



Enforcement – Lessons Learnt

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Objectives and Agenda

- Enforcement cases in 2021
- Enforcement cases in 2022
- Forsyth and Frensham
- Whither Enforcement in 2022?

Enforcement Data: FCA Annual Report 2020-21

Table 2: Average length of regulatory and civil cases

Year	Average length of cases resolved by agreement (months)	Average length of cases referred to RDC (months)	Average length of cases referred to Tribunal (months)	Average length of all cases, including NFA cases (months)
2018/19	29.1	50.8	74.1	17.5
2019/20	37.4	53.5	57.0	23.9
2020/21	32.6	47.2	120.1*	24.7

Enforcement Data: FCA Annual Report 2020-21

Table 3: Average cost of regulatory and civil cases

Year	Average cost of cases resolved by agreement (£000s)	Average cost of cases referred to RDC (£000s)	Average cost of cases referred to Tribunal (£000s)	Average cost of all cases, including NFA cases (£000s)
2018/19	£195.2	£253.5	£447.3	£103.4
2019/20	£341.6	£748.8	£601.8	£229.0
2020/21	£365.7	£597.6	£826.7	£165.1

Enforcement Cases in 2021

Firm or individual fined	Date	Amount	Reasoning
HSBC Bank plc	17/12/2021	£63,946,800	This Decision Notice refers to breaches of the Money Laundering Regulations 2007 related to financial crime in the Retail bank sector.
National Westminster Bank Plc	13/12/2021	£264,772,619.95	For 3 offences of failing to comply with the Money Laundering Regulations 2007. Note: This is not a fine that will appear in the FCA's statutory accounts as it is not levied by, or paid to, the FCA.
Sunrise Brokers LLP	12/11/2021	£642,400	This Final Notice refers to breaches of PRIN 2 and PRIN 3 related to the risk of financial crime in the trading firms sector. We imposed a financial penalty.

Enforcement Cases in 2021

<u>Credit Suisse International, Credit Suisse Securities (Europe) Ltd, and Credit Suisse AG</u>	19/10/2021	£147,190,200	This Final Notice refers to breaches of Prin 2 and Prin 3 related to financial crime and anti-bribery and corruption failings in the investment banking sector.
<u>Omar Hussein</u>	11/10/2021	£116,000	The Final Notice refers to breaches of Statements of Principle for Approved Persons 1 and 7.
<u>Lloyds Bank General Insurance Limited, St Andrew's Insurance Plc, Lloyds Bank Insurance Services Limited and Halifax General Insurance Services Limited</u>	08/07/2021	£90,688,400	This Final Notice refers to breaches of PRIN 3 and PRIN 7 related to communications with customers in the general insurance and protection sector.

Enforcement Cases in 2021

Crosfill and Archer Claims Limited	28/06/2021	£110,000	This Final Notice refers to breaches of breach of the Conduct of Authorised Persons Rules 2014 (“CAPR”) related to unfair treatment of customers in the claims management sector.
Sapien Capital Limited	06/05/2021	£178,000	This Final Notice refers to breaches of PRIN 2 and PRIN 3 related to the risk of financial crime in the trading firms sector.
Simon John Varley	15/04/2021	£68,300	This Final Notice refers to Section 63A FSMA and breaches relating to APER 1 and FIT relating to a lack of honesty and integrity in the investment advisory sector.
Adrian Horn	04/03/2021	£52,500	The Final Notice refers to breaches of MAR and FIT relating to Market Abuse in the Trading Firm sector.

Plus: BlueCrest Capital (referred to the Tribunal)

BlueCrest Capital

- ❑ On 22nd December 2021, the FCA fined BlueCrest Capital Management (BlueCrest) £41m for failing to manage a conflict of interest affecting its investors. The FCA has also decided to impose a requirement on BlueCrest to pay redress to clients who have suffered loss as a result of its failings. **BlueCrest has referred the case to the Upper Tribunal.**
- ❑ In 2020, BlueCrest reached a settlement with the US Securities and Exchange Commission for the same misconduct. As part of the settlement, the firm agreed to return \$170m to investors.
- ❑ The FCA determined that BlueCrest breached Principle 8 by failing to adequately manage the conflict of interest that moving its best performing portfolio managers from a fund for external investors to a fund investing staff money could disadvantage external investors (all external fund investors were professional clients). The FCA decision covers the period from October 1 2011 to December 31 2015. In 2016, BlueCrest converted into a family office.

