THIS DECISION NOTICE WAS REFERRED TO THE UPPER TRIBUNAL IN ORDER TO DETERMINE THE APPROPRIATE ACTION FOR THE FSA TO TAKE. HOWEVER, BEFORE THE MATTER COULD BE HEARD BY THE UPPER TRIBUNAL, MR PATTISON DIED AND THE FSA SUBSEQUENTLY DISCONTINUED ITS ACTION.

DECISION NOTICE

To:	Timothy Simon Pattison Lathom Coach House Weston Lane Bath BA1 4AA	Pave Financial Management Limited 2 The Office Village Roman Way, Bath Business Park Peasedown St John Bath BA2 8SG
Individual ref:	TSP00004	Firm ref: 435205
Date:	3 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 listed below, the FSA has decided:

(1) pursuant to section 66 of the Financial Services and Markets Act ("the Act"), to impose on Timothy Simon Pattison ("Mr Pattison"), director of Pave Financial Management Limited ("Pave"), a financial penalty of £90,000 for failing to comply with Statements of Principle 1, 2 and 7 of the FSA's Statements of Principle for Approved Persons ("Statements of Principle");

(2) pursuant to section 63 of the Act, to withdraw the approval given to Mr Pattison to perform the controlled functions CF1 (Director), CF10 (Compliance Oversight), CF11 (Money Laundering Reporting) and CF30 (Customer) at Pave, because Mr Pattison lacks integrity and the competence and capability to perform these functions; and

(3) to make an order, pursuant to section 56 of the Act, prohibiting Mr Pattison from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm because he is not a fit and proper person in terms of a lack of integrity and a lack of competence and capability.

2. SUMMARY OF THE REASONS FOR THE ACTION

2.1. Between 15 November 2005 and 4 August 2010 ("the relevant period") Mr Pattison failed to act with integrity and competence and capability in relation to Pave's dealings with customers and failed to take reasonable steps to ensure that Pave complied with the requirements and standards of the regulatory system. His conduct was also reckless because the sales model and sales practices of Pave exposed customers to a very significant risk of financial loss despite no evidence that they could sustain such losses. Even after these risks were pointed out to him by Pave's external compliance consultant, and even after the risks to customers started to crystallise, he made no material changes to Pave's sales model and sales practices. If the FSA had not intervened he would have continued to make unsuitable unregulated collective investment schemes ("UCIS") recommendations to customers of Pave.

2.2. Mr Pattison failed to take reasonable steps to understand the statutory restrictions associated with promoting UCIS before he started to promote and recommend them to customers. Specific warnings about these restrictions were contained in the UCIS marketing material which Mr Pattison should have read before recommending highly concentrated investment in these UCIS to his customers.

2.3. Mr Pattison closed his mind to the risks associated with advising Pave's customers to invest so heavily in UCIS. For example:

(1) Pave's sales model, which Mr Pattison introduced, included the use of a spreadsheet to project customers' expenditure and the performance of their investments to illustrate when they might run out of liquid capital (the "Lifeplanner"). This Lifeplanner tool encouraged customers to accept very high levels of investment risk in return for potentially high gains. It operated as a sales tool and as a substitute for gathering hard and soft facts about the customers, including their attitude to investment risk. As a result of the inadequacy of Pave's fact find or know your customer ("KYC") process Pave did not have sufficient and necessary personal and financial information about their customers. This in turn meant that Pave's inadequate KYC process impacted on its assessment of suitability.

(2) Pave failed to provide clear, fair and balanced explanations of the risks and characteristics of the UCIS investments that it recommended. This was a particularly relevant issue as none of Pave's customers had been categorised as sophisticated investors, and they had no relevant knowledge or prior experience of investing in UCIS. Pave's customers were reliant on Pave's explanations and descriptions of the investments (and on technical explanations contained in UCIS marketing literature which Pave asked the customers to read).

(3) At least 65 of Pave's customers were advised to invest in UCIS, often being advised to place large proportions of their investment portfolios (up to 80 percent) in UCIS, with no proper consideration of the concentration risk or of these customers' capacity to sustain losses.

(4) Some of Pave's customers were advised to re-mortgage their homes to raise funds to invest in UCIS with no documented assessment of their capacity to sustain losses. Some of Pave's customers were also advised to switch from existing pension schemes and to establish self-invested personal pensions where the underlying investments included high concentrations of UCIS (including on one occasion when contrary to the advice of an external pension transfer specialist).

2.4. Mr Pattison also failed to ensure that the basis on which Pave was remunerated was disclosed to customers in a way which was clear, fair and not misleading. Pave indicated in its Initial Disclosure Document ("IDD") that it was remunerated on a fee-only basis. In practice, however, Pave charged customers several types of fee and it contrived to retain all commission received from providers. It did so by recording the time its employees spent on each customer's portfolio on a notional account. The notional account should have functioned as follows: if the value of the total time recorded on the notional account was less than the amount of commission Pave received then Pave, having set off the commission against the value of the total time recorded on the account, should have then provided a rebate of the excess commission to the customer. However, no customer spoken to by the FSA had ever received a rebate of commission.

2.5. Mr Pattison also failed to ensure that Pave acknowledged and investigated customers' complaints fairly and in accordance with its own complaints handling procedures or with regulatory requirements.

2.6. Mr Pattison was personally responsible for Pave's failure to comply with regulatory requirements aimed at ensuring that customers were treated fairly. Mr Pattison must have appreciated, at some level, the risks to customers posed by Pave's sales model and sales practices, not least the concentration risk from exposing large proportions of customers' portfolios in UCIS. The impact of these failures was serious. Pave promoted and advised at least 65 (of around 200) of its retail customers to invest a total of £9.7 million in UCIS. At least £1.2 million of these customers' assets were invested in UCIS that have since been suspended or liquidated due to the schemes in question running into problems, resulting in crystallised or potential financial losses for customers.

2.7. The failings identified in this case have been mitigated to some extent by:

(1) the fact that Pave obtained advice from an external compliance consultant in respect of the statutory and regulatory restrictions on the promotion of UCIS (although this advice was only sought after Pave had already recommended UCIS to at least 25 customers); and

(2) Mr Pattison's co-operation with the FSA's investigation including his decision to voluntarily vary Pave's Part IV permission in relation to UCIS advice.

3. RELEVANT STATUTORY AND REGULATORY PROVISIONS

Provisions related to UCIS

3.1. UCIS are defined in the glossary to the FSA Handbook of Rules and Guidance ("the Glossary") as,

"*a collective investment scheme which is not a regulated collective investment scheme.*"

Unless a collective investment scheme ("CIS") falls within the narrow Glossary definition of a regulated CIS, it will be a UCIS. Whilst a UCIS does not carry the same level of regulatory oversight as a regulated CIS, it is still subject to regulation, notably around the extent to which it may be marketed and the persons to whom it may be marketed.

3.2. UCIS investments can seem attractive as they typically aim to generate high returns and they are not subject to the same restrictions as regulated CIS. For example, the latter are restricted in the underlying assets that can be held, their ability to borrow funds, and they are required to spread their investments whilst UCIS are not so restricted. The risks typically associated with UCIS investments include many of those that exist with regulated mainstream investments. However, there are a number of additional risks that are often inherent in a UCIS which an adviser should consider when making a recommendation.

3.3. The inherent risks of the UCIS recommended by Pave were very high when compared with mainstream investments. They variously involved high levels of risk in respect of liquidity, valuation, currency, gearing, transparency, management, enterprise and other factors that could influence their success or failure.

3.4. Furthermore, individuals who invest in UCIS have no recourse to the Financial Ombudsman Service ("FOS") or the Financial Services Compensation Service ("FSCS") in respect of the UCIS themselves or the providers of those schemes.

However, they may have recourse to the FOS or the FSCS in respect of personal recommendations made by authorised firms to invest in UCIS.

3.5. There is a restriction on the categories of investor to whom such schemes can be promoted.

3.6. Section 238 of the Act states that an authorised person must not communicate an invitation or inducement to participate in a collective investment scheme although there are exceptions including:

(1) those exemptions set out in the Financial Services and Markets Act 2000 (Promotion of collective investment schemes) (Exemptions) Order 2001 ("the PCIS Order"). 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 order. The exemptions tend to be narrow in scope and subject to specific requirements including reasonable checks, disclosure of appropriate warnings, the investments of the underlying fund, and the certification of the investor's status. These exemptions pertain to individuals classed as certified high net worth individuals, certified sophisticated investors or self-certified sophisticated investors; and

(2) those exemptions set out in the FSA Handbook, namely COBS 4.12.1(4)R (COB 3 Annex 5 prior to 1 November 2007). In order to be exempt under the COBS rules 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.

Suitability

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

3.8. Principle 9 of the FSA's Principles for Businesses states 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.

3.9. Before 1 November 2007, a firm was required by COB 5.2.5R to take reasonable steps to ensure it had sufficient personal and financial information about a customer before giving a personal recommendation.

3.10. From 1 November 2007, in considering the suitability of a particular scheme for a specific customer, a firm is required by COBS 9.2.2R to obtain the necessary information to understand the essential facts about the customer. 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.

