FCA DP18/5: A duty of care and potential alternative approaches

BSA Response

29 October 2018

Building Societies Association

Executive Summary

(a) As is clear from exhaustive analysis over many years, the key issues regarding conduct in financial services in the early 2000s were –

(i) **poor culture and governance in certain firms**, and

(ii) **inadequate regulatory oversight and enforcement**, with a major factor being the lack of regulatory tools to apportion and enforce individual accountability.

The legal and regulatory landscape has been further strengthened and supplemented considerably in recent years (including arrangements addressing the very important matter of individual accountability, providing tools not available to the previous regulator) and, crucially, it needs time to 'bed down' and be tested.

The clear conclusion is that, since there are ample rules, laws and duties to protect UK financial service customers, there is no need for an additional duty of care. Therefore, we do not support the proposal.

Rather, where firms or senior individuals in firms are responsible for unfair treatment of customers, those consumers need a conduct regulator that deals with the situation fairly and proportionately but robustly and effectively. The FCA has shown itself to be a strong regulator and it has all the tools it could reasonably require for the task, which now include the means to make relevant senior individuals accountable.

(b) While providing no additional benefit to consumers, the introduction of a duty of care could have a number of detrimental unintended consequences, including a more adversarial relationship between consumers and firms, and the stifling of innovation.

(c) Vulnerable customers represent a very important and evolving area. However, once again, a duty of care would be the wrong approach - it is crucial that protections deliver better outcomes in practice for vulnerable people. Rather than an inflexible and legalistic approach, like a duty of care, the best course involves a flexible, largely non-rules based, approach – ie a continuation of current work and initiatives. We look forward to continuing active and constructive engagement with relevant parties on the matter and to the FCA's consultation on vulnerable customers early next year.

A General Duty of Care: necessary or superfluous?

- **Background**

In this response, we consider the questions posed by the FCA's DP18/15 (the FCA Paper) concerning the introduction of a general duty of care for financial services firms. Following a discussion of important principles, we respond briefly to each of the FCA Paper's questions at the end of this response.

The introduction to the FCA Paper summarises why certain parties have called for a duty of care, as follows –

> *"Some stakeholders have raised concerns that our current regulatory framework does not provide adequate protection for consumers. They have called for the introduction of a 'duty of care' on firms when dealing with consumers. It has been suggested by some that the extent and longstanding nature of consumer detriment indicates that cultural change is required within firms and the market as a whole. They consider that current regulation has not yet delivered the change required, and that a duty of care would do so."*

In 2015, the Financial Services Consumer Panel, in recommending the introduction of a financial services duty of care, stated [1] –

> "*the financial services industry has frequently sold inappropriate products on an industrial scale to customers who were later revealed not to have been properly informed of the risks involved or, in some cases, were entirely unaware that they had purchased the product at all.*"

Certain other organisations have supported the duty of care proposal, including *Which?* and the House of Lords Select Committee on Financial Exclusion.

- **Poor conduct and inadequate supervision/enforcement . . .**

In 2014, a report on the culture of British retail banking [2] summarised relevant findings at that point, as follows –

> *"The various reports on banking which appeared following the financial crisis have delivered a remarkably consistent message: the failure of banks is due to a number of complex interlocking underlying issues. Simply rooting out objectionable practices such as mis-selling products, the manipulation of industry bench-marks or lax risk management practices is not enough. Banks need to address the root causes of these problems. This will take time and require fundamental transformation in these institutions. Each report identified relatively similar root causes including macro-economic issues, the structure of the marketplace, psychological factors, the structure of banks, failures of governance, poorly designed incentive structures, a lack of punishment and failures of over-sight and regulation."*

In June 2018, a study for the European Parliament ECON Committee [3] made the following points –

> "*The United Kingdom provides an exceptional case study of how an EU Member State can implement the requirements of EU financial regulation . . . yet still suffer from a massive and widespread mis-selling crisis instigated largely because of weak governance practices in financial firms, light touch supervisory practices and inadequate enforcement action by the regulator."*

In March 2008, the FSA's own internal audit report into the supervision of Northern Rock [4] (albeit that the bank's failings were in the prudential area) stated –

> *"These findings, taken together, indicate that the supervisory team did not adequately identify and pursue risks arising in the firm as a whole and in relation to its business model and control framework. . . . Our findings also show a level of engagement and oversight by supervisory line management below the standard we would expect for a high impact firm."*

