Financial Services Authority

FINAL NOTICE

To:	**McInroy & Wood Limited**
FRN:	**121926**
Address:	**Easter Alderston** **Haddington** **East Lothian** **EH41 3SF**
Date:	**15 November 2011**

1. ACTION

1.1. For the reasons given in this Final Notice, and pursuant to section 206 of the Financial Services and Markets Act 2000 (the "Act"), the Financial Services Authority (the "FSA") hereby imposes on McInroy & Wood Limited ("MWL") a financial penalty of £15,050.

1.2. MWL agreed to settle at an early stage of the FSA's investigation and qualified for a 30% (Stage 1) discount under the FSA's executive settlement procedures. Were it not for this discount, the FSA would have imposed a financial penalty of £21,500.

2. SUMMARY OF REASONS

2.1. On the basis of the facts and matters described below, the FSA has concluded that MWL breached Principle 10 (Clients' assets) of the FSA's Principles for Businesses and associated FSA Rules set out in the Client Assets sourcebook (the "CASS Rules") between 31 May 2006 and 17 August 2010 by failing to ensure adequate protection of client money during this period.

2.2. Specifically, MWL failed to comply with the requirement to provide appropriate notification and obtain acknowledgement of the trust status over money deposited with one of its banks in respect of 22 off-shore client money accounts, with the consequence that client money was not adequately protected in accordance with the CASS Rules in the event of MWL's insolvency.

2.3. A principle objective of the CASS Rules is to ensure that client money is adequately protected by requiring a firm to take various steps to prevent the crystallisation of risk to client money on the occurrence of events such as the insolvency of the firm. Although client money is held by a firm on trust for its clients, this may not afford adequate protection for client money which is deposited with a bank used by the firm unless the bank has acknowledged that it also holds such money subject to the trust and waives any right of set-off against such money.

2.4. A firm holding client money is therefore required by the CASS Rules to obtain acknowledgement in writing from all its banks that hold money on behalf of its clients. This is achieved by the firm giving written notice to the bank where client money has been deposited, requesting the bank to acknowledge in writing (by means of a trust letter) that:

(1) all money standing to the credit of the account is held by the firm as trustee and that the bank is not entitled to combine the account with any other account or to exercise any right of set-off or counterclaim against money in that account in respect of any amount owed to it on any other account of the firm; and

(2) the title of the account sufficiently distinguishes that account from any account containing money that belongs to the firm.

2.5. If the bank does not provide the required acknowledgement within 20 business days of the notice, the firm is required to withdraw all money standing to the credit of the account and to deposit it elsewhere.

2.6. By issuing notification and obtaining an acknowledgement of trust in the form of a trust letter from the bank holding its client money, the firm is taking reasonable steps to ensure that, in the event of its insolvency, client money is:

(1) ring-fenced from the firm's own assets;

(2) readily identifiable; and

(3) promptly returned to clients without incurring an undue risk of litigation between competing creditors or claims for rights of set-off and consequential delay.

2.7. MWL's failure to obtain a trust letter from its bank in respect of 22 client money accounts during the period from 31 May 2006 to 17 August 2010 breached the CASS Rules. This failure arose from incorrect assumptions made by individuals within MWL that a trust letter was in place with the relevant bank and missed opportunities to identify and remedy the breach. This is despite the importance of this requirement being highlighted to MWL by the FSA.

2.8. The requirement to have a trust letter in place is a basic and fundamental requirement of the CASS Rules. There is no adequate alternative to a trust letter. Failure to have a trust letter in place exposes clients to significant risk if a firm holding client money becomes insolvent. For example, money might have been placed in accounts that did not identify it as client money and this could lead to a firm's creditors claiming such money when seeking to exercise their rights in any insolvency. Competing claims over the money would need to be resolved by the liquidator or a Court before any disbursements could be made to clients. This could significantly impair, complicate and delay the process of recovering such money for clients, and could seriously jeopardise the prospects of clients recovering their money at all.

2.9. In MWL's case, client money was held in individually named accounts and the firm held no corporate funds at the same institution during the relevant period which could have been co-mingled with client money held in the 22 client accounts. MWL has not entered into insolvency and no client loss has been incurred.

