fieldfisher

# Smarter Consumer Communications

October 2016

***The UK is formulating its own initiatives to improve consumer communications. The FCA's October 2016 Feedback Statement (FS 16/10) sets out the FCA's commitment to this initiative:***

***"Consumers need: better practice and a more flexible approach around communications; simple, clear information and explanations; and to be able to trust firms. Moreover consumers, who choose to use digital channels, need communications that are suitable for today's digitalised context."***

## Background

The Discussion Paper on Smarter Consumer Communications (DP 15/5) from June 2015 was quite wide-ranging but its fundamentals were pretty straightforward:

- consumers ought to have access to high quality information at an appropriate time to empower them to make informed decisions about their finances;
- firms should adopt innovative techniques to communicate with consumers while moving away from an exclusively paper based mind set; and
- firms should embed on organisation a wider culture where the importance of communicating effectively with consumers is recognised and prioritised.

The March 2016 Feedback Statement on Call for Input on "Regulatory barriers to innovation in digital and mobile solutions" outlines six themes where respondents suggested there was a regulatory barrier to attempt to innovate with digital or mobile solutions. One of those was how the FCA's rules on communication should apply to digital and mobile solutions.

Given the convergence of the Regulatory Barriers to Innovation plus Smarter Consumer Communications work, and the specific focus of FS 16/10 is on communication, communication issues raised on the Call for Input on Barriers to Innovation are covered in FS 16/10.

## New mind set?

The FCA emphasise that there needs to be a fundamental change in mind set about how to communicate effectively with consumers. Obviously, with the pace of technological innovation, this means that firms and regulators need to be able to adapt quickly too.

Over the years, there has always been the concern of dealing with different consumers wanting to access products in a different way. Whilst obviously more and more will be dealing online, there is still recognition that digital exclusion is a concern which should not be forgotten.

Indeed some challenges to effective communication are not to do with the method of communication but surrounding circumstances regarding lack of consumer financial literacy, consumer misunderstanding, innate bias. In addition to these challenges, there is the fact that some products are complex.

Interestingly, the FCA indicate that more intrusive tools might be required – they intervened to prohibit the distribution of contingent convertible notes (CoCos) to retail investors (Policy Statement 15/14 on restrictions on the retail distribution of regulatory capital instruments, June 2015) and of course it might do so again. Whilst the MiFID product governance requirements, building on the existing UK RPPD requirements, might further assist – the key point is that disclosure is not sufficient of itself to solve some issues here. An obvious example to take is Terms and Conditions where, when provided online, I am sure we have all done it, you simply click "read and understood" when in reality the documents have possibly not even been opened.

## Continued use of principles

The FCA's high level Principles do not preclude operating in a digitally conducive way:

- fair treatment of consumers, Principle 6 and

- consumer communications which are clear, fair and not misleading, Principle 7

can still be applied.

Nonetheless, the FCA is planning to produce and consult on guides on effective disclosures and digital disclosures in 2017. These might be able to encourage innovation while providing reassurance of compliance with the FCA's Rules. The aim also is to get some sort of level playing field among all market participants which will aid consumers' ability to compare and contrast as a consequence. So the FCA will be keeping their principles but providing guidance on their expectations in the field of disclosure.

## Specific issues for asset managers

There is an assertion that communication in the asset management industry might be "some *of the most complex and least clear*".

- The FCA agrees that the use of websites can be a useful source of information.

- The FCA is supportive of the work of the Investment Association to develop a "Glossary for investors".

- The FCA's Asset Management Market Study is looking at how retail and institutional investors make choices and whether they have access to the information they need to make informed decisions. An interim report is scheduled for Q4 2016 and a final report in 2017.

## Specific initiatives

- **Terms and Conditions:**

  Simplifying the T&Cs would help. Removing some of the cumbersome boilerplate which even those who know what they are looking at find difficult to follow.

  The FCA also identify pensions as being a priority sector, post the pensions freedoms being introduced, and improving consumer communications at retirement is still an area of focus.

- **Costs and charges transparency:**

  There is further comment regarding making the position clear regarding investment advice services and charges. This last piece is of course difficult given the new initiatives with PRIIPs and MiFID II. All might be trying to increase transparency around costs and charges but they all do so in slightly different ways. For the asset management sector, the FCA is looking to publish a Final Report in 2017 pursuant to its asset management market study.

- **Moving on from paper based materials:**

  There is an acknowledgement that technology is transforming how consumers engage with financial services – for research, choice of products, how they buy them and how they use financial products. It is not just a case of evolvement but "rethinking" how best to engage with consumers. So an obvious point is that a predominantly paper based disclosure regime may not meet today's consumer information needs.

  The FCA acknowledge that many of the existing FCA rules envisaged the more traditional paper based communications materials. The specific European requirements will of course need to stay put but other than that there might be some latitude and a consultation is planned for early 2017.

- **Durable medium:**

  There has long been the notion of making materials available in a "durable medium" and the FCA are going to review provisions and consult on possible changes (within the confines of EU legislation) by early 2017. They are conscious that it may not easily allow the availability of long term cloud based storage applications to be taken into account. The use of the term "durable medium" could also benefit from reconsideration in the light of the fact that consumers may access services via mobile devices.

  The drafting of the rules referring to "floppy discs" and "CD ROMs" obviously does not cover the developments in digital technology.

- The FCA's **Social Media Guidance**[1] has led to various comments. Two picked up on within FS 16/10 concern:

  - **the standalone compliance requirement of the financial promotions regime.** The FCA maintain their view that a social media post and a website are separate financial promotions for Section 21 FSMA purposes. Where a social media post falls into the definition of a promotion, it is the same as a television advert or a website and is required to be individually compliant with the financial promotion regime rules. For the present, the FCA is not going to change its Guidance. It will keep it under review to see if any alternative innovative approach might offer the appropriate degree of consumer protection, but for the moment it remains unaltered.

[1] Finalised Guidance 15/4 on Social Media and customer communications

- **Risk warnings and other required statements in social media**. Curiously, some respondents had argued against the requirement to include risk warnings at every stage on the grounds that this can dilute the impact of the warning and result in poor experience. Also, some criticised the requirement to include negative risk warnings in promotions, making the argument that this can dilute the impact of the balanced information elsewhere and result in a poor experience for consumers. One can certainly support it where there are lots of boilerplate risk warnings but one cannot but sympathise with the FCA's response that, both positive and negative aspects of a product or service must be included and the statements should not mislead the consumer. As ever, there is a need to stand back and just see if the overall impression created is the right one so as to provide a fair, clear and not misleading communication. There is already a COBS Rule about a balanced impression of both the benefits and the risks (COBS 4.5.2R(2)). The FCA is going to undertake further work in this area and welcomes the discussion of new and innovative approaches. This can either be through the Innovation Hub or by contacting them directly.

- **Radio advertising** is another issue where the risk warnings are thought by some to be overkill and lead to consumers disengaging with the information they contain. The FCA is going to give consideration to risk warnings and radio advertisements in order to assess their effectiveness. The FCA agree that risk warnings can be counterproductive when they become too long and complex and agree there is scope to investigate firms' practices in a way that consumers listen to and understand information to ensure better outcomes for consumers.

## Next steps

To summarise, the FCA's intended initiatives, in order to take matters forward in addition to the above, comprise:

- hosting a smarter consumer communications event to engage further with stakeholders on key issues, including terms and conditions;

- considering issues raised around Social Media Guidance through consumer testing, especially around risk warnings;

- consulting on good disclosure guides, including digital disclosure;

- consulting to change disclosure rules or accompanying guidance where they have been identified as barriers to smarter consumer communications or innovations;

- considering the use and definition of "durable medium" in the Handbook and consultation on possible updates;

- investigating instances where firms provide unhelpful disclosure or risk warnings to consumers that reduce the overall effectiveness of communication. The FCA indicate they will reduce or remove unhelpful and unnecessary provisions of information where possible;

- responding to issues raised in the FAMR Review. It will work with various bodies to help the industry develop guidelines for preparation of suitability reports to make them more accessible to consumers, and review the time which firms spend preparing them.

## Short reports

Finally for UK regulated fund managers, one change of immediate relevance: in October 2015, CP 15/32 proposed removing a number of ineffective disclosure requirements – and the Policy Statement and Final rule changes for that CP (PS 16/23) are published alongside the one on Smarter Consumer Communications. Short form reports will no longer be required to be produced by UCITS and non UCITS fund managers as from 22 November 2016.

Producing and sending reports and accounts has always been a requirement in the UK whereas, under the European Directives, something has to be made available. Although we try to improve the approachability of the documents, even the short reports never really met their purpose. The FCA have now conceded this is the case and, in their Policy Statement 16/23 of October 2016, have followed up on last year's proposals which include removing the requirement for short reports for UCITS and non UCITS retail schemes. The obligation to produce and publish these will cease to apply from 22 November 2016. AFMs need to publish and distribute any short reports due before that date but can choose to discontinue doing so from then on. Firms can still continue to make short reports available but there will be no regulatory obligation to do so. Firms need to communicate the decision to discontinue the production of short reports and how they plan to deal with any requests for information about how any fund has been managed.

# Contacts

**Kirstene Baillie**
Partner - London

E: kirstene.baillie@fieldfisher.com
T: +44 (0)20 7861 4289