SEE FINAL NOTICE ISSUED ON 13 NOVEMBER 2013

DECISION NOTICE

To:	**Mr Rahul Shah**
IRN:	**RXS01352 (inactive)**
Date:	**8 February 2013**

ACTION

1. For the reasons given in this notice, the FSA has decided to:

   i. publish a statement that Mr Rahul Shah has encouraged another person to engage in behaviour which, if engaged in by Mr Shah, would amount to market abuse. Were it not for Mr Shah's financial position, the FSA would have decided to impose on him a financial penalty of £125,000; and

   ii. make an order prohibiting Mr Shah from performing any function in relation to any regulated activities carried on by any authorised or exempt persons, or exempt professional firm ("the Prohibition Order").

SUMMARY OF REASONS

2. Between November 2009 and March 2011 Mr Shah was retained as an independent consultant by Investor A. Mr Shah's role was to look for investment opportunities for Investor A. Mr Shah was remunerated under the terms of an unwritten profit-share agreement with Investor A, which stated that Mr Shah would receive 40% of any profits, and incur 40% of any losses, generated as a result of the opportunities he identified.

3. On 16 June 2010, Mr Shah was asked by a financial adviser ("the adviser") acting on behalf of Vyke Communications plc ("Vyke") whether he was prepared to be made an insider in respect of Vyke and thereby prohibited from trading in its shares. Mr Shah agreed.

4. The adviser then informed Mr Shah that a joint venture contract had been signed between Vyke and a US telecommunications company which would turn Vyke into a profit-making company. He suggested that Vyke would issue a formal announcement to the market in approximately two weeks.

5. On 30 June 2010, Mr Shah was informed by the adviser that the announcement of a joint venture involving Vyke was imminent and that the fall in the share price that had occurred that day following Vyke's AGM announcement was a good buying opportunity for anyone not 'inside'.

6. Moments later Mr Shah passed Investor A information to the effect that the adviser considered it a good time to buy Vyke shares, as a result of which Investor A placed two orders to buy Vyke shares. Investor A did not possess any inside information about Vyke and was not aware that Mr Shah did.

7. Immediately after Investor A had placed the first order, at Investor A's instruction Mr Shah called the adviser and told him that Investor A had just acquired 1 million Vyke shares. When the adviser reminded Mr Shah that he was "on the inside" with respect to Vyke and therefore prohibited from trading, Mr Shah replied, *"Yes, no I know. Hey, we're all friends here"*.

8. That day, Investor A bought a total of 2,178,572 Vyke shares at an average price of 2.125p per share. On 12 July 2010, when the joint venture was announced to the market the Vyke share-price increased by almost 12%. However, once Investor A became aware that Mr Shah had inside information at the time of the trading, Investor A unilaterally decided not to sell the shares. Vyke subsequently went into administration, and the shares were rendered valueless. As a result no profit was ever realised on the shares.

9. As a result of his behaviour Mr Shah encouraged Investor A to engage in behaviour which, if engaged in by Mr Shah, would have amounted to market abuse as defined by section 118(2) of the Act.

10. The FSA regards Mr Shah's behaviour as particularly egregious because in March 2010 he received a Policing letter from the Markets Division of the FSA concerning conduct indicative of market abuse, in which he was reminded about the penalties for market abuse and insider dealing.

11. The FSA considers that Mr Shah's behaviour was deliberate, and he has therefore demonstrated a serious lack of honesty and integrity.

DEFINITIONS

12. The definitions below are used in this Decision Notice.

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

"the FSA" means the Financial Services Authority.

"Vyke" means Vyke Communications plc, listed and traded on the Alternative Investment Market.

"the adviser" means the financial adviser acting on behalf of Vyke.

"the investment vehicle" means the company of which Investor A was the sole shareholder and beneficial owner.

FACTS AND MATTERS

13. Between November 2009 and March 2011, Mr Shah was retained as an independent consultant by Investor A through the investment company of which Investor A was the sole shareholder and beneficial owner ("the investment vehicle"). Investor A used his own funds to invest through the investment vehicle which was, in effect, a two man proprietary trading company, comprising only of Investor A and Mr Shah. It was not authorised by the FSA.

14. Investor A relied upon Mr Shah's familiarity with the Alternative Investment Market and the market abuse regime. Mr Shah has over 15 years experience working as a broker within financial services and has previously been approved to perform the CF30 (Customer) controlled function on behalf of authorised firms.

15. Mr Shah's role was to contact brokers, monitor the financial markets and look for investment opportunities for Investor A. Mr Shah was remunerated under the terms of an unwritten profit-share agreement, by which Mr Shah would receive 40% of any profits, less any losses, generated as a result of the opportunities he identified, whilst Investor A retained the remainder.

16. By the end of April 2010, the investment vehicle already held shares in Vyke, having participated in a placing earlier that month. Investor A, through the investment vehicle, had participated in the placing as a result of information provided by Mr Shah. Vyke shares were traded on the Alternative Investment Market.

17. On 16 June 2010, Mr Shah was contacted by the adviser, and asked if he was willing to be made an insider. Before disclosing any inside information, the adviser advised Mr Shah that Mr Shah's status as an insider would mean that he would be prohibited from trading. Mr Shah confirmed that he understood.

18. The adviser then informed Mr Shah that a joint venture contract had been signed between Vyke and a US telecommunications company which would turn Vyke into a profit-making company. He suggested that Vyke would issue a formal announcement to the market in approximately two weeks.

19. Mr Shah did not disclose this information to Investor A.

20. On 30 June 2010 at 11:30am, Vyke issued an announcement to the market in relation to its Annual General Meeting but the announcement said nothing about the joint venture. Following this announcement the price of Vyke shares fell.

