



Financial Services Authority

FINAL NOTICE

To: Alexander Edward Ten-Holter

Firm Address: Greenlight Capital (UK) LLP
5th Floor
15 Bedford Street
London
WC2E 9HE

Date: 26 January 2012

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) gives final notice that it has taken the following action:

1. THE ACTION

1.1. The FSA served on Alexander Edward Ten-Holter (‘Mr Ten-Holter’) a Decision Notice on 12 January 2012 which notified him that it had decided to impose on him:

(i) A prohibition order pursuant to Section 56 of the Financial Services and Markets Act 2000 (“the Act”), prohibiting Mr Ten-Holter from performing the Compliance oversight (CF10) and Money laundering reporting (CF11) significant influence functions in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm on the grounds that he is not a fit and proper person to perform those functions; and

(ii) A financial penalty of £130,000, pursuant to Section 66 of the Act, for breaching Statement of Principle 6 of the FSA’s Statements of Principle and Code of Practice for Approved Persons (“APER”).

1.2. Mr Ten-Holter has not referred the matter to the Upper Tribunal (Tax and Chancery Chamber).

- 1.3. Accordingly, for the reasons set out below, the FSA imposes a financial penalty on Mr Ten-Holter in the amount of £130,000 and prohibits Mr Ten-Holter from performing the Compliance oversight (CF10) and Money laundering reporting (CF11) significant influence functions in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm on the grounds that he is not a fit and proper person to perform those functions.

2. REASONS FOR THE ACTION

- 2.1. This notice is issued to Mr Ten-Holter as a result of his conduct between 9 and 15 June 2009.
- 2.2. In June 2009, Mr Ten-Holter was employed as a trader at Greenlight Capital (UK) LLP (“Greenlight UK”). Part of his role involved executing trades according to instructions received from the portfolio management team at Greenlight Capital Inc (“Greenlight”). Mr Ten-Holter was approved to perform the Customer function (CF30), a controlled function, at Greenlight UK. Mr Ten-Holter was also approved to perform the significant influence functions of Partner (CF4), Money laundering reporting (CF11) and Compliance oversight (CF10) at Greenlight UK.
- 2.3. As the person approved to perform the Compliance oversight function at Greenlight UK, Mr Ten-Holter had specific responsibility for ensuring that Greenlight UK’s regulated activities complied with its obligations under the regulatory system. This was in addition to those obligations on him as a person approved to perform the significant influence functions of partner and money-laundering reporting officer.
- 2.4. Between 9 June and 15 June 2009, Mr Ten-Holter breached Statement of Principle 6 of APER in that he failed to exercise due skill, care and diligence in managing the business of Greenlight UK for which he was responsible in his Compliance oversight function, as set out below.
- 2.5. Mr Ten-Holter failed to question and to make reasonable enquiries prior to effecting an order from Greenlight to sell its shares in Punch Taverns Plc (“Punch”) (Greenlight had investments in Punch in the form of both shares and contracts for difference, but for convenience, this Notice refers to Greenlight as “shareholder” and to Greenlight’s “shares”). Mr Ten-Holter effected the order in Punch, despite being aware that:
 - (i) Greenlight had made the decision to sell all of its shares in Punch having just spoken to Punch management; and
 - (ii) the Greenlight analyst who participated in the call with Punch management had stated at the time of giving the sell order to Mr Ten-Holter that:
 - (a) Punch management would have told them “secret bad things” had Greenlight been prepared to sign a non-disclosure agreement (“NDA”);
 - (b) other shareholders had signed the NDA and in Greenlight’s opinion would want to sell; and