3.11. Further detail and guidance in relation to the above is set out in the Annex to this Notice, together with other relevant statute and regulatory provisions.

4. FACTS AND MATTERS RELIED ON

The Firm

4.1. Pave operated as a small firm of independent financial advisers based in Bath. It has been a Capital Adequacy Directive ("CAD") exempt firm since 12 December 2007.

4.2. Mr Pattison established Pave in 2005 and it was authorised by the FSA on 15 November 2005.

4.3. Mr Pattison has been the majority shareholder and also the CF1 Director, CF10 Compliance oversight and CF11 Money laundering reporting officer of Pave since its inception. Mr Pattison was approved to perform the CF30 Customer function on 1 November 2007 (prior to which Mr Pattison was a CF21 Investment adviser). Mr Pattison has been the main decision maker at Pave since it was established. Mr Pattison sourced the majority of Pave's business and he is responsible for the structure, organisation and sales model and practices at Pave along with the

underlying investment strategy. Pave's sales model was structured around what was advertised as a tax efficient wealth creation strategy and lifestyle planning service.

Promotion of UCIS in breach of section 238 of the Act

4.4. Pave started to promote and recommend UCIS to its customers in 2005. It started to receive advice from its external compliance consultant about the regulatory restrictions on the promotion of UCIS in March 2007, by which time it had already promoted UCIS to at least 25 customers. Mr Pattison was responsible for Pave's failure, prior to March 2007, to take any steps to consider and apply the regulatory restrictions relating to the promotion of UCIS. To the extent that he undertook due diligence on UCIS before recommending them to customers in this period, he did not have regard to the warnings contained in marketing material produced by UCIS scheme providers, at least one of which contained explicit warnings about the section 238 restriction on its first page. As such he did not apply his mind to the restrictions on the promotion of UCIS to retail customers contained in marketing material, which he was obliged to read as part of his due diligence, and which he directed his customers to read in the course of making personal recommendations to them to invest in UCIS.

4.5. The external compliance consultant advised Pave, incorrectly, in March 2007 that the restriction on the promotion of UCIS did not apply because Pave advised its customers to invest in UCIS as part of its sales process and that as such Pave was not issuing financial promotions. Pave continued to breach section 238 after March 2007 but Mr Pattison was no longer culpable for this failure from that date.

Sales process

<u>Pave's approach to KYC (the Lifeplanner)</u>

4.6. When Pave applied to the FSA for authorisation its proposed sales process included the use of a personal customer questionnaire, the purpose of which was to obtain hard facts about each customer's personal and financial circumstances and soft facts such as their needs and objectives and risk appetites. This document was referred to as an essential part of the planning process which should be kept up-to-date. In practice,

these customer questionnaires were either only partially completed or not used at all within Pave's sales process from 2005.

4.7. In practice Pave did not therefore use a standalone fact find form to establish and record all relevant KYC information in one place. Some KYC information was recorded on detailed minutes of meetings with clients. Pave's practice was to input information including a customer's current income, assets and expenditure on a spreadsheet which it called the "Lifeplanner", which was used as an alternative to completing its personal customer questionnaire.

4.8. In its initial meetings with a customer, or at least at any early stage in the customer's relationship with Pave, Pave introduced the customer to the Lifeplanner tool. Customers were then asked to provide information about matters such as their current income, assets and expenditure, which Pave staff then entered on the Lifeplanner.

4.9. The Lifeplanner is an Excel spreadsheet which extrapolated the inputted data and projected a customer's current expenditure and income and the value of their assets into the future (up to age 100 and in one instance to age 135) using percentage uplift assumptions about inflation and investment growth. Pave could change the variables in many ways to show the customer the impact of changes on their future wealth and to help them think about financial planning and the impact on their lifestyle of different inputs and outcomes. The Lifeplanner plotted any future changes in the customer's income and expenditure on a chart and showed at what age, based on the relevant assumptions, the customer's outgoings would start to exceed their income or, in Pave's words, it showed when they "are likely to run out of liquid capital".

4.10. The main purpose of the Lifeplanner was to identify the rate of growth from the customer's assets deemed to be necessary to maintain their current income, and therefore to maintain or enhance their current lifestyle through to retirement and up to their death. As a customer's investment strategy changed, for example by replacing current investments with those recommended by Pave, the Lifeplanner would recalculate the projections based on the new assumed rates of return, which were based on headline rates advertised in the UCIS marketing materials and were as high as 35% per annum for some UCIS.

4.11. If the Lifeplanner calculations showed a customer that their existing savings and investment portfolio, when matched against their projected expenditure, would lead to cash shortages in future years, consideration would be given to alternative investments offering potentially higher returns.

4.12. The versions of the Lifeplanner reviewed by the FSA assumed that the customers' lifestyles and expenditure would remain the same (indexed for inflation) to the age of 100 (and in one instance to age 135), and took no account of planned changes in lifestyle (e.g. health, working arrangements, active and later retirement phases, tax status and inheritance issues).

4.13. The Lifeplanner was used to project anticipated returns on investments in one or more UCIS and other potential investments. However, the Lifeplanner was not used to project the future impact on a customer's assets (liquid or otherwise) of the failure of any of the investments recommended by Pave. Nor did it factor in the impact of fees and charges and therefore the level of growth required for the customer to achieve the projected returns illustrated in the tool.

4.14. Pave used the outputs from the Lifeplanner to quantify a customer's attitude to risk by effectively working back from the projected age that the customers were expected to run out of liquid capital. In essence, if the customer wanted to maintain their lifestyle goals and objectives, this tool showed the level of risk that the customer needed to take to stand a chance of funding these aspirational goals. It did not assess either the customer's attitude to risk or their risk tolerance.

Suitability

4.15. In its introductory meetings with customers, Pave explained to the customers the guiding principles that underpinned its service to them. The following guiding principles were found in various client files:

(1) *"Never run out of money;*

(2) Don't die with too much;

(3) *Achieve financial independence*."

4.16. Mr Pattison confirmed that these high level objectives were common to most of Pave's customers and they were the words of Pave and not the customer, on to which would be added more customer-specific objectives such as:

"…lifestyle requirements to be maintained inflation-proofed until attaining age 100, and number three ensure that both income and appreciation of capital assets are tax efficient…"

4.17. Mr Pattison explained that:

"In the evolution of Pave, what we wanted to try and do at headline level was, from our research those three statements encapsulate at very headline level what most people are aspiring to do… Then below that is the individual objectives that people might have. After all, nobody ever wants to run out of money, we don't know when you're going to die but 100 seems like a realistic assumption because if we said 62 we would be well wrong, and most people will want to actually avoid or maximise their investment opportunities through tax or using tax efficient ways…. it was just something that sort of encapsulated for all our clients a common theme…So you will see these three points coming through quite a bit through our clients records".

4.18. Pave did not produce any single document described or referred to as a suitability report or any other document which contained in one place its reasons for its recommendations. Pave's advice was instead recorded in documents such as meeting agendas, minutes of meetings, and executive summaries. Pave's executive summaries generally included the following introductions:

"This proposal is considered in conjunction with our discussions and the financial planning cash flow document which details your assets and liabilities plus detailed income and expenditure information."

"This report should be read in conjunction with the key facts information, provider profiles and literature supplied".

4.19. Pave produced an executive summary for each investment that it recommended, which included information from the marketing literature for the UCIS that it recommended.

Customers were also given copies of the underlying marketing literature and advised to read them. If a customer was recommended to invest in five UCIS (accessed via an investment platform and held within a SIPP), then they would be given an executive summary for each UCIS and copies of the underlying product literature and executive summaries for the platform and the SIPP.

4.20. The executive summaries did not contain statements in which it was made explicit that the UCIS in question was recommended by Pave as being suitable. Instead, the executive summaries used a form of words which implied that the customer had decided, based on their discussions with Pave, that such an investment fitted in with their aspirational objective of creating wealth:

"Having discussed attitude to risk you have confirmed that you wish to expose this proportion of your investment portfolio to a high risk and illiquid asset class."

4.21. Mr Pattison said that Pave's business model was such that it provided its customers with information so that they could decide for themselves whether the investment was suitable.

4.22. Pave's executive summaries for customers contained the same generic references to attitude to risk and investment objectives; that is to say, they were not tailored to reflect each customer's individual circumstances or objectives. Of 44 executive summaries reviewed that pertained to UCIS recommendations, 35 did not confirm the customer's attitude to risk. In these cases, the summaries stated that the customer's attitude to risk had been discussed and documented elsewhere.

4.23. Pave adopted an inconsistent approach when setting out in executive summaries the general and specific risk warnings associated with each investment that it recommended. By way of example, Pave's executive summary template for one fund contained detailed risk warnings over four pages. Its template for another fund had limited general risk warnings (three lines of text) and referred the customer to the offering memorandum for confirmation of the full associated risks.

4.24. 15 of the 44 executive summaries pertaining to UCIS contained very limited or no risk warnings. For example, Pave's executive summary template for one fund stated that

the fund was a UCIS, but mentioned no other risks. Whilst Pave stated that the summary should be read in conjunction with the product fact sheet, the summary itself highlighted the advantages but made no reference to the risks of investing in this fund.

