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Response to FCA DP18/5: a duty of care and potential alternative approaches

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Summary of our response

Through our work helping people in problem debt, we continue to see significant evidence of poor consumer outcomes. This includes in the credit card and overdraft markets, high cost credit market, and others. These are longstanding and widespread consumer problems that firms have been seemingly unable to pro-actively and consistently address themselves. We conclude from this that, at some fundamental level, good customer outcomes are not yet the heartbeat of financial service culture; despite the FCA's continuing and clear emphasis on the importance of this.

In our response, we set out the reasons for this, finding there are a number of gaps in the current regulatory framework. However, in our view the largest and most significant of these is the still too poor articulation between regulatory expectations, firms' culture and consumer outcomes. At route we believe this occurs because the existing objectives, principles and rules do not create a sufficiently clear and transformative understanding of what an 'appropriate degree of consumer protection' is and what is expected in terms of good consumer outcomes. Instead, the FCA has pursued a more 'workstream by workstream' approach, tackling issues in individual markets and defining consumer protection in these specific instances. However, our experience suggests this will not be enough to cause a fundamental shift in industry culture. This approach also lacks a preventative focus and means that action is often taken only once harm occurs.

It is for these reasons that we support the introduction of a duty of care. This would mean amending the Financial Services and Markets Act (FSMA), to place a duty of care on all financial services providers to ensure that they take an anticipatory approach in their dealings with customers, ensuring they are acting in the best interest of their customer, to remove or reduce the risk of harm. This should make clear that a firm cannot profit from consumer vulnerability, biases or constrained choices.

Whilst we acknowledge that there are other options for reforming the regulatory framework, we believe that only a duty of care has the ability to really drive the culture change needed to improve consumer outcomes. In particular, it embeds the concept of care towards, and fair treatment of, consumers at the highest level of the regulatory framework. In addition, as we set out in our response, further benefits of introducing a duty of care are likely to include: firms taking a more anticipatory approach to consumer harm and needs; more positive outcomes for consumers; less reliance on the FCA to intervene; more focus on 'fair by design' by firms; and sending a clear signal to consumers of what to expect from their financial service provider.

Finally, there are further opportunities to strengthen the current regulatory framework, based on the concept of a duty of care. Specifically, these include: amending or adding to the TCF outcomes; extending a specific vulnerability rule to all regulated activities; and addressing proportionality issues. These would help embed the concept of duty of care in an understandable way throughout regulation. They are also changes the FCA could make whilst waiting for the legislative change needed to introduce a duty of care.

Introduction

StepChange Debt Charity welcomes the opportunity to respond to the FCA's Discussion Paper (DP18/5) on a duty of care and potential alternative approaches.

StepChange Debt Charity is the largest specialist debt advice charity helping people across the UK. In 2017, we were contacted by 620,000 people seeking help with their debts, and in the first half of 2018 we were contacted by a further 326,897 people. This work gives us significant insight into how financial services are working for consumers, something we draw on throughout this response.

Through our services, we continue to see how a combination of adverse circumstances, poor options and the conduct of financial services providers can create detriment, increase consumers' vulnerability to debt and make financial difficulties harder to deal with. Evidence of poor outcomes for consumers, such as in the credit card and overdraft markets, front-book / back-book pricing, obsolete savings accounts, the insurance market and other areas have led a number of stakeholders to question the effectiveness of the current regulatory framework in both preventing consumer detriment and quickly addressing the causes of harm when consumer problems do emerge. This has resulted in calls for a duty of care to be introduced from the Financial Services Consumer Panel, the Lords Select Committee on Financial Exclusion, Parliamentarians from all the major parties (as part of the Financial Guidance and Claims Bill) and a range of charities and consumer groups.

