TRAVERS SMITH

Financial Services and Markets

The Greenlight case – the final punch?

On 16 February 2012, the FSA published a Final Notice against Andrew Osborne, a Managing Director in the corporate broking group of Merrill Lynch International, for committing market abuse. The FSA found that Mr Osborne had disclosed inside information improperly to U.S. hedge fund manager Greenlight Capital, Inc. and its sole portfolio manager, David Einhorn, during the course of a telephone conference call to which the chief executive of Punch Taverns Plc was party. The call took place shortly prior to a significant issue of shares by Punch. Mr Osborne has received a heavy penalty of £350,000.

The Final Notice against Mr Osborne follows the market abuse cases published by the FSA in late January, all of which revolved around Greenlight's trading in the shares and derivatives of Punch in 2009 on the basis of inside information: the aggregate fines of £7.2 million against Greenlight and Mr Einhorn, the £130,000 fine against Alexander Ten-Holter (the compliance officer and money laundering reporting officer at Greenlight) and the £65,000 fine against Caspar Agnew (a director on the trading desk at JP Morgan Cazenove).

The case centred on a telephone conference call which Mr Osborne had arranged between Greenlight and Punch on 9 June 2009. The FSA found that during that call Mr Osborne improperly disclosed information concerning an imminent equity issue by Punch for which Merrill Lynch was joint book runner and co-sponsor, despite the fact that Mr Einhorn had previously refused to be wall-crossed in relation to Punch.

The FSA has chosen to publish the full transcript of the call for the first time (it is attached to the Final Notice). The transcript gives context to the earlier enforcement notices. It is worth reading it, and perhaps using it as a training case study, because it illustrates how easy it is for a conversation to take the wrong direction, leading to the disclosure of inside information, even when it is not the intention of any of the parties that it should do so.

Key points

- Mr Osborne had significant wall-crossing experience, understood market abuse laws and, specifically, what information could constitute inside information. The fact that he knew that Greenlight had refused to be wall-crossed meant that he should have taken great care not to disclose inside information.

- None of the individual disclosures made by Mr Osborne – during a 45 minute call which covered a lot of ground – would, by the FSA's own admission, amount to inside information. However, *taken together*, the FSA argued, they amounted to inside information. By piecing together the information disclosed, it was possible for Greenlight to determine that Punch was at an advanced stage of the process towards a significant new equity issue, probably within "less than a…week". Merely stating that the conversation was conceptual was insufficient to negate the impact of information actually given.

- Mr Osborne participated in a call with Punch and its legal advisers before the call with Greenlight took place. Advice was sought as to whether the call with Greenlight could proceed on a non wall-crossed basis. The advice was that the call could proceed within certain constraints. In the FSA's view, the advice as to constraints was not followed. However, Mr Osborne was also criticised for not having consulted with MLI's own legal or compliance professionals before proceeding with the call with Greenlight. Where advice is taken from the issuer's advisers, firms should therefore be rigorous in ensuring that their own legal or compliance teams are aware of, and comfortable with, any advice received.

- Mr Osborne was also criticised for not alerting his senior management or legal or compliance personnel when, after the call, he was put on notice that Greenlight was selling its shares in Punch.

Comment

The case is a clear and stark warning to senior executives. Mr Osborne's conduct was not deliberate and he had spoken to legal advisers. The transcript illustrates how difficult it is to control the direction of a conversation: discussions are by their nature unpredictable and, even with the benefit of legal advice, it is possible for a participant inadvertently to go further than intended. In addition, there is no scope for "taking a commercial view" or pushing the boundary in relation to matters of market abuse and the disclosure of sensitive information.

Firms may wish to consider whether they have controls to monitor and review calls which may be "higher risk". The problems which arose in this case were exacerbated by the fact that, after the call, none of the participants reflected on its implications.

Other materials

Our previous client briefings on the Greenlight saga:

- Market Abuse – The Greenlight/Einhorn Case
- The Greenlight case – the saga continues

The FSA's enforcement notices can be found by clicking on the names below:

- Andrew Jon Osborne
- Greenlight Capital, Inc. (Final Notice)
- David Einhorn (Final Notice)
- Alexander Edward Ten-Holter
- Caspar Jonathan William Agnew

We regularly advise on the market abuse regime in relation to both contentious and non-contentious matters. Please follow the links for further information in relation to our Financial Services and Markets team and our Regulatory Investigations team.

To view our client bulletin in relation to the review of the Market Abuse Directive, please click HERE.

For further information on these issues please contact one of the following partners in our Financial Services and Markets department or your usual contact at Travers Smith:

Travers Smith LLP
10 Snow Hill
London EC1A 2AL
T +44 (0)20 7295 3000
F +44 (0)20 7295 3500

Margaret Chamberlain
margaret.chamberlain@traverssmith.com
+44 (0)20 7295 3233

Tim Lewis
tim.lewis@traverssmith.com
+44 (0)20 7295 3321

Jane Tuckley
jane.tuckley@traverssmith.com
+44 (0)20 7295 3238

Phil Bartram
phil.bartram@traverssmith.com
+44 (0)20 7295 3437