

Financial Services Update

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“Enforcement action”: Financial crime - bribery and corruption

Countering the risk that authorised firms may be used for financial crime remains at the core of the FSA regulatory objectives. Although recently the FSA has become more bullish in prosecuting cases of financial crime (for example insider dealing and breaches of the Financial Services and Markets Act 2000) its primary role, and perhaps where it can add the most value, is enforcing the requirement for regulated firms to identify financial crime risks and use appropriate systems and controls to counter those risks.



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The regulated sector has seen the FSA take enforcement action against high street and private banks for failures in anti-money laundering systems and controls; these resulted in sizeable fines. The Regulator’s attention then moved to anti-fraud procedures followed by anti-market abuse systems and controls and best practices to restrict the leak of price sensitive or inside information. It is therefore not surprising that the FSA now has

an interest in the hot topic of anti-bribery and corruption.

Regulatory focus on anti-bribery and corruption systems and controls

The FSA’s Financial Crime and Intelligence Division (FCID) is currently undertaking a thematic review of the anti-bribery and corruption systems and controls engaged by commercial insurance intermediaries. Part of the review resulted in the

largest financial crime related fine imposed by the FSA, when Aon Limited were fined £5.25m for breaching Principle 3 of the FSA’s Principles for Businesses, for failures to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption associated with payments to overseas parties.

The fine was reduced due to the firm’s co-operation with the FSA.

The Regulator commented: *“... the pro-active determination of Aon’s current senior management to identify past issues and improve the firm’s systems and controls in this area is a model of best practice that other firms may wish to adopt.”*

Perhaps signalling its intention to take more enforcement action, the FSA Director of Enforcement commenting on the case, stated:

“The FSA has an important role to play in the steps being taken by the UK to combat overseas bribery and corruption. We have worked closely with other law enforcement agencies in this case and will continue to take robust action focused on firms’ systems and controls in this area.”

Benchmarking existing systems

The FCID has indicated that once it has considered the results of the current thematic review it may undertake a wider review. Now is the time to benchmark and stress test existing anti-corruption systems and controls against the following areas:

- Identification of risks – while there may be lesser risks when the firm makes direct payments to a third party, payments or ‘netting off’ further along the brokerage chain pose a greater risk of illicit and inducement payments. It is currently not clear how far the FSA expects firms to investigate and control such payments, it is hoped that the results of the FCID thematic report will offer further guidance.
- *“The smell test”* – if payments are to be made, firms need to ask themselves the question does the payment seem appropriate? Does it smell right? Simple questions, such as: who are we making payment to and why? Is the amount being paid reasonable? - can answer the smell test question.
- Due Diligence – Anti-Money Laundering and Know Your Client checks can be adapted to undertake sufficient due diligence checks on third parties.
- Monitoring – once third party arrangements/relationships are

established these need to be carefully monitored.

- Management Information – is not just a Treating Customers Fairly tool, senior management

anti-corruption investigations, there is still international criticism of the UK’s efforts to combat bribery and corruption. In October 2008, the OECD’s



require adequate MI to assess the effectiveness of anti-financial crime systems and controls.

- Staff training – processes and procedures are meaningless if staff are not correctly trained how to use them, identify potential corruption risks, undertake appropriate due diligence, and report concerns to senior management. Staff training, and not just one-off training during induction, is key to any anti-financial crime systems and control.

Beyond the FSA?

In addition to attention from the FSA, firms may also face investigations and enquiries from law enforcement agencies. Last year saw a greater drive to tackle corruption; for example the Serious Fraud Office appointed a new Head of Anti-Corruption and announced that it intends to increase the number of investigators it has on anti-corruption work from 65 to around 100.

In 2008, the City of London Police Overseas Anti-Corruption Unit secured its first criminal conviction under the Prevention of Corruption Act 1906 against a company director of a British security company accused of making illicit payments to Ugandan public officials.

Although UK authorities are investing more resources into

Working Group on Bribery criticised the UK for its failure to bring its anti-bribery laws into line with its international obligations under the OECD’s Anti-Bribery Convention.

