

FSA Update

At the FSA last week: -

High Court criticism leads to proposed ban for senior executive

The FSA has issued a Decision Notice (dated 28 February, released on 16 May) to **Mr Anthony Verrier** setting out its decision to ban him from performing any function in relation to any regulated activity. The action, using powers to prohibit individuals under section 56 of the Financial Services and Markets Act 2000 ("**FSMA**"), follows comments and findings made by Mr Justice Jack in relation to Mr Verrier's honesty and integrity in High Court proceedings concluded in 2010. Mr Verrier has referred the FSA's decision to the Upper Tribunal.

The original High Court proceedings arose from Mr Verrier's departure from his previous employer for a rival broker. His previous employer pursued proceedings against Mr Verrier and others in respect of attempts to induce other employees to move with him. Finding that he and others participated in an unlawful means conspiracy to induce employees to move, Mr Justice Jack stated that he "*found that in his evidence Mr Verrier stuck to the truth where he was able to, but departed from it with equanimity and adroitness where the truth was inconvenient*". He also commented on the loss or disposal of relevant information by Mr Verrier.

The FSA has decided, on the basis of the Court's findings both that he participated in an unlawful means conspiracy to seek to induce individuals to breach their contracts of employment and that he gave untruthful evidence, that Mr Verrier no longer satisfies the honesty and integrity limb of its Fit and Proper Test for Approved Persons ("**FIT**").

Comment

This case is not the first occasion on which the FSA has banned an individual on the basis of findings made by a judge in civil proceedings. In 2007, the FSA made a prohibition order against Mr Jeffrey Butler following findings by the High Court that, through his conduct whilst acting as a reinsurance broker in the 1990, he dishonestly assisted in a breach of fiduciary duty and that he gave untruthful evidence. However, the distinction in that case was that, notwithstanding that the action taken against Mr Butler by the FSA was partly based on untruthful evidence given by him, the underlying dishonesty was found by the Court to have occurred in connection with the carrying out of a regulated activity.

The focus of the representations put forward by Mr Verrier appears to have been that the FSA is, by seeking to ban him for a lack of honesty and integrity in connection with his recruitment activities, extending its reach into areas for which it does not have regulatory responsibility. The FSA's Regulatory Decisions Committee (RDC) rejected those representations, pointing to the wide ambit of FIT 2.1.1G, which states that, "*in determining a person's honesty,*

*integrity and reputation, the FSA will have regard to **all relevant matters**" [emphasis added].*

Mr Verrier also argued that the decision to make a Prohibition Order against him represents a disciplinary sanction based largely upon the Court's findings upon ancillary issues. Prohibition Orders are protective measures and in this case such an order is not required as Mr Verrier now works abroad, will not be employed in a senior management position by a UK regulated firm and will not therefore be an approved person.

The RDC rejected those representations. It relied specifically on the criteria set out at FIT 2.1.3(2)G

Key issues

- High Court criticism leads to proposed ban for senior executive
- FSA fines Swiss bank and MLRO for systems and controls failings
- Bank of England issues guidance on designation of investment firms by Prudential Regulation Authority
- FSA issues finalised guidance on payment for order flow
- FSA issues finalised guidance on transaction reporting of strategy trades
- FSA publishes memorandum of understanding with regulators of multi-disciplinary practices

and 2.1.3(10)G, which, respectively, set out that the FSA will consider whether approved persons have been the subject of adverse findings in civil proceedings and whether they have been criticised by a court. It also pointed to the decision in *R (Davies and others) v Financial Services Authority*, where, in 2003, the Court of Appeal held that there is no requirement for the FSA, when making a Prohibition Order to consider whether an individual intends to work in the financial services industry.

<http://www.fsa.gov.uk/static/pubs/decisions/anthony-verrier.pdf>

http://www.fsa.gov.uk/static/pubs/final/butler_7dec07.pdf

FSA fines Swiss bank and MLRO for systems and controls failings

The FSA has imposed financial penalties of £525,000 and £17,500 respectively on **Habib Bank AG Zurich** ("**Habib**") and its former money laundering reporting officer ("**MLRO**") **Mr Syed Itrat Hussain** for failing to establish and maintain adequate anti-money laundering ("**AML**") systems and controls.

