

THIS DECISION NOTICE WAS SUPERSEDED BY A [FINAL NOTICE DATED 13 MARCH 2015](#)

DECISION NOTICE

To: **Sam Thomas Kenny**

Address: **12 Graham Avenue
Broxbourne
Hertfordshire
EN10 7DN**

Individual ref: **STK01013**

Date: **11 October 2012**

To: **Gracechurch Investments
Limited (In Liquidation)**

Address: **c/o The Official Receiver's
Office
2nd Floor
4 Abbey Orchard Street
London
SW1P 2HT**

Firm ref: **474151**

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:

ACTION

1. For the reasons set out below, the FSA has decided to:

- (1) impose on Mr Kenny, a financial penalty of £450,000 pursuant to section 66(3)(a) of the Financial Services and Markets Act 2000 (the "**Act**"), for breaches of Statement of Principle 1 of the FSA's Statements of Principle and Code of Practice for Approved Persons ("**APER 1**") and Statement of Principle 7 of the FSA's Statements of Principle and Code of Practice for Approved Persons ("**APER 7**") in his capacity as an approved person at Gracechurch Investments Limited (In Liquidation) ("**Gracechurch**" and/or the "**Firm**") during the period 1 April 2008 to 4 November 2009 (the "**Relevant Period**");

- (2) withdraw the approval given to Mr Kenny to perform the CF1 (Director), CF3 (Chief Executive) and CF30 (Customer) controlled functions at Gracechurch pursuant to section 63(1) of the Act; and
- (3) make an order, prohibiting Mr Kenny from performing any function in relation to any regulated activity carried on by any authorised person or exempt person or exempt professional firm pursuant to section 56(2) of the Act, because he is not a fit and proper person for such a role.

REASONS FOR THE ACTION

2. Mr Kenny was approved (by the FSA under the Act) as a director, the chief executive and as a broker at Gracechurch. He has also been the majority shareholder at Gracechurch since 1 April 2008.
3. Mr Kenny was also approved to perform the CF 28 (systems and controls reporting) controlled function, at Gracechurch during the period 1 April 2008 to 19 August 2008.
4. Gracechurch ceased business on or about 2 February 2010 and went into liquidation on 13 July 2010, before which it was a stockbroking firm, with its offices in the United Kingdom, directly authorised under the Act by the FSA from 1 April 2008.
5. Gracechurch advised individual clients as to their investments in the shares of small companies (“**small-cap stock**”), either unlisted or listed on the London Stock Exchange’s Alternative Investment Market (“**AIM**”) or the PLUS Stock Exchange.
6. The FSA considers that the Firm routinely mis-sold to its clients small-cap stocks through pressure, misrepresentation and knowingly misleading and unsuitable advice and, thereby and otherwise, (including the provision of false statements by Mr Kenny to the FSA in the course of its resulting inquiries), breached the FSA’s:
 - (1) Principles for Business (“**Principles**”) 1, 3, 7 and 9;
 - (2) Conduct of Business Sourcebook (“**COBS**”); and
 - (3) Senior Management Arrangements, Systems and Controls sourcebook (“**SYSC**”);during the Relevant Period.
7. Under the FSA’s Handbook of rules and guidance made under the Act and applicable to Mr Kenny during the Relevant Period:
 - (1) the roles in which Mr Kenny was approved by the FSA at the Firm, as described above, are and were, during the Relevant Period, “*controlled functions*”;
 - (2) Mr Kenny was and is an “*approved person*” in those controlled functions; and
 - (3) all but the broker role are and were “*significant influence*” controlled functions, carrying more responsibility under the FSA’s Handbook than other controlled functions.

8. APER 1 requires and required during the Relevant Period that an approved person such as Mr Kenny should act with integrity in carrying out his or her controlled function.
9. APER 7 requires and required during the Relevant Period that an approved person performing, as Mr Kenny did, one or more significant influence functions should take reasonable steps to ensure that the business of the firm for which he or she is responsible in those controlled functions complies with the relevant requirements and standards of the “*regulatory system*”.
10. The “*regulatory system*” is defined in the glossary to the FSA’s Handbook as “*the arrangements for regulating a firm ... in or under the Act, including the ... Principles and other rules ... and guidance*” including COBS and SYSC.
11. The FSA considers that, during the Relevant Period, Mr Kenny, in his controlled function roles, was personally responsible for numerous significant failings. Specifically, Mr Kenny breached APER 1 because he:
 - (a) personally imposed pressure on and misrepresented material facts to clients when advising them to buy small-cap stock;
 - (b) intentionally trained and encouraged his staff to impose the same pressure when recommending small-cap stock to clients;
 - (c) deliberately withheld a particular advised sale call recording requested by the FSA;
 - (d) knowingly or recklessly provided conflicted advice to clients and then lied to the FSA about that advice;
 - (e) deliberately caused the Firm’s lawyers to provide to the FSA false dates of meetings of a particular committee of the Firm;
 - (f) knowingly employed a senior manager at the Firm without required FSA approval, which individual Mr Kenny also knew to be responsible for encouraging staff to pressure sell; and
 - (g) deliberately vetoed the issuing of an important compliance questionnaire to clients.
12. The FSA also considers that, during the Relevant Period, Mr Kenny breached APER 7 through his responsibility for Gracechurch’s deficient client-specific suitability assessment criteria and broker remuneration structure.
13. For the above reasons (set out in more detail below), the FSA has decided that Mr Kenny’s conduct:
 - i. merits the imposition of a financial penalty of £450,000 under section 66(3)(a) of the Act; and
 - ii. is such that he is not fit and proper to perform any function in relation to any regulated activity carried on by any authorised person or exempt person or exempt

professional firm; and he should therefore be prohibited to that effect under section 56(2) of the Act and have all his controlled function approvals at Gracechurch withdrawn under section 63(1) of the Act.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

