Dear Frank,

RE: IA response to Work and Pensions Committee letter

Thank you for your letter of 14 December 2018 following my evidence session with the Work and Pensions Committee in relation to its ongoing inquiry into pension costs and transparency. I am delighted to provide the Investment Association’s comments on the points raised in your letter.

1. **Profitability of asset managers**

Asset managers, like any other business, have information on their profitability, and the Investment Association provided extensive comments to the FCA on its profitability analysis in our response to the Asset Management Market Study Interim Report\(^1\). Our own analysis at the time of the Interim Report indicated an average operating margin for the industry of around 35%\(^2\), consistent with the FCA figure. More recent analysis suggests that by 2017 this had fallen to 30%\(^3\), reflecting a faster increase in costs in comparison to revenue.

This average profitability across the industry masks considerable variability at a firm level. In 2017 profitability across IA members\(^4\) ranged from -27% to 65%, with one quarter of firms having profit margins below 25% and one quarter above 43%\(^5\). Profitability for any particular firm can of course change significantly from year to year.

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\(^1\) FCA Asset Management Market Study: Response to Interim Report, The Investment Association, 2017. See Annex One, section four and in particular paragraphs 52-60 which discuss the FCA’s analysis of industry operating margins.


\(^4\) Based on responses from IA member firms covering 84% of total UK assets under management by the entire IA membership base.

\(^5\) Ibid.
2. **Acting in the customer interest**

Asset managers follow strict legal obligations to act in the consumer interest:

- There is a very comprehensive set of FCA Principles and currently expanding set of rules that govern the duties of asset managers towards their customers. Of particular note are Principles 1, 6, 8 and 9 (integrity; treating customers fairly; conflict management and suitability).

- The EU-derived best interests rule, which applies to asset managers, arguably imposes a higher standard in customer treatment than Principle 6 which applies to all FCA-regulated firms.

- Added to this are recent FCA initiatives on value for money and investment research; cost transparency; the imminent extension of the SM&CR; and the evidence of very low complaints rates and compensation claims.

Taken together, these mean that there has been a step change in the focus and intensity of customer protection in recent years. We anticipate that the importance of these changes will take some time to fully become clear to those outside the industry and regulator.

In this context, we do not feel that an industry code of principles would provide additional protection. Your question highlights issues also considered in the recent consultation by the FCA on whether a duty of care or other intervention is needed. Whilst the results of that consultation are not yet known to us, the Investment Association submitted a full response identifying the wide and deep extent of regulations which are now (or about to be) governing the activity of asset managers. A copy of our response is enclosed.

This is not to suggest there are no areas for improvement. Rather, it demonstrates to us that the environment which the FCA has identified for a successful delivery of the existing outcomes-focused approach of regulation is present. The FCA identifies this as:

- The FCA having the right Principles and detailed rules in place.
- Firms understanding what is expected of them.
- The FCA using its authorisation, supervision and enforcement tools effectively.
- Firms having the right culture, particularly at senior management level, so that the standards of conduct set out in the Principles are at the heart of their approach.

We agree with these, and the third and fourth points are particularly important to ensuring existing standards speak effectively to new areas of saving and societal changes. Another set of standards or code will not add to the enhanced regime that the FCA has introduced. Rather, it may deflect from that effort over the next few years as they are developed and implemented.

3. **Mandatory versus voluntary disclosure regimes**

I reiterate the recognition by the Investment Association and the firms it represents of the importance of clear and consistent disclosure as well as our ongoing commitment to working with customers and regulators to ensure enhanced disclosure of charges and costs.

There are a number of regulatory obligations that apply to UK and European asset managers that require disclosure of total costs and charges to investors, including UK pension schemes. Disclosure is therefore a legal obligation and not a voluntary endeavour.
The discussion about whether or not firms are required to use the IDWG templates is one that relates to the precise degree of granularity of disclosure\(^6\). We support the FCA’s view that the best approach is for the asset management industry to work with its clients to develop a form of disclosure that best meets client needs. Mandating the use of specific, detailed templates in regulation makes it harder for these outputs to evolve in line with changing industry practice and client needs.

4. Validation of data on costs and charges

Taking together our comments in the two previous sections, it is clear that the legal responsibility for producing timely and accurate information is on regulated firms, who will take steps to assure the quality of data before it is provided to the client. Moreover, mandatory disclosure is subject to regulatory supervision and the FCA has the ability to intervene and take enforcement action if it believes that firms are making inaccurate disclosures to clients\(^7\). The consequence of these obligations is that the starting point should be that the data being provided to clients is accurate.

