Financial Services Authority

FINAL NOTICE

To: **Nestor Healthcare Group Limited**

Of: **Enbrook Park**
Sandgate
Folkstone
Kent
CT20 3SE

Date: 14 February 2013

1. ACTION

1.1 For the reasons given in this Notice, the FSA hereby imposes on Nestor Healthcare Group Limited ("Nestor/the company") a financial penalty of £175,000.

1.2 Nestor agreed to settle at an early stage of the FSA's investigation and therefore qualified for a 30% (stage 1) discount under the FSA's executive settlement procedures. Were it not for this discount, the FSA would have imposed a financial penalty of £250,000 on Nestor.

2. SUMMARY OF REASONS

2.1 In the period 18 October 2006 to 30 June 2010 ("the relevant period") Nestor did not take all proper and reasonable steps to secure the compliance of persons discharging

managerial responsibility ("PDMRs") with paragraphs 3-7 of the Model Code. By failing to do so, Nestor breached Listing Rule 9.2.8 ("LR9.2.8R").

2.2 Nestor also did not take reasonable steps to enable its directors to understand their responsibilities and obligations under paragraphs 3-7 of the Model Code or to maintain adequate procedures, systems and controls to enable it to comply with its obligations under LR9.2.8R. Although Nestor implemented a Share Dealing Policy adherence to which would, at the time it was introduced, have ensured compliance by PDMRs with the Model Code, Nestor did not take reasonable steps to ensure adherence to the requirements of the Share Dealing Policy, and to review and update it where necessary. Rather than following the procedure specified in the Share Dealing Policy, an ad hoc and informal process was utilised. As a result, Nestor breached Listing Principles 1 and 2.

2.3 As a result of these failings, in the relevant period:

(1) PDMRs at Nestor did not fully understand their responsibilities under paragraphs 3-7 of the Model Code;

(2) two purchases of company shares by PDMRs (90,000 shares worth £47,700 on 26 May 2010 and 110,000 shares worth £65,360 on 30 June 2010) were carried out without the required approval under the Model Code (i.e. of the whole board) being sought or obtained;

(3) one purchase of company shares (37,957 shares worth £19,999.54 on 25 May 2010) by a PDMR was carried out over two months after the proper clearance was received, rather than within two business days as required; and

(4) on four occasions the company failed to maintain a record of responses to clearance to deal requests and to provide a copy of the clearance to the restricted person concerned, as required by the Model Code.

2.4 For the avoidance of doubt, the FSA does not allege that any of the dealings noted above were based on inside information.

3. DEFINITIONS

3.1 The definitions below are used in this Decision Notice:

"Nestor" or "the company" means Nestor Healthcare Group

"Acromas" means Acromas Holdings Limited

"the Act" means the Financial Services and Markets Act 2000

"the FSA" means the Financial Services Authority

"UKLA" means the United Kingdom Listing Authority

"LSE" means the London Stock Exchange

"PDMR" means a person discharging managerial responsibility as defined in section 96B(1) of the Act and the Glossary to the FSA Handbook (reproduced in the Annex to this Notice).

"Connected Person" means a person with a connection to a PDMR as defined in section 96B(2) of the Act and the Glossary to the FSA Handbook

"the Tribunal" means the Upper Tribunal (Tax and Chancery Chamber)

4. RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant legislative provisions

4.1 The FSA has power, pursuant to section 91(1) of the Act, to impose a financial penalty on an issuer of listed securities if the FSA considers that the issuer has contravened any provision of listing rules.

Listing Rules and the Model Code

4.2 The Listing Rules are made by the FSA pursuant to Part VI of the Act and set out the requirements for the admission of securities to the Official List and the continuing obligations of companies whose securities are so admitted.

4.3 Chapter 9 of the Listing Rules sets out the requirements with continuing application to a company with a premium listing. LR9.2.8R states:

"A listed company must require every person discharging managerial responsibilities, including directors to comply with the Model Code and to take all proper and reasonable steps to secure their compliance."

4.4 The FSA regards the continuing obligation requirements of Chapter 9 of the Listing Rules as a fundamental protection for shareholders.

