’s attempt, in its draft rules, to provide assurance to firms subject to PROD that compliance with this regime will usually be evidence of compliance with the products and services outcomes (para 2.13/2A.3.28(2)E).

The general position taken by the FCA in the CP and the draft rules, however, is that the Duty imposes a higher standard on firms overall (see for example 2A.7.9RG(1)). We would want to understand whether this means that PROD, as it is currently drafted, needs to be reinterpreted under the new Duty (and whether it will in practice now impose higher standards on firms than it is currently understood to do). This is an important question as, if more is needed, this will impact the amount of work firms will have to do to implement the Duty with consequent impacts on the cost / benefit analysis and implementation timescale.

We also ask the FCA to clarify whether the Duty introduces new requirements in the context of product governance that go beyond the requirements currently set out in PROD. If the FCA does require anything over and above this, the IA would welcome the opportunity to discuss this further, with the intention of providing a clear indication to firms as to how and where they will need to upgrade their existing frameworks.

If compliance with the current PROD rules is viewed by the FCA as sufficient evidence of compliance with the products and services outcome under the Duty, the IA considers that the FCA should offer PROD-compliant firms a ‘safe harbour’ confirming this, with any additional requirements specifically spelt out. This would enable firms to plan implementation with more certainty and reduce the time it will take them to be confident that they are fully complying with the Duty. However, as noted in our response to Question 2 above, we are supportive of a positive obligation on distributors to provide information to manufacturers under the new rules proposed by the FCA (as this is current a key gap in the PROD rules).

It is not immediately clear how a collective investment scheme could comply strictly with the new products and services outcome if “consumer needs” and “targeting” are to be read as applying to groups within the broad bucket of retail. Often, a product is designed with a number of investor groups in mind (albeit, within the broad church of retail). For example, a fund can have several share classes which are specific to an investor type, so multiple types of investors in one fund is common. We would welcome to opportunity for further discussions with the FCA on the application and meaning of the product and services outcome in this context.

In terms of customer vulnerability, firms with products sold through a distribution chain, and without direct retail customers, will lack visibility of customer vulnerabilities within in their target market. Distributors with direct relationships will be best placed to meet these needs from a PROD perspective and the rules should focus this obligation on them.

1. **Do you have any comments on our proposed requirements under the price and value outcome and the related draft rules and non-Handbook guidance?**

The IA has similar concerns here to those outlined in Question 9, regarding the products and services outcome. Investment managers are subject to obligations to conduct value assessments under COLL for UK authorised funds. They have spent significant time and money setting up systems and processes to facilitate these. Whilst we recognise that there remains work to be done by some firms in our industry to improve their assessments, there is an obvious overlap here with the requirements of the price and value outcome under the Duty. Specifically, if a firm conducts a COLL-compliant value assessment, will this be sufficient evidence for the FCA of compliance with this outcome? Draft rule 2A.4.30 states that compliance with COLL 6.6 “may be relied upon as tending to establish compliance” with the price and value outcome. We would like the FCA to go further and confirm in the draft rules that compliance with the COLL regime will satisfy the price and value outcome, not least because the draft non-Handbook guidance states at 6.52 that “Where existing rules require manufacturer and distributor firms to assess whether the price of their products… provides fair value… *they will comply with the price and value outcome*”. Without this change, the rule and the guidance contradict each other. To the extent that the Duty will require investment managers to do more work on price and value than the current COLL regime requires. The IA would welcome the opportunity to discuss with the FCA what additional steps it considers firms in the industry will need to take, recognising the existing, as well as planned, regulatory framework (so as to avoid retrospective issues).

If compliance with the current COLL rules is viewed by the FCA as sufficient evidence of compliance with the price and value outcome under the Duty, the IA considers that the FCA should offer COLL-compliant firms a ‘safe harbour’ confirming this. As with the products and services outcome, this would enable firms to plan implementation with more certainty and reduce the time it will take them to be confident that they are fully complying with the Duty.

