Financial Services Authority

FINAL NOTICE

To:	**Patrick Francis O'Donnell**	To:	**P3 Wealth Management Limited**
IRN:	**PFD00002**	FRN:	**400498**
Address:	**Rooms 9-11 Elizabeth House, Royal Elizabeth Yard Kirkliston West Lothian EH29 9EN**	Address:	**Rooms 9-11 Elizabeth House, Royal Elizabeth Yard Kirkliston West Lothian EH29 9EN**

Date: **24 April 2012**

TAKE NOTICE: the FSA of 25 The North Colonnade, Canary Wharf, London E14 5HS has taken the following action.

1. ACTION

1.1. For the reasons given in this notice, the FSA hereby:

(1) imposes a financial penalty of £60,000 on Mr O'Donnell pursuant to section 66 of the Act in respect of Mr O'Donnell's contravention of Statements of Principle 2 and 7;

(2) withdraws Mr O'Donnell's approval to perform controlled functions in relation to P3 pursuant to section 63 of the Act; and

(3) makes an order, pursuant to section 56 of the Act, prohibiting Mr O'Donnell from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm because he is not a fit and proper person in that he lacks the necessary competence and capability to continue as an approved person.

1.2. On 25 February 2012, Mr O'Donnell exercised his right to make a reference to the Tribunal about the matters contained in the Decision Notice. On 16 March 2012, Mr O'Donnell withdrew that reference and the Tribunal consented to the withdrawal on 11 April 2012. Accordingly, this order takes effect from 24 April 2012.

2. REASONS FOR THE ACTION

2.1. For the reasons set out in more detail below, the FSA has concluded that Mr O'Donnell's conduct, while acting in his capacity as the sole director and adviser at P3 amounted to breaches of Statements of Principle 2 and 7 and fell below the minimum standards of fitness and propriety required of an approved person under the Act.

2.2. Mr O'Donnell breached Statement of Principle 2 because he failed to exercise due skill, care and diligence in carrying out his customer controlled function (CF30) as an adviser. Specifically, Mr O'Donnell promoted and recommended complex unregulated investments and UCIS to customers without:

(a) an understanding of the restrictions on the promotion of UCIS and/or an understanding of the nature, complexity and risks of the products he recommended;

(b) adequate regard to whether the product recommended met the customer's objectives, including whether the customer was financially able to bear any investment risks. For example, Customer H was retired on ill-health grounds and dependent on state benefits. However, she was advised to invest over 90% of her available pension funds into UCIS and unregulated schemes;

(c) adequate regard to whether the customer had the relevant knowledge and experience to understand the risks involved in the specific type of investments. For example, Customer R was employed as a fork-lift truck driver and his wife as an administrator and the couple's sole investment comprised a protection plan for their repayment mortgage. They were advised to invest the entirety of their known pension funds into unregulated schemes and UCIS; and

(d) taking reasonable steps to ensure he obtained the necessary information about customers to whom he made a personal recommendation. For example, Customer A earned £29,000 per annum, had two life policies and invested over £25,000 in UCIS. All documentation on the customer file related to her husband. There is no record of Customer A's attitude to risk, her investment objectives or financial circumstances.

2.3. The impact of Mr O'Donnell's failure to take adequate steps to ensure that the personal recommendations he made were suitable for his customers was serious and gave rise to a significant risk that unsuitable recommendations were made and products missold.

2.4. Mr O'Donnell breached Statement of Principle 7 because he failed to take reasonable steps to ensure that P3 complied with the relevant requirements and standards of the

regulatory system. Specifically, whilst acting as the sole director of P3, Mr O'Donnell failed to ensure that:

(1) P3 complied with the statutory and regulatory restrictions on the promotion of UCIS;

(2) P3 complied with the FSA's rules and requirements when he advised on the transfer of personal pensions; and

(3) adequate customer file and business records were maintained at P3, including customer files relating to P3's mortgage intermediary business; and

(4) recommendations made by P3's compliance consultant for improvements to P3's systems and procedures, including regular checking of customer files, were implemented in a timely manner.

2.5. Mr O'Donnell's failures were aggravated by his conduct in:

(1) permitting £185,306 of UCIS and unregulated scheme business to be completed four days before he submitted a variation of permission application in which he agreed that P3 would cease conducting UCIS business. This increased significantly the total sums of customers' money placed at risk in circumstances in which Mr O'Donnell was aware of the FSA's concerns regarding the suitability of his personal recommendations; and

(2) completing investment applications on behalf of two P3 customers after he had submitted a variation of permission application in which he agreed that P3 would cease conducting UCIS business.

3. DEFINITIONS

3.1. The definitions below are used in this Decision Notice.

(1) the "Act" means the Financial Services and Markets Act 2000.

(2) "COBS" means the FSA's Conduct of Business Handbook.

(3) "Company P" is a pension provider (SIPP) with which Mr O'Donnell habitually placed customers in order for them to have access to the UCIS and unregulated schemes which he advised and promoted.

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

(5) "EG" means the Enforcement Guide.

(6) the "FPA" means a Financial Planning Analysis form used by P3 the purpose of which was to record information about the customer.

(7) the "FSA" means the Financial Services Authority.

(8) "FSCS" means Financial Services Compensation Scheme.

(9) "I#3" means an unregulated closed ended investment company (closed in June 2009) into which Mr O'Donnell advised customers to invest. Customers received preference shares in I#3 proportionate to the sum invested.

(10) "I#4" means an unregulated closed ended investment company (closed in December 2009) into which Mr O'Donnell advised customers to invest. Customers received preference shares in I#4 proportionate to the sum invested.

(11) "KYC" means Know Your Customer.

(12) "Mr O'Donnell" means Mr Patrick Francis O'Donnell.

(13) "P3" means P3 Wealth Management Limited.

(14) the "PCIS Order" means the Financial Services and Markets Act 2000 (Promotion of collective investment schemes) (Exemptions) Order 2001.

(15) the "Section 238 Restriction" means the provision of section 238(1) of the Act which states that an authorised person must not communicate an invitation or inducement to participate in a collective investment scheme (which includes a UCIS) except in prescribed circumstances.

(16) the "Statements of Principle" mean the FSA's Statements of Principle and Code of Practice for Approved Persons.

(17) "UCIS" means an unregulated collective investment scheme.

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

4. RELEVANT STATUTORY PROVISIONS, REGULATORY REQUIREMENTS AND GUIDANCE

4.1. The statutory provisions, regulatory requirements and guidance relevant to this Notice are set out in Annex A.

5. FACTS AND MATTERS RELIED ON

Background

5.1. P3 was a small IFA firm based in West Lothian, Scotland and was approved by the FSA with effect from 3 August 2004.

5.2. Mr O'Donnell was the sole director and only approved person performing significant influence functions at P3. Until December 2008, P3's principal business was advising on mortgage contracts. It then switched its focus to investments during 2009.

5.3. During the period from 27 November 2008 to 4 December 2009, Mr O'Donnell was the only investment adviser at P3. He visited approximately 150 investment customers to discuss investing in UCIS and other unregulated schemes; 57 of these customers invested in one or more UCIS and/or unregulated schemes.

