FINAL NOTICE

To: **Alaba Adewale Adebajo**

Of: **137 Cherry Orchard Road**
Surrey
CR0 6BF

IRN: **AAA00001**

Dated: **31 January 2011**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives you, Alaba Adewale Adebajo ("Mr Adebajo"), final notice about the imposition of a financial penalty on you, the withdrawal of your individual approval to perform the controlled function of CF1 (Director), and an order prohibiting you from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm:

1. ACTION

1.1. The FSA gave you, Mr Adebajo, a Decision Notice on 9 June 2010 ("the Decision Notice"), which notified you that the FSA had decided to:

(1) make a prohibition order against you, Mr Adebajo, director of Whitehouse Estate Agents and Financial Services Ltd ("Whitehouse") pursuant to section 56 of the Financial Services and Markets Act 2000 ("the Act") prohibiting you from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm (the "Prohibition Order") because you are not a fit and proper person;

(2) withdraw the approval given to you to perform the controlled function of CF1 Director pursuant to section 63 of the Act because you are not a fit and proper person; and

(3) impose a financial penalty of £150,000 on you for failing to comply with Statements of Principle 1 and 7 of the FSA's Statements of Principle for Approved Persons ("APER") pursuant to section 66 of the Act.

1.2. The Decision Notice indicated to you that you had the right to refer the matters to which the Decision Notice related to the Upper Tribunal (Tax and Chancery Chamber) ("the Tribunal"). You did not make a reference to the Tribunal within the time specified and therefore a Final Notice was issued to you on 14 July 2010 stating that the FSA had taken the action specified above. You then made a reference to the Tribunal on 4 August 2010 seeking to have the FSA's decision set aside.

1.3. The Tribunal allowed your reference out of time and the FSA submitted a statement of case to the Tribunal on 3 September 2010. On 17 December 2010 the Tribunal released a direction striking out your reference as you had failed to comply with a previous Direction of the Tribunal, failed to serve a reply to the FSA's statement of case to the Tribunal and failed to provide any explanation or seek any extension of time. The Judge also directed that you had one month from the date of his Direction in which to apply to have the Direction set aside. You did not make any such application and your reference to the Tribunal remains struck out and the Tribunal has confirmed that it has closed its file. Accordingly the FSA gives you this Final Notice.

1.4. With effect from 31 January 2011, the FSA:

(1) has withdrawn your approval to perform the controlled function CF1 Director

(2) has imposed on you a financial penalty of £150,000; and

(3) hereby makes an order, pursuant to section 56 of the Act, prohibiting you from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm. The Prohibition Order takes effect from 31 January 2011.

2. REASONS FOR THE ACTION

2.1. By the Decision Notice, the FSA concluded that you applied for five mortgage contracts which were all based on false and misleading information about income and employment.

2.2. You were aware that the applications were based on false and misleading information because:

(1) you submitted mortgage applications for your own personal benefit using false income information;

(2) you submitted a mortgage application on behalf of a family member, which contained false information that related both to her income and also her employment history; and

(3) you were knowingly involved in the submission of a mortgage application on behalf of a client Mr X, which contained false and misleading information concerning his income and employment. The discrepancies contained within

the client file for Mr X would have alerted you to the fact that there was conflicting information regarding his income and employment.

2.3. You also failed to maintain adequate record keeping systems at Whitehouse which resulted in a lack of documentation within the client files and meant that there was limited information regarding client preferences, fact find details and affordability. This non disclosure was an attempt by you to obscure the fact that you had included false information in the mortgage applications and also meant that the suitability of the mortgages you provided could not be judged for the majority of clients. In this regard, you failed to ensure that Whitehouse complied with the relevant requirements and standards of the regulatory system.

2.4. The FSA has therefore decided to take the action described in the Warning Notice and the Decision Notice and to give this Final Notice. A copy of the relevant extract of the Warning Notice, which was attached to the Decision Notice, is attached to and forms part of this Final Notice.