In this response, we agree there is a need to reassess how well the FCA's statutory objective to 'secure an appropriate degree of protection for consumers' is delivering confidence of fair treatment for everyone using financial services. The experience of the clients we see (often vulnerable and nearly always meeting the FCA *Financial Lives* definition of 'surviving' or 'in difficulty') highlights a number of longstanding and widespread consumer problems that firms have been seemingly unable to pro-actively and consistently address themselves. Instead consumers rely heavily on the FCA; but subject to resource constraints and the rigorous disciplines that flow from the principle of proportionality.

We conclude from this that, at some fundamental level, good customer outcomes are not yet the heartbeat of financial service culture; despite the FCA's continuing and clear emphasis on the importance of this. That this should be so, more than a decade on from the development of the Treating Customers Fairly (TCF) outcomes, perhaps makes the outline case for a different approach.

Here we note the recent FCA consultation on CP17/27 on assessing creditworthiness in consumer credit. The rules on assessing credit worthiness have been in place for some time and in turn are based on longer standing provisions in the Consumer Credit Act, the Irresponsible Lending Guidance and the Consumer Credit Directive. Yet despite this, the FCA found evidence of under-compliance and the need to 'clarify our expectations'. The policy statement that followed went further in stating:

'Making our expectations clearer should make it easier for firms to comply with our rules, leading to better outcomes for customers.'

What was argued as true for CP17/27 is arguably true here. In this response we will make a case that the most important gap in the current regulatory framework is the still too poor articulation

between regulatory expectations, firms' culture and consumer outcomes. At route we believe this disarticulation results from the existing objectives, principles and rules not creating a sufficiently clear and transformative understanding as to what is expected in terms of good consumer outcomes. Indeed the ongoing work on vulnerable consumers illustrates how far the regulatory regime has still to travel in setting clear expectations on key aspects of consumer protection.

The examples above (overdrafts, credit cards, high-cost credit etc) highlight how the FCA can, and has been, making progress workstream by workstream - clarifying expectations on fair treatment and setting the boundaries of consumer protection through specific issues. However past experience does not suggest that a steady change in the quantity of rules and guidance will necessarily produce a fundamental quality shift in industry culture.

So the proposed 'New Duty' offers an excellent opportunity for a qualitative shift in clarifying high level regulatory objectives to embed these more firmly into firm culture. This could (and we believe should) be expressed in a new legally enforceable duty. This would mean amending the Financial Services and Markets Act (FSMA), to place a duty of care on all financial services providers to ensure that they take an anticipatory approach in their dealings with customers, ensuring they are acting in the best interest of their customer, to remove or reduce the risk of harm. We set out how this could work in our answer to question 1.

However, we recognise that a change in legislation may take time. In addition, the principles of any duty of care also need to be reflected throughout the regulatory framework to give it meaning and assist with practical application. Therefore, in this response, we also propose other practical changes to current regulation, which the FCA could make now to embed the concept of a duty of care into the regulatory framework. These would, alongside a duty of care, help address the current gaps in regulation, set clear expectations for firms and improve outcomes for consumers.

Question 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 there is, please explain what change(s) you want to see.

Gaps in the current regulatory framework and why a duty of care is needed to address them

Many, including the FCA in its Discussion Paper, have argued that existing regulation effectively constitutes a duty of care in all but name, so a duty of care is not required. However, if this were the case then we would not expect to see the poor outcomes for consumers that we do, as highlighted in our submissions to the FCA on credit cards, high cost credit, overdrafts and elsewhere. We also see that, too often, consumers in vulnerable circumstances do not get the support they require, or have to use products that are ill-suited to their needs.

Therefore, an important part of the duty of care debate is understanding why the current framework, specifically Treating Customers Fairly (TCF), product governance and the rules do not always deliver the right outcomes for consumers and how a duty of care might address this.

