

09 September 2025

Simon Walls  
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FCA Head Office  
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Dear Simon,

**Joint UK Finance and AFME submission – Impact of application of the Consumer Duty on wholesale activities of banks and the case for reform**

We welcome the opportunity to contribute to the FCA's review of the impact of the Consumer Duty on wholesale firms as requested by the Chancellor and enclose the joint submission of the member firms of UK Finance and the Association for Financial Markets in Europe ("AFME"). Our members comprise a broad range of UK and international financial service firms who all significantly contribute to the UK sector's growth and competitiveness.

UK Finance and AFME members appreciate the constructive engagement from the FCA as part of this exercise.

We fully recognise that the Consumer Duty ("Duty") plays an important role in consumer protection. However, as we have previously highlighted, its current application to wholesale activities without direct retail customers has placed a huge burden on wholesale and investment banks, without any meaningful corresponding benefit for UK retail customers.

The disproportionate compliance burden placed on wholesale banks (diverting valuable resources that could be used elsewhere) reduces the international competitiveness of UK firms. In addition, the potential for Consumer Duty to apply has incentivised product innovation and offering to occur outside the UK, contrary to the Government's growth and competitiveness objectives. The cost-benefit calculation does not add up.

We are calling, therefore, for all wholesale activities by banks without direct retail customers to be excluded from the Duty on the basis that pre-existing sectoral regulation provides adequate consumer protection. Also, as we explain in the paper, many elements of the Duty are not applicable to firms which do not have a direct relationship with retail customers.

Our industry's proposal is aligned with the FCA's growth and international competitiveness objective and will contribute to the Chancellor's strategic mission of reducing the regulatory burden on firms to drive growth in the British economy, as well as continuing to meet the FCA's objective of protecting retail consumers.

The FCA's report to the Chancellor later this month is an opportunity to send a clear signal that the exclusion of all wholesale activities by banks from the Duty is the FCA's long-term intent.

As a constructive suggestion, in the short-term, we are calling for the following activities without any direct retail customers to be excluded from the remit of the Duty as a meaningful 'first step':

- Specifically exclude the manufacture of retail structured products from the Duty, on the basis that firms are already subject to pre-existing and equivalent rules which offer significant protection to retail customers, so the Duty adds nothing material; and
- Provide a clear exclusion for services provided by wholesale banks on a B2B basis so they do not have to spend time and money proving the negative. This practice has become necessary because undefined concepts like 'distribution chain' and 'material influence' sit at the heart of the Duty and are open to a range of interpretations.

We believe that this first step will go some way in fulfilling the Chancellor's request to identify and set out a plan to deal with disproportionate burdens resulting from the Duty for wholesale firms and activities.

It would also contribute towards the Government's initiative to reduce the administrative cost of regulation by 25%, boosting economic growth and the global competitiveness of the UK as a jurisdiction. This would support the Government's objective of developing a regulatory system that is easier to navigate for businesses and one that reduces duplication.

However, only the complete disapplication of the Duty for wholesale activities by banks, would remove all the unnecessary and burdensome requirements under the Duty and unlock the potential of our sector to drive growth.

We have considered alternative short-term solutions, including amending the body of the definition of "retail market business," or further FCA guidance (for example, on the meaning of "material influence" or "retail customer outcomes"). However, as explained in our submission none of those solutions would provide the degree of regulatory certainty required to meaningfully reduce the compliance burden on wholesale firms.

Indeed, our members think that further FCA guidance alone would fall far short of the ambition set out by the Chancellor in her July Mansion House speech and would not be an adequate policy outcome.

We have also considered whether changes to the current client classification rules could address the challenges identified in this paper and as outlined in the paper, have concluded that they will not.

We are keen to continue a dialogue with the FCA on the above proposals after it has reported to HMT at the end of September 2025. If you have any questions on our submission, please do not hesitate to get in touch.

Yours sincerely,

**David Raw**

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Commercial Finance, Resilience, and  
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**UK Finance**

**AFME**

## UK Finance and AFME submission to the FCA – Impact of application of the Consumer Duty on wholesale activities of banks and the case for reform

### Executive summary

- Our members continue to believe that all wholesale activities by banks should be excluded from the Consumer Duty (the “**Duty**”), whether that be the manufacture of products intended for retail customers (but distributed by a third party) or the provision of B2B services to other ECPs/professional clients. Pre-existing sectoral regulation provides adequate consumer protection in both cases (to the extent this is required) and, as we explain below, many elements of the Duty are not applicable to firms which do not have a direct relationship with retail customers. As a result, compliance with the Duty imposes a significant burden on wholesale banks which is wholly disproportionate to any benefit (to the extent that there is any benefit, which is not accepted) that is derived from such firms being in scope of the Duty.
- We recognise that this exclusion would represent a re-framing of the FCA’s current approach to the Duty given that the ‘look through’ and concept of a distribution chain (which break the link between consumer protection regulation and a contractual/direct relationship with consumers, thereby bringing wholesale banks into scope) are key components of the concept of ‘retail market business.’. While our members continue to believe that this re-framing is critical, especially given the negative impact of the Duty on the competitiveness of UK financial markets, which we refer to later in this submission, we appreciate that it is likely to be a delicate exercise, with cross-sectoral implications, which may require more time for consideration than the current time frame for the FCA’s report to HMT (requested in July as part of the ‘Leeds Reforms’) allows. Notwithstanding this, a clear signal in the report back to the Chancellor of the FCA’s longer term intent is imperative.
- In the short term, a helpful first step which addresses some of the issues around the disproportionate impact of the Duty on wholesale banks would be to:
  - specifically exclude the manufacture of retail structured products from the Duty, on the basis that the FCA should be able to get comfortable that there are pre-existing and equivalent protections for consumers in MiFID and PRIIPs etc, so the Duty adds nothing material; and
  - provide a clear exclusion for services provided by wholesale banks on a B2B basis so they do not have to spend time and money proving the negative (a practice that has become necessary because undefined concepts like ‘distribution chain’, ‘material influence’ and ‘enable’ sit at the heart of the Duty and are open to a range of interpretations).
- We have provided initial drafting for these two exclusions for consideration (see Annex 2).
- We believe that there are arguments, analogous to those we make below for retail structured products, which support an exclusion for the manufacture of all MiFID products by wholesale banks (without a direct relationship with retail customers). Whilst other exclusions exist (such as the exclusion of vanilla capital market products and the £50 000 minimum investment or denomination exclusion), they are not targeted at the

