



Financial Services Authority

THIS DECISION NOTICE HAS BEEN REFERRED TO THE UPPER TRIBUNAL IN ORDER TO DETERMINE THE APPROPRIATE ACTION FOR THE FSA TO TAKE

DECISION NOTICE

To: **Westwood Independent Financial Planners
27 Orchard Street
Motherwell
Lanarkshire
ML1 3J**

Date: **31 May 2011**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) has decided to take the following action:

1. ACTION

1.1 For the reasons set out in this notice and pursuant to section 206 of the Financial Services and Markets Act 2000 (“the Act”), the FSA has decided to impose a financial penalty of £100,000 on Westwood Independent Financial Planners (“Westwood”). The financial penalty is in respect of breaches of Principle 7 (Communications with clients) and Principle 9 (Customers: relationships of trust) of the FSA’s Principles for Businesses (“the Principles”) and other FSA rules, in relation to its sale of geared traded endowment policy (“GTEP”) plans, between September 2005 and October 2007 (“the relevant period”).

2. REASONS FOR THE ACTION

2.1 On the basis of the facts and matters described below, the FSA has decided to impose

a financial penalty on Westwood for breaches of Principles 7 and 9 and rules relating to the conduct of business. Westwood has not demonstrated that the nature and characteristics of the GTEP plan were explained adequately to customers or that the advice it gave to customers to invest in GTEP plans was suitable. The FSA therefore considers that Westwood (1) did not pay due regard to the information needs of its clients and failed to ensure that its communications with its customers were clear, fair and not misleading, and (2) failed to take reasonable care to ensure the suitability of its advice to customers to invest in GTEP plans during the relevant period. These failings are set out in summary in this section and in more detail in the following sections.

Summary of breaches

2.2 Westwood failed to pay due regard to the information needs of its clients, and communicate information to them in a way which was clear, fair and not misleading, in breach of Principle 7 and COB 2.1.3R by:

- (1) failing to explain adequately to customers the reasons for recommending, or the suitability of, an investment into the GTEP plan; and
- (2) failing to explain adequately the characteristics of, or highlight sufficiently the risks associated with, the GTEP plan, also breaching COB 5.4.3R.

2.3 Westwood failed to take reasonable care to ensure the suitability of its GTEP recommendations in breach of Principle 9, COB 5.3.5R and COB 5.3.10AR by:

- (1) failing to adopt a consistent and suitable approach in assessing the ongoing affordability of the GTEP plan for each customer should an additional cash injection be required;
- (2) failing to ensure that each customer's attitude to risk was consistent with the recommended product's risk profile; and
- (3) failing to ensure that the GTEP plan was the most suitable product for each customer. In particular, Westwood did not undertake research into, or review,

alternative products that could have met the particular customer's needs.

2.4 The FSA regards these failings as very serious because they exposed customers to the risk of receiving unsuitable advice, as Westwood:

(1) was unable to ensure that its customers were sold a product consistent with their risk profiles and personal circumstances due to its:

(a) inadequate assessment of its customers' attitude to risk; and

(b) failure to adopt a consistent and suitable approach in relation to the assessment of the ongoing affordability of the product for its customers;

(2) failed to explain adequately the complexities, or highlight sufficiently the risks, of the GTEP plan in its communications with its customers; and

(3) advised ten of its customers to remortgage their homes to fund investment in the GTEP plan. This meant that their homes were at risk if the GTEP plan did not deliver the expected returns for those customers who were relying on income from the GTEP plan to meet their remortgage repayments. The suitability reports and meeting minutes sent to customers did not contain adequate risk warnings relating to gearing and did not specifically highlight the additional risks associated with remortgaging to invest.

2.5 The FSA considers the fact that Westwood has co-operated with the FSA investigation, and has worked with customers for whom difficulties have arisen as a result of their investment in GTEP plans, to be mitigating factors.

3. RELEVANT STATUTORY AND REGULATORY PROVISIONS

3.1 The relevant statutory provisions, regulatory requirements and FSA guidance are set out in Annex 1.

4. FACTS AND MATTERS

Background

- 4.1 Westwood is a small financial advisory firm and has been authorised since 1 December 2001. Its main business is the provision of investment advice; it also conducts some mortgage and general insurance intermediary business. Westwood carries on business as a partnership and had four advisers who were deemed competent by Westwood to sell the GTEP plan (although only three actually did so) during the relevant period.
- 4.2 At present, Westwood has two offices, one situated in London and the other in Motherwell.
- 4.3 Westwood currently holds permissions to undertake the following activities:
- (1) advising on a home reversion plan;
 - (2) advising on investments (except on Pension Transfers and Pension Opt Outs);
 - (3) advising on regulated mortgage contracts;
 - (4) agreeing to carry on a regulated activity;
 - (5) arranging (bringing about) a home reversion plan;
 - (6) arranging (bringing about) deals in investments;
 - (7) arranging (bringing about) regulated mortgage contracts;
 - (8) making arrangements with a view to a home reversion plan;
 - (9) Making arrangements with a view to regulated mortgage contracts; and
 - (10) Making arrangements with a view to transactions in investments.
- 4.4 Westwood earned £509,123 commission from the sale of 50 GTEP plans during the relevant period.
- 4.5 Westwood will earn a trail commission of approximately £700,000 over a 15 year period from its sale of 50 GTEP plans sold during the relevant period.

