Financial Services Authority

FINAL NOTICE

To:	**Topps Rogers Financial Management**
Address:	**The Coach House** **Station Road** **Hope** **Hope Valley** **Derbyshire** **S33 6RR**
FSA reference:	**210105**
Dated:	**13 February 2012**

1. ACTION

1.1. For the reasons set out in this notice, the FSA hereby takes the following action against Topps Rogers:

(1) imposes a financial penalty of £97,600 on Topps Rogers, pursuant to section 206 of the Act, for failing to comply with Principles 3 (Management and control) and 9 (Customers: relationships of trust) of the FSA's Principles for Businesses; and

(2) cancels the permission granted to Topps Rogers under Part IV of the Act, pursuant to section 45, with effect from the above date.

2. REASONS FOR THE ACTION

Breaches of the Principles

2.1. On the basis of the facts and matters described below, the FSA considers that Topps Rogers' conduct fell below the standards and requirements of the regulatory system. Specifically, Topps Rogers failed to comply with the Principles and associated FSA Rules in connection with its investment business in the period from May 2004 to June 2010.

2.2. Topps Rogers breached Principle 9 (Customers: relationships of trust) by failing to take reasonable care to ensure that its recommendations relating to UCIS were suitable for its customers. Specifically, it failed to:

(1) establish that an appropriate exemption from the statutory restriction on the promotion of UCIS in section 238 of the Act was applicable before promoting UCIS. Customer files did not explain whether or how any exemption applied to each customer to whom a UCIS transaction was recommended;

(2) obtain and record sufficient financial and personal information about its customers to determine their eligibility for UCIS promotions and to assess the suitability of its recommendations. Customer files contained limited handwritten file notes;

(3) adequately assess and establish its customers' ATR. Some customer files contained no records that any assessment had been conducted to establish customers' ATR, and in some files the risk ratings did not correlate with the stated risk profile descriptions in suitability letters;

(4) undertake adequate research to support its recommendations. Customer files did not contain adequate details of research on alternative products, UCIS and providers, or record information comparing investments before UCIS fund switches were made;

(5) explain adequately why its recommendations were suitable with regard to its customers' personal and financial circumstances. Suitability letters were template driven with standard phrases, and were not issued in respect of UCIS fund switches; and

(6) explain adequately the costs associated with its recommendations. Customer files contained no record that customers had been notified of the fees or commission Topps Rogers would receive as a result of its recommendation or the charges which would be associated with their investments.

2.3. Topps Rogers also breached Principle 3 (Management and control) by failing to establish and implement adequate compliance arrangements over its business. Specifically, it failed to put in place adequate arrangements to:

(1) ensure that it had applied an exemption when promoting UCIS business in breach of the section 238 restriction, and over-relied on guidance provided by external compliance consultants;

(2) ensure the suitability of its advice;

(3) prevent its adviser conducting discretionary portfolio management outside the scope of Topps Rogers' Part IV permission; and

(4) prevent further UCIS transactions following the imposition of a requirement on Topps Rogers' Part IV permission not to arrange new UCIS business.

2.4. The impact of these failures was serious. Topps Rogers promoted to and advised 94 customers to invest over £12 million in UCIS, either directly with UCIS providers or indirectly through a self invested personal pension or a wrap platform. It did so without proper regard to the section 238 restriction. Consequently, customers might have received unsuitable advice or made unsuitable investments in UCIS.

2.5. As with many speculative investments, a customer investing in a UCIS could lose some or all of their money. However, this risk is likely to be particularly relevant to UCIS because they frequently invest in assets that are riskier or less liquid than other investments. A number of UCIS that Topps Rogers' customers invested in have been suspended or wound up, resulting in potential financial losses for customers. The situation was aggravated by the fact that customers were advised by Topps Rogers to invest large proportions of their investment portfolios in UCIS. In some instances, customers were not aware that they had invested in UCIS, or of the associated risks.

2.6. The FSA has concluded that the nature of the breaches outlined above warrants a financial penalty. The FSA has therefore decided to impose a financial penalty of £97,600 on Topps Rogers.

2.7. This action supports the FSA's regulatory objectives of market confidence and the protection of consumers.

Failure to satisfy the Threshold Conditions

2.8. The FSA has concluded, on the basis of the facts and matters described below, that Topps Rogers is failing to satisfy the Threshold Conditions set out in Part 1 of Schedule 6 of the Act.

2.9. By a Decision Notice dated 16 November 2011, the FSA decided to withdraw the approval of Mr Rigney and to make an order prohibiting him from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm on the grounds that he is not a fit and proper person. Mr Rigney has referred this Decision Notice to the Tribunal.

2.10. Mr Rigney is the only adviser and partner who performs significant influence functions at Topps Rogers. Topps Rogers does not have any other advisers or individuals with relevant expertise to perform significant influence functions in the

event that Mr Rigney's approval is withdrawn and he is prohibited. In these circumstances, Topps Rogers will fail to satisfy Threshold Condition 4 (Adequate resources) because it will have inadequate human resources in relation to the regulated activities that it has permission to carry on.

2.11. In addition, the FSA is not satisfied that Topps Rogers is fit and proper having regard to all the circumstances, including its connection with Mr Rigney who is considered not to be a fit and proper person to perform controlled functions and an unfit controller. Consequently, Topps Rogers is failing to satisfy Threshold Condition 5 (Suitability) in that it does not have a competent and prudent management.

2.12. Given that Topps Rogers is failing, or is likely to fail, to satisfy the Threshold Conditions, the FSA has therefore cancelled Topps Rogers' Part IV permission.

