Financial Services Authority

FINAL NOTICE

To:	**Jay Alan Rutland**
Individual Reference Number:	**JAR01130 (inactive)**
Date of birth:	**11 March 1981**
Date:	**9 July 2012**

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

1. ACTION

1.1. The FSA gave Jay Alan Rutland a Decision Notice on 24 February 2010 which notified him that, pursuant to section 56, section 66 and section 123 of the Financial Services and Markets Act 2000 ("the Act"), the FSA had decided to impose on him:

(1) a financial penalty for:

a) failing to comply with Principle 1 of the FSA's Statements of Principle for Approved Persons; and

b) engaging in market abuse as defined in section 118(3) of the Act (improper disclosure) and for encouraging other persons to engage in behaviour which, if Mr Rutland had engaged in it, would have amounted to market abuse under section 123(1)(b) of the Act; and

(2) a prohibition order prohibiting Mr Rutland from performing any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm ("the Prohibition Order") on the grounds that he is not a fit and proper person as his conduct demonstrates a lack of honesty and integrity.

1.2. Mr Rutland referred the matter to the Upper Tribunal (Tax and Chancery Chamber) ("the Tribunal") but has withdrawn the reference, with the Tribunal's consent.

1.3. Mr Rutland's misconduct merits the imposition of a total penalty of £160,000. But due to Mr Rutland's financial circumstances (including a debilitating illness affecting his ability to work and his future earning capacity) and the fact that the FSA is satisfied that the imposition of such a fine would cause him serious financial hardship this penalty has been reduced to £30,000.

1.4. Accordingly, for the reasons set out below, the FSA imposes a financial penalty on Mr Rutland of £30,000 and imposes the Prohibition Order on him with effect from 9 July 2012.

2. REASONS FOR THE ACTION

Summary

2.1. The FSA has decided to take this action as a result of Mr Rutland's conduct as a senior broker employed by Pacific Continental Securities (UK) Limited ("PCS") where he deliberately defied compliance procedures, acted against the interests of customers and disclosed inside information in order to improperly maximise sales by his team.

2.2. On four separate occasions between January and April 2007, Mr Rutland was responsible for drafting sales scripts to be used by PCS's brokers when trying to sell shares to customers over the telephone in which scripts the risk warnings and risk factors normally used by PCS were significantly watered down. He circulated these sales scripts to brokers knowing that they had not been approved by PCS's compliance department (or one of PCS's two directors) and knowing that he was not permitted to circulate non-approved scripts.

2.3. In one of the four scripts, he also improperly disclosed inside information to his colleagues for use when trying to sell shares to customers. On about 27 March 2007, he obtained inside information that an AIM-traded company Provexis Plc ("Provexis") had entered into an agreement ("the Collaboration Agreement") with a major international company details of which would be announced shortly to the market. This information was not public and was price sensitive. Shortly thereafter, Mr Rutland circulated to brokers a sales script that contained inside information about the Collaboration Agreement and the forthcoming announcement. Again, he did so knowing that the script had not been approved by PCS's compliance department (or directors) and knowing that he was not permitted to circulate non-approved scripts.

2.4. Mr Rutland therefore:

(1) disclosed inside information otherwise than in the proper course of the exercise of his employment; and

(2) encouraged brokers to disclose the same inside information when attempting to sell Provexis shares.

Relevant Statutory and Regulatory Provisions

2.5. Relevant statutory and regulatory provisions are set out in the attached Annex.

Facts And Matters Relied On

Background to PCS and Mr Rutland

2.6. PCS appointed administrators on 20 June 2007 and is currently in liquidation. In 2007 the principal business of PCS was selling to the public AIM traded shares issued by companies with small market capitalisation ("Small Cap") and corporate finance services to issuers on the AIM market.

2.7. PCS employed teams of brokers who were provided with sales scripts which were intended as an aid to help achieve sales of particular shares. These scripts were required to be approved by PCS's compliance department (or a director) before their use by sales staff. Brokers were instructed to stick to the scripts in which certain highlighted passages containing regulatory information such as risk warnings were obligatory.

2.8. The FSA published a Final Notice dated 27 January 2009 imposing a public censure on PCS for breaches of the Principles for Businesses in connection with advising on and arranging the sale of certain higher risk securities to customers between 1 April 2005 and 20 June 2007. The FSA indicated that, had PCS not been in insolvent liquidation, it would have imposed a financial penalty of £2,000,000. The FSA has also issued Final Notices to the two directors of PCS. In issuing this notice to Mr Rutland, the FSA has taken into account the control failings at PCS identified in the Final Notices issued in respect of the firm and its directors.