21. At 3.45pm that day, at Investor A's instruction Mr Shah called the adviser expressing his concern at the fall in the Vyke share price. Mr Shah informed the adviser that Investor A was either going to sell all of his Vyke shares or buy more.

22. The adviser reminded Mr Shah that he was still an insider with respect to the Vyke joint venture and that he was restricted from trading. Mr Shah confirmed that he understood. The adviser told Mr Shah that he expected the details of the joint venture to be announced to the market within the next 24 hours, and

that the fall in the share price that day would be a good buying opportunity for anyone not 'inside'.

23. Moments later Mr Shah informed Investor A that the adviser had said that the fall in the share price was a good buying opportunity. At 3.51pm and at 3.56pm Investor A placed orders to buy Vyke shares.

24. Immediately after the order placed at 3.51pm, Mr Shah called the adviser at Investor A's instruction and told him that the investment vehicle had just acquired 1 million Vyke shares. When the adviser reminded Mr Shah that he was "on the inside" with respect to Vyke and therefore prohibited from trading, Mr Shah replied, *"Yes, no I know. Hey, we're all friends here"*.

25. In total Investor A, through the investment vehicle, bought a total of 2,178,572 Vyke shares on 30 June 2010 at an average price of 2.125p per share.

26. The announcement of the joint venture was in fact not made to the market until 12 July 2010, as a result of which the Vyke share price increased by 11.7%. The total unrealised profit from Investor A's dealing was £5,446.43 of which, under the terms of the agreement, Mr Shah would have been entitled to £2,178.57. However, once Investor A became aware that Mr Shah had inside information at the time of the trading, Investor A unilaterally decided not to sell the shares. Vyke subsequently went into administration, and the shares were rendered valueless. No profit was ever realised on the shares, and Mr Shah never became entitled to any profit on them.

27. On 1 July 2010, the adviser phoned Mr Shah and told him that there was a problem regarding the fact that Mr Shah had inside information. The adviser confirmed that he had escalated his concerns within his firm. The following day Mr Shah was contacted by a manager from the adviser's firm who expressed concern that insider dealing may have taken place.

28. In the days that followed Mr Shah and Investor A made telephone calls to the FSA Market Abuse Hotline volunteering innocent explanations for their trading in Vyke shares on 30 June 2010.

29. An aggravating factor regarding Mr Shah's conduct as set out above is Mr Shah's previous contact with the Markets Division of the FSA, arising from the circumstances of his dismissal from his previous employers.

30. Mr Shah was dismissed by his employers in November 2009 for gross misconduct following an incident in which he allegedly traded in a company's shares on behalf of a client, ahead of a placing announcement about which he had inside information.

31. The incident was examined by the FSA. Mr Shah maintained that his actions in trading ahead of a placing announcement were a result of a miscommunication with his client. Although no formal enforcement action was taken against Mr Shah, on 29 April 2010 he was sent an FSA Markets Division policing letter which stated that whilst his conduct might be indicative of market abuse it appeared to be negligent rather than deliberate. Mr Shah was reminded about the penalties for market abuse and insider dealing but no further action was taken.

32. As a result of his behaviour Mr Shah encouraged Investor A to engage in behaviour which, if engaged in by Mr Shah, would have amounted to market

abuse as defined by section 118(2) of the Act. As a consequence it appears to the FSA that Mr Shah is not a fit and proper person, and should therefore be prohibited, pursuant to section 56(1) of the Act.

FAILINGS

33. The statutory and regulatory provisions relevant to this Decision Notice are set out in the Annex.

34. Under section 123 of the Act, the FSA may impose a penalty on Mr Shah, or publish a statement, if the FSA is satisfied that he, by taking any action, has encouraged another person to engage in behaviour which, if engaged in by Mr Shah, would amount to market abuse. The FSA is satisfied that Mr Shah has done so.

35. Mr Shah, knowing that Investor A was planning either to buy more Vyke shares or sell the shares he already possessed, told Investor A that the adviser considered the fall in the share price to be a good buying opportunity. The FSA is satisfied that, in the circumstances, by taking this action Mr Shah encouraged Investor A to deal in Vyke shares. If Mr Shah had done so, this would have amounted to market abuse.

36. Mr Shah's behaviour fell within section 118(1)(a) of the Act, in that it occurred in relation to Vyke shares which are qualifying investments, and which are traded on a prescribed market.

37. Mr Shah's behaviour, had he dealt in Vyke shares, would have amounted to market abuse by way of insider dealing in breach of section 118(2) of the Act for the following reasons:

    a) Mr Shah was an insider;

    b) Mr Shah had inside information; and

    c) the dealing was on the basis of that information.

An insider

38. Mr Shah was an insider because he had inside information as a result of having access to information through the exercise of his employment and/or his duties as a consultant providing services to Investor A and the investment vehicle.

Inside information

39. The information received by Mr Shah both on 16 June and on 30 June 2010, met the statutory requirements of inside information, namely:

    i. the information related to Vyke, and to Vyke shares;

    ii. the information was precise because:

        a) it indicated circumstances that existed or an event that had occurred (that a joint venture contract had been signed between Vyke and a US telecommunications company which it was expected would turn Vyke into a profit-making company); and

b) it was specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of Vyke shares;

iii. the information was not generally available; and

iv. the information was likely to have a significant effect on the price of Vyke shares as it was information which a reasonable investor would be likely to use as part of the basis of his investment decisions.

Circumstances that exist or an event that has occurred

40. The information disclosed by the adviser to Mr Shah, was sufficiently precise to indicate circumstances that existed, or an event that had occurred, namely that a joint venture contract had been signed between Vyke and a US telecommunications company which it was expected would turn Vyke into a profit-making company.

