

17 January 2012

At the FSA last week: FSA charges individual with insider dealing

The FSA has charged Richard Joseph, who was arrested in May 2010, with eight counts of insider dealing and one count of money laundering. He will next appear at Southwark Crown Court in March. He becomes the sixteenth person currently being prosecuted by the FSA for insider dealing.

No further details have been released at this stage.

<http://www.fsa.gov.uk/pages/Library/Communication/PR/2012/002.shtml>

FSA beginning to exercise Decision Notice publication power in earnest?

The first two weeks of January have witnessed an upturn in the number of cases where the FSA has decided to publish Decision Notices.

Since 12 October 2010, when a Decision Notice is issued to a firm or individual (i.e. where the firm or individual does not agree to settle regulatory action and the matter progresses to the Regulatory Decisions Committee), the FSA has been required (under section 391(4) Financial Services and Markets Act 2000) to publish "such information about the matter to which [the]

decision notice...relates as it considers appropriate". This aligned the position with situations where a Final Notice is issued (i.e. where regulatory action has been concluded).

However, since acquiring the power to do so, it has only decided that it is necessary and appropriate to publish details of ongoing action relatively rarely. Of the (at least) 34 references received by the Upper Tribunal¹ since 12 October 2010, Decision Notices have only been published in 11 cases. Of these, four have been published in the last two weeks.

- On 4 January, the FSA published a Decision Notice (dated 4 October 2011) in relation to Martin Lafrance (http://www.fsa.gov.uk/pubs/decisions/martin_lafrance.pdf). This notice is the second Decision Notice to be issued to individuals connected with General Finance Centre ("GFC") (a small mortgage firm which is no longer authorised) (the first was issued to Michael Thommes (http://www.fsa.gov.uk/pubs/decisions/michael_thommes.pdf) in July 2011). The notices issued to both of these individuals propose the imposition of a prohibition order in respect of alleged failures to ensure appropriate financial crime systems and controls (as the FSA contend that they no longer meet the Fit and Proper Test for Approved Persons ("FIT")).
- On 13 January, the FSA published Decision Notices (all dated 3 November 2011) in respect of Timothy Pattison (<http://www.fsa.gov.uk/pubs/decisions/dn-pattison-pave.pdf>), Stephen Hocking ([\[ions/dn-hocking-pave.pdf\]\(http://www.fsa.gov.uk/pubs/decisions/dn-hocking-pave.pdf\)\) and Pave Financial Management Limited \("Pave"\) \(<http://www.fsa.gov.uk/pubs/decisions/dn-pave.pdf>\). These propose the imposition of a financial penalty of £90,000 on Mr Pattison and prohibition orders for both individuals and the cancellation of Pave's permission in respect of alleged breaches of Principles 1 \(integrity\), 2 \(due, skill, care and diligence\) and 7 \(responsibility of approved persons to take reasonable steps to ensure compliance by firms\) of the FSA's Statements of Principle for Approved Persons \("APER"\) arising from unsuitable recommendations to customers to invest in unregulated collective investment schemes.](http://www.fsa.gov.uk/pubs/decis</div><div data-bbox=)

It is not yet clear whether the spate of Decision Notices published in the past few weeks is coincidence (as detailed above, three relate to the same case),

Key issues

- FSA charges individual with insider dealing
- FSA beginning to exercise Decision Notice publication power in earnest?
- FSA issues guidance on switching terms in mortgage contracts
- FSA publishes policy statement on auctioning of greenhouse gas emission allowances
- RDC Chairman to become Upper Tribunal Judge
- Treasury Select Committee publishes report on Financial Conduct Authority

the consequence of greater numbers of cases progressing to the Upper Tribunal, or the result of a concerted campaign on the part of the FSA to more conspicuously publicise ongoing action. The latter may have been prompted by the withdrawal on 30 November 2011 of the judicial review challenge previously (unsuccessfully) pursued by one of the subjects of the notices, a Canadian company named 7722656 Canada Inc (formerly known as Swift Trade Inc)ⁱⁱ, to the FSA's publication of a Decision Notice proposing the imposition of an £8 million fine for alleged market abuse.

The subjects of the Decision Notices issued to date have typically been individuals or small firms. Besides the large fine proposed in respect of 7722656 Canada Inc, the penalties proposed to be imposed have ranged from cancellation of firms' Part IV permission to a financial penalty of £100,000 (and prohibition order) on one individualⁱⁱⁱ.