3. STATUTORY PROVISIONS, REGULATORY GUIDANCE AND POLICY

3.1. The relevant statutory provisions and regulatory requirements are attached at Annex A**.**

4. FACTS AND MATTERS RELIED ON

Background

4.1. You are one of two directors of Whitehouse, which is a small mortgage broker and estate agents operating in Croydon, Surrey. You own 100% of the share capital. With effect from 31 October 2004, you were approved to perform the controlled functions of CF1 (Director) and CF8 (Apportionment and Oversight). You are also the only mortgage adviser and the only approved person at Whitehouse.

4.2. Whitehouse became authorised by the FSA on 31 October 2004 to carry on the following regulated activities:

(1) advising on regulated mortgage contracts;

(2) agreeing to carry on a regulated activity;

(3) arranging regulated mortgage contracts; and

(4) making arrangements with a view to regulated mortgage contracts.

4.3. You were granted approval by the FSA under section 59 of FSMA to perform the controlled functions of CF1 (director) and CF8 (Apportionment and Oversight) with effect from 31 October 2004.

4.4. On 14 January 2005, Whitehouse was granted permission to carry on the following additional regulated activities in relation to insurance mediation:

(1) advising (except in relation to pension transfers and pension opt outs);

(2) arranging deals in investments;

(3) assisting in the administration of insurance;

(4) dealing in investments as agent; and

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

4.5. Whitehouse ceased conducting regulated activities on a voluntary basis with effect from 5 July 2008.

Your mortgage applications

4.6. You submitted two remortgage applications on 7 September 2005 to Birmingham Midshires for your main dwelling in Croydon, Surrey, and another property in Croydon, Surrey. In both applications you declared that your self employed income as a financial adviser at Whitehouse was £89,750 for the tax year ending 5 April 2005.

4.7. These figures are significantly higher than the income figures that you reported to Her Majesty's Revenue and Customs ("HMRC").

4.8. According to HMRC's records, you declared a gross income of £32,694 and a net income of £11,538 for the tax year ending 5 April 2005.

Mortgage application in respect of a family member

4.9. You submitted two mortgage applications to Birmingham Midshires on behalf of a family member on 23 August 2004 and 29 May 2005. The 2004 application records her employment status as self employed and the nature of business as an IT consultant. This application also states that the business was established on 5 February 2001 and that the family member's income for the year 2004 was £72,500.

4.10. The 2005 Birmingham Midshires' application submitted by you also states that the family member is self employed and the nature of her employment is an IT consultant. The application states that the family member started her business on 18 February 2001 and the application recorded her income in 2005 as £89,750.

4.11. Information obtained from HMRC, as a result of a search request, provides details of the family member's employment from 2004 to 2008. These results show that the family member has been employed in several positions including:

(1) employment at various dental surgeries intermittently between 2004 and 2006 where the minimum salary she earned for a contracted period of work was £3,984.38 and the maximum salary she earned for a contracted period of work was £11,158.45.

(2) employment at a retail shop until 30 December 2005 where she earned a total of £176.27

(3) employment at a dental surgery from 2006 to 2008 where the maximum salary that she earned was £17,592.41 in the tax year ending 2008.

4.12. For the following reasons, we consider that you attempted to obtain, for the family member, mortgages based on false income and employment information.

(1) For the period from 2004 to 2008 HMRC has no record of any self employed income for the family member which matches the income stated in the two mortgage applications or at all.

(2) HMRC has no record of the family member being either employed or self employed as an IT consultant.

4.13. Given the anomalies on the mortgage applications submitted by you on behalf of the family member, the FSA considers that you were knowingly involved in the submission of mortgage applications for her which contained false and misleading income information.

Mr X's mortgage application

4.14. In December 2004 you submitted an application to Birmingham Midshires to remortgage a property on behalf of Mr X. This application stated that Mr X's employment status was self employed and the nature of his business was stated to be as an IT consultant. The application also stated that Mr X's share of net profit for his business was £98,500 in 2004.

4.15. The mortgage file that you maintained for this client contained a copy of an accountant's report which was dated 15 April 2005. This report detailed Mr X's net profit for his business for the year ending 31 December 2002 to the year ending 31 December 2004. The report states that Mr X earned £72,815 in 2004. This conflicts with the information in the Birmingham Midshires application which records Mr X's net profit for 2004 as £98,500. Whilst the accountant's report post-dated the mortgage application to Birmingham Midshires, you would have been aware of the conflicting information regarding income when you made a subsequent mortgage application for Mr X.

