Financial Services Authority

DECISION NOTICE

To: **Greenlight Capital Inc.**

Of: **2 Grand Central Tower**
140 East 45 Street
Floor 24
New York
NY 10017

Date: **12 January 2012**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") has decided to take the following action:

1. ACTION

1.1. For the reasons set out below, the FSA has decided to impose on Greenlight Capital Inc ("Greenlight") a financial penalty, pursuant to section 123(1) of the Act, of £3,650,795 for engaging in market abuse in breach of section 118(2) of the Act.

1.2. The financial penalty to be imposed on Greenlight consists of the following elements:

i. A disgorgement of financial benefit arising from the market abuse of £650,795 representing the losses Greenlight avoided by way of reduced performance and management fees through the sale of Punch Taverns Plc ("Punch") shares

ii. An additional penalty element of £3 million.

2. REASONS FOR THE ACTION

2.1. This notice is issued to Greenlight as a result of the behaviour of David Einhorn ("Mr Einhorn") between 9 and 12 June 2009. Greenlight is wholly owned by Mr Einhorn and he is the President and sole portfolio manager of Greenlight and is responsible for all investment decisions on behalf of Greenlight. Mr Einhorn's behaviour is attributable to Greenlight and Greenlight has therefore engaged in market abuse, for the reasons set out below.

2.2. Greenlight is an investment management firm based in the United States. Greenlight manages investments held by various entities ("the Greenlight Funds"). Several of the Greenlight Funds had shareholdings in Punch. (The Greenlight Funds held a combination of Punch shares and contracts for difference referenced to Punch shares. There is no material difference between shares and contracts for difference for the purpose of this Notice and, for convenience, this Notice therefore refers to the Greenlight Funds holding 'shares' in Punch and being 'shareholders' in Punch even though part of the investment was through contracts for difference.) The Greenlight Funds first acquired shares in Punch on 16 June 2008 and, by June 2009, the Funds owned 13.3% of Punch's issued share capital.

2.3. On Monday 15 June 2009, Punch announced a transaction to issue new equity in order to raise approximately £375 million of capital ("the Transaction"). [REDACTED] Prior to the announcement of the Transaction, various shareholders and potential investors had been wall crossed by Firm X. Specific wall crossing procedures were in place for Punch's existing large US-based shareholders whereby they would be asked to agree the terms of a non disclosure agreement ("NDA"). (The terms "wall crossing" and "non-disclosure agreement" or "NDA" are explained further at paragraphs 3.8-3.12 below.)

2.4. On Monday 8 June 2009 (7 days before the announcement of the Transaction), Firm X raised with Greenlight the subject of a possible equity issuance by Punch, and invited Greenlight to be wall crossed in relation to Punch. Mr Einhorn refused this request, but a call was arranged for the following day between Punch's management and Mr Einhorn on a non-wall crossed basis.

2.5. On Tuesday 9 June 2009, a corporate broker from Firm X ("the Broker") and Punch management proceeded to have a telephone conference call with Mr Einhorn ("the Punch Call").

2.6. Even though the Punch Call was expressly set up on a 'non-wall crossed' basis, inside information was disclosed to Mr Einhorn during the call. The inside information disclosed to Mr Einhorn was that Punch was at an advanced stage of the process towards the issuance of a significant amount of new equity, probably within a timescale of around a week, with the principal purpose of repaying Punch's convertible bond and creating headroom with respect to certain covenants in Punch's securitisation vehicles.

2.7. Immediately following the Punch Call, Mr Einhorn directed that Greenlight traders sell the Greenlight Funds' entire shareholding in Punch. The decision to sell was solely Mr Einhorn's. Mr Einhorn decided to sell on the basis of the inside information he received on the Punch Call (albeit not solely on this basis). Between 9 June and 12

June 2009, Greenlight sold 11.65 million shares in Punch and thereby reduced the Greenlight Funds' stake from 13.3% to 8.98%.

2.8. The Transaction was announced to the market on 15 June 2009. Following the announcement of the Transaction, the price of Punch's shares fell by 29.9%. Greenlight's sale of Punch shares prior to the announcement of the Transaction had resulted in loss avoidance of approximately £5.8 million for the Greenlight Funds.

2.9. The FSA considers this to be a serious case of market abuse by Greenlight arising from the behaviour of Mr Einhorn, in particular for the following reasons:

(i) Greenlight's trading took place over a period of four days and represented a large part of the daily volume traded in Punch shares over that period. Such significant trading in a stock on the basis of inside information severely undermines confidence in the market. The trading was highly visible to market participants.

(ii) The trading resulted in loss avoidance for the Greenlight Funds of £5.8 million.

(iii) Greenlight is a high profile hedge fund, at which Mr Einhorn occupies a prominent position as President.

(iv) Mr Einhorn is an experienced trader and portfolio manager. He has had over 15 years of experience running an investment management firm and should therefore be held to the highest standards of conduct and the highest levels of accountability.

(v) Given Mr Einhorn's position and experience, it should have been apparent to him that the information he received on the Punch Call was confidential and price sensitive information that gave rise to legal and regulatory risk. The Punch Call was unusual in that it was a discussion with management following a refusal to be wall crossed. In the circumstances Mr Einhorn should have been especially vigilant in assessing the information he received. It was a serious error of judgement on Mr Einhorn's part to make the decision after the Punch Call to sell Greenlight's shares in Punch without first seeking any compliance or legal advice despite the ready availability of such resources within Greenlight.

2.10. Despite being a serious case of market abuse which merits the imposition of a substantial financial penalty, the market abuse was not deliberate or reckless. Mr Einhorn did not believe that the information that he had received was inside information, and he did not intend to commit market abuse. Nevertheless, the FSA considers Mr Einhorn's error of judgement to be a serious failure to act in accordance with the standards reasonably expected of market participants. The FSA considers that Mr Einhorn's behaviour can be attributed to Greenlight.

3. FACTS AND MATTERS

Mr Einhorn and Greenlight

3.1. Greenlight is a private investment management firm, wholly owned by Mr Einhorn and based in the United States. In 2009, Greenlight had approximately US$5 billion of assets under management and 31 employees, mainly based in the US with a small number in the UK.