The following month the Law Commission published its final report on bribery offences in the UK. The Law Commission’s recommendations include replacing the current common law and statutory offences of bribery and one specific offence of bribing a public official, plus a new corporate offence of negligently failing to prevent bribery.

Ten years earlier, when the Law Commission published its first draft Corruption Bill, this was kicked firmly into the long grass by the Parliamentary Joint Committee; however there now seems a greater enthusiasm to bring UK anti-bribery and corruption legislation into line with the international Convention. Against the background of heightened regulatory interest in anti-bribery and corruption issues, greater criminal investigative resources directed to tackle corruption and the real prospects of new criminal offences, regulated firms are well advised to review existing systems and controls.

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FSA use of a firm's reports

The FSA has recently consulted on changes to its Enforcement Guide aimed at clarifying its approach to internal investigation reports that firms commission in anticipation of possible FSA enforcement action.¹

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Gaining an understanding of a firm's control environment can be far from straightforward. In the same way as the FSA might, firms may need to consider documents and interview staff in order to understand how the firm organises itself. The internal investigation tends to focus on actual 'on the ground' practices as well as on what the firm's internal procedures designate should be happening. Internal investigations (the term is used to contrast investigations conducted by the FSA) involve particular skills and careful judgement. Often the work of conducting the internal investigation is outsourced, either in whole or in part, to external advisors such as lawyers or accountants. The issues covered by the consultation paper are far from straightforward: what use can and should the FSA make of such reports; what happens when firms claim legal professional privilege (LPP); how can the internal investigation interfere with a subsequent FSA investigation.

Generally the consultation paper is positive about firm commissioned reports. The FSA proposes to say in its Enforcement Guide: "Such reports can be very helpful for the FSA in circumstances where enforcement action is anticipated or underway." This is a pragmatic approach. The FSA's Enforcement Division does not have the resources to investigate all matters that other areas of the FSA, such as Supervision and Market Conduct, might wish to refer to Enforcement. Making use of the factual findings in internal reports, and perhaps even noting and being guided by the opinions set out in them, will allow the FSA to spread its enforcement resources further. However, there is a potential conflict here. The firm's lawyers and accountants will tend to gloss their report in a manner that is sympathetic to the firm's

position. The FSA will be alive to this and inevitably the reliance the FSA places will depend on how open the firm is being about the aims of its investigation and the methodology to be employed. It will often be sensible to discuss these matters with the FSA at the outset.

Under FSMA 2000 communications which are properly characterised as legal professional privilege can be withheld from the FSA. LPP attaches to communications between lawyers and their client which are concerned with giving and receiving legal advice and litigation privilege attaches to communications between any two persons (ie a lawyer need not be involved) provided litigation is in prospect and the dominant purpose of the communication is its use in litigation. This rule explains why lawyers are often preferred for internal investigations: for an accountant's work to benefit from privilege litigation must be in prospect and use in that litigation must be the dominant objective of the work. This can cause difficulties where the firm's aim is to settle with the FSA or where the report is mainly concerned with remediation rather than the nature of and responsibility for historic actions. The FSA accepts that LPP might be asserted over reports in which case (obviously) the FSA cannot make use of them because they will not be aware of their content. However, if reports are disclosed the FSA will also expect disclosure of underlying material such as notes of interviews.

The consultation paper sounds a note of caution though where the FSA is conducting criminal investigations. An investigation in these circumstances might alert suspects or prejudice on-going monitoring operations. This is a difficult area. In market abuse cases the FSA's investigation



will begin on a dual criminal/civil basis. How is the firm to know whether monitoring (which may be covert) is being conducted by the FSA? While the FSA may be prepared to discuss this with the firm it will not want to do so in cases where (as the consultation paper envisages) senior individuals may be abusing positions of trust within financial institutions.

Particular care is needed when agreeing the scope and nature of an internal investigation with the FSA. Out of a desire to appear co-operative the firm might agree that the report will be disclosed to the FSA and that no privilege will be asserted. Assume that the investigation reveals real concerns. It may be difficult at that later stage to assert privilege. The FSA may contend that the report, as against them, lacks confidential status and so cannot be privileged, although the report might be privileged as against others. Even if the report tended to incriminate, the FSA might still be able to compel its production on the basis that the privilege does not extend to pre-existing documents. This serves to highlight an important point. Internal investigations may reveal unexpected and very unwelcome facts and circumstances.

