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## FINAL NOTICE

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To: **Mr Jeremy Nicholas Sheard (“Mr Sheard”)**

Address: **Unit 8a, Maple Estate, Stocks Lane, Barnsley, South Yorkshire S75 2BL**

Date: **16 February 2011**

**TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) gives you final notice about a requirement to pay a financial penalty.**

### **1. PENALTY**

- 1.1. The FSA gave you a Decision Notice on 3 February 2011 which notified you that pursuant to section 66 of the Financial Services and Markets Act 2000 (“the Act”), the FSA had decided to impose on you, Mr Sheard, a financial penalty of £24,500 in respect of breaches of Statements of Principle 2 and 7 of the FSA’s Statements of Principle and Code of Practice for Approved Persons (“the Statements of Principle”) between 6 April 2006 and 7 August 2009 (“the relevant period”).
- 1.2. You agreed to settle at an early stage of the FSA’s investigation and you therefore qualified for a 30 per cent (Stage 1) discount under the FSA’s executive settlement procedures. The FSA would have otherwise sought to impose a financial penalty of £35,000 on you.
- 1.3. You agreed on 1 February 2011 that you will not be referring this matter to the Upper Tribunal (Tax and Chancery Chamber).

1.4. Accordingly, for the reasons set out below, the FSA imposes a financial penalty on you in the amount of £24,500.

## **2. REASONS FOR ACTION**

2.1. On the basis of the facts and matters described below, the FSA has decided to impose a financial penalty on you for failing to comply with Statements of Principle 2 and 7 in performing your role as a director and an approved person performing controlled and significant influence functions at Cricket Hill Financial Planning Limited (“Cricket Hill”) during the relevant period. In summary, the FSA has concluded that you failed to:

- (1) act with due skill, care and diligence in carrying out your controlled function as an adviser at Cricket Hill in relation to advising on pension switches in breach of Statement of Principle 2; and
- (2) take reasonable steps to ensure that:
  - (a) Cricket Hill and its appointed representative, Firm A, had adequate systems and controls in place to comply with the relevant requirements and standards of the regulatory system in relation to their pension switching business;
  - (b) Cricket Hill and Firm A identified and managed potential conflicts of interest; and
  - (c) Cricket Hill and Firm A had adequate systems and procedures in place to demonstrate the suitability of advice given to customers in relation to pension switches and that information and advice provided by Cricket Hill to its customers in suitability reports was clear, fair and not misleading.

As a result you breached Statement of Principle 7.

2.2. The FSA regards these failings as particularly serious because Cricket Hill’s principal customers were unsophisticated investors, many of whom had small pension pots.

2.3. The FSA has taken into account that you co-operated fully with the FSA’s investigation, which is regarded as a mitigating factor.

2.4. During the relevant period, Cricket Hill promoted a type of discretionary management service (the “RMS”), which was managed and administered by a third party (the “RMS Operator”). The RMS average performance appears to be higher than its selected benchmarks. In practice, this means that although the FSA has found significant levels of potentially unsuitable advice, the RMS has performed well and many of the affected customers may not have suffered financial detriment. In the small number of pension switches that had been reviewed at the time of this Final Notice, no customers had suffered financial detriment as a result of their pension switch.

### **3. RELEVANT STATUTORY PROVISIONS, REGULATORY REQUIREMENTS AND FSA GUIDANCE**

- 3.1. The relevant statutory provisions, regulatory requirements and FSA guidance are set out at Annex A to this notice.

### **4. FACTS AND MATTERS RELIED ON**

#### **Background**

- 4.1. On 6 April 2006 (“A-Day”), the government introduced changes to simplify the tax rules for personal and occupational pensions in the UK. In particular, limits to the amount that could be paid into a personal pension were removed, although restrictions on the amount of tax-free cash that could be taken from personal pensions remained. Additionally, from A-Day alternatives to drawing a pension as an annuity became available. Following these changes many advisers reviewed their customers’ existing pension arrangements. These reviews led to a significant increase in advice given to customers to transfer their existing pension arrangements into Personal Pension Plans (“PPPs”) or Self Invested Personal Pensions (“SIPPs”).
- 4.2. In light of the significant increase in pension switches, the FSA became concerned that consumers may have been switched into pension products which carried high charges and had features or additional flexibility that they did not need. The FSA was also concerned about whether firms’ controls, management oversight and compliance monitoring of this type of advice were robust enough to detect and prevent unsuitable advice and ensure fair outcomes for customers.
- 4.3. In the summer of 2008, the FSA commenced phase 1 of a thematic review of pension switching advice, looking at pension switches made since A-Day. For the purposes of the FSA thematic review, a pension switch was defined as advice to switch from any occupational or individual pension scheme to an individual PPP or SIPP.
- 4.4. In January 2009, Cricket Hill was referred to the Enforcement and Financial Crime Division of the FSA for investigation as a result of concerns that Cricket Hill appeared to be advising a significant proportion of its customers to switch their pensions to one provider, which used a particular RMS. The referral took place at around the same time as other referrals resulting from the FSA’s thematic review of pension switching.

