# FINAL NOTICE

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| To: | **Carl Peter Davey** | To: | **Gracechurch Investments Limited (In Liquidation)** |
| Date of birth: | **13 December 1976** | Address: | **The Official Receiver's Office<br>2nd Floor<br>4 Abbey Orchard Street<br>London<br>SW1P 2HT** |
| Individual ref: | **CPD01033** | Firm ref: | **474151** |
| Date: | **20 December 2012** | | |

**ACTION**

1. The FSA gave Carl Peter Davey ("**Mr Davey**") a Decision Notice on 11 October 2012 which notified him that the FSA had decided to:

   (1) withdraw, pursuant to section 63(1) of the Financial Services and Markets Act 2000 (the "**Act**"), the approval previously granted by the FSA for Mr Davey to perform the CF10 (Compliance Oversight), CF11 (Money Laundering Reporting), CF28 (Systems and controls) and CF30 (Customer) controlled functions at Gracechurch Investments Limited ("**Gracechurch**" and the "**Firm**"); and

   (2) make an order pursuant to section 56(2) of the Act prohibiting Mr Davey from performing any function in relation to any regulated activity carried on by an authorised person or exempt person or exempt professional firm (the "**Prohibition Order**").

2. Mr Davey confirmed that he will not be referring the matter to the Upper Tribunal (Tax and Chancery Chamber).

3. Accordingly, for the reasons set out below, the FSA hereby:

   (1) withdraws, pursuant to section 63(1) of the Act, the approval given to Mr Davey to perform the CF10 (Compliance Oversight), CF11 (Money Laundering Reporting), CF28 (Systems and controls) and CF30 (Customer) controlled functions at Gracechurch; and

   (2) makes an order, pursuant to section 56(2) of the Act, with effect from 20 December 2012, prohibiting Mr Davey from performing any function in relation to any regulated activity carried on by any authorised person or exempt person or exempt professional firm, because he is not a fit and proper person to perform such functions.

4. The FSA considered that Mr Davey's conduct also merited a substantial financial penalty pursuant to section 66 of the Act. However, because Mr Davey produced verifiable evidence showing that any penalty imposed by the FSA would cause him serious financial hardship, which the FSA accepted, this amount has been reduced to nil.

5. But for that verifiable evidence, the FSA would have imposed herein a penalty of £175,000 on Mr Davey for his breaches of Statements of Principle 1 and 7 of the FSA's Statements of Principle and Code of Practice for Approved Persons ("**APER 1 and APER 7**").

**REASONS FOR THE ACTION**

6. Mr Davey was approved by the FSA to be responsible at Gracechurch for compliance oversight (and therefore its "*compliance officer*" as that term is used in the FSA's Handbook), as well as responsible for money laundering reporting and as a broker, each from 15 October 2008, and responsible for systems and controls reporting from 19 January 2009. This notice concerns Mr Davey's conduct from 15 October 2008 to 4 November 2009 (the "**Relevant Period**").

7. Gracechurch is in liquidation, having ceased business on or about 2 February 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.

8. 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.

9. During the period 1 April 2008 to 4 November 2009, the FSA has found that Gracechurch routinely mis-sold to its clients small-cap stocks through pressure, misrepresentation, knowingly misleading and unsuitable advice and, thereby and otherwise (including the provision of false statements by Mr Davey 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**").

10. Under the FSA's Handbook:

(1) Mr Davey's roles in which he was FSA-approved were "*controlled functions*";

(2) Mr Davey was an "*approved person*" in those controlled functions; and

(3) the compliance oversight and systems and controls and money laundering reporting roles were, in addition, "*significant influence*" controlled functions, carrying more responsibility under the FSA's Handbook than other controlled functions.

11. APER 1 requires and required during the Relevant Period that an approved person such as Mr Davey should act with integrity in carrying out his or her controlled function.

12. APER 7 requires and required during the Relevant Period that an approved person performing, as Mr Davey did, a significant influence controlled function should take reasonable steps to ensure that the business of the firm for which he or she is responsible in that controlled function complies with the relevant requirements and standards of the "*regulatory system*".

13. The "*regulatory system*" is defined in 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.

14. In his roles as Gracechurch's compliance officer and, from 19 January 2009, also as the person responsible for the Firm's systems and controls reporting, the FSA has found that Mr Davey breached APER 1 and APER 7, as detailed below.

