

The FSA Business Plan 2009/10: The Regulator “tools up” for battle

March 2009

The long-running industry-wide discussion about whether the FSA is or is not an "enforcement-led" regulator can largely be left to one side now. The FSA has signalled clearly in its Business Plan for 2009/10¹ that high profile enforcement action lies at the forefront of its credible deterrence philosophy.

In commenting on the FSA's budget, Chief Executive Hector Sants draws attention to the £9.1m increase in contingency costs which are intended to cover legal fees and will be used particularly to strengthen the enforcement effort in such areas as the Regulator's capacity to pursue criminal cases and "additional regulatory policy initiatives" in the course of the year. It has also added two high level recruits to the enforcement team in the form of a Chief Criminal Counsel and a specialist manager of the digital evidence unit.

It seems there can be little doubt that we should all expect to see further significant enforcement activity in the coming year. The most significant points in relation to enforcement emerging from the Business Plan are looked at in brief below.

Senior management responsibility

This is probably the single most important issue for managers, directors and officers of regulated firms.

There will be an increased focus on senior management responsibility and oversight. The FSA has been stressing the importance of proper regulation of the conduct of individuals holding Significant Influence Functions ("SIFs"). This trend will undoubtedly increase because the FSA considers that if individuals truly believe that they face a real risk of being held to account and expect to suffer meaningful consequences, then this will help to achieve the objective of "credible deterrence".

As a result, we can expect to see an increase in the likely levels of fines and the severity of sanctions across the board. More

significantly for those individuals running the firms, the Regulator will be looking, wherever possible, to reinforce the trend of 2007 and 2008 by bringing enforcement action not against only the firm but, in addition or alternatively, against the individuals holding SIFs, i.e. the management.

Treating customers fairly

The FSA will continue to embed the TCF agenda within its core supervisory work, as well as assessing firms' delivery of the TCF Outcomes through ARROW. This work is part of the small firms enhanced supervisory strategy.

However, TCF is also a clear priority for the enforcement team within the FSA. The Business Plan tells us that continued substantial enforcement action against firms at all levels in the supply chain is to be expected and that, where appropriate, firms will be required to pay compensation to customers.

Following the decision in *Hastings Insurance Services Limited*² (where the FSA determined that policyholders had been treated unfairly following the cancellation of policies where premiums had been underpaid, even though the firm had acted in accordance with its contractual rights), senior management will need to be assiduous in ensuring that customers are treated fairly at all times and in all circumstances.

The FSA will also continue to use its powers under the Unfair Terms in Consumer Contracts Regulations 1999, for example, to require firms to undertake that they will not use contract terms which it considers to be unfair. The Office of Fair Trading is required to publish these undertakings on its website.³

Reducing Financial Crime and Market Abuse

The FSA intends to continue to take tough enforcement action, including by pursuing the current market abuse and insider trading cases it has commenced in 2008 as part of its credible deterrence agenda. It has a wide range of disciplinary sanctions

¹ http://www.fsa.gov.uk/pubs/plan/pb2009_10.pdf

² <http://www.fsa.gov.uk/pubs/final/hastings.pdf>

³ http://www.offt.gov.uk/advice_and_resources/resource_base/consumer-regulations/undertakings-court-action/

available (criminal, civil and administrative) and continues to act with the cooperation of the police to conduct searches and make arrests in order to restrain the proceeds of crime.

Whilst the FSA may not be successful with all of these cases, the clear message is that it considers that the threat of a custodial sentence acts as a significant deterrent against market abuse. It is difficult to argue with the theory. Let's see how it pans out in practice.

Throughout 2009/10 we can also expect thematic reviews of anti-bribery and corruption systems and controls, particularly in

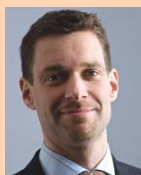
commercial insurance brokers' systems (see the Aon Limited case⁴) with continuing focus on small firms' financial crime systems and controls in the areas of anti-money laundering and counter-terrorist financing, fraud, financial sanctions and data security.

Summary

The FSA has at least made its position clear with regard to enforcement intentions. Nobody can say that there has been no warning...

⁴<http://www.fsa.gov.uk/pubs/final/aon.pdf>

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