Specific information

41. The information disclosed by the adviser to Mr Shah, and by Mr Shah to Investor A, about the nature of the joint venture and that it would turn Vyke into a profit-making company, was specific enough to allow a conclusion to be drawn as to its possible effect on the price of Vyke shares.

42. The conclusion could be drawn that when the joint venture was announced it would have an effect on the price, which would be to increase it.

The information was not generally available

43. The information regarding the joint venture was not generally available.

Information which a reasonable investor would be likely to use

44. It follows from the analysis at paragraphs 41-42 above that a reasonable investor would be likely to use the information disclosed to Mr Shah as part of the basis of his investment decisions.

Dealing on the basis of the inside information

45. The FSA considers that Investor A's decision to deal (through the investment vehicle) was based on the comment made to him by Mr Shah that the adviser had said that it was a good time to buy, which (unknown to Investor A) was based on the inside information.

SANCTION

Financial Penalty / Statement

46. The FSA's policy on imposing a financial penalty is set out in Chapter 6 of the Decision Procedures and Penalties Manual ("DEPP"), which is part of the FSA Handbook.

47. Section 123(2) of the Act states that the FSA may not impose a penalty on a person if there are reasonable grounds to be satisfied that: (1) the person concerned believed, on reasonable grounds, that his behaviour did not amount to market abuse or requiring or encouraging; or (2) the person concerned took

all reasonable precautions and exercised all due diligence to avoid engaging in market abuse or requiring or encouraging.

48. DEPP 6.3.2G lists factors which the FSA may take into account when deciding whether either of these two conditions is met. The FSA is satisfied that neither of these conditions is met by Mr Shah.

49. In respect of conduct occurring on or after 6 March 2010, the FSA applies a five-step framework to determine the appropriate level of financial penalty. DEPP 6.5C sets out the details of the five-step framework that applies in respect of financial penalties imposed on individuals in market abuse cases. Chapter 6.5C is annexed to this notice.

Step 1: disgorgement

50. Pursuant to DEPP 6.5C.1G, at Step 1 the FSA seeks to deprive an individual of the financial benefit derived directly from the market abuse where it is practicable to quantify this.

51. As a result of buying the Vyke shares on 30 June 2010, Investor A made an unrealised profit of £5,446.43. Mr Shah would have been entitled to 40% of this amount - £2,178.57. However, Investor A unilaterally chose not to sell the shares, Vyke subsequently went into administration, and the shares were rendered valueless. Mr Shah never became entitled to any profit. Mr Shah is not therefore required to disgorge any sums.

52. Step 1 is therefore £0.

Step 2: the seriousness of the breach

53. Pursuant to DEPP 6.5C.2G, at Step 2 the FSA determines a figure that reflects the seriousness of the market abuse. That figure is dependent on whether or not the market abuse was referable to the individual's employment. The market abuse was referable to Mr Shah's employment. In cases where the market abuse was referable to the individual's employment, the Step 2 figure will be the greater of:

    a) a figure based upon a percentage of the individual's relevant income;

    b) a multiple of the profit made or loss avoided by the individual for their own benefit, or for the benefit of other individuals where the individual has been instrumental in achieving that benefit, as a direct result of the market abuse (the "profit multiple"); and

    c) for market abuse cases which the FSA assesses to be seriousness level 4 or 5, £100,000.

54. An individual's relevant income is the gross amount of all benefits they received from the employment in connection with which the market abuse occurred for the period of the market abuse. Where the market abuse lasted less than 12 months, or was a one-off event, the relevant income will be that earned by the individual in the 12 months preceding the final market abuse. Where the individual was in the relevant employment for less than 12 months, his relevant income will be calculated on a pro rata basis to the equivalent of 12 months' relevant income.

55. The "period of the market abuse" was the 12 months prior to 30 June 2010. The FSA considers Mr Shah's relevant income for this period to be £88,000.

56. In cases where the market abuse was referable to the individual's employment:

    a) the FSA determines the percentage of relevant income which applies by considering the seriousness of the market abuse and choosing a percentage between 0% and 40%; and

    b) the FSA determines the profit multiple which applies by considering the seriousness of the market abuse and choosing a multiple between 0 and 4.

57. The percentage range and profit multiple range are divided into five fixed levels which reflect, on a sliding scale, the seriousness of the market abuse; the more serious the market abuse, the higher the level. For penalties imposed on individuals for market abuse there are the following five levels:

    Level 1 – 0%; profit multiple of 0

    Level 2 – 10%; profit multiple of 1

    Level 3 – 20%; profit multiple of 2

    Level 4 – 30%; profit multiple of 3

    Level 5 – 40%; profit multiple of 4

58. In assessing the seriousness level, the FSA takes into account various factors which reflect the impact and nature of the market abuse, and whether it was deliberate or reckless. DEPP 6.5C.2 G(15) lists factors likely to be considered 'level 4 or 5 factors'. Of these, the FSA considers the following factors to be relevant:

    a) The wall-crossing procedure is a recognised industry practice designed to impose restrictions on persons who receive inside information. Mr Shah demonstrated a blatant disregard for those restrictions. Such behaviour has a serious adverse effect on confidence in markets, DEPP 6.5C.2 G(15)(b);

    b) Mr Shah breached a position of trust because he had agreed to be "wall-crossed" as a pre-condition prior to the adviser disclosing the inside information, DEPP 6.5C.2 G(15)(d); and

    c) Mr Shah acted deliberately, DEPP 6.5C.2 G(15)(f).

59. DEPP 6.5C.2 G(16) lists factors likely to be considered 'level 1, 2 or 3 factors'. Of these, the only factor that the FSA considers to be relevant is that Mr Shah made no profit as a result of the market abuse, DEPP 6.5C.2 G(16)(a).

