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By email: ApproachtoConsumers@fca.org.uk

Dear Sir / Madam,

GC 19/3 Guidance consultation - Guidance for firms on the fair treatment of vulnerable customers

This is the Financial Services Consumer Panel's response to the FCA's Guidance consultation 'GC 19/3 - Guidance for firms on the fair treatment of vulnerable customers'.

The Panel welcomes the FCA's work in this area. The Panel's key points are:

- We support the view that firms must show greater care towards consumers who are less able to take responsibility for their decisions, and the proposed outcome that vulnerable consumers should get outcomes that are at least as good as other consumers.
- We believe all consumers are potentially vulnerable because of the power asymmetry between them and firms. We hope the guidance will focus firms on the level of care required towards all their customers, and encourage inclusive design approaches without detracting from specific initiatives around particularly vulnerable groups
- We continue to believe a new duty (e.g. a statutory duty of care) is required to properly reflect the position of consumers in the market and raise standards for all
- We think FCA has struck a good balance in the guidance, but suggest a number of additions:
 - Setting out an assessment of where the market now stands in regard to the stated outcome, progress made to date, and the anticipated path of further improvement
 - Reminding firms that the guidance does not create new requirements and that firms will be held accountable for the fair treatment of vulnerable consumers under long-standing rules and principles
 - Underlining the role that senior leadership should play in recognizing the importance of the Guidance and ensuring this is disseminated throughout their firm
 - Highlighting the principle that firms must manage conflicts of interest between customer groups and should not therefore trade off the needs of different consumers to their own advantage
 - Helping firms understand their obligations to avoid excluding vulnerable groups from accessing or continuing to use their services, especially among existing customers

- Adding more material on how firms can meet diverse communication and information needs alongside complying with existing requirements for prescribed documentation. The aim here is to enable and improve informed decisions among all customer segments
- Highlighting that people are more likely to take out certain products, or seek changes to those they already have, at times of greater vulnerability, for example when making decisions about retirement, seeking to change the terms of a mortgage, or seeking short-term borrowing , so a focus on the needs of vulnerable consumers in these markets would be particularly beneficial

The Panel's answers to the questions posed by the FCA are set out below.

Yours faithfully,

Wanda Goldwag
Chair, Financial Services Consumer Panel

ANSWERS TO CONSULTATION QUESTIONS

Q1: Do you have any comments on the aims of the draft Guidance?

The Panel supports the FCA's aims for the draft Guidance and its desire to make clear what firms should do to ensure that vulnerable consumers are treated fairly. The Panel strongly endorses the focus on outcomes, specifically FCA's clear articulation that the outcomes experienced by vulnerable consumers should be at least as good as those of other consumers.

We welcome the emphasis on:

- Understanding needs in a firm's target market and designing products and services accordingly
- Consistency of outcomes for consumers
- Culture within firms and senior accountability for outcomes
- Constant review and refresh to ensure products and services continue to meet needs and deliver similar outcomes for all consumers. This is the right approach to achieve a significant and lasting improvement in the way that firms treat vulnerable, and potentially vulnerable, consumers.

The FCA's approach ought to encourage firms to focus on the outcomes that they deliver for all their customers and is a useful reminder of the standards that all consumers are entitled to expect.

The outcomes-led approach should also increase the likelihood of firms taking responsibility for how they treat vulnerable customers and thinking constructively about how to engage with them, instead of relying on adherence to guidance from the regulator, and demanding ever more detailed guidance to cover every circumstance.

Q2: Do you have any comments on the application of the Guidance or its status as non-Handbook guidance?

The Panel supports the FCA in not attempting to prescribe solutions for firms to the challenges of meeting vulnerable customers' needs.

