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**FINAL NOTICE**

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To: Alexei Krilov-Harrison

Date of birth: 1 December 1974

Date: 3 November 2009

**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.**

**1. THE PENALTY**

- 1.1. The FSA gave you, Alexei Krilov-Harrison, a Decision Notice on 23 October 2009 which notified you that pursuant to section 123(1) of the Financial Services and Markets Act 2000 ("the Act"), the FSA had decided to impose a financial penalty of £24,000 for engaging in market abuse.
- 1.2. Your behaviour merits the imposition of a total penalty of £40,000 but because of your financial circumstances this has been reduced to £30,000. In addition you agreed to settle at an early stage of the FSA's investigation. You therefore qualified for a 20% (Stage 2) reduction in the financial penalty under the FSA's executive settlement procedures. The total penalty imposed is therefore £24,000.
- 1.3. You have confirmed that you will not be referring the matter to the Financial Services and Markets Tribunal.

- 1.4. Accordingly, for the reasons set out below and having agreed with you the facts and matters relied on, the FSA imposes a financial penalty on you in the amount of £24,000.

## 2. REASONS FOR THE ACTION

### Summary

- 2.1. You were employed as a broker by Pacific Continental Securities (UK) Limited (“PCS”). On or shortly before 28 March 2007 you obtained inside information that Provexis plc (“Provexis”), an Alternative Investment Market (AIM) traded company, had entered into a collaboration agreement with a major international company – a household name – which would be announced shortly to the market. This information was not public and was price sensitive.
- 2.2. You:
- a) disclosed inside information to clients of PCS (otherwise than in the proper course of the exercise of your employment); and
  - b) encouraged retail customers to purchase the shares in relation to which you knew the inside information (if you had purchased the shares it would have amounted to market abuse).
- 2.3. Between 28 and 29 March 2007 you used this inside information as a sales aid to encourage PCS retail customers to buy Provexis shares.
- 2.4. Provexis announced the inside information to the market at 07:02 on 30 March 2007. Following the announcement the opening price for Provexis shares on 30 March 2007 was 19.81% higher than the closing price for its shares the day before.

### Relevant Statutory and Regulatory Provisions

- 2.5. Section 118 of the Act defines market abuse. References in this Notice to provisions in this part of the Act are to those in force during the period of the behaviour referred to. In particular, section 118 of the Act provides 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) *and falls within any one or more of the types of behaviour set out in subsections (2) to (8).*

- (2) *The first type of behaviour is where an insider deals, or attempts to deal, in a qualifying investment or related investment on the basis of information relating to the investment in question.*
- (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...*

2.6. Section 118B of the Act provides (so far as relevant to this Notice) as follows:

*“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.”*

2.7. Section 118C of the Act (so far as it is relevant to this Notice) 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.”*

2.8. Section 123 provides that the FSA may 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.”*

2.9. Under The Financial Services and Markets Act 2000 (Prescribed Markets and Qualifying Investments) Order 2001 (made under section 130A(1) of the Act):

- a) all markets operated under the rules of a UK recognised investment exchange (which includes the AIM market operated by the London Stock Exchange) are prescribed markets; and
- b) all investments specified for the purposes of defining a regulated activity (including shares traded on AIM) are qualifying investments.

### The Code of Market Conduct

2.10. Section 119 of the Act provides as follows:

(1) *The Authority must prepare and issue a code containing such provisions as the Authority considers will give appropriate guidance to those determining whether or not behaviour amounts to market abuse.*

(2) *The code may among other things specify-*

(a) *descriptions of behaviour that, in the opinion of the Authority, amount to market abuse;*

(b) *descriptions of behaviour that, in the opinion of the Authority, do not amount to market abuse;*

(c) *factors that, in the opinion of the Authority, are to be taken into account in determining whether or not behaviour amounts to market abuse.*

(d) ...

(e) ...