The airing of these issues is to be welcomed but the paper highlights the need for great care when contemplating any type of investigative work when an FSA investigation is either proceeding or is contemplated.

¹ Consultation Paper 09/5 January 2009

Credit crunch claims - the rules that make matters worse

Investors who have lost money in the current financial crisis will inevitably be thinking about whether they have grounds for making a complaint against their financial advisers. The FOS, in its budget for 2009-10, envisages the volume of complaints next year will increase by two thirds. How will such complaints be determined?



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Last October, the FOS published a series of case studies involving endowment savings plans. In the course of these, the FOS set out what appears to be a statement of general principle: *“Our rules let us dismiss complaints about the performance of an investment. But often, although the consumer expresses the complaint in terms of performance, the underlying issue is whether the policy was suitable for them. So when we receive a complaint such as this one – about an investment providing little or no return – we will examine the evidence to see why the investment was sold, and whether it was a suitable recommendation”.*

Thus, the Ombudsman will investigate complaints that allege no more than that investments have been performing badly. Mere bad performance will not establish liability, but full investigation of the complaint may show that the investment was unsuitable. The question of suitability should be investigated by reference to the facts as they were at the time of the investment, but it is impossible in practice for that investigation to be carried out without the benefit of the wisdom of hindsight

The FSA Rules create two gateways through which a justifiable complaint may be brought²

First, a firm must take reasonable steps to ensure that any personal recommendation or discretionary management trading decision is suitable for the client. In determining suitability, the firm must obtain information about the client’s knowledge and experience, financial situation and investment objectives. In determining whether the investment is suitable, the firm must consider whether the investment meets the client’s investment objectives, is such that he is able financially to bear any related investment risks and that he has the necessary experience and knowledge to understand the risks involved. Suitability is based on the client’s investment objectives but the rest of the test is objective. Needless to say, there have been frequent cases where the Ombudsman has said that, although a client knows of the risks he is entering into, nonetheless the transaction was not suitable because these were risks he ought to have been advised not to take.

Second, the Rules require that the investor must be provided with a suitability report. This must

specify the client’s demands and needs, explain why the recommendation was considered suitable and must *“explain any possible disadvantages of the transaction for the client”*. The latter obligation may create considerable difficulties. Strict compliance would require a suitability report of encyclopaedic length. Most advisers have in the past warned of the key and most significant risks, and, in practice, of the risks where specific warning was required under previous generations of PIA and FSA Rules. Other risks which might now be perceived as obvious have not traditionally been addressed. Most significantly, any investment carries an element of counterparty solvency risk but this has rarely been the subject of express warning. On a strict reading of the rules, this means that every suitability report has failed to comply.

Defence lawyers will argue that the Rule must be treated as subject to a reasonableness test, but that is not what the Rule says and this particular rule contrasts starkly in its use of the words *“must”* and *“any possible disadvantages”* from many other rules which require reasonable steps to be taken.

In any court proceedings to gain compensation the claimant would need to establish that the breach caused his loss – in short, would a fuller risk warning have made any difference to his investment decision. If the adviser's final conclusion would have been the same, it is most likely that the client would have made the same investment even with fuller risk warnings so there will be no justifiable claim.

However, it can be expected that clients will say they would have made a different decision if they had been warned of additional risks – and they may

be believed by a judge. Where complaints are adjudicated by the FOS, there are only rare and limited opportunities to cross-examine the complainant to test what they would have done if they had been given fuller advice, and the FOS determines complaints on the basis of what "is fair and reasonable in all the circumstances" rather than strict application of legal principles. Where the FOS on this basis has declined to apply the normal law of causation, the applications for Judicial Review in the courts have failed.

In reviewing the economic situation in October/November 2008 the Chief Ombudsman, Walter Merricks wrote: "*The impossible has become the probable*". Many firms and their professional indemnity insurers fear that they may be castigated for failing to predict and warn of risks which at the time would have been dismissed as so unlikely as to be negligible.