60. The FSA also considers that the following factors are relevant:

    a) Mr Shah encouraged another, Investor A, to engage in behaviour which, if engaged in by Mr Shah, would have amounted to market abuse, DEPP 6.5C.2 G(12)(c); and

    b) Mr Shah is an experienced industry professional, DEPP 6.5C.2 G(12)(e).

61. The FSA usually expects to assess deliberate market abuse as seriousness level 4 or 5, DEPP 6.5C.2 G(3)(c).

62. Taking all of these factors into account, the FSA considers the seriousness of the market abuse to be level 4. This means that the Step 2 figure is the higher of:

    a) 30% of Mr Shah's relevant income of £88,000, a sum of £26,400;

    b) A profit multiple of 3 applied to Mr Shah's financial benefit of £0, a sum of £0; and

    c) £100,000.

63. Step 2 is therefore £100,000.

Step 3: mitigating and aggravating factors

64. Pursuant to DEPP 6.5C.3G, at Step 3 the FSA may increase or decrease the amount of the financial penalty arrived at after Step 2, but not including any amount to be disgorged as set out in Step 1, to take into account factors which aggravate or mitigate the market abuse.

65. The FSA considers that the following factor aggravates the breach: Mr Shah had recently been told about the FSA's concerns in relation to market abuse as a result of the Markets Division policing letter, in which he was reminded about the penalties for market abuse and insider dealing, DEPP 6.5C.3 G(2)(e).

66. The FSA considers that there are no factors listed within DEPP 6.5C.3G that mitigate the breach.

67. Having taken into account these aggravating and mitigating factors, the FSA considers that the Step 2 figure should be increased by 25%. This reflects the fact that Mr Shah's market abuse occurred soon after receipt by him of the Markets Division policing letter, and the similarity of his market abuse to the conduct in relation to which that letter was sent.

68. Step 3 is therefore £125,000.

Step 4: adjustment for deterrence

69. Pursuant to DEPP 6.5C.4G, if the FSA considers the figure arrived at after Step 3 is insufficient to deter the individual, or others, from further or similar market abuse, then the FSA may increase the penalty.

70. The FSA considers that the Step 3 figure of £125,000 represents a sufficient deterrent to Mr Shah and others, and so has not increased the penalty at Step 4.

71. Step 4 is therefore £125,000.

Step 5: settlement discount

72. Mr Shah did not reach an agreement with the FSA and does not qualify for a discount.

Serious financial hardship

73. Pursuant to DEPP 6.5D.4G, the FSA will consider reducing the amount of a penalty if an individual will suffer serious financial hardship as a result of having to pay the entire penalty.

74. Mr Shah has provided verifiable evidence to satisfy the FSA that payment of any penalty would cause him serious financial hardship. Were this not the case the FSA would have decided to impose on him a penalty of £125,000.

Conclusion

75. Given that the payment of any penalty would cause Mr Shah serious financial hardship, the FSA has decided to publish a statement that Mr Shah has encouraged another person to engage in behaviour which, if engaged in by Mr Shah, would amount to market abuse.

Prohibition

76. The FSA's power under section 56 of the Act to prohibit individuals who are not fit and proper from carrying out functions in relation to regulated activities helps the FSA to work towards its regulatory objectives of protecting consumers, maintaining confidence in the financial system and reducing financial crime.

77. The FSA's general policy in this area is set out in Chapter 9 of the Enforcement Guide, which is part of the FSA Handbook.

78. Mr Shah's behaviour in deliberately encouraging behaviour which, if engaged in by Mr Shah, would amount to market abuse, amounted to a serious act of dishonesty. Mr Shah received inside information and, knowing this information was confidential and price sensitive, encouraged Investor A to trade.

79. Mr Shah failed to follow the proper standards of market behaviour and he pursued a deliberate course of conduct which put other market participants at a disadvantage. His behaviour demonstrates that he lacks integrity.

80. The FSA is satisfied that in all the circumstances of the case, Mr Shah should be prohibited from performing any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm on the grounds that he is not a fit and proper person, pursuant to section 56 of the Act.

REPRESENTATIONS AND FINDINGS

81. Below is a brief summary of the key representations made by Mr Shah in response to the Warning Notice and how they have been dealt with. In making the decision which gave rise to the obligation to give this notice, the FSA has taken into account all such representations, whether or not set out below.

82. Mr Shah made representations that:

    (1) immediately after his conversation with the adviser on 16 June 2010 he passed on to Investor A the information he had received. He told Investor A that they were 'inside' with regard to Vyke until the joint venture deal was announced to the market. He told Investor A that the announcement

would be in a couple of weeks. Investor A therefore knew that he was 'inside' and consequently he did not carry out any trades in Vyke in the following days;

(2) just before the 3.45pm call on 30 June 2010, Investor A told Mr Shah that an announcement about Vyke was out, which was an AGM announcement, that the stock was dropping and that Mr Shah should call the adviser;

(3) Mr Shah knew that they were still 'inside' after his conversation at 3.45pm and Investor A must have known this too. Investor A had the only Bloomberg terminal in the office on his desk, which listed all announcements. Mr Shah presumed that Investor A kept up with the news flow;

(4) following the 3.45pm call, Mr Shah tried to attract Investor A's attention. However, he was preoccupied and Mr Shah did not want to aggravate him. Mr Shah also had other things to do and was trying to contact another broker. Therefore, between the end of the 3.45pm call and Mr Shah's call to the adviser at 3.56pm, Mr Shah had not spoken to Investor A and did not know what Investor A was doing;

