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23 April 2013

Our Ref: FOI2795

Your Ref:

Dear

Freedom of Information: internal review

I refer to your letter dated 6 February 2013. In this you asked the Financial Services Authority ("FSA") (now succeeded by the Financial Conduct Authority – "FCA") to review its decision of 24 January in response to the information you requested under the Freedom of Information Act 2000 ("the Act") about NDF Administration Limited's ("NDF") promotion of Lehman-backed products. This was:

- "1) Which of the five NDF Lehman-backed brochures did the FSA examine as part of their review.*
- 2) What did the FSA conclude regarding the compliance of each brochure examined under COBS rules and FSA Principles?*
- 3) Did the FSA look at the invitation letter (copy attached) and reach a conclusion regarding the suitability as an approach to potential investors? In particular did the FSA consider the statement that "Your capital is ONLY at risk if the FTSE 100 Index or Dow Jones EURO STOXX 50 fall by more than 50% from the Starting Index Levels" in relation to it being a false statement of inducement as per the Misrepresentation Act?"*

Internal review

I have now had an opportunity to review our original response. As you aware, we would normally aim to complete a review within 20 working days. In this case, the review has taken considerably longer, for which I apologise.

My interpretation of your letter dated 6 February is that you are interested in two things: (i) the NDFA invitation letter of March 2008 and any FSA conclusions regarding its suitability as an approach to potential investors; and (ii) the NDFA Fixed Income or Growth Plan Feb 08 brochure and whether this complied with COB rules and FSA Principles. I should note that the FSA did not review the NDFA material under the Misrepresentation Act 1967 (item 3 in your original request).

The outcome of my review is that I am able to provide in the Annex to this letter information falling within the scope of your request taken from a number of notes prepared for internal use by the FSA as part of its review in 2009 and 2010 of the various marketing communications of Lehman-backed structured products. These notes contain a mix of information some of which is disclosable to you and some of which is not. Some information is not relevant to the two points of your request (referred to above); other information is exempt from disclosure under the Act (which I describe in more detail below). In order to render the disclosable information more accessible to you, I have provided it in the form of the abstracts contained in the Annex to this letter, rather than by way of edited copies.

If I may I should also like to reiterate, as we explained in our original response letter dated 24 January, that whilst I cannot confirm definitively that the actual invitation letter you provided was part of our evaluation, I am confident that invitation letters of the type that you provided were examined by the FSA. In particular, you will see from the enclosed abstracts that there is reference to there being a review of all the documents disclosed by the firms. In addition, in the note dated 29 January 2009 in the specific section on NDF, the note records that letters to customers (both clients and IFAs) had the prominent rider at the head of the page "A Financial Promotion brought to you by NDF Administration Limited". This appears at the head of the invitation letter that you provided. There is also reference to the letter containing links to the FSA capital-at-risk fact sheet, which accompanied the letter we received from you.

In respect of whether the NDFA Fixed Income or Growth Plan Feb 08 brochure complied with COB rules and FSA Principles, the FSA's published views detailing the review of the marketing and distribution of structured products, particularly those backed by Lehman Brothers, is available on our website, which we referred you to in our response letter dated 24 January 2013. In this, we drew your attention particularly to the opening text of the FSA Press Notice, dated 27 October 2009, which noted that "*the FSA had found serious deficiencies in the marketing literature provided by a number of the plan managers selling these products*"

In terms of the remaining information that is relevant to your request, this would be information (if we hold the information) which the FSA could only make public following certain "due process" procedures set out in the Financial Services and Markets Act 2000 ("FSMA") (which I explain in more detail below). Those procedures were not followed in the case of NDFA (because of its administration). As a result, section 44(2) (Prohibitions on disclosure) of the Act is applicable in that the duty to confirm or deny does not arise because the confirmation or denial that would have to be given to comply with section 1(1)(a) of the Act would (apart from the Act) be prohibited by or under any enactment.

