

Regulatory Investigations Update. **Linkla**

19 May 2010

The FSA is continuing its focus on tackling insider dealing, with a number of new investigations, increasing fines and several new criminal prosecutions being brought. The scope of the FSA's investigations includes charges against individuals for the use of information gleaned from the printing rooms of institutions. Hector Sants, the outgoing chief executive of the FSA has stated that the regulator will pursue its approach to early detection through intensive scrutiny, as the Financial Services Act 2010 receives Royal Assent, resulting in a number of changes to the FSA's objectives, powers and duties. Yet more change is likely following the new government's indication, set out in its Coalition Agreement of 11 May, of its intention to review the workings of the banking system and further reform the regulatory system, giving the Bank of England control of macro-prudential regulation and oversight of micro-prudential regulation.

UK: Recent News

1. FSA reports on complaints handling in banks: 28 April 2010

Following the publication by the FSA of its review of complaint handling in banking groups, five unnamed banks are reported to be undertaking major changes in the way they deal with complaints, with two of them being referred to enforcement for further investigation. While the report notes examples of good practice, it has also identified areas where improvement is required. Almost one in four of the 600 complaints reviewed by the FSA were found to have been poorly investigated, with one in five wrongly dismissed by the banks. Delivering change in the area of complaints handling is a major priority for the FSA.

For the background and findings of the report on the FSA website, click [here ...](#)

2. Trial of BA executives accused of price-fixing collapses: 10 May 2010

The trial of four British Airways executives charged with price fixing which began in London on 26 April has collapsed, with Richard Latham QC, for the prosecution, announcing that he would offer "no evidence".

The collapse of the case came after the court heard how the Office of Fair Trading had failed to disclose key information to the defence. The OFT said its decision to drop the case followed the discovery last week of a substantial volume of electronic material, which neither the OFT nor the defence had previously been able to review, including evidence which apparently undermined the allegations of collusion between BA and Virgin Atlantic.

The case was the biggest criminal prosecution brought under the Enterprise Act 2002, and the first trial to hear price fixing allegations since it was made a specific criminal offence in 2003. Success in this case was seen as important for the reputation of the OFT as it attempts further to bolster its authority.

Martin George, former commercial director, Iain Burns, ex-head of communications, Alan Burnett, the former sales director and Andrew Crawley, sales and marketing director had all pleaded not guilty to the charges. Virgin Atlantic blew the whistle on its agreement with BA to fix the level of passenger fuel surcharges on transatlantic flights between 2004 and 2006. The company had been granted immunity from prosecution in the UK. However, following these developments, the OFT has announced that it will be reviewing the role of Virgin in the case, particularly in light of its obligations to provide the OFT with "continuous and complete cooperation" and that there may be potential consequences for Virgin's immunity from penalties, although it stressed that no conclusions or inferences could yet be made.

3. FSA's attitude continues to harden with focus on Insider dealing

The FSA continues to present a more aggressive stance to financial institutions. For the second year running it imposed record fines on firms found to be guilty of breaching regulatory rules, handing down fines totalling £33.1m in the financial year 2009-2010, up 21% on the previous year.

Following criticism over its response to the banking crisis, the FSA also appears to be stepping up its enforcement activities. In recent months, it has been particularly busy demonstrating its increasingly

aggressive stance on insider dealing.

In his speech on 12 March, Hector Sants, the FSA's departing chief executive, outlined plans for a new regulatory approach based on early detection and intervention through intensive supervision. The light-touch, principles based approach favoured by the FSA in recent years is being replaced by a far more outcomes-based attitude. The initiative has been criticised as lacking transparency and detail, and particular concern has been raised as to how the FSA will select those cases it scrutinises and what it will be looking for. However, Mr Sants insisted that the new approach was necessary to deliver a credible deterrence and prompt and effective redress for consumers. Despite pre-election plans by the Conservative party to abolish the FSA, it is not yet clear what decisions the new Liberal-Conservative coalition government will take with regard to the future of the regulator.