(5) at 3.56pm, before Mr Shah had had a chance to speak with him about the 3.45pm call, Investor A told Mr Shah to contact the adviser. Mr Shah immediately did so and while the conversation took place Investor A shouted over his desk what Mr Shah should say. This was common – Investor A would tell Mr Shah what to say while on a call, and Mr Shah would repeat what Investor A was saying to the person on the other end of the line;

(6) investor A told Mr Shah to tell the adviser that Investor A had just bought 1 million shares of Vyke, which Mr Shah did. Until then Mr Shah did not know that Investor A had traded in Vyke shares that day – if he had known he would have tried to stop him. Mr Shah knew that they were still 'inside' – there would be no reason for him to tell the adviser, who would not otherwise have known, that they had just bought 1 million Vyke shares, knowing the consequences. His comment to the adviser that 'we're all friends here' was simply the first thing he said in a moment of confusion - although Mr Shah believed that despite the AGM announcement they were still inside, he thought that he might have missed something in the announcement or another announcement. The timing of Investor A's trading just after the 3.45pm call ended was pure coincidence; and

(7) Mr Shah presumed at the time that Investor A knew that he was still 'inside' because he had been told. Mr Shah speculated in retrospect that Investor A might have thought that he was no longer 'inside' because it was 30 June, exactly two weeks since Mr Shah's conversation with the adviser on 16 June 2010. But the only announcement made had been an AGM announcement.

83. The FSA has found that:

(1) Mr Shah's version of events is not credible;

(2) Investor A was an experienced trader who had instructed Mr Shah to call the adviser so that Investor A could determine whether to buy more Vyke

shares or sell the ones he already owned. It is not plausible that he would then have traded in Vyke shares without first checking with Mr Shah what the adviser had said. Further, it is implausible that Investor A would have coincidentally decided to buy Vyke shares just minutes after Mr Shah had been told by the adviser that it was a good time to buy them;

(3) Mr Shah's version of events is that Investor A told Mr Shah to call the adviser, following which Investor A heard nothing back from Mr Shah. Then, 10 minutes later, Investor A again asked Mr Shah to call the adviser, and Mr Shah did so without mentioning to Investor A that Mr Shah had spoken to the adviser in the intervening 10 minutes. The FSA does not consider this to be plausible;

(4) there is no evidence to support Mr Shah's claim that he passed on inside information regarding Vyke to Investor A on 16 June 2010 or thereafter. If Investor A had been 'inside' it is not credible that he would have instructed Mr Shah to tell the adviser that Investor A intended to trade Vyke shares on 30 June 2010 and to inform him after the trading had occurred. Although Mr Shah states that he would not have told the adviser about the trading if he had known it had occurred while they were 'inside', it appears that he had little choice – he had been instructed by Investor A to inform the adviser of this, and Investor A was nearby when the call was made. Further, it is clear from the recording of the 3.56pm call that Mr Shah was not being instructed what to say while the call was taking place; and

(5) there was no reason for Investor A to trade between 16 June and 30 June, and therefore the fact that he did not do so does not evidence Mr Shah's claim that the lack of trading was because Investor A knew that he was 'inside'.

PROCEDURAL MATTERS

Decision makers

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

85. This Decision Notice is given under sections 57 and 127 of the Act and in accordance with section 388 of the Act. The following statutory rights are important.

The Tribunal

86. Mr Shah has 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 Shah has 28 days from the date on which this Decision Notice is given to him to refer the matter to the Tribunal. A reference to the Tribunal is made by way of a signed reference notice (Form FTC3) filed with a copy of this Decision 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

87. Mr Shah should note that a copy of the reference notice (Form FTC3) must also be sent to the FSA at the same time as filing a reference with the Tribunal. A copy of the reference notice should be sent to Nick Bayley at the FSA, 25 The North Colonnade, Canary Wharf, London E14 5HS.

Access to evidence

88. Section 394 of the Act applies to this Decision Notice. The person to whom this Notice is given has the right to access:

(1) the material upon which the FSA has relied on in deciding to give this Notice; and

(2) any secondary material which, in the opinion of the FSA, might undermine that decision.

89. There is no such secondary material.

Confidentiality and publicity

90. 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). The effect of section 391 of the Act is that a person to whom this notice is given may not publish the notice or any details concerning it unless the FSA has published the notice or those details.

91. The FSA may publish such information about the matter to which a Decision Notice or Final Notice relates as it considers appropriate. The facts and matters contained in this notice may therefore be made public.

FSA contacts

92. For more information concerning this matter generally, contact Nick Bayley at the FSA (direct line: 020 7066 5342) or Rebecca Green (direct line 020 7066 9496).

Andrew Long
Acting Chairman, Regulatory Decisions Committee

ANNEX

RELEVANT STATUTORY PROVISIONS AND REGULATORY GUIDANCE

Statutory provisions

1. Section 123(1)(b) of the Act states that, if the FSA is satisfied that a person ("A") by taking or refraining from taking any action has required or encouraged another person or persons to engage in behaviour which, if engaged in by A, would amount to market abuse, it may impose on him a penalty of such amount as it considers appropriate.

2. Section 123(2) sets out certain circumstances in which the FSA may not impose a penalty on a person.

3. Under section 123(3) of the Act, if the FSA is entitled to impose a penalty on a person under this section it may, instead of imposing a penalty on him, publish a statement to the effect that he has engaged in market abuse.

4. Market Abuse is defined at Section 118(1) of the Act as follows:

   For the purposes of this Act, market abuse is behaviour (whether by one person alone or by two or more persons jointly or in concert) which:-

   (a) occurs in relation to –

   (i) qualifying investments admitted to trading on a prescribed market …and

   (iii) in the case of subsection (2) or (3) behaviour, investments which are related investments in relation to such qualifying investments, and

   (b) falls within any one or more of the types of behaviour set out in subsections (2) to (8).