4.25. Some written communications with customers about UCIS contained inconsistent information about the level of risks, for example in relation to the same UCIS, the customers would sometimes be warned about "*higher levels of volatility*" and sometimes be told the fund offered "*low volatility*".

Pave's claim that it provided whole of market service

4.26. Pave communicated to customers in its initial disclosure that it provided a whole of market service, which was not the case. In practice, Pave selected from a narrow range of investments and adopted a similar investment strategy (for each of the customers whose files were reviewed by the FSA). Pave appeared to have a shortlist of preferred investments mainly comprising UCIS which constituted the majority of recommended investments to certain customers, and recommended the same investment platform and SIPP provider to its customers.

4.27. There were seven schemes which Pave regularly recommended to customers. Pave also recommended UCIS that offered higher rates of return. The schemes were represented by Pave as being the best investments in their respective sectors (e.g. East European property, fine wines, Mexican resorts, etc) on the basis of analysis of the marketing literature, meetings with the funds' distributors and Pave's own 'asset & provider assessment selection tool', which was an Excel spreadsheet in which funds were scored according to factors such as "*has to be an area where returns are likely*" and "*essential that the underlying investments are clear and can be understood*".

Wealth creation strategy, gearing and concentration of risk

4.28. When asked to comment on the risks to customers associated with investing in UCIS Mr Pattison referred frequently to volatility in the context of risk and a customer's attitude to risk. Mr Pattison explained Pave's decision to recommend UCIS over other investments; in his view one of the main risks associated with more traditional

investments was their high volatility compared to the volatility of the UCIS identified by Pave:

> *"We were trying to look for investments that we as advisors could understand and that provided a logical process that wasn't going to change dramatically on a day to day basis which is this volatility. We saw volatility as not risk but as a separate threat to a client portfolio…*
>
> *Volatility for me is about, beyond, its about trying to plan for something but because of things that are beyond my control because its got a sharp point up and very sharp point down over a very short time scale that makes uncertainty in planning and I'll describe it and I can probably endorse it."*

4.29. Included within Pave's wealth creation strategy was a recommendation that some customers should establish a SIPP (and access and switch investments via a platform) on the basis that this would provide a more cost effective and flexible means of managing their pension investments. In practice, Pave recommended long term and illiquid investments which undermined the logic of its use of a SIPP.

4.30. In circumstances where some customers did not have the liquid assets to invest in UCIS, Pave recommended that they borrow against properties and liquidate other investments. Where it made pension switching recommendations, it recommended high concentrations of UCIS in the underlying investments held within SIPPs.

4.31. The FSA found no evidence of any guidance within Pave on the use of gearing (such as borrowing against residential properties to raise funds to invest), such as for example when and for which customer profile gearing might be considered appropriate, or what limits on the level of gearing might be appropriate. Pave's external compliance consultant reported on 25 March 2008 that the use of gearing within Pave's wealth creation strategy was "*inherently high risk and not at all typical of the approach taken by other wealth management firms*". Pave made no changes to its sales model or sales practices after receiving this advice.

4.32. Customer files show that there was little if any limit in practice on how much of a customer's portfolio should be invested in UCIS in general, or into a particular fund.

In several customer files customers had been advised to invest between 70% and 80% of their available assets in UCIS. One elderly and vulnerable customer was advised to hold 70% of her investable assets in two UCIS.

Summary of Mr Pattison's responsibility for Pave's failures

Suitability of advice

4.33. Pave breached Principle 9 in the relevant period because it failed to take reasonable steps to ensure the suitability of its advice to customers who were entitled to rely on its judgment in relation to UCIS.

4.34. Mr Pattison is mainly responsible for Pave's breaches in this regard because he:

(1) failed up to March 2007 to take reasonable steps to ensure that Pave did not breach the restriction on the promotion of UCIS with the consequence that Pave started to recommend UCIS to retail customers in breach of section 238 of the Act;

(2) failed to communicate clearly to customers the risks involved in investing in UCIS. Mr Pattison promoted the benefits and misled customers about the risks of investing in UCIS, for example, by focussing inappropriately on the concept of low volatility. He also failed to give due weight to the fact that UCIS fund valuations are subjective and made typically by or on the instructions of the fund managers). He did not model the effect of the suspension or liquidation of one or more UCIS in the Lifeplanner during discussions with customers until such schemes had failed;

(3) failed to recognise and explain clearly the risks associated with gearing and transferring out of existing pension schemes to invest in UCIS;

(4) failed to undertake and/or record appropriate assessments of customers' attitudes to risk which took into account their historic risk profile and investment approaches;

(5) failed to ensure that the customers' objectives and their own understanding of their attitude to risk were consistent. In practice, customers failed to understand that the loss of capital could result in loss of their retirement income and repossession of their residential properties; and

(6) failed to take into account customers' objectives and capacity to sustain losses when recommending UCIS investments.

4.35. These failings are serious because Pave's records indicate that around 65 customers invested a total of approximately £9.7 million in UCIS for which their eligibility was never properly assessed. At least £1.2 million of these customers' assets were invested in UCIS that have since been suspended or liquidated, resulting in crystallised or potential financial losses for customers.

Misleading information about fees and commission

4.36. Pave provided what it described as a fee-based service and maintained a notional account for all customers. The notional account was a record of credits and debits that a customer had accrued through investment commission (credits) and the cost of the advice service they received from Pave (debits). The debits were service charges calculated according to the time spent by Pave's staff, and credits were fees and commission received by Pave. The fee was charged on the understanding that Pave would not derive any income from commissions and any commissions received would be offset against the fees.

4.37. Pave's approach to charging fees and taking commission was not communicated clearly to customers. On the key facts document relating to Pave's charges, the following option was ticked:

> ***"Paying by fee**. Whether you buy a product or not, you will pay us a fee for our advice and services. If we also receive commission from the product provider when you buy a product, we will pass on the full value of that commission to you in one or more ways. For example, we could reduce our fee; or reduce your product charges; or increase your investment amount; or refund the commission to you."*

4.38. Pave's introductory Powerpoint presentations to customers included the following statements:

"We do not derive our income from commissions."

"Not commission orientated endorsing the independence of the advice and recommendations – Truly Independent advice cannot be remunerated by a sales commission"

"We endeavour to obtain commissions, arrangement fees on your behalf:"

"We credit all income received on your behalf: Retainers, commission etc".

4.39. However, section 13 of Pave's operations manual, dated February 2005, headed "Timesheet and Commission Recording" made it clear to staff of Pave that it provided a service to its customers on the basis of charging for its time and achieving profit. All recorded time was to be charged to the customer's notional account. In this section of the manual Pave described the relationship between fees and commission as follows:

"Pave offsets costs of providing the service against retention fees ***and all commissions received****. Commission receipts are entered from commission statements received from Institutions.*

NOTE: This account is a notional account utilised for the purposes of establishing profit contribution to Pave. It is a notional account and therefore is not issued to clients without sanction from a Director." (emphasis added)

4.40. Two former advisers at Pave said that Mr Pattison made retrospective adjustments to the notional accounts to avoid the customer having a credit balance. The FSA found some evidence of retrospective adjustments to some customers' notional accounts some 12 months after the cost would have been incurred which, at the very least, suggested a lack of transparency in the way that notional accounts were maintained by Mr Pattison. Although Pave told the FSA that it provided a copy of notional accounts to customers at every annual review, four customers told the FSA that they had not

received a copy of their notional accounts. Three other customers did not understand how the notional account worked. The FSA did not see evidence in any customer file that the balance of a notional account was paid to the customer**.**

4.41. In some cases the notional account included significant credits to the customers. When the customers enquired about their notional account and/or sought repayment of the balance, such requests were not met and/or the balance on the notional account was belatedly reduced by the imposition of backdated or previously unrecorded time.

4.42. The lack of transparency in the way that the notional account operated meant that customers did not appreciate the true cost of Pave's investment advice, as illustrated in the three examples below.

(a) Between July 2008 and April 2009 Pave charged a total of £11,393 for attending five meetings with a married couple who were customers. The customers started with an investment portfolio of £170,700, meaning that in 10 months they had effectively surrendered an amount equivalent to **6.7 percent** of their portfolio in payment for those meetings.

(b) Between 2 May 2008 and 17 June 2009 Pave collected £30,106 through fees and commission which constituted an amount equivalent to **17 percent** of a customer's investment portfolio.

(c) One customer calculated, retrospectively, that over a ten year period an amount equivalent to **25 percent** of their portfolio had been surrendered to cover Pave's fees and charges.

4.43. By failing adequately to inform customers of the existence, nature and amount of the commissions, in a manner that was comprehensive, accurate and understandable, before making the investments for which the commission was received, Mr Pattison caused Pave to breach COBS 2.3.1R (COB 5.7.3R prior to 1 November 2007).

