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## FINAL NOTICE

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To: **Robert Middlemiss**

Of: c/o  
Simons Muirhead & Burton  
50 Broadwick Street  
London  
W1F 7AG

Date: **10 February 2004**

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

### THE PENALTY

The FSA gave you, Mr Robert Middlemiss ("Mr Middlemiss"), a Decision Notice dated 9 February 2004 which notified you that, pursuant to section 123 (Power to impose penalties in cases of market abuse) of the Financial Services and Markets Act 2000 ("the Act"), the FSA had decided to impose a financial penalty on you in the amount of £15,000.

On your behalf your solicitor confirmed on 9 February 2004 that you do not intend to refer the matter to the Financial Services and Markets Tribunal.

Accordingly, for the reasons set out below the FSA imposes a financial penalty on you in the amount of £15,000.

### REASONS FOR THE ACTION

#### Introduction

1. The FSA has decided to impose this penalty as a result of Mr Middlemiss' behaviour in relation to the sale, on 26 April 2002, of 70,000 ordinary shares in Profile Media Group plc ("PMG"). At the time Mr Middlemiss sold his shares he was in possession of information indicating a significant shortfall in the performance of PMG's largest subsidiary, Profile Pursuit Inc. ("PPI"), which would impact on the performance of PMG itself.

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

### **Relevant statutory provisions**

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

*" the behaviour is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected."*
6. PMG shares being traded on the Alternative Investment Market ("AIM") are qualifying investments and dealing in shares is behaviour occurring in relation to such investments for the purposes of section 118 of the Act.
7. The term "*regular user*", in relation to a particular market, means "*a reasonable person who regularly deals on that market in investments of the kind in question*" (Section 118(10) of the Act).
8. Under section 119 of the Act the FSA has issued the Code of Market Conduct ("the Code"), which contains guidance as to whether or not behaviour amounts to market abuse. Under section 122 of the Act, the Code may be relied on so far as it indicates whether or not particular behaviour should be taken to amount to market abuse.

### **Findings of Fact**

#### Background

9. PMG, formerly known as London & Edinburgh Publishing Plc ("LEP"), was formed in 1994. It obtained a listing for its ordinary shares on the Alternative Investment Market ("AIM") in 1996.
10. Since 1998, PMG has acquired a number of other companies and now has two main trading

activities, publishing and fulfilment. In April 2000, PMG acquired Profile Pursuit Group (“PPG”) in a reverse takeover and changed its name from LEP to PMG.

11. PPG consists of two trading divisions, Profile Pursuit Limited (“PPL”) and its subsidiaries based in the UK and PPI based in the US. At the material time, April/May 2002, PPI was the most significant subsidiary in the PMG Group.
12. Mr Middlemiss joined PMG in 1997 as Company Secretary. He is a Chartered Accountant with considerable in-house company secretarial experience. In addition to his Company Secretarial duties Mr Middlemiss was, at the material time, responsible for preparing the accounts for two of PMG's subsidiaries, Woodgate Fulfilment (“Woodgate”) and Hazelton Publishing (“Hazelton”), reporting to PMG's Group Financial Director on a project by project basis.

#### Mr. Middlemiss' share trading history

13. Mr Middlemiss purchased 17,000 PMG shares in January 1998.
14. Later that year PMG issued 2003 Convertible Unsecured Loan Stock (“CULS”), which was convertible into PMG ordinary shares at the rate 1:12. Mr Middlemiss increased the mortgage that he held jointly with his wife by borrowing a further £30,000 to purchase 30,000 CULS.
15. In April 2000 and again in March 2001 Mr Middlemiss sold part of his CULS holding thereby utilising his and his wife's Capital Gains Tax (“CGT”) allowance. In each case the transactions were undertaken shortly before the end of the relevant tax year.
16. On each occasion Mr Middlemiss followed PMG’s internal rules relating to employee trading in PMG shares, by seeking permission from PMG's Chief Executive Officer or Financial Director.
17. Later in April 2001 Mr Middlemiss converted his remaining CULS into 274,800 ordinary PMG shares.