The FCA has a statutory objective to 'secure an appropriate degree of protection for consumers'. However, as we set out above, our evidence suggests there is a fundamental disconnect between this objective and the outcomes consumers experience. We propose a key cause of this to be the lack of clear articulation regarding what is expected from firms when it comes to the treatment of consumers, and the current approach of tackling poor treatment of consumers on an issue-by-issue enforcement basis. This leads to a situation where the boundaries of consumer protection are being set on an issue or product basis, often retrospectively, once harm has occurred. This means the current regulatory framework lacks an overarching articulation of expectations when it comes to consumer protection, and ends up being fairly reactive, rather than preventative.

Evidence of firms profiting from exploiting consumer biases, vulnerabilities or constrained choices suggests a weakness of regulation in setting out what 'fair' treatment looks like. Unsolicited credit card increases are an example here. The argument previously was that consumers could simply turn these down, but all the evidence showed they were not doing so and that unsolicited credit card increases were disproportionately impacting on those struggling financially. However, regulation did not address this and, even now, only voluntary measures have been agreed with firms, which still requires customers to opt-out of automatic credit limit increases. Back-book/ front-book price discrimination provides a similar example – where the behavioural biases of consumers, specifically a tendency not to switch, is being exploited for firms' profits.

We would like to see a much clearer definition of consumer protection which sets out the expectations on firms in relation to acceptable and unacceptable consumer outcomes, and which takes a more anticipatory approach to protecting consumers.

For example, we believe there is still a significant gap when it comes to firms considering the needs of consumers in vulnerable circumstances from the start of a product's lifecycle, so that it is easy to flex products and offer support if and when someone finds themselves in vulnerable circumstances. Mortgages are a good example here. Given the length of a mortgage, and the fact that 50% of UK adults display one or more characteristics of potential vulnerability,ⁱ it is highly likely someone will find themselves in vulnerable circumstances during the lifetime of the product. This means there is a strong case for options being built into the product (and terms and conditions) to enable support such as payment holidays, periods of interest-only payments and other options to kick-in where certain conditions (such as of vulnerability) are met. Whilst this may be starting to happen in some firms, with some products, this is not consistent or widespread. Indeed, the Lending Standards Board's (LSB) recent review of progress against the Financial Services Vulnerability Taskforce recommendations highlighted that firms needed to do more work to 'ensure product design, review and change mechanisms include considerations of vulnerable circumstances'.ⁱⁱ

A further example of the current deficiency of regulation when it comes to product design can be seen in the credit card market. The recently introduced rules around persistent credit card debt

require firms to proactively contact customers in 'persistent debt' (who, over 18 months, have paid more in interest and charges than they've paid off from the original amount they borrowed). However, a greater focus on appropriate product design in regulation may have prevented the product being designed in such a way that people could fall into persistent debt in the first place. In this instance, had firms been required to anticipate and avoid the reasonably foreseeable harm that would occur from this, it would arguably have been a more effective approach than retrospectively intervening to try and prevent harm, relying on consumers to take action.

The lack of specific rules on vulnerability (except in CONC 8.2.7 – which only applies to debt advice providers) and the lack of reference to vulnerability within TCF may be contributing to this. Currently, none of the consumer outcomes sitting under TCF reference how firms should treat people whose circumstances change during the lifetime of a product, or what consumers should expect at this point. This is despite the fact that various research, including the FCA's, has highlighted the transient nature of vulnerability.

In practice, this can mean that products don't work well when customers' circumstances change, or people can't access the help they need- particularly at an early stage. Sometimes consumers will not be offered help until they have defaulted on an agreement or fallen into arrears – even when they have tried to seek help before this. This can mean financial difficulties escalate further and negatively impact on customer's credit files.

For example, consumer outcome 2, which sits under TCF, includes no reference to products working for, or being flexible to the needs of, consumers in vulnerable circumstances. Instead, it simply states that 'Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly'. Furthermore, there is no reference to the need to ensure products do not cause harm (even where this is unintentional) or to anticipate potential harm and act to reduce the risk of this. Consumer outcome 5 simply states that products should 'perform as firms have led them to expect', arguably a much lower expectation than requiring products to meet consumer needs and not cause harm (to the extent that it could have been anticipated by the firm).

