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## FINAL NOTICE

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To: **Cheshire Life & Pensions Consultants**

Of: **131 Buxton Road, Whaley Bridge, High Peak  
SK23 7HX**

FSA reference number: **126787**

Dated: **30 July 2009**

**TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) gives Cheshire Life & Pensions Consultants (“the Firm”) final notice about:**

### **1. ACTION**

- 1.1. The FSA gave the Firm a Decision Notice on 29 July 2009 which notified the Firm that the FSA has decided, and on the basis that Cheshire Life and Pensions Consultants has agreed to vary its Part IV permission and to undertake certain remedial action (as detailed at paragraph 1.4 below), to issue a public censure of the Firm in respect of breaches of the FSA’s Principles for Businesses (“Principles”) and related FSA Rules between 20 May 2003 and 19 November 2008 (“the Relevant Period”).
- 1.2. The Firm has breached Principle 9 (Customers: relationships of trust) in relation to failings in its advice and sales processes in respect of pension income withdrawal products (“income drawdown”) during the Relevant Period.
- 1.3. The Firm has also breached FSA Rules 5.2.5R, 5.2.9R, 5.3.14R, 5.3.16R and 5.4.3R in the part of the Handbook entitled Conduct of Business (“COB”), in force for part of

the Relevant Period (until 31 October 2007), and Rules 9.2.1R, 9.2.2R, 9.4.7R in the part of the Handbook entitled Conduct of Business Sourcebook (“COBS”), in force from 1 November 2007.

- 1.4. The Firm agreed to settle at an early stage of the FSA’s investigation and has agreed to the following remedial action:
  - (1) to vary its Part IV permission to exclude advising on income drawdown unless such recommendations are first approved by a suitably qualified external compliance consultant;
  - (2) to contact all income drawdown customers warning of the possibility that they may have been given unsuitable advice and offering redress where appropriate;
  - (3) to continue to utilise a suitably qualified external compliance consultant to carry out client file reviews across all business areas on a quarterly basis unless otherwise agreed by the FSA; and
  - (4) to undertake a past business review of a selection of non-income drawdown cases.
- 1.5 The Firm confirmed on 10 July 2009 that it would not refer the matter to the Financial Services and Markets Tribunal.
- 1.6 Accordingly, for the reasons set out below and having agreed with the Firm the facts and matters relied on, the FSA issues a public censure of the Firm.
- 1.7. The public censure of the Firm takes effect from 30 July 2009.

## **2. REASONS FOR THE ACTION**

### **Introduction**

- 2.1. The FSA has decided to issue a public censure of the Firm for breaches of the FSA Principle and Rules identified in Section 1 above that occurred during the Relevant Period. These breaches relate to the Firm’s failure to ensure the suitability of its advice regarding income drawdown products, including in its written communication with customers. In summary, the Firm failed to carry out appropriate fact finding and could not provide evidence that the nature and characteristics of the product had been adequately considered or explained to clients.
- 2.2. More specifically, in breach of Principle 9 the Firm failed:
  - (1) to gather or record adequate information about the customers’ personal and financial circumstances to support its assessment of suitability;

- (2) to provide suitability letters at all or to provide suitability letters that adequately explained the reasons for the recommendation;
- (3) to include adequate risk warnings about the product in suitability letters;
- (4) to undertake any, or sufficient, research to ensure the suitability of recommendations;
- (5) to undertake independent file checks to ensure suitability of advice and compliance with regulatory requirements;
- (6) to record adequately why alternative products had not been recommended, notably when customers were looking to invest less than £100,000 (a “small pot”)<sup>1</sup>; and
- (7) to monitor adequately the quality of advice being given by advisors.

### **3. FACTS AND MATTERS RELIED ON**

#### ***The Firm***

- 3.1. The Firm is a small personal investment firm based in High Peak, Derbyshire. The majority of its business is the provision of investment advice but it also conducts some insurance intermediary business. The Firm became authorised by the FSA under Part IV of the Act on 1 December 2001 and currently has permission to carry on the following regulated activities:

- (1) Advising on investments (ex Pension Transfers / Opt Outs);
- (2) Agreeing to carry on a regulated activity;
- (3) Arranging deals in investments;
- (4) Assisting in administration and performance of a contract of insurance;
- (5) Dealing in investments as agent; and
- (6) Making arrangements with a view to transactions in investments.