5.4. In addition to customer visits, Mr O'Donnell promoted UCIS by handing out a flyer at marketing and networking events and had that flyer on display at P3's office, where it could be picked up by customers. The flyer was also published on P3's website.

5.5. The first completed UCIS transaction took place on 15 December 2008 and the last on 30 November 2009. Of the 57 customers who invested in UCIS promoted by Mr O'Donnell, 14 customers also invested in schemes, I#3 and I#4, which were unregulated investment schemes but which Mr O'Donnell believed were UCIS at the time he promoted them and/or made personal recommendations in respect of them.

5.6. In September 2009, P3 was selected by the FSA to take part in its "Treating Customers Fairly" assessment programme. On 27 October 2009 the FSA visited P3

and prior to the visit the FSA randomly selected 19 customer files for review. The FSA then reviewed 8 cases during their visit on 27 October 2009. The FSA noted the absence of key information on the customer files which would otherwise have demonstrated how UCIS had been promoted in light of the Section 238 Restriction (and the statutory and regulatory exemptions to the Section 238 Restriction). The FSA also had concerns regarding the suitability of the advice.

5.7. On 13 November 2009, the FSA asked P3 to apply to vary its permission to cease conducting UCIS business as a result of serious concerns around its promotion and advice on UCIS and other unregulated schemes. P3 agreed to make a voluntary application to vary its permission and cease conducting UCIS business. Also on 13 November 2009, the FSA wrote to Mr O'Donnell confirming the above and requesting a response from Mr O'Donnell by 20 November 2009.

5.8. On 25 November 2009, the FSA confirmed it had not received a response to its letter of 13 November 2009 regarding the voluntary variation of permission form. On 27 November 2009, the FSA again wrote to request the submission of the voluntary variation of permission form and in another letter of the same date again set out its concerns in relation to the promotion of UCIS and the suitability of the personal recommendations made by Mr O'Donnell.

5.9. P3 did not submit the requisite variation of permission form until 4 December 2009 Significantly, four days prior, on 30 November 2009, Mr O'Donnell permitted £185,306 of UCIS and unregulated scheme business to be completed.

The promotion of UCIS

5.10. From evidence gathered by the FSA during its supervisory visit, Mr O'Donnell was, at that time, largely unaware of the Section 238 Restriction on the promotion of UCIS to retail customers and did not understand the exemptions to this restriction. In particular, COBS 4.12.1R states that a firm may communicate an invitation or inducement to participate in an unregulated collective investment scheme without breaching the Section 238 Restriction if the promotion falls within particular exemptions explained therein.

5.11. On 25 May 2010 (some seven months after the supervisory visit), during a compelled interview, Mr O'Donnell was able to identify that there were rules relating to the marketing of UCIS which related to high net worth individuals or sophisticated investors and that there were COBS rules which applied. However, when it came to the application of exemptions Mr O'Donnell initially admitted that he didn't consider the application of those exemptions and only after consulting his legal representative, was Mr O'Donnell able to state that he applied the exemptions in COBS 4.12.1R.

5.12. Mr O'Donnell stated that he applied the Category 2 exemption under COBS 4.12.1R. A Category 2 exemption applies to a person for whom a firm has taken reasonable steps to ensure that investment in the collective investment scheme is suitable; and who is an 'established' or 'newly accepted' customer of the firm or of a person in the same group as the firm.

5.13. There is no evidence that Mr O'Donnell understood that the Category 2 exemption under COBS 4.12.1R comprises two elements. Firstly Mr O'Donnell was required to assess whether the particular UCIS product was suitable before he promoted it to the customer. Mr O'Donnell assessed the suitability of a particular UCIS *during his discussion with the customer* and the conversation around the product informed his view of whether or not it was something the customer was interested in or not. The extent to which suitability was adequately assessed is dealt with in paragraphs 5.21 to 5.45 below.

5.14. Secondly, the customer must be either an 'established' or a 'newly accepted' customer of the firm. This requires P3 to have entered into a written agreement with the customer which related to the provision of designated investment business. This written agreement must have been obtained without breaching the rules regarding the promotion of UCIS. However, Mr O'Donnell had not retained a copy of any customer agreements because he contended it was not a regulatory requirement. This is corroborated by the nine customer files (for 15 customers) reviewed by the FSA - none of the files contained a customer agreement.

5.15. In three of the nine customer files reviewed by the FSA, there was a 'sophisticated investor certificate' on file which had been signed by Mr O'Donnell and the relevant customer. These certificates were required to be provided by Company P.

5.16. Under the PCIS Order, an unregulated collective scheme may be promoted to certain types of individual provided conditions/exemptions set out in the PCIS Order are met. One of the exemptions applies to 'sophisticated investors'. A certified sophisticated investor is a person who has a certificate signed by an authorised person confirming he is sufficiently knowledgeable to understand the risks associate with an unregulated scheme and who has also signed a statement in the terms set out in the PCIS Order. The statement the customer signs must be accompanied by an indication of the requirements for the customer to qualify as a 'sophisticated investor' and a risk warning. Importantly, the appropriately worded certificate must be signed by both the customer and the authorised person doing the 'certifying' before the promotion is made.

5.17. The wording of the certificates signed by Mr O'Donnell and the three customers referred to above did not follow that required by the PCIS Order. They were also not accompanied by the information required by the PCIS Order. Further, in all three cases the certificates were dated after the relevant promotions had been made. In one of the three, the customer who had signed the certificate, Customer C, had not actually invested in UCIS. Customer C's partner, customer DA, had invested in UCIS but had not signed a certificate.

5.18. Such information about the 15 customers as is contained in the nine customer files, shows that none of these customers could reasonably be considered, on a natural meaning of the word, 'sophisticated' investors. With one exception all the customers were basic-rate tax payers and only five had investments other than pension and life policies.

5.19. In the case of Customer H, Mr O'Donnell relied on the Category 1 exemption in COBS 4.12.1R in order to promote subsequent UCIS investments to her. A Category 1 exemption applies to a person who is already a participant in an unregulated collective investment scheme; or a person who has been, in the last 30 months, a participant in an unregulated collective investment scheme. However, the initial UCIS was not compliantly promoted and the new UCIS was not sufficiently similar to the initial UCIS in order for this exemption to be successfully applied.

5.20. Accordingly, during the period from 27 November 2008 to 4 December 2009, P3 promoted UCIS in breach of the Section 238 Restriction. This was due to Mr O'Donnell's lack of understanding of the restrictions on the promotion of UCIS (or the reasons for such restrictions) and despite Company P's requirement for 'sophisticated investor certificates' which should reasonably have alerted him to the fact that these were products only suitable for such individuals.

Suitability of advice

5.21. The FSA reviewed nine customer files dealing with personal recommendations by Mr O'Donnell to 15 customers. These recommendations related to five different UCIS and two unregulated schemes. The majority of these investments were funded by transfers from existing pension schemes that Mr O'Donnell's customers had in place.

