

Money and Mental Health response to the Financial Conduct Authority's Discussion Paper on a duty of care and potential alternative approaches (DP18/5)

Introduction

The Money and Mental Health Policy Institute is a research charity, established in 2016 by Martin Lewis to break the link between financial difficulty and mental health problems. The Institute's research and policy work is informed by our Research Community, a group of 5,000 people with lived experience of mental health problems or of caring for someone who does.

This response covers Questions 1-3 and 5.

Background

In any given year, one in four people will experience a mental health problem.¹ Mental health problems can affect a person's cognitive and psychological functioning, in ways that make managing money and navigating the market for financial services substantially more difficult.² This can mean that people are more likely to receive poor value for essential financial products like current accounts and general insurance. People experiencing mental health problems are also less likely to be in work, and more likely to be in temporary, part-time or low paid work, which can make these additional costs hard to bear.

Through a combination of reduced income, difficulties managing financial products and additional costs, people experiencing mental health problems are three times as likely to be in financial difficulty.³ Half of people in problem debt will also be experiencing a mental health problem,⁴ which can, in turn, make resolving debt issues more difficult. For this group, it is essential that credit and collections practices avoid causing unnecessary distress, and make it as simple as possible to resolve issues before they escalate. Given that half of consumers will be affected by a mental health problem in their lifetime,⁵ it's also vital that long-term financial products are designed with the needs of this group in mind.

It is essential, too, that financial services providers and regulators do not build strategies which assume that people will disclose mental health problems, and can be offered special treatment. The scale of the challenge, and the fact that over a third of people who are experiencing a diagnosable mental health problem will not, in fact, be aware of this or seeking treatment,⁶ means that this strategy will not necessarily identify all those in need of support, and could put vulnerable consumers at risk of harm. Money and Mental Health research with people with lived

¹ McManus S et al. Adult psychiatric morbidity in England, 2007. Results of a household survey. NHS Information Centre for Health and Social Care. 2009.

² Evans K and Holkar M. Levelling the playing field. Money and Mental Health Policy Institute. 2017.

³ Jenkins R et al. Debt, income and mental disorder in the general population. *Psychological Medicine* 2008; 38: 1485-1493.

⁴ Jenkins R et al. Mental disorder in people with debt in the general population. *Public Health Medicine* 2009; 6, 3: 88-92.

⁵ Mental Health Foundation. Fundamental facts about mental health 2016. 2016.

⁶ McManus S et al (eds.) Mental health and wellbeing in England: Adult Psychiatric Morbidity Survey 2014. NHS Digital. 2016.

experience of mental health conditions suggests that only a third (31%) had informed their financial services providers of their health condition. Instead, our strategies for ensuring customers are treated fairly should draw on a universal design approach. This approach involves considering the additional needs of those who may be vulnerable, and working to make services as broadly accessible as possible - with the additional benefits of making services simpler and easier to access for those who are not currently in vulnerable circumstances.

What does this mean for financial services regulation?

Given the number of people affected by mental health problems across the population, the profound impacts these can have on our financial capability and the serious consequences for our financial and mental wellbeing, Money and Mental Health believes that a different approach to regulation is needed. This also seems to be echoed in recent government policy, including elements of the Department for Business, Energy and Industrial Strategy recent green paper on consumer markets, and ongoing work across the FCA and other essential services regulators.

While we are aware of the complexity involved in defining a potential Duty of Care, we believe the drivers behind this debate, namely the need for a broader engagement with the real lives and needs of consumers on the part of firms, and a shift in mechanisms for redress, justifies a change in approach. We believe that this could be achieved pragmatically in the short term through changes to the FCA's existing Principles, and the redress options available, rather than requiring primary legislation. We would, however, expect this approach to be evaluated, and for an amendment to FSMA to be considered in the longer term if changes to the Principles and other ongoing work did not result in a significant change in the treatment of customers. This would provide greater clarity from government about how the FCA should balance their operational objectives around promoting effective competition and securing an appropriate degree of protection for consumers.