Facts of the case

- BlueCrest developed an algorithm called Rates Management Trading (RMT) which was designed to replicate trades made by BlueCrest's traders working on the internal fund for the external fund. This algorithm was an important factor in the reallocation of portfolio managers. The FCA and SEC found that RMT did not perform in the same way as portfolio managers assigned to the internal fund, and at times significantly underperformed. Decisions about allocating traders to the internal fund were made by senior managers who also invested in that fund.

BlueCrest Capital

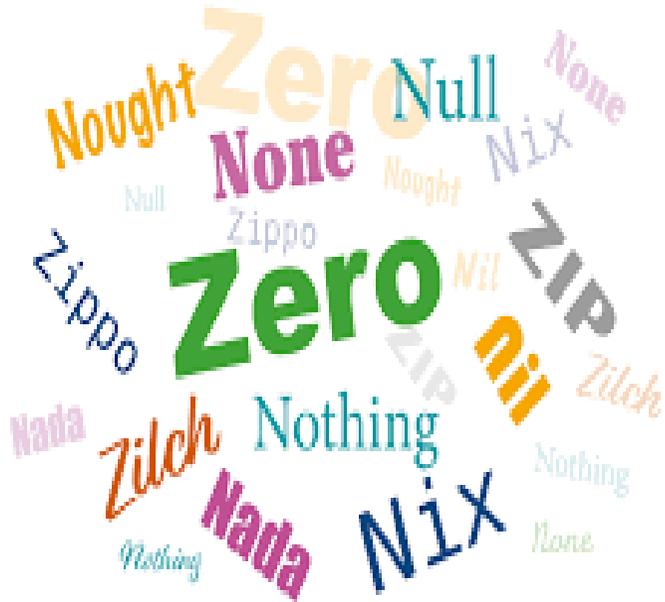
- BlueCrest had a Conflicts of Interest Policy and governance process in place for identifying and managing potential conflicts. The firm recognised that the allocation of portfolio managers to the internal fund gave rise to a conflict of interest. The primary control on which the firm relied to mitigate this conflict was the fact that decisions concerning the allocation of fund managers to the funds were made by senior individuals who had a regulatory (and fiduciary) duty to serve the interests of the funds and their investors.
- **The FCA stated that the BlueCrest failed to recognise that this control was ineffective, and indeed made the conflict worse.** This is because decisions concerning the internal fund's allocation of portfolio managers were made exclusively by the senior staff invested in it, which placed them in a situation where they stood to benefit from these decisions personally, in conflict with the duties they owed to investors in the external fund. The firm was aware of the material risks presented by this conflict, but nevertheless approved the inadequate primary control intended to mitigate it. The FCA considers BlueCrest's conduct was "reckless", and led to "a substandard" service for clients.
- The FCA further stated that BlueCrest's disclosures to investors were "entirely insufficient and, at times, misleading". For instance, investors were not told that the top performing traders had been moved to the internal fund and that a significant amount of investor money was being managed by the underperforming RMT.

Key Takeaways

Whilst the specific facts and circumstances are most relevant to buy-side firms, there are a few overarching takeaways for all FCA regulated firms, in particular three issues:

- ✓ In the area of conflicts of interest, we have previously seen enforcement actions where there is clearly a lack of appropriate systems and controls. This case demonstrates regulators' willingness to pursue enforcement actions in situations where there were (arguably) appropriate policies and governance processes in place, but the specific decisions that were made on how to manage the conflict was (in the SEC and FCA's opinion) inadequate.
- ✓ The case also demonstrates that generic conflicts disclosures are insufficient to manage a conflicts of interest. Instead, an appropriate disclosure should be provided to the client so that they are in a position to provide informed consent. When providing such disclosures, it is important that they are clear and not misleading.
- ✓ Finally, the case serves as a reminder that decisions on how to manage a particular conflict should not be made by members of staff if they themselves are in a position of conflict of interest

Enforcement Cases in 2022



Forsyth

The “lack of integrity” was based on the allegation that Mrs Forsyth did no material work for SBIA, which was found NOT to be the case

➤ 30 September 2019:

- Stuart Malcom Forsyth Decision Notice
- Forsyth was CEO of Scottish Boatowners Mutual Insurance Association
- Fine of £76,180 (PRA) and £78,318 (FCA) and banned from regulated activity based on alleged tax evasion leading to a breach of Principle 1 (Integrity)
- 6th July 2021: The Tribunal overturned the FCA’s and PRA’s case against Forsyth

