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**FINAL NOTICE**

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To: **John Paul Folan**

FSA Reference Number: **JPF01055**

Address: 16 Cedar Close  
Hutton  
Brentwood  
Essex  
CM13 1NE

Date: **30 September 2011**

**1. ACTION**

1.1. For the reasons given in this notice, the FSA hereby:

- (1) imposes on Mr John Paul Folan (“Mr Folan”) a financial penalty of £195,117 for a failure to comply with Statement of Principle 1 of the FSA’s Statements of Principle for Approved Persons (Statement of Principle) pursuant to section 66(3)(a) of the Financial Services and Markets Act 2000 (“the Act”); and
- (2) makes an order, prohibiting Mr Folan from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm. This takes effect from 30 September 2011.

- 1.2. The financial penalty consists of the following elements:
- (1) disgorgement of benefit of £125,117 arising from the commission paid to Mr Folan on completion of 50 (of 54) regulated insurance contracts which he arranged; and
  - (2) a punitive penalty of £70,000 for Mr Folan's knowing involvement in the submission of multiple fictitious insurance applications.
- 1.3. Mr Folan agreed to settle this matter under the FSA's executive settlement procedures at stage 1. Mr Folan therefore qualified for a 30% (stage 1) discount under the FSA's executive settlement procedures, were it not for this discount, the FSA would have imposed a financial penalty of £225,117. The discount was applied to the punitive penalty which was reduced from £100,000 to £70,000.
- 1.4. The total financial penalty imposed on Mr Folan (after discount) is therefore £195,117. This consists of £70,000 (punitive) plus £125,117 (disgorgement).

## **2. SUMMARY OF REASONS**

- 2.1. On the basis of the facts and matters summarised below, and set out in more detail in section 4 of this Notice, the FSA has concluded that Mr Folan contravened Statement of Principle 1 by failing to act with integrity, due to his knowing involvement in the submission of life insurance applications, in that he:
- (a) submitted applications for 54 life assurance and protection policies in his own name, and the names of close family members, with the sole intention of obtaining income from the commission payable by product providers for those policies;
  - (b) falsely used customers' details to obtain those policies without their knowledge or consent, including submitting at least two such applications for close family members where Mr Folan falsified signatures of those family members in order to enable a paper application to be completed with a product provider (all the other fictitious insurance applications were submitted online); and
  - (c) deliberately failed to retain any records of the business conducted by Key Mortgage Associates Limited ("Key Mortgage Associates") in relation to the insurance applications in question. Mr Folan admitted that he disposed of or destroyed such documentation as soon as it was received from the product providers.
- 2.2. The FSA considers that the serious nature of the misconduct referred to at paragraph 2.1 above also merits making a Prohibition Order against Mr Folan. The FSA considers that Mr Folan lacks honesty and integrity and has therefore concluded that Mr Folan is not a fit and proper person. Having regard to its statutory objectives (including consumer protection, market confidence and the reduction of financial crime) it is necessary for the FSA to exercise its power to make a Prohibition Order against him.

### **3. DEFINITIONS**

3.1. The definitions below are used in this Decision Notice:

- (1) “the Act” means the Financial Services and Markets Act 2000;
- (2) “the FSA” means the Financial Services Authority; and
- (3) “the Tribunal” means the Upper Tribunal (Tax and Chancery Chamber).

### **4. FACTS AND MATTERS**

#### **Background**

##### Key Mortgage Associates

- 4.1. Key Mortgage Associates was a small mortgage and insurance intermediary based in Brentwood, Essex. It was authorised and regulated by the FSA on 9 November 2004 to conduct mortgage mediation business and on 14 January 2005 to conduct insurance mediation business.
- 4.2. Mr Folan was the sole director and adviser at Key Mortgage Associates from November 2009 until it submitted an application to voluntarily cancel its Part IV permission in March 2010. The application was granted on 11 October 2010.
- 4.3. On 8 July 2010, a compulsory winding up order was made in relation to Key Mortgage Associates under the provisions of the Insolvency Act 1986 based on the petition of an Insurance Provider.

