Financial Services Authority

FSA

FINAL NOTICE

To: Samuel Nathan Kahn

Date of birth: 2 December 1970

Date: 24 May 2011

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

1. THE ACTION

1.1. The FSA gave Samuel Kahn ("Mr Kahn") a Decision Notice on 15 April 2011 which notified Mr Kahn that pursuant to section 123 of the Financial Services and Markets Act 2000 ("the Act"), the FSA had decided to impose a financial penalty of £1,094,900 for engaging in market abuse as defined by section 118(5) of the Act.

1.2. This penalty consists of the following elements:

(a) a disgorgement of financial benefit arising from the market abuse of £210,563.22 (excluding interest), being the financial benefit obtained by Mr Kahn as a result of his conduct set out in this Notice; and

(b) an additional penalty of £884,365 (after taking into account the settlement discount mentioned at paragraph 1.5).

It is the FSA's policy to round down the final penalty figure to the nearest £100, leading to a financial penalty of £1,094,900.

1.3. Mr Kahn confirmed on 14 April 2011 that he will not be referring the matter to the Upper Tribunal (Tax and Chancery Chamber).

1.4. Accordingly, for the reasons set out below, the FSA imposes a financial penalty on Mr Kahn in the amount of £1,094,900. This sum does not include any interest payable on the disgorgement element of the penalty (see paragraph 6.4 below).

1.5. Mr Kahn agreed to settle at an early stage of the FSA's investigation and has therefore qualified for a 30% (stage 1) discount under the FSA's executive settlement procedures. Were it not for this discount, the FSA would have imposed a penalty of £1,263,379 on Mr Kahn, plus disgorgement of £210,563.22.

2. SUMMARY REASONS FOR THE ACTION

2.1. During the period from 24 March to 30 April 2010 (the "Relevant Period"), Mr Kahn orchestrated a scheme by which repeated orders were placed by Mr Kahn and others to buy and sell shares in Global Brands Licensing ("GBL"), a company admitted to trading on PLUS Quoted, a market owned and operated by PLUS Markets plc ("PLUS"). In pursuance of this scheme, Mr Kahn:

(a) placed repeated orders to buy and sell GBL shares on behalf of a charity ("Charity A") and a company ("Company B");

(b) placed repeated orders to buy GBL shares in his own name;

(c) co-ordinated orders to buy GBL shares by other individuals (the "Private Investors").

2.2. The above trading in GBL shares represented 85% by volume of the sell trades and 91% of the buy trades during the Relevant Period.

2.3. Mr Kahn's objective in orchestrating this scheme was to inflate the price of GBL shares artificially and in so doing to manipulate the market in those shares. Despite the fact that Mr Kahn had no formal relationship with Charity A or Company B, he placed orders on their behalf and impersonated a director and trustee of Charity A (who was also purportedly connected with Company B) when giving instructions to their respective brokers. By this means, and by co-ordinating the trading of the Private Investors, Mr Kahn sought to disguise the nature of the scheme and the extent of his involvement in it.

2.4. The scheme led to an increase in the price at which GBL's shares were traded from 2 pence on 24 March 2010 to 5.25 pence at its height on 20 April 2010. Due to suspicious trading activity, trading in GBL's shares was suspended on PLUS Quoted on 30 April 2010.

2.5. Mr Kahn directly benefitted from the increase in GBL's share price by means of profits made by Company B pursuant to its trading. These profits were withdrawn from Company B's bank account at Mr Kahn's instruction and were delivered to him

in cash. By this means, Mr Kahn benefitted financially from the scheme in the sum of £210,563.22.

2.6. The scheme also involved a significant proportion of GBL's shares being donated to registered charities. These donations were co-ordinated by Mr Kahn and aimed at illegitimately taking advantage of GBL's artificially inflated share price for tax relief purposes and for the purpose of facilitating boiler room activities. This aspect of Mr Kahn's scheme was not fully implemented due to the suspension of GBL's shares on 30 April 2010.

2.7. Mr Kahn's behaviour consisted of effecting orders to trade (otherwise than for legitimate reasons and in conformity with accepted market practices) which gave a false and misleading impression as to the price of, and the demand for and supply of GBL shares. Further, the orders to trade had the effect of securing the price of GBL's shares at an artificial level. For these reasons, the FSA has concluded that Mr Kahn engaged in market abuse contrary to section 118(5) of the Act.

2.8. The FSA views Mr Kahn's conduct as particularly serious for the reasons given in paragraph 6.7 below, including that his behaviour involved frequent deliberate acts of misconduct which resulted in considerable market impact. The FSA has had regard to his previous relevant and serious misconduct in setting the appropriate financial penalty.