<u>Complaint handling</u>

4.44. Pave produced a leaflet which it sent to complainants when it acknowledged receipt of their complaints. Pave's complaint handling ethos is summarised in that document as:

> *"The handling of complaints is of great importance to our business. We take customer feedback very seriously, striving to improve our business and service for the benefit of our clients. Our goal is to treat each case impartially, sympathetically and in a consistent manner with minimal delay. Where it is not possible to resolve the problem to the client's satisfaction, we aim to act in a courteous, reasonable and prompt manner. When disputes cannot be resolved satisfactorily we fully support and work with independent dispute resolution schemes, such as the Financial Ombudsman Service ("FOS")."*

4.45. According to its complaints procedure, dated 6 September 2007, Pave undertook to acknowledge complaints within seven days of receipt and in that acknowledgement letter it would outline its understanding of the nature of the complaint and ask the complainant to confirm that its understanding of the complaint is correct. Pave also undertook to write to the complainant with an update or decision at 20 and 40 working days and to inform the complainant in its final response of their right to refer the matter to the FOS.

4.46. Mr Pattison told the FSA that all complaints were dealt with in a fair and impartial manner. However, Mr Pattison was ultimately responsible for decisions relating to all complaints even when the complaints were made by his own customers against him. Mr Pattison failed to deal with the complaints in a fair and impartial manner in that, on more than one occasion, Mr Pattison dealt with complaints relating to his own advice. Furthermore, Pave has rejected all complaints about alleged unsuitable advice to invest in UCIS.

4.47. In one instance, Mr Pattison failed to make the customer aware about his right to refer his complaint to the FOS.

4.48. Mr Pattison failed to send a 20-day update letter to one customer and failed to send a 20-day update or 40-day update letter to another customer which were required by Pave's complaints handling procedure.

4.49. On two occasions a letter of acknowledgement sent by Mr Pattison contained emotive language with regard to the validity of the complaint. In one acknowledgement Mr Pattison wrote:

> "*I was extremely disappointed to receive the latest communication as I thought our relationship was closer and deeper than that.*"

This language does not convey an impartial assessment of the customer's complaint.

4.50. On two occasions, Mr Pattison contravened Pave's complaints handling process by failing to invite the complainants to confirm whether Pave had correctly understood the nature of the complaints.

4.51. Consequently, the FSA has concluded that Mr Pattison caused Pave to fail to comply with DISP 1.3.1R, 1.4.1R, 1.6.1R and 1.6.2R.

Overview of Mr Pattison's conduct

Suitability of advice

4.52. Mr Pattison is largely responsible for the failures identified at Pave because he implemented the sales model and sales practices.

4.53. Pave's sales process was fundamentally flawed. Its sales practices did not comply with a number of regulatory requirements. For example it failed to obtain essential information about clients' circumstances, and it undertook inadequate assessments of customers' attitude and tolerance to investment risk. In some instances customers were recommended to invest in UCIS without any meaningful assessment of their risk profile and ability to sustain financial losses. In other cases the recommendation was inconsistent with the customers' established risk profiles. Large proportions of customers' assets were exposed to UCIS investments and therefore to the high risk of financial loss.

4.54. Mr Pattison failed to provide a clear, fair and balanced explanation of the risks and characteristics of the UCIS investments that Pave recommended. His descriptions of the recommended UCIS investments were insufficient to enable customers to

understand the inherent risks and characteristics. He unfairly placed the onus on customers to assess for themselves the risks by asking them to read the executive summaries (which in themselves were not clear, fair or balanced) and also to read the lengthy and detailed technical information and marketing material produced by the UCIS providers.

4.55. Mr Pattison's emphasis on low volatility as a rationale for recommending UCIS to Pave's customers was flawed. Volatility is a term used to describe the extent and speed with which the price of an investment rises and falls over time. It is commonly used to compare price characteristics of, for example, listed equity investments where reliable pricing data is available at regular and frequent intervals. It is not a term that should be used to describe for the benefit of retail customers the risks of a UCIS because of the normal lack of reliable, objective and frequent pricing data. Even if pricing data is available for a particular UCIS it would be wrong to suggest to customers that price volatility was a dominant or material risk of a UCIS (compared to the many other risks associated with investing in UCIS). Even if arithmetically a UCIS has demonstrated price characteristics that mean it has low volatility, that does not make the UCIS low risk.

Misleading information about fees and commission

4.56. Pave's approach to charging fees and taking commission was not communicated clearly to customers. The lack of transparency in the way that the notional account operated meant that customers did not appreciate the true cost of Pave's investment advice.

Complaint handling

4.57. It was not evident how Mr Pattison ensured that Pave met its stated commitment to customers to "treat each case impartially, sympathetically and in a consistent manner with minimal delay". In many respects Pave failed to comply with the standards described in its own complaint handling procedure in respect of independence and impartiality, acknowledging complaints and dealing with and communicating with customers' complaints in a timely way. It also failed to record information about its

complaints accurately and consequently it misrepresented to the FSA the nature and number of complaints it had received about UCIS. Furthermore, it rejected every UCIS complaint.

5. REPRESENTATIONS, FINDINGS AND CONCLUSIONS

Representations

5.1. Mr Pattison made oral and written representations in conjunction with Mr Hocking and Pave. In his representations Mr Pattison denied the allegations made against him. However he did concede that he had made mistakes at Pave, though he denied that these minor failings were of sufficient seriousness as to justify the conclusion that he either lacked integrity or competence and capability.

5.2. Mr Pattison submitted that the evidence presented by the investigation team failed, on the balance of probabilities, to disclose a case that was sufficient to discharge the burden of proof upon the FSA, particularly when his unblemished history in the financial services industry was taken into account. He submitted that the FSA had not put forward compelling evidence sufficient to demonstrate that he had acted without integrity or that he lacked competence and capability. Furthermore Mr Pattison criticised the conduct of the FSA investigation team and alleged that their partiality was demonstrated by the fact that they had put forward a case founded upon hearsay, innuendo and speculation.

The conduct of the FSA

5.3. Mr Pattison criticised the conduct of those from the FSA who had investigated this matter. He submitted that they had not acted in a fair or balanced manner and that this had caused them to misinterpret evidence and to use evidence very selectively. He asserted that their bias had resulted in an unbalanced investigation which had been conducted without integrity. He further submitted that the investigative team had been so fixated upon demonstrating that he had engaged in misconduct that they had overlooked evidence which was exculpatory for him. He submitted that as a result of these failings the investigation had been wholly inadequate and it had resulted in a very weak case which was characterised by "innuendo, guesswork, misquotation,

deliberate misrepresentation and subjective opinion" which he submitted did not "constitute cogent and persuasive evidence".

The breach of section 238

5.4. Mr Pattison accepted that Pave had promoted UCIS in breach of section 238 of the Act. However he submitted that this breach had been inadvertent and hence it was his submission that the FSA should make no findings adverse to him as a result of what he characterised as being a purely technical breach of the act. Mr Pattison submitted that the FSA should accept that at no stage had he been culpable for Pave's breach of section 238 because at all times he had acted in reliance upon advice. He noted that the FSA does not criticise him for his conduct relating to the promotion of UCIS by Pave in the period after March 2007 when the firm had received incorrect advice from an external compliance consultant concerning the restrictions applicable to the sale of UCIS. Mr Pattison submitted that having made this late concession, the FSA should go further and concede that Mr Pattison was not culpable for the unlawful promotion of UCIS in the period prior to March 2007. He contended that having engaged others to advise on issues relating to Pave's regulatory compliance he was entitled to expect them to provide advice about the Firm's unlawful promotion of UCIS. It was submitted that in the absence of any concerns having been raised by those who had been engaged to assist with such matters Mr Pattison was entitled to assume that Pave was acting lawfully when it promoted UCIS. Thus, it was argued, Mr Pattison was not culpable for Pave's breach of section 238 prior to March 2007 much as the FSA agreed that he was not considered to be liable for the breach after March 2007.

The advice given to customers

5.5. Despite accepting that Pave had unlawfully promoted UCIS to its customers Mr Pattison defended the quality of the advice that had been given to former customers of Pave. He asserted that he had ensured both when acting as a director and as a CF30 customer adviser that Pave's customers had received a good service and he submitted that the advice that had been given to the firm's customers had reflected that fact. He submitted that when UCIS had been promoted to customers this was because they were the most suitable products. He denied that UCIS were ever promoted to

customers because they offered more favourable commission to Pave. Indeed he commented that the level of commission which the firm received in relation to UCIS did not "significantly vary from the level of commission that could be earned from recommending regulated investments". He also noted that as staff had been salaried they were not incentivised to promote products on the basis of the commission that might be earned.

5.6. Mr Pattison submitted that because Pave did not seek to promote UCIS because of any financial incentive to the firm, it could not be suggested that the Lifeplanner had been designed to provide a scenario for customers that would inevitably result in their seeking to invest in UCIS. Instead he contended that the Lifeplanner, far from being a sales tool, was rather a tool that helped Pave to learn about the needs of their customers and to present them with "what if" scenarios.

5.7. Mr Pattision added that though Pave did not actively seek to promote UCIS over other products they would recommend carefully selected UCIS to clients where these were the best products to meet the aspirations of particular customers. He noted that many regulated products had failed to outperform inflation, and that it was therefore unsurprising if Pave had advised customers about the possibility of investing in UCIS. He argued that it was far too simplistic to suggest that because something was a UCIS that would make it an inherently bad product. As a corollary of the foregoing he also submitted that it was wrong to assert that Pave was necessarily giving customers poor advice when it had advised individuals about investing in UCIS.

