



## REGULATORY UPDATE 2/2009

This newsletter is available online at:

<http://www.complianceireland.com/Newsletter.html>

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### Our group websites

Readers will be aware that we run specialist regulatory websites - [www.antimoneylaundering.ie](http://www.antimoneylaundering.ie) and [www.mifid.ie](http://www.mifid.ie). A little while ago we launched [www.privacy.ie](http://www.privacy.ie). Like our other websites, [www.privacy.ie](http://www.privacy.ie) has proved quite a success. Content is continually added to these websites. Other specialist websites will follow soon. Take a moment to visit these sites for specialist information on the topics they cover. These sites complement the extensive resources available on [www.complianceireland.com](http://www.complianceireland.com).

Welcome to the **June 2009** regulatory update from *Compliance Ireland*. In this Newsletter:

### New subject topics added to [www.complianceireland.com/HotTopics.html](http://www.complianceireland.com/HotTopics.html)

- April 2009: Financial Regulator reminds MiFID firms of deadlines for complying with Pillar 3 disclosures and ICAAP obligations
- 24 April 2009: Convicted Money-Launderer Ted Cunningham sentenced to 10 years in jail
- 8 April 2009: Settlement Agreement with Mr John Gurhy t/a Gurhy Properties & Financial Services, The Debt Doctor
- 3 March 2009: Financial Regulator publishes report into Director's Loans at Credit institutions covered by the Government Guarantee Scheme
- 2 March 2009: New registration and financial crime requirements for gaming community

### New training presentations on MiFID & Data Protection added to

<http://www.complianceireland.com/Resources.html> (links to presentations on next page)

### Updates to our Press Page

The following Press articles and interviews, to which we have contributed since February 2009, have been uploaded at <http://www.complianceireland.com/Press.html>:

- Journal of Securities Law, Regulation & Compliance, Volume 2, Number 2, April 2009 *The changing corporate governance scene in Ireland for offshore financial services* (Kevin O'Doherty)
- Radio - Newstalk (Lunchtime with Eamon Keane), 26 March 2009 *AIB victim of complex UK investment property fraud* (Peter Oakes)
- Finance Magazine, March 2009 *Coping with new corporate governance challenges* (Kevin O'Doherty)
- eFinancial, 17 March 2009 *What happened to the rush of anti-money laundering recruitment?* (Peter Oakes)
- IrishEconomy.ie, 10 March 2009 *A Canadian Model (of regulation for Ireland)* (Peter Oakes)
- Radio - Newstalk (Down to Business with Mark Mortell), 28 February 2009 *Raid by Garda on Anglo Irish Bank* (Peter Oakes)
- Radio - RTE Morning Ireland, 2 March 2009 *Plans to create new financial regulator* (Peter Oakes)
- Video - RTE Six One News, 27 February 2009 *EU to discuss financial regulation* (Peter Oakes)
- Video - RTE Prime Time, 24 February 2009 *The state of international regulation in the Irish banking sector* (Peter Oakes)

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- Data Protection: *Personal Data Retention* (Presentation by Peter Oakes to Irish Computer Society Seminar 26 May 2009)
- Data Protection: *Courts, Legislative Update and Recent Issues* (Presentation by Peter Oakes to Irish Computer Society Data Protection Conference 21 April 2009)

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- 13 May 2009: Financial Regulator publishes warning notices
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- April 2009: Financial Regulator reminds MiFID firms of Pillar 3 and ICAAP obligations
- 23 April 2009: Corporate Governance (Codes of Practice) Bill 2009 (Private Member's Bill) introduced
- 23 April 2009: Financial Regulator publishes Consultation Paper 36 on Disclosure of Grants of Security over Shares
- 20 April 2009: Financial Regulator updates Operational Guidance on Prudential Requirements applicable to Captive Insurance Undertakings
- 8 April 2009: Settlement Agreement with Mr John Gurhy t/a Gurhy Properties & Financial Services, The Debt Doctor
- 24 March 2009: Financial Regulator issues statement rebutting allegations regarding awareness of foreign exchange overcharging
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- 13 May 2009: FSA fines Morgan Stanley £1.4m for failing to prevent trader mis-marking and fines and bans Matthew Sebastian Piper
- 29 April 2009 Hedge fund manager banned and fined £35,000 for mis-marking trading positions to hide losses
- 6 April 2009: FSA wins tribunal case to ban former Chief Executive of GenRe Business Unit

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- 10 June 2009: FSA bans and fines brokers for mortgage fraud
- 27 May 2009: Six arrested in insider dealing Investigation
- 20 May 2009: FSA brings insider dealing prosecution against City professionals
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- 27 April 2009: FSA publishes report on financial services firms' approach to UK financial sanctions
- 2 April 2009: FSA wins Market Abuse case and fines Winterflood £4 Million

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- 27 May 2009: European Commission proposes new framework for European financial supervision
- 29 April 2009: European Commission proposes Alternative Investment Fund Managers Directive

## FREE REGULATORY PRESENTATIONS

**Compliance Ireland** has uploaded Adobe pdf versions of the following presentations:

(1) MiFID: *MIFID update - The Experience of 2008 and the Challenges for 2009 (Seminar Presentation by Peter Oakes & Kevin O'Doherty on 27 February 2009)*. This document can be accessed at <http://www.mifid.ie/whatnew.html>.

(2) Data Protection: *Personal Data Retention (Presentation by Peter Oakes to Irish Computer Society Seminar 26 May 2009)*. This document can be accessed at <http://www.privacy.ie/resources.html> (scroll down to heading 'Presentations').

(3) Data Protection: *Courts, Legislative Update and Recent Issues (Presentation by Peter Oakes to Irish Computer Society Data Protection Conference 21 April 2009)*. This document can be accessed at <http://www.privacy.ie/resources.html> (scroll down to heading 'Presentations').

*These are large memory documents and so please do not try to download these documents using anything less than a broadband line.*

## COMPLIANCE IRELAND TRAINING

### Quarter 2 2009 training course dates (June 2009 dates)

Full details of all CURRENT COURSES can be found at <http://www.complianceireland.com/Training.html> or <http://www.compliancetraining.ie>. You can download the full training programme in pdf format at [http://www.complianceireland.com/documents/Q1\\_and\\_Q2\\_2009\\_Training\\_Programme\\_RoI\\_web.pdf](http://www.complianceireland.com/documents/Q1_and_Q2_2009_Training_Programme_RoI_web.pdf).

All courses can be tailored for in-house delivery too. Please contact us at +353 1 425 5962 or visit our website for further information. Bookings can be made by email to [bookings@complianceireland.com](mailto:bookings@complianceireland.com).

**CPD Credits/Hours:** Our courses are accredited by the Institute of Bankers (QFA, CPD Members, LCOI (i.e. ACOI) and CeB) and Insurance Institute of Ireland (QFA, LCOI (i.e. ACOI), CIP and CFD Members). Solicitors and Accountants may claim CPD hours from their membership bodies as may others with CPD requirements. Formal and informal CPD hours vary depending upon your professional association's rules. Please contact us ([email@complianceireland.com](mailto:email@complianceireland.com)) or your professional association if you have any queries on the amount of CPD hours that may be claimed for our courses.