- 4.6 The GTEP product provider provided documentation to assist Westwood's advisers with the sale of the GTEP plans. This included brochures, key facts documents and illustrations. The advisers also received training directly from the product provider.
- 4.7 Westwood typically held an initial meeting with each customer to gather know your customer ("KYC") information and discuss the customer's investment objectives. This information was then uploaded onto its electronic data collection database ("Prestwood"). It would then hold subsequent meetings with the customer during which it would advise the customer as to how he or she might achieve his or her investment objectives.
- 4.8 Westwood sent customers a record of the advice it provided in the form of minutes ("meeting minutes") after each meeting. It also asked customers to read the suitability reports it provided them which also set out its advice, in conjunction with the meeting minutes.

The product

- 4.9 Traded endowment policies ("TEPs") are with-profits endowment policies (a long term, regular savings plan with a life policy attached) which are no longer required by their original holder and have been sold on the secondary market. The purchaser of such policies agrees to pay the remaining premiums on the policy and in return receives the value of the policy at maturity or when the original owner dies, depending on which occurs first. This payout will include both bonuses declared at the time of the sale and subsequent bonuses, though such subsequent bonuses are not guaranteed.
- 4.10 Investment in GTEPs involves gearing and is typically funded by the customer using cash savings and in certain cases money borrowed by way of a mortgage on the investor's home or a charge on a bond already owned by the investor. These funds, along with a GTEP investment loan, are then used to purchase a portfolio of TEPs (on which the GTEP investment loan is secured). Once a customer decides to invest, the product provider would compile the portfolio of TEPs for the GTEP product and arrange the GTEP investment loan at the same time. The GTEP investment loan is

used to fund the TEP premiums and annual review fees payable on the TEPs as well as the monthly withdrawals (income), where required. The GTEP investment loan is designed to be repaid by the maturity values of the TEPs within the portfolio. The investment rationale is that by the time the final TEP matures, the loan will be repaid and any additional capital remaining can be taken as profit by the holder of the GTEP product or used to pay any mortgage that remains outstanding. In Westwood's case, a large proportion of its GTEP customers were advised to fund the investment by means of a mortgage on their properties, which resulted in them remortgaging their homes.

- 4.11 The gearing element introduces the following risks to the investment strategy: an interest rate risk and increased exposure to the usual risks of the investment (such as fluctuations in performance of the underlying TEPs and secondary market demand). This means that an investor in a GTEP plan is effectively borrowing to invest, which is a high risk strategy in certain circumstances. In order for the investor to make a profit, the underlying TEP policies have to grow faster than the rate at which interest and the policy premiums being funded accrue to the policy loan. Where the customer has also borrowed money by way of a mortgage to make the investment the policy growth also needs to be sufficient to meet the customer's mortgage interest commitments.
- 4.12 The GTEP investment loan is a rolling facility, meaning that it is renewed on an annual basis, thus allowing for premiums, charges and income to be paid each year during the life time of the plan. The product provider reviews each GTEP plan on an annual basis and the lending institution provides the annual loan review. The lending institution will agree to extend the facility for the coming year provided the ratio of loan value ("LV") to the current surrender value ("CSV") of the TEPs is within stated parameters. In circumstances where the ratio of LV to CSV is not within stated parameters, the lending institution could request that customers contribute additional funds or liquidate their assets held as security before it renews the loan facility. The GTEP investment loan effectively represents short-term funding (as it must be renewed each year) for investment in long-term products, the TEPs.

- 4.13 The consequence for the customer is serious if the facility is not renewed as the loan is used to pay premiums and withdrawals (income). In certain circumstances, customers may be required to inject further capital into the GTEP plan in order to bring the ratio of LV to CSV within the agreed levels.
- 4.14 In order for the customer to be able to draw an income from the GTEP plan, the ratio of LV to CSV must stay within the stated parameters.

Background to the FSA's investigation

- 4.15 The investigation resulted from the FSA's thematic project looking at the systems and controls and advice process in place at firms that had recommended GTEPs. As part of the thematic project, the FSA wrote to Westwood asking it to review its GTEP recommendations. Westwood conducted a review and reported that it had found no significant issues. However, when the FSA reviewed the work undertaken by Westwood, it found that a number of the GTEP plan recommendations were not consistent with customers' attitudes to risk. As a result of this, Westwood was referred for investigation.
- 4.16 The FSA investigation focused on Westwood's general approach to the sale of GTEPs and, in particular, the suitability of Westwood's advice and its communications with customers in relation to its GTEP plan recommendations.
- 4.17 As part of its investigation, the FSA reviewed 13 of Westwood's GTEP plan customer files and interviewed the three advisers who sold the product.