4.16. You submitted a further mortgage application for the same address on behalf of Mr X in June 2007. This application was submitted to GMAC Financial Services ("GMAC") and the summary sheet for this application is included in the client's mortgage file. This document states that Mr X was a self employed professional whose annual income for the year ending March 2007 was £68,407. Information obtained from HMRC as a result of a search request shows that Mr X actually earned £3,573.24 net income for the year ending 2007 and for the year ending 2008 he earned £10,768.60. For the period from 2004 to 2006 HMRC do not have any records for Mr X and he did not declare his income to HMRC. Whilst you, Mr Adebajo, would not have had access to HMRC information, you would have been aware of the earlier conflicting information concerning Mr X's income but even with this knowledge you went ahead and submitted a further mortgage application for Mr X based on what Mr X claimed to have earned for the year ending March 2007, without making any further checks and without supporting documentation. As Mr X had previously supplied significantly incorrect information concerning his income, you were not entitled to rely on information provided by Mr X and should have taken further steps to ascertain Mr X's income.

4.17. The GMAC summary sheet also records the date that the client's self employment commenced as the 31 March 2003. This date conflicts with the information detailed in the accountant's report which provides net profit for Mr X for the year ending 31 December 2002.

4.18. For the following reasons, the FSA considers that you were knowingly involved in the submission of mortgage applications for Mr X using false income and employment information.

(1) The client file contained contradictory evidence concerning Mr X's income and as the adviser for this client you would have been aware of the inconsistency.

(2) The discrepancy in terms of the self employment start date would have alerted you to the fact that conflicting information was being submitted on behalf of this client.

Record Keeping

4.19. The FSA found no evidence that you had taken reasonable steps to put in place or had put in place adequate and appropriate systems of control to ensure that Whitehouse retained sufficient client records.

4.20. The FSA received details from a high street lender of 54 mortgage applications submitted by Whitehouse. The case team reviewed this information and then compelled you to send 48 client files. You only sent 21 out of the 48 files which were required by the case team. These 21 files were reviewed by the case team and it was found that the files did not contain adequate information in order to assess the suitability of the product, none of the files had evidence of product research and only one file contained a basic fact find. One example of a client file only contained two mortgage offers from The Mortgage Business, two initial disclosure documents and three Nigerian medical notes relating to a different person.

4.21. You did not supply the case team with all the relevant documentation that you were compelled to provide. You said in interview that you were unable to retrieve electronic data because the systems via which you had submitted the information had changed and you could no longer access the documents. Other hard copy information that was required was not sent because you stated in interview that you were unable to find the files despite being aware of the location where the documents were stored.

Client Files

4.22. The details relating to 54 mortgage applications were taken from computer records held by a high street lender. These records provided information regarding the client's name, occupation, address, nature of business, income, loan amount and supporting documentation. The FSA's review of this information found the following problems:

(1) Differences between the income stated on a mortgage application and the income details provided by the individual's employer.

(2) Differences between the occupation recorded on a mortgage application and the occupation details held by the lender.

(3) Applications submitted a year apart with conflicting occupation and income details.

4.23. The FSA has serious concerns based upon the information provided by the lender, the client files you sent to the FSA team, and the responses provided by you in your interview. The FSA concludes that whilst acting as a director of Whitehouse, you have been knowingly involved in the submission of fraudulent mortgage applications and you sought to obscure this fact by providing the FSA with incomplete client files.

4.24. There are serious record keeping failures at Whitehouse which are a consequence of your failure to implement appropriate systems and controls and are also due to your deliberate attempt to hide the fact that that you were submitting mortgage applications containing false information. These failures prevented the FSA from fully assessing whether Whitehouse's mortgage recommendations were suitable and contained correct information. Your actions therefore show a deliberate disregard for whether Whitehouse complied with the relevant requirements and standards of the regulatory system.

5. ANALYSIS OF PROPOSED SANCTIONS

Financial penalty

5.1. In determining the appropriate level of financial penalty, the FSA has had regard to the following provisions of the Decision and Penalties Manual ("DEPP"). Prior to 28 August 2007, the FSA's policy in relation to financial penalties was contained in the Enforcement Manual ("ENF") at Chapter 13. Therefore, although the references in this Notice are to DEPP, as the conduct described in this Warning Notice occurred before 28 August 2007, the FSA has also had regard to the relevant sections of ENF.

