
FINAL NOTICE

To: **Alexander Simon Brincat**

Of: **1 Fox Hollies
Sharnford
Leicestershire
LE10 3PH**

FSA reference number: **ASB01129**

Date: **28 June 2011**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) gives Alexander Simon Brincat final notice of the following actions

1. ACTION

- 1.1 The FSA gave Alexander Simon Brincat (“Mr Brincat”) a Decision Notice on 14 June 2011 which notified him that the FSA had decided to take the following action against him:

- (1) to publish a statement of his misconduct pursuant to section 66(3)(b) of the Financial Services and Markets Act 2000 (“the Act”), for failing to comply with Statements of Principle 4 and 6 of the FSA’s Statements of Principle and Code of Practice for Approved Persons (“the Statements of Principle”);
- (2) to withdraw the individual approval pursuant to section 63(1) of the Act, granted to Mr Brincat to perform controlled functions, in relation to Wise Owl Services Limited (“Wise Owl”); and
- (3) to make an order pursuant to section 56 of the Act, prohibiting Mr Brincat from performing any functions in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm (“the Prohibition Order”).

1.2 The FSA considers that his misconduct warrants a financial penalty of £22,500. However, Mr Brincat has provided verifiable evidence that imposing any financial penalty would cause him serious financial hardship. Under these exceptional circumstances, the FSA has decided to censure Mr Brincat publicly instead.

1.3 Mr Brincat agreed that he would not be referring the matter to the Upper Tribunal (Tax and Chancery Chamber).

1.4 Accordingly, for the reasons set out below, the FSA takes the actions set out above.

2. REASONS FOR THE ACTION

2.1 On the basis of the facts and matters described below, the FSA withdraws Mr Brincat’s individual approval and makes the Prohibition Order against him for failing to demonstrate adequate competence and capability when carrying out controlled functions in connection with Wise Owl’s insurance business in the period from 22 September 2009 to 3 August 2010 (“the relevant period”). Mr Brincat has also failed to comply with Statements of Principle 4 and 6 while acting in his capacity as director and sole approved person at Wise Owl.

2.2 In summary, Mr Brincat failed to:

- (1) deal with the FSA in an open and cooperative way, and disclose information of which the FSA reasonably expected notice, in breach of Statement of Principle 4, by not appropriately communicating to the FSA that he had left the country and had delegated the responsibility for compliance at Wise Owl to unapproved individuals; and
- (2) exercise due skill, care and diligence in managing the business of the firm for which he is responsible, in breach of Statement of Principle 6, by:
 - a) failing to monitor adequately the high cancellation rate of life insurance policies sold by Wise Owl, and failing to disclose to Wise Owl’s insurance providers its sales strategy of offering free life cover to customers;
 - b) leaving the country for prolonged periods without putting in place

adequate compliance arrangements at Wise Owl;

- c) failing to take reasonable steps to ensure that Wise Owl had sufficient resources to pay premiums due to customers who had agreed to the free life cover offered by Wise Owl, and repay the commission clawback to insurance providers when such cover was cancelled; and
- d) failing to monitor Wise Owl's financial position, including the extent of Wise Owl's liabilities to insurance providers.

2.3 The FSA has concluded that Mr Brincat is not fit and proper to carry out any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm and that Mr Brincat should be prohibited from doing so. The FSA considers that it is proportionate to prohibit Mr Brincat because of the nature and range of his failings and the impact on Wise Owl's insurance providers.

2.4 The FSA regards these failings as particularly serious due to the significant losses incurred as a result by Wise Owl's insurance providers, and his abandonment of the authorised business. The FSA finds his conduct to have been seriously lacking in competence, but not deliberately fraudulent or dishonest.

Relevant Statutory Provisions

2.5 The relevant statutory provisions and regulatory requirements are attached at Annex A.

Facts and matters relied on

2.6 Mr Brincat was approved by the FSA on 24 November 2008 to perform the controlled functions of CF1 (Director) and CF8 (Apportionment and Oversight) at Wise Owl, and Mr Brincat is also responsible for insurance mediation (although Mr Brincat ceased to hold the controlled function of CF8 on 31 March 2009.) Mr Brincat is the only approved person at Wise Owl and was the sole person responsible for the management of the business during the relevant period.

