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**FINAL NOTICE**

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**To:** **Independent Family Advisers Limited**  
**Address:** **3 Manchester Square, London W1U 3PB**  
**Date** **19 May 2016**

**ACTION**

1. IFAL has applied under section 55A of the Act for permission under Part 4A of the Act to carry on the following regulated activities:
  - (1) Advising on investments (excluding pension transfers and pension opt outs).
  - (2) Advising on pension transfers and pension opt outs.
  - (3) Agreeing to carry on a regulated activity.
  - (4) Arranging deals in investments.
  - (5) Making arrangements with a view to transactions in investments.
2. By way of the Decision Notice, the Authority decided to refuse the application. The Applicant referred the matter to the Tribunal by way of a reference notice dated 24 February 2015; that reference was subsequently withdrawn by the Applicant on 8 December 2015.
3. Under section 390 (2A) (b) and pursuant to section 390 (7) of the Act, the Authority must give IFAL Final Notice of its decision to refuse the application.
4. For the reasons set out in this Notice and in accordance with section 55X of the Act, the Authority has refused the application.

## SUMMARY OF REASONS

5. The executive directors of IFAL are the executive directors of another regulated firm, Strabens Hall. IFAL's application states that Strabens Hall is facing inevitable insolvency due to anticipated liabilities of £1,050,000 to eight of its customers who have complained to the FOS about advice they received in relation to sales of the Connaught Income Fund 1.
6. IFAL wishes to obtain a permission under Part 4A of the Act in order to acquire the Strabens Hall business (including its assets, staff and clients) without those anticipated liabilities, which will be left to prove in the insolvency of Strabens Hall. IFAL would trade as "Strabens Hall".
7. IFAL argues that this is the outcome that causes the least damage across the board. IFAL would provide funding to Strabens Hall after it entered an insolvency procedure so it could continue to pursue a legal dispute with its professional indemnity insurer, which IFAL considers is likely to lead to a settlement for the benefit of the FOS complainants.
8. The suitability threshold condition (of paragraph 2E of Schedule 6 to the Act) requires a person seeking to carry on regulated activities to be a fit and proper person having regard to all the circumstances, including those set out specifically in paragraph 2E. These include the need to ensure that the person's affairs are conducted in an appropriate manner, having regard in particular to the interests of consumers and the integrity of the UK financial system.
9. IFAL considers that Strabens Hall's insolvency is inevitable should an award to a FOS complainant become final and its proposals anticipate Strabens Hall's insolvency. It is a serious matter that Strabens Hall will not be able to meet its liabilities to the FOS complainants (contrary to DISP 3.7.12R) and such other consumers as may complain about the Connaught sales (if any). Its insolvency may also generate liabilities for the FSCS. The Authority notes that adverse consequences for the FOS complainants would be the result of Strabens Hall's inability to meet its anticipated liabilities, rather than a decision to give IFAL a Part 4A permission per se. However, in the circumstances contemplated by IFAL's application, the directors of IFAL will have been the directors of a regulated firm that has gone into insolvency, with unsatisfied liabilities to the FOS complainants (i.e. consumer creditors) as a consequence of its consumer clients bringing successful complaints to the FOS. This was proposed from the beginning of the application process. It is unclear to the Authority whether the viability of alternatives which may better serve the interests of consumers has been considered.
10. IFAL's proposals give rise to significant concerns on the part of the Authority as to whether IFAL is a fit and proper person, having regard to all the circumstances. The application contained significant deficiencies as submitted. As considered below, it has been developed in response to concerns of the Authority in a piecemeal and incremental fashion throughout the application period, including at very late stages during the two sets of written representations following the Warning Notice of 22 October 2014, the oral representations meeting of 12 December 2014, the representations following the oral representations meeting and the representations following the Authority's letter of 7 January 2015. In view of the concerns and the changing nature of the application, the Authority has carefully considered whether the proposals (including as they stand now) and the manner in which the application has been presented and developed are consistent with IFAL, acting through its directors, being a fit and proper person, in particular considering what the process has revealed about the directors' awareness and comprehension of relevant issues and their judgment and reactions in respect of those issues. In the circumstances of this case, the Authority would have expected IFAL to have had the interests of consumers centrally in mind in developing its initial proposals and throughout the process of applying for authorisation. The Authority would also have expected IFAL to have appropriately recognised the gravity of the situation, taking into

account the effect that the behaviour they propose may have (in aggregate) on the integrity of the UK financial system.

11. The application, as submitted and as developed in representations following the Warning Notice, lacked detailed and clear proposals on issues of importance to consumers and an appropriate recognition of the gravity of the anticipated circumstances of Strabens Hall's failure and the consequences it could have for consumer creditors, public confidence in the system for redress provided by the FOS and for those funding the FSCS.
12. While the Authority accepts that applications may evolve and develop, the Authority would have expected a fit and proper person to have submitted clear and specific proposals at an earlier stage of the process that paid due regard to and struck an appropriate balance between the interests of consumers, the interests of IFAL and its directors and the Authority's obvious regulatory concerns. In this case, the Authority notes the inadequacies in the original application and that IFAL has been slow to make changes to its application, that clarification has been provided in a piecemeal and incremental fashion and that IFAL has required considerable input from the Authority in developing its application.
13. Having carefully considered the application and the proposals as they now stand, the Authority has concluded, based on the aggregation of the considerations set out in this Notice, that it does not consider that IFAL's affairs will be conducted in an appropriate manner, having regard to the interests of consumers and the integrity of the UK financial system. Accordingly, it does not consider, at this time, that IFAL will be a fit and proper person, having regard to all the circumstances.