#### Events leading to trading announcement by PMG on Thursday 2<sup>nd</sup> May 2002

18. On Monday 15 April 2002 PMG's Chief Executive Officer and Financial Director attended a board meeting of PPI in America. During the course of that meeting it became apparent that PPI was unable to meet its sales targets and a significant fall in revenue for the financial year to 30 June 2002 was projected. While under its budget projections PPI should have been making revenue of US \$14-15m, PPI was now projected to make US \$9m.
19. The Financial Director spent the rest of that week reviewing the projections and decided that, in order to assess their impact on PMG's performance overall, it would be necessary to reforecast the other PMG subsidiaries. During this week no information about PPI's significant fall in revenue projections were made known to any other members of the PMG management team.
20. On Monday 22 April 2002, the Chief Executive Officer and Financial Director returned to PMG's Head Office and informed PMG's Financial Controller about PPI's projected fall in

revenue. In light of this negative information, the Financial Controller was instructed to co-ordinate the urgent reforecasting of the other PMG subsidiaries. To ensure that the negative information about PPI did not leave the Head Office, a “cover story” was devised to give to the PMG subsidiaries, in response to any enquiries about the reason for the urgent reforecasting.

21. Although not formally briefed on PPI's position, during the early part of that week Mr Middlemiss' management colleagues in the PMG Head Office made him aware of the significant fall in PPI's revenues and of the need for urgent reforecasting the other PMG subsidiaries, including Woodgate.
22. During the course of that week, the other PMG subsidiaries supplied the Head Office with updated reforecast figures but these did not resolve the problem arising from the PPI position. PMG's Board was convened to consider this on Friday 26 April 2003. PMG's bankers were also informed that there was likelihood that there would be a substantial revenue shortfall and that banking covenants were likely to be breached.

#### Mr Middlemiss' state of knowledge

23. It appears to the FSA that, during the week beginning 22 April 2002, Mr Middlemiss was aware of the material problems relating to PPI's business performance and finances.
24. Mr Middlemiss has admitted that, although not formally briefed, he was informally told that there were problems with PPI's revenue targets. Colleagues who worked closely with him have stated they find it inconceivable that, during the week beginning 22 April 2002, Mr Middlemiss was not aware of the PPI adverse trading information. During that week Mr Middlemiss was surrounded by reliable and material information about PPI. Mr Middlemiss did not sit in isolation of the events that unfolded during that week. He worked in close proximity to colleagues who were heavily engaged in the reforecasting process, as he was himself.
25. When instructed to reforecast Woodgate, Mr Middlemiss was not given the cover story that his Head Office colleagues had devised for the other subsidiaries because he already knew the true reason for the reforecasting.
26. Mr. Middlemiss knew the significance of PPI in terms of PMG as a whole. He was also aware that three months earlier PMG had issued a trading statement which had followed similar circumstances and this had resulted in a significant fall in the PMG share price.
27. Mr Middlemiss was fully aware of PMG's policy requiring employees to seek prior permission before trading in PMG shares including CULS. On all previous occasions when he had traded in PMG shares and CULS, Mr Middlemiss had complied with this requirement. However, during the week beginning Monday 22 April 2002 he did not seek the appropriate permission. He knew that, had he done so, permission would have been refused.

#### Mr Middlemiss' share transaction

28. On Friday 26 April 2002, at 11.48 am, Mr Middlemiss telephoned his broker and sold 70,000 PMG ordinary shares at 14.5p each. After the broker's commission Mr Middlemiss realised £9,953. Mr Middlemiss did not seek permission from PMG's Chief Executive Officer or Financial Director, as he had done in relation to his previous transactions.