- (c) Greenlight potentially had a window of a week to sell before the stock “plummets”, although that “might be a lie”.
- 2.6. On 15 June 2009 Mr Ten-Holter became aware of additional information that should have further prompted him to question and make enquiries regarding the order to sell Greenlight’s shares in Punch. Specifically, on 15 June 2009 Punch announced its intention to raise a substantial and specified amount by means of a Firm Placing and Open Offer of new ordinary shares and its intention to make a tender offer to holders of convertible bonds. The unscheduled announcement had an immediate and substantial detrimental effect on the price of Punch shares.
- 2.7. This should have alerted Mr Ten-Holter to the risk of market abuse and he should, at the very least, have taken action to satisfy himself that no such risk existed. However, Mr Ten-Holter did not recognise the risk and took no action. His behaviour whilst performing the Compliance oversight function at Greenlight UK was in breach of Statement of Principle 6 of APER. His behaviour also demonstrates a lack of competence and capability, such that he is not fit and proper to perform the Compliance oversight (CF10) and Money laundering reporting (CF11) significant influence functions.
- 2.8. The FSA considers this to be a serious breach by Mr Ten-Holter, in particular for the following reasons:
 - (i) detecting and preventing market abuse is a key part of Mr Ten-Holter’s compliance role at Greenlight UK. However, he failed to take any action at all, despite his knowledge of the suspicious circumstances surrounding Greenlight’s sale of its shares in Punch;
 - (ii) Mr Ten-Holter is a senior person in a position of considerable responsibility at Greenlight UK. He has considerable experience as a trader and an approved person, and has held a significant influence function since June 2008. Although at the relevant time he was relatively new to his compliance role, he had undertaken a significant amount of regulatory and compliance training during his career;
 - (iii) Mr Ten-Holter’s approach as the approved person responsible for compliance oversight was inadequate. He relied on his view of Greenlight’s high standards of compliance in making any assessment of risk. This was inappropriate; the possibility of risk should be considered on the basis of the information available; and
 - (iv) by failing to recognise the risk of market abuse and then take appropriate steps to ensure no such abuse was taking place, Mr Ten-Holter’s conduct had the potential to impact upon the integrity of and confidence in the market. This was particularly so given that Punch is a large, publicly listed company and Greenlight is a significant and influential market participant. The UK regulatory system requires individuals approved to hold the Compliance oversight (CF10) significant influence function to act with due skill, care and diligence and, in doing so, to recognise the signs of possible market abuse and

to take action accordingly. Compliance failures of this nature can have a dramatic effect on the orderliness of the markets.

- 2.9. The FSA therefore considers that Mr Ten-Holter's conduct merits the imposition of a prohibition order prohibiting him from holding the Compliance oversight (CF10) and Money laundering reporting (CF11) significant influence functions and the imposition of a financial penalty. The FSA considers that a financial penalty of £130,000 is appropriate.

3. FACTS AND MATTERS

Mr Ten-Holter

- 3.1. Mr Ten-Holter has considerable experience as a trader and has undertaken a significant amount of regulatory and compliance training over his career. He has worked in the banking industry in London since 1995 and held a controlled function since 2001. Mr Ten-Holter had undertaken a significant amount of compliance work in his roles prior to joining Greenlight UK.
- 3.2. Mr Ten-Holter joined Greenlight UK in March 2008. Greenlight UK employs 4 individuals of which Mr Ten-Holter is the most senior. Greenlight UK executes orders to trade on the instructions of Greenlight and also provides research on UK and European stocks to Greenlight.
- 3.3. Mr Ten-Holter held the following controlled functions at Greenlight UK:
 - (i) CF 4 Partner function from 2 June 2008;
 - (ii) CF 10 Compliance Oversight from 24 March 2009;
 - (iii) CF 11 Money Laundering Reporting from 24 March 2009; and
 - (iv) CF 30 Customer function from 2 June 2008.
- 3.4. Mr Ten-Holter's performance of the trading function at Greenlight UK involved buying and selling investments according to instructions received from the portfolio management team at Greenlight. Mr Ten-Holter did not make any investment decisions himself.
- 3.5. In his role as the approved person responsible for compliance oversight at Greenlight UK, Mr Ten-Holter was responsible for ensuring that Greenlight UK's compliance function was carried out with due skill, care and diligence. In June 2009, Greenlight UK was operating under a Compliance Procedures Manual dated 2008 which included a section on insider dealing and market abuse. Greenlight UK's procedures required action to be taken if there were any suspicions regarding market abuse.