The IA considers that there is a discrepancy in the draft rules about how value is to be assessed. The correct measure of value considers what a client receives in return for what the client pays. Draft PRIN 2A.4.11 allows firms to consider, when assessing value, economies of scale and the costs the firm incurs in providing the product or service, which seem inconsistent with that definition. On that basis, if a large firm and a small firm both provide the same service for the same charge, they are both providing the same value, irrespective of the fact that the scale of the large firm may mean it makes a greater profit.

In addition, the FCA’s criteria for the assessment of total price set out in draft 2A.4.7 includes any ‘non-financial’ costs a retail customer is asked to provide a firm (e.g., data costs). This will require firms to assess the value of this, a complex exercise which may not necessarily be completed consistently between firms. The IA has not seen this in the context of other FCA rules (including those concerning value assessments). We consider that this would be more appropriately positioned as something that firms directly facing the retail investor have to comply with, and even in that case they should only be obliged to consider non-financial costs where appropriate, rather than this being a compulsory inclusion. Further, it would be practically very challenging for manufacturers to have visibility over, or otherwise be made aware of, these non-financial costs.

Assessing price and value requires looking at various factors through the chain of manufacturing to sales. Some of this information will be commercially sensitive. From a manufacturers perspective it is also possible that some of the distributors in the chain will also be competitors. Firms higher up the distribution chain may not have control over what others in the chain are charging, nor if what is being charged is correct value. The IA considers that ascribing responsibility for price and value outcomes outside of the COLL requirements to manufacturers or distributors higher up the chain in this context is problematic.

Whilst we note that the FCA has confirmed that it does not intend to act as a price regulator, the IA is interested in discussing the circumstances in which the FCA might intervene in a firm’s approach to pricing (for example, where it considers that a firm’s profit margins on a product are too high). We would like to understand more about the circumstances and conditions that might trigger this.

We also note that the FCA is currently consulting on a framework for assessing value for money in the context of occupational pensions.[[2]](#footnote-2) This consultation does not mention the Duty, which the IA finds surprising given the overlap between the two. It is important that any new regulatory requirements in the retail space are considered holistically, in the context of the wider applicable regulatory framework and the Duty in particular. Proposals for regulatory change should be co-ordinated in order to minimise the burden on firms.

1. **Do you have any comments on our proposed requirements under the consumer understanding outcome and the related draft rules and non-Handbook guidance?**

Given that this is an area which involves consumers directly, the IA thinks that it is particularly important for the FCA to be clear as to the application of the existing rules and whether compliance with the existing (comprehensive) regulatory framework applicable to the investment management industry – for example, KIIDs/PRIIPs KID disclosures - will satisfy the FCA that a firm has complied with the customer understanding outcome under the Duty. This is especially the case because a number of firms have clear evidence, and have stated publicly, that end clients do not read or understand statutory disclosures, and that they can be misleading. We wish to understand whether it the case, for example, that on top of the standard KID text set out in the PRIIPs regulation, firms subject to the Duty will need to apply a UK consumer duty ‘lens’ to these communications. The IA would welcome further guidance from the FCA on this.

The IA would be interested in exploring how the FCA see this interacting with the comprehensive work undertaken by firms to comply with PS 19/4. Prospectus disclosure in the UK is already required to be in plain English with no jargon (or with explanations) and this standard has always applied to KIIDs/KIDs. It is difficult to see what further simplification of outward investor facing documents could reasonably be achieved whilst also maintaining (in the case of prospectus, KIIDs/KIDs) their integrity as both regulatory and contractual documents. In addition, the IA is concerned that it will be difficult to reduce some of the compulsory regulatory disclosures to clients in language that can be understood by someone with a reading age of 11. The FCA may therefore need to revisit the type of information firms are compelled to provide against a backdrop of the broader protections provided by the Duty.

The IA is also concerned that there is a drafting error in the proposed rules. The comments around testing communications in the CP response refer to testing “when appropriate” or similar wording that suggests a degree of proportionality can be applied to firms’ approaches (see further 9.29/9.30). The actual rule in draft PRIN 2A.5.8 has no such qualifying clause.