- 3.2. The Firm has two partners, only one of whom continues to advise clients. The Firm has no other employees.

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<sup>1</sup> It is generally accepted that income drawdown can become increasingly unsuitable if the customer has a ‘pot’ of less than £100,000.

### ***Background to Investigation***

- 3.3. The FSA carried out a “treating customers fairly” (“TCF”) assessment of the Firm, as part of the FSA’s enhanced supervisory strategy, in June 2008. The FSA noted that the Firm had not made adequate progress in implementing TCF. A follow up TCF visit was conducted in August 2008 and the Firm’s partners were interviewed and client files were reviewed. As a result of these visits, the FSA highlighted key failings on the part of the Firm. These included a failure to demonstrate that it obtained adequate information about customers’ personal and financial circumstances prior to advice being given, failures in relation to the content of suitability letters (when issued), and a lack of adequate file monitoring. The FSA was particularly concerned by the lack of sufficient customer information being recorded on the income drawdown files reviewed. Accordingly, it was considered that there was a high risk of consumer detriment as a result of poor practice. The Firm had not, at this stage, used any external compliance consultancy to advise it and to ensure it was meeting the necessary regulatory standards.
- 3.4. The FSA recommended that the Firm should appoint independent external compliance consultants (“the Consultant”) to review its client files and advise on improving its systems and practice. The Firm agreed to do this and instructed the Consultant. The Firm identified that it had carried out 23 income drawdown cases and these cases were reviewed by the Consultant. This review identified serious deficiencies in relation to the Firm’s suitability letters, completion of fact finds, product research and adequacy of the explanations of its recommendations. As a result of the findings of both Supervision and the Consultant, the Firm was referred to the FSA’s Enforcement Division.
- 3.5. The Enforcement investigation concluded that the Firm had breached Principle 9, as set out in further detail below.

### ***Suitability of advice***

- 3.6. The Firm failed to gather and record sufficient customer information. In particular:
- (1) insufficient information was recorded about the customers’ current personal and financial circumstances including in relation to current income, existing investments and anticipated retirement age;
  - (2) fact finds did not record that alternatives to income drawdown had been discussed;
  - (3) fact finds did not include sufficient information or detail about the customers’ specific objectives including the reasons why the customer required income and how much income was required; and
  - (4) there was no process for assessing and recording the customers’ attitude to risk in a consistent manner.

- 3.7. The Firm did not have procedures in place to monitor the quality and suitability of advice being given. Although the Firm's partners claimed that they cross-checked each other's files, there was no record of such checks taking place, of any issues that were identified in such cross-checks or of any steps taken to improve the quality of advice as a result of these checks. The Firm had not used external compliance consultants to review files (until after the first FSA visit in June 2008).
- 3.8. The Firm could not demonstrate that it had considered the needs and circumstances of each customer prior to recommending the income drawdown product as there was no evidence of research into alternative products on file.
- 3.9. Often, the risk rating of the recommended product did not appear to match the customer's attitude to risk at the time the recommendation was made and no explanation or evidence was provided for the Firm's view that the product was nonetheless the most suitable.
- 3.10. The following examples serve to demonstrate that recommendations made by the Firm did not appear to have regard to the individual customer's attitude to risk:-
- (1) In one case the customer's recorded attitude to risk was low but the Firm recommended income drawdown (in itself considered a higher risk product) with part of the underlying investment to be placed in a higher risk with-profits growth fund.
  - (2) Another customer's attitude to risk was recorded as 'very low risk i.e. fixed interest, cash', but drawdown was recommended with a technology fund. The suitability report did not mention the fund and no risk warnings were given.
  - (3) A further customer was recorded in the fact find as having a low attitude to risk and the suitability report stated that their attitude to risk was cautious. It was not clear how the customer's attitude to risk had been assessed and the suitability report gave no risk warnings about the recommended product or any explanation as to why it matched the low or cautious attitude to risk of the customer.
- 3.11. Further, the Firm advised customers with only 'small pot' pensions to enter into income drawdown contracts when it is usually considered appropriate for the pot to exceed £100,000 in order for the customer to properly benefit from income drawdown. 19 of the 23 cases involved a small pot and these had an average size of £48,677.
- 3.12. In relation to suitability letters, the following additional issues were identified:
- (1) suitability letters failed to provide any, or adequate, warnings about the risks involved in entering into the income drawdown contract (including the risk of the underlying funds) or the possible disadvantages of leaving existing schemes;

