

The FCA issued a final notice (the "Final Notice") on 8 August 2014 to an applicant, by which the Authority refused the applicant's application for Part 4A permission. The Authority refused the application based (in part) on a spent conviction. In the particular circumstances, the Authority considers it appropriate (for the purposes of s391 of the Act) to publish the information in this document in anonymised form.

SUMMARY OF A FINAL NOTICE

SUMMARY OF REASONS FOR REFUSAL

1. For the reasons set out herein the Authority cannot ensure that the applicant will satisfy, and continue to satisfy, the threshold conditions set out in Schedule 6 of the Act; namely 2E (Suitability) and 2D (Appropriate Resources).
2. In particular:
 - i. The applicant deliberately failed to disclose a criminal conviction he received in 2011 despite, at the time of the non-disclosure, continuing to serve the sentence related to that conviction (and it is therefore reasonable to infer that he was aware of the conviction at that time). The Authority considers that the applicant's previous dishonesty is evidence that he is not a "fit and proper person having regard to all the circumstances" (paragraph 2E(1) of Schedule 6 to FSMA).
 - ii. The Authority is concerned that the nature of the applicant's 2011 conviction may mean that consumers are put at risk when dealing with the applicant (although the applicant has asserted he would not be a danger to his customers). In this respect, the Authority has had regard to the nature of the activities for which the applicant has applied for permission; the fact that his customers may be vulnerable by virtue of their current indebtedness, poor credit history or by reason of age, health or disability; and the fact that the applicant is proposing to operate without any other staff. The Authority is accordingly concerned that the applicant's affairs may not be "conducted in an appropriate manner" (paragraphs 2E(1)(c) of Schedule 6 to FSMA).
 - iii. For the above reasons the Authority is not satisfied that the applicant will satisfy, and continue to satisfy, threshold conditions 2E (suitability). As a result, the Authority cannot ensure that the applicant will satisfy, and continue to satisfy, threshold condition 2D (appropriate resources).

3. The above reasons are sufficient, in the Authority's view, to refuse the application and issue the Final Notice. However, the following are further reasons why the Authority considers that the applicant is unable to satisfy the threshold conditions:
 - i. The Authority considers that, having regard to the errors identified below in the applicant's financial promotions, communications, terms and conditions and pre-contractual information, the applicant is not ready and organised to comply with the Authority's regulatory requirements and standards.
 - ii. The Authority is not satisfied that the applicant has adequate skills and experience to carry out the regulated activities for which he has applied for permission. Although the applicant has relevant previous experience, he has not undertaken any relevant training for a number of years, has been absent from the industry for a number of years, and the Authority considers that the errors identified in the applicant's documentation are evidence that the applicant may not have the adequate skills and experience required. In particular, the Authority is not satisfied that the applicant has kept up to date with the relevant regulatory requirements that will apply to him, and accordingly the Authority is concerned that the applicant is not ready and organised to comply with those requirements.

DEFINITIONS

4. The definitions below are used in this document.

"the Act" means the Financial Services and Markets Act 2000

"the Authority" means the body corporate previously known as the Financial Services Authority and renamed on 1 April 2013 as the Financial Conduct Authority

"CONC" means the Consumer Credit Sourcebook, which sets out the Authority's rules and guidance applicable to consumer credit firms.

"DISP" means the Authority's Dispute Resolution rules.

"the OFT" means the body that, before 1 April 2014, was known as The Office of Fair Trading.

"the RAO" means the Financial Services and Markets Act 2000 (Regulated Activities Order) 2001.

"the Transitional Order" means The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013.

"UTCCRs" means the Unfair Terms in Consumer Contracts Regulations 1999.

"the Visit Report" refers to the On-Site Visit Report in relation to a visit made to the applicant's intended place of business by an OFT representative.

FACTS AND MATTERS

5. The applicant has applied to undertake the regulated activities of Debt Adjusting (Art. 39D of the RAO) and Debt-Counselling (Art. 39E of the RAO). He intends to trade as a debt management firm.