This is where we see a duty of care coming in. By setting out clearly what firms are required to do, a duty of care could help set the parameters of consumer protection – making this clear to firms and consumers and creating a legal and regulatory structure to enforce against.

For example, a duty of care could set out the requirements on firms to avoid reasonably foreseeable harm. This would require them to have a deep understanding of the needs of their customers, including those who may be vulnerable, or potentially vulnerable, and to ensure their products and services do not cause detriment or exacerbate vulnerabilities.

As the Discussion Paper sets out, current regulation includes a 'client's best interest rule', but this only applies to designated investment business, mortgage activities and insurance distribution. There are some more specific 'best interest' based rules in other parts of the regulation: for example the requirement to not promote high-cost short-term credit 'which would be expensive as a means of longer term borrowing, as being suitable for sustained borrowing over a longer period' (CONC 3.8.3)

or to refinance a customer's existing credit where 'the firm reasonably believes that it is not against the customer's best interests to do so' (CONC 6.7.19) However, these are specific and limited to certain circumstances. In addition, given what we have set out above about the poor outcomes we still see for consumers, in spite of these rules, we believe there is a strong case for an extension of the client's best interest rule, as part of a new duty of care.

This would mean amending the Financial Services and Markets Act (FSMA), to place a duty of care on all financial services providers to ensure that they take an anticipatory approach in their dealings with customers, ensuring they are acting in the best interest of their customer, to remove or reduce the risk of harm. This should make clear that a firm cannot profit from consumer vulnerability, biases or constrained choices. This is important, especially in the context of the FCA's recent work on price discrimination, and something we see as a frequent cause of poor outcomes for consumers.

Whilst we appreciate there will be arguments that 'best interest' can be a challenging concept to judge, the existence of best interest rules already in regulation suggests this is not an insurmountable issue. A duty of care to act in the best interests of their customer would be consistent with the FCA's statement in the Approach to Consumers that they 'expect firms to frame decisions for all customers (their 'choice architecture') based on real world consumer behaviours and not to exploit biases'.

Whilst we acknowledge that there are other options for reforming the regulatory framework, and indeed set some of these out below, without also introducing a duty of care these changes would be incomplete. A specific duty has important features which cannot necessarily be replicated or achieved elsewhere in the regulatory framework. Firstly, the legal standing of a specific duty, creating a right to action for damages in court, is important. Whilst the FCA may have regulatory powers to enforce, it is important that consumers, or groups of consumers, facing a particular unfairness have a right to take action. Furthermore, this has additional implications in particular markets, such as consumer credit, whereby credit providers can use the courts to enforce their rights (e.g. for recovery). In this context, it seems to follow that consumers should have a similar right to defend their position. If the FCA principles are about protecting consumers, that should continue to apply when consumers face court action.

Of course, we appreciate that, for some consumers, legal action will not be an option - it is expensive, time-consuming and complicated, barriers which many consumers will not be able to get over. However, this does not diminish the importance of the right to action existing in the first place. There is also an argument that the fact a consumer *could* take action for damages may compel firms to give greater attention to how they treat customers.

However, we are clear that the duty of care is not just about creating a new route of litigation. Instead, it is about embedding the concept of care towards, and fair treatment of, consumers at the highest level. In this respect, a duty of care has a sufficient level of visibility and clarity to send a clear message about expectations on firms. It also sends a clear message to consumers about what treatment to expect from their bank or financial service provider. This is particularly important given the current low levels of trust in financial services: The Financial Lives Survey identified that less than a third of UK adults agreed that most financial firms are honest and transparent in the way they treat

customers.ⁱⁱⁱ This low level of trust poses challenges to efforts to encourage self-disclosure by consumers in vulnerable circumstances – if consumers don't trust financial firms, they are less likely to disclose difficulties or ask for help.