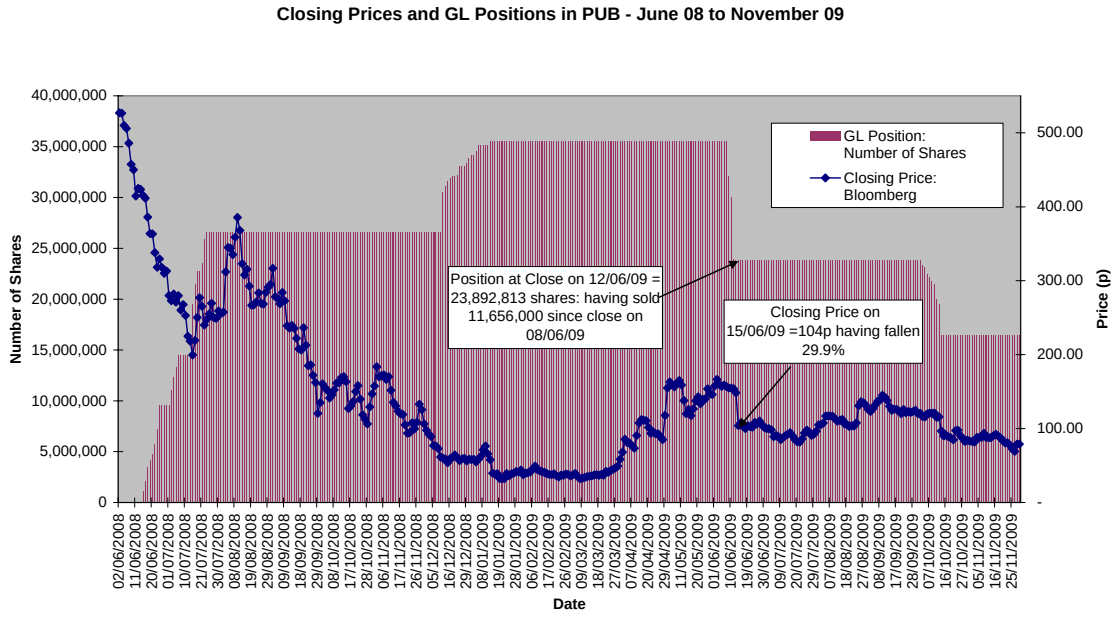
3.2. Greenlight follows a value-oriented investment philosophy and generally invests in shares and other investments that it considers to be mispriced. It mainly invests in stocks trading on the US markets, and those in Europe, including the UK.

3.3. Mr Einhorn was one of the two founding members of Greenlight in 1996 and is the President and sole portfolio manager of Greenlight. He has responsibility for all of Greenlight's investment decisions.

3.4. Mr Einhorn has significant experience as a trader and a portfolio manager. His experience includes dealings in stocks admitted to trading on EU regulated markets, including the UK markets.

The Greenlight Funds' investment in Punch

3.5. Greenlight first acquired shares in Punch on 16 June 2008 for the Greenlight Funds. Greenlight bought shares in June and July 2008 (approximately 26.6 million shares) and then bought again in December 2008 and January 2009 (approximately a further 9 million shares). The price of Punch shares as against the Greenlight Funds' position in Punch is shown on the graph below:



3.6. Greenlight was therefore a buyer of Punch shares between June 2008 and January 2009 and the position was held until June 2009. At no time prior to the Punch Call on 9 June 2009 had Greenlight sold or attempted to sell any Punch shares.

3.7. Mr Einhorn's initial decision to invest in Punch shares was made on the basis that Punch stock was mispriced by the market and that the chances of an equity issuance were not high. In Greenlight's letter to investors dated 1 October 2008, reasons for investing in Punch were explained:

> *During the quarter, the market began pricing in a high risk of default or cash trapping within the securitisations. In addition, PUB* [PUB is the Bloomberg ticker for Punch] *announced its intention not to pay a final dividend for fiscal year 2008 to conserve cash at the parent company. The market took PUB's conservatism as a sign of potential cash flow problems regarding the debt and began pricing in an equity issuance to pay down the convertibles. Based on conversations with the company and analysis of the debt documents, Greenlight believes PUB has the flexibility to manage its securitisations without a liquidity crunch, even in difficult periods for pubs. PUB is likely to use the cash savings from the cancelled dividend to pay down some of its debt early. We do not think the chances of an equity issuance are high. Greenlight initiated the position at £2.83, or less than 4x estimated 2008 profits. PUB shares ended the quarter at £1.32 (you do the multiple).*

Wall crossing

3.8. Wall crossing is a process whereby a company can legitimately provide inside information to a third party. A company may wall cross a variety of third parties ranging from large institutional shareholders to small shareholders or completely unrelated parties.

3.9. There are a number of reasons for wall crossing third parties. A common reason is to give the third party inside information about a proposed transaction by a company that is publicly listed (for example, a merger or acquisition, or fundraising transactions, including equity issuances).

3.10. In the context of a proposed transaction, the purpose of the wall crossing is to share inside information with the third party in order to be able to discuss the third party's views on the transaction. These views would usually include an indication of the third party's interest in and/or support for the transaction.

3.11. Once a third party agrees to be wall crossed, it can be provided with inside information and it is then restricted from trading. The party is only able to trade in the company's shares again once the information it has been given is made public. In the context of a transaction, the information will be made public either when the transaction is announced to the market, or in cases where a transaction does not proceed, when an announcement is made to the market stating that a transaction was contemplated, but did not proceed. This announcement may be referred to as a cleansing statement.

3.12. Wall crossing is a well-established practice in large public companies and investment banks. It may be carried out verbally or recorded in writing. An example of a verbal process of wall crossing would be where the third party is contacted by telephone. The third party is asked if they are prepared to be wall crossed, usually for a specified period of time. If they agree, they are then told the relevant information. An example of a wall crossing procedure recorded in writing is where written terms are agreed. These terms set out the basis on which the third party agrees to receive the inside

information. Such agreements may be referred to as non-disclosure agreements or NDAs.

Events leading up to the Punch Call on 9 June 2009

3.13. Punch had considered issuing equity in late 2008, but had been advised that an equity issuance would not be possible due to poor market conditions. In early 2009, market conditions improved such that equity transactions once more became a realistic possibility.

3.14. Punch issued interim results for the first quarter of 2009 on 29 April 2009. It then conducted a post results road show at the beginning of May. During the road show, several shareholders and potential investors pro-actively suggested to Punch that it should consider an equity issuance.

3.15. Following the road show, on 6 May 2009, the Board of Punch gave approval for management to consider an equity issuance. The principal purpose of the proposed issuance was to repay a convertible bond in the sum of approximately £220 million, and also to create headroom with respect to certain covenants in Punch's securitisation vehicles. (Punch had three wholly owned securitisations vehicles. Punch's assets (*i.e.*, the pubs) were owned by these securitisation vehicles. Income from the securitisations (*i.e.*, profits made by the pubs) would flow to Punch. Certain 'tests' or 'covenants' governed the flow of money from the securitisations to Punch. If the appropriate ratio was not maintained in respect of each test, there would be restrictions on the money that could flow to Punch. Cash raised through an equity issuance could therefore be used to ensure the relevant ratios were maintained and that there was no default such as to restrict money flowing from the securitisations to Punch.)