3. DEFINITIONS

3.1. The following definitions are used in this Final Notice:

'The Act' means The Financial Services and Markets Act 2000

'ATR' means attitude to risk

'The FSA' means the Financial Services Authority

'COBS' means the Conduct of Business Sourcebook

'COB' means Conduct of Business, the predecessor version of COBS that existed prior to 1 November 2007

'DEPP'means the FSA's Decision Procedure and Penalties Guide

'**PCIS Order'** means the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes (Exemptions) Order 2001

'Relevant Period' means the period between May 2004 and June 2010

'Mr Rigney' refers to Mr Martin Rigney, the subject of this final notice

'**Topps Rogers'** means Topps Rogers Financial Management

'The Tribunal' means the Upper Tribunal (Tax and Chancery Chamber)

'UCIS' means unregulated collective investment scheme

4. STAUTORY PROVISIONS, REGULATORY GUIDANCE AND POLICY

4.1. Relevant statutory provisions, regulatory guidance and policy are set out in Annexes A and B.

5. FACTS AND MATTERS

Background

5.1. Topps Rogers is a small independent financial advisory firm based in Sheffield. It is a partnership with two partners. Topps Rogers was authorised by the FSA on 25 April 2002 to conduct investment business. With effect from 25 April 2002, Topps Rogers was granted permission by the FSA to carry out the following regulated activities:

(1) advising on investments (except on pension transfers and pension opt outs);

(2) agreeing to carry on a regulated activity;

(3) arranging (bringing about) deals in investments; and

(4) making arrangements with a view to transactions in investments.

5.2. Mr Rigney was approved by the FSA on 29 April 2002 to perform the following controlled functions at Topps Rogers: CF4 (Partner), CF8 (Apportionment and oversight), CF10 (Compliance oversight) and CF11 (Money laundering reporting). In addition, he has been approved to perform the controlled function of CF30 (Customer) since 1 November 2007, has been responsible for insurance mediation since 11 July 2005 and is the only adviser at Topps Rogers.

5.3. With effect from 21 May 2009, Topps Rogers voluntarily varied its Part IV permission to stop arranging new business connected with unregulated collective investment schemes.

5.4. With effect from 20 January 2011, Topps Rogers voluntarily varied its Part IV permission such that it could not carry on any of the regulated activities in its permission. On 27 September 2011, Topps Rogers, was put into liquidation following a hearing at Stockport County Court. Mr Rigney and his wife were declared bankrupt on 15 November 2011.

Mr Rigney: penalty, withdrawal of approval and prohibition

5.5. The FSA has conducted an investigation into Topps Rogers, referred to below in paragraphs 5.7 to 5.54, and as a result identified serious concerns relating to Mr Rigney's fitness and propriety. Specifically, Mr Rigney failed to act with integrity and demonstrate the competence and capability required of an approved person while carrying out controlled functions as an adviser and a senior manager at Topps Rogers during the relevant period.

5.6. The FSA's concerns are set out more fully in the Decision Notice dated 16 November 2011, in which it decided to impose a financial penalty of £117,300 on Mr Rigney, withdraw his approval and make an order prohibiting him from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm. Mr Rigney has referred this Decision Notice to the Tribunal.

Topps Rogers: failings in relation to the conduct of its business

5.7. Following an investigation, the FSA considers that Topps Rogers failed to promote UCIS business in compliance with the section 238 restriction and respective exemptions, take adequate steps to ensure the suitability of its recommendations and put in place adequate compliance arrangements over its business, as set out in further detail below.

UCIS promotion

5.8. Material held on customer files did not evidence that Topps Rogers had established and relied on an appropriate exemption before promoting UCIS business in breach of the section 238 restriction and regulatory requirements in COB 3.11 and COBS 4.12.

The section 238 restriction

5.9. The section 238 restriction prohibits an authorised firm from communicating an invitation or inducement to participate in a UCIS. There are a number of exemptions to the section 238 restriction which an authorised firm could rely on to promote UCIS to its customers. These exemptions are contained in the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes (Exemptions) Order 2001 (the "PCIS Order") and listed in the tables at COB 3 Annex 5 (for the period up to 31 October 2007) and COBS 4.12.1R(4) (for the period from 1 November 2007). Relevant provisions relating to the promotion of UCIS are summarised in Annex B.

5.10. UCIS are often characterised by high levels of volatility and illiquidity which can in turn entail a higher degree of risk for consumers. Further, as UCIS fall outside the regulatory regime, consumers who invest in UCIS may have limited recourse to the Financial Ombudsman Service (the "FOS") and the Financial Services Compensation Scheme (the "FSCS"). For these reasons there is a restriction on the categories of investor to whom UCIS can be promoted.

Application of COBS 4.12

5.11. Topps Rogers stated that it relied on an exemption under COBS 4.12 to promote UCIS to its customers. Material held on customer files did not demonstrate that Topps Rogers had relied on an applicable exemption under COBS 4.12 before promoting UCIS business. In fact, none of the customer files showed that an exemption had been considered, let alone applied.

5.12. Although Topps Rogers had obtained some personal and financial information about its customers, there was no evidence of an adequate assessment of the customers'

investment experience and knowledge, or of whether the investment in the UCIS was suitable for the customer. Nor was there any explanation of how it had established that its customers were capable of making their own investment decisions and that they understood the risks associated with investing in UCIS. Except for one customer, there was no record on the customer files demonstrating that Topps Rogers had given its customers clear written warning that it could promote UCIS business to them. In addition, the customer files did not show that Topps Rogers had obtained any documents from customers confirming their awareness that it could promote UCIS business to them.

Application of PCIS Order

5.13. Information recorded on customer files suggested that Topps Rogers might have been seeking to rely upon the exemption relating to "high net worth individuals" under the PCIS Order.

5.14. A number of customer files contained signed statements purporting to confirm the customers' status as high net worth individuals. Topps Rogers could not have relied on this exemption as the UCIS funds that it recommended to its customers did not invest in unlisted securities. In any event, even if Topps Rogers could have relied on this exemption, the customer files did not demonstrate that the exemption had been applied properly because the statements did not comply with the necessary requirements stipulated by the PCIS Order (although they appeared to try to mirror the language). The statements referred to incorrect legislation and did not warn customers that they could lose their property and other assets. They also did not state that customers should seek independent advice if they had any doubts about investing in UCIS.

5.15. When communicating information relating to UCIS, the exemption relating to high net worth individuals also requires a warning about the risk involved when investing in the UCIS to be given to the customer, both orally and in writing, within two business days of the communication. In addition, any communication has to be accompanied by an indication that it is exempt from the section 238 restriction. However, customer files did not demonstrate that Topps Rogers had given its customers either the warning or the indication, whether orally or in writing, when promoting UCIS business.