15. Further, the FSA has found that:

(1) Mr Davey's relevant acts and omissions were 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

(2) Mr Davey should be prohibited to that effect under section 56(2) and have all his controlled function role approvals at Gracechurch withdrawn under section 63(1) of the Act.

**RELEVANT STATUTORY AND REGULATORY PROVISIONS**

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

## FACTS AND MATTERS

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

17. Gracechurch had a total of 35 individuals approved as brokers by the FSA during the period 1 April 2008 to 4 November 2009. 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.

18. Gracechurch advised approximately 340 clients to buy about £4 million of small-cap stock during the period 1 April 2008 to 4 November 2009. 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.

19. 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 period 1 April 2008 to 4 November 2009 (no current price being available for the other two).

20. 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.

21. 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 period 1 April 2008 to 4 November 2009.

22. By comparison, between 1 April 2008 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%.

23. 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 Notice.

24. According to the report by Sam Kenny (the Firm's chief executive) to the Official Receiver in relation to the Firm's liquidation, the Firm's income dropped by 90% after that 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.

25. 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

the Firm's misconduct during the period 1 April 2008 to 4 November 2009 caused at least £2 million in client losses.

**Pressure selling by the Firm**

*The FSA's sample review*

26. The FSA has reviewed a sample of advice given by the Firm in the period July 2008 to September 2009 leading to client purchases of nine small-cap stocks, with sales chosen to cover as many of the Firm's brokers 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 during the Relevant Period 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, acting as a broker, in relation to at least one client, which Mr 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 again 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 them 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. The Firm 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 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 to clients**

31. The FSA reviewed call recordings by Gracechurch's brokers in respect of seven transactions in the pressure-selling sample and two additional calls on which Mr Kenny acted as a broker.

32. In each of these calls the broker or Mr Kenny made statements which misrepresented material features of and/or comparators with the small-cap stock they were advising clients to buy. Specifically:

    (1) one broker misleadingly cited performance announcements by FTSE 100 listed companies as reasons to buy small-cap stock;

    (2) the same broker misleadingly cited the share price performance of a listed company as a reason to buy shares in an unlisted private company;

    (3) one broker misrepresented the recent price performance of a specific small-cap stock;

    (4) Mr Kenny told two clients that unlisted companies whose stock the Firm was promoting would list when that was by no means certain; and

    (5) Mr Kenny told 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.

**Mr Davey's knowledge of and reaction to the Firm's pressure selling and misrepresentations to clients**

33. Mr Davey has admitted to having had knowledge of and concerns as to such pressure selling by the Firm's brokers (as well as Mr Kenny's role in encouraging such pressure sales), during the Relevant Period. Mr Davey has since clarified that he did not know that brokers were routinely mis-selling.

34. Further, although the monitoring carried out by the Firm, under Mr Davey's direction, of advice calls by its brokers was inadequate, as described below, it did reveal that brokers were regularly making misrepresentations about the stock they recommended to clients.

35. Although Mr Davey claims to have attempted to train his monitoring staff, the FSA considers that it should and would have been apparent to him, at least by early 2009, that that training had failed to adequately identify failings by the Firm's brokers.

36. Further, it would have been apparent to him that that failure resulted not least from the fact that, as he knew, Mr Kenny and another senior manager of the Firm were party to and/or encouraging the pressure selling and misrepresentations to clients.

**Withholding of call recording**

37. Mr Davey, by his own admission, was party to a decision by the Firm to withhold from the FSA a recording of a particular advised sales call between a client of the Firm and one of its employees.

38. That call recording had been specifically requested by the FSA at the thematic visit referred to above and evidenced advice given to that client by that employee, who was not FSA-approved to give such advice.

39. Mr Davey, personally informed the FSA in writing and on repeated occasions that the relevant recording had never been made or had been mislaid, when he knew this not to be the case.

**Questionnaire veto**

40. Mr Davey proposed to Mr Kenny, when the former first joined the Firm, that it 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.

41. 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**

42. On 4 December 2008, Mr Davey signed, expressly as the Firm's compliance officer, the Firm's written withdrawal of an application for approval by the FSA of a particular individual at the Firm in a significant influence controlled function role, as "*a senior manager with significant responsibility for*" the Firm's business.

43. That withdrawal was made once the Firm had become aware that that individual was linked to an investigation by the FSA into his previous employers. The withdrawal, signed by Mr Davey, for that reason stated that the Firm would reapply once "*events have unfolded fully and been brought to a satisfactory close*".

