

FSA Update

At the FSA in the past two weeks: -

FSA decides to impose largest ever non-market abuse fine on an individual

The FSA has issued a decision notice (dated 20 March, released on 29 May) to **Mr Alberto Micalizzi**, the former CEO of hedge fund Dynamic Decisions Capital Management Limited ("**DDCM**"). The notice details its decision to impose a financial penalty of £3 million fine on him and to ban him from performing any function in relation to regulated activities for breaches of Principle 1 of its Statements of Principle for Approved Persons ("**APER**"). Specifically, it sets out the FSA's findings that, following substantial losses sustained by DDCM in 2008, he lied to investors and entered into transactions involving instruments that he knew were not genuine financial instruments, in order to seek to generate the impression that the fund was performing positively conceal those losses. The FSA also found that he provided false and misleading information to it during its investigation, and describes the conduct as "*amongst the most serious that the FSA has encountered*". It has reflected the seriousness with which it views the conduct in the level of the fine which it has decided to impose, which is the largest imposed on an individual in a non-market abuse case.

The FSA has also issued a decision notice to DDCM on the basis that it considers that it will no longer satisfy the threshold conditions if Mr Micalizzi is banned from performing functions in relation to regulated activities.

Both Mr Micalizzi and DDCM have referred the decision notices issued to them to the Upper Tribunal.

Action has already (in November 2011) been taken against the former compliance officer and money laundering reporting officer of DDCM, **Dr Sandradee Joseph**, for breaches of Principle 6 of APER. That action, leading to the imposition of a financial penalty of £14,000 and a partial prohibition order was taken (in respect of her CF10 function only) for failures by her to adequately investigate concerns raised by the fund's prime broker (see Final Notice and FSA Update commentary).

The circumstances of the collapse of DDCM has already been the subject of an investigation by the SFO and Italian police. The SFO's investigation was closed in July 2010. The status of the Italian investigation is unknown.

Although not all the facts are known, this enforcement action may fall into a similar category to that taken against **Mr Ravi Sinha**, who was fined £2.867 million in January 2012 for his operation of a false invoicing scheme. In that case, surprise was widely expressed that a criminal investigation by City of London Police did not progress to a prosecution.

<http://www.fsa.gov.uk/static/pubs/decisions/alberto-micalizzi.pdf>

Key issues

- FSA decides to impose largest ever non-market abuse fine on an individual
- FSA's £1.3 million fines for unauthorised trading scheme upheld
- Administrative Court quashes Decision Notice for inadequate reasons
- Three convictions in Blue Index insider dealing trial
- Further arrest in unauthorised business investigation
- FSA fines IFA £60,000 for sale of unsuitable non-mainstream investments
- Judge criticises hedge fund chief
- Commercial Court clarifies meaning of Collective Investment Scheme
- FSA introduces new rules on display of depositor compensation information
- FSA reports on implementation of changes to EU Prospectus and Transparency Directives
- FSA and Financial Reporting Council consult on product projections
- FSA and HM Revenue & Customs enter into Memorandum of Understanding on Money Transmitters
- FSA issues details of fees and levies for 2012/2013
- New chair of FSA Practitioner Panel appointed

<http://www.fsa.gov.uk/static/pubs/decisions/ddcm.pdf>

http://www.fsa.gov.uk/static/FsaWeb/Shared/Documents/pubs/final/dr_san dradee_joseph.pdf

<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWlbFgNhLNomwBI%2B33QzdFhRQAhp8D%2BxrlGRel2crGqLnALtlyZe8Xx43hgBYD7625E%2BXMRfYnp%0D%0A5mt12P8Wnx03DzsaBGwsIB3EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=84178>

<http://www.fsa.gov.uk/library/communication/pr/2012/009.shtml>

FSA's £1.3 million fines for unauthorised trading scheme upheld

The Upper Tribunal has (on 21 May) upheld the FSA's decisions to fine **Mr Sachin Karpe** and **Ms Laila Karan** a total of £1.3 million in respect of their parts in an unauthorised trading scheme. In addition, both individuals have been banned from performing any function in connection with any regulated activity in future. The Tribunal agreed that they had both breached Principle 1 (integrity) of APER.

Specifically, the Tribunal agreed with the decision to fine Mr Karpe £1.25 million for conducting unauthorised trading in foreign exchange instruments on 39 customer accounts and creating false documentation and making unauthorised transfers and loans across accounts to conceal the trading and associated losses. He was also found to have directed others (including Ms Karan) to assist him in doing so. Separately, he was found to have established an investment structure to enable a major customer to breach Indian law,

and to have misled compliance staff and senior management.