3. LEGISLATION, RULES AND GUIDANCE

3.1. The provisions set out below are those applicable during the Relevant Period.

Relevant legislative provisions

3.2. The FSA has the power, pursuant to section 123(1) of the Act, to impose a financial penalty where it is satisfied that a person has engaged in market abuse.

3.3. Section 118(1) of the Act defines "*market abuse*" as behaviour (whether by one person alone or by two or more persons jointly or in concert) which:

> "*occurs in relation to ... qualifying investments admitted to trading on a prescribed market; ... and ... falls within any one or more of the types of behaviour set out in subsections (2) to (8).*"

3.4. Section 118A(1) of the Act provides that:

> "*[b]ehaviour is to be taken into account for the purposes of ... [sections 118 to 131A of the Act] ... if it occurs in the United Kingdom or ... in relation to qualifying investments which are admitted to trading on a prescribed market situated in, or operating in, the United Kingdom...*"

3.5. Section 130A of the Act provides that the Treasury may by order specify markets and investments which are "*prescribed markets*" and "*qualifying investments*" for the purposes of any or all of sections 118 to 131A of the Act.

3.6. PLUS Quoted is a prescribed market for the purposes of section 118(7) of the Act by reason of the Financial Services and Markets Act 2000 (Prescribed Markets and Qualifying Investments) Order 2001. Shares are, by reason of the same Order and relevant European legislation, qualifying investments.

3.7. Section 118(5) defines as a form of market abuse behaviour which:

> "*…consists of effecting transactions or orders to trade (otherwise than for legitimate reasons and in conformity with accepted market practices on the relevant market) which –*
>
> *(a) give, or are likely to give, a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more qualifying investments, or*
>
> *(b) secure the price of one or more investments at an abnormal or artificial level."*

Relevant regulatory provisions

3.8. MAR 1.6.2E sets out non-exhaustive examples of those behaviours which are market abuse of a type involving false or misleading impressions, including:

> *(2) wash trades – that is, a sale or purchase of a qualifying investment where there is no change in beneficial interest or market risk, or where the transfer of beneficial interest or market risk is only between parties acting in concert or collusion, other than for legitimate reasons."*

3.9. Other relevant regulatory provisions are set out in the Annex to this Notice.

4. FACTS AND MATTERS RELIED ON

Background

4.1. Mr Kahn has never worked at an authorised firm regulated by the FSA. However, he has previously been the subject of an FSA investigation and enforcement action. In February 2007, the FSA obtained interim injunctions against Mr Kahn and two associated companies (Chesteroak Limited ("Chesteroak") and "Bingen Investments Limited" ("Bingen")) concerning his and their involvement in overseas boiler-room activities. In September 2007, Chesteroak and Bingen were placed into compulsory liquidation by the Court for assisting boiler-rooms. In June 2008, the FSA obtained a Bankruptcy Order against Mr Kahn following his admission of liability for claims totalling up to £3.7 million made by the FSA on behalf of about 800 investors.

4.2. Mr Kahn is currently subject to a Bankruptcy Restrictions Undertaking ("BRU") dated 8 May 2009 arising from spread betting activity in part for the purpose of artificially maintaining the value of shares associated with suspected boiler room activities. The BRU restricts Mr Kahn from, amongst other things, acting as the director of a company or taking part in its promotion, formation or management. The BRU is due to expire in 2018.

GBL

4.3. GBL's shares were admitted to trading on PLUS Quoted on 24 March 2010, at which time the company's business was the commercial development of licensing and intellectual property rights.

Initial trading

4.4. On 24 March 2010, Mr Kahn placed three orders to buy GBL shares on behalf of Charity A. One of these orders to trade was placed by telephone, and the other two orders were placed via the internet. Mr Kahn had no formal relationship with Charity A or authority to place orders on its behalf. To induce the broker to carry out his instructions, and to disguise his involvement in the transaction, Mr Kahn impersonated a director and trustee of Charity A when placing the order over the telephone.

4.5. On the same day, Mr Kahn placed four orders to buy GBL shares in his own name via his trading account with a different broker.

4.6. On 25 March 2010, Mr Kahn continued to place further orders via the internet to buy GBL shares on Charity A's behalf.