4.5 The Model Code imposes restrictions on dealing in the securities of a listed company beyond those imposed by law. Its purpose is to ensure that PDMRs do not abuse, and do not place themselves under suspicion of abusing, inside information they may be thought to have. The clearance to deal provisions of the Model Code are a key component in ensuring that listed companies meet this objective.

4.6 The Model Code is Annex 1 to Chapter 9 of the Listing Rules. The provisions of the Model Code relevant to this Notice are contained in the Annex to this Notice.

Listing Principles

4.7 The purpose of the Listing Principles is to ensure that listed companies pay due regard to the fundamental role they play in maintaining market confidence and ensuring fair and orderly markets. They are designed to assist listed companies in identifying their obligations and responsibilities under the Listing Rules and the Disclosure Rules and Transparency Rules.

4.8 Listing Principle 1 states:

"A listed company must take reasonable steps to enable its directors to understand their responsibilities and obligations as directors."

4.9 Listing Principle 2 states:

"A listed company must take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations."

5. FACTS AND MATTERS

Background

5.1 Throughout the relevant period:

(1) the Nestor board comprised the roles of chief executive, non-executive chairman, finance director and two non-executive directors;[1]

(2) between May 2008 and July 2010 Nestor's chairman also acted as chief executive, during which time he continued to work on a part-time basis;

(3) all members of the Nestor board and certain other senior executives were PDMRs pursuant to section 96B(1) of the Act;

(4) shares in Nestor were admitted to listing on the Official List of the United Kingdom Listing Authority ("UKLA") and admitted to trading on the Main Market of the London Stock Exchange ("LSE"); and

(5) Nestor held Premium Listing status and was therefore subject to the application of Chapter 7 of the Listing Rules (Listing Principles) and Chapter 9 of the Listing Rules (Continuing Obligations).

Share Dealing Policy

5.2 On 17 October 2005 a memorandum regarding dealings in the shares of Nestor was circulated to Nestor PDMRs by the company secretary. This memorandum set out the internal policy by which all dealings in Nestor shares by PDMRs and connected persons were to be governed ("the Share Dealing Policy") and formed part of the contract of employment of those who received it. The Share Dealing Policy had been drafted by external legal advisers instructed by Nestor, in order to secure compliance with the Model Code.

5.3 This policy was in place throughout the relevant period and incorporated the requirements of the Model Code as they applied to Nestor at the time. With regard to PDMRs or their connected persons the Share Dealing Policy:

(1) prohibited dealing in Nestor shares without prior written approval;

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[1] The Nestor board also had an additional executive director until 31 December 2006 and another non-executive director until 2 March 2007

(2) required the completion of a prescribed document for dealing requests to be submitted to the company secretary and subsequently approved by the chief executive or chairman;

(3) set out that all transactions must take place within two business days of approval being given; and

(4) required notification of approved dealings to be submitted to the company within four business days of the date of dealing using a prescribed document.

5.4 The policy was circulated to all directors, PDMRs and employee insiders, each of whom were asked to, and did, return a signed acknowledgement confirming that they had read and understood the requirements and would comply with them.

5.5 Although the Company took steps to comply with its other obligations under the Model Code, such as issuing six-monthly reminders to all directors, PDMRs and employee insiders reminding them that they were not permitted to trade during a close period or otherwise where they were in possession of inside information, after distributing the Share Dealing Policy Nestor did not issue any reminders or training about its content or the requirement to comply with it, or otherwise reinforce awareness of the Share Dealing Policy. This, combined with the very low number of actual dealings by PDMRs, resulted in Nestor PDMRs forgetting that the Share Dealing Policy existed and that they were required to comply with it.

PDMR dealing compliance arrangements

5.6 Within Nestor there was recognition of the need for share dealing approval for PDMR dealing and of the importance of compliance with FSA rules. As explained above, however, Nestor's PDMRs were not reminded of the requirements of the Share Dealing Policy and Nestor relied on the experience and knowledge of its board members to enable it to meet the requirements of paragraphs 3-7 of the Model Code.