- **Section 44 (Prohibitions on disclosure)**

Section 44(1)(a) of the Act provides that information is absolutely exempt if its disclosure (otherwise than under the Act) is prohibited by or under any enactment.

Section 44(2) provides that the duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

I referred above to the “due process” procedures in FSMA. In summary, these provide that, if the FSA had wanted to say publicly that NDFA’s brochures had breached the rules in COBS and the Principles for Businesses that would have been a “public censure” under section 205 FSMA. Under section 207 FSMA, if the FSA had proposed to give a public censure, it was first obliged to give the firms concerned a Warning Notice. But here no Warning Notice was given to NDFA. It follows that, if the FSA had concluded (and I should make it clear I am not saying that the FSA either did or did not so conclude) that NDFA’s brochures had breached our rules it would be a breach of section 205 for the FCA now to make that public.

Section 44 is an “absolute” exemption, and so it is not necessary to balance the public interests for and against disclosing the information.

You might think the above analysis is unduly favourable to NDFA. It may however be useful to highlight here the decision of the Information Rights Tribunal in the appeal by Mrs C S Harries (EA/2008/0061). In this case, the Tribunal believed it was important in resolving that appeal to have regard to the legal framework in which the FSA (and now the FCA) operates. In particular, the functions conferred on it by the FSMA. Of particular relevance to my decision to neither confirm nor deny we hold certain of the information you have requested, is that in the Harries appeal the Tribunal noted that it is the policy of FSMA that the views of the FSA (and now the FCA) in relation to the conduct of those it regulates should remain private unless and until a final decision to take formal enforcement action (following the “due process procedures) had been reached. (Please note that I am neither confirming nor denying that is the case here.) The Tribunal explained that the underlying rationale of these provisions is the protection of the reputation, commercial interests and private life of those who are the subject of our enquiries, investigation or enforcement proceedings.

In terms of our application to neither confirm nor deny whether we hold the information requested, I can confirm that in reaching my decision I have taken account of the Information Commissioner’s Guidance: *When to refuse to confirm or deny information*. In particular, the Commissioner’s view is that significant weight must be given to the need to protect a public authority’s ability to adopt a consistent approach when responding to similar requests in the future. Therefore, my conclusion is that the FSA (and now the FCA) was entitled to rely on the refusal to confirm or deny provided by section 44(2) of the Act.

I also consider that some information we hold is exempt under the Act on the basis that it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

- **Section 42 (Legal professional privilege)**

Advice from FSA lawyers is legally privileged, and falls within the exemption in section 42(1) of the Act. This exemption is qualified and I have balanced the public interests for and against disclosure as required by the Act.

For disclosure:

- As part of providing a wider transparency of the work of the FSA there may be a legitimate public interest in disclosure of where legal advice has been provided by FSA legal advisers in relation to the FSA as part of its review of the various marketing communications of Lehman-backed structured products.
- In particular, this would inform the public on what matters and issues legal advice has been sought and obtained, and where not.

Against disclosure:

- Whilst there may be a legitimate public interest in disclosing legal advice provided by FSA lawyers, it is strongly in the public interest for the FSA (and now the FCA) to be able to have frank communications with its lawyers to ensure the FSA/FCA receives the best possible legal advice, expressed and recorded in an open and candid way, to enable it to carry out its statutory functions lawfully as well as effectively. This would be undermined if the disclosure of legal advice was to be made publicly available.
- Disclosure of the legal advice would prejudice the FSA's/FCA's ability to defend its legal interests both directly, by exposing its legal position to those seeking to challenge it in circumstances where they are under no equivalent disclosure obligation, and indirectly by diminishing the reliance it can place on the legal advice having been fully considered and presented in an open and candid way.
- In addition, the public interest will in general rarely favour the disclosure of material covered by legal privilege. The Information Commissioner's Decision Notice FS50432367, in particular paragraphs 68 and 69, reflects the Commissioner's understanding of what is regarded as a leading decision of the Information Rights Tribunal on this exemption. In the appeal of Christopher Bellamy (EA/2005/0023) the Tribunal concluded (paragraph 35) that:

“The Tribunal has come to the unanimous view that the Appellant has failed to adduce sufficient considerations which would demonstrate that the public interest in maintaining the exemption is, in the present case, outweighed by any public interest in justifying a disclosure. ... there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest... it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut cases”

I have therefore concluded that the balance of the public interests comes down in favour of protecting the legally privileged information in this case and in maintaining the section 42(1) exemption. Accordingly, the information requested that is covered by section 42 of the Act is exempt from disclosure.

Conclusion

I believe this addresses your information request dated 6 February 2013 and 14 November 2012. I realise that you may be disappointed not to receive all the information you requested but I hope this letter explains the reasons for the decision I have reached.

If you are not content with the outcome of the internal review, you have a right of appeal to the Information Commissioner at the following address: *Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF. Telephone: 01625 545 700, Website: www.ico.org.uk*

Yours sincerely

Greg Choyce
Internal Reviewer

Financial Services Authority

Freedom of Information Request – (FOI2795)

Extract from a note, dated 22 December 2008, by the Financial Services Authority of a review of structured product marketing communications

Review of structured product promotions with Lehman Brothers' underlyings.

Plan Manager	NDF Administration Ltd.
Plan Name	Fixed Income or Growth Plan February '08
Strike Date	8 th May 2008
Maturity Date	15 th May 2013 (annual income on same dates)
Protection type and level	Soft: 50% trigger point, ungeared downside if either the FTSE 100 or Eurostoxx 50 are below their starting values at maturity.
Securities detail	Lehman Brothers Treasury Co. B.V. ISINs as follows: Annual Income: XS0343900451; Monthly Income: XS0343900022; Growth: XS0343900535.
Promotion date	unconfirmed

1. Counterparty identification

- Page 7 (5) The investment requires the purchase by the Plan Manager of one or more securities with a fixed maturity date. These will be held on your behalf and will have been specifically structured to match the Investment Objectives of the Plan. The Issuer of the Securities' capacity to meet its financial commitments is considered strong. This is supported by an independent assessment from a leading credit rating agency, Standard & Poor's, which gives the Issuer a rating of A+.
- Page 8 Q: What is my capital invested in? A: Your money will be invested in five-year securities issued by a Financial Institution with a Standard & Poor's credit rating of A+ or higher. These have been designed to produce the Investment Objectives under the Plan.
- Page 11 T&C (xvii) "issuer" means any issuer of Investments

2. Counterparty default

- Page 7 (5) However, there is a risk that the Issuer may fail to meet its obligations. In addition, the terms of the investment may permit the issuer of those investments to withhold, defer, reduce or even terminate payments in certain events, as a result of which investors may receive less than they would otherwise or may have to wait for the proceeds.
- Page 13 T&C 13 Therefore, in the event of default, any shortfall in the Investments may be shared pro rata among all investors in the NDFA Capital Secure Fixed Growth Plan February '08
- Page 14 T&C 29 The Plan Manager will exercise its authority under these Terms in an appropriate way. However, whilst the Investments will be structured with a view to meeting your Investment Objective on the Maturity Date, the Plan Manager is unable to (and does not) ensure that your Investment Objective will be met. You acknowledge that you have read and understood these Terms and the risk factors set out in the brochure provided to you in connection with your Plan. In particular, you acknowledge that your entitlement under the Plan is dependent on the exact terms of issue of the Investments. These may contain provisions allowing for (a) adjustments to the timing of calculation of entitlements and (b) the termination of the Investments, including (without limitation) in circumstances where the Plan Manager is in default. No provision in these Terms will operate so as to exclude or limit the liability of the Plan Manager to the extent that this would be prohibited by law or the FSA Rules.
- Page 15 T&C 37 In the event of any failure, interruption or delay in the performance of its obligations resulting from breakdown, failure or malfunction of any telecommunications or computer service, industrial disputes, insolvency of third parties, failure of third parties to carry out their obligations, acts of governmental or supranational authorities, or any other event or circumstance whatsoever not reasonably within its control, the Plan Manager shall not be liable or have any responsibility of any kind for any loss or damage you incur or suffer as a result.