### HOW TO HANDLE A FINANCIAL REGULATOR (IFSRA) INSPECTION (HALF DAY)

9.00am to 1.00pm, **Thursday 18th June 2009** (Compliance Ireland offices, 13 Adelaide Road, Dublin 2). Cost: €380 (no VAT)

- *"Extremely useful with good practical tips. I look forward to attending more seminars with Compliance Ireland."* (Financial Company - Financial Regulator Inspection course)

Webpage: <http://www.complianceireland.com/FRInspections.html>

### THE ROLE OF THE COMPLIANCE OFFICER (FULL DAY)

#### **BANKS & INVESTMENT BUSINESS FIRMS:**

9.00am to 5.30pm, **Tuesday 23<sup>rd</sup> June 2009** (Compliance Ireland offices, 13 Adelaide Road, Dublin 2). Cost: €580 (no VAT)

- *Very informative including blueprints & understanding the role of the Compliance Officer* (Investment Manager – Compliance Officer attendee)

Webpage: <http://www.complianceireland.com/ICONI&I.html>

### THE ROLE OF THE COMPLIANCE OFFICER (FULL DAY)

#### **INSURANCE FIRMS:**

9.00am to 5.30pm, **Tuesday 30th June 2009** (Compliance Ireland offices, 13 Adelaide Road, Dublin 2). Cost: €580 (no VAT)

- *"75% of the content of about 60% of training I have attended is 'padding' – this is one of the very few training courses I've attended where I was very impressed. Keep up the good work!"* (Insurance Company – Compliance Officer attendee)

Webpage: <http://www.complianceireland.com/ICONI&I.html>

**OTHER COURSES – SEE [WWW.COMPLIANCETRaining.IE](http://WWW.COMPLIANCETRaining.IE)**

## FINANCIAL SERVICES – IRELAND

### 17 JUNE 2009: NEW BLUEPRINT FOR IRISH, EUROPEAN UNION AND UNITED STATES FINANCIAL REGULATION SYSTEM

#### **IRELAND - Proposals for new Irish financial regulatory system:**

Since Taoiseach (Irish Prime Minister) Brian Cowen's announcement, on 28 February 2009, at his political party's 72nd annual gathering (known in Ireland as the Ard-Fheis) of his intention to push for a new Central Banking Commission (see [http://www.complianceireland.com/HotTopics.html#Cowen\\_announce\\_CBC](http://www.complianceireland.com/HotTopics.html#Cowen_announce_CBC)) little has filtered into the public domain about how the Taoiseach will achieve his objective. Even the Industry Consultative Panel established by the Minister of Finance, judging by a reading of its minutes since the time of the Taoiseach's announcement in February to the latest published May 2009 minutes, is equally in the dark despite a recent meeting between its Chairman and the Minister of Finance.

Once again we need to turn to journalists – who seem to have well-placed 'deepthroats' in government circles – to fill the transparency void.

According to Clifford Taylor writing in the *Sunday Business Post* (14 June 2009), the Minister of Finance Brian Lenihan and Communications Minister Eamon Ryan are to meet early this week (w/c 14 June 2009) to try to finalise a reform plan for financial regulation before placing same before the Cabinet. Apparently plans were scheduled to go to cabinet last week (around 10 June) but were delayed at that time because, according to Joe Brennan writing in the *Independent* (10 June 2009), the coalition partners used the meeting to discuss their respective election results in the recent local, European and by-elections.

In the absence of any meaningful publicly available information emanating from the Minister of Finance (and, to the extent that the regulators themselves are kept briefed by the Department of Finance) we have pooled areas of apparent consensus from those 'in the know'. A radical overhaul of the regulatory structure is planned keeping the consumer at the heart of the new regulatory system. New measures will include:

- the Central Bank and the Financial Regulator being centralised under the direct control of one governor *[Ed – back to the future – we split the operations between the Central Bank and Financial Regulator 6 years ago in 2003].*
- the regulatory structure will be run by a director of financial supervision, who will have four directors.
  - two directors will be involved in prudential supervision. One director will assume responsibilities for markets and securities and another for financial institutions.
  - a third director will be accountable for consumer issues.
  - the fourth will be responsible for support services *[Ed - a Chief Operating Officer type role is long overdue].*

The exact placement of the consumer director (currently Mary O'Dea) is unclear. The role includes not only ensuring that financial institutions comply with conduct of business rules but also providing information to the public on consumer issues. The latter function is expected to be spun-off into a new body and merged with the National Consumer Agency (NCA), which itself is scheduled to merge with the Competition Authority. However the government suggested a number of months ago a merger of the Financial Services Ombudsman with the consumer directorate of the Financial Regulator. The housing of the consumer director and operational distribution of his/her powers seems to be a complicated matter.

A report by Mazars of weaknesses within the Financial Regulator will be taken into account, including addressing significant underinvestment in technology and a lack of regulatory expertise in some areas.

## *Financial Regulator to beef up resources*

Following on from our article above, we read with interest the Financial Regulator's advertisements in the *Irish Times* and (twice) in the *Sunday Times* seeking 20 staff to fill new roles of Capital Markets Bank Examiners, Credit/Treasury Expert, Capital Requirements Directive Expert, Financial Data Analyst, Enforcement Specialist, Re/insurance Expert, Risk Management Expert, Markets Intelligence Expert, EU/International Expert, Business Analyst Expert, Regulated Disclosure Expert and, at a senior level, a General Counsel. If readers have an interest in these roles, act swiftly, as the closing date for application is Friday 19 June. Go to our website jobs board at [http://www.complianceireland.com/Financial\\_Regulator\\_Various.html](http://www.complianceireland.com/Financial_Regulator_Various.html) for more.

*[Ed -The advertisement refers to successful candidates working within a new Central Bank of Ireland. This body will be a single integrated structure incorporating the existing role of the Central Bank of Ireland and the Financial Regulator's responsibilities for prudential supervision of financial institutions.]*

## **EUROPEAN UNION - Proposals for new pan-European financial regulatory system:**

As Ireland gets to grips with the failures in its regulatory system, the European Commission has announced plans to set up European wide financial supervisory bodies including an European Systemic Risk Council (comprised of central bankers and national regulator and chaired by the European Central Bank) charged identifying and responding to systemic risks likely threaten the stability of the European financial system and another body to oversee the standards applied on banks operating in the EU. How these bodies will work in tandem or perhaps usurp Members State regulatory bodies is yet to be seen.

The proposals, were launched by Internal Markets Commissioner Charlie McCreevy, Commission President Jose Barosso and Economics Commissioner Joaquin Almunia. Ireland's Minister for Finance (Brian Lenihan) told, in late May 2009, the Parliamentary Assembly of the Organisation for Security and Co-operation in Europe that although legal clarity regarding the roles and responsibilities of all the elements of the new system was paramount, Ireland welcomed and supports the key recommendations and would like to see the proposed new system in place and operating as quickly as possible.

[See also below *Financial Services – Europe, 27 May 2009: European Commission proposes new framework for European financial supervision*]

## **UNITED STATES - Proposals for new United States financial regulatory system:**

President Obama announced on Wednesday 17 June fundamental changes heralded as the biggest regulatory reform in the United States since the 1930s.

If approved by the US Congress, the Federal Reserve will receive new powers to oversee companies whose failure would endanger the banking system.

Banks will face tighter capital and leverage rules. The plan is a response by the Obama administration to claims of the light-touch approach which proliferated under Alan Greenspan (former Federal Reserve chairman), and previous US presidential administrations.

“A culture of irresponsibility took root from Wall Street to Washington to Main Street,” said Mr Obama on Wednesday. “And a regulatory regime basically crafted in the wake of a 20th century economic crisis – the Great Depression – was overwhelmed by the speed, scope, and sophistication of a 21st century global economy.”

Various commentators note that the extension of the Federal Reserve’s powers will change the playing field for several companies with sizeable finance operations – and not just banks - including Ford, General Motors, GE and Wal-Mart given their sizeable financial services activities.

No new capital ratios or leverage limits were announced by Tim Geithner, Treasury Secretary but the flexibility to revise them will be given to the Federal Reserve. Even though a number of banks in the United States have significantly bolstered their capital over recent months, all banks will be fully aware that the more capital put aside to bolster their balance sheets, the less profitable they will be. A knock-on effect will be a reduction in the pay packet of bank executives which are made up of bonuses directly linked to their employers profits.

New regulations covering opaque areas of financial markets are included in the reforms planned, including over-the-counter derivatives trading. The US Government will also be empowered to seize failing institutions.