While the FCA's Principles for Business provide a relatively comprehensive set of standards for financial services firms to abide by in their dealings with customers, long-standing problems with the treatment of customers remain. The FCA already recognises that, in some instances, its powers do not go far enough - as indicated in proposals to retain parts of the Consumer Credit Act 1974 in the recent interim report.⁷ The FCA's powers alone, as they currently exist, are in the FCA's own view not sufficient to provide necessary protections to consumers in the consumer credit market. We would argue that similar inadequacies existing in deposit taking and insurance markets.

In part, we believe, this is due to regulations and compliance focusing unduly on 'average' consumers - a fact the FCA is also beginning to recognise in their own work around vulnerability. With the Financial Lives survey indicating that up to half of all consumers are potentially vulnerable at any given point,⁸ it is imperative that the treatment of vulnerable

⁷ Financial Conduct Authority. Consumer Credit Act Review: interim report. DP18/7. 2018.

⁸ Financial Conduct Authority. The financial lives of consumers across the UK: Key findings from the FCA's Financial Lives Survey 2017. 2018.

customers is at the heart of our approach to consumer protection, rather than being seen as an add-on. We believe the introduction of a Duty of Care would help to reframe firms' approaches to consumers, and provide a more effective and appropriate degree of protection for consumers, in line with the FCA's first operational objective.

1. 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.

i) The types of harm and/or misconduct any changes would address.

Money and Mental Health observes two particular types of harm which are not adequately prevented by the current regulatory framework, relating to product design and adverse distributional effects.

a) Product design

Some financial services products are explicitly expected to be used by a consumer for a long period of time - particularly investment and pension products. In these cases, providers have special duties to consider the needs of consumers especially when advising them on product choice. Other products, while not explicitly considered as long term products, however, are often used in this way by consumers - for example insurance products, current accounts and savings products. Although consumers can change providers for these products more frequently than they may for pensions and investment products, in practice the costs of doing so, in terms of time and energy, often mean consumers don't engage regularly in the market as we may expect from a purely economic standpoint. As the circumstances of consumers, and their needs, change over time, this inertia can mean that consumers are left using products that do not meet their needs.

This could be seen as consumers choosing to bear a cost of not shopping around and switching, as part of a rational decision-making process. However, our growing understanding of the ways in which consumers interact with complex markets for financial products suggests that, in practice, often this inertia is not an active choice, but a result of the volume of activity expected of consumers, who also have lives to lead and a whole range of competing demands on their time, including earning money, raising children, supporting elderly parents and managing their homes. Some people, including those experiencing mental health problems, may face particular barriers to engaging with the market, including an impaired attention span or difficulties processing large volumes of information to find a better option, anxiety about contacting providers to organise a switch, and simply not having sufficient motivation to engage with their

existing product and understand where they may be paying excessive fees or receiving a lower level of service than they could achieve with another supplier.⁹

Outcome 2 underlying Principle 6 does clarify that ‘products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly’, however this does not engage with how consumer needs change over time, and how products should be designed to take this into account. Outcome 5 also expects that ‘consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect’, but again fails to engage with the fact that a consumer’s needs and ability to engage with the product and service may vary substantially over time.

While it is clear under the existing Principle 6 that firms have a duty to ‘treat customers fairly’, when designing a new product it is unclear what obligations they have to potential customers, or consumers at large, before entering into a commercial relationship with them. We believe this creates a gap in the regulatory framework. Although firms must offer support to consumers once they provide them with a product, it is not clear where their obligations to this customer begin, and to what extent firms should balance the long-term needs of customers and their own need to make profit when designing products. This is particularly important for products which are likely to be used by consumers in a relatively passive way for a long period of time. While it could be argued that the Equality Act 2010 does place a statutory duty on firms to anticipate the needs of consumers with certain protected characteristics (including long-term mental health problems) and make anticipatory adjustments to provide the same level of service wherever practically possible,¹⁰ we do not believe that, in practice, this Act is being used to hold firms to account. The fact the Act only provides protection to people once they have experienced an illness for 12 months, although they may have faced detriment as a result far sooner, is also a limitation, particularly for people experiencing fluctuating mental health conditions. Improving the FCA’s regulatory framework would help overcome this shortcoming (although in the longer term the government have signalled that they will amend the Equality Act).¹¹