## **DEFINITIONS**

14. In this Final Notice—

"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;

"the Authority's letter of 7 January 2015" has the meaning given in paragraph 27;

"the Decision Notice" means the decision notice given by the Authority to IFAL dated 26 January 2015;

"the directors" means Adam Benskin and John Halley who are directors of IFAL, and references to "IFAL's directors" or "its directors" are to be construed accordingly;

"the FOS" means the Financial Ombudsman Service;

"the FOS complainants" has the meaning given in paragraph 19;

"the FSCS" means the Financial Services Compensation Scheme;

"the Handbook" means the Authority's Handbook of rules and guidance;

"IFAL" means Independent Family Advisers Limited;

"IFAL's submissions of 14 August 2014" means the written submissions of IFAL provided following the Authority's visit of 21 July 2014, which set out further detail concerning the application for authorisation by IFAL;

“the threshold conditions” means the threshold conditions set out in Schedule 6 to the Act;

“Strabens Hall” means Strabens Hall Limited;

“the Tribunal” means the Upper Tribunal (Tax and Chancery Chamber);

“the Warning Notice” means the Warning Notice given to IFAL dated 22 October 2014.

## **RELEVANT STATUTORY PROVISIONS**

15. The statutory and regulatory provisions relevant to this Final Notice are set out in Annex A.

## **FACTS AND MATTERS<sup>1</sup>**

16. IFAL was incorporated on 9 December 2013.
17. By an application dated 11 December 2013, IFAL applied for permission under Part 4A of the Act. Applications were also submitted for the approval of—
- (1) Adam Benskin, to perform the controlled functions of CF1 (director), CF10 (compliance oversight) and CF30 (customer);
  - (2) John Halley, to perform the controlled functions of CF1 (director), CF11 (money laundering officer) and CF30 (customer).
18. Mr Benskin and Mr Halley are currently directors of a firm, Strabens Hall, with the same permissions as are sought for IFAL. In a letter dated 28 October 2013, Mr Benskin stated:

“In order to manage the risk of Strabens Hall becoming insolvent and to protect our clients and staff, we wish to transfer the business of Strabens Hall to a new FCA-regulated firm.”

IFAL’s submissions of 14 August 2014 stated:

“In summary, unless the [insurance] dispute is resolved in [Strabens Hall’s] favour, the firm will be unable to meet any binding decision by an Ombudsman in respect of any complaint about potential losses that may ultimately crystallise from investments made in the Connaught Income Fund S1 (CIFs1). As a consequence, the firm would be forced into liquidation, with significant detriment to all its clients, including the 59 CIFs1 investors (8 of whom have made complaints).”

19. Strabens Hall advised clients on investments in the Connaught Income Fund 1 totalling £7.9 million. Eight of the clients have complained, with each of the complaints being referred to the FOS (“the FOS complainants”). In some cases provisional decisions have been made against Strabens Hall. Strabens Hall expects adverse decisions in each case. It anticipates liabilities to the existing complainants of £1,050,000 in total. IFAL has indicated that six of the eight complaints significantly exceed the applicable limit on FSCS compensation.

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<sup>1</sup> This Final Notice sets out the position as at the date of the Decision Notice

20. Strabens Hall is in a legal dispute with its professional indemnity insurer regarding its potential liability arising from the sales of Connaught Income Fund 1, due to alleged material non-disclosure. Strabens Hall would be unable to meet the liability arising from any of the eight complaints if an award becomes final and the professional indemnity insurer does not accept liability for such claims and would enter an insolvency procedure.
21. As noted above, Mr Halley and Mr Benskin are directors of Strabens Hall. Mr Benskin has held the CF10 controlled function (compliance oversight) since mid-2012, but did not hold this function at the time of the Connaught sales. It is proposed that the three Strabens Hall non-executive directors should be appointed as non-executive directors of IFAL.
22. IFAL's application involves the following proposals—
  - (1) Strabens Hall would cease to conduct regulated activities,
  - (2) Strabens Hall's assets and staff would transfer to IFAL,
  - (3) IFAL would invite Strabens Hall's clients to transfer to IFAL, signing IFAL client agreements mirroring those of Strabens Hall,
  - (4) IFAL would operate from Strabens Hall's address and trade as "Strabens Hall", but
  - (5) any liabilities of Strabens Hall in respect of the Connaught sales would not transfer to IFAL, and, in consequence, would be left to prove in the insolvency of Strabens Hall.
23. The proposals have the hallmarks, therefore, of what is sometimes described as 'phoenixing'. IFAL's submissions of 14 August 2014 acknowledge this:

"We are conscious of the FCA's views on so-called 'phoenixing' and firms seeking to avoid liabilities, which is why we disclosed our intention to the FCA before submitting the application to authorise IFAL."
24. As regards IFAL's purchase of Strabens Hall assets:
  - (1) The initial financial forecasts provided to the Authority provided for £10,000 in respect of fixed assets. IFAL's submissions of 14 August 2014 stated that IFAL will rent or purchase from Strabens Hall the computer hardware and office furniture, which are the only fixed assets.
  - (2) A valuation was obtained of Strabens Hall dated 21 August 2014. This valued the business at £600,000. However, this appears to be a 'going concern' valuation based on the continuing involvement of Mr Halley and Mr Benskin. It does not therefore address the position as contemplated in the proposals set out above.
  - (3) No provision was initially made for payment for intangible assets, such as client details or goodwill. IFAL has represented that such assets are "arguably valueless" as the Strabens Hall directors' contracts do not have restrictive covenants or non-competition clauses and because the clients are likely to wish to move with their advisers (see Annex B).
  - (4) IFAL's proposal for the purchase of assets has evolved considerably. It now proposes to purchase the assets only after Strabens Hall has entered an insolvency procedure and a fair value has been negotiated with the insolvency practitioner appointed in relation to Strabens Hall.
25. IFAL has indicated that, after Strabens Hall has entered an insolvency procedure, IFAL or Mr Benskin and Mr Halley will ensure that support and funding is provided to Strabens

Hall to continue the legal dispute with its professional indemnity insurer for the benefit of the FOS complainants. During much of the application process, including in representations following the Warning Notice, this aspect of the proposals has been vague and unspecific (see Annex B). Following the oral representations meeting, in response to issues raised by the Authority, IFAL provided a draft undertaking which has since been revised in light of issues raised by the Authority (considered further below).