² The Rules in this article are taken from the new Conduct of Business Source Book with effect from 1 November 2007. Similar rules existed under the old Conduct of Business Source Book and previously under PIA and FIMBRA Rules

Ombudsman threat looms large for mortgage advisers

As the recession bites and cracks start appearing in past deals we can expect to see an array of claims against professionals coming out of the woodwork.

Mis-selling claims brought by borrowers against their mortgage advisers will form a significant part of this new flood of claims.



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In 2008, house prices declined by around 18% and about 45,000 homes were repossessed. Prices are expected to continue declining this year, despite a slight upturn in January, and the Council of Mortgage Lenders has predicted a further 75,000 repossessions – these will inevitably trigger claims. It is likely that the vast majority of claims of this type will be brought before FOS, given the consumer-friendly nature of the service and the absence of the costs risks involved with court proceedings. This forum did not exist at the time of the last property crash and we expect disgruntled borrowers to make full use of it this time around.

The new pre-action protocol for mortgage possession claims, introduced in November of last year with the principal aim of limiting repossessions by lenders, will only have the effect of adding to mortgage advisers' woes. The Protocol requires lenders to give extra consideration before bringing possession proceedings where the borrower has brought a related complaint before FOS and give five business days' notice to the borrower where they intend to bring such proceedings in any event. Lenders bringing possession proceedings will have to be prepared to demonstrate before the courts the steps they have taken to comply with the Protocol. It will not take worried

borrowers long to realise that a complaint to FOS is worthwhile if only to delay repossession.

The crucial issue which any forum must address when resolving complaints in present economic circumstances is who should bear the exacerbated losses caused by declining property prices: the negligent professional or their client? The courts developed a reasonably settled approach to this question arising from the last property crash and, principally, in *SAAMCo*³ and the cases which followed on from it. The general theme of this case law was that the courts refused to make professionals liable for clients' losses which resulted from declining property prices

rather than their negligence. For instance, in a claim brought by a lender against a negligent valuer, the lender's recoverable loss is limited to the extent to which the property was overvalued and the greater part of the loss resulting from declining property prices is excluded.



Unfortunately, the FOS is not bound to follow this or any other common law. The Ombudsman is required to determine complaints by reference to what is, "*in his opinion, fair and reasonable in all the circumstances of the case*". Moreover, the Ombudsman is required only to "*take into account*" relevant law in making such determinations. Consequently, we are left in a position where we can only speculate as to what approach FOS will take to losses arising from declining property prices. Given that an Ombudsman's decision is binding on the business respondent - but not, incidentally, on the complainant - this is a cause for considerable concern.

Consider, by way of example, the situation where a borrower in negative equity alleges mis-selling against their mortgage adviser before FOS. As a matter of law, negative equity is not actionable in itself because there is no crystallised loss. Moreover, there is no express duty placed

on mortgage advisers to advise on 'house price risk'. However, it seems unlikely that the absence of a crystallised loss would act as a bar to recovery before FOS and the potential for broad interpretations of the general duty to advise on mortgage suitability (MCOB4.7.4) means that this door is not completely closed. After all, the financial services sector has already experienced awards based on prospective losses in the context of the Pensions Review.

Take a different scenario, where the borrower in possession cannot afford to service their mortgage. Affordability of a mortgage falls squarely within the ambit of the adviser's duties under MCOB. It is entirely conceivable that FOS could conclude it would be fair and reasonable for the adviser to pay redress to the borrower to make up any shortfall in mortgage repayments and allow the borrower to stay in his or her home. This would, presumably, amount to the difference between what the borrower can afford and the repayments on the mortgage the adviser originally recommended. Before a court, any such award would be vulnerable to the argument that the mis-sold mortgage has given the borrower the opportunity to live in a better home. However, such an argument would be likely to be given short shrift before the FOS when faced with distressed borrowers.