Deterrence: DEPP 6.5.2G (1)

5.2. The principal purpose of the imposition of this penalty is to promote high standards of regulatory conduct by deterring approved persons from acting in this way.

5.3. The FSA has had regard to the need to ensure those who are approved persons act with integrity and do not abuse their positions in the financial services industry and obtain mortgages based on false and misleading information. The FSA considers that a significant penalty should be imposed to demonstrate to you and others the seriousness with which the FSA regards such behaviour.

5.4. In determining this penalty, the FSA has also had regard to the FSA's financial crime objective in ensuring that behaviour by individuals which undermines confidence in the financial system is not tolerated.

The nature, seriousness and impact of the breach: DEPP 6.5.2G(2)

5.5. You have demonstrated your lack of integrity by knowingly submitting a total of five fraudulent mortgage applications for yourself, a family member and a client. You

have also failed to act with integrity by deliberately obscuring the fraudulent nature of your other client files by sending the FSA incomplete documentation.

5.6. You have also demonstrated your lack of competence by failing to maintain adequate and accurate records at Whitehouse. You have failed to ensure that Whitehouse complied with the relevant requirements and standards of the regulatory system.

5.7. As a result of the above actions, the FSA considers that you pose a serious risk to customers and to confidence in the financial system.

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

5.8. The FSA considers that your decisions and/or actions were deliberate actions taken by you without concern for the risk posed to customers and lenders. In this regard they amounted to deliberate misconduct. Whilst performing the CF1 and CF8 controlled functions your actions were below the standard of behaviour that could reasonably be expected of an approved person.

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

5.9. The FSA recognises that the financial penalty imposed on you is likely to have a significant impact on you as an individual, but it is considered to be proportionate in relation to the seriousness of the misconduct.

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

5.10. The FSA has taken into account your financial resources and other circumstances to the extent that these are known. There is no evidence to suggest that you are unable to pay the financial penalty.

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

5.11. The FSA has not previously taken any disciplinary action against you.

5.12. Having regard to the factors outlined above, the FSA proposes to impose a financial penalty of £150,000 on you.

Withdrawal of approval and prohibition order

5.13. The FSA has considered whether you are a fit and proper person. In doing so, the FSA has had regard to its regulatory requirements and relevant guidance. In assessing your honesty, integrity and reputation for the purpose of considering whether you are a fit and proper person, the FSA had regard to your knowing involvement in the submission of mortgage applications to lenders based on information which you knew to be false and misleading.

5.14. The FSA considers that you are not a fit and proper person to perform any functions in relation to regulated activities. The seriousness of your misconduct means that if you continued to perform any functions you would pose a substantial serious risk to

the FSA's statutory objectives of maintaining confidence in the financial system and reducing financial crime.

5.15. The FSA therefore considers that it is necessary to withdraw your individual approval pursuant to section 63 of FSMA and to make an order pursuant to section 56 of FSMA prohibiting you from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.

6. DECISION MAKER

6.1. The decision which gave rise to the obligation to give this Final Notice was made by the Deputy Chairman of the Regulatory Decisions Committee.

7. IMPORTANT

7.1. This Final Notice is given to you in accordance with section 390(2) of the Act.

Manner of and time of payment.

7.2. The financial penalty must be paid in full by you to the FSA by no later than 14 February 2011, 14 days after the date of this Final Notice.

If the financial penalty is not paid

7.3. If all or any of the financial penalty is outstanding on 14 February 2011, the FSA may recover the outstanding amount as a debt owed by you and due to the FSA.

Publicity

7.4. Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this Final Notice relates. Under those provisions, the FSA must publish such information about the matter to which this Notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.

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

FSA contact

7.6. For more information concerning this matter generally, you should contact Paul Howick at the FSA (direct line: 020 7066 7954).

Tom Spender

Head of Department

FSA Enforcement and Financial Crime Division

Annex A

The FSA's regulatory objectives, which are set out in section 2(2) of the FSMA, include the maintenance of market confidence, the protection of consumers and the reduction of financial crime.

