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## FINAL NOTICE

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**To:** **Darren Colvin Cummings** **DCC Financial Limited**

**Address:** **4 Upper Movilla Street  
Newtownards  
BT23 8JH**

**Individual  
Reference  
Number:** **DCC00024**

**Date:** **8 June 2018**

### **ACTION**

1. For the reasons given in this Final Notice, the Authority hereby:
  - (a) withdraws the approval granted to Mr Cummings to perform the CF1 (Director) controlled function in relation to DCC Financial, pursuant to section 63 of the Act;
  - (b) imposes on Mr Cummings, pursuant to section 66 of the Act, a financial penalty of £29,300; and
  - (c) makes an order, pursuant to section 56 of the Act, prohibiting Mr Cummings from performing any function in relation to any regulated activities carried on by an authorised person, exempt person, or exempt professional firm.

2. The Authority gave Mr Cummings the Decision Notice, which notified Mr Cummings of the above actions taken against him.
3. Mr Cummings has not referred the matter to the Tribunal within 28 days of the date on which the Decision Notice was given to him.

### **SUMMARY OF REASONS**

4. The RDR, launched by the Authority in 2006, was a wide ranging review of the retail investment market. From the beginning of 2013, the Authority implemented a new set of rules stemming from that review. Under those rules, all firms authorised by the Authority which have permission to conduct retail investment business are required to ensure that their retail investment advisers hold the minimum level of qualification and a Statement of Professional Standing (SPS).
5. The Authority has concluded, on the basis of the facts and matters and conclusions described in the Warning Notice, and in the Decision Notice, that Mr Cummings acted dishonestly as, whilst being approved to perform the CF1 (Director) controlled function at DCC Financial, he:
  - (a) fabricated, or caused the fabrication of, two documents, both of which resemble and purport to be an SPS issued by the CII to Mr Cummings (the SPS 1 and SPS 2 documents), to give the misleading impression that he had attained the appropriate qualifications to provide investment advice to retail customers;
  - (b) knowingly provided the SPS 1 and SPS 2 documents, and caused another person to provide the SPS 1 document, to the Authority with the intention of misleading the Authority into believing that he was fully qualified to provide investment advice to retail customers, when he did not hold (and never held) any of the qualifications he would have been required to hold in order to have been issued with an SPS; and
  - (c) knowingly made numerous false and misleading statements to the Authority concerning his qualifications and experience.
6. The Authority considers that Mr Cummings' misconduct amounts to a failure to act with integrity in breach of Statement of Principle 1 of the Authority's Statements of Principle.
7. The Authority also considers that, in view of the facts and matters set out below, Mr Cummings poses a risk to consumers and to the integrity of the financial system, and that the nature and seriousness of the breach outlined above warrants the withdrawal of Mr Cummings' approval to perform the CF1 (Director) controlled function in relation to DCC Financial, the imposition of a financial penalty and the making of an order prohibiting him from performing any function in relation to any regulated activity carried on by an authorised or exempt person or exempt professional firm.

## **DEFINITIONS**

8. The following definitions are used in this Notice (and in the Annexes):

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

"APER" means the Statements of Principle and Code of Practice for Approved Persons;

"the Authority" means the Financial Conduct Authority;

"the CF11 Application" means the regulatory application submitted by DCC Financial to the Authority on 12 May 2015;

"the CF30 Application" means the regulatory application submitted by DCC Financial to the Authority on 18 June 2015;

"the CII" means the Chartered Insurance Institute;

"Mr Cummings" means Darren Colvin Cummings;

"CV" means Mr Cummings' curriculum vitae, which was sent to the Authority on 1 June 2015;

"DCC Financial" means DCC Financial Limited (formally Kingswell Financial Services Limited);

"the Decision Notice" means the Decision Notice given to Mr Cummings dated 11 April 2018;

"DEPP" means the Decision Procedure and Penalties Manual section of the Handbook;

"EG" means the Enforcement Guide;

"FIT" means the Fit and Proper Test for Approved Persons and specified significant-harm functions section of the Handbook;

"the Handbook" means the Authority's Handbook of rules and guidance;

"QCF" means the Qualifications Credit Framework;

"the Relevant Period" means the period from 15 May 2015 to 17 July 2015;

"the RDR" means the Retail Distribution Review;

"SPS" means Statement of Professional Standing;

"the SPS 1 document" means a fabricated document which resembles and purports to be an SPS issued by the CII to Mr Cummings on 25 September 2012;

“the SPS 2 document” means a fabricated document which resembles and purports to be an SPS issued by the CII to Mr Cummings on 25 September 2012;

“the Statements of Principle” means the Statements of Principle for Approved Persons as set out in APER;

“the TC” means the Training and Competence section of the Handbook;

“the Tribunal” means the Upper Tribunal (Tax and Chancery Chamber);

“the Variation Application” means the regulatory application submitted by DCC Financial to the Authority on 17 February 2015; and

“the Warning Notice” means the warning notice given to Mr Cummings dated 11 September 2017.