2.9. Mr Rutland was employed by PCS and was approved to carry out Controlled Function 21 (investment adviser) from 15 September 2003 until 20 June 2007. His principal function was to market shares in certain AIM traded companies to PCS's retail customers. From approximately February 2005 he was a team leader for a number of junior brokers.

2.10. As a team leader he had managerial responsibilities for his team's financial performance. He put team members under pressure to achieve high volumes of

sales, setting their targets, offering rewards for high sales and imposing sanctions - up to and including dismissal, for failing to meet sales targets.

2.11. Mr Rutland received a relatively low basic salary from PCS of £18,000 per annum. His declared earnings for the tax year 2006-7 were, however, just under £500,000. The majority of his income was generated by commission on sales of shares by Mr Rutland and his team. He received direct commission on the shares he sold personally and override commission on sales by his team.

2.12. He had undertaken professional regulatory examinations which included market abuse training prior to commencing employment at PCS. He has no previous disciplinary record with the FSA. He ceased to be an approved person on 2 July 2008.

Non-compliant sales scripts

2.13. At all relevant times, Mr Rutland was aware that scripts were required to be approved by PCS's compliance department (or a director) before their use by sales staff and he knew that he was not permitted to circulate non-approved scripts.

Company A

2.14. On 15 January 2007, in relation to Company A, Mr Rutland circulated a draft of the compliance approved sales script to his team. The following day he circulated the script as amended by him which contained watered down risk warnings and risk factors.

2.15. For example, in contrast to the compliance approved script, the amended script did not contain any reference to Company A's losses in previous years; it did not contain a warning that past performance did not mean that the shares would perform well in the future; and it over-stated the extent to which Company A had already developed a niche to distinguish it from its competitors.

Company B

2.16. On 16 February 2007, in relation to Company B, Mr Rutland received a draft of the compliance approved sales script. Following an exchange of emails with compliance, he was reminded on 27 February 2007 that he should not amend scripts without prior approval from compliance or, if compliance could not be contacted, by a director. Despite this, on 2 March 2007, he circulated to his team without such prior approval the script for Company B as amended by him which contained watered down risk warnings and risk factors. His covering email stated: "*Gentleman, Attached is the* [Company B] *script that I re-worked. Of course I never sent this*".

2.17. Key amendments to the compliance approved script included emphasising the potential upside of the investment and down playing risk factors, and omitting the warning about relying on past performance.

Provexis

2.18. On 24 July 2006 Provexis announced that it had entered into an exclusivity agreement for 12 months with an unnamed major global branded food business for the joint development and use of its patented Fruitflow technology. The announcement stated that a new format of the Fruitflow product would be developed and that Provexis intended to negotiate a global licence and supply arrangements for the product within 12 months. Provexis shares had been traded on AIM since 23 June 2005.

2.19. On 1 November 2006, Provexis announced that discussions for the licensing of Fruitflow to a major international brand owner would extend into 2007 due to technical development issues. On 16 March 2007, Provexis announced its intention to raise over £2 million by way of a conditional placing at a price of 1.5 pence per share, a discount to the market price. PCS had participated in a share placement by Provexis in February 2007, and as a consequence certain individuals in the PCS corporate finance department were made insiders in respect of the negotiations between Provexis and its partner.

2.20. On 19 March 2007, Mr Rutland and other team leaders were sent a compliance approved sales script on Provexis ("the Provexis Official Sales Script") together with a PCS briefing on Provexis dated 16 March 2007.

2.21. He was aware that a high volume of sales had to be achieved to meet sales figures for March 2007. In an email dated 21 March 2007 he stated:

"Money will come in for my team. I am on the guys and they know what they have got to do."

2.22. Provexis and Unilever (the previously unnamed major global branded partner) agreed on about 27 March 2007 that they would enter into a long-term collaboration agreement (the Collaboration Agreement) to develop a new format of the patented Fruitflow technology for application in Unilever's food product portfolio. This agreement was signed on 29 March 2007 and was announced to the market on 30 March 2007.