5.7 In the relevant period Nestor did not carry out any reviews of its PDMR share dealing compliance arrangements.

Share dealing in the relevant period

5.8 The following purchases of Nestor shares were made by Nestor PDMRs in the relevant period:

Date	**Purchaser**	**Amount**	**Price (p)**
10 April 2008	Chairman	100,000	42.75
8 January 2009	Senior executive 1	14,117	21.25
16 April 2009	Chairman	50,000	24.82

16 April 2009	Board member A	50,000	24.82
16 April 2009	Board member B	50,000	24.82
11 March 2010	Chairman	81,500	51.90
11 March 2010	Board member A	100,000	52
11 March 2010	Board member C	25,024	51.95
25 May 2010	Board member B	37,957	52.69
26 May 2010	Chairman	90,000	53
30 June 2010	Chairman	40,000	58.40
30 June 2010	Chairman	70,000	60

5.9 Under the Model Code, the directors of Nestor required clearance to deal from the chairman. Senior executives who qualified as PDMRs but were not directors were required by the Model Code to obtain clearance to deal from the company secretary or a designated director. Before his appointment as acting chief executive, the Model Code required Nestor's chairman to obtain clearance to deal from the chief executive in the first instance, and when both chairman and acting chief executive (as he was at the time of all share purchases recorded in paragraph 5.8 above) he was required to obtain clearance to deal from the whole board.

5.10 No other company officer or committee of the board was designated by Nestor to give clearance to deal, as is provided for by paragraphs 4 (a) – (c) of the Model Code.

5.11 The documents prescribed in Nestor's Share Dealing Policy were not used to record the application for or granting of dealing approval for any transactions by PDMRs in the relevant period. Instead, when seeking to purchase shares PDMRs generally discussed the matter with each other by email or verbally, seeking and granting what they considered to be the appropriate approval.

5.12 Due to the lack of records available the FSA has not been able to ascertain whether, and if so how, the chairman sought and received approval for his transaction on 10 April 2008.

5.13 Due to the lack of records available the FSA has not been able to ascertain whether, and if so how, senior executive 1 sought and received approval for his transaction on 8 January 2009.

5.14 The chairman and board members A and B discussed their intention to purchase shares on 16 April 2009 before doing so. Board member C was not asked to provide clearance for the chairman's transaction, but was aware of the intended purchase and had no objection to it taking place.

5.15 Board member C sought and received approval for his purchase on 11 March 2010 from the chairman by email.

5.16 Board member A sought approval for his transaction on 11 March 2010 in an email to board member C, board member B, senior executive 2 and the chairman on 10 March 2010. The chairman did not respond directly with approval for the request; however an email from senior executive 2 on the same day records the chairman's approval for that and certain other PDMR dealings.

5.17 The chairman requested consent for his 11 March 2010 purchase in an email to board member C on 2 March 2010, who then purported to provide that consent by reply. Subsequently, the chairman's request was forwarded to board members A and B and further discussion around PDMR dealing took place. Subsequently, all members of the Nestor board were aware of the chairman's desire to trade on 10 March 2010 and did not oppose it.

5.18 Board member B sought consent to deal in early March 2010 in an email to which the chairman was a recipient. Subsequent email correspondence concluding on 12 March 2010 shows that the chairman was aware of board member B's desire to trade and did not oppose it. Board member B subsequently purchased 37,957 shares over two months later on 25 May 2010, having beforehand contacted senior executive 2 regarding his desire to purchase shares, but without fresh approval from the chairman being obtained.

5.19 The chairman sought approval for his 26 May 2010 trade verbally from a fellow director prior to dealing. There is no record of this approval being sought or granted.

5.20 On 30 June 2010 the chairman purchased 70,000 Nestor shares at 60p and 40,000 at 58.40p. The chairman verbally sought approval for these transactions from a fellow director on 29 June 2010.

5.21 On 6 December 2010 Nestor announced that it had reached agreement with Acromas on the terms of a cash acquisition of the company by the Acromas group. Nestor shares were delisted from the UKLA Official List and ceased trading on the LSE on 3 February 2011 following completion of the takeover of the company.

5.22 All of the PDMR dealings were reported to the market as required by DTR 3.1.4R.

6. FAILINGS

Listing Rule 9.2.8

6.1 Under LR9.2.8R a listed company must require every PDMR, including directors, to comply with the Model Code and to take all reasonable steps to secure their compliance.

6.2 As noted above, the purpose of the Model Code is to ensure that PDMRs do not abuse, and do not place themselves under suspicion of abusing, inside information that they may be thought to have, especially in periods leading up to an announcement of the company's results.