The guidance reminds firms of the standards expected for all consumers and highlights the additional care required for particular groups whose outcomes might otherwise fall short. Firms should understand the standards already and be applying them. Therefore, there should be no ambiguity around how supervision and enforcement will use the guidance or around the standard of care firms are required to demonstrate. While many firms will regard it as a helpful document in developing and confirming their policies and processes in relation to vulnerable consumers, there is a risk that some may fail to give it proper consideration owing to its non-binding status. The FCA should ensure that firms are left in no doubt as to the importance the regulator attaches to the treatment of vulnerable customers, and the positive role that the non-binding Guidance can play in assisting firms in sense-checking their actions. This should be made clear in all the regulator's interactions with firms (e.g. in all supervisory engagement and in the prospect of enforcement action which could refer to the Guidance).

To emphasise these points, FCA could include in the final guidance:

- Examples of the previous use of non-binding guidance in enforcement decisions

- Case studies or examples of the tools supervisors use to verify that firms have considered and acted on such guidance
- A reminder that because the guidance does not change standards or impose new obligations, its publication does not mark the start of a new regime or a date after which firms should be treating vulnerable customers better. The guidance is a milestone on a journey and firms remain accountable for their treatment of vulnerable customers to date. The principles have existed for years, the Equality Act is 9 years old, and it is over 4 years since the publication of the FCA's Occasional Paper 8 on Consumer Vulnerability¹. Firms should already be able to demonstrate a track record of improvement and change, of embedding fair treatment of vulnerable customers in culture, and be able to show through continuous review and learning that the treatment of vulnerable customers is not a one-off initiative or a compliance-led box-tick exercise.

The FCA's draft Guidance helpfully sets out its views on how firms can ensure they treat vulnerable customers fairly based on FCA Principles. In this exercise, the FCA rightly draws attention to the importance of Principle 6 (Treating Customers Fairly), Principle 2 (Skill, care and diligence), Principle 3 (Management and control), Principle 7 (Communications with clients) and Principle 9 (Customers: relationships of trust). The Panel suggests the FCA should also refer to Principle 8 (Conflicts of interest) which states "*a firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client*". Encouraging firms to focus on the interests of different groups of customers, and reminding them that their own interests must not drive trade-offs between groups, would help to reinforce the FCA's aim to ensure that the outcomes experienced by vulnerable consumers should be least as good as those of other consumers, and help guard against any levelling down of standards.

Q3: Do you have any comments on the distinction between actual and potential vulnerability (Annex 1, Section 1)? (Please note we are not seeking views on the meaning of vulnerable consumer because we have consulted on that previously.)

The Panel is pleased with the specific references to potentially vulnerable groups within the guidance. It emphasizes firms' obligation to consider people whose vulnerability might be transient, episodic or variable. Adopting such a broad approach reflects the reality of vulnerability, with people moving in and out of vulnerability, as well as being more susceptible to becoming vulnerable due to their personal characteristics or circumstances. This new, broader approach should help to encourage firms to move away from existing processes which all too often can rely on tick-box compliance and the categorization of customers into more immediately apparent types of vulnerability.

More importantly it reminds firms that the power and information advantages they enjoy mean that all consumers are potentially vulnerable. Firms' products, services and conduct can create vulnerability, make it more likely that vulnerability gives rise to harm, and make harm that does occur more severe. The guidance is not just about equalizing outcomes for groups with different characteristics, it's about reminding firms of the standards that regulation requires for all consumers and firms' accountability for treating everyone fairly.

¹ <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-8.pdf>

The Panel is pleased the FCA has acknowledged in this way the role that market structure or firm practices can play in causing harm to potentially vulnerable customers. The Panel has previously put forward this argument, pointing out in its responses to the FCA Mission² and Approach to Consumers³ consultations that all customers are potentially vulnerable due to the power asymmetry with firms. The Panel suggests that the FCA should make this explicit and, in thinking of vulnerability and potential vulnerability, firms should consider how they can deliver fair and consistent outcomes for all their customers.

Q4: Do you have any comments on our view of what firms should do to understand the needs of vulnerable consumers (Annex 1, Section 2)?

