Financial Services Authority

SEE FINAL NOTICE ISSUED ON 2 OCTOBER 2012

DECISION NOTICE

To:	**Martin Edward Rigney**	**Topps Rogers Financial Management**
Address:	**Smithy Cottage** **Station Road** **Hope** **Hope Valley** **Derbyshire** **S33 6RR**	
FSA reference:	**MLR01041**	**210105**
Date:	**16 November 2011**	

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 in this notice, the FSA has decided to take the following action against Martin Edward Rigney:

(1) impose a financial penalty of £117,330 on him, pursuant to section 66 of the Financial Services and Markets Act 2000 ("FSMA"), for failing to comply with Statements of Principle 1, 2 and 7 of the Statements of Principle for Approved Persons (the "Statements of Principle");

(2) withdraw the approval granted to him, pursuant to section 63 of FSMA, to perform controlled functions; and

(3) make an order, pursuant to section 56 of FSMA, prohibiting him from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm (the "Prohibition Order").

2. REASONS FOR THE ACTION

2.1. On the basis of the facts and matters described below, the FSA considers that Mr Rigney's conduct, while acting in his capacity as a partner and an adviser at Topps Rogers Financial Management ("Topps Rogers"), fell short of the standards expected of approved persons. Specifically, when performing controlled functions in connection with Topps Rogers' investment business in the period from May 2004 to June 2010 (the "relevant period"), he contravened the Statements of Principle.

2.2. Mr Rigney breached Statement of Principle 1 as he failed to act with integrity in carrying out his controlled functions in that he arranged a transaction in an unregulated collective investment scheme ("UCIS") on behalf of a customer despite a requirement imposed on Topps Rogers' Part IV permission not to arrange new UCIS business.

2.3. Mr Rigney also breached Statement of Principle 2 as he failed to act with due skill, care and diligence in carrying out his controlled functions. Specifically, while acting as an adviser, he did not take adequate steps to ensure that he had:

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

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

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

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

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

(6) explained adequately the costs associated with his recommendations. Customer files contained no record that customers had been notified of the fees or

commission Topps Rogers would receive as a result of his recommendation or the charges which would be associated with their investments.

2.4. In addition, Mr Rigney breached Statement of Principle 7 as he failed to take reasonable steps to ensure that the business for which he was responsible in his controlled functions complied with the relevant requirements and standards of the regulatory system. Specifically, while acting as a senior manager, he did not implement adequate compliance arrangements to ensure that Topps Rogers could:

(1) identify and manage risks to its business. In particular, he did not put in place adequate arrangements to ensure that Topps Rogers could ensure that it had applied an exemption when promoting UCIS business in breach of the section 238 restriction, and he over-relied on guidance provided by external compliance consultants; and

(2) ensure the suitability of its advice. In particular, he did not identify record keeping deficiencies during customer file reviews.

2.5. Further, Mr Rigney failed to act with integrity in that he arranged investments in UCIS without obtaining his customers' signatures and without their knowledge and consent and thereby conducted discretionary portfolio management outside the scope of Topps Rogers' Part IV permission

2.6. Mr Rigney's conduct demonstrates a failure to understand the statutory restriction associated with promoting UCIS as well as a failure to ensure that Topps Rogers complied with regulatory requirements aimed at ensuring that customers received suitable advice in Chapter 5.2 of the Conduct of Business manual ("COB") for the period up to 31 October 2007 and Chapter 9.2 of the Conduct of Business Sourcebook ("COBS") for the period from 1 November 2007, and were treated fairly. Consequently, customers might have received unsuitable advice or made unsuitable investments in UCIS.

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

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

2.9. In relation to Mr Rigney's failings while performing controlled functions as an approved person at Topps Rogers, as described in paragraphs 2.2 to 2.4 above, the FSA is able to impose a financial penalty and it is appropriate to do so. The FSA has therefore decided to impose a financial penalty of £117,330 on him for breach of Statements of Principle 1, 2 and 7.

2.10. The FSA has concluded that, as a result of the seriousness, nature and extent of Mr Rigney's misconduct, as described in paragraphs 2.2 to 2.4 and 2.5 above, he is failing to meet the minimum regulatory standards required in terms of integrity and competence and capability, and is not fit and proper to perform any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm. Accordingly the FSA has decided to withdraw his approval to perform controlled functions and to make the Prohibition Order against him.

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

3. STATUTORY PROVISIONS, REGULATORY GUIDANCE AND POLICY

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

4. FACTS AND MATTERS

Background

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

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

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

(2) agreeing to carry on a regulated activity;

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

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

4.3. On 24 and 25 February 2009, the FSA visited Topps Rogers to assess the adequacy of its sales process and systems and controls. As part of the assessment, the FSA reviewed documents relating to 11 customer files. The FSA identified a number of concerns, including, amongst other things:

(1) that Topps Rogers might have advised customers to invest in UCIS in breach of the section 238 restriction and without assessing adequately whether they fell within any of the relevant exemptions;

(2) about the suitability of Topps Rogers' advice to customers to invest in UCIS as there appeared to be weaknesses, amongst other things, in its customer information gathering and recording processes, product research and suitability letters; and

(3) with the adequacy of Topps Rogers' systems and controls to monitor its business activities.

4.4. With effect from 21 May 2009, Topps Rogers voluntarily varied its Part IV permission to stop arranging new business connected with UCIS.

4.5. With effect from 20 January 2011, Topps Rogers voluntarily varied its Part IV permission such that it could not carry on any of the regulated activities in its permission.

4.6. Following an investigation, the FSA considers that Mr Rigney failed to promote UCIS business in compliance with the section 238 restriction and respective exemptions, take adequate steps to ensure the suitability of his recommendations, exercise adequate management oversight over Topps Rogers and act with due regard to regulatory requirements and standards, as set out in further detail below.

UCIS promotion

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

The section 238 restriction

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

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

Application of COBS 4.12

4.10. Mr Rigney stated that he relied on an exemption under COBS 4.12 to promote UCIS to his customers. However, material held on customer files did not demonstrate that he had relied on an applicable exemption under COBS 4.12 before promoting UCIS

business. In fact, none of the customer files showed that an exemption had been considered, let alone applied.

4.11. Although Mr Rigney had obtained some personal and financial information about his customers, there was no evidence of an adequate assessment of the customers' investment experience and knowledge, or of whether the investment in the UCIS was suitable for the customer. Nor was there any explanation of how he had established that his customers were capable of making their own investment decisions and that they understood the risks associated with investing in UCIS. Except for one customer, there was no record on the customer files demonstrating that Mr Rigney had given his customers clear written warning that Topps Rogers could promote UCIS business to them. In addition, the customer files did not show that he had obtained any documents from customers confirming their awareness that Topps Rogers could promote UCIS business to them.

4.12. Mr Rigney indicated that with some customers no formal assessment was conducted to check their eligibility to invest in UCIS. He stated that in relation to long standing customers of Topps Rogers, because he already had a thorough knowledge of their personal circumstances, he considered that a formal assessment of eligibility was unnecessary.

