
FINAL NOTICE

To: **Michael Kwesi Yamoah**

Address: **The Lodge
Worting House
Church Lane
Basingstoke
Hampshire
RG23 8PX**

Individual reference number: **MXY01110**

Dated: **28 July 2010**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) gives you, Michael Kwesi Yamoah, final notice about the issue of a public censure, a decision to withdraw your approval to perform controlled functions CF1 (Director) and CF11 (Money laundering reporting) and an order prohibiting you from carrying out any controlled function involving the exercise of significant influence over any person in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm

1. THE ACTIONS

1.1. The FSA gave you a Decision Notice on 28 July 2010 which notified you that the FSA had decided to:

- (1) publish a statement of your misconduct, pursuant to section 66 of the Financial Services and Markets Act 2000 (“the Act”), for failing to comply with Statements of Principle 6 and 7 of the Statements of Principle and Code of Practice for Approved Persons (“the Statements of Principle”);
- (2) withdraw the approval granted to you, pursuant to section 63 of the Act, to perform controlled functions CF1 (Director) and CF11 (Money laundering reporting); and

- (3) make an order, pursuant to section 56 of the Act, prohibiting you from carrying out any controlled function involving the exercise of significant influence over any person in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm (“the Prohibition Order”).
- 1.2. You agreed that you would not be referring the matter to the Upper Tribunal (Tax and Chancery Chamber).
- 1.3. Accordingly, for the reasons set out below and having agreed with you the facts and matters relied on, the FSA has today published a statement of your misconduct, withdrawn your approval to perform controlled functions CF1 (Director) and CF11 (Money laundering reporting) and made an order prohibiting you from carrying out any controlled function involving the exercise of significant influence over any person in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm. The Prohibition Order takes effect from 28 July 2010.
- 1.4. The FSA considers that the misconduct in this case warrants a financial penalty of £17,000. However, you have provided verifiable evidence that imposing such a financial penalty would cause you serious financial hardship. Under these exceptional circumstances, the FSA has decided to censure you publicly instead.

2. REASONS FOR THE ACTIONS

- 2.1. On the basis of the facts and matters described below, the FSA considers that your conduct, while acting in your capacity as a director and an approved person at Simply Trading Group Limited (“STG”), fell short of the standards required by the Statements of Principle.
- 2.2. Specifically, when carrying out significant influence functions in connection with STG’s regulated investment business in the period from 21 November 2008 to 13 May 2009 (“the relevant period”), you:
 - (1) breached Statement of Principle 6 as you failed to exercise due skill, care and diligence in managing STG in that you placed undue reliance on an external compliance consultant to manage STG’s business;
 - (2) breached Statement of Principle 7 as you failed to take reasonable steps to ensure that STG complied with the relevant requirements and standards of the regulatory system in that you failed to put in place:
 - (a) adequate monitoring arrangements over STG’s appointed representatives; and
 - (b) adequate compliance systems to ensure that STG met regulatory requirements and standards.
- 2.3. The FSA views your failings as serious because:

- (1) the FSA places a great deal of emphasis on the responsibilities of senior management as it is senior managers who are responsible for the standards and conduct of the businesses they run;
 - (2) you acknowledged that you did not carry out sufficient checks to demonstrate that the appointed representatives were suitable both before and after being appointed to undertake regulated activities on behalf of STG;
 - (3) you confirmed that you did not take reasonable steps to monitor the activities of the appointed representatives to ensure that they complied with regulatory obligations. Consequently, you put customers at risk of receiving unsuitable investment advice;
 - (4) you admitted that you did not produce appropriate accounting records to calculate, monitor and determine STG's financial position and to ensure that it maintained adequate capital resources;
 - (5) you confirmed that you relied on the external compliance consultant for guidance and support but did not check their work to determine the adequacy of their advice and whether it was reasonable to rely on it. Consequently, you failed to identify that STG breached regulatory requirements and standards during the relevant period; and
 - (6) your conduct was well below the standard which would have been reasonable in all the circumstances.
- 2.4. The FSA has taken into account the following steps taken by you which have served to mitigate your failings:
- (1) the FSA does not consider that you deliberately caused STG to breach regulatory requirements and standards during the relevant period;
 - (2) you terminated STG's relationship with its appointed representatives and voluntarily varied STG's Part IV permission to cease conducting any of the regulated activities in its permission in response to the breaches; and
 - (3) you have co-operated with the FSA's investigation and accepted the failings set out in this Final Notice.
- 2.5. The FSA has concluded that the nature and seriousness of the breaches outlined above warrants a public censure. The FSA has therefore decided to publish a statement of your misconduct.
- 2.6. The FSA has also concluded that you are failing to meet the minimum regulatory standards required in terms of competence and capability, and are not fit and proper to carry out any controlled function involving the exercise of significant influence over any person in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm. Accordingly the FSA has decided to withdraw your approval to perform controlled functions CF1 (Director) and CF11

(Money laundering reporting) and make the Prohibition Order against you because of the nature of your failings and the potential impact on customers.

- 2.7. This action supports the FSA's regulatory objectives of maintaining confidence in the financial system and the protection of consumers.

3. STATUTORY PROVISIONS, REGULATORY GUIDANCE AND POLICY

- 3.1. Relevant statutory provisions, regulatory guidance and policy are set out in an Annex to this Final Notice.

4. FACTS AND MATTERS RELIED ON

Background

- 4.1. You were approved by the FSA on 21 November 2008 to perform the following controlled functions at STG: CF1 (Director), CF11 (Money laundering reporting) and CF30 (Customer). You were one of three directors approved to perform controlled functions in relation to the regulated activities for which STG has permission.
- 4.2. STG is a small private client advisory stockbroker, which operates in Hampshire. It specialises in telephone sales of securities traded on the main market of the London Stock Exchange to retail clients. With effect from 21 November 2008, STG became authorised and regulated by the FSA to carry on the following regulated activities (those marked with an asterisk were limited to non-investment insurance contracts):
- (1) advising on investments (except on pension transfers and pension opt-outs)*;
 - (2) agreeing to carry on a regulated activity;
 - (3) arranging (bringing about) deals in investments*; and
 - (4) making arrangements with a view to transactions in investments*.
- 4.3. STG appointed two appointed representatives in the period 17 December 2008 to 30 March 2009. The appointed representatives specialised in telephone sales of higher risk securities issued by smaller capitalised companies traded on the AIM and PLUS markets to retail clients. STG terminated its relationship with these appointed representatives on 8 May 2009 and 30 June 2009 respectively.
- 4.4. With effect from 13 May 2009, STG voluntarily varied its Part IV permission such that it is unable to carry on any of the regulated activities in its permission.
- 4.5. Following an investigation, the FSA has determined that you breached Statements of Principle 6 and 7 and that you are not a fit and proper person in terms of your competence and capability to perform significant influence functions, as set out in further detail below.

Failing to exercise due skill, care and diligence

- 4.6. As a senior manager at STG, you were responsible for its day-to-day management. However, the FSA found that you failed to run STG adequately during the relevant period.
- 4.7. You stated at an interview with the FSA that you had worked as a stockbroker and previously managed a business but had limited experience and knowledge of compliance and regulatory matters. Instead, you relied on the services of an external compliance consultant for guidance and support and to ensure that STG met its regulatory obligations.
- 4.8. The external compliance consultant was engaged to conduct quarterly audits on STG's business practices and systems and controls but they failed to perform any compliance reviews, except for an initial audit when STG started trading. Despite the external compliance consultant's failure to conduct subsequent compliance reviews, you did not put in place alternative arrangements to identify issues that needed to be addressed at STG.
- 4.9. The external compliance consultant provided compliance support to STG on an ad hoc basis but this was not documented. You stated at an interview with the FSA that you had limited interaction with the external compliance consultant. Since the compliance support provided was unstructured, it was not acceptable to rely only on the external compliance consultant to manage the business as they might not have been aware of the extent of concerns relating to the business or the context of any queries.
- 4.10. In addition, you failed to check the work undertaken by the external compliance consultant to determine the adequacy of their advice and whether it was reasonable for you to rely on it. Had you taken steps to review the work undertaken by the external compliance consultant, you might have identified issues that needed to be clarified.
- 4.11. Consequently, by placing undue reliance on the external compliance consultant for guidance and support without assessing their work or carrying out your own compliance reviews to maintain an appropriate understanding of, and to engage effectively with, the affairs of the business, you failed to realise that STG breached regulatory requirements and standards during the relevant period.

