



Association of
Mortgage Intermediaries

Association of Mortgage Intermediaries' response to FCA CP21/13 A new consumer duty

This response is submitted on behalf of the Association of Mortgage Intermediaries (AMI) and the Association of Finance Brokers (AFB). AMI is the trade association representing over 80% of UK mortgage intermediaries. AFB sits within AMI and represents second charge (formerly secured loan) brokers.

Intermediaries active in this market act on behalf of the consumer in selecting an appropriate lender and product to meet the individual consumer's mortgage requirements. AMI members also provide access to associated protection products. AFB members also provide access to unsecured products.

Our members are authorised and regulated by the Financial Conduct Authority (FCA) to carry out mortgage, insurance mediation and consumer credit activities. Firms range from sole traders through to national firms and networks, with thousands of advisers.

Response

Whilst we are supportive of the intention behind these proposals, the lack of information included in this consultation leaves us unable to support the FCA's proposals for the implementation of a new consumer duty. We remain of the opinion that the existing principles, rules and common and statute law already require firms to follow good business practice and represent the requirements of a duty of care. It is our understanding that the bad behaviour and consumer harm in the financial services industry is caused by firms who are in breach of the current requirements. The FCA has not explained in this consultation which particular failings by firms it is trying to address and how the new proposals would allow the FCA to better deal with these. This consultation has failed to counter our view and provide demonstrable evidence that a new consumer duty is the right way to mitigate the issues that the FCA has highlighted therein.

Within the last year, our member firms have implemented both the Senior Managers and Certification Regime and the FCA's vulnerability guidance; it is too early to evaluate the results of any of these measures and the addition of fair value measures in general insurance are yet to take effect. We believe that is not appropriate for the regulator to look to layer in additional regulatory change before fully assessing the success or otherwise of these measures. Only once this is clear, should the regulator feel that it is appropriate to consult on the need for a new consumer duty.

The lack of detail in this consultation paper leaves us unable to fully assess the impact or benefit of their implementation. However, we are currently of the belief that the costs of these proposals far outweigh any potential benefits to consumers from the mitigation of harm. The proposals instead have the potential to reduce competition, increase financial exclusion and increase the cost of financial services for consumers. The FCA should instead be looking to increase levels of supervision and

enforcement for firms who breach the existing rules which are in place to prevent these same poor practices, both across the regulated financial services sector and at the edge of the perimeter to quickly recognise and act against firms whose actions will cause harm.

We consider that the proposals within this consultation are weakly formed and the options so wide that this should be seen as a further Discussion Paper. We request that a further consultation based on the feedback on these proposals is delivered. This should be supported by the new supervision and enforcement concepts proposed and underpinned by publishing draft rules for consideration as this would be fair on regulated firms.

Notwithstanding our overarching concerns with this work, we believe that any new consumer principle should be outcomes based, but disagree with the wording suggested in this consultation paper. Whether or not a firm has acted to deliver good outcomes for a customer is subjective and could be prone to misunderstanding by customers. We suggest that the wording should be amended and that firms should be required to act to deliver 'fair' outcomes.

Finally, there seems to be little consideration of proportionality in this consultation. We would expect the requirements of product providers and white label manufacturers to differ substantially from those of small distributor firms. Failure to apply a proportionality lens could result in a high level of requirements from small distributors that would be difficult to meet and cost prohibitive, leading to a substantial change in the distribution market biased towards large firms and networks to the detriment of small firms. We would welcome the regulator's thoughts on this issue.

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 are supportive of the FCA's ambition that it wants to see firms avoiding causing harm to consumers by getting it right first time. However, our opinion has not changed since our response to the FCA's initial discussion paper in 2018 in that there is no gap in the current regulatory framework. The existing principles, rules and common and statute law already require firms to follow good business practice which represent the same requirements as a duty of care. Whilst we recognise that consumers are still experiencing harm, we do not believe that this harm is caused by firms who are operating within the requirements of the existing principles and the TCF outcomes. We would welcome any examples that the regulator could provide of firm behaviour that has caused consumer harm that is acceptable under the current framework but will contravene the new consumer duty and suggest such examples are vital to aid firms' understanding of these new requirements.