14. The relevant statutory provisions and regulatory requirements are set out in the Annex to this notice.

FACTS AND MATTERS RELIED ON

Broker and client numbers, client losses, transaction volumes and reasons for insolvency

15. Gracechurch had a total of 35 individuals approved as brokers by the FSA during the Relevant Period. The Firm had an average of 15 to 20 individuals operating as brokers at any one time. Those brokers made advised telephone sales to customers, with one small-cap stock also being sold on an advised basis in face-to-face meetings.
16. Gracechurch advised approximately 340 clients to buy about £4 million of small-cap stock during the Relevant Period. The Firm received the majority of its revenue in the form of corporate finance commissions from the companies whose shares it advised its clients to buy.
17. Gracechurch's clients would have lost 72% of the amount they invested (a loss of £1.901 million out of £2.624 million) had they held till 12 October 2011 (the Firm's recommended holding period being generally two to five years) eight of the top ten stocks by financial volume that the Firm advised them to buy in the Relevant Period (no current price being available for the other two).
18. Some clients sold a small proportion of those eight shares before the Firm ceased trading, but in such low volumes as not to undermine this 72% loss assessment.
19. Given the significant financial volume of sales of these eight shares, as a proportion of the Firm's overall £4 million approximate sales total, the FSA considers that this 72% is representative of the losses applicable to all client investments through the Firm in the Relevant Period.
20. By comparison, between the beginning of the Relevant Period and close of markets on 11 October 2011:
 - (1) the FTSE 100 Index fell by 7.8%;
 - (2) the FTSE SmallCap Index fell by 9.3%;
 - (3) the FTSE Fledgling Index rose by 16.6%; and
 - (4) the FTSE AIM All-Share Index fell by 26.4%.

21. Gracechurch appointed a compliance consultant in light of the feedback the Firm received from the FSA in August 2009 after an FSA thematic visit in May 2009 that led to the FSA's current investigation and this Decision Notice.
22. According to Mr Kenny's report to the Official Receiver in relation to the Firm's liquidation, the Firm's income dropped by 90% after the compliance consultant started to review the Firm's processes and procedures and all its ongoing advice and it was that 90% drop in income that led to the Firm's insolvency.
23. Having regard to the above, even allowing for recommendations by the Firm that may have led to losses without any breach of the FSA's requirements, the FSA considers that Gracechurch's misconduct during the Relevant Period caused at least £2 million in client losses.
24. The Firm made an audited operating loss of £8,066 for the year to 31 January 2009 on turnover of £1.045 million, from which it paid wages and salaries of £426,388 and consultancy fees of £325,354, of which latter figure £169,435 went to a company controlled by Mr Kenny. The FSA believes that Mr Kenny was additionally paid at least £7,196 in other remuneration by Gracechurch during the same financial year. The FSA does not have comparable figures for the rest of the Relevant Period.

Pressure sales

Mr Kenny's leadership role

25. Mr Kenny, as Gracechurch's chief executive:
 - (1) trained the Firm's other brokers how to overcome legitimate client objections to buying stock;
 - (2) told at least one of the Firm's brokers that, if a client said that they had no money to buy stock, the broker should suggest that they sell other stock and reinvest the proceeds in the stock the Firm was then promoting; and
 - (3) on at least one occasion, informed all Gracechurch staff by email that only brokers who had "*dealt that morning*" could attend a particular Firm lunch, despite the fact that the Firm was giving advice to clients and the Firm's responsibilities to ensure the suitability of that advice.

The FSA's sample review and Mr Kenny as a broker

26. The FSA has reviewed a sample of advice given by the Firm leading to client purchases of nine small-cap stocks, with sales chosen to cover as many of the Firm's brokers and as much of the Relevant Period, from July 2008 to September 2009, as possible and to focus on the largest transactions in each stock.
27. The sample covered ten purchases by eight clients ("**Sample Customers**"), advised by ten of the Firm's brokers. The review involved listening to recordings of calls in which suitability information was gathered and advice was given on the phone rather than face-to-face and taking evidence from those clients who had relevant face-to-face meetings, or where call recordings were not available.

28. Deal calls reviewed by the investigation team involving six of the eight Sample Customers evidence pressure selling techniques. Specifically, this review showed that the Firm's brokers:

- (1) persistently ignored refusals by several clients to buy stock – a technique used by Mr Kenny personally, as a broker, in relation to at least one client, which the Firm's compliance officer during much of the Relevant Period, Carl Davey, has acknowledged amounted to pressure-selling on Mr Kenny's part;
- (2) repeatedly made calls to particular clients until the clients were persuaded to purchase, which Mr Davey has acknowledged amounted to pressure-selling;
- (3) ignored clients' protests that they did not have any funds to invest;
- (4) ignored or brushed off client requests for information in relation to the stocks in question or for time to conduct their own due diligence;
- (5) even where clients were willing to buy, pressured clients to buy more than they had said they were willing to;
- (6) lied to at least one client about the amount other clients were investing;
- (7) told at least one other client that the Firm's recommendation was based on inside information; and
- (8) sent at least two clients invitations or inducements to buy and/or prospectuses in relation to stocks the clients had already refused to buy.