Failing to ensure compliance with regulatory requirements and standards

- 4.12. As a senior manager at STG you were responsible for ensuring its compliance with regulatory requirements and standards. Although you were designated money laundering reporting officer, in reality the management of STG was shared with your fellow directors. In particular, you shared responsibility with your fellow directors for handling financial matters, recruitment and training of staff, assessing complaints and setting up compliance and operational systems at STG. The FSA found that you and your fellow directors failed to establish adequate systems and controls over STG during the relevant period.

Inadequate monitoring arrangements over appointed representatives

- 4.13. You failed to conduct sufficient due diligence to demonstrate that STG's appointed representatives, and their directors, were suitable before their appointments. Specifically, you did not carry out adequate pre-appointment checks to ensure the fitness and propriety of the appointed representatives. You did not obtain accounts or undertake credit checks to determine whether they were solvent, seek references to establish whether they were of sufficiently good repute or assess their commercial and professional knowledge and experience to ensure that they were capable and competent to perform their roles and to act on behalf of STG. Instead, you relied on verbal assurances provided by business associates.
- 4.14. In addition, you failed to ensure that the directors of the appointed representatives were approved by the FSA to perform governing functions. Directors and senior managers of appointed representatives should not perform governing functions until they are granted approval by the FSA. However, you allowed the directors of the appointed representatives to direct business without holding the requisite approval throughout the relevant period.
- 4.15. You also did not take reasonable steps to ensure that the appointed representatives remained suitable after their appointments. Specifically, you provided no ongoing training to the appointed representatives and did not conduct any assessments to determine the level of their knowledge and whether they understood the scope of their permitted activities. The external compliance consultant was engaged to establish a structured testing system for staff at the appointed representatives as part of their continued professional development, but the system was never implemented. Despite the external compliance consultant's failure to implement the testing system, you did not put in place alternative arrangements to determine staff expertise. Without assessing their knowledge, it is unclear how you were able to satisfy yourself that they could perform their roles competently and understood their responsibilities.
- 4.16. You failed, in addition, to put in place adequate arrangements for controlling the activities of the appointed representatives and to ensure they complied with the relevant requirements and standards of the regulatory system. Although the appointed representatives were expected to raise issues with you, you did not put in place formal reporting arrangements. For example, apart from asking the appointed representatives to report details of trades, you did not specify the types of issues to be reported, the frequency or the format of any reports. Therefore, it is unclear how you kept informed of issues relating to the appointed representatives on a regular basis and were able to enforce compliance with regulatory obligations.
- 4.17. STG's compliance manual stated that you would monitor the activities of the appointed representatives through monthly compliance reviews, which would involve a structured appraisal of their systems and controls, customer files and call recordings to ensure that they were operating in line with STG's procedures. You did not conduct regular reviews of the appointed representatives' processes and no compliance reports were produced during the relevant period. In addition, you failed to ensure that one appointed representative had in place any call monitoring equipment. Consequently,

you were unable to listen to sales calls to monitor the advising and selling practices of the appointed representative.

