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## FINAL NOTICE

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To: **Jonathan Malins**  
Of: **55-56 St. James's Street**  
**London**  
**SW1A 1LA**  
Date: **20 December 2005**

**TAKE NOTICE:** The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives you final notice about a requirement to pay a financial penalty.

### THE PENALTY

The FSA gave you, Mr Jonathan Malins ("Mr Malins"), a Decision Notice dated 20 December 2005 which notified you that pursuant to section 123 (Power to impose penalties in cases of market abuse) of the Financial Services and Markets Act 2000 ("the Act"), the FSA had decided to impose a financial penalty on you of £25,000 ("the penalty").

On 20 December 2005 you confirmed that you waived your right to refer the matter to the Financial Services and Markets Tribunal within 28 days of the date on which the Decision Notice was given to you. Accordingly, for the reasons set out below and having taken into account that settlement has been reached, the FSA imposes a financial penalty on you in the amount of £25,000.

### REASONS FOR ACTION

#### Background

1. The FSA has decided to impose this penalty as a result of Mr Malins' behaviour in relation to his purchases of ordinary shares in Cambrian Mining plc ("Cambrian or the Company")

ahead of two announcements concerning Cambrian's Placing of shares and its Interim Results, made by the Company on 23 March 2005 and 31 March 2005 respectively.

2. On the basis of the facts and matters described below, it appears to the FSA that:
  - (a) in respect of these matters Mr Malins engaged in market abuse; and
  - (b) in all the circumstances it is appropriate to impose a penalty on Mr Malins in the amount proposed.

## RELEVANT STATUTORY PROVISIONS

3. Under section 123(1) of the Act the FSA may impose a financial penalty of such amount as it considers appropriate if the FSA is satisfied that a person has engaged in market abuse.
4. Section 118(1) of the Act defines "market abuse" as "*behaviour...*
  - (a) *which occurs in relation to qualifying investments traded on a market to which this section applies;*
  - (b) *which satisfies any one or more of the conditions set out in subsection (2); and*
  - (c) *which is likely to be regarded by a regular user of that market who is aware of the behaviour as a failure on the part of the person or persons concerned to observe the standard of behaviour reasonably expected of a person in his or their position in relation to the market.*"
5. Of the three conditions set out in section 118(2) the one relevant to this case is that:

*" the behaviour is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected."*
6. Cambrian's shares, being traded on the Alternative Investment Market ("AIM"), are qualifying investments and dealing in shares is behaviour occurring in relation to such investments for the purposes of section 118 of the Act.
7. The term "*regular user*", in relation to a particular market, means "*a reasonable person who regularly deals on that market in investments of the kind in question*" (Section 118(10) of the Act).

## Relevant guidance

8. Pursuant to section 119 of the Act the FSA has issued the Code of Market Conduct ("the Code"), which contains guidance as to whether or not behaviour amounts to market abuse. Under section 122 of the Act, the Code may be relied on so far as it indicates whether or not particular behaviour should be taken to amount to market abuse.
9. In respect of the action, the FSA has had particular regard to MAR 1.2 of the Code, which sets out guidance on the regular user, and MAR 1.4 of the Code, which sets out guidance on misuse of information. MAR 1.2.2 states:

*"in determining whether behaviour amounts to market abuse, it is necessary to consider objectively whether a hypothetical reasonable person, familiar with the market in question, would regard the behaviour as acceptable in the light of all the relevant circumstances."*

10. Examples of relevant circumstances are set out in MAR 1.2.3 and include:

*"the position of the person in question and the standards reasonably to be expected of that person at the time of the behaviour in the light of that person's experience, level of skill and standard of knowledge;" and*

*"the need for market users to conduct their affairs in a manner that does not compromise the fair and efficient operation of the market as a whole or unfairly damage the interests of investors."*

11. MAR 1.4.4 states that behaviour will be market abuse, in that it will be a misuse of information, where a person deals in any qualifying investment where all four of the following circumstances are present:

*"(1) the dealing is based on information. The person must be in possession of information and the information must have a material influence on the decision to engage in the dealing... The information must be one of the reasons for the dealing..., but need not be the only reason;*

*(2) the information must be information which is not generally available;*

*(3) the information must be likely to be regarded by a regular user as relevant when deciding the terms on which transactions in the investments of the kind in question should be effected;*

