Financial Services Authority

FINAL NOTICE

To: Mr Anthony Adams

Address: Tilehouse
School Lane
Preston
Hitchin
Hertfordshire
SG4 7UE

Individual Ref. No: AJA00041

Date: 21 February 2012

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives final notice that it has taken the following action:

1. THE ACTION

1.1 The FSA gave Mr Adams a Decision Notice on the 20 January 2012 which notified him that, pursuant to section 56 of the Financial Services and Markets Act 2000 ("the Act"), the FSA had decided to prohibit Mr Adams from performing any significant influence function (as defined in the FSA Handbook) at any authorised or exempt person or exempt professional firm, other than as, or through, an appointed representative within the meaning of the Act, on the basis that he is not a fit and proper person because he lacks competence and capability to perform such a function.

1.2 Mr Adams has not referred the matter to the Upper Tribunal (Tax and Chancery Chamber) within 28 days of the date on which the Decision Notice was given to him.

1.3 Accordingly, for the reasons set out below, the FSA hereby prohibits Mr Adams from performing any significant influence function at any authorised or exempt person or exempt professional firm, other than as, or through, an appointed representative within the meaning of the Act.

2. SUMMARY REASONS FOR THE ACTION

2.1 Between January to December 2005 ("the relevant period"), Mr Adams was a director of MNFA Limited ("MNFA" or "the firm") and the only compliance officer at the firm when it marketed and promoted an investment scheme called the environmentally beneficial plant scheme (the "EBP Scheme"). He also held several other significant influence functions at the firm.

2.2 On the basis of the facts and matters summarised below, and set out in more detail in Section 4 of this notice, the FSA has concluded that Mr Adams failed to understand the restrictions on promoting unregulated collective investment schemes ("UCIS") and was partly responsible for MNFA promoting the EBP Scheme, a UCIS, in breach of section 238 of the Act. He also failed to take any steps to ensure that there was compliance monitoring of MNFA's sale of the EBP Scheme (despite being the compliance officer). MNFA's customers invested around £11.6 million in the EBP Scheme that it unlawfully promoted and the majority of investors have subsequently sustained substantial losses.

3. RELEVANT STATUTORY PROVISIONS, REGULATORY REQUIREMENTS AND GUIDANCE

Unregulated collective investment schemes

3.1 An unregulated collective investment collective scheme is defined in the Glossary to the FSA Handbook of rules and guidance as "a *collective investment scheme* which is not a *regulated collective investment scheme*" ("UCIS").

3.2 Unless a collective investment scheme ("CIS") falls within the narrow Glossary definition of a regulated CIS, it will be a UCIS. Whilst a UCIS does not carry the same level of regulatory oversight as a regulated CIS, it is still subject to regulation, notably around the extent to which it may be marketed and the persons to whom it may be marketed.

3.3 UCIS investments can be attractive as they typically aim to generate high returns and they are not subject to the same restrictions as regulated CIS. For example, the latter are restricted in the underlying assets that can be held and their ability to borrow funds and are required to spread risk, whilst UCIS are not so restricted. The risks typically associated with UCIS investments include many of those that exist with regulated mainstream investments. However, there are a number of additional risks that are often inherent in a UCIS which an adviser should consider when making a recommendation.

3.4 Furthermore, individuals who invest in UCIS have no recourse to the Financial Ombudsman Service ("FOS") or the Financial Services Compensation Service ("FSCS") in respect of the UCIS themselves or the providers of those schemes. However, they may have recourse to the FOS or the FSCS in respect of personal recommendations made by authorised firms to invest in UCIS.