2.10. The FSA has concluded that the nature of MWL's breach warrants a financial penalty. The FSA therefore imposes a financial penalty on MWL of £15,050.

2.11. This action supports the FSA's regulatory objective of the protection of consumers.

3. DEFINITIONS

3.1. The definitions below are used in this Final Notice:

"CASS" means the Client Assets sourcebook;

"Dear CO letter" means a letter issued by the FSA to the Compliance Officers of authorised firms holding client money in March 2009;

"Dear CEO letter" means a letter issued by the FSA to the Chief Executive Officers of authorised firms holding client money in January 2010;

"DEPP" means the Decision Procedures and Penalties Manual;

the "Principles" means the FSA's Principles for Businesses;

the "relevant period" means the period between 31 May 2006 and 17 August 2010; and

the "Tribunal" means the Upper Tribunal (Tax and Chancery Chamber).

4. FACTS AND MATTERS

Background

4.1. MWL is a discretionary investment management firm based in East Lothian. MWL has been authorised and regulated by the FSA since 1 December 2001 and is permitted to hold client money.

4.2. In the course of its business, MWL receives money on behalf of its clients for the provision of its discretionary investment management services. The money MWL receives on behalf of its clients is client money and is subject to the relevant requirements set out in the CASS Rules.

4.3. MWL has around 500 active clients and holds approximately £6.5 million in client money. During the relevant period the average amount of client money held in the 22 client money accounts was £666,000.

Client assets and money thematic project

4.4. The FSA has been conducting a thematic project into the management of client money and assets held by firms. The project's aim was to assess whether client money and assets held by firms are safe and would be returned within a reasonable time in the event a firm became insolvent. It also aimed to make firms take seriously their responsibilities with regards to client money and assets and have appropriate controls in place to mitigate any risks.

4.5. In March 2009, the FSA issued a Dear CO letter notifying firms to make adequate arrangements to protect client money and assets. The letter highlighted issues for firms to consider and warned firms of visits in 2009.

4.6. In January 2010, the FSA issued a Dear CEO letter and published a "Client Money and Asset Report" notifying firms of failings identified during work conducted by the FSA in 2009. The letter warned firms that visits would continue throughout 2010.

4.7. Following these letters, the FSA visited MWL in August 2010 to review its client money arrangements. Upon the FSA requesting copies of all trust letters, MWL identified that it had failed to obtain a trust letter from one of its banks in respect of 22 client money accounts during the relevant period.

Transfer of client money accounts from Bank A to Bank C in March 2006

4.8. MWL used two different banks to hold client money that it received in connection with its off-shore and on-shore business. MWL used Bank A up to March 2006 to hold its off-shore client money accounts, and Bank B from July 1998 to hold its on-shore client money accounts.

4.9. In March 2006, MWL transferred its off-shore client money accounts from Bank A to Bank C. The money transferred from Bank A to Bank C was client money and had to be held in accordance with the CASS Rules. MWL was therefore required to obtain a trust letter from Bank C, but it did not do so.

4.10. MWL acknowledged that it had failed to obtain a trust letter when it transferred its client money accounts from Bank A to Bank C. MWL stated that the omission was inadvertent and an oversight at the time.

4.11. MWL stated at interview that money held by Bank A on behalf of its clients had previously been designated as client money accounts and protected by a trust letter. MWL was aware that it needed to replace the trust letter when it transferred its client

money accounts to Bank C, and that it needed to obtain specific acknowledgement from Bank C that money held in those accounts belonged to clients, and not MWL.

4.12. MWL stated that it had been under the misapprehension that an acknowledgement of trust was obtained from Bank C at the time of the transfer but did not specifically check. MWL did not discuss the trust status of the client money accounts with Bank C when they were transferred from Bank A in February 2006.

4.13. MWL also had an investment administration agreement in place with Bank C relating to the custodianship of client property. MWL believed the investment administration agreement afforded its clients some degree of protection as the terms of the agreement required Bank C to keep client property segregated and not part with client property (including client money). However, the terms of the investment administration agreement did not specifically acknowledge MWL's position as trustee in respect of the 22 client money accounts, or confirm that Bank C would not set-off money held in those accounts against any amount owed to it on any other account belonging to MWL. The FSA notes that there were no other accounts held by Bank C for MWL during the relevant period.