3. Capital protection and modals

- Front Your capital is at risk so you must be prepared to lose some or all of your capital. Unless you understand these risks and are sure of the suitability of this investment for you then you should take financial advice. This brochure should be read in conjunction with the Financial Services Authority Factsheet entitled "Capital-at-risk products". NDFA does not offer investment advice or make any recommendation regarding investments.
- Page 2 This brochure should be read in conjunction with the fact sheet about Capital-at-risk products which is published by the Financial Services Authority, the watchdog set up by Parliament. Please read this

document carefully. Further copies are available on the consumer website at www.fsa.gov.uk

Page 3 If the Final Index Level of both indices is the same or higher than the corresponding starting Index Level the Plan will repay at maturity the original capital invested.

your original capital investment will be repaid unless..

in which case you will also lose some or all of your initial capital investment.

Page 4 Full repayment of your capital is not guaranteed at maturity

You will lose capital if at any time between 8 May 2008 and 8 May 2013 inclusive, the closing level of either or both Indices falls by 50% or more below its Starting Index Level; and the Final Index Level of the Worst Performing Index is below its corresponding

Starting Index Level.

For the avoidance of any doubt: Any loss of capital at maturity will be based on the Worst Performing Index even if that Index has not fallen by 50% or more from its corresponding Starting Index Level during the Investment Term. By linking maturity proceeds to the worst performing of the Indices the possibility of a loss of capital is increased.

Page 7 (1) The ability to provide this income is achieved by exposing your capital to risk. On maturity you may not receive back the original capital invested...

(7) By linking capital to intra-day levels the possibility of a loss of capital is increased.

(8) By linking capital repayment to the worst performing of the two indices the possibility of a loss of capital is increased.

(10) It is important to understand that this Plan does not include the security of capital which is offered under a deposit with a bank or building society.

Page 8 The Plan is not the same as a bank or building society account and the investment does not include the security of capital which is afforded under a deposit with a bank or building society.

4. Compensation cover

Page 15 41. If you make a valid claim against the Plan Manager or your Financial Adviser in respect of the investments arranged for you under these Terms & Conditions and they are unable to meet their liabilities in full, you may be entitled to compensation from the Financial

Services Compensation Scheme. Most types of investment business are covered for 100% of the first £30,000 and 90% of the next £20,000, so the maximum compensation is £48,000. Details of the cover provided by the Scheme are given in a leaflet which the Plan Manager will send to you at your request. Further information is available from the FSA and the Financial Services Compensation Scheme. If the performance of the investments does not match any illustrated benefits there will not, for that reason alone, be any entitlement to any compensation under the Financial Services Compensation Scheme.

5. Appropriateness and suitability:

Page 3 This investment may not be suitable for you if you are not prepared to put your capital at risk.

This investment may be suitable for you if you are prepared to lose some or all of your capital.

If you require advice as to whether this Plan is suitable for you, you should consult a Financial Adviser. NDFA does not offer investment advice or make any recommendations regarding investments.

Page 7 (9) Careful consideration should be given to the benefits and risks of this Plan and its suitability to your own personal circumstances and attitude to risk. We would recommend that you take professional advice before investing.

Page 8 If you have any doubts whether this investment is suitable for you, you should contact your Financial Adviser.

6. Balance:

The promotion is clear throughout that the product is not capital protected, although much greater emphasis is placed on the potential market risk as opposed to credit risk.