Observations made by the Parliamentary Commission report *Changing Banking for Good* (2013) [5] included –

> *"The business models put in place by senior banking executives for PPI and IHRPs relied on the one-shot cross-selling opportunities of these products to deliver profits to their banks to make up for loss-leading credit product sales. The FSA did not take appropriate account of the detrimental implications that this type of business model could have for consumers. In relation to PPI, instead of taking decisive action, they waited for the Competition Commission to finish its two-year long inquiry."*
>
> The regime had *"created a largely illusory impression of regulatory control over individuals, while meaningful responsibilities were not in practice attributed to anyone".* As a result, *"there was little realistic prospect of effective enforcement action, even in many of the most flagrant cases of failure".*

As the BSA stated in its January 2017 response to the FCA *Mission* consultation [6] –

> *"The enforcement dimension is important as well. The FSA's fines for the whole of 2007 amounted to £5.3 million. This was just before the financial crash and when much of the misconduct outlined above was (in practice) well underway, i.e. at the point when much of the damage had already been done. By contrast, in 2014, FCA fines amounted to nearly £1.5 billion. There is a great deal of evidence that this move to robust enforcement, although welcome, came too late. And, even with the advent of more robust enforcement, there was still a lack of sanctions against senior executives in many of the firms that were heavily responsible for the most serious conduct failings;"*

The evidence clearly shows that the key issues in misconduct by certain financial services firms were poor culture and governance within those firms, combined with inadequate regulatory oversight and enforcement. However, as many observers have noted, the FSA did not have the tools now available to the FCA to take relevant enforcement action against individuals in many cases. As we explain below, the Senior Managers' and Certification Regime (SM&CR) provides the FCA with the necessary means to enforce accountability against senior individuals.

We could refer to numerous other credible reports that provide further evidence, but the conclusion is already very clear; ie that the key issues regarding conduct in financial services in the early 2000s were –

(a) poor culture and governance in certain firms, and

(b) inadequate regulatory oversight and enforcement, with a major factor being the lack of regulatory tools to apportion and enforce individual accountability.

- **. . . but numerous rules and principles**

There was a wide range formal provisions designed to protect consumers (whether laws, principles, rules or 'duties') during the relevant period, ie leading up to the financial crash in 2007/8. Among other things, there were the FSA's Principles for Business, the FSA's TCF Outcomes, the FSA's APER Code, various conduct of business and other rules in the FSA Handbook, and a numerous consumer protection laws (statutory and common law).

However as we noted above, crucially the FSA lacked the means to enforce against senior individuals in many cases. After 2008, the FCA and PRA considerably enhanced the mechanisms to permit them to apportion responsibility to individuals; ie the SM&CR regime applicable to banking since 2016.

In addition, the conduct regulator introduced Banking Conduct of Business Rules (in 2009), implemented Consumer Credit Rules (in 2014) and strengthened the Mortgage Rules (mainly in 2016).

There is also a range of new laws or regulations relevant to financial services consumers (including the Payment Services Regulations 2017), or consumers generally (including the Consumer Protection from Unfair Trading Regulations 2008, the Consumer Rights Act 2015 and the General Data Protection Regulation 2016).

In the table below, we summarise the key consumer protection measures provided by laws and regulatory rules.

TABLE 1

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Principles

TCF is a cultural matter that will vary from firm-to-firm, but there are certain consistent principles and themes that firms should test their processes and outcomes against –

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- **FCA Principles for Business**
- **FCA TCF outcomes**
- **FCA conduct rules – here and here**
- **The Senior managers and certification regime – FCA and PRA**

These are underpinned by a range of regulatory objectives and powers, strengthened by the Financial Services Act 2012

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The key principles behind TCF are –

- *senior management responsibility*
- *integrity and honesty*
- *customer-centric culture and practices, and*
- *skill, care and diligence.*

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'Vertical' provisions

financial services-only

- **FCA Handbook**

conduct of business rules and guidance, and other relevant provisions, which currently include –

  - *BCOBS - banking*
  - *MCOB - mortgages*
  - *CONC - consumer credit*
  - *ICOBS - insurance*
  - *COBS – investments*
  - *DISP - complaint handling*
  - *UNFCOG, RPPD - fairness guidance*
  - *SYSC - systems and controls*
  - *TC – training*

- **Consumer Credit Act 1974**
- **Payment Services Regulations 2017**
- **Financial Ombudsman Service** *(not a regulator but a major part of the conduct jigsaw)*