6.3 The FSA accepts that Nestor's PDMRs understood their obligation not to trade on the basis of inside information and the requirement to seek clearance prior to any dealing

in Nestor's shares. The steps taken by them to seek clearance for the dealings described above were in keeping with the purpose of the Model Code. The FSA also accepts that none of the dealings took place on the basis of inside information.

6.4 For the following reasons, however, the FSA is satisfied that Nestor failed to ensure its PDMRs fully understood the requirements imposed under paragraphs 3-7 of the Model Code, and that it failed to take all proper and reasonable steps to secure the compliance of its PDMRs with these provisions.

Not reinforcing awareness of the Share Dealing Policy

(1) By failing to issue any reminders or training with regard to the content of or the need to comply with its Share Dealing Policy, Nestor failed to ensure that the PDMRs were, on an ongoing basis, aware of the Share Dealing Policy which would, in turn, have made them aware of and ensured their compliance with all of the requirements of paragraphs 3-7 of the Model Code.

Relying on experience and knowledge of directors

(2) Nestor's reliance on the experience and knowledge of its board members alone to enable it to meet the requirements of paragraphs 3-7 of the Model Code was insufficient and increased the risk that PDMR dealings would be conducted in breach of the Model Code. This risk crystallised within the relevant period in that, although none of the dealings were on the basis of inside information, certain of the transactions did not comply with all of the requirements of paragraphs 3-7 of the Model Code.

Not reviewing the adequacy of its PDMR share dealing arrangements

(3) In the relevant period Nestor did not review the adequacy of its PDMR share dealing arrangements. In not doing so, the company overlooked a method by which poor practice could have been identified.

Breaches of the Model Code

(4) In the relevant period the following breaches of the Model Code[2] took place:

(a) Paragraph 3 of the Model Code states that a restricted person must not deal in shares of the company without obtaining clearance to deal in accordance with paragraph 4 of the Model Code. Paragraph 4(d) of the Model Code states that if the roles of chairman and chief executive are combined, as they were at Nestor between April 2008 and July 2010, that person must not deal in shares of the company without first notifying and receiving clearance from the board. Prior to dealing on 26 May 2010 and 30 June 2010 the chairman sought and received permission to deal from a single board member only.

[2] The precise wording of the Model Code changed on 6 March 2009, however these changes have no effect on Nestor's breach of LR9.2.8 and Listing Principles 1 and 2

(b) Paragraph 7 of the Model Code states that upon receiving clearance restricted persons must deal as soon as possible and in any event within two business days. Board member B's trade of 25 May 2010 was executed two months after he was granted clearance to deal by the chairman on 12 March 2010. Given the passage of time the FSA regards the earlier clearance to deal as having lapsed. Although board member B contacted senior executive 2 regarding his intention to trade within two days before dealing, board member B did not appreciate that the chairman was the only person who could grant a fresh clearance to deal.

(c) Paragraph 6 of the Model Code states that a company must maintain a record of the response to any dealing request made by a restricted person and of any clearance given. A copy of the response and clearance (if any) must be given to the restricted person concerned. For the transactions on 10 April 2008, 8 January 2009, 16 April 2009 and 26 May 2010, Nestor failed to maintain such records and consequently did not provide a copy of the clearance given to the restricted person(s) concerned.

(5) No Nestor board member involved in approving the dealings described at paragraph 5.8 above realised that an individual who is both chairman and chief executive needed the approval of the entire board to deal.

(6) These breaches are evidence of Nestor's failure to ensure its PDMRs fully understood their obligations under paragraphs 3-7 of the Model Code, and of Nestor's failure to take all proper and reasonable steps to secure their compliance with those provisions.

Failure to identify ongoing breaches

(7) Nestor failed to identify that its PDMRs had forgotten that they were required to comply with the Share Dealing Policy, and were not doing so, or that breaches of the Model Code had taken place.