##### John Folan

- 4.4. Mr Folan was a director of and an approved person performing the controlled functions of CF1 (Director) at Key Mortgage Associates until its Part IV permission was cancelled on 11 October 2010. He was also approved to perform the controlled function of CF8 (Apportionment and Oversight) and was responsible for insurance mediation until 31 March 2009.

#### **Conduct in issue**

- 4.5. Mr Folan made admissions to the FSA in a meeting on 31 March 2011 that he had carried out the misconduct summarised in paragraphs 4.6 to 4.11 below.
- 4.6. Mr Folan submitted at least 54 applications for life assurance and protection policies in his own name and in the names of close family members to seven different insurance providers between January 2008 and September 2009. The applications in the names of close family members were made without their consent or knowledge. When submitting these applications, Mr Folan used his own address as the correspondence address in an attempt to ensure that policy documentation was not sent to family members. In instances where such documentation was sent to the family members' home address by the product provider, Mr Folan explained the receipt of these documents by stating that he was submitting “sample policies” to providers in their names.

- 4.7. Mr Folan submitted at least three applications for close family members where he falsified the signatures of those family members in order to enable a paper application to be completed with a product provider. (The other fictitious applications were submitted online).
- 4.8. Mr Folan provided his own personal bank account details in respect of each application submitted in order for direct debit payments to be taken by the insurance providers. However, as a result of his non-payment of premiums, each of these policies either lapsed, or was cancelled by the product providers.
- 4.9. Mr Folan submitted these applications for the sole purpose of obtaining commission payments from product providers for those policies. Mr Folan was paid £125,117 by way of commission in respect of 50 regulated insurance policies that were in place as a result of him knowingly submitting multiple fictitious insurance applications. Product providers have attempted to clawback commission in relation to those policies, but Mr Folan has been unable to pay back any of the clawback debt.
- 4.10. Mr Folan said he did not keep any documentation or paperwork in relation to the life assurance and protection policies made in his own name and the names of close family members, such as copies of the original applications or policy schedules. Mr Folan said he disposed of or destroyed any such documentation as soon as it was received from the product provider.
- 4.11. As a result of Mr Folan's deliberate destruction of all the documentation relating to the fictitious insurance applications he was unable to comply with requests from the FSA for documents and other information of regulatory importance. During meetings with Mr Folan on 7 and 8 June 2010, and in a number of subsequent communications, the FSA requested that Mr Folan provide information to the FSA, including a copy of Key Mortgage Associates' new business register and confirmation of what policies were completed by 11 June 2010, together with any supporting documentation. Mr Folan was unable to provide this information to the FSA and later admitted that he had destroyed the relevant documents as soon as he received them and that he had not kept his new business register updated because Key Mortgage Associates' subscription had lapsed due to non-payment of subscription fees.
- 4.12. The FSA does, however, acknowledge Mr Folan's admissions pertaining to the above facts and matters, and his cooperation during a meeting with the FSA on 31 March 2011 and thereafter.

## **5. FAILINGS**

- 5.1. The regulatory provisions relevant to this Final Notice are referred to in Annex A.
- 5.2. Mr Folan breached Statement of Principle 1 in that he:
- (1) submitted at least 54 insurance policy applications in his name, and the names of close family members, with the sole intention of obtaining commission;
  - (2) deliberately used customers' details to obtain those insurance policies without their knowledge or consent, including falsifying customers' signatures; and
  - (3) deliberately failed to maintain any records of the business conducted by Key Mortgage Associates in relation to the insurance applications in question, including disposing of and destroying such documentation.
- 5.3. The FSA deems Mr Folan's actions to be deliberate and reckless. Mr Folan's misconduct may have caused consumer detriment to his customers by at the very least exposing them to the risk that their credit rating could be adversely affected.

