



LATHAM & WATKINS

14 September 2022

Financial Regulation Monthly Breakfast Seminar

Overview



A blue-toned background featuring a financial line chart with multiple data series and a grid. The chart shows various trends, including a sharp decline followed by a recovery and another decline. The overall aesthetic is professional and data-oriented.

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Consumer Duty: Final Policy (PS22/9) and New
Guidance (FG22/5)
Nicola Higgs

Consumer Duty: Implementation Timeline



Deadline for agreed plans to implement the Consumer Duty

The Consumer Duty does not apply retrospectively to past business. It will apply on a forward looking basis to **existing products / services** and which are either: 1. Still being sold to customers, or 2. Closed products or services that are not being sold or renewed.

Deadline to produce the firm's first **annual report** on complying with the Consumer Duty.

Consumer Duty Scope: Nuances

Scope = “retail clients”

Scoping Assessment

Relevant businesses lines should be assessed to consider:

1. Whether products / services are delivered **directly or indirectly** to retail customers?
2. Geographic location of those customers?
3. Whether the business has an ability to **determine or materially influence retail customer outcomes?**

Institutional Asset Management

- Delegation arrangements with UCITS managers
- Pension fund clients

Sales & Trading

- Intermediary brokers facing underlying retail
- SME clients

Corporate Deposit Taking

- Influence on underlying retail deposits and ability to influence interest rates

Securitisations

- Acquisition of consumer loan / mortgage books

Proportionality

The impact of the Duty applies proportionately depending on the UK firm’s role in the design / distribution of retail products / services

Reasonableness

The Duty is underpinned by the standard of conduct that could reasonably be expected of a prudent firm

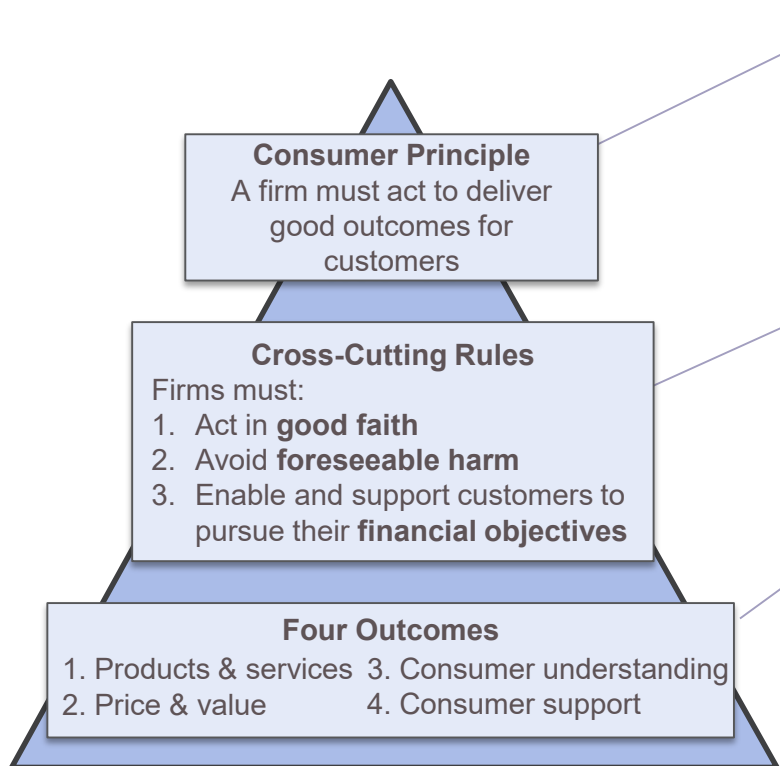
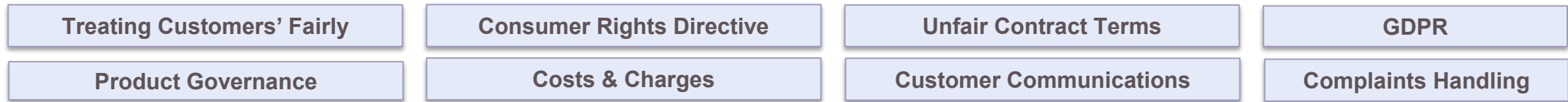
The Duty does not impose an open-ended duty that goes beyond the scope of the firm’s ability to determine or influence consumer outcomes or protect consumers from all potential harms

