Financial Services Authority

FINAL NOTICE

To: **The Garrison Finance Centre Limited (in liquidation)**

Address: **36 Richmond Road**
Catterick Garrison
North Yorkshire
DL9 3JD

Date: **28 June 2010**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives you final notice about:

1. ACTION

1.1. The FSA gave Garrison Finance Centre Limited ("Garrison") a Decision Notice on 25 June 2010 which notified Garrison that pursuant to section 205 of the Financial Services and Markets Act 2000 ("the Act"), the FSA has decided to impose a public censure on Garrison in respect of breaches of Principle 7 (Communications with clients) and Principle 9 (Customers: relationships of trust) of the FSA's Principles for Businesses ("the Principles") and associated FSA Rules, in connection with the sale

of geared traded endowment policies ("GTEPs"), between 15 January 2004 and 22 April 2008 ("the relevant period").

1.2. Garrison confirmed on 24 June 2010 that it will not be referring the matter to the Upper Tribunal (Tax and Chancery Chamber).

1.3. On 27 January 2009 Garrison went into insolvent liquidation and a liquidator was appointed. The liquidator has agreed to write to all GTEP customers on behalf of Garrison explaining that they may have been given unsuitable advice and directing them to the Financial Service Compensation Scheme (the "FSCS") should they consider they have a valid claim.

1.4. Were it not for Garrison's financial circumstances, the FSA would have imposed a financial penalty of £35,000. The FSA is not imposing a financial penalty as to do so could impact on the amount of money available to meet potential claims made by GTEP customers.

2. REASONS FOR THE ACTION

2.1. The FSA has decided to issue a public censure in respect of Garrison for the above breaches of the FSA's Principles and Rules which occurred during the relevant period. These breaches relate to failings in Garrison's correspondence and communications to clients and in the steps taken to ensure the suitability of the advice it gave to customers to invest in GTEPs. As a result, Garrison advised customers to purchase GTEPs without being able to demonstrate that the nature and characteristics of the product had been adequately explained or that the advice given was suitable. These failings are set out in more detail in paragraphs 4.7 to 4.13 below.

2.2. In summary, the FSA has concluded that:

(1) Garrison failed to communicate with its clients in an appropriate manner in breach of Principle 7 (Communications with clients). Specifically, its suitability letters and reports:

(a) failed to explain adequately the reason for, or the suitability of, recommendations for its clients; and

(b) did not adequately explain the characteristics of and risks associated with GTEPs, also breaching COB 5.4.3R and COBS 4.5.2R.

(2) Garrison was unable to demonstrate the suitability of its recommendations in breach of Principle 9 (Customers: relationships of trust). Specifically, when making the GTEP recommendations, Garrison failed to:

(a) gather and/or document adequate personal and financial information from its customers, or update that information, to support its assessment of suitability, also breaching COB 5.2.5R and COBS 9.2.6R;

(b) ensure and demonstrate that customers' attitude to risk was commensurate with the recommended product's risk profile; and

(c) retain evidence of product research to support its individual recommendations.

2.3. Garrison's failings are viewed as being particularly serious because:

(1) A number of customers re-mortgaged their homes to fund the purchase of the GTEPs on the advice of Garrison. However, Garrison's suitability letters and reports did not contain relevant risk warnings relating to the gearing element of the product or the risk to the clients' properties;

(2) of the files reviewed, only one customer was warned by Garrison that a further capital injection could be required should the product not perform as expected;

(3) Garrison could not demonstrate that customers understood fully the substantial complexities and risks of the GTEP product, given that these were not clearly highlighted in the suitability letters and reports;

(4) Garrison was unable to demonstrate that its customers were sold a product suitable to their risk profile and personal circumstances because it failed to obtain and retain adequate personal and financial information from its customers; and

(5) the failings in the sale of GTEPs continued over a period in excess of four years.

3. RELEVANT STATUTORY AND REGULATORY PROVISIONS

3.1. The relevant statutory provisions, regulatory requirements and FSA guidance are set out in the Annex to this Notice.

4. FACTS AND MATTERS RELIED ON

4.1. Garrison was a small financial advisory firm. Its main business was the provision of investment advice. It also conducted some mortgage and general insurance intermediary business. Garrison was authorised from 15 January 2004 until its liquidation on 27 January 2009. All Garrison's GTEP sales were undertaken by the same adviser.