## **6. SANCTION**

- 6.1. The FSA has concluded that Mr Folan's conduct fell short of the standards required in respect of honesty and integrity, and that Mr Folan is not therefore fit and proper to carry out any functions in relation to any regulated activities carried on by any authorised person, exempt person or exempt professional firm. The FSA further considers that Mr Folan poses a serious and ongoing risk to consumers and to anyone else with whom he has business dealings. Also, action should be taken to help prevent him from committing acts of financial crime in support of the FSA's financial crime objective. A Prohibition Order is therefore necessary and proportionate.
- 6.2. The FSA also considers it necessary and proportionate to impose a financial penalty of £225,117 upon Mr Folan for this misconduct (before discount). The financial penalty comprises the disgorgement of commission of £125, 117 arising from the commission paid to Mr Folan on completion of 50 regulated insurance contracts which were arranged by him and a punitive amount of £100,000 for his knowing involvement in the submission of multiple fictitious insurance applications in contravention of Statement of Principle 1.
- 6.3. The level of the financial penalty is aimed at promoting high standards of regulatory conduct by approved persons and to deter other approved persons from acting in this way.
- 6.4. The FSA considers it appropriate in line with its policy of credible deterrence to impose a financial penalty on Mr Folan of £100,000 for his contraventions of Statement of Principle 1 and a further £125,117 for the disgorgement of benefit. These contraventions consist of serious acts of dishonesty (including knowing involvement in insurance fraud). Insurance fraud represents a serious threat to the FSA's statutory objectives of preventing financial crime, maintaining market confidence, financial stability, and protecting consumers.

- 6.5. Mr Folan provided the FSA with verifiable evidence of financial hardship. However, the FSA considers that a punitive penalty of £100,000 for Mr Folan's breach of contraventions of Statement of Principle 1 should not be reduced and that the full amount be imposed on him due to the serious nature of his misconduct, which involved deliberate acts of dishonesty, including falsifying documents on customers' files, falsifying customers' signatures, and obtaining life policies on the customers' behalf without their knowledge or authorisation. As a result, Mr Folan obtained significant financial benefit by way of commission fees that he could not have obtained on a legitimate basis. Therefore, the FSA does not consider that it would be appropriate to reduce the level of the financial penalty. The imposition of the financial penalty is also in line with the FSA's policy of achieving credible deterrence and improving industry standards.
- 6.6. Mr Folan agreed to settle this matter under the FSA's executive settlement process and as a result qualified for a 30% (stage 1) discount on the punitive element, as a consequence this element of the financial penalty was reduced from £100,000 to £70,000, taking the total financial penalty (including £125,117 for disgorgement of benefit) to £195,117.

## **7. PROCEDURAL MATTERS**

### **Decision Maker**

- 7.1. The decision which gave rise to the obligation to give this Notice was made by the Settlement Decision Makers.
- 7.2. This Final Notice is given to Mr Folan in accordance with section 390 of the Act. The following statutory rights are important.

### **Manner of and time for Payment**

- 7.3. The financial penalty must be paid in full by Mr Folan by no later than 14 October 2011, 14 days from the date of the Final Notice.

### **If the financial penalty is not paid**

- 7.4. If all or any of the financial penalty is outstanding on 15 October 2011, the FSA may recover the outstanding amount as a debt owed by Mr Folan and due to the FSA.

### **Publicity**

- 7.5. 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.
- 7.6. The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

**FSA Contacts**

- 7.7. For more information concerning this matter generally, contact Chris Walmsley at the FSA (direct line: 020 7066 5894/fax 0207 066 5895) of the Enforcement and Financial Crime Division of the FSA.

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**Tom Spender**  
Head of Department  
FSA Enforcement and Financial Crime Division

## **Annex**

### **STATUTORY PROVISIONS, REGULATORY GUIDANCE AND POLICY**

- 1.1. The FSA's regulatory objectives, as set out in Section 2(2) of the Act, include the protection of consumers and the reduction of financial crime.
- 1.2. The FSA has the power, pursuant to Section 56 of the Act, to make a prohibition order against an individual to prevent that individual from performing a specified function or any function falling within a specified description; or any function, if it appears to the FSA that the individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person. Such an order may relate to a specific regulated activity, an activity falling within a specified description or all regulated activities.
- 1.3. The FSA has the power, by virtue of Section 66 of the Act, to impose a penalty on Mr Folan, of such amount as it considers appropriate where it appears to the FSA that he is guilty of misconduct and it is satisfied that it is appropriate in all the circumstances to take action against him.
- 1.4. Mr Folan is guilty of misconduct if, while an approved person, he failed to comply with a Statement of Principle issued under Section 64 or has been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under the Act.

