
FINAL NOTICE

To: **Peter Stephen Fox**

Of: **63 Richard Cooper Road
Lichfield
Staffordshire
WS14 0NN**

Reference Number: **PSF00005**

Date: **29 June 2011**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) gives Peter Stephen Fox final notice about the following action:

1. THE ACTION

1.1 The FSA gave Peter Stephen Fox (“Mr Fox”) a Decision Notice on 29 June 2011 which notified Mr Fox that the FSA had decided to take the following action against him:

- (1) publish a statement of Mr Fox’s misconduct pursuant to section 66 of the Financial Services and Markets Act 2000 (“the Act”), for failing to comply with Statements of Principle 2 and 7 of the FSA’s Statements of Principle and Code of Practice for Approved Persons (“the Statements of Principle”);

- (2) withdraw the approval granted to Mr Fox, pursuant to section 63 of the Act, to perform controlled functions CF4 (Partner), CF10 (Compliance Oversight), and CF11 (Money Laundering Reporting); and
- (3) make an order, pursuant to section 56 of the Act, prohibiting Mr Fox from carrying out any controlled function involving the exercise of significant influence over any person in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm (“the Prohibition Order”). The FSA would be minded to revoke the prohibition order, on Mr Fox’s application, in the event that he is able to demonstrate to the satisfaction of the FSA that he has taken adequate steps to remedy his lack of competence and capability.

1.2 The FSA considers that the misconduct in this case warrants a financial penalty of £15,000. However, Mr Fox has provided verifiable evidence that imposing such a financial penalty would cause him serious financial hardship. Under these exceptional circumstances, the FSA has decided to censure him publicly instead.

1.3 Mr Fox agreed that he would not be referring the matter to the Upper Tribunal (Tax and Chancery Chamber).

1.4 Accordingly, and for the reasons set out below, the FSA takes the action set out above. The Prohibition Order takes effect from 29 June 2011.

2. REASONS FOR THE ACTION

2.1 On the basis of the facts and matters described below, the FSA has decided to take action as a result of Mr Fox’s conduct as an approved person at Wheatcroft Fox and Company (“Wheatcroft Fox”) between 1 June 2004 and 30 May 2009 (“the relevant period”).

2.2 When carrying out significant influence functions in connection with Wheatcroft Fox’s regulated investment business during the relevant period, Mr Fox’s conduct fell short of the FSA’s prescribed regulatory standards for approved persons. In particular, he:

- (1) breached Statement of Principle 2 as he failed to act with due skill, care and diligence in managing the business of Wheatcroft Fox for which he was responsible in his controlled functions, in that he failed to:
 - (a) demonstrate that he had recorded sufficient personal and financial information about Wheatcroft Fox's customers in order to assess the suitability of his recommendations;
 - (b) demonstrate that he had adequately assessed and described customers' attitudes to risk;
 - (c) demonstrate that he had conducted adequate or independent product research to support his recommendations;
 - (d) ensure that suitability reports were clear, fair and not misleading and explained, in sufficient detail, why his recommendations were suitable;
 - (e) explain the main consequences, including associated costs, charges and risks, of his recommendations; and
 - (f) make and retain adequate records explaining why his recommendations were suitable.

- (2) breached Statement of Principle 7 as he failed, as an approved person performing a significant influence function, to take reasonable steps to ensure that the business of Wheatcroft Fox, for which Mr Fox is responsible in his controlled functions, complied with the relevant requirements and standards of the regulatory system and the associated Conduct of Business rules listed in Annex A. In particular, he failed to ensure that Wheatcroft Fox put in place adequate systems, processes and controls to ensure that it could demonstrate and monitor the suitability of the advice it gave to customers and ensure compliance with regulatory requirements and standards and associated rules.

2.3 The FSA regards these failings as serious because they exposed customers to the risk of receiving unsuitable advice, as:

- (1) a number of Mr Fox's failings related to pension products, which the FSA has publicised as being a high risk product;
- (2) Mr Fox and/or Wheatcroft Fox could not demonstrate the suitability of recommendations to customers;
- (3) Mr Fox and/or Wheatcroft Fox were unable to demonstrate that customers were provided with adequate information in respect of recommendations to ensure that they were in a position to make an informed decision; and
- (4) in 2006, Wheatcroft Fox's external compliance consultant first identified a number of failings in its sale and advice processes and brought these to Mr Fox's attention. Despite this, and the fact that the external compliance consultant raised similar concerns in subsequent years, there is little evidence that Mr Fox made substantive changes to Wheatcroft Fox's procedures as a result.