## **REPRESENTATIONS**

26. Annex B contains a brief summary of the key representations made by IFAL and how they have been dealt with. In making the decision which gave rise to the obligation to give this Final Notice, the Authority has taken into account all of the representations made by IFAL, whether or not set out in Annex B.
27. Having regard to the evolving nature of IFAL's application, IFAL and the Authority's Authorisations case team were permitted to make further representations following the oral representations meeting of 12 December 2014 and again following a letter of the Authority to IFAL dated 7 January 2015, setting out the approach the Authority was considering and the decision it was minded to take ("the Authority's letter of 7 January 2015").

## **ASSESSMENT**

28. On the basis of the facts and matters set out in this Notice, the Authority does not consider that it can ensure that IFAL will satisfy, and continue to satisfy, the threshold conditions.
29. The suitability threshold condition (of paragraph 2E of Schedule 6 to the Act) requires a person seeking to carry on regulated activities to be a fit and proper person having regard to all the circumstances, including those set out specifically in paragraph 2E. These include the need to ensure that the person's affairs are conducted in an appropriate manner, having regard in particular to the interests of consumers and the integrity of the UK financial system.
30. IFAL considers that Strabens Hall's insolvency is inevitable should an award to a FOS complainant become final and its proposals anticipate Strabens Hall's insolvency. It is a serious matter that Strabens Hall will not be able to meet its liabilities to the FOS complainants (contrary to DISP 3.7.12R) and to such other consumers as may complain about the Connaught sales (if any). Its insolvency may also generate liabilities for the FSCS. The Authority notes that adverse consequences for the FOS complainants would be the result of Strabens Hall's inability to meet its anticipated liabilities, rather than a decision to give IFAL a Part 4A permission per se. However, in the circumstances contemplated by IFAL's application, the directors of IFAL will have been the directors of a regulated firm that has gone into insolvency (a consideration to which the Authority may have regard under COND 2.5.6G(13)), with unsatisfied liabilities to the FOS complainants (i.e. consumer creditors). Further, the insolvency situation will arise because Strabens Hall has given advice that has led its consumer clients to bring successful complaints to the FOS.
31. Moreover, IFAL has indicated that Strabens Hall is a successful and profitable business, if the anticipated liabilities to the FOS complainants are disregarded (together with any further liabilities that may arise if other complaints are made in respect of the sales of the Connaught Income Fund 1 by Strabens Hall). The essence of IFAL's proposals is to acquire the Strabens Hall business without those liabilities to consumer creditors. This was what was proposed from the beginning. It is unclear to the Authority whether the viability of alternatives which may better serve the interests of consumers has been considered.

32. IFAL's proposals give rise to significant concerns on the part of the Authority as to whether IFAL is a fit and proper person, having regard to all the circumstances. The application contained significant deficiencies as submitted. As considered below, it has been developed in response to concerns of the Authority in a piecemeal and incremental fashion throughout the application period, including at very late stages during the two sets of written representations following the Warning Notice of 22 October 2014, the oral representations meeting of 12 December 2014, the representations following the oral representations meeting of 12 December 2014 and the representations following the Authority's letter of 7 January 2015. In view of the Authority's concerns and the changing nature of the application, the Authority has carefully considered whether the proposals (including as they stand now) and the manner in which the application has been presented and developed are consistent with IFAL, acting through its directors, being a fit and proper person, in particular considering what the process has revealed about the directors' awareness and comprehension of relevant issues and their judgment and reactions in respect of those issues. In the circumstances of this case, the Authority would have expected IFAL to have had the interests of consumers centrally in mind in developing its initial proposals and throughout the process of applying for authorisation. The Authority would also have expected IFAL to have appropriately recognised the gravity of the situation, taking into account the effect that the behaviour it proposes may have (in aggregate) on the integrity of the UK financial system.
33. The application, as submitted and as developed in representations following the Warning Notice, lacked detailed and clear proposals on issues of importance to consumers and an appropriate recognition of the gravity of the anticipated circumstances of Strabens Hall's failure and the consequences it could have for consumer creditors, public confidence in the system for redress provided by the FOS and for those funding the FSCS. The application has been developed over a lengthy period as a result of the concerns expressed by the Authority through the responses of IFAL and its representative to these concerns.
34. It should have been clear to a person who was fit and proper, who was acting appropriately, having regard to the interests of consumers, that a key issue would be whether fair value would be paid by IFAL for the Strabens Hall business. The initial application provided no assurance that fair value would be paid. IFAL only made a clear commitment to purchase the business of Strabens Hall from an insolvency practitioner at a late stage of the process, in representations following the Warning Notice (see Annex B). Clearly the insolvency practitioner, as a statutory office holder, is obliged to obtain the best value he can for Strabens Hall's creditors. But he will be negotiating in the circumstances of a distressed sale in Strabens Hall's insolvency. While his involvement will avoid the concern that IFAL will benefit from a transaction at an undervalue, the proposal does no more than comply with basic legal requirements.
35. Further, it is clear from IFAL's representations that IFAL and its directors intend to rely on the way in which the Strabens Hall business has been structured to argue that the value to be attributed to goodwill and to the client details is at best very low. This results from the absence of confidentiality and / or non-solicitation clauses in the Strabens Hall directors' contracts (see Annex B) and the directors' intention to rely on this in building IFAL's business. It may or may not be correct to say that, structured in this way, the intangible assets of Strabens Hall, such as goodwill and client details, are of low value. However, the Authority considers it significant that IFAL, acting through its directors, proposes to rely on these features once Strabens Hall fails and has not acknowledged the issues of consumer detriment that arise. It appears to the Authority, subject only to the point considered next, that IFAL and its directors wish to pay no more than the minimum necessary to purchase the Strabens Hall business out of insolvency. IFAL is pursuing a solution that would allow Mr Benskin and Mr Halley to continue to operate a profitable business for their benefit (together with any other shareholders) through a new limited liability company while leaving the anticipated liabilities related to customer complaints to prove in the insolvency of Strabens Hall and its customers to recover from the FSCS (should they be eligible to do so and in any event only to the

applicable limit, which IFAL notes is significantly exceeded by six of the claims of the eight existing FOS complainants).