History of Greenlight's shareholding in Punch

- 3.6. Greenlight first acquired shares in Punch on 16 June 2008. Greenlight bought two tranches of shares in June and July 2008 (approximately 10 million and 15 million

shares respectively) and then bought again in December 2008 and January 2009 (approximately a further 8 million shares).

- 3.7. Mr Ten-Holter was aware of the history of Greenlight's shareholding in Punch and had worked with the US traders at Greenlight in accumulating the position.
- 3.8. The trading pattern adopted by Greenlight shows that it did not actively trade in Punch shares. This means that it did not sell shares and then buy them back in order to improve its average holding price or lock in short term gains. At no time had Greenlight sold any of its shares in Punch prior to 9 June 2009.

The warning signs of market abuse

The sell order

- 3.9. On 9 June 2009, Mr Ten-Holter received a telephone call from Greenlight. On this call ("the Sell Order Call"), Mr Ten-Holter was given an order to sell all of Greenlight's shares in Punch. In particular he was given the following information:
 - (i) that Greenlight had made the decision to sell having just spoken to Punch management;
 - (ii) that Punch management had told Greenlight that there were "secret bad things" that they would tell Greenlight if Greenlight signed a non-disclosure agreement ("NDA") (An NDA provides written terms upon which a wall crossing can take place. Wall crossing is the process whereby a company can legitimately provide inside information to a third party);
 - (iii) that other shareholders had signed the NDA and in Greenlight's opinion would want to sell;
 - (iv) that Greenlight potentially had a window of a week to sell before the stock "plummets", although that "might be a lie".
- 3.10. Mr Ten-Holter was instructed to execute the sale of Punch shares having received this information about the reasons for the sale. Other than these indications given to Mr Ten-Holter at the time he received the sell order, he was given no other reason for the sudden sale of Punch shares.
- 3.11. Mr Ten-Holter did not make any enquiries as to the details received from Punch management and did not conduct any further investigation as to the reasons for the sale. Between Tuesday 9 June and Friday 12 June 2009, he effected the sale of a total of 11,456,000 Punch shares.

The Announcement

- 3.12. At 7.44a.m. on Monday 15 June 2009, Punch made an unscheduled announcement (a non-routine announcement which had not been anticipated by Punch's published schedule of corporate events). It stated its intention to raise a substantial and specified amount by means of a Firm Placing and Open Offer of new ordinary shares and its intention to make a tender offer to holders of certain bonds.

- 3.13. Following the announcement, the price of Punch shares declined by 29.9%. As at that time Greenlight had avoided losses of approximately £5.8 million as a result of the trades effected by Mr Ten-Holter, a figure equivalent to the cumulative detriment to the buyers of those securities and indicative of the market impact of those trades.
- 3.14. On the morning of 15 June 2009, after the announcement was issued, Mr Ten-Holter had a conversation with the broker through whom he had sold the Punch shares, in which they discussed the possibility that there had been a pre-marketing of holders of Punch shares before the announcement (some market participants refer to this process as a “pre-sounding exercise”). Pre-marketing is a technique used to gauge interest in a corporate event as a consequence of which inside information may be provided to the pre-marketed party. Mr Ten-Holter still did not take any steps to find out the basis upon which Greenlight had sold Punch shares. Neither did Mr Ten-Holter take any action to ensure there was no risk that the trading he had effected for Greenlight involved market abuse.