3.5 Section 238 of the Act states that an authorised person must not communicate an invitation or inducement to participate in a CIS although there are exceptions including:

(1) those exemptions set out in the Financial Services and Markets Act 2000 (Promotion of collective investment schemes) (Exemptions) Order 2001 ("the PCIS Order"). The PCIS Order provides for authorised firms to promote UCIS to individuals if they fall within a particular category of exemption set out in the order. The exemptions tend to be narrow in scope and subject to specific requirements including reasonable checks, disclosure of appropriate warnings, the structure of the underlying fund and the certification of the investor's status. These exemptions pertain to individuals classed as certified high net worth individuals, certified sophisticated investors or self-certified sophisticated investors; and

(2) those exemptions set out in the FSA Handbook, namely COBS 4.12.1R(4)

(COB 3 Annex 5 prior to 1 November 2007). In order to be exempt under the COBS rules, the inducement or invitation must be made only to recipients whom the firm has taken reasonable steps to establish are persons in that category or be directed at recipients in such a way as to reduce, as far as possible, the risk of participation in the CIS by persons not in that category. There is no provision for these steps to be taken retrospectively.

Further provisions

3.6 Further detail and guidance in relation to the above is set out in the Annex to this Notice, together with other relevant statutory and regulatory provisions.

4. FACTS AND MATTERS RELIED ON

Background

4.1 Mr Adams was one of three directors at MNFA and held the following significant influence functions at the firm during the relevant period: CF1 (Director), CF8 (Apportionment & oversight), CF10 (Compliance oversight), CF11 (Money laundering reporting) from 1 September 2004 to 8 February 2007. He also held the controlled function of CF21 (Investment adviser) at MNFA during the relevant period.

4.2 MNFA was incorporated as a company in March 2001. Mr Adams set up the company along with two other directors of the firm. The purpose behind the business of MNFA was initially to offer services involving mortgages and mortgage brokering for individuals who were non-domiciled. MNFA concentrated on sophisticated mortgage brokering, in particular, concentrating on tax efficient structuring of mortgages. In conjunction with this the firm also offered a general mortgage brokering business.

4.3 The other aspect of MNFA's business was principally sheltering income from taxation for wealthy individuals working in the City in a professional capacity, which involved selling tax efficient investment schemes to these individuals.

4.4 MNFA was initially an appointed representative and member of a network but became authorised on its own account on 1 September 2004.

4.5 MNFA was part of a group of companies which were all placed in creditors' voluntary liquidation on 26 January 2009. As a result, MNFA's Part IV permission was cancelled on 24 March 2009.

The EBP Scheme - an unregulated collective investment scheme

4.6 The idea behind the EBP Scheme was to set up three limited liability partnerships (LLPs) on an identical basis via which investment would be made in environmentally beneficial plant (specifically machinery used to process waste into energy) with each investor becoming a member of an LLP.

4.7 The aim was that investment into these LLPs would provide investors with a secure income whilst also benefiting from the 100% tax rebates that were allowed by tax legislation relating to environmentally beneficial plant and machinery. It was intended that the majority of the investment would be returned by way of a tax rebate by August 2005. In essence, it was a tax deferral scheme which meant that investors could obtain tax relief on a given sum at the time of investment but over time would pay tax on future income that was broadly equivalent to that sum.

4.8 Between January and May 2005, MNFA promoted the EBP Scheme to a number of its customers. Each of the three LLPs in the EBP Scheme was a UCIS because each one:

(1) fell within the definition of collective investment scheme set out in section 235 of the Act; and

(2) was not a regulated collective investment scheme as defined by the FSA Handbook.

4.9 Amongst other criteria under section 235 of the Act, an arrangement will not be a collective investment scheme if participants in the arrangement have day-to-day control over the management of the property. In determining that investors in the EBP Scheme did not have day-to-day control over the management of the property, the FSA has taken into account, amongst others, the following factors:

(1) under the terms of the EBP Scheme documentation, whilst investors retained the right to give directions they delegated management of *inter alia* the operation and maintenance of the plant and procurement and recommendation of contracts to specified named third parties at the time of investment and

execution of the scheme documentation, without any discussion or consideration of other alternative service providers, i.e. they did not retain day-to-day control over the management of the property; and

(2) the majority of investors held full time jobs, had no experience in relation to the business of processing waste into energy (the underlying business) and were led to understand by MNFA that that they would have no involvement in the day-to-day running of the EBP Scheme.