### PMG trading announcement

29. On Thursday 2 May 2002, PMG released a trading statement which stated:

*“In the light of recent trading developments the Board of Profile Media announces today that the financial results of the Group for the year to 30 June 2002 are likely to be materially below expectations...”*

*“This is mainly due to a deterioration in the trading performance of the Group’s publishing businesses caused by a material shortfall in advertising bookings, since the announcement of the interim results on 5 March 2002, and the consequent reduction of revenue for the current year.”*

30. Following the announcement PMG's share price fell from 14.5p to 4.75p.
31. Having dealt on 26 April 2002, Mr Middlemiss avoided a potential loss of £6,825 on the 70,000 PMG ordinary shares that he sold.

### **Market Abuse**

32. It appears to the FSA that Mr Middlemiss' behaviour in selling his PMG ordinary shares on 26 April 2002 amounted to market abuse for the purposes of section 118 of the Act.
33. By reference to the three required elements under section 118(1) of the Act, his behaviour amounted to market abuse in that it:
- (a) occurred in relation to PMG shares, which are qualifying investments traded on AIM which is a prescribed market for the purposes of the Act ;
  - (b) was based on information which was not generally available to those using the market but which, if available to a regular user of the market, would or would have been likely to be regarded by him as relevant when deciding the terms on which transactions in investments in the kind in question should be effected; and
  - (c) is likely to be regarded by a regular user of AIM as a failure on the part of Mr Middlemiss to observe the standards of behaviour reasonably expected of a person in his position in relation to the market.
34. The second and third elements are analysed in more detail in paragraphs 35 to 43.

### Misuse of Information

35. As noted at paragraph 5, behaviour may amount to market abuse where it is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected.
36. As indicated in the Code (at MAR 1.4.4.E), behaviour will amount to market abuse under section 118(2)(a) in circumstances where the behaviour satisfies the following four

circumstances:

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

37. The information which Mr Middlemiss possessed by Friday 26 April 2002, as described in paragraphs 23 to 27, was such as to cause his behaviour to satisfy the tests set out in paragraph 33 for the reasons set out in paragraphs 38 to 41.

*Behaviour based on information*

38. Mr Middlemiss was in possession of information concerning PPI's fall in revenues and therefore relevant information concerning PMG. It appears to the FSA that the PPI information did have a material influence on Mr Middlemiss' decision to deal in the PMG shares for the following reasons:
- (a) Mr Middlemiss sold the shares at a time when he knew that PMG's largest subsidiary was projecting that it would fail to meet its revenue target and there was a strong possibility that PMG would need to make a trading announcement;
  - (b) Mr Middlemiss did not seek permission from PMG to deal in the shares at the material time. During the investigation Mr Middlemiss accepted that he had sought such permission in the past; that he should have sought permission on this occasion and that had he done so permission would have been refused;
  - (c) Mr Middlemiss gave inconsistent and implausible explanations for his dealing, first to PMG's nominated advisers and then later to the FSA in two separate interviews.

*Information not generally available*

39. None of the information concerning PPI and its impact on PMG was generally available. It was information that was only available to Mr Middlemiss because of his position within PMG's Head Office team. PMG's senior management took a decision to keep the information within the Head Office. No information was made available to the other PMG subsidiaries because of concerns that the information would become generally available.

*Relevance of information*

40. The information that Mr Middlemiss had about PPI's position and its impact on PMG was material and current information, from a reliable source, which investors in PMG would regard as relevant when deciding the terms on which to deal in PMG shares.

### *Disclosable information*

41. For the purposes of the Code (MAR 1.4.4E) the information related to matters a regular user would reasonably expect to be disclosed to other users of the market. The information that Mr Middlemiss had about PPI's position and its impact on PMG was information relating to the financial condition of PMG and/or the performance of its business which was required to be disclosed under AIM Rules.