#### **Mr Sheard’s role at Cricket Hill**

- 4.5. During the relevant period you were approved to perform the following controlled and significant influence functions at Cricket Hill: CF1 (Director), CF3 (Chief Executive), CF8 (Apportionment and Oversight – until 31 March 2009) and CF30 (Customer Function) and were also responsible for insurance mediation.
- 4.6. Cricket Hill is a small IFA which is based in Barnsley, Yorkshire. The majority of its business comprises the provision of pension switching advice. Cricket Hill became

authorised and regulated by the FSA on 2 November 2004 and, during the relevant period, was authorised to carry on the following regulated activities:

- (1) advising on investments (except on pension transfers and pension opt outs);
- (2) agreeing to carry on a regulated activity;
- (3) arranging (bringing about) deals in investments; and
- (4) making arrangements with a view to transactions in investments.

- 4.7. During the relevant period, you were the controlling director at Cricket Hill. Cricket Hill's other personnel included a non-executive director and up to nine customer advisers at any one time.
- 4.8. Cricket Hill has two appointed representatives of which only one, Firm A, is active. It has been an appointed representative of Cricket Hill since 27 March 2007.
- 4.9. Cricket Hill and Firm A used the same sales advisers. Cricket Hill transacted all pension switching business until July 2007; Firm A transacted the majority of the business thereafter.
- 4.10. During the relevant period, Cricket Hill and Firm A conducted 1,864 pension switches. Cricket Hill and Firm A actively promoted a type of discretionary management service (the RMS), which was managed and administered by a third party (the "RMS Operator"). The RMS provides investment management for customers' pension funds, which includes regular monitoring of the funds and asset reallocation where appropriate. There is a 1% annual charge for this service, which is paid by the product provider from the customer's pension fund and is divided between either Cricket Hill or Firm A (depending on which entity advised on the switch) and the RMS Operator.
- 4.11. Of the 1,864 pension switches completed by Cricket Hill and Firm A during the relevant period, 1,858 customers opted to use the RMS.

#### **The FSA's investigation**

- 4.12. The FSA reviewed a total of 46 customer files from the relevant period, in which Cricket Hill or Firm A recommended to customers that they switch their pensions. The FSA found deficiencies in Cricket Hill's pension switching sales including the fact that its fact finding, product research and recommendation processes were tailored towards recommending the RMS, its communications with customers were not clear, fair and not misleading and it failed to identify, manage and disclose appropriately conflicts of interest. The files evidence advice given by eight different advisers, including seven where you provided the advice.
- 4.13. The FSA required Cricket Hill to instruct a skilled person to produce a report in relation to Cricket Hill's pension switching business in the relevant period. The skilled person produced an interim report in September 2010 of its findings following a review of four customer files. The skilled person's findings support the FSA's wider findings below.

## **Findings against Mr Sheard**

### Pension switching sales

- 4.14. You were unable to demonstrate that in your role as director, chief executive and adviser, you had taken reasonable care to ensure the suitability of the advice you gave to customers in relation to pension switches and to ensure that this advice was clear, fair and not misleading. These failures are evidenced by the following facts:
- (1) in all of the customer files that you advised on and which were reviewed by the FSA, the RMS provided by the RMS Operator was recommended in the initial meeting with the customer, before alternative products were researched;
  - (2) in all of the customer files that you advised on and which were reviewed by the FSA, the customer's objectives, as stated in the initial meeting note, were said to be, "*to consider an alternative...provider who would have the potential to improve on fund growth/benefits*". This demonstrates that a standardised approach was used in your sales;
  - (3) you did not undertake sufficient product research before recommending pension switches. In 6 of 7 customer files that you advised on and which were reviewed by the FSA, you only researched those product providers who could accommodate an annual management charge to cover the cost of the RMS;
  - (4) recommendations made to customers as recorded in the suitability reports were standardised towards recommending investing in a scheme with the RMS. In all of the customer files that you advised on and which were reviewed by the FSA, you used standard phrases to explain why the particular product provider was recommended and the RMS was suitable; and
  - (5) in all of the customer files that you advised on and which were reviewed by the FSA, the suitability reports were long and did not contain clear, fair and not misleading information about the cost of the recommended pension switch. For example, in all of the suitability reports reviewed, important cost information was included in the appendix and not in the main body of the report.

