

FSA Update

This week at the FSA: -

FSA imposes fine for bench mark rate failings

On 19 December, the FSA announced that it has imposed a financial penalty of £160 million on **UBS AG** ("UBS") for breaches of Principles 3 (skill, care and diligence) and 5 (market conduct) of its Principles for Businesses ("the Principles"). Settlements in associated investigations have also been reached with the US Commodity Futures Trading Commission, US Department of Justice and the Swiss Financial Market Supervisory Authority, FINMA.

The action relates to submissions made by UBS to the London Interbank Offered rate ("LIBOR") and the Euro Interbank Offered Rate ("EURIBOR"). The facts underlying the action have been extensively reported in the press.

The amount of the penalty was reduced by twenty per cent as UBS settled at stage two of the FSA's executive settlement procedures.

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

FSA takes action for pressure-selling tactics

The FSA has (on 20 December) released details of action it has taken against **Gracechurch Investments Limited (in liquidation)** ("Gracechurch") and its former compliance officer and action which it

has decided to take against the firm's former Chief Executive.

It has publicly censured Gracechurch for breaches of Principles 1 (integrity), 3 (skill, care and diligence), 7 (communications with clients) and 9 (suitability) of the Principles and rules set out in the Senior Management, Systems and Controls ("SYSC"). It has withdrawn the approval of **Carl Davey** to perform the CF10 (compliance oversight), CF11 (money laundering reporting), CF28 (systems and controls) and CF30 (customer controlled functions) and has made a prohibition order against him.

The action against him was based on breaches of Principles 1 (integrity) and 7 (significant influence function: compliance by firm with regulatory requirements) of the Statements of Principle and Code of Practice for Approved Persons ("APER"). The FSA has indicated in the Final Notices issued to Gracechurch and Mr Davey that it would have imposed financial penalties of £1.5 million and £175,000 respectively on them were it not for their financial circumstances.

It has also decided to impose a financial penalty of £450,000 and a prohibition order on **Sam Kenny**, Gracechurch's former CEO, for breaches of Principles 1 and 7 of APER.

It found that, between April 2008 and November 2009, Gracechurch's brokers used pressure sales tactics to coerce clients into investing in high risk small company stocks. Other findings against the firm included withholding of information from and provision of false information to the FSA.

The FSA found that Mr Davey, who was approved as responsible for compliance oversight at Gracechurch between October 2008 and 2009, was involved with these breaches by the firm.

The Decision Notice issued to Mr Kenny alleges involvement by him in the firm's breaches. Mr Kenny has referred the matter to the Upper Tribunal.

<http://www.fsa.gov.uk/static/pubs/final/gracechurch-investments.pdf>

<http://www.fsa.gov.uk/static/pubs/final/carl-davey.pdf>

<http://www.fsa.gov.uk/static/pubs/decisions/sam-kenny.pdf>

Tribunal upholds FSA action on individual responsibility for firm's compliance

The Upper Tribunal has directed that **Michael Thommes** should be banned from performing any significant influence function in relation to any regulated activity. In its judgment of 12 December (released on 19 December), the Tribunal upheld a Decision Notice issued in July 2011, in which the FSA set out its view that Mr Thommes should be banned from occupying any significant influence function.

The FSA based its action on arguments that, between October 2004 and December 2008, whilst occupying the CF1 (director) and CF8 (apportionment and oversight) controlled functions, he failed to meet minimum regulatory standards of competence and capability as set out

in its Fit and Proper Test for Approved Persons ("FIT").

Specifically, the Tribunal agreed with the FSA that Mr Thommes failed to establish and maintain adequate systems and controls in relation to the submission of mortgage applications to prevent financial crime and did not adequately supervise and monitor staff. It also found that he failed to ensure that adequate compliance procedures were in place or that customers were treated fairly in relation to up-front non-refundable fees and that he failed to understand his responsibilities as the occupant of a controlled function.

The Tribunal's decision follows similar action taken against Mr Thommes' co-director, Martin Lafrance earlier this year, which was based on similar failings and which resulted in him being made the subject of a partial prohibition order.

<http://www.tribunals.gov.uk/financeandtax/Documents/decisions/Michael-Thommes-v-FSA.pdf>

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

<http://www.fsa.gov.uk/static/pubs/final/martin-lafrance.pdf>

FSA publishes Arch decision notices

The FSA has (on 18 December) published details of action which it proposes to take against **Arch Financial Products LLP** ("Arch"), its Chief Executive **Robin Farrell** and its senior partner and former compliance officer **Robert Addison**.