First UT referral for a PRA enforcement action

“We have found that the Regulators have not made out their case that Mr Forsyth failed to act with integrity in relation to the subject matter of these references. Accordingly, we have directed that the Regulators should not impose a financial penalty on Mr Forsyth, and we have remitted the question of whether a prohibition order should be imposed to the Regulators for them to reconsider their decision in that regard. “

➤ Two issues arise out of this case:

➤ 1. The regulators' attitude to and diligence around future cases

- The Tribunal criticised the way in which the initial investigation was run
- The Tribunal also criticized the regulators' compliance with disclosure obligations during the proceedings:
- *“These failings "cannot be regarded as anything other but the most serious failing on the part of the Regulators. Such failings threaten the integrity of the Tribunal process.”*
- The Tribunal suggested training of the regulators' enforcement staff

➤ 2. The question of integrity

Integrity and Fitness & Propriety

- Judgement in the Forsyth Case:
- “A lack of integrity does not necessarily equate to dishonesty. While a person who acts dishonestly is obviously also acting without integrity, a person may lack integrity without being dishonest. One example of a lack of integrity not involving dishonesty is recklessness as to the truth of statements made to others who will or may rely on them or wilful disregard of information contradicting the truth of such statements.”

Integrity and Fitness & Propriety

- Wingate v SRA [2018]
- “As a matter of common parlance and as a matter of law, integrity is a broader concept than honesty... . In professional codes of conduct, the term “integrity” is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards. Integrity connotes adherence to the ethical standards of one’s own profession. That involves more than mere honesty.”

Integrity and Fitness & Propriety

- “We accept that Mr Forsyth, as the Chief Executive of a regulated insurance firm, would likewise be expected to adhere to higher standards than those expected from general members of the public because of the trust that the public rightly put in those who lead regulated financial services firms.
- This is one of the ways of distinguishing “integrity” from “honesty”. The latter concept is a basic moral quality which is expected of all members of society. Honesty involves being truthful about important matters and respecting the property rights of others. It follows that a person who is dishonest in his conduct is guilty of more serious misconduct than a person who acts without integrity. That is why regulators are usually astute in identifying whether they characterise the conduct of which they complain as demonstrating a lack of honesty as opposed to a lack of integrity.”

Where does this leave Staley?

Frensham

- September 2021:
- The Tribunal upheld the FCA's decision to ban the IFA Jon Frensham
- Frensham had been convicted of grooming a minor

- However, the Tribunal Chairman criticised the FCA for:
 - a lack of diligence in following up following Frensham's conviction (2017-2020)
 - putting forward witnesses who were not properly prepared
 - being unclear in its attitude towards non-financial misconduct

Whither Enforcement in 2022 and Beyond?



Issuing statutory notices – a new approach
to decision makers

Policy Statement
PS21/16

November 2021

Why?

“To tackle the challenges faced by consumers and industry, we need to make faster and more effective decisions to promote the right outcomes for consumers, markets and firms. This need for change was also made clear in the criticisms and recommendations set out in the independent reviews into our regulation of London Capital & Finance (LCF) and the Connaught Income Fund Series 1 and connected companies (Connaught).”

- RDC should focus on significant misconduct cases, where the harm has already materialised and the issue is what, if any, sanctions are appropriate
- Greater decision-making should be allocated to the Executive, to place greater responsibility and accountability with FCA staff
- Greater willingness to be more assertive in the use of powers when the FCA identifies concerns with the potential to cause or increase harm to consumers. As a result, senior managers will be more involved in:
 - starting civil proceedings, such as seeking an injunction
 - starting criminal proceedings, such as a prosecution for insider dealing
 - using the FCA's powers to vary or limit a firm's permissions
 - using the FCA's powers to impose requirements on a firm

- Concerns raised in the consultation:
- Too much emphasis on speed at the expense of fairness and objectivity
- RDC is independent and objective
- RDC provides procedural fairness because of its ability to act as a check and balance on the Executive
- Risk of bias due to the difficulty of maintaining proper separation between the investigation and the decision

- Poll: Are you comfortable with greater decision-making being devolved to the Executive without RDC review?

Conclusion

- The FCA has stated its aim to be an assertive regulator
- This goes for both ends of the process
- The enforcement process is going to be a more difficult one for the regulators going forward.....
- ...but more powers are to be devolved to less experienced people

- The best way to avoid these issues is to:
 - work with senior management to take a risk based approach to embedding compliance culture, policies and procedures into business as usual
 - maintain as positive a relationship with the regulators as possible

Thank you for attending

Any Questions:

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