Breach of promotional restrictions under section 238

4.10 As the LLPs were UCISs, promotion of the EBP Scheme was restricted by section 238 of the Act. Mr Adams was aware of this restriction, at least in part through MNFA's involvement in 2003-2004 in an investment scheme acknowledged to be a UCIS. In other words, Mr Adams should have been particularly mindful of the possibility that the EBP Scheme was a UCIS and of the section 238 promotional restriction.

4.11 However, he had a limited and flawed understanding of the statutory restriction and the exemptions to it. Despite being MNFA's compliance officer, and therefore being responsible for ensuring that the company complied with regulatory requirements, Mr Adams failed to take any steps to ensure that he, or anyone else within MNFA, properly understood the section 238 restriction on UCIS promotion. Mr Adams told the FSA that the restriction on UCIS promotion was beyond his level of knowledge.

4.12 Despite this lack of knowledge, Mr Adams created MNFA's promotional documentation for the EBP Scheme which he based on the documentation that was used previously in relation to the similar schemes set up as UCIS in 2003-2004 referred to above .

4.13 As a result, in promoting the EBP Scheme MNFA wrote to customers in terms that:

(1) informed them that the EBP Scheme was a UCIS;

(2) asked investors to sign a document entitled a "Confirmation of High Net-Worth" in an apparent attempt to take advantage of Article 21 of the PCIS Order which, in certain circumstances, provides an exemption from the

restriction on promotion of UCIS in section 238 of the Act for promotion to "Certified High Net Worth Individuals". However, the requirements of Article 21 were not met because (i) Article 21 is only relevant to the promotion of a UCIS that invests wholly or predominantly in the shares or debentures of an unlisted company, which was not the case in relation to the EBP Scheme, and (ii) MNFA failed to include a risk warning that promotion may expose the individual to a significant risk of losing all of the property invested as required under the relevant legislation.

4.14 Alternatively, MNFA could have sought to comply with the Conduct of Business requirements in the FSA Handbook ("COB") to be able to promote the scheme to the investors. There is no evidence however that they complied with such requirements or even intended to do so.

4.15 As a result, in promoting the EBP Scheme, MNFA breached section 238 of the Act.

Systems and controls and compliance failure at MNFA

4.16 The compliance at MNFA, for which Mr Adams had overall responsibility, was largely ad hoc as there were no formal procedures in place for monitoring and supervising the investment work undertaken by the advisers. The firm specialised in mortgages and investments and Mr Adams told the FSA that, although he was the only compliance officer at MNFA at that time, he never actually interfered with how the investment side of the business was run including the compliance aspects of it, as he mainly managed the mortgage side of the firm's business.

4.17 Mr Adams also stated that he never monitored the sale of the EBP Scheme, claiming that he had delegated the compliance of the EBP Scheme. The FSA however considers that being the only compliance officer at MNFA ultimately it was Mr Adams' responsibility to ensure that MNFA was compliant with the regulatory requirements, including for the sale of the EBP Scheme.

4.18 The FSA considers that, if Mr Adams had appropriately carried out his regulatory responsibilities he should have been in a position to identify the failures within MNFA referred to below.

Classification of the sale as "Execution Only"

4.19 The documentation prepared by Mr Adams in relation to the EBP Scheme informed customers that *"this business is treated as 'Execution Only', which means that no advice has been sought or given as to the suitability of either the product or the provider and that as a 'High Net-Worth Individual' you accept full responsibility for entering into this transaction"* .

4.20 However, despite this statement in fact MNFA did provide advice to customers. It is notable that MNFA charged each investor a fee for £1,500 for the transaction. MNFA also received commission, totalling around £760,000, for these transactions. The fees and commission charged by MNFA was a clear indication that the product was being sold on an advised basis rather than on an execution only basis.

4.21 The FSA is therefore of the view that had Mr Adams appropriately monitored the EBP Scheme he should have been in a position to have detected that the EBP Scheme was in fact conducted on an advised basis despite MNFA claiming that it was done on an execution only basis.