5.8. In the light of the foregoing submissions Mr Pattison rejected the conclusions that the FSA sought to draw about the allegedly poor advice given by Pave to its former customers. Instead Mr Pattison submitted that on a proper analysis of the circumstances for the advice given to each of Pave's former customers it was clear that Pave had provided fair and balanced advice which was informed by the knowledge Pave's customer advisers had of their clients. He complained that the FSA had not only made minor factual errors in its analysis of Pave's conduct towards various former clients, but he also submitted that the FSA had overlooked pertinent facts, such as the sophistication of some investors, whilst it had also overstated other

matters such as the alleged infirmity of one particular client. He further submitted that the investment decisions which had been taken by the customers of Pave had been ones that they had taken of their own volition in an attempt to achieve their financial goals. He argued that, whilst it was not for Pave to "tell people that they (were) being too ambitious in life", the advice that had been given to Pave's customers had been good advice tailored to their aspirations.

Pave's policy on fees and commissions

5.9. Mr Pattison submitted that Pave had treated its former clients fairly and that it had not misled them about the fees which the firm charged and the commissions it had received from product providers. He asserted that the FSA had no basis upon which to allege that Pave's fees were excessive as there were no rules governing the level of fees. He therefore submitted that the fee structure at Pave could not be said to be unfair whilst he also rejected the suggestion that Pave had sought to mislead about the use of the notional account. He submitted that the notional accounts which had been maintained for all of Pave's customers had operated in a transparent way. He argued that the transparency of how Pave dealt with fees, commissions and the notional accounts was illustrated by the telling absence of any clear evidence from former customers of Pave. Mr Pattison submitted that the FSA could not maintain that Pave's customers were confused by the operation of the notional account without putting forward evidence from these former customers supporting this allegation. Instead he submitted that it was the FSA who had become confused about this issue as it had failed to distinguish between a notional account and a real account. Mr Pattison thus submitted that in the light of the foregoing it was not possible to conclude that he had acted without integrity.

Complaints handling

5.10. Mr Pattison rejected the suggestion that he had failed to ensure that Pave had properly dealt with complaints it had received. He submitted that Pave had acknowledged and investigated customer's complaints fairly and in accordance with Pave's own complaints handling procedure and with the regulatory requirements in DISP.

The definition of integrity

5.11. When disputing the allegations made against him Mr Pattison criticised the FSA for having failed to properly define what amounted to conduct lacking in integrity. He submitted that the FSA had incorrectly characterised behaviour lacking in integrity as being constituted by reckless conduct. Instead he asserted that behaviour lacking in integrity was characterised by deliberate and wilful breaches of the law. Mr Pattison argued that the FSA did not have evidence that he, an individual of previously blameless character, had engaged in conduct amounting to deliberate and wilful breaches of the law and therefore he submitted that the FSA could not allege that he lacked integrity.

Sanction

5.12. Mr Pattison accepted that as a consequence of Pave's unlawful promotion of UCIS it was appropriate for the FSA to impose some form of sanction upon him. However he submitted that the proposed financial penalty and prohibition were far too harsh. Furthermore he submitted that the proposed financial penalty was beyond his means. Mr Pattison thus argued that the FSA should instead allow him to resign all of his authorisations. He argued that this would achieve the regulatory outcome which the FSA were seeking and it would be a proportionate response to the very limited failings which he had accepted.

Findings

5.13. The FSA rejects Mr Pattison's submissions having taken all relevant factors including his previously unblemished character into account. Instead the FSA finds that there is compelling evidence to demonstrate that he has breached Statements of Principle 1, 2 and 7 and that he is not a fit and proper person because of his lack of integrity and his lack of competence and capability. The FSA notes that Mr Pattison did accept that he had made some mistakes; however the FSA finds that his misconduct went significantly further than he had conceded.

The conduct of the FSA

5.14. The FSA rejects the suggestion that Mr Pattison's many and varied criticisms of the conduct of the investigation team demonstrate that the evidence in this matter is of limited probative value. As is noted above the FSA considers that there is clear evidence showing that Mr Pattison had engaged in the alleged misconduct. Furthermore the FSA does not agree that evidence has been 'cherry picked' or that it may have been misinterpreted to Mr Pattison's detriment. The FSA thus considers that Mr Pattison's criticisms of the investigation team have no impact on this notice.

The breach of section 238

5.15. The FSA considers that though Pave may have had external compliance support in the period prior to March 2007 Mr Pattison is culpable for Pave's breach of section 238 of the Act at this time. Mr Pattison was responsible for Pave's compliance with regulatory obligations and therefore he was also responsible for Pave's failure to take any steps to consider and apply the restrictions relating to the promotion of UCIS. Whilst the FSA accepts that Mr Pattison is not culpable for the continuing promotion of UCIS after he had sought advice about these products, the FSA finds that he can not rely on the absence of advice prior to this point to absolve him of responsibility for the breach of section 238. The FSA considers that it was Mr Pattison's responsibility to ensure regulatory compliance and that he should have proactively sought advice about the promotion of such products particularly in the light of the clear warnings which were contained in much of the UCIS marketing material to the effect that it was unlawful to distribute the material beyond limited categories of potential investors.

The advice given to customers

5.16. The FSA rejects Mr Pattison's submissions concerning the standard of advice given by Pave, and by him when carrying out his CF30 Customer Function, to former customers. The FSA considers that former customers received poor advice resulting from a number of failures at Pave.

5.17. The FSA finds that, regardless of the breach of section 238 by Pave, it was inappropriate to have promoted UCIS to the firm's customers to the extent that it did.

There is significant risk to investing in UCIS and these risks were magnified by the fact that Pave advised retail customers to invest large proportions of their wealth directly in UCIS, and in some cases this was through gearing and as part of their pension provision. Indeed Mr Pattison made personal recommendations to customers to invest in UCIS having failed to take reasonable care to ensure the suitability of that advice and that consequently he made sales which were not in fact suitable in the light of factors such as; the customers' investment history; the customers' previous attitudes to investment risk; Pave's methods of raising finance for some of these investments; and the high concentration of UCIS in each customer's portfolio. The inappropriateness of this advice was compounded by the fact that written communications were sent to customers about UCIS which contained inaccurate and inconsistent information about the nature and level of risks associated with these products. These poor communications were also mirrored in the firm's failure to make clear, during the sales process, the level of investment growth required to offset the costs of a particular scheme, and the impact of a failing or underperforming scheme.

5.18. The quality of the sales process at Pave was also severely undermined by the use of the Lifeplanner, which the FSA considers to have been ineffective in facilitating Pave's understanding of their customers. The FSA finds that the Lifeplanner was used as a sales tool; it did not provide realistic assessments of the projected returns from particular products. Instead the Lifeplanner, which modelled dangerously optimistic projected returns, had the effect of persuading customers, about whom the firm had conducted flawed assessments of their attitudes to risk, to accept very high levels of investment risk because it sought to project a scenario in which an individual's lifestyle necessitated the investment in such products.

5.19. The FSA finds that Pave gave poor advice to customers and that Mr Pattison is culpable for this. The FSA considers that Pave failed to provide realistic assessments of the suitability of certain products and the attainability of certain clients aspirations. Instead the firm, and Mr Pattison acting as a client adviser, who failed to take reasonable care when assessing clients suitability, advised clients to invest in high risk products when these were unsuitable.

Pave's policy on fees and commissions

5.20. The FSA finds that it is clear on the evidence that Pave did not communicate clearly to its customers about the fees it charged and the commissions it received. The FSA accepts that a firm is entitled to charge fees at whatever level it considers appropriate which have been agreed with the customer. However the FSA considers that a firm must be open and transparent with its customers about the levels of these fees. The FSA finds that Pave was not open with its customers on this topic and the FSA considers that Mr Pattison is culpable for the firm's lack of transparency in this area. Indeed the FSA considers that the operation of the notional account was so lacking in transparency that it demonstrates that Mr Pattison acted without integrity as he sought to conceal the true cost of Pave's investment services.

Complaints handling

5.21. The FSA finds that Pave failed to comply with the relevant requirements and standards of the regulatory system as it failed to acknowledge and investigate customers' complaints fairly and in accordance with the firm's own complaints handling procedures. The FSA considers that Mr Pattison is at fault for this failure as it was he who was responsible for the decisions relating to all complaints. Furthermore the FSA also considers that Mr Pattison is personally culpable for Pave's failings in this area because he caused Pave to breach certain specific requirements such as the need to inform a customer of his right to refer his complaint to the FOS.

The definition of integrity

5.22. The FSA rejects Mr Pattison's submissions concerning the definition of integrity. The FSA considers that that conduct lacking in integrity is not marked by "deliberate and wilful breaches of the law". Instead the FSA finds that conduct lacking in integrity is marked by recklessness. Indeed the FSA notes that in the excerpt from paragraph 49 of Fox Hayes v. FSA [2009] EWCA Civ 76, upon which Mr Pattison sought to rely in support of his submission, Longmore LJ made clear that there was a distinction between reckless and deliberate misconduct. The FSA considers that reckless conduct, as seen in this matter, clearly equates to conduct lacking in integrity.