GTEPs

4.2. Traded endowment policies ("TEPs") are with-profits endowment policies which are no longer required by their original holder and have been sold on the secondary market. The purchaser of such policies agrees to pay the remaining premiums on the policy and in return receives the value of the policy at maturity or when the original owner dies, depending on which occurs first. This payout will include both bonuses declared at the time of the sale and subsequent bonuses, though such bonuses are not guaranteed.

4.3. Investment in GTEPs involves gearing and is typically funded by the customer using cash savings, funds raised through a mortgage on the investor's home or a charge on a bond already owned by the investor. These funds are used together with a GTEP investment loan to purchase a portfolio of TEPs. The portfolio of TEPs is security for the GTEP investment loan. Once a customer decides to invest, the product provider would compile the portfolio of TEPs for the GTEP product and arrange the GTEP investment loan at the same time. The GTEP investment loan is used to fund the TEP premiums and annual review fees payable on the TEPs as well as the monthly withdrawals (income), where required. The GTEP investment loan is designed to be repaid by the maturity values of the TEPs within the portfolio. The investment

rationale is that by the time the final TEP matures, the loan will be repaid and any additional capital remaining can be taken as profit by the holder of the GTEP product or used to pay any mortgage that remains outstanding.

4.4. The gearing element introduces the following risks to the investment strategy: an interest rate risk and increased exposure to the usual risks of the investment (such as fluctuations in the performance or the underlying TEPs and secondary market demand). These varying levels of gearing are effectively using the strategy of borrowing to invest, which can be a high risk strategy. In order for the investor to make a profit, the product has to outperform the interest rate payable on the loan.

4.5. The loan is a rolling facility, meaning that it is renewed on an annual basis, thus allowing for premiums, charges and income to be paid each year during the life time of the plan. The product provider reviewed each product annually and the lending institution also annually reviewed the loan. The lending institution will agree to extend the facility for the coming year provided the ratio of loan value ("LV") to the current surrender value ("CSV") of the TEPs is within stated parameters. In circumstances where the ratio of LV to CSV is not within stated parameters, the lending institution will not renew the facility. The consequence for the client is serious if the facility is not renewed as the loan is used to pay premiums and withdrawals (income). In certain circumstances, clients may be required to inject further capital into the scheme in order to bring the ratio of LV to CSV within the agreed levels.

Background to the FSA's investigation

4.6. The case arose from a FSA thematic project looking at the systems, controls and advice processes of firms that had recommended GTEPs. Garrison sold 29 GTEPs in the relevant period. Following an FSA visit to Garrison where failures were highlighted regarding Garrison's processes, an external compliance consultant carried out a review of all Garrison's GTEP sales and took the view that they all failed to comply with the relevant FSA Principles and associated rules. Following the visit to Garrison, the FSA commenced an investigation into the Firm.

Outcome of the FSA's investigation

4.7. As a result of its investigation, the FSA identified a number of failings in relation to Garrison's suitability of advice and communications with its clients, as set out below.

Suitability of advice

4.8. The FSA found deficiencies in the steps taken by Garrison to ensure the suitability of its advice.

4.9. Garrison failed to obtain and/or document sufficient personal and financial information to establish its clients' needs and objectives and to support its assessment of suitability. Specifically:

(1) fact find information was often insufficient to clearly establish the customers' objectives; and

(2) in some cases, the customer's attitude to risk was not established and/or was not recorded. Where the customer's attitude to risk was recorded, the risk categories were not, in all cases, consistent across all documentation.

4.10. Garrison could not demonstrate that it had considered the needs and circumstances of each customer prior to making a recommendation to invest in GTEPs:

(1) in some instances, recommendations to take out GTEPs did not match the customer's risk profile especially given the gearing element of the product and the high number of customers who re-mortgaged their homes in order to invest;

(2) where the customers' attitude to risk did not meet the product's risk rating, there was no recorded explanation as to why the recommendation was nonetheless suitable;

(3) in many cases, there was no record of research to support individual recommendations and to show that alternative products had been considered and discussed with customers; and

(4) in a number of cases, no satisfactory explanation as to why the product was suitable given the customer's individual circumstances (other than attitude to risk) was provided.

