

FSA Update

Last week at the FSA:-

FSA imposes fine for listing rules systems and controls failings

The FSA has (in a Final Notice dated 15 March but released on 18 March), imposed a financial penalty of £2,428,300 on **Lamprell PLC** ("Lamprell") for failings in its systems and controls which resulted in breaches the Listing Principles, the Disclosure and Transparency Rules and the Model Code on directors' dealings in securities.

Specifically, the FSA found that, by failing to adequately monitor its financial performance against its budget and against market expectations, Lamprell breached its obligations to keep the market fully informed of its deteriorating financial position.

Comment

The penalty is the first imposed for breaches of this kind under the FSA's amended penalty policy under chapter 6.5A of its Decision Procedures and Penalties Manual ("DEPP"). Although other enforcement cases involving similar breaches have been concluded since these rules entered into force (see, for example, the action against Photo-Me International PLC in June 2010 ("Photo-Me") and JJB Sports PLC in January 2011), the penalties in those cases have been calculated under previously applicable rules (also set out in Chapter 6 of DEPP) as the conduct giving rise to enforcement

action occurred principally or entirely prior to March 2010.

The amount of the penalty imposed on Lamprell is much higher than in these previous cases (the previous highest being the penalty of £500,000 imposed on Photo-Me). Superficially, this may appear to be attributable to the application of the "new" penalty regime, whose provisions have increased average penalties imposed in other types of cases in which they have been used since their introduction in March 2010.

However, in fact, the difference is the result of the use of a methodology not expressly included in these rules, namely the assessment of the seriousness of breaches by reference to the market capitalisation of the issuer concerned. In this case, the FSA used a figure of 0.375 per cent of Lamprell's market capitalisation at the relevant time as the foundation for calculations as to the level of the penalty. Its Final Notice sets out a hitherto unused scale of penalties to be used to reflect the seriousness of breaches in cases of this type. This scale provides for penalties in respect of the least serious breaches, those at "Level 1", to be based on a starting figure of zero per cent of the issuer's market capitalisation, ranging to a starting point of 0.5 per cent of market capitalisation for the most serious ("Level 5") cases. The FSA placed the conduct in this case at "Level 4" of this scale.

Usually, penalties imposed on firms are calculated using "relevant revenue" as a starting point. However, the statement at DEPP 6.5A.2G(1) that "there may be cases where

revenue is not an appropriate indicator of the harm or potential harm that a firm's breach may cause, and in those cases the FSA will use an appropriate alternative" does allow it some latitude.

This case is the first opportunity which has presented itself for the FSA to use this latitude. However, the penalty imposed in this case appears to have followed a pragmatic decision by Lamprell to seek to conclude the FSA's investigation and resultant enforcement action quickly (the Final Notice was issued less than a year after the trading statement which, in

Key issues

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- FSA publishes policy on bench mark rate submission
- FSA consults further on implementation of Alternative Investment Fund Managers Directive
- FSA issues guidance on relationship between firms' supervisors and auditors

large part, precipitated the action).

Issuers reviewing this case are likely to point to the fact that, although the idea of market capitalisation as an alternative to revenue in cases involving breaches of the Listing Rules was referred to in passing in early consultation documents relating to the changes to the penalty regime (see, for example, Consultation Paper CP 09/19 at paragraph 3.20), firms have never had an opportunity to raise concerns about the use of the sliding scale which now appears to be proposed. They are likely to argue that, had the use of such a sliding scale or similar methodologies been proposed at the consultation stage, it would have encountered significant opposition based on, for example, the potential for larger issuers to be disproportionately penalised.

As such, this case should not necessarily be regarded as an indicator of how similar cases may be decided in future. Issuers' approaches to enforcement action will differ depending on the circumstances of each case. However, taking a less pragmatic and conciliatory stance in similar cases in future are likely to resist any proposed repetition of the calculation of penalties by expressing the seriousness of breaches as a percentage of market capitalisation.

For further details of this case and additional commentary, see our [Clifford Chance briefing](#).