- (2A) ...
- (3) *The code may make different provision in relation to persons, cases or circumstances of different descriptions. ...”*

2.11. The FSA has issued the Code of Market Conduct (“The Code”) under section 119 and it forms the first section of the Market Conduct Sourcebook (MAR 1) in the FSA’s Handbook of rules and guidance. References in this Notice to provisions of The Code (or MAR 1) are to the provisions in force at the time of the behaviour described in this Notice.

2.12. Under section 122 of the Act:

- “(1) If a person behaves in a way which is described (in the code in force under section 119 at the time of the behaviour) as behaviour that, in the Authority’s opinion, does not amount to market abuse that behaviour of his is to be taken, for the purposes of this Act, as not amounting to market abuse.*
- (2) Otherwise, the code in force under section 119 at the time when particular behaviour occurs may be relied on so far as it indicates whether or not that behaviour should be taken to amount to market abuse.”*

2.13. MAR 1 considers the general concepts relevant to market abuse, then each type of behaviour in turn and then describes exceptions to market abuse which are of general application. In doing so, it sets out the relevant provisions of the Code, that is:

- a) descriptions of behaviour that, in the opinion of the FSA, do or do not amount to market abuse (see section 119(2)(a) and (b) and section 122 of the Act);
- b) descriptions of behaviour that are or are not accepted market practices in relation to one or more identified markets (see section 119(2)(d) and (e) and section 122(1) of the Act (subject to the behaviour being for legitimate reasons)); and
- c) factors that, in the opinion of the FSA, are to be taken into account in determining whether or not behaviour amounts to market abuse (see section 119(2)(c) and section 122(2) of the Act ) (MAR1.1.5G).

2.14. Section 118(1)(a) of the Act does not require the person engaging in the behaviour in question to have intended to commit market abuse. (MAR1.2.3 G)

2.15. For the purposes of the other categories of insider specified by section 118B(a) to (d), the person concerned does not need to know that the information concerned is inside information (MAR1.2.9G).

MAR on improper disclosure (section 118(3))

2.16. In the opinion of the FSA, the following factors are to be taken into account in determining whether or not the disclosure was made by a person in the proper course of the exercise of his employment, profession or duties and are indications that it was:

- “1. *whether the disclosure is permitted by the rules of a prescribed market, of the FSA or the Takeover Code; or*
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*
  - (b) *reasonable and is (for example, to a professional adviser) for the purposes of facilitating or seeking or giving advice about a transaction or takeover bid ; or*
  - (c) *reasonable and is for the purpose of facilitating any commercial, financial or investment transaction (including prospective underwriters or placers of securities ); or*
  - (d) *reasonable and is for the purpose of obtaining a commitment or expression of support in relation to an offer which is subject to the Takeover Code; or*
  - (e) *in fulfilment of a legal obligation, including to employee representatives or trade unions acting on their behalf.” (MAR 1.4.5E)*

2.17. Behaviour where an insider discloses inside information to another person otherwise than in the proper course of the exercise of his employment, profession or duties is market abuse (section 118(3) of the Act). The Code gives a number of examples of behaviour amounting to market abuse of this type. The relevant parts of the Code are contained in MAR 1.4. In particular, MAR 1.4.6G provides that:

*“The following is an example of market abuse (improper disclosure):*

*X, a director at B plc has lunch with a friend, Y, who has no connection with B plc or its advisers. X tells Y that his company has received a takeover offer that is at a premium to the current share price at which it is trading.”*

MAR on requiring or encouraging as defined by section 123(1)(b) of the Act

2.18. As per MAR1.2.23G, the following are examples of behaviour that might fall within the scope of section 123(1)(b):

- “(1) *a director of a company, while in possession of inside information, instructs an employee of that company to deal in qualifying*

*investments or related investments in respect of which the information is inside information;*

- (2) *a person recommends or advises a friend to engage in behaviour which, if he himself engaged in it, would amount to market abuse.”*

