

# FSA Update

## Last week at the FSA:-

### Fines totalling £250,000 imposed for transaction reporting breaches

In separate actions concluded in Final Notices dated 17 October 2012 and 20 August 2012 respectively but released last week, the FSA has imposed financial penalties of £205,128 and £49,000 respectively on **Plus500UK Limited** ("Plus500") and **James Sharp and Company** ("James Sharp") for failures in their transaction reporting systems.

Both firms were found to have breached Principle 3 (management and control) of the FSA's Principles for Businesses ("the Principles") and chapter 17 of its Supervision manual ("SUP").

In the case of Plus500, the FSA found that, between June 2010 and November 2011, 189,000 transactions were not reported in accordance with SUP 17.1.4R, and that a further 1,143,000 transactions were not accurately reported in accordance with SUP 17.4.1EU/Annex 1 EU. In addition, it found that the firm breached Principle 3 as it did not have in place an adequate transaction reporting system or staff training to ensure accurate and complete transaction reporting.

In the case of James Sharp, the FSA found that, between November 2007 and June 2011, 71,000 transactions were not reported in accordance with SUP 17.1.4R and that the firm

breached Principle 3 by failing to have in place documented procedures and staff training to ensure complete and accurate transaction reporting.

Both fines were reduced by 30 per cent as both firms settled at stage 1 of the FSA's executive settlement procedures.

#### Comment

These fines are the eighth and ninth which the FSA has imposed for transaction reporting failings since August 2009, and underline the FSA's readiness to impose more severe penalties in cases where firms have not adhered to its published guidance.

Although the FSA gave credit for co-operation provided by both firms and steps taken by them to engage independent consultants to identify breaches and remedy issues, the fines imposed were increased to reflect the fact that, during the time when the breaches occurred, it had made statements and issued guidance on the importance of accurate and complete transaction reporting in, for example, successive issues of its Transaction Reporting User Pack, in its Market Watch publication (see, for example, issues 28 and 41) and in previous final notices issued to other firms.

Due to the times at which the breaches occurred, the level of the penalty imposed on Plus500 was determined by the FSA's post-March 2010 penalty regime (under Chapter 6.5A of the Decision Procedures and Penalties manual ("DEPP")), whilst the level of the penalty imposed on James Sharp was determined under the previous regime (under Chapter

6.5.2 of DEPP). The difference in the level of the fines imposed is more attributable to the relative sizes of the firms and the magnitude of breaches found by the FSA to have been committed than to differences in the systems used to calculate the level of penalties to be imposed. However, a comparison of the analysis in the final notices issued to James Sharp and Plus500 is illustrative of how, although the FSA is now required to take a more structured five step approach to penalty calculation, it still has significant discretion at each stage to adjust the level of fines to seek to deter the firm concerned and the industry more widely from future breaches.

<http://www.fsa.gov.uk/static/pubs/final/plus500uk.pdf>

<http://www.fsa.gov.uk/static/pubs/final/james-sharp.pdf>

## Key issues

- Fines totalling £250,000 imposed for transaction reporting breaches
- High Court refuses to delay land banking case
- FSA charges individual and raids premises in unauthorised investment advice investigations
- FSA releases final mortgage rules
- SIPP operators criticised by FSA
- House of Lords completes scrutiny of Financial Services Bill

<http://www.fsa.gov.uk/static/pubs/guidance/fg12-07.pdf>

[www.fsa.gov.uk/pubs/newsletters/mw\\_newsletter28.pdf](http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter28.pdf)

[http://www.fsa.gov.uk/pubs/newsletters/mw\\_newsletter41.pdf](http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter41.pdf)

<http://www.fsa.gov.uk/doing/regulated/returns/mtr/fines>

## Other Final Notices

- The FSA has (on 22 October) cancelled the registration of **Quick2PK International Limited** as a small payment institution under the Payment Services Regulations 2009 for failures to submit its Payment Services Directive Transactions return.  
<http://www.fsa.gov.uk/static/pubs/final/quick2pk.pdf>
- The FSA has (on 22 October) imposed a prohibition order on **Anthony Gott** following his conviction in September 2011 of three counts of obtaining a money transfer by deception.  
<http://www.fsa.gov.uk/static/pubs/final/anthony-gott.pdf>
- The FSA has (on 22 October) cancelled the Part IV permission of **Kenneth McKenzie trading as Mortgage & Finance Solutions** for breaches of Principle 11 of the principles through failures to provide adequate current contact details or to respond adequately to communications from the FSA.  
<http://www.fsa.gov.uk/static/pubs/final/kenneth-mckenzie.pdf>
- The FSA has (on 25 October) cancelled the Part IV permission of **MPC Mortgage Services Limited** for failure to pay regulatory fees and levies due.  
<http://www.fsa.gov.uk/static/pubs/final/mpc-mortgage-services.pdf>