Other proposed changes to embed duty of care throughout regulatory framework

As we set out in the section above, we believe there is a need for a duty of care which requires firms to act with the best interests of their customers in mind, avoid reasonably foreseeable harm and to not profit from consumer vulnerability, biases or constrained choices.

However, alongside this, there are significant opportunities for the FCA to make further changes to strengthen the current regulatory framework, based on the concept of firms having a duty of care to consumers. This would ensure that the duty has an understandable basis in other aspects of regulation and also help to close the gaps outlined above. They are also changes the FCA could make which do not require legislative approval, and so may be able to be implemented whilst waiting for a legal duty of care to complete the necessary Parliamentary stages.

Review Treating Customers Fairly, and consumer outcomes that sit under this

For any duty of care to be effective, the key tenet of it will need to be reflected throughout the various levels of regulation. This will include ensuring that TCF, and the outcomes that sit under this effectively reflect the expectations of firms as set out in the duty of care.

As we set out above, at the moment the TCF outcomes are quite transactional, largely focused on point of sale, and to some extent based only on the idea of a 'rational consumer', rather than reflecting the realities of most consumers' circumstances. TCF arguably does also not go far enough to incentivise firms to provide support for vulnerable consumers, whether that vulnerability exists at point of sale, or develops later. We therefore propose that the outcomes be revisited and refined. The starting point for this would be to develop the overarching outcomes we wish to see for consumers, and then to develop the TCF outcomes based on this. This could include amending existing outcomes or adding new ones:

Potential amendments to existing principles

- A good outcome for consumers would be that a product meets their needs and is flexible when their circumstances change, yet this is not adequately reflected in the current outcomes. **Outcome 2** states that products should be 'designed to meet the needs of identified consumer groups and... targeted accordingly'. However, it doesn't account for when a consumer's needs might change during the lifetime of a product (transient vulnerability), or say anything about what a consumer should expect at that point. Consideration should be given to adapting this to better reflect that, where a consumers' needs change, a product will be flexible or they will be offered ways to exit the product suitably in a way that doesn't cause harm. Similarly, this could be better reflected in **outcome 6**.

- **Outcome 3** currently talks about consumers being ‘provided with clear information’; but this is largely transactional and focused on the action of the firm rather than the impact this has on a consumer (what is ‘clear’ to the firm might not be clear to a consumer). It would be better for this to be focused on the requirement of firms to ‘ensure that the consumer understands the product or service’. This would place the responsibility on firms to understand the needs and levels of understanding amongst their consumers, and to present information accordingly. This would require firms to act not in a way suitable for a ‘rational consumer’ but for actual consumers: for example, they would need to design information that could be understood by customers with low literacy and numeracy skills. Firms would also need to regularly check that consumers understand the information being given to them, and have a clear understanding of how the product or service will work for them. When we start to refine the consumer outcomes in this way, we see how a focus on inclusive design can be built into regulation.
- **Outcome 5** simply states that products should ‘perform as firms have led them to expect’, arguably a much lower expectation than requiring products to meet consumer needs and not cause harm (to the extent that it could have been anticipated by the firm).

Potential areas for new outcomes

- Products which cause harm, even to small groups of consumers, are not outcomes we would expect to see in a market that is working well for consumers – and this needs to be better reflected, perhaps with a new outcome or with a significant revision to outcome 2, by making clear that products cannot cause harm to consumers. This would require firms to anticipate how products or services might lead to harm, and to design this out where possible. Here we note that vulnerable consumers can experience detriment from both poorly targeted mainstream products and products that are aimed at them but not well aligned to their needs. In this respect, we would want to see the importance of products and services being “fair by design” better reflected in the TCF outcomes, building in a focus on inclusive design.
- A new outcome specifically on vulnerable consumers is needed, that encompasses both fixed and transient vulnerabilities. As we highlighted above, currently there is no specific reference to vulnerable consumers in TCF, and we believe that introducing a specific outcome on this would help provide clarity *and* provide a statutory wrap-around for existing good practice.