## **FACTS AND MATTERS**

### *Background*

9. DCC Financial was authorised by the Authority on 20 February 2014 to conduct insurance mediation and home finance business. On the same date, Mr Cummings was approved to perform the CF1 (Director) controlled function and was allocated responsibility for insurance mediation at DCC Financial. Mr Cummings is, and has been since it was authorised by the Authority, the sole approved person at DCC Financial.

### *The RDR*

10. On 31 December 2012, the Authority implemented the RDR, in part through the introduction of new requirements in the TC. These new rules raised the benchmark qualification level for all retail investment advisers and introduced an overarching standard for continuing professional development, in order to raise professional standards. All firms authorised by the Authority to conduct retail investment business were required to ensure that their retail investment advisers had reached the QCF Level 4 or equivalent and held an SPS. An SPS is evidence that an accredited body, such as the CII, has independently verified that the retail investment adviser holds an appropriate qualification, has satisfied the appropriate continuing professional development requirement and has met the requisite ethical standard.
11. Mr Cummings does not hold (and has never held) the requisite qualifications to be a retail investment adviser and has never been issued with an SPS by the CII or any other accredited body.

### *Mr Cummings’ provision of two fabricated SPSs and his false and misleading communications to the Authority*

12. On 17 February 2015, DCC Financial submitted the Variation Application to the Authority to vary DCC Financial’s permission such that DCC Financial could provide investment advice to retail customers. The Variation Application consisted of adding regulated activities to those which DCC Financial was already

authorised to undertake. Mr Cummings submitted the Variation Application for DCC Financial.

13. In addition, on 12 May 2015, DCC Financial submitted the CF11 Application to the Authority for approval for Mr Cummings to perform the CF10 (Compliance Oversight) and CF30 (Customer) controlled functions.
14. Between 1 May 2015 and 25 August 2015, the Authority entered into correspondence with DCC Financial to obtain further information in respect of the Variation Application and the CF11 Application. In particular, in relation to the Variation Application, the Authority requested from DCC Financial information regarding the experience and qualifications of the individual(s) at DCC Financial who would be the investment adviser(s) if the variation of permission was granted, including whether the individual(s) held a valid SPS.
15. In response to the Authority's queries, Mr Cummings sent the following communications and documentation to the Authority:
  - (a) on 15 May 2015, Mr Cummings sent an email to the Authority which attached the SPS 1 document and stated that he held a valid SPS;
  - (b) on 1 June 2015, Mr Cummings sent an email to the Authority which attached the SPS 2 document and his CV. In his CV, Mr Cummings stated that he had gained "Q4 status" (being a reference to the QCF Level 4 or equivalent) during the period 2007 to 2014. In addition, the email stated that Mr Cummings had gained "Q4 status in 2012 and [had] maintained [an] SPS since and remains to date", and that he had held the CF30 (Customer) controlled function at another authorised firm when the SPS 1 document, which was sent to the Authority on 15 May 2015, had originally been issued to him; and
  - (c) on 16 June 2015, Mr Cummings sent an email to the Authority which attached the SPS 2 and stated that Mr Cummings was issued with a SPS on 1 December 2014, whilst he was approved to perform the CF30 (Customer) controlled function at another authorised firm.
16. As is mentioned in paragraph 11 above, Mr Cummings does not hold the requisite qualifications to be a retail investment adviser and has never been issued with an SPS by the CII or any other accredited body. Further, Mr Cummings was only approved to perform the CF30 (Customer) controlled function at the other authorised firm until January 2013. Accordingly, the above emails and Mr Cummings' CV contained false and misleading statements regarding Mr Cummings' qualifications and experience.
17. In relation to the CF11 Application, on 23 June 2015, the Authority requested from DCC Financial a copy of Mr Cummings' current SPS. On 17 July 2015, another member of staff at DCC Financial sent an email to the Authority which attached a copy of SPS 1 document, in response to the Authority's email of 23 June 2015. Mr Cummings provided the SPS 1 document to that member of staff to send to the Authority.
18. The Variation Application and the CF11 Application were subsequently withdrawn by DCC Financial.