Thereafter, if the client wants further validation of the data it is their prerogative to seek this. There are existing mechanisms to achieve this – for example, pension schemes can and do ask their auditors to validate their financial information. We are also aware of new third party services that are offering their services to pension schemes specifically in relation to the validation and analysis of transaction cost data.

I hope these answers are helpful and if the Investment Association can be of further assistance to the Committee in this inquiry, please do not hesitate to get in touch.

Yours sincerely,

Jonathan Lipkin

Director, Policy, Strategy & Research

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\(^6\) “We consider that the information required by MiFID II will give institutional investors a clear understanding of the costs and charges that they are incurring. If this information is delivered within a well-designed template, it could facilitate more effective competition.” *FCA Asset Management Market Study Final Report*, 2017. See p88.

\(^7\) “…..the requirements of MiFID II mean that firms should provide accurate information on costs and charges, and inaccurate information…..would be a breach of the MiFID II rules, against which we could take supervisory or enforcement action”. *FCA Asset Management Market Study Final Report*, 2017. See p89.
Dear Sir/ Madam

RE: DP18/5: A Duty of Care and Potential Alternative Approaches

Thank you for publishing your Discussion Paper on a duty of care and potential alternative approaches. We note you had committed to produce this in order to explore the potential merits of a duty of care as part of the Handbook Review which will follow the UK’s exit from the EU in 2019. We acknowledge the importance of asking whether consumers could be better served, and if that could be achieved by additional duties or rules.

This paper follows years of debate, particularly championed by the Financial Services Consumer Panel, sometimes under the theme of fiduciary duties but more recently refined in its January 2017 briefing as a call for a duty of care. During this time the Law Commission was asked and produced a paper on fiduciary duties and regulation¹; that paper did not support the introduction of an explicit fiduciary duty.

The IA believes that as far its own constituency is concerned there is no gap in the regulatory and legal framework, or the way FCA applies it in practice, that could be addressed by introducing a New Duty. Together with the Principles themselves, and particularly 1, 6, 8 and 9, the combination of EU-derived best interests’ rules; recent initiatives on value for money and research; the prospective extension of the SM&CR; and, the evidence of very low complaints rates and compensation claims, underpins our belief that a New Duty would not provide additional consumer protection in relation to our part of the asset management sector, let alone meet some unmet need for redress for consumers.

Yours faithfully,

Pauline Hawkes-Bunyan
Director, Risk, Compliance and Tax

¹ Should you wish to see our 2012 paper on the subject as further background, please let us know
DP18/5: A DUTY OF CARE AND POTENTIAL ALTERNATIVE APPROACHES

ABOUT THE INVESTMENT ASSOCIATION

The Investment Association is the trade body that represents UK investment managers, whose 250 members collectively manage over £7.7 trillion on behalf of clients.

Our purpose is to ensure investment managers are in the best possible position to:

- Build people’s resilience to financial adversity
- Help people achieve their financial aspirations
- Enable people to maintain a decent standard of living as they grow older
- Contribute to economic growth through the efficient allocation of capital

The money our members manage is in a wide variety of investment vehicles including authorised investment funds, pension funds and stocks & shares ISAs.

The UK is the second largest investment management centre in the world and manages 36% of European assets. More information can be viewed on our website.

EXECUTIVE SUMMARY

When considering the need for any new duty of care, the IA believes that as far its own constituency is concerned there is no gap in the regulatory and legal framework, or the way FCA applies it in practice, that could be addressed by introducing a New Duty. Together with the Principles themselves, and particularly 1, 6, 8 and 9, the combination of EU-derived best interests’ rules; recent initiatives on value for money and research; the prospective extension of the SM&CR; and, the evidence of very low complaints rates and compensation claims, underpins our belief that a New Duty would not provide additional consumer protection in relation to our part of the asset management sector, let alone meet some unmet need for redress for consumers.

Several of the above factors, all of which are associated with regulation of the UK’s asset management industry, are not seen in several of other sectors regulated by the FCA; in particular, we note the contrast in regulatory standards between the best interests of clients approach amongst firms, including those operating in asset management which is expressed as a rule, and which is arguably a higher obligation than that to treat customers fairly, expressed in Principle 6, applicable across all sectors.

