Financial Services Authority

FINAL NOTICE

To: **Mr Joseph Cummings**

Individual Ref: **JXC01877**

Date: **20 October 2010**

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

1. THE ACTION

1.1 The FSA gave you, Joseph Cummings ("Mr Cummings") a Decision Notice dated 12 October 2010 ("the Decision Notice") which notified you that, pursuant to section 206 of the Financial Services and Markets Act 2000 (the "Act"), the FSA had decided to impose a financial penalty of £70,000 on you in respect of breaches of Statements of Principle 1, 6 and 7 of the FSA's Statement of Principle and Code of Practice for Approved Persons ("Statements of Principle") between 31 October 2004 and 25 August 2009 ("the relevant period") in your role as director of Bridging Loans Ltd ("BLL"), and your failure to cooperate with the FSA in breach of Statement of Principle 4.

1.2 The FSA has also decided to withdraw your approval to perform controlled functions in relation to BLL pursuant to section 63 of the Act; and to make an order, pursuant to section 56 of the Financial Services and Markets Act 2000 ("the Act"), prohibiting you from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm (the "Prohibition Order") on the grounds that you are not a fit and proper person.

1.3 You confirmed on 6 October 2010 that you will not be referring the matter to the Upper Tribunal (Tax and Chancery Chamber).

1.4 Accordingly, for the reasons set out below, the FSA has today imposed a financial penalty of £70,000 on you and hereby withdraws your approval to perform controlled functions in relation to BLL pursuant to section 63 of the Act and also makes an order, pursuant to section 56 of the Act, prohibiting you from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm. This order has effect from 20 October 2010.

1.5 You agreed to settle at an early stage of the FSA's investigation. You therefore qualified for 30% (stage 1) discount under the FSA's executive settlement procedures. Were it not for this discount, the FSA would have otherwise sought to impose a financial penalty of £100,000 on you.

1.6 The financial penalty also takes into account the fact that by your conduct, you were, for all practical purposes, the sole person in control of BLL and took most material decisions in relation to FSA regulated business.

2. REASONS FOR THE ACTION

2.1 The FSA has decided to impose a financial penalty on you, Mr Cummings, based upon the following facts and matters described below.

2.2 In summary, while performing significant influence functions at BLL during the relevant period, you failed to:

(1) act with integrity by knowingly misleading a customer;

(2) deal with the FSA in an open and cooperative manner;

(3) exercise due skill, care and diligence in managing the business of BLL for which you were responsible in your controlled function by not paying due regard to your regulatory responsibilities as an approved person or BLL's as an authorised person, in relation to the entering into and administration of regulated mortgage contracts; and

(4) take reasonable steps to ensure that the business of BLL for which you were responsible in your controlled functions complied with the relevant requirements and standards of the regulatory system, in particular in the handling of complaints, treatment of customers in arrears and responsible lending.

2.3 You were, for all practical purposes, the sole person in control of BLL and took most material decisions in relation to FSA regulated business.

2.4 The FSA views your conduct as particularly serious because your failings impacted on customers who were financing or re-financing their homes; the most significant transaction that many customers make. BLL's business model of providing short term finance to customers to fund the purchase or refinancing for their residential property meant that any failings had the potential to have a significant impact on customers' lives. This should have made you acutely aware of the need to treat customers fairly and conscious of the implications of failing to do so. Your failings included all aspects of your interaction with customers from considering whether it was responsible to lend to them, to the way in which you treated customers in arrears and how you dealt with their complaints. In some respects your conduct was deliberate and designed to prevent customers from complaining or seeking redress as a consequence of your conduct. When the FSA attempted to investigate your conduct you failed to co-operate including, at times, refusing to engage with the FSA directly.

2.5 Your failings gave rise to the significant risk of consumers entering into regulated mortgage contracts that they were unable to afford, being treated unfairly and suffering financial detriment.

3. RELEVANT STATUTORY AND REGULATORY PROVISIONS

3.1 The relevant statutory provisions and regulatory requirements are set out at Annex A.

4. FACTS AND MATTERS RELIED ON

BLL

4.1 BLL is a mortgage lender, specialising in bridging loans, incorporated in Scotland. It has been authorised and regulated by the FSA since 31 October 2004 to carry on the following regulated activities:

(1) Administering a regulated mortgage contract;

(2) Agreeing to carry on a regulated activity;

(3) Dealing in investments as principal; and

(4) Entering into a regulated mortgage contract as lender.

4.2 During the relevant period, BLL operated as a non-bank specialist lender in the entering into and administration of first and second charge secured finance, with initial terms of between three and 18 months. BLL was visited by the FSA in June 2009 as part of its intrusive approach to supervision of firms operating in this sector. During the relevant period approximately 25% of BLL's business was made up of FSA regulated mortgage contracts. The remaining 75% of BLL's business consisted of second charge residential lending, commercial lending or mortgages for the purposes of buy-to-let, and therefore is not regulated by the FSA. Management information produced by the firm showed that approximately 35% of regulated mortgage contracts entered into by BLL went into arrears and a similar proportion was extended beyond the initial term.