44. The investigation in question concluded after the relevant individual left the Firm and neither Mr Davey nor anyone else at the Firm therefore submitted a further application to the FSA for such approval. The relevant individual nevertheless continued to work at the Firm for at least another eight months after the approval application was withdrawn.

45. In doing so, that individual, to Mr Davey's contemporaneous knowledge, had primary responsibility for the recruitment of brokers and responsibility, alongside Mr Kenny, for broker training.

46. The relevant individual was therefore performing, during those eight months, the significant influence controlled function role in respect of which the Firm had withdrawn its application. This was a breach by the Firm of section 59(1) of the Act.

47. 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, through his training of brokers, transplanting the pressure sales culture of his previous employer to Gracechurch, but without Mr Kenny taking any resulting action.

48. Mr Davey, having signed the withdrawal notice, did not inform the FSA during the Relevant Period of any of this knowledge or concern on his part or of the fact that the relevant individual, while at the Firm and to Mr Davey's specific contemporaneous knowledge, trained brokers in how to overcome legitimate objections by advised clients to buying small-cap stock recommended by the Firm.

**Stock advice risk warnings**

49. Mr Davey has admitted that he knew at the time that it was the Firm's standard practice, during the Relevant Period, for brokers to give generic risk warnings at the end of sales advice calls, after clients had agreed to purchase stock, rather than to do so beforehand. Giving risk warnings earlier would have given clients a chance to consider them before they agreed to invest.

**Risk capital limits**

50. When taking on each new client, at least from about October 2008, the Firm agreed with them their risk capital limits, by reference to the:

    (1) risk categorisation of the investments they held; and

    (2) amount of investments in each risk category they held as a proportion of their overall net liquid assets.

51. Each client's risk capital limits could change when they submitted new figures to the Firm for their overall net liquid assets and/or if and when the Firm reviewed and updated that client's other suitability data with the client.

52. These risk capital limits were purportedly intended to reduce the risk of unsuitable advice being given to clients, by limiting the amount of high-risk shares the Firm could advise its clients to buy.

53. Mr Davey, as the Firm's compliance officer, was primarily responsible for:

    (1) setting the Firm's risk capital assessment criteria;

    (2) reviewing the data resulting from initial suitability assessment calls between each client and the Firm with a view to setting that client's risk capital limits; and

    (3) monitoring compliance with these limits.

54. The Firm did not, however, prevent brokers recommending small-cap stocks to clients where their purchase would breach such clients' risk capital limits. Nor did the Firm require brokers to warn clients that they would exceed their risk capital limits by buying a particular stock.

55. Only from July 2009 did Mr Davey introduce a system under which client transactions were retrospectively checked to monitor risk capital limits and clients then contacted to be told that they had exceeded their limits and could cancel relevant transactions or increase their limits.

56. Before that date, Mr Davey organised no real monitoring of risk capital limit compliance, in breach of the Firm's own procedures. As a result, some clients were advised by the Firm to buy (and did in fact buy) small-cap stock despite those transactions either taking them over their risk capital limits or increasing the amount by which they had exceeded their risk capital limits.

**Client-specific suitability assessments**

57. Mr Davey misdescribed the investment strategies and objectives, which the Firm asked new clients to choose between, from at least October 2008, when he updated these criteria in that, after his 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.

58. When the compliance consultant was instructed by the Firm as described above, they advised it that these criteria were confusing and inconsistent but only at the end of the Relevant Period did the Firm, with Mr Davey responsible for the criteria, recognise as much and attempt to resolve the issue.

**Call recording monitoring**

59. Mr Davey failed to ensure that the Firm reviewed:

    (1) more than a very small proportion of recordings of initial suitability assessment calls between clients and brokers; and

    (2) any such recordings from January 2009, by which point Mr Davey was also responsible for systems and controls reporting;

despite the Firm's procedures previously stating that it aimed to review 20% of such recordings.

60. Further, even when such review took place, Mr Davey did not ensure that the Firm's procedures required any remedial action, for example that clients be contacted, if such review identified inadequacies. In addition, inadequate initial suitability assessment calls did not impact broker remuneration.