Application of PCIS Order

4.13. Despite stating that he relied on an exemption under COBS 4.12 to promote UCIS business, information recorded on customer files suggested that Mr Rigney might have been seeking to rely upon the exemption relating to "high net worth individuals" under the PCIS Order.

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

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

4.16. Mr Rigney stated that he was not aware of the specific requirements for high net worth individuals under the PCIS Order. In addition, he could not explain why he requested his customers to sign statements to confirm their status as high net worth individuals when he relied on an exemption under COBS 4.12 to promote UCIS except that he thought it was good practice.

Report by a skilled person

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

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

Suitability of recommendations

Eligibility for UCIS promotion

4.19. The skilled person's report indicated that, while acting as an adviser, Mr Rigney failed to ensure that he had adequately assessed his customers' eligibility for UCIS promotions and established whether an exemption was applicable in accordance with the PCIS Order or COBS 4.12 before promoting UCIS business to them. By promoting UCIS business to retail customers without establishing whether an appropriate exemption was applicable, he breached the section 238 restriction, and may have promoted UCIS to customers who were not eligible for such investments.

Recording customer information

4.20. Mr Rigney stated that he gathered more information on customers who indicated that they were potentially interested in investing in UCIS to gauge their reaction before deciding whether to make a recommendation. In addition, he stated that he obtained further information from customers before conducting UCIS fund switches.

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

4.22. Mr Rigney stated that a lot of information was based on his own personal knowledge and dealings with customers and that such information was retained mentally. He did not appreciate that a third party, such as the FSA or the FOS, might request Topps

Rogers' customer files for review and the importance of recording sufficient information.

Assessing and establishing ATR

4.23. Mr Rigney used a standard ATR form to record his customers' reaction to a number of different investment scenarios. Where the ATR form was used, the customer files did not demonstrate that he had used the information gathered to assess and determine his customers' ATR, or to make his recommendations.

4.24. Mr Rigney stated that he re-assessed his customers' ATR before recommending further investments in UCIS and that the details of any re-assessments were sometimes recorded on new ATR forms and retained on the customer files. However, material held on customer files showed no re-assessment of his customers' ATR before each separate UCIS transaction or additional investment into an existing UCIS.

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

4.26. Suitability letters also contained inconsistent descriptions of risk categories. They confirmed risk ratings which were not defined and did not match the risk categories described in the suitability letters. Mr Rigney stated that he was not aware of the inconsistent risk descriptions because he did not check or proof read the suitability letters.

4.27. Further, suitability letters confirmed two different risk ratings for each customer. Mr Rigney stated that where UCIS investments were made through a wrap platform, it was possible for customers to have a different risk appetite towards the product and UCIS fund. However, the suitability letters did not explain the relationship between the two different risk ratings or clarify that the customers' ATR had been assessed separately in respect of the product and UCIS fund. In addition, the customer files contained no evidence that Mr Rigney had conducted any assessments to determine his customers' risk appetite in respect of the product or UCIS fund.

4.28. As the risk ratings assigned to his customers were not explained and did not match the risk categories described in the suitability letters, Mr Rigney provided unclear information to his customers.

Due diligence

4.29. When conducting due diligence on specific UCIS and providers, Mr Rigney relied mainly on research produced by a third party who also promoted UCIS funds on behalf of the providers. In addition, he spoke to a number of UCIS fund managers and conducted site visits in response to their invitations to check the underlying assets.

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

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

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

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

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

Confirming advice

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

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

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

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

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

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

Disclosure of fees

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

4.42. In respect of customers who invested in UCIS and other investments through a wrap platform, the suitability letters did not contain information about the charges imposed by the wrap platform or the fund providers, nor did they provide details of fee and commission payments that would be made to Topps Rogers. In fact, the customer files did not demonstrate that Mr Rigney had notified customers either orally or in writing of the total fees that Topps Rogers would receive as a result of his recommendations.

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

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

Discretionary portfolio management

4.45. Mr Rigney previously notified the FSA that he had conducted fund switches for 14 customers without obtaining their signatures to make such transactions. In his view, he had not conducted discretionary portfolio management services. Although he had not obtained his customers' signatures before conducting fund switches, Mr Rigney stated that he had discussed potential fund switches with his customers and obtained verbal authority to switch funds. Further, he stated that he had notified his customers of the fund switches after they were made.

4.46. Mr Rigney's explanation differed from the recollection of a number of his customers. In particular, four customers have confirmed to the FSA that they had no discussions with him before their initial investments were switched into UCIS funds. Of these, one customer stated that Mr Rigney had asked them to sign blank switching forms ("dealing instruction forms") so that he could manage their investments.

4.47. The remaining three customers stated that they did not authorise Mr Rigney to manage their investment portfolios and that switches of their initial investments into UCIS funds were made without their knowledge and consent. In addition, they queried the appearance of their signatures on the dealing instruction forms that were submitted by Mr Rigney on their behalf as they had no recollection of signing them and their signatures were identical on every dealing instruction form. Two of these customers noted that they were away on holiday on the date that the dealing instruction forms were submitted and therefore could not have signed the forms. In addition, one customer queried why her aunt's signature appeared on a dealing instruction form given that she had an enduring power of attorney over her aunt's affairs.

4.48. Mr Rigney admitted that he had conducted fund switches for 14 customers without obtaining their signatures to make such transactions. As he arranged UCIS fund switches when he was aware that he did not have the mandate to do so, and without his customers' knowledge and consent, the FSA considers that Mr Rigney has conducted discretionary portfolio management outside the scope of Topps Rogers' Part IV permission.

Restriction on Topps Rogers' Part IV permission

4.49. Mr Rigney agreed on behalf of Topps Rogers to stop writing new UCIS business and applied to vary Topps Rogers' Part IV permission on 21 May 2009. Despite the requirement that was placed on Topps Rogers to cease writing any new UCIS business, he arranged a new UCIS transaction for a customer.

4.50. In May 2010, Mr Rigney attempted to redeem money on behalf of two existing customers by transferring their holdings in a UCIS fund to a new customer. The UCIS

fund had been suspended since September 2008, and was not taking new subscriptions or making redemptions. Given the suspended status of the UCIS fund, one way for investors to redeem their money was to transfer their holdings in the UCIS fund to other investors. By arranging for the transfer of holdings in the UCIS fund on behalf of the two existing customers to the new customer, Mr Rigney was arranging a new UCIS transaction, in breach of the restriction placed on Topps Rogers' permission.

4.51. Despite recommending an investment into the UCIS fund, Mr Rigney did not disclose relevant key information to the customer. In particular, he did not mention to the new customer that the investment was a UCIS, that it was an existing fund or that it had been suspended in September 2008.

4.52. As Mr Rigney was arranging a UCIS transaction for the new customer despite the requirement on Topps Rogers' Part IV permission not to conduct any new UCIS business, his conduct demonstrated a total disregard for regulatory requirements and standards.

Management oversight

4.53. Mr Rigney was responsible for compliance at Topps Rogers. He did not implement adequate systems and controls to ensure that Topps Rogers complied with relevant regulatory requirements and standards.