## **Facts and Matters relied on**

### (a) Background to PCS and you

- 2.19. In 2007 the principal businesses of PCS were the sale to the public of AIM traded shares issued by SmallCap companies and corporate finance services to issuers on the AIM market. PCS went into administration in June 2007.
- 2.20. You joined PCS in February 2005 as a stockbroker. From 1 February 2005 to 16 May 2005 you carried out Controlled Function 22 (trainee investment adviser) after which time you were approved by the FSA to undertake Controlled Function 21 (investment adviser). You described yourself as a senior broker by March 2007. Your role at PCS was to sell shares in AIM traded companies to PCS clients.
- 2.21. Sales scripts for selling shares to the public were used by sales staff. The sales scripts were intended as an aid to help achieve sales of a particular stock but certain highlighted passages containing regulatory information such as risk warnings were obligatory. Scripts and their content had to be approved by Compliance and senior management before use. It was the practice of PCS for legal and compliance reasons to record conversations on external telephone lines.

### (b) Sale of Provexis shares

- 2.22. Provexis one penny ordinary shares are traded on AIM and form part of the FTSE AIM All Share index.
- 2.23. In early 2007 Provexis was negotiating a long-term collaboration agreement to develop a new format of certain patented technology for application in Unilever's food product portfolio. This was an important step for Provexis in its developing relationship with an important and substantial client.
- 2.24. In February 2007 PCS participated in a share placement by Provexis to raise approximately £2.15 million of working capital by way of a conditional placing at a price of 1.5 pence per share. This represented a discount on the market price. As a consequence certain individuals in the PCS corporate finance department were made insiders in respect of the negotiations for the collaboration agreement. Provexis announced the intended share placement to the market on 16 March 2007.
- 2.25. An agreement on the terms of the collaboration agreement was concluded on or about 27 March 2007 although the formalities may not have been completed until 29 March 2007. The identity of Unilever as the collaboration partner, the fact that an agreement had been reached with a major international business and its imminent announcement were all details not yet public. If this information had been generally available it would have been likely to have had a significant effect on the Provexis share price, and in fact when it was announced the share price rose by nearly 20%.

2.26. On 28 March 2007 at 14:00, a presentation was given by Provexis to PCS staff including you. The presentation concerned Provexis's business and its prospects. 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.

(c) The Sales Calls

2.27. Following the 28 March 2007 presentation you and other sales staff were authorised by PCS management to begin sales calls to PCS clients for Provexis shares. The FSA has reviewed the recordings made of your telephone extension for 28 to 30 March 2007. The FSA has identified three calls where market abuse was committed.

**Sales Call 1: 28 March 2007, 17:00**

2.28. You called the client and told him:

*"It looks very, very good, I'm very, very excited by it. Apparently they've got a bit of news coming out in the next couple of days, potentially anyway, I've got to be careful what I say ... And I think it's going to do very, very well. It's called ... Provexis"*

*"They're meant to be releasing some news to market in about 2 days time...which should, really, really give it a kick up the backside as far as the share price goes, you know"*

*"This product here we're talking about has had...a lot of interest from a lot of unnamed, I can't name them, but major branded food businesses."*

*"...the point is they're meant to be announcing some very big news in the next couple of days..."*

*"...people have waited for an announcement of this licensing to start going ahead, and as I say [I've been] given very strong indications that we could be expecting something on this in the near, in the near future and you know I said to [them] how many weeks and [they] held up a couple of fingers, and I was going weeks and [they] actually mean days."*

*"...to be honest we don't have much time... we are literally looking at a window of maybe 24, 48 hours, maximum, yes?"*

*"I'm expecting this to move tomorrow basically".*

**Sales Call 2: 29 March 2007, 09:29**

2.29. You called the client and told him:

*"We understand that this company is going to be putting out a very interesting statement in the next couple of days which we would suspect would move the price quite a lot...company's called Provexis"*

*"They've got an exclusivity agreement, actually that's very important, the next 12 months with a major branded food business..."*



*You know I told you they've got this project going with a big multi-national household name yeah, next couple of days, hopefully, we will be expecting a bit of news to come out regarding that, OK ... that could be a very, very advantageous bit of news as far as the share price is concerned, OK"*

