

PURSUANT TO THE DECISION OF THE UPPER TRIBUNAL ON 21 MAY 2015 ([HTTP://TAXANDCHANCERY UT.DECISIONS.TRIBUNALS.GOV.UK/DOCUMENTS/DECISIONS/BAYLISS-CO-FINANCIAL-SERVICES-LTD-CLIVE-ROSIER-V-FCA.PDF](http://taxandchancery.ut.decisions.tribunals.gov.uk/documents/decisions/bayliss-co-financial-services-ltd-clive-rosier-v-fca.pdf)), THIS DECISION NOTICE HAS BEEN SUPERSEDED BY A FINAL NOTICE (<https://www.fca.org.uk/publication/final-notices/clive-john-rosier-2017.pdf>) DATED 5 OCTOBER 2017

DECISION NOTICE

To:	Clive John Rosier	To:	Bayliss & Co (Financial Services) Limited
IRN:	CJR00017	FRN:	140191
Address:	Bayliss Orchard Horley Banbury Oxfordshire OX15 6BL	Address:	Bayliss Orchard Horley Banbury Oxfordshire OX15 6BL
Date:	23 May 2013		

1. ACTION

1.1. For the reasons set out below, the Authority has decided to take the following action against Mr Clive Rosier:

- (1) impose a financial penalty on him of £10,000, pursuant to section 66 of the Financial Services and Markets Act 2000 (the "Act"), for failing to comply with Statements of Principle 2 and 7 between 7 August 2004 and 25 September 2012 (the "Relevant Period") as an approved person;

- (2) make an order, pursuant to section 56 of the Act, prohibiting him from performing any significant influence function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm on the grounds that he is not a fit and proper person to perform significant influence functions; and
- (3) withdraw his approval to perform significant influence functions at Bayliss & Co (Financial Services) Limited ("Bayliss") pursuant to section 63 of the Act.

2. SUMMARY OF REASONS

2.1. On the basis of the facts and matters described below, the Authority has decided to take action as a result of Mr Rosier's conduct as an approved person at Bayliss during the Relevant Period.

2.2. In summary, Mr Rosier failed to:

- (1) act with due skill, care and diligence, contrary to Statement of Principle 2, by failing to:
 - (a) take reasonable steps to record sufficient customer information prior to advising customers on investments; and
 - (b) ensure that the suitability of his advice could be adequately demonstrated;
- (2) take reasonable steps to ensure that the business of Bayliss for which he was responsible in his significant influence functions complied with the relevant requirements and standards of the regulatory system, contrary to Statement of Principle 7, by failing to ensure that Bayliss:
 - (a) treated customers fairly in accordance with DISP 1.3.1R, DISP 1.4.1R, DISP 1.6.1R and DISP 1.6.2R when responding to complaints;
 - (b) communicated clearly with the Authority about its inability to complete the Geared Traded Endowment Policies ("GTEPs") review, requested by the Authority, after he advised the Authority that the GTEPs review would be completed;

- (c) had adequate processes in place to establish and record the application of exemptions to section 238(1) of the Act in promoting an Unregulated Collective Investment Scheme ("UCIS") to customers;
- (d) had adequate compliance monitoring procedures in place, including the gathering of sufficient and appropriate management information, and monitoring and assessing his own performance to ensure that he was up-to-date with regulatory requirements; and
- (e) addressed the above failings once those failings were brought to his attention.

2.3. The Authority views these failings as serious because:

- (1) the failings relating to recording customer information, ensuring suitability of advice, training and competence, complaints handling and compliance checks were general and systemic;
- (2) Bayliss failed to treat complainants fairly; and
- (3) operating a firm with a single adviser presented a risk to ensuring that Bayliss maintained adequate systems, but Bayliss failed to take substantive steps to mitigate that risk.

2.4. The cumulative impact of Mr Rosier's failings represented a risk to the Authority's objective of securing the appropriate degree of protection for consumers.

2.5. The Authority has taken into account the following considerations, which are regarded as mitigating factors:

- (1) Bayliss ceased carrying out regulated activities, and voluntarily varied its permissions in September 2010 after the Authority advised Bayliss of its concerns;
- (2) with the exception of customers to whom GTEPs products were promoted, there is no evidence that customers have suffered detriment as a result of Mr Rosier's failings; and
- (3) Mr Rosier has paid some of the awards made to customers of Bayliss against the firm by the FOS from his personal resources.

3. DEFINITIONS

The definitions below are used in this Decision Notice.

