

20 February 2025

Financial Conduct Authority
12 Endeavour Square
London E20 1JN

Email: cp24-27@fca.org.uk

Dear Sir / Madam,

**The City of London Law Society's Response to Consultation Paper CP 24/27
*Advice Guidance Boundary Review – proposed targeted support reforms for Pensions***

Introduction

1. The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.
2. This response to the FCA's Consultation Paper CP 24/27 *Advice Guidance Boundary Review – proposed targeted support reforms for Pensions* ("**CP 24/27**") has been prepared by the CLLS Regulatory Law Committee (the "**Committee**" or "**we**"), a list of whose members can be found on the CLLS website.
3. We welcome the opportunity to present our views on the proposals contained in CP 24/27. In particular, we would like to respond to questions 3, 4, 7 and 8.

Question 3: Do you agree that there needs to be a threshold in place to provide targeted support? If so, do you think this should relate to delivering better outcomes or avoiding poor outcomes? Please explain your reasoning or alternative approach

4. Yes, we agree that – however the targeted regime is structured – there needs to be a clear and realistic threshold in order for enable firms to understand and manage their regulatory risk; and that any threshold should target the delivery of better outcomes rather than avoiding poor outcomes. However, in the Committee's view (as explained further below):
 - a) any regime which requires the provision to a client of a single suggestion or recommendation (to any standard) may be seen by firms as presenting unacceptable levels of legal and regulatory risk; and
 - b) in any event, the calibration of the threshold proposed in CP 24/27 (i.e. that the firm must have reasonable grounds for believing that targeted support would

deliver a better outcome than if support is not provided) does not sufficiently take into account the FCA's proposed approach that it will be a customer segment (as opposed to a single individual customer) which is the object of targeted support, and is therefore likely to present an unacceptable level of regulatory risk to firms.

5. To expand on these points, we understand that the policy context behind the 'better outcome' concept (as used in CP 24/27) is that:
 - a) A large majority of UK-resident adults who are contributing to defined contribution pensions and/or preparing for decisions concerning such pensions are doing so without the benefit of recently obtained regulated financial advice; and
 - b) Support which is (i) more focussed on an individual's particular circumstances than currently available generic financial information, but (ii) less costly to provide than currently available regulated advice (based on a holistic consideration of the client's position and the production of a personal recommendation to the client), could lead consumers within this large majority to enjoy a better outcome than they would if relying on generic information only under the status quo.
6. The policy aim here of supporting UK consumers who are currently not reaching good pensions outcomes to make better informed decisions – and ensuring that there are no regulatory impediments to this – strikes the Committee as a laudable one.
7. However, to be comfortable in providing such targeted support, firms will need to be satisfied that both (i) their contractual and other general law obligations, and (ii) their regulatory obligations, are:
 - a) clear and realistic; and
 - b) capable of being met via service offerings where costs incurred by the firm are proportionate to the fees or other benefits received.

Contractual and other general law obligations of the firm

8. Starting with how firms might document their contractual obligations towards a client in respect of a targeted support service, the Committee expects that firms will want to agree a clearly defined scope of services (and an accompanying duty to provide those services to a particular standard or level of care) which can be mutually understood without reference to the particular circumstances of an individual client. An obligation to provide a client with (or help to deliver) a better outcome via a single suggestion or recommendation (targeted at the consumer segment to which that client is allocated) is likely to present unacceptable levels of legal risk because of the inherent uncertainty as to whether:
 - a) the client could have independently found (or could have already held/been on track for) a product or course of action that fitted their needs more closely than (and therefore provided a preferable outcome to) the more broadly scoped 'segment appropriate' suggestion/recommendation from the firm, and/or
 - b) the result for any particular client arising from implementing a single 'segment appropriate' suggestion/recommendation might be simply too far removed from the optimal result for the client to meet any stated standard or level of care which the firm has contractually undertaken to provide (or alternatively which

the firm needs to provide in order to avoid liability under other areas of the general law, such as tort or fiduciary duty).

9. For these reasons, it is our expectation that a regulatory regime which requires a targeted support service to provide a single suggestion or recommendation, linked to the standard of delivering a 'better outcome' (i.e. better than the outcome which would occur in the absence of such a suggestion or recommendation), may be seen by firms as presenting unacceptable levels of legal risk.
10. A more realistic standard here might be provided if the new regulatory regime were instead to support a model where clients are given support through the communication of some or all of the following:
 - a) parameters within which most similarly placed consumers would be more likely than not to achieve a good outcome – such as a monetary range for contributions or drawdowns, or a more focussed selection of investments; and/or
 - b) 'red flag' style warnings if the client's proposed course of action falls outside the range of actions that would generally be seen as broadly sensible for an individual in their circumstances.
11. A model of the sort described above could leave a greater degree of responsibility with the client for their ultimate choice, in a way that would not be the case if the service is predicated on the delivery of a single suggestion or recommendation by the firm. It could also assist in demarcating a targeted support offering from one which falls within the scope of Article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the "**RAO**") and is subject to the full regulatory regime for MiFID-scope investment advice.

Regulatory obligations of the firm

12. In the Committee's view, the regulatory regime for targeted support might usefully distinguish between (i) the standard of care which a firm contractually undertakes to each individual client (which needs to be fully met in every case) and (ii) the firm's obligations under the regulatory regime to take steps which generally set its clients up to receive good or better results overall. A regulatory duty to take steps (when providing targeted support) which would generally assist most clients to get a better result than would be expected if they relied only on generic guidance could therefore be less problematic to a firm than an obligation to provide each individual client with a 'better' outcome.
13. As a related point, the Committee thinks that providing clients with a 'better outcome' via targeted support does not need to be predicated on the firm providing a single suggestion or recommendation to the client. Rather, it seems that the policy aim referred to in paragraph 4 above might equally be met through a regulatory regime which flexibly enables firms to implement a range of service offerings which are focussed on
 - a) challenging poor client decision-making (including apathy); and/or
 - b) indicating a range of more sensible decisions which are open to the client.