For the text of Hector Sants' Speech, please click [here ...](#)

4. Hedge fund trader pleads guilty to conspiracy to commit insider dealing: 18 May 2010

A former hedge fund trader charged by the FSA with conspiracy to commit insider dealing in relation to trades in 22 different shares between June and August 2009, has pleaded guilty at Southwark crown court. Mr Anjam Ahmad, previously employed by AKO Capital, faces a possible jail term at his sentencing next month. This is the first case in which the FSA has used powers in the Serious Organised Crime and Police Act 2005 designed to encourage defendants to co-operate in return for possible leniency, in a case alleging insider dealing. Two others arrested with Mr Ahmad in January have not yet been charged, although the FSA is continuing its investigations into their operations.

5. Lawyers on trial: 20 April 2010

The trial began in London on 20 April of three men facing insider dealing charges. Michael McFall and Andrew Rimmington, both corporate lawyers, are accused of buying shares in Neutec Pharma days before the takeover of that company by Novartis was announced, using insider information supplied by Andrew King, the finance director of Neutec. The profits alleged to have been made by the men amount to less than £40,000 each but if found guilty, they face a maximum of seven years in prison. The case is expected to last eight weeks.

For the FSA press release, click [here ...](#)

6. Seven charged with gaining insider information from printing rooms: 31 March 2010

The FSA has charged seven people with 13 charges in respect of conspiracy to deal on inside information obtained by the defendants from the in-house printing rooms of UBS and JPMorgan. Among the shares affected were those of Morgan Crucible Plc, Reuter Group Plc, Biffa Plc and Vega Group Plc. The charges related to allegations over a two year period involving alleged unlawful profits of about £2.5 million, and include allegations of money laundering. The men appeared at City of Westminster Magistrate's court on 14 April when a date of 3 May 2011 was set as the start date for the trial. The FSA is currently seeking the extradition of an eighth suspect.

For the FSA press release, click [here ...](#)

7. Proceedings commenced following extradition request: 30 March 2010

Proceedings have been brought against Helmy Omar Sa'aid who is charged with 13 counts of insider dealing one of conspiracy to commit insider dealing, relating to trading various London Stock Exchange and AIM listed shares between 2000 and 2009. Mr Sa'aid appeared before the City of Westminster Magistrates' Court on 30 March and was remanded into custody until his next court appearance on 3 June.

Mr Sa'aid was arrested by the French authorities in Mayotte, a French overseas territory in the Comoros Islands, pursuant to a European Arrest Warrant issued by City of Westminster Magistrates' Court at the request of the FSA. This is the first time the FSA had sought the extradition of a suspect from abroad to face criminal charges in the UK. This case is linked to that of Angie and Christian Littlewood, on which we reported in last month's Update.

For the FSA press release, please click [here ...](#)

8. Alstom UK board members arrested over bribery allegations: 24 March 2010

Three directors of Alstom in the UK have been arrested over allegations of bribery, money laundering and false accounting, following an investigation by the SFO. It is suspected that bribes were paid in

order to win contracts overseas, and that this involved associated money laundering and other offences. The SFO had been working closely with the Office of the Attorney General and Federal Police in Switzerland and a number of Police Forces in the UK.

For the SFO's press release, please click [here ...](#)

UK: Recent Decisions

9. FSA fine of Winterflood for market abuse upheld by Court of Appeal: 22 April 2010

The appeal against the decision of the Financial Services and Markets to uphold the FSA's fine of Winterflood Securities Ltd and two of its brokers for market abuse was dismissed by the Court of Appeal on 22 April.

The fine of over £4 million had been levied on Winterflood, part of investment bank Close Brothers, and two of its traders, Stephen Sotiriou and Jason Robins, for market abuse in relation to a share ramping scheme. There had been no allegation by the FSA that Winterflood or the traders had deliberately committed an offence. But the Court of Appeal held that the firm's failure to spot share ramping – talking up the share price – could be considered market abuse under the regulator's Code of Market Conduct. Importantly Lord Justice Moore-Bick rejected the argument that because the Code did not specifically identify such behaviour as constituting market abuse, it therefore was not market abuse. He said: "I do not think that the provisions of the Code ... are to be read as restricting market abuse of a kind which creates a false impression or distorts the market to cases in which the transaction was motivated, at least in part, by and intention to achieve either of those results."

This judgment presumes a wide definition of market abuse and confirms that UK market abuse rules can be violated unintentionally. It comes at a time when the FSA appears to be stepping up its activities in the enforcement regime, as we have noted above.

For the Court of Appeal judgment, click [here ...](#)

For the FSA press notice, click [here ...](#)

Click here for the respective final notices for [Winterflood](#), [Sotiriou](#) and [Robins](#).