Finally, there is the situation where the borrower's home has already been repossessed and they have suffered a shortfall in the recovery from the proceeds of sale. In these circumstances, it is likely that the borrower would seek to recover any lost equity put in when the house was purchased. Again, it is easy to see FOS taking a sympathetic stance towards borrowers suffering these types of losses where there has been a failure to advise properly on affordability.

It is also important to be aware of FOS's powers in respect of interest awards on redress payments and additional payments for distress and inconvenience. The FOS has complete discretion as to the rate of interest to be applied to any

award and the dates between which it should run. In the past, interest has typically been awarded at 8% simple, mirroring the court rate. However, it is clearly open to argue that a much lower rate should be applied given that the Bank of England base rate has been slashed to 1%.

The Ombudsman has an express power to make awards for distress and inconvenience and is encouraged to consider such an award for every complaint brought, whether or not the complaint itself is upheld. For complaints brought by a borrower who has had to undergo the undoubted trauma of being removed from their home, it seems likely that the Ombudsman will exercise this power liberally. Indeed, this could be a reason in itself for complaints in the absence of any other losses.

On the plus side, the quantum of these awards is usually under £300 and payments of greater than £1,000 are described by the FOS as "exceptional". Whilst it may be easy to downplay the significance of these awards, it should be noted that if an award of £500 had been made last year for every complaint received which made it beyond the initial vetting stage - of which there were 123,000 - it would have constituted an additional liability of £61m.

Given the FOS's broad discretion and unpredictability, the first trickle of complaints by borrowers against their mortgage advisers should be carefully monitored and FOS's response gauged. It is likely that a settled approach to these complaints will be established fairly quickly, though it is unlikely to be an approach which favours mortgage advisers. It is hoped that the FOS will retain at least some sense of perspective and acknowledge that mortgage advisers cannot underwrite losses their clients subsequently incur irrespective of whether these losses are attributable to the adviser's negligence.

³ *South Australia Asset Management Corp v York Montague* [1997] AC 191

Round up

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Financial risk outlook warning to financial intermediaries

The FSA has warned financial intermediaries that they must not allow financial pressures to lead to a reduction in resources devoted to compliance activities. On the contrary, the FSA (in its Financial Risk Outlook published on 9 February) say that retail intermediaries should increase resource in this area.

The FSA say they continue to be concerned about inadequate levels of oversight and control often seen in retail intermediary firms. They particularly warn networks that they are relying too heavily on remote monitoring; networks may need to increase the level of resource they dedicate to oversight and compliance.

The FSA warn that financial pressures may lead advisers whose remuneration depends on sales volumes to make inappropriate sales, and firms must have in place controls to prevent this. Quoting the Madoff case, the FSA warn that current financial circumstances may lead to increased fraud.

Given the FSA's recent focus on personal accountability of senior management, directors of intermediaries who fail to heed the FSA's warnings about the need for adequately resourced compliance departments will run the risk of personally facing enforcement proceedings.

The FSA also took the opportunity of the Financial Risk Outlook to confirm that the current financial crisis has not led to any change of direction in its proposals for the Retail Distribution Review.

SFO announces investigation into Bernard Madoff's UK operation

The Serious Fraud office has announced that it will investigate Bernard L Madoff Investment Securities. The decision comes after an interim report from Grant

Thornton who are acting as liquidators to Bernard Madoff's UK operation.

More FSA fines and bans for mortgage brokers

In 2008, there were 29 enforcement cases against mortgage advisers for fraud or mis-selling. Latest examples include:

- Dynamic Mortgage Brokers Limited (Dynamic) and one of its directors, Richard Kennedy, have been fined for obtaining mortgages using false and misleading information. In four applications, misleading information on addresses, earnings and employment were found, including the use of Mr Kennedy's home address to support client mortgage applications. Mr Kennedy has been banned from performing any regulated activity and fined £101,106. Dynamic's permission has been cancelled.
- Moses Luzinda trading as Remos & Co has been banned for submitting false mortgage applications. Moses Luzinda also breached Principle 11, requiring firms to cooperate openly with regulators and adequately disclose documents to the FSA. Moses Luzinda provided contradictory excuses to the FSA when refusing to provide client files.
- The FSA has also banned mortgage advisor John Cook and stopped the company where he was sole shareholder, Stone Financial Management Limited (SFML), from conducting any further business. SFML specialised in providing small mortgages. Mr Cook withdrew his FSA approval voluntarily when he failed to provide facts relevant to his fitness and propriety. The FSA banned Mr Cook,

despite the voluntary withdrawal, after it found that he had fraudulently submitted mortgage applications.