The IA would also appreciate the opportunity to discuss with the FCA the types of testing of customer communications that might be required where firms in our industry look to apply the Duty. Firms will need to apply testing at different stages of product and service lifecycles, given the rules apply to all firms involved in the production, approval or distribution of consumer communications as described in Appendix 2. These rules appear to require all firms to provide evidence that customers have understood communications directed to them. The IA is concerned about how manufacturers in the investment management industry, without a direct relationship with the end retail client, can be expected to test customer understanding. Is the FCA’s expectation that testing on actual customers will be done by distributors, but that manufacturers will be expected to conduct testing on focus groups before the product is rolled out for distribution (with a corresponding obligation imposed on distributors not to deviate from the tested communications)? Or will they just be expected to consume and assess information received from distributors? This is not currently clear. We would appreciate the chance to explore with the FCA exactly what the customer understanding expectations will look like in the context of investment managers’ business.

In addition, the draft rules in PRIN 2A.5 are stated to cover verbal as well as written communications (see 2a.5.1 (3)). We would also welcome clarification how the FCA envisions this working in practice for example in relation to telephone calls.

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

The delivery of support by investment management firms will invariably rest heavily on outsourced providers’ service delivery. Even with the application of operational resilience to enhanced scope firms and the regulatory responsibility for any outsourcing remaining with regulated firms, there are material challenges a firm faces in delivering the support it wants where it does not control the day-to-day operations of the unregulated outsourced provider. This is analogous to the situation now to be investigated by the FCA with wholesale market data providers. Key providers to a large number of regulated firms operating in the UK retail product space should be subject to greater regulatory scrutiny to ensure they are aligned with the outcomes regulated firms must meet. Firms’ ability to pass on regulatory compliance delivery through contracts is insufficient in practice.

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

Yes (see further Question 14).

1. **Do you have views on the desirability of the further potential changes outlined in paragraph 11.19?**

The Duty as currently drafted represents a detailed framework for considering the outcomes enjoyed by all types of consumers in considerable detail. The IA considers that the regime as drafted contains sufficient requirement for firms to consider diversity and inclusion (D&I) as part of their assessment of consumer outcomes. We consider that it would be helpful if the FCA were able to work closely with firms during the implementation process to ensure that they develop an approach with fully embeds D&I considerations into every aspect of the customer journey.

We would welcome further discussion with FCA on the interaction between diversity characteristics and its existing definition of vulnerability. For example, for direct investors, firms may look at age information as this is data they have available (along with information about known vulnerabilities). To collate a holistic view of D&I, information for a retail customer invested in a particular product through distributors and intermediaries, (e.g., ethnicity/ non-disclosure vulnerabilities) firms would have to reach out to distributors. Investment managers would need a clear remit for asking for this and the CP does not currently address the potential difficulties with this requirement from a GDPR perspective.

1. **Do you agree with our proposal not to attach a private right of action to any aspects of the Consumer Duty at this time?**

Yes. The IA strongly agrees with the FCA’s conclusion that the existing redress framework is likely to be a more appropriate route for customers than a private right of action. We also agree that is vital that the industry has adequate time to embed the Duty without the prospect of private action, if its potential benefits are to be fully realised.

1. **Do you have any comments on our proposed implementation timetable?**

The IA recognises the need for the FCA to act quickly to ensure that customers operate in a regulatory environment that is more focused on their needs and objectives. We also note that the FCA believes it requires the powers afforded to it under the Duty to address consumer harm that it considers cannot be tackled under the current TCF framework. We presume that this is driving the very short implementation period proposed in the CP. The IA is not aware of any examples of current or ongoing consumer harm occurring within the regulatory perimeter that the FCA is not currently equipped to tackle (either through enforcement or supervision) by deploying its existing principles and rules. It would welcome further discussion with the FCA on this point. A greater understanding of the apparent need for urgency here would help firms target their preparations for the introduction of the Duty on the FCA’s areas of key concern.

