



Summary: Financial Conduct Authority Discussion Paper on a Duty of Care and potential alternatives approaches

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The FCA is keen to determine the best way to combat stakeholder concern over regulatory gaps that lead to consumer detriment. The FCA has published the discussion paper to:

- Better understand whether there is a gap in our regulatory and legal framework, or the way it is applied in practice, that could be addressed by introducing a New Duty.
- Assess whether change is desirable and, if so, what form it could take, how it would work in practice alongside our current framework, and what consequences it would have for consumers, firms and the FCA.
- Better understand and consider possible alternative approaches that might address stakeholders' concerns.
- Understand what a New Duty for firms might do to enhance good conduct and culture in financial services, and how this could influence consumer outcomes, alongside the Senior Managers and Certification Regime (SM&CR).

The Council is minded to respond that a new Duty of Care is not required because stringent rules and guidance from the FCA already ensure robust protections for consumers.

We would welcome your views on the Council's intended approach and any other aspects of the discussion paper you would like the Council to respond to.

Please submit any written feedback to Sean Smith, Head of Public Affairs, sean.smith@equityreleasecouncil.com by **4 October 2018**.

A conference call can be arranged if members would prefer to input by phone.

Further details:

The FCA expects "all firms to exercise extra care where consumers may be vulnerable" and are consulting on the implementation of a Duty of Care. However, the FCA has acknowledged that a new Duty of Care could result in firms having to "introduce a new set of highly complex rules for staff to understand and follow, and these changes could result in additional and unnecessary levels of complexity and uncertainty".



The FCA is open to alternatives to introducing a new Duty of Care that would address some stakeholders concerns that could be easier and less cumbersome to implement.

New Duty (of care) definition by the FCA:

“A duty of care is a positive obligation whereas a fiduciary duty is largely a prohibition. In this paper, we use a ‘New Duty’ to cover all possible formulations of any new duty of care or fiduciary duty on firms and any other changes that could address stakeholders’ concerns”

Analysis:

At Financial Services Expo in September 2018, the Council, Intermediary Mortgage Lenders Association, Building Societies Association and UK Finance questioned the need for a new Duty of Care because existing stringent FCA rules and guidance already ensure robust protections for consumers. The FCA cites a number of cases where they have been asked to intervene in relation to unregulated activity or uncertainty about the organisation’s role has made it difficult to ensure consumer protection. One example they give is mortgage purchasers (who are not required to be regulated, as long as they employ a third party to ‘administer’ the mortgage contracts).

This presents significant challenges for firms that base their practices on the existing robust rules and guidance set out by the FCA. It is acknowledged within the consultation that the new Duty of Care would likely create confusion for both consumers and firms. It would also require the FCA to make decisions on a case-by-case basis. This is likely to be resource intensive for both regulator and firms.

The introduction of a new Duty of Care may inadvertently create an extra layer of complexity, as well as stifling innovation as resources are directed towards meeting the new requirements. Existing FCA rules and guidance already promote a high level of consumer protection, so any new Duty of Care would need to provide clear, tangible benefit.

Questions:

- 1. Do you believe there is a gap in the FCA’s existing regulatory framework that could be addressed by introducing a New Duty, whether through a duty of care or other change(s)? If you believe that there is, please explain what change(s) you want to see.**

The Council is particularly interested in whether members agree with the Introduction of a New Duty and if so, what are the advantages / disadvantages of such a scheme to both firms and consumers.

We are also interested to hear if members have any proposed alternatives to a Duty of Care that might enhance regulation for the benefit of both firms and consumers.

- 2. What might a New Duty for firms in financial services do to enhance positive behavior and conduct from firms in the financial services market, and incentivise good consumer outcomes?**



Do members believe that a New Duty would enhance positive behaviour and conduct, and if not, what are reasons for that? Also, would a New Duty provide good consumer outcomes, not only in terms of product safety but also cost and innovation in products?

3. How would a New Duty increase our effectiveness in preventing and tackling harm and achieving good outcomes for consumers? Do you believe that the way we regulate results in a gap that a New Duty would address?

Do you believe that a New Duty would give the regulator the powers it requires to regulate effectively or would the new arrangements give the regulator too much power and put firms at risk of penalties unnecessarily?

4. **Should the FCA reconsider whether breaches of the Principles should give rise to a private right for damages in court? Or should breaching a New Duty give this right?**
5. **Do you believe that a New Duty would be more effective in preventing harm and would therefore mean that redress would need to be relied on less? If so, please set out the ways in which a New Duty would improve the current regime.**

The Council is of the view that there is always a risk of harm being done to consumers and that as a result a redress service will always be required in that event. Do members believe that a New Duty would be wide ranging enough in preventing harm that the need for redress is reduced?