4.3 On 25 August 2009, BLL voluntarily varied its permission (the "VVOP"). As a result of the variation, the following requirement was imposed on BLL in relation to the activity of administering regulated mortgage contracts, which restricted it to:

(1) providing redemption figures upon request from existing customers;

(2) contacting borrowers who had missed a loan repayment or were in arrears in a format to be approved in advance and reviewed by an independent person to be agreed with the FSA;

(3) notifying borrowers whose bridging loans were shortly due to be repaid, with a view to determining whether they have an exit route in place;

(4) extending the term of a loan, subject to the extension being reviewed and approved by an independent person to be agreed with the FSA;

(5) providing borrowers' brokers and/or representatives with any information requested pursuant to (1), (2) and (3) above; and

(6) taking any necessary steps for the purposes of collecting or recovering payments due under the contract from the borrower. BLL could only take such steps once they have been approved by an independent person to be agreed with the FSA.

4.4 You have held CF1 (Director), CF3 (Chief Executive) and CF11 (Money Laundering Reporting) at BLL since 31 October 2004. As well as your role at BLL you are a director at ten other companies, a number of which appear to be involved in financial services. Other than BLL, none of these companies are regulated by the FSA.

4.5 There are four other directors at BLL, three of whom are approved persons holding CF1. All of the other directors at BLL are related to you and became directors of BLL at your invitation. None of the other directors at BLL play any active part in the running of BLL. You have told the FSA that you asked your relatives to become directors of BLL for inheritance tax planning purposes.

4.6 You were, for all practical purposes, the sole person in control of BLL and took most material decisions in relation to FSA regulated business.

Conduct in issue

Lending Decision

4.7 As a mortgage lender authorised by the FSA, BLL was required to have systems and controls in place to ensure that it lent to customers responsibly. BLL had a responsibility to take account of a customer's ability to repay the mortgage, prior to entering into that contract. Further, BLL was required to make adequate records of lending decisions and retain these for at least a year.

Reliance on a third party

4.8 You delegated responsibility for underwriting each loan application, including assessing affordability, to a third party mortgage adviser (the "third party underwriter"). You did not formally assess the competence of the third party underwriter or adequately monitor his performance. As well as acting as an underwriter on behalf of BLL, the third party underwriter also acted as a customer facing broker in regulated mortgage contracts entered into by BLL, and received 50% of the net interest payments made by a customer over the life of each loan, including loans extended beyond their original term with interest payable at a higher rate. The third party underwriter also provided a personal guarantee for 50% of any capital loss incurred by BLL on any advance that resulted from this arrangement. There was therefore a conflict between the third party underwriter's responsibility to underwrite (including assessing the affordability of the loan from the customer's perspective) and the financial benefit he stood to gain from recommending to the customer that they take out the mortgage.

4.9 You did not obtain all relevant information from the third party underwriter before making a decision to lend. Instead, you relied on information the third party underwriter provided to you in response to particular queries you had. There was therefore a risk that there may have been other information, of which you were not aware and therefore could not have asked for, that could have impacted on whether or not it was responsible for you to lend to the customer. You explained to the FSA that you did not consider this to be a risk because you considered the third party underwriter to be trustworthy on the basis that you had, in the past, set *"traps"* to test his honesty which he had subsequently passed. However, you could not explain to the FSA how you did this and the FSA considers that you did not make any formal assessment of the third party underwriter's ability effectively to underwrite mortgage applications. The FSA considers that your conduct in delegating to this third party underwriter without making a proper assessment of his capability to underwrite loans was reckless.

Decision making

4.10 You made all material decisions at BLL with regard to lending. You made your decisions without reference to BLL's responsible lending policy or regulatory requirements. Instead you relied on information provided to you over the telephone by

the third party. You therefore assessed customers' income and exit strategies on the basis of incomplete information. You made lending decisions on the basis of your instinct and experience alone, and without looking at complete customer files.

4.11 You made lending decisions arbitrarily and did not record how each decision was made. Additionally, material customer information regarding income, affordability and exit strategy was not retained.

4.12 Your failings gave rise to the significant risk that BLL's customers would enter into mortgage contracts which they would be unable to afford.

Arrears

4.13 BLL failed to deal fairly with customers in arrears.

4.14 You made all material decisions regarding the treatment of customers in arrears. Customers went into arrears when they failed to make payment or repayment for more than one month. BLL did have a written policy on arrears handling, which set out BLL's intended approach to treating customers in arrears fairly, but you failed to ensure that staff who dealt with customers in arrears were aware of this policy. You did not consider it important to collect management information on the numbers of customers in arrears and systems and controls were not in place to accurately monitor and record the number of customers in arrears. You only instructed the production of management information on arrears in anticipation of an FSA visit. You used your personal judgement of a customer's character to decide how customers in arrears should be treated with the result that those in arrears were not always treated fairly and consistently.