5. Section 118(2) sets out the behaviour that will amount to insider dealing:

   … where an insider deals or attempts to deal, in a qualifying investment or related investment on the basis of inside information relating to the investment in question.

6. Section 118B of the Act provides as follows:

   … an insider is any person who has inside information:…

   (c) as a result of having access to the information through the exercise of his employment, profession or duties.

7. Section 130A of the Act defines dealing as follows:

   in relation to an investment, means acquiring or disposing of the investment whether as principal or agent or directly or indirectly, and includes agreeing to acquire or dispose of the investment, and entering into and bringing to an end a contract creating it.

8. Section 118C(2) sets out the requirements for information to be inside information:

> Inside information is information of a precise nature which:
>
> (a) is not generally available;
>
> (b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one of more of the qualifying investments;
>
> (c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments.

The Code of Market Conduct

9. The FSA has issued the Code of Market Conduct ("MAR") pursuant to section 119 of the Act. In deciding to take the action set out in this notice, the FSA has had regard to MAR and other guidance published in the FSA Handbook.

> MAR 1.3.2E gives descriptions of behaviour that amount to market abuse (insider dealing): This example relevant to this notice is:
>
> (1) dealing on the basis of inside information which is not trading information.
>
> MAR 1.2.12 E sets out factors that are to be taken into account in determining whether or not information is generally available, each of which indicate that the information is generally available (and therefore that it is not inside information), which include:
>
> - whether the information has been disclosed to a prescribed market through a regulatory information service or otherwise in accordance with the rules of the market; and
> - whether the information is otherwise generally available, including through the Internet, or some other publication (including if it is only available on payment of a fee), or is derived from information which has been made public.

10. MAR 1.3.3 E sets out factors that are to be taken into account in determining whether or not a person's behaviour is "on the basis of" inside information and sets out a number of factors that are indications that it is not (none of which are relevant to the facts of this case).

Decision Procedures and Penalties Manual ("DEPP")

11. Section 123(1) of the Act authorises the FSA to impose financial penalties in cases of market abuse. Section 124 of the Act requires the FSA to issue a statement of its policy with respect to the imposition of penalties for market abuse and the amount of such penalties. The FSA's policy in this regard is contained in Chapter 6 of DEPP.

12. In deciding whether to exercise its power under section 123 in the case of any particular behaviour, the FSA must have regard to this statement of policy. Therefore, in determining the level of penalty, the FSA has had regard to DEPP 6 as it applied in June 2010. With regard to the application of section 123(2) of the Act, DEPP 6.3.2 G sets out factors that the FSA may take into

account in determining whether the conditions of 123(2) are met. Factors relevant to this notice include:

(1) whether, and if so to what extent, the behaviour in question was or was not analogous to behaviour described in the Code of Market Conduct (see MAR 1) as amounting or not amounting to market abuse or requiring or encouraging;

(2) whether the FSA has published any guidance or other materials on the behaviour in question and if so, the extent to which the person sought to follow that guidance or take account of those materials (see the Reader's Guide to the Handbook regarding the status of guidance.) The FSA will consider the nature and accessibility of any guidance or other published materials when deciding whether it is relevant in this context and, if so, what weight it should be given; and

(3) whether, and if so to what extent, the behaviour complied with the rules of any relevant prescribed market or any other relevant market or other regulatory requirements (including the Takeover Code) or any relevant codes of conduct or best practice.

(4) the level of knowledge, skill and experience to be expected of the person concerned

13. The five steps for penalties imposed on individuals in market abuse cases

Step 1 – disgorgement

DEPP 6.5C.1G The *FSA* will seek to deprive an individual of the financial benefit derived as a direct result of the *market abuse* (which may include the profit made or loss avoided) where it is practicable to quantify this. The *FSA* will ordinarily also charge interest on the benefit.

Step 2 – the seriousness of the market abuse

DEPP 6.5C.2G (1) The *FSA* will determine a figure dependent on the seriousness of the *market abuse* and whether or not it was referable to the individual's employment. This reflects the *FSA's* view that where an individual has been put into a position where he can commit *market abuse* because of his employment the fine imposed should reflect this by reference to the gross amount of all benefits derived from that employment.

(2) In cases where the *market abuse* was referable to the individual's employment, the figure for the purpose of Step 2 will be the greater of:

(a) a figure based on a percentage of the individual's "relevant income". The percentage of relevant income which will apply is explained in paragraphs (6) and (8) to (16) below;

(b) a multiple of the profit made or loss avoided by the individual for his own benefit, or for the benefit of

other individuals where the individual has been instrumental in achieving that benefit, as a direct result of the *market abuse* (the "profit multiple"). The profit multiple which will apply is explained in paragraphs (6) and (8) to (16) below; and

(c) for *market abuse* cases which the *FSA* assesses to be seriousness level 4 or 5, £100,000. How the *FSA* will assess the seriousness level of the *market abuse* is explained in paragraphs (9) to (16) below. The *FSA* usually expects to assess *market abuse* committed deliberately as seriousness level 4 or 5.

(3) In cases where the *market abuse* was not referable to the individual's employment, the figure for the purpose of Step 2 will be the greater of:

(a) a multiple of the profit made or loss avoided by the individual for his own benefit, or for the benefit of other individuals where the individual has been instrumental in achieving that benefit, as a direct result of the *market abuse* (the "profit multiple"). The profit multiple which will apply is explained in paragraphs (7) to (16) below; and

(b) for *market abuse* cases which the *FSA* assesses to be seriousness level 4 or 5, £100,000. How the *FSA* will assess the seriousness level of the *market abuse* is explained in paragraphs (9) to (16) below. The *FSA* usually expects to assess *market abuse* committed deliberately as seriousness level 4 or 5.

