

FSA Update

At the FSA last week

Confiscation order in boiler room money laundering case

Michael McInerney has (on 4 December) been ordered to pay £320,882 under a confiscation order. In April 2012, Mr McInerney was convicted of money laundering offences and sentenced to 54 months' imprisonment in connection with his involvement in a boiler room share scale scheme. The Court ordered that the funds, which he must pay within six months or receive an additional 42 months' imprisonment, be used to compensate the victims of the boiler room scheme operated by Tomas, Kevin and Christopher Wilmot, who were sentenced to a total of 19 years' imprisonment in August 2011. Mr McInerney was found to have assisted the Wilmots by opening and operating bank accounts for the purposes of receiving the proceeds of the boiler room scheme they operated.

<http://www.fsa.gov.uk/library/communication/pr/2012/109.shtml>

Other enforcement notices

- On 4 December, the FSA issued a Final Notice to **Raymond Wagner** imposing a public censure and a prohibition order for breaches of principle 1 (integrity) of the Statements of Principle and Code of Practice for Approved Persons ("APER"). The notice confirms the terms on

which proceedings in the Upper Tribunal were settled by agreement between Mr Wagner and the FSA in October (see FSA Update – 23 October 2012).

<http://www.fsa.gov.uk/static/pubs/final/raymond-wagner.pdf>
<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWlbFgNhLNomwBI%2B33QzdFhRQAhp8D%2BxrlGRel2crGqLnALtlyZe2c6Jjh2hRNsZWo167krIQ3p%0D%0A5mt12P8Wnx03DzsaBGwsIB3EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=137242>

- On 6 December, the FSA published an undertaking agreed with **Royal London Mutual Insurance Society Limited** under the Unfair Terms in Consumer Contracts Regulations 1999 in connection with terms included in unit linked investment funds sold by its Scottish Life division.

<http://www.fsa.gov.uk/static/pubs/other/undertaking-royal-london.pdf>

FSA consults on product intervention powers

The FSA has (on 3 December) published a consultation paper (CP 12/35) setting out how it anticipates the Financial Conduct Authority ("FCA") will use its powers to intervene to ban or restrict the promotion of products. The FCA will receive these powers, subject to parliamentary approval of proposals in the Financial Services Bill, when it inherits the FSA's conduct regulation responsibilities (expected to be in April 2013).

Under these powers, the FCA would be able to intervene to make rules banning or restricting the promotion of a product for a maximum period of twelve months without consulting. It would not be able to renew the restriction or prohibition after the expiry of that twelve month period. The consultation paper does not identify any particular products as likely targets of the new powers (although it has set out its concerns in relation to particular types of products in previous documents such as its *Retail Conduct Risk Outlook*).

It makes clear that the powers are not expected to be used extensively and describes situations where the powers may be used as including where, in the FCA's view, complex or niche products are being sold to the mass market, where non-essential features of a product are causing serious problems for consumers, or where products are "inherently flawed". It sets out the FSA's expectation that the powers will be used where urgent action is required, for example in order to avoid the likelihood of a substantial redress bill.

Consultation on the proposals remains open until 4 February 2013.

<http://www.fsa.gov.uk/static/pubs/cp/cp12-35.pdf>

Key issues

- Confiscation order in boiler room money laundering case
- FSA consults on product intervention powers
- FSA consults on benchmark regulation and supervision

FSA consults on benchmark regulation and supervision

The FSA has (on 5 December) published a consultation paper (CP 12/36) setting out its proposed approach to the future regulation of benchmark submission and administration. The Paper follows the publication of the Wheatley Review on 28 September 2012, which recommended that the setting of LIBOR should remain an industry led activity, but the processes of submission to and administration of LIBOR should be regulated.

Subject to parliamentary approval of the Bill, HM Treasury expects, by Spring 2013, to exercise its powers to create two new regulated activities of "providing information in relation to a

regulated benchmark" and "administering a regulated benchmark". In the first instance, LIBOR will be the only "regulated benchmark" for these purposes, but the new regime is intended to be capable of being applied to other benchmarks in future if appropriate.