5.22. Mr O'Donnell breached Statement of Principle 2 because he failed to take reasonable steps to ensure that his personal recommendations to customers were suitable. The FSA has concluded that Mr O'Donnell failed to have regard to his customers':

(1) financial situation;

(2) investment objectives;

(3) attitude to risk; or

(4) knowledge and experience

such that Mr O'Donnell's customers were unable to understand the risks involved in the relevant transactions.

The customers' financial situation

5.23. Of the 15 customers, only one was, at the point of sale, a higher-rate tax payer. Only three of the 15 customers earned more than £25,000 per annum. Customer H had retired due to ill-health and was dependent on state benefits and her husband. Customer R earned £25,000 as a forklift truck driver and his wife received £7,200, per annum.

5.24. Customer F (and possibly her husband) might have been capable of falling within the exemption for 'high net worth' individuals in the PCIS Order due to their existing assets and the number of properties they owned. However, this exemption could not have been used by Mr O'Donnell to promote UCIS compliantly to this couple as the UCIS he promoted did not fall within the (relatively narrow) class of UCIS to which this exemption is applicable. In any event, the financial information recorded on the customer file was insufficient for the customers' net asset position (jointly or individually) to be determined.

5.25. Six of the nine customer files reviewed contained an incomplete record of the customers' financial situation. For example:

(1) the FPA for Customer S stated that he had recently been made redundant and contained no details of income by him or his wife. A suitability letter drafted by Mr O'Donnell the following year states that he was employed with an annual income of £35,000. It is possible that Customer S had become employed in the interim but this is not reflected on the customer file;

(2) both Customer S and his wife separately invested in UCIS. There are no documents on the wife's customer file to record her income, objectives, experience, attitude to risk or why this investment was suitable for her;

(3) Customer F was advised to invest in UCIS C and a report was produced for her in January 2009. The investment was made a month later. However, the FPA for Customer F was not completed until April 2009, some 2 months after the investment was made. There may have been earlier discussions or an earlier FPA but these were not contained on the customer file.

The customers' investment objectives

5.26. Mr O'Donnell used standardised investment objectives in making personal recommendations for UCIS and unregulated schemes. Those customers who invested in the same schemes often had different personal and financial circumstances. However, in each case, with very little variation, the customers' suitability letters and pension performance reviews contained the same investment objectives. Customer F was an administrator earning £8,000 per annum. Her husband was a higher-rate tax

payer and together they owned 44 buy-to-let properties, in addition to their principal residence. They also had existing investments of £100,000. Customer F's stated objectives in relation to the I#3 scheme were almost identical to those of Customer T. Customer T earned £10,400 per annum and had one dependent son. She was 39 years old, her only existing investment was a personal pension into which she paid £125 per month. Customer T was also advised by Mr O'Donnell to invest in I#3.

5.27. Customer A was also advised to invest in I#3. He was provided with an investment report for the scheme recording his objectives. According to the investment report, Customer A's objectives included investing in an asset class with low or no correlation to the stock market. Of the seven reports for I#3 reviewed by the FSA, six had exactly the same objectives as Customer A.

5.28. In respect of UCIS SM, Mr O'Donnell made a personal recommendation to Customer W to invest in this scheme. However, he did so prior to completing his own due diligence on this scheme.

5.29. Of the nine files reviewed, none held evidence of comparisons between the UCIS and unregulated schemes recommended and a regulated alternative. There was no evidence (on the files reviewed) of research into alternatives. Mr O'Donnell stated research material was held centrally, however, this material does not evidence independent analysis of the schemes recommended or comparisons with regulated products.

5.30. In respect of the UCIS C, Mr O'Donnell made personal recommendations to customers about the scheme prior to being in receipt of its first quarterly performance report and based solely on the information contained in the Information Memorandum. The Information Memorandum described the scheme as a medium term investment. However, Mr O'Donnell described it as a 'holding bay', indicating he viewed it as a short term investment.

The customers' attitude to risk

5.31. In seven of the customers files reviewed, there were discrepancies in the descriptions of the customers' attitude to risk. Frequently, the customers' recorded attitudes to risk varied across different documents, sometimes it appeared to develop towards a

high position from an initial low/moderate position and often the recorded attitude to risk bore little correlation to the risk profile of the investment product recommended.

5.32. In the case of Customer F, her attitude to risk was variously described in different documents as low, medium, medium/high and high. Specifically, the suitability letter for entering a SIPP with Company P stated that Customer F wished to reduce her exposure to equities as she was of the view that her money would be safer in cash in the short term. Customer F invested in 84% of her known funds across three unregulated funds including one UCIS. One of these was an investment in I#3, a type of preference share investment. In the investment report for Scheme C, Mr O'Donnell described Customer F's attitude to risk as "high".

5.33. Customer A stated he could tolerate a 5-10% loss before moving his investments. Mr O'Donnell described Customer A as a 'moderate aggressive' investor, requiring a broad selection of mainly UK based equities where capital return may be limited to compensation limits. Customer A was advised to place 100% of the funds available to Mr O'Donnell and 37.4% of his known pension funds in I#3. As I#3 was a type of preference share investment, it was suitable only for those who could assume the risk of losing their entire investment. It was not covered by FSCS.

5.34. The I#3 report presented to Customer A stated that I#3 was not covered by FSCS and carried a risk of a total capital loss but not until pages 11 and 13 of 16 and these significant factors were not mentioned in the 'General Risk Warnings' section on page 2. The FSA has concluded that there is a significant risk that the product recommended does not match Customer A's attitude to risk or the descriptions set out by Mr O'Donnell in the customer documentation provided.

5.35. The UCIS and unregulated funds recommended by Mr O'Donnell products were only suitable for customers with an aggressive attitude to risk or a high risk tolerance. With the exception of UCIS C, all the products Mr O'Donnell recommended carried the risk of a total loss of capital. Mr O'Donnell explained the products to customers in meetings in order to ensure they understood the products. However, there was a significant risk that Mr O'Donnell advised customers to purchase products that did not match their real attitude to risk.

The customers' knowledge and experience

5.36. None of the files reviewed by the FSA contained evidence to support a conclusion that the relevant customers had knowledge and experience of the types of investments that Mr O'Donnell recommended to them. Of the nine files (for 15 customers) reviewed by the FSA, only five customers had any investments additional to a life policy or pension with a standard provider (such as might be expected with a home owner).

5.37. Mr O'Donnell accepted that his customers were not experienced or sophisticated investors. However he stated that he discussed the funds with his customers in order that they might understand the funds and to educate them.

5.38. Customer S was previously employed with a large company and had recently been made redundant. He had a life policy and an occupational pension which he transferred into a SIPP with Company P in order to access the unregulated funds. He was advised to place 77% of his known pension funds into UCIS C, UCIS A and the unregulated fund, I#3. The investment report stated that Customer S was not a sophisticated investor but was satisfied he understood the risks of these investments.

5.39. Customer H was a cautious investor, seeking to reduce her exposure to equities, with the objective of providing her husband with benefits in the event of her death. She had no life assurance or savings. Her husband earned £24,500 as a baggage handler and he also had no savings or life assurance. She had an occupational pension. Customer H invested 94% of her known assets in unregulated schemes.