The FCA draft Guidance is helpfully structured to provide clarity about what firms should do to treat vulnerable customers fairly at different stages of their interactions with consumers. This format should assist firms by making the Guidance more accessible, though the FCA may want to consider producing more concise materials summarizing the key elements of the Guidance for wider dissemination.

The Panel commends the FCA for including examples of both good practice and poor practice throughout the draft Guidance. This is useful to bring to life the types of activity which firms should consider when thinking constructively about how to engage with vulnerable consumers.

In relation to what firms should do to understand the needs of vulnerable consumers (Annex 1, Section 2), the Panel welcomes:

- the FCA's emphasis on the importance of firms undertaking proactive action to understand the needs arising from different vulnerabilities, though it would be helpful to make clear that such proactive action should be taken throughout the duration of the relationship with the consumer since vulnerabilities can be transitory, or can worsen or improve over time;
- the identification of four drivers of potential vulnerability, and suggestions for some of the situations and circumstances that may lead to a consumer becoming vulnerable;
- FCA's suggestions for possible ways firms can develop their understanding of the needs of vulnerable consumers. This is particularly important where firms offer products that are more likely to be taken out at times of greater vulnerability.

The Panel considers that this provides the right level of information for firms to enable them to respond positively to the FCA's expectations and to deliver consistent outcomes. The FCA should resist providing ever more detailed guidance for every circumstance since this will hinder its desire for firms to take responsibility in deciding how to achieve the right outcomes.

In the final guidance, FCA could remind firms of the prevalence of certain types of vulnerability, such as low reading age and average adult numeracy skills, hearing and sight impairments, and mental illness. Most vulnerabilities are invisible. They could highlight that in many cases the majority of users of a product or service will be vulnerable, and thus do more to encourage firms to adopt inclusive design approaches. It is likely that inclusive design will be more cost-effective than offering multiple specific adaptations to a core product, process or service.

² - https://www.fs-cp.org.uk/sites/default/files/fscp_response_fca_mission.pdf

³ https://www.fs-cp.org.uk/sites/default/files/fscp_response_approach_to_consumers.pdf

Q5: Do you have any comments on our view of what firms should do to ensure staff have the necessary skills and capabilities when engaging with vulnerable consumers (Annex 1, Section 3)?

It is essential for firms to ensure staff have the necessary skills and capabilities when engaging with vulnerable customers. If this is not the case, then this will undermine even the most progressive policies and processes.

The Panel particularly welcomes the FCA's acknowledgement that it is important for firms to recognize the role that *all* staff play in meeting the needs of vulnerable consumers. Many front-line staff, for example in banking, are young and may not have the life experience to recognize or understand the impact of the vulnerabilities presented by their customers. It is the responsibility of firms to design training and governance to equip them with the training and specialist support necessary to provide a good service to all customers, including those with vulnerabilities. While front-line staff perform a vital role due to their direct contact with consumers, consideration of the needs of vulnerable consumers should not be confined to them. Ensuring that all staff, including those responsible for developing products and processes, consider the needs of vulnerable consumers should result in better outcomes for all consumers and help to make it easier for frontline staff to respond to consumer needs.

To ensure that this wider approach to considering the needs to vulnerable consumers is embraced by firms, it will be critical for the FCA itself to change how it approaches vulnerability. Rather than through separate vulnerability-specific initiatives, the FCA will need to make sure that in all its supervisory activities and engagement with firms it seeks evidence to ascertain how vulnerability is taken into account throughout a firm. This approach should also help to address discrepancies about the knowledge of vulnerability policies and their implementation between different parts of the firm.

Q6: Do you have any comments on our view of what firms should do to translate their understanding of the needs of vulnerable consumers into practical action on product and service design, good customer service and communications (Annex 1, Section 4)?