3.16. [REDACTED]

3.17. Preparations for the Transaction were progressed in May. In early June, the Board approved certain documentation required for the Transaction and agreed that Punch management could speak to third parties about the proposed Transaction on a wall crossed basis. It was decided that it would be desirable to wall cross Punch shareholders and potential investors in the new equity prior to the Transaction being announced to the public for the purpose of gauging support for the Transaction and understanding the level of interest in purchasing new equity in Punch.

3.18. A significant stake in Punch was held at this time by shareholders based in America ("the US Shareholders"), one of which was Greenlight. It was decided that the US Shareholders would be wall crossed first. This was because it was considered desirable to understand their response to the proposed equity issuance before wall crossing others. The wall crossing procedure for the US Shareholders was that they would be invited to be wall crossed and to agree to the terms of a written NDA. Only once the terms of the NDA were agreed could details of the Transaction be provided to the US Shareholders.

3.19. The Broker was tasked with making the initial approach to wall cross the US Shareholders [REDACTED].

3.20. By the time that the Broker started to make calls to ask the US Shareholders if they would agree to be wall crossed (on 8 June), the anticipated launch date for the Transaction was set for Friday 12 June (although in the event this was delayed by one trading day to Monday 15 June).

3.21. On Monday 8 June 2009, the Broker had a telephone conversation with an analyst at Greenlight. He said that the call was a post-road show follow up call and he raised the subject of a possible equity issuance by Punch and asked the analyst if Greenlight would agree to be wall crossed. The wall crossing request was referred to Mr Einhorn. Mr Einhorn would not agree to Greenlight being wall crossed and this decision was relayed back to the Broker via the analyst. The broker attempted to persuade Greenlight to be wall crossed, but this was not agreed and instead a call was set up for the following day between Greenlight and Punch management on an 'open' basis.

Information disclosed during the Punch Call

3.22. On Tuesday 9 June, the Broker and Punch management participated in the Punch Call with Mr Einhorn and the Greenlight analyst. The Punch Call lasted for approximately 45 minutes and involved a considerable amount of discussion between Punch management and Greenlight.

3.23. The inside information received by Mr Einhorn on the Punch Call was that Punch was at an advanced stage of the process towards the issuance of a significant amount of new equity, probably within a timescale of around a week, with the principal purpose of repaying Punch's convertible bond and creating headroom with respect to certain covenants in Punch's securitisation vehicles. The Punch Call has been considered in the context in which it took place and in its entirety:

(i) with regard to context, Mr Einhorn knew in advance of the Punch Call that Firm X wanted to wall cross Greenlight in relation to Punch. When the Broker spoke to the Greenlight analyst and asked Greenlight to agree to be wall crossed he had said that the wall crossing related to Punch. The broker and the Greenlight analyst had also discussed Punch issuing equity on the same telephone call; and

(ii) the Punch Call has been considered as a whole. The particular pieces of information that are said to amount to inside information must be read as part of the entire conversation. The merits of Punch issuing equity form the subject matter of the majority of the call. Punch management and the Broker attempted to persuade Mr Einhorn of the merits of an equity issuance and discussed the risks to the company of not issuing equity. There was no discussion of any other possible new approach to address risks that Punch may take.

3.24. A number of particular points of information that were disclosed to Mr Einhorn during the Punch Call are detailed below.

3.25. First: Mr Einhorn was told that the amount of any possible equity issuance would need to be about £350 million in order to repay the convertible and create 10% headroom in the securitisations. This information was offered by the Broker:

> Einhorn: *So, would you – as you pencil that out, what do those amounts turn out to be?*
>
> The Broker: *Something like 350 sterling.*
>
> Einhorn: *350 million sterling?*
>
> The Broker: *If you were – if you were roughly to sort of work on the basis that you kinda took out the – the converts and that's something that gives you, say, 10 percent headroom in within both of the covenants, filed covenants.*

3.26. This disclosed that the principal purpose of the issuance would be to repay the convertible bond and create headroom in the securitisations, and that the sum of the issuance under consideration was of a very significant size; Punch was not considering a small equity issuance in the sum of, for instance, around £50 million. Whilst the Broker did not give the sum of £350 million as a definitive figure, what he said to Mr Einhorn made it clear that the transaction was to raise a sum of equity that would be of considerable size relative to Punch's market capitalisation (Punch's market capitalisation at the time of the Punch Call was approximately £400 million).

3.27. Second: Mr Einhorn was told that an NDA would last for less than a week. The Broker offered to give Mr Einhorn a "*timeframe*" in respect of an NDA and when questioned by Mr Einhorn on what that would be, the Broker stated "*Well, within less than a, kind of, week.*"

3.28. Whilst an NDA does not confirm that a transaction is definitely going to take place within a certain time scale, it does disclose anticipated timing and, in these circumstances, it informed Mr Einhorn that the issuance was at an advanced stage.

3.29. Third: Mr Einhorn was told that Punch was consulting with all of its major shareholders, and that there was broad support for an equity issuance, thus also indicating that the issuance was at an advanced stage and likely to proceed. The Broker said:

> *Really it's fair to say like, consulting with all of the – the major shareholders in terms of taking, you know, taking into account their views…*
>
> *… a number of people have sort of signed NDAs because we had a bit more open conv – conversations…*

…I think it's fair to say that, you know, broadly, mostly all the shareholders are supportive.

3.30. The reference to other NDAs further indicated that the issuance was likely to take place within a short period of time.

3.31. In isolation, none of the above points would (in the context of the Punch Call) amount to inside information. However, taken together these points did constitute inside information particularly because they disclosed to Mr Einhorn the purpose and anticipated size and timing of the issuance.

3.32. Despite assertions made during the call by Punch management that they were considering their options and that no formal decisions had been made, this did not detract from the essential information disclosed during the call, namely that they were at an advanced stage of the process towards the issuance of a significant amount of new equity, probably within the timescale of around a week, with the principal purpose of repaying Punch's convertible bond and creating headroom with respect to certain covenants in Punch's securitisation vehicles.