2.4 The FSA has taken into account the fact that, although the customer files did not include sufficient "know your customer" information, Mr Fox was able to demonstrate knowledge of his customers' personal and financial circumstances, which the FSA regards as a mitigating factor.

2.5 The FSA has concluded that Mr Fox's failings while performing controlled functions as an approved person at Wheatcroft Fox warrant a public censure. The FSA therefore issues a statement of Mr Fox's misconduct.

2.6 In addition, and having regard to Mr Fox's role and responsibilities at Wheatcroft Fox, the FSA has concluded that, as a result of the seriousness, nature and extent of Mr Fox's misconduct, Mr Fox is failing to meet the minimum regulatory standards required in terms of competence and capability, and is not fit and proper to carry out any controlled function involving the exercise of significant influence over any person, in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm. Accordingly the FSA withdraws Mr Fox's approval to perform controlled functions CF4 (Partner), CF10 (Compliance Oversight), and CF11 (Money Laundering Reporting), and makes the Prohibition Order against him.

2.7 This action supports the FSA's statutory objectives of protecting consumers and maintaining market confidence.

3. RELEVANT STATUTORY AND REGULATORY PROVISIONS

3.1 The relevant statutory provisions and regulatory requirements are set out at Annex A to this Final Notice.

4. FACTS AND MATTERS RELIED ON

Background

4.1 Mr Fox is one of two partners at Wheatcroft Fox. Mr Fox was approved by the FSA on 1 December 2001 to perform the following controlled functions ("CF") at Wheatcroft Fox: CF4 (Partner), CF8 (Apportionment and Oversight – until 31 March 2009), CF10 (Compliance Oversight) and CF11 (Money Laundering Oversight). On 14 January 2005, Mr Fox was also approved by the FSA to be responsible for insurance mediation and on 1 November 2007 to perform CF30 (Customer Function).

4.2 Wheatcroft Fox has been authorised by the FSA since 1 December 2001 and until 31 March 2010 was permitted by the FSA to conduct regulated activities in insurance and investment business. Wheatcroft Fox has two customer advisers.

4.3 In October 2008 the FSA carried out a Treating Customers Fairly ("TCF") assessment of Wheatcroft Fox, as part of the FSA's assessment programme for small firms, and identified concerns regarding the adequacy of Wheatcroft Fox's systems and controls and its ability to demonstrate that it was treating its customers fairly. The FSA conducted a follow-up TCF visit in November 2008 in the course of which Wheatcroft Fox's partners were interviewed and a sample of customer files were reviewed.

4.4 Following the TCF assessment and follow-up visit, the FSA has conducted an investigation into Wheatcroft Fox to review its compliance with relevant regulatory requirements and standards in connection with its business during the relevant period.

- 4.5 As a result of the investigation, the FSA considers that Mr Fox's conduct as an approved person fell short of the FSA's prescribed regulatory standards for approved persons and that he has breached Statements of Principle 2 and 7.

Suitability of advice

- 4.6 As part of its investigation, the FSA reviewed 12 sales in which Mr Fox was either the adviser or involved in the advice process. Mr Fox was unable to demonstrate that he had taken reasonable care to ensure the suitability of his advice. Specifically, Mr Fox failed to:

- (1) demonstrate that he had recorded sufficient personal and financial information about customers to assess the suitability of his recommendations to enter into investment contracts. In all 12 sales reviewed by the FSA, there was insufficient "know your customer" information held on the customer files, or incomplete or non-existent fact finds, to justify the recommendations made. In particular:
 - (a) there was no fact find on the customer files in five sales;
 - (b) in three sales, the customer file only contained historic and/or limited or incomplete fact finds, or fact finds which were signed by the customer, but were otherwise blank;
 - (c) in one sale, Wheatcroft Fox gathered information about the customer's personal and financial circumstances, and obtained the customer's signature on the customer agreement, after the application form for the investment had been completed and the suitability letter, including the recommendation, had been issued; and
 - (d) in 10 sales, the customer file did not clearly and fully identify the customers' objectives, either because there was no fact find on the file relevant to the transaction reviewed or the objectives detailed on the fact find were inadequate and insufficiently tailored to the individual customers.

