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Thank you for giving us the opportunity to provide feedback on the topics discussed in your Consultation Paper CP 25/12 *Simplifying the insurance rules: Proposed amendments following CP 25/12 and discussion on further changes for insurance and funeral plans*.

This feedback follows on from our responses to the questions in DP 24/1, which we sent on 13 September 2024.

The views set out in this response have been prepared by the Insurance Law Committee of the City of London Law Society (CLLS), and they do not necessarily represent the views of our respective firms or their clients.

The CLLS represents approximately 21,000 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, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 21 specialist committees.

The CLLS website is: https://clls.org/.

Feedback on Chapter 3 of FCA CP 25/12

Question 1: Do you agree with our proposed new definition to identify contracts and customers excluded from our regulatory protections and its scope?

1.1 We agree with the FCA's proposed approach as being the most practical of those considered in its Discussion Paper. We suspect that there will be a number of insurers and brokers who focus on retail and SME policyholders either side of the retail threshold who will find it operationally easier to treat all customers as being within the scope of ICOBS, the Consumer Duty and PROD 4. However, we also expect that a significant number will benefit from the more proportionate regulatory approach proposed in this CP.

1.2 At a technical level, we have some comments on the draft new Handbook text as set out in the CP, as set out below. A number of these points might equally have been made in relation to the current definition of *contracts of large risks*, but we believe the FCA should take the opportunity to clarify the language where possible.

1.2.1 Proposed new definition of *contracts of commercial or other risks*: the proposed definition does not give any clarity as to when a policy should be regarded as being a *contract of commercial or other risks*. On a literal reading of the proposed definition, any contract of insurance which includes any element of cover within the classes listed

in the definition could be regarded as a *contract of commercial or other risks*, even if the principal purpose of the policy is to provide cover in other classes.

At a practical level, this could create uncertainty where, for example, an insurer wishes to write a policy which principally covers the risks in the proposed definition, but also to include ancillary cover in another class (such as accident cover). It is unclear from the CP whether the FCA's intention is:

(a) that any element of cover in another class means that the policy as a whole cannot be regarded as a *contract of commercial or other risks;*

(b) conversely that any element of cover within the classes mentioned in the definition brings the policy as a whole within the definition (which would clearly be open to abuse and we assume is therefore not the intention); or

(c) that the correct approach should be to look at the principal or dominant purpose or nature of the policy as a whole.

Similarly, the proposed exclusion of PROD 4 in relation to insurance products which are contracts of commercial or other risks assumes that it is always clear when a product does or does not meet this definition. As the above paragraphs demonstrate, it will not always be clear.

A clarification of the rule, or the provision of accompanying guidance on the point, would therefore be welcome and would assist firms with commercial clients in the practical interpretation of this definition, whether in determining the scope of ICOBS, the Consumer Duty, or PROD 4.

1.2.2 Paragraph 1(b) of the proposed definition of *contracts of commercial or other risks* refers to "the liberal professions". This wording is carried across from Solvency II, but it is not a concept that as far as we have been able to establish has any clear meaning under English law or indeed generally in common law jurisdictions. We believe the FCA should take this opportunity to use terminology which is readily intelligible to the reader. If the intention is simply to make it clear that the policyholder may be carrying on professional services, we suggest the following wording: "… where the policyholder is engaged professionally in an industrial, commercial or professional activity, and the risks relate to such activity".

1.2.3 Paragraph 2 of the proposed definition of *contracts of commercial or other risks* states that the definition applies where "the *policyholder*" is within one of the specific categories. The existing defined term *policyholder* includes (in the case of policies written by Solvency II firms) a *beneficiary*, itself defined as "any person who is entitled to a right under a *contract of insurance*". By using the term *policyholder* rather than *customer*, it is again unclear whether, in cases where there may be persons who are entitled to a right under a policy but who do not come within the criteria set out in paragraph 2, the policy as a whole falls outside the definition of *contracts of commercial or other risks* and is therefore within the scope of ICOBS, PROD 4 and the Consumer Duty.

By way of example, a Directors & Officers policy will be purchased by corporates (and commonly corporates larger than the criteria set out in paragraph 2), but will include

personal cover for directors, former directors and spouses. Clarification of the FCA's intent on how this definition is intended to operate is essential, since the position as set out in the CP is unclear and open to misinterpretation.

Question 2: Do you have any concerns about our proposal that have not been covered in this chapter?

2.1 We would note that, while the proposals described in Chapter 3 of CP 25/12 will broadly align the scope of ICOBS and the Consumer Duty with FOS eligibility, there will be cases where the two do not align in practice. This is because DISP 2.7.3 R (6) applies the eligibility requirement for micro-enterprises, charities, trustees of small trusts and small businesses "at the time the complainant refers the complaint to the respondent", whereas the test in ICOBS will apply when the firms carries out the relevant distribution or claims handling activity.