### Systems and controls

- 4.15. You failed to ensure that in your role as director and chief executive, Cricket Hill and Firm A had adequate and appropriate systems and controls and procedures in place to demonstrate the suitability of the advice given to customers in relation to pension switches and to ensure that the advice given was clear, fair and not misleading. These failures are evidenced by the following facts:
- (1) the RMS provided by the RMS Operator was recommended in all of the customer files reviewed by the FSA. In all files, the RMS was recommended in the initial meeting with the customer, before alternative products were researched;

- (2) in 44 of 46 files reviewed, the customer's objectives, as stated in the initial meeting note, were said to be, "*to consider an alternative...provider who would have the potential to improve on fund growth/benefits*". There was no evidence of the customer's specific objectives being discussed;
  - (3) Cricket Hill did not undertake sufficient product research before recommending pension switches. In 34 of 46 customer files reviewed, Cricket Hill limited its research to only those product providers who could accommodate an annual management charge to cover the cost of the RMS;
  - (4) there were inadequacies in Cricket Hill's customer information gathering and Cricket Hill did not adequately check the accuracy of the customer information it recorded. For example, in two of the 46 files reviewed by the FSA, the planned retirement age of the customer was incorrectly recorded in the suitability letter;
  - (5) recommendations made to customers, as recorded in the suitability reports, were standardised and directed the customer towards investing in a scheme with the RMS without considering whether the RMS was suitable for the particular customer. In all customer files reviewed, standard explanations were given as to why the particular product provider recommended and RMS were suitable;
  - (6) in all of the customer files reviewed, the suitability reports did not contain clear, fair and not misleading information about the cost of the recommended pension switch.
- 4.16. You failed to ensure that Cricket Hill's financial promotions were compliant with relevant regulations. Specifically, you failed to recognise that initial verbal communications with customers about potentially switching pensions constituted financial promotions and were therefore subject to regulatory requirements. In breach of these requirements, the scripts on which these communications were based failed to provide a fair and prominent indication of the relevant risks and disadvantages of the proposed pension switch and omitted key facts on the payment of fees.

#### Conflicts of interest

- 4.17. You failed to ensure that in your role as director and chief executive, Cricket Hill identified, managed and, where necessary, disclosed conflicts of interest between the firm, including its managers, employees and appointed representatives, and customers of the firm. Specifically, you failed to identify, manage and, where appropriate, disclose to customers the following potential conflicts:
- (1) that you held shares (up until July 2007) in the RMS Operator. In the same period, you and other Cricket Hill advisers advised customers of Cricket Hill to invest in the RMS Operator's RMS; and
  - (2) that during the relevant period, Firm A was ultimately controlled by individuals who also controlled the RMS Operator.

- 4.18. The FSA has found no evidence that payments, such as salaries, fees, commissions, or dividends to shareholders, were made by the RMS Operator to Cricket Hill or Firm A's directors and employees. However, Cricket Hill failed to identify, manage and, where appropriate, disclose the potential conflicts of interest to customers to whom it recommended the RMS and as a result these customers did not have sufficient information to make an objective and balanced decision as to whether to accept Cricket Hill's recommendation to switch to a new pension arrangement and use the RMS.
- 4.19. You failed to take reasonable steps to ensure that Cricket Hill managed this conflict of interest between itself and its customers.

