Discussion Paper (DP 18/5) on a duty of care and potential alternative approaches

Response by the Intermediary Mortgage Lenders Association

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IMLA

IMLA is the representative trade body for mortgage lenders who lend wholly or predominantly through intermediaries. Our 42 members include banks, building societies and specialist lenders, including 16 of the top 20 UK mortgage lenders responsible for almost £180bn of annual lending. IMLA provides a unique, democratic forum where intermediary lenders can work together with industry, regulators and government on initiatives to support a stable and inclusive mortgage market. We welcome this opportunity to comment on the proposals set out in DP 18/5.

Summary of our views:

- The existing framework already gives the regulator sufficient supervisory and enforcement powers with which to enforce the complex and comprehensive regulatory regime.
- We do not consider that the imposition of further rules would enhance the quality of compliance.
- Where there are clear breaches, the regulator should act swiftly and decisively. Where the rules are unclear, further guidance should be developed to help firms understand what is required.
- A New Duty would not be sufficiently clear to make a helpful difference – and could blur the lines of responsibility introduced under the Senior Managers and Certification Regime – which will not be fully implemented until 2019 and should be allowed to bed in and prove its effectiveness.

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. The existing regulatory framework combines specific Rules and Guidance with broader Principles. The FCA also has at its disposal significant supervisory and enforcement powers. If there are specific gaps which are not currently capable of being dealt with by the existing framework, then a more targeted approach should be taken to address them, rather than the imposition of a non-specific "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?

It is not at all clear how or why a New Duty would enhance positive behaviour and conduct if the current rules and high-level Principles (such as Principle 6 – the "TCF" Principle) have not succeeded in doing so. The FCA, and FSA before it, has been at pains to emphasise that good conduct emanates from the top of a firm and permeates down to all levels. Where the culture recognises and embraces the principles behind treating customers fairly and reasonably, there should be no need for an additional "New Duty" to remind firms about the standards with which they should already comply. Where the culture does not meet those standards, the regulator should be taking appropriate disciplinary and enforcement action, rather than introducing yet more "duties" on all firms, many of which may be complying satisfactorily.

There may be areas where existing Rules and Principles are insufficiently clear and further guidance may be helpful. That could be provided by the regulator much more swiftly and effectively than a New Duty, which would require primary legislation. The focus of specific guidance would also be much sharper than a general and non-specific "Duty". We are aware of the Super Complaint issued recently by Citizen's Advice in relation to the "loyalty penalty" which, it is claimed, is paid by many consumers who fail to shop around and switch products regularly. If the FCA is concerned that mortgage consumers may fall into this category, it could issue information on best practice, guidance, and make clear its expectations as to how it thinks firms should treat customers who – for whatever reason – do not take advantage of the best priced products which may be available on the market. Effective action could be taken under existing powers – without any need for a "New Duty" - which would almost certainly be too vague to deliver the desired result.

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?

Past experience has shown that the existence of a large Rulebook does not guarantee that things will not go wrong – particularly where those who are regulated are minded to try to "game" the rules or simply disregard them. The answer is surely not to create yet more

rules – which imposes a significant burden on the majority of rule-abiding firms – but to increase supervisory and disciplinary action to identify and rectify conduct which falls short of the expected standards. Penalties must be imposed such that they represent "real and credible deterrence" – to use the FCA's own phrase – if it is not to be simply shrugged off as an occupational (and affordable) hazard of ignoring the regulator.

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. The Financial Ombudsman Service specifically recognises that the majority of consumers of financial services have neither the financial resources nor the confidence to pursue cases in court. By providing a free and impartial process for resolving complaints, the FOS is also able to look beyond the strict confines of what a contract may or may not provide for and come to a view on whether the consumer has been treated fairly in the circumstances. It is hard to see how a decision of a court as to whether an over-arching principle had been complied with would be superior or more beneficial to a consumer who has free access to the FOS. Further, legal challenge in a court could give rise to disputes and long-drawn out appeals on points of law and definitions as to what the New Duty meant in relation to specific cases. We do not think that this would be helpful to individual consumers who simply want their individual cases resolved.

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?

No. The existence of a New Duty would not "prevent harm" any more than the existing panoply of legislation, regulatory requirements, codes and undertakings and it certainly would not be "more" effective. The list of such provisions is set out in the DP and has been referred to by a number of respondents to it. Prevention of harm will only be achieved if the existing regime is effectively enforced. We are concerned that introduction of a New Duty could actually make the Senior Managers & Certification Regime – which has not yet even been fully implemented – *less* effective by blunting the sharp focus on individual responsibility which was the principle reason for introducing that regime. A general Duty of Care is bound to be just that – general – and far less specific in definition and allocation of individual responsibility than the requirement for responsibilities maps and specific liability under the SM&CR. It would undermine the whole point of the SM&CR if a senior manager were able to argue that the less specific New Duty applied to certain circumstances, and the fault/blame for a particular error lay elsewhere – somewhere unspecified – rather than with that individual.