- (2) demonstrate that he had adequately assessed and described the customer's attitude to risk. In 8 of the 12 cases reviewed, the customer file did not include an adequate assessment of the customer's attitude to risk, either because the relevant section on the fact find had not been completed or because there was no fact find on the file relevant to the specific transaction. In 11 cases, the fact find did not include a description of the risk rating or examples of the type of product falling within each category;
- (3) demonstrate that he had had undertaken adequate or independent product research to support his recommendations. In 11 out of the 12 sales reviewed, the customer file did not contain any evidence of research on alternative products or providers;
- (4) communicate with clients in a way that was clear, fair and not misleading. In 10 of the 12 sales reviewed, Mr Fox issued suitability reports which contained insufficient detail to enable customers to make an informed decision. For example, they were not individually tailored to the particular customer, nor did they adequately explain why, having regard to the customer's personal and financial circumstances, he had concluded that the recommended product was suitable for that customer. In addition, suitability reports did not include appropriate risk warnings in 10 of the 12 cases;
- (5) demonstrate that he had provided adequate information relating to alternative products or providers to customers. In 10 of the 12 sales, the suitability reports for customers either did not include, or contained limited information about, alternative products and providers and the reason for discounting them;
- (6) demonstrate that he had explained the main consequences, including associated costs, charges and risks, of his recommendations. In 11 sales, the suitability reports did not contain sufficient detail of the costs and charges associated with the advice; and
- (7) make and retain adequate records explaining why his recommendations were suitable.

- 4.7 By failing to record sufficient and accurate information about customers and product research, and by providing inadequate suitability reports, Mr Fox could not demonstrate that his recommendations were made on the basis of an adequate assessment of customers' needs and circumstances. Mr Fox has therefore failed to ensure that he acted with due skill care and diligence in carrying out his controlled function in breach of Statement of Principle 2.

Systems and Controls

- 4.8 Mr Fox was unable to demonstrate, as an approved person performing a significant influence function and the partner primarily responsible for the systems and controls in place at Wheatcroft Fox, that he had taken reasonable steps to ensure that the business of Wheatcroft Fox, for which Mr Fox is responsible in his controlled functions, complied with the relevant requirements and standards of the regulatory system and the associated provisions of Conduct of Business rules listed in Annex A. Specifically, Mr Fox failed to ensure that the systems, processes and controls at Wheatcroft Fox were adequate to demonstrate and monitor the suitability of the advice it gave to customers and failed to ensure compliance with regulatory requirements and standards.
- 4.9 As part of its investigation, the FSA reviewed 32 of Wheatcroft Fox's investment sales, including investment bonds and personal pension plans, relating to 22 customers. Of these sales, 6 recommendations were made after the FSA's visit in November 2008. The FSA identified significant failings in Wheatcroft Fox's advice and sales processes which led to customers being put at risk of receiving unsuitable advice. Specifically;
- (1) in 30 of the 32 files reviewed, there was insufficient personal and financial information on the customer file, or incomplete or non-existent fact finds, to demonstrate the suitability of the recommendation. In 17 out of 32 sales reviewed, there was only historic and/or limited or incomplete fact finds on the customer files or fact finds, which were signed by the customer, but were blank. Wheatcroft Fox's TCF action plans for the period between July 2006 and June 2009 identified that, although its advisers gathered information about customers' personal and financial circumstances, this was not always

evidenced on the customer files. Wheatcroft Fox's annual compliance review for the period from August 2007 to July 2008, completed by its external compliance consultant, identified that customer files did not always contain an up-to-date fact find. The review also emphasised the importance of Wheatcroft Fox being able to demonstrate that it had gathered and retained sufficient "know your customer" information. There was no evidence to demonstrate that Wheatcroft Fox took any steps to address this issue after it was brought to its attention;

- (2) in 6 out of 32 sales reviewed, there were specific issues relating to timing of the completion of the fact find on the customer files;
- (3) in 21 out of 32 sales reviewed, the customer file did not clearly and fully identify the customers' objectives, either because there was no fact find on the file relevant to the transaction reviewed or because the objectives detailed on the fact find were inadequate and not sufficiently tailored to the individual customer;
- (4) the customer file did not include an adequate assessment of the customer's attitude to risk in 16 of the 32 sales reviewed. In addition, the fact find for 22 sales did not include a description of the risk rating or examples of the type of product falling within each risk category;
- (5) in 16 of the 32 sales reviewed there was no evidence of research into alternative products or providers on the customer file;
- (6) Wheatcroft Fox issued suitability reports which contained insufficient detail to enable customers to make an informed decision in 17 of the 32 sales reviewed. For example, they were not individually tailored to the particular customer, nor did they adequately explain why, having regard to the customer's personal and financial circumstances, Wheatcroft Fox had concluded that the recommended investment was suitable for that customer. In 26 of the 32 sales reviewed, the suitability reports for customers either did not include, or contained limited information about, alternative products and providers and the reason for discounting them. In addition, the suitability reports did not

contain sufficient detail of the costs and charges associated with the advice in 18 of the 32 sales reviewed and appropriate risk warnings were not included in the suitability reports in 18 of the 32 sales; and

(7) none of the 32 sales reviewed, had any evidence to demonstrate that the advice had been reviewed or monitored by Wheatcroft Fox.