Client classification failure

4.22 Mr Adams was responsible for ensuring MNFA complied with COB 4.1.4R which required MNFA to classify its clients for the purpose of designated investment business. However he failed to ensure that there was a consistent procedure for doing this and as a result MNFA failed to classify the EBP Scheme investors as "private customers". Mr Adams himself confirmed in MNFA's internal audit that all of MNFA's clients were "private customers". However, he did not identify that MNFA had failed to classify the EBP Scheme's customers correctly at least in part because he had failed to detect that the EBP Scheme was not being sold on an execution only basis.

4.23 As private customers, the EBP Scheme investors were entitled to expect that MNFA would take reasonable steps to ensure that its advice was suitable (COB 5.3.5R). As compliance officer, Mr Adams was responsible for MNFA's failure to classify the EBP Scheme's investors properly.

5. FAILINGS

5.1 By reason of the facts and matters discussed above, Mr Adams is not a fit and proper person in that he lacks competence and capability.

5.2 Mr Adams acted without competence and capability by failing to inform himself about and demonstrate an understanding of the regulatory requirements relating to the promotion of UCIS, despite the relevance to MNFA's business. In particular, he failed to understand the statutory restriction on the promotion of UCIS in section 238 of the Act and the exemptions to that restriction.

5.3 Mr Adams also acted without competence and capability by:

(1) drafting documentation for use by MNFA advisers that purported to take advantage of an exemption to section 238 but in fact failed to do so thereby failing to take the necessary steps to ensure that MNFA complied with section 238;

(2) failing to take any steps to ensure that there was compliance monitoring over MNFA's sale of the EBP Scheme, with the result that MNFA informed customers that the sale was execution only when it was not and that MNFA failed to classify its clients as private customers.

6. REPRESENTATIONS AND FINDINGS

6.1 Although Mr Adams indicated initially that he wished to make representations in this matter, by a letter dated 4 November 2011 he withdrew his request to do so. Accordingly, the FSA has treated the allegations and matters in this Final Notice as undisputed.

7. PROHIBITION

7.1 Mr Adams's failings seriously undermined the protection and fair treatment of customers. Having regard to his conduct as discussed above and the provisions of FIT and EG, the FSA has concluded that Mr Adams is not a fit and proper person to perform performing any significant influence function (as defined in the FSA Handbook) at any authorised or exempt person or exempt professional firm, other than as, or through, an appointed representative within the meaning of the Act, on the basis that he is not a fit and proper person because he lacks competence and capability to perform such a function.

8. DECISION MAKER

8.1 The decision that gave rise to the obligation to give this Final Notice was made by the Regulatory Decisions Committee.

9. IMPORTANT

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

Publicity

9.2 Sections 391(4), 392(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 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 Mr Adams or prejudicial to the interests of consumers.

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

FSA contacts

9.4 For more information concerning this matter, please contact Paul Howick of the Enforcement and Financial Crime Division at the FSA (direct line: 020 7066 7954) of the FSA.

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Tom Spender
Head of Department
FSA Enforcement and Financial Crime Division

Annex (paragraph 3.6)

RELEVANT STATUTORY PROVISIONS, REGULATORY REQUIREMENTS AND FSA GUIDANCE

1. STATUTORY AND REGULATORY PROVISIONS AND POLICY TO IMPOSE A PROHIBITION ORDER

1.1 The FSA's statutory objectives are set out in section 2(2) of the Act. In relation to this case, the most relevant statutory objectives are maintaining confidence in the financial system and the protection of consumers.

Prohibition

1.2 The FSA has the power, pursuant to section 56 of the Act, to make an order prohibiting individuals from performing a specified function, any function falling within a specified description, or any function, if it appears to the FSA that he is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person. Such an order may relate to a specified regulated activity or any regulated activity falling within a specified description or all regulated activities.