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'Horizontal' provisions

cross-sectoral (financial services and others)

Key provisions include –

- **Consumer Rights Act 2015**
- **Consumer Protection from Unfair Trading Regulations 2008**
- **General Data Protection Regulation 2016**
- **Equality Act 2010**

Please note: we do not cover ***voluntary*** *codes of practice, whether vertical or horizontal, because compliance with them is a matter for individual firms to decide, but a number exist.*

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Selected key requirements derived from the provisions set out in the above table, and most closely covering the same or similar ground to the proposed duty of care, are as follows –

TABLE 2

Requirement	**Application**	**Source**
Conduct its business with integrity	Firms	FCA Principle 1*
Conduct business with due skill, care and diligence	Firms	FCA Principle 2*
Pay due regard to the interests of customers and treat them fairly (supported by FCA 'TCF Outcomes')	Firms	FCA Principle 6*
Pay due regard to the information needs of clients and communicate information to them in a way that is clear, fair and not misleading	Firms	FCA Principle 7*
Manage conflicts of interest fairly, both between itself and its customers and between a customer and another client	Firms	FCA Principle 8*
Take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely on its judgment	Firms	FCA Principle 9*
Act with integrity	Individuals	Conduct Rule 1
Act with due skill, care and diligence	Individuals	Conduct Rule 2
Pay due regard to the interests of consumers and treat them fairly	Individuals	Conduct Rule 4
Comply with the senior management duty of responsibility	Individuals	S66A(5) FSMA
Act honestly, fairly and professionally in the best interests of the client (supported by a wide range of specific conduct of business rules and fairness provisions)	Firms	Various FCA Conduct of Business Rules
A prohibition on dishonest market practice and bad faith impairing a customer in making an informed decision (supported by a list of 'blacklisted' practices)	Firms	The Consumer Protection from Unfair Trading Regulations 2008
A prohibition on commercial practices that are false, deceitful, contain misleading omissions, or amount to 'confusion marketing'	Firms	The Consumer Protection from Unfair Trading Regulations 2008
Implied service standards – • service to be performed with reasonable care and skill • information about the trader or service to be binding • if not fixed, reasonable price to be paid for a service • if not fixed, service to be performed in a reasonable time • trader must not exclude certain terms	Firms	The Consumer Rights Act 2015
Contract terms with consumers must be fair and in plain, intelligible language (supported by 'greylist' practices) and certain terms restricted or prohibited.	Firms	The Consumer Rights Act 2015 (and other provisions)

*enforceable as Rules – see eg the High Court PPI judgment from 2011

We note that the FCA Paper refers to some of these, and other, provisions on pages 9 - 15. As noted in Table 1, there are many other relevant provisions, such as consumer credit legislation (including the 'unfair relationships' test) and rules, data protection law, equality legislation, and range of provisions that protect consumers indirectly (eg competition law – an area where the FCA and other bodies are very active: please see below).

It should be borne in mind that, in addition to the numerous laws and rules set out in the tables above, the FCA has recently undertaken, or is in the process of undertaking, a wide range other exercises designed to improve competition, conduct and TCF; for example –

- the Financial Advice Market Review,
- the Cash Savings Market Study,
- the Mortgage Market Study,
- the Retail Banking Business Models Review,
- work on vulnerable customers
- competition law breach investigations, etc.

All of these exercises are still work in progress, are under review and/or have triggered further initiatives (eg the 'basic savings rate' discussion following the Cash Savings Market Study, provision under BCOBS of additional information to personal current account holders etc). The continuing work on mortgage SVR 'prisoners' shows that good progress can be made by industry initiatives in problem areas. Our response[7] to the CMA's consultation on the Citizens Advice super complaint provides more information on these matters.

UK financial services also has the largest Ombudsman Scheme in the world, free to customers, which decides individual complaints by reference to what is fair and reasonable in all the circumstances of the case (and must take into account, but is not bound by, relevant law, regulation etc). In 2017, the Financial Ombudsman Service dealt with 339,767 new complaints and resolved 400,658 complaints (upholding 34% overall) [8]. FCA Rules (DISP) require firms to deal with complaints properly and the FCA has strengthened these Rules in recent years.

There are also provisions in DISP relating to root cause analysis, and the FCA has rule-making powers to require a firm to establish and operate a consumer redress scheme (sections 404 and 404A to 404G of the Financial Services and Markets Act 2000). In addition, there are current FCA proposals to increase significantly the compensation award limit for the Financial Ombudsman Service and extend wider coverage to SMEs.