2.7 Wise Owl is a small mortgage and insurance mediation firm, whose main business was building and life insurance. With effect from 24 November 2008, Wise Owl became authorised and regulated by the FSA to carry on the following regulated activities (those marked with an asterisk were limited to non-investment insurance contracts):

- (1) advising on investments (except on pension transfers and pension opt outs);
- (2) advising on regulated mortgage contracts;
- (3) agreeing to carry on a regulated activity;
- (4) arranging (bringing about) deals in investments;
- (5) arranging (bringing about) regulated mortgage contracts;
- (6) making arrangements with a view to regulated mortgage contracts; and

(7) making arrangements with a view to transactions in investments.

2.8 However, with effect from 3 August 2010, Wise Owl voluntarily varied its permission such that it was no longer permitted to conduct any regulated activity, as a result of the FSA having identified in or around July 2010 that Wise Owl had ceased to trade. One of Wise Owl's insurance company providers petitioned for Wise Owl to be wound up on 3 December 2010. This petition was granted on 3 March 2011 and Wise Owl is now in liquidation.

Failing to notify the FSA of matters of which the FSA reasonably expected notice

2.9 Mr Brincat is the sole approved person and was responsible for Wise Owl's day-to-day management and compliance with relevant regulatory requirements during the relevant period. However, the FSA has found that Mr Brincat failed to notify it of important regulatory matters.

2.10 On or around 17 March 2010, Mr Brincat left the United Kingdom for an indefinite period. However, Mr Brincat failed to notify the FSA that he would be absent from the business, and failed to provide the FSA with any information as to management arrangements put in place for the duration of his absence.

2.11 In or around June 2010, Wise Owl ceased to conduct regulated activities and its place of business as last notified to the FSA was abandoned. Mr Brincat failed to notify the FSA that Wise Owl had ceased to trade, and, as the sole approved person, Mr Brincat failed to provide the FSA with any alternative means of contacting him.

Failing to exercise due skill, care and diligence in managing the business of the firm

2.12 Mr Brincat is the sole director and approved person and was solely responsible for the management of Wise Owl during the relevant period. The FSA considers that, during the relevant period, Mr Brincat failed to exercise due skill, care and diligence in the exercise of his significant influence function of CF1 (Director).

2.13 In the final quarter of 2009, Wise Owl adopted a business strategy of providing free life insurance cover to customers together with the building insurance it sold, as a loss leader to help it build up a large book of repeat building insurance business. Wise Owl subsequently set up a call centre to effect this sales strategy. It promised customers that it would pay all premiums for at least the first 12 months of the life cover sold. Wise Owl made a high number of life cover sales (at least 746) within a period of approximately four months. Mr Brincat failed to disclose to Wise Owl's insurance providers that you would effectively be providing the life cover to customers free of charge for the first 12 months.

2.14 The rate at which these life insurance policies were cancelled within the first three months of cover was high (approximately 80% of all policies sold), with the consequence that Wise Owl quickly accrued in excess of £170,000 in commission clawback payable to life insurance providers. This resulted in Wise Owl not being able to pay the life insurance premiums to customers as promised and customers

cancelling the policies as a result. As the sole director and approved person at Wise Owl during this period, Mr Brincat implemented this sales strategy without having adequately considered its effect on Wise Owl's financial resources, which were depleted to the extent that the strategy became unsustainable, and Wise Owl ceased to trade in or around June 2010.

- 2.15 Having left the business of Wise Owl on or around 17 March 2010 for an indefinite period, Mr Brincat failed to take adequate steps to keep himself informed of the affairs of the business for which he was responsible. In failing to adequately monitor Wise Owl's activity in his absence, Mr Brincat was unaware of the considerable liabilities incurred by Wise Owl during that period, and of its inability to meet those liabilities.
- 2.16 Further, during the period in which Mr Brincat was absent from the business, Mr Brincat received payments from Wise Owl's business account to his personal bank account, without ensuring that Wise Owl had sufficient financial resources with which to meet its liabilities to insurance providers and others.
- 2.17 Mr Brincat failed to make adequate management and compliance arrangements at Wise Owl during his absence, having assigned the day-to-day conduct of Wise Owl's business to junior members of Wise Owl's staff and to third parties who were neither employees nor familiar with the business of Wise Owl. Mr Brincat allowed junior staff and third parties, none of whom were FSA approved persons, to oversee specific regulatory responsibilities, including the submission of important regulatory information to the FSA, without those individuals having the necessary knowledge to undertake these duties.

