Discussion Paper on a Duty of Care and Potential Alternative Approaches

FLA Response

1. The Finance & Leasing Association (FLA) is the leading trade association for the UK consumer credit, motor finance and asset finance sectors. FLA member companies include banks, the finance subsidiaries of major manufacturers and independent finance firms. They offer credit services to customers from all social groups, via credit and store cards, personal loans, point of sale finance, motor finance and a number of other consumer credit products, as well as a wide range of leasing and hire purchase services to businesses of all sizes. In 2017, members of the Finance & Leasing Association provided £128 billion of new finance to UK businesses and households.

2. We welcome the opportunity to comment on the FCA's Discussion Paper (DP 18/5) on the merits of a formal Duty of Care ('New Duty') in financial services.

Executive Summary

- Over many years, and in response to a variety of specific events and initiatives, extensive legislative and regulatory measures have been introduced to ensure consumers are well protected, treated fairly and assisted in making informed financial decisions. The FCA also has at its disposal a large range of tools which it can employ to further its operational objective to secure an appropriate degree of protection for consumers. We do not consider that there are gaps in that overall framework that require, or would benefit from, the imposition of a New Duty.

- There is no suggestion in the DP that any of the existing measures would be repealed or withdrawn in the event that a New Duty were to be introduced: such a Duty would therefore add another layer of complexity and subjectivity, without necessarily achieving any tangible results. Indeed, an additional legal Duty could give rise to legal challenge and disputes which would not ultimately benefit consumers.

- Vagueness leads to uncertainty and a New Duty would of necessity be an over-arching and imprecise measure. It would not provide clear, targeted remedies for specific issues identified as requiring regulatory intervention. The current regulatory framework clearly demonstrates that targeted remedies deliver the best outcomes for consumers. If the aim is to provide further protection for vulnerable consumers, the FCA's proposed new guidance on this issue (expected in early 2019) would be a more constructive approach.

- There must be a clear acknowledgement that consumers themselves are responsible for their own decisions and actions. There is a danger that the introduction of a New Duty could simply – and inappropriately – transfer the risk of poor decision-making from consumers to firms.

General remarks

3. In essence, consumer protection aims to reduce scope for misconduct, apply sanctions when misconduct occurs, and take steps to balance the relative power of the contracting parties. It may give rights to consumers or impose requirements on firms to that end but, critically, it is about balance, fairness and proportionality to both parties, having regard to their respective positions.

4. The FCA currently operates within a consumer protection framework which comprises an extensive, robust and highly flexible mixture of legislation, principles and rules. This framework currently includes:

    - **The Consumer Protection from Unfair Trading Regulations 2008** - Regulation 2 of which provides that the '*average consumer*' is to be construed as having the characteristics of a person that is '*reasonably well informed, reasonably observant and circumspect in the context of susceptibility to an unfair commercial practice*'.

    - **The Consumer Rights Act 2015** – which contains provisions relating to unfair contract terms geared towards ensuring that there is transparency in a contract so that the consumer is able to make an informed choice. The terms should also be couched in such a way as to address the potential for terms to be used unfairly, especially given the asymmetrical power of the contracting parties.

    - **The Consumer Credit Directive (CCD)** - Recital 9 to which makes clear that one of the key intentions of the legislation is to ensure a '*high and equivalent level of protection'* and, to a lesser extent, promote consistency to facilitate cross border transactions. To achieve this, the CCD sets out clear and unambiguous information that the consumer must receive prior to, and at the time of entering into a credit agreement. By doing so, consumers will be better able to understand and evaluate the offer that they are being presented with.

    - **The MCOB and CONC Sourcebooks** and other relevant chapters of the FCA's Handbook.

    - **The extension of the FCA's Senior Managers and Certification Regime** - the purpose of which is to reduce harm to consumers and strengthen market integrity by making individuals more accountable for their conduct and competence. The introduction of an additional New Duty could serve to blur the lines of responsibility under SMCR and risk reducing its effectiveness or inviting legal challenge.

- **The Financial Ombudsman Service** – which provides a comprehensive and free-to-consumer resolution service.

- **Access to the civil courts**.

5. The FCA's planned new guidance on assisting vulnerable customers (due in early 2019) should also provide further practical clarity on regulatory expectations in this area. Again, similar to the introduction of the SM&CR, it is best to assess the effectiveness of this intervention rather than introducing a New Duty.