We feel that TCF outcomes, the vulnerability guidance and the current principles are clear in their requirements and we remain of the opinion that rather than a requirement for a new approach with a new principle, rules and outcomes, the FCA should concentrate efforts on increased supervision and prompt enforcement to ensure that consumers are not harmed and to act as a deterrent to others. This new consumer duty will add a burden disproportionate to its benefits. FCA already has powers but is not applying them rigorously and has previously failed to recognise and act against firms who were breaching the principles and rules that were in place to protect consumers from harm. We do not believe that a new duty will reduce the incidences of consumer harm caused by firms who do not meet the current rules and guidance, it will simply add an additional layer of regulation which is duplicated elsewhere and will increase the costs of compliance for well run, responsible firms and consequently, increase the costs to consumers.

The FCA published its discussion paper on a duty of care in July 2018. Since then, there has been much change in the industry and we believe it is not appropriate to continue along this path on the basis of outdated views. The Senior Managers and Certification Regime was brought in to raise the standards

of conduct and culture for everyone who works in financial services by making senior people in firms more responsible and accountable for their actions. This was only extended to solo regulated firms in December 2019 and it is still too early to assess whether it has been successful in its aim. We firmly believe that the regulator should wait until the changes are fully embedded in firms and ex post impact evaluations carried out before publishing a new discussion paper canvassing views on whether there is a need for a new consumer duty. If there is a consensus that such a duty is required, it should look to consult on a full raft of proposals rather than consulting in a piecemeal fashion with some areas shrouded in secrecy.

In order to fully assess the impact of the proposals contained within this consultation paper, we require more information on how the regulator intends to supervise and enforce these proposals. We understand from the FCA's webinar on the consumer duty that it intends to enhance supervision as part of this initiative, yet we have received no information on these changes. We are concerned that in its move to become a data-led regulator, the FCA will expect firms to provide more data to satisfy these requirements. Many of our members are small firms whose business is to provide simple mortgage and protection advice and they have limited resources. As such we ask that the FCA consider these business models to ensure that any requirements are proportionate. We do not think that by adding new principles and rules that poor firms will be identified or improve. This will require feet on the ground, not becoming robust data managers.

One of the FCA's stated concerns is that firms are considering compliance to be a tick box exercise and that is something that the regulator is trying to mitigate with this consultation. A reliance on data to regulate will only exacerbate these issues. The only way to ensure that firms are truly embracing the rules and principles into their culture is to send people out to visit firms and speak to their staff. We would like to see more of this from the regulator. Indeed, in the period before the pandemic we saw the Network Compliance Forums abandoned without consultation as these were deemed by the FCA to be no longer productive. As the vast majority of intermediary firms are not "enhanced" and are portfolio firms, this was the only direct contact they had and was greatly valued. In addition we have lost the Regional Roundtable exercises which were also seen as productive.

If the proposal to implement a new consumer duty proceeds, then it is important that the same principle is embedded within the FCA's thinking in all areas. In its call for input on open finance, the regulator asked *'whether the right incentives exist for open finance to develop, or would the FCA rules, or any other changes be necessary.'* AMI responded that, *'We believe that open finance should develop in response to consumer needs rather than being artificially forced to develop. We do not believe that the rules should be changed to facilitate this nor that firms should be incentivised to do it. If the changes are right for the consumer, then the demand will exist and firms will want to move into that market. FCA rules have been developed to enhance consumer protection and so should remain throughout the development of open finance.'* It cannot be right that firms should be required to consider consumer needs in every aspect of product development but the regulator is prepared to change rules to encourage innovation. As many of the consumer harms detailed in this consultation relate to digital channels, we are concerned that the FCA's push for technological innovation may have in part led to increasing levels of harm in this area.

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?

As detailed in our answer to question 1, we do not agree that now is the right time to consult on these proposals, nor do we agree with the decision to consult on part of the proposals without divulging all of the information. However, if it is decided that a consumer duty is warranted, we are happy with the proposed structure of a high-level principle, cross cutting rules and four outcomes. We hope that the

regulator will ensure that this structure will be strong enough to hold firms to account for causing consumer harm in cases where it has seemingly not been able to do so using the current framework.