The credit risk warning appears in the main body of the section on risk warnings but is not explicit as to the potential effect of counterparty default. The statement that "there is a risk that the Issuer may fail to meet its obligations" may not amount to a sufficiently clear warning that the entire investment is at risk, since the 'obligations' are not explicit and neither is the consequence of failing to meet them. Likewise, the warning that "investors may receive less than they would otherwise" is ambiguous and may be taken refer only to the potential upside of the investment, rather than the full return of capital. Warnings about counterparty default which appear in the Terms and Conditions aren't explicit and read like force majeure exclusions.

The counterparty is not explicitly identified but is referred to by credit rating which was accurate at the strike date. There is a commitment on Page 8 to invest in securities issued by an institution with a minimum rating of A+ and this was met.

**Extract from a note, dated 29 January 2009, by the Financial Services Authority
of a review of structured product marketing communications**

Introduction

I have reviewed all of the documents disclosed by the firms in response to my request of 16th December 2008. This paper does not address the product brochures and terms and conditions but does concern:

- All marketing communications to distributors such as print and magazine promotions, direct mail, brochures, adviser mailings, investment fact sheets or terms sheets, draft paragraphs for inclusion in suitability letters and other sales aids; whether for the above products or more generally; and
- All supplementing, clarifying or amending communications issued either to distributors or directly to retail clients.

Summary Conclusion:

None of the additional material supplied by the firms adds to consumers' (or their advisers') likely understanding of the products being sold. The additional material is of variable quality, with [redacted] being the most helpful and [redacted]/NDF being the least use. Issues arising include:

- NDF and [redacted]'s reliance on the FPO 2001 instead of the FPO 2005 (in Mifid space);
- [redacted]
- NDF's Adviser Updates contain no risk warnings [redacted];
- NDF's customer acknowledgement letters refer to non-existent KFDs which are presumably based on boilerplate wording;
- [redacted]
- [redacted]

[Redacted]

NDF

NDF provided letters to maturing customers (and IFAs), mailers to IFA's, press releases, adviser update emails, and customer acknowledgement letters.

Letters to maturing customers are aimed at both clients and IFAs. The prominent rider "A Financial Promotion brought to you by NDF Administration Limited" appears at the head of the page. The plans with soft protection state that capital is at risk and contain links to the FSA capital-at-risk fact sheet.

The capital secure options are described as "100% secure provided the Plan is held through to the investment maturity date." Letters state that "the Plan involves the purchase of investments provided by a leading Investment Bank."

[Redacted]

Letters to IFAs are “for investment professionals only” statements include “the plan will repay the original capital” “their original capital will be returned in full”. Even the letters which lead on capital secure products and mention capital at risk products contain the rider that “the client literature must be read in conjunction with the FSA fact sheet entitled ‘Capital-at-risk products.’” There seems to be little attempt to differentiate between the two product types.

[Redacted]

Customer acknowledgement letters state that “before you signed the proposal you received a brochure and key features document” No KFDs have been disclosed and the wording looks like inappropriate boilerplate. The customer is given the ISINs for the underlying securities, a statement of the investment amount, an “asset price” and the number of “assets” purchased but there is no further explanation of the product structure.

Overall the communications give no further information about the working of the products and no further risk disclosure. The information appears to be drawn from the product brochures and there is no supplementary information. [Redacted] Acknowledgement letters refer to non-existent KFDs.

[Redacted]

**Extract from a note, dated 17 March 2009, by the Financial Services Authority
about Lehmans-backed structured products**

Background

[Redacted] In January 2009 the Financial Promotion Team established a project to look at how this affected UK investors. The project focused on Lehmans-backed structured products sold by four plan managers between November 2007 and August 2008. [Redacted] Although the 'capital-secure' element of the plans is now low, there may be value in the 'derivative' elements of the plans, if they are allowed to run to maturity. [Redacted]

The project looked at whether firms had complied with the financial promotion rules when marketing these products, and examined the literature from these four plan managers: ([Redacted] NDF Administration Ltd (NDF)).