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2 1. Integrity; 6. Treating customers fairly; 8. Conflict management; and, 9. Suitability
We also note the importance of acknowledging the historic dichotomy of businesses providing services to consumers, which includes asset managers, and businesses which effect transactions with consumers; and we discuss the issues that arise from this.

Finally, we conclude that whilst we agree with the four factors identified by the FCA, both the discussion paper, and the FCA’s general approach could be improved by considering more explicitly the consumer’s role. In this respect, we consider that part of the problem is an insufficiently wholesale adoption of behavioural analysis that ensures policies and disclosures are calibrated to drive the right behaviours.

RESPONSES TO QUESTIONS

QUESTION 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.

QUESTION 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?

For the reasons given below, we do not believe there is such a gap in the FCA’s legal and regulatory framework, either as regards its scope or in the way the FCA applies it in practice, in relation to the constituency for which we speak; investment managers and fund managers principally operating in or from within the UK. It follows we do not believe for our sector that a New Duty would enhance those outcomes – or put another way, we think any such New Duty already exists and the attainment of better outcomes will not be prevented by the absence of such a duty against which the FCA could reference interventions using its existing regulatory toolkit or consumers bring action.

The FCA asserts that the success of the existing outcomes-focused approach of regulation depends upon a number of factors:

- The FCA having the right Principles and detailed rules in place.
- Firms understanding what is expected of them.
- The FCA using its authorisation, supervision and enforcement tools effectively.
- Firms having the right culture, particularly at senior management level, so that the standards of conduct set out in the Principles are at the heart of their approach.

We agree with this in the main; given the overlay with European-derived regulation and the higher standards which it arguably introduces, we consider that presently the final point is better expressed as follows:

- Firms having the right culture, particularly at senior management level, so that the standards of conduct expected are at the heart of their approach.
We see no need to limit the expression to Principles, particularly because in some areas, in their natural language, we do not think they express as high standards as some rules or EU regulations require.

We also think it worth noting here, as below, that the success FCA is aiming for, is made more likely by the fact that those rules and detailed Principles are the result of FCA’s own legislative process\(^3\). The rule-making powers given the FCA are widely expressed, and the protections given to consumers and the industry through the well-understood and used consultation process with cost-benefit analysis, is a very effective operating model for an industry of the nature and complexity of financial services.

Of course, there could be improvements but we note the global model is for a rules-based system of regulation, in contrast to a statutory duty of care interpreted by the courts. To move to such a system, or perhaps more accurately, to impose it as an overarching umbrella adding to actionable duties but never cutting back on them where specific rules apply, would give rise, in our view, to a less efficient delivery of services by already compliant firms.

As we shall note below the evidence of recent FCA interventions into the asset management industry supports a view that targeted effective corrections to perceived weaknesses in behaviours that affect consumer outcomes, can be implemented quickly and in a manner that allows the industry to work towards an agreed, but tight, implementation date. Should case-made law dominate key risk areas, as would be the case with a statutory duty of care, the industry would always be playing catch up to a newly revealed expression of duty when a new judgment came out. This alone would impact efficiency as over-cautious and inconsistent approaches would be taken. It might also render FCA’s supervision activity very complex, requiring FCA to second-guess court interpretation of a wide duty of care.

**Treating customers fairly (Principle 6)**

Returning to the Principles themselves, we note that some commentators feel the requirement to treat customers fairly enshrines a weak duty. Compared to the rule to which our members, as with some other sectors, are subject, to act in the best interests of clients, it is understandable that some readers see Principle 6 as accepting of a lower standard of care.

Nevertheless, anecdotally it is clear that our members consider that under the acronym TCF, Principle 6 provided the organising narrative to a valuable and culture-enhancing period of customer-focussed approaches, from sales and marketing, to product design and review, to the overall governance of a firm. Without taking away from the discussion about the best interests rule and new behaviours associated with it, we do think that the TCF initiative – which is still applicable today and is particularly seen in the Responsibility of Product Providers and Distributors for the Fair Treatment of Customers document to which FCA refers – was effective in causing changed behaviours at firms precisely because the third factor – FCA using its tools effectively – was a deliberate part of the delivery of that change.