Client money audit in August 2006

4.14. In August 2006, as part of its annual review for the year ended 30 April 2006, MWL's auditor reviewed its systems and controls for complying with the CASS Rules. The auditor identified that MWL did not distinguish sufficiently two client money accounts held with Bank C as the word "designated" was not included in the titles of the accounts.

4.15. MWL stated at interview that the omission identified by the audit occurred when the client money accounts transferred from Bank A to Bank C in March 2006, and was inadvertent. MWL stated that it did not undertake a full review of its client money arrangements at this stage, to satisfy itself that all its client money accounts were adequately protected by trust status, because MWL mistakenly assumed each of the 22 client accounts with Bank C had a trust letter in place and that the omission identified by the audit in August 2006 was a specific isolated incident.

Dear CO letter in March 2009

4.16. In March 2009, MWL received the Dear CO letter regarding arranging adequate protection of client money and assets. The Dear CO letter specifically highlighted the requirement on firms to obtain trust letters from banks and third parties that held money on behalf of its clients, and explained that the FSA had identified that firms were failing to have appropriate trust letters in place.

4.17. In response to the Dear CO letter, MWL reviewed its client money arrangements. The review concentrated on the adequacy of the acknowledgment in trust letters from banks that held client money in connection with MWL's on-shore business.

4.18. MWL stated at interview that the review did not cover trust letters it had in place with banks that held client money received in connection with its off-shore business. Consequently, MWL did not identify that a trust letter was missing from Bank C.

Bank C review in August 2009

4.19. In August 2009, MWL conducted a review to assess the suitability of Bank C to remain its approved bank for holding client money. The review concentrated on Bank C's compliance regime in respect of handling client money and assessed the adequacy of its resources, procedures and processes and risk management framework.

4.20. MWL stated at interview that it did not recall discussing any trust letters that it had in place with Bank C during the review.

Dear CEO letter in January 2010

4.21. In January 2010, MWL received the Dear CEO letter which emphasised the importance of ensuring that firms were in compliance with Principle 10 and the CASS Rules. Enclosed with the Dear CEO letter was the Client Money and Asset Report.

4.22. The Dear CEO letter required MWL to confirm that the content of the letter and report had been properly considered and that MWL was in compliance with its obligations regarding the protection of client money and assets. The report stated "we expect firms to be able to demonstrate to us that they have the appropriate trust documentation in place" and explained that we had identified firms who could not locate trust acknowledgements.

4.23. In response to the Dear CEO letter, MWL checked that it had trust letters in place with banks that held client money received in connection with its on-shore business, and reviewed the adequacy of the acknowledgement in the trust letters. The review confirmed the existence of a trust letter from Bank B, and resulted in amendments to the wording in the trust letter to reflect current requirements of the CASS Rules.

4.24. MWL omitted to check whether it had a trust letter in place from Bank C in respect of client money received in connection with its off-shore business as part of the review.

4.25. In any event, MWL stated at interview that it was under the misapprehension that the trust letter it had obtained from Bank B also covered its client money accounts with Bank C. This was on the basis that Bank B and Bank C belonged to the same banking group, used the same banking systems and MWL liaised with the same individuals at both banks.

FSA visit in August 2010

4.26. On 2 August 2010, the FSA wrote to MWL, notifying it that the FSA intended to visit MWL as part of its client money and asset thematic project to review MWL's client money arrangements. As part of the FSA's pre-visit preparation, the FSA asked MWL to provide copies of trust letters relating to its client money accounts, as well as any

notification and acknowledgements between MWL and any party holding money on behalf of its clients.

4.27. In response to the FSA's request, MWL identified that a trust letter was missing from Bank C in respect of 22 client money accounts.

4.28. MWL notified and obtained a trust letter from Bank C on 17 August 2010 in respect of the 22 client money accounts. Bank C acknowledged that all money standing to the credit of the 22 accounts was held by MWL as agent, and confirmed that it was not entitled to combine the accounts with any other account or to exercise any right of set-off or counterclaim against money in those accounts in respect of any amount owed to it on any other account of MWL.