6.5 For the reasons listed above, the FSA is satisfied that Nestor breached LR9.2.8R.

Listing Principles

6.6 Nestor's failure to take all proper and reasonable steps to ensure that its PDMRs were, on an ongoing basis, aware of all of the requirements of paragraphs 3-7 of the Model Code and of the Share Dealing Policy is also a breach of Listing Principles 1 and 2, as by not doing so the company:

(1) failed to take reasonable steps to enable its directors to understand fully their responsibilities and obligations as directors under the Model Code, in breach of Listing Principle 1; and

(2) failed to take reasonable steps to maintain adequate procedures, systems and controls to enable it to comply with its obligations under LR9.2.8R, in breach of Listing Principle 2.

6.7 Nestor's reliance on the experience and knowledge of its board members to meet the requirements of paragraphs 3-7 of the Model Code, rather than a robust process which ensured adherence to the Share Dealing Policy, is a breach of Listing Principle 2 as by doing so it failed to take reasonable steps to maintain adequate procedures, systems and controls to enable it to comply with its obligations under LR9.2.8R. The inadequacy of the systems and controls within Nestor is evidenced by:

(1) the breaches of the Model Code detailed above; and

(2) the fact that the chairman did not directly seek the approval of the entire board for his transactions on 16 April 2009 and 11 March 2010, and that the appropriate approval was achieved implicitly rather than because he or the board appreciated the need under the Model Code for entire board approval of his dealings.

7. SANCTION

Penalty

7.1 The FSA considers it appropriate to impose a financial penalty on Nestor. As the period over which Nestor's breaches occurred is largely prior to 6 March 2010, the financial penalty is considered under the policy in force before that date.

7.2 The FSA's policy on the imposition of financial penalties prior to 6 March 2010 was set out in Chapter 6 of the Decision Procedures and Penalties Manual ("DEPP"), which forms part of the FSA Handbook. In reaching this view and in determining the appropriate level of penalty, the FSA has had regard to the provisions of DEPP set out in the Annex to this Notice.

7.3 DEPP 6.1.2G sets out that the principal purpose of imposing a financial penalty is to promote high standards of regulatory and 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.

7.4 DEPP 6.5 (as it applied during the relevant period) sets out some of the factors that may be taken into account when the FSA determines the level of a financial penalty that is appropriate and proportionate to the misconduct. They are not exhaustive but include deterrence, the nature, seriousness and impact of the breach, the extent to which the breach was deliberate or reckless, financial resources and other circumstances, the disciplinary record and compliance history of the person, their conduct following the breach, and the action that the FSA has taken in relation to similar misconduct by other persons.

7.5 The FSA has had regard to the following factors:

(1) the duration of the breach, from 18 October 2006 to 30 June 2010;

(2) the failings in Nestor's internal processes, including:

(a) the absence of any reinforcement of the need to comply with the Share Dealing Policy, which (combined with the low level of instances of PDMR dealing) resulted in Nestor PDMRs forgetting that they were required to comply with it;

(b) the consequent failure to comply with the Share Dealing Policy, which went undetected; and

(c) Nestor's failure to review its clearance to deal procedures.

(3) the breaches of the Model Code that took place in the relevant period, which also went undetected; and

(4) the need for a strong deterrence message with regard to listed companies' compliance with the Model Code.

7.6 The FSA has also had regard to the following mitigating factors:

(1) the breach was not deliberate or reckless;

(2) Nestor's PDMRs understood their obligation not to trade on the basis of inside information and the requirement to seek clearance prior to any dealing in Nestor's shares. The steps taken by them to seek clearance for dealings were in keeping with the purpose of the Model Code;

(3) none of the dealings took place on the basis of inside information;

(4) Nestor did not benefit financially from its misconduct;

(5) Nestor has cooperated fully with the FSA's investigation;

(6) in order to help secure compliance with the requirements of LR9.2.8R, Nestor instructed external legal advisors to assist with the drafting of the Share Dealing Policy;

(7) the Share Dealing Policy was circulated to all Nestor directors, PDMRs and employee insiders in October 2005, each of whom was asked to, and did, return a signed acknowledgement confirming that they had read and understood the requirements of the Share Dealing Policy and would comply with them;

(8) Nestor took steps to comply with its other obligations under the Model Code, including issuing six-monthly reminders to all directors, PDMRs and employee insiders regarding the restriction on trading during close periods and whilst in possession of inside information, and also took steps to ensure that directors did not trade on a short term basis;

(9) none of the breaches had any adverse effect on markets. They caused no loss or risk of loss to investors, and no financial crime took place as a result of the breaches; and

(10) no previous disciplinary action has been taken against Nestor.