We do not think, therefore, that, as such, Principle 6 is an inadequate standard, though our experience is that its effectiveness was enhanced by a deliberate and systematic focus of effort by regulator and industry. But, we do recognise that the best interests rule\(^4\) has proven its strengths already (from the point of view of the regulator and consumers) and we shall turn to that, after a point of what we suggest is missing analysis by the FCA paper.

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\(^3\) We acknowledge that EU law has to be implemented, but the point still stands

\(^4\) Strictly, several rules which encompass MiFID, UCITS and AIFM firms at least
Care in services vs transactions

We are strongly of the view that any analysis of the need for a new duty, especially one involving the term “care”, should recognise that regulation remains referenced to a paradigm that distinguishes between service and transactions. We are not suggesting this is wrong, though it may be more and more outmoded, particularly with the development of technology and assisted decision-making. However, this distinction does still shape expectations of both behaviour and regulatory responses. Our members in managing investments for institutional clients, in wealth management and for retail clients or in operating authorised funds and alternative investment funds, are performing a service. Their obligations by nature are performed on an ongoing basis, and commonly as regards any individual customer these obligations will persist for many years. And since the individual consumer is heavily reliant upon the firm for any controllable outcomes of the investment, this is matched by a heavy responsibility for the firm to act in the interests of that consumer. This service relationship is not unique to our members’ businesses or other asset managers, of course. But in contrast, for many other consumers their interaction with financial services firms is transactional, in which there is a point in time contractual commitment by both parties, and no ongoing service in any real sense. We think that some of the calls for a duty of care relate precisely to the debate on appropriate behaviour in one-off transactions. Your comments at page 19 about Principle 9 perhaps being more apt to amend than Principle 6 reflects this distinction.

Fiduciary duty

At law, even before modern financial services legislation (from 1988) and consumer protection advances, the discussions about obligations when providing services, particularly to those characterised by super-reliant inexpert beneficiaries, were framed in notions of fiduciary duty. Discussions about transactional obligations involving inexpert beneficiaries related to caveat emptor and information asymmetry. In our view in the current world of regulated businesses, both these stylised approaches are distractions.

The call earlier this decade for the introduction of a fiduciary duty was in response to a legitimate concern that too many people, too often, were being let down by sectors of regulated financial services firms. Following the Law Commission work in this area in consequence of such calls, we think it is unarguable that the true position of regulated firms which provide services upon which consumer place heavy reliance, as with asset management, is that they are subject to a complex of differently-derived overlapping legal obligations and that any residual obligations deriving from historic fiduciary law are contextualised, cut back, qualified or even replaced by regulation and contract. Our own paper in 2012 expresses this position for asset managers and concluded as such. We think it is right that the debate has moved on to a discussion of what actual duties should be owed; in this regard we make further points below on the best interests rule, SM&CR and conflicts management.

The best interests rule

Introduced by MiFID, and adopted by UCITS and AIFMD, the best interests rule applies to our members, as with other asset managers. We note that some identify this rule as capturing a standard that expresses the care that should be shown to consumers. We are of the view that the existence of this rule, taken with the SM&CR and conflicts regimes, renders any further statutory or legislative intervention unnecessary on an over-arching basis. It is hard to envisage what higher standard there can be than best interests, which would remain workable and realistic. And as we noted above, by having this as a rule alongside the Principles, rather than a stand-alone duty of care interpreted by the courts, it is an efficient tool in the hands of the FCA. Whilst it is still relatively new, we note that it has already been
used by the FCA to advance important policies, firstly in relation to research payments and secondly as regards the value for money assessments.

CP13/17 on the use of dealing commission opens as follows (our italicisations here and in the next extract):

This Consultation Paper (CP) forms part of our wider asset management strategy, which focuses on ensuring investment managers, acting as agents on behalf of their clients, put the customer’s best interests at the heart of their businesses.

And in the Asset Management Market Study (“AMMS”), the entire section on value for money assessments is underpinned by it being an expression of best interests:

We propose to strengthen the duty on fund managers to act in the best interests of investors through clarifying our expectations around value for money, increasing accountability through the SM&CR and introducing a minimum level of independence in governance structures.

This is clear evidence that the best interests formulation permits the FCA to articulate a wide range of interventions better to address what it considers to be misaligned incentives and weakness in service delivery.