"Act" means the Financial Services and Markets Act 2000;

"APER" means the part of the Handbook in High Level Standards which has the title Statements of Principle and Code of Practice for Approved Persons;

"Authority" means the body corporate formerly known as the Financial Services Authority and renamed on 1 April 2013 as the Financial Conduct Authority;

"Bayliss" means Bayliss & Co (Financial Services) Limited;

"CIS" means a collective investment scheme or, depending on the context, collective investment schemes;

"CIS Order" means the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001;

"DISP" means the part of the Handbook which has the title 'Dispute Resolution: the Complaints sourcebook';

"Fact-Find" means the two page confidential fact-find questionnaire issued by Bayliss to some customers;

"FOS" means the Financial Ombudsman Service;

"GTEPs" means Geared Traded Endowment Policies;

"Handbook" means the Authority's Handbook of rules and guidance;

"PCIS Order" means the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001;

"Relevant Period" means the period 7 August 2004 to 25 September 2012;

"Requirement Notice" means the section 166 Requirement Notice issued to Bayliss by the Authority on 26 January 2011;

"Mr Rosier" means Clive John Rosier;

"SF&CD" means the former Small Firms and Contact Division of the Authority;

“Skilled Person” means Accord Compliance Consultants Limited, appointed under the Requirement Notice;

“Statement of Principle” means one of the Statements of Principle issued by the Authority under section 64(1) of the Act (Conduct: Statements and codes) with respect to the conduct of approved persons and set out in APER;

“UCIS” means an unregulated collective investment scheme or, depending on the context, unregulated collective investment schemes.

4. FACTS AND MATTERS

Background

- 4.1 On 1 April 2013 the Financial Services Authority was renamed the Financial Conduct Authority; in this Notice “the Authority” is used to refer to that organisation both before and after the name change.
- 4.2. Bayliss is a small IFA firm based outside Banbury in Oxfordshire. It was incorporated on 28 April 1986.
- 4.3. From 1 December 2001, Bayliss has been authorised by the Authority for the following regulated activities:
- (1) advising on pension transfers and pension opt outs;
 - (2) advising on investments (except pension transfers and opt outs);
 - (3) advising on regulated mortgage contracts;
 - (4) agreeing to carry on a regulated activity;
 - (5) arranging (bringing about) deals in investments;
 - (6) arranging (bringing about) regulated mortgage contracts;
 - (7) making arrangements with a view to regulated mortgage contracts; and
 - (8) making arrangements with a view to transactions in investments.
- 4.4. From 1 December 2001, Mr Rosier held controlled functions CF1 (Director), CF10 (Compliance oversight), CF11 (Money laundering reporting), CF21 (Investment adviser), CF27 (Investment management) and CF8 (Apportionment and oversight) at Bayliss. From 1 November 2007, CF21 and CF27 were replaced by

CF30 (Customer) and Mr Rosier's controlled functions were updated to include CF30. His CF8 controlled function was removed effective from 31 March 2009.

- 4.5. From the start of the Relevant Period to date, Mr Rosier has been the only approved person at Bayliss. During the Relevant Period, Mr Rosier was the only director of Bayliss, and the only person to hold significant influence controlled functions.
- 4.6. Bayliss focussed on providing investment planning services, including pension advice. Between 2001 and 2004, Bayliss recommended that clients invest in GTEPs products. Between 2001 and 2009, nine customers invested in two UCIS.
- 4.7. Bayliss has a long established client base. During the last full year of operations, May 2009 to April 2010, Bayliss arranged 53 new investment transactions for a total of 22 clients with a value of £3.45m.
- 4.8. On 26 January 2010, the Authority's Small Firms and Contact Division ("SF&CD") conducted a telephone assessment of Bayliss' fair treatment of customers. As a result of concerns identified during that call, Bayliss was visited by SF&CD staff on 1 April 2010. The visit failed to alleviate SF&CD's concerns, and as a result Mr Rosier and Bayliss were referred to the Authority's Enforcement & Financial Crime Division on 27 July 2010.
- 4.9. On 23 September 2010, Bayliss agreed to vary its permission such that it would not undertake regulated business without an approved third party reviewing that business prior to execution. Although Bayliss last transacted business on 3 August 2010, it continued to handle complaints after that date.
- 4.10. On 7 March 2011, Bayliss appointed the Skilled Person to conduct a past business review and to approve ongoing business prior to execution as required under the variation of permission of 23 September 2010. The past business review involved a review of the last 20 pieces of regulated business conducted by Bayliss to assess the suitability of that business for the customer in question. In each case, the Skilled Person found that the customer files contained insufficient information to enable the Skilled Person to assess the suitability of the advice provided.

Conduct in issue

Recording sufficient customer information

- 4.11. From 7 August 2004 to 3 August 2010, Mr Rosier failed to act with due skill, care and diligence when recording customer information and customers' attitude to risk. Specifically, this included the following failings:
- (1) none of the six customer files reviewed by the Authority contained Fact-Finds or other records of information about customers;
 - (2) none of the six customer files reviewed by the Authority contained an assessment of the customer's attitude to risk; and
 - (3) for six other customers who made investments between 1 January 2009 to 9 April 2010 and for whom Fact-Find documents were reviewed by the Authority, the documents provided were out of date or contained insufficient information.
- 4.12. In each instance, Mr Rosier was the sole adviser responsible for those customers during the Relevant Period.
- 4.13. The Skilled Person has reviewed 20 transactions from 2009 and 2010 (all of which were undertaken by Mr Rosier). The Skilled Person was unable to assess the suitability of any of those transactions due to the lack of information about customers held on file.
- 4.14. As a result of the failure to record information about customers adequately or at all, the Authority and the Skilled Person have been unable to form an assessment of the suitability of advice provided to customers.

