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**Equity Release Council response to  
*DP18/5: a duty of care and potential alternative approaches*  
published by the Financial Conduct Authority, July 2018**

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**About the Equity Release Council**

The Equity Release Council is the representative trade body for the equity release sector with nearly 300 member firms and 1000 individuals registered, including providers, regulated financial advisers, solicitors, surveyors and other professionals.

It leads a consumer-focused UK based equity release market by setting authoritative standards and safeguards for the trusted provision of advice and products. Since 1991, over 440,000 homeowners have accessed over £24bn of housing wealth via Council members to support their finances.

The Council also works with government, voluntary and public sectors, and regulatory, consumer and professional bodies to inform and influence debate about the use of housing wealth in later life and retirement planning.

Every member is committed to the Council's Statement of Principles, its Rules and Guidance, which aim to ensure consumer protections and safeguards. In addition, the Council works to boost consumer knowledge and increase awareness of equity release as a solution to financial challenges facing people aged 55 and over the UK.

The Council welcomes the opportunity to respond to this consultation on the fairness of variation terms in financial services consumer contracts.



## Summary

The Council is committed to supporting initiatives that protect consumers and promote good consumer outcomes – these principles underpin the Council’s Standards that members are expected to uphold.

The Council does not believe that a New Duty of Care is required at this time. While we are supportive of the intended outcomes of a New Duty, the Council believes that improved customer outcomes can be achieved by utilising the current mechanisms in place more effectively.

The use of FCA Principles, rules and guidance, in conjunction with one another, already cover consumer detriment in the regulated areas. Effective enforcement from the FCA is essential to give these mechanisms sufficient credence and influence.

The introduction of a New Duty would likely confuse the current landscape, adding uncertainty to the primacy of FCA Principles or the New Duty and which takes precedent. In many cases, it is also likely that a New Duty may unintentionally undermine some of the FCA Principles which businesses have structured their practices around, which has, in turn, led to positive outcomes for consumers.

## Response

- 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)?**

The discussion paper highlights areas of concern that are *outside* the regulatory remit of the FCA. Government legislation would be required to address those concerns.

Based on the FCA’s existing regulatory powers and the examples of concern provided, a reasonable assumption would be that gaps in the current regulatory framework are rare, particularly when the various mechanisms the FCA has at its disposal are fully utilised.



The eleven Principles for business set out broad expectations by the regulator. These are broad definitions in which the onus is placed on the firm to comply and for the FCA to have the power to address issues beyond non-compliance with a rule.<sup>1</sup> The rules and guidance that sit underneath the Principles, can be utilised and updated to provide robust regulatory requirements where gaps do appear helping to avoid the same gaps appearing in future.

This provides clarity for businesses, making it easier for them to ensure they are meeting the standards required of them by the FCA across various facets of their work. The UK has one of the most stringent regulatory systems in the world, with universal principles able to encapsulate most malign activities that are of detriment to the consumer.

Where Principle-based regulation fails to achieve this, or if circumstances occur in which it is not immediately clear which Principle has been breached, guidance is an effective way to set out clearly to the industry what constitutes malign practice. This provides a body of evidence and case studies, which enable companies to learn and develop their behaviours moving forward. Similarly rule amendments can be utilised to adjust the wording to ensure that malign practices are prevented under these Principles in future.

As DP18/5 acknowledges, the strength of these mechanisms is reliant on the extent to which FCA enforcement is applied when Principles, rules and guidance are breached by firms. The paper also highlights the importance of firms operating with the right culture, particularly at senior management level, so that FCA Principles are adhered to.

Use of enforcement tools in large part drives culture change at senior management level if issues occur and guidance and supervision fails. The new Senior Managers and Certification Regime (SM&CR) that is soon to come into force, placing the obligation on individuals within firms to consider the standards they operate within, will further facilitate this culture change. We believe this is a positive step and will further drive good practice in the regulated sector and should be given the time to embed.

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<sup>1</sup> <https://www.handbook.fca.org.uk/handbook/PRIN.pdf>



In cases where there are deep rooted failings, it can and should be expected that where firms fall foul of the Principles, rules and guidance, they are likely to face punishment from the FCA. The FCA must ensure it is robust in both its supervision and enforcement, using the powers available where necessary, to demonstrate that failure to align a company's own standards with those of the FCA will result in a negative outcome for businesses and will not be tolerated.

Well-managed companies which protect the interests of the consumer will dedicate time and effort in ensuring they maintain high standards and meet the rule and guidance requirements which help them stay ahead of the regulatory curve, resulting in positive consumer outcomes. Well-functioning firms with the right culture will seek to avoid at all costs getting into a position where FCA enforcement is required, or even considered.