Criminal Offence

6. The applicant was convicted in 2011 of an offence. The applicant pleaded guilty to this offence. It is now a spent conviction. The applicant has previously stated that he may meet his customers in a converted office in his home, but now asserts that he will only deal with customers by telephone.
7. Nevertheless, the applicant has no business premises separate from his residential home, and his role may require that he at some point meet customers and that these meetings may take place in private (for example at the applicant's home; the applicant has previously stated that he will not visit his client's homes). The Authority considers that consumers, and particularly vulnerable consumers, may be at risk if they visit the applicant at his home.

Non-disclosure of a criminal offence

8. On the date of the applicant's application to the OFT, the applicant's 2011 conviction was not a spent conviction, and he was continuing to serve a community order to which he was sentenced as a result of this conviction.
9. In his application to the OFT for a consumer credit licence, in response to the question "*Have you...ever been convicted of any offence...?*" the applicant answered "*No*".
10. The applicant has admitted the non-disclosure to the Authority. The applicant has not given any explanation as to why he did not declare his 2011 conviction, although he has argued that his customers will not be in danger when they meet with him. Given the applicant's admission, and the fact that he continued to serve his sentence when he failed to disclose his convictions, the Authority is satisfied that the non-disclosure was deliberate.

Communications and financial promotions

11. The OFT's Debt Management Guidance, which was in force at the time of the applicant's application and up to 31 March 2014, provides as follows:
 - i. Paragraph 3.16: "*All marketing, advertising and promotion and other oral or written representations should be clear, accurate and truthful and should not mislead, either expressly or by implication or omission*".
 - ii. Paragraph 3.18t and 3.18u: "*Examples of unfair or improper business practices occurring in various types of marketing, advertising and other communications include: ... t. making false or unsubstantiated statements about the size, pre-eminence and experience of the business ... u. claiming or implying that the consumer will definitely be debt free in a specified period of time or making statements emphasising a 'debt free life'*".
12. CONC, the Consumer Credit Sourcebook section of the FCA Handbook, contains equivalent provisions. At 3.3.1R(1) it provides that "*A firm must ensure that a communication or a financial promotion is clear, fair, and not misleading.*"
13. CONC 3.3.10G provides examples of practices that are likely to contravene 3.3.1R(1), which include "*using false or unsubstantiated claims as to the firm's size or experience or pre-eminence*" (3.3.10G(5)) and "*in relation to debt solutions... making statements emphasising a debt-free life*" (3.3.10G(6)). However:
 - i. The applicant's promotional material and communications refer variously to "*debt experts*", a "*Personal Finance Manager*", and a "*Creditor Liaison*"

Department” in relation to the applicant’s firm. However, as set out above, there will be no other staff or persons involved in the running or operation of the business.

- ii. The applicant’s advertisement emphasises “*a debt free future*” for his clients.

Systems and controls

14. In relation to the applicant’s system of controls to ensure compliance with regulatory requirements:

- i. The applicant has stated that his operational controls consist of keeping “*Consumer Credit Act Regulations downloaded into a manual and kept up to date regularly*”; and,
- ii. that he will keep up to date with regulatory changes and ensure compliance by monitoring the websites of the regulator and Government websites.

15. Further, documents submitted by the applicant to the OFT do not fully comply with the applicable regulatory requirements. Specifically:

- i. The applicant has provided a complaints procedure to the Authority but he has incorrectly referred to the OFT as the body that handles complaints (the Authority now reads the reference to the OFT as a reference to the Authority). There is no reference to the Financial Ombudsman Service (“FOS”) within the complaints procedure, the marketing information or the terms and conditions, contrary to CONC 3.9.3R(5) read with 1.2.3G(2) of DISP (the FCA Handbook section on Dispute Resolution), and the equivalent provisions at paragraph 3.52e of the OFT’s Debt Management Guidance.
- ii. The Unfair Terms in Consumer Contracts Regulations 1999 (the “UTCCRs”) provide by regulation 5(1) that “*A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.*” However:
 - i. clause 5.5 of the applicant’s terms and conditions of trading provide: “*If for any reason we receive monies from you and are unable to credit it to your account as it appears as an unknown deposit. We will: make all reasonable efforts to identify the originator of the funds, but, in the event we do not identify the depositor and no one is forthcoming with proof of payment within 6 months from date of deposit. [The applicant] shall move the deposit to our account and treat as our funds. We will be under no obligation to return these funds once moved*”.
 - ii. The Authority is concerned that this clause may fail to comply with regulation 5(1) of the UTCCRs, as it has the potential in certain circumstances to cause substantial detriment to consumers.
- iii. The UTCCRs provide by regulation 7(1) that “*A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language*”. However, clause 6.4(vi) of the applicant’s terms and conditions of trading provide that the applicant may terminate a debt management programme with four weeks’ notice in writing “*if we are affected by Force*

Majeure". Force majeure is not a defined term in the applicant's terms and conditions. In the Authority's view clause 6.4(vi) fails to comply with regulation 7(1) of the UTCCRs.

- iv. Section 6.1 of the applicant's terms and conditions wrongly refers to the Consumer Protection (Distance Selling) Regulations 2000. The 14 day cancellation period in this case is in fact provided by regulation 10 of the Financial Services (Distance Marketing) Regulations 2004.

16. The applicant subsequently offered to amend the defects identified in paragraphs 15 to 19 above on 8 April 2014, but did not do so.

The applicant's skills and experience

17. The applicant intends to run the business as a sole trader, with no employees. If authorised, he would be solely responsible for managing the firm's affairs.
18. The applicant previously held a consumer credit licence issued by the OFT (which licence expired a number of years ago). He also reports that he worked for a major financial institution for a number of years in their debt collections/recoveries department.
19. However, the applicant has failed to show that he has undertaken any training relevant to the activities he is seeking to carry out. The Authority also is of the view that the above errors in the applicant's documentation are relevant to the assessment of the applicant's skills and experience.
20. The Authority is therefore concerned that the applicant has not kept himself up to date with the regulatory requirements that would apply to him were he granted Part 4A permission.

IMPACT ON THE THRESHOLD CONDITIONS

21. The regulatory provisions relevant to the Authority's decision to refuse the application are referred to in Annex A.
22. Given the facts and matters set out above, the Authority does not consider that it can ensure that the applicant will satisfy, and continue to satisfy the threshold conditions for the following reasons:
 - i. The Authority has concerns about the applicant's honesty and integrity, and his readiness and willingness to comply with Principle 11, as a result of his deliberate failure to disclose a criminal conviction, despite the fact that he continued to serve his sentence in relation to that conviction at the time of the non-disclosure. The Authority considers that the applicant's previous dishonesty is evidence that he is not a "*fit and proper person having regard to all the circumstances*" because he may act dishonestly in the future (paragraph 2E(1) of Schedule 6 to FSMA).
 - ii. The applicant has a 2011 conviction. Given the nature of the activities for which the applicant has applied for permission; the fact that his customers may be vulnerable by virtue of their current indebtedness, poor credit history or by reason of age, health or disability; and the fact that the applicant is proposing to operate without any other staff, the Authority is concerned that the applicant's affairs may not be "*conducted in an appropriate manner*" (paragraphs 2E(1)(c) of Schedule 6 to FSMA).