61. The review of recordings of calls in which brokers gave clients advice was carried out largely by staff working for Mr Davey, who were unqualified, untrained and/or insufficiently experienced to do so. In addition, these staff were given, as Mr Davey has conceded to the FSA, inadequate checklists to carry out their task, with the result that:

    (1) at least on some occasions, these staff passed calls which clearly failed the Firm's own criteria and Mr Davey has recognised that this was inappropriate;

    (2) the criteria used in the checklist were not weighted, until after the FSA's feedback following the thematic visit referred to above, and, as a result, significant failings were not assessed as more problematic than more minor issues;

    (3) although advice call monitoring did lead to some transactions being failed, the Firm neglected to take corresponding remedial action to correct the failings with the client until prompted by FSA feedback at the thematic visit; and

    (4) the Firm's own compliance consultant assessed all of the call reviewing staff employed by the Firm in 2009, other than Mr Davey himself, as incompetent in that monitoring role.

**Broker remuneration**

62. The Firm's broker remuneration structure was redesigned with Mr Davey's input after he was approved as compliance officer. 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.

63. Some account was taken, under that structure, of the results of advice call monitoring. That was, however, insufficient in that (quite apart from the points made above about the quality of the call monitoring):

    (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.

## REPRESENTATIONS AND FINDINGS

64. Below is a brief summary of the key written representations made by Mr Davey and how they have been dealt with. In deciding to take the action described above the FSA has taken into account all of Mr Davey's representations, whether or not explicitly set out below.

### Client-specific suitability criteria

65. Mr Davey made representations that "[t]he investment strategies and objectives present on the account opening form referred to [at paragraph 57 above] were actually not used for any purpose at all, certainly not to assess a customer's attitude to risk and/or suitability to any investment". The "investment strategies and objectives" comprised only one element of the account opening form and Mr Davey stated that he believed the account opening form to be a functional form which was used in good faith. Mr Davey accepted, with hindsight, that the form could have been improved upon and asserted that it was later revised and improved.

66. The FSA has found that, after Mr Davey updated the investment strategies and objectives that Gracechurch asked new customers to choose between (on the account opening form), the description of those investment strategies did not appear to match the customers' objectives (as set out at paragraph 57(1) above). Further, even if Gracechurch did not rely on the investment strategies and objectives provided by customers (as Mr Davey asserted in his representations), the account opening form suggested portfolio allocations based on those strategies. As a consequence, customers so misinformed might wrongly allocate their portfolio under the high/medium/low risk assessment system used by Gracechurch. The FSA does accept that the account opening form was revised and improved by Mr Davey but only towards the end of the Relevant Period.

### Witholding of call recording

67. Mr Davey made representations that the allegation he "was party to a decision …. to withhold from the FSA a recording of a particular advised sales call between a client of the Firm and one of its employees" is a misrepresentation of his conduct because he was under pressure to withhold the call recording and was not involved in the decision to do it.

68. The FSA has found that Mr Davey was complicit (with Mr Kenny) in the decision to withhold the call recording of a particular advised sales call between a client of Gracechurch and one of its employees to the FSA and was therefore "party" to that decision. The FSA accepts that Mr Davey may have felt under pressure (from Mr Kenny) to withhold the call recording but notes that Mr Davey has previously stated that the decision to withhold the call recording was made by both Mr Kenny and Mr Davey. Even though Mr Davey may have felt under pressure, his conduct in misleading the FSA in relation to the withheld call recording (by stating that the relevant call recording could not be found and by also providing a false explanation why this was the case) demonstrates a serious lack of integrity.

69. Mr Davey also made representations that his eventual admission regarding the withheld call recording has been incorrectly portrayed by the FSA as having been made only when his "back was against the wall and [he] was confronted with evidence" of his wrongdoing.

70. Mr Davey admitted his involvement in the withholding of the client call recording from the FSA after the FSA obtained relevant evidence of his misconduct and put this to him in his interview. Accordingly, the FSA has found that Mr Davey misled the FSA regarding the withheld call recording until the FSA specifically questioned him on the matter in an interview.

**Stock advice risk warnings**

71. Mr Davey made representations that his attitude to the generic risk warnings given by brokers at Gracechurch has been misrepresented by the FSA as being "nonchalant" when in fact he made significant and numerous attempts to improve the practice. Mr Davey asserted that the FSA have not properly recognised his efforts in this regard.

72. The FSA has found that although Mr Davey did make improvements to the practice, by brokers at Gracechurch, of giving generic risk warnings at the end of sales advice calls, the timing of the delivery of the improvements did not take place until shortly before the end of the Relevant Period. The FSA considers that it has acknowledged Mr Davey's efforts to improve the compliance function and culture at the Firm in this notice.