Report by a skilled person

5.16. The FSA required Topps Rogers to engage a skilled person to review ten customer files. The purpose of the review was to assess whether historical instances of Topps Rogers' promotion of UCIS were compliant with the section 238 restriction.

5.17. The skilled person produced a report, which concluded as its key finding, that two cases were not UCIS but, in the eight UCIS cases reviewed, Topps Rogers had been communicating UCIS to its customers without ensuring that each customer fell within an exemption in the PCIS Order or COBS 4.12 (or COB 3.1 for the period up to 31 October 2007). The individual promotions were consequently all non-compliant.

Suitability of Recommendations

Eligibility for UCIS promotion

5.18. The skilled person report indicated that Topps Rogers had failed to ensure that it adequately assessed its customers' eligibility for UCIS promotions and established whether an exemption was applicable in accordance with the PCIS Order or COBS 4.12 before promoting UCIS business to them. By promoting UCIS business to retail customers without establishing whether an appropriate exemption was applicable, Topps Rogers breached the section 238 restriction, and may have promoted UCIS to customers who were not eligible for such investments.

Recording customer information

5.19. Although customer files showed that Topps Rogers had obtained some personal and financial details about its customers, the customer files did not demonstrate that Topps Rogers had explored whether its customers understood the risks involved with investing in UCIS or could financially bear any risks associated with such investments before recommending UCIS investments or conducting UCIS fund switches.

Assessing and establishing ATR

5.20. Topps Rogers used a standard ATR form to record its customers' reaction to a number of different investment scenarios. Where the ATR form was used, the customer files did not demonstrate that Topps Rogers had used the information gathered to assess and determine its customers' ATR, or to make its recommendations. Customer files also showed no re-assessment of the customers' ATR before each separate UCIS transaction or additional investment into an existing UCIS.

5.21. In addition, the customer files did not evidence that Topps Rogers had assessed the risk of exposing a proportion of its customers' investment portfolios to UCIS, or applied any diversification policy in respect of its customers' investment portfolios to mitigate the risks associated with investing in UCIS. In particular, the customer files did not demonstrate that Topps Rogers had assessed whether its customers could financially bear the risk of investing a substantial proportion of their money into UCIS, or explain how such an approach met their ATR.

5.22. Suitability letters also contained inconsistent descriptions of risk categories. They confirmed risk ratings which were not defined and did not match the risk categories described in the suitability letters. Further, suitability letters confirmed two different risk ratings for each customer. However, the suitability letters did not explain the relationship between the two different risk ratings.

5.23. As the risk ratings assigned to its customers were not explained and did not match the risk categories described in the suitability letters, Topps Rogers provided unclear information to its customers.

Due diligence

5.24. When conducting due diligence on specific UCIS and providers, Topps Rogers relied mainly on research produced by a third party who also promoted UCIS funds on behalf of the providers, and by speaking to UCIS fund managers.

5.25. Given that the third party and UCIS fund managers were actively involved in marketing and promoting UCIS funds, research material produced by these parties may have contained biased information. Topps Rogers relied heavily on information provided by these parties, and the FSA has seen no evidence that Topps Rogers obtained the necessary impartial knowledge to be able to assess objectively and identify concerns relating to specific UCIS funds.

5.26. To the extent that Topps Rogers conducted independent due diligence of UCIS, its research was inadequate because it focussed on reviewing investment performance and returns rather than on establishing the regulatory status of products. Consequently, Topps Rogers promoted UCIS without ensuring that it had an adequate knowledge of the regulatory status and the associated requirements attached to such investments. In fact, Topps Rogers promoted at least two products in the erroneous belief that they were UCIS.

5.27. Customer files also did not evidence that Topps Rogers had researched and considered alternative products, UCIS funds and providers before making recommendations. The customer files did not explain why the UCIS recommended was the most suitable, or why the provider selected was the most appropriate, compared to any alternatives. Topps Rogers did not always record details of its research on the customer files because it took the view that as UCIS were unregulated, there was no requirement to provide the level of evidence which it normally associated with regulated products. This view was incorrect.

5.28. Further, in respect of customers who invested through a wrap platform, where their initial investments were subsequently switched into UCIS funds, the customer files did not evidence that Topps Rogers had conducted any research before moving the investments into UCIS funds. In particular, the customer files did not demonstrate that it had compared the advantages and disadvantages of investing in UCIS funds with the customers' existing investments.

5.29. As customer files did not contain adequate details of research on alternative products, UCIS funds and providers, or record comparison information between investments before UCIS fund switches were made, it is unclear whether investments in UCIS made on behalf of customers were suitable.

Confirming advice

5.30. Although authorised firms are not required to issue suitability letters in respect of UCIS recommendations, firms that choose to do so are required by Principle 7 (Communications with customers) to communicate information to customers in a way that is clear, fair and not misleading.

5.31. Topps Rogers issued suitability letters, which were based on a standard template. The FSA found that the suitability letters were not tailored to each customer and Topps Rogers did not remove parts of the letters which were not relevant. For example, it included standard phrases to describe its customers' investment objectives which in some cases were inconsistent with other information recorded on the customer files.

5.32. Suitability letters suggested that Topps Rogers had considered regulated investments for its customers. However, the suitability letters did not explain adequately why regulated investments had been discounted in favour of UCIS with reference to the customers' personal and financial circumstances. Instead, the suitability letters included standard reasons for dismissing investments in regulated products but the reasons encompassed concerns that were not noted on the customer files.

5.33. Where customers invested in UCIS through a wrap platform, the suitability letters did not specifically highlight that the products could invest in UCIS funds or the general risks involved with investing in UCIS. In fact, the suitability letters did not evidence that Topps Rogers had explained what a UCIS was or that it had discussed investing in UCIS with its customers; this is of particular concern given that investments in UCIS might not be covered by the FOS or the FSCS and therefore would be important information to the customers.

5.34. In respect of customers who switched from other investments into UCIS funds through a wrap platform, Topps Rogers did not issue any suitability letters. The FSA has seen no evidence that Topps Rogers confirmed its advice and communicated key information to its customers, given that the customer files did not evidence any discussions it had with its customers, or any other written communications about the suitability of UCIS fund switches before they were made.