10. Fraudulent investor jailed for ten years: 16 April 2010

Following an investigation by the SFO with the assistance of Kent Police, Kevin Foster was found guilty by a jury at Harrow Crown Court on 9 March 2010 of eight counts under the Financial Services Act 2000 and six further offences under the Theft Act 1968, relating to the running of a "wholly dishonest" and unauthorised investment business which attracted £34 million from investors. He was sentenced to a total of 10 years imprisonment on 16 April 2010 for offences including unauthorised investment activity, deliberately concealing facts from investors and stealing investors' funds.

For the SFO press release, click [here ...](#)

11. FSA imposes fines and bans in market abuse case: 16 April 2010

The FSA imposed fines of over £275,000 on two men, Sameer Patel and Robin Chhabra, who used confidential information to gain profits through spread betting and banned them from working in the financial service sector. Both men were originally found guilty of market abuse by the FSA in November 2008. They referred that decision to the Financial Services and Markets Tribunal, but subsequently withdrew their references, and the original penalties have been imposed.

For the FSA Final Notice, click [here ...](#)

12. FSA imposes fines for reporting failures: 8 April 2010; 28 April 2010

On 8 April the FSA fined Credit Suisse, Getco Europe Ltd and Instinet Europe Ltd a total of £4.2 million for multiple breaches of their duties to provide accurate and timely transaction reports. The FSA insists that such information is vital to aid detection and investigation of market abuse, and to assist its efforts to combat financial crime. In a separate investigation, on 28 April, the London branch of Commerzbank AG was fined £595,000 for failing to provide accurate transaction reports to the FSA, following breaches occurring over two years.

All fines levied by the FSA were discounted by 30% following the firms' co-operation with the

investigation and early settlement.

Please click [here](#) for the FSA's press release and Final Notices relating to Credit Suisse, Getco and Instinet, and [here](#) for those relating to Commerzbank.

UK: Policy and Practice

13. Reform of UK corruption laws - Bribery Act 2010: 8 April 2010

Once it is brought into force, the Bribery Act 2010, which received Royal Assent on 8 April, will radically overhaul the UK's outdated and oft criticised anti-corruption laws and introduce a new, clearer regime for tackling bribery that will apply to all businesses based or operating in the UK.

For a detailed note on the Act's provisions, please click [here](#) ...

For the text of the Bribery Act 2010, please click [here](#) and for the Explanatory notes, click [here](#) ...

14. Financial Services Act 2010 receives Royal Assent: 8 April 2010

The Financial Services Act 2010 received Royal Assent on 9 April 2010, resulting in a number of changes to the FSA's objectives, powers and duties including strengthening financial regulation, improving remuneration practices and corporate governance and giving greater rights to consumers. However, the controversial proposal to introduce collective actions was dropped from the Bill prior to Royal Assent. Opponents had argued that the proposals were not fully thought through and did not contain enough detail. It is likely that alternative proposals will be made in the future.

The FSA has already begun to consult on the implementation of various provisions in the Act - see below.

For further details on the main provisions of the Act, please click [here](#) ...

For a link to the Financial Services Act, please click [here](#) ...

15. FSA issues consultation on implementing Financial Services Act 2010: 26 April 2010

The Financial Services Authority (FSA) has issued a consultation paper (CP10/11) on proposed Handbook changes resulting from aspects of the Financial Services Act 2010. The consultation includes the FSA's proposed policy for exercising its new enforcement powers which come into force on 8 June, including powers to impose:

- suspensions or restrictions on authorised and approved persons
- penalties on persons that perform controlled functions without approval, and
- financial penalties on persons who breach short selling prohibition rules or disclosure requirements.

The consultation closes on 25 June 2010.

For a Linklaters briefing on the consultation, please click [here](#) ...

For the consultation paper, please click [here](#) ...

For the FSA press release, please click [here](#) ...

US: Recent News

16. Federal Court in California Dismisses Madoff Investors' Suit Against SEC: 22 April 2010

The U.S. District Court for the Central District of California ("CDCA") has dismissed a lawsuit brought by former investors in Bernard L. Madoff's investment fund against the U.S. Securities and Exchange Commission ("SEC") over the SEC's failure to uncover Madoff's fraud earlier. The investors brought an action under the Federal Tort Claims Act ("FTCA"), which gives federal courts jurisdiction over claims

against the U.S. for money damages for injury or loss of property caused by the negligent or wrongful act or omission of a government employee while acting within the scope of the employee's office or employment.