## High Court refuses to delay land banking case

In a judgment handed down on 16 October but released last week, a Deputy High Court Judge has refused an application by **Asset L I Inc (trading as Land Investments Inc)** and three individuals associated with it for the trial to be delayed in order for the Court to determine an important preliminary issue on whether their activities amounted to a collective investment scheme (under section 235 of the Financial Services and Markets Act 2000 ("FSMA")) and therefore required authorisation under section 19 of FSMA.

The FSA, which maintains that the company's and the individuals' activities did amount to a collective investment scheme and that they were therefore in breach of the general prohibition on undertaking regulated activities without being authorised or exempt, commenced action against the company and the individuals (who have not been named) in July 2012 by obtaining orders freezing all their assets. Those orders remain in place.

The individuals associated with the company have raised as a preliminary issue relating to whether, in the schemes they operated, individual investors had day-to-day control over the property in which they, together with others, invested. This question is one of a number of issues which are determinative of whether a scheme falls within the meaning of a "collective investment scheme" under section 235(2) of FSMA.

For now, this and other issues relating to the complex and often unclear definition of "collective investment scheme" remains unresolved. The Deputy Judge, refusing the

application, ruled that the issue should be resolved at trial, which is due to conclude on 2 November.

<http://www.fsa.gov.uk/library/communication/pr/2012/073.shtml>

Case reference: [2012] EWHC 2775 (Ch)

## FSA charges individual and raids premises in unauthorised investment advice investigations

In separate cases, the FSA has charged two individuals and has arrested another in connection with the unauthorised provision of investment advice.

The FSA has (on 24 October) charged **Gary Hexley**, a former approved person, with one count of carrying on a regulated activity without being authorised or exempt contrary to sections 19 and 23 of FSMA and five counts of dishonestly concealing a material fact, contrary to section 397 of FSMA. Mr Hexley was made subject to a prohibition order in June 2011. The FSA has charged Mr Hexley's business partner, **John Cooper**, with three counts of dishonestly concealing a material fact contrary to section 397 of FSMA.

Also on 24 October, the FSA, with the assistance of Kent Police, executed a search warrant in Kent in connection with an investigation into provision of mortgage advice by a prohibited individual. One individual, a 64 year old man, was arrested. The FSA has not released any further details, save to confirm that its investigation is ongoing and that no individuals have yet been charged in connection with it.

<http://www.fsa.gov.uk/library/communication/pr/2012/097.shtml>

[www.fsa.gov.uk/pubs/final/gary\\_hexley.pdf](http://www.fsa.gov.uk/pubs/final/gary_hexley.pdf)

## FSA releases final mortgage rules

Further to the conclusion of its long-running Mortgage Market Review, and to the publication of its proposed rules in December 2011 (in consultation paper CP 11/31), the FSA has (on 25 October) published a policy statement (PS 12/16) setting out final rules.

Some changes proposed in the consultation paper are being taken forward substantively unchanged. Further details of the proposed changes were set out in FSA Update on 20 December 2011.

The changes will include removing the non-advised sales process, strengthening arrears charging rules and introducing a requirement for lenders to consider borrowers' net income and basic monthly expenditure, take account of the impact on mortgage payments of market expectations of future interest rate increases and to assess affordability of interest only mortgages on a capital and interest basis, taking into account factors other than anticipated house price rises. Martin Wheatley, in a statement accompanying the publication of the new rules stated that the aim of the rules was to "hard-wire" common sense principles into the system to ensure borrower protection.

In some other areas, the FSA has rethought its approach and made changes to the proposals set out in the consultation paper issued in December 2011. Specifically, it has clarified its understanding of the meaning of "regulated advice" and explained that it is changing its approach to contract variations by

allowing them to be completed without advice where there is no increase in the amount outstanding under the mortgage, and has changed its approach to high-net worth and business lending. In this latter area, it has confirmed that it will allow an opt out from the need for advice and will require less stringent affordability checks for customers in these categories.

In addition, the FSA has introduced transitional rules affecting borrowers who are sometimes referred to as "mortgage prisoners", which enable lenders to make exceptions to the responsible lending rules for customers who need to remortgage, providing there is no increase in the outstanding amount to be repaid.