[Redacted]

The applicable rules

We have established that the communications were required to comply with rules in COBS 4 (which apply differently, depending on whether communications are intended for professional or retail clients). In particular:

- all promotions must be fair, clear and not misleading (COBS 4.2.1R(1));
- promotions to retail clients must be balanced i.e. must not emphasise the potential benefits without giving a fair and prominent indication of any relevant risks (COBS 4.5.2R(2));
- promotions to retail clients must be sufficient for the average member of the target group (COBS 4.5.2R(3)); and
- promotions to retail clients must not disguise, diminish or obscure important items, statements or warnings (COBS 4.5.2R(4)).

As [redacted] plan managers sent brochures directly to advisers with the expectation they would be passed on to retail clients (with some being sent directly to existing retail clients) we consider that the more detailed 'retail' COBS 4 rules applied.

Presentation of risk to capital

All the products in the sample presented 100% capital protection as a key benefit. Where benefits are highlighted, the rules require applicable risks to be highlighted as well, to ensure the promotion is balanced, fair and not misleading. To ensure continuing compliance, risk statements in promotions should be checked as compliant when a promotion is initially produced, and reviewed for continuing compliance whenever appropriate, such as when economic conditions necessitate.

These products had two key risks: market risk (the risk of no or minimal growth potential due to market fluctuations); and credit risk (the risk the counterparty

providing the instrument designed to return the capital at maturity is unable to meet its obligations). In the case of these products, the credit risk materialised.

There are various ways of disclosing credit risk, such as: naming the counterparty to allow its financial position to be understood; and ensuring credit ratings are accurate (as reported by credit ratings agencies) and not out of date¹.

We understand that the Lehmans offerings were highly competitive. The plan managers should have been aware of what they were buying and any added or altered credit risk. This aspect of product design is to be looked into further.

ANNEX

Provider	Plan Name
NDF	Fixed Income or Growth Plan February 2008

¹ Standard & Poor downgraded Lehman Brothers Holding Inc. from A+ to A on 2 June 2008; and Moody downgraded of Lehman Brothers Holding Inc. from A1 to A2 on the 17 July 2008.

**Extract from a note, dated 29 January 2010, by the Financial Services Authority
of a review of structured product marketing communications**

Lehman-backed capital-at-risk structured product plans

[Redacted]

In addition, FSA considers that while investment risk is dealt with acceptably, none of the brochures fairly and clearly reflect the *true* counterparty risk, in terms of:

- Prominence within the brochure, and prominence relative to the investment risks;
- Directness of language used to describe the risk and in particular the consequences of the risk crystallising;
- Unequivocal statement of the risk.

Key points on each brochure are set out in Annex 1

Annex 1

Detailed analysis of firms and brochures

With the NDFA FIOGP brochure, there are similar issues:

- a. **Emphasis on investment risk only:** Page 3 (Plan Overview) sets out various scenarios, including 'If the Final Index Level of both indices is the same or higher than the corresponding Starting Index Level the Plan will repay at maturity the original capital invested.'
- b. There is in effect a single warning on counterparty risk, which is identifiable as such, on page 7 (of 15)
- c. The risk warning is qualified by the credit strength of issuer: The Issuer of the Securities' capacity to meet its financial commitments is considered strong. This is supported by an independent assessment from a leading credit rating agency, Standard & Poor's, which gives the Issuer a rating of A+. However, there is a risk that the Issuer may fail to meet its obligations.
- d. The risk warning is not clear on the circumstances or consequences of counterparty failure: In addition, the terms of the investment may permit the issuer of those investments to withhold, defer, reduce or even terminate payments in certain events, as a result of which investors may receive less than they would otherwise or may have to wait for the proceeds.
 - i. It refers here to 'the terms of the investment' rather than risk as such
 - ii. Investors 'may receive less that they would otherwise or have to wait for the proceeds' rather than an actual loss (whole or part) of capital
- e. The warnings are inconsistent with the trend in CDS spreads, and also with other information which was in the public domain, though probably not widely known at the time. Such information would have been – or should have been - known to firms involved in designing and marketing the

products, although it is unlikely that an average retail investor would have been familiar with it.