4.15 You dictated all correspondence that BLL sent to customers. On more than one occasion, you used language towards customers in arrears which could have been interpreted by those customers as aggressive or threatening.

4.16 You failed to ensure that customers who fell into arrears were provided with any of the information due to such customers, for example the FSA's current information sheet on mortgage arrears.

4.17 You also failed to ensure that charges applied to customers in arrears were a reasonable estimate of the cost of the additional administration required as a result of that customer being in arrears. In addition to monthly administration fees, customers were charged "equitable expenses" in administrating the account whilst in default. You were unable to explain how these charges were calculated or why they were made. In addition, in some cases you continued to add customers' interest to the balance outstanding when in arrears.

Charges and interest

4.18 You made all decisions in relation to the charges applied to regulated mortgage contracts. As director of BLL you had a responsibility to ensure that BLL did not impose excessive charges upon customers. In particular you were obliged to consider: how BLL's charges compared to similar products or services on the market, the degree to which the charges were an abuse of the trust that the customer placed in BLL and the nature and extent of the disclosure of charges to the customer. Further, BLL was required to ensure that charges levied on customers in payment difficulties should be based upon the costs incurred by BLL.

4.19 During the relevant period, BLL issued customers with a tariff of charges but you failed to ensure that BLL applied charges and interest to customers' accounts accurately. You claimed to the FSA that you believe that the charges and interest were not excessive and were "market rate" but could not substantiate how these charges and interest were determined, or how they compared to the market. The FSA has concluded that you did not understand the basis for the charges. Your failure to understand how fees and charges were calculated created a risk that charges would be applied inaccurately or in a manner which was excessive. This risk crystallised when you applied:

(1) charges to a customer's account that differed from those detailed on the tariff of charges which had been issued to that customer. For example, monthly administration fees for an extended loan were charged at £60 instead of £50, and a redemption statement was charged at £395 instead of £295;

(2) charges which had not been disclosed to customers on the tariff. For example, charges for directors' time dealing with various issues, for which no hourly charge, or otherwise, was provided on the tariff;

(3) excessive charges to customers. For example, the charges made to customers for extending the term of the bridging loan increased on a monthly basis. You did not calculate charges on the basis of costs incurred by the business, and you did not retain records of how charges were set. This led to the significant risk that customers with payment difficulties received excessive charges; and

(4) interest inaccurately calculated to customers' accounts. For example, offer illustrations showed fixed monthly interest payments calculated on a simple basis, however customers' interest payments were charged on a compound basis. You only corrected interest payments where a customer drew it to your attention.

Complaints

4.20 You made all material decisions in relation to customer complaints. BLL was required to treat its customers fairly, including by establishing, implementing and maintaining effective and transparent procedures for the reasonable and prompt handling of complaints. Further, BLL was required to investigate complaints competently and diligently and make a fair and consistent assessment of the complaint.

4.21 You explained that you "negotiated" with customers who complained. You believed that BLL had received complaints that you considered to be justified; however, BLL's complaints log recorded no complaints that it considered to be justified.

4.22 Your approach to dealing with complainants was arbitrary and based on your assessment of the character of the complainants. In interview with the FSA you explained that you considered some customers to be 'evil', whilst others were not. You made this judgement without having a proper basis for doing so. Your conduct in this regard, created a significant risk that complainants would not be treated fairly. This risk crystallised when:

(1) you refused to deal with a customer until the customer withdrew a reference to the Financial Ombudsman Service ("FOS"); and

(2) on at least one occasion, you attempted to deter a customer from making a complaint to the FOS, by threatening to charge that customer for time spent dealing with the complaint, despite having no intention to do so .

Failure to deal with the FSA in an open and cooperative way

4.23 You have not acted in an open and cooperative manner with the FSA during the course of the investigation.

4.24 The FSA has been unable to contact you directly during the course of the investigation. You do not have an e-mail address and you refused to provide the FSA with your telephone number, despite you being the only active director with regard to regulated business at BLL. This meant that any discussions regarding, for example, the appointment of a skilled person had to pass through others at BLL who were not approved persons. This contributed to a significant delay in appointing a skilled person. You also refused to allow the FSA to conduct a scoping visit at the offices of BLL.

4.25 You breached a statutory requirement by failing to attend two compelled interviews without reasonable excuse.

Conflicts of Interest

4.26 You failed to recognise the potential for a conflict of interest to arise between BLL and its customers. The potential for conflict arose from the arrangement with the third party underwriter who also acted as a customer facing broker, in approximately 63 regulated mortgage contracts entered into by BLL. This arrangement was formally put in place on 27 August 2003. Failure to consider this potential conflict gave rise to the risk of customers entering into unsuitable mortgage contracts, or not receiving best advice.