Arch, and Messrs Farrell and Addison applied to the Upper Tribunal to seek to prevent publication of the Decision Notices issued to them on 14 September, arguing that publication

may have an adverse and unfair impact on ongoing civil proceedings. However, in a judgment handed down on 30 November (released on 19 December), the Tribunal rejected their applications.

The Decision Notice issued to Arch sets out the FSA's view that Arch breached Principles 1 (integrity), 2 (management and control), 3 (skill, care and diligence) and 8 (conflicts of interest) of the Principles and rules set out in SYSC and the Conduct of Business ("COB") section of the Handbook. It proposes the publication of a statement that the firm has contravened regulatory requirements. It indicates that, but for Arch's current financial position, the FSA would have decided to impose a financial penalty of £9 million.

The Decision Notice issued to Mr Farrell sets out the FSA's view that he breached Principles 1 (integrity), 6 (significant influence function: skill, care and diligence) and 7 (significant influence function: compliance by firm with regulatory requirements) of APER. It proposes the withdrawal of Mr Farrell's approval to perform the CF4 (partner) and CF30 (customer) functions and the imposition of a financial penalty of £650,000 and a prohibition order.

The Decision Notice issued to Mr Addison alleges breaches of Principles 1 and 7 of APER by him, and proposes the withdrawal of his approval to perform the CF4 (partner) and CF30 (customer) functions and the imposition of a financial penalty of £200,000 and a prohibition order.

The action is based on Arch's role as the investment manager of the CF Arch cru funds ("the Funds") between March 2006 and July 2009. These funds were suspended in 2009 amid liquidity concerns (see FSA Update –

3 December 2012). The FSA maintains that Arch did not demonstrate fair management of conflicts of interest when investing the majority of the investors' funds in Guernsey cell companies, listed on the Channel Islands Stock Exchange, which it set up and for which it was also the investment manager. It argues that this arrangement gave rise to a risk that material non public information relating to the Guernsey cell companies was available to those making decisions on behalf of the Funds, and resulted in significant liquidity risks for the Funds.

It argues that Mr Farrell and Mr Addison were reckless in their management of conflicts of interest, and did not mitigate risks in relation to material non public information. It also argues that Mr Addison, who occupied the CF10 (compliance oversight) significant influence function at the relevant time, and did not adopt a sufficiently structured approach to compliance monitoring.

All three Decision Notices have been referred to the Upper Tribunal.

<http://www.fsa.gov.uk/static/pubs/decisions/arch-financial-products.pdf>

<http://www.fsa.gov.uk/static/pubs/decisions/robert-addison.pdf>

<http://www.fsa.gov.uk/static/pubs/decisions/robin-farrell.pdf>

<http://www.tribunals.gov.uk/financeandtax/Documents/decisions/Arch-Financial-Products-LLP-Others-v-FSA.pdf>

<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWlbfGhNhLNomwBl%2B33QzdFhRQAhp8D%2BxrIGRel2crGqLnALtlyZezlrE8eBWCik1HH1GV%2F6z4Xp%0D%0A5mt12P8Wnx03DzsaBGwsIB3>

[EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=123904](#)

FSA outlines Arch redress scheme

In a separate development, the FSA has announced the terms of the redress scheme to be put in place under section 404 of the Financial Services and Markets Act 2000 ("FSMA") for investors in the Funds. This follows consultation in May 2012 (see FSA Update – 8 May 2012) and is the first occasion on which the FSA has used its statutory powers under section 404. These powers enable it to make rules to require firms to set up and operate redress schemes where widespread mis-selling has been identified.

The policy statement (PS 12/24), released on 18 December, sets out the requirements on advisers and the timescales within which they must take action to contact investors. Advisers must contact their clients within one month from 1 April 2013 using letters containing wording mandated by the FSA. Investors will then have until 22 July 2013 to opt in to the redress scheme using a short prescribed form, after which advisers must decide their case and let them know the outcome by 9 December 2013. The amount of redress payable is to be decided by reference to what would have been a suitable investment for the particular investor and the current value of the Funds. Deductions from redress payable will be made to reflect payments made under the separate payment scheme set up by the authorised corporate director and depositaries of the Funds.

In response to concerns raised during the consultation process, the FSA has modified the operation of the scheme, including by requiring consumers to

opt in, rather than requiring advisers to conduct a proactive review of all sales. However, it resisted calls from many respondents for an alternative solution to the inaugural use of its statutory redress powers, stating that it had not seen any evidence or arguments suggesting that it could not use these powers or that a different approach would better serve the interests of affected investors.