In practice, this means that customers are being provided with products where we believe firms could reasonably anticipate that, over the medium term, harm would be caused. This includes some high-cost credit products, current accounts with overdraft provision, mortgages and some insurance products.

⁹ Evans K and Holkar M. Levelling the playing field: How regulators can support consumers with mental health problems. Money and Mental Health Policy Institute. 2017.

¹⁰ S20 Equality Act 2010.

¹¹ Conservative Party. Forward, Together: Our plan for a Stronger Britain and a Prosperous Future. 2017.

b) Adverse distributional effects

While we understand that it is not the FCA's role to make social policy, and that all its work must balance the sometimes-conflicting operational objectives to promote competition and ensure adequate consumer protection, we sometimes feel the balance between these two goals is misplaced, particularly with regards to the costs falling on inactive customers.

We have particular concerns about the operation of the current account market, where the free-if-in-credit current account model has created a range of cross-subsidies between consumers who use unarranged overdrafts, and those who are largely in credit. We are concerned by the distributional consequences of long-standing unarranged overdraft use, and the long-term financial and emotional distress these fees and charges can cause. Although the FCA is already investigating these market dynamics, we believe they stem from a lack of clarity around Principle 8, around managing conflicts of interest, and specifically firms' obligations between managing distributional decisions between different consumer segments while profit seeking. Differential interest rates for front and back book savings customers can also be taken as an indication of firms taking certain decisions between the needs of customers with the aim of profit maximising, both in the mortgage and savings product markets.

While we understand that customers should have responsibility for their own decisions, including whether to use overdrafts or to shop around for savings, insurance or mortgage products, we believe that the marketplace as currently functioning does not properly account for the differing abilities of consumers to engage in this way, and as such adverse distributional impacts often cumulatively affect the same customers, imposing substantial aggregate harm. We are particularly concerned about how this impacts people experiencing mental health problems, who may experience symptoms such as memory problems, a shortened attention span, increased impulsivity or difficulties problem solving which can make navigating markets drastically more difficult.¹² Given that a quarter of the population are experiencing a mental health problem at any one time, this should have a profound impact on the way we understand the role of consumers in ensuring markets function effectively, and the ways in which we regulate. The FCA's current framework does not adequately reflect this.

ii) Whether a New Duty should be introduced and, if so, what form it should take?

We believe that changes to the FCAs regulatory framework are needed to tackle the long-term issues facing consumers in the market for essential financial products, on the basis of the harm outlined above. However we understand the legal complications

¹² Holkar M. Seeing through the fog: How mental health problems affect financial capability. Money and Mental Health Policy Institute. 2017.

around defining a 'Duty of Care' in either a fiduciary or tort sense, and that this may be seen as duplicating existing FCA Principles for Businesses.

Instead, in the short term, we suggest the following clarifications to the FCA's Principles for Businesses would in effect meet the aims of a 'duty of care'.

- **Principle 6 Customers' interests** should be edited, from "A firm must pay due regard to the interests of its customers and treat them fairly" to strengthen the obligations this implies a firm has to customers, and make it clear this applies to all customers. We would suggest rewording this Principle "A firm must work in the interests of all its customers and treat them fairly". We believe this, together with edits to the underlying outcomes to explicitly state that firms must consider consumers likely circumstances over time, would help ensure that firms consider the needs of consumers when designing products and reduce the number of products which do not provide an adequate service to customers over their lifespan.
- **Principle 8 Conflicts of interest**, should be edited from "A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client" to "A firm must manage conflicts of interest fairly both between itself and its customers and between different groups of customers fairly and so as to avoid consumer harm." We believe that this clarification makes clear, for example, that firms should not be pricing products aimed at different market segments in such a way that one cross-subsidises another where this harms one group of customers (e.g. as is currently the case in the current account market through overdraft fees and charges).