4.10 By failing to take reasonable steps to ensure that Wheatcroft Fox's business complied with the relevant requirements and standards of the regulatory system, for which he was responsible in his controlled function, Mr Fox breached Statement of Principle 7.

5. ANALYSIS OF THE BREACHES

5.1 By reason of the facts and matters referred to in paragraphs 4.6 above, the FSA considers that Mr Fox was unable to demonstrate that he took reasonable care to ensure the suitability of his advice. Mr Fox therefore failed to act with due skill, care and diligence in carrying out his controlled function, in breach of Statement of Principle 2. Specifically, he failed to demonstrate that he had obtained and retained sufficient personal and financial information about his customers, undertaken adequate or independent product research and explained the main consequences and risks of his recommendations. He also failed to ensure that suitability reports were clear fair and not misleading.

5.2 By reason of the facts and matters referred to in paragraphs 4.8 to 4.10 above, the FSA considers that Mr Fox failed, as an approved person performing a significant influence function and the partner primarily responsible for the systems and controls in place at Wheatcroft Fox, to take reasonable steps to ensure that the business of Wheatcroft Fox, for which Mr Fox is responsible in his controlled functions, complied with the relevant requirements and standards of the regulatory system and the associated Conduct of Business rules listed in Annex A, in breach of Statement of Principle 7. Specifically, Mr Fox failed to maintain adequate systems, processes and controls in relation to the adequacy of management, oversight and sales processes to ensure compliance with regulatory requirements and standards and associated rules.

5.3 Having regard to the facts and matters set out in this notice, the FSA considers it proportionate and appropriate in all the circumstances to take disciplinary action against Mr Fox.

5.4 In addition, as a result of the breaches outlined above, the FSA has concluded that Mr Fox's conduct fell short of the minimum regulatory standards in terms of his competence and capability, and that he is not a fit and proper person to carry out any controlled function involving the exercise of significant influence over any person in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.

6. ANALYSIS OF THE SANCTIONS

Public censure

6.1 The FSA's policy in relation to the imposition of a public censure is set out in Chapter 6 of the Decision Procedure and Penalties Manual ("DEPP"), which forms part of the FSA Handbook. DEPP sets out the factors that may be of particular relevance in determining whether it is appropriate to issue a public censure rather than impose a financial penalty. The criteria are not exhaustive and all relevant circumstances of the case will be taken into consideration. Relevant extracts from DEPP are set out in Annex A.

6.2 In addition, the FSA has had regard to the corresponding provisions of Chapter 13 of the Enforcement Manual ("ENF") in force during the relevant period until 27 August 2007 and Chapter 7 of the Enforcement Guide ("EG"), in force thereafter.

6.3 In determining whether a financial penalty or a public censure is appropriate the FSA is required to consider all the relevant circumstances of a case.

6.4 The factors in this case would ordinarily merit the imposition of a financial penalty. However, the FSA considers that, in accordance with DEPP 6.4.2(8)G, there are exceptional circumstances under which conduct by a person which would ordinarily attract a financial penalty, may be dealt with by way of a public censure. In this case, there is evidence that Mr Fox has insufficient resources to pay a financial penalty such that the application of the FSA's policy on serious financial hardship (set out in DEPP

6.5D) would result in the financial penalty being reduced to zero. Mr Fox's breaches are such that the FSA would have otherwise imposed a financial penalty of £15,000 on him.

6.5 The principal purpose of imposing a public censure is to promote high standards of regulatory conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches and demonstrating generally the benefits of compliant behaviour. A public censure is a tool that the FSA may employ to help it achieve its regulatory objectives.

6.6 The FSA considers that a public censure, rather than a financial penalty, is appropriate.

6.7 DEPP 6.4.2G sets out a list of factors that may be of relevance in determining whether it is appropriate to issue a public censure rather than impose a financial penalty. The factors are not exhaustive and the FSA will consider all the relevant circumstances of the case. The FSA considers that the following factors are particularly relevant in this case.