Events following the Punch Call

3.33. Having decided that Greenlight should sell the entire shareholding in Punch, immediately after the Punch Call ended Mr Einhorn gave the Greenlight analyst instructions to that effect. He did not take the opportunity to consult with Greenlight's internal compliance or legal advisers. This was despite the unusual circumstances of the call following his refusal to be wall crossed, and despite Greenlight's own policy regarding insider dealing which stated:

In practical terms, information you obtain that makes you want to trade, or affects your investment decision making may well be material.

3.34. Within about two minutes of the conclusion of the Punch Call, the analyst had passed on Mr Einhorn's sell order to Greenlight traders.

3.35. Trades effecting the sale of Punch shares commenced through an external UK broker less than 30 minutes after the Punch Call ended. On 9 June, Greenlight sold 3,456,000 shares of Punch which accounted for approximately 63% of the day's volume. Greenlight continued to sell Punch shares between 10 - 12 June and dominated trading in Punch shares on the London Stock Exchange on these days:

- 10 June – Punch's stock closed at 154.75p. Greenlight traded 2,000,000 shares, 62.28% of the daily volume;
- 11 June – Punch's stock closed at 154p. Greenlight traded 6,100,000 shares, 85.52% of the daily volume;
- 12 June – Punch's stock closed at 148.5p. Greenlight traded 100,000 shares, 6.15% of the daily volume.

3.36. On Friday 12 June at 08:31, a Regulatory News Story ("RNS") was released by Greenlight stating:

Greenlight reduced their investment in Punch Taverns to 12.02% on 9 June, 11.27% on 10 June, and 9% on 11 June.

3.37. On Monday 15 June an RNS was released by Punch announcing the Transaction. Punch informed the market of its intention to raise approximately £375 million by means of a firm placing and open offer of new ordinary shares. It also announced its intention to make a tender offer to holders of the convertible bond to purchase any or all of the bonds at a purchase price of not less than 95% (as a percentage of nominal principal amount outstanding).

3.38. Following the announcement of the Transaction, the price of Punch's shares fell by 29.9%. Greenlight's trading had avoided losses of approximately £5.8 million.

4. FAILINGS

4.1. Relevant statutory provisions and regulatory guidance are set out in Annex 1.

4.2. As stated above, the market abuse by Greenlight arises by the attribution of Mr Einhorn's behaviour to Greenlight. The analysis of the breach set out below is therefore based on Mr Einhorn's behaviour.

4.3. Mr Einhorn's behaviour fell within section 118(1)(a) of the Act, in that it occurred in relation to Punch shares:

(i) shares in Punch are qualifying investments and contracts for difference referenced to Punch shares are related investments under section 130A(3) of the Act for the purpose of section 118(2) of the Act; and

(ii) shares in Punch are traded on a prescribed market, the London Stock Exchange.

4.4. Mr Einhorn's behaviour amounted to market abuse by way of insider dealing in breach of section 118(2) of the Act for the following reasons (as detailed further below):

(i) Mr Einhorn was an insider;

(ii) Mr Einhorn dealt in the investment;

(iii) Mr Einhorn had inside information; and

(iv) Mr Einhorn dealt on the basis of that inside information.

4.5. Mr Einhorn was an insider because he had inside information as a result of having access to information through the exercise of his employment at Greenlight and his duties as President and portfolio manager of Greenlight.

4.6. Mr Einhorn dealt in the investment by directing Greenlight traders to sell Greenlight's Punch shares.

4.7. The information received by Mr Einhorn met the statutory requirements of inside information, namely:

(i) the information related to Punch and to Punch shares;

(ii) the information was precise because:

(a) it indicated an event (*i.e.*, the issue of new shares) that may reasonably have been expected to occur (see paragraphs 4.9–4.12 below); and

(b) it was specific enough to enable a conclusion to be drawn as to the possible effect of the share issuance on the price of Punch shares (see paragraphs 4.13–4.16 below);

(iii) the information was not generally available (see paragraphs 4.17–4.18 below); and

(iv) the information was likely to have a significant effect on the price of Punch shares as it was information which a reasonable investor would be likely to use as part of the basis of his investment decisions (see paragraph 4.19 below).

4.8. Mr Einhorn dealt on the basis of the inside information (see paragraph 4.20 below).

The information indicated an event may reasonably have been expected to occur

4.9. The information disclosed to Mr Einhorn was sufficiently precise to indicate that a share issuance may reasonably be expected to occur. It was not necessary for Mr Einhorn to be told that the issuance was definitely going to proceed and, indeed, the Transaction was not a certainty at the time of the disclosures.

4.10. From what he was told, Mr Einhorn understood the likely amount of the issuance and the purpose of the issuance, that an NDA would last for less than a week, that Punch was consulting with all of the major shareholders and that other shareholders had signed an NDA and shareholders were broadly supportive of Punch issuing equity. These points together indicated that an equity issuance may reasonably be expected to occur.

4.11. The information provided, that an NDA would last less than a week, is particularly relevant in that it gave a clear indication as to the expected timing of the issuance. When a firm wall crosses investors, a transaction is usually close to launch. Firms do not usually wall cross investors for more than a short period of time prior to the intended launch date of a transaction and it is usually one of the latter stages in the transaction process. Thus, at the time of wall crossing third parties, there is no absolute certainty that a transaction will go ahead, however, it is the case that a transaction is likely to be at an advanced stage of preparation. The Broker's disclosure that the NDA would last for less than a week, together with the other pieces of information disclosed to Mr Einhorn, provided a clear indication that the issuance was at an advanced stage, probably with a timescale of around a week.

4.12. The information disclosed to Mr Einhorn was sufficient to indicate that an equity issuance might reasonably be expected to occur, especially when viewed in the context of the Punch Call generally.

The information was specific enough to enable a conclusion to be drawn as to the possible effect of the issuance on the price of Punch shares

4.13. With regard to the price sensitivity of the information, the information given to Mr Einhorn about the size and purpose of the issuance was sufficient to allow a conclusion to be drawn as to its possible effect on the price of Punch shares.

4.14. The conclusion could be drawn that when the issuance was announced it would have an effect on the price, and that if there were such an effect it would be to reduce the price.

4.15. Whilst in some situations equity issuances may cause the share price to go up, the most likely effect of this size of equity issuance by Punch, at this time and for the given reasons was to cause the share price to fall. The particular factors to note are:

(i) the market was not expecting the issuance so it was not factored into the share price; in particular, the interim results released by Punch 6 weeks previously had indicated that Punch was financially on track and that it was focussing on a strategy of "self help";

(ii) the anticipated size of the issuance was a large amount of equity in relation to Punch's market capitalisation;

(iii) the money was to be used to pay off debt and create headroom in relation to the securitisations in order to avoid a breach of covenants, but would still leave Punch with substantial debt;

(iv) the money was not being used to make an acquisition or some other such purpose that may reasonably be expected to boost the share price; and

(v) Punch's share price had significantly recovered from its low of 32p in March 2009 and Punch was not in a position where the only possible reaction to the issuance was for the share price to increase.