Risk identification and management

4.54. Mr Rigney did not put in place adequate arrangements to identify and manage risks to his business. Specifically, he did not put in place formal or documented compliance procedures until January 2009. The FSA therefore considers that he was not able to monitor and rectify issues arising from his business adequately.

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

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

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

4.58. As Mr Rigney did not put in place adequate compliance arrangements, or take adequate steps to equip himself with the basic knowledge to assess effectively the advice given by his external compliance consultants and to monitor his business, he was not in a position to identify and manage risks that might have arisen in connection with activities undertaken by Topps Rogers.

Ensuring suitability of recommendations

4.59. Mr Rigney's customer file reviews were not sufficiently robust, as evidenced by the unacceptably high number of errors, inconsistencies and omissions contained in his suitability letters, which were not routinely identified.

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

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

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

4.63. As Mr Rigney did not conduct robust independent file checks, or put in place adequate record keeping arrangements at Topps Rogers, he did not take reasonable steps to ensure the suitability of his UCIS recommendations.

5. FAILINGS

5.1. The facts and matters described above lead the FSA, having regard to its regulatory objectives which include market confidence and the protection of consumers, to conclude that, while performing controlled functions as an approved person at Topps Rogers, Mr Rigney has failed to comply with the Statements of Principle.

5.2. Mr Rigney breached Statement of Principle 1 as he failed to act with integrity in carrying out his controlled functions. As described in paragraphs 4.49 to 4.52 above, he arranged a UCIS transaction despite Topps Rogers being subject to a requirement not to arrange new UCIS business. Mr Rigney's conduct demonstrated a total disregard for regulatory requirements and standards.

5.3. Mr Rigney also breached Statement of Principle 2 as he failed to act with due skill care and diligence in carrying out his controlled functions. On the basis of the facts and matters described in paragraphs 4.10 to 4.44 above, he failed to:

(1) demonstrate a fundamental understanding and awareness of the statutory restriction and risks associated with promoting UCIS business;

(2) establish that customers were eligible to invest in UCIS (which have significant risks due to their illiquidity);

(3) ensure that UCIS recommendations were (i) made on the basis of an adequate assessment of customers' personal and financial circumstances and (ii) based on adequate research; and

(4) provide customers with adequate information to make informed investment decisions.

5.4. In addition, Mr Rigney breached Statement of Principle 7 as he failed to take reasonable steps to ensure that the business for which he was responsible in his controlled functions complied with the relevant requirements and standards of the regulatory system. On the basis of the facts and matters described in paragraphs 4.53 to 4.63 above, he failed to exercise appropriate control over, or maintain adequate regulatory knowledge about, his business.

5.5. Consequently, the FSA considers there is a serious risk that customers might have received unsuitable advice and/or made unsuitable investments in UCIS.

5.6. Further, the FSA considers that Mr Rigney is not a fit and proper person as he failed to act with integrity. As described in paragraphs 4.45 to 4.52 above, Mr Rigney (i) conducted discretionary portfolio management outside the scope of Topps Rogers' permission and (ii) arranged a UCIS transaction despite being subject to a requirement not to arrange new UCIS business. His conduct failed to demonstrate a readiness and willingness to observe and comply with requirements and standards of the regulatory system.

6. SANCTION

Imposition of financial penalty

6.1. The financial penalty to be imposed on Mr Rigney is considered in two parts. His breach of Statements of Principle 2 and 7 occurred before 6 March 2010, when a new policy framework came into force for determining financial penalties. The financial penalty for this breach is therefore considered under the previous policy framework that applied up to 5 March 2010. His breach of Statement of Principle 1 occurred after 6 March 2010. The financial penalty for this breach is determined under the new policy framework in place from 6 March 2010.

Financial penalty for breach of Statements of Principle 2 and 7

6.2. The FSA's previous policy framework for the imposition of financial penalties that applied from 28 August 2007 to 5 March 2010 (the majority of the relevant period)

was set out in Chapter 6 of the Decision Procedure and Penalties Manual ("DEPP"), which forms part of the FSA Handbook. The relevant sections of DEPP are set out in more detail in Annex A. In addition, the FSA has had regard to the corresponding provisions of Chapter 13 of the Enforcement Manual which were in force during part of the relevant period up to 27 August 2007.

6.3. The principal purpose of imposing a financial penalty is to promote high standards of regulatory conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches and demonstrating generally the benefits of compliant behaviour. A financial penalty is a tool that the FSA may employ to help it achieve its regulatory objectives.

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

6.5. DEPP 6.5.2G sets out a non-exhaustive list of factors that may be of relevance in determining the level of a financial penalty. The FSA considers that the following factors are particularly relevant in this case.

Deterrence

6.6. In determining whether to impose the financial penalty, the FSA has had regard to the need to ensure those who are approved persons must act with integrity and appropriate levels of competence and capability and in accordance with regulatory requirements and standards. The FSA considers that a financial penalty should be imposed to demonstrate to Mr Rigney and others the seriousness with which the FSA regards such behaviour.

The nature, seriousness and impact of the breach in question

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

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

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

The extent to which the breach was deliberate or reckless

6.10. The FSA does not consider that Mr Rigney acted in a deliberate or reckless manner in failing to establish the eligibility of his customers to invest in UCIS, in demonstrating the suitability of his recommendations and in managing Topps Rogers. Instead, the FSA considers that he has acted without competence and capability in respect of these failings.

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

6.11. The FSA recognises that the financial penalty imposed on Mr Rigney is likely to have a significant impact on him as an individual but it is considered to be proportionate in relation to the seriousness of the misconduct and given his position as an approved person performing significant influence functions at Topps Rogers.

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

6.12. The FSA considers that a financial penalty of the level set out above is appropriate, having taken account of all relevant factors.

Conduct following the breach

6.13. The FSA has taken into account Mr Rigney's co-operation with the FSA's investigation.

Previous action taken by the FSA

6.14. The FSA has taken action against other approved persons for similar conduct.

Penalty

6.15. The FSA has decided to impose a financial penalty of £70,000 on Mr Rigney for breaching Statements of Principle 2 and 7.

Financial penalty for breach of Statement of Principle 1

6.16. The FSA's new policy framework for determining financial penalties that came into force on 6 March 2010 is set out in Chapter 6 of DEPP. In respect of conduct occurring on or after 6 March 2010, in accordance with DEPP 6.5, the FSA applies a five-step framework to determine the appropriate level of financial penalty. DEPP 6.5B sets out the details of the five-step framework that applies in respect of financial penalties imposed on individuals in non-market abuse cases. The relevant sections of DEPP are set out in more detail in Annex A.

Step 1 – disgorgement

6.17. Pursuant to DEPP 6.5B.1G, the FSA will seek to deprive an individual of the financial benefit derived directly from the breach where it is practicable to quantify this.

6.18. In this case Mr Rigney did not derive any financial benefit directly from the breach given that the UCIS transaction he arranged on behalf of his customer did not proceed. No disgorgement therefore applies.