Although the sample size is small, those notices which have been published may be seen as an indicator of trends in the FSA's enforcement policy. A particular theme is the extent to which individuals are being held responsible for systems and controls failings by firms. As exemplified by the most recently published notices referred to below, action appears to increasingly be taken in respect of individuals' competence and capability issues (as opposed to active wrongdoing) leading to systems and controls breaches by firms.

Beyond their immediate wish, for obvious commercial and reputational reasons, to avoid publication of the details of action being taken against them, there is wider industry resistance to what is seen by many as

a concerning pattern, particularly in the light of the proposals in the Financial Services Bill (strongly opposed by firms and their advisers) that the Financial Conduct Authority ("FCA") acquires the power to publish Warning Notices.

FSA issues guidance on switching terms in mortgage contracts

In a brief guidance note, the FSA has set out in finalised guidance some of the circumstances in which it considers terms in interest only mortgage contracts which allow firms to switch customers from interest only to repayment mortgages are likely to be unfair under the Unfair Terms in Consumer Contracts Regulations 1999 ("the Regulations"). The note, which is not exhaustive, deals only with the FSA's view in relation to the Regulations, and does not provide any guidance in relation to any Handbook provisions.

In summary, the guidance sets out that the FSA will consider switching terms are likely to be unfair if they provide the firm concerned with too broad a discretion to determine when they will apply, or if they are not expressed in "plain, intelligible language" which is not clear about when a firm's right to switch a customer from interest only to repayment arises and/or which fails to define key phrases in the contract dealing with when the firm has a right to switch the customer.

http://www.fsa.gov.uk/pubs/guidance/fq12_01.pdf

FSA publishes policy statement on auctioning of greenhouse gas emission allowances

Further to consultation last year (in CP11/14 - http://www.fsa.gov.uk/pages/Library/Policy/CP/2011/11_14.shtml), the FSA has issued a policy statement (PS12/1) on the auctioning of greenhouse gas emission allowances. The statement sets out the changes made to rules (principally the Recognised Investment Exchanges and Recognised Clearing Houses Sourcebook ("REC") and some minor changes to the Supervision and Perimeter Guidance Manuals ("SUP" and "PERG" respectively), which came into force on 22 December 2011, and summarises the approach which the FSA proposes to take to the recognition and supervision of Recognised Auction Platforms

http://www.fsa.gov.uk/pages/Library/Policy/Policy/2012/12_01.shtml

Coming up this week at the FSA:

RDC Chairman to become Upper Tribunal Judge

This week is Tim Herrington's last week as Chairman of the FSA's Regulatory Decisions Committee ("RDC"). It was announced in December that he is moving to become a Judge of the Upper Tribunal (Tax and Chancery Chamber), where he will hear references in relation to decisions taken by the RDC.

He will be succeeded as Chairman by Andrew Long, who is currently Deputy Chairman.

Further afield:

Treasury Select Committee publishes report on Financial Conduct Authority

Following hearings late last year, the Treasury Select Committee has published its report and recommendations on the proposed shape, powers and approach of the

FCA. The report is designed to complement that issued by the Joint Committee on the Financial Services Bill

(<http://www.publications.parliament.uk/pa/it201012/jtselect/jtdraffin/236/23602.htm>) in December 2011 by focusing more closely on the proposed arrangements for conduct regulation under the new regulatory architecture.

The report, which is more critical of existing arrangements for conduct regulation than that published by the Joint Committee in December, has been broadly welcomed by industry bodies. It makes detailed recommendations not only as to how the draft bill ought to be amended as it progresses through Parliament but also in relation to steps which should be taken by those in charge at the FCA to make the most effective use of the FCA's proposed new powers and clearer objectives.

<http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news/financial-conduct-authoritys-objectives-should-be-rewritten-to-include-duty-to-promote-competition-for-benefit-of-consumer-says-treasury-committee-report/>

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- i <http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/tax-and-chancery-upper-tribunal/forms-and-guidance/hearings-register.pdf> (accessed 16 January 2012)
- ii see Decision Notice at http://www.fsa.gov.uk/pubs/decisions/swift_trade.pdf and FSA press release in relation to withdrawal of judicial review proceedings at http://www.fsa.gov.uk/pages/Library/Communication/Statements/2011/swift_trade.shtml.
- iii Raymond Wagner – Decision Notice dated 14 April 2011 (http://www.fsa.gov.uk/pubs/decisions/raymond_wagner.pdf)