Outcome of the FSA's investigation

- 4.18 The FSA's investigation identified a number of failings in relation to Westwood's communications with its customers and the suitability of the advice it gave them and these are set out below:

Communications with clients

- 4.19 Westwood's suitability reports did not explain adequately the reasons for recommending, or the suitability of, an investment into the GTEP plan. Specifically,

the suitability reports:

- (1) failed to explain adequately the risks associated with GTEPs to ensure that customers understood the nature of the risks involved. Risk warnings were inadequate, as they did not always relate to the customers' personal circumstances, or highlight sufficiently the risks associated with investing in a GTEP plan;
- (2) contained a significant amount of standard information and were not individually tailored to the particular customer. They failed adequately to explain why, having regard to each customer's personal circumstances, Westwood had concluded that the relevant GTEP plan was suitable, including how it matched the customer's attitude to risk and investment objectives. As a result, customers who had cash to invest, were not relying on the GTEP plan to provide them with an income and who held adequate reserves of funds (should an additional injection of money be required) received the same risk warnings as customers who remortgaged their homes to invest, were relying on the GTEP plan to provide them with a regular income and had no spare funds available in the event that they were required to make an additional cash injection. For example, customer H, a retired widow who remortgaged her home and customer M, a 73 year old widow who invested £75,000 (from the proceeds of the sale of her house), each invested in a GTEP plan to provide a regular income. Westwood's suitability reports and meeting minutes for customers H and M contained the identical risk warnings as those provided to customers W and G, two married couples with respective joint incomes of £40,000 and £96,000, who remortgaged their homes and had significant capital to make an additional cash injection if required;
- (3) contained misleading information. For example, six customers were provided with inaccurate information about the potential cost of servicing the loan taken out to purchase TEPs. The suitability reports stated that the applicable interest rate in respect of the loan facility was 1.5% above the Bank of England base lending rate. This was misleading as the loan facility offered to the six

customers (by one of the two lenders providing loans to the GTEP investors) at the time was based on the three month LIBOR interest rate; and

- (4) in cases where customers remortgaged, the suitability reports focused on the potential benefits for customers of the release of equity in their properties for investment purposes and how the GTEP plan would generate increased income. The suitability reports failed to highlight the increased risk to customers as they did not:
 - (a) clearly explain the risks associated with remortgaging a customer's property to raise the required minimum investment level (i.e. customers' homes could be at risk) and that the gearing element increased the risk of the investment in the GTEP plan;
 - (b) draw customers' attention to the fact that the product had to provide a return sufficient to meet the cost of the mortgage interest, in addition to the product's loan interest and premium funding obligations, in order for customers to be able to draw an income;
 - (c) inform customers that if the loan to CSV ratio became too high, the lender could withdraw or reduce the loan facility, or require an additional injection of capital or security; and
 - (d) highlight sufficiently the risk to customers of an injection of additional capital or the potential impact (particularly for those who were relying on the GTEP plan to provide them with a regular income) in the event that either income from the GTEP plan was suspended or reduced.

4.20 Inaccurate information was also contained in the customer meeting minutes taken by Westwood. Westwood sent the meeting minutes to its customers as a record of the discussion that had taken place between the customer and Westwood about the GTEP recommendation. The meeting minutes were meant to be read by each customer in conjunction with his or her suitability report. However, in six of the 13 customer files reviewed, the meeting minutes referred to the fact that the lender required that the outstanding loan facility could not exceed 100% of the total current surrender value of

the underlying TEPs. In actual fact, the lender required that the outstanding loan facility could not exceed 80% of the total current surrender value of the underlying TEPs.

Suitability of advice

4.21 Westwood was unable to demonstrate that it had taken reasonable care to ensure the suitability of its advice. Specifically, Westwood:

- (1) failed to adopt a consistent and suitable approach in assessing the ongoing affordability of the GTEP plan for its customers. There were differing opinions among Westwood's advisers as to whether or not they would recommend the GTEP plan if a customer did not have additional funds to invest in the event that the lender required this:
 - (a) adviser A said in interview with the FSA that the GTEP plan could be sold to a customer even if he or she had no additional funds, as he considered the likelihood of needing to invest additional capital was so low;
 - (b) adviser B, by contrast, said in interview that a customer should not invest in the GTEP plan if he or she did not have spare funds; and
 - (c) adviser C's response in interview when asked if he thought customers should invest in a GTEP plan if they did not have cash to inject should it require additional capital was, at best, ambiguous;
- (2) could not demonstrate that it had considered, or researched, alternative means of achieving each customer's goals prior to making a recommendation to invest in a GTEP plan having regard to that individual customer's particular needs and circumstances. In all 13 GTEP customer files reviewed, there was no evidence that Westwood had:
 - (a) carried out research or reviewed alternative products; or
 - (b) provided each customer with an explanation as to why the alternative

products listed in the suitability reports had been discounted;

- (3) failed to demonstrate that the risk profile of the recommendation was consistent with each customer's attitude to risk. At least one adviser adopted the view that the GTEP plan was suitable for customers with a medium attitude to risk or above, regardless of their individual circumstances. This was evident in the case of Customer H. Customer H was a retired widow, experiencing financial difficulties in that her monthly expenditure significantly exceeded her income. She had described her attitude to risk as medium but nonetheless was advised to remortgage her property to invest in a GTEP plan. There was no evidence on the customer file to indicate that the adviser had considered the higher level of risk as a result of the remortgage or the potential impact on her (particularly as she was relying on the GTEP plan to provide her with a regular monthly income) if she was required to inject additional cash or the income from the plan was suspended, or stopped. Customer H was unable to make additional cash contributions to the GTEP plan and her income from the plan was stopped in January 2009, whilst she remained liable to meet the cost of funding the mortgage debt incurred to provide the funds to invest.