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

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

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

http://www.fsa.gov.uk/pubs/cp/cp09_19.pdf

Stockbroker enters special administration regime

The FSA has (on 20 March) announced that Fyshe Horton Finney Stockbrokers has entered special administration. It becomes the fourth firm to do so since the special administration regime ("SAR") was introduced in February 2011. The SAR is aimed at ensuring that client assets are returned in a timely manner and that administrators of financial services firms engage constructively with relevant market infrastructure bodies and authorities.

<http://www.fsa.gov.uk/library/communication/pr/2013/026.shtml>

FCA business plan and risk outlook published

The FSA has (on 25 March) published the business plan and risk outlook for the FCA for 2013/14.

In addition to setting out FSA's assessment of the economic backdrop, the risk outlook outlines how the FCA will monitor market conditions and identify future risks. It identifies the main risks for the coming year as:

- firms not designing products and services that respond to real consumer needs or are in consumers' long-term interests;
- distribution channels not promoting transparency for consumers on financial products and services;
- over-reliance on, and inadequate oversight of, payment and product technologies;
- shift towards more innovative, complex or risky funding strategies or structures that lack oversight, posing risks to market

integrity and consumer protection; and

- poor understanding of risk and return, combined with the search for yield or income, leading consumers to take on more risk than is appropriate.

The FCA's business plan sets out in detail how these risks will be managed in its first year and of operation how the FCA will use its resources to meet its objectives.

<http://www.fsa.gov.uk/static/pubs/plan/bp2013-14.pdf>

<http://www.fsa.gov.uk/static/pubs/other/fcarco.pdf>

FCA's approach to publication of warning notice details becomes clearer

The FSA has (on 18 March) issued a consultation paper (CP13/8) setting out how it is proposed that the Financial Conduct Authority ("FCA") will exercise its power to publish details of warning notices (under section 391 of the Financial Services and Markets Act 2000, as amended by the Financial Services Act 2012).

The paper confirms that the FCA's proposed policy will be to publish a statement in each case where a warning notice to which this power applies (which, in practice, will be the majority of instances).

Under section 391 of FSMA as amended, the FCA will not have the power to publish warning notices in their entirety; it will only be able to publish information relating to the Warning Notice.

This will, in practice, mean that statements published will normally contain enough information to identify the firm or individual concerned and

sufficient information to enable consumers, other firms and market users to understand the FCA's concerns. This will include which rules and/or principles are alleged to have been breached, brief details of how the breaches are alleged to have occurred and (where applicable) the names of financial products concerned.

It is not proposed that the statement will normally contain details of the level of the sanction proposed (although the consultation paper appears to allow scope for the FCA to specify the type of sanction to be imposed in some cases).

The paper sets out that the FCA will not normally decide against publication of details of a warning notice solely on the basis that it would have a negative impact on a firm's or an individual's reputation. Firms and individuals will have to prove disproportionate levels of damage would be caused by the publication of such details.

The FSA makes clear in the paper that the main factors which would lead the FCA not to publish a Warning Notice are: -

- Material effect on physical or mental health of recipient of Warning Notice or a direct family member;
- Disproportionate effect on livelihood or loss of income (examples given in the Consultation paper suggest that the FSA considers that "likely insolvency" would cross this threshold but that loss of employment and/or damage to career prospects would not be enough to avoid publication);

- Prejudice to criminal proceedings to which the recipient of the Warning Notice is a party; or
- "some other equal degree of harm" (no further detail is given as to the meaning of this).

The consultation paper makes clear that if action is discontinued after the issuance and publication of a statement in relation to a Warning Notice, the FCA will publish a notice of discontinuation (if the subject of that notice consents).

Decisions as to whether publication would be unfair are to be taken by the Regulatory Decisions Committee ("RDC"). The procedure which it will adopt when doing so is set out in new text in Chapter 3 of DEPP (specifically at DEPP 3.2.14AG to 3.2.14HG). Recipients of Warning Notices will have a "reasonable period of time", normally seven days, within which to respond to the proposal that a statement relating to the Warning Notice is published. The FCA will not normally agree to meet the recipient of the Warning Notice to hear responses to the proposal that a statement is made in relation to a Warning Notice. The FSA consulted on these proposed procedures in December 2012 (in consultation paper CP 12/37 - see in particular paragraphs 6.40 to 6.49 and proposed new text of DEPP 3 at Appendix 5).