<http://www.fsa.gov.uk/library/policy/policy/2012/12-24.shtml>

<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWlbFgNhLNomwBl%2B33QzdFhRQAhp8D%2BxrIGRel2crGqLnALtlyZe%2FxbFDMK7o1LDb24p%2Bkv1xrp%0D%0A5mt12P8Wnx03DzsaBGwslB3EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=116757>

Financial Services Bill receives royal assent

The Financial Services Bill has (on 19 December) received royal assent. It will therefore now be known as the Financial Services Act 2012. Its provisions will enter into force in April 2013, when they will facilitate the transfer of the FSA's powers and responsibilities, and will provide some new powers and responsibilities, to the Financial Conduct Authority ("FCA") and Prudential Regulatory Authority ("PRA").

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

FSA consults on markets powers and decision making policies and procedures

The FSA has published the latest of a series of consultation papers setting out changes intended to pave the way

for the new rulebooks and policies of the FCA and PRA and to reflect the new powers which both regulators will receive under the Act.

Its consultation paper (CP 12/37), released on 18 December, outlines proposed amendments to rules governing its markets powers and decision making policies and procedures.

The FSA has invited comments on the proposals by 1 February 2013.

Markets powers

When it inherits responsibility for regulating market conduct in April 2013, the FCA will have a greater range of powers than the FSA currently has in several areas. Specifically, it will have new powers to supervise and discipline sponsors. The consultation paper sets out amendments to the Listing Rules relating to approval and restrictions, suspensions and limitations which may be placed on sponsors following approval and the imposition of disciplinary sanctions on sponsors.

The FCA will also receive powers to approve, supervise and discipline "primary information providers" (currently known as "Regulatory Information Services"). The consultation paper sets out amendments proposed to be made to the Disclosure and Transparency Rules in relation to these new powers.

The paper also sets out new guidance proposed to be inserted into the Listing Rules to amend the procedure for the issue of notices regarding cancellations or suspensions of an issuer's securities at the issuer's request. Other revisions include changes to the Recognised Clearing Houses ("REC") section of the Handbook required to accommodate its new powers to approve, supervise

and sanction recognised investment exchanges and recognised auction platforms.

Decision making policies and procedures

The paper sets out some important proposed amendments to the Decision Procedures and Penalties manual ("DEPP") in relation to the exercise by the FCA of its disciplinary powers from April 2013. A summary of the key proposed changes is set out below:

- Regulatory Decisions Committee ("RDC") to retain responsibility for decisions relating to the issue of warning notices and decision notices in respect of all the FCA's disciplinary powers;
- RDC will decide on behalf of the FCA whether to exercise the FCA's power to publish information about the matter to which warning notices relate;
- Chapter 3 of DEPP to be amended to set out a process for deciding whether to exercise the power to publish information about the matter to which warning notices relate – to include a reasonable period of time (normally seven days) to allow recipients of warning notices to respond to proposed publication;
- FCA staff to be able to decide under executive decision making procedures whether to: -
 - exercise the FCA's "own initiative" power to vary a firm's permission. This differs from the current position under the current legislation and rules, where the RDC makes such decisions;

- exercise the FCA's new financial promotions directions powers;
- refuse consent to the PRA in respect of applications relating to the authorisation of dual-regulated firms where the FCA's consent
- Existing penalties and suspensions policies in DEPP (Chapters 6 and 6A respectively) to apply to the FCA's new disciplinary powers in respect of sponsors and primary information providers.

<http://www.fsa.gov.uk/static/pubs/cp/cp12-37.pdf>

PRA decision-making processes unveiled

The FSA has also set out the policies and procedures which it is proposed the PRA will adopt when using its disciplinary and enforcement powers.

The FSA has previously indicated that it will not adopt DEPP, including the current RDC structure and processes. The consultation paper (CP 12/39), released on 20 December, sets out the replacement for the guidance currently set out in DEPP which the FSA is required, and the PRA will be required to maintain under FSMA.

The FSA has invited firms to respond to the consultation paper by 28 February 2013.

Replacement for the RDC in PRA cases

The alternative to the use of the RDC in the PRA decision making process proposed in the paper reflects the PRA's intention to employ a judgement-led approach. It has previously indicated its plans to divide the deposit-takers, investment firms and insurers it will supervise into five categories according to their impact

on the PRA's objectives (see previous consultation papers on its approach to banking and insurance supervision and FSA Update – 23 October 2012). The paper builds on these previous plans by proposing that decisions be categorised according to the potential impact on firms' ability to carry out their business effectively. It proposes that a range of different committees be established. The question of which committee will take which decisions will be dictated by the categorisation of the firm and the likely severity of the effect of the particular decision.