The Tribunal also agreed with the fine of £75,000 imposed by the FSA on Ms Karan. The Tribunal found that, although she, as a client advisor in Mr Karpe's team, had been placed in a difficult position by his requests that she assist him by creating and endorsing falsified documents, she had breached Principle 1 of APER by becoming dishonestly involved in the fraud rather than escalating the matter.

The Tribunal's decisions on these references, which relate to decision notices issued in 2010, are the latest in a series of enforcement cases pursued by the FSA linked to unauthorised transactions on 39 customers' accounts in 2007 and 2008. The FSA has taken action both against active participants and those which it alleges to have failed to have acted to prevent or adequately respond to compliance failings. In this series of cases, fines and bans against active participants have been upheld, whilst the Tribunal has disagreed with the FSA that a person at the top of the institution did not act sufficiently decisively to prevent or address compliance failings (see FSA Update – 1 May 2012).

http://www.tribunals.gov.uk/financeandtax/Documents/decisions/FS0019_Sachin_Karpe.pdf

http://www.tribunals.gov.uk/financeandtax/Documents/decisions/FS10_0025_Laila_Karan_v_FSA.pdf

<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWlbFgNhLNomwBI%2B33QzdFhRQAhp8D%2BxrlGRel2crGqLnALtlyZe%2FxbFDMK7o1LMuA2WitVt5zp%0D%0A5mt12P8Wnx03DzsaBGwsIB3>

[EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=141846](http://www.tribunals.gov.uk/financeandtax/Documents/decisions/FS0019_Sachin_Karpe.pdf)

Administrative Court quashes Decision Notice for inadequate reasons

The Administrative Court has (on 25 May) quashed a decision notice issued to an unnamed individual by the FSA, finding that the Regulatory Decisions Committee ("**RDC**") did not give adequate reasons for a decision to impose a financial penalty of £100,000 on the individual for alleged breaches of Principle 6 of APER. Mr Justice Silber found that the decision notice issued to the individual, although it summarised his arguments, did not give sufficient reasons as to why they had been rejected, and therefore that the RDC had not discharged its obligations (under section 388(1) of FSMA) to give reasons for its decision. He further held that the availability of a re-hearing of decisions of the FSA by the Upper Tribunal is not a suitable or adequate remedy for such a breach. The case has now been remitted back to the RDC (differently composed from that which issued the original decision notice) in order for a fully reasoned decision notice to be issued.

The FSA, in the proceedings before the Administrative Court, expressed concern that the statutory regime under the Financial Services and Markets Act 2000 ("**FSMA**") would be undermined if subjects of regulatory action were able to use judicial review proceedings to challenge the contents of enforcement notices issued to them. Mr Justice Silber rejected those concerns. He distinguished between the nature of judicial review proceedings concerned with the reasonableness of particular decisions taken by the FSA and

proceedings before the Upper Tribunal, which involve a complete re-hearing of matters originally argued before the RDC. He also pointed to the key distinctions that, in tribunal proceedings, new allegations may be made, new evidence introduced and higher penalties imposed and there are less established safeguards in relation to costs and anonymity applications. Relying on and drawing analogies with decisions from other regulatory jurisdictions, he held that referring matters to the Upper Tribunal is not as suitable or effective a mechanism for challenging failures by the FSA to give adequate reasons for their decisions.

Acknowledging the FSA's concerns that, as a consequence of the decision in this case, judicial review challenges by subjects of regulatory action may lead to delay or disruption of the regulatory process, he emphasised that the number of cases in which such challenges will succeed is likely to be small. He carefully pointed to examples of decision notices in other FSA enforcement cases where full and adequate reasons had been given, and distinguished the particular facts and deficiencies of the decision notice in this case from those examples.

There have been numerous previous instances where subjects of regulatory action have (mostly unsuccessfully) pointed to procedural irregularities as reasons why enforcement notices issued to them by the FSA should be quashed. Most recently, for example, Mr Stewart Ford unsuccessfully argued that the warning notice issued to him should be quashed as it included references to legally privileged material, which the FSA should not have accessed (see FSA Update – 1 May 2012). This is the first case involving a notice

issued by the FSA in which the Court has found that the procedural issues to have been sufficiently fundamental as to invalidate the notice.

This case turns on its own facts and does not open decision notices up to routine examination by the Administrative Court. However, it is still significant.

The RDC is anxious to stress that its processes differ qualitatively from those of the courts (see, for example, the frequently asked questions published on its section of the FSA's website). However, Mr Justice Silber cast some doubt upon this, stating (at paragraph 66 of his judgment) that: -

"The stark fact, as is shown by the nature of its hearings, is that the RDC is indeed determining a dispute between the views of the Enforcement Division and those of a claimant and to that extent it is sitting in judgment between two sides. The procedure before the RDC was very similar to many hearings before tribunals with both sides making oral and written submissions in turn before the decision is considered by the decision-makers".