(4) An individual's "relevant income" will be the gross amount of all benefits received by the individual from the employment in connection with which the *market abuse* occurred (the "relevant employment") for the period of the *market abuse*. In determining an individual's relevant income, "benefits" includes, but is not limited to, salary, bonus, pension contributions, *share* options and *share* schemes; and "employment" includes, but is not limited to, employment as an adviser, *director*, partner or contractor.

(5) Where the *market abuse* lasted less than 12 *months*, or was a one-off event, the relevant income will be that earned by the individual in the 12 *months* preceding the final *market abuse*. Where the individual was in the relevant employment for less than 12 *months*, his relevant income will be calculated on a pro rata basis to the equivalent of 12 *months'* relevant income.

(6) In cases where the *market abuse* was referable to the individual's employment:

(a) the *FSA* will determine the percentage of relevant income which will apply by considering the seriousness of the *market abuse* and choosing a percentage between 0% and 40%; and

(b) the *FSA* will determine the profit multiple which will apply by considering the seriousness of the *market abuse* and choosing a multiple between 0 and 4.

(7) In cases where the *market abuse* was not referable to the individual's employment the *FSA* will determine the profit multiple which will apply by considering the seriousness of the *market abuse* and choosing a multiple between 0 and 4.

(8) The percentage range (where the *market abuse* was referable to the individual's employment) and profit multiple range (in all cases) are divided into five fixed levels which reflect, on a sliding scale, the seriousness of the *market abuse*. The more serious the *market abuse*, the higher the level. For penalties imposed on individuals for *market abuse* there are the following five levels (the percentage figures only apply where the *market abuse* was referable to the individual's employment):

(a) level 1 - 0%, profit multiple of 0;

(b) level 2 - 10%, profit multiple of 1;

(c) level 3 - 20%, profit multiple of 2;

(d) level 4 - 30%, profit multiple of 3; and

(e) level 5 - 40%, profit multiple of 4.

(9) The *FSA* will assess the seriousness of the *market abuse* to determine which level is most appropriate to the case.

(10) In deciding which level is most appropriate to a *market abuse* case, the *FSA* will take into account various factors which will usually fall into the following four categories:

(a) factors relating to the impact of the *market abuse*;

(b) factors relating to the nature of the *market abuse*;

(c) factors tending to show whether the *market abuse* was deliberate; and

(d) factors tending to show whether the *market abuse* was reckless.

(11) Factors relating to the impact of the *market abuse* include:

(a) the level of benefit gained or loss avoided, or intended to be gained or avoided, by the individual from the *market abuse*, either directly or indirectly;

(b) whether the *market abuse* had an adverse effect on markets and, if so, how serious that effect was. This may include having regard to whether the orderliness of, or confidence in, the markets in question has been damaged or put at risk; and

(c) whether the *market abuse* had a significant impact on the price of *shares* or other *investments*.

(12) Factors relating to the nature of the *market abuse* include:

(a) the frequency of the *market abuse*;

(b) whether the individual abused a position of trust;

(c) whether the individual caused or encouraged other individuals to commit *market abuse*;

(d) whether the individual has a prominent position in the market;

(e) whether the individual is an experienced industry professional;

(f) whether the individual held a senior position with the firm; and

(g) whether the individual acted under duress.

(13) Factors tending to show the *market abuse* was deliberate include:

(a) the *market abuse* was intentional, in that the individual intended or foresaw that the likely or actual consequences of his actions would result in *market abuse*;

(b) the individual intended to benefit financially from the *market abuse*, either directly or indirectly;

(c) the individual knew that his actions were not in accordance with exchange rules, *share* dealing rules and/or the firm's internal procedures;

(d) the individual sought to conceal his misconduct;

(e) the individual committed the *market abuse* in such a way as to avoid or reduce the risk that the *market abuse* would be discovered;

(f) the individual was influenced to commit the *market abuse* by the belief that it would be difficult to detect;

(g) the individual's actions were repeated;

(h) for *market abuse* falling within section 118(2) of the *Act*, the individual knew or recognised that the information on which the *dealing* was based was *inside information*; and

(i) for *market abuse* falling within section 118(4) of the *Act*, the individual's behaviour was based on information which he knew or recognised was not generally available to those using the market, and the individual regarded the information as relevant when deciding the terms on which transactions in qualifying *investments* should be effected.

(14) Factors tending to show the *market abuse* was reckless include:

(a) the individual appreciated there was a risk that his actions could result in *market abuse* and failed adequately to mitigate that risk; and

(b) the individual was aware there was a risk that his actions could result in *market abuse* but failed to check if he was acting in accordance with internal procedures.

(15) In following this approach factors which are likely to be considered 'level 4 factors' or 'level 5 factors' include:

(a) the level of benefit gained or loss avoided, or intended to be gained or avoided, directly by the individual from the *market abuse* was significant;

(b) the *market abuse* had a serious adverse effect on the orderliness of, or confidence in, markets;

(c) the *market abuse* was committed on multiple occasions;

(d) the individual breached a position of trust;

(e) the individual has a prominent position in the market; and

(f) the *market abuse* was committed deliberately or recklessly.

(16) In following this approach factors which are likely to be considered 'level 1 factors', 'level 2 factors' or 'level 3 factors' include:

(a) little, or no, profits were made or losses avoided as a result of the *market abuse*, either directly or indirectly;

(b) there was no, or limited, actual or potential effect on the orderliness of, or confidence in, markets as a result of the *market abuse*; and

(c) the *market abuse* was committed negligently or inadvertently.

[**Note:** For the purposes of DEPP 6.5C, "firm" has the special meaning given to it in DEPP 6.5.1 G.]