Deterrence (DEPP 6.4.2G(1))

6.8 In determining whether to publish a statement of Mr Fox's misconduct, the FSA has had regard to the need to ensure those who are approved persons must act with the appropriate levels of competence and capability and in accordance with regulatory requirements and standards. The FSA considers that a public censure should be imposed to demonstrate to Mr Fox and others the seriousness with which the FSA regards his behaviour.

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

6.9 In determining the appropriate sanction, the FSA has had regard to the seriousness of the breaches, including the nature of the requirements breached, the duration and frequency of the breaches, whether the breaches revealed serious failings in Wheatcroft Fox's systems and controls and the number of customers who were affected and/or placed at risk of loss.

6.10 Mr Fox's failings covered the period from 1 June 2004 to 30 May 2009 and are viewed as being serious because Mr Fox:

- (1) could not demonstrate the suitability of his recommendations;
- (2) could not demonstrate that he had provided customers with adequate information in respect of his recommendations to ensure that customers were in a position to make an informed decision;
- (3) failed to ensure that Wheatcroft Fox had adequate systems and controls to ensure compliance with regulatory standards and requirements; and
- (4) failed to make any substantive changes to Wheatcroft Fox's procedures despite being made aware by its external compliance consultant of failings in its sales and advice processes.

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

6.11 While Mr Fox has taken some steps to rectify his shortcomings, the remedial action has not been sufficient to address fully the failings that have been identified. On 31 March 2010, Wheatcroft Fox applied voluntarily to vary its Part IV permission to the effect that it would cease all new regulated business with immediate effect. By agreeing to vary Wheatcroft Fox's Part IV permission, Mr Fox has allayed the FSA's immediate concern that he might pose an ongoing risk to consumers.

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

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

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

6.13 Mr Fox has breached Statements of Principle 2 and 7. The breaches are serious and the FSA would have imposed a financial penalty of £15,000 on Mr Fox as a result. However, Mr Fox has provided verifiable evidence that imposing such a financial penalty would cause him serious financial hardship. Under these exceptional

circumstances, the FSA proposes to publish a statement of his misconduct and censure him publicly instead.

Withdrawal of approval and prohibition

6.14 The FSA has concluded that Mr Fox's conduct demonstrated a lack of competence and capability and he is therefore not fit and proper to perform any controlled function involving the exercise of significant influence over any person in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.

6.15 It is therefore necessary and proportionate, in order for it to achieve its regulatory objectives, for the FSA to exercise its powers to withdraw Mr Fox's approval to perform controlled functions CF4 (Partner), CF10 (Compliance Oversight), and CF11 (Money Laundering Reporting) and to make the Prohibition Order against him.

7. CONCLUSIONS

7.1 On the basis of the facts and matters described above, the FSA concludes that Mr Fox's conduct fell short of the minimum regulatory standards required of an approved person and that he has breached Statements of Principle 2 and 7.

7.2 The FSA, having regard to all the circumstances, therefore considers that it is appropriate and proportionate to issue a public censure of Mr Fox's misconduct, withdraw his approval to perform controlled functions CF4 (Partner), CF10 (Compliance Oversight), and CF11 (Money Laundering Reporting) and to make the Prohibition Order against him.

8. DECISION MAKERS

8.1 The decision which gave rise to the obligation to give this notice was made on behalf of the FSA by the Settlement Decision Makers.

9. IMPORTANT

9.1 This Final Notice is given to Mr Fox in accordance with section 390 of the Act.

Publicity

- 9.2 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 Mr Fox or prejudicial to the interests of consumers.

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

FSA contact

- 9.4 For more information concerning this matter generally, Mr Fox should contact Rachel West of the Enforcement and Financial Crime Division at the FSA (direct line: 0207 066 0142 Fax: 0207 066 0143).

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Tom Spender
Head of Department
FSA Enforcement and Financial Crime Division

