Financial Services Authority

FINAL NOTICE

First Financial Advisers Limited
33-34 Cheap Street
Newbury
Berkshire
RG14 5DB

Stephen Herbert Danner
Orchard Cottage
White Farm
Leckwith
Cardiff
CF11 8AS

Date: 20 July 2012

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") hereby takes the following action:

1. ACTION

1.1. By an application received by the FSA on 14 April 2010 ("the Application"), First Financial Advisers Ltd ("First Financial Advisers") applied under section 60 of the Financial Services and Markets Act 2000 ("the Act") for approval of Stephen Danner ("Mr Danner") to perform the Customer Function (CF30).

1.2. For the reasons listed below the FSA has refused the Application and, in the light of the Upper Tribunal's ("the Tribunal") dismissal of the reference to it as referred to below, has issued this Final Notice.

2. REASONS FOR THE ACTION

2.1. By its Warning Notice dated 13 August 2010 ("the Warning Notice"), the FSA gave First Financial Advisers and Mr Danner notice that it proposed to refuse the Application. First Financial Advisers and Mr Danner were given the opportunity to make representations to the FSA about that proposed action.

2.2. By its Decision Notice dated 3 November 2010 ("the Decision Notice"), the FSA gave First Financial Advisers and Mr Danner notice that it had decided to refuse the Application on the basis that the FSA could not be satisfied that Mr Danner is a fit and proper person to perform the controlled function to which the Application relates.

2.3. On 29 November 2010, First Financial Advisers referred the Decision Notice to the Upper Tribunal. The Upper Tribunal, in a written decision dated 21 June 2012, (which can be found on the Tribunal's website at:

http://www.tribunals.gov.uk/financeandtax/Documents/decisions/First_Financial_Advisors_Ltd_v_FSA.pdf)

found that the FSA had been correct to refuse First Financial Advisers's Application and dismissed the reference. Accordingly the FSA has refused the Application and issued this Final Notice.

Summary

2.4. On the basis of the facts and matters set out in the Tribunal's Decision and for the reasons set out therein, the FSA has concluded that it cannot be satisfied that Mr Danner is a fit and proper person to perform the controlled function to which the application relates.

2.5. The Tribunal's Decision sets out fully the Tribunal's (and thus the FSA's) reasons for refusing the Application and should therefore be read in full. By way of summary, the Authority notes the following particular aspects/paragraphs of the Decision.

2.6. In relation to the issue of conflicts of interest, the Tribunal first set out its views on the distinction that had been advanced before it between actual and potential conflicts of interest. The Tribunal concluded as follows at paragraphs 65 to 66 of the judgment:

> "65. We do not accept the argument of Mr Danner and Mr Davies in this respect. The mere fact that actual benefits received by Mr Danner cannot be traced to particular investments made by SDAM clients does not mean that there was no conflict of interest. Nor do we accept that for this purpose there can be any distinction between a conflict of interest and a potential conflict of interest. If the use of "potential" is intended to denote a circumstance where a person may become entitled to receive benefit from an interest that could be in conflict with a duty, but at the material time there has been no such receipt, then that in our judgment is a real and present conflict, notwithstanding that the benefit has not crystallised, or indeed may never do so.
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> 66. Our conclusion in this regard is supported, to the extent that it needs to be, by the guidance on types of conflicts in that part of the FSA Handbook dealing with systems and controls, in particular SYSC 10.1.4. Point (2) of that section refers to whether the firm or a relevant person has an interest in the outcome of a service provided to the client, or of a transaction carried out on behalf of a client, which is distinct from the client's interest in that outcome. It is only necessary that there be an interest in the outcome, not that the interest has

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crystallised. Accordingly, once something can be described as a potential conflict, it is already an actual conflict of interest."