Step 3 - mitigating and aggravating factors

DEPP 6.5C.3G (1) The *FSA* may increase or decrease the amount of the financial penalty arrived at after Step 2, but not including any amount to be disgorged as set out in Step 1, to take into account factors which aggravate or mitigate the *market abuse*. Any such adjustments will be made by way of a percentage adjustment to the figure determined at Step 2.

(2) The following list of factors may have the effect of aggravating or mitigating the *market abuse*:

(a) the conduct of the individual in bringing (or failing to bring) quickly, effectively and completely the *market abuse* to the *FSA's* attention (or the attention of other regulatory authorities, where relevant);

(b) the degree of cooperation the individual showed during the investigation of the *market abuse* by the *FSA*, or any other regulatory authority allowed to share information with the *FSA*;

(c) whether the individual assists the *FSA* in action taken against other individuals for *market abuse* and/or in criminal proceedings;

(d) whether the individual has arranged his resources in such a way as to allow or avoid disgorgement and/or payment of a financial penalty;

(e) whether the individual had previously been told about the *FSA's* concerns in relation to the issue, either by means of a private warning or in supervisory correspondence;

(f) the previous disciplinary record and general compliance history of the individual;

(g) action taken against the individual by other domestic or international regulatory authorities that is relevant to the *market abuse* in question;

(h) whether *FSA guidance* or other published materials had already raised relevant concerns, and the nature and accessibility of such materials; and

(i) whether the individual agreed to undertake training subsequent to the *market abuse*.

Step 4 - adjustment for deterrence

DEPP 6.5C.4G (1) If the *FSA* considers the figure arrived at after Step 3 is insufficient to deter the individual who committed the *market abuse*, or others, from committing further or similar abuse then the *FSA* may increase the penalty. Circumstances where the *FSA* may do this include:

(a) where the *FSA* considers the absolute value of the penalty too small in relation to the *market abuse* to meet its objective of credible deterrence;

(b) where previous *FSA* action in respect of similar *market abuse* has failed to improve industry standards; and

(c) where the penalty may not act as a deterrent in light of the size of the individual's income or net assets.

Step 5 - settlement discount

DEPP 6.5C.5G The *FSA* and the individual on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, DEPP 6.7 provides that the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the *FSA* and the individual concerned reached an agreement. The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1.

Enforcement Guide ("EG")

14. Section 9 of EG deals with prohibition orders. Paragraph 9.1 provides an introduction to the FSA using its powers under section 56 of the Act:

> The FSA's power under section 56 of the Act to prohibit individuals who are not fit and proper from carrying out functions in relation to regulated activities helps the FSA to work towards achieving its regulatory objectives. The FSA may exercise this power to make a prohibition order where it considers that, to achieve any of those objectives, it is appropriate either to prevent an individual from performing any function in relation to regulated activities, or to restrict the functions which he may perform.

15. Paragraphs 9.3 to 9.7 of EG then set out the FSA's general policy in relation to prohibition orders and withdrawal of approval.

16. Paragraphs 9.17 to 9.18 of EG state that where the FSA is considering making a prohibition order against an individual who is not an approved person, the FSA will consider the severity of the risk posed by the individual, and may prohibit the individual where it considers this is appropriate to achieve one or more of its regulatory objectives. When considering whether to exercise its power to make a prohibition order against such an individual, the FSA will consider all the relevant circumstances of the case, which may include the following (see paragraph 9.9 of EG). Of those listed, the circumstances of relevance to this notice include:

    (2) Whether the individual is fit and proper to perform functions in relation to regulated activities. The criteria for assessing the fitness and propriety of approved persons are set out in FIT 2.1 (Honesty, integrity and reputation); FIT 2.2 (Competence and capability) and FIT 2.3 (Financial soundness);

    (4) Whether the approved person has engaged in market abuse; and

    (9) The previous disciplinary record and general compliance history of the individual including whether the FSA, any previous regulator, designated professional body or other domestic or international regulator has previously imposed a disciplinary sanction on the individual.

17. EG 9.10 provides that the FSA can have regard to the cumulative effect of a number of factors. EG 9.11 provides that the factors set out at paragraph 9.9 are not a definitive list.

18. EG 9.12 provides examples of types of behaviour which have previously resulted in the FSA deciding to issue a prohibition order or withdraw the approval of an approved person. The example of particular relevance to this notice is:

    (3) Severe acts of dishonesty, e.g. which may have resulted in financial crime.

Fit and Proper Test for Approved Persons ("FIT")

19. Paragraph 1.3.1 of FIT states:

    The FSA will have regard to a number of factors when assessing the fitness and propriety of a person to perform a particular controlled function. The most important considerations will be the person's:

    (1) honesty, integrity and reputation;

    (2) competence and capability; and

    (3) financial soundness.

20. FIT 1.3.3 states:

    The criteria listed in FIT 2.1 to FIT 2.3 are guidance and will be applied in general terms when the FSA is determining a person's fitness and propriety. It would be impossible to produce a definitive list of all the matters which would be relevant to a particular determination.

21. FIT 1.3.4 states:

> If a matter comes to the FSA's attention which suggests that the person might not be fit and proper, the FSA will take into account how relevant and how important it is.

22. The relevant criteria in this case are honesty, integrity and reputation.

23. In assessing the fitness and propriety of an approved person under the criterion of honesty, integrity and reputation, the FSA will have regard to the matters including, but not limited to, those set out in FIT 2.1.3 G.

24. FIT 2.1.3G refers to various matters, including:

> (5) whether the person has contravened any of the requirements and standards of the regulatory system or the equivalent standards or requirements of other regulatory authorities (including a previous regulator), clearing houses and exchanges, professional bodies, or government bodies or agencies.
>
> (13) whether, in the past, the person has been candid and truthful in all his dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards.