
FINAL NOTICE

To: **ActivTrades Plc**

Of: **5th Floor**
110 Middlesex Street
London
E1 7HY

FRN: **434413**

Date: **15 March 2011**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) gives ActivTrades Plc final notice about the imposition of a financial penalty

1. THE ACTION

- 1.1. The FSA gave ActivTrades Plc (“ActivTrades”) a Decision Notice on 15 March 2011 which notified ActivTrades that the FSA had decided, pursuant to section 206 of the Financial Services and Markets Act 2000 (“the Act”), to impose a financial penalty of £85,750 on ActivTrades for breaches of Principle 3 (Management and control) and Principle 10 (Clients’ assets) of the FSA’s Principles for Businesses (“the Principles”) and associated FSA Rules set out in the Client Assets sourcebook (“CASS”) between 14 April 2009 and 2 September 2010 (“the relevant period”).
- 1.2. ActivTrades agreed that it would not be referring the matter to the Upper Tribunal (Tax and Chancery Chamber). Accordingly, for the reasons set out below, the FSA imposes a financial penalty of £85,750.

1.3. ActivTrades agreed to settle at an early stage of the FSA's investigation and qualified for a 30% (Stage 1) discount under the FSA's executive settlement procedures. Were it not for this discount, the FSA would have imposed a financial penalty of £122,500.

2. REASONS FOR THE ACTION

2.1. On the basis of the facts and matters described below, the FSA considers that ActivTrades' conduct fell below the requirements and standards of the regulatory system. Specifically, ActivTrades failed to ensure proper accounting and treatment of client money during the relevant period.

2.2. ActivTrades breached Principle 10 in that it failed to arrange adequate protection for clients' assets when it was responsible for them by failing to:

- (1) segregate client money appropriately and ensure that it did not hold client money in its own bank accounts;
- (2) perform client money calculations and reconciliations accurately or in a timely way;
- (3) pay interest received on client money to clients; and
- (4) confirm in its client agreement the circumstances in which it would cease to treat any unclaimed client money as client money.

2.3. ActivTrades also breached Principle 3 in that it failed to take reasonable care to organise and control its affairs responsibly and effectively with adequate risk management systems by failing to ensure that:

- (1) adequate policies and procedures were in place relating to client money processes; and
- (2) senior managers were provided with regular management information to monitor and assess the adequacy of its systems and controls relating to the protection of client money.

2.4. As a consequence of its failings, ActivTrades also breached a number of associated CASS Rules. Details of the relevant CASS Rules are set out in the Annex to this Final Notice.

2.5. The FSA considers ActivTrades' failings to be serious for the following reasons:

- (1) ActivTrades had a responsibility to manage and protect client money properly but it failed to do so;
- (2) the failings were not identified by ActivTrades through its own compliance monitoring;
- (3) failings were found throughout ActivTrades' client money processes, indicating that its client money regime was fundamentally flawed; and

- (4) the failings placed some client money at risk (although none of ActivTrades' clients suffered any losses as a result).
- 2.6. The FSA has taken into account the following factors which have served to mitigate the seriousness of ActivTrades' failings:
 - (1) it co-operated fully with the FSA's investigation and accepted the failings set out in this Final Notice;
 - (2) it proactively engaged a skilled person to review its client money processes in light of the FSA's concerns; and
 - (3) it took significant steps to rectify its client money issues, including enhancing its staffing arrangements and compliance support, and improving its software systems.
- 2.7. The FSA has concluded that the nature of the breaches outlined above warrants a financial penalty. The FSA therefore imposes a financial penalty of £85,750 on ActivTrades.
- 2.8. This action supports the FSA's regulatory objective of the protection of consumers.

3. STATUTORY PROVISIONS, REGULATORY GUIDANCE AND POLICY

- 3.1. The relevant statutory provisions, regulatory guidance and policy are set out in the Annex to this Final Notice.

4. FACTS AND MATTERS RELIED ON

Background

- 4.1. ActivTrades is a broker specialising in foreign exchange, contracts for difference and futures, which operates in London. ActivTrades has been authorised and regulated by the FSA since 27 October 2005 and is permitted to hold client money.
- 4.2. In the course of its business, ActivTrades received money on behalf of its clients for the provision of its brokerage services. The money ActivTrades received on behalf of its clients was "client money" and was subject to the relevant requirement and standards set out in the CASS Rules. During the relevant period, the amount held by ActivTrades as client money ranged between £3.4 million and £23.6 million and averaged £12.2 million.

Client assets and money thematic project

- 4.3. The FSA has been conducting a thematic project into the management of client assets and money held by firms. The project's aim was to assess whether client assets and money held by firms are safe and would be returned within a reasonable time in the event a firm became insolvent. It also aimed to make firms take seriously their responsibilities with regards to client assets and money and have appropriate controls in place to mitigate any risks.

- 4.4. In March 2009, the FSA issued a “Dear Compliance Officer” letter notifying firms to make adequate arrangements to protect client money and assets. The letter highlighted issues for firms to consider and warned firms of visits in 2009.
- 4.5. In January 2010, the FSA issued a “Dear Chief Executive Officer” letter and published a “Client Money and Asset Report” notifying firms of failings identified during work conducted by the FSA in 2009. The letter warned firms that visits would continue throughout 2010.
- 4.6. Following these letters, the FSA visited ActivTrades in June 2010 to review its client money arrangements. The FSA identified a number of weaknesses with ActivTrades’ client money processes and were concerned that it did not have in place adequate risk management systems.
- 4.7. In September 2010, the FSA issued ActivTrades with a skilled person requirement notice pursuant to section 166 of the Act. The requirement notice required ActivTrades to engage a skilled person to review its client money arrangements in light of the concerns identified during the FSA’s visit, and to calculate the value of client money that was at risk during the relevant period. The skilled person produced its report in November 2010 (“the skilled person report”), the findings of which are summarised below.

Failing to arrange adequate protection in respect of client money

- 4.8. Firms that receive client money are required under CASS Rules to arrange adequate protection for client money that they hold but ActivTrades failed to do so. During the relevant period, it failed to segregate client money appropriately, perform client money reconciliations correctly or make clear the circumstances in which it would retain interest received on client money or cease to treat this money as client money.

Segregation of client money

- 4.9. ActivTrades failed to segregate client money appropriately in that it could not demonstrate the suitability of the institutions that it deposited client money with, and client money was mixed with its own funds.

Due Diligence

- 4.10. Firms are required to exercise all due skill care and diligence in the selection, appointment and periodic review of institutions where client money is deposited and should consider factors such as the need for diversification of risks, the financial and legal standing of the institution and the market practices of the institution relating to its investment and loan activities. Firms are required to demonstrate the appropriateness of the institution selected by making sufficient records of the due diligence undertaken, the factors considered and the rationale for choosing the institution.
- 4.11. ActivTrades appeared to rely solely on the credit rating of the institutions that it used. Although ActivTrades held client money at well recognised financial institutions, the skilled person report highlighted that ActivTrades did not perform any due diligence on one institution with which it placed client money. The skilled person report also

highlighted that ActivTrades did not document sufficiently the due diligence undertaken or the rationale for choosing three other institutions with which it placed client money.

Co-mingling of client and corporate money

- 4.12. Firms are required to take necessary steps to ensure that client money deposited is held in accounts that can be identified separately from any accounts used to hold the firms' own funds.
- 4.13. The skilled person report highlighted that on several dates between October 2009 and February 2010, and on one date in August 2010, client money received in respect of ActivTrades' futures business was co-mingled in an account used to hold its own funds.
- 4.14. The skilled person also calculated that between 29 January 2010 and 14 June 2010, client money totalling €800,000 was held in an account used for ActivTrades' own funds. This money was at risk of being combined with ActivTrades' own funds in the event that it became insolvent. In these circumstances, client money would not have been ring-fenced but would have been pooled with ActivTrades' money with the effect that clients would have been classed as general creditors in ActivTrades' insolvency process rather than having the right to claim from a pool of protected client money. Consequently, the likelihood of such clients recovering their money in the event of ActivTrades' insolvency would have been reduced.

Calculating client money

- 4.15. ActivTrades did not perform client money calculations or reconciliations accurately or in a timely manner.

Internal reconciliations

- 4.16. Firms are required to keep such records and accounts as are necessary to enable them at any time and without delay to distinguish client money held for one client from money held for any other client and from their own funds. Carrying out reconciliation of records and accounts for each client is one of the ways that firms can ensure that client money has been segregated appropriately. For firms that adopt the normal approach and pay client money that they receive promptly into a client bank account, internal client money reconciliations should be performed as at the close of business on the previous day.
- 4.17. Prior to June 2010, ActivTrades performed its client money calculations and transfers on a monthly basis, rather than on a daily basis. The FSA does not consider ActivTrades' approach of reconciling client money on a monthly basis to be sufficient given the nature, volume and complexity of its business. To maintain accurate records, the FSA expects firms that undertake daily transactions to normally undertake daily reconciliations.
- 4.18. The skilled person report also highlighted that prior to October 2010 ActivTrades' client money calculations were performed at various times during the day, rather than

at midnight on the previous working day, which was when the reconciliations were done.

- 4.19. Further, the skilled person report highlighted that ActivTrades did not perform any client money calculation on one date in April 2010, which resulted in an under-segregation of £1,123,254.
- 4.20. Consequently, by failing to perform timely reconciliations, ActivTrades' records and accounts were neither accurate nor up-to-date and could not distinguish at any time and without delay client money held for one client from money held for any other client and from its own funds.

Incorrect client money calculations

- 4.21. Firms are required to maintain their records and accounts in a way that ensures their accuracy; this is particularly important for client money records. The skilled person report highlighted that ActivTrades failed to perform its client money calculations correctly during the relevant period. Consequently, ActivTrades' accounts and records did not correspond to client money held for clients.
- 4.22. ActivTrades' failure to calculate its client money accurately led to an under segregation of client money and potentially placed client money at risk. The skilled person highlighted the following failings:
 - (1) prior to August 2009, bank charges were added to client money calculations;
 - (2) prior to January 2010, client cash balances rather than equity balances were used to calculate client money;
 - (3) between 31 May 2010 and 17 June 2010, initial margins totalling £334,000 were excluded from client money calculations;
 - (4) prior to June 2010, client money that had been received but not allocated to specific clients was excluded from client money calculations;
 - (5) prior to June 2010, negative balances were included in client money calculations (although the total of these balances was not material when compared to the amount of client money held); and
 - (6) prior to 6 October 2010, client money that had been received in connection with its futures business was excluded from client money calculations.
- 4.23. As ActivTrades failed to calculate client money correctly, it would not have been able to perform an accurate top up or transfer of client money excesses or shortfalls from its client bank accounts. In addition, including negative balances in the client money calculation, effectively meant that money belonging to one client was being used to pay the debts of another client.

External reconciliations

- 4.24. Firms are required to conduct reconciliations on a regular basis between their internal accounts and records and those of any third parties who hold client money. In practice, firms should reconcile their client money account balances with their books and records and then reconcile these with external bank statements.
- 4.25. Prior to June 2010, ActivTrades' trading system did not show a bank account level breakdown of client money balances so reconciliations were conducted against client transactions recorded in its client cashbook. External reconciliations performed by ActivTrades were aimed at calculating the amount that needed to be adjusted on the trading system to bring it in line with balances recorded on client bank statements. The skilled person report highlighted that such reconciliations and adjustments were performed incorrectly. In addition, the skilled person report noted that due to incorrect adjustments being made, the opening cashbook and bank statements did not agree.

Paying interest received on client money

- 4.26. Firms are required to pay interest earned from holding client money unless they have notified their clients in writing that they will not pay interest on client money.
- 4.27. The skilled person report noted that ActivTrades did not explicitly state in its client agreement, as in force during the relevant period, that interest would not be paid unless they held a pre-agreed balance. In any event, ActivTrades did not obtain permission from each client to retain interest paid on money held in client bank accounts.
- 4.28. Except for one client, ActivTrades did not pay interest received on client money to clients, contrary to the terms of its client agreement. The skilled person report calculated that ActivTrades owed interest of £50 or more, totalling £16,553.11, to 141 clients, and interest of less than £50, totalling £26,177.21, to 8,308 clients. By failing to pay interest received on client money, ActivTrades benefitted in its capacity as trustee.

Treatment of unclaimed client money

- 4.29. Firms are permitted to cease treating as client money any unclaimed client money if they can demonstrate that they have taken reasonable steps to trace the client concerned and return the balance. The FSA considers reasonable steps to include entering into a written agreement in which the client consents to the firm releasing any client money balances held for that client from client bank accounts after a specified period of time, or taking action to contact the client in question if there has been no movement on the client's balance for a period of time.
- 4.30. ActivTrades' client agreement, as in force during the relevant period, stated that client money would cease to be client money if there was no movement on the balance after six years without any further evidence or steps being required.

Failing to implement adequate risk management systems

- 4.31. ActivTrades failed to establish adequate systems and controls over client money. Consequently, it was not in a position to identify and remedy failings in its client money processes. In particular, ActivTrades' failings included inadequate policies and procedures and poor management oversight of its client money arrangements.

Client money policies and procedures

- 4.32. ActivTrades' policies in respect of retaining client money records were insufficient. It did not have any specific procedures relating to the review, sign off and retention of records that supported client money calculations. ActivTrades was unable to provide any documents that supported its client money reconciliations performed during the relevant period.
- 4.33. ActivTrades also failed to ensure there was separation of duties between the preparer and reviewer of client money calculations. As calculations were not independently reviewed, ActivTrades was not in a position to identify errors in the computation of its client money requirement and resources. This placed client money at risk of loss in the event of insolvency.
- 4.34. The skilled person report highlighted that ActivTrades previously conducted sample checks which consisted of selecting at random and reviewing only one calculation from the prior week. The skilled person report stated that not checking client money calculations increased the risk that incorrect amounts could be transferred. It also stated that in the event that an error was identified during the sample check, it would be too late to correct the error.

Management information

- 4.35. ActivTrades did not provide its Board with sufficient information to monitor and assess the adequacy of its client money systems and controls. Prior to July 2010, only information relating to the month end client money balances was provided to the Board. The skilled person report highlighted that Board minutes reviewed by the skilled person did not contain any points relating to client money.
- 4.36. The skilled person report noted that since July 2010 ActivTrades has started providing more information about client money to the Board. The information provided now includes the following:
- (1) the month end client money balances held;
 - (2) the proportion of client money held within each bank;
 - (3) details of new client money accounts opened;
 - (4) unallocated cash balances;
 - (5) the number of times client money calculations had been performed and confirmation whether records had been filed; and

(6) other information deemed relevant i.e. changes to process.

4.37. The skilled person report highlighted that further work still needed to be undertaken by ActivTrades to increase formal minuted Board meetings and to ensure more formal management information was provided to the Board. The skilled person report suggested that client money information could be enhanced with details of the number of reviews performed and errors found.

5. ANALYSIS OF THE MISCONDUCT

5.1. The facts and matters described above lead the FSA, having regard to its regulatory objectives which include the protection of consumers to conclude that ActivTrades has failed to satisfy Principle 3 and Principle 10. Specifically, in connection with its client money arrangements ActivTrades breached:

(1) Principle 10 as it failed to protect client money adequately for the reasons set out in paragraphs 4.8 to 4.30. The weaknesses in ActivTrades' approach to the accounting and treatment of client money meant that client money was not adequately segregated from its own funds, and exposed clients to risk of loss in the event it became insolvent; and

(2) Principle 3 as it failed to take reasonable care to organise and control its affairs responsibly and effectively with adequate risk management systems for the reasons set out at paragraphs 4.31 to 4.37. The effect of this weakness meant that ActivTrades' Board was not in a position to monitor and assess the adequacy of its client money arrangements, and shortcomings were not identified during the relevant period.