5. ANALYSIS OF BREACHES

5.1 By reason of the fact and matters referred to at paragraphs 4.1 to 4.26 above, the FSA considers that you failed to comply with Statements of Principle 1, 4, 6 and 7, in that you:

(1) failed to act with integrity in dealing with customer complaints, as at paragraph 4.22, in breach of Statement of Principle 1;

(2) failed to act in an open and cooperative way with the FSA, including failing to comply with statutory notices, as at paragraphs 4.23 to 4.25, in breach of Statement of Principle 4;

(3) failed to exercise due skill, care and diligence in managing the business of BLL for which you were responsible in your controlled functions, by failing to consider the potential for a conflict of interest to arise between BLL and its customers, as at paragraph 4.26, in breach of Statement of Principle 6;

(4) failed to take reasonable steps to ensure that the business of BLL for which you were responsible in your controlled functions complied with the relevant requirements and standards of the regulatory system, particularly with regard to lending decisions, arrears handling and complaints handling in paragraphs 4.7 to 4.12, 4.13 to 4.17 and 4.20 to 4.22. respectively, in breach of Statement of Principle 7; and

(5) You were, for all practical purposes, the sole person in control of BLL and took most material decisions in relation to FSA regulated business.

6. ANALYSIS OF SANCTION

Financial Penalty

6.1 The FSA's policy on the imposition of financial penalties as at the date of this notice is set out in Chapter 6 of the Decision Procedures and Penalties Manual ("DEPP") in force prior to 6 March 2010, which forms part of the FSA Handbook. All references to DEPP in this section are references to that version of DEPP, in force at the relevant time. In addition, the FSA has had regard to the corresponding portions of Chapter 13

of the Enforcement Manual ("ENF") in force during the relevant period until 27 August 2007 and chapter 7 of the Enforcement Guide ("EG"), in force thereafter.

6.2 The principal purpose of imposing 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 (DEPP 6.1.2G).

6.3 In determining whether a financial penalty is appropriate the FSA is required to consider all the relevant circumstances of a case. Applying the criteria set out in the DEPP 6.2.1 (regarding whether or not to take action for a financial penalty or public censure) and 6.4.2 (regarding whether to impose a financial penalty or public censure), the FSA considers that a financial penalty is an appropriate sanction, given the serious nature of the breaches, the risks created for customers of BLL and the need to send out a strong message to other individuals performing Significant Influence Functions ("SIF") that they must ensure that the business for which they are responsible complies with its regulatory responsibilities.

6.4 DEPP 6.5.2 and prior to August 2007, ENF, sets out a non-exhaustive list of factors that may be of relevance in determining the level of financial penalty. The FSA considers that the following factors are particularly relevant in this case.

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

6.5 The FSA considers your conduct to be particularly serious because:

(1) your failings persisted over a period of approximately five years;

(2) you were aware that customers may not be being treated fairly, but did not take steps to intercede or investigate these matters; and

(3) through your conduct, customers, including those who already had impaired credit histories, were put at risk of entering into unsuitable regulated mortgage contracts, suffered unfair treatment and financial detriment.

The extent to which the breach was deliberate or reckless DEPP 6.5.2G (3)

6.6 The FSA considers your conduct to be reckless in that you were aware that customers may not have been being treated fairly, but did not take any steps to intercede or investigate matters.

6.7 Further, as a director of BLL you should have been aware of the regulatory requirements imposed on you and the firm for which you were responsible and your failure to turn your mind to these matters is reckless. In addition, it appears that you acted to deliberately mislead a customer in relation to a complaint, as above in paragraph 4.22.

Whether the person on whom the penalty is to be imposed is an individual DEPP 6.5.2G (4)

6.8 The FSA recognises that the financial penalty imposed on you is likely to have a significant impact on you as an individual.

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

6.9 The FSA has no evidence to suggest that you will be unable to pay this penalty.

Conduct following the breach DEPP 6.5.2G (8)

6.10 As detailed above in paragraphs 4.23 to 4.25, you have failed to cooperate with the FSA's investigation.

Disciplinary record and compliance history DEPP 6.5.2(9)

6.11 The FSA has taken into account the fact that you have not been the subject of previous disciplinary action.

Other action taken DEPP 6.5.2(10)

6.12 In determining the level of financial penalty, the FSA has taken into account penalties imposed by the FSA on other approved persons for similar behaviours.

Prohibition

6.13 The FSA has concluded that your conduct fell short of the standards required by the FSA's Fit and Proper Test for Approved Persons in terms of honesty and integrity and competence and capability. The FSA therefore concludes that you are not fit and proper to carry out any functions in relation to any regulated activities carried on by any authorised persons.