36. IFAL and its directors sought to address the concerns it anticipated that the Authority would have about these proposals by indicating that it was proposing to go beyond the minimum legal standards that apply through a proposal to assist the FOS complainants. Mr Halley and Mr Benskin state that they are pursuing a solution that causes “the least damage across the board”. They propose that IFAL will provide funding to enable the legal dispute with Strabens Hall’s professional indemnity insurer to be continued in Strabens Hall’s insolvency. It is unclear to the Authority whether the viability of alternatives which may better serve the interests of consumers has been considered. It is the only feature of the application that seeks to address the Authority’s concerns and IFAL and its directors must have been aware of the significance that may be attached to this proposal when deciding to pursue and subsequently develop this particular proposal.
37. The Authority has carefully considered this proposal to see if through it IFAL and its directors have shown an appropriate awareness and comprehension of the position of consumers and the gravity of the situation produced by the anticipated failure of Strabens Hall and appropriate judgment in and reactions to the circumstances. The Authority acknowledges both that Mr Benskin and Mr Halley have been open about their intentions from the beginning and that this element of the proposal shows that some consideration has been given to the position of consumers (beyond what general company law requires).
38. However, it should have been clear to a person who was fit and proper, who was acting appropriately, having regard to the interests of consumers, that this aspect of the application and its effect should be clear, specific and credible. Until written representations of 18 December 2014 were submitted following the oral representations meeting of 12 December 2014, the proposal was vague and unspecific and offered to the Authority very little assurance. In those representations, IFAL set out a draft undertaking under which it would provide funding to Strabens Hall for the purpose of completing arbitration of the legal dispute with its professional indemnity insurers. The Authority’s review of the proposal left it with concerns and uncertainty about a number of aspects of the proposal. These included, in particular, the limited and conditional nature of the undertaking. The limit on funding protected IFAL’s exposure under the undertaking but did not appear to meet the requirements then stated, in papers provided by IFAL, by the proposed insolvency practitioner for continuing the legal dispute. The application also did not address clearly why the insolvency practitioner would not be able to continue the legal dispute without this funding (given the information provided in Strabens Hall’s last accounts, supplied with the representations containing the draft undertaking; see Annex B). Similarly, the funds that the directors had drawn from Strabens Hall during the course of the application process and any implications of these payments were not addressed in the application.
39. The undertaking was only revised to address the problems caused by the limits on funding after they were identified in the written comments of the Authority’s Authorisations case team of 23 December 2014 and following the Authority’s letter of 7 January 2015. The Authority should not have needed to make repeated attempts to obtain clarity about this important element of the application. This element was particularly important in this case when IFAL had chosen to rely on this proposal as the principal way of showing that it had demonstrated appropriate regard to the interests of consumers. In the particular circumstances of this application, IFAL should have thought through the issues properly, paying appropriate regard to the interests of consumers and the gravity of the situation, rather than appearing to be ‘negotiating’ with the Authority to permit IFAL’s application to succeed at the lowest overall cost to IFAL through the making of incremental improvements to its proposals in response to concerns raised by the Authority.



40. Viewing the development of the application in the round, it appears to the Authority that IFAL has been slow to make changes to its application, that clarification has been provided in a piecemeal and incremental fashion and that IFAL has required considerable input from the Authority in developing its application. While the Authority accepts that applications may evolve and develop, in the circumstances of this case the Authority would have expected a fit and proper person to have submitted clear, specific and credible proposals at an earlier stage of the process that paid due regard to and struck an appropriate balance between the interests of consumers, the interests of IFAL and its directors and the Authority's obvious regulatory concerns. The Authority notes the inadequacies in the original application, IFAL's awareness of the concerns that the Authority would be likely to have about the proposals (and the level of likely consumer detriment), the number of occasions on which the Authority has had to seek clarification of key issues and the slow and inadequate treatment of these issues and concerns during a lengthy process.
41. Having carefully considered the application and the proposals as they now stand, the Authority has concluded, based on the aggregation of the considerations set out in this Notice, that it does not consider that IFAL's affairs will be conducted in an appropriate manner, having regard to the interests of consumers and the integrity of the UK financial system. Accordingly, it does not consider, at this time, that IFAL will be a fit and proper person, having regard to all the circumstances.

## **PROCEDURAL MATTERS**

42. This Final Notice is given to IFAL under section 390 (2A) (b) and pursuant to section 390 (7) of the Act.

### **Decision maker**

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

### **Confidentiality and publicity**

44. Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this Notice relates. Under those provisions, the Authority must publish such information about the matter to which this Notice relates as the Authority considers appropriate. However, the Authority may not publish information if such publication would, in its opinion, be unfair to you or prejudicial to the interests of consumers, or detrimental to the stability of the UK financial system.
45. The Authority intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

### **Contacts**

46. For more information concerning this matter generally, IFAL should contact Michelle O'Bryan at the Authority (telephone: 020 7066 8610; email: [michelle.o'bryan@fca.org.uk](mailto:michelle.o'bryan@fca.org.uk)).

Andrew Freeman

Financial Conduct Authority, Authorisations Division

## **ANNEX A**

### **RELEVANT STATUTORY PROVISIONS**

#### Statutory provisions

1. Section 55B(2) of the Act provides:

“In giving or varying permission [...] under any provision of this Part, [the Authority] must ensure that the person concerned will satisfy, and continue to satisfy, in relation to all the regulated activities for which the person has or will have permission, the threshold conditions ...”

