

A blue-toned background image featuring a financial line chart with multiple data series and a grid of horizontal and vertical dashed lines.

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12 June 2024

Financial Regulation Monthly Breakfast Seminar

Overview



The FCA's Dear CEO letters on implementing the Consumer Duty for closed products and services

The impact of the general election on the regulatory reform agenda

ESMA's statement on good practices in relation to pre-close calls

An ESG update, including implementation of the UK SDR framework, and the latest on greenwashing from the EU

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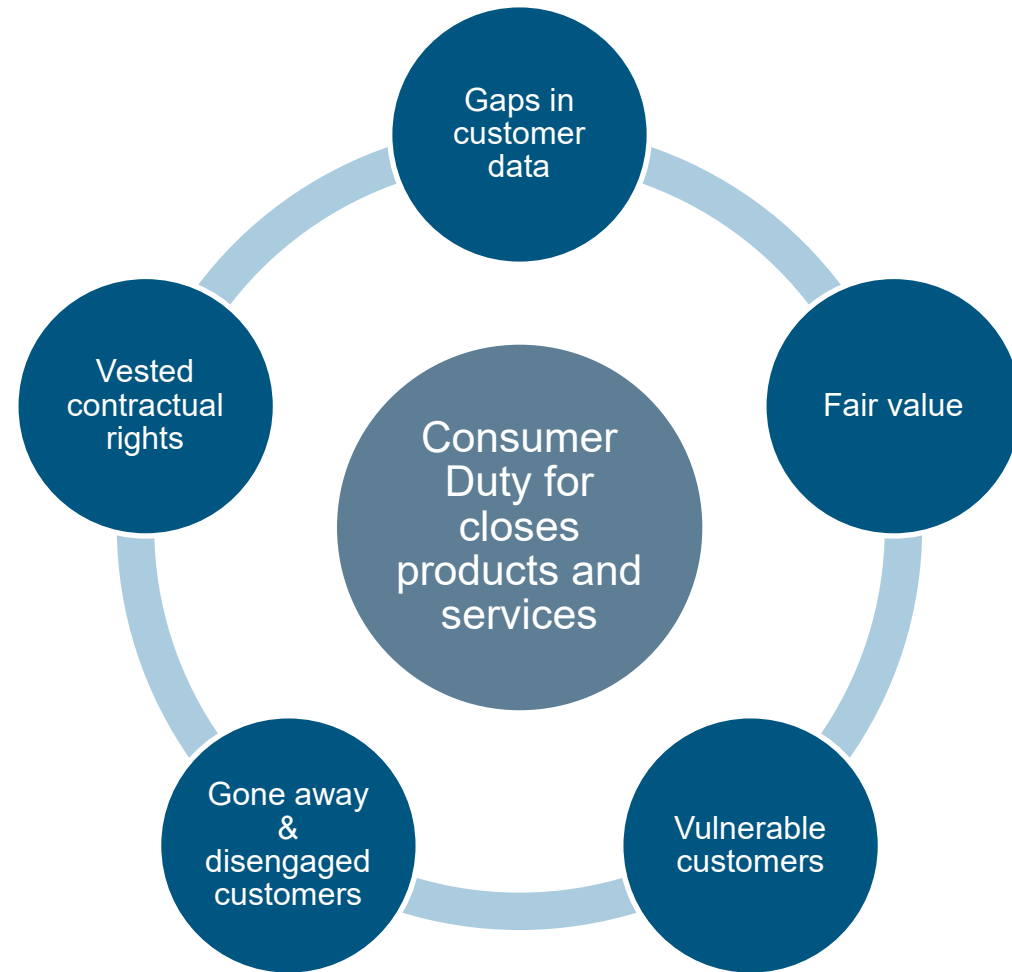
The FCA's Dear CEO letters on implementing
the Consumer Duty for closed products and
services

Becky Critchley

Dear CEO Letters

- 16 May 2024 six Dear CEO letters:
 - Asset management
 - Consumer finance
 - Consumer investments
 - Life insurance
 - Retail banking
 - All other firms
- FCA sets out five priority areas and “action prompts”
- Questions for firms:
 - “How would we respond to these questions if asked by the FCA, or our Consumer Duty Champion?”
 - “How are our responses recorded as part of our ongoing data and monitoring?”
 - “How do we close gaps and how do we evidence gaps are closed?”

Five priority areas



Gaps in customer data

- Legacy products and systems
- Firm M&A and back-book sales
- Historic record keeping issues
- Identifying and taking proportionate steps to address gaps

FCA Action Prompts:

- Have you identified what are material data gaps for your firm?
- Have you explored different ways to identify and fill material data gaps, and to cleanse and update existing data?
- Where data is not available, what action can you take to ensure your firm is delivering good outcomes for customers, both in advance of the 31 July 2024 deadline and ongoing?

Fair value

- Applies on a forward-looking basis only
- There must be a reasonable relationship between price and the benefits of a product/service
- Consistency between the fair value framework for open products and services and that for closed products and services

FCA Action Prompts:

- Have you applied your fair value framework consistently to open and closed products and services? You should justify any different approaches you have taken.
- Have you assessed the expected total price to be paid by or become due from retail customers? Is this reasonable relative to the potential benefits provided by the product or service to retail customers?

Vulnerable customers

- Closed products may present a particular risk of harm
- Firms must consider if any vulnerable customers experience poor outcomes

FCA Action Prompts:

- Is any enhanced action, monitoring or support needed for potentially vulnerable customers of closed products compared to open products?

Gone away & disengaged customers

- Firms should identify and gone-away and less engaged customers of closed products and services
- More of an issue with closed products and therefore a greater risk for customer harm
- Firms must be able to evidence any actions they take and why

FCA Action Prompts:

- Has your firm followed all reasonable and proportionate avenues to contact gone-away or unresponsive consumers? This might include enhanced tracing activities, including through specialist third parties.
- Has your firm assessed the effectiveness of its activities and channels to re-contact customers marked as gone away?
- What processes does your firm have in place to establish the appropriate course of action when it cannot successfully contact a customer?
- What processes does your firm have in place to establish the appropriate course of action when a 'gone-away' customer does contact your firm?

Vested Contractual Rights

- Could vested contractual rights cause foreseeable harm?
- Where a firm does not want to give up a vested right it must consider alternative ways to manage potential harm to consumers (e.g. helping a customer switch to a new product)

Vested contractual right:

To help decide if a contractual term amounts to a vested right, you should consider the contract length and whether either party can freely terminate the contract. Where a customer can terminate a contract without an exit charge, firms have no more than an expectation of the customer continuing the contract. In this case, the future payment of charges is not a vested right.

FCA Action Prompt:

- Where you have identified that your firm has vested rights and is causing foreseeable harm to the customers of a closed product or service, what alternative action could you take to deliver good outcomes for your customers and avoid the harm?

Next steps for firms

- Gap analysis of letter(s)
- Be satisfied that they have prepared adequately for the 31 July 2024 implementation deadline
- FCA notification if firms will not be ‘substantially’ compliant by 31 July 2024 and/or if there are any significant issues that come to light
- Prioritisation of areas where there is the greatest level of harm / potential for harm

Next steps for firms

- Implement clear, timebound, resourced plans to address any gaps in implementing remedies where they have identified these are needed to ensure good outcomes
- Put in place clear mitigations to protect customers from known or possible harms in the period until they have fully implemented identified improvements
- Governing bodies should challenge their businesses on all the above
- Consider assurance work on Consumer Duty compliance



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The impact of the general election on the
regulatory reform agenda
Rob Moulton

Run up to the election

- General election called 4 July 2024
- Parliament prorogued 24 May 2024 and dissolved 30 May 2024, meaning all Parliamentary business has come to an end
 - Parliament expected to sit for a short time in July, before the Summer recess, then reconvene in September
 - We are unlikely to see any new legislation being made until the Autumn

Run up to the election

- The pre-election period of sensitivity began on 25 May 2024
 - Affects government and public bodies (including the regulators) and involves limiting communications until after the election
 - Routine business can continue behind the scenes but will not make any important policy announcements during this time
 - FCA “The essential business we carry out will continue and be publicised as normal. However, we are not planning to publish any major consultation or significant final rules during the election period and while Parliament is dissolved.”
 - FCA has also stated the publication of the next edition of the Regulatory Initiatives Grid (due in May) will be delayed

Impact on regulatory reform

Measures requiring government input or legislation



Unlikely to see progress until the Autumn



Possible priorities will change

Measures the regulators can take on their own



Work will continue and can resume publications post-election



May go ahead with measures the government has disagreed with?