It is crucially important that, after years of implementation, the SM&CR and the other provisions are allowed reasonable time to bed down and be tested. The addition of a further general duty would make this process much more difficult. Indeed, if the regulators do not draw a line under relevant new rules, at least for the time being, it will be very difficult to test whether or not SM&CR and other enhancements been effective.

The BSA appreciates that more work is needed regarding certain customer groups; for example, vulnerable customers (see below). We also recognise that, over time, consumer protection provisions will probably require amendment in order to keep pace with innovation. However, in general, we believe that both consumers and financial services firms would now benefit from a moratorium on new rules and laws.

Page 9 of the DP examines some niche areas that are unregulated or lightly regulated and we comment separately on this matter below.

The clear conclusion is that there is no shortage of rules, laws or duties to protect the generality UK financial service customers and they do not need an additional duty of care. Rather, where firms or senior individuals in firms are responsible for unfair treatment of customers, they need a conduct regulator that deals with the situation fairly but robustly.

- **Previous examination of the duty of care proposal**

The Financial Services Consumer Panel has proposed the introduction of a duty of care on a number of occasions in the past. In 2012, the Panel submitted proposals to the Parliamentary Commission on Banking [9]. After detailed analysis of evidence, the Commission decided not to take the idea forward in its final report, but stated –

> *"Banks need to demonstrate that they are fulfilling a duty of care to their customers, embedded in their approach to designing products, providing understandable information to consumers and dealing with complaints. A bank has a responsibility to ensure that customers have had a reasonable opportunity to understand a transaction, having regard to their knowledge and personal circumstances. The FCA now has a mandate under its consumer protection objective to enforce this responsibility."*

The Law Commission also considered the Panel's proposal [10], but did not pursue it either.

- **Learning the lessons of the past**

As we also stated in our response to the FCA's Mission consultation –

> *"In 2007 (just before the financial crash), a House of Commons library report described the volume of material emanating from the FSA as "near-legendary" and noted how, in response to complaints of regulatory overload, it had been "reduced now to a mere 8,800 pages". Yet, since the formation of the FSA in 2001 (replaced by the FCA in 2013) we have had many serious conduct issues; for example, in relation to mortgage endowments, PPI, LIBOR, foreign exchange, sales incentives, systems and controls, interest rate hedging etc.*
>
> *The comparison between the size of the regulatory output and the number of major conduct problems is as clear evidence as we are ever likely to see that more regulation is not the same thing as good regulation. Yet some people and organisations, whose reaction to problems is usually a call for additional laws or regulations, appear to disregard the clear evidence."*

In 2003, the outgoing chief executive of the FSA, Sir Howard Davies, said [11] –

> "*the recent history of the British financial services industry is proof of the adage that those who fail to understand the mistakes of the past are condemned to repeat them."*

It was not what Sir Howard Davies contemplated, but his sentiment is relevant to the proposal for a duty of care in financial services. If (despite the experiences of recent decades) some firms still have not changed their cultures for the better then the solution is clear. *It is not the introduction of yet another rule - it is strong regulatory supervision and enforcement.*

We have already noted that the FCA is a tougher regulator than its predecessor, although in its later years (after the financial crash) the FSA increased its enforcement activity considerably. Although major market issues, such as LIBOR or interest rate hedging products, account for the largest proportion of the increased fines levied by the FCA, a great deal related to retail conduct/TCF. For example, the FCA levied substantial fines on individual firms for failings or deficiencies concerning –

- financial incentives - £28million in 2013
- mortgage advice processes - £17million in 2014
- investment advice - £12million in 2014
- a wide range of compliance issues - £30million in 2014
- handling PPI complaints - £117million in 2015.

These are, of course, simply a selection of enforcement decisions. They are in addition to massive sums in remediation, such as nearly £33billion redress for PPI mis-selling.

The part of the jigsaw that was missing until recently was a regime enabling the conduct regulator to enforce individual accountability against directors and senior managers in financial services. As already noted, the SM&CR has now plugged that gap, and we have begun to see the results including enforcement action against the chief executive of a major bank.