- 4.18. As you failed to implement adequate monitoring arrangements over the appointed representatives, you did not appear to have the ability to determine whether they were, and continued to remain, suitable to undertake regulated activities on behalf of STG. This created a serious risk that customers might have received unsuitable investment advice.

Failing to ensure STG's compliance with regulatory requirement and standards

- 4.19. You failed to ensure the suitability of staff employed by STG. STG's training and competency policy stated that it would recruit only experienced and highly competent staff. You stated at an interview with the FSA that STG did not carry out credit checks or obtain references for potential staff until February 2009. Therefore, it is unclear how you were able to determine their suitability if you did not examine their personal and working background.
- 4.20. In addition, although STG had a formal recruitment process, you did not abide by the procedures and, on occasions, recruited staff based on personal connections to the directors, and who had no relevant qualifications or experience. For example, STG employed an individual to perform the role of compliance assistant even though he had no previous compliance experience or qualifications and had never worked in the financial services industry.
- 4.21. You failed to ensure that STG made and retained adequate accounting records. Although STG reviewed cash flow statements and bank statements, it did not prepare any management accounts or balance sheets during the relevant period. Consequently, you were unable to calculate, monitor and determine whether STG had adequate financial resources.
- 4.22. You failed to ensure that STG met its capital resources requirement. According to STG's internal capital adequacy assessment plan dated July 2008, STG was required to maintain capital resources of £39,683. You stated at an interview with the FSA on 4 March 2010 that STG was failing to meet its capital resources requirement at that time. Specifically, STG had a capital resources deficit of £65,683 to £71,683 based on an overdraft of £26,000 to £32,000 as at March 2010.
- 4.23. In addition, you failed to consider whether STG needed to hold additional capital resources after engaging the appointed representatives. STG's internal capital adequacy assessment plan highlighted that additional risks might arise from taking on appointed representatives and STG needed to demonstrate that it had sufficient controls in place. Despite engaging the appointed representatives, you did not assess whether their appointments presented additional risks for the business or consider whether STG had adequate capital resources available to meet potential liabilities arising from business conducted by the appointed representatives.

- 4.24. As a result of your failure to implement adequate compliance controls over STG, the FSA found that STG had breached regulatory requirements and standards during the relevant period.

5. ANALYSIS OF THE MISCONDUCT

- 5.1. The facts and matters described above lead the FSA, having regard to its regulatory objectives which include maintaining confidence in the financial system and the protection of consumers, to conclude that you have failed to satisfy Statements of Principle 6 and 7. Specifically, while acting as a senior manager and performing significant influence functions at STG, you breached:

- (1) Statement of Principle 6 as you failed to exercise due skill, care and diligence in managing the affairs of STG for which you were responsible in that you placed undue reliance on the advice of an external compliance consultant to manage it; and
- (2) Statement of Principle 7 as you failed to take reasonable steps to ensure that STG complied with the relevant requirements and standards of the regulatory system as you did not put in place:
 - (a) adequate monitoring arrangements over STG's appointed representatives; and
 - (b) adequate compliance systems to ensure that STG met regulatory requirements and standards.

- 5.2. Having regard to the facts and matters, the FSA considers it appropriate and proportionate in all the circumstances to take disciplinary action against you for the breaches.

- 5.3. In addition, as a result of the breaches outlined above, the FSA has concluded that your conduct as a director and money laundering reporting officer fell short of the minimum regulatory standards in terms of your competence and capability, and that you are not a fit and proper person to carry out any controlled function involving the exercise of significant influence over any person in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.

- 5.4. The FSA considers that you pose a serious risk to consumers and to confidence in the financial system if you are involved in the running of, or hold a senior management role with, another authorised firm in the future.

6. ANALYSIS OF THE SANCTIONS

Public censure

- 6.1. The FSA's policy in relation to the issue of a public censure is set out in Chapter 6 of the Decision Procedures and Penalties Manual ("DEPP"), which forms part of the FSA Handbook. The relevant sections of DEPP are set out in more detail in the Annex.