Step 2 – relevant income and the seriousness of the breach

6.19. Pursuant to DEPP 6.5B.2G(1) and (4), the FSA will determine a figure that reflects the seriousness of the breach and will base the figure on a percentage of the individual's relevant income. The relevant income will be the gross amount of all benefits received by the individual from the employment in connection with which the breach occurred and for the period of the breach.

6.20. The period selected to determine Mr Rigney's relevant income is 26 May 2009 to 25 May 2010 as this represents the 12 month period preceding the end of the breach. The FSA estimates Mr Rigney's relevant income to be £131,474 for this period.

6.21. DEPP 6.5B.2G(4) provides that having determined the relevant income, the FSA will then decide on the percentage of that income which will form the basis of the penalty. In making this determination the FSA will consider the seriousness of the breach and choose a percentage between 0% and 40%. DEPP 6.5B.2G(5) explains that this range is divided into five fixed levels which reflect, on a sliding scale from level 1 to 5, the seriousness of the breach; the more serious the breach, the higher the level.

6.22. DEPP 6.5B.2G(7) provides that in deciding which level is most appropriate to a case against an individual, the FSA will take into account various factors. These include factors that: (i) relate to the impact of the breach; (ii) relate to the nature of the breach; (iii) show whether the breach was deliberate; and (iv) show whether the breach was reckless. DEPP 6.5B.2G(8) to (11) lists types of conduct by an individual that fall within these factors.

6.23. DEPP 6.5B.2G(12) sets out factors that are likely to be considered seriousness level 4 or 5 (i.e. very serious) and DEPP 6.5B.2G(13) sets out factors that are likely to be considered seriousness level 1, 2 or 3 (i.e. less serious).

6.24. In assessing the seriousness of the breach, the FSA considers the following factors to be relevant:

(1) Mr Rigney did not disclose relevant key information to his customer of which he was aware when arranging the new UCIS transaction, including the fact that the recommendation was to invest in UCIS and that it had been suspended;

(2) had the UCIS transaction proceeded, the investment could have caused significant risk of loss to the customer;

(3) Mr Rigney acted without integrity by arranging the new UCIS transaction when he was aware that Topps Rogers was subject to a requirement not to conduct new UCIS business; and

(4) Mr Rigney set out deliberately to circumvent the requirement on Topps Rogers' permission.

6.25. Based on the above factors, the FSA considers the seriousness of the breach to be level 4 and that a percentage of 30% is therefore appropriate. The penalty at Step 2 is therefore £39,442.

Steps 3 – mitigating and aggravating factors

6.26. Pursuant to DEPP 6.5B.3G(1), the FSA may increase or decrease the amount of the financial penalty arrived at after Step 2 to take into account factors which aggravate or mitigate the breach. Any such adjustment will be made by way of a percentage adjustment to the figure determined at Step 2.

6.27. In assessing whether the financial penalty should be increased or decreased, the FSA has taken into account the following aggravating factors:

(1) Mr Rigney did not bring the breach quickly, effectively or completely to the FSA's attention;

(2) the FSA had previously notified Mr Rigney of its concerns relating to Topps Rogers' UCIS sales; and

(3) Mr Rigney had agreed on behalf of Topps Rogers not to arrange new UCIS sales but then failed to observe the requirement on Topps Rogers' permission.

6.28. Due to these aggravating factors, the FSA considers that the penalty at Step 2 should be increased by 20%. The penalty at Step 3 is therefore £47,330.

Step 4 – adjustment for deterrence

6.29. Pursuant to DEPP 6.5B.4G(1), if the FSA considers the penalty arrived at after Step 3 is insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches, then the FSA may increase the penalty.

6.30. The FSA considers that the penalty of £47,330 represents a sufficient deterrent to Mr Rigney and to others from arranging transactions in breach of requirements on a firm's permission. No adjustment for deterrence applies. The penalty at Step 4 therefore remains £47,330.

Step 5 – settlement discount

6.31. Pursuant to DEPP 6.5B.5G, if the FSA and the individual seek to agree the amount of any financial penalty, in recognition of such agreements, DEPP 6.7 provides that the amount of financial penalty will be reduced to reflect the stage at which the FSA and individual reached agreement.

6.32. No settlement discount applies. The penalty at Step 5 therefore remains £47,330.

Penalty

6.33. Having regard to the five-step penalty framework, the FSA has decided to impose a financial penalty of £47,330 on Mr Rigney for breaching Statement of Principle 1.

Total penalty to be imposed

6.34. The FSA has therefore decided to impose a total financial penalty of £117,330 on Mr Rigney for breaching Statements of Principle 1, 2 and 7.

Withdrawal of approval and prohibition

6.35. The FSA has had regard to the guidance in Chapter 9 of the Enforcement Guide ("EG") in proposing to withdraw Mr Rigney's approval and to impose the Prohibition Order on him.

6.36. Given the nature and seriousness of the failures summarised in paragraph 5 above, the FSA has concluded that Mr Rigney's conduct demonstrates a lack of integrity and competence and capability and he is therefore not fit and proper to perform any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.

6.37. It is therefore necessary and proportionate, in order for it to achieve its regulatory objectives, for the FSA to exercise its powers to withdraw Mr Rigney's approval and make the Prohibition Order against him.

7. REPRESENTATIONS AND FINDINGS

7.1. Below is a brief summary of the key written and oral representations made by Mr Rigney 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 Mr Rigney's representations, whether or not explicitly set out below.

Representations

7.2. Mr Rigney admitted attempting to arrange a transaction in a UCIS, despite the requirement imposed on Topps Rogers not to arrange UCIS business. He denied doing so dishonestly but stated that, even though he knew it was not permitted, he wanted to assist two of his customers, bearing in mind their personal circumstances.

7.3. Mr Rigney admitted that he promoted UCIS to customers who were not eligible to receive such promotions, but made representations that:

(1) the rules regarding the restriction on promotion of UCIS and the exemptions to it are extremely complex. His breach of the restriction was inadvertent and

was a result of the 'confusing and conflicting' regulations regarding UCIS investments;

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

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

7.4. Mr Rigney admitted that he did not record adequate information on his files to demonstrate compliance with the FSA's rules, but made representations that:

(1) he did obtain sufficient financial and personal information about his customers – his knowledge of his customers far superseded the handwritten notes in the files;

(2) he did adequately assess and establish his customers' attitude to risk;

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

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

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

7.5. Mr Rigney admitted that he undertook discretionary management without being authorised to do so, although he noted that he had informed the FSA of this when he realised that he might have done so.

7.6. Mr Rigney made representations that:

(1) the imposition of the financial penalty is completely out of proportion with the breaches committed and does not reconcile with fines imposed by the FSA in similar cases. The imposition of a significant penalty is disproportionate to the circumstances of the case;

(2) Mr Rigney is the subject of a bankruptcy petition which he will not be contesting, and is unable to pay any financial penalty. The imposition of any fine will therefore cause Mr Rigney serious financial hardship, especially if his approval is withdrawn, thereby depriving him of the means to earn a living; and

(3) it would be disproportionate, and unduly harsh and oppressive, both to withdraw Mr Rigney's approval and to prohibit him from performing any function in relation to any regulated activity. At most his approval should be withdrawn, with no prohibition being imposed and any penalty being waived due to the serious financial hardship it would cause him.