19. During compelled interviews with the Authority, Mr Cummings admitted that he had not been issued with a SPS by the CII and that the SPS 1 and SPS 2 documents were fabricated documents. The Authority considers that Mr Cummings fabricated, or caused the fabrication of, the SPS 1 and SPS 2 documents. In addition, the Authority considers that Mr Cummings provided the SPS 1 and SPS 2 documents and made false and misleading statements to the Authority in order to demonstrate to the Authority that DCC Financial had the required personnel with the appropriate qualifications (which had been verified by an accredited body) to provide retail investment advice, with the intention that the Authority would rely on that false information and grant the Variation Application.
20. Mr Cummings has admitted that he provided the SPS 1 document to another member of staff at DCC Financial and he instructed that person to send the SPS 1 document to the Authority in support of the CF11 Application.

## **FAILINGS**

21. The statutory and regulatory provisions relevant to this Final Notice are set out in Annex A.

*Failing to act with integrity whilst carrying out controlled functions: Statement of Principle 1*

22. During the Relevant Period, Mr Cummings acted in breach of Statement of Principle 1 by failing to act with integrity as an approved person carrying out the CF1 (Director) controlled function, in that he:
  - (a) fabricated or caused the fabrication of, the SPS 1 and SPS 2 documents to give the misleading impression that he had attained the appropriate qualifications to provide investment advice to retail customers;
  - (b) knowingly provided the SPS 1 and SPS 2 documents, and caused another to provide the SPS 1 document, to the Authority with the intention of misleading the Authority into believing that he was fully qualified to provide investment advice to retail customers, when he did not hold (and had never held) any of the qualifications he would have been required to hold in order to have been issued with an SPS; and
  - (c) knowingly made numerous false and misleading statements to the Authority concerning his qualifications and experience.

*Not fit and proper*

23. By reason of the facts and matters described above, the Authority considers that Mr Cummings lacks honesty and integrity and, therefore, is not a fit and proper person.

## **SANCTIONS**

### **Financial penalty**

24. Given Mr Cummings' breach of Statement of Principle 1, the Authority hereby imposes a penalty on him pursuant to section 66 of the Act. The Authority's policy on the imposition of a financial penalty is set out in Chapter 6 of DEPP. In determining the financial penalty, the Authority has had regard to that guidance.
25. The application of the Authority's penalty policy is set out in Annex B to this Final Notice in relation to Mr Cummings' breaches of Statement of Principle 1.
26. In determining the financial penalty to be attributed to Mr Cummings' breach, the Authority has had particular regard to the following matters as applicable:
  - (a) the need for credible deterrence;
  - (b) the nature, seriousness and impact of the breach;
  - (c) the aggravating factors relating to the breach; and
  - (d) serious financial hardship.
27. The penalty calculation in relation to Mr Cummings is set out in Annex B to this Final Notice. Having regard to all the circumstances, the Authority considers that £29,300 is the appropriate financial penalty to impose on Mr Cummings.

### **Withdrawal of approval and prohibition**

28. The Authority considers that Mr Cummings is not a fit and proper person as he lacks honesty and integrity, and poses a serious risk to consumers and to confidence in the financial system. Consequently, the Authority considers it appropriate to withdraw Mr Cummings' approval to perform the CF1 (Director) controlled function in relation to DCC Financial, and to prohibit him from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.

## **REPRESENTATIONS**

29. Annex C contains a brief summary of the key representations made by Mr Cummings and how they have been dealt with. In making the decision which gave rise to the obligation to give this Final Notice, the Authority has taken into account all of the representations made by Mr Cummings, whether or not set out in Annex C.

## **PROCEDURAL MATTERS**

30. This Final Notice is given to Mr Cummings in accordance with section 390(1) of the Act.

### **Decision maker**

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

### **Manner and time for payment**

32. The financial penalty of £29,300 must be paid by Mr Cummings to the Authority by instalments over an 18 month period. The payment will comprise of the following:
  - (i) 17 instalments of £1,650 per month due by the 28<sup>th</sup> day of each calendar month; the first payment of £1,650 being due by 28 June 2018; and
  - (ii) a final instalment of £1,250, due by 28 November 2019.