4. FAILINGS

Breach of Statement of Principle 6

- 4.1. It appears to the FSA that Mr Ten-Holter is guilty of misconduct, in that he failed to act with due skill, care and diligence in carrying out his CF10 controlled function, in his role as the approved person responsible for compliance oversight at Greenlight UK. The FSA is satisfied that it is appropriate in all the circumstances to take action against Mr Ten-Holter.
- 4.2. Mr Ten-Holter’s breach of Statement of Principle 6 is evidenced by his conduct on and around 9 to 15 June 2009 in failing to take any steps to identify and address the risk of market abuse. Mr Ten-Holter had sufficient information such that he should have been on notice of possible market abuse taking place. The relevant information known to Mr Ten-Holter can be summarised as follows:
- (i) the instruction from Greenlight for the sudden disposal of its entire holding of a major stake in Punch;
 - (ii) that the instruction followed immediately after a call with Punch management;
 - (iii) that Punch management had told Greenlight that there were “secret bad things” that they would tell Greenlight if Greenlight signed a non-disclosure agreement (“NDA”);
 - (iv) that, following the call with management, Greenlight had formed a view that the share price would plummet and this was the reason for the instruction;
 - (v) that there was no other reason for the instruction known or anticipated by Mr Ten-Holter; and
 - (vi) that the sales took place immediately prior to Punch’s unscheduled announcement on 15 June 2009, which caused the share price to fall significantly.

- 4.3. An approved person responsible for compliance oversight acting with due skill, care and diligence would have been sufficiently alerted by these factors to make enquiries of Greenlight as to the reason for the sale.
- 4.4. For example, if an individual holding the Compliance oversight function is directly told that a decision to sell stock has been made following a conversation with management of the issuer, and the conclusion following that conversation is that there is a short period of time before the stock price is going to fall, the reasonable and diligent response would be to make enquiries as to the reason for the sale.
- 4.5. On the basis of all the warning signs received by Mr Ten-Holter, if acting with due skill, care and diligence, he should have checked whether any advance information had been given to Greenlight regarding the equity issuance prior to the Punch announcement, whether as part of a pre-marketing exercise or otherwise.
- 4.6. The consequences of Mr Ten-Holter's inaction were serious in that he failed to recognise clear warning signs of market abuse in Greenlight's behaviour. These are the types of warning signs an approved person responsible for compliance oversight should be alert to in order to protect both their firm and the integrity of the UK markets.
- 4.7. Furthermore, Mr Ten-Holter has stated that he relied on his view that Greenlight had high standards of compliance and a strict market abuse policy. This is an inappropriate approach for an approved person responsible for compliance oversight. Whilst many firms operate excellent regulatory and compliance policies and procedures, that does not mean that mistakes cannot be made and that rules cannot be broken. It is the role of the compliance function to ensure, so far as possible, that no mistakes, misjudgements or deliberate breaches occur and that policies, procedures and regulatory requirements are adhered to. If the compliance function of a firm considers that the risk of market abuse is very low on the basis that the firm has appropriate policies and procedures and will only assess risk accordingly, then warning signs that should reasonably alert it to market abuse may be ignored. As such, the compliance function is not operating properly.

Fitness and Propriety

- 4.8. The FSA further considers that in failing to act with due skill, care and diligence in the manner described above, Mr Ten-Holter has demonstrated that he is not competent and capable of holding the Compliance oversight (CF10) and Money laundering reporting (CF11) significant influence functions.
- 4.9. Individuals approved to hold the Compliance oversight (CF10) significant influence function are a fundamental part of the regulatory system and provide front line protection against market abuse for the firms for which they work and the wider market. Mr Ten-Holter's conduct shows that he is unable to recognise signs of possible market abuse and has a flawed approach to compliance. As such, he does not have the requisite levels of competence and capability required to be fit and proper to hold the Compliance oversight (CF10) significant influence function. For the same reason he lacks sufficient competence and capability to hold the Money

laundering reporting (CF11) significant influence function, which requires a similar level of alertness to warning signs.