Compliance consultant's sample review

29. Gracechurch appointed a compliance consultant after the FSA thematic visit that led to the FSA's investigation into the Firm and this notice. The compliance consultant conducted its own review of 17 of the Firm's advised sale call recordings occurring in the three months immediately after the FSA's thematic visit.

30. The compliance consultant identified further pressure sales, even after that visit, in relation to two additional clients of the Firm in the Relevant Period, describing:

- (1) one sale as "*extremely pressured*"; and
- (2) the other sale as involving a broker "*hell bent on making a sale*" to a client who had, after an operation, just come out of hospital that day, stated he was "*broke*", refused to buy but was eventually persuaded to change his mind.

Misrepresentations and misleading advice to clients

31. The FSA reviewed Gracechurch's promotional documents for each of the small-cap stocks included in the sample review referred to above, checking whether those documents accurately relayed the financial position of the small-cap stock, and identified call recordings where information from those promotional documents was provided to customers.

32. The promotional documents for four of the nine small-cap stocks contained material misrepresentations of the financial position of the stock. In addition, in recorded calls the brokers made statements which misrepresented material financial features of and comparators with the small-cap stock they were advising clients to buy.
33. In addition, the FSA identified and reviewed two recorded calls where Mr Kenny gave advice as a broker. In those calls, Mr Kenny personally told:
 - (1) two clients that unlisted companies whose stock the Firm was promoting would list when that was by no means certain; and
 - (2) one of those clients that the Firm would in future almost certainly buy back, at a profit to the client, the small-cap stock Mr Kenny was advising him to buy, when there was no obligation on the Firm to do so.

Withholding of call recording

34. Mr Kenny, by his own admission, decided to withhold from the FSA a recording of a particular advised sales call between a client of the Firm and one of its employees. That recording had been specifically requested by the FSA at the thematic visit referred to above. It evidenced advice given to that client by that employee, who was not FSA-approved to give such advice.

Conflicted advice

35. In or about March 2009, the Firm supplied at least two clients with an information memorandum (“**IM**”), produced by and in relation to shares in a particular small-cap company being recommended by the Firm at 1p per share.
36. That IM disclosed that several persons, including Mr Kenny, were shareholders in the small-cap company in question and how many shares they held. The IM did not, however, identify those persons’ links to the Firm.
37. Further, Mr Kenny, who had been allotted his shares in the small-cap company at only 0.001p per share, attended meetings with clients at which he personally recommended the stock and provided clients with copies of the IM.
38. Mr Kenny recognised his personal conflict by recusing himself from voting at the meeting of the Firm’s relevant committee at which it was decided that the stock was suitable to be promoted to clients on an advised basis at 1p per share.
39. The FSA considers that Mr Kenny knew or should have known that the IM failed to fully disclose the links with Gracechurch that he and other shareholders in the company had.
40. Mr Kenny then assured the FSA in writing in August 2009 that “*no conflicted persons were involved in the advisory process*” in relation to this stock. This was untrue and Mr Kenny must have known this was untrue.
41. After the FSA’s thematic visit and after the resultant initial FSA feedback, the Firm amended its conflicts policy, from 1 June 2009, so as to require that at least two persons

with no relevant conflict should attend any such committee meeting and no conflicted person could vote at such a meeting.

42. Despite this amendment to its conflicts policy in light of the FSA's initial feedback, the Firm, in August and September 2009, promoted the same stock in a second round of advised sales, this time at 3p per share, three times the previous price, but had no relevant committee meeting, in breach of its own procedures.
43. Mr Kenny has been unable to explain how the decision to undertake the second round of advised sales was made by the Firm. He has conceded that whoever decided that the Firm should promote and advise clients to buy the stock at 3p per share was conflicted, in further breach of the Firm's own procedures, and that that breach was his responsibility.
44. Further to the FSA's final feedback after the thematic visit, Gracechurch cancelled all such 3p sales. It refunded £13,350 in cash to some of the clients who had paid for such stock at 3p. It advised other such clients to reinvest further such refunds in other small-cap stock rather than take them in cash.

Questionnaire veto

45. Mr Davey suggested to Mr Kenny, when the former first joined Gracechurch, that the Firm should, in accordance with relevant specific FSA guidance published in June 2008, send out a questionnaire to clients, intended to identify whether it was treating them fairly and, if not, in what ways. Mr Kenny vetoed this proposal.
46. The FSA considers that Mr Kenny vetoed the questionnaire to prevent clients being prompted to complain about the way they had been treated by the Firm.

Employment of unapproved senior manager

47. Gracechurch applied in September 2008 for FSA approval of an individual at the Firm as a senior manager with significant responsibility for its business. Such a role is categorised by the FSA as a significant influence function. Persons approved in such functions, as noted above, have extra obligations (beyond those of persons approved in other functions) under the FSA's Handbook.
48. By December 2008, if not earlier, Mr Kenny had become aware that that individual was linked to an ongoing investigation by the FSA into his previous employer. The Firm therefore withdrew the application in December 2008, by notice to the FSA.
49. The investigation in question concluded after the relevant individual left the Firm and the Firm did not therefore submit a further application to the FSA for such approval. The relevant individual nevertheless continued to work at the Firm for at least eight months after the approval application was withdrawn and was primarily responsible for broker recruitment and responsible alongside Mr Kenny for broker training.
50. Further, while at the Firm, the individual in question, by email copied to Mr Kenny, on at least one occasion, threatened all brokers with disciplinary action if they failed to reach monthly advised sales volume targets.