manufacturing of products intended for retail customers. It would be more effective and consistent, plus simpler for firms to navigate, if there were a single exclusion for the manufacture of all products subject to the existing sectoral protections of MiFID.

- Although our membership does not represent other sectors, we would anticipate that there may be similar arguments in favour of a disapplication of the Duty to be made for other sectors.
- We would be keen to continue a dialogue on this with the FCA after it has reported to HMT at the end of September 2025. This would be with a view to both securing the two exclusions described above at pace and working towards broadening the proposed manufacturing exclusion for retail structured products to MiFID financial instruments generally (and potentially other sectors too), which we recognise could take more time. We anticipate that this would include considering the likely impact on other sectors (in conjunction with their respective industry bodies). We strongly encourage the FCA to consider its policy objectives and the proportionality of the application of the Duty beyond the specific areas of wholesale activity on which we have been able to comment within the timeframe for producing this submission. As we note above, a clear steer to the market, with an indication of likely timeframe would be helpful.
- Implementation of the proposals in this paper will provide immediate benefits to wholesale banks and significantly contribute towards the Government's initiative to reduce the administrative cost of regulation by 25%, boosting economic growth. It will also support the government's objective of developing a regulatory system which is easier to navigate for businesses and reduces duplication and developing financial markets which support retail participation.
- As we note below, we have considered alternative short-term solutions, including further FCA guidance (for example, on the meaning of "material influence" or "retail customer outcomes"). However as explained in our submission none of those solutions would provide the degree of regulatory certainty required to meaningfully reduce the compliance burden on wholesale firms.
- We have also considered whether changes to the current client classification rules could address the challenges identified in this paper and as outlined in the paper, have concluded that they will not.

## Background

Wholesale banks are a vital component of UK (and international) financial markets, supporting primary market activities and providing market access and liquidity for secondary markets. Activities such as the manufacture of structured products by wholesale banks are critical to providing (indirectly) access for retail investors to a broader range of investment products; ensuring the wider engagement of retail investors in financial markets; and ensuring the broader operation of those markets overall. Wholesale banks do not typically service or interact directly with retail investors<sup>1</sup>.

Wholesale banks are subject to a detailed and tailored scheme of regulation designed to ensure that the specific products they manufacture and services they provide operate in a way that benefits the wider financial markets and (where relevant) ensures that consumers are protected. These include (but are not limited to) MiFID II, the CASS rules, COLL, the PRIIPS regime and the financial promotions regime. These regimes are well-established and understood and pre-date the Duty. Crucially, they strike a careful balance between regulating for consumer protection whilst not restricting wholesale banking activities in a manner that could result in both (i) reduced investment opportunities and deterrents to retail participation and/or (ii) reduced international competitiveness, market innovation and economic growth. As stated in the FCA's 2025 Strategy: *"[...] regulation should be about enabling informed risk to be taken not eliminating it entirely. Attempting to do so would stifle innovation and competition, and with them the market dynamism that drives growth and benefits consumers. [...] Rebalancing risk can spur growth, which is crucial if finance is to serve the country in not only meeting the challenges ahead, but of thriving amidst them".*

We recognise that the Duty is an important element of the FCA's consumer protection regime. However, the inclusion of wholesale firms within its scope was unnecessary in terms of securing the FCA's retail protection objectives. It has also required firms to construct and continually refresh analyses that 'prove a negative' (i.e. that the activity in question is out of scope). The key reasons for this are:

- Wholesale banks manufacturing products for retail customers but without interacting with direct retail customers were already obliged (by the pre-existing sectoral regulation mentioned above) to take steps to protect retail customers to the extent that they have material influence over outcomes for them.
- The use of subjective (and undefined) terms within the definition of 'retail market business' has made it difficult for firms to de-scope the provision of pure wholesale services (that is, the provision of services to professionals / ECPs to enable them to meet their own regulatory obligations, provide back-office services or manage their own commercial objectives or risks). The Duty begins from the premise that any firm in a distribution chain – including a wholesale firm – which might involve retail customers could be in scope of the Duty. Many wholesale firms offer services to professional clients who in turn provide a range of products/services to retail customers. To demonstrate that they are out of scope to the satisfaction of their

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<sup>1</sup> We note that there are some wholesale business models that include direct interaction with retail, but these models are not the subject of this paper.

internal control frameworks, wholesale firms must demonstrate why each of their activities are either (i) not in a distribution chain involving retail customers or (ii) if they could be considered within a distribution chain, they are subject to either an exemption or do not have material influence over outcomes for end retail customers. This is particularly difficult since the FCA rules and guidance comprising the Duty give no indication of how broadly the concept of the distribution chain is intended to extend. This continues to require firms to satisfy themselves (and their internal audit functions) on an ongoing basis that these 'pure wholesale' services (and any new business lines they intend to offer) are or remain out of scope – a costly exercise in terms of time and money which has no discernible benefit for consumers and to which their global competitors are not subject, making UK firms less competitive vis-a-vis their peers.

As UK Finance and AFME members have highlighted (previously and most recently at the meeting with the FCA on 05 August 2025) the Duty has had a significant and disproportionate impact on wholesale banks<sup>2</sup> without adding to the consumer protection under existing sectoral legislation. To support the FCA in addressing this, the remainder of this paper will cover:

### **Part 1: Proposals for further exclusions**

- A. Excluding all wholesale activities undertaken by banks from the remit of the Duty. This is our preferred solution and critical to ensure the relative competitiveness of UK financial markets. As a short-term step, we propose the following.
- B. Excluding the manufacture of retail structured products from the remit of the Duty.
- C. Excluding the provision of services by wholesale banks on a B2B basis to other professional firms or ECPs from remit of the Duty.

### **Part 2: Supporting evidence / assessment of alternatives**

- A. Specific examples of the disproportionate governance/compliance costs for wholesale banks seeking to comply with the Duty.
- B. Reasons why alternative (to the proposed exclusions) solutions such as additional guidance or changes to the client classification rules will not be effective.

**Annex 1:** Direct comparison of the pre-existing regulatory framework for firms manufacturing retail structured products with the requirements for manufacturers contained in the Consumer Duty

**Annex 2:** Initial drafting suggestions for exclusions 1(B) and 1(C) above.

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<sup>2</sup> In this document, references to “wholesale banks” should be read as banks undertaking wholesale activities without interacting directly with retail customers.

## **Part 1 – Further exclusions**

*Drafting suggestions for the second and third proposed exclusions below can be found in Annex 2. We have not at this stage included any draft wording to exclude all MiFID wholesale products (part of our preferred solution) but would be pleased to engage with the FCA further to explore how that could be structured, taking into account the FCA's policy approach in relation to other wholesale sector products.*

### **The case for excluding all activities undertaken by wholesale banks from the remit of the Duty**

Our starting point is that, for the reasons we outline below, wholesale banks should not be considered within the scope of the Duty in respect of any service they provide, or product they manufacture, where they do not have any direct interactions with retail customers. We request this general exclusion on the grounds that:

- In most cases, the activities of wholesale banks have no material influence over retail customer outcomes. Wholesale firms predominantly manufacture products and services for other professional clients and ECPs and do not deal directly with retail customers. As such they are not in scope for the consumer understanding and consumer support outcomes under the Duty.
- Some wholesale banks do have material influence over outcomes for end retail customers as the manufacturer of products specifically intended for retail customers. Even here they do not directly face retail clients – such products are always distributed by an intermediary professional firm. Where the manufacture of these products is governed by MiFID II, the Duty does not provide any significant additional protections to indirect retail customers. The conduct and product governance rules implementing MiFID II and rules specific to retail investment products<sup>3</sup> offer adequate protections to indirect retail customers and are specifically designed for investment products. Indeed, the products and services outcome under the Duty is switched off for products complying with the MiFID II rules set out in PROD 3 (we expand upon this point further in the section specifically considering retail structured products and Annex 1 below).
- In relation to the provision of services intended to enable other professional firms to comply with their regulatory obligations, these are similarly governed by comprehensive regulatory frameworks, such as the CASS regime for custodians and the COLL rules for depositaries. In addition, it is clear that – in offering these services - wholesale banks have no ability to influence retail consumer outcomes in respect of any specific product or service offered directly to them, nor should they properly be considered as operating in a distribution chain for the purposes of the Duty.
- The burden of compliance with the Duty, including the work and governance framework necessary to assess when and how the Duty may apply at product inception and upon subsequent product reviews (including subjective judgements regarding "material

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<sup>3</sup> These rules are currently set out in PRIIPs but are being revised by HMT and the FCA in the new post-Brexit Consumer Composite Investments regime.

influence" over end-retail customer outcomes); the need to demonstrate to the satisfaction of internal control functions (including internal audit) and external auditors (and potentially the FCA) that business is either out of scope or compliant with the Duty, and to refresh that analysis so it remains current; and the compilation of an annual report by the Board, is disproportionate to the very marginal (if any) additional consumer protection provided by including the activities of wholesale banks within the scope of the Duty. This is contrary to the regulatory principle of proportionality and has a negative impact on competitiveness of UK financial markets. We have provided below specific examples of where member firm governance/compliance costs for meeting the expectations under the Duty (or achieving assurance that particular activities are outside scope of the Duty) are currently disproportionate to the additional protection provided by the Duty.

- The current definition of 'retail market business' (which is the trigger for the application of the Duty) does provide exemptions for some products manufactured by wholesale banks, but these are not comprehensive and do not focus specifically on manufacturing of products intended for retail customers. These include exclusions for the provision of vanilla debt and equity products and activities relating to investments with a £50,000 minimum denomination or investment requirements. Wholesale banks rely on these exclusions to carve out some of their activities from the scope of the Duty. However, this still leaves aspects of the bank's activities at least prima facie within the Duty. A clear exclusion for the activities of wholesale banks without direct retail relationships would help to capture all of a wholesale bank's activities that should not be considered as in scope of the Duty. It will also be considerably more efficient to operationalise both for banks and the FCA than a patchwork of exclusions and "proving the negative" arguments. Such a broad exclusion for wholesale activities would provide consistency and legal certainty which is currently lacking: too many banks currently have to rely on subjective judgments. This would free up legal, compliance and business time to focus on expanding product offerings and delivering growth and provide a clear bright line to FCA supervision teams. It would also ensure that UK banks are not disadvantaged from a competitiveness perspective and that retail customers continue to have access to a broad suite of products and services without there being a reduction in standards of care and quality of retail customer outcomes.

### **The case for excluding structured products from the remit of the Duty and how the pre-existing sectoral specific requirements provides adequate protection to end retail customers**

We recognise a full exclusion from the Duty for the activities of wholesale banks would require a re-framing of aspects of the Duty. It could also have cross-sectoral implications which require more considered thought and testing.

We strongly believe that there should be a full exclusion for the manufacturing of products in scope of MiFID where the wholesale manufacturer has no direct client relationship or direct contact with the end retail investor. Such an exclusion, properly drafted, would not have cross-sectoral implications and the arguments set out in this paper for the more focused exclusion of retail structured products apply equally to other MiFID products. We recognise, however, that it may be desirable to consider how such an exclusion should sit with the existing



exclusions from the definition of “retail market business” and the definition of “non-retail financial instrument” so understand that this might not be achievable in the short-term.

As a first step in the short term, therefore, we consider that there should be a specific exclusion for retail structured finance products manufactured by wholesale banks and made available to retail investors where:

- the wholesale manufacturer has no direct client relationship or direct contact with the end retail investor;
- the structured products are distributed by third party distributors; and
- the structured products are already in scope of protections provided by the MIFID II and PRIIPS regime.

We request this exclusion on the following grounds:

Banks manufacturing retail structured finance products are already subject to MiFID II and PRIIPs requirements designed to protect end retail customers. Detailed gap analysis work carried out by our members here has shown the Duty does not provide any meaningful additional consumer protection. This is (indirectly) confirmed by the fact that the Duty rules switch off the provisions of the products and services outcome where PROD 3 applies to the manufacture of a product intended for a retail customer.

Unlike the Duty, which applies broadly as a general set of outcomes-based rules and expectations, regimes such as the rules implementing MiFID II were specifically calibrated for wholesale activities where the manufacturer may not have a direct relationship with the underlying end investor. The policy objective of the PRIIPs regulation was to provide retail investor protection and improve disclosures so that retail investors can make informed investment decisions in the very specific context of packaged investment products. The FCA has made clear in the context of its new product information framework for Consumer Composite Investments that its objective is *“to prioritise good consumer outcomes through empowering consumers to make effective, timely and properly informed decisions, and [to] enable... firms to tailor their communications to meet consumers’ needs.”*<sup>4</sup> These rules have been drafted with structured finance and similar investment products in mind, ensuring that the regulatory standards are tailored to the unique risks and characteristics of these products. They are targeted at the specific areas of influence wholesale manufacturers have over end retail customer outcomes in the context of specific investment products.

#### Equivalence with Consumer Duty outcomes and cross-cutting rules

At Annex 1 below we set out, with reference to specific sections in FCA rules and guidance, how regulatory regimes that pre-existed the Duty provide adequate protections to indirect end retail customers in the context of structured finance products. We have specifically considered:

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<sup>4</sup> See here: [CP24/30: A new product information framework for Consumer Composite Investments | FCA](#)

- (a) the four specific outcomes;
- (b) the cross-cutting rules;
- (c) the concept of manufacturing a "service";
- (d) the requirements around vulnerable customers; and
- (e) FCA enforcement powers.

### **The case for excluding from the Duty the provision of services by wholesale banks on a B2B basis to other professional firms or ECPs**

In addition to the above, "pure wholesale" (B2B) activities - where professional clients engage with wholesale banks on an arms-length basis across a range of contexts - should also be excluded from the application of the Duty. This includes where the professional client uses the wholesale bank's services to:

- manage/meet their own regulatory obligations (for example when using custody/safeguarding services or using a wholesale firm as a depositary);
- access administrative support /other 'back-office' functions (for example, transfer agency services); or
- generate income on its own account/manage cash concentration and other risks (e.g. Agency Securities Lending).

We request this exclusion on the following grounds:

- Providing these types of services to a professional client should not bring a wholesale firm within the scope of the Duty simply because the professional client they contract with may or may not (in turn) have its own direct relationships with retail customers. In many cases (for example custody) a separate regulatory regime already exists to protect customers generally (including any end retail customers) from any harm that the wholesale bank might cause - the Duty adds nothing. In all cases, wholesale firms providing these types of services have no ability to materially influence outcomes for end retail customers of any specific products offered to retail customers by the professional firm with whom they are contracting.
- It is not entirely clear that these type of services, when provided by wholesale banks, do not fall within the definition of 'product' for the purposes of the Duty, i.e. they are not a product provided by the wholesale firm to its professional client (further to an arrangement between them) to enable the professional client to distribute another product to a retail investor, or operate a specified investment held by a retail investor. This is a further area of confusion for firms, because of the range of interpretations of 'enabling' that can be taken.

Further FCA guidance would be insufficient here. Change needs to be made to the Handbook itself (rather than in non-binding guidance) in order to satisfy firms internal risk controls and to ensure consistent future application of the Duty by the FCA.

## **Part 2 - Supporting evidence / assessment of alternatives**

### **Examples of firm governance/compliance costs for meeting the expectations under the Duty (or achieving assurance that particular activities are outside scope of the Duty)**

#### **Disproportionate costs and burden**

In relation to manufacturing retail structured finance products, existing regulatory frameworks already provide significant protections for retail clients. Based on members' gap analyses the Duty is not materially additive. In relation to the provision of 'pure wholesale' services by wholesale firms to other professional firms, the Duty is similarly unnecessary, as this activity has no ability to influence outcomes for retail customers of specific retail products.

The recent House of Lords report titled [Growing pains: clarity and culture change required - An examination of the secondary international competitiveness and growth objective](#) reinforced this point, noting that witnesses from wholesale businesses and specialist service providers viewed the Duty as duplicating pre-existing fiduciary duties and other regulatory requirements governing client relationships. According to those witnesses, this duplication introduced either additional compliance burdens or new obligations to evidence responsibilities that were already being met.

Moreover, the report notes that some firms have highlighted that the Duty forced them to dedicate significant resources to building compliance systems for retail activity, despite having little or no exposure to that market. They stressed that this amounted to unnecessary work, illustrating how a 'one-size-fits-all' approach can impose costs on firms whose business models do not align with retail-focused regulation. Industry leaders have pointed to this as an example of where regulation could be more proportionate and better tailored to different types of firms.

Our members, i.e. wholesale firms with no direct end retail client interaction and with no or limited influence over customer outcomes, did not materially benefit from lesser implementation and ongoing costs for the entity level requirements under the Duty, in spite of the concept of proportionality. For example, wholesale firms still had to conduct detailed and lengthy scoping exercises and still have an ongoing obligation to produce an annual board report, which involves significant resource and effort. PRIN 2A.8.1(2)(b) requires the Duty to be a focus for internal audit, irrespective of the extent to which it impacts the firm's business. It is reasonable to consider that further scoping exercises will be required in the future as application of the Duty continues to evolve.

Ongoing commentary and FCA guidance to date focusses on the relative size of firm when applying proportionality (with the assumption that proportionality means lower requirements only for small firms). However, proportionality should also take into account the *size of the activity and additional regulatory protection relative to the size of the firm*. For example, a wholesale firm with no direct retail client interaction has minimal influence on consumer outcomes but could be brought into the fairly onerous entity level requirements of the Duty (for example, the annual report or an internal audit) because of one relatively small indirect retail business line.

The following are examples of extra steps which wholesale firms have typically had to implement in order to (a) assess whether a business line is in scope of the Duty and if so, which additional obligations apply and how; (b) implement the Duty; and (c) monitor compliance on an ongoing basis:

#### *Assessing scope*

- Extensive interpretation and assessment of definitions and rules including difficult subjective judgements, such as whether the firm has "material influence" on end-customer outcomes. Both up-front and on an ongoing basis for new businesses and products.
- Rules gap analyses, across multiple rule sets.

#### *Implementation and on-going monitoring*

- Additional policies and procedures, such as a new Consumer Duty Policy and related procedures.
- Governance arrangements – such as a Consumer Duty Committee; reviews of new products for scope; monitoring the distribution and results of in-scope products against the Duty (which can be difficult without end client interaction)
- Extra arrangements with distributors for provision of MI.
- Training and education.
- Preparation of the annual report, involving considerable input from multiple functions (e.g., legal, compliance, risk, businesses - for both in scope and out of scope for completeness).
- Board and senior management MI and review.
- Internal audit of compliance.

#### Territorial application: non-UK retail customers

The territorial application of the Duty presents further challenges to wholesale firms which have cross border operations. Although the default position is that the Duty applies to UK retail customers, where there is another applicable rule (such as COBS) or onshored regulation which is relevant to the activity, the scope under the other rule / regulation applies (PRIN 3.3.1 R). This means for example that where the firm is carrying on COBS scope business, the Duty will apply outside the UK to non-UK retail customers for a UK MiFID firm (but not an overseas firm). This extra territorial application has made the UK a more expensive and less attractive location for manufacturing and distributing retail financial products to the rest of the world negatively impacting UK's international competitiveness. In contrast, the Central Bank of Ireland's Consumer Protection Code only applies to Irish retail consumers. The FCA has other rules in its Handbook that apply only where firms are dealing with UK clients, for example the RDR rules on advisor charging (and equivalent rules on inducements relating to portfolio management business). It is therefore not unprecedented for FCA rules to be limited in their territorial scope.

As the FCA may recall, this was raised as a considerable issue at several breakout sessions during the FCA Regulatory Summit held on 03 July. We welcome the FCA's proposed actions

as announced in the feedback statement relating to the Cfl on the Consumer Duty, to review the international application of conduct rules **and request the FCA to review the extra-territorial application of the Duty as a priority**. We consider that the PRIN scope rules should be self-contained in PRIN and not rely on applying other Sourcebook's territorial scope.

#### Impact on new products and innovation

The inherent uncertainty of the Duty's application, together with the costs and governance burdens arising from the managing compliance with Duty requirements, have resulted in wholesale firms deciding to offer certain products from outside the UK (in accordance with applicable UK marketing restrictions), which in turn impacts the UK's competitiveness and position as a leading financial hub; and UK economic growth.

#### **Reasons why alternatives (to the proposed exclusions) will not significantly reduce the compliance burden on wholesale banks**

We have considered whether the following alternative solutions, short of changing the rules themselves, would be sufficient, but have concluded that none of the alternatives would provide the necessary clarity and certainty required.

- *Further guidance:* our members' experience is that existing guidance and other communications, such as portfolio letters, have been of limited help. These have tended to indicate when things 'might' be in scope rather than clarifying what is out of scope. Examples given are often at the more straightforward end of the fact pattern. We are not convinced that any number of extra explanations and /or illustrative examples would be sufficient.
- *More explanation / guidance on the 'material influence on retail customer outcomes' threshold:* as noted above this additional threshold, which we understand was intended to keep the application of the Duty proportionate in the context of distribution chains, has been difficult to apply in practice. We have considered the merit of further clarity on what amounts to material influence, including by way of a non-exhaustive list of activities which do not amount to material influence. Although this could be useful – provided that the examples were sufficiently relevant and granular - guidance will only take firms so far if the text of the rules themselves continues to admit an interpretation which scopes-in the types of activities undertaken by wholesale banks described in this paper. Given that the concept of "material influence" is innately subjective and very fact specific, we are not confident that any number of extra explanations and /or illustrative examples would be sufficient.
- *Changes to client classification rules:* We have also considered whether a possible future redrawing of the boundaries of the client classification rules through a more qualitative approach could resolve some of the challenges highlighted in this paper. Whilst we think that a change to the client classification rules to allow for a more proportionate approach to the sophisticated or high-net-worth end of the retail spectrum would be a welcome and beneficial development (especially for the direct-to-retail business models), for wholesale banks which do not have direct interaction

with retail investors, changes to the client classification rules would not resolve the material challenges outlined in this paper.

## Annex 1

### Direct comparison of the pre-existing regulatory framework for firms manufacturing retail structured products with the Consumer Duty

#### (a) Consumer Duty - Outcomes

##### ***Products and services outcome***

The Duty framework switches off the products and services outcome where the product which a firm manufactures (or distributes) is already subject to the product governance rules in PROD 3 (PRIN 2A.3.24 R). On this basis, MiFID structured finance products manufactured by wholesale firms are out of the scope of this outcome.

Wholesale firms already carry out regular product monitoring. These reviews consider any event that could materially affect the potential risk to the identified target market, in accordance with the requirements of PROD 3.2.19 – 26. Good practices include, for example, a product monitoring dashboard which tracks any structured finance product with significant and consistent negative mark-to-market (MtM) variations.

##### ***Price and value outcome***

Analysis undertaken by some member firms has concluded that existing policies and procedures put in place by firms to comply with the equivalent MiFID II and PRIIPs requirements should be sufficient to satisfy this outcome. For example, taking each of the three core elements of this outcome:

Price and value outcome requirements	Equivalent existing requirements
Must ensure that the product provides "fair value" to retail customers in the target market (PRIN 2A.4.2(1) R) and	Under PROD 3, manufacturers must consider the charging structure proposed for each financial instrument, including examination of the following: (1) whether the financial instrument's costs and charges are compatible with the needs, objectives and characteristics of the target market; (2) whether the charges undermine the financial instrument's return expectations, such as where the costs or charges equal, exceed or remove almost all the expected tax advantages linked to a financial instrument; and (3) whether the charging structure of the financial instrument is appropriately transparent for the target market, such as that it does not disguise charges or is too complex to understand (PROD 3.2.14 R).

	<p>For packaged retail investment products (PRIIPs) regulations, the PRIIPS Regulation requires detailed disclosure of costs and charges in the KID.</p> <p>Firms will typically use the standard European MiFID Template (EMT) to help meet these requirements.</p>
<p>Must carry out a value assessment and review the assessment on a regular basis (PRIN 2A.4.2(2) R), including the items listed in PRIN 2A.4.8 R:</p> <ul style="list-style-type: none"> <li>• Nature of product</li> <li>• Any product limitations</li> <li>• Total price</li> <li>• Target market retail customer vulnerability characteristics</li> </ul>	<p>Under PROD 3, manufacturers must undertake a scenario analysis of their financial instruments to assess the risks of poor outcomes for end clients posed by the financial instruments and in which circumstances those poor outcomes may occur.</p> <p>Manufacturers must also regularly review the financial instruments they manufacture taking into account, among other things:</p> <p>(1) whether the financial instrument remains consistent with the needs, characteristics and objectives of the identified target market; and</p> <p>(2) events that would affect the potential risk return expectations of the financial instrument.</p>
<p>Must ensure that distributors have all necessary information to understand the value the product is intended to provide (PRIN 2A.4.15 R)</p>	<p>Under PROD 3, manufacturers must make available to any distributor of that financial instrument:</p> <p>(1) all appropriate information on the financial instrument;</p> <p>(2) all appropriate information on the product approval process;</p> <p>(3) the identified target market of the financial instrument, including information about the target market assessment undertaken;</p> <p>(4) information about the appropriate channels for distribution of the financial instrument;</p> <p>and must ensure that the information is of an adequate standard to enable distributors to understand and recommend or sell the</p>



	<p>financial instrument properly (PROD 3.2.16 R).</p> <p>Manufacturers will typically provide distributors with the product terms, a prospectus / KID, target market assessment and value assessment; plus any material updates during the life of the product.</p> <p>For packaged retail investment products (PRIIPs) regulations, the PRIIPS Regulation requires all the key product information to be in the KID prepared by the product provider/manufacturer.</p> <p>Firms use regular product reviews and mark-to-market monitoring to monitor that the products are delivering the expected outcomes</p>
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### ***Consumer understanding outcome***

The consumer understanding outcome applies where a firm in scope of the Duty is "involved in the production, approval or distribution of retail customer communications, regardless of whether the firm has a direct relationship with a retail customer". However, in practice it has little relevance to wholesale firms in the context of manufacturing structured products who do not communicate directly with retail customers, for two reasons. Firstly, the firm with material influence on customer understanding will be the distributor, who prepares and approves communications intended for their actual or potential retail customers. Secondly, the type of product communications that wholesale firms do produce are usually subject to prescriptive form and content requirements under additional specific rules designed to ensure consumer understanding, for example a key information document (**KID**) required under the UK PRIIPS Regulation for a packaged retail investment product. Even if such prescriptive rules are replaced with Consumer Composite Investments (CCI) disclosures, compliance with such rules by a manufacturer without direct retail customer interface should still (presumably) provide sufficient protection from a consumer understanding perspective.

### ***Consumer support outcome***

The consumer support outcome applies to firms in scope of the Duty "who are responsible for interacting directly with, and providing support to, retail customers, such as through its customer services functions..." (PRIN 2A.6.1 R). This outcome has little, if any relevance to wholesale firms that do not communicate directly with retail customers. Whilst wholesale firms might deal with queries from distributors who are in turn supporting retail customers, this is insufficient to bring the wholesale firm into the distribution chain. In addition, dealing effectively and in good time with a reasonable request from a distributor who is supporting retail customers is common practice and required as part of a wholesale firm's commercial

relationship with its distributor. The primary obligation to provide customer support properly rests with distributors and other firms with the direct client relationship.

(b) Consumer Duty - Cross-cutting rules

***Act in good faith (PRIN 2A.2.1 – 7)***

Acting in good faith involves "honesty, fair and open dealing and acting consistent with the reasonable expectations of retail customers" (PRIN 2A.2.2 R). For wholesale firms without the direct retail customer relationship, this cross-cutting rule is mainly relevant to how the firm takes into account potential investors when designing, changing and operating products distributed to retail customers. Steps which the firm takes to comply with its obligations as manufacturer under PROD 3 to ensure that the product is designed to meet the needs of an identified target market of end clients (PRIN 3.2.1(1) R), and the related period review obligations (PRIN 3.2.19 R), should be sufficient here to have the same objective as the cross-cutting rule.

***Avoid foreseeable harm (PRIN 2A.8 – 13)***

For wholesale firms without the direct retail customer relationship, this cross-cutting rule is mainly relevant to (a) how the firm takes into account potential harm to target market investors when designing, changing and operating products distributed to retail customers; (b) taking appropriate action to mitigate risks of harm identified during the lifecycle.

- For (a), steps which the firm takes to comply with its obligations as manufacturer under PROD 3 to ensure that the product is designed to meet the needs of an identified target market of end clients (PRIN 3.2.1(1) R), the product testing requirements (PRIN 3.2.12 R) and the related periodic review obligations (PRIN 3.2.19 R), should be sufficient.
- For (b), steps which the firm takes to comply with its obligations under PROD 3.2.24 R to take appropriate action when a "crucial event" affecting the potential risk or return expectation of the financial instrument occurs – such as for example stopping further issuance of the products, changing its terms, informing the distributors or changing the distribution model, should be sufficient.

***Enable and support retail customers (PRIN 2A.2.14 – 22)***

As with the customer support outcome, the main relevance of this cross-cutting objective for wholesale firms without the direct retail customer relationship is making sure that the design and terms of a product meet the objectives of interests of retail customers and avoiding adverse features such as unreasonable barriers to exit. The firm's obligations as manufacturer under PROD 3 should be sufficient to cover these objectives.

### **(c) Consumer Duty – manufacturer of "service" vs "product"**

We have further explored whether excluding certain wholesale activities from the Duty will remove any significant protections provided by the Duty to retail consumers. As part of that we have considered the FCA's views regarding the new requirements that were introduced as part of the Duty which did not exist previously. We understand that one of the 'gaps' identified by the FCA in the pre-Duty rules was in relation to investment services (as distinct from investment products) provided by manufacturers to other firms in the distribution chain. We acknowledge that under PROD 3, the distributor (and not manufacturer) has specific obligations in relation to "services" (defined by reference to MiFID scope "regulated activities") whereas the manufacturer's obligations are limited to investment "products" (defined by reference to "investments" only). However, we believe that this 'gap' is less relevant to wholesale banks' activities. The extended definition of "product" for the purposes of the Duty includes two limbs ((b) and (c)) covering 'indirect' services provided to another firm which has the direct retail customer relationship<sup>5</sup>. Neither limb seems to be designed for wholesale activity: none of the illustrative examples given is relevant for wholesale bank activity. The services 'gap' is not relevant to the kinds of wholesale activities we are focused on in this note.

### **(d) Consumer Duty - Vulnerable customers**

We have also considered the FCA question as to whether excluding certain wholesale activities from the Duty will remove any safeguards provided to vulnerable customers.

Primary responsibility for ensuring fair treatment and good outcomes for vulnerable customers must be with the firm which has the direct customer relationship and contact.

For those areas where the activities of a wholesale firm without the direct customer relationship can potentially affect the treatment and outcomes for the end-customer, existing (non-Duty) FCA requirements should be sufficient and proportionate. Considering each of the key areas for firms identified in the FCA's February 2021 guidance on vulnerable customers<sup>6</sup>, for example, the FCA expects firms to:

- *Understand the needs of their target market and customer base.* For the target market element, procedures to meet the target market identification and review requirements for manufacturers under PROD 3 cover this adequately and members have confirmed that they do not in practice do anything material in addition for the purposes of the Duty. Understanding the customer base is primarily for the distributor with the direct

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<sup>5</sup> ""Product" means: (1) any specified investment distributed or to be distributed to retail customers; and (2) any service which involves or includes the carrying on of a regulated activity or an ancillary activity, providing a payment service, or issuing electronic money and activities connected to providing a payment service or issuing electronic money which is:

(a) provided directly to a retail customer;

(b) provided by Firm A to Firm B (further to an arrangement between them) for the purpose of enabling Firm B to distribute a specified investment to a retail customer or provide a regulated activity directly to a retail customer (for example providing a credit reference for the purposes of mortgage lending or consumer credit); or

(c) provided by Firm A to Firm B (further to an arrangement between them) to enable Firm B to operate or procure performance of the terms of a specified investment, or a credit agreement, that has been distributed to a retail customer (for example debt collection)." (FCA Glossary)

<sup>6</sup> <https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf>

customer relationship. The nature of the wholesale business is such that they are several steps removed from the end retail customer to make an effective assessment on vulnerable customers.

- *Ensure their staff have the right skills and capability to recognise and respond to the needs of vulnerable customers.* Arrangements to comply with the training and competence requirements under SM&CR and the Training and Competence rules cover this adequately.
- *Respond to customer needs throughout product design, customer service provision and communications customers.* Since the wholesale firm will typically not have any ongoing interaction with the customer, this is primarily for the distributor. In relation to financial promotions, there are sufficient protections under existing (non-Duty) requirements which apply regardless of where there is a customer relationship - including the COBS 4 requirements in relation to communicating or approving a financial promotion (which have the extended definition of "client"); and product specific marketing restrictions, such as those on the promotion of contingent convertibles and structured capital at risk products.
- *Monitor and assess whether they are meeting and responding to the needs of customers with characteristics of vulnerability and make improvements where this is not happening.* This is largely for the distributor. The wholesale firm is not in a position to know or assess the needs of individual vulnerable customers. However, information about the distribution of products to potential vulnerable customers outside the target market would typically be gathered and considered as part of the regular review as required under PROD 3.2.19 R.

In recent feedback on firms' application of FCA Guidance and the treatment of vulnerable customers (March 2025) the FCA highlighted several examples of good and poor practice specific to manufacturers, and made a number of recommendations. The fact that the FCA was able to be so specific about its requirements for manufacturers under its existing 2021 Guidance demonstrates that the Duty is again not adding to the regulatory requirements on manufacturers here. There is no substantive difference between the FCA's existing guidance on treatment of vulnerable customers and the new Duty. Both require firms to consider vulnerable customers in product design, understand their needs and ensure that the design of products meets those needs. In fact, we would argue that the FCA's existing guidance (and recent feedback on this) provides more detail about the steps the FCA expects manufacturers to take to meet its expectations here. Equally, to the extent that manufacturers are involved in drafting client communications, the 2021 Guidance already requires firms to tailor these to support the characteristics of retail customers, including characteristics of vulnerability.

#### **(e) Enforcement powers**

The FCA arguably has sufficient (non-Duty) enforcement powers to take action against a wholesale firm in relation to adverse impacts on vulnerable customers, to the extent that a firm without any client relationship or interface could reasonably be held accountable for such impact. Potentially enforceable rules may include, for example:

- Principle 6 (A firm must conduct its business with due skill, care and diligence) – which is not dependent on there being a "client" relationship.

- 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) and COBS 4 (financial promotions) – which have the extended definition of "client".
- PROD 3 (MiFID product governance).
- PROD 2 (product intervention powers).

The FCA does not need additional powers in relation to the Duty to achieve its statutory objectives in relation to wholesale firms without the end customer relationship.

## Annex 2

### Initial drafting proposals (for further development and discussion with the FCA)

#### Drafting solutions to implement the requested exclusions in the Consumer Duty rules

##### 1) MiFID II structured products

We propose addressing this by adding a further exclusion to the definition of 'retail market business' for structured products:

In the definition of "retail market business", insert the following additional exclusion:

" (7) the "manufacture" by Firm A of a "*structured finance product*" where the "*structured finance product*" is not "*distributed*" by Firm A to a "*retail customer*".

##### 2) Pure wholesale products

We propose addressing this by adding a further exclusion to the definition of 'retail market business' for 'pure wholesale activity':

" (8) the undertaking of "*pure wholesale activity*" by a wholesale bank.

This would be accompanied by a definition of "pure wholesale activity" in the Glossary as follows:

*Pure wholesale activity:* For the purposes of PRIN 2A '*pure wholesale activity*' shall mean the offer of services exclusively to professional clients and ECPs, by a wholesale bank on an arms-length basis to enable the recipient professional client or ECP to:

- manage/meet their own regulatory obligations (for example, providing custody, safeguarding or depository services);
- access administrative support / other 'back-office' functions (for example, transfer agency services); or
- generate income on its own account/manage cash concentration and other risks (for example, providing agency securities lending services).

regardless of whether or not the business of the professional client or ECP involves the provision of *products* to *retail clients*.

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