5. SANCTION

Financial penalty

- 5.1. DEPP 6.1.2 sets out that the principal purpose of imposing a financial penalty is to promote high standards of regulatory and 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.
- 5.2. DEPP 6.5.1 states 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.
- 5.3. DEPP 6.5.2 (as it applied during the relevant period) sets out some of the factors that may be taken into account when the FSA determines the level of a financial penalty that is appropriate and proportionate to the misconduct. They are not exhaustive, but include deterrence, the nature, seriousness and impact of the misconduct, the extent to which the breach was deliberate or reckless, whether the person on whom the penalty is to be imposed is an individual, the size, financial resources and other circumstances of the person on whom the penalty is to be imposed, the amount of any benefit gained or loss avoided, the difficulty of detecting the breach, the conduct following the breach, the disciplinary record and compliance history of the person and the action that the FSA has taken in relation to similar misconduct by other persons.
- 5.4. The FSA has taken all of the circumstances of this case into account and considered the guidance in DEPP 6 in deciding that the imposition of a financial penalty in this case is appropriate and that the level of financial penalty is proportionate.
- 5.5. The FSA considers this to be a serious breach by Mr Ten-Holter, in particular for the following reasons:
 - (i) detecting and preventing market abuse is a key part of Mr Ten-Holter's compliance role at Greenlight UK. However, he failed to take any action at all, despite his knowledge of the suspicious circumstances surrounding Greenlight's sale of its shares in Punch;
 - (ii) Mr Ten-Holter is a senior person in a position of considerable responsibility at Greenlight UK. He has considerable experience as a trader and an approved person, and has held a significant influence function since June 2008. Although at the relevant time he was relatively new to his compliance role, he had undertaken a significant amount of regulatory and compliance training during his career;
 - (iii) Mr Ten-Holter's approach as the approved person responsible for compliance oversight was inadequate. He relied on his view of Greenlight's high standards of compliance in making any assessment of risk. This was

inappropriate; the possibility of risk should be considered on the basis of the information available; and

- (iv) by failing to recognise the risk of market abuse and then take appropriate steps to ensure that no such abuse was taking place, Mr Ten-Holter's conduct had the potential to impact upon the integrity of and confidence in the market. This is particularly so given that Punch was a large, publicly listed company and Greenlight is a significant and influential market participant. The UK regulatory system requires individuals approved to hold the Compliance oversight (CF10) significant influence function to act with due skill, care and diligence and, in doing so, to recognise the signs of possible market abuse and to take action accordingly. Compliance failures of this nature can have a dramatic effect on the orderliness of the markets.

5.6. However, Mr Ten-Holter did not deliberately or recklessly contravene regulatory requirements. It is also noted that he has not previously been the subject of an adverse finding by the FSA and that he co-operated in the course of the FSA's investigation.

5.7. The FSA has taken into account Mr Ten-Holter's financial resources and considers that the penalty to be imposed upon him is proportionate and necessary to be effective as a deterrent. The penalty is considered necessary to act as an incentive to Mr Ten-Holter and others, including other persons performing significant influence functions at firms such as Greenlight UK, to comply with regulatory standards and required standards of market conduct. Mr Ten-Holter has provided no evidence that he would suffer serious financial hardship or financial difficulties if he were to pay the penalty.

5.8. In the circumstances, the FSA has decided to impose a financial penalty on Mr Ten-Holter of £130,000.

Prohibition Order

5.9. In considering whether to impose a prohibition order, the FSA has had regard to the provisions of the Enforcement Guide ("EG"), and in particular the provisions of EG 9.9. This includes, but is not limited to, whether the individual is fit and proper to perform functions in relation to regulated activities; whether the approved person has failed to comply with the Statements of Principle with respect to the conduct of approved persons; the particular controlled function the approved person was performing; and the relevance and materiality of any matters indicating unfitness.

5.10. The FSA considers that Mr Ten-Holter is not a fit and proper person to perform the Compliance oversight (CF10) and Money laundering reporting (CF11) significant influence functions. He should therefore be prohibited, under section 56 of the Act, from performing those functions.

6. REPRESENTATIONS AND FINDINGS

6.1. Below is a brief summary of the key written and oral representations made by Mr Ten-Holter in this matter and how they have been dealt with. In making the decision

which gave rise to the obligation to give this notice, the FSA has taken into account all of Mr Ten-Holter's representations, whether or not explicitly set out below.