4.16. In these circumstances, it was predictable that the share price would fall. The information received by Mr Einhorn was therefore specific enough to enable a conclusion to be drawn as to the possible effect of the issuance on the price of Punch shares.

The information was not generally available

4.17. There was some speculation in the market that Punch may have to raise capital by way of new equity in or around 2009. However, public statements by Punch indicated that it was pursuing a strategy of "self help" by disposing of assets and buying back debt at a discount in the market.

4.18. There was no generally available information regarding the timing, size and shareholder support for the issuance and these factors could not have been deduced from other public information by market participants. Thus, it was not generally available information that Punch was at an advanced stage of the process towards the issuance of a significant amount of new equity, probably within a timescale of around a

week, with the principal purpose of repaying Punch's convertible bond and creating headroom with respect to certain covenants in Punch's securitisation vehicles.

The information was likely to have a significant effect on price as it was information which a reasonable investor would be likely to use as part of the basis of his investment decisions

4.19. It follows from the analysis at paragraphs 4.13 - 4.16 above that a reasonable investor would be likely to use the information disclosed to Mr Einhorn as part of the basis of his investment decisions.

Dealing on the basis of the inside information

4.20. The FSA's view is that Mr Einhorn's decision to deal was based on the inside information he received. It is sufficient that a decision to deal is materially influenced by the inside information, it need not be the sole reason for the trading.

5. SANCTION

Financial Penalty

5.1. DEPP 6.1.2 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.

5.2. In enforcing the market abuse regime, the FSA's priority is to protect prescribed markets from any damage to their fairness and efficiency. Effective and appropriate use of the power to impose penalties for market abuse will help to maintain confidence in the UK financial system by demonstrating that high standards of market conduct are enforced in the UK financial markets. The public enforcement of these standards also furthers public awareness of the FSA's statutory objective of the protection of consumers, as well as deterring potential future market abuse.

5.3. DEPP 6.2.2 sets out a number of factors to be taken into account when the FSA decides whether to take action in respect of market abuse. They are not exhaustive, but include the nature and seriousness of the behaviour, the degree of sophistication of the users of the market in question, the size and liquidity of the market and the susceptibility of the market to market abuse. Other factors include action taken by the FSA in similar cases, the impact that any financial penalty or public statement may have on financial markets or on the interests of consumers and the disciplinary record and general compliance history of the person concerned.

5.4. DEPP 6.4 sets out a number of factors to be taken into account when the FSA decides whether to impose a financial penalty or issue a public censure. They are not exhaustive but include deterrent effect, whether a person has made a profit or loss by his misconduct, the seriousness of the behaviour and the FSA's approach in similar previous cases.

5.5. 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 misconduct, the extent to which the breach was deliberate or reckless, whether the person on whom the penalty is to be imposed is an individual, his status, position and responsibilities, financial resources and other circumstances, the amount of any benefit gained or loss avoided, the difficulty of detecting the breach, the disciplinary record and compliance history of the person and the action that the FSA has taken in relation to similar misconduct by other persons.

5.6. The FSA has taken all of the circumstances of this case into account and considered the guidance in DEPP 6 in deciding that it is appropriate in this case to take action in respect of behaviour amounting to market abuse, that the imposition of a financial penalty is appropriate and that the level of financial penalty is appropriate and proportionate.

5.7. The FSA has had particular regard to the following circumstances in relation to the behaviour attributable to Greenlight that mean a substantial financial penalty is warranted:

(i) Greenlight's trading took place over a period of four days and represented a large part of the daily volume traded in Punch shares over that period. Such significant trading in a stock on the basis of inside information severely undermines confidence in the market. The trading was highly visible to market participants.

(ii) The trading resulted in loss avoidance for the Greenlight Funds of £5.8 million.

(iii) Greenlight is a high profile hedge fund, at which Mr Einhorn occupies a prominent position as President.

(iv) Mr Einhorn is an experienced trader and portfolio manager. He has had over 15 years of experience running an investment management firm and should therefore be held to the highest standards of conduct and the highest levels of accountability.

(v) Given Mr Einhorn's position and experience, it should have been apparent to him that the information he received on the Punch Call was confidential and price sensitive information that gave rise to legal and regulatory risk. The Punch Call was unusual in that it was a discussion with management following a refusal to be wall crossed. In the circumstances Mr Einhorn should have been especially vigilant in assessing the information he received. It was a serious error of judgement on Mr Einhorn's part to make the decision after the Punch Call to sell Greenlight's shares in Punch without first seeking any compliance or legal advice despite the ready availability of such resources within Greenlight.

5.8. It is noted that Mr Einhorn did not deliberately or recklessly contravene the regulatory requirements. Further, he voluntarily attended an FSA interview under caution, and neither he nor Greenlight has previously been the subject of an adverse finding by the FSA.

5.9. In the circumstances, the FSA has decided to impose a financial penalty on Greenlight of £3,650,795. The financial penalty consists of the following elements:

(i) A disgorgement of financial benefit arising from the market abuse of £650,795 representing the losses Greenlight avoided by way of reduced performance and management fees through the sale of Punch shares.

(ii) An additional penalty element of £3 million.

6. REPRESENTATIONS AND FINDINGS

6.1. Below is a brief summary of the key written and oral representations made by Mr Einhorn on behalf of Greenlight, and how they have been dealt with. In making the decision which gave rise to the obligation to give this notice, the FSA has taken into account all of the representations made, whether or not explicitly set out below.

