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CHANCE

Briefing note 23 October 2012

FSA Update

Last week at the FSA:-

FSA imposes fine for mortgage record-keeping failings

The FSA has (on 19 October) imposed a financial penalty of £4.2 million on **Bank of Scotland plc** ("BOS") for breaches of Principle 3 (management and control) of its Principles for Businesses ("the Principles").

The FSA found that, between 2004 and 2011, reliance was placed upon inaccurate records relating to mortgage customers' accounts. This led to them not receiving information in relation to variations to their mortgage terms and conditions. It also found that a programme agreed further to a voluntary variation of permission in February 2011, under which goodwill payments were made to customers in respect of these issues, was incorrectly implemented with the result that some customers were incorrectly excluded from the programme.

The penalty imposed was reduced from £6 million as BOS agreed to settle at stage 1 of the FSA's executive settlement procedures. The FSA acknowledged the full co-operation provided by BOS in the course of its investigation and the comprehensive assurance programme which has been undertaken to ensure that information held is now correct and complete.

http://www.fsa.gov.uk/static/pubs/final/bank-of-scotland.pdf

Tribunal approves ban for integrity breaches

Further to a Decision Notice issued in April 2011, the Upper Tribunal has (on 19 October) ruled on action taken by the FSA against **Mr Raymond Wagner** for breaches of Principle 1 (integrity) of its Statements of Principle for Approved Persons ("APER").

The FSA's action relates to its findings that, whilst occupying the CF1 (director) and CF10 (compliance oversight) controlled functions, he knowingly inflated his income in order to obtain a mortgage in May 2005 and deliberately allowed false and inflated income figures to be submitted in order to obtain four further buy-to-let mortgages between May 2006 and July 2007. The FSA also found that he failed to have in place proper systems and controls to prevent employees at the firm of which he was a director from being able to submit mortgage applications containing false information.

The Tribunal rejected an argument put forward by Mr Wagner that the FSA had no power to impose a financial penalty as, until June 2008, it had not been the FSA's policy to impose financial penalties on individuals for mortgage fraud. It disagreed with Mr Wagner that his human rights were infringed by the FSA's deviation from this policy, and accepted the FSA's explanations in relation to the reasons why the FSA has found it necessary, as part of its credible deterrence agenda, to impose financial penalties in addition to prohibition orders in cases of knowing involvement in mortgage fraud.

However, although the Tribunal ruled against Mr Wagner on that issue, he was able to negotiate with the FSA as to the basis upon which the reference could be disposed of. He agreed with the FSA a proposed settlement which referred to a statement that he recklessly allowed a mortgage application to be submitted to a lender and that he acted without integrity. He agreed to the imposition of a prohibition order and the FSA agreed not to impose a financial penalty. The Tribunal approved the proposed basis agreed between the FSA and Mr Wagner and the FSA (on 19 October) issued a Final Notice imposing a public censure and prohibition order.

Key issues

Comment

The action was concluded on a narrower basis than was originally proposed in the Decision Notice (i.e. on the basis of Mr Wagner's specific conduct in respect of his own mortgage applications). Occupants of CF10 roles will welcome in particular the FSA's eventual concessions in negotiations with Mr Wagner that findings of integrity breaches by him should be based on this specific conduct rather than on the basis of more passive failures to supervise his staff.

http://www.fsa.gov.uk/static/pubs/decisions/raymond_wagner.pdf

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

http://www.fsa.gov.uk/static/pubs/final/raymond-wagner.pdf

FSA imposes fine for governance failings

The FSA has (on 18 October) imposed a financial penalty of £600,000 on **Sun Life Assurance Company of Canada (UK) Limited** ("SLOC UK") for breaches of Principle 3 (management and control) of the Principles and rules set out in its Prudential Sourcebook for Insurers ("INSPRU") and the Supervision manual ("SUP").

The penalty related principally to shortcomings in the design and operation of SLOC UK's governance arrangements for its with-profits business between November 2008 and September 2009, leading to potential detriment for policyholders.