Regulatory breaches

6.2. Mr Ten-Holter made representations that:

- (i) he has given careful thought to his behaviour in light of the FSA's investigation, and recognised that in some ways it fell short of the proper standards. In particular, he accepted that his behaviour following the announcement fell below the standards to be expected of a compliance officer in his position, and breached regulatory standards, specifically Statement of Principle 6. Mr Ten-Holter accepted that, after the announcement, he should have asked questions of Greenlight to confirm the reasons for the trading. Mr Ten-Holter made an incorrect judgment about the 'red flags' indicating potential market abuse;
- (ii) he did not accept that his behaviour on first receiving the sell order breached regulatory standards. He stated that, when he received the sell order, in accordance with 'best practice', he should have recorded in writing his implicit judgment that there was no cause for concern as regards insider dealing. This was because the order was a substantial sell order closely following a call with company management. However, Mr Ten-Holter stated that in his view no further investigation was warranted in the circumstances. His failing in this regard was a failure to follow best practice, but not a breach of regulatory standards;
- (iii) he accepted that an order to sell shares following a call with management could in certain circumstances be an indicator of market abuse, if other factors were present, but was not such an indicator in the specific circumstances of this case. He noted that it was not unusual or improper for him not to be told the reason for an order he was given, and he set out a number of matters which in his view positively indicated that inside information had not been conveyed on Greenlight's call with management, and meant that there were therefore no suspicious circumstances. These included:
 - (a) the routine nature of the order to sell Punch stock, which included a narrow price limit, and which for Greenlight was not unusually urgent or aggressive;
 - (b) the fact that he was told that Greenlight had not signed an NDA;
 - (c) the speculation about "secret bad things", which suggested that Greenlight had not received inside information;
 - (d) the uncertainty about the time available before the stock price would "plummet"; and
- (iv) he interpreted the comments made on the Sell Order Call in light of his knowledge of how those on the call regularly expressed themselves, including that the individual who referred to "secret bad things" had an "air for the dramatic".

6.3. The FSA has found that:

- (i) Mr Ten-Holter's recognition and acceptance that some of his behaviour breached Statement of Principle 6 is a feature to be taken into account in assessing the action to be taken against him, and the FSA has done so;
- (ii) in the circumstances, on receiving the sell order Mr Ten-Holter should not simply have made a written record of his implicit assumptions, but should have carried out further investigation. His failure to do so was a breach of Statement of Principle 6;
- (iii) although there were some potential contra-indications of market abuse, there were still more than sufficient warning signs to require further investigation of what specific information Greenlight had received, and the precise reasons for selling; and
- (iv) irrespective of how those on the Sell Order Call usually expressed themselves, the comments made to Mr Ten-Holter on the call, immediately following Greenlight's call with Punch management, should have put Mr Ten-Holter on alert. In particular, the use of words such as "secret bad things" indicated that significant information had been learned, and should have prompted Mr Ten-Holter to investigate further.

Penalty

6.4. Mr Ten-Holter made representations that:

- (i) although he accepted that his behaviour following the announcement constituted a breach of Statement of Principle 6, it was a breach at the lower end of the scale. This was not a case of an obvious failing, and any negligence was in relation to a single transaction, in the context of otherwise unblemished career. A censure or small penalty would be appropriate and would achieve the appropriate deterrent affect;
- (ii) although he has relinquished his CF10 and CF11 roles, this is because his primary career focus is on his other roles; he believes that he is competent and capable to perform the CF10 and CF11 roles, and that a prohibition from performing those functions is therefore not appropriate; and
- (iii) in comparison with penalties imposed in previous FSA cases Mr Ten-Holter's penalty should be reduced. In particular, Mr Ten-Holter's failings were not as serious as those of Mr Caspar Agnew. Mr Agnew was fined £65,000 for a similar failure to recognise warning signs of market abuse, however, Mr Agnew did not have the counter-indications of market abuse which Mr Ten-Holter had to positively allay his concerns.