By the FCA’s own admission, the Duty represents a fundamental reset of the industry’s approach to its customers. Notwithstanding the fact that many investment management firms already comply with PROD and COLL, the work they will still need to undertake in terms of setting up systems and governance to ensure/ verify compliance and construct frameworks for ongoing monitoring, record keeping, and reporting will take time. Mapping existing governance structures and creating new structures is a lengthy exercise. Firms will also need to implement change projects to perform gap analysis and updates to existing products (which as noted previously will be subject to investor/ regulatory approvals in some cases before such changes can be made) as well as policies/ processes and T&Cs, implementing staff training on the new requirements, and adapting monitoring and testing consumer outcomes. Firms may need to develop administrative systems to record and store reasons for vulnerability of customers in a GDPR compliant manner. We expect board and governing bodies will also include non-Executive Directors in this process. As board meetings are quarterly, the proposed period does not, in our view, provide sufficient time to have completed the gap analysis through to recommendations to present and deliver training to all board members on the new expectations, as required by 2A.8.15 to 2A.8.17. The IA believes that the investment management industry needs to be given a minimum of [two] years from July 2022 to implement the Duty. [***Note: members to confirm suggested 2 year period or to leave period open TBD- until better understanding of any ‘safe harbour’***]

Firms who already take their responsibilities seriously will likely bear the greatest burden in implementing the Duty well, and monitoring and evidencing how they have done so. ‘Bad actors’ are less likely to collect data and comply with their reporting obligations. There is a risk of regulatory attention being skewed towards minor infractions by compliant firms who actually submit data, as the FCA does not hear about genuinely harmful activity by less scrupulous firms until it is too late.

As noted above, many investment managers have a large back book of products sold in good faith a number of years ago. These products have legacy practicalities around commission and value and many firms are already trying to address these, but this is not always straightforward. Whilst it may be valuable to review the terms of these products and firms’ ongoing relationships in the light of the new Duty, there are many practical challenges around contacting legacy customers even where this contact is to their benefit. This is not an exercise that can be undertaken in just a few months. If a general extension to the proposed timeframe is not possible, a staggered start with more time given for the review of legacy and existing products is essential.

The introduction of safe harbours and/ or confirmation that compliance with existing regulatory regimes is sufficient (as discussed in our responses to Question 9 and Question 10) would help alleviate the compliance burden to an extent (although even then the proposed timeframe appears unrealistic). We ask whether the FCA has considered reviewing its current rulebooks to remove overlapping rules, as suggested earlier in this response. This would assist investment managers in understanding where they need to upgrade their processes for the new principle, rules and guidance proposed and make a shorter implementation period more achievable.

As we state at the outset, the Duty represents a significant opportunity to reframe the working relationship between firms and the FCA when it comes to consumer protection and in developing a more “outcomes based” approach. Firms need time to work through the FCA’s rules and guidance supporting the Duty, and both the FCA and firms are likely to need time to become comfortable with the more outcomes-based approach, where judgement about proportionality and reasonableness is needed. The IA considers that this will require widespread and ongoing dialogue throughout the implementation period. This opportunity may be lost if industry is racing towards an unrealistic implementation deadline with unintended consequences, which could then have the undesirable outcome of limiting consumer access and choice.

We would welcome confirmation as to whether the FCA envisions firms maturing in their delivery of the Duty as it embeds, and whether the FCA would be prepared to consider an implementation plan similar to that accompanying the new Operational Resilience rules, which matures over three years, in which the FCA could provide meaningful delivery points over a multiyear programme for firms to implement and achieve milestones.

The IA would be grateful for more details of the FCA’s expectations for the implementation period, including an explanation of the work it considers investment managers will need to undertake in order to demonstrate compliance and the time it believes will be required to do this. It would also be useful to discuss what the FCA will expect firms to have in place when the implementation period ends. Whilst firms might be able to put in place processes to review their activities through the Consumer Duty lens within an extended time period, any follow up actions identified as necessary in that first round of reviews will require additional time to address. Given that implementation is intended to be iterative, and that there should be a continuous process of monitoring and improvement, our understanding is that actions to improve consumer outcomes will always be being identified and implemented after the rules come into force without that being a breach. It would be helpful for the IA to understand the FCA’s views here.