4.7. Later that day, Mr Kahn placed an order by telephone to sell GBL shares on behalf of Company B, which had acquired shares in GBL prior to its admission to PLUS Quoted. Once again, Mr Kahn had no formal relationship with Company B or authority to place orders on its behalf. Company B's trading in GBL shares was conducted via a different broker to those used when placing orders on Mr Kahn's own account or on behalf of Charity A. When instructing the broker in relation to this order, Mr Kahn concealed his identity by impersonating the same individual referred to at paragraph 4.4, whom the broker believed had authority to act on behalf of Company B.

Telephone call to the market-maker

4.8. On 26 March 2010, Mr Kahn telephoned the sole market-maker in GBL's shares and impersonated a non-executive director of GBL. During the telephone call, Mr Kahn sought to persuade the market-maker to increase his indicated quote for GBL's shares from 1-2 pence to 4-5 pence on the basis that certain "US investors" would only be willing to invest at the higher price. This request was refused.

4.9. From this point onwards, Mr Kahn continued to place orders by telephone and/or via the internet to trade in GBL shares on behalf of Charity A and Company B and in his own name. The trading essentially consisted of buying activity by Mr Kahn and Charity A, as well as by the Private Investors co-ordinated by him; and selling activity by Company B. This trading activity and its impact on GBL's share price are described below.

Buy orders by Charity A

4.10. Between 24 March and 26 April 2010, 68 trades to buy GBL shares were executed on behalf of Charity A, representing 32% of the total volume of GBL share purchases during the Relevant Period. All of the associated orders to trade were placed by Mr Kahn via the internet or by telephone. On each occasion Mr Kahn placed orders to

trade by telephone, he impersonated the director and trustee of Charity A referred to at paragraph 4.4 above to facilitate and disguise his involvement in the trading.

Buy orders by Mr Kahn and the Private Investors

4.11. Between 24 March and 22 April 2010, Mr Kahn purchased shares in GBL in his own name on five occasions, and co-ordinated purchases of GBL shares by the Private Investors. Cumulatively, these purchases represented 59% of the total volume of GBL share purchases during the Relevant Period. The trading by the Private Investors is considered further at paragraphs 4.17 – 4.21 below.

Sell orders by Company B

4.12. Between 25 March and 22 April 2010, Company B sold a total of 5.42 million GBL shares in a series of 14 trades, representing 85% of the total volume of GBL share sales during the Relevant Period. All of the orders to trade were placed by Mr Kahn via email (sent by a third party effecting Mr Kahn's instructions) or by telephone. When placing orders with the broker by telephone, Mr Kahn again impersonated the individual referred to at paragraph 4.4 above. He acted in this way to facilitate and disguise his involvement in the trading.

Company B's trading via the market-maker

4.13. Prior to 14 April 2010, Company B sold its GBL shares almost entirely to the market-maker.

4.14. Shortly after GBL's admission, Mr Kahn instructed Company B's broker to convey to the market-maker the terms of a limit order. Pursuant to this order, Company B's broker was instructed to sell GBL shares at the following levels:

250,000 shares at 1.5p

250,000 shares at 2p

250,000 shares at 2.5p

250,000 shares at 3p.

4.15. Mr Kahn subsequently repeatedly instructed Company B's broker to adjust the limit order to increase the price at which Company B was prepared to sell GBL shares to the market maker.

4.16. As discussed at paragraph 4.22(c) below, the purpose of these instructions was to create the false impression of genuine supply and demand in GBL's shares at steadily increasing prices.

Company B's broker-to-broker trades with the Private Investors

4.17. From 14 April 2010 onwards, Company B's trading predominantly consisted of selling GBL shares via a series of broker-to-broker trades with the Private Investors.

A broker-to-broker trade is one which takes place between two brokers, rather than between a broker and the market maker.

4.18. On 13 April 2010, Mr Kahn informed Company B's broker by telephone that he may receive enquiries from a certain broker on behalf of a client seeking to buy GBL shares at a price of 4.5 pence. Mr Kahn instructed Company B's broker to sell GBL shares to that client at that price if such enquiries were received. When making this telephone call, Mr Kahn impersonated the same individual referred to at paragraph 4.4 above.

4.19. On the next day, as Mr Kahn had predicted the broker identified by him approached Company B's broker on the instructions of a client who wished to purchase GBL shares at a price of 4.5 pence. This broker had specifically been provided by his client with the name and contact details for Company B's broker. This client was the first of the Private Investors to trade in GBL shares.