2. The suitability threshold condition, of paragraph 2E of Schedule 6 to the Act, provides:

#### **“Suitability**

A must be a fit and proper person having regard to all the circumstances, including—

[...]

- (b) the nature (including the complexity) of the regulated activities that A carries on or seeks to carry on;
- (c) the need to ensure that A’s affairs are conducted in an appropriate manner, having regard in particular to the interests of consumers and the integrity of the UK financial system;
- (d) whether A has complied and is complying with requirements imposed by the [Authority] in the exercise of its functions, or requests made by the [Authority], relating to the provision of information to the [Authority] and, where A has so complied or is so complying, the manner of that compliance;
- (e) whether those who manage A’s affairs have adequate skills and experience and have acted and may be expected to act with probity;
- (f) whether A’s business is being, or is to be, managed in such a way as to ensure that its affairs will be conducted in a sound and prudent manner;

[...].”

3. The appropriate resources threshold condition, of paragraph 2D of Schedule 6 to the Act, provides:

#### **“Appropriate resources**

- (1) The resources of A must be appropriate in relation to the regulated activities that A carries on or seeks to carry on.
- (2) The matters which are relevant in determining whether A has appropriate resources include—

- (a) the nature and scale of the business carried on, or to be carried on, by A;
- (b) the risks to the continuity of services provided by, or to be provided by, A;

[...]

- (4) The matters which are relevant in determining whether A has appropriate non-financial resources include—
  - (a) the skills and experience of those who manage A's affairs;
  - (b) whether A's non-financial resources are sufficient to enable A to comply with—
    - (i) requirements imposed or likely to be imposed on A by the [Authority] in the exercise of its functions, or
    - (ii) any other requirement in relation to whose contravention the [Authority] would be the appropriate regulator for the purpose of any provision of Part 14 of this Act."

#### Relevant rules of the Authority

4. DISP 3.7.12R provides:

*"A respondent must comply promptly with:*

- (1) any award or direction made by the *Ombudsman*; and
- (2) any settlement which it agrees at an earlier stage of the procedures."

#### Relevant regulatory provisions

5. COND 2.5.4G provides:

*"Examples of the kind of general considerations to which the FCA may have regard when assessing whether a firm will satisfy, and continue to satisfy, the threshold conditions set out in paragraphs 2E and 3D of Schedule 6 to the Act include, but are not limited to, whether the firm:*

- (a) conducts, or will conduct, its business with integrity and in compliance with proper standards;
- (b) has, or will have, a competent and prudent management; and
- (c) can demonstrate that it conducts, or will conduct, its affairs with the exercise of due skill, care and diligence."

6. COND 2.5.6G provides:

“Examples of the kind of particular considerations to which the *FCA* may have regard when assessing whether a *firm* will satisfy, and continue to satisfy, this *threshold condition* include, but are not limited to, whether:

[...]

(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*;

[...]

(4) the *firm* has contravened, or is connected with a *person* who has contravened, any provisions of the *Act* or any preceding financial services legislation, the *regulatory system* or the rules, regulations, statements of principles or codes of practice (for example the *Society of Lloyd's Codes*) of other regulatory authorities (including the *FCA's* predecessors), *clearing houses* or *exchanges*, *professional bodies*, or government bodies or agencies or relevant industry standards (such as the Non-Investment Products Code); the *FCA* will, however, take into account both the status of codes of practice or relevant industry standards and the nature of the contravention (for example, whether a *firm* has flouted or ignored a particular code);

(5) the *firm*, or a *person* connected with the *firm*, has been refused registration, authorisation, membership or licence to carry out a trade, business or profession or has had that registration, authorisation, membership or licence revoked, withdrawn or terminated, or has been expelled by a regulatory or government body; whether the *FCA* considers such a refusal relevant will depend on the circumstances;

[...]

(7) the *firm* has put in place procedures which are reasonably designed to:

- (a) ensure that it has made its *employees* aware of, and compliant with, those requirements and standards under the *regulatory system* that apply to the *firm* for which the *FCA* is responsible and the *regulated activities* for which it has, or will have *permission*;
- (b) ensure that its *approved persons* (whether or not employed by the *firm*) are aware of those requirements and standards under the *regulatory system* applicable to them;
- (c) determine that its *employees* are acting in a way compatible with the *firm* adhering to those requirements and standards; and
- (d) determine that its *approved persons* are adhering to those requirements and standards;

[...]

(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*;

(11) where appropriate, the *governing body* of the *firm* includes non-executive representation, at a level which is appropriate for the control of the *regulated activities* proposed, for example, as members of an audit committee;

[...]

(13) the *firm*, or a *person* connected with the *firm*, has been a *director*, *partner* or otherwise concerned in the management of a *company*, *partnership* or other organisation or business that has gone into insolvency, liquidation or administration while having been connected with that organisation or within one year of such a connection;

(14) the *governing body* of the *firm* is organised in a way that enables it to address and control the *regulated activities* of the *firm*, including those carried on by *managers* to whom particular functions have been delegated;

[...].”

## **ANNEX B**

### **REPRESENTATIONS**

#### Introductory representations

1. IFAL made the following representations:
  - (1) Final awards to the FOS complainants will be made and will inevitably cause Strabens Hall to become cashflow and balance sheet insolvent.
  - (2) IFAL has been open and transparent about the rationale for its proposals from the beginning, having regard to the Authority's views on so-called 'phoenixing'.
  - (3) IFAL is seeking to pursue a solution that causes "the least damage across the board", in particular by continuing to pursue a settlement with Strabens Hall's professional indemnity insurer.
2. The Authority has no reason to doubt the representation in paragraph 1(1) and accepts the representation in (2). It deals with the representation in (3) below, but notes that IFAL seeks to pursue a solution that would allow Mr Benskin and Mr Halley to continue to operate a profitable business through a new limited liability company while leaving anticipated liabilities related to customer complaints to prove in the insolvency of Strabens Hall.