#### **The Statements of Principle (“APER”)**

- 1.5. APER sets out the Statements of Principle in respect of approved persons and sets out examples of conduct, which, in the opinion of the FSA, does not comply with the relevant Statements of Principle. It further describes factors to be taken into account in determining whether an approved person's conduct complies with a Statement of Principle.
- 1.6. APER 3.1.3G stipulates 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, the precise circumstances of the individual case, the characteristics of the particular controlled function and the behaviour expected in that function.
- 1.7. APER 3.1.4G states that an approved person will only be in breach of a Statement of Principle if they are personally culpable, that is, in a situation where their conduct was deliberate or where their standard of conduct was below that which would be reasonable in all the circumstances.
- 1.8. In this case, the FSA considers the most relevant Statement of Principle to be Statement of Principle 1, as referred to in paragraph 2.1 of this Final Notice.



## **Fit and Proper Test for Approved Persons**

- 1.9. The section of the FSA Handbook entitled “FIT” sets out the Fit and Proper test for Approved Persons. The purpose of FIT is to outline the main criteria for assessing the fitness and propriety of a candidate for a controlled function and FIT is also relevant in assessing the continuing fitness and propriety of an approved person.
- 1.10. In this instance, the criteria set out in FIT are relevant in considering whether the FSA may exercise its powers to make a prohibition order against an approved person in accordance with EG 9.9.
- 1.11. FIT 1.3 provides that the FSA will have regard to a number of factors when assessing the fitness and propriety of a person and the most important considerations will be the person’s honesty, integrity and reputation, competence and capability, and financial soundness.
- 1.12. In determining a person’s honesty, integrity and reputation, FIT 2.1 provides that the FSA will have regard to matters including, but not limited to, those set out in FIT 2.1.3G. The guidance referred to includes:
  - (1) whether the person has contravened any of the requirements and standards of the regulatory system (FIT 2.1.3G (5));
  - (2) whether the person has been a director, partner, or concerned in the management, of a business that has gone into insolvency, liquidation or administration while the person has been connected with that organisation or within one year of that connection (FIT 2.1.3G(9); and
  - (3) 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 (FIT 2.1.3G (13)).
- 1.13. In determining a person’s competence and capability FIT 2.2 provides that the FSA will have regard to matters including, but not limited to, whether the person satisfies the relevant requirements of the FSA’s Training and Competence sourcebook (TC) in relation to the controlled function, and whether the person has demonstrated by experience and training that the person is able, or will be able if approved, to perform the controlled function.

## **FSA’s policy for exercising its power to make a prohibition order**

- 1.14. The FSA’s power under Section 56 of the Act to prohibit individuals who are not fit and proper from carrying out functions in relation to regulated activities helps the FSA to work towards achieving its regulatory objectives. The FSA may exercise this power to make a prohibition order where it considers that, to achieve any of those objectives, it is appropriate either to prevent an individual from performing any function in relation to regulated activities, or to restrict the functions which he may perform. The FSA policy in relation to the decision to make a prohibition order is set out in Chapter 9 of the Enforcement Guide (EG).