5.2. Although the actual impact of ActivTrades' failure to arrange adequate protection for client money was limited, the breaches exposed its clients to a risk of financial loss in the event that it became insolvent.

5.3. Having regard to the facts and matters, the FSA considers it appropriate and proportionate in all the circumstances to take disciplinary action against ActivTrades for the breaches.

6. ANALYSIS OF THE PROPOSED SANCTION

6.1. The FSA's policy on the imposition of financial penalties is set out in Chapter 6 of the Decision Procedures and Penalties Manual ("DEPP"), which forms part of the FSA Handbook. The relevant sections of DEPP are set out in more detail in the Annex.

6.2. Since the majority of ActivTrades' failings started and occurred before the change in the regulatory provisions governing the determination of financial penalties on 6 March 2010, the FSA has applied the penalty regime that was in place before 6 March 2010. All references to DEPP in this section are references to the version that was in force prior to 6 March 2010.

6.3. The principal purpose of a financial penalty is to promote high standards of regulatory conduct by deterring firms which have committed breaches from committing further

breaches, and helping to deter other firms from committing similar breaches, as well as demonstrating generally the benefits of compliant behaviour.

- 6.4. In determining whether a financial penalty is appropriate, and if so its level, the FSA is required to consider all the relevant circumstances of a case. DEPP 6.5.2G sets out a non-exhaustive list of factors that may be of relevance in determining the level of a financial penalty. The FSA considers that the following factors to be particularly relevant in this case.

Deterrence (DEPP 6.5.2G(1))

- 6.5. The FSA views compliance with its client money requirements as of significant importance. The FSA considers that a financial penalty is an appropriate sanction, given the serious nature of the breaches and the risks created for clients of ActivTrades. The FSA also considers there to be a need to send a strong message to the industry that firms must handle client money in a way which is compliant with the CASS Rules and the Principles, and of the consequences of failing to ensure adequate protection of client money.

The nature, seriousness and impact of the breach in question (DEPP 6.5.2G(2))

- 6.6. ActivTrades' breaches are serious as they relate to the control of money belonging to retail clients. The breaches were not indentified by ActivTrades but by external parties and exposed clients to a risk of financial loss in the event of its insolvency. The breaches also highlighted weaknesses throughout ActivTrades processes in relation to the protection of client money.
- 6.7. The amount ActivTrades held as client money ranged between £3.4 million and £23.6 million during the relevant period and averaged £12.2 million. The FSA has taken into account that ActivTrades' clients suffered only minimal actual detriment in respect of amounts of interest owed and a process of reimbursing clients is underway.

The extent to which the breach was deliberate or reckless (DEPP 6.5.2G(3))

- 6.8. The breaches were neither deliberate nor reckless.

The size, financial resources and other circumstances of the firm (DEPP 6.5.2G(5))

- 6.9. In determining the level of the penalty, the FSA has considered the size and financial resources of ActivTrades.

The amount of benefit gained or loss avoided (DEPP 6.5.2G(6))

- 6.10. Although ActivTrades benefitted in its capacity as trustee from retaining interest received on client money, a process of reimbursing clients is underway. The FSA has also taken into account that ActivTrades has applied significant resources to rectify and improve its client money processes.

Conduct following the breach (DEPP 6.5.2G(8))

- 6.11. ActivTrades co-operated fully with the FSA's investigation and worked with the FSA to facilitate an early settlement of the matter. From the outset, ActivTrades acknowledged its failure to comply with the CASS Rules and the Principles.
- 6.12. ActivTrades was proactive in engaging an external consultant and skilled person to review its client money processes after the FSA's visit in June 2010.
- 6.13. ActivTrades has taken significant steps to update promptly and improve its client money processes, including enhancing its staffing arrangements and compliance support, and improving its software systems. ActivTrades has also appointed new auditors.