Sanction

5.23. In the light of the foregoing findings the FSA considers that the proposed sanctions are merited in this case. Whilst Mr Pattison argued for an alternative outcome the FSA notes that he did so on the basis that he only accepted responsibility for one aspect of the overall case against him (and this admission was made with a significant caveat). The FSA rejects Mr Pattison's submissions about the appropriate sanctions in this case and considers that the proportionate response in this case is to impose a financial penalty, withdraw his approval and to prohibit him (in the terms set out in paragraph 1(3) of this notice). The FSA considers that the financial penalty set out at paragraph 1(1) of this notice properly reflects the seriousness of Mr Pattison's misconduct. Additionally the FSA notes that it has seen no evidence of verifiable financial hardship. Therefore the FSA does not consider that the financial penalty should be reduced in his case. In relation to the other two sanctions; the FSA considers that it is necessary to withdraw Mr Pattison's approval and to prohibit him as he has engaged in serious misconduct and the FSA considers that he continues to pose a risk to the FSA's objectives.

Conclusion

5.24. On the basis of the facts and matters and analysis set out in this Notice the FSA has therefore concluded that:

(1) Mr Pattison acted recklessly and thus failed to act with integrity in carrying out his controlled functions in contravention of Statement of Principle 1 by:

(a) failing to inform himself of the statutory and regulatory restrictions on the promotion of UCIS before starting to promote and recommend them to Pave's customers (and ignored warnings, which he ought to have read as part of his due diligence, in the UCIS marketing material that he duly passed on to Pave's customers);

(b) using the Lifeplanner as a sales tool which modelled dangerously optimistic projected returns and which had the effect of persuading customers to accept very high levels of investment risk;

(c) closing his mind to the risks associated with retail customers investing large proportions of their wealth in UCIS directly, through gearing and as part of their pension provision; and

(d) concealing the true cost of Pave's investment service from customers through the opaque operation of its notional account;

(2) Mr Pattison failed to act with due skill, care and diligence in carrying out the CF30 Customer function in contravention of Statement of Principle 2 by:

(a) carrying out flawed assessments of customers' attitudes to investment risk in a sales process which included increasing customers' attitude to risk scores in line with Pave's understanding of the risks associated with the UCIS on its shortlist without adequate regard to the customers' investment history and their previously documented attitudes to investment risk;

(b) producing and sending written communications to customers about UCIS (e.g. the executive summaries) which contained inaccurate and inconsistent information about the nature and level of risks associated with the UCIS;

(c) failing during the sales process to make clear to customers the level of investment growth required to offset the costs and/or disclose to customers the impact of a failing or underperforming scheme; and

(d) making personal recommendations to customers to invest in UCIS which were not suitable, taking into account, for example, the customers' previous attitudes to investment risk, Pave's methods of raising finance for some of these investments (which included gearing of some customers' residential properties), and pension switching, with a high concentration of UCIS (up to 80%) in each customer's portfolio; and

(3) Mr Pattison failed to take reasonable steps to ensure that Pave complied with the relevant requirements and standards of the regulatory system, in breach of Statement of Principle 7, by:

(a) implementing Pave's sales model and sales practices which contained inherent flaws in the approach to KYC and which led to systemic failures in the way that Pave made investment recommendations to customers that failed to comply with the rules in COBS, and

(b) failing to ensure that Pave acknowledged and investigated customers' complaints fairly and in accordance with Pave's own complaints handling procedure and with regulatory requirements in DISP.

5.25. In the light of the foregoing the FSA concludes that it is appropriate to impose a financial penalty of £90,000, withdraw Mr Pattison'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. A further analysis of these sanctions is provided below.

6. ANALYSIS OF THE SANCTIONS

Imposition of the financial penalty

6.1. The FSA's policy on the imposition of financial penalties relevant to the misconduct detailed in this notice is set out in Chapter 6 of the version of the Decision Procedure and Penalties Manual ("DEPP") in force prior to 6 March 2010, which formed part of the FSA Handbook. All references to DEPP in this section are references to that version of DEPP. The FSA has also had regard to the provisions of the Enforcement Manual ("ENF"), which were in force for the early part of the Relevant Period.

6.2. 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 providing an incentive for compliant behaviour.

6.3. In determining whether a financial penalty is appropriate the FSA is required to consider all the relevant circumstances of a case.

6.4. 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 (DEPP 6.5.2(1))

6.5. In determining the level of the financial penalty, the FSA has had regard to the need to ensure those who are approved persons exercising significant influence functions act in accordance with regulatory requirements and standards. The FSA considers that a penalty should be imposed to demonstrate to Mr Pattison and others the seriousness of failing to meet these requirements.

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

6.6. As a result of Mr Pattison's failings, Pave exposed retail customers (including his own customers) to a risk of investing in schemes for which they did not have adequate knowledge or experience. Consequently, these customers have invested significant proportions of their assets, sometimes geared by raising additional borrowing, in schemes that are not suited to their circumstances, attitude to risk or level of understanding.

6.7. Some of the unsuitable schemes have been wound up or suspended, resulting in crystallised or potential financial losses for customers, many of whom could not absorb these losses and in some cases may be facing financial ruin. Customers may also face difficulties and potential financial losses in disinvesting from UCIS which were not suitable for them in the first place.

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

6.8. The FSA has concluded that in certain specified respects (see paragraph 5.6(1) above) Mr Pattison's conduct was reckless. Given his long experience in the financial services industry Mr Pattison must have been aware of the risks associated with

Pave's sales model and sales practices, dependent as it was on the Lifeplanner to encourage customers to enter into high risk aspirational wealth creation programmes. Mr Pattison must also have been aware of the opaque method used to conceal from customers the true cost of Pave's services.

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

6.9. When determining the appropriate level of financial penalty, the FSA will take into account that individuals will not always have the same resources as 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 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.

6.10. The FSA recognises that the financial penalty imposed on Mr Pattison is likely to have a significant impact on him as an individual but considered it to be proportionate in relation to the seriousness of his misconduct and as an approved person performing a significant influence function at Pave.

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

6.11. The FSA considers that a financial penalty of the level proposed is appropriate, having taken account of all relevant factors. Mr Pattison has been given the opportunity to submit a statement of means form to the FSA but has not done so. The FSA has no evidence that Mr Pattison would be unable to pay such a financial penalty.

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

6.12. The FSA is aware that Mr Pattison received dividends as a result of his shareholding in Pave, and therefore stood to gain benefit from the increased revenue produced by Pave's sales model.

Conduct following the breach (DEPP 6.5.2G(8))

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

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

6.14. The FSA has taken into account the fact that Mr Pattison has not been the subject of previous disciplinary action by the FSA.

Other action taken by the FSA (DEPP 6.5.2G(10))

6.15. The FSA has taken into account action against other approved persons for similar conduct.

6.16. Taking into account the above factors, the FSA has decided to impose a financial penalty of £90,000 on Mr Pattison.

Withdrawal of approval and prohibition

6.17. Given the nature and seriousness of the failures outlined above the FSA having had regard to the guidance in Chapter 9 of the Enforcement Guide ("EG"), has decided that Mr Pattison lacks integrity and is not competent and capable, and is therefore not fit and proper and thus it is appropriate in this case to prohibit Mr Pattison from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm and to withdraw his approval. The relevant provisions of EG are set out in the Annex to this notice.

7. DECISION MAKER

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

8. IMPORTANT

8.1. This Decision Notice is given to Mr Pattison and Pave under sections 57, 63 and 67 and in accordance with section 388 of the Act. The following information is important.

The Upper Tribunal

8.2. Mr Pattison 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 Pattison 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 on his behalf and filed with a copy of this Notice. The Tribunal's address is: The Upper Tribunal, Tax and Chancery Chamber, 45 Bedford Square, London WC1B 3DN (tel: 020 7612 9700; email **financeandtaxappeals@tribunals.gsi.gov.uk**. Further details are contained in "Making a Reference to the UPPER TRIBUNAL (Tax and Chancery Chamber)" which is available from the Upper Tribunal Website:

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

8.3. Mr Pattison 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 Chris Walmsley at the FSA, 25 The North Colonnade, Canary Wharf, London, E14 5HS.

Access to evidence

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

(1) the material upon which the FSA has relied in deciding to give him this Decision Notice; and

(2) any material other than material falling within sub-paragraph (1) which was considered by the FSA in reaching the decision that gave rise to the obligation to give this notice or was obtained by the FSA in connection with the matter to which this notice relates but which was not considered by it in reaching that decision ("secondary material"), which, in the opinion of the FSA, might undermine that decision.

8.5. A schedule of the material upon which the FSA has relied in deciding to give Mr Pattison this Decision Notice was sent to him with the Warning Notice. There is no secondary material to which the FSA must grant Mr Pattison access.