51. Mr Davey has conceded that, given the withdrawal, the individual “*had too much of a role in running the floor*” and has also stated that he raised concerns with Mr Kenny at the possibility that the individual was transplanting the pressure sales culture of his previous employer to Gracechurch.
52. That individual was therefore performing the significant influence role in respect of which the Firm had applied to the FSA for approval, until approximately September 2009, if not later. This was a breach by the Firm of section 59(1) of the Act.
53. Further, the Firm employed that individual despite Mr Kenny knowing, by December 2008, quite apart from Mr Davey’s warnings, that the FSA’s concerns were well-founded and that that individual had in fact been responsible for creating the pressure sales culture at his previous employer. Mr Kenny has admitted to the FSA that the decision to recruit the individual was “*a bad one.*”

False committee meetings

54. The FSA asked the Firm, on 8 September 2009, to provide the dates, since the FSA’s thematic visit of 19 May 2009 referred to above, on which the committee of the Firm, which was, as described above, responsible for considering whether to promote and advise clients to buy particular small-cap stock, had met.
55. By letter dated 11 September 2009, lawyers for the Firm informed the FSA that such meetings had occurred on 4 and 8 June, 1, 17 and 27 July and 10 August 2009. The FSA has, however, been unable to identify, in the large number of the Firm’s documents it subsequently obtained, any evidence that such meetings took place other than on 4 June and 1 July 2009.
56. A recording of a call between Mr Kenny and a third party on 11 September 2009 indicates clearly that Mr Kenny knew that there was no such meeting on 8 June, 17 or 27 July or 10 August 2009. The Firm, however, through its lawyers, represented to the FSA otherwise and the FSA believes, specifically, that its lawyers did so on Mr Kenny’s instructions.
57. Further, the recording shows that Mr Kenny and the third party:
 - (1) deliberately picked those false dates so as to be able to say that the committee met to discuss specific stocks; and
 - (2) were prepared, if the FSA requested copies of relevant minutes, to forge those minutes.

Client-specific suitability assessments

58. In October 2008, Mr Kenny, as a member of the board of directors, approved, revised/updated investment strategies and objectives, prepared by Mr Davey, which the Firm asked new clients to choose between. After this update:
 - (1) they specified that a client choosing a conservative growth investment strategy had:

- (a) the objective of “*significantly*” increasing the capital value of his or her portfolio; and
 - (b) a willingness to take “*high*” overall risk such that “*capital returns may be negative over short to medium time horizons*”.
- (2) the Firm, applying these criteria, classified three out of four of the clients, whose files the FSA reviewed as part of the sampling exercise referred to above and who had stated that their investment objectives were such that they were willing to accept a “*balanced level of risk*”, as willing to accept the high level of “*overall risk*” just described.
59. The Firm’s compliance consultant, instructed as described above, advised it that these criteria were confusing and inconsistent but only at the end of the Relevant Period did the Firm recognise this and attempt to resolve the issue.

Broker remuneration

60. Gracechurch’s broker remuneration structure was redesigned or approved by Mr Kenny in late 2008. Under it, brokers were paid a low base annual salary of £15,000 and significant additional commission-based remuneration. That commission was calculated almost exclusively by reference to the financial volume of sales made, despite almost all those sales being advised.
61. Some account was taken, under that structure, of the results of advice call monitoring. That was, however, insufficient in that:
- (1) it was not retroactive, instead applying only to future commission;
 - (2) the scoring of calls was flawed in that it did not sufficiently reflect their quality - for example, a small number of calls assessed as significant failures balanced against a large majority of perfect calls would lead to no adverse impact on remuneration;
 - (3) no account was taken of the relative financial volume of sales resulting from failed calls; and
 - (4) no account was taken of call monitoring scores when the Firm considered broker promotion, which gave brokers access to better quality leads and more lucrative existing clients.

No representations

62. By its Warning Notice dated 4 May 2012 (the “**Warning Notice**”), the FSA gave notice that it proposed to take the action described above and Mr Kenny was given the opportunity to make representations to the FSA about that proposed action.
63. No representations having been received by the FSA from Mr Kenny within the time allowed by the Warning Notice, the default procedures in DEPP 2.3.2G of the FSA’s Decision Procedure and Penalties Manual (“**DEPP**”) permit the facts and matters

described in the Warning Notice, and repeated in this Decision Notice, to be regarded as undisputed.

64. The FSA has therefore decided, in light of the facts and matters set out above to:
- i. impose on Sam Thomas Kenny, a financial penalty of £450,000;
 - ii. withdraw the approval given to Mr Kenny to perform the CF1 (Director), CF3 (Chief Executive) and CF30 (Customer) controlled functions at Gracechurch; and
 - iii. to make an order, prohibiting Mr Kenny from performing any function in relation to any regulated activity carried on by any authorised person or exempt person or exempt professional firm.