Consumer Duty: Board Approval of Implementation

Key points for boards

- Appoint a **Consumer Duty Champion** (preferably a NED)
 - **Annual report** on whether the firm is delivering good customer outcomes must be reviewed and scrutinised to confirm the firm is compliant with the Duty
 - Consumer Duty must be embedded into the firm's **strategy** – in addition to **compliance, risk and audit functions**
 - **Management information** required to demonstrate compliance with the Duty
- By 31 October 2022, firms' boards (or equivalent management body) must have agreed their firm's plans for implementing the Duty
 - Firms must be able to evidence they have scrutinised and challenged the plans to ensure they are deliverable and robust to meet the new standards
 - Firms should expect to be asked to share implementation plans, board papers and minutes with supervisors and be challenged on their contents
 - The FCA intends to carry out work during the implementation period to monitor and assist firms. This will include:
 - Supervisory work to understand firms' implementation plans and progress. In FG22/5 the FCA has published examples of the type of questions firms can expect to be asked in their interactions with the FCA relating to each of the outcomes, as well as governance and accountability
 - Reviewing firms' implementation plans and proposed change programmes.
 - Engaging with firms and trade bodies to answer questions and discuss issues they raise
 - Publishing regular updates on its work with firms and further guidance and case studies

Consumer Duty: Building on existing framework



Replaces certain Principles for Business for **retail** customers:

- **Principle 6** - A firm must pay due regard to the interests of its customers and treat them fairly
- **Principle 7** - A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading
- **Good faith** → Characterised as honesty, fair and open dealing and consistency with customer expectations
- **Foreseeable harm** → An *ongoing* obligation to act to avoid *reasonably foreseeable* harm through a firm's conduct, products and services
- **Financial objectives** → A firm's obligation is determined by its role and knowledge of a customer. A higher standard is expected with respect to advised / discretionary managed services

FCA wants to see action in relation to:

- Product & service design
- Price & value assessments
- Customer journey / communications
- Ongoing customer support
- MI enhancements
- Staff engagement / feedback
- Customer engagement / feedback

Consumer Duty: Key Takeaways from Final Rules

Products & Services

Largely replicates PROD. BUT extends the product range beyond MiFID instruments and expands the 'manufacturer' definition

Where existing products / services are subject to PROD, these will not need to be reviewed

Price & Value

All retail customers must receive fair *value* – defined by FCA's minimum fair value factors

More than just price: requires evidencing how fees, product features, service delivery and ongoing support represent fair value

Consumer Understanding

New Handbook guidance to build on FCA's Smart Customer Communications work

Enhanced expectations around the testing and monitoring of communications (in particular in the context of vulnerable customers)

Consumer Support

Applies where a firm is responsible for interacting directly with, and providing support to, retail customers

Firms must not cause harm to customers due to shortcomings in the way they deal with other firms

Vulnerable customers

Enhanced clarity on the expectations of FCA when dealing with vulnerable customers at all stages of interaction

Likely to involve an expansion in consideration of vulnerability metrics. Increased focused on real world events (e.g. cost of living crisis)

A blue-tinted background featuring a financial line chart with a grid. The chart shows two data series: a solid blue line and a dotted blue line. The solid line starts high on the left, dips, rises, dips again, and then rises sharply towards the right. The dotted line starts high, dips, and then trends downwards. The overall aesthetic is professional and data-oriented.

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FSM Bill and Future Regulatory Framework Review
Rob Moulton

EU Law Repeal

- Much existing EU legislation repealed (section 1)
- It seems almost all content will then reappear in regulatory rules instead
- However, the regulated activity of administering a benchmark appears to be significantly narrowed (back to the UK's original 'significant benchmarks only' approach)
- FCA has been approached for confirmation...

Designated Activities Regime

- HMT will press ahead with ability to make rules in non-regulated fields
- Can prevent non-compliant firms from carrying on designated activities
- FCA given investigation and enforcement powers

Designated Activities Regime – Non-Exhaustive List of Potential Activities

- Activities related to entering into derivative contracts
- Holding positions in commodity derivatives
- Short selling
- Securitisation origination, sponsor, lender, SPV
- Selling a securitisation position to a retail client located in the UK
- Offering securities to the public
- Applying for, securing or maintaining the admission of securities to trading on a securities market

Designated Activities Regime – Non-Exhaustive List of Potential Activities

- Issuing an instrument which references a benchmark
- Determining the amount payable under an instrument referencing a benchmark or otherwise being a party to a financial contract which references a benchmark
- Measuring the performance of an investment fund through a benchmark
- Acting as a benchmark contributor
- Contributing data to a regulated benchmark administrator

Critical Third Parties

- Ability for HMT to designate CTPs
- Must take into account materiality of services and number of users
- FCA has the ability to make rules, take disciplinary action, impose Section 166s etc.
- Extra territorial effect
- Joint BoE/PRA/FCA paper sets out more detail

Financial Promotions Gateway

- Firms will need FCA's approval before they can approve financial promotions

Objectives

- New regulatory objectives relating to competitiveness, growth, and the UK's net zero target