3. ANALYSIS OF THE BREACHES

Statement of Principle 4

- 3.1 As a result of the facts and matters set out at paragraphs 2.9 to 2.11 above, the FSA considers that Mr Brincat failed to keep it informed of basic and important regulatory matters, such that the FSA's ability to contact and thereby properly regulate Wise Owl was frustrated. In having failed to notify the FSA that Mr Brincat would be absent from the business for an indefinite period, and in having failed to provide the FSA with alternative contact details, the FSA was unable to establish whether appropriate management and compliance arrangements had been made for Wise Owl's regulated activities, and even that Wise Owl had eventually ceased to conduct regulated activities at all. In this regard, the FSA considers that Mr Brincat is in breach of Statement of Principle 4.

Statement of Principle 6

- 3.2 On the basis of the facts and matters set out at paragraphs 2.12 to 2.17, the FSA considers that Mr Brincat failed to perform adequately the significant influence functions for which Mr Brincat was approved by the FSA in relation to Wise Owl, during the relevant period. Having allowed Wise Owl to incur significant liabilities to its insurance providers by failing to monitor the high cancellation rate of policies sold as part of a strategy of selling free life cover to Wise Owl's customers, Mr Brincat

then abandoned the business without having made adequate, or any, management and compliance arrangements. In this regard, the FSA considers that Mr Brincat is in breach of Statement of Principle 6.

4. ANALYSIS OF THE SANCTION

- 4.1 The FSA's policy on issuing a public censure or 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. In addition, the FSA has had regard to Chapter 7 of the Enforcement Guide ("EG").
- 4.2 The principal purpose of issuing a public censure or imposing a financial penalty is to promote high standards of conduct by deterring persons who have committed regulatory breaches from committing further breaches, helping to deter others from committing similar breaches and demonstrating generally the benefits of compliant behaviour.
- 4.3 DEPP 6.4.2G sets out a list of factors that may be of relevance in determining whether it is appropriate to issue a public censure rather than impose a financial penalty. The factors are not exhaustive and the FSA will consider all the relevant circumstances of the case. The FSA considers that the following factors are particularly relevant in this case.

Financial penalty

- 4.4 In determining whether a financial penalty or public censure is appropriate, the FSA is required to consider all the relevant circumstances of the case. Applying the criteria set out in DEPP 6.2.1 and 6.4.2, the FSA considers that a financial penalty would be an appropriate sanction in this case, given the serious nature of the breaches, and the need to send out a strong message of deterrence to others.
- 4.5 In this case the misconduct in question straddles both the old and new FSA penalty regimes. The new penalty regime took effect on 6 March 2010 and, as the substance of the misconduct took place after then, the FSA has applied that penalty to all the misconduct in this case. The new penalty regime requires the FSA to apply a five-step framework to determine the appropriate level of the financial penalty. DEPP 6.5B sets out the details of the five-step framework that applies in respect of financial penalties imposed on individuals in non-market abuse cases. Chapter 6.5B is annexed to this Final Notice.

Step 1: Disgorgement

- 4.6 Pursuant to DEPP6.5B.1G, at Step 1 the FSA seeks to deprive an individual of the financial benefit derived directly from the breach where it is practicable to quantify this. In this case it is not practicable to quantify any financial benefit that Mr Brincat derived directly from the breach and so the Step 1 figure is zero.

Step 2: The seriousness of the breach

Relevant income

- 4.7 Pursuant to DEPP6.5B.2G, at Step 2 the FSA will determine a figure reflecting the seriousness of the breach which is based on a percentage of the individual's income ("relevant income") from the employment in connection with which the breach occurred (the "relevant employment") and for the period of the breach. Where the breach lasted less than 12 months, the relevant income will be that earned by the individual in the 12 months preceding the end of the breach. The relevant income is therefore the amount Mr Brincat earned between 4 August 2009 and 3 August 2010. His total income from Wise Owl for this period was £50,000, which the FSA considers is his relevant income in this case.

The percentage to be applied

- 4.8 The percentage of Mr Brincat's income which will form the basis of the Step 2 figure depends on the level of seriousness of the breach. There are five seriousness levels, ranging from level 1 (0%) to level 5 (40%); the more serious the breach, the higher the level. In assessing the seriousness level, the FSA takes into account various factors which reflect the impact and nature of the breach, and whether it was committed deliberately or recklessly. A non-exhaustive list of factors which are likely to be considered level 4 or level 5 factors are set out at DEPP 6.5B.2G(12). In this particular case, there is one level 4 or level 5 factor:

- (1) Impact of the Breach: The breach by Mr Brincat and the failure of the firm caused Wise Owl's insurance providers to lose in excess of £170,000 in commission clawback, which cannot be repaid. This represents a loss to other market users (DEPP 6.5B.2G(12)(a)).