### **If the financial penalty is not paid**

33. If all or any of the financial penalty is outstanding on 28 November 2019, the Authority may recover the entire outstanding amount as a debt owed by Mr Cummings and due to the Authority.

### **Confidentiality and publicity**

34. The Authority must publish such information about the matter to which this Final Notice relates as the Authority considers appropriate. This information may be published in such manner as the Authority considers appropriate. However, the Authority may not publish information if such publication would, in the opinion of the Authority, be unfair to Mr Cummings or prejudicial to the interests of consumers or detrimental to the stability of the UK financial system.
35. The Authority intends to publish such information about the matters to which this Final Notice relates as it considers appropriate.

### **Authority contacts**

36. For more information concerning this matter generally, contact Sheena Baldev at the Authority (direct line: 020 7066 6760).

**Anna Couzens**  
**Enforcement and Market Oversight Division**

## **ANNEX A**

### **RELEVANT STATUTORY PROVISIONS**

1. The Authority's operational objectives established in section 1B of the Act include protecting and enhancing the integrity of the UK financial system and the protection of consumers.
2. The Authority has the power, pursuant to section 56 of the Act, to make a prohibition order against an individual prohibiting that individual from performing a specified function, any function falling within a specified description, or any function, if it appears to the Authority that the individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person, exempt person or exempt professional firm.
3. The Authority has the power, pursuant to section 63 of the Act, to withdraw an approval given under section 59 of the Act if it considers that the person in respect of whom it was given is not a fit and proper person to perform the function to which the approval relates.
4. Section 66 of the Act provides that the Authority may take action against a person if it appears to the Authority that the person is guilty of misconduct and the Authority is satisfied that it is appropriate in all the circumstances to take action against him/her. Misconduct includes failure, while an approved person, to comply with a Statement of Principle issued under section 64 of the Act. The action that may be taken by the Authority pursuant to section 66 of the Act includes the imposition of a penalty on the approved person of such amount as it considers appropriate.

### **RELEVANT HANDBOOK PROVISIONS**

#### **Fit and Proper Test for Approved Persons (FIT)**

5. FIT sets out the criteria for assessing the fitness and propriety of a candidate for a controlled function. FIT is also relevant in assessing the continuing fitness and propriety of an approved person.
6. FIT 1.3.1G provides that the Authority will have regard to a number of factors when assessing the fitness and propriety of a person. The most important considerations will be the person's honesty, integrity and reputation, competence and capability, and financial soundness (FIT 1.3.1BG).
7. FIT 2.1.1G provides that in determining a person's honesty and integrity, the Authority will have regard to all relevant matters including, but not limited to, those set out in FIT 2.1.3G, which include whether the person has contravened any of the requirements or standards of the regulatory system (FIT 2.1.3G(5)).

#### **Statements of Principle and Code of Practice for Approved Persons (APER)**

8. APER sets out the fundamental obligations of approved persons and sets out descriptions of conduct, which, in the opinion of the Authority, does not comply with the relevant Statements of Principle. It also sets out, in certain cases, factors to be taken into account in determining whether an approved person's conduct complies with a Statement of Principle.
9. APER 2.1A.3R, which applies from 1 April 2013, sets out Statement of Principle 1 which states that an approved person must act with integrity in carrying out his accountable functions.

10. APER 3.1.3G provides that, when assessing 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, including the precise circumstances of the individual case, the characteristics of the particular accountable function and the behaviour expected in that function.
11. APER 3.1.4G provides that an approved person will only be in breach of a Statement of Principle if they are personally culpable, that is, where their conduct was deliberate or where their standard of conduct was below that which would be reasonable in all the circumstances.
12. APER 4.1.4G sets out examples of behaviour which the Authority considers does not comply with Statement of Principle 1. Examples of such conduct are falsifying documents (APER 4.1.4G(1)); providing false or inaccurate documentation or information, including details of training, qualifications, past employment record or experience (APER 4.1.4G(9)); and providing false and inaccurate information to the Authority (APER 4.1.4G(11)).