Fit and Proper Test for Approved Persons

1.3 The section of the FSA handbook entitled "FIT" sets out the Fit and Proper test for Approved Persons. The purpose of FIT is to outline the main criteria for assessing the fitness and propriety of a candidate for a controlled function and FIT is also relevant in assessing the continuing fitness and propriety of an approved person.

1.4 FIT 1.3.1G provides that the FSA will have regard to a number of factors when assessing a person's fitness and propriety. Among the most important considerations will be the person's competence and capability.

Enforcement Guide

1.5 The FSA's approach to exercising its powers to make prohibition orders and withdraw approvals is set out at Chapter 9 of the Enforcement Guide ("EG").

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

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

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

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

(1) whether the individual is fit and proper to perform functions in relation to regulated activities, including in relation to the criteria for assessing the fitness and propriety of an approved person in terms of competence and capability as set out in FIT 2.2;

(2) the relevance and materiality of any matters indicating unfitness;

(3) the length of time since the occurrence of any matters indicating unfitness;

(4) 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;

(5) the severity of the risk which the individual poses to consumers and to confidence in the financial system; and

(6) the previous disciplinary record and general compliance history of the individual.

1.10 EG 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 serious lack of competence.

Conduct of Business Rules – client categorisation

1.11 Guidance on the Conduct of Business rules is set out in the Conduct of Business manuals of the FSA Handbook.

1.12 COB 4.1 sets out provisions relating to several steps that MNFA had to take to classify their clients as 'intermediate clients'. These are as follows:

- COB 4.1.9R(1) provides that a firm may classify a client who would otherwise be a private customer as an intermediate customer if:

  (1) the firm has taken reasonable care to determine that the client has sufficient experience and understanding to be classified as an intermediate customer; and

  (2) the firm:

    (a) has given a written warning to the client of the protections under the regulatory system that he will lose;

(b) has given the client sufficient time to consider the implications of being classified as an intermediate customer; and

(c) has obtained the client's written consent, or is otherwise able to demonstrate that informed consent has been given.

- COB 4.1.10G(1) provides that to take reasonable care to determine that a client has sufficient experience and understanding to be classified as an intermediate customer for the purposes of COB 4.1.9 R (1)(a), the firm should have regard to:

  (1) the client's knowledge and understanding of the relevant designated investments and markets, and of the risks involved;

  (2) the length of time the client has been active in these markets, the frequency of dealings and the extent to which he has relied on the advice on investments of the firm;

  (3) the size and nature of transactions that have been undertaken for the client in these markets;

  (4) the client's financial standing, which may include an assessment of his net worth or of the value of his portfolio.

2. STATUTORY AND REGULATORY PROVISIONS REGARDING UCIS

Section 235 of the Act

2.1. Section 235 of the Act provides the definition of a collective investment scheme as follows:

(1) In this Part “collective investment scheme” means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.

(2) The arrangements must be such that the persons who are to participate (“participants”) do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions (our emphasis).

(3) The arrangements must also have either or both of the following characteristics:

(a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;

(b) the property is managed as a whole by or on behalf of the operator of the scheme.

(4) If arrangements provide for such pooling as is mentioned in subsection (3)(a) in relation to separate parts of the property, the arrangements are not to be regarded as constituting a single collective investment scheme unless the participants are entitled to exchange rights in one part for rights in another.

(5) The Treasury may by order provide that arrangements do not amount to a collective investment scheme—

(a) in specified circumstances; or

(b) if the arrangements fall within a specified category of arrangement.

Section 238 of the Act

2.2. Section 238 of the Act provides restriction on promotion of collective investment schemes.

(1) An authorised person must not communicate an invitation or inducement to participate in a collective investment scheme.

(2) But that is subject to the following provisions of this section and to section 239.

(3) Sub-section (1) does not apply in relation to—

(a) an authorised unit trust scheme;

(b) a scheme constituted by an authorised open-ended investment company; or

(c) a recognised scheme.

(4) Subsection (1) does not apply to anything done in accordance with rules made by the Authority for the purpose of exempting from that subsection the promotion otherwise than to the general public of schemes of specified descriptions.