- 6.2. The principal purpose of issuing a public censure is to promote high standards of regulatory conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches and demonstrating generally the benefits of compliant behaviour.
- 6.3. DEPP 6.4.2G sets out a list of factors that may be of relevance in determining whether it is appropriate to issue a public censure rather than impose a financial penalty. The factors are not exhaustive and the FSA will consider all the relevant circumstances of the case. The FSA considers that the following factors are particularly relevant in this case.

Deterrence (DEPP 6.4.2G(1))

- 6.4. In determining whether to publish a statement of your misconduct, the FSA has had regard to the need to ensure those who are approved persons exercising management functions act with the appropriate levels of competence and capability and manage their businesses in accordance with regulatory requirements and standards. The FSA considers that a public censure should be imposed to demonstrate to you and others the seriousness with which the FSA regards such behaviour.

The seriousness of the breach (DEPP 6.4.2G(3))

- 6.5. In determining the appropriate sanction, the FSA has had regard to the seriousness of the breaches, including the nature of the requirements breached and the duration of the breach.
- 6.6. The FSA has concluded that you exercised inadequate management and control over the running of STG, which resulted in the business failing to comply with regulatory requirements and standards during the relevant period. In particular, as you failed to ensure that STG's appointed representatives were fit and proper and remained suitable to undertake regulated activities, you put customers at risk of receiving unsuitable investment advice.

Conduct following the breach (DEPP 6.4.2G(5))

- 6.7. You have co-operated with the FSA's investigation.

Previous action taken by the FSA (DEPP 6.4.2G(7))

- 6.8. In determining the appropriate sanction, the FSA has taken into account sanctions imposed by the FSA on other approved persons for similar behaviour. This was considered alongside the deterrent purpose for which the FSA imposes sanctions.

The financial impact on the person concerned (DEPP 6.4.2G(8))

- 6.9. You have breached Statements of Principle 6 and 7. These breaches are serious and the FSA would have imposed a financial penalty of £17,000 on you as a result. However, you have provided verifiable evidence that imposing such a financial penalty would cause you serious financial hardship. Under these exceptional

circumstances, the FSA has decided to publish a statement of your misconduct and censure you publicly instead.

Withdrawal of approval and prohibition

- 6.10. The FSA has concluded that your conduct demonstrated a lack of competence and capability and you are therefore not fit and proper to carry out significant influence functions in relation to any regulated activities carried on by any authorised persons.
- 6.11. It is therefore necessary and proportionate, in order for it to achieve its regulatory objectives, for the FSA to exercise its powers to withdraw your approval to perform controlled functions CF1 (Director) and CF11 (Money laundering reporting) and make the Prohibition Order against you.

7. DECISION MAKERS

- 7.1. 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.

8. IMPORTANT

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

Publicity

- 8.2. Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this Final Notice relates. Under those provisions, the FSA must publish such information about the matter to which this Final 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.
- 8.3. The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

FSA contact

- 8.4. For more information concerning this matter generally, you should contact Anna Hynes of the Enforcement and Financial Crime Division at the FSA (direct line: 020 7066 9464).

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Tom Spender
Head of Department
FSA Enforcement and Financial Crime Division

STATUTORY PROVISIONS, REGULATORY GUIDANCE AND POLICY

1. Statutory provisions

- 1.1. The FSA's regulatory objectives are set out in section 2(2) of the Act and include maintaining confidence in the financial system and the protection of consumers.
- 1.2. Section 56 of the Act provides that the FSA may make a prohibition order 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 carried on by an authorised person. Such an order may relate to a specific regulated activity, an activity falling within a specified description or all regulated activities.
- 1.3. Section 63 of the Act provides that the FSA may withdraw an approval given under section 59 of the Act if it considers that the person in respect of whom it was given is not a fit and proper person to perform the function to which the approval relates.
- 1.4. Section 66 of the Act provides that the FSA may take action to publish a statement of misconduct if it appears to the FSA that the individual is guilty of misconduct and it is satisfied that it is appropriate in all the circumstances to take action. Misconduct includes failure, while an approved person, to comply with a statement of principle issued under section 64 of the Act or to have been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under the Act.