These changes alone, however, will not be sufficient unless properly enforced by the FCA. We believe that alongside these changes to the FCA's regulatory framework, protection for consumers would also be strengthened by some changes to the way the FCA authorises and supervises firms and enforces regulation, set out in our response to Question 3 below.

We would expect that any changes made as a result of this consultation to introduce a 'new duty' should be evaluated over the medium term, and if they prove to have been ineffective in addressing the types of harm set out in the first part of our answer to this question, we would view this as a sign that the FCA does not have sufficient power to take a clear stance on the balance between its operational objectives to promote competition and secure adequate protection for consumers. In this case, we would argue that an amendment to the Financial Services Markets Act 2000 may be necessary to clarify how the FCA should balance these objectives, where introducing a commitment to the primacy of protecting consumers would have the effect of creating a Duty of Care.



iii) What additional consumer protection and benefit would this provide, above the current regime (including over and above the existing implied term in the CRA for reasonable care and skill)?

We believe these changes would encourage firms to think of their customers in four dimensions, taking account of the breadth of their circumstances and how these could change in future when designing and selling products. This would help avoid a ‘tick box’ approach to vulnerability, and instead move towards a ‘universal design’ approach. The ‘tick box’ approach, where firms focus on identifying consumers in vulnerable circumstances and making specific adjustments for them simply is not fit for purpose when we know that 50% of consumers are potentially vulnerable at any given time¹³ and one in four experiencing a mental health problem (which is not well-measured in the Financial Lives survey, with its focus on long-term conditions, when many mental health problems fluctuate). Instead, firms will need to engage with the ongoing needs of consumers throughout the product life cycle, and design products with flexibility to meet the need of real people.

iv) How could the New Duty act to mitigate or remove conflicts of interest, including the types of conflicts which exist in the provision of financial services?

As the FCA points out, some conflicts of interest are inherent in the provision of profit-making services, and in serving a range of markets. We are not concerned by the existence of conflicts of interest per se, but by those instances in which these are managed in such a way that the cost falls on those consumers who are disadvantaged in their ability to navigate the market and counterbalance firms’ market power. This is particularly problematic when consumers are not choosing not to switch products or providers as an active choice following cost-benefit analysis, but rather face circumstantial or systematic barriers which make it more difficult for them to engage with markets. People with mental health problems, for example, may experience a range of symptoms, including changes in executive function, planning and problem solving, which can make navigating the market for financial services dramatically more difficult. It is not fair for these people to consistently lose out when this impairment is not a choice or a personal failing. Instead, a new duty should provide the FCA with an opportunity to level the playing field for these consumers.

We hope the proposed changes would encourage firms to consider more carefully the design of products to help achieve better balance in the tradeoffs between product maximization and consumer protection inherent in providing products in a competitive market, and would provide a regulatory signal about how firms should navigate cross-subsidies between consumer groups.

¹³ Financial Conduct Authority. The financial lives of consumers across the UK: Key findings from the FCA’s Financial Lives Survey 2017. 2018.

vi) **Whether other alternatives could help address any gaps, for example, extending the clients' best interest rules to different activities?**

We believe that these changes would be complementary to the FCA's forthcoming guidance on the treatment of vulnerable consumers, and together would send a clear message to firms that, when setting expectations of consumers, they must do so from a universal design approach, taking steps to make services and products accessible and suitable to the substantial number of consumers who will be experiencing a mental health problem or other potentially vulnerable circumstances.

2. 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?

