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Financial Conduct Authority
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By email: FCAMission@fca.org.uk

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Dear Sirs

FCA Future Mission

The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). The Regulatory Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

We acknowledge the value in any further transparency for firms as to the way in which the FCA interprets its objectives and exercises its powers. However, given that the FCA annually publishes a business plan in which it sets out its priorities for the following year, and has published general guidance as to how it advances its objectives (the FCA's Approach to Advancing its Objectives 2015), it may be helpful to clarify where the final Mission will fit with existing publications.

Given the new environment in which the UK financial services sector will find itself upon Brexit and the potential for deregulation in the U.S., the competitive threat is significantly heightened. We believe that the FCA should consider whether it should seek a reintroduction of the requirement for regulators to have regard to the impact of UK regulation on the international competitiveness of UK financial services. Principle 3 of the Principles of Good Regulation (providing for the desirability of "sustainable growth in the UK economy in the medium or long term"); and Principle 2 of Proportionality are not adequate to address this concern.

Q11 – would a duty of care help ensure that financial markets function well?

We respond to this question by reference to the three elements identified in the FCA's *Our Future Mission.*

1. *In the Consumer Panel's view, 'consumers can only reasonably be expected to take responsibility for their decisions where firms have exercised a duty of care.' The scope of the duty on firms, and whether it would extend beyond a duty to use reasonable skill and care in a firm's dealings with its customers, would need to be explored. A result of introducing a 'duty of care' might be to strengthen consumers' ability to take action in the courts if there has been a breach of FCA rules or to increase the use of class actions.*

We consider that the creation of a directly enforceable duty of care is unnecessary for the following reasons:

a) **Overlap with a regulatory requirement:** the FCA is required to secure an appropriate degree of protection for consumers having regard (among other matters) to the principles that providers of regulated financial services should provide consumers with an appropriate level of care in light of their capabilities and the risk of the transaction, while consumers should take responsibility for their decisions (section 1C FSMA). We consider that the protection of consumers is an objective best achieved by the FCA through the exercise of its rulemaking and supervisory functions and not by creating an additional (and we argue duplicative and impracticable) duty directly owed by firms to their customers.

b) **Duplication of a rulebook requirement:** a private person who suffers loss in consequence of a firm's breach of certain of the PRA's or the FCA's rules, for example Conduct of Business Rules, can bring a claim against the firm for damages based on breach of statutory duty (section 138D FSMA). These directly enforceable rules contain most if not all of the elements that could be covered by the creation of a duty of care. The courts have recognised that the existence of rules such as COBS does not give rise to a duty of care at common law because the section 138D remedy removes the need for the imposition of a separate common law duty.[1]

c) **Duplication of an existing legal requirement**: a firm already owes a directly enforceable duty of care to a customer in contract – the implied duty of reasonable care and skill – and also in tort.

d) **Enforcement**: a duty of care would be enforced by the courts, and current experience is that the vast majority of claims are dealt with by the Ombudsman service. It is unlikely that many customers take advantage of a new remedy that required enforcement at their expense in a court of law to the exclusion of a free and informal remedy providing coverage up to £150,000.

2. *We have argued previously that a duty of care is unnecessary, as the FCA Principles are themselves FCA rules, and they include an obligation on firms to treat customers fairly. This remains our view. However, we recognise that customers cannot currently bring civil claims based on an alleged breach of Principle 6 (the duty to treat customers fairly) alone …*

We agree that a duty of care is unnecessary in relation to the Principles for two main reasons:

a) **Impracticability of enforcement:** we do not consider that it would be practicable for a customer to bring an action for, for instance, breach of Principle 6. In our view

[1] Green & Rowley v The Royal Bank of Scotland plc [2013] EWCA Civ 1197. See also X (Minors) Appellants v Bedfordshire County Council Respondents [1995] 3 WLR 152.