7.7 On considering the various factors above the FSA has determined that it is appropriate to impose a financial penalty of £175,000 on Nestor.

8. PROCEDURAL MATTERS

Decision maker

8.1 The decision which gave rise to the obligation to give this Notice was made by the Settlement Decision Makers.

8.2 This Final Notice is given under and in accordance with section 390 of the Act.

Manner of and time for Payment

8.3 The financial penalty must be paid in full by Nestor to the FSA by no later than 28 February 2013, 14 days from the date of the Final Notice.

If the financial penalty is not paid

8.4 If all or any of the financial penalty is outstanding on 29 February 2013, the FSA may recover the outstanding amount as a debt owed by Nestor and due to the FSA.

Publicity

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

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

FSA contacts

8.7 For more information concerning this matter generally, contact Celyn Armstrong (direct line: 020 7066 2818) or Simon Bowker (direct line: 020 7066 5308) of the Enforcement and Financial Crime Division of the FSA

Jamie Symington

Head of Department

FSA Enforcement and Financial Crime Division

ANNEX

THE MODEL CODE - INTRODUCTION AND PARAGRAPHS 3-7

Introduction

This code imposes restrictions on dealing in the securities of a listed company beyond those imposed by law. Its purpose is to ensure that persons discharging managerial responsibilities do not abuse, and do not place themselves under suspicion of abusing, inside information that

they may be thought to have, especially in periods leading up to an announcement of the company's results.

Nothing in this code sanctions a breach of section 118 of the Act (Market abuse), the insider dealing provisions of the Criminal Justice Act or any other relevant legal or regulatory requirements.

Paragraph 3: Dealing by restricted persons

3) A restricted person must not deal in any securities of the company without obtaining clearance to deal in advance in accordance with paragraph 4 of this code.

Paragraphs 4 – 7: Clearance to deal

4) (a) A director (other than the chairman or chief executive) or company secretary must not deal in any securities of the company without first notifying the chairman (or a director designated by the board for this purpose) and receiving clearance to deal from him.

(b) The chairman must not deal in any securities of the company without first notifying the chief executive and receiving clearance to deal from him or, if the chief executive is not present, without first notifying the senior independent director, or a committee of the board or other officer of the company nominated for that purpose by the chief executive, and receiving clearance to deal from that director, committee or officer.

(c) The chief executive must not deal in any securities of the company without first notifying the chairman and receiving clearance to deal from him or, if the chairman is not present, without first notifying the senior independent director, or a committee of the board or other officer of the company nominated for that purpose by the chairman, and receiving clearance to deal from that director, committee or officer.

(d) If the role of chairman and chief executive are combined, that person must not deal in any securities of the company without first notifying the board and receiving clearance to deal from the board.

(e) Persons discharging managerial responsibilities (who are not directors) must not deal in any securities of the company without first notifying the company secretary or a designated director and receiving clearance to deal from him.

5) A response to a request for clearance to deal must be given to the relevant restricted person within five business days of the request being made.

6) The company must maintain a record of the response to any dealing request made by a restricted person and of any clearance given. A copy of the response and clearance (if any) must be given to the restricted person concerned.

7) A restricted person who is given clearance to deal in accordance with paragraph 4 must deal as soon as possible and in any event within two business days of clearance being received.

GLOSSARY TO FSA HANDBOOK

PERSON DISCHARGING MANAGERIAL RESPONSIBILITY

A “person discharging managerial responsibilities” is (in accordance with section 96B(1) of the Act):

(a) a director of an issuer:

(i) registered in the United Kingdom that has requested or approved admission of its shares to trading on a regulated market; or

(ii) not registered in the United Kingdom or any other EEA State but has requested or approved admission of its shares to trading on a regulated market and who is required to file annual information in relation to shares in the United Kingdom in accordance with Article 10 of the Prospectus Directive; or

(b) a senior executive of such an issuer who:

(i) has regular access to inside information relating, directly or indirectly, to the issuer; and

(ii) has power to make managerial decisions affecting the future development and business prospects of the issuer.

DEPP 6.1

DEPP 6.1.1

DEPP 6 includes 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.

