

Consumer duty part 3 - 'The drill-down' into the 'cross-cutting' rules

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Consumer duty part 3: Enabling and supporting customers' financial objectives

This article is the third in a series to help firms deal practically with the 'cross-cutting rules' ("CCR") within the new 'Consumer Duty' ("CD") regime.

1. The immediate context

On 31 July 2023 the CD rules take effect. Their cornerstone will be [Principle 12](#): "A *firm* must act to deliver good outcomes for *retail customers*" (not limited to "*consumers*").

The principal framework for the regime is set out from [PRIN 2A.1](#) (accessible via the FCA Handbook's 'timeline' feature).

The CCR include ([PRIN 2A.2.14 R](#)): "A *firm* must enable and support *retail customers* to pursue their financial objectives" (the 'Customer Financial Objectives Rule – "CFOR")

2. How the CD rules address the CFOR

2.1. The 'prudent firm'

PRIN 2A contains guidance which highlights 'prudence' as a particular component within the CFOR:

PRIN 2A.2.22 G: "Enabling and supporting *retail customers* to pursue their financial objectives does not mean that a *firm* is expected to go beyond what a prudent *firm* carrying out the same activity in relation to the same *product*, taking appropriate account of the needs and characteristics of *retail customers*, including in particular as set out in [PRIN 2A.7.4G](#) to [PRIN 2A.7.5G](#), would do ..."

The characteristics of a prudent firm's operations are indicated in PRIN 2A.2.20 G, and include: "... acting to empower *retail customers* to make good choices in their interests ...

(1) ensuring all aspects of the design, terms, marketing, sale of and support for ... *products* meet and not frustrate the objectives and interests of *retail customers*;

(2) making sure *retail customers* have the information and support they need, when they need it, to make and act on informed decisions;

(3) enabling *retail customers* to enjoy the use of their *product* and to switch or exit ... where they want to without unreasonable barriers or delay; and

(4) taking account of *retail customers*' behavioural biases and the impact of characteristics of vulnerability [during] ... customer interaction."

2.2. Reasonableness

PRIN 2A.2.22 G explains that the CFOR: "... does not require *firms* to go beyond what is reasonably expected by *retail customers* in the delivery of the *product*." However, a firm's understanding of what is reasonably expected is informed by what a firm should reasonably know, as per PRIN 2A.2.16, 17 G (emphasis added). "A *firm* which provides ...

... an execution-only service or a non-advised service can assume (unless it knows or **could reasonably be expected to have known otherwise**) that the financial objectives of *retail customers* are to purchase, use and enjoy the full benefits of the *product* in question ... [or]

... advisory or discretionary services is entitled to rely on the objectives that *retail customers* have disclosed unless it knows **or could reasonably be expected to know** that information disclosed is manifestly out of date, inaccurate or incomplete.”

In particular, PRIN 2A.2.18 G highlights that compliance with specific rules pertaining to the suitability of particular products is fundamental to ascertaining the reasonableness of a firm’s knowledge: “Information a *firm* must obtain under a provision of law (including, ... *COBS 9.2.1R*, ... *ICOB 5.2.2R*, *MCOB 4.7A.6 R*, ... and *CONC 5.2A.5R*) is relevant to whether a *firm* knew or could reasonably be expected to know that a customer has different financial objectives ...”

3. Understanding the CFOR from outside the CD rules

3.1. The nature of the CFOR

The FCA’s guidance in *FG22/5* shows how the CFOR is the ‘other side of the coin’ from the first two CCR:

“Product design that disguises risks is ... likely to be inconsistent with firm acting in good faith and enabling and supporting customers to pursue their financial objectives ...

... unreasonable exit charges ... may cause foreseeable harm and are unlikely to support customers in fulfilling their financial objectives.”

3.2. Giving effect to the CFOR

The key to compliance with CFOR is “creating the right environment” for the customer’s pursuit of its financial objectives. Customer communication methodologies are central to this, as per the FCA’s generalised examples of good and bad practice:

“One customer was unable to read large print and did not know braille. They informed their bank of this and asked to receive communications by email, to allow them to use software to turn the emails into speech.

However, the bank continued to send the customer communications on paper, and not by email. This firm did not tailor its communications taking into account the known characteristics of the recipient, which it became aware of when interacting directly with the customer on a one-to-one basis. The firm did not act reasonably to avoid causing consumer harm or enable them to pursue their financial objectives ...

A firm sells a high-risk investment product online on an execution-only basis. As part of the sales process, it requires customers to watch an educational video on investment risks, the benefits of diversification and regulatory protections, before purchasing the product.

While some customers may consider this to be an unnecessary step, it has been designed for the purpose of supporting them in making informed decisions and to reduce the risk of harm that could arise if they purchase a product and it is not right for them.

Therefore, this is unlikely to amount to an unreasonable barrier under the consumer support outcome as the firm has acted to avoid causing harm to its customers, enabling them to pursue their financial objectives ...

During our work [on] ... the Coronavirus Tailored Support ... we identified that some firms used [third party] digital tools when providing financial help [to customers, and these tools amounted to] ... ‘sludge’ practices which can ... prevent customers from pursuing their financial objectives.

These practices included:

- customers ... having to register and log on to more than one system or platform to complete the automated forbearance journey
- customers ... using third party digital tools having to wait a day or more before receiving confirmation of their payment plan or if they need to provide further clarity.”

3.3. Other regulatory rules

The FCA’s reference to the ‘prudent firm’ in CFOR guidance calls to mind the ‘prudent person principle’ (“PPP”) under Article 132 of Solvency II. At face value the PPP is about the appropriate management of assets, but each management activity in issue is a type, or involves a manner, of conduct which illustrate how a ‘prudent firm’ should conduct itself under the CFOR, as per the quote / transposition below:

“[Firms] shall only [take steps] whose risks they can properly identify, measure, monitor, manage, control and report, and appropriately take into account in assessing [customer] needs.”

Specific assistance from the PPP can be found in its provisions that:

“Assets are to be invested in the best interest of all policyholders ... taking into account any disclosed policy objective ... [and]

In the case of a conflict of interest, firms, ... shall ensure that investments are made in the best interest of the policyholders ...”

4. Legal ramifications and conclusion

The concept of the ‘reasonably prudent person’ is central to the English common law duty of care, and judgments identify what such a person would or would not do in the circumstances of a particular case.

However, becoming or being a ‘prudent firm’ for the CFOR involves creating an environment that enables and supports customers in making and being subject to properly informed decisions and actions. Such an environment can only thrive in the right culture.

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