*"...they've got an exclusivity agreement in place with a major company, I can't say what it is, right, household name, you've probably... you almost certainly have it in your house, in your kitchen."*

*"On the 30th, yes, the news I would assume would be released then, that's what we've been told."*

2.30. At 11:45 on 29 March 2007, PCS Compliance hand delivered to all sales staff a warning headed "*Provexis Cautionary Note from Compliance.*" The note said:

*"[Provexis] told us yesterday that they had been negotiating.*

*The Stock Note and Script mention the importance of a deal:*

- *Positive if it happens*
- *Negative if it does not.*

*Do not say anything that suggests that such a deal has been concluded and be extra careful not to name any international major in that context.*

*Ask me if in the slightest doubt."*

2.31. Despite this you made a further sales call at 13:41

**Sales Call 3: 29 March 2007, 13:41**

2.32. You called the client and told him:

*"Now, the company's called Provexis..."*

*"It looks like we can expect a very big announcement coming through on the market tomorrow..."*

*"They're working with a lot of major branded food companies, I can't give you the names unfortunately because they haven't released it owing to confidentiality agreements...what they're doing is taking the emphasis of the company towards global licensing"*

*"We're looking for some quite substantial news in the short term, okay, and we would be expecting this price to move pretty well hopefully...we're looking at this coming out towards the end of the week, which is like tomorrow mate."*

*"The market has been waiting very much for a bit of advance in the licensing situation...if there's an announcement in the near future we could expect the price to jump up substantially...we know they're in negotiations with, well I can't give you*

*the name, but you'll know the name, it's an international food distributor ...it's very positive if this happens ... I've got a very good feeling that this is going to come through, put it like that..."*

*"...this has got a lot of short term potential in it as well, you know it could do very well in the next few weeks is what I'm sort of getting at."*

2.33. The FSA understands that these Sales Calls by you resulted in agreements or potential agreements by PCS clients to buy shares in Provexis as follows:

<b>Sales Call</b>	<b>No of shares</b>	<b>Price / share</b>	<b>Total cost quoted to client £</b>
1	unknown	2.75 pence	unknown
2	75,000	2.75 pence	2,108.13
3	350,000	2.88 pence	10,080

2.34. The closing Provexis share price on 29 March 2007 was 3.13 pence. The following day on 30 March 2007, at 07:02, Provexis announced to the market that it had entered into a long-term collaboration agreement with Unilever to develop a new format of the relevant patented technology. The opening price of Provexis shares was 3.75 pence. This represented a 19.81% increase on the closing price the previous day.

### **Conclusions - Market Abuse**

2.35. The FSA is satisfied that in relation to the three sales calls, you, as an insider, disclosed inside information to others otherwise than in the proper course of the exercise of your employment profession or duties in breach of section 118(3) of the Act because:

- a) You had access to the information through the exercise of your employment and were therefore an insider;
- b) You disclosed inside information to each of the clients in your three sales calls by revealing that:
  - a) Provexis had entered into an agreement. This was substantially accurate. An agreement had been reached and the Unilever press office briefed. The terms of the agreement were at an advanced stage if not completed by 27 March 2007;
  - b) The announcement would be made to the market in the next few days, probably on 30 March 2007. This was accurate. The announcement was made on 30 March 2007;

- c) The effect of the announcement was expected to increase the share price significantly. This was accurate. The share price rose 19.81% after the announcement.
- c) This information was inside information because it was of a precise nature, not generally available, in relation to qualifying investments and the information would, if generally available, be likely to have had a significant effect on the price of Provexis shares. This is supported by statements to this effect by you in the course of Sales Calls 1 to 3, and the 19.81% increase in the Provexis share price following the announcement on 30 March 2007 against the closing price of the previous day;
- d) On 28 and 29 March 2007 you disclosed the inside information to PCS retail clients, otherwise than in the proper course of the exercise of your employment during telephone sales calls to encourage clients to purchase Provexis shares. For the reasons set out, you must have been aware that disclosing the information was not in the proper course of the exercise of your employment:
  - a) the Compliance department of PCS provided staff with an approved sales script for Provexis which did not contain inside information. Sales staff were instructed to follow this script to avoid saying anything inappropriate. You failed to adhere to the script by introducing additional material information;
  - b) it would also have been apparent to you from the Compliance “Cautionary Note” of 29 March 2007, that disclosure was improper; and
  - c) it is quite clear from the telephone transcripts that you knew the information was not in the public domain and it would have been obvious to you as an experienced member of the sales staff and an Approved Person that this was inside information that you should not have disclosed to your clients.