- (2) suitability letters failed adequately to explain why the recommendation matched the customers' attitude to risk, personal circumstances and specific objectives;
- (3) there was no reference to alternative products considered in suitability letters or adequate justification for choosing the product in question;
- (4) suitability letters did not explain how income drawdown worked;
- (5) in one case, no suitability letter was produced; and
- (6) no research appeared to have been done into the most suitable provider or fund.

#### **4. ANALYSIS OF BREACHES**

- 4.1. By failing to gather and record sufficient personal and financial information about customers, failing to research alternative products and failing to monitor adequately advice being given, the Firm failed to take reasonable care to ensure the suitability of its advice. By failing to ensure that its suitability letters explained the characteristics of, and risks associated with, income drawdown and why the Firm had concluded that income drawdown was suitable, the Firm was not able to demonstrate that its recommendations to enter into income drawdown contracts were suitable and failed to provide suitable advice to its customers. The Firm therefore breached Principle 9 and the associated COB and COBS rules listed in Annex A.

#### **5. ANALYSIS OF SANCTION**

- 5.1. The FSA's policy on issuing a public censure as at the date of this Notice is set out in Chapter 6 of the Decision Procedures and Penalties Manual ("DEPP") and Chapter 7 of the Enforcement Guide ("EG"), which form part of the FSA Handbook.
- 5.2. The principal purpose of public censure is to promote high standards of regulatory conduct by deterring firms who 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.
- 5.3. In determining whether a public censure is appropriate, the FSA is required to consider all the relevant circumstances of a case. DEPP 6.2.1 sets out a non-exhaustive list of factors that may be of relevance in determining whether it is appropriate to take action against a person and DEPP 6.4.1 and 6.4.2 set out considerations for determining whether it is appropriate to issue a public censure rather than impose a financial penalty.
- 5.4. The FSA considers that the following factors are particularly relevant in this case.
- 5.5. **The nature, seriousness and impact of the breach in question**

- 5.6. In determining the appropriate sanction, the FSA has had regard to the seriousness of the breaches, including the nature of the requirements breached, the duration and frequency of the breaches, whether the breaches revealed serious failings in the firm's systems and controls and the number of clients who were affected and/or placed at risk of loss. For the reasons set out below the FSA considers that, while serious enough to necessitate action against the Firm, the breaches in this case are of a less serious nature such that a public censure rather than a financial penalty is appropriate.
- 5.7. In this context, the Firm's failings are viewed as being less serious because:
- (1) the identified failings specifically relate to income drawdown cases which made up a small percentage of the Firm's business; and
  - (2) the Firm has agreed to contact all income drawdown customers to ensure that redress is offered where appropriate.
- 5.8. The FSA has also taken into account the following steps taken by the Firm which have served to mitigate its failings:
- (1) the Firm has accepted its shortcomings and has appointed compliance consultants to advise it on an on-going basis;
  - (2) the Firm has agreed that all future income drawdown recommendations will first have to be approved by an external compliance consultant (as to which, see footnote 1 above); and
  - (3) the Firm has agreed to undertake a past business review of non-income drawdown cases.

#### **The extent to which the breach was deliberate or reckless**

- 5.9. The FSA has found no evidence to show that the Firm acted in a deliberate or reckless manner.

#### **Deterrence**

- 5.10. When determining whether it is appropriate to issue a public censure, 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. In this case, the Firm's acceptance of historic failings and the level of co-operation shown by the Firm since the FSA's involvement has persuaded the FSA that deterrence will effectively be achieved by issuing a public censure.

### **The size, financial resources and other circumstances of the firm**

5.11. In determining that public censure is more appropriate than a financial penalty in this case, the FSA has been mindful of the need to ensure that the interests of clients are protected. The FSA has also considered the following issues:

- (1) the cost of the consultant's report incurred by the Firm prior to the Enforcement investigation;
- (2) the cost of the proposed past business review and other potential remedial action;
- (3) the need for the Firm to be able to satisfy potential claims of financial redress to customers, within the three year timescale permitted by the Financial Ombudsman Service; and
- (4) the relatively low turnover and profit levels of the Firm.

