Chartered Banker

Chartered Banker Institute
Response to FCA Discussion Paper 18/5:
A New Duty of Care and Possible Alternative Approaches

We welcome the opportunity to engage with the FCA in this important discussion. We have reflected on how a new Duty of Care might be viewed by our members and conclude that the further introduction of a formal requirement is unlikely to result in the desired outcomes.

General Comments

Noting your description of a Duty of Care in Annex 1 of DP 18/5, we share the concern of others that a formal legal obligation could have the opposite effect, i.e. negating work to date focused on encouraging improved corporate cultures that are open and supportive of employees, including with regards to speaking out.

We do, however, support the notion of a softer duty of care; one that does not require a new set of rules or principles, but instead:

- Results in amendments to the wording of the Principles and Principles of Good Regulation in line with the recommendations made by the FSCP and as detailed in our specific responses below;
- Facilitates easy reference to, and simple communication of, the existing rules and principles which, combined, should provide consumers with confidence that their needs are understood, and their best interests considered without conflict of interest;
- Recognises and supports the work of professional bodies that already have in place professional standards and professional codes of conduct. Being a member of a Chartered professional body is an achievement signifying the type of ongoing personal commitment to high levels of knowledge, skills and behaviour that go beyond the minimum standards required by regulators and better meet the expectation of trust.

Fundamentally, it is our view that, as far as our members are concerned, they have already personally committed to, to quote FCA Chair Charles Randall, an '*almost Hippocratic duty to treat customers fairly*'[1]. In their application, our professional codes of conduct not only compel individuals to doing the best for their customers and society, they also hold them accountable to each other in upholding the highest standards of ethical professionalism, regardless of organisation or location. Our members say that they have found their customers *"are more comfortable when they see that they are being looked after by someone who has taken the time to undertake professional examinations*".

This provides individuals with a reference point; that they are part of a wider community of individuals that have a sense of common purpose and shared values, independent of their organisations. J. R. Boatright[2], in considering the introduction of oaths in banking, notes that most "*affirmations of a commitment to service [ ] are embedded in a larger institutional framework that*

[1] Introduction to FCA Regulation Round-Up September 2018: https://www.fca.org.uk/news/newsletters/regulation-round-september-2018

[2] John R Boatright, 'Swearing to Be Virtuous: The Prospects of a Banker's Oath' (2013) 71 Review of Social Economy 140;

is absent in banking". We believe that professional bodies, such as ours and those forming the Chartered Body Alliance[3], working alongside regulators can and already provide this 'larger institutional framework', which extends beyond their business division, their corporate body and even their geographic location. Indeed, our research[4] shows that, for the second year running, professional pride amongst our members is increasing. Despite the many challenges faced by banks and bankers since the global financial crisis and more recently, the pace of technological change, professional bankers have drawn strength from their professionalism.

Furthermore, it is our view that a statutory duty is in danger of being symbolic in terms of its impact. The expectations we place on our members remind them of the societal purpose of their role; individually, as part of their organisations, beyond this as part of this wider community of professional bankers and ultimately members of society themselves. It is perhaps this aspect which requires far greater attention when considering the desired outcomes of this discussion.

A paper from the University of South Wales[5] references the challenges a stakeholder approach presents [including one that is consumer/client-centric] and makes the following proposal:

"A public-regarding professional duty makes it more difficult to justify 'internal decisions, unrelated to the objective needs of the wider world' or 'decisions and behaviour that advance [a bank's] own narrow ambitions but harm the enterprise and the societies it serves."

Our Institute was founded on this societal purpose and, whilst considering what more we can do in this context, we again see a very central role to be played by professional bodies such as ours in helping individuals discharge the obligations placed upon them; whether by law and regulatory principles, or by our own codes. Our focus is and therefore shall remain, on the public interest and customer priority.

It is our belief that a closer engagement between the regulator and the professional bodies such as those forming the Chartered Body Alliance can strengthen the covenant between the interests of wider society and the individuals in whose hands ultimately the responsibility for discharging these duties fall.

[3] https://CharteredBodyAlliance.org
[4] Chartered Banker Professionalism Index 2018: https://www.charteredbanker.com/news
[5] "Banking And The Limits Of Professionalism", D. Kingsford Smith, T. Clarke, & J. Rogers https://www.thebfo.org/BFO/media/contents/PDFs/UNSWLJ_401_KingsfordSmithClarkeRogers.pdf

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Specific Responses

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.

As expressed in our general comments, we agree that something within the existing framework is not working and consumers remain concerned about the asymmetry of power in their relationship with the financial services sector. We do not believe that additional rules will adequately address this, and indeed may cause some detriment to progress being made towards improved conduct and culture within the sector, particularly as key aspects of the Individual Accountability embed.

Instead we call for:

- Amendment of the existing Principles and Principles of Good Regulation in line with the recommendations made by the FSCP and as detailed below [new text in **bold**]:

  "6. Customers' interests – A firm must ~~pay due regard to~~ **act in** the **best** interests of **all** its customers and treat them fairly."

  "8. Conflicts of interest – A firm must manage conflicts of interest ~~fairly~~, both between itself and its customers and between ~~a customer and another client~~ **different groups of its customers, fairly and so as to avoid customer harm or exclusion**."
- Amending Principle of Good Regulation 4[6] as follows [new text in **bold**]:

  "4. Consumer responsibility - Consumers should take responsibility for their decisions **where they are capable of doing so and where firms have complied with the principles for businesses**."