ANNEX A

RELEVANT STATUTORY PROVISIONS, REGULATORY REQUIREMENTS AND GUIDANCE

1. Statutory provisions

- 1.1 The FSA's regulatory objectives are set out in section 2(2) of the Act and include market confidence, public awareness, the protection of consumers and the reduction of financial crime. In relation to this case, the most relevant statutory objectives are the protection of consumers and market confidence.
- 1.2 The FSA has power under section 56 of the Act to make a prohibition order if it appears to the FSA that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.
- 1.3 By virtue of section 56 of the Act, the FSA has the power to make an order prohibiting him from performing a specified function, any function falling within a specified description or any function, if it appears to the FSA that Mr Fox 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 specified regulated activity, any regulated activity falling within a specified description or all regulated activities.
- 1.4 Section 63 of the Act provides that the FSA may withdraw an approval given under section 59 of the Act if it considers that the person in respect of whom it was given is not a fit and proper person to perform the function to which the approval relates.
- 1.5 Section 66 of the Act provides that the FSA may take action against a person to impose a penalty on an individual of such amount as it considers appropriate or publish a statement of his misconduct if it appears to the FSA that he is guilty of misconduct and the FSA is satisfied that it is appropriate in all the circumstances to take action against him. Misconduct includes failure, while an approved person, to comply with a statement of principle issued under section 64 of the Act. The action that may be taken by the FSA includes the imposition of a penalty on the approved person of such amount as it considers appropriate.

2. Relevant Handbook provisions

2.1 In exercising its power to issue a public censure, the FSA must have regard to relevant provisions in the FSA Handbook of rules and guidance (“the FSA Handbook”).

2.2 The FSA’s Enforcement Guide (“EG”) and Decision Procedure and Penalties Manual (“DEPP”) came into effect on 28 August 2007. Although the references in this Final Notice are to DEPP and EG, the FSA has also had regard to the appropriate provisions of the FSA’s Enforcement Manual, which preceded DEPP and EG and applied during part of the relevant period.

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

2.3 APER sets out the Statements of Principle as they relate to approved persons and descriptions of conduct which, in the opinion of the FSA, do not comply with a Statement of Principle. It further describes factors which, in the opinion of the FSA, are to be taken into account in determining whether or not an approved person’s conduct complies with a Statement of Principle.

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

2.5 APER 3.1.4G provides that an approved person will only be in breach of a Statement of Principle where he is personally culpable, that is in a situation where his conduct was deliberate or where his standard of conduct was below that which would be reasonable in all the circumstances.

2.6 APER 3.1.6G provides that APER (and in particular the specific examples of behaviour which may be in breach of a generic description of conduct in the code) is not exhaustive of the kind of conduct that may contravene the Statements of Principle.

2.7 The Statements of Principle relevant to this matter are:

- (1) Statement of Principle 2 which provides that an approved person must act with due skill, care and diligence in carrying out his controlled function; and
- (2) Statement of Principle 7 which provides that an approved person performing a significant influence function must take reasonable steps to ensure that the business of the firm for which he is responsible in his controlled function complies with the relevant requirements and standards of the regulatory system.

2.8 APER 3.3.1E states that in determining whether or not the conduct of an approved person performing a significant influence complies with Statements of Principle 5 to 7, the following are factors which, in the opinion of the FSA, are to be taken into account:

- (1) whether he exercised reasonable care when considering the information available to him;
- (2) whether he reached a reasonable conclusion which he acted on;
- (3) the nature, scale and complexity of the firm's business;
- (4) his role and responsibility as an approved person performing a significant influence function; and
- (5) the knowledge he had, or should have had, of regulatory concerns, if any, arising in the business under his control.

2.9 APER 4.2 lists types of conduct which, in the opinion of the FSA, do not comply with Statement of Principle 2.

2.10 APER 4.2.3E states that failing to inform a customer of material information in circumstances where he was aware, or ought to have been aware of such information and the fact that he should provide it, falls within the type of conduct that would not comply with Statement of Principle 2.

2.11 APER 4.2.4E states that behaviour of the type referred in APER 4.2.3E (referred to in paragraph 2.9 above) would include, but is not limited to, failing to explain the risks

of an investment to a customer and/or failing to disclose details of the charges or surrender penalties on investment products to customers.

- 2.12 APER 4.7 lists types of conduct which, in the opinion of the FSA, do not comply with Statement of Principle 7.
- 2.13 APER 4.7.3E states that failing to take reasonable steps to implement (either personally or through a compliance department or other departments) adequate and appropriate systems of control to comply with the relevant requirements and standards of the regulatory system in respect of its regulated activities is conduct that does not comply with Statement of Principle 7.
- 2.14 APER 4.7.4E states that failing to take reasonable steps to monitor (either personally or through a compliance department or other departments) compliance with the relevant requirements and standards of the regulated system in respect of its regulated activities is conduct that does not comply with Statement of Principle 7.

Conduct of Business Rules

- 2.15 Guidance on the Conduct of Business Rules is set out in the Conduct of Business manuals of the FSA handbook.