Which regulatory reforms are impacted? (1)

Reform	Previous timing	Impact
Investment research – changes to rules on unbundling	<ul style="list-style-type: none">FCA expected to issue PS in Q2 2024	<ul style="list-style-type: none">Final rules not now expected until Q3 2024
Changes to UK Short Selling regime	<ul style="list-style-type: none">HM Treasury expected to legislate in 2024FCA expected to publish CP in 2024	<ul style="list-style-type: none">Timing of legislation may be pushed backFCA not expected to publish CP before Q3 2024
Improvements and reforms to the SMCR	<ul style="list-style-type: none">Consultations from FCA/PRA and HM Treasury expected Q2 2024	<ul style="list-style-type: none">Regulators may consult after the election but HM Treasury consultation on any legislative changes likely to be further delayed, which may push back overall timing

Which regulatory reforms are impacted? (2)

Reform	Previous timing	Impact
UK implementation of Basel 3.1	<ul style="list-style-type: none">• Second near-final PS expected Q2 2024• PRA to publish final PSs once HM Treasury has made the necessary legislation	<ul style="list-style-type: none">• PRA not expected to publish second PS until at least Q3 2024• Legislation now unlikely to be made until the Autumn
Regulation of ESG ratings providers	<ul style="list-style-type: none">• HM Treasury expected to publish a consultation response later in 2024	<ul style="list-style-type: none">• Election disruption may push back this timing
PISCES	<ul style="list-style-type: none">• Sandbox to be up and running before the end of 2024	<ul style="list-style-type: none">• Requires legislation, which is unlikely to be made until the Autumn

Which regulatory reforms are impacted? (3)

Reform	Previous timing	Impact
Replacement of PRIIPs regime with UK CCI regime	<ul style="list-style-type: none">• HM Treasury expected to legislate in 2024• FCA expected to publish CP in Q2 2024 and PS in H2 2024• Regime to take effect by end 2024	<ul style="list-style-type: none">• Timing of legislation may be pushed back• FCA will not publish CP before Q3 2024• Regime may now not take effect until 2025
Reform of the ring-fencing regime for banks	<ul style="list-style-type: none">• Government had planned to introduce legislation to effect short-term reforms in early 2024• Government expected to set out proposals for longer-term reform in H2 2024	<ul style="list-style-type: none">• Legislation unlikely to be made before the Autumn• Further consultation likely to be pushed back• New government could decide to take a different approach

Which regulatory reforms are impacted? (4)

Reform	Previous timing	Impact
Changes to FCA Enforcement Guide	<ul style="list-style-type: none">House of Lords Committee had told the FCA not to proceed until it had taken evidence and reached a conclusion	<ul style="list-style-type: none">Committee dissolved and call for evidence cancelledMight the FCA go ahead?
Regulation of Buy-Now-Pay-Later	<ul style="list-style-type: none">Waiting for Parliament to make the necessary legislation	<ul style="list-style-type: none">Timing remains uncertain, but could be prioritised under a new government?
Review of the Consumer Credit Act 1974	<ul style="list-style-type: none">Second stage government consultation expected H2 2024	<ul style="list-style-type: none">Election disruption may push back this timing
Proposals on D&I	<ul style="list-style-type: none">Following criticism of these proposals in the Sexism in the City report, the FCA stated it was not prioritising taking them forward	<ul style="list-style-type: none">Could the FCA take a different direction under a new government?