Pursuant to section 63 of the FSMA, the FSA has the power to withdraw the approval given to you under section 59 of the FSMA - to perform the controlled functions set out in section 4.1 above – if it considers that you are not a fit and proper person to perform them.

Further, the FSA has the power, by virtue of section 56 of the FSMA, to make an order prohibiting you from performing a specified function, any function falling within a specified description or any function, if it appears to the FSA that you are not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person. Such an order may relate to a specified regulated activity, any regulated activity falling within a specified description or all regulated activities.

Pursuant to section 66 of the FSMA, where it appears to the FSA that an approved person is guilty of misconduct and it is appropriate to take action against him, it has the power, inter alia, to impose on that person a financial penalty of such amount as it considers appropriate.

Regulatory requirements

The Statements of Principle and Code of Practice for Approved Persons ("APER") are made pursuant to section 64 of the FSMA. They are general statements of the fundamental obligations of approved persons under the regulatory system and conduct which, in the opinion of the FSA, constitutes a failure to comply with them. They also describe factors to be taken into account by the FSA in determining whether an approved person's conduct complies with a particular Statement of Principle.

On the facts of this case, the FSA considers the most relevant Statements of Principle to be Principle 1 and Principle 7. Statement of Principle 1 requires that an approved person must act with integrity in carrying out his controlled function. Statement of Principle 7 requires

that an approved person performing a significant influence function must take reasonable steps to ensure that the business of the firm for which he is responsible in his controlled function complies with the relevant requirements and standards of the regulatory system.

APER 3.1.3G states that, when establishing compliance with, or breach of, a Statement of Principle, account will be taken of the context in which a course of conduct was undertaken, the precise circumstances of the individual case, the characteristics of the particular controlled function and the behaviour expected in that function. APER 3.1.4(1)G states that an approved person will only be in breach of a Statement of Principle if they are personally culpable, that is, in a situation where their conduct was deliberate or where their standard of conduct was below that which would be reasonable in all the circumstances.

In considering a person's integrity the FSA may also have regard to whether that person has contravened any of the requirements and standards of the regulatory system (FIT 2.1.3G(5)).

Fit and Proper Test for Approved Persons

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

FIT 1.3G provides that the FSA will have regard to a number of factors when assessing a person's fitness and propriety. Among the most important considerations will be the person's honesty, integrity and reputation.

In determining a person's honesty, integrity and reputation, FIT 2.1G states that the FSA will have regard to matters including, but not limited to, those set out in FIT 2.1.3G. This guidance includes:

(1) FIT 2.1.3G(4) whether the person is or has been subject of any proceedings of a disciplinary or criminal nature or has been notified of any potential proceedings or any investigation which might lead to those proceedings;

(2) FIT 2.1.3G(5) whether the person has contravened any of the requirements and standards of the regulatory system;

(3) FIT 2.1.3G(13) whether, in the past, the person has been candid and truthful in all his dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards.

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

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

EG 9.1 states that the FSA's power to make prohibition orders under section 56 of the FSMA helps it work towards achieving its regulatory objectives. The FSA may exercise this power where it considers that, to achieve any of those objectives, it is appropriate either to prevent an individual from performing any functions in relation to regulated activities or to restrict the functions which he may perform.

EG 9.4 sets out the general scope of the FSA's powers in this respect, which include the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant. EG 9.5 provides that the scope of a prohibition order will vary according to the range of activities that the individual performs in relation to regulated activities, the reasons why he is not fit or proper and the severity of the risk posed by him to the consumers or the market generally.

In circumstances where the FSA has concerns about the fitness and propriety of an approved person, EG 9.8 to 9.14 provide guidance. In particular, EG 9.8 states that in deciding whether to make a prohibition order, the FSA will consider whether its regulatory objectives can be achieved adequately by imposing disciplinary sanctions.