Looking forward, the FCA's *Annual Enforcement Performance Report 2017/18* records an increase in the number of investigations relating to culture and governance, presumably flowing from SM&CR. There were 15 open culture/governance cases as at 1 April 2017 but, by 31 March 2018, there were ***61*** open cases. Taking the overall position, there were 247 open FCA investigations as at 31 March 2016. This had increased to ***527*** by mid-June 2018.
The number of investigations of individuals is on the increase.

Therefore, the picture in terms of regulatory investigations and enforcement is much stronger in recent years, and it should strengthen still further because of individual accountability provided that the FCA's supervision and enforcement remains robust.

The introduction of a new duty of care, which would inevitably overlap many (if not all) of the provisions listed in Table 2 above and so provide no additional benefits to consumers, would be likely to –

- lead to litigation on scope and application, together with increased CMC activity
- develop a more adversarial relationship between firms and consumers, with firms developing a more defensive ethos,
- stifle innovation (with firms being less willing to adopt a 'test and learn' approach)
- push firms' staff into unintended advice situations, where they lacked the relevant training or skills (eg on wider tax aspects and other subjects), and
- involve increased costs in addressing how the duty worked and its complexity.

Indeed, another aspect of a duty of care, which would require considerable examination, is its exact nature. The DP does not address this point but, rather, states that *"In this paper, we use a 'New Duty' to cover all possible formulations of any new duty of care or fiduciary duty on firms."* While this approach might suffice at discussion paper stage, the FCA would have to articulate the matter clearly if the proposals were to go to the next stage.

For example, would the duty be akin to the tort relating to negligent misstatement, would it be implied into consumer contracts, would it be a fiduciary duty, or would it be a new species of duty altogether? The Financial Services Consumer Panel papers on the subject in 2015 and 2017 [12] tend to indicate that it would be the last of those options, which Parliament would have to introduce through an amendment to the FSMA and which would need to be followed by further regulatory rules.

There is a strong case that consumer law and regulation, rather than being made even more complicated, requires streamlining and simplification. This could greatly benefit consumers, who currently find it very difficult to recognise and understand their rights. It could also benefit the vast majority of firms, which are inundated with compliance requirements. Simplification could also help other parties, such as conduct regulators and ombudsmen. Further complexity could impede competition, if firms were so stretched that they were unable to devote enough resources to pro-consumer due diligence (eg product governance).

Therefore, for all the reasons set out above, we do not support the introduction of a general duty of care in financial services.

Vulnerable customers

One of the fundamental points that we hope we demonstrated earlier in this response is that, in the light of the large number of existing consumer protection measures in financial services, there is no room for an additional duty of care.

However, the legal and regulatory provisions that we listed do not cover all areas. For example, Chapter 2 of the FCA Paper discusses unregulated, or lightly regulated, activities. The Chapter goes on to provide some examples but makes the point that, while potentially the FCA has certain rule-making powers, any introduction of a new duty would require legislation. Of course, some subject areas that are unregulated 'vertically' by the FCA (ie in financial services) might nevertheless be within the remit of 'horizontal' laws and regulations (ie those covering a wide range of business, and/or other, sectors including financial services – see references above).

The FCA Paper refers to vulnerable customers, including the fact that some stakeholders *"put forward a duty of care as a solution which would promote responsible behaviour as part of businesses, ensuring fair outcomes for consumers **(particularly the vulnerable)** and an improvement in firm culture."* [Our emphasis].

The FCA Paper also notes that the FCA expects all firms to exercise extra care where consumers may be vulnerable. The BSA and its members are committed to fair treatment of the vulnerable and have done (and continue to do) a great deal of work regarding vulnerable customers [13].

The FCA Paper states that the regulator plans to consult early in 2019 to clarify its expectations on firms about the identification and treatment of vulnerable customers. This would imply that there are outstanding issues relating to vulnerable customers and, from our experience, we would agree – this is a complicated and evolving area (see below).

Furthermore, unlike financial services customers in general, vulnerable customers in particular have few *explicit* regulatory or legislative safeguards. The Mental Capacity Act 2005 sets the current legal framework for how a third party can take over a running a person's financial affairs once that person has lost mental capacity. The Consumer Protection from Unfair Trading Regulations 2008 cover vulnerable customers to a degree. Under the Equalities Act 2010, service providers must ensure that they do not give their customers with disabilities a lower standard of service simply because they have a disability.

Therefore, relevant legislation is piecemeal and limited. This is perhaps understandable the following reasons.

First, it is only in relatively recent years that proper awareness of the needs of vulnerable customers has emerged, and it is of course still developing.