4.29. The initial trust letter obtained by MWL from Bank C did not did not distinguish sufficiently that the 22 accounts held client money because the titles of those accounts did not include the word "client money". On 23 August 2010, MWL obtained a replacement trust letter from Bank C which correctly designated the 22 accounts as client money accounts.

5. FAILINGS

5.1. The statutory and regulatory provisions and policy relevant to this Final Notice are referred to in the Annex.

5.2. MWL's failure arose from misapprehensions about the existence of a trust letter from Bank C and missed opportunities to review its compliance with CASS in relation to the 22 client money accounts.

Misapprehension by MWL

5.3. MWL's failure to obtain a trust letter from Bank C arose from two incorrect assumptions. The first misapprehension was that a trust letter was obtained when the 22 client money accounts were transferred from Bank A to Bank C. The second misapprehension was that a trust letter that MWL had obtained from Bank B also covered its client money accounts with Bank C.

5.4. Owing to the misapprehensions, MWL failed to question, check and identify earlier whether a trust letter was in place for its client money accounts held with Bank C.

Missed opportunities to identify breach

5.5. In March 2009 and January 2010, MWL received the Dear CO letter and Dear CEO letters respectively which stated the importance of complying with the CASS Rules, including the requirement to obtain trust letters, and asked firms to ensure that they were compliant.

5.6. The letters should have prompted MWL to consider a full review of its client money arrangements, including a review of its bank selection, approval and appointment process. Such a review would have enabled MWL to identify and remedy the lack of trust letter with Bank C more quickly, but a full review did not occur.

Conclusion

5.7. MWL's failure to obtain a trust letter from Bank C in respect of 22 client money accounts, and to identify the issue during the relevant period, placed clients held in those 22 accounts at risk of being included within the pool of assets available to general unsecured creditors in the event of MWL's insolvency, rather than in a pool of protected client money. MWL has not entered into insolvency and rectified its failure to have a trust letter in place.

5.8. Having regard to the facts and matters, the FSA has concluded that MWL has breached the CASS Rules and Principle 10. Consequently, it is appropriate and proportionate in all the circumstances to take disciplinary action against MWL for the breach.

6. SANCTION

6.1. The FSA's policy on the imposition of financial penalties is set out in Chapter 6 of DEPP, which forms part of the FSA Handbook. The relevant sections of DEPP are set out in more detail in the Annex.

6.2. Since the majority of MWL's failings started and occurred before the change in the regulatory provisions governing the determination of financial penalties on 6 March 2010, the FSA has applied the penalty regime that was in place up to 5 March 2010. All references to DEPP in this section are references to the version that was in force up to 5 March 2010.

6.3. The principal purpose of a financial penalty is to promote high standards of regulatory conduct by deterring firms which have committed breaches from committing further breaches, and helping to deter other firms from committing similar breaches, as well as demonstrating generally the benefits of compliant behaviour.

6.4. In determining whether a financial penalty is appropriate, and if so its level, the FSA is required to consider all the relevant circumstances of a case. DEPP 6.5.2G sets out a non-exhaustive list of factors that may be of relevance in determining the level of a financial penalty. The FSA considers that the following factors to be particularly relevant in this case.

Deterrence (DEPP 6.5.2G(1))

6.5. The FSA views compliance with its client money requirements as of significant importance and considers that there is no adequate substitute for a trust letter. The FSA considers that a financial penalty is an appropriate sanction in this case given the nature of MWL's failing. The FSA also considers it necessary to send a strong message to the industry that firms must handle client money in a way which is

compliant with the CASS Rules and the Principles, and of the consequences of failing to ensure adequate protection of client money.

6.6. MWL failed to obtain a trust letter from Bank C in respect of 22 client money accounts for over four years, in breach of CASS. The amount of client money held in the 22 client money accounts during the relevant period varied, reaching £4.2 million. The likelihood of such clients recovering their money promptly (or at all) in the event of MWL's insolvency would have been significantly reduced.

6.7. MWL did not enter into insolvency and no client money was lost as a consequence of MWL's breach.

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

6.8. The FSA has had regard to the seriousness of the breach, including the nature of the requirement breached and the duration of the breach.