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

(1) the matters set out in section 61(2) of the FSMA;

(2) whether the individual is fit and proper to perform functions in relation to regulated activities. The criteria for assessing the fitness and propriety are set out in FIT 2.1 (Honesty, integrity and reputation), FIT 2.2 (Competence and capability) and FIT 2.3 (Financial soundness);

(3) whether, and to what extent, the approved person has:

(a) failed to comply with the Statements of Principle issued by the FSA with respect to the conduct of approved persons; or

(b) been knowingly concerned in a contravention by the relevant firm of a requirement imposed on the firm by or under the FSMA (including the Principles and other rules);

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

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

(7) the particular controlled function the approved person is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates; and

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

EG 9.10 provides that the FSA may have regard to the cumulative effect of a number of factors and may take into account the particular controlled function which an approved person is performing for a firm, the nature and activities of the firm concerned and the markets within which it operates.

EG 9.12 provides a number of examples of types of behaviour which have previously resulted in the FSA deciding to issue a prohibition order or withdraw the approval of an approved person. The examples include:

(1) severe acts of dishonesty, for example those which may have resulted in financial crime; and

(2) serious breaches of the Statements of Principle and Code of Practice for Approved Persons, such as providing misleading information to clients, consumers or third parties.

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

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

As mentioned, in determining the appropriate level of financial penalty in this case, the FSA has also had regard to Chapter 13 of the Enforcement Manual ("ENF"), the part of the FSA's Handbook setting out the FSA's policy on the imposition of financial penalties in force until 27 August 2007, and therefore during part of the relevant period.

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.

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

(1) DEPP6.2.1G(1): The nature, seriousness and impact of the suspected breach.

(2) DEPP6.2.1G(2): The conduct of the person after the breach.

(3) DEPP6.2.1G(3): The previous disciplinary record and compliance history of the person.

(4) DEPP6.2.1G(4): FSA guidance and other published materials.

(5) DEPP6.2.1G(5): Action taken by the FSA in previous similar cases.

Determining the level of the financial penalty

The FSA will consider all the relevant circumstances of a case when it determines the level of financial penalty. DEPP6.5.2G, and previously ENF 13.3.3 G, sets out guidance on a non exhaustive list of factors that may be of relevance when determining the amount of a financial penalty.

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

(1) Deterrence

When determining the appropriate level of 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.

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

The FSA will consider the seriousness of the breach in relation to the nature of the rule, requirement or provision breached. The following considerations are among those that may be relevant:

(a) the duration and frequency of the breach;

(b) 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;

(c) in market abuse cases, the FSA will consider whether the breach had an adverse effect on markets and, if it did, how serious that effect was, which may include having regard to whether the orderliness of, or confidence in, the markets in question has been damaged or put at risk. This factor may also be relevant in other types of case;

(d) the loss or risk of loss caused to consumers, investors or other market users;

(e) the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the breach; and

(f) in the context of contraventions of Part VI of the Act, the extent to which the behaviour which constitutes the contravention departs from current market practice.

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

The FSA will regard as more serious a breach which is deliberately or recklessly committed. The matters to which the FSA may have regard in determining whether a breach was deliberate or reckless include, but are not limited to, the following:

(a) whether the breach was intentional, in that the person intended or foresaw the potential or actual consequences of its actions;

(b) where the person has not followed a firm's internal procedures and/or FSA guidance, the reasons for not doing so;

(c) where the person has taken decisions beyond its or his field of competence, the reasons for the decisions and for them being taken by that person;

(d) whether the person has given no apparent consideration to the consequences of the behaviour that constitutes the breach;

(e) in the context of a contravention of any rule or requirement imposed by or under Part VI of the Act, whether the person sought any professional advice before the contravention occurred and whether the person followed that professional advice. Seeking professional advice does not remove a person's responsibility for compliance with applicable rules and requirements.

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.

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

When determining the amount of a penalty to be imposed on an individual, the FSA will take into account that individuals will not always have the resources of a body corporate, that enforcement action may have a greater impact on an individual, and further, that it may be possible to achieve effective deterrence by imposing a smaller penalty on an individual than on a body corporate. The FSA will also consider whether the status, position and/or responsibilities of the individual are such as to make a breach committed by the individual more serious and whether the penalty should therefore be set at a higher level.

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

(a) The FSA may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the person were to pay the level of penalty appropriate for the particular breach. The FSA regards these factors as matters to be taken into account in determining the level of a penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty.

