

FSA Update

Last week at the FSA:-

Upper Tribunal upholds fines and bans for market manipulation

The Upper Tribunal has (on 28 September) directed the FSA to impose prohibition orders and financial penalties of £900,000 and £650,000 respectively on **Stefan Chaligné** and **Patrick Sejean**. It also directed that a third individual, **Tidiane Diallo**, be prohibited from working in the financial services industry.

The FSA took action against the three individuals for market abuse (in breach of section 118(5) of the Financial Services and Markets Act 2000 ("FSMA")) through the manipulation of share prices on portfolio valuation dates in 2007 and 2008. This practice is otherwise known as "window dressing the close".

Specifically, the Tribunal found that Mr Chaligné, a hedge fund manager based in Switzerland, placed orders to buy a total of ten securities with a view to increasing their closing prices and thereby increasing the value of a hedge fund of which he was the manager and in which he was a shareholder.

The Tribunal found that Messrs Sejean and Diallo, UK based traders, were aware of Mr Chaligné's objectives and effected trades on his behalf in order to achieve them.

Mr Diallo established that the imposition of a financial penalty would

cause him serious financial hardship. The FSA has indicated that it would otherwise have sought to impose a financial penalty of £100,000 on him.

In addition to the financial penalty imposed on him, Mr Chaligné has been ordered to disgorge the benefit he obtained (€362,950).

Comment

The Tribunal increased the penalty imposed on Mr Sejean from £550,000 on the basis of additional material presented to it by the FSA illustrating involvement in market manipulation on more occasions than were referred to when the matter was considered by the Regulatory Decisions Committee ("RDC"). Rejecting arguments advanced on behalf of Mr Sejean that it could not take into account facts and events not originally pleaded before the RDC, it concluded that it was not so restricted and that its jurisdiction under section 133 of FSMA extends to considering additional facts and events "connected with the subject matter" of a reference. Its decision in this area is a reminder for individuals considering pursuing references to the Tribunal of the risks associated with the considerable latitude available to it to reach its own conclusions on cases referred to it, including by substantially increasing penalties.

Mr Sejean has challenged the level of the penalty imposed upon him, which the Tribunal increased from £550,000, arguing that it will cause him serious financial hardship. The Tribunal's decision on that application is awaited.

The Tribunal also took the opportunity to support the policy adopted by the

FSA of imposing substantial penalties to seek to deter market abuse, warning that, although there may be minor cases where prohibition is not appropriate in cases of inadvertent or technical breaches, "as a matter of principle both severe punishment and removal from the market must be expected by those who are caught".

http://www.tribunals.gov.uk/financeandtax/Documents/decisions/C_S_D_v_FSA.pdf

FSA charges individual for involvement in unauthorised investment scheme

The FSA has (on 24 September) charged **Benjamin Wilson** with seven offences relating to his alleged operation of an unauthorised investment scheme. He has been charged with specific offences under

Key issues

- Upper Tribunal upholds fines and bans for market manipulation
- FSA charges individual for involvement in unauthorised investment scheme
- Wheatley Review reports on the future of LIBOR
- Senior FSA figures give further detail on FCA's supervision of asset managers
- FSA issues guidance on Remuneration Code
- FSA announces changes to Compensation sourcebook

FSMA (specifically breaching the general prohibition contrary to sections 19 and 23 of FSMA and misleading the market contrary to section 397) in addition to offences under the Fraud Act 2006 and the Forgery and Counterfeiting Act 1981. He has been bailed to appear at a hearing on 5 October.

Although the full facts of the case are not known, the decisions to charge such a wide range of offences, and in particular to seek to prosecute an individual for non-FSMA offences in addition to specific offences under the FSA's statutory remit, may be indicative of the FSA's increasing confidence as a criminal prosecutor. The Supreme Court reaffirmed in 2010 that the FSA is able to prosecute non-FSMA offences.

<http://www.fsa.gov.uk/library/communication/pr/2012/088.shtml>

Wheatley Review reports on the future of LIBOR

The final report of the Wheatley Review of LIBOR was released on 28 September. Following examination of the mechanisms for the calculation of LIBOR and consultation with a range of stakeholders, it has concluded that there is a clear case in favour of comprehensively reforming, rather than replacing it. It found that these reforms should include the explicit use of transaction data and that market participants should continue to play a significant role in the production and oversight of LIBOR.

The report goes on to detail a ten point plan for the comprehensive reform of LIBOR, which includes a proposed move to statutory regulation, institutional reform through transfer of responsibility for compilation, distribution, oversight and governance of rates to a new administrator, the

introduction of a code of conduct and phased removal of less well used rates.