Communications with clients

4.11. The FSA found that Garrison failed to communicate its recommendations to clients in an appropriate manner.

4.12. Documents sent by Garrison to clients often lacked sufficiently clear or balanced information for a client to make an informed decision as to whether to accept the advice or not.

4.13. The majority of Garrison's suitability letters and reports did not explain adequately the reasons for, or the suitability of, recommendations for its clients. Specifically, the suitability letters and reports:

(1) failed to explain fully the reasons why Garrison had concluded that the relevant transaction was suitable for the particular client, having regards to the client's personal and financial circumstances and attitude to risk;

(2) in some cases contained different objectives or a different attitude to risk from those recorded in the fact find; and

(3) did not explain adequately the risks associated with GTEPs to ensure that clients understood the full nature of the risks involved. Risk warnings were inadequate and did not relate to the clients' individual circumstances. The suitability letters and reports failed to make clear the risks associated with re-mortgaging the clients' properties to raise the required minimum investment level and that the gearing element of GTEPs increased the risk for the client. Garrison should have drawn the clients' attention, for example, to the fact that the product has to outperform the interest rate payable on the loan in order for the client to make a profit, or that if the loan to confirmed surrender value ratio becomes too high, the lender may withdraw or reduce the loan facility, or require an additional injection of capital or security.

5. ANALYSIS OF BREACHES

5.1. Garrison failed to pay due regard to the information needs of its clients, or communicate with them in a way which is clear, fair and not misleading, in breach of Principle 7 (Communications with clients) by:

(1) failing to ensure that documentation provided to clients was sufficiently clear and balanced; and

(2) failing to ensure that suitability letters and reports explained the characteristics of, and the risks associated with, GTEPs and the suitability of recommendations for the individual client.

5.2. By failing to ensure that clients understood the nature of the risks involved, Garrison also breached COB 5.4.3R and COBS 4.5.2R.

5.3. Garrison failed to obtain, or adequately document, sufficient personal and financial information from its customers in order to make a suitable recommendation and was unable to provide evidence demonstrating the suitability of its recommendations for each customer. Therefore, Garrison was not able to demonstrate that it took reasonable care to ensure the suitability of its advice in breach of Principle 9 (Customers: relationships of trust). By failing to obtain and/or document adequate personal and financial information from its customers, Garrison also breached COB 5.2.5R and COBS 9.2.6R.

6. ANALYSIS OF PROPOSED SANCTION

General policy on financial penalties and public censures

6.1. As stated above, the FSA would ordinarily have proposed to impose a financial penalty in relation to Garrison's conduct and the specific breaches it committed. Given Garrison's financial situation, the FSA proposes to issue a public censure.

6.2. In assessing the appropriate penalty the FSA would otherwise have imposed, the FSA has had regard to the guidance published in the Decision Procedure and Penalties Manual ("DEPP"), which forms part of the FSA's Handbook and which, together with the Enforcement Guide ("EG"), came into effect on 28 August 2007. For conduct

prior to 28 August 2007, the FSA has also considered the relevant chapters of the Enforcement Manual ("ENF"). The relevant parts of ENF which contain the factors relevant to determining whether to issue a public censure or impose a financial penalty are Chapters 12 and 13 of ENF respectively. In particular, the FSA has taken into account the general criteria for determining whether to take disciplinary action and the factors relevant to determining the appropriate level of financial penalty set out in DEPP 6.5. These criteria are not exhaustive and all relevant circumstances of the case will be taken into consideration. Relevant extracts from DEPP 6.5 are set out in Appendix 1.

6.3. The FSA's policy in relation to the imposition of a public censure is set out in Chapter 6.2 and 6.4 of DEPP. DEPP sets out the factors that may be of particular relevance in determining whether it is appropriate to issue a public censure rather than impose a financial penalty. Again, these criteria are not exhaustive and all relevant circumstances of the case will be taken into consideration and complement the criteria relating to the assessment of financial penalty set out in 6.5 of DEPP. Relevant extracts from DEPP 6.2 and 6.4 are also set out in Appendix 1.

Deterrence

6.4. The principal purpose of imposing a financial penalty or a public censure is to promote high standards of regulatory conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches and demonstrating generally the benefits of compliant behaviour.