The penalty imposed was reduced from £750,000 as SLOC UK settled at stage 2 of the FSA's executive settlement procedures. The FSA acknowledged SLOC's full co-operation with its investigation and the steps it had taken to remedy shortcomings and implement recommendations arising from a skilled person's report.

The action follows a Dear CEO letter on governance of with profit funds, sent in September 2007 and a review of the with-profits sector in June 2010, which led to the referral of two firms to enforcement. Following its review, the FSA undertook further policy work to clarify the standards expected of with-profits providers, leading to the publication of a policy statement (PS 12/4) in March 2012.

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

http://www.fsa.gov.uk/static/pubs/ceo/with_profits.pdf

http://www.fsa.gov.uk/library/communication/pr/2010/110.shtml

http://www.fsa.gov.uk/library/policy/policy/2012/12-04.shtml

FSA fines former SIPP administrator director for capital requirements breaches

The FSA has (on 19 October) imposed a financial penalty of £17,850 on **Mr Graeham Sampson** for breaches of Principle 6 (controlled functions: due skill care and diligence in managing business of firm) of APER between September 2009 and May 2011 whilst fulfilling the CF1 (director) controlled function at Montpelier Pension Administration Services Limited ("MPAS"), an operator and administrator of Self Invested Personal Pension schemes ("SIPPs") which has since ceased to be authorised.

The FSA found that Mr Sampson failed to correctly calculate MPAS' regulatory capital position, leading to it operating with a regulatory capital deficit. Specifically, it found that he did not take reasonable care to understand the requirements of Chapter 5 of the FSA's Interim Prudential sourcebook for Investment Businesses ("IPRU(INV)"), adequately monitor MPAS' liquid capital resources on an ongoing basis or discount illiquid assets when reporting the firm's liquid capital position to the FSA.

The financial penalty imposed, which was calculated under the post March 2010 penalty regime set out at chapter 6.5B of its Decision Procedure and Penalties Manual ("DEPP") was reduced from £25,500 as Mr Sampson agreed to settle at stage 1 of the FSA's executive settlement procedures.

The action arose from the FSA's thematic review of SIPP operators and administrators undertaken between 2008 and 2010, which has led to a number of instances of enforcement action against individuals and firms.

The FSA confirmed in a statement released on 17 October that it expects to release the results of its thematic review and associated draft guidance before the end of October.

http://www.fsa.gov.uk/static/pubs/final/graeham-sampson.pdf

http://www.fsa.gov.uk/smallfirms/updates/sipps.shtml

Other Final Notices

- In a Final Notice dated 9 October but released last week, the FSA has set out its objections to the acquisition by **Ms Ewa Karczewska** of 70 per cent of the

issued share capital of **Think Finance.com**. The FSA exercised its power to object to the acquisition (under section 185(1)(b)(ii) of FSMA based on concerns as to Ms Karczewska's fitness and propriety, failures to notify it of acquisition of control of the business and failures to comply with FSA requirements in relation to the provision of information.

http://www.fsa.gov.uk/static/pubs/final/ewa-karczewska.pdf

- The FSA has (on 19 October) cancelled the Part IV permission of **Mortgage & Finance Professionals** for failing to submit its Retail Mediation Activities Return.

  http://www.fsa.gov.uk/static/pubs/final/mortgage-and-finance-professionals.pdf

Insider dealing trial commences

The trial of **Thomas Ammann** and **Christina Weckwerth** commenced last week at Southwark Crown Court. They were charged in August 2011 with insider dealing under section 52 of the Criminal Justice Act 1993 and money laundering under section 327 of the Proceeds of Crime Act 2002. The charges relate to trading by Mr Ammann, a former investment banker, and Ms Weckwerth, his former partner, in 2009.

Details of FCA and PRA approaches revealed

The new regulators which will assume the FSA's functions have announced how they propose to approach their respective areas of regulation.

The FCA's approach

In its document, *Journey to the FCA* (released on 16 October), the Financial Conduct Authority ("FCA") has confirmed the message conveyed by public statements made by numerous senior FSA figures over recent months that its priority is "resetting conduct standards" to make financial markets work well for consumers. It has given some further detail on how it proposes to use the new powers, including in the areas of product governance and intervention and financial promotions which it will receive (subject to parliamentary approval).