4.20. Between 14 and 22 April 2010, the five Private Investors purchased a total of 3.385 million GBL shares. The trading activity of the Private Investors shared the following characteristics:

(a) The individuals opened their trading accounts between December 2009 and March 2010, shortly before GBL's admission to the market;

(b) The individuals invested significant sums purchasing large volumes of GBL shares within a period of seven trading days;

(c) Each individual requested that the trade be conducted at a specified volume and at the same price of 4.5 pence, on a broker-to-broker basis, and naming (and providing contact details for) Company B's broker with whom it was specified that the trade should be conducted;

(d) Each of the individuals' trades had Company B as its counterparty; and

(e) Four of the five individuals appear to have been in receipt of oral and/or written instructions when placing their orders to trade in GBL shares.

4.21. These common characteristics were present in the trading of the Private Investors because their trading was co-ordinated by Mr Kahn as part of his scheme to manipulate GBL's share price.

Effect of the trading activity

4.22. The trading activity described above had the effect of increasing the price at which GBL's shares were traded from 2p on 24 March 2010 to 5.25p at its height on 20 April 2010. This was achieved by the following means:

(a) The trading constituted the vast majority of all trading in GBL's shares on PLUS Quoted during the Relevant Period, amounting to 85% by volume of the sell trades and 91% by volume of the buy trades. The trading therefore dominated the supply and demand for GBL's shares.

(b) The buy orders placed by Mr Kahn and Charity A consistently left the market maker in a short position (i.e. it had sold more GBL shares than it owned), necessitating its acquisition of GBL shares to meet its obligations as market maker.

(c) These repeated purchases also had the effect of creating consistent upward pressure on GBL's share price throughout the Relevant Period. Against the demand created by Mr Kahn and Charity A via this trading, Mr Kahn ensured it was made known to the market-maker that Company B had a ready supply of GBL shares for sale. This created the false impression of genuine supply and demand in the market and significantly increased the volume of trading in GBL's shares.

(d) The price at which Company B was willing to sell its shares increased incrementally during the Relevant Period and by reference to the volume of shares sold. The ongoing demand created by Mr Kahn's trading and that of Charity A ensured that trades continued to be executed at these higher prices.

(e) The Private Investors each specifically instructed their broker to buy shares at 4.5p. Notwithstanding that these shares were traded on a broker-to-broker basis, the trades were reported to PLUS. As a result, the price at which these trades had been effected was published by PLUS and would have helped to set the share price at or around that level.

Financial benefit

4.23. Company B's trading in GBL shares resulted in total proceeds of sale (less broker's commission) amounting to £210,563.22. During the Relevant Period, these proceeds of sale were periodically transferred from Company B's trading account to its bank account. That money was then withdrawn from Company B's bank account at Mr Kahn's instruction and delivered to him in cash.

Donations to charity

4.24. On or around 1 April 2010, approximately 20% of GBL's shares were donated to a number of registered charities. The donations were co-ordinated and were aimed at taking advantage of GBL's artificially inflated share price for tax relief purposes. The donations were also aimed at facilitating boiler room schemes by means of Mr Kahn buying the donated shares back from the charities in order to re-sell them to innocent investors at an inflated market price generated by Mr Kahn's scheme described in this Notice. The fact that this aspect of the scheme was not fully implemented by Mr Kahn was solely due to the suspension of GBL's shares on 30 April 2010.

5. ANALYSIS OF THE BREACHES

5.1. GBL shares were qualifying investments admitted to trading on PLUS Quoted, a prescribed market, for the purposes of section 118 of the Act, situated in the United Kingdom.

5.2. Mr Kahn effected orders to trade on his own behalf and on behalf of Charity A and Company B. Furthermore, Mr Kahn acted jointly or in concert with the Private Investors when they effected orders to trade in GBL shares.

5.3. These orders were not for legitimate reasons, nor were they in accordance with accepted market practices. They involved repeated impersonations by Mr Kahn of the same individual when placing orders to trade with the intention of artificially inflating GBL's share price.

5.4. The orders to trade gave a false and misleading impression as to the price of GBL's shares and as to the demand and supply of GBL's shares. The orders to trade did not constitute genuine investment activity undertaken by independent parties, but constituted a form of wash trading as described in MAR 1.6.2E. It was co-ordinated trading orchestrated by Mr Kahn for the purpose of inflating GBL's share price. The trading achieved its purpose by causing GBL's share price to increase by almost three-fold in less than a month.

5.5. The orders to trade had the effect of securing the price of GBL's shares at an artificial level. They were not undertaken at a price which genuinely reflected the proper operation of supply and demand in the shares, but were undertaken in a particular manner and for the purpose of fixing GBL's share price at an artificial level.