(5) The Treasury may by order specify circumstances in which subsection (1) does not apply.

(6) An order under subsection (6) may, in particular, provide that subsection (1) does not apply in relation to communications—

(a) of a specified description;

(b) originating in a specified country or territory outside the United Kingdom;

(c) originating in a country or territory which falls within a specified description of country or territory outside the United Kingdom; or

(d) originating outside the United Kingdom.

(7) "Communicate" includes causing a communication to be made.

(8) "Promotion otherwise than to the general public" includes promotion in a way designed to reduce, so far as possible, the risk of participation by persons for whom participation would be unsuitable.

2.3 "Participate", in relation to a collective investment scheme, means become a participant (within the meaning given by section 235(2)) in the scheme.

Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001

2.4 Article 21 of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 ("the PCIS Order") provides for a specific exemption for "Certified High Net Worth Individuals". Article 21 of the PCIS Order which was in force from the start of the relevant period until 3 March 2005 provides as follows:

(1) If the requirements of paragraphs (4) and (5) are met, the scheme promotion restriction does not apply to any communication which—

(a) is a non-real time communication or a solicited real time communication;

(b) is made to a certified high net-worth individual;

(c) relates only to units falling within paragraph (6);

(d) does not invite or induce the recipient to enter into an agreement under the terms of which he can incur a liability or obligation to pay or contribute more than he commits by way of investment.

(2) "Certified high net-worth individual" means any individual—

(a) who has a current certificate of high net worth; and

(b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

"I make this statement so that I am able to receive promotions of units in unregulated collective investment schemes where such promotions are exempt from the restriction in section 238 of the Financial Services and Markets Act 2000. The exemption relates to certified high net worth individuals and I declare that I qualify as such. I accept that the schemes to which the promotions will relate are not authorised or recognised for the purposes of that Act. I am aware that it is open to me to seek advice from an authorised person who specialises in advising on this kind of investment".

(3) For the purposes of paragraph (2)(a) a certificate of high net worth—

(a) must be in writing or other legible form;

(b) is current if it is signed and dated within the period of twelve months ending with the day on which the communication is made;

(c) must state that in the opinion of the person signing the certificate, the person to whom the certificate relates either—

(i) had, during the financial year immediately preceding the date on which the certificate is signed, an annual income of not less than £100,000; or

(ii) held, throughout the financial year immediately preceding the date on which the certificate is signed, net assets to the value of not less than £250,000;

(d) must be signed by the recipient's accountant or by the recipient's employer.

(4) The requirements of this paragraph are that the communication is accompanied by an indication—

(a) that it is exempt from the restriction on the promotion of unregulated schemes (in section 238 of the Financial Services and Markets Act 2000) on the grounds that the communication is made to a certified high net worth individual;

(b) of the requirements that must be met for a person to qualify as a certified high net worth individual;

(c) that buying the units to which the communication relates may expose the individual to a significant risk of losing all of the property invested;

(d) that any person who is in any doubt about the units to which the communication relates should consult an authorised person specialising in advising on participation in unregulated schemes.

(5) In determining an individual's "net assets", no account is to be taken of—

(a) the property which is his primary residence or of any loan secured on that residence;

(b) any rights of his under a qualifying contract of insurance; or

(c) any benefits (in the form of pensions or otherwise) which are payable on the termination of his service or on his death or retirement and to which he is (or his dependents are), or may be, entitled.

(6) A unit falls within this paragraph if it is in an unregulated scheme—

(a) which is not operated by the person who has signed the certificate of high net worth referred to in paragraph (2)(a); and

(b) which invests wholly or predominantly in the shares in or debentures of an unlisted company.

(7) "Unlisted company" has the meaning given in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001(1).