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?

Notwithstanding our objections outlined in question 1, we do not have any objection to this intention.

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 with the intention to apply the concept of the Consumer Duty across all parts of a distribution chain for retail products or services. It is our understanding that firms will be expected to embed the principle into their culture and conduct and we would therefore expect firms to apply the principle regardless. We would welcome more detail on this from the regulator, particularly with regards any prescribed measures that may be needed to ensure that the principle is thoroughly embedded. Is it the intention to include the new principle in the senior manager responsibilities, in the senior manager rules and in the conduct rules?

We would also be interested to hear the FCA's views as to whether it would expect a regulated firm to apply this principle to non-regulated business? This could potentially cause an unlevel playing field and place regulated firms at a competitive disadvantage in areas of non-regulated business. If this were the case, this might lead to more consumer harm on the edge of the perimeter.

There is little discussion on the elements of proportionality. We would expect a scale provider to have significant responsibilities for outcomes and demonstrating adherence. An intermediary packaging product to act as white labelled manufacturer should similarly have the same responsibilities. However, if the same were applied to small distributors, it would be likely that manufacturers could adversely select against them and they could be removed from the chain, so forcing consolidation and a reduction in competition.

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 do not agree with the proposal of a new principle requiring a firm to act in the best interests of its clients. Whilst we note it is not the intention of the regulator to create a fiduciary duty, we are concerned that this could be taken out of the regulator's hands if considered by the courts whether or not a private right of action were allowed. With this in mind, we are not in agreement with a best interests principle.

Whilst we agree that an outcomes-based approach could be a sensible option and would give firms a clear sense of how to act if a situation arose that seemed novel and out of the scope of the outcomes or cross cutting rules, we do not agree with the wording of option one. Whether a firm has acted to deliver good outcomes will be subjective, with the potential to be misunderstood by a consumer who may believe that matters that are outside a firm's control should be taken into account. We would suggest that the wording should be amended to read 'a firm must act to deliver *fair* outcomes for retail clients' which will be easier for consumers to understand. This is also in line with the requirements for decisions made by the Ombudsman Service who resolve complaints based upon what they think is fair and reasonable in the circumstances of the case.

We note that the consultation states that the FCA will not expect firms to go beyond what is reasonably expected given the nature of their role and the product or service they offer and that consumers would remain responsible for the decisions they make. We would welcome some additional guidance and examples on the expectations of the regulator. Firm guidance on proportionality will be key.

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?

See answer to question 7 below.

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

We have some concerns that the statement that firms should take 'all reasonable steps', will lead to firms having to undertake a very big paperchase to document the steps that they have taken to ensure that they have proof on file for the regulator or at a later date in case of a complaint. We suspect that the strength of these rules will see some firms follow them at great expense to themselves and at an eventual cost to the end consumer. The regulator must ensure that adequate guidance is provided to ensure that firms understand the requirements of this rule and how the concept of reasonableness will apply.

The strength of this rule may result in firms looking to reduce their product ranges to enable them to ensure that they have considered everything; it is likely that the difference between reasonable steps and all reasonable steps will take conscientious, rule abiding firms a disproportionate amount of time to satisfy whilst making no difference to firms who do not intend to comply fully with the rules.

We would like the rules to be clear that customers are not absolved of responsibility for their actions. FCA needs to give firms clear examples of good and poor practice, across different markets, to ensure that firms fully understand what is expected of them.

With regards the rule on enabling customers to pursue their financial objectives, we would be grateful for clarification that this new rule will continue to allow firms to work within their disclosures as is currently allowed. Any move to require firms to take a more holistic approach to a customer's financial circumstances would unduly penalise firms, particularly small firms who currently look at just one aspect. The ability for firms to restrict their scope of service and the ability to limit the number of providers considered is an important component of the current regime.