He also quoted the earlier observation of Sir Stephen Oliver QC that "the Tribunal's role is not to adjudicate on the rightness or otherwise of the decision as expressed in the decision notice", thereby delineating the respective functions of the RDC, the Upper Tribunal and the Administrative Court. However, the expectation that those decision notices should be similar, in the level of detailed reasoning they contain, to courts' written judgments, marks some convergence between them.

The RDC, and its successor bodies after the transfer of the FSA's

responsibilities to the Financial Conduct Authority ("FCA") and Prudential Regulation Authority ("PRA") in 2013, will continue to act as a crucial check and balance in contested cases. The numbers of such cases are likely to increase as the FSA and FCA remain committed to conspicuously tough enforcement action and as the PRA begins to exercise "*judgments on judgments*". This decision underlines the importance of its not only continuing to challenge and scrutinise proposed regulatory action, but also of it carefully documenting the reasons for decisions which are adverse to firms and individuals.

Case reference: *R (C) v Financial Services Authority* [2012] EWHC 1417 (Admin)

<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWibFgNhlNomwBI%2B33QzdFhRQAhp8D%2BxrlGRel2crGqLnALtlyZe%2FxbFDMK7o1LMuA2WiTVt5zp%0D%0A5mt12P8Wnx03DzsaBGwslB3EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=141846>

<http://www.fsa.gov.uk/about/who/board/committees/rdc/faqs#faq17>

Three convictions in Blue Index insider dealing trial

On 28 May, **James Sanders**, a director of the specialist Contract for Difference broker Blue Index, his wife **Miranda Sanders**, and his co-director **James Swallow** pleaded guilty to insider dealing. They will be sentenced on 19 June.

Christopher Hossain, a former senior trader and **Adam Buck**, a former employee of Blue Index, were acquitted of insider dealing.

<http://www.fsa.gov.uk/library/communication/pr/2012/060.shtml>

Further arrest in unauthorised business investigation

On 30 May, a 54 year old man was arrested in East London on suspicion of offences under FSMA and Fraud Act 2006. The arrest is in connection with an ongoing FSA investigation into a suspected unauthorised foreign exchange trading scheme, and follows the arrest of a 23 year old man in April.

The FSA has not released any further details at this stage.

<http://www.fsa.gov.uk/library/communication/pr/2012/064.shtml>

FSA fines IFA £60,000 for sale of unsuitable non-mainstream investments

In a Final Notice dated 24 April (released on 30 May), the FSA has imposed a financial penalty of £60,000 on **Mr Patrick O'Donnell**, has withdrawn his approval to perform controlled functions, and has banned him from performing any function in relation to regulated activities in future for providing customers with unsuitable advice to invest in Unregulated Collective Investment Schemes ("UCIS"). The FSA found that Mr O'Donnell breached Principles 2 (due skill, care and diligence) and 7 (compliance by firm with regulatory requirements) of APER.

It has also issued a Final Notice (again dated 24 April and released on 30 May) to **P3 Wealth Management ("P3")** cancelling its Part IV permission for failure to satisfy the threshold conditions relating (as it would have inadequate human resources).

Mr O'Donnell and P3 had both previously referred the Final Notices to the Upper Tribunal, but withdrew their references on 11 April.

The action is the latest in a line of enforcement cases taken against IFAs for UCIS-related failings. It follows the publication in April 2012 of robust guidance by the FSA indicating that traded life policy investments ("TLPIs"), which are categorised as UCIS products should not be marketed to UK retail investors, and the previous separate publication in 2010 of a thematic review in relation to the promotion of UCIS.

<http://www.fsa.gov.uk/static/pubs/final/patrick-odonnell.pdf>

<http://www.fsa.gov.uk/static/pubs/final/p3-wealth.pdf>

http://www.fsa.gov.uk/library/policy/financial_guides/2012/fq1212

http://www.fsa.gov.uk/pages/library/other_publications/ucis/index.shtml

Other Final Notices: -

- The FSA has (on 18 May) cancelled the Part IV permission of **Carousel Finance Limited** for non-payment of fees and levies.

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

- The FSA has (on 30 May) cancelled the registration of **Jose Quiambao** as a Small Payment Institution under Payment Services Regulations 2009 for non-payment of fees and levies.

<http://www.fsa.gov.uk/static/pubs/final/jose-quiambao.pdf>

- The FSA has (on 31 May) cancelled the Part IV permission of **Prime Choice Mortgages Limited** for failure to submit its

Retail Mediation Activities Report ("**RMAR**").