- 4.9 A non-exhaustive list of factors which are likely to be considered levels 1 to 3 factors are set out at DEPP 6.5B.2G(13). There is one level 1 to 3 factor:

- (1) Whether the breach was committed negligently: Mr Brincat showed a serious lack of competence in managing the significant debts owed by Wise Owl to insurers, which could not be repaid. However, the FSA did not conclude that Mr Brincat had knowingly incurred large amounts of debt to insurance providers without intending to repay these debts, and it appears instead that this is a case of a failed business strategy. When Mr Brincat left the UK, he was incompetent in understanding the effect on the business, its customers and insurers of him leaving the firm under the control of non FSA-approved and unsupervised persons. Mr Brincat should have been aware that there was a risk that his actions or inactions could result in a breach and he failed to adequately mitigate that risk.

- 4.10 Pursuant to DEPP 6.5B.2G(7) to (11) there are additional factors to consider. Specifically, the FSA considers the nature of the breach, in this case, increases the seriousness of the breach: Mr Brincat was the only approved person at Wise Owl and solely responsible for the firm's compliance with relevant regulatory requirements. His actions caused Wise Owl to fail to satisfy Threshold Condition 4 (Adequate resources). Specifically, Wise Owl has failed to meet its liabilities as they fell due, and failed to have competent and prudent management. On the basis of failure to meet Threshold Condition 4, the FSA has sought to cancel Wise Owl's Part IV

permission.

- 4.11 Taking all of these factors into account, the FSA has determined that this case falls into level 4 (30%) in relation to the seriousness of the breaches. As the relevant income has been assessed as £50,000 this means that the Step 2 penalty figure is £15,000.

Step 3: Mitigating and aggravating factors

- 4.12 Pursuant to DEPP 6.5B.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, by taking into account factors which aggravate or mitigate the breaches. Any such adjustments will be made by way of a percentage adjustment to the figure determined at Step 2.

- 4.13 In deciding on the mitigating and aggravating factors in this case, the FSA has particularly taken into account the following aggravating factors:

- (1) Mr Brincat did not bring the firm's ongoing failure to meet Threshold Condition 4 (Adequate Resources) quickly, effectively and completely to the FSA's attention (DEPP 6.5B.3G(2)(a));
- (2) Mr Brincat showed a lack of cooperation in his communications with the FSA once the breaches had been identified. Specifically, he declined to communicate with the FSA by any means other than email which hampered the FSA's attempts to obtain information (DEPP 6.5B.3G(2)(b));
- (3) Mr Brincat failed to take steps to stop the breach in circumstances where Mr Brincat knew that Wise Owl was running up significant debts to insurers (DEPP 6.5B.3G(2)(c); and
- (4) as the sole approved person Mr Brincat took inadequate remedial steps to mitigate the effect of the firm's failings once Mr Brincat's breaches had been identified, specifically, his absence from the country and the offices of the firm meant that the FSA was forced to issue a consumer alert to ensure customers of the firm were on notice that it had ceased to trade (DEPP 6.5B.3G(2)(d)).

- 4.14 The FSA considers that because of these aggravating factors, the Step 2 penalty figure should be increased by 50% which, would mean the Step 3 penalty figure is £22,500.

Step 4: Adjustment for deterrence

- 4.15 Pursuant to DEPP6.5B.4G, at Step 4 the FSA may increase the figure arrived at after Step 3 if it considers it is insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches. The FSA considers that on balance a Step 4 uplift is not necessary in this case.

Serious financial hardship (DEPP6.5D)

- 4.16 DEPP 6.5D.1G states that the FSA's approach to determining penalties described in DEPP 6.5 to DEPP 6.5C is intended to ensure that financial penalties are

proportionate to the breach. The FSA recognises that penalties may affect persons differently, and that the FSA should consider whether a reduction in the proposed penalty is appropriate if the penalty would cause the subject of enforcement action serious financial hardship. The FSA has reviewed the Statement of Means signed by Mr Brincat on 6 January 2011, and the documentary evidence that Mr Brincat has provided, and considers that there is verifiable evidence that Mr Brincat would suffer serious financial hardship if he was required to pay any financial penalty. Having regard to all the circumstances, the FSA considers the appropriate level of financial penalty would be £22,500, but for the evidence that the imposition of any financial penalty would create serious financial difficulties for Mr Brincat. Accordingly, in light of this evidence, the FSA considers that the financial penalty it would otherwise have sought to impose should be reduced to nil.

Step 5: settlement discount scheme

- 4.17 Mr Brincat has agreed to settle this case at stage 1 and so would be entitled to a 30% discount. However, as the FSA has reduced the Step 4 figure to zero on account of Mr Brincat's financial position, the settlement discount scheme does not apply.