Finally, the FCA should require firms to publish more information on how they are ensuring these outcomes for consumers. Transparency and monitoring is an important part of improving outcomes for consumers and, without this, any progress may be limited. Equally, we would call on the FCA to themselves provide more information when they are designing and implementing remedies. We would reiterate the ask we set out in our response to the Mission Consultation around whether the FCA could, when drawing up interventions and remedy packages, be more transparent in stating the outcomes it expects these to deliver in line with its objectives. Where the FCA discovers actual or potential consumer detriment, we believe the aim should be to stop and prevent that detriment as completely as is practicable. This would provide a firm set of outcomes to assess against.

Extend specific vulnerability rule to all regulated activities

Currently, the only specific rule relating to vulnerability that we are aware of is in CONC 8.2.7, which places a responsibility on debt advice providers to ‘establish and implement clear and effective policies and procedures to identify particularly vulnerable customers and to deal with such customers appropriately’. For all that the Treating Customers Fairly principle has been used as a hook for much of the regulator’s (and others’) focus on vulnerability, there is no actual specific reference to customers in vulnerable circumstances within this. This weakens the strength of the focus on vulnerability, and means there is no clear regulatory framework on which firms can be held to account for how they treat customers in vulnerable circumstances, or ensure their products and services meet their needs. This impacts upon the outcomes experienced by these consumers and can lead to a worsening financial situation. Whilst we welcome the FCA’s work to develop guidance on vulnerability in 2019, this should be underpinned by a more specific focus on vulnerability within the principles and rules.

We therefore propose that the specific vulnerability rule in CONC 8.2.7 be extended to all regulated activities. This would compel firms to give greater consideration to how products and services work for consumers in vulnerable circumstances and provide a statutory basis for current good practice and the upcoming vulnerability guidance, due to be produced by the FCA in 2019.

Address proportionality issues

The Consumer Approach clearly sets out how vulnerable consumers often have a lower tolerance to loss than others; meaning that a small loss to them may have a greater impact than to someone not generally considered to be vulnerable.^{iv} However, the number of consumers in a vulnerable situation may be a small part of a given market.

Section 3 (1b) of FSMA states ‘*the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction*’.

However, because the number of consumers affected may be small, when a cost-benefit analysis is undertaken in this way, there is a numerical imbalance which can discourage intervention. We have heard proportionality stated as a constraint on remedies, including the possible costs that may be incurred by other (not vulnerable) consumers.

We are concerned that this could mean that the needs of vulnerable consumers are not being adequately considered or weighted in discussions about consumer protection, especially in cases where the market serves some consumers well but more vulnerable consumers poorly (as was found in credit cards and retail banking).

We would therefore argue for an amendment to FSMA that redefines proportionality in terms of a proportional means to achieve the necessary consumer protection objective(s). This would address the issues outlined above and ensure that, when the FCA examines an issue, the focus is on achieving a suitable level of consumer protection via an appropriate and proportional means.

Question 2: 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?

Throughout our response to question 1, we have referenced some of the positive behaviour changes that a New Duty, and supporting measures, might create. This includes, but is not limited to, the following positive changes:

- Encouraging firms to take a more anticipatory approach to consumer needs and harm, by requiring them to think more carefully about the outcomes their products and services are creating for consumers – at all stages of the product journey, including initial design, sale and product governance. Taking an anticipatory approach should not be unfamiliar to firms as they are already required to do so under the Equality Act, which imposes a positive, proactive and anticipatory duty to take steps to remove obstacles for disabled consumers in accessing and using products and services. A new duty, however, would extend this focus to a wider range of consumers.
- In doing so, we would expect to see less harm occurring, and more positive outcomes for consumers. We therefore hope this would lead to less reliance on the FCA to intervene and seek redress.
- Requiring firms to consider how their products and services can be ‘fair by design’. By this, we mean that firms understand how they will work for consumers in a range of circumstances, including (importantly) consumers who may become vulnerable during the lifetime of the product. A more inclusive design, which builds in support for vulnerable consumers from the outset, will undoubtedly work better for all consumers.
- As we set out in response to question 1, a clear duty of care which is embedded at the highest level of regulation should send a clear signal to consumers about what to expect from firms, in turn building the trust they have in the industry. This should help increase people’s confidence in disclosing vulnerabilities, and encourage them to seek help, as they can be assured that firms will have to offer them support where appropriate, based on their interests and needs.

Question 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?

As we have set out above, in our answers to questions 1 and 2, we believe that introducing a duty of care would increase the FCA’s effectiveness in tackling harm and achieving good outcomes for consumers. This is because, as set out above, it would tackle the current disarticulation of consumer protection that currently results from the existing objectives, principles and rules not creating a

sufficiently clear and transformative understanding as to what is expected in terms of good consumer outcomes. Instead, the FCA has focused on tackling harm and defining consumer protection on an issue by issue basis, updating rules and guidance as needed. However past experience does not suggest that a steady change in the quantity of rules and guidance will necessarily produce a fundamental quality shift in industry culture. This is where we believe a duty of care can play a significant role, by clarifying high level regulatory objectives regarding consumer protection and to embed these more comprehensively into firm culture. For further detail on this, please see our answers to questions 1 and 2 above.

Question 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?

As we set out in response to question 1, we believe it is important that any New Duty creates a right to action for damages in court. Whilst the FCA may have regulatory powers to enforce, it is important that consumers too have a right to action. This ensures that individual consumers, or groups of consumers, facing a particular unfairness have a right to take action. In addition, considering areas such as consumer credit, whereby credit providers can use the courts to enforce their rights (e.g. for recovery), it follows that consumers should have a similar right to defend their position. Of course, we appreciate that, for some consumers, legal action will not be an option - it is expensive, time-consuming and complicated, barriers which many consumers will not be able to get over. However, this does not diminish the importance of the right to action existing in the first place. There is also an argument that the fact a consumer *could* take action for damages may compel firms to give greater attention to how they treat customers, although further work may be required to understand the specific impact of this on firms' culture and behaviour.

These same arguments apply when considering whether breaches of the Principles should give rise to a private right for damages and we would expect the FCA to be looking at this, should a duty of care not be introduced.

However, as we have explained throughout our response, we believe introducing a duty of care has important features and creates levers for change that make it preferential to just making the Principles actionable. The introduction of a duty of care is not just about creating a private right for damages in court, but about embedding the concept of fairness and care at the highest level of regulation.

Question 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?

As we have set out above, we believe that the introduction of a duty of care would clarify expectations on firms, and compel them to take a more anticipatory approach to harm. This would mean they would need to give greater consideration to how products and services meet consumers' needs, and to ensure they do not cause harm. This should include introducing more of a focus on 'fair by design', and a better focus on vulnerability in product design and governance. If implemented and enforced successfully we would expect this to reduce reliance on redress and, indeed, this should be a key aim of introducing a New Duty, and supporting measures.

For further information on anything in this consultation response, please contact: Grace Brownfield, Senior Public Policy Advocate, grace.brownfield@stepchange.org.

ⁱ Financial Conduct Authority (2017) *Understanding the financial lives of UK adults*

ⁱⁱ Lending Standards Board (2018) *Summary Report: Financial Services Vulnerability Taskforce Principles and recommendations: Review of progress towards implementation*

ⁱⁱⁱ Financial Conduct Authority (2017) *Understanding the financial lives of UK adults*

^{iv} Financial Conduct Authority (2017) *FCA Mission: Our Future Approach to Consumers*