The Panel applauds the FCA for setting out its expectations for what firms should do to ensure that product and service design take account of the needs of vulnerable customers. This has the potential to deliver significant improvements for large numbers of customers since its impact will potentially be felt across large parts of the firm's customer base, rather than limited to individual customers who can benefit from specific adjustments.

We also welcome the FCA's recognition that firms should use their understanding of the needs of vulnerable consumers to consider how best to serve these customers and how they should communicate with them. This has the potential to benefit all consumers.

The Final Guidance could make clearer what firms could do in the area of customer communications. It should call out unacceptable practices such as where firms – either deliberately or inadvertently – reduce a customer's ability to properly consider and make an informed decision, for example through the use of aggressive marketing that puts consumers under pressure to make quick decisions that are not in their interests.

The Panel often hears of the tension between trying to meet consumers' needs and the heavily-prescribed format in which information is required to be given. In some areas (e.g. some areas of consumer credit), the form and content of communications to consumers is heavily prescribed. In its Guidance document, the FCA should set out its view on how such

prescription does or does not restrict a firm's ability to tailor consumer communications or to provide supplementary, more accessible information in different formats. The guidance helpfully references the FCA's previous work on smarter communications⁴, but it could usefully be more explicit about the conclusions of that work. Our understanding is that while firms are bound by the detailed requirements, they have significant flexibility in providing additional separate information to consumers, including via the creative use of different media and channels, even where written communications are required under maximum harmonization legislation. If this interpretation is correct, FCA should include such a summary in the Guidance.

The Guidance reminds firms that they owe additional care to consumers who are less able to take responsibility for their decisions. It could also talk about the potential usefulness of guidance and advice in assisting decision-making and helping firms comply with Principle 9. People with certain vulnerabilities often need more support in reaching decisions and guidance and advice interventions are potentially very helpful. Firms are often put-off by the potential cost and liability associated with advice, but technology ought to help with the cost and much advice and guidance could be offered by outsourced providers or partners.

The FCA should also make more explicit its view that consideration of consumers' information needs should influence how it distributes products. Where necessary – for example where a product may be complex, or where there is a risk a consumer may not fully understand the product features – a firm should consider whether the product is only offered with advice or whether signposting to advice or guidance would help a consumer make an informed decision.

Q7: Do you have any other comments on the draft Guidance?

One potential unintended consequence of the FCA's focus on vulnerability, and of the guidance's objective of ensuring similar outcomes for all consumers regardless of vulnerability, is that firms might choose to deter or exclude particular groups of consumers from using their products and services.

One approach to mitigating this risk would be for the final guidance to include the FCA's view on whether such strategies would breach the direct and/or indirect discrimination provisions of the Equality Act 2010. Another, especially if the Equality Act is not thought to offer broad enough protection, would be for FCA to set out its expectations on firms with regard to:

- Existing customers
- Signposting to alternative or more suitable services.

The draft Guidance, specifically Figure 3 on page 27, seems to assume a very simple chain / firm structure. This means it does not reflect the reality of how firms are structured, with little mention of frontline staff working for e.g. outsourcing firms, franchises, other 'trading styles' in a group of firms, as well as other bits of the supply chain e.g. brokers and lead generators. The FCA's work on motor finance work highlighted issues with car dealers who work at arm's length from the finance firms who pay their commission⁵. The FCA guidance

⁴ DP15/5 and subsequent FCA Consultation Papers and Policy Statements

⁵ <https://www.fca.org.uk/publication/multi-firm-reviews/our-work-on-motor-finance-final-findings.pdf>

should mention this more explicitly and make clear where the responsibility lies for ensuring these 'non-core' staff take account of customer vulnerability.

We also note that the draft Guidance makes little reference to the role of senior leadership teams and non-executive directors, yet they are responsible for the firm's culture and strategy which will impact vulnerable customers e.g. decisions about physical infrastructure via which products are marketed and sold, branch networks etc. The Guidance should make clear the important role senior leaders can and should play in setting the right culture within firms so decisions which affect vulnerable consumers properly take account of their needs. This could usefully link to the FCA's continuing priority to improve culture⁶.