**Mr Davey's efforts to improve the compliance function at Gracechurch**

73. Mr Davey made representations that the FSA have not recognised his "significant efforts to improve processes and [c]ompliance arrangements at [Gracechurch] following the FSA … visit in May 2009 as well as the significant work [he] undertook with [the compliance consultant] (once they were appointed) …". Mr Davey stated that he "did [his] best at [Gracechurch] and acted in good faith". He regretted that the standard of compliance was below that expected by the FSA but he had very little time at Gracechurch (to make improvements) and little compliance experience to draw on at the time of the FSA's thematic visit. Mr Davey asserted that he has undertaken training while at Gracechurch and believes himself to far more competent now than he may have been during the Relevant Period.

74. The FSA has found that Mr Davey's representation that the FSA has not recognised his "significant efforts to improve processes and [c]ompliance arrangements at [Gracechurch] following the FSA … visit in May 2009 as well as the significant work [he] undertook with [the compliance consultant] (once they were appointed) …" is without merit. The FSA considers that it has appropriately acknowledged (in this notice – particularly at paragraph 93(8) below) that Mr Davey made efforts to improve the compliance function and culture at Gracechurch, and did in fact improve the operation of the compliance function (albeit towards the end of the Relevant Period).

**Comparator cases**

75. Mr Davey made representations that he saw the Final Notices relating to Pacific Continental Securities (UK) Limited ("**PacCon**") and in particular, the Final Notices to the PacCon Significant Influence Function holders, Mr Griggs and Mr Weston, when they were published by the FSA in January 2009. Mr Davey asserted that those Final Notices were an influence on him at the time and he cited the steps he took to improve Gracechurch's compliance culture as evidence for his assertion. In particular, Mr Davey asserted that his failings should be distinguished from that of Mr Weston because he was not a director at Gracechurch, he did the best that he was able to given his experience and Mr Kenny's opposition/resistance and he did not benefit in any way from the Firm's breaches.

76. The FSA accepts Mr Davey's representations that he saw the Final Notices relating to PacCon and in particular, the Final Notices to the PacCon Significant Influence Function holders, Mr Griggs and Mr Weston, when they were published by the FSA in January 2009. Mr Davey's admission that he was aware of the PacCon Final Notices undermines his representation that his conduct should be distinguished from Mr Weston's because he did what he should not have done and failed to do what he should have done despite his knowledge of the PacCon Final Notices. The FSA accepts that Mr Davey was not a director of Gracechurch and does not suggest that Mr Davey received any direct financial benefit from his misconduct.

77. Mr Davey made representations that the misconduct detailed in the Final Notice to Mr Fagbulu was more serious than his misconduct in this case.

78. The FSA has found that Mr Davey appears to have misunderstood the FSA's comparison of his misconduct with the misconduct set out in Mr Fagbulu's Final Notice. The FSA accepts that Mr Davey's misconduct was not as serious as Mr Fagbulu's misconduct.

**Sanction**

79. Mr Davey made representations that the full prohibition proposed is grossly excessive, disproportionate and unfair. Mr Davey stated that he takes full responsibility for what he asserts was an isolated lapse in judgment that led to his dishonesty about the whereabouts of the withheld call recording. Mr Davey believes that the proposed sanction is inconsistent with other cases where the FSA has found an individual's honesty and integrity to have been an issue. In particular, Mr Davey relied on the FSA's Final Notice to Mr Goodwin and queried whether the FSA considered his withholding of a telephone call that was requested to be as serious as continuous significant theft from clients. Mr Davey also stated that he regretted the withholding of the telephone call and understands why the FSA has taken a serious view of the issue. He stated that he has accepted his wrongdoing and has paid a huge price for it already in terms of the stress that the investigation has caused him. Mr Davey submitted that the sanction he faces constitutes both a punishment and a deterrent – the prohibition does not need to extend as far as a full prohibition.

80. The FSA has found that Mr Davey's withholding of the client call recording requested by the FSA is a serious failing and goes directly to Mr Davey's fitness and propriety. Mr Davey, personally informed the FSA in writing and on repeated occasions that the

relevant recording had never been made or had been mislaid, when he knew this not to be the case. Accordingly, the FSA does not accept that Mr Davey's misconduct was simply a "lapse in judgment" or "an isolated event". Further, the FSA notes that the withholding of the requested call recording was not Mr Davey's only failing (for the reasons outlined in this notice) during the Relevant Period. Mr Davey has also admitted that he did what he should not have done and failed to do what he should have done despite his knowledge of the PacCon Final Notices. For the foregoing reasons and in all the circumstances of the case, the FSA considers its decision to impose a full prohibition on Mr Davey to be entirely proportionate and fair. The FSA notes that Mr Davey may apply to have the prohibition revoked at any time when he is able to satisfy the FSA that he is fit and proper to be an approved person. For completeness, the FSA has never stated that Mr Davey's misconduct in withholding the call recording is equivalent to Mr Goodwin's fraud (although as already noted, it is a very serious failing).

