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Joint Response by UKSA and ShareSoc on behalf of Private Investors

Duty of Care FCA Paper – Draft Response

To: dutyofcare@fca.org.uk

We write on behalf of the UK Shareholders' Association ("UKSA") and the UK Individual Shareholders Society ("ShareSoc") to give our comments on the FCA's Discussion Paper "On a Duty of Care...". We represent the interests of individual investors in the stock market and related financial investments, i.e. the consumers of financial services. Our Members invest both directly in publicly listed shares as well as in managed funds and are likely to own pensions (often invested in SIPPs) and ISAs. They may also invest in private equity and unregulated investments of various kinds and are also likely to be consumers of other financial products such as insurance.

Our main desired outcome is firmer and faster, transparent action against those who violate the integrity of the FCA standards, rules and guidance. In practically every financial scandal or financial crisis, the FCA seems to have taken far too long to decide whether companies/firms/individuals have a case to answer and too often has concluded that nothing has gone seriously wrong. If this fundamental issue is not addressed, then no amount of debate about duty of care will solve the fundamental problem. Miscreants need to know that their behaviour will not be tolerated and will be punished. Once this message is clear, sent and delivered, changing the current, failing culture will become much easier.

We have the following comments and suggestions about achieving our desired outcome of firmer and faster, transparent action.

As our members often look after their own investments with the objective of minimising costs (i.e. they are often "execution-only" clients of stockbrokers, although they may use financial advisors for other purposes) they have a strong interest in minimising the costs imposed by regulation on investment platforms. Regulatory costs have clearly been increasing in recent years, often with no clear advantage to our Members. We would be concerned if additional costs were imposed on financial organisations with no obvious benefit. The financial regulatory environment is already very complex and onerous and this can deter new market entrants and lead to an uncompetitive market (only the largest organisations can stand the overhead costs of very high regulatory obligations in terms of training, monitoring of staff and

other compliance costs). This risk was recently highlighted by the Financial Times in an article on 20th August: "Mifid II fuels stockbroker consolidation talk".

However, our Members are well aware that some investment providers are not always trustworthy and sometimes appear to pursue their own interests rather than those of their clients.

As regards regulated activities, the FCA's "Principles for Business" and consumer protection legislation are already very comprehensive in providing for adequate protection of consumers of financial products and services. But there do appear to be some loopholes. For example, it is not always clear that a financial organisation is acting in the best interests of their clients rather than their own interests. They may promote investments that are more profitable to them than other investments the client could be offered without breaching the Principles for Business. As the Discussion Paper spells out, there can currently be "conflicts of interest" which firms have to manage fairly but that is a somewhat confusing concept and can lead to ambiguity as to what are their obligations. We are therefore not opposed to imposing a "New Duty" of some form.

As regards whether to introduce a new general "duty of care" rather than a "fiduciary duty" we favour the latter as it is already a well-known legal concept and is easier to define. A general "duty of care" would impose much more extensive and severe obligations on firms as it might imply that a firm would need to take into account all the circumstances of the client and relieve the client of any responsibility to try and understand what they were committing to and to act wisely.

We do not believe that clients should be relieved of an obligation to take reasonable care of their own affairs and to become informed on financial matters in general. The FCA should not be in the business of protecting (foolish) people from their own lack of knowledge, except in certain very limited circumstances. To introduce such a principle and impose a new general duty of care would impose very heavy financial costs on firms, which will be passed onto all consumers.

As regards the specific questions posed in the Discussion Paper, our answer are as follows:

Question 1: Do you believe there is a gap in the existing regulatory framework.....

Answer: As explained above we believe there are some gaps in the regulatory framework at present. We believe a New Duty should be imposed on certain activities whereby a "fiduciary duty" would be imposed on those activities, i.e. to impose a duty to avoid conflicts of interest and to act in the best interests of the client.

We believe that such a duty could bring greater clarity to the existing regulations in relation to certain activities.

We believe it should cover both wholesale and retail markets.

We believe that the main issue is in the failure of the FCA to enforce regulations rather than a need for more regulation. The primary need is for firmer and faster, transparent action against those who violate the integrity of the FCA standards, rules and guidance; not more rules and regulations. Having said that, we do recognise that a New Duty may improve the clarity of the existing framework and provide a stimulus and a new impetus for the existing framework to be enforced more actively in a firmer, faster and more transparent way.

Question 2: What might a New Duty for firms in financial services do to enhance positive behaviour.....

Answer: Imposing a New Duty based on a fiduciary duty would lay down a clear principle for firms operating in the financial sector.

Question 3: How would a New Duty increase our effectiveness.....

Answer: It would clarify the obligations of firms and hence make enforcement by the FCA easier. It would also make it easier for firms to understand their regulatory obligations and hence prevent breaches.

Question 4: Should the FCA reconsider whether breaches of the Principles should give rise to a private right for damages in court.....

Answer: There is undoubtedly a gap at present where the FCA can find that its regulations have been breached (e.g. the Principles), but the consumer finds it very difficult to obtain any redress. The Financial Ombudsman can ignore the law, has limited means to enforce its judgements and awards are limited to £150,000 which is a somewhat trivial amount in relation to our Members' investments (and is less than the value of most pension holdings). The Financial Ombudsman appears to be focussed on minor complaints or minor faults in administration and many of the possible complaints might be excluded from its remit.

Just reading pages 28/30 of the Discussion Paper shows how complex this area is and how difficult it is to understand how to pursue claims for redress by consumers.

We therefore believe that breaches of the Principles and of any New Duty should give a private right to damages in Court.

Question 5: Do you believe a New Duty would be more effective in preventing harm....

Answer: A New Duty based on fiduciary responsibility would clarify the obligations of firms and hence help to prevent harm. A New Duty based on a general duty of care might actually confuse matters, may not prevent harm and might make redress more difficult.

In conclusion, we would be happy to answer any further questions on this matter.

Yours sincerely

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