There is also very little mention in the draft Guidance of tech and automated decision-making, and how this might impact on vulnerable consumers. Questions to consider might include:

- what happens if AI training data doesn't include vulnerable customers?
- How can firms make sure their systems and processes are not discriminatory?

The Panel suggests that the Guidance should include greater consideration of these type of issues to prompt firms to take account of them when designing new services, and to ensure that vulnerability considerations are hardwired into their design.

Q8: Do you have any comments on how firms are expected to use and apply the Guidance?

The Guidance helpfully provides greater clarity about the FCA's expectations for how firms should take account of the FCA's Principles for Business to treat vulnerable consumers fairly. It should, however, make clear that there should be meaningful support and buy-in at a senior level. As we state in our answer to Questions 15-18 the FCA should consider the merits of making the treatment of vulnerable customers a prescribed responsibility under the Senior Managers and Certification Regime (SMCR).

While the Guidance includes some examples of good practice and poor practice, it is right that the FCA has not attempted to prescribe what firms should do in every situation. There is a risk, however, that in producing the Guidance the FCA creates an opportunity for some firms to demand ever more detail and to allow them to perpetuate a more compliance-led tick box approach to identifying vulnerability. The FCA's two-stage consultation process heightens this risk. The FCA should resist such calls and have confidence in its belief that firms should 'own' their approach to ensuring vulnerable customers are treated fairly, rather than relying on the FCA to spoon-feed them what form this should take.

Q9: Do you have any views on the extent to which the Guidance will enable firms to comply with their obligations under the Principles and achieve better outcomes for vulnerable consumers?

The Panel considers that the FCA has managed to achieve an appropriate balance in its draft Guidance. It should prove useful for firms with established policies and processes to check these are appropriate and in line with FCA expectations, whilst also serving as a valuable introduction for firms which have not yet developed their approach.

⁶ <https://www.fca.org.uk/firms/culture-and-governance>

Q10: To inform our cost-benefit analysis, do you have any comments on what costs firms may incur as a result of this Guidance?

It is for firms to provide information about the type and level of costs they may incur as a result of the FCA's Guidance. We note, however, that the FCA is not imposing new requirements or standards on firms. Nor are they prescribing how firms should comply or demonstrate their compliance. Therefore, our starting point is that any costs firms incur as a result of the guidance are either necessary to comply with long-established standards, or voluntary ways of demonstrating to internal and external stakeholders, including FCA, how they are performing.

The Panel would make one broader observation about the wider implications of the FCA's approach and the potential benefits this might deliver to consumers. This is to note that the FCA's assertion that firms should focus on "*ensuring the outcomes experienced by vulnerable consumers are at least as good as those of other consumers*" has the potential to act as a real spur to incentivize competition to operate in a way that fully embraces inclusive design. Rather than products and services for vulnerable consumers being adapted versions of existing products, such an approach could transform the market so that products and services are designed with vulnerable consumers in mind at the outset and thereby make them more accessible to all consumers. Such an approach has the potential to fundamentally alter calculations of costs and benefits.

Q11: Do you have any examples of activities or processes that are in place, or could be established, to ensure the fair treatment of vulnerable consumers?

There are a number of examples of good practice which merit consideration by the FCA:

- Work highlighted by Macmillan in its 'In the Balance' report which includes information about its work with two firms to help them improve the service they offer to customers affected by cancer⁷.
- The Money Advice Trust has conducted extensive work in this area and has created a variety of useful training materials and resources⁸.

Q12: Do you have any analysis you could share with us of the positive outcomes for vulnerable customers resulting from the implementation of activities or processes in place aimed at achieving better outcomes for vulnerable consumers?

No comment.

Q13: Do you have any comments on the role of the Guidance in holding firms to account about how they comply with their obligations under the Principles in treating vulnerable consumers fairly?