2.23. At 12:31 on 27 March 2007, Mr Rutland sent an email to the individuals within the PCS corporate finance department who had been made insiders, with the message "*Please can you write a brief paragraph outlining what we can mention (if anything) in regards to the expected announcement from Provexis.*"

2.24. At 19:15 on 27 March 2007, he sent an email (with "high" importance) to the sales advisers in his team, with the text *"Gentleman, this script does not exist"*. Attached to the email was a revised version of the Provexis Official Sales Script as amended by him ("the Provexis Unofficial Sales Script"). As well as watered down risk warnings and risk factors, the Provexis Unofficial Sales Script included

the following paragraphs:

"…The next step for the company now is to start getting Fruitflow integrated into dairy products. They have signed an agreement with an as yet unnamed Major Food company which is expected to lead to a license to do exactly that. …

"As I said the agreement with the major food manufacturer is signed. The announcement of the company name and full details of the deal are imminent. That is why it is essential we move fast and get involved now because there will be a likely impact on the share price. I had a meeting earlier with my corporate finance department who have done the research on this one. … that department, predicted we could see the price rise as high as 5 or 6p when we see the announcement. We are moving in today at 2.75p. It makes sense…

"…Their recent collaboration could not have come at a better time…

"…Without a shadow of a doubt, with major collaborations already signed… this company is an attractive proposition."

2.25. At 19:17 on 27 March 2007, two minutes later, Mr Rutland sent an email to the same sales advisers (not with "high" importance), with the text "*This script does exist*". Attached to this email were the Provexis Official Sales Script and the PCS briefing on Provexis dated 16 March 2007. This script did not contain the wording from the Provexis Unofficial Sales Script identified above.

2.26. On 28 March 2007 a presentation was given by Provexis to PCS staff. The presentation concerned Provexis's business and its prospects. Mr Rutland attended at least part of this presentation. Different accounts have been given regarding whether and to what extent, if at all, inside information about the Collaboration Agreement was expressly or impliedly disclosed to PCS staff at the presentation. However, as noted above, by this stage Mr Rutland's team was already in possession of information relating to the imminent announcement owing to his circulation of the Provexis Unofficial Sales Script. Following the presentation, PCS sales staff began making calls to sell Provexis shares.

2.27. At 10:36 on 29 March 2007 (the day before the announcement to the market about the Collaboration Agreement), Mr Rutland sent an email entitled "Provexis" to sales advisers in his team encouraging them to "*Pitch as many people as possible this stock. Even if they say no, if the stocks doubles tomorrow* [i.e. on 30 March] *then that is an excellent reason for them to deal again in the future. Keep a log of everyone you pitch, then we can go back to all the no's when the stock goes up*". The reference to the stock doubling the following day was a clear reference to the anticipated impact of the imminent announcement.

2.28. In addition, the risk warnings in the Provexis Unofficial Sales Script were changed to reduce the emphasis on the risks and potential downside of the investment and did not contain a warning about relying on past performance.

2.29. The Provexis Unofficial Sales Script was used by members of Mr Rutland's team seeking to sell Provexis shares to clients. At 11:30 on 29 March 2007, he and his

team were reminded by compliance that nothing should be said that suggested that a deal had been concluded by Provexis as this could be insider dealing. Despite this there is no evidence that Mr Rutland did anything to prevent his team from continuing to use the Provexis Unofficial Sales Script, and the script continued to be used.

2.30. At 21:23 on 29 March 2007, Mr Rutland sent an email to his team setting out their sales figures and stating "*This is a record day in the history of Pacific! Congratulations"*. Total sales of Provexis shares that day were £645,000, of which Mr Rutland sold £185,000. He also stated:

"On a final note make sure you all hammer it on Friday. If the stock goes up as expected then we should be able to get a lot more business on the back of it."

2.31. The reference to the stock being expected to go up on Friday (30 March 2007) was another clear reference to the anticipated impact of the expected announcement on the Provexis share price.

Company C

2.32. On 11 April 2007, Mr Rutland received a compliance approved script for Company C. Although he knew that risk warnings should not be changed, later that day, he circulated an amended script which again contained watered down risk warnings and risk factors.

2.33. As with the other three amended scripts, the amended script for Company C did not contain a warning about relying on past performance. In addition, reference to the company's earlier losses was removed.

Analysis of Breaches: Fitness and propriety

2.34. The FSA considers that Mr Rutland's conduct in the matters described in this Warning Notice demonstrates that he acted without honesty and integrity. The FSA finds that he was motivated by a desire to sell the maximum number of shares and earn commission. He was prepared to take whatever steps necessary to achieve this including deliberately defying compliance procedures and concerns.