## FAILINGS

### Roles and responsibilities

81. The FSA's Handbook describes the roles and responsibilities arising from Mr Davey's relevant significant influence controlled function approvals as follows:

    (1) The Firm having been "*a common platform firm*", as that term is used in the FSA's Handbook, during the Relevant Period, Mr Davey, as compliance officer at the Firm, was responsible, under that Handbook, for the Firm's compliance function and therefore for:

        (a) monitoring and, on a regular basis, assessing the adequacy and effectiveness of:

            (i) the measures and procedures put in place by the Firm to:

                (A) detect any risk of failure by the Firm to comply with its obligations under the regulatory system, as that term is defined above, as well as associated risks; and

                (B) minimise such risks; and

            (ii) the actions taken to address any deficiencies in the Firm's compliance with its obligations; and

        (b) advice and assistance, to the Firm's staff involved in the provision of its advice on shares, as to compliance with the Firm's obligations under the regulatory system.

    (2) The systems and controls reporting function, for which Mr Davey was approved at the Firm from 19 January 2009, 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 [the] firm, or the audit committee (or its equivalent) in relation to (1) its financial affairs, (2) setting and controlling its risk exposure [and] (3) adherence to internal systems and controls, procedures and policies*."

**Breach of APER 1**

82. In his roles as the Firm's compliance officer and, from 19 January 2009, also as responsible for systems and controls reporting, the FSA considers that Mr Davey acted dishonestly, in breach of APER 1, in telling the FSA, as described above, in writing on more than one occasion, that a particular recording of a call between an employee of the Firm and a client, specifically requested by the FSA, had not been made or could not be found, when that was untrue to Mr Davey's knowledge.

83. The FSA has come to this conclusion having had regard to the relevant guidance and evidential provisions of the FSA's Handbook (APER 3.1.1G, 3.1.3G, 3.1.4G(1), 4.1.2E, 4.1.3E(3) and 4.1.4E(11), as they were worded in the Relevant Period).

**Breach of APER 7**

84. The FSA also considers, having regard to the relevant guidance and evidential provisions of the FSA's Handbook (APER 3.1.1G, 3.1.4G(1), 3.1.8G, 3.3.1E, 4.7.2E, 4.7.4E, 4.7.5E, 4.7.6E, 4.7.7E, 4.7.10E, 4.7.11G, 4.7.12G and 4.7.13G, as they were worded in the Relevant Period), that Mr Davey breached APER 7.

85. The FSA considers that Mr Davey did so through his failure to:

    (1) take reasonable steps to put a stop to or minimise the risk of the Firm's brokers mis-selling, making misrepresentations to clients and giving otherwise unsuitable advice and thereby ensure that the Firm complied with the relevant requirements and standards of the regulatory system, through his responsibility for monitoring, assessing the adequacy of and reporting, advising and assisting on and in relation to the Firm's:

        (a) broker remuneration structure, which ignored relevant July 2007 FSA guidance in its document entitled "*Treating customers fairly – culture*";

        (b) call recording monitoring and resulting remedial action process;

        (c) client-specific investment strategy and objectives assessment process and criteria;

        (d) risk capital limit compliance monitoring and enforcement process; and

        (e) risk warning provision process;

    (2) ensure that the Firm complied with the relevant requirements and standards of the regulatory system, by taking reasonable steps to put a stop to a particular individual, to Mr Davey's knowledge, who was:

        (a) being employed by the Firm in what amounted to a significant influence controlled function for at least eight months after Mr Davey had signed and sent to the FSA, as the Firm's compliance officer, its withdrawal of its application for FSA approval of that individual in that function; and

(b) in that role, transplanting the pressure sales culture of his previous employer to Gracechurch and, in particular, training the Firm's brokers how to overcome legitimate objections by advised clients to buying small-cap stock recommended by the Firm

86. The FSA accepts that, had Mr Davey attempted to raise the alarm in relation to the facts and matters described above, it is very possible that he would have been ignored or frustrated by Mr Kenny and the unapproved senior manager referred to herein or alternatively, Mr Davey may have decided not to take such steps because he believed that he would be ignored or frustrated and might be victimised.

