



Regulatory Roundup – 30 April 2010

Issue #13



In Brief:

Transaction Reporting:

Firms are still having issues with transaction reporting

Winterflood: FSA fines

Wins £4m

Fines: FSA fines to date in 2010 are up to £14.3m

Bribery Act 2010: Creates new statutory offences, replacing common law.

FINMAR: A new financial stability objective for the FSA

Greek Shorts: No more shorting in Greece

New Websites:

Complyport and the FSA launch their new websites!

In your Complyport Regulatory Roundup:

<i>Transaction Reporting Problems</i>	<u>2</u>
<i>Winterflood Securities Fined</i>	<u>3</u>
<i>More FSA Fines</i>	<u>3</u>
<i>Bribery Act 2010</i>	<u>4</u>
<i>FINMAR</i>	<u>5</u>
<i>Greek Shorts</i>	<u>6</u>
<i>New Websites</i>	<u>6</u>

If any of the topics discussed above raise questions or a need for guidance or support, please feel free to contact [Peter Carlisle](#).

Transaction Reporting Problems



Useful Links:

[Commerzbank Final Notice](#)

[The TRUP](#)

Following on the heels of the £4.2m fine imposed on three big name firms for transaction reporting failures (see Regulatory Roundup No 12) the FSA released details of a further firm – **Commerzbank AG** - to be fined for transaction shortcomings. What is interesting about the latest fine (£595,000) is that it is imposed upon an incoming EEA branch passported into the UK. Commerzbank is actually regulated by the BaFin so the FSA could not take any action in respect of possible systems and controls failures as this is the responsibility of the home state regulator. The transaction reporting got off to a bad start in the run up to MiFID implementation when the classic scenario of one project team assuming that the other project team was 'doing something' arose. Add to this a lack of formal transaction monitoring for a year and incorrect filtering by the firm's transaction reporting system could only mean that one day there would be 'a problem'. The Final Notice shows that the firm failed to report 10% of transactions in the two year period in question and inaccurately reported 84% of reportable transactions: adding the two together means that only 6% of reportable transactions were reported in keeping with regulatory requirements.

Firms that have an obligation to transaction report may wish to give consideration to increasing the frequency and/or sampling size in their compliance monitoring. Note that not for the first time the FSA has mentioned that it is willing to provide firms with sample reports so that firms can check those transaction reports against their own records.

None of the cases to date are against any firms that are simply providing a service of portfolio management and so take advantage of SUP 17.2.2G which allows them to rely on the other party (typically the broker) to make the report. In the absence of any further comments etc. from the FSA such firms can only look to the guidance given on page 12 of TRUP and to make sure that they can justify the 'reasonable grounds' requirement. In the last Regulatory Roundup we also suggested that firms with a low risk appetite could consider requesting appropriate confirmation from their brokers. Having said that, we are aware from some firms that in the current regulatory environment such requests are not being met. Other approaches we have heard include firms undertaking to do their own transaction reporting – reporting 100% of everything as a precaution.

We would be interested to hear any views that firms may have on this topic, including whether you feel that enough is being done by the FSA to explain what (further) actions need be taken by firms to ensure that their transaction reporting obligations are met. Any comments received would, of course, be treated in confidence although if there was a consensus response we would be happy to include it/them in a future Regulatory Roundup.

2

Winterflood Securities Fined

Other FSA Fines



Useful Links:

[Wins Final Notice](#)

Winterflood, the largest market maker on the AIM market, lost its appeal against the decision of the Financial Services and Markets Tribunal in March 2009, which found they had committed market abuse. Winterflood had been accused of failing to recognise and react to clear warning signs that something was amiss, and instead of challenging trades Winterflood allowed them to go ahead and make large profits as a result. The Court of Appeal has found in favour of the FSA and now requires Winterflood to pay a fine of £4m, while the two traders in question, Sotiriou and Robins, must pay a fine of £200,000 and £50,000 respectively.

The significance of the case is that it was found that s118 of FSMA is wholly objective; that is, market abuse can exist **irrespective of whether or not there was any intention** to commit an offence. (Winterflood had previously argued that there had to be a form of 'actuating purpose' or subjective mental element on the part of the accused to mislead or distort the market). The message is that the FSA is determined to take tough action to tackle market abuse.

[FSA Fines](#)

Further to the Winterflood and Commerzbank fines, this marks the end of a very busy April for the FSA. The month saw a total of 16 fines added to the 2010 fines table (although some cases stem from the same source e.g. the Winterflood case gives rise to three separate entries in the table). Total fines to date in 2010 amount to £14.3m.

Bribery Act 2010



Useful Links:

[Bribery Act 2010](#)

[FSA Interim Findings](#)

[AON Final Notice](#)

The Bribery Act 2010 creates new statutory offences, replacing common law. The most significant change is the introduction of a corporate offence, 'failure to prevent bribery' by persons associated with a business. 'Bribery' would include the suggestion of a bribe and penalties include an unlimited fine. The UK courts could have jurisdiction if the offence takes place outside the UK but is committed by a person who is closely connected with the UK, such as UK nationals or companies incorporated in the UK.