Decisions with the greatest potential impact on a "category 1" (i.e. the largest and most complex) firm's business would be considered by the "Regulatory Sub-Committee", a sub-committee of the PRA's Board comprising the Governor of the Bank of England, the PRA's Chief Executive, the Deputy Governor for Financial Stability and all other members of the PRA's Board except the Chief Executive of the FCA. For smaller and/or less complex firms, the same decision would be considered by either the "Supervision and Risk Committee" (composed of the PRA Chief Executive and Deputy Heads and Directors of the PRA) or the "Supervision Assessment Panel" (composed of Deputy Heads and Directors of the PRA and Heads of Departments. A similar multi-layered approach is proposed for decisions to be taken by the PRA which, the FSA considers, would have a moderate or low impact on firms' ability to carry out business effectively, with some decisions in respect of smaller firms being taken by a Panel of Heads of Departments and managers from across the PRA.

The paper sets out arrangements for urgent notices and confirms that the

subjects of regulatory action will be given the opportunity to make representations to the relevant committee and will have the right to refer statutory notice decisions to the Upper Tribunal.

Imposition of financial penalties, suspensions and restrictions

The paper sets out the PRA's proposed approach to deciding whether to take action for a penalty and to determining the appropriate level of penalty, which broadly reflect the arrangements currently set out in Chapter 6 of DEPP. It also sets out its proposed approach to the imposition of suspensions and restrictions, which similarly broadly reflects the arrangements currently set out in Chapter 6A of DEPP.

Settlement

The paper seeks views as to whether the PRA should implement a policy on settlement. It recognises the potential benefits, but also sets out some concerns at the potential for an option to settle cases to cause delay and/or for firms to seek to settle cases to reduce the sanctions which may be imposed or without fully exploring the merits of the case against them. It confirms that the PRA will have discretion to settle cases and sets out a draft scheme with a sliding scale of discounts for settlement similar to that currently operated by the FSA.

Publication of statutory notice decisions

The paper includes a proposal that decisions as to whether a Warning Notice should be published by the PRA using the powers it will receive under the Act should be taken by the same committee as issued the notice. It also sets out detailed proposed policy as to publicity in relation to

PRA investigations and enforcement action.

Interviews at the request of overseas regulators

Finally, the paper includes details of arrangements for interviews where the PRA co-operates with overseas regulators. This broadly reflects the arrangements currently in place where the FSA assists overseas regulators.

<http://www.fsa.gov.uk/library/policy/cp/2012/12-39.shtml>

<http://www.bankofengland.co.uk/publications/Documents/other/pr/bankingappr1210.pdf>

<http://www.bankofengland.co.uk/publications/Documents/other/pr/insuranceappr1210.pdf>

<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWlbfGnhLNomwBl%2B33QzdFhRQAhp8D%2BxrlGRel2crGqLnALtlyZe2c6Jjh2hRNszWol67krlQ3p%0D%0A5mt12P8Wnx03DzsaBGwsIB3EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=137242>

FSA updates firms on transition to PRA

The CEO Designate of the PRA, Andrew Bailey has (on 17 December) written to firms to update them on the progress being made towards "legal cutover", when the PRA will inherit responsibility for prudential regulation from the FSA.

The letter draws firms' attention to the series of consultation papers which have been released over recent months dealing with supervision, authorisation and, most recently, decision-making processes (see above) and indicated that further consultations on remaining issues including the PRA's power of direction

over parent undertakings will be released before 1 April 2013.

The letter annexes a list of frequently asked questions on issues including authorisations, supervision, Handbook material, co-ordination between the PRA and FCA.

<http://www.fsa.gov.uk/static/pubs/other/letter-pra-transition.pdf>

FSA consults on mutuality and with-profits funds

The FSA has (on 19 December) published a consultation paper (CP 12/38) setting out proposals addressing changes in the with-profits sector in the UK life insurance industry, specifically the falling proportion of firms involved in the sector which are mutuals.

The paper proposes changes to Chapter 20 of the Conduct of Business Sourcebook aimed at allowing mutual insurers to expand beyond with-profits business into writing new non-profits business, whilst protecting the interests of all policyholders.

Firms have been invited to respond to the FSA's proposals by 19 March 2013.

<http://www.fsa.gov.uk/static/pubs/cp/cp12-38.pdf>

FSA announces add-on general insurance study

The FSA has (on 20 December) announced that it is conducting a study into general insurance products sold as add-ons. It anticipates that the study, which looks at an concerns identified in its Retail Conduct Risk Outlook earlier this year, will be completed by the third quarter of 2013, and that a report will follow shortly thereafter.

<http://www.fsa.gov.uk/library/communication/statements/2012/gi-study>

We wish all our readers a
Happy Christmas and a
prosperous new year. FSA
Update will return on 7
January 2013.

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