5. ANALYSIS OF THE BREACHES

Communication with clients

5.1 The FSA considers that Westwood failed to communicate in a manner that was clear, fair and not misleading. Specifically, Westwood failed to ensure that:

- (1) documents provided to customers were sufficiently clear and balanced; and
- (2) its communications (meeting minutes and suitability reports) with customers:
 - (a) explained the characteristics of and highlighted sufficiently the risks associated with, the GTEP plan;
 - (b) were specifically tailored to individual customers, including setting out

the key risks relevant to that particular customer's personal and financial circumstances; and

- (c) set out clearly the suitability of the recommendation for the individual customer.

5.2 By reason of the facts and matters referred to in paragraph 4.19 and 4.20 above, the FSA considers that Westwood failed to ensure that its suitability reports were sufficiently clear and that they appropriately communicated the characteristics of, and risks associated with, the GTEP plan to customers.

5.3 The consequences of failing to ensure that its communications with customers were sufficiently clear and balanced were that:

- (1) the content of suitability reports were not tailored sufficiently to the customer's individual circumstances. In all the files reviewed by the FSA the risk warnings were the same. This had the effect that customers were not expressly warned of the individual risks inherent in the GTEP plan in relation to their specific personal and financial circumstances; such as the increased risk if the source of investment funds was derived from remortgaging the customer's home or the risk that the bank would not extend the loan if an additional capital injection was required and the customer had no readily available additional funds to put into the GTEP plan;
- (2) Westwood failed to communicate the particular characteristics and risks of the GTEP plan to its customers. For example, in two out of the 13 files reviewed by the FSA, the customers were seeking to draw an income from the product. However, in both cases, the full risk of drawing an income was not adequately explained in the meeting minutes or suitability reports. The customers should have explicitly been made aware that any income drawn down from the GTEP plan would be added to the existing loan and this therefore increased the customer's level of debt and the corresponding level of risk of the product, as the product needed to perform better to continue to out perform the interest rate payable on the loan in order to maintain the required Loan Value Ratio

that would enable customers to continue to draw an income.

- 5.4 Westwood's suitability reports could not be used by customers as a stand alone document without reference to the meeting minutes. In some cases, the meeting minutes or suitability reports contained inaccurate or out of date information.
- 5.5 As a consequence of these failures, Westwood failed to pay due regard to the information needs of its clients, or communicate with them in a way which was clear, fair and not misleading, in breach of Principle 7. By failing to ensure that clients understood the nature of the risks involved, Westwood also breached COB 5.4.3R.

Suitability of advice

- 5.6 By reason of the facts and matters referred to in paragraph 4.21 above, the FSA considers that Westwood failed to take reasonable care to ensure the suitability of its advice in breach of Principle 9 (Customers: relationships of trust) by failing to:
- (1) adopt a consistent and suitable approach in assessing the ongoing affordability for customers should they be required to inject additional cash into their GTEP plans in the future;
 - (2) ensure that the customer's risk profile, including attitude to risk and personal circumstances, was consistent with the risk profile of the recommended product; and
 - (3) ensure that the GTEP plan was the most suitable product for each customer, in particular by failing to undertake research into, or a review of, alternative products that could have met the particular customer's needs.
- 5.7 Westwood's failure to adopt a consistent and suitable approach in considering the ongoing affordability of the GTEP plan, should an additional cash injection be required in the future, exposed at least two customers to the risk of being sold an unsuitable product.
- 5.8 Westwood's failure to ensure that the risk profile of the recommended transaction was consistent with the attitude to risk of the customer in every case is particularly

significant given the gearing element of the GTEP plan. As the GTEP plan involves a level of gearing, the FSA considers that if a customer also borrows to invest (for example by remortgaging their home), the level of gearing and the corresponding level of risk is considerably higher. This has the effect that the recommendation to invest in the GTEP plan becomes potentially unsuitable for customers with only a medium attitude to risk (or lower). The risk level is further amplified if a customer wishes to draw a regular income from the product. There is no evidence that Westwood took the issues of additional gearing and the corresponding impact on the risk of the product into account. Ten of the 13 GTEP plan customer files reviewed by the FSA showed that the customers remortgaged their home to invest and eight of these customers classified their attitude to risk as medium.

- 5.9 In all 13 GTEP customer files reviewed, there was no evidence that Westwood had carried out research or reviewed alternative products, or provided each customer with an explanation as to why the alternative products listed in the suitability reports had been discounted, which exposed the customers to the risk of being sold an unsuitable product.
- 5.10 For the reasons stated above, the FSA considers that Westwood failed to take reasonable care to ensure the suitability of its advice to customers to invest in the GTEP plan, in breach of Principle 9.