2.36. In addition the FSA is satisfied that in relation to sales calls 1 to 3 your actions encouraged your clients to buy Provexis shares and that if you had bought or attempted to buy Provexis shares on 28 or 29 March 2007 this would have amounted to market abuse under section 118(2) (insider dealing) because the inside information would either have been the reason for, or a material influence on, the decision or attempt to deal. Your encouragement of a third party to purchase shares in Provexis when you were in possession of inside information amounted to encouragement of another to commit market abuse within the meaning of section 123(1)(b) of the Act.

### Defences

2.37. The FSA finds that there are no reasonable grounds for not imposing a penalty for market abuse (section 123(2) of the Act).

### **3. SANCTION**

#### Financial Penalty

- 3.1. 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.
- 3.2. 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.
- 3.3. 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.
- 3.4. 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.
- 3.5. 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.
- 3.6. 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 in respect of behaviour amounting to market abuse, that the imposition of a financial penalty is appropriate and that the level of financial penalty is appropriate and proportionate.
- 3.7. The FSA has had regard in particular to the following circumstances of this case:

### *Aggravating features*

- a) Your impropriety in the manner in which you conducted your primary role, that is, to sell shares.
- b) Your conduct was deliberate and motivated by personal gain through PCS's bonus scheme.
- c) You made a number of calls over the course of two days.
- d) These calls continued despite the Cautionary Note distributed by Compliance.
- e) Other AIM market participants were disadvantaged and your actions had the potential to cause damage in the AIM market.

### *Mitigating features*

- a) You voluntarily attended for interview and provided a pre-prepared statement (although you did not answer all of the investigators' questions).
- b) There have been no previous findings of market misconduct against you.
- c) The FSA recognises that there was a poor regulatory and compliance culture at PCS and that it appears unlikely that you were alone in engaging in market abuse.

## **Conclusions**

- 3.8. In all the circumstances, the FSA considers that a total financial penalty of £24,000 is appropriate.
- 3.9. The FSA would have imposed a penalty of £40,000 on you but has had regard to your financial resources and other circumstances (DEPP 6.5.2(5)) in determining that the penalty should be limited to £30,000. You also qualified for a 20% (Stage 2) reduction in the financial penalty under the FSA's executive settlement procedures, reducing the penalty to £24,000.

## **4. DECISION MAKER**

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

## **5. IMPORTANT**

- 5.1. This Final Notice is given to you in accordance with section 390 of the Act.

### **Manner of and time for Payment**

5.2. The FSA is in possession of evidence that it would cause you serious financial hardship or financial difficulties if you were required to pay the full payment in a single instalment. Accordingly, the financial penalty of £24,000 must be paid in full in instalments as follows:

- a) £1,000 within 28 days of the final notice.
- b) An additional £1,000 per month for the next 23 months, payable from 1 January 2010, and on the first day of each consecutive month.

5.3. The financial penalty must be paid in full by you to the FSA by no later than 3 November 2011, 2 years from the publication date of the Final Notice.

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

5.4. If all or any of the financial penalty is outstanding on 4 November 2011, the FSA may recover the outstanding amount as a debt owed by you and due to the FSA.

### **Publicity**

5.5. 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.

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

### **FSA contacts**

5.7. For more information concerning this matter generally, you should contact Matthew Nunan (direct line: 020 7066 2672) of the Enforcement Division of the FSA.

**Tracey McDermott**  
**FSA Enforcement Division**