Information disclosed on the Punch Call

6.2. Mr Einhorn made representations that:

(i) on a fair view of the Punch Call, taken as a whole and in context, and bearing in mind relevant market practice, no inside information was conveyed. Although the pros and cons of Punch potentially issuing equity were discussed on the Punch Call, the discussion was high-level and conceptual. Punch management invited Mr Einhorn's views and engaged in debate with him, and the discussion ended inconclusively. Punch's management made it clear that they were considering different alternatives, that no decisions had been made regarding an equity issuance or other course of action, and that Punch was continuing to operate on a 'business as usual' basis;

(ii) even on the FSA's case there was no single statement of inside information; rather, the information comprised various comments scattered throughout the 45-minute call. Since Mr Einhorn was not aware of what Punch were actually planning or doing, he therefore had to interpret the overall information provided to him, taking the Punch Call as a whole. Mr Einhorn was entitled to expect, having refused to sign an NDA and be wall crossed, that he would not be given inside information. Although this did not mean that he could act on inside information if he received it, in order to know whether he had received it he interpreted what he was told in light of that expectation. Further, there were a number of experienced professionals on the call, who were aware of Punch's plans, none of whom raised any concern that inside information had been disclosed, even when Mr Einhorn stated that Greenlight might sell its Punch shares. This suggested that nothing said on the call should be interpreted as constituting inside information;

(iii) it would not be fair to require Mr Einhorn, or any reasonable investor, to deduce that they had been given inside information by making inferences and assumptions, and ignoring the plain meanings of the words spoken to them. Mr Einhorn was told that an NDA would last for less than a week, not that an equity issuance was less than a week away. He was not told what the NDA covered. He did not understand this to mean that an equity issuance was taking place imminently, particularly since an NDA does not indicate that a transaction is about to occur, and that a timescale of a week, as opposed to a day, would indicate that any transaction was not yet at an advanced stage. The fact that Punch management wanted him to sign an NDA suggested matters were still at the discussion phase. The conversation was presented as a hypothetical back and forth, and included a number of 'disclaimers' from Punch management that it was purely conceptual. Mr Einhorn took Punch management at their word;

(iv) none of the parties on the call thought that inside information had been disclosed. This supports the view that, as a matter of objective fact, no inside information was disclosed as the information disclosed would not indicate to a reasonable investor that an event may reasonably have been expected to occur; and

(v) even if inside information was, as a matter of objective fact, disclosed to Mr Einhorn, he did not understand it. He did not know what Punch was going to do after the call because the inside information, as formulated by the FSA, was not a conclusion that he drew. In his view he had simply participated in a conversation about the potential issuance of equity at some future time, about which Punch management had made no decisions.

6.3. The FSA has found that:

(i) taking the Punch Call as a whole and in context, it was sufficiently clear that an equity issuance was reasonably to be expected to occur imminently. Punch management's comments to the contrary made that no less apparent when taken in context;

(ii) while there was no single statement of inside information, and some interpretation was required, the clear interpretation of the comments made on the Punch Call disclosed inside information;

(iii) reasonable investors are expected to interpret comments made to them in an appropriate manner, which may sometimes mean understanding more than the precise words spoken, or interpreting certain comments in light of the context. If it is sufficiently clear that a discussion is not, in fact, merely conceptual, even express words to the contrary will not prevent inside information from being given. In the specific circumstances of the Punch Call it was clear that the equity issuance was imminent and that the reference to a timetable for the NDA disclosed the anticipated timetable for the issuance;

(iv) the fact that none of the parties to the call raised concerns regarding the disclosure of inside information does not affect the objective test of whether the information disclosed was inside information. In the FSA's view it was; and

(v) Mr Einhorn interpreted and understood the inside information disclosed, notwithstanding that he did not believe that it was inside information.

Inside information

6.4. Mr Einhorn made representations that:

(i) the information alleged by the FSA to have been disclosed on the Punch Call did not in any event amount to inside information;

(ii) the equity issuance was not reasonably expected to occur at the time of the Punch Call; and

(iii) the information lacked sufficient detail to be 'specific' within the meaning of section 118C of FSMA. It lacked detail, such as regarding the type of shares to be issued, and how and with whom they were to be placed. It was therefore not possible to draw a conclusion as to whether the effect on the share price would be to increase or decrease it.

6.5. The FSA has found that:

(i) the information disclosed to Mr Einhorn on the Punch Call did amount to inside information, for the reasons set out in detail in this Notice;

(ii) although the equity issuance was not certain to occur, at the time of the Punch Call, taking into account among other factors the advanced stage of preparation of the transaction, it was reasonably expected to occur; and

(iii) taking into account Punch's circumstances and the information about it which was already generally available, the information disclosed, which included the anticipated size, purpose and timing of an equity issuance, contained sufficient detail to enable the conclusion to be drawn that the effect on the share price would be a decrease. The information was therefore 'specific'.

Dealing 'on the basis of' inside information

6.6. Mr Einhorn made representations that:

(i) even if inside information was disclosed on the call, he did not deal on the basis of it. Although there was a presumption that he did so, the evidence here showed both that he did not interpret the call in way that gave him that information and that in fact he traded for other reasons. Mr Einhorn did not understand the inside information disclosed, and therefore did not trade on the basis of a conclusion that he did not reach. His reasons for trading did not include, as a material factor, an appreciation of an imminent equity issuance.

He did not dispute that he traded on the basis of the Punch Call, but stated that this was because the call made him lose faith in Punch as an investment, with which he was already unhappy. In particular, Punch's CEO stated that the stock was fairly valued at its then-current price, which Mr Einhorn found very surprising, and that there were 'pluses and minuses' unknown to the market, that might mean the stock price would be discounted if the market knew. Overall he found Punch management's tone to be surprisingly negative, and he began to doubt Greenlight's understanding of Punch. Given Punch's troubled nature and the relatively small size of the position compared to Greenlight's overall portfolio (less than 2%), he did not believe it made sense to stay invested when there were better uses for Greenlight's capital; and

(ii) the manner of Greenlight's actual trading evidences that it did not trade 'on the basis' of the alleged inside information. The trading was not aggressive, and in the end Greenlight still suffered a big loss at the time of the announcement and subsequent price drop, since Greenlight still owned two-thirds of its previous total amount of shares. If Mr Einhorn had understood that Punch was planning an imminent equity issuance he either would have sold much more aggressively or held all of his shares in order to vote against the issuance and prevent it from going ahead.

6.7. The FSA has found that:

(i) as set out above, Mr Einhorn did understand the inside information disclosed to him. In the view of the FSA he has not rebutted the presumption that he dealt on the basis of that information. Although the FSA accepts that Mr Einhorn may have had more than one reason for trading, he has not shown that the equity issuance did not play a material part in that decision; and

(ii) while Greenlight's selling was not as aggressive as it could have been, it still disposed of around one third of its Punch shares within a matter of days, resulting in an avoidance of loss of over £5 million.