6. REPRESENTATIONS AND FINDINGS

- 6.1 Below is a brief summary of the key written and oral representations made by Westwood 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 Westwood's representations, whether or not explicitly set out below.

General points

- 6.2 Westwood made representations that:

- (1) the FSA's investigation was biased, incomplete, fundamentally flawed and professionally incompetent. Further, not all firms that sold GTEPs were investigated;
- (2) the FSA's case should be subject to a standard of proof as high as the criminal litigation standard of proof i.e. 'beyond a reasonable doubt'; and
- (3) the 13 cases reviewed by the FSA were not properly representative of the whole body of GTEP investments sold by Westwood.

6.3 The FSA has found that:

- (1) allegations relating to the FSA's investigation itself are not relevant to the decision which gave rise to the obligation to give this notice, although they may be matters that can be dealt with by way of the FSA's Complaints Scheme;
- (2) the FSA's case is not subject to the criminal standard of proof. In relation to this case the FSA has made its decision having regard to the following:
 - (a) the FSA, in accordance with section 206 of the Act, may impose a penalty if it considers that Westwood has contravened a requirement imposed on it by or under the Act; and
 - (b) the Upper Tribunal, in regulatory cases, applies the civil standard of proof i.e. the balance of probabilities (is it 'more likely than not' that what is alleged actually occurred?); and
- (3) in the FSA's view, in the circumstances of this case, the 13 files reviewed, out of a total of 50 in the relevant period, provide a sufficiently large and representative sample of Westwood's sales of the GTEP product on which to base the findings set out in this notice.

Communications with clients

6.4 Westwood made representations that:

- (1) Westwood's clients fully understood the advice Westwood gave them. Westwood informed each of its clients of all of the relevant information and risks associated with the GTEP product by providing product literature and a suitability report, and through extensive discussions with its clients in meetings, detailed minutes of which were subsequently provided to each client;
- (2) the FSA's allegation that Westwood's clients may not have understood the information is purely hypothetical and unsupported by evidence. Most of the clients in question signed a receipt to show that they had understood the advice given. The small number of clients who indicated that they did not understand were contacted by Westwood to clarify any points as necessary; and
- (3) the risk warnings Westwood gave to its clients were not inadequate. The product literature referred to the risks involved and, although the suitability reports contained standard wording where clients' circumstances were similar or identical, the meeting minutes expanded on those risks as they applied to each of the clients individually.

6.5 The FSA has found that:

- (1) a GTEP is a complex, non-standard product, the characteristics and risks of which Westwood did not sufficiently explain to its clients. Although intended to aid customer communication, Westwood's use of both meeting minutes (in some cases a number of them provided over a number of months) and suitability report to explain the product and recommendation, especially where information was not consistent between the two, meant that its communication with customers was unclear and, in some instances, misleading;
- (2) the suitability report did not adequately explain all of the characteristics of, and risks associated with, the GTEP plan, in particular the increased risk due to gearing (i.e. borrowing to invest). Further, Westwood failed to ensure that the reports and minutes together provided a clear, balanced reflection of how

the recommendation addressed the specific client's needs and objectives, which sufficiently highlighted the investment risks;

- (3) the risk warnings set out in the suitability reports and meeting minutes were inadequate. They were standardised rather than tailored to the customer's personal circumstances. Clients were not expressly warned of the individual risks that they faced, such as their home being at risk where they had remortgaged to invest, or the risk that a significant additional capital injection would be required which they could not afford to pay;
- (4) Westwood should have advised customers that it was not possible to achieve returns of 10% per annum or more without taking extreme risk with their capital and in such a case should have explained the risk/reward trade-off of different products along the risk spectrum; and
- (5) as set out above, the full details and risks of the GTEP product had not been adequately explained to clients when they signed the report receipt indicating that they understood the advice they had been given.

Suitability of recommendations

6.6 Westwood made representations that:

- (1) Westwood was and is of the view that the GTEP product is a medium risk product. A TEP or group of TEPS is low risk. Gearing (i.e. funding or part-funding the investment with a loan) increases the risk to medium. Where a client remortgages their home to invest in a GTEP the affordability of the mortgage is a risk of the mortgage, not of the GTEP. Remortgaging one's home to raise an investment stake to invest in a GTEP does not affect the risk of investing in a GTEP, as it is not an integral part of the GTEP plan. Where a client remortgaged their property to invest, Westwood took this into account, and the mortgage was mentioned in the GTEP suitability report. However, as the mortgage was a separate financial transaction a separate suitability letter was issued. The remortgaging of a property to raise capital for investment

does not make the investment product a higher risk. Only the remortgage is secured on the house, which is assessed on a stand alone affordability excluding the future income to be derived from the investment, whereas the investment loan is secured on the portfolio of TEPs. The two elements are separate. Any diminution in the future income from the GTEP plan would not have affected affordability as assessed at the time of the loan advice being given;