5.6. On the basis of the foregoing and by reference to the regulatory guidance set out in the Annex to this Notice, Mr Kahn's conduct amounted to market abuse contrary to section 118(5) of the Act.

6. ANALYSIS OF SANCTION

Penalty

6.1. The FSA considers it appropriate to impose on Mr Kahn a financial penalty of £1,094,900. The FSA has taken all of the circumstances of the case into account in deciding that the imposition of a financial penalty is appropriate. In reaching this view, and in determining the appropriate level of penalty, the FSA has had regard to the provisions of the Decision Procedures and Penalties Guide ("DEPP") set out in the Annex to this Notice. The DEPP provisions relevant to assessing the level of penalty came into force on 6 March 2010 and are therefore applicable to Mr Kahn's conduct set out in this Notice.

6.2. The application of the five-step framework at DEPP 6.5CG (and set out in the Annex to this Notice) to Mr Kahn's conduct is as follows:

Step 1

6.3. Under Step 1, the FSA will seek to deprive the individual of any financial benefit gained as a direct result of the market abuse where it is practicable to quantify this. As discussed at paragraph 4.23, the financial benefit obtained by Mr Kahn as a result of his conduct set out in this Notice amounts to £210,563.22. Consequently, this is the amount to be disgorged under Step 1 (excluding interest).

6.4. In accordance with the FSA's policy, interest will be charged on this figure up to the date of payment of the financial penalty.

Step 2

6.5. In cases where the market abuse is not referable to the individual's employment (as in this case), the figure for the purpose of Step 2 will be the greater of:

(a) a multiple of between 0 and 4 (depending on the applicable 'seriousness levels' as described below) of the profit made or loss avoided by the individual for his own benefit, or for the benefit of other individuals where the individual has been instrumental in achieving that benefit, as a direct result of the market abuse (the "profit multiple"); and

(b) for market abuse cases which the FSA assesses to be seriousness level 4 or 5 (as described below), £100,000.

6.6. The seriousness of the market abuse will be assessed on a scale of 1 (least serious) to 5 (most serious) depending on the impact and nature of the market abuse and whether it was committed deliberately or recklessly.

6.7. The FSA considers Mr Kahn's conduct to be particularly serious, for the following reasons:

(a) his conduct was deliberate;

(b) his conduct resulted in a substantial personal profit and was directed at generating excessive levels of tax relief on donations to charities and facilitating boiler room activities;

(c) his abusive behaviour involved frequent and repeated acts of misconduct, which relied on other parties to trade in GBL's shares in order to facilitate the scheme and conceal its manipulative purpose;

(d) he deliberately deceived brokers by impersonating another person when placing orders to trade on behalf of Charity A and Company B in order to induce them to carry out his instructions and to disguise his involvement in the trading;

(e) his actions resulted in considerable market impact, specifically the significant increase in GBL's share price, the suspension from trading of GBL's shares and the consequent adverse effect on the orderliness of and confidence in trading on PLUS Quoted; and

(f) his previous relevant and serious misconduct, as discussed at paragraph 4.1 above.

6.8. Taking into account these factors, the FSA considers Mr Kahn's conduct to be at level 4 in terms of its seriousness. Accordingly, a profit multiple of 3 has been applied to the financial benefit figure of £210,563.22, resulting in a figure of £631,689.66 at the end of Step 2.

Step 3

6.9. At Step 3, the FSA may increase or decrease the amount of the financial penalty arrived at after Step 2 to take into account aggravating or mitigating factors. Any adjustments are made by way of a percentage adjustment to the figure determined at Step 2.

6.10. The FSA has had particular regard to Mr Kahn's previous misconduct discussed at paragraph 4.1, and that his conduct set out in this Notice has close similarities to Mr Kahn's previous misconduct. In both cases:

(a) Mr Kahn engaged in abusive trading activity in relation to a company's shares admitted to a public market;

(b) this trading activity was conducted on Mr Kahn's own account and via third parties, including using companies controlled by Mr Kahn and apparently unconnected individuals and/or entities on whose behalf he gave trading instructions;

(c) a significant proportion of shares were donated to charities in order to facilitate boiler room schemes.

The FSA considers this to be a very serious aggravating factor warranting a substantial uplift to the Step 2 figure.

6.11. The FSA does not consider there to be any applicable mitigating factors. The FSA therefore considers it appropriate to apply an uplift of 100% to the Step 2 figure, resulting in a figure of £1,263,379 at the end of Step 3.