We believe that these new rules may limit competition in the market. These rules could be seen to be contradictory, some firms may be too worried to interact with certain types of customer, some may refuse to take on customers who are not in their target market, others may decide that where the transaction is small it does not make commercial sense from a risk/reward basis. This issue has already been seen in the consumer investments market where the costs of regulation mean that consumers with a lower net worth lack mainstream advised investment options and consequently the regulator is looking to information only or guidance propositions to fill the void.

Whilst the FCA is looking to embed the concept of reasonableness into the duty, we note that there is no mention of proportionality. This was a clear point in the recent vulnerability guidance but whilst we note that the consultation mentions proportionate action in relation to the potential levels of consumer harm, it does not mention proportionality with regards firm size or more significantly the potential to only "target" particular consumer segments. We would appreciate confirmation as to whether proportionality will apply to the measures that firms will be expected to take?

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

We believe that the vulnerability guidance has been a great help to clarify the levels of care appropriate for vulnerable customers, however it is too early to be able to judge any tangible results. We know that our member firms have worked very hard to implement changes in line with this guidance where necessary. Whilst we believe that these proposals, in conjunction with the vulnerability guidance will improve the levels of care for vulnerable consumers, any improvement may be the result of the new guidance rather than any new consumer duty. Without leaving time for the new guidance to bed in before more changes are made, the FCA will not be able to assess the efficacy of each individual change.

The equality and diversity considerations section in the paper notes that where groups of people, especially those sharing protected characteristics (as defined by the Equality Act 2010) may be disadvantaged and experience different outcomes from a firm's products and services, that firms should investigate this and be able to satisfy themselves, and prove to the FCA, that these different outcomes are compatible with firms fully meeting the standards of the consumer duty. Whilst we fully support the objective, we are concerned that this may be a complicated endeavour for firms and we require more information on this point. Is the regulator asking firms to start collecting information on a customer's sexuality, disability, ethnicity etc as part of these proposals? This is quite different to the vulnerability guidance which suggested that firms should focus on a consumer's needs, rather than disability as it recognised that there are very strict controls around special category data. AMI would question the need to collect and store details such as the sexuality of customers who apply for a mortgage.

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?

We feel strongly that if the regulator believes that the new consumer principle and associated rules and outcomes are stronger than the existing regulation, that it should replace what is currently there, and Principles 6, 7 and the TCF outcomes should be disapplied and removed from the FCA's handbook and associated documentation. Failure to do so will lead to confusion for consumers and firms and could dilute the efficacy of the changes. As firms should provide clear communications for their customers, so should the regulator provide clear communication to the financial services industry to eliminate any doubt as to the meaning of the changes

We understand that this will take time, but we believe that it is wholly necessary to ensure full clarity and for firms to understand how existing regulations interlink. It is also important that the regulator provides clarity to the industry on the harm that was caused to consumers by firms who were adhering to the principle and TCF outcomes to ensure that firms understand the reasons for any changes and do not view these requirements as a box to tick.

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?

This detail must be removed from the handbook to avoid confusion. It's not enough to say that the consumer duty should supersede other requirements. The FCA needs to be clear in its communications to ensure that firms fully understand the requirements placed upon them. In the event of the FCA wanting to keep the existing principles, we would request this is assessed against a proper cost benefit analysis.

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?

We do not believe that these proposals will enhance the FCA's competition objectives. These proposals could be detrimental to competition and could act as a barrier for firms looking to cross into financial services from other industries or indeed other countries which have less prescriptive and philosophical regulatory regimes and rely more on market forces and consumer demand to control products. This may be the intention of the regulator but should be considered.

We believe that the new requirements could see firms reducing the number of products in their ranges in order to be able to carry out full consideration of the product value. Within the mortgage industry, we may see an increasing number of firms operating a restricted panel of lenders. The changes may also lead to fewer sales of protection and general insurance products from intermediary firms in view of the large changes and additional requirements that product providers have to undertake on their distribution chains following the recent rule changes in PROD.

Our sector may see similar changes to those that have taken place in recent years in the investments market whereby as it is less profitable to advise on smaller mortgages, the advice options for the more mainstream consumers will become limited. As buying a house is one of the most important touch points in the protection journey, this may lead to fewer people protecting their mortgages by taking out an insurance policy which could lead to greater incidences of unforeseeable consumer harm in the future.