The FSA proposes the addition of an eighth chapter to the Code of Market Conduct ("MAR"); and a new Handbook Guide, to be called "General Guidance on Benchmark Submission and Administration" ("BENCH"). A summary of the key changes is set out below.

The consultation paper also includes a section discussing the FSA's proposed methodology for identifying additional contributors to LIBOR as recommended by the Wheatley Review.

The FSA has invited firms to respond to the proposed new rules and guidance by 16 January 2013, and to the points raised in relation to broader participation in LIBOR by 13 February 2013.

<http://www.fsa.gov.uk/static/pubs/cp/cp12-36.pdf>

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

http://www.hm-treasury.gov.uk/d/implementing_wheatley_review281112.pdf

Key changes

Administration of LIBOR

- The FSA proposes that requirements would be imposed on the administrator (whose function, the FSA acknowledges, may be carried on by more than one entity) to:
 - maintain effective systems enabling it to carry out the new regulated activity, including receiving benchmark submissions and determining the resultant benchmark;
 - arrange for the monitoring and validation of submissions;
 - publish quarterly statistics on activity in relevant underlying markets;
 - create, adapt and maintain a code of practice for submission to its benchmark providing detailed guidance on operational and procedural issues relating to submission to LIBOR (the FCA would recognise this as confirmed industry guidance);
 - have a process of identification of benchmark manipulation or breaches of its code of practice;
 - appoint an oversight committee composed of benchmark users, market infrastructure providers and submitters to consider matters of definition and scope of the benchmark, and to scrutinise individual submissions;
 - through its oversight committee, undertake regular, periodic reviews of the nature of the benchmark.
- A new significant influence function ("SIF"), CF50 (benchmark administration function), is proposed for the individual within the administrator firm who manages the team responsible for calculating and corroborating daily benchmark submissions.
- The FSA also anticipates that authorisation is also likely to be required for individuals fulfilling the CF1 (director), CF2 (chief executive) and CF3 (non-executive director) controlled functions within the administrator firm.

Submission to benchmarks

- In the proposed new chapter of MAR, the FSA intends to include provisions requiring submitting firms to:
 - have appropriate governance arrangements to oversee the submission process. The FSA states that it considers that these should include:
 - oversight by middle and senior management;
 - periodic reviews by Internal and External Audit (with the role of the latter to be focused on providing assurances as to compliance with the FCA's rules); and
 - appointment of a benchmark manager, to be an approved person, who should have responsibility for overseeing the submission process;
 - use effective methodologies based on objective criteria, and review these methodologies at least quarterly;
 - maintain and operate effective organisational and administrative arrangements aimed at identifying and managing conflicts of interest, including:
 - conflicts of interest policies in relation to benchmark submissions;
 - effective controls to manage conflicts between different parts of the business;
 - restraining the ability of any person, including senior management, to exercise inappropriate influence over the daily submission;
 - keep adequate records to justify how the level of submissions has been determined and to record details of firms' own sensitivities to the benchmark;
 - report any reasonable suspicions about the activities of other submitters;
 - have regard to the code of practice to be prepared by the benchmark administrator.
- A new SIF, CF40 (benchmark submission function), is proposed. The Paper proposes that, if a firm has an establishment in the UK, the individual performing this new controlled function will be required to apply regardless of where the submission activity takes place.
- The FSA states that it expects individuals performing the CF40 function to be based in the UK, but that it will take a pragmatic view to applications for CF40 approved person status where firms' submission activity takes place outside the UK.
- The FSA proposes that submitting firms are given six months from the introduction of the new LIBOR regime to ensure that individuals are approved for the new CF40 function, and states that, in order for this to be possible, firms will have to submit their applications for individual approval within two weeks of the introduction of the new LIBOR regime.

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