The FSA has indicated that the FCA will not use the power until the period for responses to its latest consultation paper (CP 13/8) has ended (18 June 2013) and until a statement of policy has been finalised and included in the Enforcement Guide thereafter.

Comment

The power for the FCA (and the PRA) to publish details of Warning Notices

builds upon the power to publish Decision Notices which have been referred to the Upper Tribunal, which the FSA has used since 2011. In cases to date where subjects of enforcement action have challenged the FSA's powers to publish Decision Notices, it has set a high threshold for subjects of regulatory action to satisfy where they have sought to prevent publication. For example, in December 2012, the Upper Tribunal rejected challenges pursued by Arch Financial Products LLP and Messrs Robin Farrell and Robert Addison to the publication of Decision Notices alleging breaches by them (see FSA Update - 21 December 2012). It appears likely that it will take a similarly uncompromising approach in cases involving the publication of details of Warning Notices.

The use of the new power will form an important part of the FCA's commitment to transparency (see FSA Update, 11 March 2013), and this consultation paper confirms previous public statements that publication of details will be the default position, and that the FCA will not step back from the FSA's proactive policy of publication of Decision Notices. However, significant concerns about the new power and the potential for unfairness to arise to those involved in and affected by enforcement action from the early publication of details of unproven allegations remain.

The first few cases in which the FCA uses these (and other) new powers are likely to lead to challenges by the subjects of enforcement action. These initial cases, and the approach taken to the by the FCA, the Upper Tribunal and/or the Courts will be crucial to ensuring that the process by which enforcement action is taken against

firms and individuals is, and is seen to be, fair.

<http://www.fsa.gov.uk/static/pubs/cp/cp13-08.pdf>

<http://www.fsa.gov.uk/library/policy/cp/2012/12-37.shtml>

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

<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWlBfGqNhLNomwBI%2B33QzdFhRQAhp8D%2BxrlGRel2crGqLnALtlyZe4LZU5rrHqc8Db24p%2Bkv1xrp%0D%0A5mt12P8Wnx03DzsaBGwsIB3EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=155648>

FSA confirms FCA's approach to the use of temporary product intervention powers

Further to consultation in December 2012 (in consultation paper CP12/35), the FSA has (on 25 March) published a policy statement (PS13/03) confirming how it is proposed the FCA will use its powers (under section 138M of the Financial Services and Markets Act 2000 as amended by the Financial Services Act) to make rules restricting the promotion of particular products or product features. Specifically, this power will, from 1 April, enable the FCA to make rules restricting the promotion of particular products or product features for a period of twelve months or less without the need to go through a consultation process.

Although some minor revisions have been made to reflect feedback during the consultation exercise, the statement of policy setting out the circumstances in which these powers

will be used. The statement confirms that the principal instances in which the FCA will consider using its new powers will include where it considers that:

- a product is in serious danger of being sold to the wrong customers, for instance where complex or niche products are sold to the mass market;
- a non-essential feature of a product seems to be causing serious problems for consumers; and
- a product is inherently flawed.

For further details of the circumstances in which the FCA may use its product intervention powers, see FSA Update - 10 December 2012.

<http://www.fsa.gov.uk/static/pubs/policy/ps13-03.pdf>

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

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FSA publishes policy on bench mark rate submission

The FSA has (in policy statement PS13/06, published on 25 March) confirmed how the FCA will approach the regulation and supervision of bench mark rate submissions.