Step 4

6.12. If the FSA considers that the figure arrived at after Step 3 is insufficient to deter the individual or others from committing further or similar abuse then the FSA may increase the penalty under Step 4, including in circumstances where the FSA considers the absolute value of the penalty too small in relation to the market abuse to meet its objective of credible deterrence.

6.13. The FSA considers the figure reached at the end of Step 3 to act as a sufficient deterrent to Mr Kahn and others from committing further or similar abuse. The FSA does not therefore propose an upwards adjustment at Step 4.

Step 5

6.14. The FSA operates a settlement discount scheme under which the penalty which might otherwise have been payable will be reduced to reflect the stage at which the FSA and individual concerned reached an agreement. The discount scheme does not apply to disgorgement of any benefit calculated at Step 1.

6.15. Mr Kahn has agreed to settle at an early stage of the FSA's investigation and has therefore qualified for a 30% (stage 1) discount under the FSA's settlement discount

scheme. Were it not for this discount, the FSA would have imposed a financial penalty of £1,263,379 on Mr Kahn.

Serious financial hardship

6.16. The FSA understands that Mr Kahn is discharged from the bankruptcy referred to at paragraph 4.1 above. Mr Kahn has not provided any evidence to suggest that payment of the penalty imposed would cause him serious financial hardship. In any event, were such evidence to exist, the FSA considers that any reduction would be inappropriate by reference to the factors identified at paragraph 6.7 and DEPP 6.5D.2G (as set out in the Annex to this Notice).

7. DECISION MAKERS

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

8. IMPORTANT

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

Manner of and time for payment

8.2. The financial penalty must be paid in full by Mr Kahn to the FSA by no later than 7 June 2011, 14 days from the date of the Final Notice.

If the financial penalty is not paid

8.3. If all or any of the financial penalty is outstanding on 8 June 2011, the FSA may recover the outstanding amount as a debt owed by Mr Kahn and due to the FSA.

Publicity

8.4. 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.

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

FSA contacts

8.6. For more information concerning this matter generally, you should contact Celyn Armstrong (direct line: 020 7066 2818) or Bob Beauchamp (direct line: 020 7066 5302) at the FSA.

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Jamie Symington
FSA Enforcement and Financial Crime Division

ANNEX

Relevant Regulatory Guidance

1. The provisions quoted below are those in force at the time of all the material events, acts and omissions described above.

Code of Market Conduct

2. The FSA issued MAR pursuant to section 119 of the Act, which requires the FSA to "*prepare and issue a code containing such provisions as the … [FSA] … considers will give appropriate guidance to those determining whether or not behaviour amounts to market abuse*." Under section 122 of the Act, MAR may be relied on "*so far as it indicates whether or not particular behaviour should be taken to amount to market abuse*."

3. MAR 1.6.2E provides examples of conduct which amount, in the opinion of the FSA, to behaviour falling within section 118(5)(a) of the Act. Those examples include:

> *"(2) wash trades - that is, a sale or purchase of a qualifying investment where there is no change in beneficial interest or market risk, or where the transfer of beneficial interest or market risk is only between parties acting in concert or collusion, other than for legitimate reasons;"*

4. MAR 1.6.5E of the Code sets out factors that are to be taken into account when considering whether the behaviour is for legitimate reasons. The Code sets out factors that indicate behaviour is <u>not</u> for legitimate reasons, including:

> *"(1) if the person has an actuating purpose behind the transaction to induce others to trade in, or to position or move the price of, a qualifying investment;*
>
> …
>
> *(3) if the transaction was executed in a particular way with the purpose of creating a false or misleading impression."*

5. MAR 1.6.9E of the Code sets out factors that are to be taken into account in determining whether a person's behaviour has given a false or misleading impression, including:

> *"(1) the extent to which orders to trade given or transactions undertaken represent a significant proportion of the daily volume of transactions in the relevant qualifying investment on the regulated market concerned, in particular when these activities lead to a significant change in the price of the qualifying investment;*
>
> *(2) the extent to which orders to trade given or transactions undertaken by persons with a significant buying or selling position in a qualifying investment*

lead to significant changes in the price of the qualifying investment or related derivative or underlying asset admitted to trading on a regulated market;

(3) whether transactions undertaken lead to no change in beneficial ownership of a qualifying investment admitted to trading on a regulated market."