87. However, the FSA expects Mr Davey, as Gracechurch's compliance officer, to take those reasonable steps (and raise the alarm) in relation to the facts and matters described above. Mr Davey's failure to raise the alarm and/or challenge his colleagues indicates that Mr Davey failed to understand the importance of his CF10 role and the regulatory obligations it brings. He failed to properly discharge his responsibilities as the Firm's compliance officer.

**Fitness and propriety**

88. 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, described above are such that Mr Davey 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**

**Responsibility for client detriment**

89. Mr Davey, despite being FSA-approved as a broker at Gracechurch, did not act as such when employed there and was not therefore primarily guilty of mis-selling, misrepresentations and/or otherwise unsuitable advice, which the FSA considers directly caused the significant client losses described above.

90. The FSA recognises, further, that Mr Davey did not hold his relevant significant influence controlled function roles at Gracechurch until 15 October 2008 as compliance officer and 19 January 2009 as responsible for systems and controls reporting and therefore did not do so during the period 1 April 2008 to 14 October 2008.

91. Mr Davey's significant influence controlled function roles at the Firm, the degree and detail of his knowledge of the Firm's failings and the multiple and various ways in which he breached APER 1 and APER 7 are such, however, that he bears a real responsibility for a significant proportion of those losses through his failures to take reasonable steps as described above.

**Application of the FSA's Decision Procedure and Penalties Manual** ("**DEPP**")

92. In light of the above, the FSA, having regard to the terms of the relevant guidance set out in DEPP, specifically DEPP 6.4.1G, 6.4.2G, 6.5.1G(1) and 6.5.2G, as they were worded during the Relevant Period (set out in the Annex), the FSA would have proposed herein a

penalty of £175,000 under section 66(3) of the Act on Mr Davey for his breaches of APER 1 and APER 7.

93. The FSA has reached that figure of £175,000 having regard to:

(1) the fact that Mr Davey's breach of APER 1, described above, involved repeated lies in writing by Mr Davey to the FSA itself;

(2) the fact that Mr Davey breached APER 7 so comprehensively, in several different and various ways, and over a period of almost a year after he was approved as the Firm's compliance officer;

(3) the significant losses caused to the Firm's clients through the mis-selling and unsuitable advice that Mr Davey should have minimised or dealt with through the reasonable steps described above;

(4) the principal purpose for which the FSA imposes sanctions – to promote high standards of regulatory conduct by deterrence;

(5) the fact that all of Mr Davey's misconduct was in significant influence rather than other approved functions;

(6) the facts that the FSA published Final Notices to Square Mile Securities Limited, PacCon and two persons holding significant influence functions at the latter firm, in relation to misconduct similar to that at Gracechurch and by Mr Davey, before and during the Relevant Period;

(7) the quantum of penalties imposed by the FSA in similar cases, adjusted to take account of material factual differences; and

(8) by way of mitigation:

(a) after his recruitment and despite his lack of experience for the position, Mr Davey made substantial efforts to improve the compliance function and culture at the Firm, and did in fact improve the operation of the compliance function substantially, in particular, Mr Davey:

(i) put in place a formal compliance manual;

(ii) put in place call monitoring procedures;

(iii) documented those procedures;

(iv) amended the broker remuneration policy, including an assessment of call quality and removing a sliding scale of commission rate based on volume;

(v) increased the minimum net liquid assets required before customers could invest through Gracechurch;

(vi) substantially revised and improved the account opening form; and

(vii) required that customer accounts be fully opened and signed off by compliance before brokers could make recommendations to those customers.

(b) in respect of criticisms and breaches identified above, the investigation team notes that:

(i) Mr Davey did not consider that the person who was acting as an unapproved SIF at the time was in fact acting as a SIF, and in any event did not have any control over that person;

(ii) Mr Davey did not sit on the board of Gracechurch; and

(iii) Mr Kenny had a majority shareholding in Gracechurch, and was the dominant individual in the management of the company;

(c) the facts that Mr Davey is an individual and has no previous adverse FSA disciplinary history;

(d) the impact of Mr Kenny's influence, which may have at times adversely impacted on Mr Davey's ability to pursue efforts to implement and maintain appropriate systems and controls;

(e) Mr Davey admitted withholding from the FSA the client call recording at the first available opportunity once the FSA's investigation team obtained relevant evidence and put the related allegations to him in interview; and

(f) the significant extent to which he has co-operated with the FSA's investigation and admitted relevant facts and matters, as described above.