Section 123 of the Act

6.8. Mr Einhorn made representations that:

(i) he took all reasonable precautions and exercised all due diligence to avoid committing, and reasonably believed that he had not committed, market abuse. He refused to be wall crossed, and relied on Punch management and the other insiders on the Punch Call not to give him inside information, or to tell him if they inadvertently did so. None of the experienced parties on the call raised any concerns, even after he stated that he was considering selling Punch shares. Punch management told him that they were talking only in general terms and having an in-concept discussion – as a matter of market practice it was reasonable for him to place considerable weight on those disclaimers. Further, towards the end of the call he asked if the decision to issue equity had been made and was told that no formal decision had been made, and that the firm was consulting with various parties. He was also still being told at the end of the call that he was not wall crossed. He took these

comments as confirmation that he was 'nowhere close' to having inside information; and

(ii) he did not consult with internal or external compliance staff because he believed, reasonably and in good faith, that there was nothing to consult about. Further, the sell order was relayed to the trader who served as Greenlight UK's compliance officer, and the sales were vetted by Greenlight's in-house counsel to make sure that the necessary regulatory filings were made.

6.9. The FSA has found that:

(i) Although Mr Einhorn's approach to the Punch Call is not criticised, following the call Mr Einhorn should have been aware that he had been given inside information, or at the very least that there was a risk of this. He had a responsibility to consider whether the information received during the call constituted inside information before instructing the sale of shares. Given that the call took place following Mr Einhorn's refusal to sign an NDA, Mr Einhorn should have been even more diligent than usual in considering whether inside information had been disclosed to him before selling. Having received the information, although it is accepted that he did not believe that it was inside information, before dealing he should have taken steps to ensure that it was not before dealing, such as obtaining compliance or legal advice, or contacting Punch management again to specifically clarify whether the information he had been given was inside information. Although he was entitled to give some weight to the fact that neither Punch [REDACTED] raised any concerns either during or immediately after the call, that does not remove the obligation on Mr Einhorn to remain alert to the risk, make his own assessment of any information he received, and take steps as necessary to confirm it. That the trading was subject to Greenlight's usual processes for dealing does not mitigate these failings; and

(ii) in the absence of these necessary further steps, it cannot be said that Mr Einhorn took all reasonable precautions and exercised all due diligence to avoid committing market abuse, nor that his honestly-held belief that he was not committing market abuse was reasonable.

Penalty

6.10. Mr Einhorn made representations that:

(i) deterrence should not be a significant factor in determining the penalty in this case, since there is no evidence of a material risk of these circumstances being replicated. A private warning or disgorgement-only penalty would be sufficient. A significant penalty is impossible to reconcile with the finding that the conduct was not deliberate;

(ii) bearing in mind the penalties imposed in other FSA cases, the penalty imposed on Greenlight should be much lower; and

(iii) any breach was not deliberate or reckless, but totally accidental. If Mr Einhorn had thought he was "anywhere close to the line" he would not have traded. In the circumstances this was, at worst, an understandable misjudgement.

6.11. The FSA has found that:

(i) the trading in this case was very significant in terms of volume, highly visible, and related to a large public company. Although the market abuse was inadvertent, it is appropriate and necessary to deter similar errors of judgement in relation to inside information, both in the same circumstances and more generally, through the imposition of a significant penalty;

(ii) any penalty must be sufficiently substantial to be meaningful, and act as a credible deterrent, to highly visible and influential investors like Greenlight, who have a significant involvement in the markets and commensurate access to company management. Such market participants must act with due caution when liaising with companies and their brokers; and

(iii) Mr Einhorn did not act deliberately or recklessly. However, having been asked to and having refused to sign an NDA, with knowledge that the subject of the Punch Call with management and its advisors was the issuance of equity, Mr Einhorn, a highly experienced market professional, should have recognised that there was a real risk of inside information being disclosed to him, and that extreme caution would be required before any trading following the call. His failure to apply the necessary care and rigour, while unintentional, was an extremely serious matter, and warrants a substantial penalty.

7. DECISION MAKER

7.1. The decision which gave rise to the obligation to give this notice was made by the Regulatory Decisions Committee.

8. IMPORTANT

8.1. This Decision Notice is given to Greenlight under section 127 and in accordance with section 388 of the Act. The following statutory rights are important.

The Tribunal

8.2. Greenlight has the right to refer the matter to which this Decision Notice relates to the Upper Tribunal (the "Tribunal"). Under paragraph 2(2) of Schedule 3 of the Tribunal Procedure (Upper Tribunal) Rules 2008, Greenlight has 28 days from the date on which this Decision Notice is given to it to refer the matter to the Tribunal. A reference to the Tribunal is made by way of a reference notice (Form FTC3) signed on behalf of Greenlight and filed with a copy of this Notice. The Tribunal's address is: The Upper Tribunal, Tax and Chancery Chamber, 45 Bedford Square, London WC1B 3DN (tel: 020 7612 9700; email financeandtaxappeals@tribunals.gsi.gov.uk). Further details are

contained in "Making a Reference to the UPPER TRIBUNAL (Tax and Chancery Chamber)" which is available from the Upper Tribunal website:

http://www.tribunals.gov.uk/financeandtax/FormsGuidance.htm

8.3. Greenlight should note that a copy of the reference notice (Form FTC3) must also be sent to the FSA at the same time as filing a reference with the Tribunal. A copy of the reference notice should be sent to Helena Varney at the FSA, 25 The North Colonnade, Canary Wharf, London E14 5HS.

Access to evidence

8.4. Section 394 of the Act applies to this Decision Notice. In accordance with section 394, Greenlight is entitled to have access to:

(a) the material upon which the FSA has relied in deciding to give Greenlight this notice; and

(b) any secondary material which, in the opinion of the FSA, might undermine that decision.

There is no such secondary material.

Confidentiality and publicity

8.5. Greenlight should note that this Decision Notice may contain confidential information and should not be disclosed to a third party (except for the purpose of obtaining advice on its contents). The effect of section 391 of the Act is that Greenlight may not publish the notice or any details concerning it unless the FSA has published the notice or those details. The FSA may publish such information about the matter to which a Decision Notice or Final Notice relates as it considers appropriate. Greenlight should be aware, therefore, that the facts and matters contained in this notice may be made public.

FSA contact

8.6. For more information concerning this matter generally, Greenlight should contact either Helena Varney at the FSA (direct line: 020 7066 1294) or Sadaf Hussain (direct line: 020 7066 5768).