Findings

7.7. In relation to Mr Rigney's arrangement of transactions outside the scope of Topps Rogers' permissions, the FSA has found that he deliberately breached the requirement imposed on Topps Rogers not to do so. Although Mr Rigney states that he was acting in his clients' best interests, his behaviour nevertheless demonstrates a deliberate disregard of regulatory requirements and therefore a lack of integrity.

7.8. The FSA does not agree that the rules regarding the restriction on promotion of UCIS and the exemptions to it are 'conflicting'. The rules are necessarily complex in dealing with products which should not be promoted to consumers except in specific limited circumstances. It was not sufficient for Mr Rigney to act on advice without even the most rudimentary understanding of the applicable rules. Mr Rigney should have satisfied himself, taking into consideration the advice he had received, that he fully understood the applicable rules, and should have ensured that Topps Rogers had arrangements in place to ensure that UCIS were not promoted in breach of the restriction. Since Mr Rigney did not understand the rules, he should not have

promoted UCIS to Topps Rogers' customers, irrespective of the advice he received. As an approved person he was required to inform himself of the relevant regulatory requirements and take reasonable steps to equip himself with the basic knowledge to identify and manage risks arising from UCIS business before engaging in it.

7.9. The evidence, in particular that contained in Topps Rogers' customer files, and the evidence of customers themselves, does not support Mr Rigney's claims, as set out in paragraph 7.4 above, regarding his compliance with the relevant requirements. In fact the evidence supports the opposite conclusion. The FSA considers that the relevant facts are accurately set out in the "Facts and Matters" section of this notice, evidencing significant failings in this regard.

7.10. Mr Rigney admitted that he undertook discretionary management without being authorised. Although he informed the FSA of this at an early stage, this does not exonerate him of the responsibility for doing so.

7.11. In relation to the sanctions, the FSA has found that:

(1) taking into account Mr Rigney's breaches of the Statements of Principle, both as a result of his lack of competence and capability, and his lack of integrity, the financial penalty is appropriate;

(2) the bankruptcy proceedings against Mr Rigney are ongoing and have yet to conclude. Despite being given the opportunity to do so, Mr Rigney has provided insufficient evidence to prove that the imposition of a financial penalty will cause him serious financial hardship; and

(3) taking into account all of the circumstances, including Mr Rigney's behaviour demonstrating a lack of integrity, and the need to protect consumers, the FSA considers it appropriate, in addition to imposing a financial penalty on him, both to withdraw Mr Rigney's approval and to prohibit him from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.

8. DECISION MAKER

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

9. IMPORTANT

9.1. This Decision Notice is given to Mr Rigney under sections 57, 63 and 67 of FSMA and in accordance with section 388 of FSMA. The following statutory rights are important.

The Upper Tribunal

9.2. Mr Rigney 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, Mr Rigney has 28 days from the date on which this Decision Notice is given to him to refer the matter to the Tribunal. A reference to the Tribunal is made by way of a reference notice (Form FTC3) signed by Mr Rigney 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

9.3. Mr Rigney 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 Rachel West at the FSA, 25 The North Colonnade, Canary Wharf, London E14 5HS.

Access to evidence

9.4. Section 394 of FSMA applies to this Decision Notice. In accordance with section 394, Mr Rigney is entitled to have access to:

(1) the material upon which the FSA has relied in deciding to give Mr Rigney this notice; and

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

Confidentiality and publicity

9.5. Mr Rigney 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 FSMA is that Mr Rigney 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. Mr Rigney should be

aware, therefore, that the facts and matters contained in this Decision Notice may be made public.

FSA contact

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

……
Tim Herrington
Chairman, Regulatory Decisions Committee

ANNEX A

STATUTORY PROVISIONS, REGULATORY GUIDANCE AND POLICY

1. STATUTORY PROVISIONS

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

1.2. Section 56 of FSMA provides that the FSA may make a prohibition order if it appears to the FSA that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person. Such an order may relate to a specific regulated activity, an activity falling within a specified description or all regulated activities.

1.3. Section 63 of FSMA provides that the FSA may withdraw an approval given under section 59 of FSMA if it considers that the person in respect of whom it was given is not a fit and proper person to perform the function to which the approval relates.

1.4. Section 66 of FSMA provides that the FSA may take action to impose a penalty on an individual of such amount as it considers appropriate where it appears to the FSA that the individual is guilty of misconduct and it is satisfied that it is appropriate in all the circumstances to take action. Misconduct includes failure, while an approved person, to comply with a statement of principle issued under section 64 of FSMA or to have been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under FSMA.

2. REGULATORY PROVISIONS

2.1. The FSA's Enforcement Guide ("EG") and Decision Procedure and Penalties Manual ("DEPP") came into effect on 28 August 2007. Although the references in this Decision Notice are to DEPP and EG, the FSA has also had regard to the appropriate provisions of the FSA's Enforcement Manual, which preceded DEPP and EG and applied during part of the relevant period.

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

Statements of Principle and the Code of Practice for Approved Persons ("APER")

2.3. APER sets out the Statements of Principle as they relate to approved persons and descriptions of conduct which, in the opinion of the FSA, do not comply with a Statement of Principle. It further describes factors which, in the opinion of the FSA, are to be taken into account in determining whether or not an approved person's conduct complies with a Statement of Principle.

2.4. APER 3.1.3G states that when establishing compliance with or a breach of a Statement of Principle, account will be taken of the context in which a course of conduct was undertaken, including the precise circumstances of the individual case,

the characteristics of the particular controlled function and the behaviour to be expected in that function.

2.5. APER 3.1.4G provides that an approved person will only be in breach of a Statement of Principle where he is personally culpable, that is in a situation where his conduct was deliberate or where his standard of conduct was below that which would be reasonable in all the circumstances.

2.6. APER 3.1.6G provides that APER (and in particular the specific examples of behaviour which may be in breach of a generic description of conduct in the code) is not exhaustive of the kind of conduct that may contravene the Statements of Principle.

2.7. The Statements of Principle relevant to this matter are:

(1) Statement of Principle 1 which provides that an approved person must act with integrity in carrying out his controlled function;

(2) Statement of Principle 2 which provides that an approved person must act with due skill, care and diligence in carrying out his controlled function; and

(3) Statement of Principle 7 which provides that an approved person performing a significant influence function must take reasonable steps to ensure that the business of the firm for which he is responsible in his controlled function complies with the relevant requirements and standards of the regulatory system.

2.8. APER 4.1 lists types of conduct which, in the opinion of the FSA, do not comply with Statement of Principle 1.

2.9. APER 4.1.3E(1) states that deliberately misleading (or attempting to mislead) a customer by act or omission is conduct that does not comply with Statement of Principle 1. APER 4.1.4E(9) states that such conduct includes, but is not limited to, deliberately providing false or inaccurate information.