2. Regulatory provisions

- 2.1. In exercising its power to withdraw approval, make a prohibition order and in determining whether to issue a public censure, the FSA has had regard to relevant regulatory guidance and policy published in the FSA's Handbook.
- 2.2. The guidance and policy that the FSA considers relevant to this case is set out below.

Statements of Principle and the Code of Practice for Approved Persons ("APER")

- 2.3. APER sets out the Statements of Principle as they relate to approved persons and descriptions of conduct which, in the opinion of the FSA, do not comply with a Statement 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.
- 2.4. APER 3.1.3G states that when establishing compliance with or a breach of a Statement of Principle, account will be taken of the context in which a course of conduct was undertaken, including the precise circumstances of the individual case, the characteristics of the particular controlled function and the behaviour to be expected in that function.

- 2.5. APER 3.1.4G provides that an approved person will only be in breach of a Statement of Principle where he is personally culpable, that is in a situation where his conduct was deliberate or where his standard of conduct was below that which would be reasonable in all the circumstances.
- 2.6. APER 3.1.6G provides that APER (and in particular the specific examples of behaviour which may be in breach of a generic description of conduct in the code) is not exhaustive of the kind of conduct that may contravene the Statements of Principle.
- 2.7. The Statements of Principle relevant to this matter are:
- (1) Statement of Principle 6 which provides that an approved person performing a significant influence function must exercise due skill, care and diligence in managing the business of the firm for which he is responsible in his controlled function; and
 - (2) Statement of Principle 7 which provides that an approved person performing a significant influence function must take reasonable steps to ensure that the business of the firm for which he is responsible in his controlled function complies with the relevant requirements and standards of the regulatory system.
- 2.8. APER 3.3.1E states that in determining whether or not the conduct of an approved person performing a significant influence complies with Statements of Principle 5 to 7, the following are factors which, in the opinion of the FSA, are to be taken into account:
- (1) whether he exercised reasonable care when considering the information available to him;
 - (2) whether he reached a reasonable conclusion which he acted on;
 - (3) the nature, scale and complexity of the firm's business;
 - (4) his role and responsibility as an approved person performing a significant influence function; and
 - (5) the knowledge he had, or should have had, of regulatory concerns, if any, arising in the business under his control.
- 2.9. APER 4.6 lists types of conduct which, in the opinion of the FSA, do not comply with Statement of Principle 6.
- 2.10. APER 4.6.3E states that failing to take reasonable steps adequately to inform himself about the affairs of the business for which he is responsible is conduct that does not comply with Statement of Principle 6.
- 2.11. APER 4.6.6E states that failing to take reasonable steps to maintain an appropriate level of understanding about an issue or part of the business that he has delegated to an individual or individuals (whether in-house or outside contractors) is conduct that

does not comply with Statement of Principle 6. APER 4.6.7E(1) states that such conduct includes, but is not limited to, disregarding an issue or part of the business once it has been delegated.