Which regulatory reforms are impacted? (5)

Reform	Previous timing	Impact
Smarter Regulatory Framework (repeal and restatement of assimilated law)	<ul style="list-style-type: none">• Priority tranche 3 items identified in March 2024 include: MiFID II (Org Reg and transaction reporting), remaining parts of the CRR, EMIR, AIFMD, the UCITS Directive, the E-Money and Payment Services Directives	<ul style="list-style-type: none">• Election disruption may prevent significant progress on these files by HM Treasury this year

Note that Primary Markets reforms (new UK listing and prospectus regimes) are expected to progress as previously announced:

- Final listing regime rules expected mid to late July
- FCA expected to consult on prospectus regime reforms Q3 2024

Conservative Manifesto 2024

- Ensure Basel III does not inhibit lending to SMEs
- “Implement” the Mansion House and “build on” the Edinburgh reforms

“Financing growth – Labour’s plan for financial services” (Jan 2024)

- Heavy focus on regionalism
 - For banking in particular
 - Examples of challenger banks, investment banking hubs, insurance etc.
 - Possibly for regulators?
- Growth
 - Backing financial services as an international competitive advantage
- Women in financial services
 - Closer to the D&I policies of the FCA than the current Government

“Financing growth – Labour’s plan for financial services” (Jan 2024)

- Edinburgh reforms overall
 - Broadly aligned
 - Specific reference to upholding ring-fencing regime
 - Wholesale backing for capital markets reforms
 - “Streamline” rulebook, like the Consumer Duty (?)
- Closer relationship with the EU
 - Already happening (in comparison)
 - Little prospect of any major licensing breakthrough
- Consumer Protection
 - A key focus
 - Aligned with the FCA, more than Government
 - Will regulate BNPL (also current Government plan)

“Financing growth – Labour’s plan for financial services” (Jan 2024)

- Heavy focus on ESG/green agenda
 - Accelerate UK’s green taxonomy work
 - Further push for disclosure at big business level
- Importance of developments in AI
- Creation of British Business Bank, and improvements to retail ISA scheme, to try to drive investment in British business

Liberal Democrats Manifesto 2024

- Introduce a new national financial inclusion strategy (and require the PRA/FCA to “have regard” to financial inclusion in policy making)
- Use regulation to promote climate friendly investing



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ESMA's statement on good practices in relation
to pre-close calls
Jonathan Ritson-Candler

ESMA statement

- On 29 May 2024, ESMA released a statement setting out good practices (as compared to rules or guidance) on conduct during pre-closed period calls with analysts
- ESMA cites this being as a result of both it and NCAs having recently observed a number of “high volatility episodes” in EU share prices, some of which took place shortly after pre-close calls
- Media articles have made a link between pre-close calls and this volatility, implying the possibility that inside information had been unlawfully shared with analysts

Examples of good practice for pre-close calls

- ESMA reminds issuers and their investor relations teams not to unlawfully disclose inside information
- Sets out some examples of good practice ESMA has seen European issuers adopt
- Indicates that these “could reduce the risk” of unlawful disclosure
- These include issuers performing a thorough assessment of the information they plan to disclose ahead of the call, to ensure no inside information
- Other examples likely to be less practicable
- Timely reminder for issuers and their advisors to revisit practices

Similar to FSA Guidance from 2002

- FSA cites similar concerns in 2002 UKLA Guidance
- Recommends issuers to adopt internal procedures to mitigate the risk of disclosure
- FSA recognised that giving access to these briefings to the public would not be an effective cure all
- Endorses announcing the fact of an analysts' briefing along with the key information to be disclosed at the briefing
- But expressly says that the FSA was not advocating for anyone other than analysts attending these briefings



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An ESG update, including implementation of
the UK SDR framework, and the latest on
greenwashing from the EU

Nicola Higgs

ESMA Finalised Guidance on Fund Names

- **14 May 2023:** ESMA published its final Guidelines on funds' names using ESG- or sustainability-related terms

Funds using transition- , social- and governance- related terms	<ul style="list-style-type: none">• At least 80% of investments should be used to meet ESG or sustainable investment objectives• Must apply the EU Climate Transition Benchmark exclusions
Funds using environmental- or impact- related terms	<ul style="list-style-type: none">• At least 80% of investments should be used to meet ESG or sustainable investment objectives• Must apply the EU Paris-aligned Benchmark exclusions
Funds using sustainability- related terms	<ul style="list-style-type: none">• At least 80% of investments should be used to meet ESG or sustainable investment objectives• Must apply the EU Paris-aligned Benchmark exclusions• Must commit to invest meaningfully in sustainable investments