6.14 It is, therefore, necessary and proportionate, in order to achieve its regulatory objectives, for the FSA to exercise its powers to make a Prohibition Order against you.

7. DECISION MAKERS

7.1 The decision which gave rise to the obligation to give this Final Notice was made by the Settlement Decision Makers on behalf of the FSA.

8. IMPORTANT

8.1 This Final Notice is given to you in accordance with section 390 of the Act.

Manner of and time for payment

8.2 The financial penalty of £70,000 must be paid in full by you to the FSA by no later than 3 November 2010, 14 days from the date of this Final Notice.

If the financial penalty is not paid

8.3 If all or any of the financial penalty is outstanding on 4 November 2010, the FSA may recover the outstanding amount as a debt owed by you and due to the FSA.

Publicity

8.4 Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this notice relates. Under those provisions, the FSA must publish such information about the matter to which this notice relates as the FSA

considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.

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

FSA contacts

9.6 For more information concerning this matter generally, you should contact Mario Theodosiou at the FSA (direct line: 020 7066 5914 / email: mario.theodosiou@fsa.gov.uk).

Tom Spender
Head of Department
FSA Enforcement and Financial Crime Division

ANNEX A:

1. Relevant Statutory and regulatory provisions

Prohibition and Withdrawal of Approval

1.1. The FSA's statutory objectives, set out in section 2(2) of the Act are: market confidence; public awareness; the protection of consumers; and the reduction of financial crime.

1.2. The FSA has the power, pursuant to section 56 of the Act, to make an order prohibiting an individual from performing a specified function, any function falling within a specified description, or any function, if it appears to the FSA that that individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person, exempt person or exempt professional person.

1.3. Such an order may relate to a specified regulated activity, any regulated activity falling within a specified description or all regulated activities.

1.4. Pursuant to section 63 of the Act, the FSA may withdraw an approval given under section 59 if it considers that the person in respect of whom it was given is not a fit and proper person to perform the function to which the approval relates.

The Fit and Proper Test for Approved Persons

1.5. The part of the FSA Handbook entitled the Fit and Proper Test for Approved Persons ("FIT") sets out guidance on how the FSA will assess the fitness and propriety of a person to perform a particular controlled function.

1.6. The purpose of FIT is to outline the main criteria for assessing the fitness and propriety of a candidate for a controlled function. FIT is also relevant in assessing the continuing fitness and propriety of an approved person.

1.7. FIT 1.3.1G states that the FSA will have regard to a number of factors when assessing the fitness and propriety of a person and that the most important considerations will be the person's honesty, integrity and reputation, competence and capability and financial soundness.

1.8. FIT 2.1.1G provides that, in determining a person's honesty, integrity and reputation, the FSA will have regards to factors including, but not limited to, those set out in FIT 2.1.3G. FIT 2.1.3.G sets out the following factors, amongst others which are relevant to this matter:

(1) whether the person has contravened any of the requirements and standards of the regulatory system (FIT 2.1.3(5) G); and

(2) whether, in the past, the person has been candid and truthful in all his dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory systems and with other legal, regulatory and professional requirements and standards (FIT 2.1.3(13)G).

The FSA's policy in relation to prohibition orders and withdrawal of approval

1.9. The FSA's policy in relation to prohibition orders and withdrawal of approval is set out in Chapter 9 of the Enforcement Guide ("EG").

1.10. EG 9.4 summarises the FSA's policy on making prohibition orders and the circumstances under which Enforcement will consider recommending such action. In particular:

1.11. *"The FSA has the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant. Depending on the circumstances of each case, the FSA may seek to prohibit individuals from performing any class of function in relation to any class of regulated activity, or it may limit the prohibition order to specific functions in relation to specific regulated activities. The FSA may also make an order prohibiting an individual from being employed by a particular firm, type of firm or any firm."*

1.12. EG 9.5 continues as follows: *"The scope of a prohibition order will depend on the range of functions which the individual concerned performs in relation to regulated activities, the reasons why he is not fit and proper and the severity of the risk which he poses to consumers of the market generally."*

1.13. EG 9.8 provides: *"When the FSA has concerns about the fitness and propriety of an approved person, it may consider whether it should prohibit that person from performing functions in relation to regulated activities, withdraw its approval, or both. In deciding whether to withdraw its approval and/or make a prohibition order, the FSA will consider in each whether its regulatory objectives can be achieved adequately by imposing disciplinary sanctions, for example public censures or financial penalties, or by issuing a private warning."*

1.14. EG 9.9 states that, when it decides to exercise its power to make a prohibition order against an approved person and/or withdraw its approval, the FSA will consider all the relevant circumstances of the case. These may include, but are not limited to, the following factors:

(1) whether the individual is fit and proper to perform functions in relation to regulated activities. The criteria for assessing the fitness and propriety of approved persons are set out in FIT 2. One criterion is the honesty, integrity and reputation of the individual (FIT 2.1);

(2) whether and to what extent the approved person has failed to comply with the Statements of Principle issued by the FSA with respect to the conduct of approved persons;

(3) whether the approved person has engaged in market abuse;

(4) the relevance and materiality of any matters indicating unfitness;

(5) the particular controlled function the approved person is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates; and

(6) the severity of the risk which the individual poses to consumers and to confidence in the financial system.