We believe that effective regulation is achievable and requires elements as follows:

- A. **Rules and regulations** underpinning principles provide the basis by which industry sets its standards. The absence of these presents a challenge to the industry as it is effectively left to self-regulate and interpret what FCA standards are.
- B. **Consistent enforcement** is a key lever behind firms' compliance with FCA standards. The absence of consistent enforcement removes the incentive to not only meet, but to exceed regulatory standards. In parallel with consistent enforcement there should also be forensic monitoring of firms so that those failing to meet standards are identified and where applicable will provide intelligence for considering future updates to guidance and rules.
- C. **Education - Firms own understanding and acceptance of regulatory requirements** of why they are in place as well as what the impact of failing to meet those requirements.
- D. **Ownership and responsibility - Firms are supported in working to improve culture** is an essential part to ensure FCA standards are met, improving consumer outcomes. The majority of firms will do this, while those that do not put consumer interest at the heart of their operation should face FCA enforcement.



E. **Access to redress** is important as invariably things will occasionally go wrong for consumers. In this instance it is imperative that consumers do have the ability to challenge firms. Access to redress provides confidence to consumers when engaging with a market they may have little understanding of.

**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?**

Some potential alternatives:

Rules introducing a New Duty

We do not see how using rules to introduce a New Duty would differ from the FCA's current ability to make rule changes to the overarching Principles for businesses. It would be more beneficial to companies, and ultimately the consumer that rules under the Principles are amended to meet the desired goals of a New Duty. This would mitigate the need for significant regulatory change which would add complexity to meeting regulatory requirements.

Introduction of a statutory Duty

While it is stated that potentially a statutory Duty of Care would have greater status than the Principles, it should also be considered that although this may add certain gravitas to the contents of any New Duty, it might unintentionally undermine the perceived standing of current Principles in place which exist to serve the same function thereby conflicting with its own purpose.

The FCA already requires "the general principle that those providing regulated financial services should be expected to provide consumers with a level of care that is appropriate, having regard to the degree of risk involved in relation to the investment or other transaction and capabilities of the consumer in question".<sup>2</sup> It is questionable what the role of a New Duty would be given the requirement of consumer care that already exists. It is also worth considering the utilisation of rule

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<sup>2</sup>Section 1C(2)(e) of FSMA



changes and amendments to the Principles if it is felt these do not go far enough, rather than the introduction of a New Duty.

#### Extending the client's best interests rule

Extending the client's best interests rules could be an effective way of meeting the demands of a New Duty without introducing a New Duty that supersedes the Principles. The discussion paper outlines examples where both Principle 6 and Principle 9 could be amended in this way. Bolstering the (relevant) Principles would help to ensure consumer protection.

#### Additional detailed rules or guidance on the Principles

We are supportive of the use of rules and guidance that can be applied to the Principles to achieve the goals of a New Duty. If a New Duty were to be introduced universally, it would be paramount that detailed rules and guidance are used to help firms understand the requirements placed on them and there would be concerns about doing so at a time where there is already much confusion and uncertainty regarding regulatory alignment.

However, this highlights the point, that rules and guidance can be utilised in this way to achieve higher standards, without the requirement of introducing a New Duty.

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

The current regulatory structure, with multiple levels and tools at the FCA's disposal can address the majority of circumstances that lead to consumer detriment. The purpose of a New Duty is to provide more holistic requirements on industry to ensure consumers are adequately protected. We believe this objective can be achieved through the application of the Principles.



Where more stringent requirements are needed, guidance and rule changes can be produced to inform business. This in turn enables them to change their current processes, ensuring good conduct and enacting cultural changes within firms.

We recognise the FCA has to balance consumer protection and fostering innovation but feel the broad nature of the potential to introduce a blanket New Duty would add further compliance requirements on all businesses, while not necessarily satisfying the underlying cause and effect of issues which may have been identified with some businesses. The uncertainty that an additional layer of bureaucracy would create, may in fact stifle business innovation and the opportunities such innovation could provide customers via product offerings. The broad nature of a New Duty means it could be difficult for innovative firms to fully understand where they may have fallen foul of regulation.

As highlighted above, the lever behind this is effective monitoring and enforcement which is the bedrock of an effective regulatory system. To achieve the desired outcomes of a proposed New Duty, we would suggest that it would be more effective to expand on guidance and amend rules that apply to the eleven principles as appropriate.

**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?**

We support the current regime in place that enables a private right for damages in court in the case of a breach of Principles. We do not believe that a New Duty is required to ensure this. Access to redress, in its various forms including through court when consumers are not being treated fairly, is essential to facilitating trust in the financial services sector.

**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?**

Ensuring high consumer standards will reduce the need for redress. We believe this can be achieved through the existing mechanisms of Principles, rules and guidance.



**Submitted by the Equity Release Council  
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