**Statutory duty**

To return to the question of a statutory duty at this point, we only wish to record that the rule-making powers to particularise and apply the best interests rule are widely expressed. It is hard to envisage a circumstance in which an evidenced failing in standards of behaviour impacting consumers could not be addressed by a rule based on best interests, or under the Principles. We do not consider that a statutory duty would add anything in our sector, and it could introduce a whole range of costs and downsides as noted in the FCA paper and summarised well in the blog by members of the University of Bristol5. New interpretations and applications would emerge through judge-made law. Constitutionally, there is huge strength in having judge-made law and we are not in principle against it, and we have not overlooked that the law of negligence was developed though judge-made law, but the speed with which the AMMS could proceed to rule-making, the protections given to the industry through the process of consultation – note how the dealing profit rule was technically improved through that process – and the fact that consumers did not have to bring cases to get these changes, all demonstrate that modern regulatory regimes are much more fitted to the specificities of a complex financial services ecosystem than we should expect judge-made law to be. Indeed, we can only think that a series of judge-made decisions on a statutory duty may result in greater legal uncertainty as firms will need to review many more piecemeal decisions across specific fact bilateral disputes, and FCA would need to be engaged in intervening in many more court hearings, which in itself may be impracticable.

Other matters of practical legal uncertainty will be the lack of a common date on which any new duty arises – case-made law effectively exposes pre-existing duties and so might introduce considerable backward-facing legal risk; whether a duty of care in financial services should be read equivalently to existing law on negligence and similar (often contractual) obligations; and to what extent future decisions in other sectors of the economy should be applied to sectors of financial services.

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Even now where case-by-case disputes do arise and the results are reported; this is the role of the Financial Ombudsman Service (FOS). Access to the FOS provides what we suspect will be a speedier resolution of complaints with a low barrier to access justice for consumers. Importantly, it provides a single portal for a consumer to make a complaint without having to over-worry about the formal structure of an application as would occur with Courts. Firms also have the benefit of relating to a single portal on such issues rather than across hundreds of local Sheriffs courts and County courts. We note that elsewhere the FCA is consulting on widening access to FOS by SMEs and charities, so potentially reducing the number of persons who would feel need to have to access the Court systems.

**Best interests in the EU**

We noted that the best interests rule derived directly from European legislation. Not only has it been of use to the FCA, but it was also used immediately by the European legislature to flesh out MiFID I (sic) at Level 2. The rules relating to best execution where investment managers place orders with others for execution were explicitly referenced as an expression of the obligation to act in the best interests of customers. This is another example of how, recognising an apparent lacuna – “how can asset managers be under a duty to ensure best execution even when they do not execute?” – the legislature was able to specify equivalent obligations as being examples of acting in the clients’ best interests.

**SM&CR**

The discussion paper refers to the expansion of the SM&CR to all firms, including the asset managers in our membership. We are firmly of the view that this will have a real impact on the culture and focus of many firms, and affirm that position at many others. Again we note that the FCA has been able to find synergies between best interests and the SM&CR in the AMMS:

> We are also setting out our intention to introduce a new Prescribed Responsibility under the SM&CR to act in the best interests of investors including a consideration of value for money.

The SM&CR initiative ought to deliver better outcomes for consumers on a speedier basis than a statutory duty of care might be expected to. The focus on personal responsibility as well as firm-wide training targets behavioural responses much more directly and can only improve poor cultures, whilst reinforcing good culture. That there is a cost, and residual concerns about aspects of the regime is not relevant for this response, what matters is that compared to the counterfactual of more rules on a firm, a statutory duty or wider Judge-made decisions, consumers will be better served by it. As a tool, it can also be adapted – in the expression of the personal responsibilities and who has them – more easily, to future developments in the financial services sector, whether due to new technologies, business model or behaviours, good and bad.

**Conflicts of interest**

A key component of good regulation are rules on conflicts of interest. We note that the European-derived rules to which our members are subject set out a conflicts regime that differs from that which persisted under earlier UK rules; it provides a better regime for protecting inexpert consumers. Before MiFID I the UK regime permitted most conflicts to be dealt with by disclosure to and some form of agreement from the consumer. Now asset managers, as with other EU-regulated sectors, must identify all conflicts, manage them out and only in the final circumstance seek approval following disclosure. This puts the onus on a firm to do what can be done to prevent conflicts potentially harming a client.
This approach to conflicts is not only appropriate but again, in our view, supports a view that the concerns that external commentators understandably have, are able to be met by the regime that the FCA has put, and is putting, in place, particularly as regards the best interests rule, SM&CR, the AMMS and conflicts of interest rules.