## **OTHER RELEVANT REGULATORY PROVISIONS**

### **The Authority's policy on the imposition of financial penalties**

13. The Authority's policy in relation to the imposition of financial penalties is set out in Chapter 6 of DEPP (the penalty analysis in relation to Mr Cummings is located at Annex B).
14. DEPP 6.5B sets out the five steps for the calculation of financial penalties to be imposed on individuals in non-market abuse cases.
15. DEPP 6.5D sets out the Authority's approach to serious financial hardship.
16. DEPP 6.5D.1G states that the Authority may consider whether a reduction in the proposed penalty is appropriate if the penalty would cause the subject of the enforcement action serious financial hardship.
17. DEPP 6.5D.1G(2)(a) sets out that the Authority will consider a reduction only if the individual provides verifiable evidence that payment of the penalty will cause them serious financial hardship, and the individual provides full, frank and timely disclosure of the verifiable evidence, and cooperates fully in answering any questions asked by the Authority about their financial position.
18. DEPP 6.5D.2G(1) states that the Authority would consider an individual's ability to pay the penalty over a reasonable period. The Authority's starting point is that an individual will suffer serious financial hardship only if during that period his net annual income will fall below £14,000 and his capital will fall below £16,000 as a result of payment of the penalty.
19. DEPP 6.5D.2G(7) states that there are cases where, even though the individual has satisfied the Authority that payment of the financial penalty would cause serious financial hardship, the Authority considers the breach to be so serious that it is not appropriate to reduce the penalty. Examples of such conduct are where the individual has acted dishonestly with a view to personal gain (DEPP 6.5D.2G(7)(b) and where there has been previous Authority action in respect of similar breaches (DEPP 6.5D.2G(7)(c)).

## **The Authority's policy for exercising its power to withdraw approvals and to make prohibition orders**

20. In exercising its power to withdraw approvals and to make a prohibition order, the Authority must have regard to guidance published in the Handbook and in regulatory guides, such as EG. The relevant main considerations in relation to the action specified above are set out below.
21. The Authority's approach in relation to exercising its power to withdraw approvals and to make prohibition orders is set out in Chapter 9 of EG.
22. EG 9.1 explains the purpose of prohibition orders and the withdrawal of approval from an approved person in relation to the Authority's regulatory objectives. EG 9.1.2 also provides that, where it considers the withdrawal of approval to be appropriate, the Authority may prohibit an approved person, in addition to withdrawing their approval.
23. EG 9.2 sets out the Authority's general policy on making prohibition orders and the withdrawal of approval of an approved person. In particular:
  - a. EG 9.2.1 states that the Authority will consider all relevant circumstances, including whether enforcement action has been taken against the individual by other enforcement agencies, in deciding whether to make a prohibition order and/or to withdraw approvals;
  - b. EG 9.2.2 states that the Authority has the power to make a range of prohibition orders depending on the circumstances of each case;
  - c. EG 9.2.3 states that the scope of a prohibition order will depend on, among other things, the reasons why the individual is not fit and proper and the severity of risk he poses to consumers or the market generally.
24. EG 9.3.1 states that when the Authority has concerns about the fitness and propriety of an approved person, it may consider whether it should prohibit that person from performing functions in relation to regulated activities, withdraw its approval, or both. In deciding whether to withdraw its approval and/or make a prohibition order, the Authority must consider in each case whether its statutory objectives can be achieved adequately by imposing disciplinary sanctions, for example, public censures or financial penalties, or by issuing a private warning.
25. EG 9.3.2 states that, when the Authority decides to make a prohibition order against an approved person, and/or withdraw its approval, the Authority will consider all the relevant circumstances of the case. These may include, but are not limited to, the following factors:
  - a. whether the individual is fit and proper to perform functions in relation to regulated activities (the criteria for assessing the fitness and propriety of approved persons in terms of honesty, integrity and reputation are set out in FIT 2.1);
  - b. the relevance and materiality of any matters indicating unfitness;
  - c. 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
  - d. the severity of the risk which the individual poses to consumers and to confidence in the financial system.

26. EG 9.7.1 provides that in appropriate cases the Authority may take other action against an individual in addition to making a prohibition order and/or withdrawing its approvals, including the use of its power to impose a financial penalty.

## **ANNEX B**

### **PENALTY ANALYSIS**

1. The Authority's policy for imposing a financial penalty is set out in Chapter 6 of DEPP. In determining a financial penalty, the Authority must have regard to that guidance.
2. The application of the Authority's penalty policy is set out below in relation to Mr Cummings' breach of Statement of Principle 1.

#### **Breach of Statement of Principle 1**

3. In respect of any breach occurring on or after 6 March 2010, the Authority applies a five-step framework to determine the appropriate level of financial penalty. DEPP 6.5 sets out details of the five-step framework to determine the appropriate level of financial penalty. DEPP 6.5B sets out details of the five-step framework that applies in respect of financial penalties imposed on individuals in non-market abuse cases.