6.9. The FSA considers MWL's failing to be serious for the following reasons:

(1) the missing trust letter was not identified for over four years;

(2) MWL failed to identify that the trust letter was missing despite several opportunities to review its client money arrangements;

(3) MWL only identified that the trust letter was missing shortly before the FSA's visit when the FSA specifically asked, as part of its pre-visit information request, for copies of trust letters in respect of all the banks used by MWL to hold its client money. The FSA is particularly concerned about firms that do not identify and report breaches as a result of their own initiatives;

(4) the breach related to the control of money belonging to retail clients; and

(5) the need to protect client money adequately is a high profile issue that the FSA has issued several communications on.

6.10. The FSA has taken into account the following factors which have served to mitigate the seriousness of MWL's failing:

(1) the average amount of client money involved was £666,000;

(2) the number of clients affected was small (only 22 clients involved);

(3) no client money was lost as a consequence of MWL's breach;

(4) MWL used others banks to deposit and hold its corporate funds;

(5) MWL undertook remedial action on a voluntary basis and promptly rectified its failing upon identification of the breach; and

(6) MWL has fully co-operated with the FSA's investigation and accepted the failings set out in this Final Notice.

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

6.11. The breaches were neither deliberate nor reckless.

The size, financial resources and other circumstances of the firm (DEPP 6.5.2G(5))

6.12. In determining the level of financial penalty, the FSA has considered the size and financial resources of MWL.

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

6.13. MWL did not profit from its breach.

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

6.14. MWL co-operated fully with the FSA's investigation and worked with the FSA to facilitate an early settlement of the matter. From the outset, MWL acknowledged its failure to obtain a trust letter from Bank C in respect of 22 client money accounts.

6.15. MWL undertook remedial action on a voluntary basis and rectified its failing upon identification of the breach.

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

6.16. In determining the level of financial penalty, the FSA has taken into account previous cases involving the failure to adequately protect client money by obtaining trust letters.

FSA guidance and other published materials (DEPP 6.5.2G(12))

6.17. The Dear CO letter and Dear CEO letter specifically highlighted the requirement on firms to obtain trust letters from banks and third parties that held money on behalf of its clients. MWL failed to review the trust status of the 22 client accounts held by Bank C upon receipt of these letters.

Conclusion

6.18. In the light of the matters above, the FSA imposes a financial penalty of £15,050 on MWL for breaching Principle 10 and the CASS Rules. Were it not for the early stage at which MWL have settled, the penalty would have been £21,500.

7. PROCEDURAL MATTERS

Decision maker

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

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

Manner of and time for Payment

7.3. The financial penalty must be paid in full by MWL to the FSA by no later than 29 November 2011, 14 days from the date of the Final Notice.

If the financial penalty is not paid

7.4. If all or any of the financial penalty is outstanding on 30 November 2011, the FSA may recover the outstanding amount as a debt owed by MWL and due to the FSA.

Publicity

7.5. 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.

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

FSA contact

7.7. For more information concerning this matter generally, contact Rachel West of the Enforcement and Financial Crime Division at the FSA (direct line: 020 7066 0142 / fax: 020 7066 0143).

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Tom Spender
Head of Department
FSA Enforcement and Financial Crime Division

ANNEX

STATUTORY PROVISIONS, REGULATORY GUIDANCE AND POLICY

1. STAUTORY PROVISIONS

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

1.2. The FSA has the power, pursuant to section 206 of the Act, to impose a financial penalty of such amount as it considers appropriate where the FSA considers an authorised person has contravened a requirement imposed on him by or under the Act.

2. REGULATORY PROVISIONS

2.1. In exercising its power to impose a financial penalty, the FSA has had regard to the relevant regulatory provisions, guidance and policy published in the FSA Handbook. The main provisions that the FSA considers relevant to this case are set out below.

Principles for Businesses ("Principles")

2.2. Under the FSA's rule-making powers, the FSA has published in the FSA Handbook the Principles which apply either in whole, or in part, to all authorised persons.

2.3. The Principles are a general statement of the fundamental obligations of firms under the regulatory system and reflect the FSA's regulatory objectives. A firm may be liable to disciplinary sanction where it is in breach of the Principles.