#### Suitability of advice

- 4.20. You failed to ensure in your role as director, chief executive and adviser, that Cricket Hill had adequate systems and controls in place to demonstrate the suitability of advice given to customers. Specifically, you failed to ensure that:
- (1) Cricket Hill obtained and retained sufficient personal and financial information about its customers to enable the suitability of the advice to be assessed. In 38 of 46 files reviewed, there was insufficient evidence that it had assessed the customer's knowledge and experience of making investments and in 45 out of 46 sales the customer's pension needs in retirement were not identified;
  - (2) Cricket Hill adequately assessed and described each customer's attitude to risk ("ATR"). In all files, Cricket Hill assessed customers' future ATR at the fact finding stage using only the RMS profiler tool. This indicated Cricket Hill was already disposed towards recommending the RMS even though it had not yet considered whether other products could be more suitable for the customer;
  - (3) Cricket Hill undertook and/or retained adequate product or provider research to support its recommendations. Cricket Hill's product provider analysis involved using an external personal pension projection system to select the best funds for the customers. It input customers' data into the system and the results were subsequently listed in projected maturity value order. In 34 out of 46 sales, Cricket Hill limited its research to only those product providers who could accommodate an annual management charge to cover the cost of the RMS, and did not research any other providers. It therefore excluded stakeholder pensions, which could have been a suitable option for a number of customers. In 44 of the 46 sales, the recommended RMS fund was not the best performing fund in terms of projected maturity values and there was no evidence on the files of research into the alternative product providers;
  - (4) Cricket Hill obtained sufficient information from the customer's ceding scheme. In all sales, there was insufficient information, particularly in relation to costs, to enable a meaningful comparison between the ceding system and the recommended product. This meant that it was difficult for the customer to

make an objective and balanced decision as to whether to accept Cricket Hill's recommendation to switch to a new pension arrangement and use the RMS;

- (5) Cricket Hill produced suitability reports which were clear, fair and not misleading and explained sufficiently why recommendations were suitable. In all files reviewed, the suitability reports did not contain sufficient information about the costs of the switch. Cost illustrations (which purported to show when the recommended product would outperform the ceding scheme) were included in appendices at the back of the suitability reports. This meant that customers' attention was not sufficiently drawn to the illustrations, even though they provided fundamental information as to whether or not the customers would benefit from the proposed switch;
- (6) Cricket Hill explained the main consequences, including costs, charges and risks, associated with its recommendations. In 42 out of 46 sales, the projected value of the receiving scheme at retirement on a cost basis was lower than the projected value of the ceding scheme. The suitability reports did not explain the total cost of the recommended scheme or compare the total cost in a clear way with the total cost of the ceding scheme. Although the suitability reports indicated that the recommended scheme would cost more, they did not clearly set out by how much, taking into account the RMS charge, the provider's charges, Cricket Hill's commission, any penalty charge imposed by the ceding scheme provider and any loss of guaranteed benefits under the ceding scheme. All of these failings made it difficult for customers to make an informed decision as to whether to accept Cricket Hill's recommendation to switch to a new pension arrangement and use the RMS; and
- (7) Cricket Hill produced suitability reports which were tailored sufficiently to the circumstances of each customer. The suitability reports used standard phrases, for example in all the files reviewed the following standard customer objective was stated: *"To maximise your income in retirement by a combination of contributions, charges and investment performance"*. Also, in relation to different customers, standard wording was used to recommend three different RMS pension providers, on the basis of *"...financial strength, product features, value for money and fund performance..."*.

## **5. ANALYSIS OF BREACHES**

- 5.1. As a result of the facts and matter referred to in paragraph 4.14 above, the FSA has determined that you were unable to demonstrate that you took reasonable care to ensure the suitability of your pension switching advice to Cricket Hill's and Firm A's customers, in breach of Statement of Principle 2.
- 5.2. As a result of the facts and matters set out in paragraphs 4.15 to 4.21 above, the FSA has determined that you failed, as an approved person performing a significant influence function, to take reasonable steps to ensure that the business of Cricket Hill and Firm A, for which you were responsible in your controlled functions, complied with the relevant requirements and standards of the regulatory system, in breach of Statement of Principle 7.



## **6. ANALYSIS OF PROPOSED SANCTION**

- 6.1. The FSA's policy on the imposition of financial penalties as at the date of this notice is set out in Chapter 6 of the Decision Procedures and Penalties Manual ("DEPP"), which forms part of the FSA Handbook. In addition, the FSA has had regard to the corresponding provisions of Chapter 13 of the Enforcement Manual ("ENF") in force during the relevant period until 27 August 2007 and Chapter 7 of the Enforcement Guide ("EG"), in force thereafter.
- 6.2. The principal purpose of imposing a financial penalty is to promote high standards of conduct by deterring persons who have committed regulatory breaches from committing further breaches and helping to deter others from committing similar breaches, as well as demonstrating generally the benefits of compliant behaviour.