94. The FSA considered that Mr Davey's conduct merited the substantial financial penalty of £175,000 (particularly given the seriousness of Mr Davey's APER 1 breach). However, because Mr Davey has produced verifiable evidence showing that any penalty imposed by the FSA would cause him serious financial hardship, which the FSA has accepted; this amount has been reduced to nil. But for that verifiable evidence, the FSA would have imposed herein a penalty of £175,000 on Mr Davey for his breaches of APER 1 and 7.

**Withdrawal of approval & prohibition**

95. The FSA has decided, in light of the facts and matters set out above, to:

i. withdraw the approval given to Mr Davey to perform CF10 (Compliance Oversight), CF11 (Money Laundering Reporting), CF28 (Systems and controls) and CF30 (Customer) controlled functions at Gracechurch; and

ii. prohibit Mr Davey 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

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

97. This Final Notice is given under, and in accordance with, section 390 of the Act. It is given to Gracechurch pursuant to section 390(1) of the Act.

### Publicity

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

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

### FSA contacts

100. For more information concerning this matter generally, contact Kate Tuckley (direct line: 020 7066 7086/fax: 020 7066 7087) of the Enforcement and Financial Crime Division of the FSA.

**Bill Sillett**
**FSA Enforcement and Financial Crime Division**

**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;*

…

*(b) publish a statement of his misconduct.*"

**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 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 … does not comply with Statement of Principle 1.*"

*APER 4.1.3E*

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

*…*

*(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:*

…

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

**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 4.7.4E*

"*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 4.7.5E*

"*Failing to take reasonable steps adequately to inform himself about the reason why significant breaches (whether suspected or actual) of the relevant requirements and standards of the regulatory system in respect of [the relevant business's] regulated activities may have arisen (taking account of the systems and procedures in place) falls within APER 4.7.2 E.*"

*APER 4.7.6E*

"*Behaviour of the type referred to in APER 4.7.5 E includes, but is not limited to, failing to investigate what systems or procedures may have failed including, where appropriate, failing to obtain expert opinion on the adequacy of the systems and procedures.*"

*APER 4.7.7E*

"*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, falls within APER 4.7.2 E.*"

*APER 4.7.10E*

(from 1 April 2009)

> "*In the case of an approved person performing a significant influence function responsible for compliance …, failing to take reasonable steps to ensure that appropriate compliance systems and procedures are in place falls within APER 4.7.2E.*"

*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.*"

*APER 4.7.13G*

> "*Where the approved person performing a significant influence function becomes aware of actual or suspected problems that involve possible breaches of relevant requirements and standards of the regulatory system falling within his area of responsibility, then he should take reasonable steps to ensure that they are dealt with in a timely and appropriate manner … . This may involve an adequate investigation to find out what systems or procedures may have failed and why. He may need to obtain expert opinion on the adequacy and efficacy of the systems and procedures.*"

**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;*

*(2) competence and capability; and*

*…*."

*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;*

*…*

*(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.*"

**The Decision Procedure and Penalties Manual – ("DEPP")**

**DEPP 6.4 – Financial Penalty or Public Censure**

*DEPP 6.4.1G*

"*The FSA will consider all the relevant circumstances of the case when deciding whether to impose a penalty or issue a public censure. As such, the factors set out in DEPP 6.4.2 G are not exhaustive. Not all of the factors may be relevant in a particular case and there may be other factors, not listed, that are relevant.*"

*DEPP 6.4.2G*

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

"*The criteria for determining whether it is appropriate to issue a public censure rather than impose a financial penalty are similar to those for determining the amount of penalty set out in DEPP 6.5. Some particular considerations that may be relevant when the FSA determines whether to issue a public censure rather than impose a financial penalty are:*

*…*

*(8) the impact on the person concerned. In exceptional circumstances, if the person has inadequate means (excluding any manipulation or attempted manipulation of their assets) to pay the level of financial penalty which their breach would otherwise attract, this may be a factor in favour of a lower level of penalty or a public statement. However, it would only be in an exceptional case that the FSA would be prepared to agree to issue a public censure rather than impose a financial penalty if a financial penalty would otherwise be the appropriate sanction. Examples of such exceptional cases could include where there is:*

*(a) verifiable evidence that a person would suffer serious financial hardship if the FSA imposed a financial penalty;*

*…."*

**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, … ;*

*…*

*(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.*"