Second, the possibility of a customer being vulnerable is one that spans a range of potential circumstances and different product areas. There is a wide spectrum of possible vulnerabilities and they can have different effects. Therefore, it would be difficult to 'legislate' for all possibilities.

Problems can range from vulnerable people falling prey to criminals (or even duress or undue influence from family members) to the difficulties that vulnerable customers might experience in being able to understand or compare products. Indeed, there are numerous situations where vulnerable customers might require third party support, including where a customer has declining or fluctuating mental capacity; is housebound; has failing sight, hearing or other physical illness problems; has fluctuating memory; is recuperating from illness; is severely bereaved etc.

However, we believe that achieving a duty of care that worked in practice and was genuinely helpful for vulnerable people, while not making unreasonable or unrealistic demands on firms and their staff, is not a realistic possibility.

One of the advantages of current arrangements is that, broadly speaking, they are not mandated and therefore permit flexibility. This is very helpful given the wide range of vulnerabilities and practical circumstances attending vulnerability. There is a risk that a duty that would either be too broad or too prescriptive and, either way, would be counter-productive. It would be crucial to achieve a sensible balance. Equally, poor treatment of vulnerable customers must not be left unaddressed.

Should the FCA examine the possibility of a duty of care for vulnerable customers, there would be a large number of considerations, and getting the balance right in each case would require very careful thought. Considerations would include the following –

- the scope and limits of vulnerability including the different categories of vulnerability, customers who lack mental capacity, customers who have disadvantages falling short of vulnerability etc

- the scope and limits of a firm's duty including different practical circumstances (crime and financial abuse/undue influence as well as categories of health, resilience, life events etc) and how what is required (and indeed achievable in practice) would vary and would often be very difficult to mandate

- whether it would be helpful to vulnerable consumers for any duty of care to be limited to financial services firms, when so many other private and public sector organisations and agencies could reasonably be regarded as having safeguarding responsibilities (and financial services firms need to be confident in referring vulnerable people to them)

- ensuring that steps required to identify a vulnerable customer were not intrusive and respected a vulnerable consumer's right to privacy

- achieving a clear balance between that right to privacy (including rights under data protection law) and a firm's responsibilities under any duty of care

- an equally clear balance between a firm's responsibilities under any duty of care and the fact that, even with appropriate training, people in a firm could not take on a role outside their reasonable competence, ie they could not be required to exercise the specialist skills of doctors, the police, social services, the teaching profession etc

- proportionality among firms, products, delivery channels etc – for example, there are often very different considerations between face-to-face and non face-to-face situations

- how, or whether, to mandate training, discretionary elements, customer information, safeguarding etc.

The above list of considerations is by no means exhaustive and illustrates how difficult it would be to introduce an effective duty of care. It would certainly be highly counter-productive if any new regime were to prove so difficult to apply in practice that the protection of vulnerable people deteriorated, rather than improved, as a result.

Therefore, we believe that the best course would be for the regulators and the industry to continue to build on the numerous informal arrangements, including guidance, that already exist. We need a sensible and constructive discussion with the interests of vulnerable customers at its heart, in order to map out an effective way forward. The BSA is keen to continue engaging with the FCA (including through its forthcoming consultation) and other relevant parties in order to improve the treatment of vulnerable customers.

In conclusion, we do not believe that a duty of care would be the right approach for specific customers, such as those with vulnerabilities, either although we fully recognise that there is further work to be done.

FCA Questions

Q1: 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. We are particularly interested in your views on:

i. ***The types of harm and/or misconduct any changes would address.***

ii. ***Whether a New Duty should be introduced and, if so, what form it should take.***

iii. ***What additional consumer protection and benefit this would provide, above the current regime (including over and above the existing implied term in the Consumer Rights Act (CRA) for reasonable care and skill).***

iv. ***How a New Duty could and should act to mitigate or remove conflicts of interest, including the types of conflicts which exist in the provision of financial services?***

v. ***Whether a New Duty could reduce complexity and bring greater clarity, or whether it could result in an additional layer of regulation and make it more complex, and, if so, how?***

vi. ***Whether other alternatives could help address any gaps, for example, extending the clients' best interests rule to different activities.***

vii. ***Whether we should introduce more detailed rules and guidance, and, if so, what specific rules and guidance are required?***

viii. ***Whether the scope of any changes should differ between markets and whether it should include wholesale transactions.***