Interested party

8.6. This Notice is given to Pave as an interested party in accordance with section 63(3) of the Act.

Confidentiality and publicity

8.7. Mr Pattison should note that this Decision Notice may contain confidential information and should not be disclosed to a third party (except for the purpose of obtaining advice on its contents). The effect of Section 391 of the Act is that neither Mr Pattison nor any other person to whom a Decision Notice is given or copied, may publish the notice or any details concerning it unless the FSA has published the notice or those details.

8.8. Mr Pattison should also be aware that, in addition to publishing the Decision Notice or any details concerning it, the FSA must publish such information about the matter to which a Final Notice relates as it considers appropriate. Mr Pattison therefore should be aware that any Final Notice may contain reference to the facts and matters contained in this Notice.

FSA contacts

8.9. For more information concerning this matter generally Mr Pattison should contact Chris Walmsley at the FSA (direct telephone line: 020 7066 5894).

Tim Herrington
Chairman, Regulatory Decisions Committee

ANNEX

RELEVANT STAUTORY PROVISIONS, REGULATORY REQUIREMENTS AND FSA GUIDANCE

1. Statutory provisions

1.1. The FSA's statutory objectives, set out in section 2(2) of the Act, include the protection of consumers.

1.2. The FSA has the power, by virtue of section 66 of the Act, to impose a financial penalty on Mr Pattison of such amount as it considers appropriate where it appears to the FSA that he is guilty of misconduct and it is satisfied that it is appropriate in all the circumstances to take action against him.

1.3. Mr Pattison is guilty of misconduct if, while an approved person, he fails to comply with a statement of principle issued under section 64 or has been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under the Act.

1.4. Pursuant to section 63 of the Act, the FSA has the power to withdraw the approval given to Mr Pattison under section 59 of the Act – to perform the significant controlled functions of CF10 Compliance Oversight and CF11 Money Laundering Reporting – if it considers that Mr Pattison is not a fit and proper person to perform them.

2. Statements of Principle for Approved Persons

2.1. The Statements of Principle are issued pursuant to section 64 of the Act. The section sets out Statements of Principle with which approved persons are required to comply when performing a controlled function for which approval has been sought and granted. They are general statements of the fundamental obligations of approved persons under the regulatory system. The Statements of Principle also contain descriptions of conduct which, in the opinion of the FSA, constitutes a failure to comply with a particular Statement of Principle and describe factors which the FSA

will take into account in determining whether an approved person's conduct complies with it.

2.2. APER 3.1.3G states, as guidance, that when establishing compliance with, or breach of, a Statement of Principle, account will be taken of the context in which a course of conduct was undertaken, the precise circumstances of the individual case, the characteristics of the particular controlled function and the behaviour expected in that function.

2.3. APER 3.1.4G states, as guidance, that an approved person will only be in breach of a Statement of Principle if they are personally culpable, that is in a situation where their conduct was deliberate or where their standard of conduct was below that which would be reasonable in all the circumstances.

2.4. In this case, the FSA considers the most relevant Statements of Principle to be Statements of Principle 1, 2 and 7.

2.5. Statement of Principle 1 requires that an approved person must act with integrity in carrying out his controlled function.

2.6. Statement of Principle 2 requires that an approved person must act with due skill, care and diligence in carrying out his controlled function.

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

2.8. APER 4.1.2E to 4.1.15E provide examples of the types of behaviour that, in the opinion of the FSA, do not comply with Statement of Principle 1. These include:

(1) Deliberately misleading (or attempting to mislead) by act or omission a client (APER 4.1.3(1)E);

(2) deliberately misleading a client about the likely performance of investment products by providing inappropriate projections of future investment returns (APER 4.1.4(4)E); and

(3) deliberately recommending an investment to a customer where the approved person knows that he is unable to justify its suitability for that customer (APER 4.1.5E).

2.9. APER 4.2.2E to 4.2.13E provide examples of the types of behaviour that, in the opinion of the FSA, do not comply with Statement of Principle 2. These include:

(1) failing to inform a customer of material information in circumstances where the approved person ought to have been aware of such information and of the fact that he should provide it, including failing to explain the risks of an investment to a customer (APER 4.2.3E and 4.2.4E);

(2) recommending an investment to a customer where the approved person does not have reasonable grounds to believe that it is suitable for that customer (APER 4.2.5E); and

(3) recommending transactions without a reasonable understanding of the risk exposure of the transaction to a customer including where that recommendation is made without a reasonable understanding of the liability (either potential or actual) of the transaction (APER 4.2.6E and 4.2.7E).

2.10. APER 4.7.2E to 4.7.10E provide examples of the types of behaviour that, in the opinion of the FSA, do not comply with Statement of Principle 7. These include:

(1) 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 standards of the regulatory system in respect of the relevant firm's regulated activities (APER 4.7.3E);

(2) 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 regulatory system in respect of the relevant firm's regulated activities (APER 4.7.4E); and

(3) failing to take reasonable steps to ensure that procedures and systems of control are reviewed and, if appropriate, improved, following the identification of significant breaches (whether suspected or actual) of the relevant requirements and standards of the regulatory system relating to its regulated activities, including but not limited to:

(a) unreasonably failing to implement recommendations for improvements in systems and procedures; or

(b) unreasonably failing to implement recommendations for improvements to systems and procedures in a timely manner;

(APER 4.7.7E and 4.7.8E).

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

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

3.2. 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.

3.3. The FSA will consider the full circumstances of each case when determining whether or not to take action for a financial penalty. DEPP k6.2.1G sets out guidance on a non-

exhaustive list of factors that may be of relevance in determining whether to take action for a financial penalty, which include the following.

(1) DEPP 6.2.1G(1): The nature, seriousness and impact of the suspected breach.

(2) DEPP 6.2.1G(2): The conduct of the person after the breach.

(3) DEPP 6.2.1G(3): The previous disciplinary record and compliance history of the person.

(4) DEPP 6.2.1G(4): FSA guidance and other published materials.

(5) DEPP 6.2.1G(5): Action taken by the FSA in previous similar cases.

4. Determining the level of the financial penalty

4.1. The FSA will consider all the relevant circumstances of a case when it determines the level of financial penalty. DEPP 6.5.2G sets out guidance on a non exhaustive list of factors that may be of relevance when determining the amount of a financial penalty.

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

(1) whether the breach revealed serious or systematic weaknesses in the person's procedures or of the management systems or internal controls relating to all or part of a person's business (DEPP 6.5.2G(2)(b)); and

(2) the general compliance history of the person, including whether the FSA has previously brought to the person's attention, issues similar or related to the conduct that constitutes the breach in respect of which the penalty is imposed (DEPP 6.5.2(9)(d)).

5. Fit and Proper Test for Approved Persons

5.1. The part of the FSA Handbook entitled "FIT" sets out the Fit and Proper Test for Approved Persons. The purpose of FIT is to outline the main criteria for assessing the

fitness and propriety of a candidate for a controlled function. FIT is also relevant in assessing the continuing fitness and propriety of an approved person.

5.2. FIT 1.3.1G provides that the FSA will have regard to a number of factors when assessing a person's fitness and propriety. One of the considerations will be the person's competence and capability.

5.3. As set out in FIT 2.2, in determining a person's competence and capability, the FSA will have regard to matters including but not limited to:

(1) whether the person satisfies the relevant FSA training and competence requirements in relation to the controlled function the person performs or is intended to perform; and

(2) whether the person has demonstrated by experience and training that the person is able, or will be able if approved, to perform the controlled function.

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

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

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

6.3. EG 9.4 sets out the general scope of the FSA's powers in this respect, which include the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant. EG 9.5 provides that the scope of a prohibition order will vary according to the range of 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 posed by him to consumers or the market generally.

6.4. In circumstances where the FSA has concerns about the fitness and propriety of an approved person, EG 9.8 to 9.14 provide guidance. In particular, EG 9.8 states that the FSA may consider whether it should prohibit that person from performing functions in relation to regulated activities, withdraw that person's approval or both. In deciding whether to withdraw approval and/or make a prohibition order, the FSA will consider whether its regulatory objectives can be achieved adequately by imposing disciplinary sanctions.

6.5. EG 9.9 states that the FSA will consider all the relevant circumstances when deciding whether to make a prohibition order against an approved person and/or to withdraw that person's approval. Such circumstances may include, but are not limited to, the following factors:

(1) whether the individual is fit and proper to perform functions in relation to regulated activities, including in relation to the criteria for assessing the fitness and propriety of an approved person in terms of competence and capability as set out in FIT 2.2;

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

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

(4) 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;

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

(6) the previous disciplinary record and general compliance history of the individual.

6.6. 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 serious lack of competence.

7. Complaints handling rules

7.1. DISP 1.3.1 R in the part of the Handbook entitled Dispute Resolution: Complaints ("DISP") requires that effective and transparent procedures for the reasonable and prompt handling of complaints must be established, implemented and maintained by the respondent.

7.2. DISP 1.4.1 R requires that once a complaint has been received by a respondent, it must:

(1) investigate the complaint competently, diligently and impartially; and

(2) assess fairly, consistently and promptly the subject matter of the complaint, whether the complaint should be upheld, what remedial action or redress (or both) may be appropriate and, if appropriate, whether it has reasonable grounds to be satisfied that another respondent may be solely or jointly responsible for the matter alleged in the complaint.

