Browne Jacobson

Financial Services – 'Duty of Care' Bill: consumer protection or damp squib?

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Introduction

The Financial Services Duty of Care Bill (the "Bill") was introduced into the House of Lords in October 2019 and had its second reading on 9 January 2020.

In one page the bill proposes to amend the Financial Services and Markets Act 2000 ("**FSMA**") so that the Financial Conduct Authority's ("**FCA's**") statutory rule-making powers include "*the power to introduce a duty of care owed by authorised persons to consumers in carrying out regulated activities*".

The "*duty of care*" is defined as "*an obligation to exercise reasonable care and skill when providing a product or service*".

A "*consumer*" is defined as per the ***Consumer Rights Act 2015 s 2(3)***: "*an individual acting for purposes that are wholly or mainly outside that individual's … business …*"

<p">This definition is narrower than that in FSMA, which applies to "persons who use … services provided by authorised persons in carrying on regulated activities …" (see ***FSMA s 1G, H(2)***), so includes business purposes and corporates. </p">

What's the point?

Neither the terms of the Bill nor or commentary around it make its purpose clear.

The FCA's view is that the power set out in the Bill is neither necessary nor beneficial for the FCA to meet its statutory objective as to "*securing an appropriate degree of protection for consumers*" (see ***FSMA s 1C(1)***).

According to the FCA's '*Feedback Statement*' from April 2019 (***FS 19/2***), it has, over a number of years been:

"*… told … that our regulatory framework, … may not be sufficient or applied effectively enough to prevent harm to consumers …*

- *Some* [have] *suggested we introduce a duty of care to reduce harm and ensure that firms avoid conflicts of interest, as well as supporting firms' longer-term cultural change …*
- *However,* [others] *suggested existing … rules already provide sufficient protection for consumers and impose the same requirements on firms as a duty of care would.*"

FS 19/2 resulted from a 'Discussion Paper' (**DP 18/5**) that the FCA issued in 2018 for "*an open discussion about the potential merits of a duty of care,* [and] *… to give us a deeper understanding of the issues, and the way in which stakeholders perceive them …*"

The material points from the FCA's summary of the feedback were:

- "*Most … arguments … for and against a statutory duty of care* [assumed] *that individual consumers would have the ability to take court action to recover losses that resulted from a breach of that duty (i.e. be 'actionable') …*"

- The FCA identified risks from creating an actionable duty, including:
  - "*complexity … uncertainty … delay … cost*";
  - inconsistency between judicial and FCA decisions, with the potential for the former to constrain the latter; and
  - "*a negative, adversarial effect on firm/consumer relationships*".
- Moreover, the FCA stated that "*Most respondents do not support a statutory duty …*"
- There was a "*small group*" that did want a statutory duty because
  - of "*its ability to re-set the context in which financial services are delivered and regulated …*
  - [it could be] *a critical step towards restoring consumer trust …*
  - [and has a] u*nique capacity to drive change by providing* [a] *… standard of care that sits above the rest of the regulatory and legal framework … to which everyone would have regard at all times.*"

The FCA's response to the feedback was:

- "*We recognise* [the arguments of some] *that a* [primary legislative] *duty of care … would*
  - *be more effective than one created with our existing rule-making powers …*
  - *have greater visibility because it would sit above our Principles and rules* [set out in the FCA Handbook] [but]
- *We do not consider that this is a sufficient basis for making changes to primary legislation …*"

The FCA's clear preference was for the following "*options … most likely to deliver a higher degree of consumer protection …* :

- *reviewing how we apply the regulatory framework – particularly … the Principles and how we communicate with firms about this* [and]
- *new/revised Principles to strengthen and clarify firms' duties to consumers, including consideration of the potential merits and unintended consequences of a potential private right of action for Principles breaches.*"

By contrast, the Bill introduces a change at primary level to expand the FCA's existing powers without obliging the FCA to deploy such power. Nor does the Bill clarify if consumers may bring private law actions against firms for alleged breach of the duty of care. As the Bill heads towards more detailed parliamentary scrutiny, practical challenges await.

This article was co-authored by Gabriel Downey - Trainee Solicitor, Charlotte Gregory - Senior Associate and Jeremy Irving - Partner and Head of Financial Services.

Contact

Mark Hickson

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

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