These cases involving the most egregious conduct or fraud inevitably progress through the enforcement process first. We will watch with interest as the treatment of systemic advisory failings is publicised.

Court of Appeal rules against Fox Hayes

In the latest twist in this long-running saga, the Court of Appeal remitted the law firm, Fox Hayes' case back to the Financial Services & Markets Tribunal to determine which partners would be liable to pay the penalty imposed and how much each would have to pay. The Tribunal's criticisms of the FSA were over-turned.

The firm had approved a number of financial promotions for unauthorised overseas companies. The promotions took the form of letters approved by Fox Hayes and sent by overseas companies to private investors in the UK offering a free research report into a company in which the investor already held shares. Investors, by returning a form with their address and telephone number, agreed to be contacted about other investment opportunities, and the overseas company would then contact investors by telephone and persuade them to buy shares in OTC Bulletin Board companies.

The Court of Appeal held that the Tribunal should have concluded that the purpose of the promotion was disguised, and that in itself tended to show that there had been a contravention of the rules. The Court was satisfied that there was a 'financial promotion' and that, given the Tribunal's finding that Fox Hayes knew that the whole purpose was to gain access to investors to invite them to buy OTC Bulletin Board shares, it followed that they did not take reasonable steps to ensure that the promotion was clear, fair and not misleading. It also followed that Fox Hayes had reason to doubt that the overseas companies would deal with their UK customers in an honest and reliable way. Their managing partner had received secret commissions from the overseas companies and the Tribunal had erred in considering the knowledge of the firm separately

from that of its managing partner. Fox Hayes' conduct was serious and reckless and an appropriate penalty would be £750,000, reduced to £500,000 to reflect the fact that the case was to some extent a test case.

Unfair Terms in Consumer Contracts Regulations (UTCCR)

The FSA's business plan for 2009/10 confirms that helping retail consumers to achieve a fair deal will include a renewed focus on the UTCCR. In her speech of 13 January, Katherine Webster of the FSA's UCT team, said: *"We are still surprised by how many consumer contracts are drafted in legal jargon. Last year we published a statement advising firms that the use of language such as 'consequential loss' in their consumer contracts is not, in our view, plain and intelligible and that terms using this kind of language may be unfair. ... And, towards the end of last year we also published an undertaking from a firm which agreed not to use the word 'indemnify' in its consumer contract as, among other concerns, we did not think that the average consumer would understand the implications of a term whereby he agrees to 'indemnify' a firm. ... It is worth bearing in mind that the whole purpose of Regulation 7 and the obligation on firms to use plain language is to ensure that consumers – and not just lawyers – can understand the contract and can make an informed choice as to whether to become a party to it in the first place."*

The FSA will not accept the excuse that an otherwise unfair term is applied fairly. They say the fair treatment of the term should be plain from the term itself. It will not be acceptable to use legal terminology, even though their meaning is well-established through case law. Firms with long-standing consumer contracts need to review them for plain English and compliance with the Regulations.

Whilst the Unfair Contract Terms Act does not apply to contracts of insurance, UTCCR does.

More businesses eligible for FOS?

The Ombudsman's traditional definition of a 'small business' is set to change as a result of EU legislation (the Payment Services Directive). From November 2009, when the Directive comes into effect, businesses with an annual turnover of up to €2m (currently approx £1.765m) will be covered by the FOS – as long as they have fewer than ten staff (so called 'micro-enterprises' in Euro speak). This raises the turnover limit from the current threshold of £1m (and by a substantial margin given current exchange rates) – but introduces the new, separate, requirement relating to the number of staff.

Although the change has been prompted by the Directive, it will apply across the board.

⁴ *FSA v Fox Hayes (A Firm)* (2009) [2009] EWCA Civ 76

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