### Failure to observe standards of behaviour

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

### **Financial Penalties**

44. In enforcing the market abuse regime the FSA's priority is to protect prescribed markets from any damage to their efficiency caused by the misuse of information in relation to the market. The effective and appropriate use of the power to impose penalties for market abuse will help to maintain confidence in the UK financial system by demonstrating that high standards of market conduct are appropriately enforced in the UK financial markets. The public enforcement of these standards also furthers the statutory objectives of public awareness, the protection of consumers and the reduction of crime (ENF 14.1.3).
45. In accordance with the FSA's published policy (ENF 14.4) in determining whether to take action in respect of market abuse, and in determining the level of the proposed penalty, the FSA has regard to all the circumstances, including the nature and seriousness of the abuse, the person's conduct following the abuse (including their co-operation with the FSA's investigation), the nature of the market that has been abused, the likelihood of abuse of the same type being repeated and the need to deter such abuse, and the previous history of the person concerned. This is one of the first cases in which the FSA has proposed to impose a financial penalty in respect of market abuse.
46. The FSA has taken all the relevant circumstances into account in deciding that the imposition of a financial penalty in this case is appropriate and that the level of the penalty proposed is proportionate. The FSA has particular regard to the guidance set out in ENF 14.4, 14.6 and

14.7 and to the following considerations:

- (a) Mr Middlemiss avoided a potential loss of £6,825. The FSA would normally seek to impose a penalty that at a minimum deprived Mr Middlemiss of the benefits that he gained from his abusive behaviour;
- (b) investors in shares listed on AIM need to have confidence in the integrity of the processes by which shares are traded on the market. The misuse of information by an employee who obtains relevant information in the course of his employment must undermine investor confidence very seriously. It can result in significant financial gain or, as in this case, the avoidance of a significant loss and yet the detection of such abuse can be very difficult. The FSA therefore considers it essential that the penalty imposed should be such as not only such as to deprive Mr Middlemiss of the benefits gained (that is the loss avoided) by his behaviour but also to act as a powerful incentive to others to refrain from such abuse;
- (c) the seriousness of this case is aggravated by the fact that Mr Middlemiss was at the time PMG's Company Secretary, a position of trust that he still holds;
- (d) Mr Middlemiss' behaviour was deliberate or reckless;
- (e) Mr Middlemiss has no previous history of market misconduct and nor was he an approved person;
- (f) Mr Middlemiss holds a modest portfolio of shares; he does not regularly deal on AIM, or on any other stock market;
- (g) During the FSA's investigation Mr Middlemiss was experiencing some personal difficulties which may have contributed to the inconsistent explanations that he gave for his dealing;
- (h) The FSA recognises that the impact on Mr Middlemiss, as a professionally qualified individual, is likely to be very significant.

## **CONCLUSION**

47. The imposition of a penalty for market abuse is a very serious measure but the seriousness of the abuse in this case is such that the FSA considers the imposition of a penalty in the amount proposed is appropriate. Mr Middlemiss' behaviour merits the imposition of a financial penalty of £20,000; however this has been reduced to £15,000 on account of his financial resources and other personal circumstances.

## **IMPORTANT NOTICES**

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

### **Manner of payment**

The financial penalty of £15,000 must be paid to the FSA in full.

**Time for payment**

The financial penalty is to be paid in three instalments. The first instalment of £7,500 must be paid to the FSA on or before 8 March 2004. The second instalment of £3,750 must be paid to the FSA on or before 31 March 2004. The third and final instalment of £3,750 must be paid to the FSA on or before 30 June 2004.

**If the penalty is not paid**

If all or any part of the instalments are outstanding after the date of agreed payment, the FSA may recover the outstanding amount as a debt owed by you and due to the FSA.

**Publicity**

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 Notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to Mr Middlemiss or prejudicial to the interests of consumers.

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

**FSA contact**

For more information concerning this matter generally, you should contact Ian Brown at the FSA (direct line: 020 7066 1366/fax: 020 7066 1367).

Martyn Hopper  
Head, Market Integrity Group  
Enforcement Division