Public censure (DEPP 6.4)

- 4.18 Because of the above factors that were considered in order to determine the appropriate level of financial penalty and specifically because of the serious financial hardship which Mr Brincat would suffer were a financial penalty to be imposed, the FSA has concluded that the financial penalty should be reduced to nil, and that a public censure in respect of his misconduct is an appropriate sanction. This is in accordance with guidance set out in DEPP6.4.2G(8)(a).

Withdrawal of approval and prohibition

- 4.19 The FSA has considered his behaviour and is of the view that Mr Brincat poses a serious risk to consumers and to confidence in the financial system if Mr Brincat acts as an adviser or is involved in the running of, or holds a senior management role with, another authorised firm in the future.
- 4.20 The FSA therefore considers that it is necessary and proportionate to withdraw his individual approval and to prohibit Mr Brincat from performing any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm.

Conclusions

- 4.21 The facts and matters described above lead the FSA to the conclusion that his conduct fell short of the minimum regulatory standards required of approved persons performing controlled functions. As such, Mr Brincat is not fit and proper in terms of his competence and capability to perform any function in relation to any regulated activity.
- 4.22 In particular, his conduct constituted breaches of the following Statements of Principle:

- (1) Statement of Principle 4, because Mr Brincat failed in his role as director of and sole approved person at Wise Owl to deal with the FSA in an open and cooperative way, and disclose appropriately information of which the FSA reasonably expected notice. Specifically, Mr Brincat failed to notify the FSA that:
 - (i) he had left the United Kingdom for an indefinite period and had delegated regulatory responsibilities to unapproved individuals in his absence; and
 - (iii) Wise Owl had ceased to trade.
- (2) Statement of Principle 6, because Mr Brincat failed in his role as manager of Wise Owl to exercise due skill, care and diligence in managing the business of the firm, for which Mr Brincat was responsible in his controlled functions. Specifically, Mr Brincat:
 - (i) failed to monitor adequately the high cancellation rate of life insurance policies sold by Wise Owl, and failed to disclose to Wise Owl's insurance providers the sales strategy of offering free life cover;
 - (ii) failed to take adequate steps to keep himself informed of the affairs of the business for which Mr Brincat was responsible;
 - (iii) delegated regulatory responsibilities to junior members of staff and third parties, without having notified the FSA, and where none of those individuals was an FSA approved person; and
 - (iv) failed to monitor Wise Owl's financial position, including the extent of Wise Owl's liabilities to insurance providers.

4.23 The FSA, having regard to all the circumstances, therefore considers that it is appropriate to issue a public censure of his misconduct, withdraw his approval and make the Prohibition Order in relation to Mr Brincat.

5. DECISION MAKERS

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

6. IMPORTANT

6.1 This Final Notice is given to Mr Brincat in accordance with section 390 of the Act.

Publicity

6.2 Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this notice relates. Under those provisions, the FSA must publish such information about the matter to which this 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 you or prejudicial to the interests of consumers.

FSA contact

- 6.3 For more information concerning this matter generally, you should contact Rachel West in the Enforcement and Financial Crime Division of the FSA (direct line: 0207 066 0142).

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Tom Spender
Head of Department
FSA Enforcement and Financial Crime Division

RELEVANT STATUTORY PROVISIONS, REGULATORY REQUIREMENTS AND GUIDANCE**1. Statutory provisions**

- 1.1 The FSA's statutory objectives as set out in section 2(2) of the Act include market confidence, public awareness, the protection of consumers and the reduction of financial crime.

2. Other relevant regulatory provisions

- 2.1 In exercising its power to withdraw approval and make a prohibition order, the FSA must have regard to guidance published in the FSA Handbook. The guidance that the FSA considers relevant to this case is set out below.

Enforcement Guide ("EG")

- 2.2 The FSA's policy on exercising its powers to withdraw approval and make prohibition orders is set out in Chapter 9 of EG.
- 2.3 EG 9.1 states that the FSA's power under section 56 of the Act to prohibit individuals who are not fit and proper from carrying out controlled 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 functions in relation to regulated activities, or to restrict the functions which he may perform.
- 2.4 EG 9.2 states that the FSA's effective use of the power under section 63 of the Act to withdraw approval from an approved person will also help to ensure high standards of regulatory conduct by preventing an approved person from continuing to perform the controlled function to which the approval relates if he is not a fit and proper person to perform that function. Where it considers that this is appropriate, the FSA may prohibit an approved person, in addition to withdrawing their approval.
- 2.5 EG 9.3 states that, in deciding whether to make a prohibition order and/or, in the case of an approved person, to withdraw its approval, the FSA will consider all the relevant circumstances.
- 2.6 EG 9.4 sets out the general scope of the FSA's power in this respect. The FSA has the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant.
- 2.7 EG 9.5 provides that the scope of a prohibition order will depend on the range of functions which the individual concerned performs in relation to regulated activities,

the reasons why he is not fit and proper and the severity of risk which he poses to consumers or the market generally.