Read the Executive Summary

[http://www.financialstability.gov/docs/regulatoryreform/executive\\_summary.pdf](http://www.financialstability.gov/docs/regulatoryreform/executive_summary.pdf)

Read the Full Report

[http://www.financialstability.gov/docs/regs/FinalReport\\_web.pdf](http://www.financialstability.gov/docs/regs/FinalReport_web.pdf)

## **17 JUNE 2009: DEPARTMENT OF FINANCE RELEASES RESPONSES RECEIVED TO CONSUMER CREDIT CONSULTATION**

The Department of Finance has released responses received to its Consumer Credit Directive Consultation Process. Responses were received from the Consumer Credit Association, Consumer Association of Ireland, Irish Banking Federation, Irish League of Credit Unions, MABS, National Irish Bank, Ulster Bank, Free Legal Advice Centres and the Consumer Consultative Panel of the Financial Regulator.

- Responses at <http://www.finance.gov.ie/viewdoc.asp?DocID=5837>.
- Details of the Consultation Process at <http://www.finance.gov.ie/viewdoc.asp?DocID=5707>
- Consumer Credit Directive at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:133:0066:0092:EN:PDF>

## **15 JUNE 2009: REVISED AND UP-DATED CODE OF PRACTICE FOR THE GOVERNANCE OF STATE BODIES ISSUED BY MINISTER OF FINANCE**

A revised and updated *Code of Practice for the Governance of State Bodies* was issued on 15 June 2009. The Code, last revised in 2001, sets out the governance framework agreed by Government for the internal management, and the internal and external reporting relationships, of commercial and non-commercial State bodies. The Code is aimed at ensuring State bodies observe the highest standards in acting in the interests of the citizens.

The Code reflects numerous changes since 2001 to legislation and administrative guidelines for the governance framework of State bodies. A copy of the Code is located at [here](http://www.finance.gov.ie/documents/guidelines/codepractstatebodies.pdf) (<http://www.finance.gov.ie/documents/guidelines/codepractstatebodies.pdf>).

## **12 JUNE 2009: FINANCIAL MEASURES (MISCELLANEOUS PROVISIONS) BILL 2009 INTRODUCED**

The Financial Measures (Miscellaneous Provisions) Bill 2009 was introduced to the Dáil on 12 June 2009. The Bill is intended to:

- amend the Credit Institutions (Financial Support) Act 2008 and will facilitate longer-term debt issuance by the 6 covered banks of up to 5 years maturity (see Supplementary Budget Statement dated 7 April 2009). As the Bill will guarantee certain debt securities beyond 29 September 2010, the Oireachtas must approve the Bill under section 6 (4) of the 2008 Act and EU State aid approval.
- provide for the continuing successful operation of direct debit mandates (over 100 million a year) following transfer from the Irish direct debit scheme to the new pan-European SEPA scheme starting 1 November 2009. The provision will help to avoid a considerable and unnecessary administrative burden on consumers and businesses if these mandates had to be individually re-signed to enable migration to occur.
- provide for the transfer of the pension fund assets in the Universities and some State Bodies to the National Pension Reserve Fund which will be managed by the NTMA as part of the Reserve Fund.
- protect the Exchequer by ending its responsibility for, and removing legal liability from the Minister for Finance as guarantor of, debt securities in relation to the accuracy of information contained in prospectuses. This provision will require amendment of the Prospectus Directive Regulations 2005 and the Investment Funds, Companies and Miscellaneous Provisions Act 2005.
- allow the Financial Regulator to, as it may do so in respect of non-life insurance companies, petition the High Court for the administration of a life insurance and reinsurance undertakings and the appointment of an administrator. The amendment addresses this regulatory deficiency by amending the Insurance (No 2) Act 1983 and the Insurance Act 1989.
- provide for a technical amendment to the Netting of Financial Contracts Act 1995 clarifying the application of that the 1995 Act for netting agreements (i.e. where one party to the agreement has created a security interest in favour of a third party).
- amend the Central Bank Act 1989 to clarify that any acquisition coming within the scope of the Directive 2007/44/EC on the Prudential Assessment of Acquisitions in the Financial Sector will not also be subject to the provisions of the 1989 Act.

## **9 JUNE 2009: NEW POWERS SOON FOR ODCE – COMPANIES (AMENDMENT) BILL 2009**

Assuming that the Companies (Amendment) Bill passed by the Seanad on 9 June 2009 continues its quick passage through the Dáil then we may see it signed into law before the end of July 2009. The amended Bill, amongst other things, grants the Director of Corporate Enforcement additional powers

of seizure than previously enjoyed under Section 20 of the Companies Act 1990 [*Ed - the law used to raid the offices of Anglo Irish Bank earlier this year*].

The initial draft of the Bill allowed the ODCE to assess the materiality of documents seized and taken off-site, "as soon as practicable". The ODCE now appears to be provided only three months to decide materiality of seized information and to separate material information from immaterial information. Material not relevant must be returned to the other party within 7 days of that determination.

## 9 JUNE 2009: COMPLIANCE STATEMENTS – WHAT IS THE STATUS?

The latest twist in the ongoing saga of *company law* Compliance Statements saw the issue debated in the Seanad on 9 June 2009 (Report and Final stage of the Companies (Amendment) Bill 2009). Following the defeated vote on the proposed amendment in the 2009 Bill, we now must wait until 2010 to see if the Compliance Statement proposal gets another chance to live via the Companies Consolidation and Reform Bill to be published in 2010.

Readers should note that the Compliance Statement regime (introduced by the Central Bank & Financial Services Authority of Ireland Act 2004) which allows the Financial Regulator to require a Compliance Statement under that law from financial service providers is in effect even though the former Chief Executive of the Financial Regulator stated that it would only be used in exceptional circumstances. Separately, Directors of Insurance Companies must give a Directors' Compliance Certificate each year. The format of this certificate was reissued in February 2009 and requires amongst other things that each director of the insurance company certify that '*Except for instances of non-compliance of a minor or otherwise immaterial nature that may have inadvertently occurred, the company's business has been carried out in accordance with applicable legislation and with the written guidelines issued by the insurance supervisory authority*'.

[*Ed - we still wonder how directors who sign these certificates can do so without seeking verification from management or third parties as to whether this statement is correct. See also piece below on 23 April 2009: Corporate Governance (Codes of Practice) Bill 2009 (Private Member's Bill) introduced*]

## 6 JUNE 2009: EUROPEAN COMMUNITIES (ASSESSMENT OF ACQUISITIONS IN THE FINANCIAL SECTOR) REGULATIONS 2009 ISSUED

On 6 June 2009, Brian Lenihan as Minister for Finance signed the European Communities (Assessment of Acquisitions in the Financial Sector) Regulations 2009 [S.I.206 of 2009]. This Statutory Instrument transposes the Acquisitions Directive [2007/44/EC] into Irish law. It applies to the acquisition of credit institutions, insurance undertakings, reinsurance undertakings, investment firms (authorised under MiFID) and UCITS Managers and sets out a requirement to notify the Financial Regulator where shareholdings are to be made or increase beyond certain trigger levels. The Regulations also contain a defined set of criteria to be used by the Financial Regulator when assessing the proposed acquirer.

## 13 MAY 2009: FINANCIAL REGULATOR PUBLISHES WARNING NOTICES

The Financial Regulator published a warning notice on four firms: Allconi Bank Administration Ltd (Ireland), Dufresne and Andy International (USA), Investor Relations Corp. (Switzerland) and Intraday Investment Group (Commonwealth of Dominica and Ireland). None of these firms are authorised as investment firms in Ireland.