Money and Mental Health believes that a New Duty would have two primary benefits for consumers:

- 1) Improving the quality of products, and their suitability for consumers over time, by encouraging firms to engage more closely with consumer needs, and balance their profit motive more finely when designing products.
- 2) Facilitating access to redress in such a way that firms have a much greater incentive to proactively treat customers well whenever there is doubt about what would constitute fair treatment, rather than prioritising their profit maximising objective on the basis that the cost of redress is likely to be limited. If automatic compensation was applicable, firms would be more likely think twice about mis-selling or dealing with customers in an inappropriate way. We believe this could be a game changer in ongoing conversations about improving firm culture. We return to how we expect this would be achieved in Question 3, below, which sets out our expectations of how the FCA could operationalise a New Duty.

Question 3: 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 that the changes to the FCA's regulatory framework suggested above would help the FCA to clarify how they navigate the tradeoffs between their operational objectives to promote competition and ensure consumers receive adequate protection. However, we also believe that some changes in the way the FCA enforces its rules would also be necessary if these changes are to be effective in practice.

One significant problem with the way the FCA regulates at present is the barriers consumers face in seeking redress, which in turn means that some groups of consumers are much less

likely to receive redress when they are harmed by firms. Often, these consumers will be those in potentially vulnerable circumstances, including people experiencing mental health problems.

The current system of redress relies on a consumer's ability to make a complaint about an issue, even if the FCA has already investigated the issue and concluded that there was substantial harm, for example in the case of payment protection insurance. Despite the scale of regulatory failure to anticipate this mis-selling and regulate the sales of these products effectively from the start, consumers affected are expected to identify for themselves that they may be entitled to redress, and to go through the often complex process of seeking this. For some consumers, the process of drawing together relevant documentation and proactively contacting providers is so difficult as to make this effectively impossible - particularly in the case of consumers experiencing mental health problems, more than half (54%) of whom struggle to communicate with financial services providers by telephone.¹⁴ Across the population, fewer than half of us (47%) find it easy or very easy to deal with problems with essential services.¹⁵ Many customers with mental health problems find that complaints processes are inaccessible, for instance, if they are required to use the telephone or if information about how to complain is obscured. Others struggle to lodge complaints because of psychological barriers, such as difficulties with confrontation.¹⁶

Firms have a duty to record information about their relationships with customers, including products sold, and have institutional systems for managing communications with customers. Where firm or industry-wide redress is therefore needed, it makes sense for the obligation to be on firms to put right the damage they have done, by proactively offering redress to consumers, rather than waiting for consumers to approach them seeking the redress they are due. A change in the FCA's approach to expect firms to provide redress in this way would be in line with a broader shift towards a universal design approach to regulation.

While the current enforcement procedures remain in place, there is a constant risk that for some firms, the profits which can be made from treating customers unfairly will outweigh the costs of redress, if it is too difficult for customers to complain. We believe a shift in the rules around enforcement would create a significant incentive for firms to be more proactive in treating customers fairly.

¹⁴ Online survey of 2,078 people, carried out by Populus for the Money and Mental Health Policy Institute, 11-13 May 2018. Data is weighted to be nationally representative. Holkar M, Evans K and Langston K. Access Essentials: Giving people with mental health problems equal access to vital services. Money and Mental Health Policy Institute. 2018.

¹⁵ Online survey of 2,078 people, carried out by Populus for the Money and Mental Health Policy Institute, 11-13 May 2018. Data is weighted to be nationally representative. Holkar M, Evans K and Langston K. Access Essentials: Giving people with mental health problems equal access to vital services. Money and Mental Health Policy Institute. 2018.

¹⁶ Holkar M, Evans K and Langston K. Access Essentials: Giving people with mental health problems equal access to vital services. Money and Mental Health Policy Institute. 2018.

Question 5: 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.

The prevention of harm is not a replacement for redress. Taking together the complexity of financial services products, and the lives of consumers who rely on them, sometimes things will go wrong and redress will be necessary, particularly in a competitive and innovative market. However we do believe that the changes proposed in the rest of this response would reduce the incidence of harm, particularly that caused by inflexible product design and inappropriate sales.