2.8 EG 9.9 provides that when deciding whether to make a prohibition order against an approved person and/or to withdraw that person's approval, the FSA will consider all the relevant circumstances of the case. This may include, but are not limited to, the following:

- (1) whether the individual is fit and proper to perform functions in relation to regulated activities. The criteria for assessing 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);
- (2) whether, and to what extent, the approved person has:
 - (i) failed to comply with the Statements of Principle issued by the FSA with respect to the conduct of approved persons; or
 - (ii) been knowingly concerned in a contravention by the relevant firm of a requirement imposed on the firm by or under the Act (including the Principles and other rules);
- (3) the relevance and materiality of any matters indicating unfitness;
- (4) the length of time since the occurrence of any matters indicating unfitness;
- (5) the particular controlled function the approved person is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates; and
- (6) the severity of the risk which the individual poses to consumers and to confidence in the financial system.

2.9 E.G 9.12 provides a number of 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 examples include:

- (1) serious lack of competence; and
- (2) serious breaches of the Statements of Principle for approved persons.

Statements of Principle and the Code of Practice for Approved Persons (“APER”)

2.13 APER, in the High Level Standards block of the FSA Handbook, sets out the Statements of Principle as they relate to approved persons and descriptions of conduct which, in the opinion of the FSA, does not comply with a Statement of Principle. APER and further describes factors which, in the opinion of the FSA, are to be taken into account in determining whether or not an approved person's conduct complies with a Statement of Principle.

- 2.14 The Statements of Principle relevant to this matter are:
- (1) Statement of Principle 4 which provides that an approved person must deal with the FSA in an open and cooperative way and must disclose appropriately any information of which the FSA would reasonably expect notice; and
 - (2) Statement of Principle 6 which provides that an approved person performing a significant influence function must exercise due skill, care and diligence in managing the business of the firm for which he is responsible in his controlled function.
- 2.15 APER 3.1.3G states that when establishing compliance with or a breach of a Statement of Principle, account will be taken of the context in which a course of conduct was undertaken, the circumstances of the individual case, the characteristics of the particular controlled function and the behaviour expected in that function.
- 2.16 APER 3.1.4G provides that an approved person will only be in breach of a Statement of Principle if he is personally culpable, that is in a situation where his conduct was deliberate or where his standard of conduct was below that which would be reasonable in all the circumstances.
- 2.17 APER 4.4 lists types of conduct which do not comply with Statement of Principle 4.
- 2.18 APER 4.4.7E states that failing promptly to inform the FSA of information of which he is aware and which it would be reasonable to assume would be of material significant to the FSA, whether in response to questions or otherwise, is conduct that breaches Statement of Principle 4.
- 2.19 APER 4.4.9E states that failing without good reason to inform the regulator of information of which the approved person was aware in response to questions from that regulator, or failing to answer questions put by a regulatory, despite a request or demand having made, is conduct that breaches Statement of Principle 4.
- 2.20 APER 4.6 lists types of conduct which do not comply with Statement of Principle 6.
- 2.21 APER 4.6.3E states that failing to take reasonable steps to adequately inform oneself as an approved person about the affairs of the business for which he is responsible in his controlled functions is conduct that breaches Statement of Principle 6.
- 2.22 APER 4.6.8E states than failing to supervise and monitor adequately the individual or individuals to whom responsibility for dealing with an issue or authority for dealing with a part of the business has been delegated by an approved person is conduct that breaches Statement of Principle 6.

Decision Procedures and Penalties Manual

- 2.23 DEPP 6.5B sets out the steps to be taken by the FSA when calculating the penalty to be imposed on individuals in non-market abuse cases.

Step 1 - disgorgement

DEPP 6.5B.1G

- 2.24 The FSA will seek to deprive an individual of the financial benefit derived directly from the breach (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. Where the success of a firm's entire business model is dependent on breaching FSA rules or other requirements of the regulatory system and the individual's breach is at the core of the firm's regulated activities, the FSA will seek to deprive the individual of all the financial benefit he has derived from such activities.