#### **Step 1: Disgorgement**

4. Pursuant to DEPP 6.5B.1G, at Step 1, the Authority seeks to deprive an individual of the financial benefit derived directly from the breach where it is practicable to quantify this.
5. The Authority has not identified any financial benefit that Mr Cummings derived directly from the breach.
6. The Step 1 figure is therefore £0.

#### **Step 2: Seriousness of the breach**

7. Pursuant to DEPP 6.5B.2G, at Step 2, the Authority determines a figure that reflects the seriousness of the breach. That figure is based on a percentage of the individual's relevant income.
8. Pursuant to DEPP 6.5B.2G(1), the individual's relevant income is the gross amount of all benefits received by the individual from the employment in connection with which the breach occurred, and for the period of the breach.
9. Pursuant to DEPP 6.5B.2G(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 period of the breach.
10. As the Relevant Period is less than 12 months, in accordance with DEPP 6.5B.2G(2), the Authority considers Mr Cummings' relevant income during the period 18 July 2014 to 17 July 2015 to have been £63,695.
11. In deciding the percentage of relevant income that forms the basis of the Step 2 figure, the Authority considers the seriousness of the breach and chooses a percentage between 0% and 40%. This range is divided into five fixed levels which represent, on a sliding scale, the seriousness of the breach; the more serious the breach, the higher the level. For penalties imposed on individuals in non-market abuse cases there are the following five levels:

Level 1 – 0%

Level 2 – 10%

Level 3 – 20%

Level 4 – 30%

Level 5 – 40%

12. In assessing the seriousness level, the Authority will take into account various factors which reflect the impact and nature of the breach, and whether it was committed deliberately or recklessly. DEPP 6.5B.2G(12) lists the factors likely to be considered 'level 4 or 5 factors'. Of these, the Authority considers the following factors to be relevant.

*Impact of the breach*

13. Although the Variation Application and CF11 Application were subsequently withdrawn, Mr Cummings' misconduct resulted in false and misleading information being provided to the Authority in support of regulatory applications. If the misconduct had not been detected, the Variation Application, CF11 Application and CF30 Application may have been granted. The granting of the Variation Application and CF30 Application would have resulted in DCC Financial obtaining permissions, and Mr Cummings being approved to, provide investment advice to retail customers, in circumstances where Mr Cummings (who was the only individual in respect of whom DCC Financial had submitted an application for approval to perform the CF30 (Customer) controlled function) was not qualified to be a retail investment adviser.

*Nature of the breach*

14. Mr Cummings failed to act with integrity during the Relevant Period. Specifically, he fabricated, or caused the fabrication of, SPS 1 and SPS 2 and personally sent the fabricated SPS documents to the Authority on three occasions, and caused another person to send the SPS 1 document to the Authority on one occasion. He also attempted to mislead the Authority on numerous separate occasions over the course of the Relevant Period which compounded the dishonesty, making it more serious.

*Whether the breach was deliberate or reckless*

15. Mr Cummings has admitted that he did not have the appropriate qualifications to be a retail investment adviser and that he did not hold (and has never held) an SPS. The Authority considers that Mr Cummings fabricated, or caused the fabrication of, the SPS 1 and SPS 2 documents, and that he sent the SPS 1 and SPS 2 documents to the Authority, and caused another person to send the SPS 1 document to the Authority, with the intention of misleading the Authority. Mr Cummings also made numerous false and misleading statements in communications sent to the Authority.
16. The Authority considers that Mr Cummings took the actions set out in paragraph 15 above in order to mislead the Authority so that it would believe that DCC Financial had the required personnel (i.e. a qualified retail investment adviser) and would therefore grant the Variation Application. His actions were therefore deliberate.
17. Taking all these factors into account, the Authority considers the seriousness of Mr Cummings' breach of Statement of Principle 1 to be level 5 and so the Step 2 figure is therefore 40% of £63,695, which is £25,478.

### **Step 3: Mitigating and aggravating factors**

18. Pursuant to DEPP 6.5B.3G, at Step 3, the Authority may increase or decrease the amount of the financial penalty arrived at 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.
19. The Authority considers that Mr Cummings' conduct during the course of the Authority's investigation aggravates the breach. In response to questions asked by the Authority in relation to the circumstances surrounding how the SPS 1 and SPS 2 documents were created and subsequently provided to the Authority, Mr Cummings provided explanations which sought to put the blame on other individuals, and which the Authority considers were implausible, untrue and intended to mislead it.
20. The Authority considers the above factor to justify an increase in the penalty of 15%.
21. The Step 3 figure is therefore £29,300.