5.40. Customer F had 44 buy-to-let properties held jointly with her husband. She earned just under £10,000 as an administrator and also had ISAs and other investments which may have included regulated collective investment schemes.

5.41. Mr O'Donnell placed too much reliance on his discussions with the customer and to proxy indicators, such as the customer being a company director or owning buy-to-let properties, in determining whether the customer should be able to understand and tolerate the investment risk presented by these schemes.

5.42. There was a high risk that Mr O'Donnell's discussions with customers were insufficient as it appears he himself did not adequately understand the risks of the schemes on which he advised in order for such explanations to be reasonably sufficient. In particular he:

(1) described UCIS C as low risk with a guaranteed return. However, all the funds were invested in one type of asset, the capital guarantee was dependent on the solvency of a firm on which Mr O'Donnell does not appear to have conducted any due diligence and it was not covered by the Financial Services Compensation Scheme;

(2) appeared to be unaware that the due diligence on UCIS A and UCIS AH carried out by an introducer was performed on the parent company and not on the schemes themselves;

(3) understood that all the schemes recommended related to property, something he and his customers understood and it was safer than FTSE-linked investments. However, UCIS G, in which six of his customers invested, invested in futures in listed companies and the offer document specifically stated that UCIS G would not invest in land.

(4) appeared not to have understood the charging structure of I#3 and I#4 as he stated that the investors got the first 30% increase in the net asset value of the fund before any charge. In fact, a fixed closing fee, administration fees and annual investment adviser fees would be incurred and paid regardless of the funds' performance. Mr O'Donnell also described I#3 and I#4 as a two year deal. He did not understand that it was open to the ordinary shareholders to extend the termination date beyond two years (which has already occurred).

Personal pensions

5.43. Seven out of the nine customer files reviewed reveal that the relevant customers had invested in UCIS and unregulated funds using pension funds. Where Mr O'Donnell advised on the transfer to a different personal pension provider in order to be able to invest in these specific funds, the advice to transfer should have been suitable for the relevant customers and the customer files should have evidenced this.

5.44. Of the files reviewed, three customers had small pension funds which were worth less than £33,000. The largest pension pot was worth £139,586. These customers were advised to accept a significantly higher investment risk in exchange for the possibility of greatly increasing their pension provision in circumstances in which the suitability reports did not adequately explain why the particular pension provider was suitable for the customers.

5.45. In the majority of cases it appears the pension provider was recommended for their access to the specific UCIS and unregulated funds that Mr O'Donnell advised on. For example:

(1) Customer R was initially advised against entering into a SIPP, however a month later Mr O'Donnell advised him to enter into a SIPP with Company P to gain access to I#3;

(2) Customer W held an occupational pension and was advised by an independent pensions adviser to retain it. Customer W stated that Mr O'Donnell advised him the pensions adviser was naturally cautious and he subsequently chose to pursue the transfer to gain access to the specific UCIS and unregulated funds recommended by Mr O'Donnell. The suitability letter did not adequately deal with the reasons why these investments were suitable for Customer W; and

(3) Customer T consolidated her three personal pensions on Mr O'Donnell's advice. Mr O'Donnell initially advised Customer T that a SIPP would not be appropriate as she would not utilise the wide range of funds. Two months later he advised her to transfer into a SIPP with Company P to permit her to invest in I#3.

Record keeping

5.46. The overall level of record keeping on the customer files was inadequate. The record keeping requirements set out in COBS vary across the different products on which Mr O'Donnell was advising. However, given the complexity and high-risk nature of the underlying products and the inexperience and financial background of the customers he advised, the FSA considers that Mr O'Donnell should have applied the most

stringent levels of record keeping to the customer files in order to be able to demonstrate that the advice he gave his customers was suitable.

5.47. In particular, in the nine customer files reviewed:

(a) there were no terms of business such as to establish whether those customers to whom UCIS was recommended were "established" customers for the purposes of the COBS 4.12R Category 2 exemption;

(b) the FPA documentation for most customers was incomplete and, in some of the cases reviewed, did not separate out husband and wife despite the variance in financial position between husband and wife and the differing investments made;

(c) such risk analysis documentation as was contained on the files, set out varying attitudes to risk across a number of different documents in relation to a number of different products making it difficult to establish the customer's true attitude to risk for the specific product recommended (i.e. it is unclear whether the attitude to risk related to the transfer of the personal pension or the specific unregulated scheme recommended as the underlying investment);

(d) files often did not contain Key Facts Illustrations, suitability letters or comparison material for every part of the transaction. For example, where a customer had transferred their personal pension, such suitability letters as were contained on the file related only to the underlying pension investment and not to the transfer of the pension itself;

(e) the files did not contain a complete and coherent record of the transactions the customer had entered into.

5.48. P3 was repeatedly advised to improve the record keeping on its customer files by its compliance consultant and persistently failed to act on these recommendations. This included persistent failures detailed in compliance reports (in relation to both mortgage and investment customer files) regarding out of date or missing fact finds,

missing suitability letters and inadequate records of a customer's financial circumstances such as to enable an assessment of affordability to be made.

5.49. In terms of general record keeping, the pensions information provided to the FSA was incomplete as was the new business register. P3 also could not provide the FSA with a complete set of the compliance consultant's reports and appendices or the terms and conditions agreements entered into with the customers.

Compliance

5.50. The failings by Mr O'Donnell regarding the promotion of UCIS, the record keeping failures and the risk that P3 may have made unsuitable sales were made in the context of repeated failures by Mr O'Donnell to act on the advice of P3's compliance consultant.

5.51. The compliance consultant had made a number of findings and recommendations as part of their ongoing reviews, such recommendations and findings were often reiterated in subsequent reports as a result of the failure of P3 to follow up on these recommendations. In particular, the compliance consultant repeatedly identified the failure of P3 to record within the files evidence to demonstrate why the advice given was suitable.

5.52. Mr O'Donnell appears to have attached little import to the findings by P3's compliance consultant. He informed the FSA that where the compliance consultant had raised issues he would endeavour to get things done but it depended what was going on and how much time he had available to work on compliance issues.

5.53. As already noted above, P3 could not provide the FSA with a complete set of the compliance consultant's reports and appendices or the terms and conditions agreements entered into with the customers.

6. REPRESENTATIONS, FINDINGS AND CONCLUSIONS

Representations

6.1. Below is a summary of the key representations made by Mr O'Donnell in this matter and how they have been dealt with. In making the decision which gave rise to the obligation to give this Final Notice, the FSA took into account all of Mr O'Donnell's representations, whether or not explicitly set out below.

6.2. Mr O'Donnell did not seek to contest the alleged breaches in so far as they related to his promotion and recommendation of complex unregulated investments and UCIS.

6.3. Mr O'Donnell accepted that:

(1) "he was by and large, unaware of the statutory requirements and regulatory imperatives" relating to the promotion and recommendation of complex unregulated investments and UCIS; and

(2) his conduct was in breach of the Section 238 Restriction; and

(3) he could not rely on any of the exemptions in the PCIS Order.