### **The amount of benefit gained or loss avoided**

5.12. Whilst the Firm potentially may have earned higher commission from its sale of income drawdown products compared to other investment products, there is no evidence that the Firm earned significant sums as a result of these sales since income drawdown recommendations made up a relatively small proportion of the Firm's business.

### **Conduct following the breach**

5.13. The Firm has co-operated fully, and at an early stage, with the FSA and has agreed to the remedial action set out at paragraph 1.4 above.

### **Disciplinary record and compliance history**

5.14. The Firm has not been the subject of previous disciplinary action.

### **Other action taken by the FSA**

5.15. In determining to issue a public censure, the FSA has taken into account sanctions imposed by the FSA on other authorised persons for similar behaviour.

## **6. DECISION MAKER**

The decision which gave rise to the obligation to give this Final Notice was made by the Settlement Decision Makers.

## **7. IMPORTANT**

7.1. This Final Notice is given to the Firm in accordance with section 390 of the Act.



## **Publicity**

- 7.2. 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 you or prejudicial to the interests of consumers.
- 7.3. The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

## **FSA contact**

- 7.4. For more information concerning this matter generally, you should contact Anna Hynes of the Enforcement Division at the FSA (direct line: 020 7066 9464).

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**Jonathan Phelan**

**Head of Department**

**FSA Enforcement Division**

## Annex A

### 1. RELEVANT STATUTORY AND REGULATORY PROVISIONS

- 1.1. The FSA's statutory objectives, set out in section 2(2) of the Act, include the protection of consumers.
- 1.2. Section 138 of the Act provides that the FSA may make such rules applying to authorised persons as appear to it to be necessary or expedient for the purpose of protecting consumers.
- 1.3. Pursuant to section 205 of the Act, if the FSA considers that an authorised person has contravened a requirement imposed on him by or under the Act, the Authority may publish a statement to that effect.

#### Principles for Businesses

- 1.4. Under the FSA's rule-making powers as referred to above, the FSA has published in the Handbook the Principles which apply either in whole, or in part, to all authorised persons.
- 1.5. The Principles are a general statement of the fundamental obligations of firms under the regulatory system and reflect the FSA's regulatory objectives.
- 1.6. The Principle which is most relevant to this matter is:
- 1.7. **Principle 9** (Customers: relationships of trust)

*"A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment."*

- 1.8. The relevant provisions of Conduct of Business ("COB"), which were in force during the Relevant Period up to 31 October 2007, are as follows:

**COB 5.2.5R** requires that before a firm gives a personal recommendation concerning a designated investment to a private customer, it must take reasonable steps to ensure that it is in possession of sufficient personal and financial information about that customer relevant to the services that the firm has agreed to provide;

**COB 5.2.9R** requires that a firm must make and retain a record of a private customer's personal and financial circumstances that it has obtained in satisfying COB 5.2.5R.

**COB 5.3.14R** requires that a firm that gives a personal recommendation in relation to a life policy must provide the person with a suitability letter prior to the conclusion of the contract.

**COB 5.3.16R** provides that a suitability letter written by the firm must explain why the firm has concluded that the transaction is suitable for the customer, having regard

to his personal and financial circumstances and contain a summary of the main consequences and any possible disadvantages of the transaction.

**COB 5.4.3R** provides that a firm must not, amongst other things, make a personal recommendation of a transaction to a private customer unless it has taken reasonable steps to ensure that the private customer understands the nature of the risks involved.

- 1.9. The relevant provisions of the Conduct of Business Sourcebook (“COBS”), which were in force during the relevant period from 1 November 2007, are as follows:

**COBS 9.2.1R** Requires that a firm must take reasonable steps to ensure that a personal recommendation is suitable for its client.

**COBS 9.2.2R** Requires that a firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him.

**COBS 9.4.7R** Provides that the suitability report must at least specify the client’s demands and needs; explain why the firm has concluded that the recommended transaction is suitable for the client having regard to the information provided by the client; and explain any possible disadvantages of the transaction for the client.