We do agree that these proposals have the potential to enhance FCA's consumer protection objectives, but as mentioned elsewhere in this response, we do not agree with the timeline of these proposals which will not allow the FCA to assess the impact of these proposals. We believe that the FCA should first ensure that it is able to assess the benefits of the implementation of the Senior Managers and Certification Regime as well as the vulnerability guidance, before looking to layer additional requirements on top.

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?

Yes, we agree. The FCA needs to be very clear in its statements that this duty is not intended to impose a fiduciary duty.

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

See answer to question 14 below.

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

We agree with the proposed outcome and objectives and feel that it builds on the work that firms should already be doing as in order to adhere to the TCF outcomes and the guidance on treating vulnerable customers fairly.

It is difficult to comment fully on these proposals without an understanding of how the FCA intends to measure and supervise these requirements, particularly as the regulator seems to be taking a more data-led approach to regulation. We do not believe it will be possible to monitor adherence to these requirements through data. If there is no effective supervision, then we do not believe that this new requirement will make a substantial difference to consumers outcomes.

As stated earlier in our response, it would be useful to understand the FCA's position on proportionality for these requirements and to have an indication of the measures that small firms will be expected to take.

We understand from our member firms that there are some communications that are mandated by the FCA and that are not clear to consumers. Should we revert back to a KFI from the ESIS it was easier for consumers to understand? Is the communication of an APR clear and transparent? Does the required explanation of the cheapest rule help consumers or confuse them? Particularly where the product designated as the 'cheapest' by the FCA's rule, is often not actually the cheapest product for the consumer. Will the FCA look to ensure that mandated communications also meet the requirements of this new duty?

We would appreciate more information from the regulator on its expectations of communications from both the distributor and product provider and how these firms should work together, particularly with regards consumers who have taken mortgage advice from an intermediary. What is the regulator's view of a situation where, at renewal, the product provider puts barriers in the way of the intermediary to stop them from fulfilling their duty to their customer? For example, where the product provider writes to the consumer to offer them a product transfer, in view of the fact that the consumer initially chose the advice route, should the consumer be pointed back to that route? Where a customer is using a mortgage adviser to review their mortgage at the end of the initial term, is it reasonable for a product provider to refuse to give details of the product transfer options to the adviser and to require the customer to contact the lender directly? If a customer, following a mortgage review, looks to take a further advance with the same lender, is it reasonable for a lender to refuse to transact with the broker and to require the borrower to transact directly although they had selected to take advice from a broker? If a customer has chosen to take the whole of market advice route, should lenders create barriers to this?

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

See answer to question 16 below.

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

We agree with the outcome sought by these proposals. However, we believe that this is a fundamental change for the financial services industry and we anticipate that the introduction of new rules for products and services will be some of the changes with the greatest effect under these proposals. Again, it is difficult to comment on these changes until we see the details of the requirements from the regulator, the strength of the changes and the effects on both firms and consumers will all be determined by the strength of the new rules and guidance for which no detail has been given. For example, how will the regulator expect product providers to discharge their requirements and how often will it expect the regular reviews to be carried out?

In the mortgage sector, advisers offer their customers reviews as they come towards the end of their initial rate to ensure that both their mortgage and protection cover continue to meet the customers' changing needs. Will product providers be able to outsource the reviews of the product performance to the adviser to ensure that customers' ongoing needs and the suitability of the products have been considered?

We are of the opinion that an intermediated distribution model is beneficial for consumers. Previous research undertaken by the FCA demonstrates that consumers who use a mortgage adviser are more likely to switch their product at the end of their initial mortgage term and more likely to remortgage,

indicating that they have undertaken a review of their product's value in comparison with other providers.

Mortgage advisers recommend a product based on its suitability to meet the customer's needs. However, following the mortgages market study, our experience demonstrates that the regulator needs to be mindful that statements regarding the need to consider price as part of the product recommendation do not confuse the issue. We have seen some advisers and compliance departments undertake the price comparison as a priority rather than first considering the suitability of a product as that could lead to a consumer taking out a cheaper but less suitable product.