6.4. Mr O'Donnell maintained that he honestly and sincerely believed he was doing the best for his customers when he promoted and recommended complex unregulated investments and UCIS to them.

6.5. Notwithstanding the above, Mr O'Donnell submitted that he should not be prohibited from working as a mortgage intermediary because:

(1) he is (and always has been) a competent mortgage intermediary; and

(2) his overall level of record keeping on the customer files is (and always was) adequate although he accepts that his record keeping is "by no means perfect".

6.6. Mr O'Donnell also submitted that the financial penalty of £60,000 is disproportionate in all the circumstances (and especially if he is prohibited from working as a mortgage intermediary).

6.7. Mr O'Donnell stated that even if he is able to continue working as a mortgage intermediary, the impact of the financial penalty of £60,000 on him will be "catastrophic" as the income he is capable of deriving from a mortgage intermediation business is at best marginal in the current market conditions. Mr O'Donnell asserted that the detailed statement of means form he provided to the FSA demonstrates that the imposition of a financial penalty of £60,000 would cause him severe and undue financial hardship.

6.8. Finally, during his oral representations meeting, Mr O'Donnell admitted that he completed investment applications on behalf of two P3 customers after he had submitted a variation of permission application in which he agreed that P3 would cease conducting UCIS business. Mr O'Donnell was unable to provide any reasons for his actions in this regard.

Findings

6.9. The FSA noted that Mr O'Donnell did not seek to contest the alleged breaches in so far as they related to his promotion and recommendation of complex unregulated investments and UCIS.

6.10. The FSA found that Mr O'Donnell failed to take adequate steps to ensure that the personal recommendations he made were suitable for his customers. In particular, Mr O'Donnell promoted and recommended complex unregulated investments and UCIS to customers without:

(a) an understanding of the restrictions on the promotion of UCIS and/or the nature, complexity and risks of the products he recommended;

(b) adequate regard to whether the product recommended met the customer's objectives, including whether the customer was financially able to bear any investment risks;

(c) adequate regard to whether the customer had the relevant knowledge and experience to understand the risks involved in the specific type of investments; and

(d) taking reasonable steps to ensure he obtained the necessary information about customers to whom he made a personal recommendation.

6.11. The FSA accepted that Mr O'Donnell may have honestly and sincerely believed he was doing the best for his customers when he promoted and recommended complex unregulated investments and UCIS to them.

6.12. However, Mr O'Donnell did not appear to understand that:

(1) as a result of his advice, just under two thirds of those customers reviewed by the FSA invested over 75% of their known available funds into UCIS and other unregulated schemes. None of these schemes are covered by FSCS and all of them carry a risk of potential loss of capital; and

(2) the impact of his actions was serious and gave rise to a significant risk that unsuitable recommendations were made and products missold to customers, some of whom were vulnerable individuals.

6.13. Accordingly, the FSA found that Mr O'Donnell breached Statement of Principle 2 because he failed to exercise due skill, care and diligence in carrying out his customer controlled function (CF30) as an adviser.

6.14. The FSA also found that Mr O'Donnell breached Statement of Principle 7 as he failed to take reasonable steps to ensure that P3 complied with the relevant requirements and standards of the regulatory system. Specifically, whilst acting as the sole director of P3, Mr O'Donnell failed to ensure that:

(1) P3 complied with the statutory and regulatory restrictions on the promotion of UCIS;

(2) P3 complied with the FSA's rules and requirements when he advised on the transfer of personal pensions;

(3) adequate customer file and business records were maintained at P3 including customer files relating to P3's mortgage intermediary business; and

(4) recommendations made by P3's compliance consultant for improvements to P3's systems and procedures, including regular checking of customer files, were implemented in a timely manner.

6.15. The FSA considers that Mr O'Donnell's failures were aggravated by his conduct in:

(1) permitting £185,306 of UCIS and unregulated scheme business to be completed four days before he submitted a variation of permission application in which he agreed that P3 would cease conducting UCIS business. This increased significantly the total sums of customers' money placed at risk in circumstances in which Mr O'Donnell was aware of the FSA's concerns regarding the suitability of his personal recommendations; and

(2) completing investment applications on behalf of two P3 customers after he had submitted a variation of permission application in which he agreed that P3 would cease conducting UCIS business.

Conclusion

6.16. The FSA has concluded (for the reasons set out above) that Mr O'Donnell has demonstrated a serious lack of competence and capability and the FSA considers that he does not meet the minimum standards of fitness and propriety required to remain an approved person under the Act.

6.17. In light of its findings, the FSA considers that the imposition of a financial penalty of £60,000 and full prohibition against Mr O'Donnell is both justified and proportionate in all the circumstances and supports the FSA's regulatory objectives of maintaining market confidence and the protection of consumers. In making this decision, the FSA has taken into account (in paragraphs 7.1 to 7.23 below) all of Mr O'Donnell's representations regarding the appropriateness of the sanction.

7. SANCTION

Imposition of financial penalty

7.1. The FSA's policy on the imposition of financial penalties relevant to the misconduct as detailed in this Notice is set out in Chapter 6 of the version of DEPP in force prior

to 6 March 2010, which formed part of the FSA Handbook. All references to DEPP in this section are references to that version of DEPP.

7.2. The principal purpose of imposing a financial penalty 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 providing an incentive for compliant behaviour.

7.3. In determining whether a financial penalty is appropriate the FSA is required to consider all the relevant circumstances of a case.

7.4. 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 are particularly relevant in this case.

Deterrence (DEPP 6.5.2(1))

7.5. In determining the level of the financial penalty, the FSA has had regard to the need to ensure those who are approved persons exercising significant influence functions act in accordance with regulatory requirements and standards. The FSA considers that a penalty should be imposed to demonstrate to Mr O'Donnell and others the seriousness of failing to meet these requirements

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

7.6. As a result of Mr O'Donnell's breaches, P3 exposed retail customers to a serious risk that the personal recommendations made were unsuitable having regard to their financial circumstances, attitude to risk, investment objectives, and knowledge and experience. Consequently, these customers have invested significant proportions of their available assets in complex schemes which place them at risk of losing their entire investment which, for almost all of the customers reviewed, would be a loss they could not bear financially.

7.7. The FSA has also taken into account the fact that Mr O'Donnell:

(1) permitted the sums invested by P3's customers in UCIS and unregulated schemes to increase when on 30 November 2009 he permitted £185,306 of unregulated transactions to be completed; and

(2) completed investment applications on behalf of two P3 customers after he had submitted a variation of permission application in which he agreed that P3 would cease conducting UCIS business.

The FSA considers these actions aggravate the seriousness and impact of the breaches.

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

7.8. The FSA has concluded that Mr O'Donnell did not wilfully or intentionally place customers at risk. It has therefore concluded that the contraventions were not deliberate but arose primarily from his own lack of understanding about these schemes. However, the FSA considers that the nature of his actions (and inaction) as set out in this Notice amounts to serious misconduct. In particular, the FSA considers Mr O'Donnell's actions in completing investment applications on behalf of two P3 customers after he had submitted a variation of permission application in which he agreed that P3 would cease conducting UCIS business to be particularly serious.