2.2 It will also be important for firms to recognise that, if they seek to apply the new definition of *contracts of commercial or other risks* closely, they may well need to assess on each renewal whether their original categorisation of the policyholder remains true.

2.3 As noted in the CP, many firms do not distinguish currently between different sizes of commercial customer, and in practice we would expect this to continue to be the case. However, it will be particularly important in such examples for the Financial Ombudsman to recognise that not all policyholders who may have been treated by their insurer or intermediary as if ICOBS and the Consumer Duty applied to them will be eligible complainants. It would be helpful if the FCA could confirm that the fact that a firm may have treated a policyholder as if ICOBS and/or the Consumer Duty applied to them should not be taken as meaning that the firm has opted in to the jurisdiction of the Financial Ombudsman.

2.4 In addition, there will be cases where a commercial policyholder exceeded the size criteria when the policy was taken out, but meets those criteria when it makes a complaint about that policy to the insurer. The reverse will also be true in some cases. This means that it will be important for firms and the Financial Ombudsman to understand that the fact that a complainant is eligible to bring a complaint to the Ombudsman does not automatically mean that the Consumer Duty or ICOBS rules applied at the time of the act or omission complained of. Similarly, the fact that a firm was required to comply with ICOBS requirements when dealing with the customer does not necessarily mean that that customer will be an eligible complainant when they come to bring a complaint. We feel that, given the emphasis in the CP on the alignment of the two definitions, recognition of the fact that this alignment is not exact, whether by way of guidance in the Handbook or in the FCA's response to this CP, would be helpful.

Question 3: Do you agree with our proposed rule changes related to co-manufacturing arrangements, including that these should apply to all non- investment insurance products (both retail and commercial)?

3.1 Yes, we agree with these proposed rule changes. However, we would note that we sometimes see intermediaries unwilling to contractually accept that they are a co-manufacturer of a product, even where they have a decision-making role in respect of the product that would meet the FCA's definition of a manufacturer. As such, we would welcome clarity from the FCA on what might constitute a decision-making role in respect of a product. The Handbook definitions and descriptions in the PROD rules do not currently provide detailed guidance in this regard.

Question 4: Do you agree with the proposed rule and guidance related to the Bespoke contract exclusion, including that it should be available to all non-investment insurance products?

4.1 Yes, we agree with the proposed rule and guidance and its proposed scope.

Question 5: Do you agree with our proposal to remove the 12-month minimum review frequency requirement under PROD 4.2 and PROD 4.3?

and

Question 6: Do you agree with our proposal to require firms to determine the appropriate review frequency based on the potential for customer harm arising from risk factors associated with the product?

6.1 Yes. We would welcome generally the removal of "one size fits all" requirements of this nature, and would prefer to see rules which, in line with the Consumer Duty, enable firms to take a more risk-based approach.

Question 7: Do you agree with the proposed consequential change that only the lead manufacturer should be responsible for producing the ICOBS disclosure documents (applicable to insurers and managing agents), where a lead is appointed?

7.1 Yes, we do. However, the proposed amended wording of ICOBS 6.-1.1R refers to "An insurer and" the lead firm being responsible for producing the product information, which could be read as meaning all insurers, including a lead firm where selected. We therefore think this wording should be amended to better reflect the FCA's policy intent.

Question 8: Do you agree with the proposed rule changes related to the EL notification and reporting requirements? Is there other guidance that we should include on circumstances that are unlikely to amount to a significant breach?

8.1 Yes, we agree with the proposed rule changes. We do not have any suggestions for any other guidance.

Question 9: Do you agree with our proposal to remove the prescriptive minimum 15 hours training and development (and associated monitoring and record keeping requirements) for non-investment insurance and funeral plan firms? Please explain your answer.

9.1 Yes, we do. As noted in our response to Questions 5 and 6, we favour the removal of one size fits all prescriptive rules, consistent with the Consumer Duty, particularly where the prescriptive requirement is likely to be disproportionate, as we consider it to be in the case of non-investment insurance.

Question 10: Are you aware of instances where requirements imposed by local regulators duplicate or exceed those imposed by us? Please provide examples.

10.1 We are not aware of such instances.

Question 11: Do you have views on whether we should restrict ICOBS and/or PROD 4 to business with UK insurance customers or risks? Please explain your response and set out the basis of why you consider this would be justified.

11.1 We have no strong views, but we would expect that a UK insurance customer, particularly a UK retail insurance customer, would naturally assume that they would have the same protection afforded to them under the Handbook regardless of where the risk is located. Any diminution in such protection would therefore need to be clearly signposted to them. In practice, we suspect many insurers and brokers would not look to operate on the basis that ICOBS and/or PROD 4 were switched off entirely, but might wish to have the ability to make modifications where appropriate, including where necessary to meet any local regulatory requirements they were aware of.