<http://www.fsa.gov.uk/static/pubs/final/prime-choice.pdf>

Judge criticises hedge fund chief

Press reports (on 31 May) indicate that the High Court has (on 30 May) criticised the directors of failed hedge fund **Weaving Capital** and has ordered them to pay approximately \$450 million to liquidators. Although the judgment has not been released, reports suggest that Mrs Justice Proudman, ruling in favour of the hedge fund's liquidators, found that communications with investors in relation to the fund's investment strategy were misleading.

The judgment is also reported to comment upon evidence provided by **Mr Magnus Peterson**, the fund's founder. Although no action has been taken either by it or by the FSA, the SFO has conducted an investigation into the circumstances of the fund's collapse. That investigation concluded prior to the High Court Trial.

This judgment comes shortly after the FSA's decision to take action in a separate case against **Mr Anthony Verrier** based upon comments made by Mr Justice Jack in High Court proceedings (see FSA Update – 21 May) further to findings and comments in relation to evidence provided in those civil proceedings.

Case reference: Weaving Capital (UK) Limited & another v Peterson & others (30 May 2012, unreported)

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[XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=122277](http://www.fsa.gov.uk/library/policy/policy/2012/12-09.shtml)

FSA introduces new rules on display of depositor compensation information

The FSA has (on 28 May) issued a policy statement (PS 12/10) setting out the steps which banks, building societies and credit unions must take to prominently display posters and stickers in branches and information on websites explaining which deposit guarantee schemes apply to customers' deposits. These include a requirement for foreign banks from outside the European Economic Area to set out that deposits are not covered by the UK Financial Services Compensation Scheme ("FSCS").

The rules will take effect from 31 August.

<http://www.fsa.gov.uk/library/communication/pr/2012/058.shtml>

FSA reports on implementation of changes to EU Prospectus and Transparency Directives

The FSA has (on 25 May) issued a policy statement (PS12/9) giving details of near-final amended versions of the Prospectus Rules, Listing Rules and Disclosure and Transparency Rules, reflecting policy decisions taken further to responses to a consultation paper issued in November 2011 (CP 11/28) on how the EU Prospectus and Transparency Directives will be implemented into the UK regulatory framework. Implementation of those directives must be completed by 1 July 2012. The new rules will come into effect on that date.

<http://www.fsa.gov.uk/library/policy/policy/2012/12-09.shtml>

http://www.fsa.gov.uk/library/policy/cp/2011/11_28.shtml

FSA and Financial Reporting Council consult on product projections

The FSA has (on 31 May) issued a joint consultation paper (CP12/10) with the Financial Reporting Council ("FRC") on the assumptions to be used for non-MiFID product projections and transfer value analysis. The changes are aimed at making the assumptions used by the FSA, contained in the Conduct of Business Sourcebook ("COBS") more consistent with those used by the FRC for Statutory Money Purchase Illustrations.

Firms have been invited to respond to the FSA in relation to the sections of the paper relating to mortality assumptions in personal pensions by 29 June, and to the sections relating to proposed changes to assumptions for pension transfer value analysis and investment return by 31 August.

<http://www.fsa.gov.uk/library/policy/cp/2012/12-10.shtml>

FSA and HM Revenue & Customs enter into Memorandum of Understanding on Money Transmitters

The FSA has (on 1 June) published a memorandum of understanding entered into with HM Revenue & Customs ("HMRC") in relation to the management of regulation of money transmitters and money remitters. The FSA has responsibility for regulating these organisations under the Payment Services Regulations 2009.

HMRC has responsibility for their supervision under the Money Laundering Regulations 2007.

The memorandum of understanding is aimed at efficient and effective regulation through joint visits and exchange of information where permitted.

<http://www.fsa.gov.uk/static/pubs/mou/fsa-hmrc.pdf>

FSA issues details of fees and levies for 2012/2013

The FSA has (on 29 May), further to the consultation paper issued in February 2012, published a policy statement (PS12/11) giving details of fees and levies for 2012/2013.

<http://www.fsa.gov.uk/library/policy/policy/2012/12-11.shtml>

<http://www.fsa.gov.uk/library/policy/cp/2012/12-03.shtml>

New chair of FSA Practitioner Panel appointed

Mr Joe Garner of HSBC has (with effect from 1 June) been appointed as the new chair of the FSA's Practitioner Panel. He takes over from Mr Russell Collins of Deloitte, who has retired.

<http://www.fsa.gov.uk/library/communication/pr/2012/059.shtml>

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



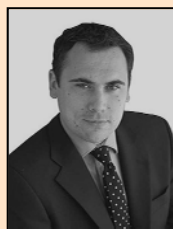
Martin Saunders
Partner

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

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