6. MAR 1.6.10E of the Code sets out factors that are to be taken into account in determining whether a person's behaviour has secured a price at an abnormal or artificial level, including:

> "*(1) the extent to which the person had a direct or indirect interest in the price or value of the qualifying investment or related investment;*
>
> ...
>
> (*3*) *whether a person has successively and consistently increased or decreased his bid, offer or the price he has paid for a qualifying investment or related investment.*"

Decision Procedure and Penalties Manual (DEPP)

7. In deciding to take the action described above, the FSA has had regard to the guidance it has published in Chapter 6 of DEPP, under section 124 of the Act, which requires the FSA to "*issue a statement of its policy with respect to the imposition of penalties under section 123 and the amount of*" such penalties.

8. The principal purpose of imposing a financial penalty is "*to promote high standards of regulatory and/or market conduct 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*" (DEPP 6.1.2G).

9. DEPP 6.2.1G sets out a number of factors to be taken into account when the FSA decides whether or not to impose a financial penalty. They are not exhaustive but include:

> "*(1) the nature, seriousness and impact of the suspected breach, including:*
>
> > *(a) whether the breach was deliberate or reckless;*
> >
> > *(b) the duration and frequency of the breach;*
> >
> > *(c) the amount of any benefit gained or loss avoided as a result of the breach;*
> >
> > ...
> >
> > *(e) the impact or potential impact of the breach on the orderliness of markets including whether confidence in those markets has been damaged or put at risk;*
> >
> > *(f) the loss or risk of loss caused to consumers or other market users.*"

(2) The conduct of the person after the breach, including the following:

(a) how quickly, effectively and completely the person brought the breach to the attention of the FSA or another relevant regulatory authority;

(b) the degree of co-operation the person showed during the investigation of the breach;

(c) any remedial steps the person has taken in respect of the breach;

(d) the likelihood that the same type of breach (whether on the part of the person under investigation or others) will recur if no action is taken;

…

(f) the nature and extent of any false or inaccurate information given by the person and whether the information appears to have been given in an attempt to knowingly mislead the FSA."

(3) The previous disciplinary record and compliance history of the person including:

(a) whether the FSA (or any previous regulator) has taken any previous disciplinary action resulting in adverse findings against the person.

…

(5) Action taken by the FSA in previous similar cases."

10. DEPP 6.2.2G sets out additional factors specific to the decision whether to take action for market abuse or for requiring or encouraging it. These include:

"*(2) The impact, having regard to the nature of the behaviour, that any financial penalty or public censure may have on the financial markets or on the interests of consumers:*

(a) a penalty may show that high standards of market conduct are being enforced in the financial markets, and may bolster market confidence;

(b) a penalty may protect the interests of consumers by deterring future market abuse and improving standards of conduct in a market."

11. DEPP 6.4.1G states, more generally, that the "*FSA will consider all the relevant circumstances of a case when deciding whether to impose a penalty or issue a public censure.*"

Relevant guidance as to level of penalty

12. DEPP 6.5.2G states that the "*FSA's penalty setting-regime is based on the following principles:*

    (1) Disgorgement – a firm or individual should not benefit from any breach;

    (2) Discipline – a firm or individual should be penalised for wrongdoing; and

    (3) Deterrence – any penalty imposed should deter the firm or individual who committed the breach, and others, from committing further or similar breaches."

13. DEPP 6.5.3G sets out a five-step framework to achieve compliance with those principles when setting penalties:

    "*(a) Step 1: the removal of any financial benefit derived directly from the breach;*

    (b) Step 2: the determination of a figure which reflects the seriousness of the breach;

    (c) Step 3: an adjustment made to the Step 2 figure to take account of any aggravating and mitigating circumstances;

    (d) Step 4: an upwards adjustment made to the amount arrived at after Steps 2 and 3, where appropriate, to ensure that the penalty has an appropriate deterrent effect; and

    (e) *Step 5: if applicable, a settlement discount will be applied. This discount does not apply to disgorgement of any financial benefit derived directly from the breach.*"

14. DEPP 6.5CG provides guidance as to the application of the five-step framework in cases involving market abuse by an individual:

    "***Step 1 – disgorgement***

    The FSA will seek to deprive an individual of the financial benefit derived as a direct result of the market abuse (which may include the profit made or loss avoided) where it is practicable to quantify this. The FSA will ordinarily also charge interest on the benefit.

    Step 2 – the seriousness of the market abuse

    …

    (2) In cases where the market abuse was not referable to the individual's employment, the figure for the purpose of Step 2 will be the greater of:

    …

    (b) a multiple of the profit made or loss avoided by the individual for his own benefit, or for the benefit of other individuals where the individual

has been instrumental in achieving that benefit, as a direct result of the market abuse (the "profit multiple")...

