

Financial Services Bill 2020 – New clause 6 A duty of care for financial service providers

StepChange Debt Charity briefing on duty of care amendments NC6 and NCs38-42

New clause 6: Duty of Care for Financial Service Providers

To move the following Clause—

Duty of Care for Financial Service Providers

(1) The Financial Services and Markets Act 2000 is amended as follows.

(2) In section 1C, after subsection 2(e) insert—

“(ea) the general principle that firms should not profit from exploiting a consumer’s vulnerability, behavioural biases or constrained choices;”

(3) After section 137C insert—

“137CA FCA general rules: duty of care

(1) The power of the FCA to make general rules includes the power to introduce a duty of care owed by authorised persons to consumers in carrying out regulated activities under this Act.

(2) The FCA must make rules in accordance with subsection (1) which come into force no later than six months after the day on which this Act is passed.”

New clauses 6, and 38-42 propose introducing a duty of care for financial service providers. We believe that a new duty of care is needed to strengthen the Financial Conduct Authority’s key consumer protection objective, setting a clearer expectation on firms of the steps they need to take to make sure they do not knowingly or unknowingly harm consumers.

New clause 6 would introduce into the Financial Services and Markets Act 2000 (FSMA) a new requirement for the FCA to have regard to ‘the general principle that firms should not profit from exploiting a consumer’s vulnerability, behavioural biases or constrained choices’ in fulfilling its consumer protection objective. New clause 6 would also give the FCA a rule making power to ensure that the concept of a duty of care can be embedded across the FCA rulebook.

New clauses 38-42 also seek to introduce a duty of care for financial service firms, focusing on the need for firms to act honestly, fairly professionally and ethically; to manage conflicts of interest fairly; with a focus on the role of senior management in setting the approach to these duties.

Introduction and background: StepChange Debt Charity is the largest specialist debt adviser helping people across the UK. Last year 635,000 people contacted us for help with problem debt.

Through our work helping people in problem debt, we see often longstanding and widespread consumer problems with consumer credit and other financial products and services. While the FCA generally does a good job with the tools at its disposal, regulatory interventions tend to come after problems have already happened and harm has been done.

Repeated problems in financial services markets suggest firms are still unable to pro-actively and consistently prevent or address emerging consumer detriment themselves. 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.

We believe that this is in large part the result of poor articulation of the FCA's core consumer protection objective in FSMA, where an underdefined requirement for 'appropriate' consumer protection creates a fuzziness in both the FCA's regulatory expectations and firms' culture with respect to consumer outcomes.

It is notable that after 20 years of FSMA, the FCA is still talking about culture and has recently consulted on substantial new guidance to ensure firms treat their customers who are particularly vulnerable to detriment fairly. We strongly support this guidance but note that the FCA states that 'the guidance itself is not legally binding'.

The call for a Duty of Care on financial services providers is not new and was recently debated during the passing of the Financial Guidance and Claims Act 2018. That discussion led to a commitment for the FCA to consult on a Duty of Care, with the FCA's response now due in Q1 2021. Alas that is likely to be too late for this Bill, so the opportunity to make a meaningful improvement to the legislative definition of the consumer protection objective, and the FCA's duties under it will be missed.

New clause 6 aims to improve the FSMA consumer protection objective and give the FCA specific rule making powers.

Paragraphs 1 and 2 of New Clause 6 would add a new 'have regard' to the FCA's consumer protection objective. Section 1C of FSMA defines the consumer protection objective as 'securing an appropriate degree of protection for consumers', which is then defined and contained by a series of 'have regards'.

This does include a general principle that firms 'should be expected to provide' consumers with an appropriate level of care; but this tentative formulation (weakened by a further principle that consumers should take responsibility for their decisions) seems badly at odds with the succession of serious problems, often experienced by consumers most vulnerable to detriment.

As a result we believe Section 1C needs a much stronger recognition of the power imbalances between firms and consumers in financial services markets. Paragraph 1 and 2 would do this by requiring that the FCA must have regard to the general principle that firms should not profit from exploiting a consumer's vulnerability, behavioural biases or constrained choices. This gives the FCA

a specific requirement to focus on the key root causes of consumer detriment in a way that will be legally binding. It will set an explicit expectation for firms to consider their products, services and conduct that the existing high-level principles, Treating Customers Fairly and the Senior Managers Regime have not yet achieved.

Paragraph 3 would give the FCA Duty of Care rule making powers, allowing the FCA to set better and clearer expectations across the rulebook that firms use sufficient care and skill when developing and delivering products and services to ensure that these do not work against the interests of consumers.

Paragraph 3 is therefore similar in some respects to the concerns raised in amendments 38-42, which seek stronger legal requirements for the professional conduct of firms. We support the intention of these amendments to set clearer expectations in the regulatory regime.

Examples of where a Duty of Care would help: The following examples suggest where a Duty of Care would have provided a stronger definition of fair treatment, and stopped firms profiting from exploiting constrained choices, vulnerabilities, or behavioural biases.

Unsolicited credit card increases. 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 exacerbating the debt problems of those already 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. A duty of care would provide a safer default, stopping firms from exploiting behavioural biases to push further credit onto individuals already in financial difficulty, or at the very least, prevent debt problems from being carelessly worsened.

Persistent debt 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.

For more information, or if you would like to discuss any of the issues raised by this briefing further, please contact Mark Haslam, Senior Parliamentary and Public Affairs Officer on 07890 111 214 or mark.haslam@stepchange.org.