Step 2 - the seriousness of the breach

DEPP 6.5B.2G

- 2.25 (1) The FSA will determine a figure which will be based on a percentage of an individual's "relevant income". "Relevant income" will be the gross amount of all benefits received by the individual from the employment in connection with which the breach occurred (the "relevant employment"), and for the period of the breach. 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.
- 2.26 (2) Where the breach 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 end of the breach. 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.
- 2.27 (3) This approach reflects the FSA's view that an individual receives remuneration commensurate with his responsibilities, and so it is reasonable to base the amount of penalty for failure to discharge his duties properly on his remuneration. The FSA also believes that the extent of the financial benefit earned by an individual is relevant in terms of the size of the financial penalty necessary to act as a credible deterrent. The FSA recognises that in some cases an individual may be approved for only a small part of the work he carries out on a day-to-day basis. However, in these circumstances the FSA still considers it appropriate to base the relevant income figure on all of the benefit that an individual gains from the relevant employment, even if his employment is not totally related to a controlled function.
- 2.28 (4) Having determined the relevant income the FSA will then decide on the percentage of that income which will form the basis of the penalty. In making this determination the FSA will consider the seriousness of the breach and choose a percentage between 0% and 40%.
- 2.29 (5) This range is divided into five fixed levels which reflect, on a sliding scale, the seriousness of the breach. The more serious the breach, the higher the level. For penalties imposed on individuals there are the following five levels:

- (a) level 1 - 0%;
- (b) level 2 - 10%;
- (c) level 3 - 20%;
- (d) level 4 - 30%; and
- (e) level 5 - 40%.

2.30 (6) The FSA will assess the seriousness of a breach to determine which level is most appropriate to the case.

2.31 (7) In deciding which level is most appropriate to a case against an individual, 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 breach;
- (b) factors relating to the nature of the breach;
- (c) factors tending to show whether the breach was deliberate; and
- (d) factors tending to show whether the breach was reckless.

2.32 (8) Factors relating to the impact of a breach committed by an individual include:

- (a) the level of benefit gained or loss avoided, or intended to be gained or avoided, by the individual from the breach, either directly or indirectly;
- (b) the loss or risk of loss, as a whole, caused to consumers, investors or other market users in general;
- (c) the loss or risk of loss caused to individual consumers, investors or other market users;
- (d) whether the breach had an effect on particularly vulnerable people, whether intentionally or otherwise;
- (e) the inconvenience or distress caused to consumers; and
- (f) whether the breach 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.

2.33 (9) Factors relating to the nature of a breach by an individual include:

- (a) the nature of the rules, requirements or provisions breached;
- (b) the frequency of the breach;
- (c) the nature and extent of any financial crime facilitated, occasioned

- or otherwise attributable to the breach;
- (d) the scope for any potential financial crime to be facilitated, occasioned or otherwise occur as a result of the breach;
 - (e) whether the individual failed to act with integrity;
 - (f) whether the individual abused a position of trust;
 - (g) whether the individual committed a breach of any professional code of conduct;
 - (h) whether the individual caused or encouraged other individuals to commit breaches;
 - (i) whether the individual held a prominent position within the industry;
 - (j) whether the individual is an experienced industry professional;
 - (k) whether the individual held a senior position with the firm;
 - (l) the extent of the responsibility of the individual for the product or business areas affected by the breach, and for the particular matter that was the subject of the breach;
 - (m) whether the individual acted under duress;
 - (n) whether the individual took any steps to comply with FSA rules, and the adequacy of those steps;
 - (o) in the context of contraventions of Part VI of the Act, the extent to which the behaviour which constitutes the contravention departs from current market practice ;
 - (p) in relation to a contravention of section 63A of the Act, whether the individual's only misconduct was to perform a controlled function without approval;
 - (q) in relation to a contravention of section 63A of the Act, whether the individual performed controlled functions without approval and, while doing so, committed misconduct in respect of which, if the individual had been an approved person, the FSA would have been empowered to take action pursuant to section 66 of the Act; and
 - (r) in relation to a contravention of section 63A of the Act, the extent to which the individual could reasonably be expected to have known that he was performing a controlled function without approval. The circumstances in which the FSA would expect to be satisfied that a person could reasonably be expected to have known that he was performing a controlled function without approval include:
 - (i) the person had previously performed a similar role at the same or another firm for which he had been approved;
 - (ii) the person's firm or another firm had previously

applied for approval for the person to perform the same or a similar controlled function;

- (iii) the person's seniority or experience was such that he could reasonably be expected to have known that he was performing a controlled function without approval; and
- (iv) the person's firm had clearly apportioned responsibilities so the person's role, and the responsibilities associated with it, were clear.