The nature, seriousness and impact of the breach

6.5. 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 Garrison's systems and controls and the number of customers who were affected and/or placed at risk of loss. For the reasons set out below the FSA considers that the breaches in this case are of a serious nature. Under normal circumstances the breaches would have merited the imposition of a financial penalty. The FSA proposes to issue a public

censure in this case because Garrison is in liquidation and to ensure that any funds remaining, after the completion of the insolvency process, are available to satisfy potential claims by GTEP customers.

6.6. Garrison's failings are viewed as being particularly serious because:

(1) a number of clients re-mortgaged their homes to fund the purchase of the GTEPs. However, the suitability letters and reports did not contain relevant risk warnings relating to the gearing element of the product or the risk to the clients' properties;

(2) of the files reviewed, only one customer was warned that a further capital injection could be required should the product not perform as expected;

(3) Garrison could not demonstrate that customers understood fully the substantial complexities and risks of the GTEP product, given that these were not clearly highlighted in the suitability letters and reports;

(4) The suitability letters and reports failed to make clear the risks associated with re-mortgaging the clients' properties to raise the required minimum investment level; and

(5) the failings in the sale of GTEPs continued over a period in excess of four years.

The extent to which the breach was deliberate or reckless

6.7. The FSA has found no evidence to show that Garrison acted in a deliberate or reckless manner.

The size, financial resources and other circumstances of Garrison

6.8. In determining that public censure is more appropriate than a financial penalty in this case, the FSA has been mindful of the need to protect consumer interests by ensuring that any assets that Garrison retains after the completion of the insolvency process can be made available to any customers who may wish to pursue a claim through the FSCS.

The amount of benefit gained or loss avoided

6.9. The FSA notes that Garrison received approximately £165,000 in commission from the sale of GTEPs during the relevant period until the appointment of the liquidator.

Conduct following the breach

6.10. The liquidator has agreed to the remedial action in paragraph 1.3.

Disciplinary record and compliance history

6.11. Garrison has not been the subject of previous disciplinary action.

Previous action taken in relation to similar failings

6.12. In determining the appropriate sanction, the FSA has taken into account sanctions imposed by the FSA on other authorised persons for similar behaviour. This was considered alongside the principal purpose for which the FSA imposes sanctions, namely to promote high standards of regulatory conduct by deterring persons who have committed breaches from committing further breaches and helping to deter other persons from committing similar breaches, as well as demonstrating generally the benefits of compliant business.

7. DECISION MAKERS

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

8. IMPORTANT

8.1. This Final Notice is given to the liquidator in accordance with section 390 of the Act.

Publicity

8.2. Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this notice relates. Under those provisions, the FSA must publish such information about the matter to which this notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA considers appropriate. However, the FSA may not publish information if such

publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.

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

FSA contacts

8.4. For more information concerning this matter generally, you should contact Anna Hynes (direct line: 020 7066 9464/fax: 020 7066 9465) of the Enforcement and Financial Crime Division of the FSA.

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Tom Spender
Head of Department
FSA Enforcement and Financial Crime Division

RELEVANT STATUTORY AND REGULATORY PROVISIONS

1. The Act

1.1. The FSA's statutory objectives, set out in section 2(2) the Financial Services and Markets Act 2000 ("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. The FSA has the power, pursuant to section 205 of the Act, to impose a public censure where the FSA considers an authorised person has contravened a requirement by or under the Act.

2. Principles for Businesses

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

2.2. Principles which are relevant to this matter are:

Principle 7 (Communications with clients) provides that:

"A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading".

Principle 9 (Customers: relationships of trust) which provides that:

"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".

3. Conduct of Business Rules (COB and COBS)

3.1. The relevant provisions of the FSA Handbook module COB (which was in force during the relevant period from 15 January 2004 to 31 October 2007) are as follows:

(1) 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; and

(2) COB 5.4.3R requires 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.

3.2. The relevant provisions of the FSA Handbook module COBS (which was in force during the relevant period from 1 November 2007 to 22 April 2008) are as follows:

(1) COBS 4.5.2R requires a firm, amongst other things, to ensure that the information provided to its retail clients in relation to its designated investment business is accurate, in particular the information must not emphasise any potential benefits without also giving a fair and prominent indication of any relevant risks;

(2) COBS 9.2.6R provides that a firm must not make a personal recommendation to a client in relation to a designated investment unless it has obtained the necessary information to assess suitability; and

(3) COBS 9.2.1R to COBS 9.2.3R require the necessary information to include, in summary, the client's financial situation, investment objectives, and knowledge and experience in the investment field relevant to the specific type of designated investment.

4. Decision Procedures and Penalties ("DEPP")

4.1. The FSA's policy in relation to the imposition of financial penalties or the issue of the public censures is set out in Chapter 6 of DEPP which forms part of the FSA Handbook. It was previously set out in Chapter 12 of the Enforcement Manual (ENF), to which the FSA has also had regard. The principal purpose of issuing a public censure is to promote high standards of regulatory conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches and demonstrating generally the benefits of compliant behaviour.

4.2. The relevant section of DEPP in relation to deciding whether to take action is 6.2.1 which states:

The FSA will consider the full circumstances of each case when determining whether or not to take action for a financial penalty or public censure. Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive: not all of these factors may be applicable in a particular case, and there may be other factors, not listed, that are relevant.

(1) The nature, seriousness and impact of the suspected breach, including:

(a) whether the breach was deliberate or reckless;

(b) the duration and frequency of the breach;

(c) the amount of any benefit gained or loss avoided as a result of the breach;

(d) whether the breach reveals serious or systemic weaknesses of the management systems or internal controls relating to all or part of a person's business;

(e) the impact or potential impact of the breach on the orderliness of markets including whether confidence in those markets has been damaged or put at risk;

(f) the loss or risk of loss caused to consumers or other market users;

(g) the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the breach; and

(h) whether there are a number of smaller issues, which individually may not justify disciplinary action, but which do so when taken collectively.

(2) The conduct of the person after the breach, including the following:

(a) how quickly, effectively and completely the person brought the breach to the attention of the FSA or another relevant regulatory authority;

(b) the degree of co-operation the person showed during the investigation of the breach;

(c) any remedial steps the person has taken in respect of the breach;

(d) the likelihood that the same type of breach (whether on the part of the person under investigation or others) will recur if no action is taken;

(e) whether the person concerned has complied with any requirements or rulings of another regulatory authority relating to his behaviour (for example, where relevant, those of the Takeover Panel or an RIE); and

(f) the nature and extent of any false or inaccurate information given by the person and whether the information appears to have been given in an attempt to knowingly mislead the FSA.

(3) The previous disciplinary record and compliance history of the person including:

(a) whether the FSA (or any previous regulator) has taken any previous disciplinary action resulting in adverse findings against the person;

(b) whether the person has previously undertaken not to do a particular act or engage in particular behaviour;

(c) whether the FSA (or any previous regulator) has previously taken protective action in respect of a firm, using its own initiative powers, by means of a variation of a Part IV permission or otherwise, or has previously requested the firm to take remedial action, and the extent to which such action has been taken; and

(d) the general compliance history of the person, including whether the FSA (or any previous regulator) has previously issued the person with a private warning.

(4) FSA guidance and other published materials:

The FSA will not take action against a person for behaviour that it considers to be in line with guidance, other materials published by the FSA in support of the Handbook or FSA-confirmed Industry Guidance which were current at the time of the behaviour in question. (The manner in which guidance and other published materials may otherwise be relevant to an enforcement case is described in EG 2.)

(5) Action taken by the FSA in previous similar cases.

4.3. The relevant section of DEPP in relation to the imposition of financial penalties is DEPP 6.5.2 which states:

The following factors may be relevant to determining the appropriate level of financial penalty to be imposed on a person under the Act:

(1) Deterrence

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

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

The FSA will consider the seriousness of the breach in relation to the nature of the rule, requirement or provision breached. The following considerations are among those that may be relevant:

(a) the duration and frequency of the breach;

(b) whether the breach revealed serious or systemic weaknesses in the person's procedures or of the management systems or internal controls relating to all or part of a person's business;

…

(d) the loss or risk of loss caused to consumers, investors or other market users;

(e) the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the breach; and

(f) in the context of contraventions of Part VI of the Act, the extent to which the behaviour which constitutes the contravention departs from current market practice.

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

The FSA will regard as more serious a breach which is deliberately or recklessly committed. The matters to which the FSA may have regard in determining whether a breach was deliberate or reckless include, but are not limited to, the following:

(a) whether the breach was intentional, in that the person intended or foresaw the potential or actual consequences of its actions;

(b) where the person has not followed a firm's internal procedures and/or FSA guidance, the reasons for not doing so;

(c) where the person has taken decisions beyond its or his field of competence, the reasons for the decisions and for them being taken by that person;

(d) whether the person has given no apparent consideration to the consequences of the behaviour that constitutes the breach;

(e) in the context of a contravention of any rule or requirement imposed by or under Part VI of the Act, whether the person sought any professional advice before the contravention occurred and whether the person followed that professional advice. Seeking professional advice does not remove a person's responsibility for compliance with applicable rules and requirements.

If the FSA decides that the breach was deliberate or reckless, it is more likely to impose a higher penalty on a person than would otherwise be the case.

(4) Whether the person on whom the penalty is to be imposed is an individual

When determining the amount of a penalty to be imposed on an individual, the FSA will take into account that individuals will not always have the resources of a body corporate, that enforcement action may have a greater impact on an individual, and further, that it may be possible to achieve effective deterrence by imposing a smaller penalty on an individual than on a body corporate. The FSA will also consider whether the status, position and/or responsibilities of the individual are such as to make a breach committed by the individual more serious and whether the penalty should therefore be set at a higher level.

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

(a) The FSA may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the person were to pay the level of penalty appropriate for the particular breach. The FSA regards these factors as matters to be taken into account in determining the level of a penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty.

(b) The purpose of a penalty is not to render a person insolvent or to threaten the person's solvency. Where this would be a material

consideration, the FSA will consider, having regard to all other factors, whether a lower penalty would be appropriate. This is most likely to be relevant to a person with lower financial resources; but if a person reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the FSA will take account of those assets when determining the amount of a penalty.

(c) The degree of seriousness of a breach may be linked to the size of the firm. For example, a systemic failure in a large firm could damage or threaten to damage a much larger number of consumers or investors than would be the case with a small firm: breaches in firms with a high volume of business over a protracted period may be more serious than breaches over similar periods in firms with a smaller volume of business.

(d) The size and resources of a person may also be relevant in relation to mitigation, in particular what steps the person took after the breach had been identified; the FSA will take into account what it is reasonable to expect from a person in relation to its size and resources, and factors such as what proportion of a person's resources were used to resolve a problem.

(6) The amount of benefit gained or loss avoided

The FSA may have regard to the amount of benefit gained or loss avoided as a result of the breach, for example:

(a) the FSA will propose a penalty which is consistent with the principle that a person should not benefit from the breach; and

(b) the penalty should also act as an incentive to the person (and others) to comply with regulatory standards and required standards of market conduct.

(7) Difficulty of detecting the breach

A person's incentive to commit a breach may be greater where the breach is, by its nature, harder to detect. The FSA may, therefore, impose a higher penalty where it considers that a person committed a breach in such a way as to avoid or reduce the risk that the breach would be discovered, or that the difficulty of detection (whether actual or perceived) may have affected the behaviour in question.

(8) Conduct following the breach

The FSA may take the following factors into account:

(a) the conduct of the person in bringing (or failing to bring) quickly, effectively and completely the breach to the FSA's attention (or the attention of other regulatory authorities, where relevant);

(b) the degree of co-operation the person showed during the investigation of the breach by the FSA, or any other regulatory authority allowed to share information with the FSA, such as an RIE or the Takeover Panel. Where a person has fully co-operated with the FSA's investigation, this will be a factor tending to reduce the level of financial penalty;

(c) any remedial steps taken since the breach was identified, including whether these were taken on the person's own initiative or that of the FSA or another regulatory authority; for example, identifying whether consumers or investors or other market users suffered loss and compensating them where they have; correcting any misleading statement or impression; taking disciplinary action against staff involved (if appropriate); and taking steps to ensure that similar problems cannot arise in the future; and

(d) whether the person concerned has complied with any requirements or rulings of another regulatory authority relating to the breach (for example, where relevant, those of the Takeover Panel).

(9) Disciplinary record and compliance history

The FSA may take the previous disciplinary record and general compliance history of the person into account. This will include:

(a) whether the FSA (or any previous regulator) has taken any previous disciplinary action against the person;

(b) whether the person has previously undertaken not to do a particular act or engage in particular behaviour;

(c) whether the FSA (or any previous regulator) has previously taken protective action in respect of a firm using its own initiative powers, by means of a variation of a firm's Part IV permission, or has previously requested the firm to take remedial action and the extent to which that action has been taken.