*(4) the information must relate to matters which the regular user would reasonably expect to be disclosed to users of the particular prescribed market... This includes both matters which give rise to such an expectation of disclosure or are likely to do so either at the time in question, or in the future."*

12. MAR 1.4.9 sets out some criteria for determining whether a piece of information is relevant information. It says that in making such a determination, the regular user is likely to consider the extent to which:

*(1) the information is specific and precise;*

*(2) the information is material;*

*(3) the information is current;*

*(4) the information is reliable, including how near the person providing the information is, or appears to be, to the original source of that information and the reliability of that source;*

*(5) there is other material information which is already generally available to inform users of the market; and*

*(6) the information differs from information which is generally available and can*

*therefore be said to be new or fresh information."*

13. In the case of information relating to possible future developments which may lead to a disclosure or an announcement being made, MAR 1.4.13 states that *"the following additional factor is to be taken into account when determining whether the information is to be treated as disclosable information or as announceable information, namely whether the information provides, with reasonable certainty, grounds to conclude that the possible future developments will, in fact, occur and accordingly that a disclosure or announcement will, in fact, be made."*
14. Examples of disclosable information include *"information relating to officially listed securities which is required to be disclosed under the Listing Rules"* (MAR 1.4.14). Although Cambrian was not subject to the Listing Rules, it was subject to the AIM rules which require disclosure of information on broadly the same basis as the Listing Rules. Another example of disclosable information includes information which is required to be disseminated under the City Code on Takeover and Mergers.
15. In determining the appropriate level of penalty in this case, the FSA has had regard to Chapter 14 (headed "Sanctions for market abuse") in the part of the FSA's Handbook titled Enforcement Manual ("ENF"). In particular, ENF 14.7.4 sets out some factors which may be relevant in setting the amount of a financial penalty in a market abuse case.

## **Facts and Matters Relied On**

### Background

16. Cambrian was formed in 2002. It obtained a listing for its ordinary shares on AIM in 2003. Cambrian is a diversified mining company.
17. Mr Malins is a founding co-member of Cambrian and is the only executive director based in the UK. He was the Finance Director at the material time, a position Mr Malins still holds. In addition Mr Malins is also a director of a number of other AIM companies.

### The Placing on 23 March 2005

18. Mr Malins purchased 50,000 ordinary shares in Cambrian on 23 March 2005 ahead of an announcement concerning a Placing by the Company on the same day. As the order was so large it had to be filled in two tranches. 30,000 shares were purchased for 192p at 10:45 am and the remaining 20,000 shares were purchased for 187p at 15:14 pm. The Placing announcement was made at 16:10 pm.
19. It was on the morning of 23 March 2005 that Mr Malins attended and chaired a board meeting to discuss and finalize the Placing announcement. Mr Malins appreciated the price sensitivity of the announcement, the Placing being at a premium to the then share price, and he urged the Company's broker to release the announcement as soon as possible to the market. By this time Mr Malins had already made his 50,000 share purchase.
20. Mr Malins did not seek permission to purchase the 50,000 Cambrian shares. When he made his purchases on 23 March 2005 he knew the Placing announcement had not been made, that the Company was in a close period and the likely content of the Interim Results. Had Mr Malins sought permission, such permission would not have been granted.

21. As the announcement was released so late in the day on 23 March 2005, the market did not react to it fully until the following day when the share price opened higher and then closed much higher than the price at which Mr Malins had made his purchases. Mr Malins continues to hold the 50,000 shares but had he chosen to sell them the day after the announcement he would have realised a profit of £6,000.