- iii. For the above reasons the Authority is not satisfied that the applicant will satisfy, and continue to satisfy, threshold conditions 2E (suitability). As a result, the Authority cannot ensure that the applicant will satisfy, and continue to satisfy, threshold condition 2D (appropriate resources).
23. The above reasons are sufficient, in the Authority's view, to issue the Final Notice. However, the following are further reasons why the Authority considers that the applicant is unable to satisfy the threshold conditions:
- i. The applicant has also not satisfied the Authority that he has "*adequate skills and experience*" to conduct the regulated activities for which he has applied for permission (as required by paragraph 2E(1)(e) of Schedule 6 to FSMA). The Authority has considered the applicant's previous experience but is concerned that the applicant has not undertaken any recent training in relation to the activities for which he has applied for permission and has been absent from the industry (for a number of years). In particular, the Authority is not satisfied that the applicant has kept up to date with the relevant regulatory requirements that will apply to him, and accordingly the Authority is concerned that the applicant is not ready and organised to comply with those requirements. The Authority is also of the view that the errors in the applicant's documentation are evidence that the applicant may not have adequate skills and experience.
 - ii. The Authority considers that the applicant's non-compliant financial promotions, communications, terms and conditions and pre-contractual information are evidence that the applicant is not ready and organised to comply with the Authority's regulatory requirements and standards. The Authority also considers that were the defects in those documents remedied, as the applicant has indicated he could do (but has not done), the fact of those defects in itself serves as evidence that the applicant does not have adequate skills and experience and/or that the applicant is not ready and organised to comply with the regulatory requirements that will apply to him.

PUBLICATION

24. Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which the Final Notice relates. Under those provisions, the Authority must publish such information about the matter to which the Final Notice relates as the Authority considers appropriate. The information may be published in such manner as the Authority considers appropriate. However, the Authority may not publish information if such publication would, in the opinion of the Authority, be unfair to the applicant or prejudicial to the interests of consumers or detrimental to the stability of the UK financial system.
25. The Authority has decided to publish such information about the matter to which the Final Notice relates as it considers appropriate, including by way of this summary document.

ANNEX A – RELEVANT REGULATORY PROVISIONS

Relevant Statutory Provisions

1. Section 55A(1) of the Act provides for an application for permission to carry on one or more regulated activities to be made to the appropriate regulator. Section 55A(2) defines the “appropriate regulator” for different applications.
2. Section 55B(3) of the Act provides that, in giving or varying permission, imposing or varying a requirement, or giving consent, under any provision of Part 4A of the Act, each regulator must ensure that the person concerned will satisfy, and continue to satisfy, in relation to all of the regulated activities for which the person has or will have permission, the threshold conditions for which that regulator is responsible.
3. The threshold conditions are set out in schedule 6 of the Act. In brief, the threshold conditions relate to:
 - (1) Threshold condition 2B: Location of offices
 - (2) Threshold condition 2C: Effective supervision
 - (3) Threshold condition 2D: Appropriate resources
 - (4) Threshold condition 2E: Suitability
 - (5) Threshold condition 2F: Business model
4. In respect of applications for a consumer credit licence received but not determined by the OFT before 1 April 2014, paragraph 31(8) of the Transitional Order provides that, for the purposes of section 55V of the Act (determination of applications), the appropriate regulator is to be treated as having received the application on 1st April 2014.

Relevant provisions of the Authority’s Handbook

5. In exercising its powers in relation to the granting of a Part 4A permission, the Authority must have regard to guidance published in the Authority Handbook, including the part titled Threshold Conditions (“COND”). The main considerations in relation to the action specified are set out below.

Threshold condition 2D: Adequate Resources

6. COND 1.3.2G(2) states that, in relation to threshold conditions 2D to 2F, the Authority will consider whether a firm is ready, willing and organised to comply on a continuing basis with the requirements and standards under the regulatory system which will apply to the firm if it is granted Part 4A permission.
7. COND 2.4.2G(2) states that the Authority will interpret the term 'appropriate' as meaning sufficient in terms of quantity, quality and availability, and 'resources' as including all financial resources (though only in the case of firms not carrying on, or seeking to carry on, a PRA-regulated activity), non-financial resources and means of managing its resources; for example, capital, provisions against liabilities, holdings of or access to cash and other liquid assets, human resources and effective means by which to manage risks.