(b) The purpose of a penalty is not to render a person insolvent or to threaten the person's solvency. Where this would be a material consideration, the FSA will consider, having regard to all other factors, whether a lower penalty would be appropriate. This is most likely to be relevant to a person with lower financial resources; but if a person reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the FSA will take account of those assets when determining the amount of a penalty.

(c) The degree of seriousness of a breach may be linked to the size of the firm. For example, a systemic failure 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.

(d) 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.

(e) The FSA may decide to impose a financial penalty on a mutual (such as a building society), even though this may have a direct impact on that mutual's customers. This reflects the fact that a significant proportion of a mutual's customers are shareholder-members; to that extent, their position involves an assumption of risk that is not assumed by customers of a firm that is not a mutual. Whether a firm is a mutual will not, by itself, increase or decrease the level of a financial penalty.

(9) Disciplinary record and compliance history

The FSA may take the previous disciplinary record and general compliance history of the person into account. This will include:

(a) whether the FSA (or any previous regulator) has taken any previous disciplinary action against the person;

(b) whether the person has previously undertaken not to do a particular act or engage in particular behaviour;

(c) whether the FSA (or any previous regulator) has previously taken protective action in respect of a firm using its own initiative powers, by means of a variation of a firm's Part IV permission, or has previously requested the firm to take remedial action and the extent to which that action has been taken.

(d) the general compliance history of the person, including whether the FSA (or any previous regulator) has previously brought to the person's attention, including by way of a private warning, issues similar or related to the conduct that constitutes the breach in respect of which the penalty is imposed.

A person's disciplinary record could lead to the FSA imposing a higher penalty, for example where the person has committed similar breaches in the past.

In assessing the relevance of a person's disciplinary record and compliance history, the

age of a particular matter will be taken into account, although a long-standing matter may still be relevant.

Corresponding provisions were set out in ENF 13.3.3 G, which sets out factors that may be relevant when determining the appropriate level of financial penalty for a firm including the following:

1) The seriousness of the misconduct or contravention. In relation to the statutory requirement to have regard to the seriousness of the misconduct or contravention, the FSA recognises the need for a financial penalty to be proportionate to the nature and seriousness of the misconduct or contravention in question. The following may be relevant:

(a) in the case of an approved person, the FSA must have regard to the seriousness of the misconduct in relation to the nature of the Statement of Principle or requirement concerned. Similarly, in the case of a firm, the FSA must have regard to the seriousness of the contravention in relation to the nature of the requirement contravened.

(b) the duration and frequency of the misconduct or contravention (including, in relation to a firm, when the contravention was identified by persons exercising significant influence functions at the firm);

(c) whether the misconduct or contravention revealed serious or systemic weaknesses of the management systems or internal controls relating to all or part of a firm's business;

(d) the impact of the misconduct or contravention on the orderliness of financial markets, including whether public confidence in those markets has been damaged;

(e) the loss or risk of loss caused to consumers or other market users. If a contravention has caused loss to another firm, that firm may be able to take its own action against the firm which has committed the contravention; however, the FSA generally expects firms to comply with regulatory requirements, regardless of the nature of the counterparty; for example, persistent departures from MAR 3 (Inter-professional conduct) may have implications for the FSA's assessment of a firm's continued fitness and propriety.

(2) The extent to which the contravention or misconduct was deliberate or reckless. In determining whether a contravention or misconduct was deliberate, the FSA may have regard

to whether the firm's or person's behaviour was intentional, in that they intended or foresaw the consequences of their actions. The matters to which the FSA may have regard in determining whether a contravention was reckless include, but are not limited to, the following:

(a) whether the firm or approved person has failed to comply with the firm's procedures;

(b) whether the firm or approved person has taken decisions beyond its or his field of competence;

(c) whether the firm or approved person has given no apparent consideration to the consequences of the behaviour that constitutes the contravention.

If the FSA decides that behaviour was deliberate or reckless, it may be more likely to impose a higher penalty on a firm or approved person than would otherwise be the case.