2.10. APER 4.1.10E states that deliberately misusing the assets or confidential information of a customer is conduct that does not comply with Statement of Principle 1. APER 4.1.11E(2) states that such conduct includes, but is not limited to, deliberately carrying out unjustified trading on customer account.

2.11. APER 4.2 lists types of conduct which, in the opinion of the FSA, do not comply with Statement of Principle 2.

2.12. APER 4.2.3E(1) states that failing to inform a customer of material information in circumstances where he was aware, or ought to have been aware, of such information, and of the fact that he should provide it is conduct that does not comply with Statement of Principle 2. APER 4.2.4E states that such conduct includes, but is not limited to:

(1) failing to explain the risks of an investment to a customer (APER 4.2.4E(1); and

(2) failing to disclose to a customer details of the charges of investment products (APER 4.2.4E(2)).

2.13. APER 4.2.6E states that undertaking, recommending or providing advice on transactions without a reasonable understanding of the risk exposure of the transaction to a customer is conduct that does not comply with Statement of Principle 2.

2.14. APER 3.3.1E states that in determining whether or not the conduct of an approved person performing a significant influence function complies with Statements of Principle 5 to 7, the following are factors which, in the opinion of the FSA, are to be taken into account:

(1) whether he exercised reasonable care when considering the information available to him;

(2) whether he reached a reasonable conclusion which he acted on;

(3) the nature, scale and complexity of the firm's business;

(4) his role and responsibility as an approved person performing a significant influence function; and

(5) the knowledge he had, or should have had, of regulatory concerns, if any, arising in the business under his control.

2.15. APER 4.7 lists types of conduct which, in the opinion of the FSA, do not comply with Statement of Principle 7.

2.16. APER 4.7.3E states that failing to take reasonable steps to implement (either personally or through a compliance department or other departments) adequate and appropriate systems of control to comply with the relevant requirements and standards of the regulatory system in respect of its regulated activities is conduct that does not comply with Statement of Principle 7.

2.17. APER 4.7.4E states that failing to take reasonable steps to monitor (either personally or through a compliance department or other departments) compliance with the relevant requirements and standards of the regulated system in respect of its regulated activities is conduct that does not comply with Statement of Principle 7.

Fit and Proper Test for Approved Persons ("FIT")

2.18. The FSA has issued specific guidance on the fitness and propriety of individuals in FIT. The purpose of FIT is to outline the main criteria for assessing the fitness and propriety of a candidate for a controlled function and FIT is also relevant in assessing the continuing fitness and propriety of approved persons.

2.19. FIT 1.3.1G provides that the FSA will have regard to a number of factors when assessing a person's fitness and propriety. Two of the most important considerations will be a person's honesty, integrity and reputation and competence and capability.

2.20. FIT 1.3.3G provides that it would be impossible to produce a definitive list of all the matters which would be relevant to a determination of a particular person's fitness and propriety.

2.21. FIT 1.3.4G provides that if a matter comes to the FSA's attention which suggests that the person might not be fit and proper, the FSA will take into account how relevant and how important it is.

2.22. FIT 2.1.1G provides that in determining a person's honesty, integrity and reputation, the FSA will have regard to all relevant matters including, but not limited to, those set out in FIT 2.1.3G, including:

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

(2) whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards (FIT 2.1.3G(13)).

2.23. FIT 2.2.1G(2) provides that in determining a person's competence and capability, the FSA will have regard to all relevant matters including, but not limited to, whether the person has demonstrated by experience and training that the person is suitable to perform controlled function.

Decision Procedure and Penalties Manual ("DEPP")

Policy on financial penalties up to 5 March 2010

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

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

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

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

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

Deterrence: DEPP 6.5.2G(1)

2.29. When determining the appropriate level of financial penalty, the FSA will have regard to the principal purpose for which it imposes sanctions, namely to promote high

standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches and helping to deter other persons from committing similar breaches, as well as demonstrating generally the benefits of compliant business.

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

2.30. The FSA will consider the seriousness of the breach in relation to the nature of the rule, requirement or provision breached, which can include considerations such as the duration and frequency of the breach, whether the breach revealed serious or systemic weaknesses in the person's procedures or of the management systems or internal controls relating to all or part of a person's business and the loss or risk of loss caused to consumers, investors or other market users.

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

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

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

2.32. When determining the amount of 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.

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

2.33. The purpose of a penalty is not to render a person insolvent or to threaten a 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.

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

2.34. The FSA may have regard to the amount of benefit gained or loss avoided as the result of the breach, for example the FSA will impose a penalty that is consistent with the principle that a person should not benefit from the breach, and the penalty should

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

Conduct following the breach: DEPP 6.5.2G(8)

2.35. The FSA may take into account the degree of co-operation the person showed during the investigation of the breach by the FSA.

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

2.36. The FSA seeks to apply a consistent approach to determining the appropriate level of penalty. The FSA may take into account previous decisions made in relation to similar misconduct.

Policy on financial penalties from 6 March 2010

2.37. Guidance on the imposition and amount of penalties from 6 March 2010 is also set out in Chapter 6 of DEPP. DEPP 6 applies a five-step framework to determine the appropriate level of financial penalty.

2.38. DEPP 6.5.2G provides that the FSA's penalty setting regime is based on the following principles:

(1) disgorgement – a firm or individual should not benefit from any breach;

(2) discipline – a firm or individual should be penalised for wrongdoing; and

(3) deterrence – any penalty imposed should deter the firm or individual who committed the breach, and others, from committing further or similar breaches.

2.39. DEPP 6.5.3G(1) provides that the total amount payable by a person subject to enforcement action may be made up of two elements: (i) disgorgement of the benefit received as a result of the breach; and (ii) a financial penalty reflecting the seriousness of the breach. These elements are incorporated in a five-step framework, which can be summarised as follows:

(1) Step 1 – the removal of any financial benefit derived directly from the breach;

(2) Step 2 – the determination of a figure which reflects the seriousness of the breach;

(3) Step 3 – an adjustment made to the Step 2 figure to take account of any aggravating and mitigating circumstances;

(4) Step 4 – an upwards adjustment made to the amount arrived at after Steps 2 and 3, where appropriate, to ensure that the penalty has an appropriate deterrent effect; and

(5) Step 5 – if applicable, a settlement discount will be applied. This discount does not apply to disgorgement of any financial benefit derived directly from the breach.

Step 1 – disgorgement

2.40. DEPP 6.5B.1G provides that the FSA will seek to deprive an individual of the financial benefit derived directly from the breach (which may include the profit made or loss avoided) where it is practicable to quantify this. The FSA will ordinarily also charge interest on the benefit. Where the success of a firm's entire business model is dependent on breaching FSA rules or other requirements of the regulatory system and the individual's breach is at the core of the firm's regulated activities, the FSA will seek to deprive the individual of all the financial benefit he has derived from such activities.