The chase to the cheapest premium has been exacerbated by price comparison websites in the general insurance market but the suitability of the product to meet the customer's needs and requirements seems to take less prevalence in these searches.

Any changes in requirements by product providers may see a reduction of the number of firms in distribution models, and also a reduction in the number of advisers in the market. The regulator should be mindful that any exodus away from the industry will cause a large cost increase to those that remain, particularly whilst the cost of regulation is so high. This in itself, may cause more firms to exit.

It is also foreseeable that some firms consider may consider limiting their product portfolios or their distribution partners in order to be able to better comply with any new rules. This could have some conflict with the cross-cutting rules and prevent some people who are in the designated target market from being able to access the products so easily. It may also result in increased end costs to consumers.

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

See answer to question 18 below.

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

We agree with the proposed outcome that customer service should meet the needs of consumers and allow them to act in their own interests without undue hindrance. We are pleased that the regulator is looking to remove sludge practices. The statement that it should be at least as easy to exit a product as it is to enter it is key. However, we are not able to fully comment on the proposals until we have more detail from the regulator. It is important to know whether there will be a degree of proportionality applied to facilitate the requirements for smaller firms.

We believe that these proposals will be of benefit to consumers who are looking to change their mortgage product at the end of the initial term as members have told us of various methods used to encourage the customer to stay with the lender and to transact directly and without advice. We would appreciate clarification as to whether the regulator would expect a product provider to communicate fully with a customer's adviser if that were in line with the customer's wishes.

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

See answer to question 20 below.

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

We are in agreement with the proposed outcome outlined in this proposal but we understand that the introduction of such proposals will require large changes for firms. As with the other proposals, it is difficult to provide full comment without knowing more information, specifically the expectations on firms

with regards evidencing that they are meeting these requirements and the regulator's supervision of these proposals.

We believe that the regulator should make clear that these proposals do not require firms to provide consumers with cheap products. Such a change could lead to cheaply priced, homogenous products that are not suitable for the variety of needs that we see in the market. Furthermore, consumers would risk not understanding the benefits of any products that they take out which could then lead to consumer harm. A product with a higher price is not necessarily a bad value product and in many cases will provide better value for the consumer.

The FCA should be clear in all communications to highlight the requirements for a product to meet the suitability and needs of a consumer rather than be the cheapest product in the market place. Whilst we are confident that advisers are able to help enable the appropriate decision for their customers, we are not sure that customers would be able to make that same decision on an execution only basis.

We are also concerned that a push from the regulator for firms to place too much emphasis on the price of products, or even a perceived emphasis on the price of products may then reduce the benefits of certain products for example life policies that operate on a pooled risk pricing basis which then allow other, potentially more vulnerable consumers to benefit.

We believe that there is a real risk that if the regulator does not adequately enforce these requirements, then the enforcement and interpretation of the rules will emanate instead from the Financial Ombudsman Service (FOS) when any complaints flow through. The regulator must give clear guidance on its interpretation of the requirements needed to meet this outcome to ensure that the interpretation of FOS remains inline.

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

We fundamentally disagree with a proposal to allow a Private Right of Action (PROA) on the FCA's principles. Whilst the FCA has stated that it is not its intention that a new consumer duty would imply a fiduciary duty, if a PROA is allowed on the principles then it will be the court that decides this, not the regulator. This could fundamentally change the regulation of financial services and risks of firms grappling with conflicting interpretations of the handbook.

We are concerned that claims management companies (CMCs) could see any Private Right of Action as a new business opportunity now that PPI claims are largely concluded, which could lead to a large number of spurious claims for firms.

Mortgage intermediaries have recently been on the receiving end of thousands of Data Subject Access Requests from claims management companies looking to replace their PPI income streams who have targeted customers with interest only mortgages that they claim have been missold. Such practices have led to mounting costs for well managed firms, who need to liaise with their PII provider in these instances and are liable to pay the policy excess for each separate claim. The situation has also led to increased PII costs, both excesses and premiums for firms, some of whom are now essentially self-insuring yet have to maintain their PII cover in adherence to the regulatory requirements. The legal costs alone to defend one case are in excess of £50k which places a huge burden on smaller firms.