- (2) Westwood assessed each GTEP plan prior to and at the point of sale, looking forward, as medium risk on the basis of its knowledge of the underlying TEPs' known performance to that date, its experience of and judgment of future market performance, and the known effect of gearing. This assessment was based on all of the evidence available at the time. The FSA has considered the GTEPS and advice given with the benefit of hindsight and has applied a generic risk rating of 'higher than medium' to all GTEP plans;
- (3) Westwood sold GTEPs with a 15-year term. Like a house purchased with a 95% mortgage (a ratio of debt to equity of 19 to 1), the GTEPs Westwood sold were highly geared but not high risk;
- (4) at the time of the sale of each plan to each client, there was a clear match of the respective clients' attitude to risk to Westwood's assessment of the plan. Westwood assessed the GTEPs as having a medium risk profile. All clients to whom Westwood sold GTEPs had an attitude to risk of either medium or medium/high;
- (5) in most cases Westwood advised its clients to save any income drawn down from the GTEP;
- (6) where Westwood's advisers took different views this was because they had differing clients and differing experiences, which resulted in differing professional opinions;
- (7) there were no alternatives to the GTEP plan which could be researched – the relevant clients were looking for a higher rate of income than could be

achieved by any other investment plan available on the market. Alternative products were fully discussed and considered with the clients at meetings. Other types of investment were considered, and covered in the suitability report, but each had a much higher risk rating with a much lower level of income return than required. Westwood was not aware of any other product in the market place that could achieve a 10% drawdown facility in a tax efficient manner and therefore the generic question of other investments was discussed but no actual individual product reviewed. There was little benefit to the client in comparing products which were not like-for-like where there were no comparable investments on the market;

- (8) no clients have lost their homes or their GTEP investments, and Westwood's client satisfaction surveys show an overwhelming satisfaction rate; and
- (9) overall, Westwood maintains that it has taken reasonable care and reasonable steps to ensure the suitability of its advice for each of its clients.

6.7 The FSA has found that:

- (1) the provision of mortgage advice is usually a distinct issue from the provision of other investment advice. However, where a customer remortgages for the sole purpose of funding their investment in a GTEP product, the two transactions are intrinsically linked and cannot be considered to be truly separate. In this case, the suitability report in cases where clients have remortgaged to invest in a GTEP often refers to the GTEP plan providing a lump sum at the term end to pay off all or part of the mortgage. The GTEP product cannot be considered to be separate from the mortgage advice, particularly where one aim of the GTEP plan was to pay part or all of the mortgage balance;
- (2) in cases where individuals remortgaged their property to invest, the FSA considers that, at the time of sale, the GTEPs were too risky for those customers, who were at risk of losing their investment and being left with substantial debt. Where the customer had remortgaged to invest, as in any

case where a customer has borrowed to invest, the risk posed to the customer was higher than medium (i.e. above medium risk and potentially high risk, depending on the specific circumstances);

- (3) advising clients that they should save the income provided by the GTEP does not of itself render the advice to invest in a GTEP suitable. Even where Westwood advised its clients to save this income, it was not made clear to them in the suitability letter or the meeting minutes the full extent of the consequences if they did not save;
- (4) in the FSA's view the varying approaches adopted by Westwood's advisers went beyond the range of acceptable professional opinions. Although advice must be tailored to each individual customer, Westwood should have adopted a consistent and suitable approach to the assessment of affordability of the GTEP plan, which could then be applied to each individual client to produce individualised advice;
- (5) Westwood should have documented on each customer file that there were no alternative products that provided the level of income required by the customer. In any event, a recommendation should not be driven solely by a customer's desire for a particular level of income. Other factors such as the customer's attitude to risk and personal circumstances should also be taken into consideration when assessing suitability; and
- (6) the level of satisfaction reported by Westwood's clients, and the fact that no clients have lost their homes or GTEP products, does not prove that the advice that they were given was suitable. The FSA considers that in giving the advice it did, Westwood failed to take reasonable care to ensure the suitability of its GTEP recommendations.

Financial penalty

6.8 Westwood made representations that:

- (1) imposing a financial penalty on Westwood may well prove terminal to the firm; and
- (2) in considering the level of financial penalty the FSA should not consider Westwood's commission payments relating to the GTEPs sold.

6.9 The FSA has found that:

- (1) Westwood has provided no evidence that the imposition of a financial penalty will cause Westwood serious financial hardship; and
- (2) the FSA's policy on assessing the appropriate level of financial penalty (set out in the Decision Procedure and Penalties Manual ("DEPP")) states that the FSA may consider any benefit gained as a result of a firm's breach.

7. SANCTION

Policy on financial penalties

7.1 The FSA's policy on the imposition of financial penalties as at the date of this notice is set out in Chapter 6 of 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.

7.2 The principal purpose of a financial penalty is to promote high standards of regulatory conduct by deterring firms who have committed breaches from committing further breaches, and helping to deter other firms from committing similar breaches, as well as demonstrating generally the benefits of compliant business.

7.3 In determining whether a financial penalty is appropriate, and if so, its level, the FSA is required to consider all the relevant circumstances of a case. DEPP 6.5.2G sets out a non-exhaustive list of factors that may be of relevance in determining the level of a financial penalty.