FAILINGS

Controlled functions

65. The controlled function (“CF”) roles in respect of which Mr Kenny was approved by the FSA at the Firm during the Relevant Period were, as they are described in the FSA’s Handbook: CF1: Director, CF3: Chief Executive, CF28: Systems and Controls (between 1 April 2008 and 19 August 2008) and CF30: Customer.
66. The FSA’s Handbook describes each such role and/or the responsibilities arising as follows.
- (1) The responsibilities of a person approved in the CF1: Director role at an FSA-authorised firm are the same, under the FSA Handbook, as those of a director appointed as such under the Companies Acts, together with the responsibilities imposed by APER.
 - (2) Guidance in the FSA’s Handbook describes the responsibility of a person approved in the CF3: Chief Executive role as “*the conduct of the whole of the business ... under the immediate authority of the governing body*” of the relevant firm.
 - (3) The CF28: Systems and Controls function is, as defined in the FSA’s Handbook, “*the function of acting in the capacity of an employee of the firm with responsibility for reporting to the governing body of a firm ... in relation to ... its financial affairs, ... setting and controlling its risk exposure [and] ... adherence to internal systems and controls, procedures and policies.*”
 - (4) The definition of the CF30: Customer function in the FSA’s Handbook includes “*advising on investments ... and performing other [related] functions ... such as dealing and arranging.*”

Breach of APER 1

67. The FSA considers, having regard to the relevant evidential provisions and guidance in the FSA’s Handbook, that Mr Kenny breached APER 1 in that his:
- (a) pressure selling;

- (b) training of other brokers at the Firm to pressure sell;
- (c) conflicted advice;
- (d) TCF questionnaire veto;
- (e) sales of the conflicted stock at 3p; and
- (f) employment of the unapproved senior manager;

were instances of a lack of integrity.

68. Mr Kenny further breached APER 1 in that his:

- (a) withholding of the call recording from the FSA;
- (b) misrepresentations and/or misleading advice to clients;
- (c) statement to the FSA regarding his conflicted advice; and
- (d) falsification of committee meeting dates;

were instances of dishonesty.

Breach of APER 7

69. The FSA also considers, having regard to the relevant guidance in and evidential provisions of the FSA's Handbook, that Mr Kenny breached APER 7 because he failed to take reasonable steps to ensure that Gracechurch complied with the relevant requirements and standards of the regulatory system.

70. Specifically, Mr Kenny caused Gracechurch to breach:

- (1) Principle 3, which requires a firm authorised by the FSA to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems, when he produced the Firm's broker remuneration structure as described above; and
- (2) Principle 9, which requires a firm to take reasonable care to ensure the suitability of its advice, by producing the Firm's client-specific suitability assessment criteria.

Fitness and propriety

71. The FSA (having regard to that part of the FSA's Handbook entitled "*The Fit and Proper Test for Approved Persons*" ("**FIT**")) considers that the repeated instances of dishonesty and lack of integrity, described above are such that Mr Kenny is not fit or proper to perform any function in relation to any regulated activity carried on by any authorised person or exempt person or exempt professional firm.

SANCTION

72. The FSA considers, having regard to:

- (1) Mr Kenny's report to the Official Receiver in the context of the Firm's liquidation – that the introduction of the compliance consultant referred to above as reviewer of all the Firm's transactions from September 2009 led to the Firm's income dropping by 90%; and
- (2) the significant losses that would have been made by the Firm's clients had they kept the most significant of the small-cap stock the Firm advised them to buy to October 2011, which losses far exceed any losses they would have incurred since the Relevant Period began had they invested in even small-cap listed UK equity indices as described above;

that many of the Firm's clients were mis-sold, often deliberately, the small-cap stock they bought on the basis of the Firm's advice during the Relevant Period.

73. The FSA further considers that Mr Kenny was primarily responsible, in his leadership roles at the Firm, for that mis-selling and the losses arising, as described above, given his:

- (1) inappropriate relevant encouragement and training (which the FSA considers, given his other breaches of APER 1, to have been widespread, beyond the examples as to which the FSA has uncovered direct evidence, referred to above);
- (2) recruitment of the unapproved senior manager, who, to Mr Kenny's knowledge, trained and encouraged the Firm's brokers in the same way; and
- (3) TCF questionnaire veto and failures in relation to suitability assessment and broker remuneration, but for which the mis-selling and losses might have been reduced.

74. In addition, the FSA considers that Mr Kenny's decision to withhold the call recording and his lies to the FSA via the Firm's lawyers as to the Firm's relevant committee meeting dates were particularly egregious breaches of APER 1.

Application of DEPP

75. Having considered the above, in the light of the relevant guidance set out in DEPP, specifically DEPP 6.5.1G and 6.5.2G, as they were worded during the Relevant Period, together with the following:

- (1) the significant total number of different APER 1 breaches, almost all of them deliberate, on Mr Kenny's part during the Relevant Period;
- (2) the extent to which those breaches included attempts to mislead the FSA and hide the Firm's and Mr Kenny's breaches of the requirements of the FSA's Handbook;
- (3) the principal purpose for which the FSA imposes sanctions – to promote high standards of regulatory conduct by deterrence;
- (4) Mr Kenny's remuneration during the Relevant Period, at least until January 2009, of £176,631 per annum, according to the Firm's audited accounts;

- (5) the penalties imposed by the FSA in similar cases, adjusted to take account of material factual differences; and
- (6) by way of mitigation:
 - (a) the facts that Mr Kenny is an individual and has no previous adverse FSA disciplinary history;
 - (b) the fact that Mr Kenny appointed the compliance consultant described above, albeit after the FSA's thematic visit;
 - (c) the refund of £13,350 in cash, as noted above, to the clients who bought the stock described above at 3p, albeit once the FSA pointed out the issue;
 - (d) the extent to which Mr Kenny has co-operated with the FSA's inquiries, at least once the FSA's Enforcement investigation commenced; and
 - (e) the extent to which he has admitted relevant facts and matters, as described above, albeit when faced with clear evidence of his breaches;

the FSA has decided that the appropriate penalty to impose on Mr Kenny is £450,000.