5.35. As those suitability letters which were issued (i) contained inaccurate, generic and often misleading information; and (ii) did not contain certain key information about its recommendations (for example, as to the fact the recommendation could involve investment in UCIS and the associated risks), the FSA considers that customers were not able to make informed investment decisions.

Disclosure of fees

5.36. Topps Rogers typically received a fee from the wrap platform and an introductory fee from the UCIS provider. In addition, Topps Rogers received trail commission depending on the UCIS fund.

5.37. In respect of customers who invested in UCIS and other investments through a wrap platform, the suitability letters did not contain information about the charges imposed

by the wrap platform or the fund providers, nor did they provide details of fee and commission payments that would be made to Topps Rogers. In fact, the customer files did not demonstrate that it had notified customers either orally or in writing of the total fees that Topps Rogers would receive as a result of its recommendations.

5.38. Further, customer files contained no record that any discussions about the cost implications had taken place with customers, or that Topps Rogers had compared the costs between different funds before recommending fund switches. The customer files also did not demonstrate that it had notified customers either orally or in writing of the total costs associated with any fund switches, or of any related fees.

5.39. Given that Topps Rogers did not confirm in writing the total charges associated with setting up investments through a wrap platform or fund switches, or disclose details of the fees and commission received from the wrap platform and fund providers, the FSA considers there is a serious risk that customers might not have understood or been aware of the important cost implications associated with their investments.

Compliance arrangements

5.40. Topps Rogers did not put in place adequate systems and controls to comply with relevant regulatory requirements and standards.

Risk identification and management

5.41. Topps Rogers did not put in place adequate arrangements to identify and manage risks to its business. Specifically, it did not put in place formal or documented compliance procedures until January 2009. The FSA therefore considers that Topps Rogers was not able to monitor and rectify issues arising from its business adequately.

5.42. In addition, Topps Rogers did not introduce any measures to ensure that it applied an appropriate exemption under the PCIS Order or COBS 4.12 (or COB 3.11 up to 31 October 2007) when promoting UCIS business. There was no specific provision within Topps Rogers' sales and compliance procedures explaining the steps to be taken to comply with the section 238 restriction. Procedures which were implemented after January 2009 did not include any specific steps for transacting unregulated investments.

5.43. Topps Rogers relied heavily on external compliance consultants for guidance and support and to ensure that it met its regulatory obligations. However, it did not consider the adequacy of their advice and whether it was reasonable for it to rely on them. Instead, Topps Rogers considered that it did not have the ability to question their advice.

5.44. The FSA's view is that Topps Rogers could and should have identified some of the issues observed on the customer files itself independently of any guidance or support provided by its external compliance consultants, but it did not do so. For example, it could have referred to the FSA's Handbook for information on the application of rules and required procedures.

5.45. As Topps Rogers did not put in place adequate compliance arrangements, or take adequate steps to assess effectively the advice given by its external compliance consultants and to monitor its business, it was not in a position to identify and manage risks that might have arisen in connection with activities it had undertaken.

Ensuring suitability of recommendations

5.46. Topps Rogers' customer file reviews were not sufficiently robust, as evidenced by the unacceptably high number of errors, inconsistencies and omissions contained in its suitability letters, which were not routinely identified.

5.47. As mentioned above, suitability letters contained inconsistent descriptions of risk ratings. In addition, where customers invested through a wrap platform, the suitability letters confirmed funds that were not reflected on the application forms. Topps Rogers accepted that the suitability letters contained incorrect information because they had not been checked.

5.48. Authorised firms are required to take reasonable steps to ensure the suitability of their advice. Although the FSA does not prescribe the manner and format in which to store information, firms are nevertheless required to maintain adequate records to support their recommendations. Topps Rogers did not put in place adequate arrangements to ensure that customer files recorded sufficient information about customers' financial and personal circumstances and recommendations to ensure that its advice was suitable.

5.49. Topps Rogers' external compliance consultants identified concerns relating to its lack of record keeping. Compliance reports relating to investment transactions that Topps Rogers had arranged during the period from 1 July 2008 to 31 July 2009 noted that the customer files for these transactions recorded insufficient information to evidence the advice given. Topps Rogers accepted that the findings in the compliance reports were a fair reflection of its record keeping weaknesses.

5.50. As Topps Rogers did not conduct robust independent file checks, or put in place adequate record keeping arrangements, it was unable to ensure the suitability of its UCIS recommendations.

Discretionary portfolio management

5.51. Topps Rogers did not put in place adequate arrangements to prevent its adviser conducting discretionary portfolio management outside the scope of its Part IV permission.

5.52. Topps Rogers notified the FSA that it had conducted fund switches for 14 customers without obtaining their signatures to make such transactions. As Topps Rogers arranged UCIS fund switches when it was aware that it did not have the mandate to do so, the FSA considers that Topps Rogers conducted discretionary portfolio management outside the scope of its Part IV permission and therefore breached section 20 of FSMA.

Restriction on Topps Rogers' Part IV permission

5.53. Topps Rogers agreed to stop writing new UCIS business and applied to vary Topps Rogers' Part IV permission on 21 May 2009. However, Topps Rogers did not put in place adequate arrangements to ensure that its adviser observed this requirement. Despite the requirement that was placed on Topps Rogers to cease writing any new UCIS business, it arranged a new UCIS transaction for a customer.

5.54. Specifically, in May 2010, Topps Rogers attempted to redeem money on behalf of two existing customers by transferring their holdings in a UCIS fund to a new customer. The UCIS fund had been suspended since September 2008, and was not taking new subscriptions or making redemptions. Given the suspended status of the UCIS fund, one way for investors to redeem their money was to transfer their holdings in the UCIS fund to other investors. By arranging for the transfer of holdings in the UCIS fund on behalf of the two existing customers to the new customer, Topps Rogers was arranging a new UCIS transaction. Had the transfer succeeded, Topps Rogers would have acted in breach of the restriction placed on its permission.

6. REPRESENTATIONS AND FINDINGS

6.1. Below is a brief summary of the key written and oral representations made by Topps Rogers and how they have been dealt with. In giving this notice, the FSA has taken into account all of Topps Rogers' representations, whether or not explicitly set out below.

