

Compliance Monitor

The monthly briefing service for compliance specialists

And the gold medal goes to...

*The Olympic athletes have gone home and the flame is extinguished, but East London continues to host our regulatory Games. **Julian Sampson** is exercised about some activities that eluded the glare of television cameras.*

**Dear Compliance Officer letter, 20 June 2012
re: Unregulated Collective Investment Schemes (UCIS), requiring an attestation from the Compliance Officer and review of four years' data within a one-month time frame.**

Did you see this event? You may have missed it if you don't compete in this activity yourself. But there are important lessons here for all teams. It was added to the Games schedule at short notice. Indeed, nobody knew of its existence until they were told they were competing. (But the FSA did say in their defence that it had been looking at this for ages and that competitors should have expected it). All this at a time when the back room team were coping with their existing events and many of their key players had already disappeared for their summer training camps.

This was a tricky event. There were time penalties – for not acknowledging the letter itself within one week of receipt and for failing to meet the substantive requirement to analyse four years' worth of performance statistics within one month.

And then there was the event itself, the team having to sign an attestation that it had adequate systems and controls for UCIS. In this race, it was the team itself that decided whether it had won or lost. The FSA, perhaps surprising given their historic insistence on having evidence to support decisions made, accepted the team's word for it that they had cleared the bar.

So, a well-earned medal for those who had to compete in this event. Let's just hope that the FSA won't ask you for it back later, when they point to a subsequent breach of procedure which they say means that you gave an invalid attestation as in fact you did not have appropriate systems and controls. Were you on drugs when you signed it? Some might say that you'd have to have been.

But one more thing on this – did you see there was a non-runner on the track? This wasn't one of the athletes – it was one of the training staff! Why were they running in this race? Yet so it was in this event, this letter being sent unusually to the Compliance Officer rather than the team's flag-carrier and leader, the Chief Executive. Surprising, given the historic focus on senior management and their role in ensuring compliance. It was like asking David Brailsford, rather than Chris Hoy, to get on the bike.

**Consultation paper CP19/12, 22 August 2012
re: Restrictions on the retail distribution of unregulated collective investment schemes and close substitutes.**

And hard on the heels of its request for Compliance Officers to jump through multiple hoops in a short space of time and then sign their lives away, the FSA announces that it is, in any case, intending dramatically to restrict the access of these products. It proposes that UCIS should not be available to retail customers.

These two developments need not be connected. The data obtained by the FSA from the 'Dear Compliance Officer' letter will be of value to it in investigating potential mis-selling for some time to come, irrespective of whether UCIS can continue to be sold to retail customers in the future.

But it would clearly have been preferable if these two initiatives had been better co-ordinated than they appear to have been. What incentive is there for firms now to invest further money and time in systems and controls over these products if they know that their scope to market them in the future – in full compliance with existing rules – is in all likelihood to be severely restricted?

It's as if the IOC had allowed a new event to be represented at the Games, only then to decide, as the medals were handed out, that this event would not be eligible for future Olympics. Such a decision would be a frustration for competitors and a waste of everybody's resources.

Guidelines on certain aspects of the MiFID compliance function requirements – European Securities and Markets Authority final report, 6 July 2012.

While the International Olympic Committee and the athletics federations will set the rules for their events, the details of how the teams organise themselves are left to them. Nobody told the British Olympic Association which events to enter or who to enter. Even less so did they tell them how to train for or how to get to the Games. Athletes, trainers and teams all knew that. They didn't need to be told.

But that doesn't stop financial services regulators of all sorts from issuing 'guidance' – to firms and to other regulators – on how to run a compliance department. Thus, ESMA gave guidance to other EU regulators on how they should assess firms' compliance functions.

Does this guidance change much? Not substantially, but there are detailed points that firms should consider and a 'new' suite of documentation – compliance policy, compliance risk assessment – that may be required. All of these may already exist in one form or another. But all will have to be reviewed again against this new benchmark, or written from scratch. All of which takes time and resource.

It's as if the IOC said to the BOA that the BOA needed to make sure its athletes got to the stadium on time, with the correct kit. And taking a document of many pages to tell them that.

Does this help to win any medals? Unlikely. Does it distract from the central objective? Possibly. And if that is the case, it's not helpful.

Guidelines on certain aspects of the MiFID suitability requirements – European Securities and Markets Authority final report, 6 July 2012.

Some events, particularly the sprints, are over in a flash. Others, like the endurance sports, go on for longer. And then there are the multi-disciplinary events, like pentathlon, which require multiple skills to be displayed over a sustained period. (I'm sure that Compliance Officers should be forgiven for seeing themselves as competitors in each of these events. But sadly without the back-up support – or less, the cheering crowds – which the athletes have).

And was there ever a more marathon-like event than the issue of suitability? It seems to run and

run. We've passed some landmarks along the way – FSA's original themed visits, draft guidance, finalised guidance. Now we have ESMA's guidance of June 2012 on the same subject, but inevitably with some subtle – and some not so subtle – differences. While the marathon will end after 26.2 miles, this issue seems still to have the legs to go on and on, as firms get to grips with the subjective issues of affordability and capacity for loss, and how and by whom these concepts can be measured.

FSA Performance Statistics, released 16 May 2012

The success of the Olympic Games rests on many foundations. The performance of the athletes, the impartiality of the officials and the integrity of the performance statistics are all key components. And on the latter subject, there are lessons to be learnt.

The medals table is transparent, straightforward and understood by all. The athletes' individual times that are run, distances jumped or weights lifted are theirs to achieve, but not theirs to adjust or confirm. The performance statistics themselves are in the hands of independent officials.

How unlike the FSA's performance statistics. With the FSA reporting that it achieved 90% of the target or more in 95% of the service standards by which it is judged, they'll be handing out the gold medals – to themselves.

And is it surprising that they achieve such good statistics in events where they can stop the clock, by deciding on a unilateral basis that, say, your application, is incomplete? Did you see a moment when Mo Farah, running the 10,000 metres, pulled to one side and asked everyone else to stop so that he could think about things, or train some more? I must have missed that. We all know that teams can take a time-out – but these are finite and pre-defined. They're not indefinite halts.

Presentation ceremony

So – who gets first place on the podium? Who gets the gold? The person who has completed all the challenges, met all the short-term demands, shown long-term endurance, overcome a lack of resource and has still, in spite of it all, achieved for the team. Step forward and receive your medal, Compliance Officer.

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