These transitional rules take effect immediately. The remainder of the rule changes will take effect on 26 April 2014.

<http://www.fsa.gov.uk/static/pubs/policy/ps12-16.pdf>

[http://www.fsa.gov.uk/static/pubs/cp/cp11\\_31.pdf](http://www.fsa.gov.uk/static/pubs/cp/cp11_31.pdf)

<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWlbFgNhLNomwBl%2B33QzdFhRQAhp8D%2BxrlGRel2crGqLnALtlyZe2NqciikyCJoHpxvSAvxk%2BHp%0D%0A5mt12P8Wnx03DzsaBGwslB3E VF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=98172>

## SIPP operators criticised by FSA

The FSA has (on 23 October) published a guidance consultation paper (GC12/12) setting out the findings of its thematic review on Self-Invested Personal Pensions ("SIPP") operators. It follows a previous report on, and letter sent to, SIPP operators, published in 2009, which detailed the

FSA's concerns at levels of compliance with its rules and principles. The follow-up review was prompted by further concerns that SIPP operators had not adequately adapted their processes and procedures to address the points made in the 2009 report and reduce risks.

The FSA's most recent review sets out continuing shortcomings in levels of compliance with rules set out in SUP, the Conduct of Business Sourcebook ("COBS") and the Client Assets Sourcebook ("CASS") which, the FSA, concluded, lead to a risk of "significant consumer detriment through a failure [by SIPP operators] to adequately control their businesses" and, in some cases, to SIPP operators being used as a conduit for financial crime.

The report includes (at annexes 1 and 2 respectively) proposed high level guidance as to SIPP operators' responsibilities generally and more specifically in relation to client money and custody assets.

The report sets out the FSA's plans for a programme of co-ordinated work to build upon this proposed guidance and change rules where necessary, which will include consultation papers and a policy statement, which it aims to publish later this year. These documents will deal with areas including capital requirements, disclosure and inflation adjusted projections. The report also sets out a more general commitment to greater supervision and, in appropriate cases, including where firms fail to adequately change their systems and controls in response to the FSA's concerns, enforcement action.

The FSA has invited firms to comment on the proposed guidance by 20 November 2012.

[www.fsa.gov.uk/smallfirms/your\\_firm\\_type/financial/.../sipp\\_report.pdf](http://www.fsa.gov.uk/smallfirms/your_firm_type/financial/.../sipp_report.pdf)

[www.fsa.gov.uk/smallfirms/your\\_firm\\_type/financial/pdf/sipp\\_letter.pdf](http://www.fsa.gov.uk/smallfirms/your_firm_type/financial/pdf/sipp_letter.pdf)

<http://www.fsa.gov.uk/static/pubs/guidance/gc12-12.pdf>

<http://www.fsa.gov.uk/static/pubs/guidance/gc12-12-annex1.pdf>

<http://www.fsa.gov.uk/static/pubs/guidance/gc12-12-annex2.pdf>

## Further afield

### House of Lords completes scrutiny of Financial Services Bill

The Financial Services Bill has completed its passage through the House of Lords. After nine sessions of scrutiny at Committee stage, it has now progressed to report stage in the House of Commons. Latest indications from senior figures at the FSA are that the final transfer of the FSA's functions to the Financial Conduct Authority and Prudential Regulatory Authority is expected to take place in the second quarter of 2013.

<http://services.parliament.uk/bills/2012-13/financialservices.html>

## Authors



**Roger Best**  
Partner

T: +44 20 7006 1640  
E: roger.best  
@cliffordchance.com



**Matthew Newick**  
Partner

T: +44 20 7006 8942  
E: matthew.newick  
@cliffordchance.com



**Martin Saunders**  
Partner

T: +44 20 7006 8630  
E: martin.saunders  
@cliffordchance.com



**Carlos Conceicao**  
Partner

T: +44 20 7006 8281  
E: carlos.conceicao  
@cliffordchance.com



**Luke Tolaini**  
Partner

T: +44 20 7006 4666  
E: luke.tolaini  
@cliffordchance.com



**Chris Stott**  
Professional Support Lawyer

T: +44 20 7006 4231  
E: chris.stott  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ  
© Clifford Chance LLP 2012

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to [nomorecontact@cliffordchance.com](mailto:nomorecontact@cliffordchance.com) or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh\* ■ Rome ■ São Paulo ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

\*Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.