DEPP 6.1.2

The principal purpose of imposing a financial penalty or issuing a public censure 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 and public censures are therefore tools that the FSA may employ to help it to achieve its regulatory objectives.

DEPP 6.5

DEPP 6.5 Determining the appropriate level of financial penalty

DEPP 6.5.1

(1) 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. The list of factors in DEPP 6.5.2 G is not exhaustive: not all of these factors may be relevant in a particular case, and there may be other factors, not included below, that are relevant.

(2) The FSA does not apply a tariff of penalties for different kinds of breach. This is because there will be very few cases in which all the circumstances of the case are essentially the same and because of the wide range of different breaches in respect of which the FSA may take action. The FSA considers that, in general, the use of a tariff for particular kinds of breach would inhibit the flexible and proportionate policy which it adopts in this area.

DEPP 6.5.2

The following factors may be relevant to determining the appropriate level of financial penalty to be imposed on a person under the Act:

(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.

(6) The amount of benefit gained or loss avoided

The FSA may have regard to the amount of benefit gained or loss avoided as a result of the breach, for example:

(a) the FSA will propose a penalty which is consistent with the principle that a person should not benefit from the breach; and

(b) the penalty should also act as an incentive to the person (and others) to comply with regulatory standards and required standards of market conduct.

(7) Difficulty of detecting the breach

A person's incentive to commit a breach may be greater where the breach is, by its nature, harder to detect. The FSA may, therefore, impose a higher penalty where it considers that a person committed a breach in such a way as to avoid or reduce the risk that the breach would be discovered, or that the difficulty of detection (whether actual or perceived) may have affected the behaviour in question.

(8) Conduct following the breach

The FSA may take the following factors into account:

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

(b) the degree of co-operation the person showed during the investigation of the breach by the FSA, or any other regulatory authority allowed to share information with the FSA, such as an RIE or the Takeover Panel. Where a person has fully co-operated with the FSA's investigation, this will be a factor tending to reduce the level of financial penalty;

(c) 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 or another regulatory authority; for example, identifying whether consumers or investors or other market users suffered loss and compensating them where they have; correcting any misleading statement or impression;

taking disciplinary action against staff involved (if appropriate); and taking steps to ensure that similar problems cannot arise in the future; and

(d) whether the person concerned has complied with any requirements or rulings of another regulatory authority relating to the breach (for example, where relevant, those of the Takeover Panel).

(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.

(10) Other action taken by the FSA (or a previous regulator)

Action that the FSA (or a previous regulator) has taken in relation to similar breaches by other persons may be taken into account. This includes previous actions in which the FSA (whether acting by the RDC or the settlement decision makers) and a person on whom a penalty is to be imposed have reached agreement as to the amount of the penalty. As stated at DEPP 6.5.1 G (2), the FSA does not operate a tariff system. However, the FSA will seek to apply a consistent approach to determining the appropriate level of penalty.

(11) Action taken by other domestic or international regulatory authorities

Considerations could include, for example:

(a) action taken or to be taken against a person by other regulatory authorities which may be relevant where that action relates to the breach in question;

(b) the degree to which any remedial or compensatory steps required by other regulatory authorities have been taken (and whether taken promptly).

(12) FSA guidance and other published materials

(a) A person does not commit a breach by not following FSA guidance or other published examples of compliant behaviour. However, where a breach has otherwise been established, the fact that guidance or other published materials had raised relevant concerns may inform the seriousness with which the breach is to be regarded by the FSA when determining the level of penalty.

(b) The FSA will consider the nature and accessibility of the guidance or other published materials when deciding whether they are relevant to the level of penalty and, if they are, what weight to give them in relation to other relevant factors.

(13) The timing of any agreement as to the amount of the penalty

The FSA and the person on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, DEPP 6.7 provides that the amount of the 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.

DEPP 6.5.2A

The factors to which the FSA will have regard when determining the appropriate level of financial penalty to be imposed under regulation 34 of the RCB Regulations are set out in RCB 4.2.5 G.

DEPP 6.5.3

Part III (Penalties and fees) of Schedule 1 to the Act specifically provides that the FSA may not, in determining its policy with respect to the amount of penalties, take account of expenses which it incurs, or expects to incur, in discharging its functions.