1.15. EG 9.11 provides that due to the diverse nature of the activities and functions which the FSA regulates, it is not possible to produce a definitive list of matters which the FSA might take into account when considering whether an individual is not a fit and proper person to perform a particular, or any, function in relation to a particular, or any firm. However, EG 9.12 gives examples of types of behaviour which have previously resulted in the FSA deciding to issue a prohibition order or to withdraw the approval of an approved person. These examples include:

(1) severe acts of dishonesty e.g. which may have resulted in financial crime; and

(2) serious breaches of the Statements of Principles for approved persons.

(3) EG 9.23 provides that in appropriate cases, the FSA may take other action against an individual in addition to making a prohibition order and/or withdrawing approval, including the use of its powers to impose a financial penalty

Statements of Principle and Code of Conduct for Approved Persons

1.16. The FSA's statutory objectives, set out in section 2(2) of the Act, include the protection of consumers.

1.17. Section 66 of the Act provides that the FSA may take action against a person if it papers to the FSA that he is guilty of misconduct and the FSA is satisfied that it is appropriate in all the circumstances to take action against him.

1.18. An approved person is guilty of misconduct if, while an approved person, he has failed to comply with a statement of principle issued under section 64 of the Act or has been knowingly concerned in a contravention by the relevant authorised person or a requirement imposed on that authorised person by or under the Act.

1.19. The Statements of Principle and Code of Conduct for Approved Persons ("APER") sets out the fundamental obligations of approved persons and also conduct which, in the opinion of the FSA, constitutes a failure to comply with a particular Statement of Principle. It also describes factors which the FSA will take into account in determining whether an approved person's behaviour complies with it.

1.20. APER 3.1.3G states that, when establishing compliance with, or a breach of, a Statement of Principle, account will be taken of the context in which a course of conduct was undertaken, the precise circumstances of the individual case, the characteristics of the particular controlled function and the behaviour expected in that function.

1.21. APER 3.1.4G states that an approved person will only be in breach of a Statement of Principle when he is personally culpable. Personal culpability arises where an approved person's conduct was deliberate or where the approved person's standard of conduct was below that which would be reasonable in all circumstances.

Statement of Principle 1

1.22. Statement of Principle 1 is set out in APER 2.1.2P and requires that an approved person must act with integrity in carrying out his controlled function.

1.23. APER 3.3.1E provides that in determining whether or not the conduct of an approved person performing a controlled function complies with the Statements of Principle 1 to 4, the following are factors which, in the opinion of the FSA, are to be taken into account:

(1) whether that conduct relates to activities that are subject to other provisions of the Handbook; and

(2) whether that conduct is consistent with the requirements and standards of the regulatory system relevant to his firm.

1.24. APER 4.1 lists the types of conduct which, in the opinion of the FSA do not comply with Statement of Principle 1.

1.25. APER 4.1.3E states that deliberately misleading (or attempting to mislead) a client by act or omission falls within the type of conduct that would not comply with Statement of Principle 1.

Statement of Principle 4

1.26. Statement of Principle 4 is set out in APER 2.1.2P and requires that an approved person must deal with the FSA and with other regulators in an open and cooperative way and must disclose appropriately any information of which the FSA would reasonably expect notice.

1.27. APER 3.3.1E provides that in determining whether or not the conduct of an approved person performing a controlled function complies with the Statements of Principle 1 to 4, the following are factors which, in the opinion of the FSA, are to be taken into account:

(1) whether that conduct relates to activities that are subject to other provisions of the Handbook; and

(2) whether that conduct is consistent with the requirements and standards of the regulatory system relevant to his firm.

1.28. APER 4.4 lists the types of conduct which, in the opinion of the FSA do not comply with Statement of Principle 4.

1.29. APER 4.4.7E states that where the approved person is, or is one of the approved persons who is, responsible within the firm for reporting matters to the FSA, failing promptly to inform the FSA of information of which he is aware and which it would be reasonable to assume would be of material significance to the FSA, whether in response to questions or otherwise, is an example of conduct which does not comply with Statement of Principle 4.

1.30. APER 4.4.8E states that in determining whether or not an approved person's conduct under APER 4.4.7 E complies with Statement of Principle 4 (APER 2.1.2 P), the following are factors which, in the opinion of the FSA, are to be taken into account:

(1) the likely significance of the information to the FSA which it was reasonable for the approved person to assume;

(2) whether any decision not to inform the FSA was taken after reasonable enquiry and analysis of the situation.