FCA/PRA Rule Reviews

- FCA/PRA must have a policy on reviewing their rules
- Treasury has the ability to require reviews
- Creation of new Cost Benefit Analysis panel

Political Influence

- Obligation on PRA/FCA to respond to certain Treasury requests
- Obligation to engage with Parliamentary Committees
- Significant strengthening of scrutiny/influence from Parliament and Government

MiFID Amendments

- All as previously advertised
 - Removing the Share Trading Obligation, and aligning the Derivatives Trading Obligation with EMIR Clearing Obligation
 - Removing the double volume cap and replacing the pre-trade transparency waiver regimes
 - Removing restrictions on midpoint crossing
 - Significantly simplifying the position limit regime



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Proposals for operational resilience of critical third
parties
Rob Moulton

Background

- HMT/PRA/FCA identify ongoing risk of dependence of sector on certain third parties
- Concentration risks can apply through interconnectedness, supply chains, concentration in the provision of services
- Technology is the key foundation of complex financial services businesses – but technology providers currently unregulated
- ‘There is widespread recognition that the existing financial regulatory and supervisory framework has inherent limitations when it comes to managing the potential systemic risks posed by CTPs’

CTP Designation

- HMT will be able to designate third parties as ‘critical’ – CTPs
- Only the critical service provided by the CTP (and not its whole business) will be affected
- HMT to be advised by PRA/FCA
- Designation must take into account both materiality of the services, and the number of users
- Widely understood to include cloud providers, but may be others too
- Agnostic as to location of CTP (extra territorial)

Resilience Standards

- CTPs likely to be subject to rules setting out minimum resilience standards
 - Focussed on existing operational resilience frameworks
 - Working assumption that disruption will occur, and thinking about how to mitigate it rather than prevent it
 - List of international standards to assist in demonstrating resilience standards are met (e.g: Germany's Cloud Computing Compliance Controls Catalogue; US FedRAMP certification; Cloud Security Alliance's Cloud Controls Matrix etc.)

Powers over CTPs

- Broad suite of powers including
 - Issuing a direction requiring a CTP to do or refrain from doing something
 - Appointing a Section 166 skilled person
 - Publishing censure statements, limitations, or disqualification notices

Practical Observations from HMT/PRA/FCA

- List of CTPs is expected to evolve in steps, rather than be complete at an early stage
- Clear that cloud providers will be in the first group
- No intention to create standard clauses between CTPs and regulated firms, but an acknowledgement that rules may assist firms negotiating with CTPs
- Extra resources needed at PRA/FCA/HMT
- Acceptance by CTPs that regimes like this will come in around the world – cloud providers already feel like they are regulated given the scrutiny – and their main focus is to ensure the proposals are internationally aligned, and shaped sensibly, rather than avoided

A blue-tinted background image of a financial line chart. The chart features a grid of dashed lines and a solid line that fluctuates across the grid. The overall aesthetic is professional and data-oriented.

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FCA Fines Sir Christopher Gent for Market Abuse

Rob Moulton

Background

- Gent was ‘an experienced, successful and prominent business man’ formerly CEO of Vodafone, formerly Chairman of GSK, currently Chairman of ConvaTec
- ConvaTec received information suggesting revenue growth would be below guidance provided to market
- Spent several weeks confirming the position before announcing it
- Reduced corporate performance called into question the position of the CEO
- Spent several weeks clarifying the position

Background

- Gent explored CEO's retirement and later told FCA it was 'distinctly likely' (CEO said to FCA it was 'highly likely') CEO would resign at this interim stage
- Gent contacted two major shareholders five days in advance of the announcement of the change in performance, and CEO departure
- Gent did discuss this prospect with a Senior Executive and one (possibly both) of the Company's brokers
- Said he 'didn't [want them] to get it from a press release on the day'
- Company only classified the information as inside shortly prior to the announcement

FCA's Position

- Information on both revenue growth and CEO resignation were inside information prior to the time that the company determined them to be so
- A 'set of circumstances [existed] or may reasonably be expected to come into existence at this stage'
- Fostering good relations with shareholders does not trump the MAR obligation not to disclose inside information

Gent – Key Lessons

- Information can become inside information when it is still uncertain whether it will occur and unclear what the underlying position may be
- The fact the information could not yet be announced does not prevent it from being inside
- FCA does seem to recognise that there can be a short period of time in order to determine what should be announced, but not that absolute certainty or precision around impact must be clear before information is announceable
- Particular challenges in relation to senior executive departures – these can be sensitive, take time, and cannot be partly announced
- Sharing inside information is a ‘necessity’ test – it is insufficient to show that it is subjectively ‘better’, or in the company’s interests, to do so