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

Investment managers generally endeavour to obtain as little personal data from customers as possible in order to minimise their GDPR obligations. The Duty will require investment management firms to gather data about individuals, who will often not be their direct customers, in order to monitor and evidence good outcomes. Manufacturers may be in long value chains, so obtaining this data may not even be possible. We would want to understand whether the FCA considered this scenario and the significant barriers to information some firms will face.

When it comes to vulnerabilities and identified protected characteristics, much of this will be special category data under the GDPR. We would ask that the FCA considers the GDPR implications of its proposals here.

1. **Do you have any comments on our proposal to amend the individual conduct rules in COCON and the related draft rule and non-Handbook guidance?**

No.

1. **Do you have any comments on our cost benefit analysis?**

As mentioned at the start of this response, the sums quoted as one-off and ongoing costs of implementation in the FCA’s CBA contrast starkly with the absence of any real articulation of the benefit this vast industry spend is intended to deliver for consumers. A policy initiative that will potentially cost the industry £2.5bn in one-off costs (and millions in ongoing costs) needs to deliver at least a commensurate improvement in the quality of retail consumers’ experience and ideally something that will be qualitatively distinct from the current TCF regime. The IA sees no evidence in the FCA’s CBA that this is likely to be the case and it is not clear to us how the costs quoted can be justified.

This is significant as it impacts directly on the industry’s broader global competitiveness - which is to become one of the FCA’s secondary objectives under the Future Regulatory Framework. Overseas firms looking to establish operations in the UK will need to accept a considerable future outlay in costs to comply with the Duty in respect of their UK business. Existing market participants will also factor these increased costs into where they develop their operations, and this risks depriving the UK of investment as other jurisdictions are not imposing similar requirements. If the benefits of this spending, to consumers and the industry as a whole, cannot be articulated, such firms may well decide not to do business here which will significantly undermine the UK’s global competitiveness agenda.

The IA would be interested to hear whether the FCA has considered whether the Duty will impact providers and possibly reshape some markets, rather than just change behaviours toward customers. It is possible that its introduction could prompt continued movement toward larger firms with more consolidation and squeeze out smaller players thereby having the undesirable outcome of reducing choice, innovation and competition.

There is also a disconnect between FCA’s own estimate of the amount of money it expects firms to spend on implementation and the amount of time it has allocated for this to occur. It is quite simply not possible to spend these sums in the nine months allotted. The types of implementation programmes that cost £2.5bn in one-off costs take several years for the industry to complete.

One aspect of weakness in the FCA’s CBA is that the Duty addresses the symptoms (but not the cause) of a much deeper issue – poor financial capability across the wider population. At page 96 of the CBA the FCA states as a proposed benefit of the Duty:

*“Products and services are designed to meet the needs, characteristics and objectives of consumers in the target market and prices provide fair value for consumers leading to improved matching of products and services to consumer needs, time saved and reduction in the probability of harm”*

We know that some consumers lack confidence when it comes to financial services and can find it difficult to find products which meet their needs. According to the FCA’s Financial Lives survey data[[3]](#footnote-3), in October 2020, 14.6m adults (28%) had a low confidence in their ability to manage their money, 7.1m adults (14%) did not consider themselves to be confident and savvy when it comes to financial services and products, and 15.9m (30%) felt they had a low knowledge about financial matters. Adults with low financial capability are more likely to suffer harm: 57% of adults with low financial capability felt nervous, overwhelmed or stressed speaking to financial services providers or found it hard to find suitable financial products or services; 37% struggled to assess financial products or found it difficult to shop around; while 16% had fallen into debt which might have been avoidable if they had understood their options better.

