Financial Services Authority

FINAL NOTICE

To:	**Gary John Hexley**
Of:	**62 Anchorage Road** **Sutton Coldfield** **West Midlands** **B74 2PG**
Individual ref:	**GJH00005**
Date:	**13 June 2011**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives Mr Gary Hexley final notice about the publication of a statement of his misconduct and the making of a prohibition order.

1. ACTION

1.1. On 13 June 2011 the FSA gave Mr Hexley a Decision Notice which stated that it had decided to:

(1) publish a statement of his misconduct, pursuant to section 66 of the Financial Services and Markets Act 2000 ("the Act"), in respect of a failure to comply with Statement of Principle 2 of the FSA's Statements of Principle and Code of Practice for Approved Persons ("APER"); and

(2) make an order, pursuant to section 56 of the Act, prohibiting Mr Hexley from performing any function in relation to any regulated activity carried out by an

authorised person, exempt person or exempt professional firm because he is not a fit and proper person in that he lacks competence and capability.

1.2. The FSA would have imposed a financial penalty of £20,000 on Mr Hexley in respect of his breach of APER Statement of Principle 2 pursuant to section 66 of the Act but for the fact that he has been declared bankrupt.

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

1.4. Accordingly, for the reasons set out below, the FSA hereby publishes a statement of Mr Hexley's misconduct and makes an order pursuant to section 56 of the Act prohibiting Mr Hexley from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm (the "Prohibition Order"). The statement of misconduct is set out below. The Prohibition Order takes effect from 13 June 2011.

2. STATEMENT OF MISCONDUCT

2.1. For the reasons set out in more detail in section 4 below, the FSA has concluded that:

(1) Mr Hexley lacks the competence and capability to perform controlled functions because he:

(a) made inadvertently misleading statements to the FSA, by initially stating in writing that investors in his property development company, Greenfield International Limited In Liquidation ("Greenfield"), had received shares in return for their investments and by subsequently stating that the investors were not shareholders;

(b) issued Greenfield investors with share certificates when they were not in fact shareholders of Greenfield (and are now being considered by Greenfield's Liquidator to be creditors);

(c) made unclear and inadvertently misleading statements to Greenfield investors about the timing of the repayment of their investments;

(d) failed to disclose to the investors the complex company and financing structure of Greenfield; and

(2) Mr Hexley failed to act with due skill, care and diligence in carrying out the customer function at Exclusive Asset Management Limited In Liquidation ("Exclusive") in contravention of APER Statement of Principle 2 by:

(a) failing to obtain and record sufficient information about customers before making personal recommendations;

(b) issuing generic suitability reports which did not explain the reasons for his personal recommendations in a way which was clear, fair and not misleading;

(c) failing to assess adequately his clients' attitudes to investment risk;

(d) failing to research product recommendations adequately and relying on a small selection of preferred investments (which yielded a much higher proportion of Exclusive's commission than any other individual adviser); and

(e) advising on a pension transfer without being appropriately qualified to do so.

2.2. The FSA considers that Mr Hexley's misconduct in respect of Greenfield was particularly serious because, by inadvertently providing misleading information at a time when the FSA's Unauthorised Business Department was making enquiries as to whether Greenfield's activities constituted regulated activities, he prevented the FSA from making a properly informed decision about whether to take preventative action to protect investors' money. There is no evidence to suggest that Mr Hexley deliberately misled the FSA and it appears he believed that he had followed the advice with which he had been provided on this issue.

2.3. The FSA concluded that Mr Hexley lacks the competence and capability to perform controlled functions at any authorised firm, exempt person or exempt professional

firm and that if he performed such functions he would pose a serious risk to consumers.

2.4. Whilst the failings identified in this Notice have been mitigated to some extent by his cooperation with the FSA's investigation and the failure of Exclusive to supervise him, the FSA regards these failings to be so serious that it is necessary and proportionate to make the Prohibition Order.

2.5. But for Mr Hexley's bankruptcy, the FSA would have imposed a financial penalty of £20,000 (before any discount) on him for his failure to comply with APER Statement of Principle 2.

3. RELEVANT STATUTORY AND REGULATORY PROVISIONS

3.1. The relevant statutory provisions and regulatory requirements are set out at Annex A.

4. FACTS AND MATTERS RELIED UPON

Background

4.1. From 1 January 2001, Mr Hexley was approved at an independent financial advisor ("IFA") firm to perform the controlled functions of CF1 (Director), CF8 (Apportionment and Oversight) and CF21 (Investment Advisor). He was also one of the shareholders in the firm. In 2003, Mr Hexley and his fellow shareholders sold all their shares but Mr Hexley remained involved in the business. His approval to perform the CF21 function was withdrawn on 30 December 2004 and his significant influence functions were withdrawn on 19 May 2005 and 30 June 2005 as a result of the IFA firm going into liquidation.

4.2. On 15 January 2009 Mr Hexley was approved to perform the CF30 (Customer) controlled function at Exclusive. This approval was withdrawn on 25 May 2010.

4.3. Outside of the work Mr Hexley undertook as an approved person, he was involved in various property development projects.

Greenfield

4.4. Greenfield is a property investment company that Mr Hexley set up in 2003 to develop residential and commercial property. Greenfield is not regulated by the FSA. He was a director of the firm as well as being a shareholder. The developments were funded through a mixture of private investors' money and secured loans from several banks.

4.5. In order to secure investors for the company, Mr Hexley approached both current and former clients of his IFA firm, some of whom had made investments in a previous property company Mr Hexley had been involved in. The IFA firm also advised some clients to invest in Greenfield.

4.6. The FSA considers that Mr Hexley provided unclear information to and inadvertently misled both investors and the FSA in relation to the nature of the investment and the method in which the funds would be returned to investors.

Nature of investment

4.7. As evidence of the sum of money invested, investors were given a share certificate which stated that they were the registered holders of "A shares" subject to the Memorandum and Articles of Association of Greenfield which was signed by Mr Hexley. In addition, investors were provided with a synopsis of the Articles of Association of Greenfield which also stated that their investment would be made in the form of shares.

4.8. Following various complaints, the FSA had concerns that Mr Hexley was operating an unauthorised collective investment scheme or performing regulated activities without authorisation. However, after reviewing Greenfield's activities in April 2007, the FSA concluded that Greenfield fell within the "bodies corporate" exemption set out in the Financial Services and Markets 2000 (Collective Investment Schemes) Order 2001 due to its status as a company incorporated under English law. Therefore

the FSA concluded that the operation did not constitute a collective investment scheme.[1]

4.9. Further, the FSA concluded that Greenfield was not conducting any other regulated activities, on the basis that:

(1) issuing shares is not a regulated activity; and

(2) Greenfield was not unlawfully accepting deposits because investors' money was used to subscribe for shares and the investors did not have the right to their money back at any time.

4.10. In April 2010, as a result of further complaints, the FSA reviewed its conclusions in relation to Greenfield. When contacted by the FSA Mr Hexley confirmed that the investments in Greenfield were made in the form of shares. At this point, the FSA also contacted a sample of investors who confirmed their understanding that the investments had been made in the form of shares. Therefore the FSA's position on Greenfield's activities (as set out above) remained unchanged.

4.11. However, further investigations later in 2010 during the FSA's investigation into Mr Hexley's personal conduct revealed that while Greenfield's 2006 and 2007 accounts showed that shares had been issued to investors, the 2008 and 2009 accounts recorded the investors' money as loans. The Articles of Association and Memorandum of Association for Greenfield make no provision for different classes of shares to be issued and limit the total share capital of Greenfield to £1,000.

4.12. Mr Hexley informed the FSA on 15 September 2010 that Greenfield was being put into liquidation.

4.13. On 1 October 2010, Mr Hexley informed the FSA that while the investment was referred to as "shares", these shares were never issued and the investment was merely carried as a debt on the balance sheet. Mr Hexley stated that he had relied on his legal

[1] SI 2001/1062, paragraph 21.

advisers in relation to this matter and that the certificates were issued simply to represent the units that each investor had invested.

4.14. Contrary to their understanding of the investments that they entered into, the Greenfield investors are being treated as creditors of Greenfield in the liquidation process and not shareholders.

4.15. Mr Hexley therefore inadvertently misled both the FSA and investors about the nature of the investment made into Greenfield, which prevented the FSA from reaching an informed decision as to whether Greenfield's activities constituted regulated activities or not.

4.16. In mitigation, there is no evidence to suggest that Mr Hexley deliberately misled the FSA and it appears that he believed that he had followed the advice that he had been provided with.

Return of funds

4.17. The property investment was structured so that the investors' money was lent by Greenfield to various related companies which then purchased the properties with the aid of secured loans. The investors were not aware that their money had been lent to related companies and believed that their money had been directly invested in specific properties. They were also not aware that additional funding had been obtained in the form of secured loans which would rank above their claims in the event of any insolvency.

4.18. When investing in Greenfield, investors were told that they should consider the investment to be medium to long term and that after five years they, as shareholders, would be consulted to obtain a consensus as whether to dispose of the entire investment and share the proceeds or continue with it. Investors were also told that, should they wish to sell before the five year anniversary, Greenfield would endeavour to find a means whereby the shares could be bought out.

4.19. The majority of the investors that the FSA spoke to invested in Greenfield in 2004 and therefore expected their investment to mature in 2009. When these investors contacted Mr Hexley to request the return of their investment from 2007 onwards,

they were repeatedly promised that funds would soon be made available. The FSA does not have evidence to suggest that these statements were deliberately misleading. Mr Hexley thought at the time that the funds would be able to be returned as promised.

4.20. However, as a result of the downturn in the property market, Mr Hexley was unable to sell the property developments to realise the funds necessary to repay the investors. Furthermore, as all of the properties were mortgaged, in the event of any sale completing most, if not all, of the funds would have been payable to the secured creditors.

4.21. Of the nine investors spoken to by the FSA, only one investor has received back part of their investment.

4.22. The FSA has therefore concluded that while Mr Hexley may have expected to be able to return the funds as promised, his statements to investors about the timing and likelihood of repayment of the investment were inadvertently misleading. In addition Mr Hexley did not provide clear information to investors by failing to explain the company and financing structure of the investment which had a direct impact on the likelihood of them receiving all of their investment back.

Investment advice

4.23. Mr Hexley worked as an IFA at Exclusive from 15 January 2009 to 25 May 2010. He was an FSA approved person, holding CF30 (Customer). During this time he advised on 223 individual completed transactions.

4.24. As part of the investigation, the FSA reviewed 14 client files and identified the following failings:

(1) In 8 out of 14 cases, Mr Hexley failed to obtain sufficient information about his clients' knowledge and experience in the investment field relevant to the type of investment being recommended, their financial situation and investment objectives, which would have enabled him to make a suitable recommendation; and/or he failed to obtain sufficient information to have a reasonable basis for believing that the recommendation met his clients'

investment objectives and that they had the necessary experience and knowledge to understand the risks. In five cases where Mr Hexley was reviewing clients' pension arrangements, he failed to obtain or record that he had obtained the details of their existing pensions.

(2) In 7 out of 14 cases, the advice given required the production of a suitability report. In four out of seven of those cases, Mr Hexley's suitability letters do not specify adequately his clients' demands and needs, nor did they sufficiently explain the reasons for his recommendations or any disadvantages. They were generic in form. In the other three cases, there was no evidence a suitability letter had been issued to customers at all.

(3) In 10 out of 14 cases, Mr Hexley failed to assess adequately his clients' preferences regarding risk taking and their risk profiles. In four of these cases, he failed to document how he arrived at the clients' preferences regarding risk taking and risk profile and in the other six cases there was no evidence that he had assessed his clients' preferences regarding risk or risk profile.

(4) In 14 out of 14 cases, Mr Hexley failed to research adequately product recommendations and instead relied on a preferred selection of products. As a result, out of the 223 transactions he advised on, 164 transactions were in favour of his 3 preferred products.

(5) In the case of one client, Mr Hexley advised him on an occupational pension transfer without being appropriately qualified to do so. A relevant mitigating factor is that Mr Hexley was informed by Exclusive that he was allowed to advise on pension transfers, as it believed that he had obtained the necessary qualification. However, as an approved person, the FSA concluded that Mr Hexley should have known about the need to have obtained the qualification before advising on the pension transfer.

5. CONCLUSION

Greenfield

5.1. The FSA has concluded that Mr Hexley's actions in relation to Greenfield represent a severe lack of competence. Even though Greenfield was not regulated by the FSA, it views his behaviour as very serious, as the investors he approached were clients of his regulated IFA firm and had previously received investment advice from either Mr Hexley or one of his advisers. This provided Greenfield with added credibility and without such endorsement many investors may not have invested any money into Greenfield.

5.2. Furthermore by inadvertently providing misleading information at a time when the FSA's Unauthorised Business Department was making enquiries whether Greenfield was an unauthorised collective investment scheme, Mr Hexley prevented the FSA from making a properly informed decision about whether to take preventative action to protect investors' money.

Investment advice

5.3. As a result of the failing identified above, the FSA has concluded that Mr Hexley breached APER Statement of 2 and that he is not competent to provide investment advice.

6. ANALYSIS OF THE SANCTIONS

Imposition of financial penalty

6.1. The FSA's policy on the imposition of financial penalties relevant to the misconduct as detailed in this Notice is set out in Chapter 6 of the version of the Decision Procedure and Penalties Manual ("DEPP") in force prior to 6 March 2010, which formed part of the FSA Handbook. All references to DEPP in this section are references to that version of DEPP.

6.2. The principal purpose of imposing a financial penalty 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 providing an incentive for compliant behaviour.

6.3. In determining whether a financial penalty is appropriate, the FSA is required to consider all the relevant circumstances of a case.

6.4. DEPP 6.5.2G sets out a non-exhaustive list of factors that may be of relevance in determining the level of a financial penalty. The FSA considers that the following factors are particularly relevant in this case.

Deterrence (DEPP 6.5.2(1))

6.5. In determining the level of the financial penalty, the FSA has had regard to the need to ensure that those who are approved persons act in accordance with regulatory requirements and standards. The FSA considers that a penalty should be imposed to demonstrate to Mr Hexley and others the seriousness of failing to meet these requirements.

The nature, seriousness and impact of the breach in question (DEPP 6.5.2(2))

6.6. As Mr Hexley was not required to be approved in relation to his role at Greenfield, a financial penalty can only be imposed in relation to his failings while at Exclusive.

6.7. As a result of these failings, Mr Hexley exposed retail customers to the risk of receiving unsuitable advice.

The extent to which the breach was deliberate or reckless (DEPP 6.5.2(3))

6.8. The FSA has concluded that Mr Hexley's contraventions were not deliberate. However, the FSA considers that the nature of his actions (and inaction) in relation to his at Exclusive as set out in section 4 of this Notice amounts to serious misconduct.

Whether the person on whom the penalty is to be imposed is an individual (DEPP 6.5.2(4))

6.9. When determining the appropriate level of financial penalty, the FSA will take into account that individuals will not always have the same resources as 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 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.

The size, financial resources and other circumstances of the person on whom the penalty is to be imposed (DEPP 6.5.2(5))

6.10. Mr Hexley was declared bankrupt on 25 May 2010.

The amount of benefit gained or loss avoided (DEPP 6.5.2.G(6))

6.11. The FSA is aware that Mr Hexley received a significant level of commission during his time at Exclusive.

Conduct following the breach (DEPP 6.5.2G(8))

6.12. The FSA has taken into account that Mr Hexley failed to notify the FSA of his bankruptcy on 25 May 2010 until 15 September 2010. However, in all other aspects Mr Hexley has cooperated with the FSA's investigation.

Disciplinary record and compliance history (DEPP 6.5.2G(9))

6.13. The FSA has taken into account the fact that Mr Hexley has not been the subject of previous disciplinary action by the FSA.

Other action taken by the FSA (DEPP 6.5.2G(10))

6.14. The FSA has taken action against other approved persons for similar conduct.

Financial penalty

6.15. Having regard to Mr Hexley's breach of APER Statement of Principle 2 and the factors outlined above, the FSA would have imposed a financial penalty of £20,000 on him. However, as a result of his bankruptcy, it published a public statement of his misconduct instead.

Prohibition

6.16. The FSA has had regard to the guidance in Chapter 9 of the Enforcement Guide ("EG") in deciding that a Prohibition Order is appropriate in this case. The relevant provisions of EG are set out in Annex A of this notice.

6.17. Given the nature and seriousness of the failures outlined above in relation to both Greenfield and his breach of APER Statement of Principle 2, the FSA has concluded that Mr Hexley's behaviour demonstrates a severe lack of competence and capability and as such he is not fit and proper to perform any functions in relation to regulated activities carried on by any authorised person, exempt person or exempt professional firm.

6.18. The FSA views Mr Hexley's conduct in relation to Greenfield as particularly serious, as by inadvertently providing misleading information at a time when the FSA's Unauthorised Business Department was making enquiries into whether it was an unauthorised collective investment scheme, he prevented the FSA from making a properly informed decision about whether to take preventative action to protect investors' money.

6.19. The seriousness of his misconduct means that if he continued to perform any functions he would pose a serious risk to the FSA's statutory objectives of maintaining confidence in the financial system and securing consumer protection.

6.20. The FSA therefore considers that it is necessary to make an order pursuant to section 56 of the Act to make the Prohibition Order.

7. CONCLUSIONS

7.1. On the basis of the facts and matters described above, the FSA concluded that Mr Hexley's conduct at Greenfield and his breach of APER 2 at Exclusive was, at the very least, indicative of a severe lack of competence.

7.2. The FSA, having regard to all the circumstances, therefore considers that it is appropriate and proportionate to make the Prohibition Order against Mr Hexley. But

for his bankruptcy, it would have also been appropriate and proportionate to impose a financial penalty of £20,000 on him.

8. DECISION MAKER

8.1. The decision which gave rise to the obligation to give this Final Notice was made on behalf of the FSA by Settlement Decision Makers for the purposes of the FSA's Decision Procedure and Penalties Manual.

9. IMPORTANT

9.1. This Final Notice is given to Mr Hexley in accordance with section 390 of the Act. The following statutory rights are important.

Publicity

9.2. 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 Mr Hexley or prejudicial to the interests of consumers.

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

FSA contacts

9.4. For more information concerning this matter generally, contact Chris Walmsley at the FSA (direct telephone line: 020 7066 5894/ fax: 020 7066 5895).

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Tom Spender

Head of Department, Enforcement and Financial Crime Division

ANNEX A

RELEVANT STAUTORY PROVISIONS, REGULATORY REQUIREMENTS AND FSA GUIDANCE

1. Statutory provisions

1.1. The FSA's statutory objectives, set out in Section 2(2) of the Act, include the protection of consumers.

1.2. The FSA has the power, by virtue of section 66 of the Act, to publish a statement of misconduct or impose a financial penalty on a person of such amount as it considers appropriate where it appears to the FSA that he is guilty of misconduct and it is satisfied that it is appropriate in all the circumstances to take action against him.

1.3. A person is guilty of misconduct if, while an approved person, he fail to comply with a statement of principle issued under section 64 or have been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under the Act.

1.4. The FSA has the power, pursuant to section 56 of the Act, to make a prohibition order against an individual to prevent that individual from performing a specified function or any function falling within a specified description; or any function, if it appears to the FSA 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. Such an order may relate to a specific regulated activity, a regulated activity falling within a specified description or all regulated activities.

2. APER Statements of Principle for Approved Persons

2.1. APER is issued pursuant to section 64 of the Act. It sets out Statements of Principle with which approved persons are required to comply when performing a controlled function for which approval has been sought and granted. They are general statements of the fundamental obligations of approved persons under the regulatory system. APER also contains descriptions of conduct which, in the opinion of the FSA, constitutes a failure to comply with a particular Statement of Principle and

describes factors which the FSA will take into account in determining whether an approved person's conduct complies with it.

2.2. APER 3.1.3G states, as guidance, that, when establishing compliance with, or breach of, a Statement of Principle, account will be taken of the context in which a course of conduct was undertaken, the precise circumstances of the individual case, the characteristics of the particular controlled function and the behaviour expected in that function.

2.3. APER 3.1.4G states, as guidance, that an approved person will only be in breach of a Statement of Principle if they are personally culpable, that is in a situation where their conduct was deliberate or where their standard of conduct was below that which would be reasonable in all the circumstances.

2.4. In this case, the FSA considers the most relevant Statement of Principle to be APER Statement of Principle 2.

2.5. APER Statement of Principle 2 requires that an approved person must act with due skill, care and diligence in carrying out his controlled function.

2.6. APER 4.2.2E to 4.2.13E provide examples of the types of behaviour that, in the opinion of the FSA, do not comply with APER Statement of Principle 2. These include:

(1) failing to inform a customer of material information in circumstance where the approved person ought to have been aware of such information and of the fact that he should provide it, including failing to explain the risks of an investment to a customer (APER 4.2.3E and 4.2.4E);

(2) recommending an investment to a customer where the approved person does not have reasonable grounds to believe that it is suitable for that customer (APER 4.2.5E); and

(3) recommending transactions without a reasonable understanding of the risk exposure of the transaction to a customer including where that

recommendation is made without a reasonable understanding of the liability (either potential or actual) of the transaction (APER 4.2.6E and 4.2.7E)).

3. FSA's policy on exercising its power to impose a financial penalty or public censure

3.1. The FSA's statement of policy with respect to the imposition and amount of penalties or public censure under the Act, as required by sections 69(1), 93(1), 124(1) and 210(1) of the Act, and guidance on those matters is provided in Chapter 6 of the FSA's Decision Procedure and Penalties Manual ("DEPP"), entitled "Penalties", which is part of the FSA's Handbook. In summary, chapter 6 of DEPP states that 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, and sets out a non-exhaustive list of factors that may be relevant for this purpose.

3.2. The principal purpose of imposing a financial penalty or 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.

3.3. 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. DEPP6.2.1G sets out guidance on a non-exhaustive list of factors that may be of relevance in determining whether to take action for a financial penalty, which include the following:

(1) DEPP 6.2.1G(1): The nature, seriousness and impact of the suspected breach.

(2) DEPP 6.2.1G(2): The conduct of the person after the breach.

(3) DEPP 6.2.1G(3): The previous disciplinary record and compliance history of the person.

(4) DEPP 6.2.1G(4): FSA guidance and other published materials.

(5) DEPP 6.2.1G(5): Action taken by the FSA in previous similar cases.

3.4 DEPP 6.4 sets out factors that may be considered when deciding whether to impose public censure. These are similar to the factors relevant to financial penalties, for example, include whether public censure will be a sufficient deterrent, the extent of any profit derived from the breach and the degree of seriousness of the breach, In addition the FSA will consider whether due to inadequate means the person is unable to pay a financial penalty. If so this may be a factor in favour of a public statement (DEPP 6.4.2G (8)).

4. Determining the level of the financial penalty

4.1. The FSA will consider all the relevant circumstances of a case when it determines the level of financial penalty. DEPP 6.5.2G sets out guidance on a non exhaustive list of factors that may be of relevance when determining the amount of a financial penalty.

4.2. Factors that may be relevant to determining the appropriate level of financial penalty include:

(1) whether the breach revealed serious or systematic weaknesses in the person's procedures or of the management systems or internal controls relating to all or part of a person's business (DEPP 6.5.2G(2)(b)); and

(2) the general compliance history of the person, including whether the FSA has previously brought to the person's attention, issues similar or related to the conduct that constitutes the breach in respect of which the penalty is imposed (DEPP 6.5.2(9)(d)).

5. Fit and Proper Test for Approved Persons

5.1. The part of the FSA Handbook entitled “FIT” sets out the Fit and Proper Test for Approved Persons. The purpose of FIT is to outline the main criteria for assessing the fitness and propriety of a candidate for a controlled function. FIT is also relevant in assessing the continuing fitness and propriety of an approved person.

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

5.3. As set out in FIT 2.2, in determining a person's competence and capability, the FSA will have regard to matters including but not limited to:

(1) whether the person satisfies the relevant FSA training and competence requirements in relation to the controlled function the person performs or is intended to perform; and

(2) whether the person has demonstrated through experience and training that the person is suitable, or will be suitable if approved, to perform the controlled function.

6. FSA's policy for exercising its power to make a prohibition order and withdraw a person's approval

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

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

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

6.4. In circumstances where the FSA has concerns about the fitness and propriety of an approved person, EG 9.8 to 9.14 provides guidance. In particular, EG 9.8 states that the FSA may consider whether it should prohibit that person from performing functions in relation to regulated activities, withdraw that person's approval or both. In deciding whether to withdraw approval and/or make a prohibition order, the FSA

will consider whether its regulatory objectives can be achieved adequately by imposing disciplinary sanctions.

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

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

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

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

(4) the particular controlled function the approved person is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates;

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

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

6.6. EG 9.12 provides a number of examples of types of behaviour which have previously resulted in the FSA deciding to issue a prohibition order or withdraw the approval of an approved person. The examples include providing false or misleading information to the FSA and serious lack of competence.

6.7. EG 9.17 states that where the FSA is considering making a prohibition order against an individual other than an approved person, the FSA will consider the severity of the risk posed by the individual, and may prohibit the individual where it considers this appropriate to achieve one or more of its regulatory objectives.

6.8. EG 9.18 provides that when considering whether to exercise its power to make a prohibition order against such an individual, the FSA will consider all relevant circumstances of the case. These may include, but are not limited to, where appropriate, the factors set out in paragraph 9.9.