Full details of the report and its impact are set out in the Clifford Chance briefing, released on 28 September.

http://cdn.hm-treasury.gov.uk/wheatley_review_libor_finalreport_280912.pdf

<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWlbfqNhLNomwBI%2B33QzdFhRQAhp8D%2BxrIGRel2crGqLnALtlyZe0wTPUXbRf33cjXgxEd4XHfp%0D%0A5mt12P8Wnx03DzsaBGwsIB3EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=78979>

Senior FSA figures give further detail on FCA's supervision of asset managers

Following speeches given to insurance firms several weeks ago (see FSA Update – 24 September), senior figures at the FSA have, in speeches given on 25 September, turned their attention to what the transition to conduct regulation under the Financial Conduct Authority ("FCA") will mean for the asset management sector. Martin Wheatley has reiterated that the FCA will adopt a policy of earlier and more decisive intervention in cases where it considers that products cause unacceptable levels of consumer detriment, including by using its powers to restrict promotion of or ban products "in the worst cases, where we have to step in to stop people being ripped off".

However, he made clear that an equally important plank of the approach to be taken by the FCA is consistency in decision making, and

that he is encouraging FCA staff to behave boldly and confidently but consistently when adopting its new proactive approach. He also set out some of the preparatory work which the FSA has been undertaking to better analyse and understand the behaviour of consumers.

He made clear that the FCA accepts its and government's responsibilities to educate consumers, but set out that these are matched by the duties of firms to work more closely with intermediaries than has historically been the case and to improve the levels of transparency in areas including charging and future product performance.

Further detail on the FCA's expectations and the approach it will take to supervising asset managers was added in speeches by others including Clive Adamson. He reiterated that the FCA will take a forward looking judgement led approach. He gave an update on the process of categorisation of firms according to their impact on customers and the market, which will be completed in early 2013. He gave details of the new Firm Systematic Framework ("FSF") which will give structure to this approach and is designed to supervise firms in a risk based fashion by reference to factors including their categorisation according to potential impact, the types of product offered and the sector(s) in which they operate.

He also reiterated the FCA's commitment to taking a more "assertive and interventionist" approach to the wholesale sector, and stated that wholesale-specific supervision modules are under development and will form part of the FSF.

He also detailed some of the current work which the FSA is undertaking in advance of the change to the FCA, including thematic work in respect of particular products and planned changes to the Collective Investment Scheme sourcebook ("COLL").

As the date for cutover to conduct regulation by the FCA approaches, and, in the meantime the release of the FCA's approach document (scheduled for the end of this month), similar sector specific briefings are expected from senior FSA figures detailing how firms will be affected by the changes.

<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWlbfGnhLNomwBl%2B33QzdFhRQAhp8D%2BxrlGReI2crGqLnALtlyZe7m72i7AQGT0zIRI3kBcRMrp%0D%0A5mt12P8Wnx03DzsaBGwslB3EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=122960>

<http://www.fsa.gov.uk/library/communication/speeches/2012/0925-mw.shtml>

<http://www.fsa.gov.uk/library/communication/speeches/2012/0925-ca.shtml>

FSA issues guidance on Remuneration Code

Further to a guidance consultation paper (GC 12/10) released in July 2012, the FSA has (on 25 September) issued finalised guidance (FG12/19) clarifying how firms may comply with the Remuneration Code and Pillar 3 remuneration disclosure rules in a manner commensurate with their size and type of internal organisation and the nature, scope and complexity of their activities. No changes have been made to the framework proposed by the guidance consultation paper issued in July 2012.

http://www.fsa.gov.uk/library/policy/guidance_consultations/2012/gc1210

<http://www.fsa.gov.uk/static/pubs/guidance/fq12-19.pdf>

FSA announces changes to Compensation sourcebook

Further to a consultation paper (CP 12/7) released in March 2012, the FSA has (on 28 September) issued a policy statement (PS 12/15) setting out changes to its Compensation sourcebook ("COMP"). The changes originally proposed in the consultation paper, which relate principally to giving the Financial Services Compensation Scheme ("FSCS") greater flexibility to pay full compensation to customers without full investigation and simplifying eligibility criteria, have been carried forward into FSA policy, with some minor modifications based on respondents' comments.

<http://www.fsa.gov.uk/library/policy/cp/2012/12-07.shtml>

<http://www.fsa.gov.uk/static/pubs/policy/ps12-15.pdf>

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