2.35. Mr Rutland's conduct when carrying out his controlled function (CF21) and as a team leader was deliberately misleading both to customers and to PCS. He encouraged others to disregard regulatory requirements. He understood and intended the consequences of his actions. In particular:

(1) he altered compliance approved sales scripts for shares in Provexis and three other companies and circulated these altered scripts to PCS sales staff;

(2) the alterations watered down the risk warnings and risk factors used and made the shares sound more attractive to potential investors;

(3) he repeated this pattern of behaviour even after being reminded by compliance that he should not circulate unapproved scripts; and

(4) he deliberately included inside information in the Provexis Unofficial Sales Script and circulated this script to sales staff for them to use, again to increase the prospects of selling shares.

2.36. The FSA finds that the altering of all four of the sales scripts and watering down of the risk warnings and risk factors as well as the deliberate inclusion of inside information in the Provexis Unofficial Sales Script, when Mr Rutland knew he was not authorised to make these amendments, demonstrates a lack of integrity similar to the behaviour described at APER 4.1.3E. The FSA finds that his conduct lacked honesty and integrity and that, as a result, he breached Statement of Principle 1.

2.37. This conduct amounts to serious failings to satisfy the criteria of honesty and integrity such that Mr Rutland is not a fit and proper person to perform any function in relation to any regulated activity and such that it is appropriate that a prohibition order be made against him.

Representations

2.38. By Mr Rutland's representations he challenged the FSA's analysis of the evidence presented against him and the conclusions reached.

2.39. Although he did not dispute that he sent the Provexis Unofficial Sales Script on 27 March 2007, Mr Rutland argued that the FSA had misunderstood its purpose. While he acknowledged that his choice of language was unfortunate and could lead those unfamiliar with him to the wrong conclusion, those to whom the email was addressed were aware that the script was not to be used in actual sales conversations. The PCS staff knew him well enough to not use the script as a sales aid. In any event Mr Rutland argued that the FSA had not provided any evidence to support the allegation that he intended the script to be used. Furthermore, he stated that if he had wanted the team to use this script, he would not have sent the second email.

2.40. On the substantive allegation of Mr Rutland having committed market abuse, he argued that the FSA's conclusion that the script contained inside information is not sustainable. Extracts of the Provexis announcement as referred to in the Provexis Unofficial Sales Script were general knowledge and in the public domain. The script did not specifically refer to the name of the major food company or the licensing deal. The only conclusion which could be drawn from this is that Mr Rutland was not an insider or in possession of inside information.

2.41. In particular, Mr Rutland argued that it was general knowledge that Provexis had an agreement with an unnamed major food company. Furthermore, this agreement was expected to lead to a licence and an announcement was likely as to whether the licence would be entered into between the parties, given that the agreement period was due to expire within 3 months.

2.42. Therefore, as the Provexis Unofficial Sales Script was based on information which Mr Rutland represented was general knowledge and was already in the public domain, the script did not contain inside information. It was further reasonable to assume that, on the basis of that public information, when the announcement was made, given the unveiling of the major food company, an increase in the price of the stock was inevitable.

2.43. To the extent that there was any improper disclosure of inside information, Mr Rutland argued that the disclosure had been by Provexis at the presentation on 28 March 2008. He challenged the FSA's approach in preferring the evidence of Provexis to his evidence. Due to a client meeting, he did not even stay for the entirety of the Provexis presentation. This too, Mr Rutland argued, supported his representation that he was not in possession or aware of any inside information, whether prior to or after the Provexis presentation.

2.44. Mr Rutland stated that his representations were supported by the evidence of the PCS staff who, he said, did not regard the Provexis Unofficial Sales Script as inside information. He said that the PCS staff became aware of the alleged inside information from the Provexis presentation and relied on it in their subsequent conversations with clients. In any event, Mr Rutland maintained that it could not have been inside information as the information disseminated at the presentation should be treated as generally available and therefore not capable of being inside information.

2.45. Mr Rutland informed the FSA that the Provexis Unofficial Sales Script was the result of personal research based on publicly available information that Provexis was coming to an end to the period of the Collaboration Agreement and that an announcement would be shortly made.

2.46. Mr Rutland asserted that there is no evidence to substantiate the allegation that any of his team used the Provexis Unofficial Sales Script and therefore there is no basis to support the allegation that he encouraged others to engage in market abuse.

2.47. At no time has the FSA been able to show that Mr Rutland was an insider. He did not accept the FSA's analysis of his alleged status for the purposes of this matter arguing that it was not sufficiently particularised to enable such a conclusion to be drawn. In the absence of this, he argued there was no case to answer.