Representations

6.2. Topps Rogers admitted that it promoted UCIS to customers who were not eligible to receive such promotions, but made representations that:

(1) the rules regarding the restriction on promotion of UCIS and the exemptions to it are extremely complex. Topps Rogers' breach of the restriction was inadvertent and was a result of the 'confusing and conflicting' regulations regarding UCIS investments;

(2) although Topps Rogers was not aware of the restriction or the exemptions to it, it was aware that there were substantive differences in the nature of UCIS investments from those within the regulated market. For that reason it engaged the services of external compliance consultants; and

(3) in promoting UCIS to its customers Topps Rogers relied and acted, in good faith, on the advice it received from its compliance consultants, who had advised that it was acting within the rules.

6.3. Topps Rogers admitted that it did not record adequate information on its files to demonstrate compliance with the FSA's rules, but made representations that:

(1) it did obtain sufficient financial and personal information about its customers – Topps Rogers' knowledge of its customers far exceeded the handwritten notes in the files;

(2) it did adequately assess and establish its customers' attitude to risk;

(3) adequate research was taken into consideration and due diligence on the UCIS funds themselves was carried out;

(4) the suitability of each UCIS fund chosen for each customer was explained and discussed at length with the customer, although this was not fully recorded in the files. All customers were made aware of the breakdown of the specific funds in which they were investing. Topps Rogers' detailed knowledge of its customers and their investments enabled it to assess suitability; and

(5) all customers were provided with full details of fees and commissions in the information memoranda with which they were provided, and these were explained to them.

6.4. Topps Rogers admitted that its adviser undertook discretionary management without being authorised to do so, and also attempted to arrange a transaction in a UCIS, despite the requirement imposed on Topps Rogers not to arrange UCIS business.

6.5. Topps Rogers stated that it is the subject of a winding up petition which it will not be contesting, and is unable to pay any financial penalty. The imposition of any fine will therefore cause Topps Rogers serious financial hardship

Findings

6.6. The FSA does not agree that the rules regarding the restriction on promotion of UCIS and the exemptions to it are 'conflicting'. The rules are necessarily complex in dealing with products which should not be promoted to consumers except in specific limited circumstances. It was not sufficient for Topps Rogers to act on advice without even the most rudimentary understanding of the applicable rules. Topps Rogers' adviser Mr Rigney should have satisfied himself, taking into consideration the advice received, that he fully understood the applicable rules, and Topps Rogers should have had arrangements in place to ensure that UCIS were not promoted in breach of the restriction. The FSA considers that firms that are unable to apply the necessary expertise, or to obtain appropriate specialist advice, to navigate the relevant provisions successfully, should refrain from promoting UCIS.

6.7. The evidence, in particular that contained in Topps Rogers' customer files, and the evidence of customers themselves, does not support Topps Rogers' claims, as set out in paragraph 6.3 above, regarding its compliance with the relevant requirements. In fact the evidence supports the opposite conclusion. The FSA considers that the relevant facts are accurately set out in the "Facts and Matters" section of this notice, evidencing significant failings in this regard.

6.8. The FSA has found that Topps Rogers did not have adequate compliance arrangements in place to prevent its adviser undertaking discretionary management without being authorised to do so, and arranging transactions in UCIS, despite the requirement imposed on Topps Rogers not to arrange UCIS business.

7. FAILINGS

Breaches of the Principles

7.1. The facts and matters described above lead the FSA, having regard to its regulatory objectives which include market confidence and the protection of consumers, to conclude that Topps Rogers has failed to comply with the Principles. Specifically, in connection with its investment business Topps Rogers breached:

(1) Principle 3 (Management and control) as it failed to establish and implement adequate compliance arrangements over its business. This failure meant that Topps Rogers was unable to identify and manage risks to its business; and

(2) Principle 9 (Customers: relationships of trust) as it failed to ensure the suitability of its recommendations. This failure meant that customers might have received unsuitable advice or made unsuitable investments in UCIS.

7.2. Having regard to the facts and matters, the FSA considers it appropriate and proportionate in all the circumstances to take disciplinary action against Topps Rogers for the breaches.

Failure to satisfy the Threshold Conditions

7.3. As a consequence of the FSA's action to withdraw Mr Rigney's approval and to make a prohibition order against him, it appears to the FSA that Topps Rogers is failing to satisfy:

(1) Threshold Condition 4 (Adequate resources) because it will not have adequate human resources in relation to the regulated activities that it has permission to carry on; and

(2) Threshold Condition 5 (Suitability) because it no longer satisfies the FSA that it is a fit and proper person having regard to all the circumstances, including its connection with Mr Rigney who is considered to be an unfit controller.

7.4. The FSA, having regard to its regulatory objectives which include market confidence and the protection of consumers, therefore considers it appropriate to cancel Topp Rogers' Part IV permission.

8. SANCTION

Imposition of financial penalty

8.1. The FSA's policy framework for the imposition of financial penalties that applied from 28 August 2007 to 5 March 2010 (the majority of the relevant period) was set out in Chapter 6 of the Decision Procedures and Penalties Manual ("DEPP"), which forms part of the FSA Handbook. The relevant sections of DEPP are set out in more

detail in Annex A. In addition, the FSA has had regard to the corresponding provisions of Chapter 13 of the Enforcement Manual which were in force during part of the relevant period up to 27 August 2007.

8.2. 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. A financial penalty is a tool that the FSA may employ to help it achieve its regulatory objectives.

8.3. In determining whether a financial penalty is appropriate the FSA is required to consider all the relevant circumstances of a case. Applying the criteria set out in DEPP 6.2.1G (regarding whether or not to take action for a financial penalty or public censure) and 6.4.2G (regarding whether to impose a financial penalty or a public censure), the FSA considers that a financial penalty is an appropriate sanction, given the serious nature of the breaches.

8.4. 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

8.5. The FSA considers that the imposition of the financial penalty is appropriate to deter firms which have committed breaches from committing further breaches and deter others from committing similar breaches, as well as demonstrating generally the benefits of compliant behaviour.