7.9. The FSA notes that Mr O'Donnell actively sought compliance advice from a third party. However, he then failed to take account or implement the recommendations made.

Whether the person on whom the penalty is to be imposed is an individual (DEPP 6.5.2(4))

7.10. When determining the appropriate level of financial penalty, the FSA will take into account that individuals will not always have the same resources as a body corporate, that enforcement action may have a greater impact on an individual, and further, that it may be possible to achieve effective deterrence by imposing a smaller penalty on an individual than a body corporate. The FSA will also consider whether the status,

position and/or responsibilities of the individual are such as to make a breach committed by the individual more serious and whether the penalty should therefore be set at a higher level.

7.11. The FSA recognises that the financial penalty imposed on Mr O'Donnell is likely to have a significant impact on him as an individual but considers it to be proportionate in relation to the seriousness of his misconduct and as the only approved person performing a significant influence function at P3.

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

7.12. The FSA considers that a financial penalty of the level proposed is appropriate, having taken account of all relevant factors, including the statement of means Mr O'Donnell has submitted and the resources available to him.

7.13. The FSA notes that Mr O'Donnell failed to provide any evidence that the imposition of a financial penalty of the level proposed will cause him serious financial hardship.

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

7.14. P3 received an upfront commission and an ongoing annual fee based on a percentage of customers' funds that it transferred into new pensions arrangements. In addition, P3 has also received commission payments from some of the schemes it has recommended.

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

7.15. The FSA has taken into account Mr O'Donnell's conduct since the breach (including Mr O'Donnell's co-operation with the FSA's investigation).

7.16. Mr O'Donnell continued to assist customers to reinvest in the UCIS he originally recommended to them, introducing these customers to other firms for advice on UCIS investments and permitting P3 to assist them to make online reinvestments of interest. As a result, some customers remain invested in UCIS C. This is inconsistent with his statement made in written representations that no customers remained invested in UCIS C. He also continued to advise customers to enter into off shore, complex

structured products. This indicates that Mr O'Donnell has not adequately taken steps to mitigate the exposure of customers for whom there is a significant risk that these schemes may be unsuitable given the concerns raised in this Decision Notice.

7.17. Mr O'Donnell admitted (during his oral representations meeting) that he completed investment applications on behalf of two P3 customers after he had submitted a variation of permission application in which he agreed that P3 would cease conducting UCIS business. Mr O'Donnell was unable to provide any reasons for his actions in this regard.

Disciplinary record and compliance history (DEPP 6.5.2G(9))

7.18. The FSA has taken into account the fact that Mr O'Donnell has not been the subject of previous disciplinary action by the FSA.

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

7.19. The FSA has taken action against other approved persons for similar conduct.

7.20. Taking into account the above factors, the FSA hereby imposes a financial penalty of £60,000 on Mr O'Donnell.

Withdrawal of approval and prohibition

7.21. The FSA's policy on the imposition of prohibition orders is set out in Chapter 9 of EG. The relevant provisions of EG are set out in Annex A of this notice.

7.22. The FSA has considered and rejected Mr O'Donnell's submissions that his failings do not extend to basic file maintenance tasks such as those required to be conducted in his mortgage intermediary business. Given the nature and seriousness of Mr O'Donnell's failures outlined in this Notice (above), the FSA has concluded that he is not fit and proper to perform any functions in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm. Mr O'Donnell's individual approval to perform controlled functions are hereby withdrawn and he is prohibited from performing any functions in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.

7.23. In particular, Mr O'Donnell has demonstrated:

(1) a fundamental lack of understanding of the restrictions and risks associated with promoting UCIS to retail customers and has demonstrated that he is unable to take adequate steps to ensure customers receive suitable personal recommendations. In the interests of consumer protection, the FSA deems it appropriate to impose the prohibition order; and

(2) that he poses a serious risk to customers generally (in light of his admission that he completed investment applications on behalf of two P3 customers after he had submitted a variation of permission application in which he agreed that P3 would cease conducting UCIS business).

8. PROCEDURAL MATTERS

Decision maker

8.1. The decision which gave rise to the obligation to give this Notice was made by the Regulatory Decisions Committee.

8.2. This Final Notice is given to Mr O'Donnell in accordance with section 390 of the Act.

Manner of and time for Payment

8.3. The financial penalty must be paid in full by Mr O'Donnell to the FSA by no later than 8 May 2012, 14 days from the date of the Final Notice.

If the financial penalty is not paid

8.4. If all or any of the financial penalty is outstanding on 8 May 2012, the FSA may recover the outstanding amount as a debt owed by Mr O'Donnell and due to the FSA.

Publicity

8.5. 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.

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

FSA contacts

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

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Tom Spender
FSA Enforcement and Financial Crime Division

ANNEX A

RELEVANT STAUTORY PROVISIONS, REGULATORY REQUIREMENTS AND FSA GUIDANCE

1. Statutory provisions

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

1.2. The FSA has the power, by virtue of section 66 of the Act, to impose a financial penalty of such amount as it considers appropriate where it appears to the FSA that an individual is guilty of misconduct and it is satisfied that it is appropriate in all the circumstances to take action against the individual.

1.3. An individual is guilty of misconduct if, while an approved person, they fail to comply with a statement of principle issued under section 64 or 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.

1.4. Pursuant to section 63 of the Act, the FSA has the power to withdraw the approval given to an individual under section 59 of the Act if it considers that they are not a fit and proper person to perform them.

1.5. The FSA has the power, pursuant to Section 56 of the Act, to make a prohibition order against an individual to prevent that individual from performing a specified function or any function falling within a specified description; or any function, if it appears to the FSA that the 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, a regulated activity falling within a specified description or all regulated activities.

2. APER Statements of Principle for Approved Persons

2.1. APER is issued pursuant to section 64 of the Act. It sets out Statements of Principle with which approved persons are required to comply when performing a controlled function for which approval has been sought and granted. They are general statements of the fundamental obligations of approved persons under the regulatory

system. APER also contains descriptions of conduct which, in the opinion of the FSA, constitutes a failure to comply with a particular Statement of Principle and describes factors which the FSA will take into account in determining whether an approved person's conduct complies with it.

2.2. APER 3.1.3G states, as guidance, that, when establishing compliance with, or breach of, a Statement of Principle, account will be taken of the context in which a course of conduct was undertaken, the precise circumstances of the individual case, the characteristics of the particular controlled function and the behaviour expected in that function.

2.3. APER 3.1.4G states, as guidance, that an approved person will only be in breach of a Statement of Principle if they are personally culpable, that is in a situation where their conduct was deliberate or where their standard of conduct was below that which would be reasonable in all the circumstances.

2.4. In this case, the FSA considers the most relevant Statements of Principle to be Statement of Principle 2 and Statement of Principle 7.

2.5. Statement of Principle 2 requires that an approved person must act with due skill, care and diligence in carrying out his controlled function.