### **Step 4: Adjustment for deterrence**

22. Pursuant to DEPP 6.5B.4G, if the Authority 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 Authority may increase the penalty.
23. The Authority considers that the Step 3 figure of £29,300 represents a sufficient deterrent to Mr Cummings and others, and so has not increased the penalty at Step 4.
24. The Step 4 figure is therefore £29,300.

### **Step 5: Settlement discount**

25. Pursuant to DEPP 6.5B.5G, if the Authority and the individual on whom a penalty is to be imposed agree the amount of the financial penalty and other terms, DEPP 6.7 provides that, from 1 March 2017, the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the extent to which the Authority and the individual have agreed the facts and issues as to whether those facts constitute a breach(s). The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1.
26. No settlement discount applies.

### **Serious financial hardship**

27. Pursuant to DEPP 6.5D.1G, the Authority may reduce the proposed penalty if appropriate, if the penalty would cause the individual serious financial hardship.
28. DEPP 6.5D.1G(2)(a) sets out that the Authority will consider a reduction only if the individual provides verifiable evidence that payment of the penalty will cause him/her serious financial hardship, and the individual provides full, frank and timely disclosure of the verifiable evidence, and cooperates fully in answering any questions asked by the Authority about his/her financial position.
29. DEPP 6.5D.2G(7) provides that there may be cases where, even though the individual has satisfied the Authority that payment of the financial penalty would cause him/her serious financial hardship, the Authority considers the breach to be

so serious that it is not appropriate to reduce the penalty. The Authority will consider all the circumstances of the case in determining whether this course of action is appropriate, including whether the individual acted fraudulently or dishonestly with a view to personal gain.

30. Information provided by Mr Cummings indicates that he has capital assets of less than £16,000 and it is likely that Mr Cummings' income will fall below £14,000 (as a result of the prohibition). Accordingly, the Authority considers that the proposed penalty is likely to cause Mr Cummings serious financial hardship.
31. However, the Authority considers that Mr Cummings acted dishonestly with a view to personal gain and his misconduct is considered to be at level 5 on the scale of seriousness. Therefore, having regard to all the circumstances of the case, the Authority considers Mr Cummings' breach to be so serious that it is not appropriate to reduce the financial penalty.

### **Penalty**

32. The Authority therefore has decided to impose a total financial penalty of £29,300 on Mr Cummings in respect of his breach of Statement of principle 1.

## ANNEX C

1. Mr Cummings' representations (in italics) and the Authority's conclusions in respect of them are set out below.

### Mr Cummings' admission of the breach

2. *The facts set out in the Decision Notice are not disputed. It is accepted that Mr Cummings fabricated documents in an attempt to mislead the Authority, that this constitutes a serious breach and that therefore a prohibition order is appropriate. However, the whole incident should be viewed in light of Mr Cummings' mental health and personal situation during the Relevant Period, which should be taken into account when determining the amount of the financial penalty.*
3. When making the decision reflected in this Decision Notice, the Authority carefully considered all the circumstances of Mr Cummings' breach. As is explained in paragraph 5 below, these circumstances included his mental health and personal situation.

### Mr Cummings' mental health

4. *The Authority has failed properly to take into account Mr Cummings' mental health issues and alcohol dependence during the Relevant Period, despite Mr Cummings' submission of relevant medical evidence. The Authority has substituted its own assessment of Mr Cummings' mental health issues for that of a psychiatrist, without explaining why it rejects the medical evidence or why it believes it is in a better position to assess Mr Cummings' mental state. It is not enough for the Authority simply to assert that it has taken Mr Cummings' mental health issues into account; it must show how it took these issues into account in its decision as Mr Cummings' mental health is relevant in assessing the dishonest or reckless nature of the breach. It is accepted that the actions of Mr Cummings were deliberate, but it was the deliberateness of a broken mind, of someone whose judgement was destroyed and who was struggling to live his day-to-day life.*
5. The Authority does not dispute that Mr Cummings experienced mental health and alcohol dependence issues during the Relevant Period, and does not consider that it has substituted its own assessment of Mr Cummings' mental health for that of a psychiatrist. However, the Authority considers that its conclusion that Mr Cummings acted dishonestly is appropriate notwithstanding his mental health issues. The breach was a sustained course of action, committed in a conscious effort to deceive the Authority in order to obtain approval of the Variation Application and hence to expand Mr Cummings' business and to increase his income. Mr Cummings' actions were therefore dishonest and Mr Cummings has not provided a compelling explanation as to how his mental state affected the honesty of his actions.