The nature, seriousness and impact of the breach in question

8.6. The purpose of the section 238 restriction is to protect customers from the risks associated with potentially high risk, speculative and sophisticated investments which they may not properly understand.

8.7. As a result of its failings, Topps Rogers exposed customers to a risk of investing in UCIS for which they did not have adequate knowledge or experience. Consequently, these customers may have invested significant proportions of their assets in UCIS that are not suited to their circumstances, ATR or level of understanding.

8.8. A number of UCIS have been suspended or wound up, resulting in crystallised or potential financial losses for customers. Customers also face difficulties and potential financial losses in disinvesting from illiquid and/or underperforming UCIS which were not suitable for them.

The extent to which the breach was deliberate or reckless

8.9. The breaches were neither deliberate nor reckless.

The size, financial resources and other circumstances of the firm

8.10. In determining the level of the financial penalty, the FSA has considered the size and financial resources of Topps Rogers.

The amount of benefit gained or loss avoided

8.11. In determining the level of the financial penalty, the FSA has taken into account that Topps Rogers benefitted financially from the breaches.

Conduct following the breach

8.12. Topps Rogers has co-operated with the FSA's investigation.

Other action taken by the FSA

8.13. In determining the level of financial penalty, the FSA has taken into account penalties imposed on other authorised firms for similar conduct.

Penalty

8.14. The FSA hereby imposes a financial penalty of £97,600 on Topps Rogers for breaching Principles 3 (Management and control) and 9 (Customers: relationships of trust).

8.15. The financial penalty consists of a punitive element of £70,000 and disgorgement of financial benefit of £27,600, being the commission payments obtained by Topps Rogers for arranging eight unsuitable UCIS sales.

Cancellation of Part IV permission

8.16. On the basis of the facts and matters described above the FSA has concluded that, as a consequence of the FSA's action to withdraw Mr Rigney's approval and to make a prohibition order against him, Topps Rogers is failing to satisfy:

(1) Threshold Condition 4 (Adequate resources) because it will not have adequate human resources in relation to the regulated activities that it has permission to carry on; and

(2) Threshold Condition 5 (Suitability) because it no longer satisfies the FSA that it is a fit and proper person having regard to all the circumstances, including its connection with Mr Rigney who is considered to be an unfit controller.

8.17. In these circumstances, having regard to its regulatory objectives which include market confidence and the protection of consumers, the FSA considers it appropriate to cancel Topp Rogers' Part IV permission.

9. PROCEDURAL MATTERS

Decision maker

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

9.2. The Final Notice is given under, and in accordance with, section 390 of the Act.

Manner of and time of Payment

9.3. The financial penalty will fall to be paid fourteen days after the date of this notice, the minimum statutory requirement under section 390(8) of the Act. The FSA recognises however that Topps Rogers was formally wound up at Stockport County Court on 27 September 2011 and that Mr Rigney and his wife were declared bankrupt on 15 November 2011. In those circumstances the FSA may not seek to enforce the penalty where to do so would be detrimental to the creditors of either Topps Rogers or Mr and Mrs Rigney and, in particular, to the interests of consumers.

Publicity

9.4. 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.

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

FSA contact

9.6. For more information concerning this matter generally, Topps Rogers should contact Rachel West (direct line: 020 7066 0142) of the Enforcement and Financial Crime Division at the FSA.

…….
Tom Spender
Head of Department- Retail 3
Enforcement and Financial Crime Division
Financial Services Authority

ANNEX A

STATUTORY PROVISIONS, REGULATORY GUIDANCE AND POLICY

1. STATUTORY PROVISIONS

1.1. The FSA's regulatory objectives are set out in section 2(2) of FSMA and include market confidence and the protection of consumers.

1.2. Section 20(1)(a) and (b) of FSMA states that if an authorised person carries on a regulated activity in the United Kingdom, or purports to do so, otherwise than in accordance with permission given to him by the FSA under Part IV or resulting from any other provision of FSMA, he is taken to have contravened a requirement imposed on by the FSA under FSMA.

1.3. Section 41 and Schedule 6 of FSMA set out the Threshold Conditions which are conditions that the FSA must ensure a firm will satisfy, and continue to satisfy, in relation to the regulated activities for which it has permission.

1.4. The FSA is authorised by section 45(1) and 45(2) of FSMA to cancel an authorised person's Part IV permission where it appears to the FSA that such a person is failing, or likely to fail, to satisfy the Threshold Conditions.

1.5. Paragraph 4(1) of Schedule 6 to FSMA sets out Threshold Condition 4 (Adequate resources) which provides that the resources of the person concerned must, in the opinion of the FSA, be adequate in relation to the regulated activities that he seeks to carry on, or carries on.

1.6. Paragraph 5 of Schedule 6 to FSMA sets out Threshold Condition 5 (Suitability) which provides that the person concerned must satisfy the FSA that he is a fit and proper person having regard to all the circumstances, including: (a) his connection with any person; (b) the nature of any regulated activity that he carries on or seeks to carry on; and (c) the need to ensure that his affairs are conducted soundly and prudently.

1.7. The FSA is authorised by section 206 of FSMA to impose a financial penalty of such amount as it considers appropriate where the FSA considers an authorised person has contravened a requirement imposed on him by or under FSMA.

2. REGULATORY PROVISIONS

2.1. In exercising its power to impose a financial penalty and to cancel a Part IV permission, the FSA has had regard to the relevant regulatory provisions and policy published in the FSA Handbook.

2.2. The guidance and policy that the FSA considers relevant to this case are set out below.

Principles for Businesses (the "Principles")

2.3. Under the FSA's rule making powers, the FSA has published in the FSA Handbook the Principles which apply either in whole, or in part, to all authorised persons.

2.4. The Principles are a general statement of the fundamental obligations of firms under the regulatory system and reflects the FSA's regulatory objectives. A firm may be liable to disciplinary sanction where it is in breach of the Principles.

2.5. The Principles relevant to this case are:

(1) Principle 3 (Management and control) which states that:

"A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems."

(2) Principle 9 (Customers: relationships of trust) which states that:

"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."