6.5. The FSA has found that:

- (i) although Mr Ten Holter has admitted to some failings, to which the FSA has had regard, his breaches extend further than those accepted. His behaviour

demonstrated very serious compliance failings, in respect of which the imposition of a significant penalty is appropriate;

- (ii) bearing in mind the seriousness of Mr Ten-Holter's failings, the FSA does not consider him fit and proper to perform the Compliance oversight (CF10) and Money laundering reporting (CF11) significant influence functions. He should therefore be prohibited from doing so; and
- (iii) Mr Ten-Holter, unlike Mr Agnew, was approved to perform the Compliance oversight (CF10) significant influence function and was in a position to prevent market abuse. Notwithstanding any counter-indications of market abuse his failings were serious and, given his position and responsibilities, and taking into account the penalties imposed in previous FSA cases, the penalty to be imposed on him is appropriate.

7. DECISION MAKER

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

8. IMPORTANT

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

Manner and time for payment

- 8.2. The financial penalty must be paid in full by Mr Ten-Holter to the FSA by no later than 12 February 2012, being 14 days after the date of this Final Notice.

If the financial penalty is not paid

- 8.3. If all or any of the financial penalty is outstanding on 12 February 2012 the FSA may recover the outstanding amount as a debt owed by Mr Ten-Holter and due to the FSA.

Publicity

- 8.4. Sections 391(4), (6) and (7) of FSMA apply to the publication of information about the matter to which this Final Notice relates. Under those provisions, the FSA must publish such information about the matter to which the Final 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 the consumers.
- 8.5. The FSA intends to publish such information about the matter which this Final Notice relates as it considers appropriate.

FSA contacts

8.6 For more information concerning this matter generally, you should contact either Helena Varney (direct line: 020 7066 1294) or Sadaf Hussain (direct line: 020 7066 5768) at the FSA.

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Jamie Symington
Head of Department
FSA Enforcement and Financial Crime Division

ANNEX 1

RELEVANT STATUTORY PROVISIONS AND REGULATORY GUIDANCE

Statutory provisions

1. The FSA's statutory objectives, set out in Section 2(2) of the Act, include market confidence, the protection of consumers and the reduction of financial crime.
2. The FSA may prohibit an individual from carrying out regulated activities under section 56 of the Act which states:
 - (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) ... ;
 - (b) *authorised persons generally or any person within a specified class of authorised persons.*
3. The FSA may impose a financial penalty under section 66 of the Act which states:
 - (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*
 - (b) *he has been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under this Act...*
 - (3) *If the Authority is entitled to take action under this section against a person, it may*

(a) impose a penalty on him of such amount as it considers appropriate;

(b) publish a statement of his misconduct.

FSA Handbook

4. In deciding to take the action set out in this notice, the FSA has had regard to rules and guidance published in the FSA Handbook.

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

5. Individuals that are approved by the FSA to hold controlled functions are required to abide by the Statements of Principle for Approved Persons in the performance of their controlled functions under section 64(1) of the Act and APER 1.1.1.

6. Statement of Principle 6 at APER 2.1.2P states:

An approved person performing a significant influence function must exercise due skill, care and diligence in managing the business of the firm for which he is responsible in his controlled function

7. A Code of Practice for Approved Persons has been issued under section 64 of the Act and is set out at APER 3 and APER 4.
8. APER 3.1.1G states that the purpose of this code is to help determine whether or not an approved person’s conduct complies with a Statement of Principle.
9. APER 3.1.3G states that 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.
10. APER 3.1.4(1)G states that 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.
11. APER 3.2.1(2)E states that in determining whether or not the particular conduct of an approved person within his controlled function complies with the Statements of Principle, the FSA will take into account whether the conduct is consistent with the requirements and standards of the regulatory system relevant to the firm in question.
12. APER 3.1.8G states that 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.