6. We therefore consider that introducing a New Duty – which by definition would be over-arching and non-specific - would only add a further layer of complexity. A 'best interests' duty would not be appropriate in the majority of commercial relationships where the consumer is expected as a matter of law to exercise prudence and care on their own account. For those situations where a 'best interest' clause might be appropriate, the FCA's rules already provide for them (for example, mortgage advice or debt advice). This is consistent with the wider legal and regulatory landscape.

7. In principle, we do not object to rules or guidance where it is genuinely appropriate to adjust the balance of responsibility. However, the FCA will need to take great care not to introduce such changes inappropriately without recognising legitimate consumer responsibility.

8. Consumers should take responsibility for their decisions and actions and this principle is clearly set out in:

    - **Recital 26 of the Consumer Credit Directive**, which provides that: "*Consumers should also act with prudence and respect their contractual obligations*."
    - **FSMA** (as amended by the Financial Services Act 2012, which provides, in Section 1C (2)(d) that "*the FCA must have regard to … the general principle that consumers should take responsibility for their decisions*"
    - **Principle No 4 of the FCA's Principles of Good Regulation** (first published in April 2016) which is that "*Consumers should take responsibility for their decisions*."
    - **The FCA's "Approach to Consumers" document** (published in 2017), which stated (p14) that "*in line with FSMA, we expect consumers to take reasonable responsibility for their choices and decisions*."

Responses to specific questions

Q1: Do you believe that 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)?

No. We consider that the existing consumer protection framework is comprehensive and allows for poor conduct to be addressed, where necessary.

Any calls supporting a New Duty needs to be backed by robust evidence and this has not been provided. For example, representations by Financial Services Consumer Panel (FSCP) have been based on supposition or 'snapshot' surveys, as opposed to firm and quantifiable evidence. Research survey samples have invariably been very small and so any conclusions are of questionable evidential value. These small and potentially misleading 'snapshots' should not be held as sufficient for these purposes or, indeed, treated as more than potentially indicative. Doing so risks poor quality interventions with adverse effects for markets, consumers and firms. These calls may also conflate unrelated issues, including social policy points such as financial capability, or those that the FCA already has addressed or has the tools to do so. As such, we can see no basis, nor have we seen any evidence or argument to suggest otherwise, that there is a need for a New Duty.

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 do not believe that there would be a significant uplift in behaviours or positive outcomes, as a result of a New Duty. The trend amongst firms is toward a much tighter focus on delivering good customer outcomes and the introduction of the Senior Managers' regime will continue to shape and influence this. As the regime is still in the process of being applied to all firms, it should be given time to embed its effectiveness.

When auditing the effectiveness of its own activities the FCA will be aware that, as regulatory interventions at firm and market-level increase, so does the potential for some consumers to no longer be able to access the full range of financial options – in terms of product and price. Firms are commercial entities and will not accept unnecessary risks or responsibilities that properly (including legally) lie elsewhere. It is important therefore to keep in mind that a poorly judged response to calls for a New Duty are likely to have a negative effect, whether on the cost of products, access to them, or both.

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?

As above, it seems highly unlikely that a New Duty of any description would address misconduct that the FCA could not already address using its existing powers. The FCA should use those powers to amend existing rules to address specific concerns about conduct which may have given rise to specific detriment to consumers – rather than rely on another over-arching, non-specific power. Arguably a New Duty would simply provide consumers with a further route to raise a complaint. The question would then become whether such a route materially adds value, or could potentially be abused.

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?

No. It is entirely appropriate that the FCA can, as it does, take action for what it sees as a contravention of its Principles. It is in the best position to judge, on a consistent basis, what conduct it deems to be unacceptable. We see no credible argument or evidence that a New Duty should be actionable.

Consumers are already able to take action where there is a breach of the rules and they can also take action through the courts in respect of a range of transgressions outside of the FCA rulebook, for example, under the Unfair Relationships provisions in the Consumer Credit Act.

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 upon less?

If so, please set out the ways in which a New Duty would improve the current regime.

No. As already stated, we do not believe that a New Duty would be more effective than existing mechanisms. In terms of redress utilisation, we do not believe that it is likely that this would decline. On the contrary, the more likely outcome would be an increase in FOS utilisation. The inherently subjective nature of any New Duty relative to the individual circumstances make it more likely that complaint volumes would increase. Similarly, given the inconsistency in FOS decision making, coupled with the inability for firms to challenge poor decision-making without recourse to the judicial review route, the result is likely to be a negative outcome for firms.

2 November 2018