Notes:

1. The guidelines apply on a “comply of explain” basis
2. The thresholds apply cumulatively
3. Potential for the guidelines to be extended to cover MiFID financial instruments, green bonds, or green loans

UK update on Sustainability Disclosure Requirements

- **16 May 2024:** the UK Government published updated guidance regarding the UK Sustainability Disclosure Requirements (SDR) framework
 - In August 2023, the government announced that it would develop standards for corporate sustainability disclosures in the UK, with an initial expected timeline of July 2024
 - The timeline has now been revised:
 - Q1 2025: endorsed standards are due
 - Q2 2025: a decision on potential future requirements will follow
 - 1 Jan 2026: requirements likely to become effective no earlier than accounting periods beginning on or after 1 January 2026
 - The UK SDR standards will be aligned with the International Sustainability Standards Board (ISSB) global baseline standards, which launched in 2023
 - Following endorsement, there will be a consultation process to update the current TCFD-based disclosure standards for UK-listed companies to reference the ISSB Standards

ESA's report on greenwashing in the financial sector (1)

- **1 June 2024:** the European Supervisory Authorities (ESAs) – EBA, EIOPA and ESMA – published their progress Reports on greenwashing in the financial sector. In these Reports, the ESAs put forward a common high-level understanding of greenwashing applicable to market participants across their respective remits – financial markets, banking, and insurance and pensions
- **“Greenwashing”** = *practice where sustainability-related statements, declarations, actions, or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or financial services. This practice may be misleading to consumers, investors, or other market participants*

ESA's report on greenwashing in the financial sector (2)

Dimensions	Detailed parameters used to analyse greenwashing risks under each dimension				
Roles	Trigger		Spreader		Receiver
Sustainability topics (and sub-topics) about which a claim is communicated	Governance and resources <ul style="list-style-type: none"> Board and senior management role (governance-related elements of entity-level ESG policies) ESG resources and expertise (incl. ESG dedicated staff) 		ESG strategy <ul style="list-style-type: none"> ESG strategy, objectives, characteristics (integration of sustainability in strategy, ESG characteristics, sustainable objectives, taking into account clients' sustainability preferences) Sustainability management policies ESG credentials (qualifications, labels, certificates): adherence to (voluntary) reporting frameworks (e.g. UNPRI, TCFD), labels, ratings, awards, certifications Engagement with stakeholders (proxy voting and active engagement) 		Sustainability metrics and targets <ul style="list-style-type: none"> ESG performance to date: ESG results, metrics for real-world impact Pledges about future ESG performance: ESG targets (incl. net zero targets), transition plans
Qualities through which the claim is misleading investors or consumers	Misleading through provision of information <ul style="list-style-type: none"> Empty claims (exaggeration and/or failure to deliver on claims) Inconsistency Irrelevance Outright lie (false) Suggestive non-textual imagery and sounds Suggestive use of ESG-related terminology 		Misleading through omission of information <ul style="list-style-type: none"> Selective disclosure / cherry-picking Omission or lack of disclosure Vagueness or ambiguity or lack of clarity Lack of fair and meaningful comparisons, thresholds and/or underlying assumptions No proof (unsubstantiated) Outdated information 		
Channels through which the claims are communicated	Regulatory information (e.g. Prospectuses, Financial statements, Mandatory sustainability disclosures, Issuers' press releases etc.)		Marketing materials (including website, social media, presentations to investors)		
	Ratings (inc. ESG ratings) and Benchmarks & Labels	Intermediary/advice information	Product information (including internal classifications)	Voluntary reporting, falling outside previous categories	

Recent Thought Leadership



Monthly London Webcast Materials

Each month the UK and European Financial Regulatory lawyers at Latham & Watkins host a presentation and discussion covering recent changes to financial services regulation.

[VIEW](#) ←

- [Consumer Duty - The Final Countdown?](#)
- [ESMA Finalises Guidelines on Fund Names](#)
- [UK Government Update on Sustainability Disclosure Requirements Framework](#)

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