The policy statement gives effect, largely unchanged, to the proposals set out in its consultation paper (CP12/36) published in December 2012 in relation to the obligations on firms submitting rates and on the

administrators of bench mark rates. For full details, see FSA Update, 10 December 2012

<http://www.fsa.gov.uk/static/pubs/policy/ps13-06.pdf>

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

<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWlBfGqNhLNomwBI%2B33QzdFhRQAhp8D%2BxrlGRel2crGqLnALtlyZe1VGEhb6K2frATHh9IO3Pijp%0D%0A5mt12P8Wnx03DzsaBGwsIB3EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=122356>

Other policy statements

■ Personal pension illustrations and product information -

Further to previous consultation (in consultation paper CP 12/29 in November 2012 – see FSA Update, 5 November 2012), the FSA has (on 21 March), published details of feedback and final rules in relation to inflation-adjusted illustrations for personal pensions and guidance in relation to product information. The policy statement incorporates minor changes made to the rules and guidance, which will appear in COBS and which will take effect from 6 April.

<http://www.fsa.gov.uk/static/pubs/policy/ps13-02.pdf>

<http://www.fsa.gov.uk/static/pubs/cp/cp12-29.pdf>

<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWlBfGqNhLNomwBI%2B33QzdFhRQAhp8D%2BxrlGRel2crGqLnALtlyZe0FtkwiDCVVZFGIGwcv3Hbp%0D%0A5mt12P8Wnx03DzsaBGwsIB3EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=135231>

- **Complaints against FCA , PRA and Bank of England** - Further to its consultation paper published in November 2012 (CP12/30), the FSA has (on 25 March) issued a policy statement (PS13/07) confirming details of the scheme governing complaints against the FCA, PRA and the Bank of England after the transition to the new regulatory structure is completed on 1 April.

<http://www.fsa.gov.uk/static/pubs/policy/ps13-07.pdf>
<http://www.fsa.gov.uk/static/pubs/cp/cp12-30.pdf>
- **Financial Services Compensation Scheme funding** – Further to consultation papers in July 2012 (CP12/16) and January 2013 (CP13/1), the FSA has (on 25 March) issued a policy statement (PS13/04) setting out the model to be adopted for deciding how the Financial Services Compensation Scheme will be funded after 1 April.

<http://www.fsa.gov.uk/static/pubs/policy/ps13-04.pdf>
<http://www.fsa.gov.uk/library/policy/cp/2012/12-16.shtml>

<http://www.fsa.gov.uk/library/policy/cp/2013/13-01.shtml>

FSA consults further on implementation of Alternative Investment Fund Managers Directive

Further to its previous consultation paper in November 2012 (CP12/32), the FSA has (on 19 March) issued a further paper (CP13/9) setting out its proposed approach to the implementation of the Alternative Investment Fund Managers Directive ("AIFMD").

The paper, although not as comprehensive as originally intended due to delays caused by the EU transposition process and the transfer of responsibilities from the FSA to the FCA and the Prudential Regulation Authority in the UK, still proposes specific changes to the Conduct of Business Sourcebook ("COBS") and other rules across a relatively wide range of areas.

Specifically, the paper, in addition to providing an update on the progress of the European legislative process to implement AIFMD, contains proposals in relation to prudential rules, redress arrangements, application of rules

relating to the protection of client assets to some types of depositaries, the FSA's approach to marketing and passporting and fees.

The FSA has invited responses to the proposed changes by 10 May.

<http://www.fsa.gov.uk/static/pubs/cp/cp13-09.pdf>

<http://www.fsa.gov.uk/library/policy/cp/2012/12-32.shtml>

FSA issues guidance on relationship between firms' supervisors and auditors

The FSA has (on 19 March) released a guidance note on the relationship between firms' supervisors and auditors. The guidance, which contains a proposed code of practice and a set of principles relating to duties to report, the sharing of information and confidentiality, is designed to clarify the obligation on auditors under rule 3.8 of the Supervision chapter of the FCA's Handbook ("SUP") to co-operate with the FCA.

http://www.fsa.gov.uk/static/pubs/guidance/gc13_3.pdf

This is the last edition of *FSA Update*. From 8 April, Clifford Chance will continue to update you on the most important developments at the FCA, the PRA and other financial services regulators around the world in a new alerter, *This Week at the Regulators*.

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