Step 2 – the seriousness of the breach

2.41. DEPP 6.5B.2G(1) provides that the FSA will determine a figure which will be based on a percentage of an individual's "relevant income". "Relevant income" will be the gross amount of all benefits received by the individual from the employment in connection with which the breach occurred (the "relevant employment"), and for the period of the breach. In determining an individual's relevant income, "benefits" includes, but is not limited to, salary, bonus, pension contributions, share options and share schemes; and "employment" includes, but is not limited to, employment as an adviser, director, partner or contractor.

2.42. DEPP 6.5B.2G(2) provides that where the breach lasted less than 12 months, or was a one-off event, the relevant income will be that earned by the individual in the 12 months preceding the end of the breach. Where the individual was in the relevant employment for less than 12 months, his relevant income will be calculated on a pro rata basis to the equivalent of 12 months' relevant income.

2.43. DEPP 6.5B.2G(4) provides that having determined the relevant income, the FSA will then decide on the percentage of that income which will form the basis of the penalty. In making this determination the FSA will consider the seriousness of the breach and choose a percentage between 0% and 40%.

2.44. DEPP 6.5B.2G(5) explains that this range is divided into five fixed levels which reflect, on a sliding scale, the seriousness of the breach; the more serious the breach, the higher the level. For penalties imposed on individuals there are the following five levels:

(1) level 1 – 0%;

(2) level 2 – 10%;

(3) level 3 – 20%;

(4) level 4 – 30%; and

(5) level 5 – 40%.

2.45. DEPP 6.5B.2G(7) provided that in deciding which level is most appropriate to a case against an individual, the FSA will take into account various factors which will usually fall into the following four categories:

(1) factors relating to the impact of the breach;

(2) factors relating to the nature of the breach;

(3) factors tending to show whether the breach was deliberate; and

(4) factors tending to show whether the breach was reckless.

2.46. DEPP 6.5B.2G(8) lists the factors relating to the impact of a breach committed by an individual. This includes:

(1) the level of benefit gained or loss avoided, or intended to be gained or avoided, by the individual from the breach, either directly or indirectly (DEPP 6.5B.2G(8)(a)); and

(2) the loss or risk of loss caused to individual consumers, investors or other market users (DEPP 6.5B.2G(8)(c)).

2.47. DEPP 6.5B.2G(9) lists the factors relating to the nature of a breach by an individual. This includes:

(1) the nature of the rules, requirements or provisions breached (DEPP 6.5B.2G(9)(a));

(2) the frequency of the breach (DEPP 6.5B.2G(9)(b));

(3) whether the individual failed to act with integrity (DEPP 6.5B.2G(9)(e));

(4) whether the individual held a senior position with the firm (DEPP 6.5B.2G(9)(k));

(5) the extent of the responsibility of the individual for the product or business areas affected by the breach, and for the particular matter that was the subject to the breach (DEPP 6.5B.2G(9)(l)); and

(6) whether the individual took any steps to comply with FSA rules, and the adequacy of those steps (DEPP 6.5B.2G(9)(n)).

2.48. DEPP 6.5B.2G(10) lists the factors tending to show the breach was deliberate. This includes:

(1) the breach was intentional, in that the individual intended or foresaw that the likely or actual consequences of this actions or inaction would result in a breach (DEPP 6.5B.2G(10)(a));

(2) the individual intended to benefit financially from the breach, either directly or indirectly (DEPP 6.5B.2G(10)(b)); and

(3) the individual knew that his actions were not in accordance with his firm's internal procedures (DEPP 6.5B.2G(10)(c)).

2.49. DEPP 6.5B.2G(11) lists the factors tending to show the breach was reckless. This includes:

(1) the individual appreciated there was a risk that his actions or inaction could result in a breach and failed adequately to mitigate that risk (DEPP 6.5B.2G(11)(a)); and

(2) the individual was aware there was a risk that his actions or inaction could result in a breach but failed to checked if he was acting in accordance with internal procedures (DEPP 6.5B.2G(11)(b)).

2.50. DEPP 6.5B.2G(12) lists the factors which are likely to be consider "level 4 factors" or "level 5 factors". This includes:

(1) the breach caused a significant loss or risk of loss to individual consumers, investors or other market users (DEPP 6.5B.2G(12)(a));

(2) the individual failed to act with integrity DEPP 6.5B.2G(12)(d)); and

(3) the breach was committed deliberately or recklessly DEPP 6.5B.2G(12)(g)).

2.51. DEPP 6.5B.2G(13) lists the factors which are likely to be consider "level 1 factors", "level 2 factors" or "level 3 factors". This includes:

(1) little, or no, profits were made or losses avoided as a result of the breach, either directly or indirectly (DEPP 6.5B.2G(13)(a)); and

(2) there was no or little or no risk of loss to consumers, investors or other market users individually and in general (DEPP 6.5B.2G(13)(b)).

Step 3 – mitigating and aggravating factors

2.52. DEPP 6.5B.3G(1) provides that the FSA may increase or decrease the amount of the financial penalty arrived at after Step 2, but not including any amount to be disgorged as set out in Step 1, to take into account factors which aggravate or mitigate the breach. Any such adjustments will be made by way of a percentage adjustment to the figure determined at Step 2.

2.53. DEPP 6.5B.3G(2) lists factors that may have the effect of aggravating or mitigating the breach. This includes:

(1) the conduct of the individual in bringing (or failing to bring) quickly, effectively and completely the breach to the FSA's attention (DEPP 6.5B.3G(2)(a));

(2) the degree of cooperation the individual showed during the investigation of the breach by the FSA (DEPP 6.5B.3G(2)(b));

(3) whether the individual took any steps to stop the breach, and when these steps were taken (DEPP 6.5B.3G(2)(c));

(4) whether the individual had previously been told about the FSA's concerns in relation to the issue, either by means of a private warning or in supervisory correspondence (DEPP 6.5B.3G(2)(f)); and

(5) whether the individual had previously undertaken not to perform a particular act or engage in particular behaviour (DEPP 6.5B.3G(2)(g)).

Step 4 – adjustment for deterrence

2.54. DEPP 6.5B.4G(1) provides that if the FSA considers the figure arrived at after Step 3 is insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches then the FSA may increase the penalty. Circumstances where the FSA may do this include:

(1) Where the FSA considers the absolute value of the penalty too small in relation to the breach to meet its objective of credible deterrence (DEPP 6.5B.4G(1)(a)); and

(2) Where the FSA considers it is likely that similar breaches will be committed by the individual or by other individuals in the future (DEPP 6.5B.4G(1)(c)).

Step 5 – settlement discount

2.55. DEPP 6.5B.5G provides that the FSA and the individual 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 financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the FSA and the individual concerned reached an agreement. The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1.

Enforcement Guide ("EG")

2.56. The FSA's approach to exercising its power to withdraw approval and to make a prohibition order under sections 56 and 63 of FSMA is set out in Chapter 9 of EG. The FSA has had regard to the appropriate provisions of EG that applied during the relevant period.