13. APER 3.3.1E states that 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.*

14. The Code of Practice for Approved Persons also provides examples of conduct that, in the opinion of the FSA, does not comply with Statement of Principle 6. APER 4.6.2E states:

In the opinion of the FSA, conduct of the type described in APER 4.6.3E...does not comply with Statement of Principle 6.

15. The conduct described in APER 4.6.3E is as follows:

Failing to take reasonable steps to adequately inform himself about the affairs of the business for which he is responsible falls within APER 4.6.2 E.

16. APER 4.6.4E states that the behaviour of the type referred to in APER 4.6.3E includes, but is not limited to conduct such as:

- (1) *permitting transactions without a sufficient understanding of the risks involved;...*
- (3) *inadequately monitoring highly profitable transactions or business practices or unusual transactions or business practices.*

Enforcement Guide (“EG”)

17. Paragraph 9.1 provides an introduction to the FSA using its powers to prohibit under section 56 of the Act:

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.

18. Paragraphs 9.3 to 9.7 of EG then set out the FSA's general policy in relation to prohibition orders and withdrawal of approval. Paragraph 9.4, for example, states:

The FSA has 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. Depending on the circumstances of each case, the FSA may seek to prohibit individuals from performing any class of function in relation to any class of regulated activity, or it may limit the prohibition order to specific functions in relation to specific regulated activities. The FSA may also make an order prohibiting an individual from being employed by a particular firm, type of firm or any firm.

19. Paragraphs 9.8 to 9.14 of EG set out additional guidance on the FSA's approach to making prohibition orders against approved persons or withdrawing such persons' approvals.

20. Paragraph 9.9 of EG provides that when considering whether to exercise its power to make a prohibition order against such an individual, the FSA will consider all the relevant circumstances of the case, which may include the following (but are not limited to these 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 approved persons are set out 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) or failed to comply with any directly applicable Community regulation made under MiFID.*
- (4) *Whether the approved person has engaged in market abuse.*
- (5) *The relevance and materiality of any matters indicating unfitness.*

- (6) *The length of time since the occurrence of any matters indicating unfitness.*
 - (7) *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.*
 - (8) *The severity of the risk which the individual poses to consumers and to confidence in the financial system.*
 - (9) *The previous disciplinary record and general compliance history of the individual including whether the FSA, any previous regulator, designated professional body or other domestic or international regulator has previously imposed a disciplinary sanction on the individual.*
21. Paragraph 9.10 of EG provides that the FSA can have regard to the cumulative effect of a number of factors. Paragraph 9.11 of EG provides that the factors set out at paragraph 9.9 are not a definitive list.
22. Paragraph 9.23 of EG provides that a prohibition order and/or withdrawal of approval may be combined with other sanctions (such as the imposition of a financial penalty) where appropriate.

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

23. FIT G 1.3.1 states that 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 persons’:
- (1) *honesty, integrity and reputation;*
 - (2) *competence and capability; and*
 - (3) *financial soundness.*
24. FIT 1.3.3 states:
- 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.*

25. FIT 1.3.4 states:

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.

26. FIT 2.2.1 states:

In determining a *person's* competence and capability, the FSA will have regard to *all relevant matters including but not limited to:*

- (1) *whether the person satisfies the relevant FSA training and competence requirements in relation to the controlled function the person performs or is intended to perform;*
- (2) *whether the person has demonstrated by experience and training that the person is suitable, or will be suitable if approved, to perform the controlled function;*
- (3) *whether the person has adequate time to perform the controlled function and meet the responsibilities associated with that function.*

Decision Procedures and Penalties Manual ("DEPP")

27. The FSA's policy in relation to the imposition of financial penalties is set out in Chapter 6 of the part of the FSA Handbook entitled Decision Procedure and Penalties Manual ("DEPP"). DEPP 6.2.1G states that the FSA will consider the full circumstances of each case when determining whether or not to take action for a financial penalty and sets out a non-exhaustive list of factors that may be relevant for this purpose.
28. In determining the appropriate level of financial penalty, the FSA has had regard to DEPP 6.5 as it stood in June 2009.