7.3. DISP 1.6.1 R requires that on receipt of a complaint:

(1) a respondent must send the complainant a prompt written acknowledgement providing early reassurance that it has received the complaint and is dealing with it, and

(2) ensure the complainant is kept informed thereafter of the progress of the measures being taken for the complaint's resolution.

7.4. DISP 1.6.2 R requires that the respondent must, by the end of eight weeks after its receipt of the complaint, send the complainant:

(1) a final response; or

(2) a written response which explains why it is not in a position to make a final response and indicate when it expects to be able to provide one, inform the complainant that he may now refer the complaint to the FOS, and enclose a copy of the FOS standard explanatory leaflet.

8. Inducements

8.1. COBS 2.3.1R, in force since 1 November 2007, states that a firm which carries out designated investment business (e.g. arranging deals in units in CIS) must not pay or accept any fee or commission in relation to designated investment business carried on for a customer other than:

(1) a fee or commission paid or provided to or by the customer or a person on behalf of the customer; or

(2) a fee or commission paid or provided to or by a third party or a person acting on behalf of a third party, if:

(a) the payment of the fee or commission does not impair compliance with the firm's duty to act in the best interests of the customer; and

(b) the existence, nature and amount of the fee or commission or, where the amount cannot be ascertained, the method of calculating that amount, is clearly disclosed to the customer, in a manner that is comprehensive, accurate and understandable, before the provision of the service;

(c) in relation to MiFID or equivalent third country business (e.g. making a personal recommendation in relation to units in collective investment undertakings), the payment of the fee or commission is designed to enhance the quality of the service to the customer; or

(3) proper fees which enable or are necessary for the provision of designated investment business or ancillary services, such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and which, by their nature,

cannot give rise to conflicts with the firm's duties to act honestly, fairly and professionally in accordance with the best interests of its customers.

8.2. COBS 2.3.2R states that a firm will satisfy this disclosure obligation if it:

(1) discloses the essential arrangements relating to the fee or commission in summary form;

(2) undertakes to the customer that further details will be disclosed on request; and

(3) honours the undertaking in (2).

8.3. Prior to 1 November 2007, COB 5.7.3R contained similar rules about disclosing charges to customers. In particular, COB 5.7.3 R(1) stated that a firm, before conducting designated investment business for a private customer, must disclose in writing to that private customer the basis or amount of its charges for conducting that business and the nature or amount of any other income receivable by it.

9. UCIS

The Glossary defines a UCIS as a CIS which is not a regulated CIS. A regulated CIS is defined in the Glossary as:

(1) an investment company with variable capital (a body incorporated under the Open Ended Investment Companies Regulations 2001 or the equivalent Northern Ireland regulations);

(2) an authorised unit trust scheme (a unit trust scheme which is authorised for the purposes of the Act by an FSA authorisation order; or

(3) a recognised scheme, i.e. a scheme under:

(a) section 264 of the Act (schemes constituted in other EEA states);

(b) section 270 of the Act (schemes authorised in designated countries or territories); or

(c) section 272 of the Act (individually recognised overseas schemes);

whether or not the units are held within a PEP, ISA or personal pension scheme.

Promotion of CIS

9.2. Section 238(1) of the Act provides that an authorised person must not communicate an invitation or inducement to participate in a CIS, and therefore also an UCIS. Section 21 of the Act imposes an equivalent restriction in relation to unauthorised persons.

9.3. Section 238 goes on expressly to carve out circumstances where this prohibition will not apply. These include the following.

(1) Where the CIS in question is an authorised unit trust/open ended investment company.

(2) The circumstances set out in the Financial Services and Markets Act 2000 (Promotion of collective investment schemes)(Exemptions) Order 2001 ("the PCIS Order").

(3) The exemptions listed in table 4.12.1R(4) of the Conduct of Business Sourcebook (see COB 3 Annex 5 for the exemptions that applied prior to 1 November 2007)

9.4. 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 order.

9.5. These exemptions pertain to individuals classed as certified high net worth individuals, certified sophisticated investors or self-certified sophisticated investors (articles 21, 23 and 23A of the PCIS Order).

The PCIS Order exemptions - Certified high net worth individuals

9.6. 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. Part I of the Schedule to the PCIS Order sets out the form and content

which such a statement must have. This includes confirmation that at least one of the following sets of circumstances applies:

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

(2) the person held, throughout the previous financial year, assets to the value of £250,000 or more, not including that person's primary residence/mortgage, life insurance or death in service benefits.

9.7. The statement must also contain a confirmation that the individual 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.

9.8. If the person making the communication (i.e. the promotion) 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) includes a specified warning in the following terms which 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 individuals and a reminder that the individual should consult a specialist if in any doubt about participating in a UCIS.

9.9. There are similar provisions for high net worth companies and associations at Article 22.

The PCIS Order exemptions - Sophisticated investors

9.10. There are two sorts of sophisticated investors referred to in the PCIS Order – certified and self-certified.

Certified sophisticated investors

9.11. A certified sophisticated investor is defined in Article 23(1) as someone:

(1) who has a current certificate (signed and dated in the past three years) in writing or other legible form signed by an authorised person to the effect that he is sufficiently knowledgeable to understand the risks associated with participating in a UCIS; and

(2) who has signed, within the previous 12 months, a statement in the following terms:

"I make this statement so I can receive promotions which are exempt from the restriction on promotion of unregulated schemes in the Financial Services and Markets Act 2000. The exemption relates to certified sophisticated investors and I declare that I qualify as such. I accept that the schemes to which the promotions will relate are not authorised or recognised for the purposes of that Act. I am aware that it is open to me to seek advice from an authorised person who specialises in advising on this kind of investment."

9.12. The communication must be accompanied by an indication that section 238 does not apply, of the requirements to be a certified sophisticated investor, a prescribed risk warning and a reminder to seek independent advice.

9.13. Provided all this is met, and the communication is not to participate in a UCIS carried on by the person who certified the investor as sophisticated, then the section 238 restriction will not apply.

Self-certified sophisticated investors

9.14. Article 23A defines a self-certified sophisticated investor as an individual who has signed a statement complying with Part II of the Schedule to the PCIS Order in the past 12 months. Part II of the Schedule to the PCIS Order sets out the form and content which such a statement must have. This includes confirmation that at least one of the following sets of circumstances applies to the investor:

(1) he is a member of a network or syndicate of "business angels" and has been so for at least the last six months;

(2) he has made more than one investment in an unlisted company in the past two years;

(3) he is working, or has worked in the past two years, in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises;

(4) he is currently, or has been in the two years before signing the statement, a director of a company with an annual turnover of at least £1 million.

9.15. As with certified high net worth individuals, the statement also contains a confirmation that the investor accepts he can lose his property and assets from making investment decisions based on financial promotions and that he is aware that it is open to him to seek specialist advice.

9.16. If the person making the communication (i.e. the promotion) believes on reasonable grounds that he is making it to a self-certified sophisticated investor, then the section 238 restriction will not apply as long as the communication:

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

(2) 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;

(3) includes a specified warning in the following terms which is given both orally (in respect of real time communications) and in writing in the manner prescribed in Article 23A:

"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

(4) is accompanied by an indication that the promotion is exempt from section 238 on the ground that it is made to a self-certified sophisticated investor, together with details of the requirements for self-certified sophisticated investors and a reminder that the individual should consult a specialist if in any doubt about participating in a UCIS.

The relevant COBS and COB exemptions

9.17. 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 table at 4.12.1R(4) of the Conduct of Business Sourcebook (COBS), which has been in force since 1 November 2007. These exemptions mirror (except where indicated below) those set out in COB 3 Annex 5, which was in force prior to 1 November 2007.

9.18. 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.

9.19. 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.

9.20. 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 a customer of the firm or a company in its group.

9.21. Category 7 provides that if a customer is categorised as a "professional customer" or "eligible counterparty" (known as an "intermediate customer" and "market counterparty, respectively, prior to 1 November 2007) then an authorised person can promote to that customer any UCIS in relation to which the customer is so categorised.

9.22. Category 8 (which was not previously included in COB 3 Annex 5) 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.

10. Suitability of advice

10.1. The fact that a customer is eligible to receive a communication promoting an unregulated scheme under one or more exemptions does not mean that the unregulated scheme will be automatically suitable for that customer.

10.2. Principle 9 of the FSA's Principles for Businesses states 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.

In force until 31 October 2007

10.3. COB 5.2.5R requires that before a firm gives a personal recommendation concerning a designated investment to a private customer, it must take reasonable steps to ensure that it is in possession of sufficient personal and financial information about that customer relevant to the services that the firm has agreed to provide; and

10.4. COB 5.4.3R requires that a firm must not, amongst other things, make a personal recommendation of a transaction to a private customer unless it has taken reasonable steps to ensure that the private customer understands the nature of the risks involved.

In force from 1 November 2007

10.5. COBS 9.2.2R provides that:

(1) 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:

(a) meets his investment objectives;

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

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

(2) The information regarding the investment objectives of a customer must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

(3) The information regarding the financial situation of a customer must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

10.6. 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.