2.34 (10) Factors tending to show the breach was deliberate include:

- (a) the breach was intentional, in that the individual intended or foresaw that the likely or actual consequences of his actions or inaction would result in a breach;
- (b) the individual intended to benefit financially from the breach, either directly or indirectly;
- (c) the individual knew that his actions were not in accordance with his firm's internal procedures;
- (d) the individual sought to conceal his misconduct;
- (e) the individual committed the breach in such a way as to avoid or reduce the risk that the breach would be discovered;
- (f) the individual was influenced to commit the breach by the belief that it would be difficult to detect;
- (g) the individual knowingly took decisions relating to the breach beyond his field of competence; and
- (h) the individual's actions were repeated.

2.35 (11) Factors tending to show the breach was reckless include:

- (a) the individual appreciated there was a risk that his actions or inaction could result in a breach and failed adequately to mitigate that risk; and
- (b) the individual was aware there was a risk that his actions or inaction could result in a breach but failed to check if he was acting in accordance with internal procedures.

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

- (a) the breach caused a significant loss or risk of loss to individual consumers, investors or other market users;
- (b) financial crime was facilitated, occasioned or otherwise attributable to the breach;

- (c) the breach created a significant risk that financial crime would be facilitated, occasioned or otherwise occur;
 - (d) the individual failed to act with integrity;
 - (e) the individual abused a position of trust;
 - (f) the individual held a prominent position within the industry; and
 - (g) the breach was committed deliberately or recklessly.
- 2.36 (13) 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 breach, either directly or indirectly;
 - (b) there was no or little loss or risk of loss to consumers, investors or other market users individually and in general;
 - (c) there was no, or limited, actual or potential effect on the orderliness of, or confidence in, markets as a result of the breach;
 - (d) the breach was committed negligently or inadvertently; and
 - (e) in relation to a contravention of section 63A of the Act, the individual's only misconduct was to perform a controlled function without approval.

Step 3 - mitigating and aggravating factors

DEPP 6.5B.3G

- 2.37 (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 breach. Any such adjustments will be made by way of a percentage adjustment to the figure determined at Step 2.
- 2.38 (2) The following list of factors may have the effect of aggravating or mitigating the breach:
- (a) the conduct of the individual in bringing (or failing to bring) quickly, effectively and completely the breach 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 breach by the FSA, or any other regulatory authority allowed to share information with the FSA;
 - (c) whether the individual took any steps to stop the breach, and when these steps were taken;
 - (d) any remedial steps taken since the breach was identified, including whether these were taken on the individual's own initiative or that of the FSA or another regulatory authority;

- (e) whether the individual has arranged his resources in such a way as to allow or avoid disgorgement and/or payment of a financial penalty;
- (f) 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;
- (g) whether the individual had previously undertaken not to perform a particular act or engage in particular behaviour;
- (h) whether the individual has complied with any requirements or rulings of another regulatory authority relating to the breach;
- (i) the previous disciplinary record and general compliance history of the individual;
- (j) action taken against the individual by other domestic or international regulatory authorities that is relevant to the breach in question;
- (k) whether FSA guidance or other published materials had already raised relevant concerns, and the nature and accessibility of such materials;
- (l) whether the FSA publicly called for an improvement in standards in relation to the behaviour constituting the breach or similar behaviour before or during the occurrence of the breach;
- (m) whether the individual agreed to undertake training subsequent to the breach ; and
- (n) in relation to a contravention of section 63A of the Act, whether the person's firm or another firm has previously withdrawn an application for the person to perform the same or a similar controlled function or has had such an application rejected by the FSA.

Step 4 - adjustment for deterrence

DEPP 6.5B.4G

- 2.39 (1) If the FSA considers the figure arrived at after Step 3 is insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches 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 breach to meet its objective of credible deterrence;
 - (b) where previous FSA action in respect of similar breaches has failed to improve industry standards. This may include similar breaches relating to different products (for example, action for mis-selling or claims handling failures in respect of 'x' product may be relevant to a case for mis-selling or claims handling failures in respect of 'y' product);
 - (c) where the FSA considers it is likely that similar breaches

will be committed by the individual or by other individuals in the future;

- (d) where the FSA considers that the likelihood of the detection of such a breach is low; and
- (e) where a penalty based on an individual's income may not act as a deterrent, for example, if an individual has a small or zero income but owns assets of high value.

Step 5 - settlement discount

DEPP 6.5B.5G

- 2.40 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.