Tim Herrington
Chairman, Regulatory Decisions Committee

ANNEX 1

RELEVANT STATUTORY PROVISIONS AND REGULATORY GUIDANCE

Statutory provisions

1. Market Abuse is defined at Section 118(1) of the Act as follows:

> *For the purposes of this Act, market abuse is behaviour (whether by one person alone or by two or more persons jointly or in concert) which:-*
> *(a) occurs in relation to –*
> *(i) qualifying investments admitted to trading on a prescribed market …and*
> *(iii) in the case of subsection (2) or (3) behaviour, investments which are related investments in relation to such qualifying investments, and*
> *(b) falls within any one or more of the types of behaviour set out in subsections (2) to (8).*

2. "Related investments" are defined at section 130A(3) as "*an investment whose price or value depends on the price or value of the qualifying investment*."

3. Section 118(2) sets out the behaviour that will amount to insider dealing:

> *… where an insider deals or attempts to deal, in a qualifying investment or related investment on the basis of inside information relating to the investment in question.*

4. Section 118B of the Act provides as follows:

> *… an insider is any person who has inside information:…*
> *(c) as a result of having access to the information through the exercise of his employment, profession or duties.*

5. Section 130A of the Act defines dealing as follows:

> *in relation to an investment, means acquiring or disposing of the investment whether as principal or agent or directly or indirectly, and includes agreeing to acquire or dispose of the investment, and entering into and bringing to an end a contract creating it.*

6. Section 118C(2) sets out the requirements for information to be inside information:

> *Inside information is information of a precise nature which:*
> *(a) is not generally available;*
> *(b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one of more of the qualifying investments;*
> *(c) would, if generally available, be likely to have a significant effect on the price of the qualifying* investments.

7. Section 118C(5) states that information will be precise if it:

> *(a) indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur, and*
> *(b) is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments or related investments.*

8. Section 118C(8) of the Act states that:

> *Information which can be obtained by way of research or analysis conducted by, or on behalf of, users of a market is to be regarded, for the purposes of this Part, as being generally available to them.*

9. Section 118C(6) of the Act sets out when the information will have a significant effect on price:

> *Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions.*

10. Section 123(1) of the Act states:

> *If the Authority is satisfied that a person ("A")—*
>
> *(a) is or has engaged in market abuse, or*
> *(b) by taking or refraining from taking any action has required or encouraged another person or persons to engage in behaviour which, if engaged in by A, would amount to market abuse,*
>
> *it may impose on him a penalty of such amount as it considers appropriate.*

11. Section 123(2) of the Act states that the Authority may not impose a penalty for market abuse in certain circumstances:

> *But the Authority may not impose a penalty on a person if … there are reasonable grounds for it to be satisfied that –*
> *(a) he believed, on reasonable grounds, that his behaviour did not fall within paragraph (a) or (b) of subsection (1), or*
> *(b) he took all reasonable precautions and exercised all due diligence to avoid behaving in a way which fell within paragraph (a) or (b) of that subsection.*

The Code of Market Conduct

12. The FSA has issued the Code of Market Conduct ("MAR") pursuant to section 119 of the Act. In deciding to take the action set out in this notice, the FSA has had regard to MAR and other guidance published in the FSA Handbook.

13. MAR 1.2.3 G states that it is not a requirement of the Act that the person who engaged in the behaviour amounting to market abuse intended to commit market abuse.

14. MAR 1.2.9 G states that in order for an individual to be an insider under subsection 118B(c) of the Act, it is not necessary for the person concerned to know that the information in question is inside information

15. MAR 1.2.12 E sets out factors that are to be taken into account in determining whether or not information is generally available, each of which indicate that the information is generally available (and therefore that it is not inside information):

- *Whether the information has been disclosed to a prescribed market through a regulatory information service or otherwise in accordance with the rules of the market.*

- *Whether the information is contained in records which are open to inspection by the public.*

- *Whether the information is otherwise generally available, including through the Internet, or some other publication (including if it is only available on payment of a fee), or is derived from information which has been made public.*

- *Whether the information can be obtained by observation by members of the public without infringing rights or obligations of privacy, property or confidentiality; and*

- *The extent to which the information can be obtained by analysing or developing other information which is generally available.*

16. MAR 1.2.13 E states that in relation to the factors it sets out, information is "generally available" even if only available outside the UK. Further, information is "generally available" even if the observation or analysis is only achievable by a person with above average financial resources, expertise or competence (other than in relation to information contained in records open to inspection by the public).

17. MAR 1.3.3 E sets out factors that are to be taken into account in determining whether or not a person's behaviour is "on the basis of" inside information and sets out a number of factors that are indications that it is not (none of which are relevant to the facts of this case).

Decision Procedures and Penalties Manual ("DEPP")

18. Section 123(1) of the Act authorises the FSA to impose financial penalties in cases of market abuse. Section 124 of the Act requires the FSA to issue a statement of its policy with respect to the imposition of penalties for market abuse and the amount of such penalties. The FSA's policy in this regard is contained in Chapter 6 of DEPP.

19. In deciding whether to exercise its power under section 123 in the case of any particular behaviour, the FSA must have regard to this statement of policy. Therefore,

in determining the penalty to be imposed on Greenlight, the FSA has had regard to DEPP 6 as it applied in June 2009.

20. With regard to defences to a penalty for market abuse under section 123(2) of the Act, DEPP 6.3.2 G sets out factors that the FSA may take into account in determining whether the conditions of 123(2) are met:

> *(1) whether, and if so to what extent, the behaviour in question was or was not analogous to behaviour described in the Code of Market Conduct (see MAR 1) as amounting or not amounting to market abuse or requiring or encouraging;*
>
> *(2) whether the FSA has published any guidance or other materials on the behaviour in question and if so, the extent to which the person sought to follow that guidance or take account of those materials (see the Reader's Guide to the Handbook regarding the status of guidance.) The FSA will consider the nature and accessibility of any guidance or other published materials when deciding whether it is relevant in this context and, if so, what weight it should be given;*
>
> *(3) whether, and if so to what extent, the behaviour complied with the rules of any relevant prescribed market or any other relevant market or other regulatory requirements (including the Takeover Code) or any relevant codes of conduct or best practice;*
>
> *(4) the level of knowledge, skill and experience to be expected of the person concerned;*
>
> *(5) whether, and if so to what extent, the person can demonstrate that the behaviour was engaged in for a legitimate purpose and in a proper way;*
>
> *(6) whether, and if so to what extent, the person followed internal consultation and escalation procedures in relation to the behaviour (for example, did the person discuss the behaviour with internal line management and/or internal legal or compliance departments);*
>
> *(7) whether, and if so the extent to which, the person sought any appropriate expert legal or other expert professional advice and followed that advice; and*
>
> *(8) whether, and if so to what extent, the person sought advice from the market authorities of any relevant prescribed market or, where relevant, consulted the Takeover Panel, and followed the advice received*

****