2.48. Mr Rutland represented that the FSA had not presented any evidence of the sales scripts having been challenged by the PCS compliance team. This would suggest that either the amended scripts were compliant or that they had not been used. In any event, he argued that the compliance review process was at that time fragmented such that the FSA should not rely on the absence of a documented compliance review in its evidence against him. The absence of a clear structure for compliance approval and the fact of there being no record of approval does not mean that it was not in fact approved. Sometimes approval was obtained informally. Mr Rutland argued that this conclusion should be preferred over any determination of impropriety by the FSA against him.

2.49. Mr Rutland challenged the FSA's assertion that he was the author of all the amended scripts. The fact that the risk factors were altered does not support the FSA's contention. He acknowledged that he added a "share calculator" to the end of the Provexis Unofficial Sales Script. This however was done with the knowledge, approval and assistance of his line manager.

2.50. Mr Rutland also made representations on his financial circumstances representing that the fine proposed by the FSA would cause him severe financial hardship. He further argued that the proposed prohibition is disproportionate in all the circumstances.

2.51. In the light of his representations he reiterated that the FSA did not have the evidence to support its allegations of a breach of Principle 1 and having engaged in market abuse.

Conclusions

2.52. The FSA is satisfied that in circulating scripts with amended risk warnings which Mr Rutland knew had not been approved and in disclosing inside information about Provexis to PCS staff, his behaviour amounts to market abuse. Furthermore, in doing so, he encouraged PCS staff to engage in behaviour which, if he had engaged in it, would have amounted to market abuse.

2.53. It follows therefore that the FSA does not accept Mr Rutland's assertions that the Provexis Unofficial Sales Script did not contain inside information. The Provexis Unofficial Sales Script did include information which was not in the public domain. It was altered by Mr Rutland to amend key factors including emphasising that a further positive announcement was "imminent", the potential attractiveness of the investment, downplaying risk factors and omitting the warning about past performance.

2.54. Accordingly, the FSA is not satisfied with Mr Rutland's explanation of the purpose for sending the Provexis Unofficial Sales Script or for alterations made. There is no evidence to support his representations and his explanation lacks credibility in the light of all the circumstances of this matter.

2.55. The FSA is further satisfied that members of Mr Rutland's team relied on the Provexis Unofficial Sales Script and used it as a sales aid with their clients. Even when reminded by PCS compliance that no statements should be made which would suggest a deal had been concluded by Provexis, Mr Rutland did not take any steps to stop his team from using the script.

2.56. The FSA also does not accept Mr Rutland's representations as to interpretation of the market abuse regime. This is further particularised below.

Analysis of Market abuse

2.57. The FSA is satisfied that, by distributing the Provexis Unofficial Sales Script to PCS brokers, Mr Rutland disclosed inside information otherwise than in the proper course of the exercise of his employment, profession or duties in breach of

section 118(3) of the Act. Mr Rutland also encouraged other persons to engage in behaviour which, if he had engaged in it, would have amounted to market abuse and thereby breached section 123(1)(b) of the Act.

Improper disclosure of inside information

2.58. The information disclosed by Mr Rutland in the Provexis Unofficial Sales Script included information to the effect that there had been a significant recent development in the existing agreement with the unnamed partner such that Provexis would imminently announce the name of the partner as well as full details of the deal and that the effect of the announcement would be to increase the share price significantly. This information was not included in the Provexis Official Sales Script approved by compliance.

2.59. Mr Rutland had access to the information through the exercise of his employment and he was therefore an insider.

2.60. The information was precise in that it indicated circumstances that existed or may reasonably have been expected to come into existence or an event that had occurred or may reasonably have been expected to occur and was specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of Provexis shares.

2.61. The FSA considers that, when read in context, the references in the Provexis Unofficial Sales Script to "*the agreement with the major food manufacturer is signed"*, "*full details of the deal are imminent*" and "*recent collaboration*" were clear references to a new, non-publicised agreement having been reached. This information was not generally available when Mr Rutland disclosed it by circulating the Provexis Unofficial Sales Script, whether or not the whole, or any part, of it was later disclosed at the Provexis presentation to PCS on 28 March 2007. In any event, the information did not become generally available as a result of the Provexis presentation to PCS brokers. Even if inside information was disclosed at the presentation, this would only have had the effect of making the PCS brokers insiders to that information.