### **Financial penalty**

- 6.3. In determining whether a financial penalty is appropriate, the FSA is required to consider all the relevant circumstances of the case. Applying the criteria set out in DEPP 6.2.1 and 6.4.2, the FSA has determined that a financial penalty is an appropriate sanction in this case, given the serious nature of the breaches, the risks created for customers of Cricket Hill and the need to send out a strong message of deterrence to others.
- 6.4. DEPP 6.5.2G sets out a non-exhaustive list of factors which may be relevant to determining the appropriate level of financial penalty. The FSA considered that the following factors were particularly relevant in this case.

### **Deterrence (DEPP 6.5.2(1))**

- 6.5. Imposing a financial penalty will deter you from committing further breaches and deter others from committing similar breaches, as well as demonstrating generally the benefits of compliant behaviour.

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

- 6.6. In determining the appropriate sanction, the FSA has had regard to the seriousness of the breaches, the duration and frequency of the breaches, and whether the breaches revealed serious failings in your oversight of Cricket Hill's systems and controls. The FSA considers the breaches are serious as they occurred over a significant period of time and potentially affected a significant number of customers, most of whom were unsophisticated investors with small pension pots.

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

- 6.7. The FSA has found no evidence that the breaches were deliberate or reckless.

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

- 6.8. The FSA has taken into account in determining the amount of penalty to be imposed on you that you are an individual and that enforcement action may have a greater impact on you than, for example, on Cricket Hill.

**Conduct following the breach – (DEPP 6.5.2(8))**

- 6.9. The FSA has taken into account that you have cooperated with the FSA's investigations and the past business review and you are taking steps to ensure that similar problems do not arise at Cricket Hill in the future.

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

- 6.10. In determining the level of financial penalty, the FSA has taken into account penalties imposed on other approved persons for similar behaviour.
- 6.11. Having regard to all the circumstances, the FSA has determined the appropriate level of financial penalty to be £35,000 (before discount for early settlement).

**7. DECISION MAKER**

- 7.1. The decision which gave rise to the obligation to give this notice was made by the Settlement Decision Makers on behalf of the FSA.

**8. IMPORTANT**

- 8.1. This Final Notice is given to you in accordance with section 390 of the Act.

**Manner of and time for payment**

- 8.2. The financial penalty must be paid in full to the FSA by no later than 2 March 2011, 14 days from the date of the Final Notice.
- 8.3. If all or any of the financial penalty is outstanding on the day after the due date for payment, the FSA may recover the outstanding amount as a debt owed by you and due to the FSA.

**Publicity**

- 8.4. Sections 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 information if such publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.

**FSA contacts**

- 8.5. For more information about this matter, you should contact Anna Hynes of the Enforcement and Financial Crime Division of the FSA (direct line: 020 7066 9464; fax: 020 7066 9465).

**Tom Spender**  
**FSA Enforcement and Financial Crime Division**

## ANNEX A

### **RELEVANT STATUTORY PROVISIONS, REGULATORY REQUIREMENTS AND FSA GUIDANCE**

#### **1. Statutory provisions**

- 1.1. The FSA's statutory objectives are set out in section 2(2) of the Act. In relation to this case, the most relevant statutory objective is the protection of consumers.
- 1.2. Section 66 of the Act provides that the FSA may take action against a person if it appears to the FSA that he is guilty of misconduct and the FSA is satisfied that it is appropriate in all the circumstances to take action against him. Misconduct includes failure, while an approved person, to comply with a statement of principle issued under section 64 of the Act. The action that may be taken by the FSA includes the imposition of a penalty on the approved person of such amount as it considers appropriate.

#### **2. Relevant Handbook provisions**

- 2.1. In exercising its power to impose a financial penalty, the FSA must have regard to relevant provisions in the FSA Handbook of rules and guidance ("the FSA Handbook"). The main provisions relevant to the action specified above are set out below.

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

- 2.2. APER sets out the Statements of Principle as they relate to approved persons and descriptions of conduct which, in the opinion of the FSA, do not comply with a Statement of Principle. It further describes factors which, in the opinion of the FSA, are to be taken into account in determining whether or not an approved person's conduct complies with a Statement of Principle.
- 2.3. APER 3.1.3G states that when establishing compliance with or a breach of a Statement of Principle, account will be taken of the context in which a course of conduct was undertaken, including the precise circumstances of the individual case, the characteristics of the particular controlled function and the behaviour to be expected in that function.
- 2.4. APER 3.1.4G provides that an approved person will only be in breach of a Statement of Principle where he is personally culpable, that is in a situation where his conduct was deliberate or where his standard of conduct was below that which would be reasonable in all the circumstances.
- 2.5. APER 3.1.6G provides that APER (and in particular the specific examples of behaviour which may be in breach of a generic description of conduct in the code) is not exhaustive of the kind of conduct that may contravene the Statements of Principle.

