Association of Mortgage Intermediaries

Association of Mortgage Intermediaries' response to FCA DP18/05:
Discussion Paper on a duty of care and potential alternative approaches

This response is submitted on behalf of the Association of Mortgage Intermediaries (AMI). AMI is the trade association representing over 80% of UK mortgage intermediaries.

Intermediaries active in this market act on behalf of the consumer in selecting an appropriate lender and product to meet the individual consumer's mortgage requirements. Our members also provide access to associated protection products.

Our members are authorised and regulated by the Financial Conduct Authority (FCA) to carry out mortgage and insurance mediation activities. Firms range from sole traders through to national firms and networks, with thousands of advisers.

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)?

No. As the paper sets out, there are a raft of examples which show there is no gap in the current framework. The FCA principles, rules and common and statute law already require firms to follow good business practice which represent the same requirements as a duty of care. The Senior Managers & Certification Regime (SMCR) extends this further with explicit responsibilities and codes of conduct that individuals must adhere to. The whole purpose of SMCR is to drive up standards in financial services and improve firm culture. It would be illogical to introduce a New Duty whilst these changes have yet to be fully implemented and embedded as the impact of SMCR cannot yet be measured. The importance of timing should not be underestimated, and perspective and reasoning must be prioritised over impatience or any reputational desire to be seen as proactive.

Over recent years the FCA has become more reluctant to issue guidance for fear of judicial review, which is unhelpful for firms. Instead of introducing a general and non-specific duty of care, firms would benefit from further guidance. For example we have asked for guidance on the Insurance Distribution Directive (IDD) as the FCA could have done more to engage with firms to help them understand the requirements. Any non-compliance with IDD could therefore be addressed through better regulatory communication rather than a duty of care.

We share the concerns raised by the consumer lobby in that there are still instances of poor firm conduct and mis-selling. The significant amount of claims being paid out by the Financial Services Compensation Scheme (FSCS) which has escalated in recent years reflect a regulatory approach that is failing. Fraud, mis-representation and mis-selling are indeed the primary reasons for the FSCS claims being paid by the industry, not financial failure. However this is an indication of insufficient authorisation, supervision and enforcement rather than a gap in the regulatory framework. The FCA already has the powers to identify and investigate misconduct, with the ability to determine whether a firm or individual has breached the principles, rules or legislation. But this is not being applied rigorously enough.

We have raised these concerns with the FCA over recent years, which we reiterated in our responses to the FCA's Mission documents. The following examples set out how the regulatory approach needs to be improved in order to prevent consumer harm, rather than imposing additional regulation:

- Where a firm fails and leaves a number of complaints, a legacy of poor advice and claims against it, those responsible should not be allowed back into the sector. We however continue to see these individuals re-emerge and become authorised by the FCA. The Threshold Conditions are "de minimis" with the conduct required by the rulebook higher, yet this is rarely reflected in assessments. With the requirements of integrity, competence and capability clearly not met by these individuals, the FCA has enough reasoning to refuse authorisation. Despite the FCA stating that it should not be authorising individuals who "have knowingly sold inappropriate services or defrauded customers" we do not see this carried out in practice.
- As well as not considering past behaviour, we are also not seeing enough regulatory scrutiny around references from previous (active) employers. This issue is particularly acute where Appointed Representatives have been dismissed by the Principal firm for misconduct but have subsequently been given permissions by the FCA as a directly authorised firm. Whilst SMCR will introduce new requirements that should make conduct breaches transparent between authorised firms, the gap between firms' recruitment processes and the FCA's authorisation process will significantly widen if the regulator does not adopt an effective approach. There cannot be an unlevel playing field where it is easier for these "rolling bad apples" to be directly authorised by the FCA.
- There is currently not enough on-the-ground supervision or enforcement work being carried out to stop fraudulent activity, or to mitigate mis-selling claims that arise from the FSCS. The FCA should be concentrating on gathering more market intelligence. There is not enough action taken against firms and individuals who have caused consumer harm; complaints continue to escalate with the individuals responsible for mis-selling still operating in financial services without reprimand.
- Over the last two years the number and value of home finance claims paid by FSCS has significantly increased. This has been attributed to the fraudulent activity of one particular firm, Fuel Investments. Despite the FCA believing that "wrongdoers must be held to account and our rules and requirements must be obeyed" in practice there has been no regulatory appetite to pursue those responsible for the £30m of compensation paid by firms so far. The sheer volume of mis-selling complaints being upheld against one firm demonstrates a systemic issue in the firm's conduct and integrity. Yet despite the FCA possessing powers and functions to take civil, criminal and/or disciplinary action it has considered the serious misconduct of this one firm as not worth pursuing.
- We have raised several concerns about certain firms' business models and the risks to consumers to either be told that the FCA can't take any action because it's outside of their scope (with which we would disagree) or market intelligence has been left unactioned. For example, we raised breaches to clear, fair and not misleading rules in respect of a particular firm a year ago yet the inappropriate disclosures on their website still exists.
- We do not believe that the FCA is translating the following belief into practice: "where we have concerns about a single firm, we will look at the root causes of issues. We will identify the senior manager responsible for the relevant business area and assess what steps they have taken to prevent, or reduce, the harm. We will expect an immediate change to the business model and will use our tools to ensure that change persists." We consider that there is an inappropriate focus on 'innovative' firms and insufficient scrutiny of business models at authorisation which appears to supersede any risk of potential consumer harm that is identified as part of a firm's day-to-day activities. The need to have evidence ahead of using expertise and knowledge of what might work or not, is limiting good control. The recently published findings of the supervisory work carried out in automated investment advice services reconfirms the concerns and risks we have raised on business models in the mortgage advice sector. However it would appear that rather than taking the opportunity to more widely communicate expectations or apply these findings to other sectors, we will instead see a reactive and delayed approach to consumer harm.