2.62. Mr Rutland disclosed the information otherwise than in the proper course of the exercise of his employment. The disclosure, which was not accompanied by the imposition of confidentiality requirements, was not permitted under compliance requirements at PCS. There was no legitimate reason to disclose it to brokers who were about to market Provexis shares to customers. Mr Rutland had a clear financial incentive to see his team sell the maximum amount of Provexis shares.

2.63. It is clear from the wording Mr Rutland used in his emails sent at 12:31 and 19:15 on 27 March 2007 that he was aware that the information was not generally available and from his email stating "*this script does not exist*" that he was aware that he should not be circulating it.

2.64. The information related to a qualifying investment, namely Provexis one penny ordinary shares traded on AIM, a prescribed market.

2.65. The information would, if generally available, be likely to have had a significant effect on the price of shares in Provexis. The Provexis Unofficial Sales Script predicted that the share price would rise. Following the announcement on 30 March 2007 the opening price for Provexis shares that day rose 19.81% from the closing price the day before.

Encouragement

2.66. By sending them the Provexis Unofficial Sales Script on 27 March at 19:15, Mr Rutland encouraged his team to disclose inside information when selling Provexis shares. On the day before the announcement Mr Rutland also encouraged his team, making an indirect reference to the impending announcement, to pitch the stock to as many customers as possible. If Mr Rutland had disclosed inside information to customers on 28 or 29 March 2007 this would have amounted to market abuse under section 118(3) of the Act (improper disclosure). He therefore breached section 123(1)(b) of the Act.

Analysis of Sanctions

Financial penalty

2.67. The FSA's published policy states that the principal purpose of imposing a financial penalty is to promote high standards of regulatory and/or market 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.

2.68. DEPP 6.4 sets out a number of factors to be taken into account when the FSA decides whether to impose a financial penalty or issue a public censure. They are not exhaustive but include deterrent effect, whether a person has made a profit or loss by his misconduct, the seriousness of the behaviour and the FSA's approach in similar previous cases.

2.69. DEPP 6.5 sets out a number of factors to be taken into account when the FSA determines the level of a financial penalty that is appropriate and proportionate to the misconduct. They are not exhaustive but include deterrence, the nature, seriousness and impact of the misconduct, the extent to which the breach was deliberate or reckless, whether the person on whom the penalty is to be imposed is an individual, his financial resources and other circumstances, the amount of any benefit gained or loss avoided, disciplinary record and compliance history and action that the FSA has taken in relation to similar misconduct by other persons.

2.70. In enforcing the market abuse regime, the FSA's priority is to protect prescribed markets from any damage to their fairness and efficiency caused by the misuse of information in relation to the market in question. Effective and appropriate use of the power to impose penalties for market abuse will help to maintain confidence in the UK financial system by demonstrating that high standards of market

conduct are enforced in the UK financial markets. The public enforcement of these standards also furthers public awareness of the FSA's protection of consumers objective, as well as deterring potential future market abuse.

2.71. DEPP 6.2 sets out a number of factors to be taken into account when the FSA decides whether to take action in respect of market abuse. They are not exhaustive but include the nature and seriousness of the behaviour, the degree of sophistication of the users of the market in question, the size and liquidity of the market and the susceptibility of the market to market abuse. Other factors include action taken by the FSA in similar cases, the impact that any financial penalty or public statement may have on the financial markets or on the interests of consumers and the disciplinary record and general compliance history of the person concerned.

2.72. The FSA has taken all of the circumstances of this case into account and considered the guidance in DEPP 6 in deciding that it is appropriate in this case to take action. The FSA regards Mr Rutland's behaviour as showing serious failings to satisfy the criteria of honesty and integrity, including but not limited to deliberate market abuse, such that a financial penalty and a prohibition order are appropriate in the circumstances.

2.73. The FSA has had regard in particular to the following circumstances of this case.

Aggravating features

2.74. The FSA regards the following as aggravating factors in respect of Mr Rutland's conduct:

(1) Four separate examples were identified over a four month period of him amending and forwarding sales scripts that had not been approved by compliance, despite being aware that he should not do so. The risk warnings and risk factors in each case had been amended and diluted, which was contrary to the interests of customers;

(2) The amended scripts were used a number of times when selling shares to customers;

(3) He deliberately amended and forwarded the scripts in each case, in defiance of his firm's procedures that all scripts should be approved by compliance;

(4) He circulated the amended scripts covertly to circumvent internal controls;

(5) He was an experienced broker and a team leader and as such he should have set an example of observing all compliance requirements but failed to so do. Instead he deliberately defied compliance requirements and encouraged his team to do the same, putting an unacceptable emphasis on achieving sales at the expense of regulatory requirements. The FSA considers that he actively and deliberately contributed to the poor regulatory and compliance culture at PCS; and

(6) He gained a substantial amount of commission in his position as team leader, including at least £20,000 from the sale of Provexis shares.