Suitability reports

- 4.15. From 30 January 2009 to 31 December 2009, Mr Rosier failed to act with due skill, care and diligence when producing suitability reports to customers in respect of investment recommendations as set out below.
- (1) The Authority reviewed a total of 25 suitability reports issued to nine clients by Mr Rosier during 2009. Each of these suitability reports contained a template section discussing attitude to risk without tailoring this to the customer's situation, objectives or risk tolerance. In particular, the template section is not linked to the customer's attitude to risk.

- (2) Mr Rosier failed adequately to record the reasons for recommendations in suitability reports, for example by referring to other documents not contained in the client files, referring to other discussions not documented in the suitability report or the customer file or omitting reasons entirely.
- (3) In 17 of the 25 suitability reports details of the recommendation are not provided, for example the total amount to be invested or the breakdown of the amount invested between the various funds recommended.
- (4) In one case, the suitability report omitted the reasons for the recommendation entirely.

4.16. As a result, the suitability reports prepared and provided to customers by Mr Rosier often did not explain, in a way which was clear, fair and not misleading, the reasons why the recommended investment was suitable for the customer's personal situation.

UCIS

4.17. Between 5 November 2004 and 4 December 2009, Mr Rosier failed to take reasonable steps to ensure that Bayliss promoted, and could demonstrate that it promoted, UCIS only to customers to whom an exemption to section 238(1) of the Act applied.

4.18. The files for the ten clients who invested in UCIS (and which covered the period 5 November 2004 to 4 December 2009) did not contain evidence of which exemption applied when the UCIS was promoted to them.

4.19. The Authority notes, however, that Mr Rosier did not promote UCIS to all customers. Further, Mr Rosier did appear to form an assessment of whether any given customer was eligible to receive a UCIS promotion prior to promoting UCIS to that customer (although the basis for or validity of that assessment is unclear to the Authority in light of the above matters).

Complaints handling

4.20. From 29 July 2005 to 25 September 2012, Mr Rosier failed to take reasonable steps when responding to complaints. Bayliss did not have a written complaints handling policy and instead relied on the provisions in DISP. However, when handling complaints, Bayliss failed to meet the requirements of DISP, or to treat customers fairly in that it did not:

- (1) provide or retain initial responses to complainants which set out how the complaint was going to be investigated. The Authority has reviewed the files for 13 complaints which Bayliss dealt with during the Relevant Period. Of these files, four held copies of initial responses; two further files included references to initial responses without holding copies of those responses while one customer complained directly to FOS. The remaining six files did not contain initial responses;
- (2) provide final responses to complaints. Of the 12 complaints made to Bayliss for which files were reviewed, none contained a final response; and
- (3) adopt an appropriate tone in communications with complainants, in that the initial responses sought to dissociate Bayliss from the advice given, blame the customers for not contacting Bayliss earlier, dissociate Bayliss from liability for the advice given and, in the case of at least one customer, failed to make it clear as to whether Bayliss had adequate resources to meet the liability or not.

4.21. As a result of Bayliss not resolving their complaints, 12 complainants subsequently approached FOS for adjudication, with an additional one complainant approaching FOS directly. In each instance, the Ombudsman upheld the complaint and awarded redress to the customer concerned. Mr Rosier stated that the reason that Bayliss required customers to have an adjudication from FOS prior to paying redress was that Bayliss' professional indemnity insurer would not pay out on claims without an adjudication from the Ombudsman. All of the complaints related to GTEPs advice given by Bayliss prior to the Relevant Period.

Management information, compliance/performance monitoring, training and competence

4.22. During the period 7 August 2004 to 3 August 2010, Mr Rosier failed to take reasonable steps to ensure that Bayliss could demonstrate the adequacy of the compliance procedures in place. After the departure of Bayliss' compliance officer on or around 7 August 2004, Mr Rosier failed to ensure that Bayliss could demonstrate that it had undertaken any monitoring of his own performance, either by use of training needs assessments, assessments of his own competence or by gathering and analysing management information, nor did he ensure that Bayliss appointed any other person to undertake similar functions or to review advice given.

- 4.23. From 7 August 2004, Bayliss had no formal procedures in place to review the quality of advice given. Mr Rosier also failed to maintain a formal record of training that he received.