#### Settlement with professional indemnity insurer

3. IFAL made the following representations:
  - (1) Strabens Hall has spent approximately £100,000 pursuing a legal dispute with its professional indemnity insurer. Strabens Hall will continue to fund the legal dispute until forced into insolvency. This money is being spent to protect the interests of the FOS complainants. Mr Halley and Mr Benskin have forgone dividends and pension contributions which they could lawfully have drawn. They are willing to take this risk with their money to ensure that the FOS complainants have their money.
  - (2) The best case scenario is winning the dispute following arbitration, recovering from the professional indemnity insurer up to the policy limit of £2 million (together with a proportion of costs). <Redaction>. The worst case scenario is losing the arbitration and being awarded nothing. The funds would be for the benefit of the FOS complainants (including any complainants whose complaints were yet to result in a final award at the moment Strabens Hall entered an insolvency procedure). Any sum awarded improves their position and lessens the burdens on the FSCS.
  - (3) If Strabens Hall enters liquidation, the insolvency practitioner would not have the funding to continue to the legal dispute and would not have the knowledge and experience that Mr Halley and Mr Benskin have of the dispute. <Redaction>.
  - (4) If IFAL is authorised, Mr Benskin and Mr Halley would be able to continue to practise and this would generate funding for the legal dispute.
  - (5) Mr Halley and Mr Benskin would provide such funding, as they consider they have a moral obligation to do so. They are not seeking to walk away from their responsibilities. They are behaving with integrity, going above and beyond the efforts of their peers. In its written representations of 18 December 2014, submitted following the oral representations meeting, IFAL indicated that it is prepared to give an undertaking, subject to authorisation, to fund the progression

of the legal dispute to its conclusion at arbitration. IFAL estimated the costs to be “£54,000 inclusive of VAT”. The draft undertaking provided—

“If costs exceed the estimated £54,000 for concluding at Arbitration, IFAL agrees to consider additional costs, but does not undertake to make good on those costs unless <Redaction>”.

- (6) The Authority’s letter of 7 January 2015 noted that this draft undertaking was seriously deficient (see paragraph 4(5) below). In response to this letter IFAL revised the draft undertaking such that it proposes to fund the progression of the dispute to its conclusion in arbitration without the funding limit and to meet the proposed insolvency practitioner’s costs.

4. The Authority has concluded as follows:

- (1) In response to the representations in paragraph 3(1):

- (a) The Authority acknowledges that Strabens Hall has pursued a legal dispute with its professional indemnity insurer where costs have been incurred by Strabens Hall.
- (b) The Authority notes, in response to questions from the Authority in the oral representations meeting, that the directors explained that they have continued to draw substantial amounts from Strabens Hall through salary and dividends broadly in line with a £72,000 salary. The Financial Statements for the year ended 31 May 2014 provided following the oral representations meeting indicate that Mr Benskin and Mr Halley were each paid a dividend of £50,000 together with a total of just over £22,000 in directors’ salaries. No information was provided about remuneration following the 31 May 2014 accounts, but Mr Halley noted in oral representations that the drawings had not changed in the last two years.
- (c) Mr Halley and Mr Benskin are company directors, owing directors’ duties, including promoting the success of the company. They are also directors and approved persons of a regulated firm, owing the duties imposed by the regulatory system, including that Strabens Hall has resources appropriate to the regulated activities it carries on (the appropriate resources threshold condition of paragraph 2D of Schedule 6 to the Act) and pays FOS awards (under DISP 3.7.12R).
- (d) In funding the legal dispute Strabens Hall was spending its money on a dispute which Mr Halley and Mr Benskin evidently considered would assist the company in satisfying the very substantial liabilities it anticipates to the FOS complainants.
- (e) While the Authority’s concerns would have been greatly magnified had Mr Benskin and Mr Halley sought to draw more money and abandon the company, this argument does not bear the weight that IFAL appears to place on it in demonstrating that IFAL, and its directors, are acting appropriately, having regard to the interests of consumers.

- (2) <Redaction>. As IFAL notes, any settlement moneys would, viewed in isolation, only be beneficial to the FOS complainants. However, the assessment the Authority needs to make is not to consider whether, in isolation, the successful settlement of the legal dispute would be beneficial, but instead whether it assists IFAL in demonstrating that it will, and will continue, to satisfy the threshold conditions.

- (3) In respect of the representations in paragraph 3(2):



- (a) Irrespective of whether IFAL is given a permission under Part 4A of the Act, Mr Benskin and Mr Halley would be able to make their knowledge and experience of the legal dispute available to an insolvency practitioner who wished to continue the dispute.
- (b) IFAL's representations are unclear and appear to be inconsistent. They do not establish that there is no prospect of the recovery of sums from the professional indemnity insurer otherwise than through IFAL's proposals. For example, IFAL has represented that Strabens Hall has sufficient funds to absorb the costs of taking the arbitration to its conclusion. It provided the accounts for the year end 31 May 2014 stating that Strabens Hall's net profit was £151,000 and "until a final decision crystallises a liability in the context of a CIF complaint, [Strabens Hall] is well able to fund the dispute from its reserves. This is without factoring in accruing reserves as [Strabens Hall's] turnover exceeds its current liabilities" (emphasis added). If this is correct (and if funding the legal dispute could be met out of the company's existing assets rather than profits from further trading), the insolvency practitioner would be able to form an assessment of the costs and benefits of doing so to creditors as a whole.
- (4) The Authority notes the representation in paragraph 3(4).
- (5) On the issue of the funding that would be available under the proposal:
- (a) The Authority notes that IFAL's initial representations following the Warning Notice included generalised and vague suggestions that IFAL or Mr Halley and Mr Benskin would provide funding for continuing the legal dispute. These offered very little assurance to the Authority.
- (b) The Authority notes that the initial draft undertaking involved a limited and conditional financial commitment by IFAL. However, it acknowledges that the undertaking would involve the provision of substantial additional funding and this goes beyond what the directors of a limited liability company are obliged to do under general company law and that this proposal reflects some consideration being given to the interests of Strabens Hall's customers.
- (c) However:
- (i) The qualification within the initial draft undertaking (of £54,000 inclusive of VAT) did not reflect either costs estimate provided by IFAL's solicitors. They estimate the costs of arbitration at £52,500 plus VAT (three day hearing) or at £65,500 plus VAT (five day hearing), noting that the case is currently listed for five days but the issues may narrow to make three days more appropriate.
- (ii) The draft undertaking failed to take account of the position of the proposed insolvency practitioner, who at that stage indicated in an email to IFAL's representatives dated 19 December 2014 that—
- "The following matters would need to be provided by the third party to facilitate the handling of this claim:
- Confirmation they will fund the handling of the claim in administration
  - An indemnity against any third party costs order which may be awarded against the administrator
  - Confirmation that any costs incurred by the administrator in assisting with the claim would be met by the third party"