Conduct of Business

- 2.16 Conduct of Business Rules (“COB”) applied to firms for part of the relevant period (until 31 October 2007).
- 2.17 COB 5.2.5R requires that before a firm gives a personal recommendation concerning a designated investment to a private customer, it must take reasonable steps to ensure that it is in possession of sufficient personal and financial information about that customer relevant to the services that the firm has agreed to provide.
- 2.18 COB 5.2.9R requires that a firm must make and retain a record of a private customer’s personal and financial circumstances that it has obtained in satisfying COB 5.2.5R.
- 2.19 COB 5.2.12R requires a firm to provide the client with a statement of his demands and needs if he makes a recommendation of a life policy or arranges for the client to

enter into a life policy. Unless the client asks for such a statement to be made orally (of if immediate cover is required) the statement of demands and needs must be in writing and made as soon as practicable, and in any event, before the conclusion of the contract for the life policy.

- 2.20 COB 5.3.5R requires that firm must take reasonable steps to ensure that a personal recommendation concerning a designated investment to a private customer is suitable for the client.
- 2.21 COB 5.3.16R requires that the suitability letter must: (1) explain why the firm has concluded that the transaction is suitable for the customer, having regard to his personal and financial circumstances; and (2) contain a summary of the main consequences and any possible disadvantages of the transaction.
- 2.22 COB 5.3.18R requires that a firm must provide a suitability letter when or as soon as possible after the transaction is effected.
- 2.23 COB 5.3.21R requires that if a firm makes a recommendation about a pension transfer or pension opt out by an individual who is not a pension transfer specialist it must have established procedures for checking, amongst other things, the merits of the proposed transaction and the suitability of the recommendation.
- 2.24 COB 5.4.3R requires that a firm must not, amongst other things, make a personal recommendation of a transaction to a private customer unless it has taken reasonable steps to ensure that the private customer understands the nature of the risks involved.
- 2.25 COB 5.7.3R requires that before a firm conducts investment business with a private customer it must disclose in writing the basis or amount of its charges for conducting that business and the nature or amount of any other income receivable by it.
- 2.26 COB 5.7.5R requires that when a firm recommends or arranges the sale of a packaged product the firm must disclose to the customer in cash terms any commission receivable by it in connection with the transaction.

Conduct of Business Sourcebook

- 2.27 Conduct of Business Sourcebook (“COBS”) applied to firms for part of the relevant period (with effect from 1 November 2007).
- 2.28 COBS 4.2.1R requires a firm to ensure that a communication is fair, clear and not misleading.
- 2.29 COBS 4.5.2R requires that information is accurate and, in particular, does not emphasise any potential benefits of an investment without also giving a fair and prominent indication of any relevant risks.
- 2.30 COBS 4.5.6R requires that if information compares investments a firm must ensure that the comparison is meaningful and presented in a fair and balanced way.
- 2.31 COBS 9.2.1R (assessing suitability) requires that a firm must take reasonable steps to ensure that a personal recommendation or decision to trade, is suitable for its client.
- 2.32 COBS 9.2.2R requires that a firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him.
- 2.33 COBS 9.2.6R requires that if a firm does not obtain the necessary information to assess suitability it must not make a personal recommendation to the client.
- 2.34 COBS 9.4.7R requires that the suitability report must at least specify the client’s demands and needs; explain why the firm has concluded that the recommended transaction is suitable for the client having regard to the information provided by the client; and explain any possible disadvantages of the transaction for the client.

3. Other relevant regulatory provisions

- 3.1 In exercising its power to make a prohibition order, the FSA must also have regard to relevant regulatory provisions and guidance. The guidance that the FSA considers relevant to this case is set out below.

Enforcement Guide

- 3.2 The FSA's policy on exercising its enforcement power is set out in the Enforcement Guide ("EG"), which came into effect on 28 August 2007. Although the references in the Final Notice are to EG, the FSA has also had regard to the appropriate provisions of the FSA's Enforcement Manual, which preceded EG and applied during part of the relevant period.