GTEPs past business review

- 4.24. On 3 August 2007, the Authority requested that Bayliss complete a past business review of the files of all customers who received advice to invest in GTEPs. In its response dated 7 August 2007, Bayliss stated to the Authority that the review would be completed. This was notwithstanding that, at the time of its letter, Bayliss did not have in its possession the customer files for many of the relevant customers.
- 4.25. The Authority acknowledges and recognises that Mr Rosier subsequently took all reasonable steps to retrieve those files from third parties. However, Bayliss did not subsequently notify the Authority (whether by way of its letter of 7 August 2007 or following its attempts to retrieve the files) that it had been unable to retrieve those files or conduct the review.
- 4.26. In light of the above, the Authority considers that Mr Rosier did not take reasonable steps to ensure that Bayliss notified the Authority of its inability to complete the past business review. However, the Authority notes that it has not identified any evidence which suggests that Mr Rosier's failure in this regard was deliberate.

Failure to address issues raised

- 4.28. In a letter to Bayliss dated 24 June 2010, the Authority requested that Bayliss take various steps to mitigate the risks identified. Bayliss agreed to do so, although it considered that the best way to do so would be to join a network. Bayliss was not successful in joining a network and by 21 April 2011 still could not demonstrate that it had taken any other reasonable steps (such as engaging a third party compliance consultant) to deal with the issues identified.

5. FAILINGS

- 5.1. The regulatory provisions relevant to this Decision Notice are referred to in the Annex.
- 5.2. On the basis of the facts and matters referred to above, the Authority considers that Mr Rosier has breached Statements of Principles 2 and 7.

5.3. As a result of these failings, the Authority has decided to impose the following sanctions:

- (1) a financial penalty of £10,000;
- (2) an order prohibiting Mr Rosier from performing any significant influence function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional on the grounds that he is not a fit and proper person; and
- (3) the withdrawal of his approval to perform significant influence controlled functions at Bayliss.

6. SANCTION

6.1. The Authority's policy on the imposition of financial penalties as at the date of this Notice is set out in Chapter 6 of the Decision Procedures and Penalties Manual ("DEPP"), which forms part of the Handbook. Although the Authority has had regard to the fact that part of Mr Rosier's misconduct occurred after the new provisions came into force on 6 March 2010, the analysis of the proposed sanction is undertaken using DEPP as it stood prior to that date, for the following reasons:

- (1) in the period 7 August 2004 to 26 May 2011, Bayliss provided approximately 330 pieces of advice which resulted in transactions, of which only 15 (4.5%) occurred after 6 March 2010;
- (2) the majority of the Relevant Period is prior to 6 March 2010; and
- (3) there is no evidence of customer detriment occurring after 6 March 2010 other than as a consequence of the initial failures which resulted in complaints to FOS.

6.2. All references to DEPP in this section are therefore references to that version of DEPP in force at the relevant time.

Prohibition order and withdrawal of approval

6.3. In considering whether to impose a prohibition order, the Authority has had regard to the provisions of the Authority's Enforcement Guide ("EG"). The Authority has also had regard to the provisions of its Handbook in force during the Relevant Period.

- 6.4. The Authority considers that in breaching Statements of Principle 2 and 7 as described, Mr Rosier has demonstrated his lack of competence in relation to the performance of his significant influence functions.
- 6.5. Having regard to the Fit and Proper Test for Approved Persons contained in the Handbook ("FIT"), the Authority concludes that Mr Rosier is not a fit and proper person to hold significant influence functions.
- 6.6. Having regard to its regulatory objectives, including the need to maintain confidence in the financial system and to secure the appropriate degree of protection for consumers, the Authority considers it necessary to impose an order prohibiting Mr Rosier from performing any significant influence function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.
- 6.7. The Authority also considers that Mr Rosier's current significant influence functions should be withdrawn.

Financial penalty

- 6.8. In determining whether or not a financial penalty is appropriate, the Authority considers all the relevant circumstances of a case. The Authority considers the following factors to be particularly important in this case.
 - (1) Deterrence: DEPP 6.5.2G(1): in determining the appropriate level of penalty, the Authority has had regard to the need to promote high standards of regulatory conduct by deterring those who have committed breaches from committing further breaches and to help to deter others from committing similar breaches.
 - (2) The nature, seriousness and impact of the breach: DEPP 6.5.2G(2): the Authority has considered the nature and seriousness of the contraventions and considers the following to be relevant in this regard:
 - (a) the breaches occurred over a significant period of time; and
 - (b) Mr Rosier's conduct caused the risk of loss to the customer base of Bayliss.
 - (3) Whether the breaches were deliberate or reckless: DEPP 6.5.2G(3): the Authority does not consider that the breaches were deliberate or reckless.