Dufresne and Andy International and Investor Relations Corp. been or offering investment services and/or investment advice to members of the Irish public. Allconi Bank Administration Ltd and Intraday Investment Group may be claiming or holding themselves out to be investment firms based here. [*Ed -*

*Movie buffs will remember Andy Dufresne was the name of the lead character in the film "Shawshank Redemption"].*

## 7 MAY 2009: FINANCIAL SERVICES OMBUDSMAN ISSUES 2008 ANNUAL REPORT

The number of complaints received by the Financial Services Ombudsman rose to 6,000 complaints (an increase of 36% on the previous year). The Ombudsman noted a further 45% increase in 2009. The Ombudsman also commented on a couple of emerging trends:

- Many of the current year's complaints deal with investments which have not performed as well as expected or which are even worthless and where alleged mis-selling of investment products has taken place. The Ombudsman commented on the "noticeable greed of both consumers and providers" in such cases and the significant sums lost by investors.
- Property type investments are increasingly giving rise to complaints.
- Geared property funds are likewise giving rise to complaints. The Ombudsman has concerns that in many instances the implications of these were not fully explained when people were buying into them, especially the downside risk.
- The Ombudsman noted that he had received a number of complaints against accountants who gave investment advice but he could not deal with them as they are not subject to the Ombudsman's remit. The Ombudsman cited three or four major complaints involving accountancy firms where the amount involved was up to €700,000 in each instance. *[Ed – in such case the consumer will need to take his/her/its complaint to the relevant accountant professional body for action. There is no law in Ireland which forbids a person from using the title 'accountant' – unlike in the case of a 'solicitor' – so any consumer dealing with a fly-by-night operation will likely find no recourse other than the courts].*

## APRIL 2009: FINANCIAL REGULATOR REMINDS MIFID FIRMS OF PILLAR 3 AND ICAAP OBLIGATIONS

The Financial Regulator has written to MiFID firms reminding them of their obligations to develop and maintain an Internal Capital Adequacy Assessment Process ("ICAAP") document. The Financial Regulator reminds that these documents are to be kept up to date, expecting them to be reviewed quarterly by the firm in current market conditions. ***The Financial Regulator has previously stated that it intends to inspect firms' ICAAP documents in 2009.*** But this is an area also subject to ongoing monitoring – The Financial Regulator is reminding firms that they are also required to include ICAAP results as part of their quarterly Capital Requirements filings.

**Compliance Ireland** has extensive experience of assisting firms draft, update and complete their ICAAP processes and documents. We have worked with both non-complex firms, such as Asset Managers, and complex firms, such as CFD trading firms.

**Compliance Ireland** can assist you to risk assess your business, both in terms of investment operations and general corporate exposures. We can help you consider appropriate stress testing and then assess capital requirements to set aside against those risks. We can help you draft or revise your ICAAP document, or simply review the document already created in-house.

The Financial Regulator has set a deadline of 30 June 2009 for publication by investment firms of their 'Pillar 3' disclosures. Many firms may yet need to fully focus on this as an issue. Extensive disclosure of your firm's internal capital allocations and risk management objectives may be required, possibly for separate display on your website. **Compliance Ireland** is happy to assist firms draft their Pillar 3 disclosure. We can help you satisfy the legal obligations without making unnecessary, confidential or proprietary disclosures that could have competitive consequences for your business. Contact Peter Oakes on ph + 353 1 425 5962 or [peter@complianceireland.com](mailto:peter@complianceireland.com) for more information.

## **23 APRIL 2009: CORPORATE GOVERNANCE (CODES OF PRACTICE) BILL 2009 (PRIVATE MEMBER'S BILL) INTRODUCED**

On 23 April 2009, Deputy Eamon Gilmore introduced a Private Member's Bill to provide for the issuance by the Financial Regulator and approval by the Minister for Finance of codes of practice in relation to good corporate governance for companies admitted to trading on the official list of the Irish Stock Exchange. Among the proposals are:

- a prohibition on the positions of chairman and chief executive of a company being held by the same person
- a prohibition on a former chief executive of a company being elected as its chairman
- a prohibition on non-executive directors serving on a board for more than seven consecutive years
- a limit on the number of boards of listed companies on which a non-executive director may sit
- a requirement that companies establish independent audit committees, naming the members with recent and relevant financial expertise
- a requirement that the chairman and chief executive assume direct responsibility for ensuring good corporate governance and transparency in corporate reporting
- a requirement on the part of non-executive directors to demonstrate the time and skills necessary to contribute effectively to the board

*[Ed - Although this is a private member's bill and may not eventually find its way on to the statute books, it should hopefully open debate on corporate governance developments in Ireland. The issue of audit committees has been addressed before with Section 42 of the Companies (Accounting & Auditing) Act 2003 (but not commenced). There is already a limit of 25 on the number of directorships (other than for public companies) a person may hold as set out in Section 45 of the Companies (Amendment) (No. 2) Act, 1999. On Tuesday 9 June 2009, the Minister for State at the Department of Enterprise, Trade and Employment, Billy Kelleher, told the Seanad that the Government intended to address the issue of directors' compliance statements in the Companies Consolidation and Reform Bill which is expected to be published in 2010.*

## **23 APRIL 2009: FINANCIAL REGULATOR PUBLISHES CONSULTATION PAPER 36 ON DISCLOSURE OF GRANTS OF SECURITY OVER SHARES**

The Financial Regulator published Consultation Paper 36 on disclosure of grants of security over shares by persons discharging managerial responsibility within an issuer, and where applicable, persons closely associated with them. The Financial Regulator proposed, that legislative change should be sought to require disclosure of such transactions in the interests of enhanced market transparency. The consultation period closed on 22<sup>nd</sup> May 2009.

The Consultation Paper is available on:

<http://www.complianceireland.com/Resources.html#Consultations>

## **20 APRIL 2009: FINANCIAL REGULATOR UPDATES OPERATIONAL GUIDANCE ON PRUDENTIAL REQUIREMENTS APPLICABLE TO CAPTIVE INSURANCE UNDERTAKINGS**

The Guidance Note "Operational Guidance on Prudential Requirements applicable to Captive Insurance Undertakings" was first issued by the Financial Regulator in July 2007. This Guidance Note sets out that captive insurers may only write own risks, and cannot write any non-group risks. The Financial Regulator has now updated this Guidance Note for the treatment of Joint Ventures.

## **8 APRIL 2009: SETTLEMENT AGREEMENT WITH MR JOHN GURHY T/A GURHY PROPERTIES & FINANCIAL SERVICES, THE DEBT DOCTOR**

The Financial Regulator has entered into a Settlement Agreement with effect from 8 April 2009 with Mr John Gurhy t/a Gurhy Properties & Financial Services, The Debt Doctor, an authorised mortgage intermediary in relation to breaches of the Consumer Protection Code and the Consumer Credit Act, 1995, as amended.

Mr John Gurhy agreed to a disqualification from being a person concerned in the management of a regulated financial service provider for a period of 2 years commencing from 8 April 2009 and has sought revocation of his authorisation as a mortgage intermediary.

The full text of the Settlement Agreement is available on our website at:

<http://www.complianceireland.com/documents/SettlementAgreementGurhy20090408.pdf>

- Details of Settlement Agreements:  
<http://www.complianceireland.com/Resources.html#Enforcement>
- Details of full list of firms/persons the subject of a Financial Regulator at  
<http://www.financialregulator.ie/unauthorised-firms/Pages/list-search-unath.aspx>

## **24 MARCH 2009: FINANCIAL REGULATOR ISSUES STATEMENT REBUTTING ALLEGATIONS REGARDING AWARENESS OF FOREIGN EXCHANGE OVERCHARGING**

Allegations were made by a witness at the Joint Oireachtas Committee on Economic Regulatory Affairs that the Financial Regulator was previously aware of and withheld information regarding to overcharging for foreign exchange by AIB in 2004. The Financial Regulator immediately issued a press statement rebutting the allegations and detailing its position.

“The Financial Regulator published a detailed report in December 2004 into foreign exchange and other charging issues at AIB following a full investigation into these matters. In that report it is stated clearly that the Financial Regulator became aware of these matters in April of 2004...”

“Entirely separate and unrelated instances of overcharging by AIB to those covered in the 2004 Report were reported to and known to the Central Bank (the then banking regulator) in 2001.”

## **3 MARCH 2009: FINANCIAL REGULATOR PUBLISHES REPORT INTO DIRECTOR'S LOANS AT CREDIT INSTITUTIONS COVERED BY THE GOVERNMENT GUARANTEE SCHEME**

The Financial Regulator published its report into the examination of loans to directors and connected parties at six of the credit institutions covered by the Government Guarantee Scheme for the period December 2005 to December 2008. This review followed the discovery of the removal and reduction at year-end of a director's loan at Anglo Irish Bank. It was aimed at discovering if any of the covered institutions were reducing loans at year-end to avoid disclosure in their financial statements, but did not find any evidence of this.