Withdrawal of Approval and Prohibition

76. In light of the above, the FSA has decided to:

- i. withdraw the approval given to Mr Kenny to perform CF1 (Director), CF3 (Chief Executive) and CF30 (Customer) controlled functions at Gracechurch; and
- ii. prohibit Mr Kenny from performing any function in relation to any regulated activity carried on by any authorised person or exempt person or exempt professional firm.

PROCEDURAL MATTERS

Decision maker

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

Important

78. This Decision Notice is given under section 57, 63 and 67 of the Act and in accordance with section 388 of the Act. The following statutory rights are important. It is given to Gracechurch pursuant to section 63 of the Act. The following statutory rights are important.

The Tribunal

79. Mr Kenny and/or Gracechurch have 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 Kenny and/or

Gracechurch have 28 days from the date on which this Decision Notice is given to refer the matter to the Tribunal. A reference to the Tribunal is made by way of a reference notice (Form FTC3) signed by Mr Kenny and/or on behalf of Gracechurch filed with a copy of this Decision 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 Tribunal website:

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

80. Mr Kenny and Gracechurch 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 Kate Tuckley at the FSA, 25 The North Colonnade, Canary Wharf, London E14 5HS.

Access to evidence

81. Section 394 of the Act applies to this Decision Notice. Mr Kenny and Gracechurch, to whom this notice is given, have the right to access:
- (1) the material upon which the FSA has relied in deciding to give this Decision Notice; and
 - (2) any secondary material which, in the opinion of the FSA, might undermine that decision. There is no such secondary material.

Confidentiality and publicity

82. Mr Kenny and Gracechurch 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). Section 391 of the Act provides that neither the FSA nor a 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. The FSA must publish such information about the matter to which a Decision Notice or Final Notice relates as it considers appropriate. Mr Kenny and Gracechurch should be aware, therefore, that the facts and matters contained in this notice may be made public.

FSA contacts

83. For more information concerning this matter generally, contact Kate Tuckley at the FSA (direct line: 020 7066 7086/fax: 020 7066 7087).

Martin Hagen
Deputy Chairman, Regulatory Decisions Committee

ANNEX

THE ACT

Section 56

- “(1) *Subsection (2) applies if it appears to the Authority that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.*
- (2) *The Authority may make an order (“a prohibition order”) prohibiting the individual from performing a specified function, any function falling within a specified description or any function.*
- (3) *A prohibition order may relate to –*
- (a) *a specified regulated activity, any regulated activity falling within a specified description or all regulated activities;*
 - (b) *authorised persons generally or any person within a specified class of authorised person.”*

Section 59

- “(1) *An authorised person (“A”) must take reasonable care to ensure that no person performs a controlled function under an arrangement entered into by A in relation to the carrying on by A of a regulated activity, unless the Authority approves the performance by that person of the controlled function to which the arrangement relates.*

...

- (10) *“Arrangement”:*
- (a) *means any kind of arrangement for the performance of a function of A which is entered into by A or any contractor of his with another person; and*
 - (b) *includes, in particular, that other person’s ... employment (whether under a contract of service or otherwise).”*

Section 63

- “(1) *The Authority may withdraw an approval given under section 59 if it considers that the person in respect of whom it was given is not a fit and proper person to perform the function to which the approval relates.*

- (2) *When considering whether to withdraw its approval, the Authority may take into account any matter which it could take into account if it were considering an application made under section 60 in respect of the performance of the function to which the approval relates.”*

Section 66

- “(1) *The Authority may take action against a person under this section if –*
- (a) *it appears to the Authority that he is guilty of misconduct; and*
 - (b) *the Authority is satisfied that it is appropriate in all the circumstances to take action against him.*
- (2) *A person is guilty of misconduct if, while an approved person –*
- (a) *he has failed to comply with a statement of principle issued under section 64;*
or
- ...
- (3) *If the Authority is entitled to take action under this section against a person, it may do one or more of the following –*
- (a) *impose a penalty on him of such amount as it considers appropriate;*
-”

THE FSA’S HANDBOOK

The Statements of Principle and Code of Practice for Approved Persons (“APER”)

APER 3.1 – Introduction

APER 3.1.1G

“This Code of Practice for Approved Persons is issued under section 64 of the Act (Conduct: statements and codes) for the purpose of helping to determine whether or not an approved person's conduct complies with a Statement of Principle. The code sets out descriptions of conduct which, in the FSA's opinion, do not comply with the relevant Statements of Principle. The code also sets out certain factors which, in the opinion of the FSA, are to be taken into account in determining whether an approved person's conduct complies with a particular Statement of Principle.”

APER 3.1.3G

“The significance of conduct identified in the Code of Practice for Approved Persons as tending to establish compliance with or a breach of a Statement of Principle will be assessed only after all the circumstances of a particular case have been considered. Account will be taken of the context in which a course of conduct was undertaken, including the precise circumstances of the individual case, the characteristics of the particular controlled function and the behaviour to be expected in that function.”

APER 3.1.4G(1)

“An approved person will only be in breach of a Statement of Principle where he is personally culpable. Personal culpability arises where an approved person’s conduct was deliberate or where the approved person’s standard of conduct was below that which would be reasonable in all the circumstances.”