Question 12: Please provide us with estimates on what the expected financial impact (including either to increase or decrease in costs) would be to your firm if we were to disapply ICOBS and/or PROD 4 in relation to non- UK business.

12.1 We are not in a position to answer this question.

Question 13: Please provide us with estimates on what expected financial impact (including either to increase or decrease in costs) would be to your firm if the scope of the Duty were to follow the revised scope of ICOBS and PROD 4. Please also explain whether your answer is different depending on whether Principles 6 and 7 continue to apply.

13.1 We are not in a position to answer this question.

Question 14: Should any restriction be based on the customer's habitual residence, the state of risk, or both?

14.1 We do not have strong views on this, but as noted above in relation to the location of the risk, we would expect UK retail consumers in particular who are dealing with UK-authorised firms would expect to receive the same rights and protections regardless of the location of the risk. However, there may be cases where that is not appropriate or necessary, or where compliance by a UK insurer or intermediary is dependent on the co-operation of an insurer or intermediary in another jurisdiction subject to different rules.

Question 15: Are there any other ways of determining the customer's location that we should consider?

15.1 We do not have any alternative suggestions.

Question 16: Are there any instances of products which are manufactured for, and distributed to, both customers in the UK and overseas? How should the ICOBS and PROD 4 rules deal with such situations?

16.1 While there are likely to be such products that will come within the proposed scope of ICOBS and PROD 4, we believe their number is likely to be small, particularly post-Brexit. We do not have a strong view on how they should be treated, save to say that any approach should be practical for firms and understandable to policyholders.

Question 17: How should the rules apply where the customer changes from being a UK to a non-UK customer (or vice versa) during the term of the contract?

17.1 We have no strong views on this, but our starting assumption should be that the rules that apply when the contract is entered into should apply for the duration of the contract, since that gives all parties certainty at the time they enter into the contract. In practice, firms will need to be able to restrict their cover contractually, including where appropriate to be able to terminate policies where policyholders are no longer in the UK.

Question 18: Are you aware of any instances where the changes we have set out would lead to a gap in regulatory protections for consumers and SME customers? For example, are there any jurisdictions which rely (for consumer protection) on UK firms being subject to our rules in relation to business in their jurisdiction?

18.1 We are not aware of such cases – we would expect, at least in the case of consumers, that most jurisdictions would apply their own rules and laws where the consumer is in their jurisdiction when they enter into a contract.

Question 19: Would there be any adverse consequences for the UK insurance industry arising from the changes we have set out? For example, do you think limiting the scope of our conduct rules would affect trust and confidence in, and therefore potentially the competitiveness of, UK firms?

19.1 We do not consider that the proposed changes are likely to adverse affect trust and confidence in UK firms. A proportionate regulatory regime which balances the needs of firms and customers and which is clear and predictable in how it operates is also likely to be one which facilitates competition and makes the UK attractive to overseas investors.

Question 20: Do you agree with our considerations around the rules applicable to the insurance products discussed above? If not, please provide your reasoning.

20.1 We agree that the Consumer Duty and the requirements of PROD 4 should mean that product-specific rules are likely to be largely superfluous, as well as inherently limited in their scope and therefore liable to have a diminishing relevance over time. Such rules may also inhibit innovation by preventing the development of new products which might be caught by the relevant definitions but have a different regulatory risk profile. The option of applying to the FCA for a waiver is uncertain in terms of timing and outcome, particularly if no comparable waiver has been granted, and inefficient for both firms and the FCA.

Question 21: Please provide us with estimates on what the expected financial impact (including either to increase or decrease in costs) would be to your firm if we were to remove the product-specific rules discussed above. Please provide the impacts in relation to each of the rules.

21.1 We are not in a position to answer this question.

Question 22: Are there any product-specific rules that you think no longer meet their intended purpose and should be reviewed? If yes, please explain why.

22.1 We believe that FCA should review all product-specific rules where the Consumer Duty and PROD rules may have made those rules superfluous.

Question 23: Do you think we should remove the minimum 12-month product review requirement for funeral plan manufacturers? Please explain your response.

23.1 Yes, consistent with our answers above, we would argue against the hard-coding of time limits in this context, since they lock in a cost without necessarily providing an corresponding benefit.

Question 24: Please provide us with estimates on what the expected financial impact (either to increase or decrease in costs) would be to your firm if we change the minimum product review requirement for funeral plans.

24.1 We are not in a position to answer this question.

Please direct any responses to this submission to the Chair of the Insurance Law Committee of the CLLS, Philip Hill (philip.hill@cliffordchance.com**) and Kevin Hart (**kevin.hart@clls.org**).**

Philip Hill

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