For the reasons set out earlier in the response, we do not believe that there is a general gap in the FCA's existing regulatory framework that the FCA could address by introducing a duty of care. Our specific observations on question 1 are as follows -

i. As noted, we do not consider the introduction of a duty of care to be the right approach. It would add no consumer benefit, but would introduce further complexity and confusion to an already over-populated legal and regulatory space.

ii. No, for the reasons given. Regarding the question about form, the FCA Paper makes the point that, if the regulator were to introduce a duty, it could take one of a number of forms (eg fiduciary or based on a tortious duty of care). Whatever the route, there would be significant compliance implications; for example, it could have substantial consequences for the responsibilities of customer-facing staff. Set against the fact that there are already more than enough provisions to protect consumers (please see the tables above), this would be a highly undesirable outcome for all concerned.

iii. None.

iv. It is unnecessary – relevant requirements already exist.

v. In the BSA's view, it would result in an additional layer of regulation and make it more complex. We set out our reasoning above.

vi. Again, there are more than sufficient existing provisions.

vii. No, for the reasons given.

viii. No, for the reasons given.

Q2: What might a New Duty for firms in financial services do to enhance positive behaviour and conduct from firms in the financial services market, and incentivise good consumer outcomes?

We believe that, at best, a general duty would be redundant at inception because, as we have evidenced, there are already a large number of material provisions covering the relevant ground.

Q3: 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?

We do not believe that it would increase the FCA's effectiveness. The FCA now has all the tools it could reasonably need to regulate effectively, and avoid the pitfalls that the FSA fell into, especially following the introduction of the SM&CR. The latter regime needs a period of stability so that it can bed down and so that its effectiveness can be tested properly.

Q4: 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?

Consumers invariably pursue complaints through the firm's processes and, if unsatisfied, through the Financial Ombudsman Service. As we noted above, the Scheme is the largest in the world and free and simple for customers to use. In addition, section 138D of the Financial Services and Markets Act provides a right of private action for a number of FCA Rules but not, of course, for guidance and not for the FCA Principles for Business. As we have seen, both the courts and ombudsmen are able to take into account all aspects of the FCA Rulebook, including the Principles.

Overall therefore, we cannot see how the changes referred to in the question would be likely to be of significant benefit to consumers. As we have already made very clear, the best option for protecting consumers from poor TCF in future is for the FCA to regulate strongly on the basis of the large number and wide range of provisions and tools at its disposal, including against relevant senior individuals whose accountability will now clear under SM&CR.

Q5: 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.

No, for the reasons already given.

FOOTNOTES

1
https://www.fs-cp.org.uk/sites/default/files/fscp_position_paper_on_duty_of_care_2015.pdf

2
http://newcityagenda.co.uk/wp-content/uploads/2014/11/Online-version.pdf

3
http://www.europarl.europa.eu/RegData/etudes/STUD/2018/618996/IPOL_STU(2018)618996_EN.pdf

4
https://www.fca.org.uk/publication/corporate/fsa-nr-report.pdf

5
https://www.parliament.uk/business/committees/committees-a-z/joint-select/professional-standards-in-the-banking-industry/news/changing-banking-for-good-report/

6
https://www.fca.org.uk/news/press-releases/fca-mission-consultation

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8
http://www.financial-ombudsman.org.uk/publications/annual-review-2018/index.htm

9
https://www.parliament.uk/documents/banking-commission/Banking-final-report-vol-ii.pdf

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https://www.lawcom.gov.uk/banks-duties-to-customers/

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https://publications.parliament.uk/pa/jt201314/jtselect/jtpcbs/27/27iv59.htm

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https://www.fs-cp.org.uk/sites/default/files/duty_of_care_briefing_-_jan_2017.pdf

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Initiatives, projects and subjects concerning vulnerable customers, which the BSA and our sector participates in (sometimes with partners) include third party support, the financial abuse code of practice, *Take 5*/banking protocol, financial resilience in later life, lending into retirement, National Mental Capacity Forum, Joint Fraud Taskforce, and the social purpose of savings.

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The Building Societies Association (BSA) is the voice of the UK's building societies and also represents a number of credit unions.

We fulfil two key roles. We provide our members with information to help them run their businesses. We also represent their interests to audiences including the Financial Conduct Authority, Prudential Regulation Authority and other regulators, the Government and Parliament, the Bank of England, the media and other opinion formers, and the general public.

Our members have total assets of over £387 billion, and account for 22% of the UK mortgage market and 18% of the UK savings market.