2.4. Principle 10 (Clients' assets) states that:

> *"A firm must arrange adequate protection for clients' assets when it is responsible for them".*

3. Client Assets sourcebook ("CASS")

3.1. The provisions relating to notification and acknowledgement of trust by banks that applied during the relevant period were set out at:

(1) CASS 4.3.48R and CASS 4.3.49R (from 31 May 2006 to 31 December 2008); and

(2) CASS 7.8.1R (from 1 January 2009 to 17 August 2010).

3.2. CASS 7.8.1R(1) states that when a firm opens a client bank account, the firm must give or have given written notice to the bank requesting the bank to acknowledge to it in writing that:

(1) all money standing to the credit of the account is held by the firm as trustee (or if relevant, as agent) and that the bank is not entitled to combine the account with any other account or to exercise any right of set-off or counterclaim

against money in that account in respect of any sum owed to it on any other account of the firm; and

(2) the title of the account sufficiently distinguishes that account from any account containing money that belongs to the firm, and is in the form requested by the firm.

3.3. CASS 7.8.1R(2) states that in the case of a client bank account in the United Kingdom, if the bank does not provide the required acknowledgement within 20 business days after the firm dispatched the notice, the firm must withdraw all money standing to the credit of the account and deposit it in a client bank account with another bank as soon as possible.

3.4. CASS 4.3.48R and CASS 4.3.49R were direct equivalent provisions.

4. Decision Procedure and Penalties Manual ("DEPP")

4.1. DEPP came into effect on 28 August 2007. Although the references in this Final Notice are to DEPP, the FSA has also had regard to the appropriate provisions of the FSA's Enforcement Manual, which preceded DEPP and applied during part of the relevant period.

4.2. The FSA's policy on the imposition and amount of penalties that applied up to 5 March 2010 was set out in Chapter 6 of DEPP.

4.3. DEPP 6.1.2G provides 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. Financial penalties are therefore tools that the FSA may employ to help it to achieve its regulatory objectives.

4.4. DEPP 6.5.1G(1) provides that the FSA will consider all the relevant circumstances of a case when it determines the level of financial penalty (if any) that is appropriate and in proportion to the breach concerned.

4.5. DEPP 6.5.2G sets out a non-exhaustive list of factors that may be relevant to determining the appropriate level of financial penalty to be imposed on a person under the Act. The following factors are relevant to this case:

Deterrence: DEPP 6.5.2G(1)

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

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

4.7. The FSA will consider the seriousness of the breach in relation to the nature of the rule, requirement or provision breached, which can include considerations such as the duration and frequency of the breach, whether the breach revealed serious or systemic weaknesses in the person's procedures or of the management systems or internal controls relating to all or part of a person's business and the loss or risk of loss caused to consumers, investors or other market users.

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

4.8. The FSA will regard as more serious a breach which is deliberately or recklessly committed, giving consideration to factors such as whether the person has given no apparent consideration to the consequences of the behaviour that constitutes the breach. If the FSA decides that the breach was deliberate or reckless, it is more likely to impose a higher penalty on a person than would otherwise be the case.

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

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

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

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

4.11. The FSA may have regard to the amount of benefit gained or loss avoided as the result of the breach, for example the FSA will impose a penalty that is consistent with the principle that a person should not benefit from the breach, and the penalty should also act as an incentive to the person (and others) to comply with regulatory standards and required standards of market conduct.

Conduct following the breach: DEPP 6.5.2G(8)

4.12. The FSA may take into account the degree of co-operation the person showed during the investigation of the breach by the FSA any remedial steps taken since the breach was identified, including whether these were taken on the person's own initiative or that of the FSA, for example, identifying whether consumers or investors or other market users suffered loss and compensating them where they have and taking steps to ensure that similar problems cannot arise in the future.

Other action taken by the FSA (or a previous regulator): DEPP 6.5.2G(10)

4.13. The FSA seeks to apply a consistent approach to determining the appropriate level of penalty. The FSA may take into account previous decisions made in relation to similar misconduct.

FSA guidance and other published materials: DEPP 6.5.2G(12)

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