- 2.12. APER 4.6.8E states that failing to supervise and monitor adequately the individual or individuals (whether in-house or outside contractors) to whom responsibility for dealing with an issue or authority for dealing with a part of the business has been delegated is conduct that does not comply with Statement of Principle 6. APER 4.6.9E(2) states that such conduct includes, but is not limited to, failing to review the performance of an outside contractor in connection with the delegated issue or business.
- 2.13. APER 4.6.12G(1) provides that it is important for the approved person performing a significant influence function to understand the business for which he is responsible. An approved person performing a significant influence function is unlikely to be an expert in all aspects of a complex financial services business. However, he should understand and inform himself about the business sufficiently to understand the risks of its trading, credit or other business activities.
- 2.14. APER 4.6.14G provides that although an approved person performing a significant influence function may delegate the resolution of an issue, or authority for dealing with a part of the business, he cannot delegate responsibility for it. It is his responsibility to ensure that he receives reports on progress and questions those reports where appropriate.
- 2.15. APER 4.7 lists types of conduct which, in the opinion of the FSA, do not comply with Statement of Principle 7.
- 2.16. APER 4.7.3E states that failing to take reasonable steps to implement (either personally or through a compliance department or other departments) adequate and appropriate systems of control to comply with the relevant requirements and standards of the regulatory system in respect of its regulated activities is conduct that does not comply with Statement of Principle 7.
- 2.17. APER 4.7.4E states that failing to take reasonable steps to monitor (either personally or through a compliance department or other departments) compliance with the relevant requirements and standards of the regulated system in respect of its regulated activities is conduct that does not comply with Statement of Principle 7.

Fit and Proper Test for Approved Persons ("FIT")

- 2.18. The FSA has issued specific guidance on the fitness and propriety of individuals in FIT. The purpose of FIT is to outline the main criteria for assessing the fitness and propriety of a candidate for a controlled function and FIT is also relevant in assessing the continuing fitness and propriety of approved persons.
- 2.19. FIT 1.3.1G provides that the FSA will have regard to a number of factors when assessing a person's fitness and propriety. One of the most important considerations will be a person's competence and capability.

- 2.20. FIT 1.3.3G provides that it would be impossible to produce a definitive list of all the matters which would be relevant to a determination of a particular person's fitness and propriety.
- 2.21. FIT 1.3.4G provides that if a matter comes to the FSA's attention which suggests that the person might not be fit and proper, the FSA will take into account how relevant and how important it is.
- 2.22. FIT 2.2.1G(2) provides that in determining a person's competence and capability, the FSA will have regard to all relevant matters including, but not limited to, whether the person has demonstrated by experience and training that the person is suitable, or will be suitable if approved, to perform the controlled function.

Decision Procedure and Penalties Manual ("DEPP")

- 2.23. Guidance on the issue of public censures is set out in Chapter 6 of DEPP. Changes to DEPP 6 were introduced on 6 March 2010. The FSA has had regard to the appropriate provisions of DEPP that applied during the relevant period.
- 2.24. DEPP 6.1.2G provides that the principal purpose of imposing a financial penalty or issuing a public censure 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 and public censures are therefore tools that the FSA may employ to help it to achieve its regulatory objectives.
- 2.25. DEPP 6.4.1G provides that the FSA will consider all the relevant circumstances of the case when deciding whether to impose a penalty or issue a public censure.
- 2.26. DEPP 6.4.2G sets out a non-exhaustive list of factors that may be of relevance in determining whether it is appropriate to issue a public censure rather than impose a financial penalty, and the factors are similar to those that the FSA will consider in determining the amount of penalty set out in DEPP 6.5. Some particular considerations that may be relevant when the FSA determines whether to issue a public censure rather than impose a financial penalty are:
 - (1) whether or not deterrence may be effectively achieved by issuing a public censure (DEPP 6.4.2G(1));
 - (2) if the person has made a profit or avoided a loss as a result of the breach, this may be a factor in favour of a financial penalty, on the basis that a person should not be permitted to benefit from its breach (DEPP 6.4.2G(2));
 - (3) if the breach is more serious in nature or degree, this may be a factor in favour of a financial penalty, on the basis that the sanction should reflect the seriousness of the breach; other things being equal, the more serious the breach, the more likely the FSA is to impose a financial penalty (DEPP 6.4.2G(3));