(3) Whether the person on whom the penalty is to be imposed is an individual, and the size, financial resources and other circumstances of the firm or individual. This will include having regard to whether the person is an individual, and to the size, financial resources and other circumstances of the firm or approved person. The FSA may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the firm or approved person were to pay the level of penalty associated with the particular contravention or misconduct. The FSA regards these factors as matters to be taken into account in determining the level of a penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty. The size and financial resources of a firm or approved person may be a relevant consideration, because the purpose of a penalty is not to render a firm or approved person insolvent or to threaten its solvency. Where this would be a material consideration, the FSA will consider, having regard to all other factors, whether a lower penalty would be appropriate; this is most likely to be relevant to smaller firms or groups of firms or approved persons with lower financial resources; but if a firm or individual reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the FSA will take account of those assets when determining the amount of a penalty. The size of the firm may also be a relevant consideration for the following reasons:

(a) the degree of seriousness of a contravention may be linked to the size of the firm. For example, a systemic failure in a large firm could damage or threaten to damage a much larger number of consumers than would be the case with a small firm: contraventions in firms with a high volume of business over a protracted period may therefore be more serious than contraventions over similar periods in firms with a smaller volume of business; and

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

(4) The amount of profits accrued or loss avoided. The FSA may have regard to the amount of profits accrued or loss avoided as a result of the contravention or misconduct, for example:

(a) the FSA will propose a penalty which is consistent with the principle that a firm or approved person should not benefit from the contravention or misconduct; and

(b) the penalty should also act as an incentive to the firm or approved person (and others) to comply with regulatory standards.

(5) Conduct following the contravention. The FSA may take into account the conduct of the firm or approved person in bringing (or failing to bring) quickly, effectively and completely the contravention or misconduct to the FSA's attention and:

(a) the degree of cooperation the firm or approved person showed during the investigation of the contravention or misconduct (where a firm or approved person has fully cooperated with the FSA's investigation, this will be a factor tending to reduce the level of financial penalty);

(b) any remedial steps taken since the contravention or misconduct was identified, including identifying whether consumers suffered loss, compensating them, taking disciplinary action against staff involved (if appropriate), and taking steps to ensure that similar problems cannot arise in the future.

(6) Disciplinary record and compliance history. The previous disciplinary record and general compliance history of the firm or approved person may be taken into account. This will

include whether the FSA (or any previous regulator) has taken any previous formal disciplinary action, resulting in adverse findings, against the firm or approved person, or whether the FSA has previously required the firm to take remedial action by means of a variation of Part IV permission (see ENF 3), or has previously requested the firm to take remedial action, and the extent to which that action has been taken. For example, the disciplinary record of a firm or approved person could lead to the FSA increasing the penalty, where the firm or approved person has committed similar contraventions or misconduct in the past. In assessing the relevance of a firm's or approved person's disciplinary record and compliance history, the age of a particular matter will be taken into account, although a long-standing matter may still be relevant. However, in undertaking this assessment, private warnings will not be taken into account.

(7) Previous action taken by the FSA. The action that the FSA has taken previously in relation to similar behaviour by other firms or approved persons may be taken into account. The FSA will seek to ensure consistency when it determines the appropriate level of penalty. If it has taken disciplinary action previously in relation to a similar contravention or misconduct, this will clearly be a relevant factor. However, as stated at ENF 13.3.1 G, with the exception of the specific circumstances described at ENF 13.5, the FSA does not intend to adopt a tariff system, and there may be other relevant factors which could increase or decrease the seriousness of the contravention or misconduct.

(8) Action taken by other regulatory authorities. This could include for example:

(a) action taken or to be taken against a firm or approved person by other regulatory authorities which may be relevant where it relates to the contravention or misconduct in question;

(b) action taken by any previous regulator regarding the general level of penalties.

(9) The timing of any agreement as to the amount of the disciplinary penalty. The FSA and the person subject to disciplinary action may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, ENF 13.7 provides that the amount of the penalty which might otherwise have been payable will be reduced to reflect the stage at which the FSA and the person concerned reach an agreement.

Guidance in relation to conduct of mortgage business

The part of the FSA handbook entitled "MCOB" sets out rules and guidance concerning the conduct of mortgage business. MCOB 4.7.8G in respect of advised sales, states that:

"A firm may generally rely on any information provided by the customer for the purposes of MCOB 4.7.4 R(1)(a) unless, taking a common-sense view of this information, it has reason to doubt it."