Amongst the findings of the examination were:

- There were some inaccuracies in disclosures in financial statements in most of the institutions examined, because of weaknesses in the procedures and controls for the preparation of the disclosures of directors' loans. These included loans to directors or to connected parties not

identified and therefore not disclosed, incorrect balances on disclosed loans and loans included in disclosures that were not required to be disclosed

- The largest non-disclosure of a loan to director amounted to EUR148,214. The largest non disclosed loan to a connected party amounted to EUR11.3 million
- Some 10% of disclosures signed by directors were incorrect
- One institution had omitted two small loans of less than EUR16,000 from the data submitted to the Financial Regulator in response to its letter of 24 December 2008

*[Ed - Given the Financial Regulator's philosophy of reliance on corporate self-governance by fit and proper persons, the statistic that 10% of disclosures signed by directors of major banking institutions were incorrect must surely give some pause for thought about the attention to detail in discharging compliance obligations among those charged with direction in such institution].*

Further Details are available on our website at <http://www.complianceireland.com/HotTopics.html>.

## **DATA PROTECTION - IRELAND**

### **REGULATORY PRESENTATIONS**

**Compliance Ireland** has uploaded Adobe pdf versions of the following presentations:

(1) Data Protection: *Personal Data Retention (Presentation by Peter Oakes to Irish Computer Society Seminar 26 May 2009)*. This document can be accessed at <http://www.privacy.ie/resources.html> (scroll down to heading 'Presentations').

(2) Data Protection: *Courts, Legislative Update and Recent Issues (Presentation to Irish Computer Society Data Protection Conference 21 April 2009)*. This document can be accessed at <http://www.privacy.ie/resources.html> (scroll down to heading 'Presentations').

### **17 JUNE 2009: UNENCRYPTED LAPTOP STOLEN FROM BORD GÁIS CONTAINING BANK ACCOUNT DETAILS OF 75,000 CUSTOMERS**

An unencrypted laptop computer containing bank account details of 75,000 Bord Gáis customers has been stolen in Dublin. The unencrypted laptop was one of four laptops stolen from Bord Gáis on 5 June 2009.

In its press release Bord Gáis states that it did not publicise the theft for fear this would have hampered the Gardaí investigation. Since the burglary Bord Gáis has worked closely with the Gardaí, the Data Protection Commissioner and the Irish Banking Federation. Bord Gáis states that Gardaí and the Data Protection Commissioner were immediately informed of the theft and a full investigation is under way.

It is understood that the information included customers who recently switched over from the ESB in the company's 'Big Switch' campaign.

Any customers affected by the theft will be contacted by Bord Gáis next week.

Bord Gáis Managing Director David Bunworth apologised unreservedly to the customers affected and confirmed that all Bord Gáis laptops are now encrypted.

Bord Gáis press release at:

[http://www.bordgais.ie/files/corporate/media/20090617085151\\_Laptop%20Theft%20statement%20170609..pdf](http://www.bordgais.ie/files/corporate/media/20090617085151_Laptop%20Theft%20statement%20170609..pdf)

## 16 JUNE 2009: UNENCRYPTED LAPTOP STOLEN FROM HEALTH SAFETY EXECUTIVE

In an exercise of how not to handle a data protection issue, the Data Protection Commissioner has severely criticised the Health Service Executive (HSE) following the theft of 15 laptops from HSE offices in Roscommon town on 12 and 13 June 2009. The HSE was 'named and shamed' in the Data Protection Commissioner's 2008 Annual Report (see more below).

The Deputy State Protection Commissioner Gary Davis strongly criticised the HSE over the situation and expressed disappointment that his office had not been notified by the HSE but learned about it on (RTÉ) news. Mr Davis was also disappointed that the missing laptop had not been encrypted despite an explicit commitment received from Brendan Drumm of the HSE last September that all laptops within the organisation would be encrypted.

Information on 13 of the laptops was encrypted. Of the two unencrypted laptops one contains confidential information which is accessible to anybody in possession of the laptop. The other unencrypted laptop is believed to contain training material [*Ed – data protection training slides perhaps? This is not a joke – see report in box below*]

The theft took place at the offices of the Roscommon Primary/Community and Continuing Care Department of the HSE on Lanesboro Road between Friday night (12 June) and Saturday morning (13 June).

In a statement released by the HSE it says it 'is satisfied that there was no identifying information in relation to patients or clients on one of the non-encrypted laptops' but is awaiting an incident report about the stolen unencrypted laptop to determine whether it contained sensitive information.

HSE press release at: [http://www.hse.ie/eng/News/National\\_Tab/laptops%20roscommon.shortcut.html](http://www.hse.ie/eng/News/National_Tab/laptops%20roscommon.shortcut.html)

**Previous data protection issue at HSE:** In September 2008 the Data Protection Commissioner investigated a theft of a HSE laptop containing the personal information of HSE staff. The Commissioner states in his 2008 Annual Report that his office experienced delays in obtaining an explanation from the HSE why it collected the stolen information in the first place. Following a number of data breach incidents involving personal data held by the HSE, senior officials from the Commissioner met with senior management in the HSE to discuss a number of concerns regarding data security.

In relation to the 2008 issues, the Commissioner said he was 'disappointed on a number of occasions during the year when the HSE did not seem to be able to match its good data protection policy intentions with practice on the ground'. The Commissioner identified a number of high profile losses of sensitive personal data by HSE employees and further *that the HSE did not appear to demonstrate any real learning or improvement from one incident to the next.*

## 13 MAY 2009: DATA PROTECTION COMMISSIONER ISSUES 2008 ANNUAL REPORT

On 13 May 2009, the Data Protection Commissioner published his Annual Report for 2008.

During 2008, the Office of the Data Protection Commissioner continued to receive a high volume of complaints. The total of 1,031 complaints submitted in 2008 is similar to the total for 2007, a substantial increase from previous years (658 complaints were submitted in 2006). However, a

significant decrease in the number of complaints reporting unsolicited direct marketing text messages, phone calls, fax messages and emails was noted.

The Commissioner noted a corresponding increase in the number of complaints related to access rights under the Data Protection Acts 1988 and 2003. The Commissioner includes a list of occasions when he had to resort to the use of his legal powers to advance an investigation.

The Commissioner reports considerable success on efforts to encourage public and private sector bodies to voluntarily report personal data security breaches to the Office, including breaches at Jobs.ie, Bank of Ireland, the Office of the Comptroller and Auditor General and the Health Service Executive.

The Report updates on the Commissioner's intensive audit of data security at the Department of Social and Family Affairs, prosecutions undertaken against Iarród Éireann and Clarion Marketing, complaints received against UPC (formerly Chorus/NTL), concerns in relation to the overall approach to data protection within An Post and continued interaction in relation to the M50 Barrier-Free Tolling Project. The Commissioner's report also includes case studies of a number of specific investigations into the use of personal data including:

- Breaches of the Data Protection Acts related to a marketing postcard campaign launched by the insurance company 123.ie to promote its home insurance product
- Unsolicited premium rate text messages sent by Interactive Voice Technologies (IVT) and a substantial donation to charity as part of an amicable resolution
- Total Fitness Ireland and the use of legal powers to ensure compliance with an access request
- BuyAsYouFly and a failure to respect opt-outs from direct marketing by email
- Celtic Water Solutions and marketing telephone calls to numbers on the NDD Opt-Out Register
- Breaches of the Data Protection Acts by Halston Street Credit Union
- Tesco and the resale of an Apple iPod containing a customer's personal data, and
- Dell and persistent unsolicited marketing faxes

The Data Protection Commissioner Annual Report for 2008 is available for download from <http://www.privacy.ie/resources.html>.