It also fails to describe properly the significance of the credit rating. 'A high level of financial strength' does not fully convey the S&P definition, which is *'An obligation rated 'A' is somewhat more susceptible to the adverse effects of changes in circumstances and economic conditions than obligations in higher-rated categories. However, the obligor's capacity to meet its financial commitment on the obligation is still strong'*.

**Extract from a note, dated 5 February 2010, by the Financial Services Authority
of a review of structured product marketing communications**

Lehman-backed capital-at-risk structured products

[Redacted]

Key points

In all the brochures, the existence of **counterparty risk** was not prominent and/or clear enough. (In fact, the counterparty risk warnings were similarly deficient with regard to the ‘capital secure’ products). We agree [redacted] that investment risk is dealt with acceptably in the brochures – but the prominence and clarity of this reinforces the lack of prominence/clarity on counterparty risk.

Lehman’s **CDS spread** differential with other banks was significant, and was high on an absolute basis [redacted], and as a result in the brochures they should have either made the risks of default by the counterparty more prominent, or not marketed the products at all.

The plans in question

<i>Provider</i>	<i>Plan Name</i>	<i>Strike date</i> <i>(2008)</i>
N DFA	Fixed Income or Growth Plan February 2008	8 May

Section A

Each of the brochures is considered below [redacted]. For ease of reference, full details of the counterparty risk warnings in each case are in Annex 1.

<i>Plan Manager - Plan</i>	<i>Summary</i>	<i>Number of pages in brochure</i>	<i>Emphasis on investment risk – first example</i>	<i>Capital at risk warnings</i>

<p>NDFA - Fixed Income or Growth Plan February 2008</p>	<p>The brochure gives prominence to the dependence of returns on the relevant indices, but gives only one recognisable warning about counterparty risk, around half-way through a 15-page brochure. This is also not clear about the consequences of counterparty insolvency.</p>	<p>15 numbered pages, plus application forms</p>	<p>Page 3 (Plan Overview) sets out scenarios, including 'If the Final Index Level of both indices is the same or higher than the corresponding Starting Index Level the Plan will repay at maturity the original capital invested.'</p>	<p>Page 7 only (Investment Risks)</p>
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Annex 1 – Counterparty risk warnings

<i>Firm</i>	<i>Product</i>	<i>Number of pages in brochure</i>	<i>Capital at risk</i>
<p>NDFA</p>	<p>Fixed Income or Growth Plan February 2008</p>	<p>15 numbered pages, plus application forms</p>	<p>Page 7 (Investment Risks):</p> <p>The Issuer of the Securities' capacity to meet its financial commitments is considered strong. This is supported by an independent assessment from a leading credit rating agency, Standard & Poor's, which gives the Issuer a rating of A+.</p> <p>However, there is a risk that the Issuer may fail to meet its obligations. In addition, the terms of the investment may permit the issuer of those investments to withhold, defer, reduce or even terminate</p>

			payments in certain events, as a result of which investors may receive less than they would otherwise or may have to wait for the proceeds.
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Extract from a draft letter, dated 28 September 2010, by the Financial Services Authority to the Financial Services Compensation Scheme

Lehmans-backed structured capital-at-risk products ([redacted] NDFA)

[Redacted] have concerned the quality of disclosure of counterparty risk in the marketing literature in the products noted above.

The structured capital-at-risk products (SCARPs) brochures in issue concern five of those that were sold with a Lehman's entity as the counterparty. [Redacted]

[Redacted]

[Redacted] our position on the marketing literature has already been set out in our press release of 27 October 2009 as follows:

The FSA found significant advice failings on Lehman-backed products in most of the financial advice firms sampled, as well as serious deficiencies in the marketing literature provided by a number of the plan managers selling these products.

This expression of our concerns was not limited to the capital-secure products [redacted], but relates also to the SCARPs.

[Redacted]