#### The Interim Results announcement of 31 March 2005

22. Mr Malins purchased a further 20,000 ordinary shares for 187p in Cambrian on 31 March 2005 ahead of the Interim Results announcement. It was at 9:22 am on the morning of 31 March 2005 that Mr Malins made his purchase but it was not until 11:02 am the same day that the announcement concerning the Interim Results was released.
23. It was on the afternoon of 30 March 2005, the day before the Interim Results announcement, that Mr Malins attended and chaired a board meeting to formalise the acceptance of the accounts and agree the making of the Interim Results announcement the following day. Mr Malins appreciated the price sensitivity of the announcement, the results showing an increase in profitability and an increase in the value of the Company's investments.
24. Mr Malins was given permission to make the purchase of the additional 20,000 Cambrian shares but such permission was granted on the basis that the purchase was not made until after the release of the Interim Results announcement. Despite this, Mr Malins went ahead and made the purchase at 9:22 am on 31 March 2005 without having checked or confirmed that the Interim Results announcement had already been made. He also gave a presentation in the City on the Interim Results at 10:30 am on 31 March 2005 without having checked or confirmed that the Interim Results announcement had been made. Such announcements were usually made about 10:00 am but due to unforeseen formatting problems with the text of the announcement it was delayed until 11:02 am.
25. Following the Interim Results announcement the share price climbed to 189p. Mr Malins continues to hold the additional 20,000 shares but had he chosen to sell them on 31 March 2005 he would have realised a profit of £400.

#### **MARKET ABUSE**

26. Mr Malins' behaviour in purchasing ordinary shares in Cambrian on 23 March 2005 and again on 31 March 2005 amounted to market abuse for the purposes of section 118 of the Act. For the avoidance of doubt, it is FSA's view that the share purchases taken together or separately amount to market abuse for the purposes of section 118 of the Act.
27. By reference to the three required elements under section 118(1) of the Act, Mr Malins behaviour amounted to market abuse in that it:
- (a) occurred in relation to Cambrian shares, which are qualifying investments traded on AIM which is a prescribed market for the purposes of the Act ;
  - (b) was based on information which was not generally available to those using the market but which, if available to a regular user of the market, would or would have been likely to be regarded by him as relevant when deciding the terms on which

transactions in investments in the kind in question should be effected; and

- (c) is likely to be regarded by a regular user of AIM as a failure on the part of Mr Malins to observe the standards of behaviour reasonably expected of a person in his position in relation to the market.

28. The second and third elements are analysed in more detail in paragraphs 29 to 37 below.

#### Misuse of Information

29. As noted at paragraph 12 above, behaviour may amount to market abuse where it is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected.

30. As indicated in the Code (at MAR 1.4.4.E), behaviour will amount to market abuse under section 118(2)(a) in circumstances where the behaviour satisfies the following four circumstances:

- (a) the dealing must be based on information. The information must have a material influence on the person's decision to deal (but need not be the only reason for his dealing);
- (b) the information is not generally available;
- (c) a regular user of the market is likely to regard the information as relevant when deciding the terms on which transactions of the kind in question should be effected; and
- (d) the information must relate to matters which the regular user would reasonably expect to be disclosed to users of the prescribed market.

31. The information which Mr Malins possessed prior to the Placing on 23 March 2005 and the Interim Results on 31 March 2005, as described in paragraphs 18 to 25 above, was such as to cause his behaviour to satisfy the tests set out in paragraph 27 for the reasons set out in paragraphs 29 to 37.

#### *Behaviour based on information*

32. Mr Malins was in possession of information concerning Cambrian's Placing and therefore relevant information concerning Cambrian. It appears to the FSA that the Placing information did have a material influence on Mr Malins' decision to deal in the ordinary shares of Cambrian for the following reasons:

- (a) Mr Malins purchased the shares at a time when he knew the Placing announcement had not been made, that the Placing had been at a premium to the then market price, and that as such, the information was relevant information that was not generally available to the public
- (b) Mr Malins, at the time of his purchase, was in possession of relevant information

concerning the likely contents of the Interim Results;

- (c) Mr Malins did not seek permission from Cambrian to deal in the shares at the material time. During the investigation Mr Malins accepted that he should have sought permission and that had he done so, permission would have been refused;
- (d) Mr Malins share purchase was made during a close period and as such he should not have traded in the Company's shares; and
- (e) Mr Malins gave inconsistent explanations for his dealing to the FSA in two separate interviews.

*Information not generally available*

33. None of the information concerning the Placing or the Interim Results was generally available. This information was available to Mr Malins in his capacity as Finance Director of Cambrian.

*Relevance of information*

34. The information that Mr Malins had about both the Placing and the Interim Results was material and current information, from a reliable source, which investors in Cambrian would regard as relevant when deciding the terms on which to deal in Cambrian shares.

*Disclosable information*

35. For the purposes of the Code (MAR 1.4.4E) the information related to matters a regular user would reasonably expect to be disclosed to other users of the market. The information that Mr Malins had both in relation to the Placing and the Interim Results was information relating to the financial condition of Cambrian and/or the performance of its business which was required to be disclosed under AIM Rules.