8. COND 2.4.2(2A) states that paragraph 1A(2) of Schedule 6 to FSMA provides that the "non-financial resources" of a firm for the purposes of the threshold conditions includes any systems, controls, plans or policies that the firm maintains and the human resources that the firm has available.
9. COND 2.4.4G(2) and 2.4.4G(2)(d) provide that, when assessing whether a firm has appropriate resources, the Authority will have regard to whether the firm has taken reasonable steps to identify and measure any risks of regulatory concern that it may encounter in conducting its business and has installed appropriate systems and controls and appointed appropriate human resources to measure them prudently at all times.

Threshold condition 2E: Suitability

10. COND 1.3.3BG provides that, in determining whether the firm will satisfy, and continue to satisfy, the FCA threshold conditions, the FCA will have regard to all relevant matters, whether arising in the United Kingdom or elsewhere.
11. COND 1.3.3CG provides that, when assessing the FCA threshold conditions, the FCA may have regard to any person appearing to be, or likely to be, in a relevant relationship with the firm, in accordance with section 55R of the Act (Persons connected with an applicant). For example, a firm's controllers, its directors or partners, other persons with close links to the firm (see COND 2.3), and other persons that exert influence on the firm which might pose a risk to the firm's satisfaction of the FCA threshold conditions, would be in a relevant relationship with the firm.
12. COND 2.5.6G provides that examples of the kind of particular considerations to which the Authority may have regard when assessing whether a firm will satisfy, and continue to satisfy, this threshold condition include, but are not limited to, whether:
 - (1) 2.5.6G(1): the firm has been open and co-operative in all its dealings with the FCA and any other regulatory body (see Principle 11 (Relations with regulators)) and is ready, willing and organised to comply with the requirements and standards under the regulatory system.
 - (2) 2.5.6G(1A): the firm has made arrangements to put in place an adequate system of internal control to comply with the requirements and standards for which the FCA is responsible under the regulatory system.
 - (3) 2.5.6G(2) the firm has been convicted, or is connected with a person who has been convicted, of any criminal offence
 - (4) 2.5.6G(10): the governing body of the firm is made up of individuals with an appropriate range of skills and experience to understand, operate and manage the firm's regulated activities.

Other relevant provisions

13. Principles for Businesses ("**PRIN**")
 - (1) Principle 11 provides that: "*A firm must deal with its regulators in an open and cooperative way, and must disclose to the appropriate regulator appropriately anything relating to the firm of which that regulator would reasonably expect notice.*"

14. Relevant rules and guidance – Consumer Credit (“**CONC**”)

- (1) CONC 3.9.3R(5) provides, as read with 1.2.3G(2) of DISP, that a financial promotion or communication to a customer must include a statement that if a complaint is not resolved, the complainant may be entitled to refer the complaint to the Financial Ombudsman Service;
- (2) CONC 3.3.10G states that examples of practices that are likely to contravene the clear, fair and not misleading rule in CONC 3.3.1R include:
 - i. *“using false or unsubstantiated claims as to the firm's size or experience or pre-eminence”*; and
 - ii. *“in relation to debt solutions, claiming or implying that a customer will be free of debt in a specified period of time or making statements emphasising a debt-free life or that a debt solution is a stress free or immediate solution”*.

OFT Guidance

15. The OFT’s Debt Management Guidance (in force up to 31 March 2014) provides:

- (1) Paragraph 3.16: *“All marketing, advertising and promotion and other oral or written representations should be clear, accurate and truthful and should not mislead, either expressly or by implication or omission”*.
- (2) Paragraph 3.18t and 3.18u: *“Examples of unfair or improper business practices occurring in various types of marketing, advertising and other communications include: ... t. making false or unsubstantiated statements about the size, pre-eminence and experience of the business ... u. claiming or implying that the consumer will definitely be debt free in a specified period of time or making statements emphasising a ‘debt free life’”*.
- (3) Paragraph 3.52e provides: *“Examples of unfair or improper business practices include: ... e. not informing a consumer complainant, where appropriate and applicable, that he may refer the complaint to the Financial Ombudsman Service if he is not satisfied with the way that his complaint has been handled by the business concerned.”*