We have seen good firms forced to wind down due to these claims as whilst they are likely to win the case in court, they do not have the capital to fund the court journey and are not prepared to risk the loss.

We feel strongly that there are already many ways for consumers to seek redress: through complaints to firms, to the Ombudsman and to the Compensation Scheme. Our members are happy to pay for

these on the basis that it is the right thing to do and reduces the cost to the consumer. The proposal to allow a private right of action on the principles, which are subject to interpretation, could call this decision into question.

Whilst we recognise that the regulator has recently consulted on implementing a fee cap for CMC charges, it is important to note the financial cost to consumers of taking a complaint to court. If the claim is not successful then consumers are liable for their own costs as well as the costs of the other side which could cause significant harm to a potentially vulnerable consumer. As such we are vehemently opposed to this measure.

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?

Our thoughts on the PROA are separate to our answers to the other questions in this consultation.

Q23: To what extent would your firm's existing culture, policies and processes enable it to meet the proposed requirements? What changes do you envisage needing to make, and do you have an early indication of the scale of costs involved?

No comment.

Q24: [If you have indicated a likely need to make changes] Which elements of the Consumer Duty are most likely to necessitate changes in culture, policies or processes

No comment.

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?

This question has been answered elsewhere.

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

We have outlined our concerns of potential unintended consequences throughout our answers to the previous questions. These include:

- If firms have to embed the consumer duty within their firms, these heightened standards could mean regulated firms are no longer able to competitively undertake non-regulated business which could lead to increased levels of consumer harm on the regulatory perimeter.
- The new duty will potentially create frictions in the consumer journey as has been seen with the implementation of the FCA's cheapest rule in mortgages.
- If the FCA does not clearly set out the requirements of firms under these proposals then there is a likelihood that the regulation will be decided by the interpretation of the Financial Ombudsman Service.
- The introduction of more structured links between product providers and distributors could limit the ability of distributors to undertake the act of intermediation so ensuring their activity remains VAT exempt. We do not consider that the FCA should be introducing new rules which make distributors service providers.
- We believe that the new proposals could hamper innovation in the market and act as a deterrent to new firms as it will increase the level of caution in firms.
- We also believe that these proposals will have a detrimental effect on competition, that they will cause a large number of firms to scale back their product offerings and distribution strategies to

ensure that they are more manageable given the raft of new requirements and rules that we expect to stem from these proposals.

- Increased consumer protection measures in the investments market have seen a shift in firm approaches and the costs to firms of onboarding new customers have prohibited them from taking on consumers who have less money to invest. This has conversely led to a reduction of protection for customers who choose to invest as they are instead using the internet for their research and making their own decisions which often lead to greater risk and therefore a greater risk of harm.
- These proposals could lead to greater financial exclusion for more complicated or vulnerable consumers.
- These proposals could act as a barrier for firms looking to cross into financial services from other industries or indeed other countries which have less prescriptive and philosophical regulatory regimes and rely more on market forces and consumer demand to control products.
- We are very concerned about the costs of these proposals, something that we are unable to quantify due to the lack of detail. The market has recently been beset by increases in regulatory costs and these heightened requirements will serve to further increase the costs of products and services to consumers.

Q27: What are your views on the amount of time that would be needed to implement a Consumer Duty following finalisation of the rules? Are there any aspects that would require a longer lead-time?

It is not possible to answer this question with the scant details contained in this consultation. Only when firms understand what the specific requirements will be, and have sight of the new rules, will they be able to quantify the work required to meet them.

The regulator should not underestimate volume of change that firms have been and are coping with. The changes brought in by SM&CR, the vulnerability guidance, operational resilience, GI pricing practices, diversity and inclusion, green finance, not to mention the pandemic are all in addition to a firm's day job. Implementation of any changes resulting from this paper will all take time and the regulator must be cognisant of this and ensure plenty of time is allowed once the requirements have been fully communicated.