Exercising the power to make a prohibition order under section 56 of the Act – EG 9

- 3.3 EG 9.1 states that the FSA's power under section 56 of the Act to prohibit individuals who are not fit and proper from carrying out controlled functions in relation to regulated activities helps the FSA to work towards achieving its regulatory objectives. The FSA may exercise this power to make a prohibition order where it considers that, to achieve any of those objectives, it is appropriate either to prevent an individual from performing any functions in relation to regulated activities, or to restrict the functions which he may perform.
- 3.4 EG 9.2 states that the FSA's effective use of the power under section 63 of the Act to withdraw approval from an approved person will also help to ensure high standards of regulatory conduct by preventing an approved person from continuing to perform the controlled function to which the approval relates if he is not a fit and proper person to perform that function. Where it considers this is appropriate, the FSA may prohibit an approved person, in addition to withdrawing their approval.
- 3.5 EG 9.4 sets out the general scope of the FSA's power in this respect. The FSA has the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant. Depending on the circumstances of each case, it may seek to prohibit individuals from performing any class of function in relation to any class of regulated activity, or it may limit the prohibition order to specific functions in relation to specific regulated activities.
- 3.6 EG 9.5 provides that the scope of the prohibition order will depend on the range of functions which the individual concerned performs in relation to regulated activities,

the reasons why he is not fit and proper and the severity of risk which he poses to consumers or the market generally.

3.7 EG 9.9 provides that when deciding whether to make a prohibition order, the FSA will consider all the relevant circumstances of the case. This may include, but are not limited to, the following:

- (1) whether the individual is fit and proper to perform the functions in relation to regulated activities. The criteria for assessing fitness and propriety are set out in FIT 2.1 (honesty, integrity and reputation), FIT 2.2 (competence and capability) and FIT 2.3 (financial soundness);
- (2) the relevance and materiality of any matters including unfitness;
- (3) the length of time since the occurrence of any matters indicating unfitness; and
- (4) the severity of the risk which the individual poses to consumers and to confidence in the financial system.

3.8 EG 9.11 provides that due to the diverse nature of the activities and functions which the FSA regulates, it is not possible to produce a definitive list of matters which the FSA might take into account when considering whether an individual is not a fit and proper person to perform a particular, or any, function in relation to a particular, or any firm. However, EG 9.12 gives examples of types of behaviour which have previously resulted in the FSA deciding to issue a prohibition order, and one such example is a serious lack of competence.

3.9 EG 9.23 provides that in appropriate cases the FSA may take other action against an individual in addition to making a prohibition order and/or withdrawing its approval, including the use of its power to impose a financial penalty.

Fit and Proper Test for Approved Persons (“FIT”)

3.10 The FSA has issued specific guidance on the fitness and propriety of individuals in FIT. The purpose of FIT is to outline the main criteria for assessing the fitness and propriety of a candidate for a controlled function and FIT is also relevant in assessing the continuing fitness and propriety of approved persons.

- 3.11 FIT identifies three criteria as being the most important considerations, namely:
- (1) FIT 2.1 (honesty, integrity and reputation): This includes an individual's openness and honesty in dealing with customers, market participants and regulators and willingness to comply with requirements placed on him by or under the Act as well as other legal and professional obligations and ethical standards;
 - (2) FIT 2.2 (competence and capability): This includes an assessment of the individual's skills in carrying out the controlled function that he is performing; and
 - (3) FIT 2.3 (financial soundness): This includes an assessment of the individual's financial soundness.
- 3.12 FIT 2.2.1G(2) provides that in determining a person's competence and capability, the FSA will have regard to all relevant matters including, but not limited to, whether the person has demonstrated by experience and training that the person is able, or will be able if approved, to perform the controlled function.

Decision Procedure and Penalties Manual ("DEPP")

- 3.13 The FSA's policy in relation to the issue of public censures is set out in Chapter 6 of DEPP, which forms part of the FSA Handbook. The principal purpose of issuing a public censure is to promote high standards of regulatory conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches and demonstrating generally the benefits of compliant behaviour.
- 3.14 DEPP 6.4.1G(1) provides that the FSA will consider all the relevant circumstances of a case when deciding whether to impose a penalty or issue a public censure.
- 3.15 DEPP 6.4.2G sets out a non-exhaustive list of factors that may be relevant to determining whether it is appropriate to issue a public censure. The following factors are relevant to this case:

Deterrence: DEPP 6.4.2G(1)

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

The seriousness of the breach in question: DEPP 6.4.2G(3)

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

Conduct following the breach: DEPP 6.4.2G(5)

- 3.18 The FSA may take into account the degree of co-operation the person showed during the investigation of the breach by the FSA.

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

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

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

- 3.20 In exceptional circumstances, if the person concerned has inadequate means to pay the level of financial penalty which their breaches would otherwise attract this may be

a factor in favour of a lower penalty or a public statement. Examples of circumstances where this might be appropriate include whether the person concerned has provided verifiable evidence that they would suffer serious financial hardship if the FSA imposed a financial penalty.