- 1.15. In particular EG 9.4 sets out the general scope of the FSA's powers in this respect, which include the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant.
- 1.16. EG 9.5 says that the scope of a prohibition order will depend on the range of activities that the individual performs in relation to regulated activities, the reasons why he is not fit and proper, and the severity of risk which he poses to consumers or the market generally.
- 1.17. EG 9.8 to 9.14 provide guidance in circumstances where the FSA has concerns about the fitness and propriety of an approved person.
- 1.18. In particular, EG 9.8 states that the FSA may consider whether it should prohibit that person from performing functions in relation to regulated activities, withdraw its approval, or both. The FSA will, in deciding whether to withdraw its approval and/or make a prohibition order, consider whether its regulatory objectives can be achieved adequately by imposing disciplinary sanctions.
- 1.19. EG 9.9 states that, when deciding whether to make a prohibition order against an approved person and/or withdraw its approval, the FSA will consider all the relevant circumstances of the case which may include, but are not limited to, the following factors:
  - (1) the matters set out in Section 61(2) of the Act;
  - (2) whether the individual is fit and proper to perform functions in relation to regulated activities. The criteria for assessing the fitness and propriety of an approved person are contained in FIT 2.1 (Honesty, integrity and reputation); FIT 2.2 (Competence and capability); and FIT 2.3 (Financial soundness);
  - (3) whether, and to what extent, the approved person has:
    - (a) failed to comply with the Statements of Principle issued by the FSA with respect to the conduct of approved persons; or
    - (b) been knowingly concerned in a contravention by the relevant firm of a requirement imposed on the firm by or under the Act (including the Principles and other rules);
  - ....
  - (4) the relevance and materiality of any matters indicating unfitness;
  - (5) the length of time since the occurrence of any matters indicating unfitness;
  - (6) the particular controlled function the approved person is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates;

- (7) the severity of the risk which the individual poses to consumers and to confidence in the financial system; and
  - (8) the previous disciplinary record and general compliance history of the individual including whether the FSA, any previous regulator, designated professional body or any other domestic or international regulator has previously imposed a disciplinary sanction on the individual.
- 1.20. EG 9.10 states that the FSA may have regard to the cumulative effect of a number of factors and it may take account of the particular controlled function which an approved person is performing for a firm, the nature and activities of the firm concerned and the markets within which it operates.
- 1.21. EG 9.12 provides examples of types of behaviour which have previously resulted in the FSA deciding to issue a prohibition order or withdraw the approval of an approved person. The examples include severe acts of dishonesty, for example, which may have resulted in financial crime, serious lack of competence, and serious breaches of the Statements of Principle for Approved Persons.

#### **Policy on imposition of financial penalties**

- 1.22. The FSA's policy in relation to the imposition of financial penalties is set out in Chapter 6 of the Decision Procedure and Penalties Manual (DEPP) which forms part of the Handbook.
- 1.23. The Decision Procedure and Penalties Manual (Financial Penalties) Instrument 2010, which came into force on 6 March 2010, made changes to DEPP. As the misconduct described in the Final Notice occurred prior to 6 March 2010, the FSA has had regard to the provisions of DEPP in force prior to 6 March 2010, which are summarised below.
- 1.24. In determining whether a financial penalty is appropriate under the policy in place before 6 March 2010, the FSA is required to consider all the relevant circumstances of a case. Applying the criteria set out in DEPP 6.2.1G and DEPP 6.4.2G (regarding whether or not to take action for a financial penalty or public censure, and if so which sanction).
- 1.25. The FSA considers that a financial penalty of £195,117 is an appropriate sanction for Mr Folan's knowing involvement in the submission of multiple fictitious insurance applications for the sole purpose of generating income from the commission payments, in contravention of Statement of Principle 1. The financial penalty also includes the disgorgement of any financial benefit Mr Folan received as a result of his misconduct, as there is a need to send out a strong message to other individuals performing controlled functions that they must act with honesty and integrity.
- 1.26. DEPP 6.2.1G says that the FSA will consider the full circumstances of each case when determining whether or not to take action for a financial penalty or public censure. Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive: not all of these factors may be applicable in a particular case, and there may be other factors, not listed, that are relevant.

- (1) The nature, seriousness and impact of the suspected breach, including:
  - (a) whether the breach was deliberate or reckless;
  - (b) the duration and frequency of the breach;
  - (c) the amount of any benefit gained or loss avoided as a result of the breach;
  - (d) whether the breach reveals serious or systemic weaknesses of the management systems or internal controls relating to all or part of a person's business;
  - ....
  - (f) the loss or risk of loss caused to consumers or other market users; and
  - (g) the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the breach.
- (2) The conduct of the person after the breach, including the following:
  - (a) how quickly, effectively and completely the person brought the breach to the attention of the FSA or another relevant regulatory authority;
  - (b) the degree of co-operation the person showed during the investigation of the breach
  - ....
- (5) Action taken by the FSA in previous similar cases.
- ....