### The relevant income

6. *The Step 2 relevant income figure in the Warning Notice is incorrect. The Authority decided upon that figure by calculating the total payments made from Kingswell's bank account to Mr Cummings during the period from 18 July 2014 to 17 July 2015. These payments comprised: dividends; payments to reimburse business expenses paid by Mr Cummings personally; and additional payments that were treated as an overdrawn director's current account. Of these*

*payments, only the dividends (totalling £34,232.88) should be considered to be Mr Cummings' relevant income, as is reflected in Mr Cummings' tax returns.*

7. As cited in paragraph 8 of Annex B of this Notice, in calculating the penalty to be imposed on an individual, the individual's relevant income is the gross amount of all benefits received by the individual from the employment in connection with which the breach occurred. Thus the relevant income may include payments other than dividends. The Authority gave Mr Cummings the opportunity to identify, explain and evidence the other payments made by Kingswell to him. Although the Authority was provided with a list of various business expenses that Mr Cummings allegedly paid personally, it was only provided with the basis on which motoring expenses were calculated. In the absence of the requested supporting evidence, the Authority therefore considers that all payments from Kingswell to Mr Cummings, less its reimbursement of the motoring expenses, amount to the total benefit received by Mr Cummings from his employment at Kingswell during the period from 18 July 2014 to 17 July 2015, and thus form the relevant income.

#### Seriousness of the breach

8. *The seriousness of the breach should not be level 5. Mr Cummings did not derive any financial benefit from the breach unlike the subject of another similar case, whose conduct the Authority considers to be more serious. There was also no loss to consumers, although it is accepted that there was a risk of loss. Even though there is an element of dishonesty, this is mitigated by the fact that, due to his mental illness and his personal circumstances, Mr Cummings suffered a breakdown around the time of the Relevant Period. Hence, his mental state reduces the level of dishonesty and the seriousness of the breach. Consequently, an assessment that Mr Cummings' breach was of level 4 seriousness would certainly not be too lenient and the situation would even allow for a conclusion that it was of level 3 seriousness.*
9. The Authority has assessed the seriousness of Mr Cummings' breach on the basis of the factors described in DEPP, having regard to the particular circumstances of his case. Although Mr Cummings did not derive a financial benefit from the breach and no loss was caused to consumers, this was only due to the fact that his misconduct was detected. Given that Mr Cummings' behaviour was dishonest, the level 5 seriousness assessment is justified regardless of the fact that the breach by a subject in another similar case may have been even more serious. For the reasons given in paragraph 5 above, the mental health issues do not make Mr Cummings' behaviour reckless rather than dishonest; hence they do not have an impact on the seriousness of the breach.

#### Mitigating and aggravating factors

10. *There should not be an uplift in the penalty on the basis of any aggravating factors because, taking into account all the circumstances, the breach was not sufficiently serious for an aggravating factor to be applied.*
11. The Authority is of the view that the behaviour of Mr Cummings during the interviews, namely that he repeatedly tried to mislead the Authority to cover up the breach or blame it on other people, constitutes a factor which is separate to the seriousness of the breach and in itself justifies the uplift in the penalty.

Serious financial hardship

12. *As the monetary threshold as set out in DEPP is met, Mr Cummings is eligible for the reduction of the financial penalty on the basis of serious financial hardship. Mr Cummings has no means to pay the penalty. He is now living on help from his family and social benefits and struggles to support his three children. In addition, a substantial part of his earnings will be lost as a result of the prohibition. DEPP 6.5D.4G(2) contains the criteria which the Authority considers may warrant the imposition of a financial penalty notwithstanding that it will cause serious financial hardship. The breach only satisfies one of the four criteria. Hence, it is disproportionate to disregard the serious financial hardship that Mr Cummings and his family will suffer.*
13. The Authority has carefully considered all the circumstances of the case including Mr Cummings' personal circumstances. The Authority considers that Mr Cummings acted dishonestly with a view to personal gain and that his misconduct is at level 5 on the scale of seriousness. In the light of this, the Authority has concluded that the breach is so serious that it is not appropriate to reduce the financial penalty. The Authority considers that the fact that only one of the circumstances mentioned at DEPP 6.5D.4G(2) applies does not make its decision not to reduce the penalty disproportionate.