## FINANCIAL CRIME – IRELAND

### **13 JUNE 2009: NO DATE, STILL, FOR IMPLEMENTATION OF NEW MONEY LAUNDERING LAWS**

We covered in our February newsletter that Ireland was likely to publish the proposed Criminal Justice (Money Laundering) Bill in the second quarter of 2009. At time of writing this has not yet occurred. As we noted in that newsletter, it is possible that this timetable may be too ambitious given the government's need for *legislative priority flexibility* as the banking crisis worsens.

Various stories are circulating about the look and feel of the new law. One story is that the Guidance Notes (to accompany the new legislation) will be issued as a Statutory Instrument in order to mandate full compliance. Although giving certainty as to demonstrable compliance, such an approach could undermine the basic tenet of the 3<sup>rd</sup> EU Money Laundering Directive, that being to allow firms – within reason – to adopt a risk-based approach to complying with financial crime obligations.

It has long been the position of firms operating in Ireland's offshore financial services industry that the existing Guidance Notes for financial institutions are too focussed on domestic, face-to-face business and do not reflect the issues faced by firms conducting significant and varied non face-to-face business with persons located abroad. If, in addition to properly satisfying the provisions of the relevant Criminal Justice Acts, these designated bodies had to demonstrate strict compliance with the provisions of Guidance Notes - where such guidance is not relevant to their circumstances - service delivery will be severely impacted. At a time when Ireland *must rediscover its competitive edge*, such a move would impose significant costs on organisations for little additional gain. Perhaps a better idea is to allow, in respect of financial services firms, the Financial Regulator to issue a Code of Conduct binding authorised firms. This approach would, while mandating compliance with the Guidance Notes, permit quick revisions and updates as necessary without the need for Ministerial approval. However this approach would likely be unfair to other types of designated bodies which do not have a day-to-day supervisor and therefore would be stuck with rigid and prescriptive guidance. Whatever the outcome we can be sure that there will be no ringing endorsement of the law or the guidance from all designated body sectors.

## **24 APRIL 2009: CONVICTED MONEY-LAUUNDERER TED CUNNINGHAM SENTENCED TO 10 YEARS IN JAIL.**

Having previously been convicted of possessing more than £3m (€3.24m) from the infamous IRA heist and running an elaborate dirty money racket, financial advisor and director of Chesterton Finance, Ted Cunningham was sentenced to jail for 10 years. The 60-year-old, from Farran in Co Cork, was also found guilty at Cork Circuit Criminal Court of another nine counts linked to the stolen cash which moved from Belfast to Cork.

"He stored money, he gave money to others to store, bought cars, used money as security, and obtained euro value for the northern sterling," said the judge. "There's no doubt there was premeditation and planning involved in the offences."

"He persisted to the end with a concocted alibi that Bulgarians were going to buy a pit."

His son, Timothy Cunningham Junior, was given a three-year suspended sentence after he admitted knowing money came from the December 2004 robbery at the Northern Bank cash centre in Belfast.

*[Ed – although itself not regulated by the Financial Regulator, Chesterton Finance had appointed a number of Financial Regulator-authorized mortgage intermediaries based in Dublin, Limerick, Co Mayo and Galway. Chesterton Finance is a designated body for the purposes of the 1994 Criminal Justice Act, 1994. We stress that there is no allegation that the regulated firms were involved in the matters before the Court]*

Further Details are available on our website at <http://www.complianceireland.com/HotTopics.html>.

## **17 APRIL 2009: CRIMINAL JUSTICE (SURVEILLANCE) BILL 2009 INTRODUCED**

This Bill seeks to provide a statutory framework to the Revenue Commissioners, An Garda Síochána and the Defence Forces for the operation of secret electronic surveillance to combat serious crime as well as subversive and terrorist threats against the security of the State.

A superior officer of the Revenue Commissioners, An Garda Síochána or the Defence Forces may apply to a judge for authorisation to carry out covert surveillance for a period of up to three months without renewal.

The Bill also provides for the superior officer to authorise the use of covert surveillance for a period of up to 72 hours without authorisation by a judge in certain circumstances.

Professional advisers including solicitors and accountants – and not just financial institutions - should ensure that they are familiar with the likely impact that this law (if passed) shall have upon their businesses.

## FINANCIAL SERVICES – UNITED KINGDOM

### **26 MAY 2009: FSA BANS AND FINES FORMER MORGAN STANLEY TRADER £140,000 FOR UNAUTHORISED 'PRE-HEDGING'**

The Financial Services Authority (FSA) has banned and fined trader Nilesh Shroff for deliberately disadvantaging his customers by 'pre-hedging' trades without their consent. Shroff has been prohibited from performing any regulated function on the grounds that he is not fit and proper and has been fined £140,000.

While Shroff was a senior trader at Morgan Stanley, the FSA found that he disadvantaged his clients on seven occasions between June and October 2007 by partially 'pre-hedging' programme trades (trading by a broker for his firm's benefit in advance of carrying out a trade for his customer, using information provided by that customer) without the clients' consent. Shroff knew such unauthorised pre-hedging was expressly prohibited by the FSA and Morgan Stanley's policies and not in his clients' interests.

Shroff's job title was executive director, risk-trading programme and his role included carrying out 'programme trades' on behalf of clients. Following its own investigation, Morgan Stanley dismissed Shroff for gross misconduct on 28 December 2007.

### **13 MAY 2009: FSA FINES MORGAN STANLEY £1.4M FOR FAILING TO PREVENT TRADER MIS-MARKING AND FINES AND BANS MATTHEW SEBASTIAN PIPER**

On 13 May 2009, the FSA announced it had fined Morgan Stanley & Co International Plc (Morgan Stanley) £1.4 million for systems and controls failings in relation to trader mis-marking which led the firm to make a \$120 million negative adjustment in June 2008.

The FSA has also banned Matthew Sebastian Piper, a former proprietary trader at the firm, from performing any function in relation to any regulated activity on the grounds that he is not a fit and proper person. Piper was also fined £105,000.

In breach of FSA Principles, the firm failed to effectively use the controls it had in place for dealing in illiquid financial products. It failed to ensure adequate supervision of Piper's books and as a result, did not price certain positions accurately. Further, the firm failed to prevent or detect the mis-marking in a timely manner. The firm further failed to respond quickly enough to changing conditions in the credit markets (namely an increase in volatility and a decrease in liquidity) by making adjustments to its existing systems and controls which would have enabled it to detect the mis-marking of the illiquid products in a timely manner.

Piper deliberately mis-marked the positions he traded on behalf of Morgan Stanley and sought to hide losses by manipulating the processes the firm had in place to monitor trading activity. On discovery of the mis-marking, the firm suspended Piper and senior management commissioned a review into the marking of his positions. The review identified serious weaknesses in the implementation, operation and management of Morgan Stanley's systems and controls.

Further details of the FSA's findings in relation to Morgan Stanley can be found at [http://www.fsa.gov.uk/pubs/final/morgan\\_stanley.pdf](http://www.fsa.gov.uk/pubs/final/morgan_stanley.pdf)

*[Ed – If the FSA can use its 'fit & proper' powers in such an effective way to sanction financial services professionals, should we expect the Financial Regulator to do the same as an outcome of its investigations into various institutions and (former and current) senior management ?]*

## **29 APRIL 2009 HEDGE FUND MANAGER BANNED AND FINED £35,000 FOR MISMARKING TRADING POSITIONS TO HIDE LOSSES**

The FSA has banned and fined Mr Loic Albert Antoine Montserret, a former portfolio manager at BlueCrest Capital Management Limited (BlueCrest), £35,000 for deliberately mismarking his positions in an attempt to avoid losing his job over losses he was making on his trading book.

This is the first time the FSA has both banned and fined an individual for mismarking trading positions.

## **6 APRIL 2009: FSA WINS TRIBUNAL CASE TO BAN FORMER CHIEF EXECUTIVE OF GENRE BUSINESS UNIT**

The FSA announced that it had won its case before the Financial Services and Markets Tribunal (the Tribunal) to ban Mr Milan Vukelic from working in the financial services industry in the UK. The Tribunal found that Mr Vukelic's actions whilst CEO of Alternative Solutions (AltSol) lacked integrity. The AltSol business unit was established by the General Reinsurance Corporation to develop and market financial reinsurance products, which could be misused by struggling insurance companies seeking to disguise their true financial position.