Other action taken by the FSA (DEPP 6.5.2(10))

- 6.14. In determining the level of financial penalty, the FSA has taken into account penalties imposed by the FSA on other authorised persons for similar behaviour.

7. CONCLUSION

- 7.1. In the light of the matters above, the FSA imposes a financial penalty of £85,750 on ActivTrades for breaching Principle 3, Principle 10 and the CASS Rules. This penalty is equivalent to 1% of the average client money balances held by ActivTrades during the relevant period, less a discount for early settlement.

8. DECISION MAKERS

- 8.1. The decision which gave rise to the obligation to give this Final Notice was made by the Settlement Decision Makers on behalf of the FSA.

9. IMPORTANT

- 9.1. This Final Notice is given to ActivTrades in accordance with section 390 of the Act.

Manner of and time for payment

- 9.2. The financial penalty must be paid in full by ActivTrades to the FSA by no later than 29 March 2011, 14 days from the date of the Final Notice.

Publicity

- 9.3. Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this Final Notice relates. Under those provisions, the FSA must publish such information about the matter to which this Final Notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to ActivTrades or prejudicial to the interests of consumers.

- 9.4. The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

FSA contact

- 9.5. For more information concerning this matter generally ActivTrades should contact Anna Hynes (direct line: 020 7066 9464) of the Enforcement and Financial Crime Division at the FSA.

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Tom Spender
Head of Department
FSA Enforcement and Financial Crime Division

STATUTORY PROVISIONS, REGULATORY GUIDANCE AND POLICY

1. STAUTORY PROVISIONS

- 1.1. The FSA's statutory objectives are set out in section 2(2) of the Act and include the protection of consumers.
- 1.2. The FSA has the power, pursuant to section 206 of the Act, to impose a financial penalty of such amount as it considers appropriate where the FSA considers an authorised person has contravened a requirement imposed on him by or under the Act.

2. REGULATORY PROVISIONS

- 2.1. In exercising its power to impose a financial penalty, the FSA has had regard to the relevant regulatory provisions and policy published in the FSA Handbook. The main provisions that the FSA considers relevant to this case are set out below.

Principles for Businesses (“Principles”)

- 2.2. Under the FSA's rule-making powers, the FSA has published in the FSA Handbook the Principles which apply either in whole, or in part, to all authorised persons.
- 2.3. The Principles are a general statement of the fundamental obligations of firms under the regulatory system and reflect the FSA's regulatory objectives. A firm may be liable to disciplinary sanction where it is in breach of the Principles.
- 2.4. The Principles relevant to this case are:

- (1) Principle 3 (Management and control) which states that:

“A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems”; and

- (2) Principle 10 (Clients' assets) which states that:

“A firm must arrange adequate protection for clients' assets when it is responsible for them”.

3. Client Assets sourcebook (“CASS”)

- 3.1. CASS 7.2.14R states that unless a firm notifies a retail client in writing whether or not interest is to be paid on client money and, if so, on what terms and at what frequency, it must pay that client all interest earned on that client money. Any interest due to a client will be client money.
- 3.2. CASS 7.2.19R states that a firm may cease to treat as client money any unclaimed client money balance if it can demonstrate that it has taken reasonable steps to trace the client concerned and to return the balance.

- 3.3. CASS 7.4.7R states that a firm that does not deposit client money with a central bank must exercise all due skill, care and diligence in the selection, appointment and periodic review of the credit institution, bank or qualifying money market fund where the money is deposited and the arrangements for the holding of this money.
- 3.4. CASS 7.4.10R states that a firm must make a record of the grounds upon which it satisfies itself as to the appropriateness of its selection of a credit institution, a bank or a qualifying money market fund. The firm must make the record on the date it makes the selection and must keep it from the date of such selection until five years after the firm ceases to use the third party to hold client money.
- 3.5. CASS 7.4.11R states that a firm must take the necessary steps to ensure that client money deposited in a central bank, a credit institution, a bank authorised in a third country or a qualifying money market fund is held in an account or accounts identified separately from any accounts used to hold money belonging to the firm.
- 3.6. CASS 7.6.1R states that a firm must keep such records and accounts as are necessary to enable it, at any time and without delay, to distinguish client money held for one client from client money held for any other client, and from its own money.
- 3.7. CASS 7.6.2R states that a firm must maintain its records and accounts in a way that ensures their accuracy, and in particular their correspondence to the client money held for clients.
- 3.8. CASS 7.6.9R states that a firm must conduct, on a regular basis, reconciliations between its internal accounts and records and those of any third parties by whom client money is held.