Mitigating features

2.75. The FSA regards the following as mitigating factors:

(1) Mr Rutland voluntarily attended for interview and answered questions; and

(2) No previous disciplinary action has been taken against him by the FSA.

Conclusion on Sanctions

Financial penalty

2.76. In determining the financial penalty, the FSA has considered the severity of the conduct, the need to deter Mr Rutland and others from engaging in this type of activity, as well as penalties imposed in other cases. In the Decision Notice dated 24 February 2010 the FSA had regard to Mr Rutland's representations on his financial circumstances and concluded that a financial penalty of £160,000 was appropriate. However since the matter was referred to the Tribunal Mr Rutland has been diagnosed with a serious debilitating illness affecting his ability to work and his future earning capacity.

2.77. The FSA therefore considers that whilst Mr Rutland's misconduct merits the imposition of a total penalty of £160,000, such a fine would cause him serious financial hardship and that it is appropriate in all the circumstances to reduce the penalty to £30,000.

Prohibition Order

2.78. In view of Mr Rutland's conduct, the FSA is of the view that he has demonstrated a lack of honesty and integrity such that a prohibition order is necessary in order to meet the FSA's regulatory objectives, particularly the protection of consumers and market confidence.

3. DECISION MAKER

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

4. IMPORTANT

4.1. This Final Notice is given in accordance with section 390 of the Act.

Manner of and time for Payment

4.2. The financial penalty must be paid in full by Mr Rutland to the FSA by no later than 23 July 2012, 14 days from the date of the Final Notice..

If the financial penalty is not paid

4.3. If all or any of the financial penalty is outstanding on 24 July 2012, the FSA may recover the outstanding amount as a debt owed by Mr Rutland and due to the FSA.

Publicity

4.4. 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 Rutland or prejudicial to the interests of consumers.

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

FSA contacts

4.6. For more information concerning this matter generally contact Clare Hitchcock at the FSA (direct line: 020 7066 1490).

Matthew Nunan
FSA Enforcement and Financial Crime Division

ANNEX

Relevant Statutory and Regulatory Provisions

Market abuse

1. The FSA is authorised by section 123 of the Act to impose a financial penalty on a person who has engaged in market abuse or encouraged others to do so:

   (1) If the Authority is satisfied that a person ("A")-

   (a) is or has engaged in market abuse, or

   (b) by taking or refraining from taking any action has required or encouraged another person or persons to engage in behaviour which, if engaged in by A, would amount to market abuse,

   it may impose on him a penalty of such amount as it considers appropriate.

2. Section 118 of the Act sets out the regulatory offence of market abuse as follows:

   (1) For the purposes of this Act, market abuse is behaviour (whether by one person alone or by two or more persons jointly or in concert) which –

   (a) occurs in relation to –
   (i) qualifying investments admitted to trading on a prescribed market

   …

   (ii) …

   (iii) …and

   (b) falls within any one or more of the types of behaviour set out in subsections (2) to (8).

   …

   (3) The second is where an insider discloses inside information to another person otherwise than in the proper course of the exercise of his employment, profession or duties.

   …

3. Section 118B of the Act in respect to insiders provides:

   For the purposes of this Part an insider is any person who has inside information—
   (a) …

   (b) …

(c) as a result of having access to the information through the exercise of his employment, profession or duties …

4. Section 118C of the Act defines inside information as follows:

(2) In relation to qualifying investments, or related investments, which are not commodity derivatives, inside information is information of a precise nature which—

(a) is not generally available,

(b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and

(c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments.

…

(5) Information is precise if it—

(a) indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur, and

(b) is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments or related investments.

…

(6) Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions.

5. The Financial Services and Markets Act 2000 (Prescribed Markets and Qualifying Investments) Order 2001, made under section 118(3) of the Act, provides that:

5.1 all markets operated under the rules of a UK recognised investment exchange (which includes the AIM market operated by the London Stock Exchange) and prescribed markets; and

5.2 all investments specified for the purposes of defining a regulated activity (including shares traded on AIM) are qualifying investments.

6. The FSA has published the Code of Market Conduct (MAR 1 or the Code) in the FSA Handbook pursuant to section 119 of the Act to provide guidance on whether or not behaviour amounts to market abuse.