- (4) Whether the person on whom the penalty is to be imposed is an individual: DEPP 6.5.2G(4): the Authority recognises that the financial penalty imposed on Mr Rosier is likely to have an impact on him as an individual.
- (5) The size, financial resources and other circumstances of the person on whom the penalty is to be imposed: DEPP 6.5.2G(5): Mr Rosier has not claimed, or provided verifiable evidence, that the financial penalty will place him in a position of serious financial hardship.
- (6) The amount of benefit gained or loss avoided: DEPP 6.5.2G(6): Mr Rosier is the sole shareholder of Bayliss, and has been the majority shareholder since its authorisation. As a result, all net gains by Bayliss appear to result in an economic benefit to Mr Rosier. However, since 2009, Mr Rosier has not taken any drawings or received any salary from Bayliss, with those monies being used to pay redress to GTEPs customers.
- (7) Disciplinary record and compliance history: DEPP 6.5.2G(9): the Authority has not previously taken any disciplinary action against Mr Rosier.

6.9. In light of these factors, the Authority considers that a financial penalty of £10,000 is appropriate in this case.

7. REPRESENTATIONS AND FINDINGS

7.1. Below is a brief summary of the key written representations made by Mr Rosier, on behalf of himself and Bayliss, and how they have been dealt with. In making the decision which gave rise to the obligation to give this Notice, the Authority has taken into account all of Mr Rosier's representations, whether or not set out below.

Recording sufficient customer information/suitability reports

7.2. Mr Rosier conceded that information about customers and the suitability of investments recommended by Bayliss was missing from the client files reviewed by the skilled person and that more complete information should have been available in order to demonstrate compliance with the Authority's rules. He made representations that such information was nevertheless contained in other files.

7.3. The Authority has found that Mr Rosier has not produced the missing documentation, and therefore that such documentation either did not exist or was not retained by Bayliss.

Complaints handling

7.4. Mr Rosier made representations as follows:

(a) Bayliss had a complaints handling process in place, although it was "dated"; and

(b) He did not require customers to complain to FOS, and Bayliss's failures to provide final responses to complaints as required by the Authority's rules were due to the fact that he was acting in accordance with the instructions of Bayliss's professional indemnity insurers.

7.5. The Authority has found that Mr Rosier did not produce any evidence of a complaints handling process (such as a copy of a written process), and that Bayliss's process for the handling of complaints was neither effective nor transparent. The Authority has found that Mr Rosier did not produce any instructions given by Bayliss's professional indemnity insurers which prevented final responses to complaints being given. In any event, Bayliss's obligations to its professional indemnity insurers did not excuse it from compliance with the Authority's rules regarding communications to customers, and Mr Rosier's responses to clients were inadequate to treat customers fairly in accordance with the Authority's complaints handling rules.

GTEPs

7.6. Mr Rosier made representations that he had informed the Authority that he had experienced difficulties retrieving the files from third parties and, by letter, requested the Authority's help in doing so. Mr Rosier said that the Authority should therefore have been aware that he was unable to complete the review of past GTEPs business.

7.7. The Authority has found that Mr Rosier has not produced any letters or other documents in support of those representations, despite the fact that the Authority made a compelled information request for any such documentation, and the Authority has found that Mr Rosier did not inform it of his difficulties in completing the review.

UCIS

- 7.8. Mr Rosier made representations that he did establish that customers to whom he promoted UCIS fell within the permitted exemptions to the prohibition on promoting these products, before making such promotion. Mr Rosier conceded, however, that he did not obtain a signed certificate from the investor, as required by the PCIS Order (see the Annex) as a precondition of the application of the relevant exemptions.
- 7.9. The Authority has found that although, as noted at paragraph 4.19 above, Mr Rosier did appear to consider the exemptions prior to promoting UCIS, Bayliss's processes in relation to the promotion of such products fell short of adequately establishing and recording the application of the exemptions.

Management information, compliance/performance monitoring, training and competence

- 7.10. Mr Rosier made representations:
- (1) denying that he did not arrange for any reviews of his own advice; and
 - (2) stating that Bayliss did maintain a formal record of training "for technical articles etcetera as well as informal records".
- 7.11. The Authority has found that Mr Rosier has not provided any further evidence on either point (in the case of (2), despite a compelled information request). The Authority has found that he did not arrange for his advice to be reviewed or for Bayliss to keep formal records of training.

Limitation

- 7.12. Mr Rosier made representations in relation to the time limit for taking action against a person under section 66 of the Act which is prescribed by section 66(4).
- 7.13. Prior to 8 June 2010, section 66(4) provided that the Authority could not take action under section 66 against a person in respect of misconduct more than two years after the first day on which it knew of the misconduct, unless proceedings had been begun before the end of that period. With effect from 8 June 2010, that provision was amended to substitute a three year period. Mr Rosier submitted that, in cases where the investigation had begun before 8 June 2010

(which he submitted was in substance the case here), the two year period should apply. Mr Rosier also submitted that the Authority could have begun proceedings against him within two years of first becoming aware of relevant matters and, that being the case, the two year period should apply. If either submission were correct, no financial penalty could be imposed on Mr Rosier.