4. Decision Procedure and Penalties Manual (“DEPP”)

- 4.1. The FSA’s policy in relation the imposition and amount of penalties that applied during the majority of the relevant period was set out in Chapter 6 of DEPP that was in force prior to 6 March 2010.
- 4.2. DEPP 6.1.2G provides that the principal purpose of imposing a financial penalty is to promote high standards of regulatory and/or market 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. Financial penalties are therefore tools that the FSA may employ to help it to achieve its regulatory objectives.
- 4.3. DEPP 6.5.1G(1) provides that the FSA will consider all the relevant circumstances of a case when it determines the level of financial penalty (if any) that is appropriate and in proportion to the breach concerned.
- 4.4. DEPP 6.5.2G sets out a non-exhaustive list of factors that may be relevant to determining the appropriate level of financial penalty to be imposed on a person under the Act. The following factors are relevant to this case:

Deterrence: DEPP 6.5.2G(1)

- 4.5. When determining the appropriate level of financial penalty, the FSA will have regard to the principal purpose for which it imposes sanctions, namely to promote high standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches and helping to deter other persons from committing similar breaches, as well as demonstrating generally the benefits of compliant business.

The nature, seriousness and impact of the breach in question: DEPP 6.5.2G(2)

- 4.6. The FSA will consider the seriousness of the breach in relation to the nature of the rule, requirement or provision breached, which can include considerations such as the duration and frequency of the breach, 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 and the loss or risk of loss caused to consumers, investors or other market users.

The extent to which the breach was deliberate or reckless: DEPP 6.5.2G(3)

- 4.7. The FSA will regard as more serious a breach which is deliberately or recklessly committed, giving consideration to factors such as whether the person has given no apparent consideration to the consequences of the behaviour that constitutes the breach. If the FSA decides that the breach was deliberate or reckless, it is more likely to impose a higher penalty on a person than would otherwise be the case.

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

- 4.8. The degree of seriousness of a breach may be linked to the size of the firm. For example, a systemic failure in a large firm could damage or threaten to damage a much larger number of consumers or investors than would be the case with a small firm: breaches in firms with a high volume of business over a protracted period may be more serious than breaches over similar periods in firms with a smaller volume of business.
- 4.9. In addition, the size and resources of a person may also be relevant in relation to mitigation, in particular what steps the person took after the breach had been identified; the FSA will take into account what it is reasonable to expect from a person in relation to its size and resources, and factors such as what proportion of a person's resources were used to resolve a problem.

The amount of benefit gained or loss avoided: DEPP 6.5.2G(6)

- 4.10. The FSA may have regard to the amount of benefit gained or loss avoided as the result of the breach, for example the FSA will impose a penalty that is consistent with

the principle that a person should not benefit from the breach, and the penalty should also act as an incentive to the person (and others) to comply with regulatory standards and required standards of market conduct.

Conduct following the breach: DEPP 6.5.2G(8)

- 4.11. The FSA may take into account the degree of co-operation the person showed during the investigation of the breach by the FSA any remedial steps taken since the breach was identified, including whether these were taken on the person's own initiative or that of the FSA, for example, identifying whether consumers or investors or other market users suffered loss and compensating them where they have and taking steps to ensure that similar problems cannot arise in the future.

Other action taken by the FSA (or a previous regulator): DEPP 6.5.2G(10)

- 4.12. The FSA seeks to apply a consistent approach to determining the appropriate level of penalty. The FSA may take into account previous decisions made in relation to similar misconduct.