Calibration of any threshold for better outcomes

14. We note that CP 24/27 proposes that firms would need to apply the threshold of *"having reasonable grounds for believing that the delivery of targeted support suggestions would deliver a better outcome for their customers than if targeted*

support was not provided" (paragraph 4.8). It further states that "In setting this threshold, we recognise that targeted support suggestions will not be optimised for the individual but instead will be developed for groups of consumers. Therefore, the application of the threshold should principally be at the level of the internal firm design of targeted support rather than in the context of individualised assessments by firms. But in relation to the delivery of targeted support, if a firm had reason to believe that the provision of targeted support would not deliver a better outcome for a particular customer then the firm would not be able to give that customer targeted support" (paragraph 4.11).

15. This commentary in CP 24/27 highlights a key difficulty in the whole proposal from the perspective of legal and regulatory certainty for firms. On one hand, firms would be expected to design their targeted support at customer segment level; while ultimately their regulatory responsibilities – from compliance all the way through to complaints handling and financial liability – would (except in class-based redress) generally need to be identified at the level of the individual client. As currently proposed, the threshold is ambiguous as to whether it is intended to operate at segment or individual customer level; and it is unclear how the threshold would operate "principally" at the level of the customer segment design rather than at the level of individualised assessments. The inherent tension between segment and individual level, and the framing of the requirements, would need to be much clearer to provide sufficient regulatory certainty for firms and customers.

Question 4: How would you make a judgement of when the better outcome threshold was reached? What steps could the FCA take to support this judgement?

16. For the reasons set out in our response to question 3, we think that a subjective threshold where the firm must ensure a 'better outcome' for each client than they would otherwise have had is likely to result in unacceptable levels of risk (including legal risk) for firms.
17. It seems more realistic to require firms (as a general regulatory standard) to design their targeted support offerings so that they leave clients well placed to be warned away from poor decision-making (including apathy), whilst also identifying a spectrum of outcomes which are open to clients and which are at least broadly appropriate for the majority of in-segment customers in the relevant assumed circumstances.

Question 7: Do you agree with our proposal on ready-made solutions including that firms could suggest a new product? Do you agree that it should generally only capture support that constitutes a personal recommendation in the current framework? Do you have views on whether the targeted support regime should facilitate suggestions not involving a personal recommendation, and if so, how?

18. As we understand the FCA's proposals (and in particular the comments in paragraph 1.14 of CP 24/27), targeted support would be treated as a regulated 'personal recommendation' but (assuming the existing regulated advice perimeter is amended) not one falling with the existing Article 53 RAO definition of "personal recommendation".

19. We consider there to be several difficulties with this approach from the perspective of achieving legal and regulatory certainty. Most fundamentally, there seems to be an inherent ambiguity here between (a) firms giving targeted support which is designed for and aimed at addressing the needs and circumstances of a collective customer segment rather than of any particular individual and (b) such support being treated as a personal recommendation.
20. Even if the regulatory perimeter and related rules could be calibrated in a way which resolves this tension and provides sufficient certainty for firms about the nature and scope of their regulatory responsibilities and liability (and it is not immediately apparent from the current proposals in CP 24/27 how this will be achievable), there could remain (unless addressed through legislation) material uncertainty about the scope of a firm's duties and liability as a matter of general law. For example, the scope of duty of care which a firm would have to a particular individual to whom it provides targeted support. As the recent court decision in the insurance broker commission cases (*Johnson v FirstRand Bank*, *Wrench v FirstRand Bank* and *Hopcraft v Close Brothers Limited*) illustrates, albeit it in a very different legal and factual context, firms are potentially subject to general law obligations which are unpredictable and can go beyond their commonly understood regulatory obligations. Such uncertainty would need to be addressed alongside the FCA's proposed targeted support regime.

Question 8: Do you agree with the three steps of pre-defining scenarios, consumer segments, and ready-made solutions? In particular we welcome views on the need to design these prior to the delivery of support.

21. Our understanding of the proposals for these three steps in CP 24/27 is that a client will in most cases be assigned to a particular consumer segment and will then receive a single suggestion as to the course of action they might or should take, which has been pre-determined for that segment.
22. Given the difficulties already outlined in our responses to questions 3 and 4 which would arise if a firm were to try to agree a standard of service whereby the client is given a single suggestion or recommendation which approximates to a better outcome than what would have been achieved by the client using only generic information (but which falls short of the quality of a personal recommendation given via traditional regulated advice), we would recommend additional flexibility for targeted support to:
- a) be data driven so as to address certain details of the client in a tailored manner (without the imprecision that would seem to be inherent in addressing a segment) – e.g. by factoring in precise monetary values for amounts already invested;
 - b) provide suggestions as to parameters within which the client is well placed to find a good outcome, or shortlists of investments, so that some ultimate choice is left to the client instead of the client being presented with a single suggestion or recommendation; and
 - c) for clients whose situation results in them bordering two pre-identified client segments, show the targeted suggestions for each of those segments as well as the factors that cause those suggestions to differ.

We hope the above feedback has been useful. If you would like to discuss any of these comments, then we would be happy to do so. Please contact Hannah Meakin by telephone on +44 (0)20 7444 2102 or by e-mail at hannah.meakin@nortonrosefulbright.com in the first instance.

Yours faithfully

A handwritten signature in dark ink, appearing to read 'H Meakin'.

Hannah Meakin
Chair, CLLS Regulatory Law Committee

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