If a business has 'adequate procedures' in place designed to prevent persons associated with it from undertaking conduct which would be regarded as bribery, then the existence of such procedures will be a defence against prosecution. Although the Bribery Bill received Royal Assent on 8 April 2010, most sections of the Act will only come into force upon order of the Secretary of State made by Statutory Instrument – expected to be by the end of this year although the exact date is unknown. Unfortunately at this moment there are also no guidelines as to what 'adequate procedures' are. The Bribery Act provides the Secretary of State with powers to produce guidance (see section 9 of the Act) on what these might be. The Conservatives, during debate of the bill, have indicated they would create an agency to advise businesses on their practices and would do so if they enter government after the election.

The FSA also has an interest in anti-bribery measures. It may be recalled that the FSA fined AON Ltd £5.25m last year for failings related to maintaining effective systems and controls to counter the risks of bribery and corruption associated with making payments to overseas firms and individuals. The FSA's key findings to date on the subject, albeit with an insurance broker twist, can be viewed via the link to the FSA webpage.





Useful links:

[CP10/11](#)

[Financial Services Act 2010](#)

FINMAR will be the abbreviation given to a new Handbook module: the Financial Stability and Market Confidence Sourcebook. It is referenced in the latest consultation paper from the FSA – CP10/11 “Implementing aspects of the Financial Services Act 2010”. The CP has been released following the Financial Services Bill 2010 receiving Royal Assent on 8 April 2010 (see Regulatory Roundup issue number 12), although it should be noted that many of the Act’s provisions do not come into force until two months from this date. The paper reminds us that the FSA’s powers have been increased and have been given a new regulatory objective of financial stability (the regulator’s public awareness objective is likely to be removed following the establishment of a new consumer financial education body).

Highlights include removing the **short selling** rules in MAR and remaking them in FINMAR, so removing the current need for the FSA to link shorting rules with market abuse. The proposals would also tighten the rule in respect of rights issues so that it will apply only to UK incorporated companies (or non-UK companies if a UK prescribed market is the sole/main trading venue). The FSA acknowledge the CESR shorting proposals which contain different disclosure thresholds. Disclosure obligations will apply to the client (for non-discretionary management) and to both the client and the investment manager for discretionary managed portfolios (although it will be acceptable for the manager to make disclosures on behalf of a client).

Enforcement powers will be beefed up and will include the imposition of penalties on persons who breach short selling prohibition/disclosure requirements. The power of suspension can be applied to both firms (up to 12 months) and to approved persons (up to 2 years). The FSA’s penalty reach also extends to persons performing controlled functions without approval. It’s interesting to read from section 3.63 of CP10/11 that the FSA will need to train up relevant persons within its organisation, so that they are familiar with the new enforcement powers, which will cost an estimated £30 per head.

Information gathering powers now fall to the FSA and applies equally to authorised and non-authorised firms. Tucked away on page 33 is a comment that the power would also allow the FSA to gather information which could lead to expanding the regulator’s regulatory scope. Firms subject to the information gathering powers could include regulated/unregulated collectives and “. . . vehicles often referred to as **‘hedge funds’** and their managers . . .”. Additionally the power will extend to proprietary traders and service providers to authorised firms.

Cont... 5



FINMAR (cont)

Greek Shorts

Websites



Useful links:

[CP10/11](#)

[Financial Services Act 2010](#)

From previous page...

The Act also places a duty on the FSA to make rules in relation to **remuneration**. As you'll know, SYSC 19 ("Remuneration Code" - introduced at the beginning of the year) does, of course, already apply to certain types of firms; however the Act refers to "... requiring *each* authorised person ... to have, and act in accordance with, a remuneration policy." The current CP does not cover remuneration issues and we'll have to wait until the end of Q2, when a further CP will be issued, to learn more. Another aspect of the Act which is aimed at all firms ("each authorised person") is the need for the FSA to make rules regarding 'living wills', or 'recovery and resolution plans' as described in the Act. The CP barely references this.

The consultation period ends 25 June.

As is always, the draft new rules and changes to existing rules are contained within various Appendices to the paper.

[Press Release](#)

A press release reveals that Greece has banned the short selling of shares listed on the Athens Exchange.

[Complyport](#)

Complyport has launched its 'new look' website, which hopefully firms will find far easier to navigate than the FSA's 'new look' website.

[FSA](#)

The new look Complyport website now includes an archive (via 'Regulatory News') of the current and past Regulatory Roundups. If you have any comments or suggestions for improvement then do please let us know.

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If any of the topics discussed above raise questions or a need for guidance or support, please feel free to contact

[Peter Carlisle](#)

For details of any other of Complyport's services, please contact [Philip Chapman](#)

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