1.31. APER 4.4.9E states that failing without good reason to:

(1) inform a regulator of information of which the approved person was aware in response to questions from that regulator;

(2) attend an interview or answer questions put by a regulator, despite a request or demand having been made;

(3) supply a regulator with appropriate documents or information when requested or required to do so and within the time limits attaching to that request or requirement;

are examples of conduct which does not comply with Statement of Principle 4.

Statement of Principle 6

1.32. Statement of Principle 6 is set out in APER 2.1.2P and requires that an approved person performing a significant influence function must exercise due skill, care and diligence in managing the business of the firm for which he is responsible in his controlled function.

1.33. APER 3.3.1E provides that in determining whether or not the conduct of an approved person performing a significant influence function complies with Statements of Principle 5 to 7, the following are factors which, in the opinion of the FSA, are to be taken into account:

(1) whether he exercised reasonable care when considering the information available to him;

(2) whether he reached a reasonable conclusion which he acted on;

(3) the nature, scale and complexity of the firm's business;

(4) his role and responsibility as an approved person performing a significant influence function;

(5) the knowledge he had, or should have had, of regulatory concerns, if any, arising in the business under his control.

1.34. APER 4.6 lists the types of conduct which, in the opinion of the FSA do not comply with Statement of Principle 6.

1.35. APER 4.6.3E to 4.6.8E provides examples of the types of behaviour that, in the opinion of the FSA, do not comply with Statement of Principle 6. These include:

(1) failing to take reasonable steps to adequately inform himself about the affairs of the business for which he is responsible (APER 4.6.3E).

(2) delegating the authority for dealing with an issue or part of the business to an individual or individuals (whether in-house or outside contractors) without reasonable grounds for believing that the delegate had the necessary capacity, competence, knowledge, seniority or skill to deal with the issue or to take authority for dealing with part of the business (APER 4.6.5E) (see APER 4.6.14G);

(3) failing to take reasonable steps to maintain an appropriate level of understanding about an issue or part of the business that he has delegated to an individual or individuals (APER 4.6.6E); and

(4) failing to supervise and monitor adequately the individual or individuals (whether in-house or outside contractors) to whom responsibility for dealing with an issue or authority for dealing with a part of the business has been delegated (APER 4.6.8E).

1.36. APER 4.6.10E clarifies that in determining whether or not the conduct of an approved person performing a significant influence function under APER 4.6.5 E, APER 4.6.6 E and APER 4.6.8 E (i.e. where they have delegated an issue or part of the business to an individual or individuals) complies with Statement of Principle 6; the following are factors which, in the opinion of the FSA, are to be taken into account:

(1) the competence, knowledge or seniority of the delegate; and

(2) the past performance and record of the delegate.

1.37. APER 4.6.12G(1) acknowledges that while an approved person performing a significant influence function is unlikely to be an expert in all aspects of a complex

financial services business, he should understand and inform himself about the business sufficiently to understand the risks of its trading, credit or other business activities. APER 4.6.12G(4) says that where the approved person is not an expert in a business area, he should consider whether he or those with whom he works have the necessary expertise to provide him with an adequate explanation of issues within that business area. If not, he should seek an independent opinion from elsewhere within or outside the firm.

1.38. APER 4.6.13G(2) says that the approved person should have reasonable grounds for believing that the delegate has the competence, knowledge, skill and time to deal with the issue. APER 4.6.13G(4) says that an approved person carrying out a significant influence function will not be in breach of Statement of Principle 6 unless he fails to exercise due and reasonable consideration before he delegates the resolution of an issue or authority for dealing with a part of the business and fails to reach a reasonable conclusion. If a decision to delegate was wrong in hindsight but was not unreasonable at the time then it won't be a breach of Statement of Principle 6.

Statement of Principle 7

1.39. Statement of Principle 7 is set out in APER 2.1.2P and requires that an approved person performing a significant influence function must take reasonable steps to ensure that the business of the firm for which he is responsible in his controlled function complies with the relevant requirements and standards of the regulatory system.

1.40. APER 3.3.1E provides that in determining whether or not the conduct of an approved person performing a significant influence function complies with Statements of Principle 5 to 7, the following are factors which, in the opinion of the FSA, are to be taken into account:

(1) whether he exercised reasonable care when considering the information available to him;

(2) whether he reached a reasonable conclusion which he acted on;

(3) the nature, scale and complexity of the firm's business;

(4) his role and responsibility as an approved person performing a significant influence function;

(5) the knowledge he had, or should have had, of regulatory concerns, if any, arising in the business under his control.