1.29. DEPP 6.2.4G says the primary responsibility for ensuring compliance with a firm's regulatory obligations rests with the firm itself. However, the FSA may take disciplinary action against an approved person where there is evidence of personal culpability on the part of that approved person. Personal culpability arises where the behaviour was deliberate or where the approved person's standard of behaviour was below that which would be reasonable in all the circumstances at the time of the conduct concerned.

1.30. DEPP 6.2.6G says that in addition to the general factors outlined in DEPP 6.2.1 G, there are some additional considerations that may be relevant when deciding whether to take action against an approved person pursuant to section 66 of the Act. This list of those considerations is non-exhaustive. Not all considerations below may be

relevant in every case, and there may be other considerations, not listed, that are relevant.

- (1) The approved person's position and responsibilities. The FSA may take into account the responsibility of those exercising significant influence functions in the firm for the conduct of the firm. The more senior the approved person responsible for the misconduct, the more seriously the FSA is likely to view the misconduct, and therefore the more likely it is to take action against the approved person.

....

- (3) Whether disciplinary action would be a proportionate response to the nature and seriousness of the breach by the approved person.

1.31. DEPP 6.4.2G says that 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:

- (1) whether or not deterrence may be effectively achieved by issuing a public censure;
- (2) if the person has made a profit or avoided a loss as a result of the breach, this may be a factor in favour of a financial penalty, on the basis that a person should not be permitted to benefit from its breach;
- (3) if the breach is more serious in nature or degree, this may be a factor in favour of a financial penalty, on the basis that the sanction should reflect the seriousness of the breach; other things being equal, the more serious the breach, the more likely the FSA is to impose a financial penalty;
- (4) if the person has brought the breach to the attention of the FSA, this may be a factor in favour of a public censure, depending upon the nature and seriousness of the breach;
- (5) if the person has admitted the breach and provides full and immediate co-operation to the FSA, and takes steps to ensure that those who have suffered loss due to the breach are fully compensated for those losses, this may be a factor in favour of a public censure, rather than a financial penalty, depending upon the nature and seriousness of the breach;

.....

- (7) the FSA's approach in similar previous cases: the FSA will seek to achieve a consistent approach to its decisions on whether to impose a financial penalty or issue a public censure;

.....

1.32. DEPP 6.5.2G says 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;

(e) the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the breach;

.....

(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;

.....

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

.....

(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; but if a person reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the FSA will take account of those assets when determining the amount of a penalty.

...

(d) The size and resources of a person may also be relevant in relation to mitigation, in particular what steps the person took after the breach had been identified; the FSA will take into account what it is reasonable to expect from a person in relation to its size and resources, and factors such as what proportion of a person's resources were used to resolve a problem.

....

(6) The amount of benefit gained or loss avoided

The FSA may have regard to the amount of benefit gained or loss avoided as a result of the breach, for example:

- (a) the FSA will propose a penalty which is consistent with the principle that a person should not benefit from the breach; and
- (b) the penalty should also act as an incentive to the person (and others) to comply with regulatory standards and required standards of market conduct.

(7) Difficulty of detecting the breach

A person's incentive to commit a breach may be greater where the breach is, by its nature, harder to detect. The FSA may, therefore, impose a higher penalty where it considers that a person committed a breach in such a way as to avoid or reduce the risk that the breach would be discovered, or that the difficulty of detection (whether actual or perceived) may have affected the behaviour in question.

(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, or any other regulatory authority allowed to share information with the FSA, such as an RIE or the Takeover Panel. Where a person has fully co-operated with the FSA's investigation, this will be a factor tending to reduce the level of financial penalty;
- (c) any remedial steps taken since the breach was identified, including whether these were taken on the person's own initiative or that of the FSA or another regulatory authority; for example, identifying whether consumers or investors or other market users suffered loss and compensating them where they have; correcting any misleading statement or impression; taking disciplinary action against staff involved (if appropriate); and taking steps to ensure that similar problems cannot arise in the future; and
- (d) whether the person concerned has complied with any requirements or rulings of another regulatory authority relating to the breach (for example, where relevant, those of the Takeover Panel).