APER 3.1.6G

“The Code of Practice for Approved Persons (and in particular the specific examples of behaviour which may be in breach of a generic description of conduct in the code) is not exhaustive of the kind of conduct that may contravene the Statements of Principle.”

APER 3.1.8G

“In applying Statements of Principle 5 to 7, the nature, scale and complexity of the business under management and the role and responsibility of the individual performing a significant influence function within the firm will be relevant in assessing whether an approved person’s conduct was reasonable. For example, the smaller and less complex the business, the less detailed and extensive the systems of control need to be. The FSA will be of the opinion that an individual performing a significant influence function may have breached Statements of Principle 5 to 7 only if his conduct was below the standard which would be reasonable in all the circumstances.”

APER 3.2 – Factors Relating to All Statements of Principle

APER 3.2.1E

“In determining whether or not the particular conduct of an approved person within his controlled function complies with the Statements of Principle, the following are factors which, in the opinion of the FSA, are to be taken into account:

- (1) *whether that conduct relates to activities that are subject to other provisions of the Handbook;*
- (2) *whether that conduct is consistent with the requirements and standards of the regulatory system relevant to his firm.”*

APER 3.3 – Factors Relating to Statements of Principle 5 to 7

APER 3.3.1E

“In determining whether or not the conduct of an approved person performing a significant influence function complies with Statements of Principle 5 to 7, the following are factors which, in the opinion of the FSA, are to be taken into account:

- (1) *whether he exercised reasonable care when considering the information available to him;*
- (2) *whether he reached a reasonable conclusion which he acted on;*
- (3) *the nature, scale and complexity of the firm's business;*
- (4) *his role and responsibility as an approved person performing a significant influence function;*
- (5) *the knowledge he had, or should have had, of regulatory concerns, if any, arising in the business under his control.”*

APER 3.2 – Factors Relating to All Statements of Principle

APER 3.2.1E

“In determining whether or not the particular conduct of an approved person within his controlled function complies with the Statements of Principle, the following are factors which, in the opinion of the FSA, are to be taken into account:

- (1) *whether that conduct relates to activities that are subject to other provisions of the Handbook;*
- (2) *whether that conduct is consistent with the requirements and standards of the regulatory system relevant to his firm.”*

APER 3.3 – Factors Relating to Statements of Principle 5 to 7

APER 3.3.1E

“In determining whether or not the conduct of an approved person performing a significant influence function complies with Statements of Principle 5 to 7, the following are factors which, in the opinion of the FSA, are to be taken into account:

- (1) whether he exercised reasonable care when considering the information available to him;*
- (2) whether he reached a reasonable conclusion which he acted on;*
- (3) the nature, scale and complexity of the firm's business;*
- (4) his role and responsibility as an approved person performing a significant influence function;*
- (5) the knowledge he had, or should have had, of regulatory concerns, if any, arising in the business under his control.”*

APER 4.1 – Statement of Principle 1

APER 4.1.2E

(as worded between 1 December 2001 and 31 December 2010)

“In the opinion of the FSA, conduct of the type described in APER 4.1.3 E, APER 4.1.5 E ...[or] APER 4.1.13E does not comply with Statement of Principle 1.”

APER 4.1.3E

“Deliberately misleading (or attempting to mislead) by act or omission:

- (1) a client, or*

...

- (3) the FSA;*

falls within APER 4.1.2 E.”

APER 4.1.4E

“Behaviour of the type referred to in APER 4.1.3 E includes, but is not limited to, deliberately:

...

(2) *misleading a client about the risks of an investment;*

...

(4) *misleading a client about the likely performance of investment products by providing inappropriate projections of future investment returns;*

...

(11) *providing false or inaccurate information to the FSA;”*

APER 4.1.5E

“Deliberately recommending an investment to a customer, or carrying out a discretionary transaction for a customer where the approved person knows that he is unable to justify its suitability for that customer, falls within APER 4.1.2 E.”

APER 4.1.13E

“Deliberately failing to disclose the existence of a conflict of interest in connection with dealings with a client falls within APER 4.1.2 E.”

APER 4.7 – Statement of Principle 7

APER 4.7.2E

“In the opinion of the FSA, conduct of the type described in APER 4.7.3 E, APER 4.7.4 E, APER 4.7.5 E, APER 4.7.7 E, APER 4.7.9 E or APER 4.7.10 E does not comply with Statement of Principle 7.”

APER 4.7.3E

“Failing to take reasonable steps to implement (either personally or through a compliance department or other departments) adequate and appropriate systems of control to comply with the relevant requirements and standards of the regulatory system in respect of its regulated activities falls within APER 4.7.2 E.”

APER 4.7.4E

“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 business’s] regulated activities falls within APER 4.7.2 E.”

APER 4.7.11G

“The FSA expects an approved person performing a significant influence function to take reasonable steps both to ensure his firm's compliance with the relevant requirements and standards of the regulatory system and to ensure that all staff are aware of the need for compliance.”

APER 4.7.12G

(as worded between 1 December 2001 and 5 July 2010)

“An approved person performing a significant influence function need not himself put in place the systems of control in his business Whether he does this depends on his role and responsibilities. He should, however, take reasonable steps to ensure that the business for which he is responsible has operating procedures and systems which include well-defined steps for complying with the detail of relevant requirements and standards of the regulatory system and for ensuring that the business is run prudently. The nature and extent of the systems of control that are required will depend upon the relevant requirements and standards of the regulatory system, and the nature, scale and complexity of the business.”