Habib was found to have breached Principle 3 (management and control) of the FSA's Principles for Businesses ("**the Principles**"). Specifically, the FSA's review of a sample of client files found failures between 2007 and 2010 to conduct adequate enhanced due diligence, inappropriate risk classification of customers and cases where enhanced due diligence had not been completed prior to transactions occurring on accounts. It also found inappropriate reliance on local knowledge when deciding not to

include some countries where it maintained a group office on a list of high risk territories.

Mr Hussain, who has since retired from the financial services industry, acted as Habib's MLRO at the relevant time. The FSA found that he breached Principle 7 (significant influence function: reasonable steps to ensure compliance with regulatory standards) of its Statements of Principle for Approved Persons ("**APER**") by failing to identify shortcomings during his checks of customer files, adequately review AML systems and controls or revise training procedures to address shortcomings which he identified.

Both fines were reduced by 30 per cent as Habib and Mr Hussain settled at stage one of the FSA's executive settlement procedures and the FSA acknowledged that Habib and Mr Hussain co-operated with its investigation.

These cases are the latest to emerge from the FSA's thematic review into firms' compliance with their AML obligations, the results of which it announced in June 2011.

<http://www.fsa.gov.uk/static/pubs/final/habib-bank.pdf>

<http://www.fsa.gov.uk/static/pubs/final/syed-hussain.pdf>

http://www.fsa.gov.uk/pubs/other/aml_final_report.pdf

Other Final Notices: -

The FSA has (on 16 May) cancelled the registration of **Mr Fawad Afzal Choudhry** as a small payment institution under Payment Services Regulations 2009 following a failure

by him to notify the FSA of a change of head office.

<http://www.fsa.gov.uk/static/pubs/final/fawad-choudhry.pdf>

Bank of England issues guidance on designation of investment firms by Prudential Regulation Authority

The Bank of England has (on 17 May) published a paper setting out their initial views on the application of criteria which it proposes should be used to designate certain investment firms for regulation by the Prudential Regulation Authority ("**PRA**") after the transition to "twin peaks" regulation in 2013.

A proposed draft order setting out the criteria which the PRA will have to consider when deciding whether to designate a firm for regulation by it rather than by the Financial Conduct Authority ("**FCA**") was published in January 2012. Under its provisions the PRA must have regard to the assets of the firm concerned and where the firm is a member of a group, the assets of other 730K investment firms within the group, whether other members of the firm's group have been designated and whether the firm's activities have, or might have, a material impact on the regulation by the PRA of other persons in its group.

The note sets out the factors which it is proposed the PRA will take into account when applying these criteria to decide whether firms have sufficient impact on the financial system to require them to be regulated by it.

<http://www.bankofengland.co.uk/publications/Documents/other/financialstability/investmentfirms.pdf>

FSA issues finalised guidance on payment for order flow

Following consultation in October and November 2011, the FSA has (on 14 May) issued finalised guidance on payment for order flow ("PFOF") – i.e. arrangements whereby brokers receive payment from market makers in return for sending order flow to them. Whilst the guidance does not prohibit the practice, it makes clear that the FSA considers that it creates a clear conflict between the interests of firms and their clients. The guidance emphasises the parts of the FSA's Senior Management Systems and Controls ("SYSC") and Conduct of Business ("COBS") sourcebooks to which it considers firms should pay particular regard when entering into PFOF arrangements, and clarifies the circumstances in which it considers that payment arrangements will constitute PFOF.

http://www.fsa.gov.uk/library/policy/financial_guides/2012/fg1213-guidance-on-payment-for-order-flow

FSA issues finalised guidance on transaction reporting of strategy trades

Further to consultation in January and February, the FSA has (on 14 May) issued finalised guidance (FG12/14) on transaction reporting of strategy trades. The guidance is effective from 15 August.

http://www.fsa.gov.uk/library/policy/financial_guides/2012/fg1214

FSA publishes memorandum of understanding with regulators of multi-disciplinary practices

The FSA has (on 14 May) released details of a framework memorandum of understanding ("MoU") with the regulators of multi-disciplinary practices under the Legal Services Act 2007 ("LSA 2007"). The MoU largely replicates the provisions of similar agreements already in place with various sector and professional regulators in the UK by clarifying the areas in which the FSA will work together with the regulators with responsibility for overseeing bodies which, under LSA 2007, will be able to provide legal services alongside non-legal services. It also sets out proposed mechanisms for sharing of information and for deciding which regulator should take action in particular circumstances.

<http://www.fsa.gov.uk/static/pubs/mou/framework.pdf>

<http://www.fsa.gov.uk/pages/library/corporate/memorandums/uk/index.shtml>

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