IFAL's draft undertaking was qualified on the first bullet point and did not address the second and third bullet points.

- (d) The draft undertaking was proposed at a very late stage of the process, in written representations of 18 December 2014 submitted following the oral representations meeting of 12 December 2014. Even at this stage, in the form initially proposed, it did not present a credible option for continuing the legal dispute and establish that a potential benefit for consumers would result from the proposal.
- (6) The undertaking was only clarified to address the problems caused by the limits on funding after they were identified in the written comments of the Authority's Authorisations case team of 23 December 2014 and following the Authority's letter of 7 January 2015. The Authority considers that, in the circumstances of this case, a person who was fit and proper, who was acting appropriately, having regard to the interests of consumers, would have presented clear, detailed and credible proposals at a much earlier stage of the process, rather than only following repeated attempts by the Authority to obtain clarity about this important element of the application. This element was particularly important in this case when IFAL had chosen to rely on this proposal as the principal way of showing that it had demonstrated appropriate regard to the interests of consumers. In the particular circumstances of this application, IFAL should have thought through the issues properly, paying appropriate regard to the interests of consumers and the gravity of the situation, rather than appearing to be 'negotiating' with the Authority to permit IFAL's application to succeed at the lowest overall cost to IFAL through the making of incremental improvements to its proposals in response to concerns raised by the Authority.

#### Fair value

5. IFAL made the following representations:
- (1) While the early financial forecasts provide for the payment of only £10,000 in relation to Strabens Hall's fixed assets, the original proposal was to build IFAL "from scratch", involving a new client base in a new business.
  - (2) The way that the Strabens Hall business is structured is such that the goodwill in the business is arguably valueless in monetary terms to any third party. This is because, amongst other things, the clients pay for services on an ad hoc basis, the clients have the freedom to move elsewhere and the contracts of Mr Benskin and Mr Halley do not include non-competition clauses or restrictive covenants. The clients would want to, and more likely than not will, follow their advisers whether they are with IFAL or another regulated entity. The intrinsic value of the goodwill resides in the directors' skills, which are transferrable.
  - (3) An assertion that an insolvency practitioner at a national firm of accountants agrees in principle that it would not be necessary to pursue Mr Halley and Mr Benskin if no value was given to the goodwill and / or a low value was paid for a list of client names and associated data.
  - (4) If an insolvency practitioner determined that value should be put on the client list, he could ensure that it is recovered for the benefit of creditors. IFAL would pay the open market value of Strabens Hall, as determined by an independent insolvency practitioner.
  - (5) In representations of 18 December 2014 following the oral representations meeting IFAL stated that it proposes to purchase the assets only after Strabens Hall has entered an insolvency procedure, for a fair value negotiated with the insolvency practitioner appointed in relation to Strabens Hall.

- (6) "If there is competition for the assets, including the client bank, the only way that IFAL will acquire those assets is, in effect, to pay top dollar i.e. having beaten off the competition".

6. The Authority has concluded as follows:

- (1) In response to the representation in paragraph 5(1), the Authority notes the inconsistencies with the following statements:

In a letter dated 28 October 2013, Mr Benskin wrote:

"In order to manage the risk of Strabens Hall becoming insolvent and to protect our clients and staff, we wish to transfer the business of Strabens Hall to a new FCA-regulated firm."

The "Regulatory Business Plan" for IFAL, submitted with its application for authorisation dated 11 December 2013, states:

"As per previous correspondence with the FCA ... the intention is that clients of Strabens Hall Limited will migrate to IFAL, which will in turn trade as Strabens Hall."

- (2) The Authority notes that the Strabens Hall business has been structured in this way, but this does not address the Authority's concerns about IFAL's proposals. The Authority refers to paragraph 35 above (of the main body of the Notice, under "Assessment").
- (3) The Authority does not accept that IFAL has provided adequate information concerning the valuation of Strabens Hall's business. The valuation provided to the Authority values the business at £600,000 but on a basis not envisaged by IFAL's proposals. Such a valuation could have been obtained but has not been.
- (4) The proposals for the purchase of the business of Strabens Hall by IFAL have evolved considerably. At one stage, representations appeared to suggest that value for goodwill and the client list could be recovered by the insolvency practitioner for the benefit of creditors (implying that no value would be paid for these unless steps were taken by the insolvency practitioner to recover it). Elsewhere it was suggested that the value would be determined by an insolvency practitioner. However, at that stage, it was unclear when this would take place (and whether the purchase would therefore take place only after Strabens Hall had entered an insolvency procedure).
- (5) The Authority accepts that IFAL has now clarified the position to the extent that the purchase would take place once Strabens Hall has entered an insolvency procedure and would be negotiated with an the insolvency practitioner. The Authority would have expected to have seen clearly articulated and specific proposals at an earlier stage on such an important issue as ensuring that fair value is paid for any assets sold to the new company seeking to carry on the business of the failed company. Clearly the insolvency practitioner, as a statutory office holder, is obliged to obtain the best value he can for Strabens Hall's creditors. But he will be negotiating in the circumstances of a distressed sale in Strabens Hall's insolvency. While his involvement will avoid the concern that IFAL would have benefitted from a transaction at an undervalue, the proposal does no more than comply with basic legal requirements.
- (6) The Authority notes elsewhere IFAL has represented that these assets are of very low value. The Authority remains of the view that, subject to the funding of the legal dispute, IFAL and its directors intend to pay no more than the minimum

necessary to purchase the Strabens Hall business out of insolvency, including by relying on the absence of confidentiality and / or non-solicitation clauses in the Strabens Hall directors' contracts.