- A review of the effectiveness of the current Treating Customers Fairly regime;
- Publication of a simple document which pulls together all the explicit and implicit requirements under the existing framework, in a single easily readable and referenced and document;
- That all parties in the discussion consider the prioritisation of societal purpose, which could facilitate the extension of improved outcomes in culture and conduct beyond the scope of regulated activities and also the retail market into wholesale transactions. This could tie in with, for example, the FCA and PRA developing strategies to address the financial risks of climate change.
- The FCA to recognise and engage with professional bodies as a partner for positive change, as outlined in our general comments.

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?

Assuming this softer approach is adopted, we believe that, by clarifying and making more explicit all existing requirements, the asymmetry of power in the consumer/provider relationship could be rebalanced. It would be easier for consumers to understand the rules in place to protect them, and

[6] https://www.fca.org.uk/about/principles-good-regulation

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individuals in the sector, in discharging their duties, would have clearer, direct, understanding of the rules, both of which should make it easier for the FCA to enforce the existing binding principles.

We also note that this question talks of enhanced positive behaviour and conduct by firms. But firms are not sentient and therefore really what is implied is that the people within these firms behave better. Professional bodies, such as ours educate and encourage our members to continually ask and challenge 'what is the impact of my actions on my customer'?

However, challenge upwards remains difficult; whilst this would no doubt help to positively change conduct and culture it remains a struggle for individuals, particularly when their personal commitment to such change and improvement through professional membership continues to not be recognised and supported by the regulator.

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 believe consumers and their representatives are calling for better enforcement of the existing rules and principles. However, if it is made clearer to the individuals to which the current framework applies, what is expected of them, through simple guidance, that is easy to understand and can reference the relevant regulations, without the need for interpretation via compliance specialists or external consultants, this then stands a good chance of being actioned at the level of individual actor. As mentioned in our response to Question 2 above, the FCA should also be in a clearer position to act when breaches of the 'spirit' of the regime occur.

Better support will need to be shown by the regulator for those willing to challenge and again the regulator could do more with fixed portfolio firms to ensure they are creating an open and supportive culture where challenge is seen positively and blockers [leaning on processes and procedures] are not put in the way of individual actors 'doing the right thing'. We would again call for greater support and recognition of the work of professional bodies in this area.

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?

This is a difficult legal area and one which we feel others are better qualified to discuss.

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.

Please see our responses to Questions 1, 2 and 3 above. The FCA has many tools at its disposal already to address the main concerns in this debate. There is an argument that these could be used more effectively, and that rather than introduce new tools, those already existing should be better

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applied. A very simple example would be to publish more examples and case studies of 'good' and 'bad' practice.

We understand that one of the main issues raised in this discussion is the need to change how individuals within the sector are acting. We would argue that there is again a simple solution, and it is not that a statutory duty of care is placed on these individuals; good people want to do good things and, as outlined in our response to question 3 above, simple guidance aimed directly at the individuals will support this. At the same time FCA supervisors should focus on whether those in executive authority are encouraging and listening to the upwards challenges, given than many of those reporting to them are the guardians of "*superior technical competence*"[7] and more likely to have made a personal commitment, independent of their organisation, to a positive culture change that holds the best interests of society and customers at its heart.

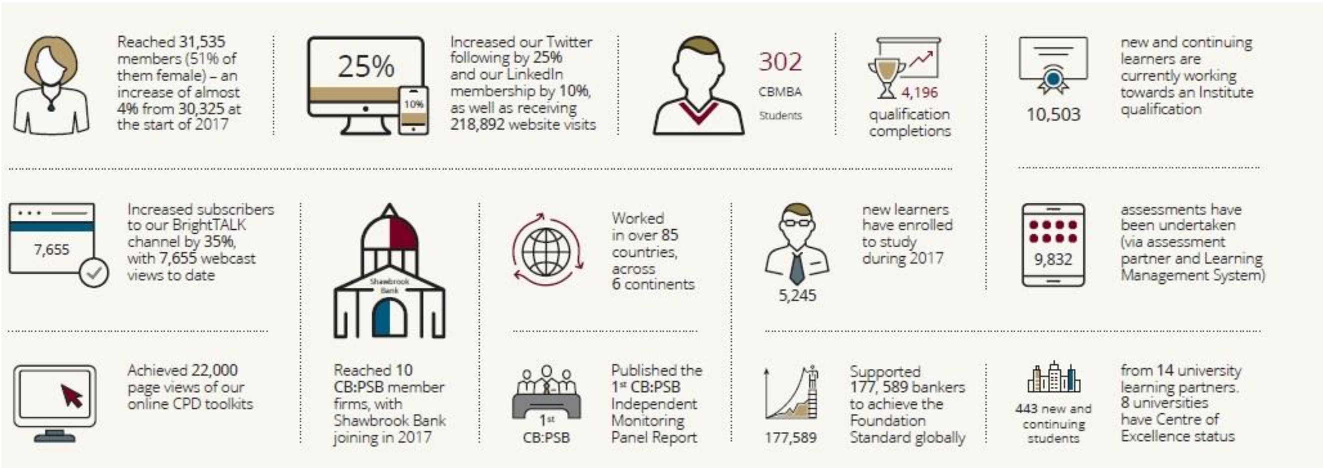
Conclusion

We again stress that professional bodies are working together to support such individuals, and can do so in a way that no regulator can. That said, more consistent, visible and above all public support and encouragement from regulators would encourage those firms and individuals who have not yet made such a commitment to do so. By comparison, Wayne Byres, Chairman of the Australian Prudential Regulation Authority recently stated at the Financial Services Institute of Australia's (FINSIA) Summit that, "*A stronger focus on professionalism can only be beneficial for all stakeholders.*"

[7] Talcott Parsons, 'The Professions and Social Structure' (1939) 17 Social Forces 457, 460

About the Chartered Banker Institute

The Institute in Numbers



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