The investors alleged that SEC negligence in its failure adequately to police Madoff's investment firm allowed "Madoff's scheme to continue, perpetuate and expand." In dismissing the investors' suit, Judge Stephen V. Wilson of the CDCA ruled that while the SEC's investigation of Madoff was a display of "sheer ignorance," the discretionary nature of the SEC's investigatory powers placed the SEC's exercise of those powers within the discretionary function exception of the FTCA, and as such, the SEC was immune to the investors' lawsuit. Although Judge Wilson's decision falls squarely within existing precedent with respect to federal agencies' exercise of discretionary authority, given the far-reaching implications of Judge Wilson's decision for the investors, it is expected that the investors will appeal the decision to the U.S. Court of Appeals for the Ninth Circuit.

17. FINRA Issues New Guidelines on Private Placement Offerings: 20 April 2010

The Financial Industry Regulatory Authority ("FINRA") has unveiled new guidelines outlining brokerage firms' obligations when selling securities without a public offering to a small group of investors, which are known as private placement offerings. FINRA Regulatory Notice 10-22 supplements and details the duty owed by brokerage firms to conduct a reasonable investigation of an issuer and its securities when recommending private placement offerings made pursuant to Regulation D of the Securities Exchange Act of 1933.

Specifically, the new guidelines recommend inquiries into an issuer's management, assets and business prospects. The decision to release the guidelines was spurred by what FINRA Chairman and CEO Rick Ketchum describes as a recent "lack of regulatory compliance" on the part of brokerage firms. Recent FINRA investigations have led to several enforcement actions, most notably the expulsion of Provident Asset Management LLC in March for marketing private placements that were part of a Ponzi scheme. The new FINRA guidelines, while not law, do constitute FINRA's policy view on the way such offerings are to be conducted, and as such, any institution engaged in such offerings is advised to familiarize itself with the new guidelines and take steps to ensure compliance as appropriate.

FINRA's new guidelines can be linked to [here ...](#)

18. U.S. Attorneys Office Forms Civil Unit for Complex Frauds

The U.S. Attorneys Office for the Southern District of New York ("SDNY") has created a Civil Frauds Unit that will focus exclusively on investigating and litigating complex fraud cases. The new six-person unit is designed to complement the criminal unit in its prosecutions of bank, mortgage, and other fraud cases, including those under the civil False Claims Act, which imposes civil and criminal liability on individuals or companies that knowingly present false or fraudulent claims to the government.

The creation of the SDNY Civil Frauds Unit follows the 2009 passage of the Fraud Enforcement and Recovery Act, which gives U.S. Attorneys offices the authority to quickly issue civil investigative demands to obtain documents, responses to interrogatories, and sworn depositions from companies and financial institutions. As a result of the new Civil Frauds Unit, it is likely that the SDNY will issue civil investigative demands more frequently as tools in pre-litigation inquiries. Companies should be prepared for an uptick in both inquiries and in civil investigations as a result of the SDNY's new specialized unit and new investigative powers.

19. U.S. Financial Reform: 28 April 2010

The U.S. Senate has voted to allow debate on the U.S. House of Representatives' version of the financial reform bill, with a possible vote to approve such a bill expected in the coming weeks. The ambitious Democrat-sponsored financial reform bill aims to institute more rigorous consumer protections in the financial industry, by creating an independent Consumer Financial Protection Agency within the Federal Reserve that would regulate credit cards and mortgages; strengthening regulation and oversight of financial firms by giving the Federal Reserve increased oversight of large bank holding companies; limiting the ability of banks and other institutions to engage in risky transactions by imposing new rules on the over-the-counter derivatives market; and creating a procedure and fund by which the federal government would be able to liquidate financial firms that become insolvent.

Republicans and Democrats disagree on several major points of reform, including the scope of government intervention in the economy and consumer protection, as well as what actions the government should take in preventing taxpayers from paying for future bailouts. The U.S. regulatory landscape with respect to the finance sector is currently in a state of dramatic flux; banks and other institutions operating in this area should endeavour to remain apprised of all ongoing developments.

For further information on these stories, please contact [Ulysses Smith](#) or [Sheila Chithran](#) in our New York office.

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