(c) for market abuse cases which the FSA assesses to be seriousness level 4 or 5, £100,000…The FSA usually expects to assess market abuse committed deliberately as seriousness level 4 or 5.

…

(9) The FSA will assess the seriousness of the market abuse to determine which level is most appropriate to the case.

(10) In deciding which level is most appropriate to a market abuse case, the FSA will take into account various factors which will usually fall into the following four categories:

(a) factors relating to the impact of the market abuse;

(b) factors relating to the nature of the market abuse;

(c) factors tending to show whether the market abuse was deliberate…;

…

(11) Factors relating to the impact of the market abuse include:

(a) the level of benefit gained or loss avoided, or intended to be gained or avoided, by the individual from the market abuse, either directly or indirectly;

(b) whether the market abuse had an adverse effect on markets and, if so, how serious that effect was. This may include having regard to whether the orderliness of, or confidence in, the markets in question has been damaged or put at risk; and

(c) whether the market abuse had a significant impact on the price of shares or other investments.

(12) Factors relating to the nature of the market abuse include:

(a) the frequency of the market abuse;

(b) whether the individual abused a position of trust;

(c) whether the individual caused or encouraged other individuals to commit market abuse;

…

(13) Factors tending to show the market abuse was deliberate include:

(a) the market abuse was intentional, in that the individual intended or foresaw that the likely or actual consequences of his actions would result in market abuse;

(b) the individual intended to benefit financially from the market abuse, either directly or indirectly;

(c) the individual knew that his actions were not in accordance with exchange rules, share dealing rules and/or the firm's internal procedures;

(d) the individual sought to conceal his misconduct;

(e) the individual committed the market abuse in such a way as to avoid or reduce the risk that the market abuse would be discovered;

(f) the individual was influenced to commit the market abuse by the belief that it would be difficult to detect;

(g) the individual's actions were repeated;

…

(15) In following this approach factors which are likely to be considered 'level 4 factors' or 'level 5 factors' include:

(a) the level of benefit gained or loss avoided, or intended to be gained or avoided, directly by the individual from the market abuse was significant;

(b) the market abuse had a serious adverse effect on the orderliness of, or confidence in, markets;

(c) the market abuse was committed on multiple occasions;

(d) the individual breached a position of trust;

…

(f) the market abuse was committed deliberately or recklessly.

(16) In following this approach factors which are likely to be considered 'level 1 factors', 'level 2 factors' or 'level 3 factors' include:

(a) little, or no, profits were made or losses avoided as a result of the market abuse, either directly or indirectly;

(b) there was no, or limited, actual or potential effect on the orderliness of, or confidence in, markets as a result of the market abuse; and

(c) the market abuse was committed negligently or inadvertently.

Step 3 – mitigating and aggravating factors

(1) The FSA may increase or decrease the amount of the financial penalty arrived at after Step 2, but not including any amount to be disgorged as set out in Step 1, to take into account factors which aggravate or mitigate the market abuse. Any such adjustments will be made by way of a percentage adjustment to the figure determined at Step 2.

(2) The following list of factors may have the effect of aggravating or mitigating the market abuse:

(a) the conduct of the individual in bringing (or failing to bring) quickly, effectively and completely the market abuse to the FSA's attention (or the attention of other regulatory authorities, where relevant);

(b) the degree of cooperation the individual showed during the investigation of the market abuse by the FSA, or any other regulatory authority allowed to share information with the FSA;

…

(f) the previous disciplinary record and general compliance history of the individual;

Step 4 – adjustment for deterrence

(1) If the FSA considers the figure arrived at after Step 3 is insufficient to deter the individual who committed the market abuse, or others, from committing further or similar abuse then the FSA may increase the penalty.

Step 5 – settlement discount

The FSA and the individual on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, DEPP 6.7 provides that the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the FSA and the individual concerned reached an agreement. The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1."

15. DEPP 6.5D.2 provides that there may where, even though the FSA is satisfied that payment of the financial penalty would cause serious financial hardship, the FSA may consider the breach to be so serious that it is not appropriate to reduce the penalty. The FSA will consider all the circumstances of the case in determining whether this course of action is appropriate, including whether:

"*(a) the individual directly derived a financial benefit from the breach and, if so, the extent of that financial benefit;*

(b) the individual acted fraudulently or dishonestly with a view to personal gain;

(c) previous FSA action in respect of similar breaches has failed to improve industry standards; or

(d) the individual has spent money or dissipated assets in anticipation of FSA or other enforcement action with a view to frustrating or limiting the impact of action taken by the FSA or other authorities."