### Miscellaneous

7. IFAL made various representations to the effect that others shared responsibility for the losses suffered by the FOS complainants, including that "fraud and / or other breaches of duty ... have been publically alleged against the non-IFA parties" and "this duality of duties is not recognised by FOS" and that professional indemnity insurers have sought to utilise exclusions for spurious reasons.
8. The Authority has concluded that if FOS awards become final, Strabens Hall will have liabilities to those consumer creditors. If IFAL wishes to challenge the outcome of the complaints at FOS it should do so through the FOS procedure. The essence of IFAL's proposals is to acquire the Strabens Hall business without any liabilities to any consumer creditors arising from the Connaught sales.
9. IFAL represented that the proposals would provide continuity to those clients who wished to continue their relationships with their advisers at Strabens Hall.
10. The Authority has given appropriate weight to this representation, but it does not alter its conclusion that it does not consider that IFAL will satisfy, and will continue to satisfy, the threshold conditions.
11. IFAL made various representations concerning the FSCS, including that authorising IFAL cannot place any burden on the FSCS because the FSCS believes that other parties are culpable for the losses in relation to the Connaught Income Fund 1 and it does not have sufficient evidence to determine on balance that there was a breach of duty by independent financial advisers which led to the consumer loss. A copy of a letter from the FSCS to a redacted claimant was provided.
12. In respect of this representation, the Authority notes that the letter<sup>2</sup> from the FSCS states that the FSCS does not have sufficient evidence at this time to reach a view on the liability of independent financial advisers. Moreover, the Authority considers that, if this representation is correct, then the outcome for consumers is worse than suggested in IFAL's initial representations (as the full burden of IFAL's insolvency as regards the Connaught sales will be borne by the FOS complainants, rather than shared between those consumer creditors and the FSCS). It is unclear why IFAL considers this representation assists its application.
13. IFAL made various representations concerning Article 8 of the European Convention on Human Rights, including that—

"[r]efusal to authorise IFAL for the reasons given to date are arguably disproportionate, and breach [the directors'] Article 8 rights, in that it strips the gentlemen of their right and / or permission to trade in their own right in their chosen industry *at all* because:

- Complaints have arisen: something that was always envisaged by the legislature;
- The inability to trade at all in the only industry in which the gentlemen are trained, will absolutely interfere in their right to respect of their families and their home, in that they will not be able to earn at all to maintain either;

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<sup>2</sup> Dated 11 December 2014

- The sanction i.e. outright refusal to permit IFAL to trade is arguably disproportionate to the infringements alleged.”

14. A firm may only be granted a Part 4A permission where the Authority considers it can ensure that the firm will, and will continue, to satisfy the threshold conditions. The Authority does not consider that the conclusion that IFAL will not satisfy the suitability threshold condition (and, accordingly, should not be given a Part 4A permission) involves a breach of Article 8 of the European Convention on Human Rights. The decision has been made in the individual circumstances of the case and in light of the features of these particular proposals. The Authority further notes in respect of the comment that the directors will be unable “to trade at all in the only industry in which the gentlemen are trained” that this is not a decision which precludes them from working in the industry at all, for example through employment at another regulated firm.
15. IFAL made various representations about the Authority’s observation in the Authority’s letter of 7 January 2015 and repeated in this Notice that clarification of the application was provided in a piecemeal and incremental way, arguing amongst other things that it sought the guidance of the Authority and the Authority could have clarified what it was asking of IFAL months ago.
16. IFAL has been slow to make changes to its application, that clarification has been provided in a piecemeal and incremental fashion and that IFAL has required considerable input from the Authority in developing its application. While the Authority accepts that applications may evolve and develop, in the circumstances of this case the Authority would have expected a fit and proper person to have submitted clear, specific and credible proposals at an earlier stage of the process that paid due regard to and struck an appropriate balance between the interests of consumers, the interests of IFAL and its directors and the Authority’s obvious regulatory concerns. The Authority notes the inadequacies in the original application, IFAL’s awareness of the concerns that the Authority would be likely to have about the proposals (and the level of likely consumer detriment), the number of occasions on which the Authority has had to seek clarification of key issues and the slow and inadequate treatment of these issues and concerns during a lengthy process.
17. IFAL represented that the Authority could give IFAL the Part 4A permission it seeks, check the insolvency process via the insolvency practitioner to see whether the directors have conducted themselves as they have stated they would in representations and withdraw permission if the insolvency practitioner highlights inappropriate behaviour.
18. The Authority notes that it must ensure that IFAL will satisfy, and continue to satisfy, the threshold conditions before it is appropriate to give permission to IFAL to undertake regulated activities. The representation appears to misunderstand the nature of the authorisations process.
19. IFAL represented that the issues “are not such that Company law would render these gentlemen unfit to hold the rank of director”.
20. The Authority considers that it does not follow that IFAL will satisfy the threshold conditions simply because Mr Halley and Mr Benskin are not disqualified from acting as directors.
21. IFAL made representations that the Authority criticised repeated ‘phoenixing’ and that the proposals do not involve repeated ‘phoenixing’.
22. The Authority has considered IFAL’s application on the individual circumstances of the case. The absence of repeated behaviour in this case does not change the conclusion of the Authority that it cannot ensure that IFAL will satisfy, and will continue to satisfy, the threshold conditions.