- The poor communication and lack of collaboration around the change in debt management permissions last year is another example of why we are concerned with the regulator's approach. Authorisations issued a communication to all firms regarding changes to the "no debt management" limitation, yet the new options were not appropriate for mortgage intermediaries. Not only had there had been no consideration or understanding of how these options would apply to these business models, but there was a refusal to admit that the communication and options were inappropriate. Half a year of resisting ensued before the regulator finally issued clarification, distributed only on a narrow basis (but ultimately refusing to make system changes). As a trade body we communicated with our firms and subsequently published guidance on this issue, which should have been the responsibility of the regulator.

The Mission papers had set out theoretical approaches without any acknowledgement of feedback that has been given or any measurement of the FCA's performance against its aims. The papers started from an assumption of good delivery, without sufficient critical self-assessment. We are disappointed that because of this lack of reflection we are now seeing a discussion paper on a complex and unnecessary change to the regulatory framework.

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 a New Duty would materially enhance positive behaviour as existing regulation already requires firms to do so. It will be SMCR that refocuses firms' responsibilities, not any introduction of a New Duty. The FCA should however focus on engaging with firms more effectively as we believe its communication strategy is misaligned.

Those pushing for a New Duty should be providing technical reasoning to address why the existing regulation is insufficient, as opposed to the FCA's application of its powers, and how a New Duty would specifically address each gap. The arguments given by those attending the FCA's discussion forum in September, and indeed those listed in this paper, do not adequately respond to this. We too have concerns around mis-selling leading to consumer detriment, however the solution is for the FCA to improve the way it supervises and be more effective in enforcing its rules, rather than introducing a New Duty, which fraudulent firms and individuals would ignore in the same way they do with their other regulatory obligations.

Regulation must be proportionate and we believe that a Duty of Care would add a burden to firms which is disproportionate to the benefits. It would be inappropriate to introduce an unnecessary layer of regulation which is duplicated elsewhere.

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?

No. The way the FCA applies its existing rules and powers in practice is ineffective as it does not deter firms from acting in a way that leads to negative outcomes for consumers. The FCA should review its current regulatory approach rather than look to rely on an arbitrary New Duty.

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. This would not be a beneficial solution for consumers who are able to access the Financial Ombudsman Scheme given the costs and time involved.

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?

No. To believe that a New Duty is a silver bullet to preventing harm is unrealistic. Firms and individuals who behave badly will not be deterred by an extra rule. It is for the FCA to ensure that those causing consumer harm are held accountable in order to deter misconduct, and it already has the powers to do so. However, ineffective supervision and enforcement has led to an environment where bad firms believe they can get away with this behaviour. This is the reason behind the significant FSCS claims that are being paid, not because there is a lack of an explicit duty of care.

As well as firms struggling to understand a New Duty and how this differs from their existing obligations, we have concerns around how FOS will understand and interpret these cases. We agree that by introducing a New Duty it will be highly complex and each customer relationship and circumstances will differ. It will therefore be difficult for adjudicators to appreciate this, with a risk of inappropriate comparisons being made for simplicity and cases being judged poorly.