7.4 The FSA considers that the following factors are particularly relevant in this case:

Deterrence

7.5 A financial penalty would deter Westwood from further breaches of regulatory rules and Principles. Equally, other firms will be deterred from following Westwood's practices and it will promote the message to the industry that the FSA expects firms to maintain high standards of regulatory conduct. The financial penalty will reinforce the message that the FSA expects firms, when contemplating advising on complex products where the risk is augmented by gearing, to:

- (1) match each customer's attitude to risk to the risk profile of the product; and
- (2) communicate clearly the characteristics and risks of the product, to ensure the suitability of its advice.

The nature, seriousness and impact of the breach in question

7.6 In determining the appropriate sanction, the FSA has had regard to the seriousness of the breaches, including the nature of the requirements breached, the duration and frequency of the breaches, whether the breaches revealed serious failings in Westwood's systems and controls and the number of customers who were affected and/or placed at risk of loss.

7.7 Westwood's failings are viewed as being very serious because its:

- (1) advice meant that a significant number of customers' homes were at risk if the GTEP plans did not perform as well as expected or the customers failed to keep up payments. A large proportion of Westwood's GTEP customers remortgaged their homes (10 out of the 13 customer files reviewed) to fund the purchase of the product. However, the suitability reports did not contain relevant risk warnings relating to the gearing element of the product nor did they highlight the risk this could pose to customers' properties;
- (2) customers included individuals who were retired or close to retirement with no source of income other than a pension and with no significant assets other than their homes should a further capital injection be required; and
- (3) inadequate consideration of customers' attitude to risk and the risks associated

with the GTEP plan meant that it was unable to ensure that its customers were sold a product suitable to their risk profiles and personal circumstances.

The extent to which the breach was deliberate or reckless

- 7.8 The FSA has found no evidence to show that Westwood acted in a deliberate or reckless manner.

The size, financial resources and other circumstances of Westwood

- 7.9 In determining the level of penalty, the FSA has considered the following issues:

- (1) Westwood's latest financial statements;
- (2) the cost of the remedial action Westwood will be required to undertake; and
- (3) the need for Westwood to be able to afford the cost of paying financial redress to those customers, where appropriate, within the timescale permitted by the Financial Ombudsman Service.

The amount of benefit gained or loss avoided

- 7.10 The FSA notes that Westwood made £509,123 commission from the sale of 50 GTEP plans during the relevant period. Westwood is scheduled to earn approximately £700,000 trail commission over a 15-year period from the 50 GTEP plans it sold during the relevant period.

Conduct following the breach

- 7.11 The FSA has also taken into account the following steps taken by Westwood which has served to mitigate its failings:
- (1) Westwood continues to work with customers who are experiencing financial difficulties as a result of the income from their GTEP plans being reduced or suspended, and those who have been required to inject further capital; and
 - (2) Westwood has co-operated with the FSA investigation.

Disciplinary record and compliance history

7.12 Westwood has not been the subject of previous disciplinary action.

Other action taken by the FSA

7.13 In determining the level of financial penalty, the FSA has taken into account penalties imposed by the FSA on other authorised persons for similar behaviour.

Financial penalty

7.14 Having considered the above issues, the FSA considers that a financial penalty of £100,000 is appropriate.

8. DECISION MAKER

8.1 The decision which gave rise to the obligation to give this notice was made by the Regulatory Decisions Committee.

9. IMPORTANT

9.1 This Decision Notice is given to Westwood under section 208 and in accordance with section 388 of the Act. The following statutory rights are important.

The Tribunal

9.2 Westwood has the right to refer the matter to which this Decision Notice relates to the Upper Tribunal (the “Tribunal”). Under paragraph 2(2) of Schedule 3 of the Tribunal Procedure (Upper Tribunal) Rules 2008, Westwood has 28 days from the date on which this Decision Notice is given to it to refer the matter to the Tribunal. A reference to the Tribunal is made by way of a reference notice (Form FTC3) signed on Westwood’s behalf and filed with a copy of this Notice. The Tribunal’s address is: The Upper Tribunal, Tax and Chancery Chamber, 45 Bedford Square, London WC1B 3DN (tel: 020 7612 9700; email financeandtaxappeals@tribunals.gsi.gov.uk). Further details are contained in “Making a Reference to the UPPER TRIBUNAL (Tax and Chancery Chamber)” which is available from the Upper Tribunal website:

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

- 9.3 Westwood should note that a copy of the reference notice (Form FTC3) must also be sent to the FSA at the same time as filing a reference with the Tribunal. A copy of the reference notice should be sent to Rachel West at the FSA, 25 The North Colonnade, Canary Wharf, London E14 5HS.

Access to evidence

- 9.4 Section 394 of the Act applies to this Decision Notice. In accordance with section 394, Westwood is entitled to have access to:

- (1) the material upon which the FSA has relied in deciding to give Westwood this notice; and
- (2) any secondary material which, in the opinion of the FSA, might undermine that decision.

- 9.5 There is no such secondary material to which Westwood must be allowed access.

Third party rights

- 9.6 There are no third party rights.