Mr Vukelic was CEO from August 1997 until October 2002. During that time Mr Vukelic was responsible for overseeing and structuring three different transactions that were designed to allow the client insurance companies to hide very significant losses in their accounts. Mr Vukelic knew that the deals were not genuine reinsurance transactions and that they could be used to mislead the clients' auditors. Two of the three client insurance companies subsequently collapsed with wide-ranging consequences. The Tribunal found that Mr Vukelic had "turned a blind eye" to the true nature of the contracts and was "reckless as to whether they were intended to mislead auditors and others".

## **18 MARCH 2009: FSA PUBLISHES TURNER REVIEW OF GLOBAL BANKING REGULATION**

Lord Turner, chairman of the FSA, was asked by the Chancellor of the Exchequer to review the events that led to the financial crisis and to recommend reforms of global banking regulation. The Review identifies three underlying causes of the crisis:

- (1) macro-economic imbalances,
- (2) financial innovation of little social value, and
- (3) important deficiencies in key bank capital and liquidity regulations.

These were underpinned by an exaggerated faith in rational and self-correcting markets. The review stresses the importance of regulation and supervision being based on a system-wide "macro-prudential" approach rather than focussing solely on specific firms. It recommends:

- Fundamental changes to bank capital and liquidity regulations and to bank published accounts
- More and higher quality bank capital, with several times as much capital required to support risky trading activity

- Counter-cyclical capital buffers, building up in good economic times so that they can be drawn on in downturns, and reflected in published account estimates of future potential losses
- A central role for much tighter regulation of liquidity
- Regulation of "shadow banking" activities on the basis of economic substance not legal form: increased reporting requirements for unregulated financial institutions such as hedge funds, and regulator powers to extend capital regulation
- Regulation of Credit Rating Agencies to limit conflicts of interest and inappropriate application of rating techniques
- National and international action to ensure that remuneration policies are designed to discourage excessive risk-taking
- Major changes in the FSA's supervisory approach, building on the existing Supervisory Enhancement Programme (SEP), with a focus on business strategies and system wide risks, rather than internal processes and structures, and
- Major reforms in the regulation of the European banking market, combining a new European regulatory authority and increased national powers to constrain risky cross-border activity

## FINANCIAL CRIME – UNITED KINGDOM

### **10 JUNE 2009: FSA BANS AND FINES BROKERS FOR MORTGAGE FRAUD**

On 10 June 2009, the Financial Services Authority (FSA) banned North London broker Akin Johnson (trading as Lifestyle Mortgages Islington) for systems and controls failings which led to at least eight mortgage applications being submitted to lenders containing false and misleading information. This is the latest enforcement decision under the mortgage fraud initiative currently being undertaken by the FSA.

On 14 May 2009, the FSA banned Bradford mortgage adviser, Sofique Ullah, who traded as M A Financial Services and M A Mortgages (M A Financial Services), for knowingly submitting mortgage applications supported by inaccurate and misleading employment details for himself and on behalf of his customers

On 11 May 2009, the Financial Services Authority (FSA) banned Gabriel Aramide and fined him £101,279 for submitting a fraudulent mortgage application and for concealing a fraud conviction when applying to the FSA for approval as a director. Gabriel Aramide was an FSA approved person and director of 1st Point based in Romford. The FSA noted that the six figure fine was aimed at deterring mortgage brokers from getting involved in mortgage fraud and at retrieving Mr. Aramide's illicit profits.

On 30 April 2009, the FSA banned Tower Hamlets based mortgage adviser Zia Chowdhury for certifying client identities for fraudulent mortgage applications. He also operated his firm Express Financial without being approved by the FSA as required.

On 16 April 2009, the FSA banned Abiola Agbalaya and fined him £100,000 for his knowing involvement in the submission of false mortgage applications. Abiola Agbalaya was an FSA approved person and sole controller of Herald Finance Ltd (Herald) which operated in South London. The fine is as a result of Mr Agbalaya's supervision of, and knowing involvement in, the submission of false mortgage applications. Grace Olatunji, who worked as a mortgage consultant for Herald, has also been banned for submitting mortgage applications based on false income information.

On 8 April 2009, the FSA banned Dorset mortgage brokers Peter and James Dean for failing to prevent their firm from being used to perpetrate financial crime and for other serious regulatory failures. Peter Dean was also fined £17,500. Peter and James Dean were Directors of UK Finance House Limited (UKFH).

On 30 March 2009, the FSA banned Walthamstow-based mortgage adviser Ashfaq Ahmed for submitting mortgage applications on his own behalf that were based on false and misleading information about his income.

On 2 March 2009, the FSA banned Wakefield-based mortgage adviser Mohammed Ahmed for submitting mortgage applications on his and a customer's behalf that were supported by false payslips.

See also <http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/076.shtml>  
<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/064.shtml>  
<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/061.shtml>  
<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/058.shtml>  
<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/052.shtml>  
<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/049.shtml>  
<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/043.shtml>  
<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/033.shtml>

## **27 MAY 2009: SIX ARRESTED IN INSIDER DEALING INVESTIGATION**

Five men and one woman, aged between 27 and 34, were arrested in connection with an ongoing investigation by the FSA into suspected organised insider dealing. Search warrants were also executed at eight addresses in London and Essex as part of the investigation.

The operation was jointly carried out by the FSA and the City of London Police Economic Crime Directorate (ECD). The operation and investigation are part of the FSA's work to tackle market abuse. This is the third set of arrests carried out by the FSA and the City of London Police into organised insider dealing in the last 12 months. One of the arrests, on 31 March 2009, involved a senior corporate finance adviser. The three sets of arrests are not linked. No further details have been released.

## **20 MAY 2009: FSA BRINGS INSIDER DEALING PROSECUTION AGAINST CITY PROFESSIONALS**

On 20 May 2009, *The Times* newspaper published an article reporting that the FSA has launched a criminal prosecution for insider dealing against three City professionals. The FSA did not comment on the article.

The article states that the FSA alleges that Andrew Rimmington, a corporate partner at law firm Dorsey & Whitney's London office, and Michael McFall, a former corporate partner at law firm McDermott Will and Emery's London office, engaged in insider dealing in relation to the 2006 takeover by Novartis of Neutec Pharma. According to the article, Neutec Pharma's former finance director, Peter King, is also being prosecuted by the FSA for alleged insider dealing in the same case. Mr. McFall and Mr. King are also accused of disclosing non-public information.

The prosecution is the FSA's fifth criminal insider dealing case. In March 2009, the FSA achieved its first insider dealing convictions on 27 March 2009 when Christopher McQuoid, former general counsel of TTP Communications, and his father in law James Melbourne were both sentenced at Southwark Crown Court to eight months' imprisonment for insider dealing (Mr. Melbourne's sentence was suspended for twelve months).

See also: <http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/067.shtml>  
<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/042.shtml>

## **6 MAY 2009: SEVEN ARRESTS IN FSA OPERATION AGAINST BOILER ROOMS**

The Financial Services Authority (FSA), in close cooperation with the City of London Police Economic Crime Directorate and with assistance from Hertfordshire Constabulary Fraud Squad, announced that it had conducted a major operation to search a number of premises in Surrey, West Sussex, London and Hertfordshire.

The investigation, which is being conducted with assistance from Eurojust, Europol, the anti-money laundering unit of the Malta Police, and several European law enforcement agencies, focuses on share fraud and boiler room activity in the United Kingdom and Europe which has taken approximately £28 million of victims' funds. Six males and one female have been arrested in the south of England.