Gent – Key Lessons

- Confidentiality obligations are necessary, but insufficient on their own if information is shared unnecessarily
- Whilst taking advice from colleagues and professionals is helpful, ultimately individuals must understand the regime and make their own judgements
- Approach taken to other major shareholders (calls with management after the RNS announcement) were seen as a ‘more appropriate means’ of managing shareholder relations
- FCA did note (and did not criticise) ConvaTec’s usual approach, which was to inform some key shareholders after the market had closed on the evening prior to an announcement



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Removal of SEC No-action relief for Soft Dollar
Payments
Rob Moulton

No-action Relief – Background

- MiFID II – unbundling and payment for research
- Extra territorial impact – including US investment advisor requirement
- 26 October 2017 – no-action letter from SEC to SIFMA (due to expire 3 July 2023)

No-action Relief – Update

- Firm intention to allow no-action relief to expire
- Does not affect other statements independent of the ‘temporary advisor status position, such as those regarding client commission arrangements’
- Potential for UK to attempt forbearance as a UK-specific solution?

Institutional Asset Management Symposium



WEDNESDAY

28 September 2022

8:30 - 9:00 a.m. | Registration and Breakfast

9:00 - 1:00 p.m. | Symposium

1:00 p.m. | Lunch

Drapers' Hall

Throgmorton Avenue

London, EC2N 2DQ

Register interest

This year's keynote address will be delivered by [Mark Manning](#), the FCA's Technical Specialist for Sustainable Finance and Stewardship. Mark will shine a light on FCA priorities and share his expert observations and insights.

We have a fulsome agenda, covering – with a decidedly practical slant – a range of highly topical subjects, including:

- ESG – Governance in practice
- ESG – A cross-Atlantic perspective on supervisory approaches and expectations
- ESG – Designing products to withstand greenwashing allegations
- SMCR – Is it time to re-visit your "reasonable steps" framework?
- Consumer Duty – What does this mean for firms?
- Market conduct – The latest industry insights
- Conduct and culture – Direction of travel

Non-Financial Misconduct in Financial Services and Parliament



WEDNESDAY

2 November 2022

8:30 – 10:30 a.m.

Drapers' Hall

Throgmorton Avenue
London, EC2N 2DQ

REGISTER

Join us for a lively discussion based on real-life case studies as we address the complexities of non-financial misconduct and consider lessons to be learned from the continuing 'party-gate' saga.

This session will explore non-financial misconduct's relevance within the financial services context, recent legal developments, and ways to establish practical boundaries.

We will be joined by Beth Rigby, Political Editor at Sky News. Beth has worked as a political journalist for nearly a decade, covering two general elections, the Scottish independence and EU referendums, and all the twists and turns of Brexit.

Speakers



[Beth Rigby](#)

Political Editor
Sky News



[David Berman](#)

Partner
London



[Jon Holland](#)

Partner
London



[Rob Moulton](#)

Partner
London



[Charlie Bowden](#)

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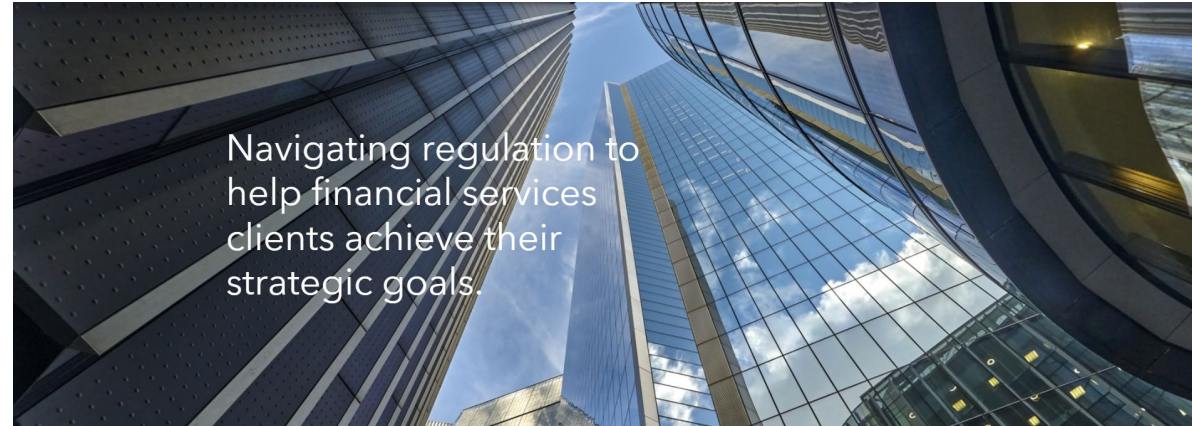
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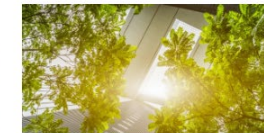
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