- (4) if the person has admitted the breach and provides full and immediate co-operation to the FSA, and takes steps to ensure that those who have suffered loss due to the breach are fully compensated for those losses, this may be a factor in favour of a public censure, rather than a financial penalty, depending upon the nature and seriousness of the breach (DEPP 6.4.2G(5));
- (5) the FSA's approach in similar previous cases: the FSA will seek to achieve a consistent approach to its decisions on whether to impose a financial penalty or issue a public censure (DEPP 6.4.2G(7)); and
- (6) the impact on the person concerned. In exceptional circumstances, if the person has inadequate means (excluding any manipulation or attempted manipulation of their assets) to pay the level of financial penalty which their breach would otherwise attract, this may be a factor in favour of a lower level of penalty or a public statement. However, it would only be in an exceptional case that the FSA would be prepared to agree to issue a public censure rather than impose a financial penalty if a financial penalty would otherwise be the appropriate sanction. Examples of such exceptional cases could include where there is verifiable evidence that a person would suffer serious financial hardship if the FSA imposed a financial penalty (DEPP 6.4.2G(8)(a)).

Enforcement Guide ("EG")

- 2.27. The FSA's approach to exercising its power to withdraw approval and to make a prohibition order under sections 56 and 63 of the Act is set out in Chapter 9 of EG.
- 2.28. EG 9.1 states that the FSA's power under section 56 of the Act to prohibit individuals who are not fit and proper from carrying out controlled functions in relation to regulated activities helps the FSA to work towards achieving its regulatory objectives. The FSA may exercise this power to make a prohibition order where it considers that, to achieve any of those objectives, it is appropriate either to prevent an individual from performing any functions in relation to regulated activities, or to restrict the functions which he may perform.
- 2.29. EG 9.2 states that the FSA's effective use of the power under section 63 of the Act to withdraw approval from an approved person will also help to ensure high standards of regulatory conduct by preventing an approved person from continuing to perform the controlled function to which the approval relates if he is not a fit and proper person to perform that function. Where it considers this is appropriate, the FSA may prohibit an approved person, in addition to withdrawing their approval.
- 2.30. EG 9.4 sets out the general scope of the FSA's power in this respect. The FSA has the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant.
- 2.31. EG 9.5 provides that the scope of the prohibition order will depend on the range of functions which the individual concerned performs in relation to regulated activities, the reasons why he is not fit and proper and the severity of risk which he poses to consumers or the market generally.

- 2.32. EG 9.9 provides that when deciding whether to make a prohibition order against an approved person and/or withdraw its approval, the FSA will consider all the relevant circumstances of the case. These may include, but are not limited to, the following:
- (1) whether the individual is fit and proper to perform the functions in relation to regulated activities. The criteria for assessing the fitness and propriety of approved persons are set out in FIT 2.1 (honesty, integrity and reputation), FIT 2.2 (competence and capability) and FIT 2.3 (financial soundness) (EG 9.9(2));
 - (2) whether, and to what extent, the approved person has failed to comply with the Statements of Principle issued by the FSA with respect to the conduct of approved persons, or been knowingly involved in a contravention by the relevant firm of a requirement imposed on the firm by or under the Act (including the Principles and other rules (EG 9.9(3)(a) and (b)));
 - (3) the relevance and materiality of any matters indicating unfitness (EG 9.9(5));
 - (4) the length of time since the occurrence of any matters indicating unfitness (EG 9.9(6));
 - (5) the particular controlled function the approved person is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates (EG 9.9(7)); and
 - (6) the severity of the risk which the individual poses to consumers and to confidence in the financial system (EG 9.9(8)).
- 2.33. EG 9.12 provides a number of examples of types of behaviour which have previously resulted in the FSA deciding to issue a prohibition order or withdraw the approval of an approved person. The examples include:
- (1) serious lack of competence (EG 9.12(4)); and
 - (2) serious breaches of the Statements of Principle for approved persons (EG 9.12(5)).
- 2.34. EG 9.23 provides that in appropriate cases the FSA may take other action against an individual in addition to making a prohibition order and/or withdrawing its approval, including the use of its power to issue a public censure.