2.6. Statement of Principle 7 requires 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.

2.7. APER 4.2.2E to 4.2.13E provide examples of the types of behaviour that, in the opinion of the FSA, do not comply with Statement of Principle 2. These include:

(1) failing to inform a customer of material information in circumstance where the approved person ought to have been aware of such information and of the fact that he should provide it, including failing to explain the risks of an investment to a customer (APER 4.2.3E and 4.2.4E);

(2) recommending an investment to a customer where the approved person does not have reasonable grounds to believe that it is suitable for that customer (APER 4.2.5E); and

(3) recommending transactions without a reasonable understanding of the risk exposure of the transaction to a customer including where that recommendation is made without a reasonable understanding of the liability (either potential or actual) of the transaction (APER 4.2.6E and 4.2.7E)).

2.8. APER 4.7.2E to 4.7.10E provide examples of the types of behaviour that, in the opinion of the FSA, do not comply with Statement of Principle 7. These include:

(1) 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 standards of the regulatory system in respect of the relevant firm's regulated activities (APER 4.7.3E);

(2) 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 regulatory system in respect of the relevant firm's regulated activities (APER 4.7.4E); and

(3) failing to take reasonable steps to ensure that procedures and systems of control are reviewed and, if appropriate, improved, following the identification of significant breaches (whether suspected or actual) of the relevant requirements and standards of the regulatory system relating to its regulated activities, including but not limited to:

(a) unreasonably failing to implement recommendations for improvements in systems and procedures; or

(b) unreasonably failing to implement recommendations for improvements to systems and procedures in a timely manner.

3. FSA's policy on exercising its power to impose a financial penalty

3.1. The FSA's statement of policy with respect to the imposition and amount of penalties under the Act, as required by sections 69(1), 93(1), 124(1) and 210(1) of the Act, and guidance on those matters is provided in Chapter 6 of the FSA's Decision Procedure and Penalties Manual ("DEPP"), entitled "Penalties", which is part of the FSA's Handbook. In summary, chapter 6 of DEPP states that the FSA will consider the full circumstances of each case when determining whether or not to take action for a financial penalty, and sets out a non-exhaustive list of factors that may be relevant for this purpose.

3.2. The principal purpose of imposing a financial penalty 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.

3.3. The FSA will consider the full circumstances of each case when determining whether or not to take action for a financial penalty. DEPP6.2.1G sets out guidance on a non-exhaustive list of factors that may be of relevance in determining whether to take action for a financial penalty, which include the following.

(1) DEPP 6.2.1G(1): The nature, seriousness and impact of the suspected breach.

(2) DEPP 6.2.1G(2): The conduct of the person after the breach.

(3) DEPP 6.2.1G(3): The previous disciplinary record and compliance history of the person.

(4) DEPP 6.2.1G(4): FSA guidance and other published materials.

(5) DEPP 6.2.1G(5): Action taken by the FSA in previous similar cases.

4. Determining the level of the financial penalty

4.1. The FSA will consider all the relevant circumstances of a case when it determines the level of financial penalty. DEPP 6.5.2G sets out guidance on a non exhaustive list of factors that may be of relevance when determining the amount of a financial penalty.

4.2. Factors that may be relevant to determining the appropriate level of financial penalty include:

(1) whether the breach revealed serious or systematic weaknesses in the person's procedures or of the management systems or internal controls relating to all or part of a person's business (DEPP 6.5.2G(2)(b)); and

(2) the general compliance history of the person, including whether the FSA has previously brought to the person's attention, issues similar or related to the conduct that constitutes the breach in respect of which the penalty is imposed (DEPP 6.5.2(9)(d)).

5. Fit and Proper Test for Approved Persons

5.1. The part of the FSA Handbook entitled "FIT" sets out the Fit and Proper Test for Approved Persons. The purpose of FIT is to outline the main criteria for assessing the fitness and propriety of a candidate for a controlled function. FIT is also relevant in assessing the continuing fitness and propriety of an approved person.

5.2. 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 considerations will be the person's competence and capability.

5.3. As set out in FIT 2.2, in determining a person's competence and capability, the FSA will have regard to matters including but not limited to:

(1) whether the person satisfies the relevant FSA training and competence requirements in relation to the controlled function the person performs or is intended to perform; and

(2) whether the person has demonstrated by experience and training that the person is able, or will be able if approved, to perform the controlled function.

6. FSA's policy for exercising its power to make a prohibition order and withdraw a person's approval

6.1. The FSA's approach to exercising its powers to make prohibition orders and withdraw approvals is set out at Chapter 9 of the Enforcement Guide ("EG").

6.2. EG 9.1 states that the FSA's power to make prohibition orders under section 56 of the Act helps it work towards achieving its regulatory objectives. The FSA may exercise this power 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.

6.3. EG 9.4 sets out the general scope of the FSA's powers in this respect, which include 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. EG 9.5 provides that the scope of a prohibition order will vary according to 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 posed by him to consumers or the market generally.

6.4. In circumstances where the FSA has concerns about the fitness and propriety of an approved person, EG 9.8 to 9.14 provides guidance. In particular, EG 9.8 states that the FSA may consider whether it should prohibit that person from performing functions in relation to regulated activities, withdraw that person's approval or both. In deciding whether to withdraw approval and/or make a prohibition order, the FSA will consider whether its regulatory objectives can be achieved adequately by imposing disciplinary sanctions.

6.5. EG 9.9 states that the FSA will consider all the relevant circumstances when deciding whether to make a prohibition order against an approved person and/or to withdraw that person's approval. Such circumstances may include, but are not limited to, the following factors:

(1) whether the individual is fit and proper to perform functions in relation to regulated activities, including in relation to the criteria for assessing the fitness and propriety of an approved person in terms of competence and capability as set out in FIT 2.2;

(2) the relevance and materiality of any matters indicating unfitness;

(3) the length of time since the occurrence of any matters indicating unfitness;

(4) 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;

(5) the severity of the risk which the individual poses to consumers and to confidence in the financial system; and

(6) the previous disciplinary record and general compliance history of the individual.

6.6. 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 serious lack of competence.

7. Promotion of collective investment schemes

7.1. Section 238(1) of the Act provides that an authorised person must not communicate an invitation or inducement to participate in a collective investment scheme ("CIS"), and therefore also an UCIS. Section 21 of the Act imposes an equivalent restriction in relation to unauthorised persons.

7.2. Section 238 goes on expressly to carve out circumstances where this prohibition will not apply. These include:

(1) Where the CIS in question is an authorised unit trust/open ended investment company.

(2) The circumstances set out in the Financial Services and Markets Act 2000 (Promotion of collective investment schemes)(Exemptions) Order 2001 ("the PCIS Order").

(3) The exemptions listed in table 4.12.1R(4) of the Conduct of Business Sourcebook (COBS).

7.3. The PCIS Order provides for authorised firms to promote UCIS to individuals if they fall within a particular category of exemption set out in the order.