Decision Procedure and Penalties Manual ("DEPP")

2.6. Guidance on the imposition and amount of penalties that applied up to 5 March 2010 was set out in Chapter 6 of DEPP. The FSA has had regard to the appropriate provisions of DEPP that applied during the relevant period.

2.7. DEPP 6.1.2G provides that the principal purpose of imposing a financial penalty is to promote high standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches, and demonstrating generally the benefits of compliant behaviour. Financial penalties are therefore tools that the FSA may employ to help it to achieve its regulatory objectives.

2.8. DEPP 6.2.1G provides that the FSA will consider the full circumstances of each case when determining whether or not to take action for a financial penalty.

2.9. DEPP 6.5.1G(1) provides that the FSA will consider all the relevant circumstances of a case when it determines the level of financial penalty (if any) that is appropriate and in proportion to the breach concerned.

2.10. DEPP 6.5.2G sets out a non-exhaustive list of factors that may be relevant to determining the appropriate level of financial penalty to be imposed on a person under FSMA. The following factors are relevant to this case:

Deterrence: DEPP 6.5.2G(1)

2.11. When determining the appropriate level of financial penalty, 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 nature, seriousness and impact of the breach in question: DEPP 6.5.2G(2)

2.12. 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.

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

2.13. The FSA will regard as more serious a breach which is deliberately or recklessly committed, giving consideration to factors such as whether the breach was intentional, in that the person intended or foresaw the potential or actual consequences of its actions. If the FSA decides that the breach was deliberate or reckless, it is more likely to impose a higher penalty on a person than would otherwise be the case.

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

2.14. The degree of seriousness of a breach may be linked to the size of the firm. For example, a systemic failing in a large firm could damage or threaten to damage a much larger number of consumers or investors than would be the case with a small firm: breaches in firms with a high volume of business over a protracted period may be more serious than breaches over similar periods in firms with a smaller volume of business.

2.15. In addition, the size and resources of a person may also be relevant in relation to mitigation, in particular what steps the person took after the breach had been identified; the FSA will take into account what it is reasonable to expect from a person in relation to its size and resources, and factors such as what proportion of a person's resources were used to resolve a problem.

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

2.16. The FSA may have regard to the amount of benefit gained or loss avoided as the result of the breach, for example the FSA will impose a penalty that is consistent with the principle that a person should not benefit from the breach, and the penalty should also act as an incentive to the person (and others) to comply with regulatory standards and required standards of market conduct.

Conduct following the breach: DEPP 6.5.2G(8)

2.17. The FSA may take into account the degree of co-operation the person showed during the investigation of the breach by the FSA, any remedial steps taken since the breach was identified, including whether these were taken on the person's own initiative or that of the FSA, for example, identifying whether consumers or investors or other market users suffered loss and compensating them where they have and taking steps to ensure that similar problems cannot arise in future.

Other action taken by the FSA (or a previous regulator): DEPP 6.5.2G(10)

2.18. 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.

Threshold Conditions

2.19. Guidance on the Threshold Conditions is set out in the part of the FSA Handbook entitled Threshold Conditions ("COND").

Threshold Condition 4: Adequate resources (paragraph 4, Schedule 6 to FSMA) – COND 2.4

2.20. COND 2.4.1UK(1) states that the resources of the person concerned must, in the opinion of the FSA, be adequate in relation to the regulated activities that he seeks to carry on, or carries on.

2.21. COND 2.4.2G(1) states that Threshold Condition 4 requires the FSA to ensure that a firm has adequate resources in relation to the specific regulated activity or regulated activities which it seeks to carry on, or carries on.

2.22. COND 2.4.2G(2) states that the FSA will interpret the term "adequate" as meaning sufficient in terms of quantity, quality and availability, and "resources" as including all financial resources, non-financial resources and means of managing its resources such as, for example, human resources and effective means by which to manage risks.

2.23. COND 2.4.3G(1) states that when assessing this Threshold Condition, the FSA may have regard to any person appearing to it to be, or likely to be, in a relevant relationship with the firm, in accordance with section 49 of FSMA (Persons connected with an applicant); for example, a firm's controllers, its directors or partners, other persons with close links to the firm, and other persons that exert influence on the firm which might pose a risk to the firm's satisfaction of the Threshold Conditions and would, therefore, be in a relevant relationship with the firm.

Threshold Condition 5: Suitability (paragraph 5, Schedule 6 to FSMA) – COND 2.5

2.24. COND 2.5.1UK reproduces the relevant statutory provision that the person concerned must satisfy the FSA that he is a fit and proper person having regard to all the

circumstances, including, among other things, the need to ensure that his affairs are conducted soundly and prudently.

2.25. COND 2.5.2G(1) states that Threshold Condition 5 requires the firm to satisfy the FSA that it is "fit and proper" to have Part IV permission having regard to all the circumstances, including its connections with other persons, the range and nature of its regulated activities and the overall need to be satisfied that its affairs are and will be conducted soundly and prudently.

2.26. COND 2.5.3G(1) states that the emphasis of this Threshold Condition is on the suitability of the firm itself. The suitability of each person who performs a controlled function will be assessed by the FSA under the approved persons regime. In certain circumstances, however, the FSA may consider that the firm is not suitable because of doubts over the individual or collective suitability of persons connected with the firm.

2.27. COND 2.5.3G(2) permits the FSA, when assessing this Threshold Condition in relation to a firm, to have regard to any person appearing to it to be, or likely to be, in a relevant relationship with the firm, as permitted by section 49 of FSMA (Persons connected with the applicant). The guidance in COND 2.5.3G(2) also refers to COND 2.4.3G, which sets out examples of persons in a relevant relationship with the firm.

2.28. COND 2.5.4G(1) and (2) states that when determining whether the firm will satisfy and continue to satisfy Threshold Condition 5, the FSA will have regard to all relevant matters including whether a firm: (a) conducts, or will conduct, its business with integrity and in compliance with proper standards; or (b) has or will have a competent and prudent management.

2.29. COND 2.5.6G states that in determining whether a firm will satisfy, and continue to satisfy, Threshold Condition 5 in respect of conducting its business with integrity and in compliance with proper standards, relevant matters may include whether:

(1) the firm has contravened, or is connected with a person who has contravened, any provisions of FSMA, the regulatory system or the rules, statements of principles or codes of practice (COND 2.5.6G(4); and

(2) the firm has taken reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory systems that apply to the firm and the regulated activities for which it has permission (COND 2.5.6G(6).

