



Front of mind

Joanne Davis

A New Duty of Care



This Spring, the Financial Conduct Authority is due to consult on proposals to introduce an extensive duty of care owed by financial services.

The FCA found that the number of consumers with low financial resilience – meaning overindebtedness or with low levels of savings or low or erratic earnings – has grown. Over the course of 2020, the number of UK adults with low financial resilience increased from 10.7 million to 14.2 million. Highlighting the threat to people's incomes from the pandemic, in October one in three (30pct or 15.9 million) adults said they expect their household income to fall during the next six months, while 25pct (13.2 million) expected to struggle to make ends meet.

To cope with the hardships they

expected to face, many adults reported that they were likely to cut back on essentials (33pct or 17.5 million) or to use a food bank (11pct or 5.6 million); 8.1 million (16pct) expected to take on more debt. However, 48pct of adults have not been affected financially by Covid-19, and 14pct have actually seen an improvement in their financial situation.

Report reveals the impact these measures have had with one in six (17pct or 3.2 million) mortgage holders having taken up a mortgage payment deferral and four in ten (40pct) of them reporting they would have struggled a lot without such measures.

The Financial Lives survey provides insight into the financial lives of consumers, which the FCA and others use to understand the experiences of

consumers, including those who are most vulnerable to harm and ensure that the right protections are in place. This is something which has been especially important as the economic toll of coronavirus (Covid-19) has continued to mount.

The FCA surveyed more than 16,000 people between August 2019 and February 2020. This was followed by a subsequent survey, with over 22,000 respondents, focused on the impact of the pandemic on consumers, conducted in October.

The FCA final new Guidance on Vulnerability is expected any time soon (Q1 2021). Auxillias will be reporting on this as soon as it is published.

Providers to consumers

This consultation will review whether or not the FCA's regulatory framework is sufficient or applied effectively enough to prevent harm to consumers and what should be done if it is not. The debate has provoked strong and polarised views and, thus far, no clear direction of travel.

The Financial Services (Duty of Care) Bill, a private member's bill, seeks an amendment to the Financial Services and Markets Act 2000 (FSMA) that would require the FCA to introduce a duty of care within six months of that bill passing into law. Whether the bill will pass into law remains to be seen, but its existence guarantees that the issue of a duty of care will be granted parliamentary airtime and will present an opportunity for lobbying and publicity.

The consultation will be of particular interest to regulated firms and industry representatives, as well as to consumers and consumer groups.

What is the background to the proposed change?

In July 2018, the FCA published Discussion Paper 18/5 (DP 18/5) and sought views on whether a new statutory or regulatory duty should be introduced to provide additional protection for consumers.

The FCA suggested that this new duty might be a duty of care or a fiduciary duty. DP 18/5 generated a wide range of responses, ranging from whole-hearted support to strong opposition. Most respondents called for changes to how the FCA applies the existing regulatory framework. They wanted the FCA to act more readily in applying the Principles in PRIN 2.1. They also wrote that the FCA should be more transparent about its standards for good customer treatment.

Some respondents suggested that the Principles should be revised as a means of bringing about change without introducing legal complexity. They raised specific concerns that Principle 6 (“A firm must pay due regard to the interests of its consumers and treat them fairly”) is too vague and is not applied robustly enough.

Some stakeholders considered that a new duty was needed to trigger fundamental change. Some say that a new statutory duty was needed to provide a legislative standard of care that everyone would have to pay regard to.

The FCA reviewed the responses and, in April 2019, published its Feedback Statement 19/2 (FS 19/2). The FCA concluded that whilst there was no clear case for a new statutory duty, it did have a clear mandate for change. Most respondents considered that consumers needed better protection.

What happens next?

The next step is for the FCA to put forward specific options for change and seek detailed views on them. The FCA recognises that any changes it makes will have a long-lasting impact. It commented that “there is unlikely to be a one-size-fits-all solution to any deficiencies in consumer protection”, which may explain its reluctance to support a new statutory duty of care.

The FCA has stated that its primary focus is on reviewing how it applies the regulatory framework – particularly

how it applies the Principles in its authorisations, supervisory and enforcement functions, and how it communicates this to firms and considering new or revised Principles to strengthen and clarify firms’ duties to consumers, including whether a potential private right of action for breaches of Principles is appropriate and what the unintended consequences of this might be. What should regulated firms consider?

Regulated firms must meet the standards of consumer protection that are set out in the Principles or risk enforcement action by the FCA. For example, regulated firms must conduct their business with integrity (Principle 1), conduct their business with due skill, care and diligence (Principle 2), pay due regard to the interest of customers and to treat them fairly (Principle 6) and pay due regard to the information needs of their clients (Principle 7). The FCA does not prescribe exactly how regulated firms should meet the Principles, which recognises that what might be appropriate for one regulated firm or one group of consumers might not be appropriate for another.

The Senior Managers & Certification Regime (“SMCR”) complements the Principles, for example by requiring employees of FSMA authorised firms to act with integrity, to act with due care, skill and diligence and to pay due regard to the interests of consumers and treat them fairly. The FCA and Prudential Regulatory Authority have enforcement powers under the SMCR.

In addition, consumers have various routes to redress when things go wrong. They can seek redress from regulated firms through complaints channels and voluntary redress programmes, escalate complaints to the Financial Ombudsman Service (FOS), seek damages for losses suffered as a result of breaches of FCA rules (s.138D FSMA) and have recourse to the FCA and the courts in the event of breaches of relevant legislation and common law principles.

What should we be considering now?

Regulated firms may wish to anticipate the consultation by thinking carefully about whether the types of changes that the FCA is considering would be appropriate and what how they would impact their businesses.

Our view is that we need clarity from the FCA around the expected duties to consumers and how the FCA will apply the regulatory framework, provided that this does not give rise to a “one-size-fits-all” approach. Such clarity could enable firms to determine more readily whether their practices are adequate.

There is a discussion around the FCA’s likely proposal to introduce a private right of action for breach of Principles. If such a right of action were to apply, it would cover a wide range of customer disputes that are not actionable by consumers currently (e.g. actions based on a failure by a regulated firm to “pay due regard to the interest of customers and to treat them fairly” (Principle 6)). Firms may question whether this would be necessary or desirable in addition to the FCA’s likely proposals to clarify the existing regulatory regime and to introduce new or amended Principles.

The question is whether an actionable duty of care is necessary where the FOS already presents a process for resolving disputes which is binding on firms and which is flexible enough to provide redress whenever this would be “fair and reasonable”?

We will await the FCA’s consultation to understand the FCA’s proposed combination of changes, including the scope of any proposed duty of care and provide further information once this is to hand. ■



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