Failure to observe standards of behaviour

36. The FSA considers that a reasonable person who regularly deals on AIM would regard Mr Malins' behaviour as a failure to observe the standard of behaviour reasonably to be expected of any investor and certainly that of a Finance Director of an AIM company. Being in such a position, Mr Malins was well aware of the sensitivity of the information available to him and the impropriety of exploiting that information to his own advantage before it had been made available to investors in accordance with Cambrian's obligation under AIM Rules. Further Mr Malins' failure to comply with Cambrian's rules and requirements regarding share dealing by employees is additional evidence of his failure to observe the standards reasonably expected of an employee in his position.
37. The Code indicates (MAR 1.4.3E) that, where market users rely on the timely dissemination of relevant information (as in this case on AIM), those who possess relevant information ahead of its general dissemination should refrain from acting on that information. Confidence in such markets depends, in part, on market users' confidence that they can deal with each other on the basis that they have equal, simultaneous access to information that is required to be disclosed.

## FINANCIAL PENALTY

38. In enforcing the market abuse regime the FSA's priority is to protect prescribed markets from any damage to their efficiency caused by the misuse of information in relation to the market. The 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 appropriately enforced in the UK financial markets. The public enforcement of these standards also furthers the statutory objectives of public awareness, the protection of consumers and the reduction of crime (ENF 14.1.3).
39. In accordance with the FSA's published policy (ENF 14.4) in determining whether to take action in respect of market abuse, and in determining the level of the proposed penalty, the FSA has regard to all the circumstances, including the nature and seriousness of the abuse, the person's conduct following the abuse (including their co-operation with the FSA's investigation), the nature of the market that has been abused, the likelihood of abuse of the same type being repeated and the need to deter such abuse, and the previous history of the person concerned.
40. The FSA has taken all the relevant circumstances into account in deciding that the imposition of a financial penalty in this case is appropriate and that the level of the penalty proposed is proportionate. The FSA has particular regard to the guidance set out in ENF 14.4, 14.6 and 14.7 and to the following considerations:
- (a) Had Mr Malins chosen to sell the shares, he would have made a potential profit of £6,400;
  - (b) investors in shares traded on AIM need to have confidence in the integrity of the processes by which shares are traded on the market. The misuse of information by an employee who obtains relevant or price sensitive information in the course of his employment must undermine investor confidence very seriously. It can result in significant financial gain or, as in this case, the avoidance of a significant loss and yet the detection of such abuse can be very difficult. The FSA therefore considers it essential that the penalty imposed should be such as not only to deprive Mr Malins of the potential benefits gained by his behaviour but also to act as a powerful incentive to others to refrain from such abuse;
  - (c) the seriousness of this case is aggravated by the fact that Mr Malins was at the time Cambrian's Finance Director, a position that he still holds. As such he was entrusted with highly sensitive information, a trust that he abused through the misuse of that information by his trading;
  - (d) Mr Malins' behaviour was deliberate. He traded twice within a short period of time without any or any proper regard to the consequences of his actions; and
  - (e) Mr Malins has no previous history of market misconduct and nor was he an approved person. He has also co-operated to the extent that he attended two voluntary interviews.

## CONCLUSION



41. The imposition of a penalty for market abuse is a very serious measure and the seriousness of the abuse in this case is such that the FSA considers the imposition of a penalty in the amount of £25,000 is appropriate.

## **DECISION MAKER**

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

## **IMPORTANT**

43. This Decision Notice is given to you in accordance with Section 390 of the Act.

## **Manner and Time for Payment**

44. The financial penalty must be paid in full by you to the FSA by no later than 3 January 2006, being not less than 14 days beginning with the date on which this notice was given to you.

## **If the Penalty is not Paid**

45. If all or any of the penalty is outstanding on 4 January 2006, the FSA may recover the outstanding amount as a debt owed by you and due to the FSA.

## **Publicity**

46. 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.
47. The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

## **FSA contacts**

48. For more information concerning this matter generally, you should contact John Rufford of the Enforcement Division at the FSA (direct line: 020 7066 1378).

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Julia Dunn Head of Retail 1 Department - Enforcement Division