PRIN6 is less susceptible to direct enforcement than, for example, a breach of COBS. This is because COBS (and the other conduct of business rules) generally contains rules of direct application to a customer, such requiring disclosure or the achievement of best execution, which are directly observable by the customer. In contrast, breach of a rule or principle directed to the achievement of higher level requirements,

i. Is less detectable by a customer;

ii. May involve consideration of regulatory policy decisions (such as what may or may not be fair, and for which no detailed rules have been established); and

iii. May require detailed investigation or benchmarking in order to be substantiated, which are functions better performed by a regulator than tackled by a customer.

Considerations of this nature may underlie the decision that breach of SYSC (and possibly also the capital rules) are not actionable under section 138D FSMA.

b) **This objective is already attained:** the FCA already effectively enforces the requirement that a firm treats its customers fairly. The following cases demonstrate that the FCA is an effective enforcer of the TCF requirement across a wide spectrum of systemic and customer-specific breaches. This in our view indicates that customers are already protected adequately, and that little would be gained from the creation of a directly enforceable TCF right.

i. **Inappropriate sales process**—using pressurized sales tactics;[2] operating an unfair sales process or a sales strategy that encouraged mis-selling;[3]

ii. **Remuneration**—operating a remuneration policy that encouraged mis-selling;[4]

iii. **Unfair terms**—relying on an unfair contract term to customers' detriment;[5]

iv. **Product development**—operating a poor product development process;[6]

v. **Unsuitable recommendations**—making unsuitable recommendations;[7]

vi. **Misleading communications**—issuing misleading customer communications;[8]

vii. **Complaints handling**—failing to handle complaints properly;[9]

viii. **Hidden charges**—making hidden charges or wrongly retaining benefits due to customers;[10]

ix. **Weak controls**—exposing customers to the risk through generally weak controls.[11]

[2] Final Notices: Square Mile Securities (January 2008); Falcon Securities UK (January 2010); Card Protection Plan (November 2012).
[3] Final Notices: Swinton Group (July 2013); Stonebridge International Insurance (July 2014).
[4] Final Notice: Square Mile Securities (January 2008).
[5] Final Notice: Card Protection Plan (November 2012).
[6] Final Notice: Swinton Group (July 2013).
[7] Final Notices: Square Mile Securities (January 2008); Pacific Continental Securities (January 2009).
[8] Final Notice: Clydesdale Bank (September 2013).
[9] Final Notices: Friends Provident Life & Pensions (15 December 2003); Guardian Assurance (January 2006); Bank of Scotland (May 2011); Cooperative Bank (January 2013); UBS AG (February 2013); Policy Administration Services (July 2013); Homeserve Membership (February 2014); Lloyds Bank plc, Bank of Scotland plc and Black Horse Limited (4 June 2015).
[10] Final Notices: State Street Bank Europe & State Street Global Markets International (January 2014); Forex Capital Markets & FXCM Securities (February 2014).
[11] Final Notice: Combined Insurance Company of America (December 2011).

3. *We would also welcome views on whether such a duty could help to define the respective responsibilities of product providers and intermediaries or advisers responsible for the sale of the products.*

The responsibilities of product providers and distributors will be defined in the contractual and procedural arrangements between them. The regulator can set out its expectations, which the FSA did on a number of occasions,[12] and which the ESFS is now addressing through the issue of a series of guidelines.[13] The FCA has also taken enforcement action against firms that have failed adequately to discharge these requirements.[14] We consider that these responsibilities are adequately defined and – for the same reasons as given in relation to the direct enforceability of PRIN6 – are best enforced by the regulator.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact Karen Anderson by telephone on +44 (0) 20 7466 2404 or by email at Karen.Anderson@hsf.com in the first instance.

Yours faithfully

Karen Anderson
Chair, CLLS Regulatory Law Committee

[12] For example PS07/11: Responsibilities of providers and distributors for the fair treatment of customers (July 2007); Treating Customers Fairly (TCF) in product design (July 2007); PS 07/11 Regulatory Guide—The Responsibilities of Providers and Distributors for the Fair Treatment of Customers (RPPD) (July 2007)
[13] For example ESMA: Draft guidelines on MiFID II product governance requirements (October 2016)
[14] For example Final Notices Credit Suisse & Yorkshire Building Society 16 June 2014

THE CITY OF LONDON LAW SOCIETY
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