- 7.14. The Authority has found that the three year period applies in relation to a particular case provided that the two year period had not already expired when the amendment introducing the three year period came into force. The two years had not expired in respect of this matter on 8 June 2010, and thus the Authority has found that the three year period applies in this case. The Authority has further found that the three year period applies in the circumstances set out at paragraph 7.13, regardless of whether proceedings could have been begun within the shorter period.

Financial penalty

- 7.15. Mr Rosier represented that the Authority's proposal to impose on him a financial penalty was flawed, as the failings for which it was imposed would, if proven, be corporate failings.
- 7.16. For the reasons set out in this Decision Notice, the Authority has found it to be both in accordance with its powers, and appropriate, to impose a financial penalty on Mr Rosier by reason of his own conduct as an approved person.

8. PROCEDURAL MATTERS

Decision maker

- 8.1. The decision which gave rise to the obligation to give this Decision Notice was made by the Regulatory Decisions Committee.

Important

- 8.2. This Decision Notice is given to Mr Rosier and Bayliss under sections 57, 63 and 67 and in accordance with section 388 of the Act. The following statutory rights are important.

The Tribunal

- 8.3. Mr Rosier and Bayliss have the right to refer the matter to which this Decision Notice relates to the Upper Tribunal (the "Tribunal"). Under paragraph 2(2) of

Schedule 3 of the Tribunal Procedure (Upper Tribunal) Rules 2008, Mr Rosier and Bayliss have 28 days from the date on which this Decision Notice is given to them to refer the matter to the Tribunal. A reference to the Tribunal is made by way of a signed reference notice (Form FTC3) and filed with a copy of this Notice. The Tribunal's address is: The Upper Tribunal, Tax and Chancery Chamber, 45 Bedford Square, London WC1B 3DN (tel: 020 7612 9700; email financeandtaxappeals@tribunals.gsi.gov.uk). Further details are contained in "Making a Reference to the UPPER TRIBUNAL (Tax and Chancery Chamber)" which is available from the Upper Tribunal website:

<http://www.tribunals.gov.uk/financeandtax/FormsGuidance.htm>

- 8.4. Mr Rosier and Bayliss should note that a copy of the reference notice (Form FTC3) must also be sent to the Authority at the same time as filing a reference with the Tribunal. A copy of the reference notice should be sent to Kate Tuckley at the Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS.

Access to evidence

- 8.5. Section 394 of the Act applies to this Decision Notice. The persons to whom this Notice has been given have the right to access:
- (1) the material upon which the Authority has relied on in deciding to give this Notice; and
 - (2) any secondary material which, in the opinion of the Authority, might undermine that decision. There is no such secondary material.

Confidentiality and publicity

- 8.6. This Decision Notice may contain confidential information and should not be disclosed to a third party (except for the purpose of obtaining advice on its contents). Section 391 the Act provides that neither Mr Rosier nor Bayliss may publish the Notice or any details concerning it unless the Authority has published the Notice or those details.
- 8.7. However, the Authority must publish such information about the matter to which a decision notice or final notice relates as it considers appropriate. Mr Rosier and Bayliss should be aware, therefore, that the facts and matters contained in this Notice may be made public.

Contacts

- 8.8. For more information concerning this matter generally, contact Kate Tuckley at the Authority (direct line: 020 7066 7086/ fax: 020 7066 7087).

Andrew Long

Acting Chairman, Regulatory Decisions Committee

ANNEX

RELEVANT STATUTORY PROVISIONS, REGULATORY REQUIREMENTS AND GUIDANCE

1. Statutory provisions

The Authority's operational objectives, set out in sections 1B to 1E of the Act, include securing an appropriate degree of protection for consumers.

Section 56 of the Act provides that the Authority may make a prohibition order if it appears to the Authority that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person. Such an order may relate to a specific regulated activity, an activity falling within a specified description or all regulated activities.

The Authority has the power, by virtue of section 66 of the Act, to impose a financial penalty on an approved person of such amount as it considers appropriate where it appears to the Authority that the approved person is guilty of misconduct and it is satisfied that it is appropriate in all the circumstances to take action against the approved person.

An approved person is guilty of misconduct if, while an approved person, the approved person fails to comply with a statement of principle issued under section 64 or has been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under the Act.

Pursuant to section 63 of the Act, the Authority has the power to withdraw the approval given to an approved person under section 59 of the Act – to perform the significant influence function controlled functions of CF1 Director, CF10 Compliance Oversight and CF11 Money Laundering Reporting – if it considers that the approved person is not a fit and proper person to perform them.

2. Statements of Principle for Approved Persons

APER is issued pursuant to section 64 of the Act. It sets out Statements of Principle with which approved persons are required to comply when performing a controlled function for which approval has been sought and granted. They are general statements of the fundamental obligations of approved persons under the regulatory system. APER also contains descriptions of conduct which, in the

opinion of the Authority, constitutes a failure to comply with a particular Statement of Principle and describes factors which the Authority will take into account in determining whether an approved person's conduct complies with it.