The guidance is the latest in a series of publications in which FCA has set out their expectations for firms. The FCA's Occasional Paper 8 contained a number of questions that firms should ask themselves, and that could form the basis of relevant indicators and measures that firms could use. Supervisors should already be holding firms to account for how they treat vulnerable customers, including:

⁷ https://www.macmillan.org.uk/_images/MAC16756-In-The-Balance-Report-ENG-Web_tcm9-313924.pdf

⁸ <http://www.moneyadvicetrust.org/creditors/creditsector/Pages/Vulnerability-resources-hub.aspx>

- How well firms understand the diversity of needs among their customers and target customers
- how data is gathered and used to measure success
- how measures inform decisions, and how decisions convert to actions
- how firms constantly review and refresh their policies and practices and close any identified policy/practice gaps.

The renewed focus on outcomes in the guidance ought to spur firms to challenge themselves in understanding what outcomes their products and services are intended to deliver, and how they measure whether or not they do so. It provides supervisors with a refreshed opportunity to check how firms are progressing.

It's important that FCA help the market on its journey of improvement by being transparent in its supervisory findings, highlighting good and poor practice that it comes across.

The Panel welcomes the FCA's intention that its supervisory teams will expect firms to consider the relevance of the Guidance for their firm and, where necessary, to take action by improving existing, or implementing new, practices and processes. The Panel would anticipate that the FCA's supervisory teams should be actively feeding into the development of the draft Guidance to ensure it can be implemented efficiently and effectively.

The Panel would also like to understand how the FCA plans to disseminate the Guidance and ensure its effective implementation throughout the flexible portfolio which does not have regular engagement with the FCA's Supervision teams.

Q14: Do you have any comments on our intention to monitor the effectiveness of the Guidance?

The Panel welcomes the FCA's focus on outcomes when monitoring the effectiveness of the Guidance. In particular, we welcome the FCA's clear commitment that the Guidance should result in improved outcomes for vulnerable customers, and that it will be looking for firms to embed the fair treatment of vulnerable customers into their culture. The Panel would welcome further details on how the FCA plans to measure outcomes rather than recording and monitoring firms' systems and processes, as it recognises that this can be challenging.

The FCA has made clear its desire for firms to embed the fair treatment of vulnerable customers in their culture. This culture change needs to be matched by the FCA and its supervisory approach if it is to adequately monitor, record and, where necessary, challenge firms over their response to the publication of the FCA Guidance.

Q15: Do you have any comments on the potential additional policy options?

Q16: Should we consider any further additional policy options?

Q17: Do you agree that proposing to issue guidance is the most effective means of achieving our aim at this stage?

Q18: What are your views on whether proposing new rules or guidance at this stage would add to the effectiveness of our intervention? Where possible, please provide supporting evidence for your answer.

We answer Questions 15-18 together.

We are comfortable with the guidance as FCA's next step in securing adequate consumer protections for vulnerable people. We would welcome transparency on where the FCA thinks the industry now is with regard to the outcome the guidance is designed to deliver, the trajectory of progress since the publication of OP8 in February 2015 and its expectations for the path of further progress. Further, more prescriptive interventions should be considered alongside monitoring against that path, and alongside prompt enforcement against firms who fall short.

There are other policy interventions FCA might consider. For instance, the treatment of vulnerable customers could become a prescribed responsibility under the Senior Managers and Certification Regime (SMCR). In our opinion, this would ensure that treatment of vulnerable customers receives appropriate attention at a senior level within firms.

The Consultation refers to FCA's work on a new Duty of Care or alternative duty on firms. The Panel is clear that the guidance and any such new duty are complementary regulatory tools. One is no substitute for the other. The vulnerability guidance is about making sure particular groups of consumers are not treated less well than others. The debate about a new duty relates to setting high enough standards for all. We do not believe consumer protection is satisfactory in the modern financial services market and continue to support a Duty of Care and/or other measures to raise standards.