(d) the general compliance history of the person, including whether the FSA (or any previous regulator) has previously brought to the person's attention, including by way of a private warning, issues similar or related to the conduct that constitutes the breach in respect of which the penalty is imposed.

A person's disciplinary record could lead to the FSA imposing a higher penalty, for example where the person has committed similar breaches in the past.

In assessing the relevance of a person's disciplinary record and compliance history, the age of a particular matter will be taken into account, although a long-standing matter may still be relevant.

(10) Other action taken by the FSA (or a previous regulator)

Action that the FSA (or a previous regulator) has taken in relation to similar breaches by other persons may be taken into account. This includes previous actions in which the FSA (whether acting by the RDC or the settlement decision makers) and a person on whom a penalty is to be imposed have reached agreement as to the amount of the penalty. As stated at DEPP 6.5.1 G

(2), the FSA does not operate a tariff system. However, the FSA will seek to apply a consistent approach to determining the appropriate level of penalty.

…

(12) FSA guidance and other published materials

(a) A person does not commit a breach by not following FSA guidance or other published examples of compliant behaviour. However, where a breach has otherwise been established, the fact that guidance or other published materials had raised relevant concerns may inform the seriousness with which the breach is to be regarded by the FSA when determining the level of penalty.

(b) The FSA will consider the nature and accessibility of the guidance or other published materials when deciding whether they are relevant to the level of penalty and, if they are, what weight to give them in relation to other relevant factors.

4.4. The relevant section of DEPP in relation to determining whether to impose a financial penalty or issue a public censure is 6.4.2 which states:

The criteria for determining whether it is appropriate to issue a public censure rather than impose a financial penalty are similar to those for determining the amount of penalty set out in DEPP 6.5. Some particular considerations that may be relevant when the FSA determines whether to issue a public censure rather than impose a financial penalty are:

(1) whether or not deterrence may be effectively achieved by issuing a public censure;

(2) if the person has made a profit or avoided a loss as a result of the breach, this may be a factor in favour of a financial penalty, on the basis that a person should not be permitted to benefit from its breach;

(3) if the breach is more serious in nature or degree, this may be a factor in favour of a financial penalty, on the basis that the sanction should reflect the

seriousness of the breach; other things being equal, the more serious the breach, the more likely the FSA is to impose a financial penalty;

(4) if the person has brought the breach to the attention of the FSA, this may be a factor in favour of a public censure, depending upon the nature and seriousness of the breach;

(5) if the person has admitted the breach and provides full and immediate co-operation to the FSA, and takes steps to ensure that those who have suffered loss due to the breach are fully compensated for those losses, this may be a factor in favour of a public censure, rather than a financial penalty, depending upon the nature and seriousness of the breach;

(6) if the person has a poor disciplinary record or compliance history (for example, where the FSA has previously brought disciplinary action resulting in adverse findings in relation to the same or similar behaviour), this may be a factor in favour of a financial penalty, on the basis that it may be particularly important to deter future cases;

(7) the FSA's approach in similar previous cases: the FSA will seek to achieve a consistent approach to its decisions on whether to impose a financial penalty or issue a public censure; and

(8) the impact on the person concerned. In exceptional circumstances, if the person has inadequate means (excluding any manipulation or attempted manipulation of their assets) to pay the level of financial penalty which their breach would otherwise attract, this may be a factor in favour of a lower level of penalty or a public statement. However, it would only be in an exceptional case that the FSA would be prepared to agree to issue a public censure rather than impose a financial penalty if a financial penalty would otherwise be the appropriate sanction. Examples of such exceptional cases could include where there is:

(a) verifiable evidence that a person would suffer serious financial hardship if the FSA imposed a financial penalty;

(b) verifiable evidence that the person would be unable to meet other regulatory requirements, particularly financial resource requirements, if the FSA imposed a financial penalty at an appropriate level; or

(c) in Part VI cases in which the FSA may impose a financial penalty, where there is the likelihood of a severe adverse impact on a person's shareholders or a consequential impact on market confidence or market stability if a financial penalty was imposed. However, this does not exclude the imposition of a financial penalty even though this may have an impact on a person's shareholders.