7. MAR 1.4.5E identifies certain factors which, in the opinion of the FSA, are to be taken into account in determining whether or not the disclosure was made in the

proper course of the exercise of a person's employment, profession or duties and are indications that it was. These factors include:

(2) whether the disclosure is accompanied by the imposition of confidentiality requirements upon the person to whom the disclosure is made and is: (a) reasonable and is to enable a person to perform the proper functions of his employment, profession or duties; or

…

(3) whether: (c) it is reasonable for the person to make the disclosure to enable him to perform the proper functions of his employment, profession or duties.

Principles

8. The FSA is authorised by section 66(1) of the Act to take action against a person under this section if (a) it appears to the FSA that he is guilty of misconduct; and (b) the FSA is satisfied that it is appropriate in all the circumstances to take action against him. Section 66(3) of the Act gives the FSA the power to impose a financial penalty in such circumstances.

9. Section 66(2)(a) of the Act provides that a person is guilty of misconduct if, while an approved person he has failed to comply with a statement of principle issued under section 64.

10. The Statements of Principle issued under section 64 of the Act are set out in APER in the FSA Handbook. APER 1.1 states that the Statements of Principle apply only to approved persons, namely persons in relation to whom the FSA has given its approval under section 59 of the Act for the performance of a controlled function.

11. CF21 (investment adviser function) included the function of:

    (a) advising on investments other than a non-investment insurance contract.

12. Statement of Principle 1 states that:

    "An approved person must act with integrity in carrying out his controlled function."

13. The Code of Practice for Approved Persons (APER 3) sets out descriptions of conduct which, in the opinion of the FSA, do not comply with the Statements of Principle. It further describes factors which, in the opinion of the FSA, are to be taken into account in determining whether or not an approved person's conduct complies with a Statement of Principle.

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

15. APER 3.1.4G states that an approved person will only be in breach of a Statement of Principle if he or she is personally culpable, that is in a situation where his or her conduct was deliberate or where his or her standard of conduct was below that which would be reasonable in all the circumstances.

16. APER 4.1 lists types of conduct which do not comply with Statement of Principle 1. Deliberately misleading (or attempting to mislead) by act or omission a client or his firm is conduct which, in the opinion of the FSA, does not comply with Statement of Principle 1 (APER 4.1.3E). Behaviour of this type includes, but is not limited to, misleading a client about the risks of an investment (APER 4.1.4E (2)).

Prohibition

17. The FSA is authorised by the Act to impose a prohibition order pursuant to section 56 of the Act if it appears to the FSA that an individual is not a fit and proper person to perform functions in relation to a regulated activity.

18. The FSA's policy in relation to prohibition orders is set out in Chapter 8 of the Enforcement Manual of the FSA Handbook ("ENF").[1] ENF 8.3.2 states that a prohibition order may relate to a specified regulated activity, any regulated activity falling within a specified description or all regulated activities. ENF 8.4.2 states that the scope of a prohibition order will depend on the range of functions which the individual concerned carries out in relation to regulated activities, the reasons why he is not fit and proper and the severity of risk which he poses to consumers or the market generally.

19. The FSA has issued guidance in the FSA Handbook on the minimum standards for becoming and remaining an approved person in the Fit and Proper Test for Approved Persons ("FIT"). Paragraph 1.3.1 of FIT identifies three criteria as being the most important considerations when assessing the fitness and propriety of an approved person. The relevant criterion in this case is an individual's honesty, integrity and reputation.

20. FIT 2.1.1G states that in determining a person's honesty, integrity and reputation, the FSA will have regard to all relevant matters including but not limited to those set out in FIT 2.1.3G. FIT 2.1.3G states that, in relation to honesty, integrity and reputation, the FSA will have regard to such matters as whether the individual has contravened any of the requirements and standards of the regulatory system.

21. FIT 1.3.4G states that if a matter comes to the FSA's attention which suggests that a person might not be fit and proper, the FSA will take into account how relevant and how important it is.

Relevant Guidance

22. In deciding to take the action set out in this Notice, the FSA has had regard to guidance published in the FSA Handbook, in particular the provisions of the Code,

[1] ENF, which was in force until 27 August 2007, was in force at the relevant time.

APER and FIT referred to above. The FSA has also had regard to guidance published in Chapters 11, 13 and 14 of ENF, Chapter 6 of the Decision Procedure and Penalties manual (DEPP) and Chapter 9 of the Enforcement Guide.