It has also outlined in more detail than has been released to date how it anticipates its new approach to supervision will operate. It has set out the broad parameters by which firms will be categorised (which will be based on size, exposure to retail customers and types of activity carried out), which will in turn inform decisions as to the level and type of supervision to which they are subjected. The new supervision framework, which replaces the current ARROW approach, is to be based on three main pillars: -

- The Firm Systematic Framework, which aims to prevent consumer detriment through structured conduct assessment of firms;
- Event-driven work, responding to problems as they emerge, including securing consumer redress or remedial work where required; and
- Product or issue specific campaigns responding quickly to areas where the FCA considers consumers may be at risk.

The document also outlines the FCA's approach to prudential supervision of smaller forms, and re-states its commitment to building on the tougher line which the FSA has taken on enforcement. It concludes by providing an overview of the initiatives which it proposes to put in place to build its understanding of consumers' experience of financial markets.

The release of its approach document was accompanied by a speech by Martin Wheatley, in which he set out his priorities for the FCA.

The PRA's approach

On 15 October, the Bank of England and the FSA jointly released two separate documents detailing how it is proposed the Prudential Regulation Authority ("PRA") will approach banking and insurance supervision.

Both documents are clear that it will not be the PRA's role to prevent firm failure, but rather to ensure that failures do not result in significant disruption to depositors or policyholders. They also make clear that the PRA will expect firms and their directors and senior managers not only to adhere to the letter of rules and principles, but to consider overriding principles of prudence, safety, soundness, stability and protection of depositors and policyholders.

The documents also reiterate that the PRA will exercise judgement based and forward looking supervision, and that it will seek to engage with the boards of firms and insurers and to intervene early and decisively where it perceives there to be current or future risks.

The release of the approach documents was accompanies by a speech by Andrew Bailey.

Interim measures: changes to authorisations

The FSA has also (on 15 October) released details of changes to procedures for authorisations as it prepares for the transfer of its

functions to the FCA and PRA. In an effort to mirror the process to be adopted after cutover, assessment of applications submitted by firms which will be dual regulated will be conducted by case officers from both the Conduct Business Unit and the Prudential Business Unit.

http://www.fsa.gov.uk/static/pubs/other/journey-to-the-fca-standard.pdf

http://www.fsa.gov.uk/static/pubs/other/pra-approach-banking.pdf

http://www.fsa.gov.uk/static/pubs/other/pra-approach-insurance.pdf

http://www.fsa.gov.uk/library/communication/speeches/2012/1016-mw.shtml

http://www.fsa.gov.uk/library/communication/speeches/2012/1017-mw.shtml

http://www.fsa.gov.uk/library/communication/speeches/2012/ab-1017

http://www.fsa.gov.uk/library/communication/statements/2012/authorisations

Further afield

SEC agrees $14 million settlement in insider trading case

The US Securities and Exchange Commission ("SEC") has (on 18 October) agreed a settlement with **Well Advantage** in respect of allegations of insider trading. The settlement which, if approved by the Court, will require the firm to pay over $14 million, follows action taken in July 2012 to freeze its assets based on information that an order to sell securities may have been based on inside information. As part of the settlement agreed with the SEC, the firm has neither admitted nor denied the allegations made against it, and the SEC's investigation continues.

The settlement in this case contracts with the SEC's inability to take such decisive action against, for example, David Einhorn or Greenlight Capital Inc, which were the subject of significant enforcement action brought by the FSA for market abuse in early 2012. The essential difference between the two cases appears to be the presence in this latest case of "scienter", an important concept in US securities law, which was absent in the Einhorn and Greenlight case (see Clifford Chance briefing for full discussion on this point).

http://www.sec.gov/litigation/complaints/2012/comp-pr2012-145.pdf

https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWIbFgNhLNomwBl%2B33QzdFhRQAhp8D%2BxrIGReI2crGqLnALtlyZezo6BbixT4uCb6QrVI7eZgPp%0D%0A5mt12P8Wnx03DzsaBGwsIB3EVF8XihbSpJa3xHNE7tFeHpEbaeIf&attachmentsize=72631

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