- 2.6. The Statement of Principle relevant to this matter is Statement of Principle 7 which provides that an approved person performing a significant influence function must take reasonable steps to ensure that the business of the firm for which he is responsible in his controlled function complies with the relevant requirements and standards of the regulatory system.
- 2.7. APER3.1.8G provides, in relation to applying Statements of Principle 5 to 7, that 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.
- 2.8. APER 3.3.1E states that in determining whether or not the conduct of an approved person performing a significant influence complies with Statements of Principle 5 to 7, the following are factors which, in the opinion of the FSA, are to be taken into account:
- (1) whether he exercised reasonable care when considering the information available to him;
  - (2) whether he reached a reasonable conclusion which he acted on;
  - (3) the nature, scale and complexity of the firm's business;
  - (4) his role and responsibility as an approved person performing a significant influence function; and
  - (5) the knowledge he had, or should have had, of regulatory concerns, if any, arising in the business under his control.
- 2.9. APER 4.7 lists types of conduct which, in the opinion of the FSA, do not comply with Statement of Principle 7.
- 2.10. APER 4.7.3E states that failing to take reasonable steps to implement (either personally or through a compliance department or other departments) adequate and appropriate systems of control to comply with the relevant requirements and standards of the regulatory system in respect of its regulated activities is conduct that does not comply with Statement of Principle 7.
- 2.11. APER 4.7.4E states that failing to take reasonable steps to monitor (either personally or through a compliance department or other departments) compliance with the relevant requirements and standards of the regulated system in respect of its regulated activities is conduct that does not comply with Statement of Principle 7.
- 2.12. APER 4.7.47E provides that failing to take 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 is conduct that does not comply with Statement of Principle 7.

***Conduct of Business Sourcebook ("COBS")***

- 2.13. COBS 4.2.1R provides that a firm must ensure that a communication or a financial promotion is fair, clear and not misleading.
- 2.14. COBS 4.5.2R provides that a firm must ensure that information is accurate and in particular does not emphasis any potential benefits of relevant business or a relevant investment without also giving a fair and prominent indication of any relevant risks, and that information does not disguise, diminish or obscure important items, statements or warnings.

***Conduct of Business (“COB”) (applicable before 31 October 2007)***

- 2.15. COB 3.8.4 provides that a firm must be able to show it has taken reasonable steps to ensure that a non-real time financial promotion is clear, fair and not misleading.
- 2.16. COB 3.2.4R extends the scope of COB 3.8.4 to certain unsolicited real time financial promotions approved by a firm.

**3. Other relevant regulatory provisions**

***Enforcement Guide***

- 3.1. The FSA’s policy on exercising its enforcement power is set out in the Enforcement Guide (“EG”), which came into effect on 28 August 2007. Although the references in the Decision Notice are to EG, the FSA has also had regard to the appropriate provisions of the FSA’s Enforcement Manual, which preceded EG and applied during part of the relevant period.

***Decision Procedure and Penalties Manual (“DEPP”)***

- 3.2. Guidance on the imposition and amount of penalties is set out in Chapter 6 of DEPP.
- 3.3. DEPP 6.1.2G provides that the principal purpose of imposing a financial penalty is to promote high standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches, and demonstrating generally the benefits of compliant behaviour. Financial penalties are tools that the FSA may employ to help it to achieve its regulatory objectives.
- 3.4. DEPP 6.4.1G provides that the FSA will consider all the relevant circumstances of the case when deciding whether to impose a penalty or issue a public censure.
- 3.5. DEPP 6.4.2G(8)(a) provides that a particular consideration in determining whether to impose a financial penalty or a public censure is where there is verifiable evidence that the person would suffer serious financial hardship if the FSA imposed a financial penalty.
- 3.6. DEPP 6.5.1G(1) provides that the FSA will consider all the relevant circumstances of a case when it determines the level of financial penalty (if any) that is appropriate and in proportion to the breach concerned.

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

*Deterrence: DEPP 6.5.2G(1)*

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

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

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

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

- 3.10. The FSA will regard as more serious a breach which is deliberately or recklessly committed, giving consideration to factors such as 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.

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

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

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

- 3.12. 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.

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

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

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

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

*FSA guidance and other published materials: DEPP 6.5.2G(12)*

- 3.15. 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.