2.57. EG 9.1 states that the FSA's power under section 56 of FSMA to prohibit individuals who are not fit and proper from carrying out controlled functions in relation to regulated activities helps the FSA to work towards achieving its regulatory objectives. The FSA may exercise this power to make a prohibition order where it considers that, to achieve any of those objectives, it is appropriate either to prevent an individual from performing any functions in relation to regulated activities, or to restrict the functions which he may perform.

2.58. EG 9.2 states that the FSA's effective use of the power under section 63 of FSMA to withdraw approval from an approved person will also help to ensure high standards of regulatory conduct by preventing an approved person from continuing to perform the controlled function to which the approval relates if he is not a fit and proper person to perform that function. Where it considers this is appropriate, the FSA may prohibit an approved person, in addition to withdrawing their approval.

2.59. EG 9.4 sets out the general scope of the FSA's power in this respect. The FSA has the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant.

2.60. EG 9.5 provides that the scope of the prohibition order will depend on the range of functions which the individual concerned performs in relation to regulated activities, the reasons why he is not fit and proper and the severity of risk which he poses to consumers or the market generally.

2.61. EG 9.9 provides that when deciding whether to make a prohibition order against an approved person and/or withdraw approval, the FSA will consider all the relevant circumstances of the case. These may include, but are not limited to, the following:

(1) whether the individual is fit and proper to perform the functions in relation to regulated activities. The criteria for assessing the fitness and propriety of approved persons are set out in FIT 2.1 (honesty, integrity and reputation), FIT 2.2 (competence and capability) and FIT 2.3 (financial soundness) (EG 9.9(2));

(2) whether, and to what extent, the approved person has failed to comply with the Statements of Principle issued by the FSA with respect to the conduct of approved persons, or been knowingly involved in a contravention by the relevant firm of a requirement imposed on the firm by or under the Act (including the Principles and other rules (EG 9.9(3)(a) and (b));

(3) the relevance and materiality of any matters indicating unfitness (EG 9.9(5));

(4) the length of time since the occurrence of any matters indicating unfitness (EG 9.9(6));

(5) the particular controlled function the approved person is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates (EG 9.9(7)); and

(6) the severity of the risk which the individual poses to consumers and to confidence in the financial system (EG 9.9(8)).

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

(1) serious lack of competence (EG 9.12(4)); and

(2) serious breaches of the Statements of Principle for approved persons, such as acting without regard to instructions, providing misleading information to customers, giving customers poor or inaccurate advice and failing to ensure that a firm acted within the scope of its permission (EG 9.12(5)).

2.63. EG 9.23 provides that in appropriate cases the FSA may take other action against an individual in addition to making a prohibition order and/or withdrawing its approval, including the use of its power to impose a financial penalty.

ANNEX B

CONDUCT OF BUSINESS PROVISIONS

1. PROMOTION OF UCIS

1.1. Section 238(1) of FSMA provides that an authorised person must not communicate an invitation or inducement to participate in a collective investment scheme ("CIS"), and therefore also an UCIS.

1.2. Section 238 goes on expressly to carve out circumstances where this prohibition will not apply. These include:

(1) where the CIS in question is an authorised unit trust/open-ended investment company or a recognised scheme (section 238(4));

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

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

2. EXEMPTIONS UNDER THE PCIS ORDER

2.1. The PCIS Order provides for authorised firms to promote UCIS to individuals if they fall within a particular category of exemption set out in the PCIS Order.

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

Certified high net worth individuals

2.3. Article 21(2) defines a certified high net worth individual as being an individual who has signed a statement complying with Part I of the Schedule to the PCIS Order in the past 12 months. Essentially this requires that at least one of the following sets of circumstances apply:

(1) the person had, during the previous financial year immediately preceding the date of the statement, an annual income of £100,000 or more; and/or

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

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

2.4. The statement also requires that the person signs a statement to indicate he accepts that he can lose his property and other assets from making investment decisions based on financial promotions and is aware it is open to him to seek specialist advice.

2.5. If the person making the communication believes on reasonable grounds that he is making it to a certified high net worth individual, then the section 238 restriction will not apply as long as the communication:

(1) is a non-real time communication or a solicited real time communication;

(2) relates only to units in a UCIS which invests wholly or predominantly in the shares in or debentures of one or more unlisted companies;

(3) does not invite or induce the recipient to enter into an agreement under the terms of which he can incur a liability or obligation to pay or contribute more than he commits by way of investment;

(4) a specified warning in the following terms is given both orally (in respect of a real-time communication) and in writing in the manner prescribed in article 21:

"Reliance on this promotion for the purpose of buying the units to which the promotion relates may expose an individual to a significant risk of losing all of the property or other assets invested"; and

(5) is accompanied by an indication that the promotion is exempt from section 238 on the grounds that it is communicated to a certified high net worth individual, together with details of the requirements for certified high net worth investors and a reminder that the individual should consult a specialist if in any doubt about participating in a UCIS.

3. EXEMPTIONS UNDER COBS 4.12

3.1. A firm may communicate an invitation or inducement to participate in a UCIS without breaching the section 238 restriction if the promotion falls within an exemption listed in the tables at:

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

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

3.2. The inducement or invitation must be made only to recipients whom the firm has taken reasonable steps to establish are persons in that category or be directed at recipients in such a way as to reduce, as far as possible, the risk of participation in the CIS by persons not in that category. There is no provision for these steps to be taken retrospectively.

3.3. Category 1 covers people who are already participants in a UCIS or have been so in the last 30 months. An authorised person can promote to these persons the UCIS in which they are already participants (and any successor scheme) or one whose underlying property and risk profile are both "substantially similar" to those of the UCIS in which they participate.

3.4. Category 2 deals with those persons for whom the firm has taken reasonable steps to ensure that investment in the UCIS is suitable and who is an "established" or "newly accepted" customer of the firm or a company in its group.

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

3.6. Category 8 under COBS 4.12 only allows financial promotion of UCIS to a person:

(1) in relation to whom the firm has undertaken an adequate assessment of his expertise, experience and knowledge and that assessment gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the person is capable of making his own investment decisions and understanding the risks involved;

(2) to whom the firm has given a clear written warning that this will enable the firm to promote UCIS to the customer; and

(3) who has stated in writing, in a document separate from the contract, that he is aware of the fact the firm can promote certain UCIS to him.

4. ENSURING SUITABILITY OF ADVICE

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

4.2. Principle 9 (Customers: relationships of trust) of the FSA's Principles for Businesses states that a firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.

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

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

(2) COBS 9.2 from 1 November 2007.

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

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

(2) financial situation; and

(3) investment objectives

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

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

(1) meets his investment objectives;

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

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

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

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

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

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

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

4.8. COBS 9.2.6R provides that if a firm does not obtain the necessary information to assess suitability, it must not make a personal recommendation to the customer or take a decision to trade for him. There is no direct equivalent COB rule but COB 5.2.7G provides that where a customer declines to provide sufficient information a firm should not proceed to make a personal recommendation without promptly advising

the customer that the lack of such information may adversely affect the quality of the services which it can provide.

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