1.41. APER 4.7.2E to 4.7.10E provides examples of the types of behaviour that, in the opinion of the FSA, do not comply with Statement of Principle 7. These include:

(1) failing to take reasonable steps to implement (either personally or through a compliance department or other departments) adequate and appropriate systems of control to comply with the relevant standards of the regulatory system in respect of its regulated activities (APER 4.7.3E);

(2) failing to take reasonable steps to monitor (either personally or through a compliance department or other departments) compliance with the relevant requirements and standards of the regulatory system in respect of its regulated activities (APER 4.7.4E); and

(3) in the case of an approved person performing a significant influence function responsible for compliance, failing to take reasonable steps to ensure that appropriate compliance systems and procedures are in place (APER 4.7.10E).

1.42. APER 4.7.11 G provides that the FSA expects an approved person performing a significant influence function to take reasonable steps both to ensure his firm's compliance with the relevant requirements and standards of the regulatory system and to ensure that all staff are aware of the need for compliance.

Mortgages and Home Finance: Conduct of Business sourcebook

1.43. The rules and guidance relating to the entering into and administration of regulated mortgage contracts are located in the Mortgages and Home Finance: Conduct of Business sourcebook section of the FSA Handbook ("MCOB").

1.44. The rules and guidance on mortgage illustrations at the pre-application and offer stage are located in MCOB 5 and MCOB 6. MCOB 5.4.2R states that an illustration on a

particular regulated mortgage contract issued by, or on behalf of, a mortgage lender must be an accurate reflection of the costs of the regulated mortgage contract.

1.45. The rules and guidance on responsible lending are located in MCOB 11. MCOB 11.3.1R states that:

(1) a *firm* must be able to show that before deciding to enter into, or making a further advance on, a *regulated mortgage contract*, or *home purchase plan*, account was taken of the *customer's* ability to repay.

(2) a *mortgage lender* must make an adequate record to demonstrate that it has taken account of the *customer's* ability to repay for each *regulated mortgage contract* that it enters into and each further advance that it provides on a *regulated mortgage contract*. The record must be retained for a year from the date at which the *regulated mortgage contract* is entered into or the further advance is provided.

1.46. The rules and guidance on charges are located in MCOB 12. MCOB 12.4 states that:

(1) A *firm* must ensure that any *regulated mortgage contract* that it *enters into* does not impose, and cannot be used to impose, a charge for *arrears* on a *customer* except where that charge is a reasonable estimate of the cost of the additional administration required as a result of the *customer* being in *arrears*.

(2) Paragraph (1) does not prevent a *firm* from *entering into a regulated mortgage contract* with a *customer* under which the *firm* may change the rate of interest charged to the *customer* from a fixed or discounted rate of interest to the *firm's* standard variable rate if the *customer* goes into *arrears*, providing that this standard variable rate is not a rate created especially for *customers* in *arrears*.

1.47. The rules and guidance on arrears and repossessions is located in MCOB 13. MCOB 13.3.1 states that a firm must deal fairly with any customer who is in arrears on a regulated mortgage contract.

FSA's policy on financial penalties

1.48. The FSA's policy on the imposition and amount of penalties is set out in Chapter 6 of the Decision Procedure and Penalties manual ("DEPP") in the FSA Handbook. This states that the FSA will consider the full circumstances of each case when determining whether or not to take action for a financial penalty, and sets out a non-exhaustive list of factors that may be relevant for this purpose.

1.49. The following are the provisions of DEPP which were applicable to misconduct during the relevant period. Revised provisions of DEPP came into force on 6 March 2010 for misconduct after 6 March 2010.

1.50. The principal purpose of imposing 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.

1.51. The FSA will consider the full circumstances of each case when determining whether or not to take action for a financial penalty. DEPP 6.2.1G set out guidance on a non-exhaustive list of factors that may be of relevance in determining whether to take action for a financial penalty, which include the following:

(1) The nature, seriousness and impact of the suspected breach (DEPP 6.2.1G(1)).

(2) The conduct of the person after the breach (DEPP 6.2.1G(2)).

(3) The previous disciplinary record and compliance history of the person (DEPP 6.2.1G(3)).

(4) FSA guidance and other published materials (DEPP 6.2.1G(4)).

(5) Action taken by the FSA in previous similar cases (DEPP 6.2.1G(5)).

1.52. The FSA will consider all the relevant circumstances of a case when it determines the level of financial penalty. DEPP 6.5.2G set out guidance on a non exhaustive list of factors that may be of relevance when determining the amount of a financial penalty.

1.53. Factors that may be relevant to determining the appropriate level of financial penalty for misconduct prior to 6 March 2010 include:

(1) the nature, seriousness and impact of the breach in question, including 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 (DEPP 6.5.2G(2));

(2) the extent to which the breach was deliberate or reckless (DEPP 6.5.2(3));

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

(4) the general compliance history of the person, including whether the FSA has previously brought to the person's attention, issues similar or related to the conduct that constitutes the breach in respect of which the penalty is imposed (DEPP 6.5.2(9)(d)).