2.30. COND 2.5.7G states that in determining whether a firm will satisfy, and continue to satisfy, Threshold Condition 5 in respect of having competent and prudent management, relevant matters may include whether:

(1) the governing body of the firm is made up of individuals with an appropriate range of skills and experience to understand, operate and manage the firm's regulated activities (COND 2.5.7G(1); and

(2) the firm has made arrangements to put in place an adequate system of internal control to comply with the requirements and standards under the regulatory system (COND 2.5.7G(5).

Enforcement Guide ("EG")

2.31. The FSA's policy to cancellation under section 45 of FSMA is set out in Chapter 8 of the Enforcement Guide ("EG").

2.32. EG 8.13(1) provides that the FSA will consider cancelling a firm's Part IV permission using its own-initiative powers contained under section 45 of FSMA in circumstances where the FSA has very serious concerns about the firm, or the way its business is or has been conducted.

2.33. EG 8.14 provides that the grounds on which the FSA may exercise its power to cancel an authorised person's permission under section 45 of FSMA are set out in section 45(1). These include where it appears to the FSA that the firm is failing, or is likely to fail, to satisfy the Threshold Conditions.

ANNEX B

CONDUCT OF BUSINESS PROVISIONS

1. PROMOTION OF UCIS

1.1. Section 238(1) of FSMA 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.

1.2. 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 or a recognised scheme (section 238(4));

(2) the Treasury may by order specify circumstances (section 238 (6)) (there is a statutory exemption in an order made by the Treasury - the PCIS Order);

(3) the financial promotion is permitted under FSA rules exempting the promotion of UCIS under certain circumstances (section 238 (5)) (the FSA has made rules exempting the promotion of UCIS in COB 3.11 for the period up to 31 October 2007 and COBS 4.12 for the period from 1 November 2007).

2. EXEMPTIONS UNDER THE PCIS ORDER

2.1. 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 PCIS Order.

2.2. These exemptions pertain to a certain category of individuals, for example certified high net worth individuals (article 21), certified sophisticated investors (article 23) or self-certified sophisticated investors (article 23A).

Certified high net worth individuals

2.3. 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 immediately preceding the date of the statement, an annual income of £100,000 or more; and/or

(2) the person held, throughout the previous financial year immediately preceding the date of the statement, net assets to the value of £250,000 or more, not including that person's primary residence or any loan secured on that residence; that person's rights under a qualifying contract of insurance within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001; or any benefits (in the form of pensions or otherwise) which are payable on the

termination of that person's service or on that person's death or retirement and to which that person is (or that person's dependants are), or may be, entitled.

2.4. 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.

2.5. 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.

3. EXEMPTIONS UNDER COBS 4.12

3.1. 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 tables at:

(1) COB 3 Annex 5 of COB 3.11 for the period up to 31 October 2007; and

(2) COBS 4.12.1R(4) of COBS 4.12 for the period from 1 November 2007.

3.2. 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.

3.3. 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.

3.4. 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 an "established" or "newly accepted" customer of the firm or a company in its group.

3.5. Category 7 provides that if a customer is categorised as a professional customer or eligible counterparty under COBS 4.12 (or, for the period up to 31 October 2007, a market counterparty or intermediate customer under COB 3 Annex 5) then an authorised person can promote to that customer any UCIS in relation to which the customer is so categorised.

3.6. Category 8 under COBS 4.12 only 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 customer; 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.

4. ENSURING SUITABILITY OF ADVICE

4.1. The fact that a customer is eligible to receive a communication promoting a UCIS under one or more exemption does not mean that UCIS will be automatically suitable to that customer.

4.2. Principle 9 (Customers: relationships of trust) of the FSA's Principles for Businesses states that 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.

4.3. Before making a personal recommendation, a firm is required to obtain and document information about a specific customer to assess the suitability of an investment for that customer. The relevant provisions that applied during the relevant period were set out at:

(1) COB 5.2 up to 31 October 2007; and

(2) COBS 9.2 from 1 November 2007.

4.4. COBS 9.2.1R(2) provides that when making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the customer's:

(1) knowledge and experience in the investment field relevant to the specific type of designated investment or service;

(2) financial situation; and

(3) investment objectives

so as to enable the firm to make the recommendation, or take the decision, which is suitable for him.

4.5. COBS 9.2.2R(1) provides that a firm must obtain from the customer such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:

(1) meets his investment objectives;

(2) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and

(3) is such that he has the necessary experience knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

4.6. COBS 9.2.3R clarifies that the information regarding a customer's knowledge and experience in the investment field includes the nature and extent of the service to be provided and the type of product or transaction envisaged, including its complexity and the risks involved. In addition consideration needs to be given to the:

(1) types of service, transaction and investments with which the customer is familiar;

(2) nature, volume and frequency of the customer's transactions in investments and the period over which they have been carried out; and

(3) level of education, profession or relevant former profession of the customer.

4.7. There is no direct equivalent COB rule to COBS 9.2.1R(2), COBS 9.2.2R(1) and COBS 9.2.3R but COB 5.2.11G(1)(a) provides that information collected from a customer should at a minimum provide an analysis of a customer's personal and financial circumstances leading to a clear identification of his needs and priorities so that, combined with attitude to risk, a suitable investment can be recommended.

4.8. 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 customer or take a decision to trade for him. There is no direct equivalent COB rule but COB 5.2.7G

provides that where a customer declines to provide sufficient information a firm should not proceed to make a personal recommendation without promptly advising the customer that the lack of such information may adversely affect the quality of the services which it can provide.

4.9. A firm is also required to maintain adequate records to support its recommendations. The provision that applied during the relevant period from 1 November 2007 is set out in COBS 9.5.2R which provides minimum periods that a firm must retain its records relating to suitability. The provision that applied during the relevant period up to 31 October 2007 is set out in COB 5.2.9R which provides that a firm must make and retain a record of a private customer's personal and financial circumstances that it has obtained.