APER 3.1.3G states, as guidance, that, when establishing compliance with, or breach of, a Statement of Principle, account will be taken of the context in which a course of conduct was undertaken, the precise circumstances of the individual case, the characteristics of the particular controlled function and the behaviour expected in that function.

APER 3.1.4G states, as guidance, that an approved person will only be in breach of a Statement of Principle if they are personally culpable, that is in a situation where their conduct was deliberate or where their standard of conduct was below that which would be reasonable in all the circumstances.

In this case, the Authority considers the most relevant Statements of Principle to be Statement of Principle 2 and Statement of Principle 7.

Statement of Principle 2 requires that an approved person must act with due skill, care and diligence in carrying out his controlled function.

Statement of Principle 7 requires that an approved person performing a significant influence function must take reasonable steps to ensure that the business of the firm for which he is responsible in his controlled function complies with the relevant requirements and standards of the regulatory system.

APER 4.2.2E to 4.2.13E provide examples of the types of behaviour that, in the opinion of the Authority, do not comply with Statement of Principle 2. These include:

- failing to inform a customer of material information in circumstance where the approved person ought to have been aware of such information and of the fact that he should provide it, including failing to explain the risks of an investment to a customer (APER 4.2.3E and 4.2.4E); and
- recommending an investment to a customer where the approved person does not have reasonable grounds to believe that it is suitable for that customer (APER 4.2.5E).

APER 4.7.2E to 4.7.10E provide examples of the types of behaviour that, in the opinion of the Authority, do not comply with Statement of Principle 7. These include:

- failing to take reasonable steps to implement (either personally or through a compliance department or other departments) adequate and appropriate systems of control to comply with the relevant standards of the regulatory system in respect of the relevant firm's regulated activities (APER 4.7.3E);
- failing to take reasonable steps to monitor (either personally or through a compliance department or other departments) compliance with the relevant requirements and standards of the regulatory system in respect of the relevant firm's regulated activities (APER 4.7.4E); and
- in the case of an approved person performing a significant influence function responsible for compliance, failing to take reasonable steps to ensure that appropriate compliance systems and procedures are in place (APER 4.7.10E).

3. Authority's policy on exercising its power to impose a financial penalty

The Authority's statement of policy with respect to the imposition and amount of penalties under the Act, as required by sections 69(1), 93(1), 124(1) and 210(1) of the Act, and guidance on those matters is provided in Chapter 6 of DEPP, entitled "Penalties", which is part of the Authority's Handbook. In summary, chapter 6 of DEPP states that the Authority will consider the full circumstances of each case when determining whether or not to take action for a financial penalty, and sets out a non-exhaustive list of factors that may be relevant for this purpose. As noted, DEPP is being applied as it stood prior to 6 March 2010 for the reasons set out in the body of this Decision Notice.

The principal purpose of imposing a financial penalty is to promote high standards of regulatory conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches and demonstrating generally the benefits of compliant behaviour.

The Authority will consider the full circumstances of each case when determining whether or not to take action for a financial penalty. DEPP 6.2.1G sets out guidance on a non-exhaustive list of factors that may be of relevance in

determining whether to take action for a financial penalty, which include the following.

DEPP 6.2.1G(1): The nature, seriousness and impact of the suspected breach.

DEPP 6.2.1G(1)(a): whether the breach was deliberate or reckless.

DEPP 6.2.1G(1)(c): The amount of benefit gained or loss avoided as a result of the breach.

DEPP 6.2.1G(3): Disciplinary record and compliance history.

4. Determining the level of the financial penalty

The Authority will consider all the relevant circumstances of a case when it determines the level of financial penalty. DEPP 6.5.2G sets out guidance on a non-exhaustive list of factors that may be of relevance when determining the amount of a financial penalty.

Factors that may be relevant to determining the appropriate level of financial penalty include:

DEPP 6.5.2G(1): Deterrence.

DEPP 6.5.2G(4): Whether the person on whom the penalty is to be imposed is an individual.

DEPP 6.5.2G(5): The size, financial resources and other circumstances of the person on whom the penalty is to be imposed.

DEPP 6.5.2G(2)(b): Whether the breach revealed serious or systemic weaknesses in the person's procedures or of the management systems or internal controls relating to all or part of a person's business.

DEPP 6.5.2(9)(d): The general compliance history of the person, including whether the Authority has previously brought to the person's attention issues similar or related to the conduct that constitutes the breach in respect of which the penalty is imposed.

5. Fit and Proper Test for Approved Persons

FIT sets out the Fit and Proper Test for Approved Persons. The purpose of FIT is to outline the main criteria for assessing the fitness and propriety of a candidate

for a controlled function. FIT is also relevant in assessing the continuing fitness and propriety of an approved person.

FIT 1.3.1G provides that the Authority will have regard to a number of factors when assessing a person's fitness and propriety. One of the considerations will be the person's competence and capability.

As set out in FIT 2.2, in determining a person's competence and capability, the Authority will have regard to matters including but not limited to:

- whether the person satisfies the relevant Authority training and competence requirements in relation to the controlled function the person performs or is intended to perform; and
- whether the person has demonstrated by experience and training that the person is suitable, or will be suitable if approved, to perform the controlled function.

6. Authority's policy for exercising its power to make a prohibition order and withdraw a person's approval

The Authority's approach to exercising its powers to make prohibition orders and withdraw approvals is set out at Chapter 9 of EG.

EG 9.1 states that the Authority's power to make prohibition orders under section 56 of the Act helps it work towards achieving its regulatory objectives. The Authority may exercise this power where it considers that, to achieve any of those objectives, it is appropriate either to prevent an individual from performing any functions in relation to regulated activities or to restrict the functions which he may perform.

EG 9.4 sets out the general scope of the Authority's powers in this respect, which include the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant. EG 9.5 provides that the scope of a prohibition order will vary according to the range of functions which the individual concerned performs in relation to regulated activities, the reasons why he is not fit and proper and the severity of risk posed by him to consumers or the market generally.

In circumstances where the Authority has concerns about the fitness and propriety of an approved person, EG 9.8 to 9.14 provides guidance. In particular, EG 9.8 states that the Authority may consider whether it should prohibit that person from performing functions in relation to regulated activities, withdraw that person's approval or both. In deciding whether to withdraw approval and/or make a prohibition order, the Authority will consider whether its regulatory objectives can be achieved adequately by imposing disciplinary sanctions.

EG 9.9 states that the Authority will consider all the relevant circumstances when deciding whether to make a prohibition order against an approved person and/or to withdraw that person's approval. Such circumstances may include, but are not limited to, the following factors:

- whether the individual is fit and proper to perform functions in relation to regulated activities, including in relation to the criteria for assessing the fitness and propriety of an approved person in terms of competence and capability as set out in FIT 2.2;
- the relevance and materiality of any matters indicating unfitness;
- the length of time since the occurrence of any matters indicating unfitness;
- the particular controlled function the approved person is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates;
- the severity of the risk which the individual poses to consumers and to confidence in the financial system; and
- the previous disciplinary record and general compliance history of the individual.

EG 9.12 provides a number of examples of types of behaviour which have previously resulted in the Authority deciding to issue a prohibition order or withdraw the approval of an approved person. The examples include serious lack of competence.

7. Dispute resolution: complaints

DISP 1 is headed 'Treating customers fairly'. DISP 1.3 contains the complaints handling rules. DISP 1.3.1R requires that effective and transparent procedures for the reasonable and prompt handling of complaints must be established, implemented and maintained by the respondent (which includes an authorised firm).

DISP 1.4 contains the complaints resolution rules. DISP 1.4.1R requires that once a complaint has been received by a respondent, it must (among other things):

- investigate the complaint competently, diligently and impartially;
- assess fairly, consistently and promptly the subject matter of the complaint, whether the complaint should be upheld, what remedial action or redress (or both) may be appropriate and, if appropriate, whether it has reasonable grounds to be satisfied that another respondent may be solely or jointly responsible for the matter alleged in the complaint.

DISP 1.6 contains the complaints time limit rules. DISP 1.6.1R (Keeping the complainant informed) requires that on receipt of a complaint a respondent:

- must send the complainant a prompt written acknowledgement providing early reassurance that it has received the complaint and is dealing with it; and
- ensure the complainant is kept informed thereafter of the progress of the measures being taken for the complaint's resolution.

DISP 1.6.2R (Final or other response within eight weeks) requires that the respondent must, by the end of eight weeks after its receipt of the complaint, send the complainant:

- a final response; or
- a written response which explains why it is not in a position to make a final response and indicate when it expects to be able to provide one, inform the complainant that he may now refer the complaint to the FOS, and enclose a copy of the FOS standard explanatory leaflet.

8. Promotion of collective investment schemes

Section 238(1) of the Act provides that an authorised person must not communicate an invitation or inducement to participate in a collective investment scheme ("CIS"), and therefore also an UCIS. Section 21 (Restrictions on financial promotion) of the Act imposes an equivalent restriction in relation to unauthorised persons.

Section 238 goes on expressly to set out circumstances where this prohibition will not apply. These include:

where the CIS in question is an authorised unit trust or a scheme constituted by an authorised open-ended investment company.

the circumstances set out in the Financial Services and Markets Act 2000 (Promotion of collective investment schemes) (Exemptions) Order 2001 (the "PCIS Order"); and

the exemptions listed in the table in (4) of COBS (Conduct of Business Sourcebook) 4.12.1R (Unregulated collective investment schemes).

The PCIS Order provides for authorised firms to promote UCIS to individuals if they fall within a particular category of exemption set out in the order.

These exemptions pertain to individuals classed as certified high net worth individuals, certified sophisticated investors or self-certified sophisticated investors (articles 21, 23 and 23A of the PCIS Order).