7.4. These exemptions pertain to individuals classed as certified high net worth individuals, certified sophisticated investors or self-certified sophisticated investors (articles 21, 23 and 23A of the PCIS Order).

8. The PCIS Order exemptions - Certified high net worth individuals

8.1. Article 21(2) defines a certified high net worth individual as being an individual who has signed a statement complying with Part I of the Schedule to the PCIS Order in the past 12 months. Essentially this requires that at least one of the following sets of circumstances apply:

(1) The person had, during the previous financial year, an annual income of £100,000 or more; and/or

(2) The person held, throughout the previous financial year, assets to the value of £250,000 or more, not including that person's primary residence/mortgage, life insurance or death in service benefits.

8.2. The statement also requires that the person signs a statement to indicate he accepts that he can lose his property and other assets from making investment decisions based on financial promotions and is aware it is open to him to seek specialist advice.

8.3. If the person making the communication believes on reasonable grounds that he is making it to a certified high net worth individual, then the section 238 restriction will not apply as long as the communication:

(1) is a non-real time communication or a solicited real time communication;

(2) relates only to units in a UCIS which invests wholly or predominantly in the shares in or debentures of one or more unlisted companies;

(3) does not invite or induce the recipient to enter into an agreement under the terms of which he can incur a liability or obligation to pay or contribute more than he commits by way of investment;

(4) a specified warning in the following terms is given both orally (in respect of a real-time communication) and in writing in the manner prescribed in Article 21:

"Reliance on this promotion for the purpose of buying the units to which the promotion relates may expose an individual to a significant risk of losing all of the property or other assets invested."; and

(5) is accompanied by an indication that the promotion is exempt from section 238 on the grounds that it is communicated to a certified high net worth individual, together with details of the requirements for certified high net worth investors and a reminder that the individual should consult a specialist if in any doubt about participating in a UCIS.

8.4. There are similar provisions for high net worth companies and associations at Article 22.

9. The PCIS Order exemptions - Sophisticated investors

9.1. There are two sorts of sophisticated investors referred to in the PCIS Order – certified and self-certified.

Certified sophisticated investors

9.2. A certified sophisticated investor is defined in Article 23(1) as someone**:**

(1) Who has a current certificate (signed and dated in the past three years) in writing or other legible form signed by an authorised person to the effect that he is sufficiently knowledgeable to understand the risks associated with participating in a UCIS; and

(2) Who has signed, within the previous 12 months, a statement in the following terms:

"I make this statement so I can receive promotions which are exempt from the restriction on promotion of unregulated schemes in the Financial Services and Markets Act 2000. The exemption relates to certified sophisticated investors and I declare that I qualify as such. I accept that the schemes to which the promotions will relate are not authorised or recognised for the purposes of that Act. I am aware that it is open to me to seek advice from an authorised person who specialises in advising on this kind of investment."

9.3. The communication must be accompanied by an indication that section 238 does not apply, of the requirements to be a certified sophisticated investor, a prescribed risk warning and a reminder to seek independent advice.

9.4. Provided all this is met, and the communication is not to participate in a UCIS carried on by the person who certified the investor as sophisticated, then the section 238 restriction will not apply.

Self-certified sophisticated investors

9.5. Article 23A defines a self-certified sophisticated investor as an individual who has signed a statement complying with Part II of the Schedule to the PCIS Order in the past 12 months. Essentially this requires that at least one of the following sets of circumstances applies to the investor:

(1) he is a member of a network or syndicate of "business angels" and has been so for at least the last six months;

(2) he has made more than one investment in an unlisted company in the past two years;

(3) he is working, or has worked in the past two years, in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises;

(4) he is currently, or has been in the two years before signing the statement, a director of a company with an annual turnover of at least £1 million.

9.6. As with high net worth individuals, the statement also requires the investor to sign a statement that he accepts he can lose his property and assets from making investment decisions based on financial promotions and that he is aware that it is open to him to seek specialist advice.

9.7. If the person making the communication believes on reasonable grounds that he is making it to a self-certified sophisticated investor, then the section 238 restriction will not apply as long as the communication:

(1) relates only to units in a UCIS which invests wholly or predominantly in the shares in or debentures of one or more unlisted companies;

(2) does not invite or induce the recipient to enter into an agreement under the terms of which he can incur a liability or obligation to pay or contribute more than he commits by way of investment;

(3) a specified warning in the following terms is given both orally (in respect of real time communications) and in writing in the manner prescribed in Article 23A:

"Reliance on this promotion for the purpose of buying the units to which the promotion relates may expose an individual to a significant risk of losing all of the property or other assets invested."; and

(4) is accompanied by an indication that the promotion is exempt from section 238 on the ground that it is made to a self-certified sophisticated investor, together with details of the requirements for self-certified sophisticated investors and a reminder that the individual should consult a specialist if in any doubt about participating in a UCIS.

10. The COBS exemptions

10.1. A firm may communicate an invitation or inducement to participate in a UCIS without breaching the section 238 restriction if the promotion falls within an exemption listed in the table at 4.12.1R(4) of the Conduct of Business Sourcebook (COBS).

10.2. The inducement or invitation must be made only to recipients whom the firm has taken reasonable steps to establish are persons in that category or be directed at recipients in such a way as to reduce, as far as possible, the risk of participation in the CIS by persons not in that category. There is no provision for these steps to be taken retrospectively.

10.3. Category 1 covers people who are already participants in a UCIS or have been so in the last 30 months. An authorised person can promote to these persons the UCIS in which they are already participants (and any successor scheme) or one whose

underlying property and risk profile are both "substantially similar" to those of the UCIS in which they participate.

10.4. Category 2 deals with those persons for whom the firm has taken reasonable steps to ensure that investment in the UCIS is suitable and who is a client of the firm or a company in its group.

10.5. Category 7 provides that if a client is categorised as a professional client or eligible counterparty then an authorised person can promote to that client any UCIS in relation to which the client is so categorised.

10.6. Category 8 allows financial promotion of UCIS to a person:

(1) In relation to whom the firm has undertaken an adequate assessment of his expertise, experience and knowledge and that assessment gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the person is capable of making his own investment decisions and understanding the risks involved;

(2) To whom the firm has given a clear written warning that this will enable the firm to promote UCIS to the client; and

(3) Who has stated in writing, in a document separate from the contract, that he is aware of the fact the firm can promote certain UCIS to him.

11. Suitability of advice

11.1. The fact that a customer is eligible to receive a communication promoting an unregulated scheme under one or more exemptions does not mean that the unregulated scheme will be automatically suitable to that customer.

11.2. Principle 9 of the FSA's Principles for Businesses states a firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.

11.3. COBS 9.1.1 states that COBS 9 applies to a firm which makes a personal recommendation to a designated investment. The definition of a designated

investment includes in investments which are rights or interests in collective investment schemes.

11.4. In considering the suitability of a particular scheme for a specific client, a firm is required by COBS 9 to obtain the necessary information to understand the essential facts about the client (COBS 9.2.2R).

11.5. COBS 9.2.6R provides that if a firm does not obtain the necessary information to assess suitability, it must not make a personal recommendation to the client.