As we stated above, we consider the tools are in place in our sector for ensuring:

- The FCA having the right Principles and detailed rules in place.
- Firms understanding what is expected of them.
- The FCA using its authorisation, supervision and enforcement tools effectively.
- Firms having the right culture, particularly at senior management level, so that the standards of conduct expected are at the heart of their approach.

Future developments need to reflect on how the remedies from the AMMS and the new SM&CR regime bed in, whilst maintaining a focus on existing standards through supervision and enforcement.

**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 do not believe the way you regulate results in a gap that a New Duty would address – at least as regards our sector. We do not seek to speak for others.

We note what you say here about the different areas of activity. We consider the competition power is one which is already being seen as adding to the way you can both investigate and seek to remedy a wide-range of consumer issues. We only have a comment to add about the section on policy.

We note that you identify what you do, but not how you do it. As we mentioned in our answer to questions 1 and 2, the debate over caveat emptor and the statutory provision on consumer responsibility is still heard. Commentators have referred to the consumer responsibility principle as if it were a fetter on good regulation. We think it is right in policy-making that the FCA has to bear this in mind, but we consider how the FCA does this is perhaps worth reviewing. In its extreme view, consumer responsibility is expressed as caveat emptor. The Gower report in the 1984 which preceded, and shaped, modern UK – and so to a real extent, EU – conduct regulation, already noted that caveat emptor alone would not instil the right level of investor confidence, especially for a consumer base that could not understand what was being said to them and did not know what they should be asking about.

We think that more should be done to understand how consumers react to information and choices. It is understandable for some to ask for a new duty; we have explained above why we feel it is not needed and could be counter-productive in our sector. We do question whether a deeper understanding of how consumers make decisions would help tailor regulation better to the mischiefs that need to be addressed. It ought to improve consumer outcomes, it may well reduce or alter compliance burdens on firms – either way we can only think that it should prove more fruitful than another duty. We acknowledge that FCA is in the forefront of this, we think more could be made of it in future policy work, especially were there to be greater policy freedom after Brexit.
QUESTION 4. 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?

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 IMPROVISE THE CURRENT REGIME.

We note the 1999 consultation by Financial Services Authority ahead of the roll-out of the newly unified regulatory regime. The conclusion there that no civil liability would attach to the Principles since they created no new civil responsibilities remains the correct decision in our view. As may be recalled, the predecessor regime had introduced the Statement of Principles, after the Companies Act 1989 gave power to promulgate Principles as statements of the behaviours expected of (broadly in those days) investment firms. From the outset these did not create any new civil liability.

The debates in the House of Lords referred to this approach. The power to make principles was being introduced very quickly after the Securities and Investments Board (“SIB”, the company today known as FCA) had commenced operation. Full regulation commenced on 28 April 1988, and yet just over a year later this power was being proposed. We understand that one reason for this proposal was that under the regime at the time, SIB had taken a view that every rule it made had to be independently justiciable. There was therefore already a detailed set of conduct rules overlaying even more rules at the individual Self-Regulatory Organisations. To get away from this, the Principles were created as a set of standards with which the regulator could control and discipline. We think it is still beneficial to have such high-level expressions of expected behaviour without their creating stand-alone civil duties. And where they may not match EU-derived legislation, they are in any event modified.

But quite apart from the Principles, the reality is that the best interests rule and most other conduct rules are rules upon which civil action can be founded. We think for our sector this demonstrates that there is already a form of duty of care which is actionable by consumers.

Otherwise, we have no particular comments upon the redress issue. In our sector, we understand that the level of complaints is very low as is the level of compensation paid out through FOS. We only take note of your assertion that prevention is better than redress. We do not find this controversial but note that like any apparent axiom, it may not always apply, nevertheless like yourselves we believe that the use of redress powers is important both as a deterrent and to provide redress where problems occur in the financial services market. Between FOS, individual action which FCA can take, and the collective redress schemes, we think that FCA already has the tools it requires to protect consumer appropriately.

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Section 47A(3) inserted by Parliament into the Financial Services Act 1986 stated: Failure to comply with a statement of principle under this section is a ground for the taking of disciplinary action or the exercise of powers of intervention, but it does not of itself give rise to any right of action by investors or other persons affected or affect the validity of any transaction.
FURTHER INFORMATION

For further information, please contact: Emma Sears