The IA considers that these statistics, along with the statistics in the broader CP regarding low adult literacy, are evidence of societal issues no amount of financial regulation can solve. This can only be addressed by a broader programme of engagement led by government agencies. Financial services will always involve a degree of complexity. Whilst the IA wholly agrees that firms should not be able to exploit this to the detriment of consumers, it is impossible to remove this altogether. It is akin to asking car manufacturers to build self-driving cars because of poor driving skills, when it is better driving skills that are needed. Whilst the IA acknowledges that financial capability is not specifically within the FCA’s remit, it remains the fact that higher financial capability across society is a key, if not the decisive, factor in preventing consumer harm. Given this, the sums the Duty is estimated to cost the industry cannot be justified.

The IA also questions the FCA’s view that harm is reduced by saving consumers time (see further the diagram at Fig 1 of Appendix 2). Before investing, retail consumers have to read and assess a lot of mandatory information – an updated/clear prospectus, KIID/KID, and/or assessment of value reports (among others). Reducing time for consumers runs the risk that they do not have the information they need, at the time that they need it, to make a good investment decision. Whilst we accept that consumers should not spend unnecessary time managing their relationships with financial services providers, “time” is also an important measure of engagement. Given the backdrop of low general levels of financial capability described above, arguably consumers need to spend more time engaged on financial matters, not less. The CP provides only limited evidence that time spent on financial matters is actually harmful (in that it is unnecessary or unhelpful) and should therefore be reduced. Of the examples of ‘harm’ given in this context, none are compelling; delays with investment platform switches have already been addressed by the FCA in PS19/29[[4]](#footnote-4), and complaints handling could be addressed by better supervision of the existing rules here.

The FCA states in the CBA, *“We know that consumers value their time, so saving time creates a welfare gain for them*”. The IA would argue that a greater welfare gain would be found by fostering an improvement in financial capability and more engagement by customers with financial matters. We do not think that the FCA’s CBA provides sufficient, or compelling evidence that saving time is a positive benefit to consumers and its reliance upon this to justify the costs to the industry involved in introducing the Duty is misplaced.

1. **Do you have any other comments on the draft non-Handbook guidance?**

The IA appreciates that the FCA plans to develop its non-Handbook guidance on the Duty over time, recognising that its implementation will be an iterative process. Wesupport this approach. As such we have no broad comments on the current draft guidance, save that the examples within it are too focused upon mass-market retail firms. This is unhelpful for a Duty that applies across the industry. Investment management firms would welcome further discussion with the FCA about how it envisages the Duty applying to their specific business models.

Please also see our comments in Question 7 regarding pre-existing Handbook and non-Handbook material on Principles 6 and 7.

1. **Can you suggest any other examples you consider would be useful to include in the draft non-Handbook guidance?**

The IA has highlighted throughout this response areas where we feel the FCA needs to provide more detail about how it envisages specific aspects of the Duty applying to investment management firms. The IA has also provided examples of common scenarios relevant to investment management businesses where we believe that the application of the Duty is unclear, all of which would form the basis of useful further discussions with the FCA. Given that this regime has not been designed with investment managers in mind, we repeat our request made in the introduction that the FCA enters into targeted discussions with the investment management industry to ensure that the Duty is firstly drafted and applied in a manner that is more tailored to our industry and secondly, with the aim of generating high-level scenarios or ‘guardrails’ which can guide firms’ approaches as they look to apply the Duty to their businesses.

1. [Future Regulatory Framework Review Consultation](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1032075/FRF_Review_Consultation_2021_-_Final_.pdf) [↑](#footnote-ref-1)
2. [PS21/12 Assessing value for money in workplace pension schemes and pathway investments: requirements for IGCs and GAAs](https://www.fca.org.uk/publications/policy-statements/ps21-12-assessing-value-money-workplace-pension-schemes-pathway-investments) [↑](#footnote-ref-2)
3. [FCA Financial Lives Survey 2020](https://www.fca.org.uk/publication/research/financial-lives-survey-2020.pdf) [↑](#footnote-ref-3)
4. [PS19-29 Making Transfers Simpler (fca.org.uk)](https://www.fca.org.uk/publication/policy/ps19-29.pdf) [↑](#footnote-ref-4)