## **27 APRIL 2009: FSA PUBLISHES REPORT ON FINANCIAL SERVICES FIRMS' APPROACH TO UK FINANCIAL SANCTIONS**

The FSA has published a report entitled "Financial services firms' approach to UK financial sanctions", which sets out its findings on firms' compliance with UK financial sanctions requirements. The report concludes that there are inadequacies in firms' systems and controls on reducing the risk of breach of UK financial sanctions. The FSA states that firms need to enhance their systems and controls, and small firms in particular should improve their awareness of the regime. The full report is available to download from <http://www.antimoneylaundering.ie/News.html>.

## **2 APRIL 2009: FSA WINS MARKET ABUSE CASE AND FINES WINTERFLOOD £4 MILLION**

The Financial Services Authority (FSA) won its market abuse case at the Financial Services and Markets Tribunal (the Tribunal) against Winterflood and two of its traders, Mr Sotiriou and Mr Robins. Winterflood is an FSA authorised firm and the largest market maker in AIM securities.

In June 2008, the FSA found that Winterflood and its traders had played a pivotal role in an illegal share ramping scheme relating to Fundamental-E Investments Plc (FEI), an AIM listed company. In particular, the market maker had misused rollovers and delayed rollovers thereby creating a distortion in the market for FEI shares and misleading the market for about six months in 2004.

The FEI share trades executed by Winterflood had a series of unusual features which should have alerted the market maker to the clear and substantial risks of market manipulation. Rather than taking steps to ensure that the trades were genuine, Winterflood continued the highly profitable trading.

Winterflood made about £900,000 from trading in FEI shares, its single most profitable stock at the time. As a result of their conduct, the FSA decided to impose fines of £4 million, £200,000 and £50,000 on Winterflood, Mr Sotiriou and Mr Robins respectively.

## **FINANCIAL SERVICES – EUROPE**

### **9 JUNE 2009: AGREED TEXT OF THE UCITS IV DIRECTIVE PUBLISHED**

The European Parliament and the European Council have published the agreed text of the Level 1 Directive on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast). This document is available for download from <http://www.complianceireland.com/Resources.html#UCITSFunds>.

## 4 JUNE 2009: CEIOPS PUBLISHES LIST OF SOLVENCY II IMPLEMENTING MEASURES

Following its first set of advice on Level 2 measures for Solvency II that was published for consultation in March 2009, the Committee of European Insurance and Occupational Pensions Supervisors has produced a list of the implementing measures on which it will consult in its second and third sets of advice later in 2009. These implementing measures can be viewed at <http://tinyurl.com/CIJun0901>.

### ***Solvency II Directive Transposition Date 31 October 2012***

The European Parliament approved the amended version of the Solvency II Directive on 22 April 2009. On 5 May 2009 the European Union's Economic & Financial Affairs Council approved the Directive. The transposition date for Solvency II the Directive is 31 October 2012. Useful and free material that should help readers get up to speed with the implications of the Solvency II Directive can be found on the UK FSA's website at <http://www.fsa.gov.uk/pages/About/What/International/solvency/index.shtml>.

## 28 MAY 2009: EUROPEAN COMMISSION PROPOSES AMENDMENTS TO LIABILITY OF DEPOSITARIES

Commissioner McCreevy announced in Brussels on 28 May 2009 that he intends to clarify and strengthen provisions of the UCITS regime particularly as regards the liability of depositories as he is of the opinion that there are inconsistencies in the application of the UCITS directive which were shown up by the Madoff scandal. One of the consequences of the Madoff scandal in the EU is that it affected retail investors who had invested in certain UCITS funds the assets of which had been entrusted to a Madoff entity as a sub-custodian.

A review undertaken by the Committee of European Securities Regulators (CESR) looking into the liability of the UCITS depositories concluded that minimum high level principles of the UCITS Directive have been transposed in very diverging ways by Member States, providing diverging levels of investor protection in different jurisdictions.

In a parallel development, the EU Commission has made stringent proposals on the regulation of depositories, their liability and eligibility criteria in its recent proposal for Alternative Investment Fund Managers (AIFM). According to this proposal, depositories will be required to be credit institutions based, authorised and supervised in the EU. Their liability has been strengthened, including an inversion of the burden of proof, and there are clear provisions on delegation as well as on the conditions under which assets can be entrusted to depositories outside the EU. Mr McCreevy wants to extend such provisions to UCITS funds, if not strengthen them as it would not be appropriate to have a less stringent approach for retail investors than for professional investors.

## 27 MAY 2009: EUROPEAN COMMISSION PROPOSES NEW FRAMEWORK FOR EUROPEAN FINANCIAL SUPERVISION

The European Commission has issued a Communication on financial supervision in Europe, following the de Larosière group's recommendations published in February 2009. The Communication proposes the establishment of: a new European Systemic Risk Council, for macro-prudential supervision; and a European System of Financial Supervisors (ESFS), for the supervision of individual financial institutions. The ESFS would comprise of a network of national financial supervisors, working in tandem with three new European Supervisory Authorities which would replace the existing Committee of European Banking Supervisors, Committee of European Insurance and Occupational Pensions Committee and the Committee of European Securities Regulators. It is intended that legislation will follow in the autumn, with the new architecture in place during 2010. Comments are invited online by 15 July 2009.

## 29 APRIL 2009: EUROPEAN COMMISSION PROPOSES ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE

The European Commission published a draft Directive on 29th April 2009 proposing stricter regulation of Managers of Alternative Investment Funds established in an EU member state. If approved by the European Parliament, the proposal's provisions will come into force in 2011.

The Directive focuses on Alternative Investment Funds Managers ("AIFM") that is managers of all funds that are not regulated under the UCITS Directive. This will therefore apply to funds authorised in Ireland under the Non-UCITS regime. There is an exemption for AIFMs managing funds with total assets of less than €100 million and for AIFMs which only manage funds which are not leveraged and which do not grant investors redemption rights for five years following the date of establishment. In this latter case, an authorisation threshold of €500 million applies.

Authorisation as an AIFM will entitle the manager to market the AIF to professional investors only (as defined by MiFID). Funds falling outside of the scope of the Directive, such as Non-UCITS funds open to retail investors, will continue to be regulated on a national basis.

AIFMs will be entitled to market funds cross-border subject only to the filing of appropriate information with the host competent authority. AIFMs will be permitted to manage and market funds domiciled in third countries

The limitation to professional investors is consistent with the current situation in many EU Member States. However, some of the categories of AIF covered by the proposed Directive – such as funds of hedge funds and open-ended real estate funds - are accessible to retail investors in some EU Member States, subject to strict regulatory controls. It is intended that EU Member States may allow for marketing to retail investors within their territory and may apply additional regulatory safeguards for this purpose.

AIFMs will be required to put in place risk management and liquidity management procedures. AIFMs will be subject to capital requirements similar to those imposed on UCITS managers.

For each fund managed by an AIFM, an independent valuator (administrator) must be appointed to establish the value of assets acquired by the fund and the value of the shares and units of the fund.

Similarly, the assets of any fund managed by an AIFM must be entrusted to a depositary which must be a bank established in an EU member state. This is in excess of the current requirement for UCITS funds sold to the public, which does not require the depositary to have credit institution status. More pertinently, the draft Directive would seem to impose a strict liability for loss of financial instruments safe-kept. This could have significant implications for trustee/custodians as strict liability is much higher than the standard currently required (particularly where sub-custodians are utilised) and may well lead to service offerings being withdrawn as a response to the increased risk.

It would appear that the responsibilities of the depositary are to be limited to receipt and safe-keeping of assets belonging to the funds. It is unclear whether the fiduciary duty of stewardship which currently applies to Irish UCITS funds will be extended to AIFM-managed funds. This also could have competitive implications for Irish trustee/custodians. The removal of a fiduciary duty would lower the operational risk they face, but it removes a prime rationale for choosing an onshore Irish fund as against a Cayman or other offshore vehicle.

**[SEE NEXT PAGE]**

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Compliance Ireland Regulatory Services Limited  
Lower Ground Floor, 13 Adelaide Road, Dublin 2  
E-mail: [email@complianceireland.com](mailto:email@complianceireland.com)  
Telephone: +353 1 425 5962 / 5962  
[www.complianceireland.com](http://www.complianceireland.com)

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