The FSA's Current Enforcement Priorities

In keeping with the statement by the FSA's chief executive, Hector Sants, that 'people should be very afraid of the FSA', the year 2010 has seen an increased emphasis by the FSA on enforcement activity — a by-product of its move to a more intrusive form of regulatory supervision. The days when the FSA was at pains to deny that it was an enforcement-led regulator appear firmly in the past.

Thus far in 2010, the FSA has announced some 50 disciplinary measures (or the undertaking of criminal prosecutions) against authorised firms and individuals. Whilst over a quarter of these cases involve mortgage brokers, insurance intermediaries and independent financial advisers, they nonetheless warrant attention by investment managers and broker-dealers, as they illustrate the sort of behaviour that the FSA is increasingly targeting. Coupled with the other measures the FSA has taken, they indicate that the regulator is pursuing an aggressive strategy against those it perceives as wrongdoers.

Perhaps the most important area where the FSA has been active is in taking action against those committing insider dealing. So far in 2010, the FSA has announced five separate fines, including one of £4 million on an FSA-regulated firm, and its largest-ever fine on an individual, of £2.8 million. In a further prosecution for insider dealing, a partner in a major stockbroking firm received a 21-month prison sentence. Additionally, the FSA is currently prosecuting five separate insider dealing cases involving 14 persons. The interesting aspect here is that, accelerating a trend that began some two years ago, the FSA is combining the civil powers it has to take action in this sphere (fining) with its criminal powers, which can lead (and have led) to those found guilty being imprisoned. The FSA clearly believes that a realistic possibility of imprisonment can act as an important curb on the behaviour of individuals and thus as a defence against market abuse; as there seems to be no desire by the FSA to keep its powers in this area hidden — indeed, quite the reverse — investment managers and broker-dealers would be well advised to ensure that their systems and controls are sufficient to prevent the possibility of insider dealing by their staff.

An FSA enforcement case from February 2010 shows how having adequate systems and controls, coupled with a desire to compensate investors for any loss suffered as a result of employee wrongdoing, can result in a firm escaping FSA censure, even if its employee does not. In this case, a hedge fund manager working for Bluebay Asset Management ('Bluebay') was fined £140,000 for deliberately mismarking positions. However, the FSA went out of its way (in both the 'Final Notice' issued to the manager and in its press release) to emphasise that despite the finding against the manager, it made no criticism of Bluebay. It could not have come to this conclusion had the mismarking revealed a crucial weakness in the systems that Bluebay had put in place.

Systems and controls failures form the basis of many of the FSA's enforcement actions in 2010. In action taken against Standard Life announced in January (where the firm was fined £2.4 million for systems and controls failures relating to misleading marketing material for a pension fund), the FSA made it clear that this case showed its intention to take tough action against firms where the marketing material fell short of the 'clear, fair and not misleading' standards required by the FSA's rules, and where customers have not been treated fairly. The FSA has also meted out heavy fines for firms that have failed to provide it with accurate and timely transaction reports (some £4.2 million in April), and has fined a firm and its money laundering reporting officer for failures in anti-money laundering systems and controls. Those firms that have lax systems and controls can thus expect little mercy from the FSA should their failings be exposed — and the same is true of those individuals who are responsible.

In 2010, the FSA has also proven that it will take steps to bar from the industry those who by their actions show that they are unsuitable to carry out their functions. This is not simply for acts of dishonesty (though there are examples of that as well), but also in circumstances where individuals fall short of the degree of competence that the FSA expects to be exhibited, whether as director, manager, broker or adviser. Firms therefore need to satisfy themselves (through a combination of training programmes and assessments) that their staff — particularly those who are approved persons — continue to display the appropriate level of ability that the FSA rules demand. The consequences of FSA action in this area can be severe: Gartmore shares fell 5% after it announced on 1 June 2010 that the FSA was investigating the conduct of Guillaume Rambourg, one of the firm's top fund managers.

Whilst rumours of the FSA's long-term survival may be somewhat exaggerated (the final coalition document between the Conservative and Liberal Democrat parties leaves it tantalisingly unclear as to whether micro-supervision of institutions will remain with the FSA or be transferred to the Bank of England), there seems little doubt that it will exist for the immediate future. Firms should therefore note its more interventionist enforcement policy, and plan accordingly.

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