Confidentiality and publicity

- 9.7 Westwood should note that this Decision Notice may contain confidential information and should not be disclosed to a third party (except for the purpose of obtaining advice on its contents). The effect of section 391 of the Act is that Westwood may not publish the notice or any details concerning it unless the FSA has published the notice or those details. The FSA may publish such information about the matter to which a Decision Notice or Final Notice relates as it considers appropriate. Westwood should be aware, therefore, that the facts and matters contained in this notice may be made public.

FSA contact

9.8 For more information concerning this matter generally, Westwood should contact Rachel West at the FSA (direct line: 020 7066 0142/ fax: 0207 7066 0143).

Signed.....

Andrew Long

Deputy Chairman, Regulatory Decisions Committee

ANNEX 1

RELEVANT STATUTORY PROVISIONS, REGULATORY GUIDANCE AND POLICY

1. Statutory Provisions

- 1.1 The FSA's statutory objectives are set out in section 2(2) of the Act and include the protection of consumers and maintaining market confidence.
- 1.2 Section 138 of the Act provides that the FSA may make such rules applying to authorised persons as appear to it to be necessary or expedient for the purpose of protecting consumers.
- 1.3 The FSA has the power, pursuant to section 206 of the Act, to impose a financial penalty of such amount as it considers appropriate where the FSA considers an authorised person has contravened a requirement imposed on it by or under the Act.

2. Relevant Handbook Provisions

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

3. Principles for Businesses

- 3.1 Under the FSA’s rule-making powers, the FSA has published in the FSA Handbook the Principles which apply either in whole, or in part, to all authorised persons.
- 3.2 The Principles are a general statement of the fundamental obligations of firms under the regulatory system and reflect the FSA’s regulatory objectives. A firm may be liable to disciplinary sanction where it is in breach of the Principles.
- 3.3 The Principles relevant to this matter are:
 - (1) **Principle 7** (Communications with clients) which provides that:

“A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading”.

- (2) **Principle 9** (Customers: relationships of trust) which provides that:

“A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment”.

4. Conduct of Business Rules (COB)

4.1 The relevant provisions of the FSA Handbook module COB (which was in force during the relevant period) are as follows:

- (1) COB 2.1.3R requires that when a firm communicates information to a customer, the firm must take reasonable steps to communicate in a way which is clear, fair and not misleading;
- (2) COB 5.3.5R requires that a firm must take reasonable steps to ensure that, if in the course of designated investment business, it makes any personal recommendation to a private customer to buy a designated investment, the advice on the investment is suitable for the client. It also states that if the recommendation relates to a packaged product, the firm must have regard to the facts disclosed by the client and other relevant facts about the client of which the firm is, or reasonably should be, aware;
- (3) COB 5.3.10AR requires a firm which holds itself out as giving personal recommendations to private customers on packaged products from the whole market (or the whole of a sector of that market) must not give any such personal recommendation unless it:
 - (a) has carried out a reasonable analysis of a sufficiently large number of packaged products which are generally available from the market (or sector of the market); and

- (b) conducts the analysis in (a) on the basis of criteria which reflect adequate knowledge of the packaged products generally available from the market as a whole (or from a relevant sector);
- (4) COB 5.4.3R requires that a firm must not, amongst other things, make a personal recommendation of a transaction to a private customer unless it has taken reasonable steps to ensure that the private customer understands the nature of the risks involved; and
- (5) guidance set out in the FSA handbook under COB 5.3.29G (H) states that, when considering the suitability of a particular investment product which is linked directly or indirectly to any form of loan or mortgage, a firm:
 - (a) should take account of the source of the funds being invested and the suitability of the overall transaction; and
 - (b) must follow any relevant suitability and other rules in COB and MCOB.

5. Decision Procedure and Penalties (“DEPP”)

- 5.1 The FSA's policy in relation to the imposition of financial penalties that applied during the relevant period was set out in Chapter 6 of DEPP, which forms part of the FSA Handbook. It was previously set out in Chapter 13 of the Enforcement Manual (“ENF”), in force during part of the relevant period, to which the FSA has also had regard.
- 5.2 The principal purpose of issuing a financial penalty is to promote high standards of regulatory 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.
- 5.3 The relevant section of DEPP (as at October 2007) was 6.5.2G which set out a non-exhaustive list of factors that may be relevant in determining the appropriate level of financial penalty to be imposed on a person under the Act. The FSA considers that

the following factors are particularly relevant:

Deterrence: DEPP 6.5.2G(1)

- 5.4 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.

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

- 5.5 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; and the loss or risk of loss caused to consumers, investors or other market users;

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

- 5.6 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 including consideration of factors such as the degree of seriousness of a breach and the size and resources of a person.

The amount of benefit gained or loss avoided: DEPP 6.5.2G(6)

- 5.7 The FSA may have regard to the amount of benefit gained or loss avoided as a result of the breach, for example the FSA will propose a penalty which is consistent with the principle that a person should not benefit from the breach; and that the penalty should also act as an incentive to the person (and others) to comply with regulatory standards and required standards of market conduct.

Conduct following the breach: DEPP 6.5.2G(8)

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