2.5 The PCIS Order was amended on 3 March 2005. Article 21 of the amended PCIS Order in force from 3 March 2005 until the end of the relevant period provides as follows:

(1) If the requirements of paragraphs (4) and (7) are met, the scheme promotion restriction does not apply to any communication which–

(a) is a non-real time communication or a solicited real time communication;

(b) is made to an individual whom the person making the communication believes on reasonable grounds to be a certified high net worth individual;

(c) relates only to units falling within paragraph (8); and

(d) does not invite or induce the recipient to enter into an agreement under the terms of which he can incur a liability or obligation to pay or contribute more than he commits by way of investment.

(2) "Certified high net worth individual" means an individual who has signed, within the period of twelve months ending with the day on which the communication is made, a statement complying with Part I of the Schedule1.

(3) The validity of a statement signed for the purposes of paragraph (2) is not affected by a defect in the form or wording of the statement, provided that the defect does not alter the statement's meaning and that the words shown in bold type in Part I of the Schedule are so shown in the statement.

(4) The requirements of this paragraph are that either the communication is accompanied by the giving of a warning in accordance with paragraphs (5) and (6) or, where because of the nature of the communication this is not reasonably practicable,–

(a) a warning in accordance with paragraph (5) is given to the recipient orally at the beginning of the communication together with an indication that he will receive the warning in legible form and that, before receipt of that warning, he should consider carefully any decision to participate in a collective investment scheme to which the communication relates; and

(b) a warning in accordance with paragraphs (5) and (6) (d) to (h) is sent to the recipient of the communication within two business days of the day on which the communication is made.

(5) The warning must be in the following terms–

"Reliance on this promotion for the purpose of buying the units to which the promotion relates may expose an individual to a significant risk of losing all of the property or other assets invested.".

But, where a warning is sent pursuant to paragraph (4)(b), for the words "this promotion" in both places where they occur there must be substituted wording which clearly identifies the promotion which is the subject of the warning.

(6) The warning must–

(a) be given at the beginning of the communication;

(b) precede any other written or pictorial matter;

(c) be in a font size consistent with the text forming the remainder of the communication;

(d) be indelible;

(e) be legible;

(f) be printed in black, bold type;

(g) be surrounded by a black border which does not interfere with the text of the warning; and

(h) not be hidden, obscured or interrupted by any other written or pictorial matter.

(7) The requirements of this paragraph are that the communication is accompanied by an indication–

(a) that it is exempt from the restriction on the promotion of unregulated schemes (in section 238 of the Act) on the grounds that the communication is made to a certified high net worth individual;

(b) of the requirements that must be met for an individual to qualify as a certified high net worth individual;

(c) that any individual who is in any doubt about the units to which the communication relates should consult an authorised person specialising in advising in participation in unregulated schemes.

(8) A unit falls within this paragraph if it is in an unregulated scheme which invests wholly or predominantly in the shares in or debentures of one or more unlisted companies.

(9) “Business day” means any day except a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

(10) “Unlisted company” has the meaning given in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001.”

Conduct of Business Rules – promotion of unregulated collective investment schemes

2.6 COB 3 set out rules relating to financial promotion.

2.7 COB 3.11 sets out exemptions from the restriction on promoting unregulated collective investment schemes under section 238 of the Act.

2.8 Under COB 3.11.2R a firm may communicate an invitation or inducement to participate in an unregulated collective investment scheme if the communication falls within COB 3 Annex 5 R.

2.9 Under COB 3, Annex 5 a firm may communicate an invitation or inducement to participate in an unregulated collective investment scheme without breaching the restriction on promotion in section 238 of the Act if the promotion is to a category of persons and promoted in a particular way.

2.10 A Category 1 person is a person who is already a participant in a UCIS or a qualified investment scheme; or a person who has been in the last 30 months a participant in an unregulated collective investment scheme or a qualified investment scheme. Promotion of that specified collective investment scheme is permissible.

2.11 A Category 2 person is a person for whom a firm is required to take reasonable steps to ensure that their investment in that particular collective investment scheme was suitable and who is an established or newly accepted customer of the firm or of a person in the same group as the firm. Financial promotion of any such collective investment scheme is permissible.