The Fit and Proper Test for Approved Persons (“FIT”)

FIT 1.3 – Assessing Fitness and Propriety

FIT 1.3.1G

“The FSA will have regard to a number of factors when assessing the fitness and propriety of a person to perform a particular controlled function. The most important considerations will be the person's:

(1) honesty, integrity and reputation;

... .”

FIT 1.3.3G

“The criteria listed in FIT 2.1 to FIT 2.3 are guidance and will be applied in general terms when the FSA is determining a person's fitness and propriety. It would be impossible to produce a definitive list of all the matters which would be relevant to a particular determination.”

FIT 1.3.4G

“If a matter comes to the FSA's attention which suggests that the person might not be fit and proper, the FSA will take into account how relevant and how important it is.”

FIT 2.1 – Honesty, Integrity and Reputation

FIT 2.1.1G

“In determining a person's honesty, integrity and reputation, the FSA will have regard to ... matters including, but not limited to, those set out in FIT 2.1.3 G The FSA ... will consider the circumstances only where relevant to the requirements and standards of the regulatory system.”

FIT 2.1.3G

“The matters referred to in FIT 2.1.1 G to which the FSA will have regard include, but are not limited to:

...

(5) whether the person has contravened any of the requirements and standards of the regulatory system or the equivalent standards or requirements of other regulatory authorities (including a previous regulator), clearing houses and exchanges, professional bodies, or government bodies or agencies;

...

(9) whether the person has been a director, partner, or concerned in the management, of a business that has gone into insolvency, liquidation or administration while the person has been connected with that organisation or within one year of that connection;

...

(13) whether, in the past, the person has been candid and truthful in all his dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards.”

DEPP 6.5 – Determining the Appropriate Level of Financial Penalty

DEPP 6.5.1G(1)

(as worded between 28 August 2007 and 5 March 2010)

“The FSA will consider all the relevant circumstances of a case when it determines the level of financial penalty (if any) that is appropriate and in proportion to the breach concerned. The list of factors in DEPP 6.5.2 G is not exhaustive: not all of these factors may be relevant in a particular case, and there may be other factors, not included below, that are relevant.”

DEPP 6.5.2G

(as worded between 28 August 2007 and 5 March 2010)

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

(1) Deterrence

When determining the appropriate level of penalty, the FSA will have regard to the principal purpose for which it imposes sanctions, namely to promote high standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches and helping to deter other persons from committing similar breaches, as well as demonstrating generally the benefits of compliant business.

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

The FSA will consider the seriousness of the breach in relation to the nature of the rule, requirement or provision breached. The following considerations are among those that may be relevant:

(a) the duration and frequency of the breach;

...

(d) the loss or risk of loss caused to consumers, investors or other market users;

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

The FSA will regard as more serious a breach which is deliberately or recklessly committed. The matters to which the FSA may have regard in determining whether a breach was deliberate or reckless include, but are not limited to, the following:

(a) whether the breach was intentional, in that the person intended or foresaw the potential or actual consequences of its actions;

(b) where the person has not followed a firm's internal procedures and/or FSA guidance, the reasons for not doing so;

...

- (d) *whether the person has given no apparent consideration to the consequences of the behaviour that constitutes the breach;*

...

If the FSA decides that the breach was deliberate or reckless, it is more likely to impose a higher penalty on a person than would otherwise be the case.

- (4) *Whether the person on whom the penalty is to be imposed is an individual*

When determining the amount of a penalty to be imposed on an individual, the FSA will take into account that individuals will not always have the resources of a body corporate, that enforcement action may have a greater impact on an individual, and further, that it may be possible to achieve effective deterrence by imposing a smaller penalty on an individual than on a body corporate. The FSA will also consider whether the status, position and/or responsibilities of the individual are such as to make a breach committed by the individual more serious and whether the penalty should therefore be set at a higher level.

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

- (a) *The FSA may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the person were to pay the level of penalty appropriate for the particular breach. The FSA regards these factors as matters to be taken into account in determining the level of a penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty.*

- (b) *The purpose of a penalty is not to render a person insolvent or to threaten the person's solvency. Where this would be a material consideration, the FSA will consider, having regard to all other factors, whether a lower penalty would be appropriate. This is most likely to be relevant to a person with lower financial resources;*

...

- (8) *Conduct following the breach*

The FSA may take the following factors into account:

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

- (b) *the degree of co-operation the person showed during the investigation of the breach by the FSA, ... ;*

- (c) *any remedial steps taken since the breach was identified, including whether these were taken on the person's own initiative or that of the FSA or another regulatory authority; for example, identifying whether*

consumers or investors or other market users suffered loss and compensating them where they have; correcting any misleading statement or impression; taking disciplinary action against staff involved (if appropriate); and taking steps to ensure that similar problems cannot arise in the future; and

...

(9) *Disciplinary record and compliance history*

The FSA may take the previous disciplinary record and general compliance history of the person into account. This will include:

- (a) *whether the FSA (or any previous regulator) has taken any previous disciplinary action against the person;*

...

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

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

(12) *FSA guidance and other published materials*

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

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

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

The FSA and the person on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, DEPP 6.7 provides that the amount of the penalty which might otherwise have been payable will be reduced to reflect the stage at which the FSA and the person concerned reach an agreement.”