2.7. The Tribunal held that Mr Danner should have been aware of the conflict of interest arising out of his interests in SDAM (for most of the company's existence Mr Danner was the sole director) and CruIM (of which he was a director and shareholder at the material times) and, further, that he should have sought to give proper disclosure of that conflict to SDAM clients. The Tribunal reached the view that Mr Danner's failure to do so cast doubt on whether he was a fit and proper person to perform the CF30 function. In particular paragraphs 95 to 99 of the judgment state:

"Conflicts of interest

95. We turn first to our findings in relation to conflicts of interest. In that regard, we have two concerns. The first is the failure by Mr Danner to appreciate at all what we consider to be an obvious conflict of interest arising out of his interests in SDAM on the one hand and CruIM on the other. We have rejected the argument that this was not an actual, but potential, conflict. We have likewise rejected the submission that Mr Danner did not benefit from the investments made at the outset by SDAM clients into the Funds, because the marketing allowance was used to meet set-up costs. In our judgment, in his position, Mr Danner should have been aware of the conflict of interest and sought to give proper disclosure of it to SDAM clients. The mere reference to CruIM at the roadshows, and general knowledge on the part of clients already invested in the Cru Portfolio was plainly insufficient.

96. The second concern is that, even at this stage, Mr Danner, and indeed Mr Davies on behalf of the Applicant, was not prepared to acknowledge the real conflict of interest that arose. It was not just a question of disclosure. The financial benefits accruing to Mr Danner through CruIM were not known to the SDAM clients at the time Mr Danner was recommending the CF Arch cru Funds, until, following Mr Davies' intervention, May 2008. Until Mr Davies' firm had pointed out the issue there was no recognition of the conflict, and certainly no effective management of it.

97. Mr Danner accepted that his approach to certain compliance matters, and to the conflict of interest issue, had been less than satisfactory. We accept that he took steps, following the intervention of Mr Davies, to rectify the lack of proper disclosure to clients. But the continuing failure to recognise the circumstances as giving rise to what appears to us to be a clear and present conflict of interest does cast doubt on whether Mr Danner is now a fit and proper person to perform the CF30 function.

98. FIT 2.1.3 in the FSA Handbook at para (13) requires regard to be had to the readiness and willingness of the relevant person to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards. We

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agree with Ms Clarke that it is appropriate for us to ask ourselves the question whether Mr Danner has demonstrated sufficient insight into the problem to recognise, firstly, that there was a problem, and, secondly, to acknowledge it so as to give the Tribunal confidence that should a similar situation arise again it would be dealt with in a different way. Mr Danner, and the Applicant in its application, has failed to give us that confidence.

99. Does the fact of the intended supervision of Mr Danner alter the position in this respect? In our view it does not. Although such supervision can, on the evidence before us, be expected to pick up conflicts that might become apparent through remote monitoring, that is not in our view sufficient. The doubts about the integrity of Mr Danner that arise as a consequence of his continuing failure to acknowledge the real significance of the conflict of interest that arose between SDAM and CruIM cannot be dispelled by reliance on systems to spot a problem if Mr Danner himself cannot."

2.8. As to the meaning of "integrity", at paragraphs 118 and 119 of its judgment the Tribunal stated as follows:

"118. In her skeleton argument Ms Clarke referred us to *Hoodless and Blackwell v The Financial Services Authority* (3 October 2003) in the Financial Services and Markets Tribunal, in which the Tribunal described (at [19]) the expression "integrity" in the following terms:

> "In our view 'integrity' connotes moral soundness, rectitude and steady adherence to an ethical code. A person lacks integrity if unable to appreciate the distinction between what is honest and dishonest by ordinary standards."

119. This formulation was approved by this Tribunal in *Atlantic Law LLP and another v The Financial Services Authority* (Case no FIN/2009/0007), where it was pointed out that a person may lack integrity even though it is not established that he or she has been dishonest. It is, as was remarked in *Vukelic v The Financial Services Authority* (13 March 2009), unwise to attempt a comprehensive definition of integrity. But we agree with the guidance afforded by *Hoodless and Blackwell* and *Atlantic Law*. Even though a person might not have been dishonest, if they either lack an ethical compass, or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity."

2.9. Considering the facts and matters against that standard, the Tribunal found as follows at paragraphs 120 and 121:

"120. In our view, whilst we acknowledge that Mr Davies asked us to record that he himself had confidence in Mr Danner's integrity, we consider that the evidence points to the opposite conclusion. Having regard to Mr Danner's position as a director and shareholder of CruIM, his

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continuing failure to appreciate or understand the conflict of interest between that and his responsibility in making investment recommendations to SDAM's clients, his lack of knowledge, understanding and competence in relation to the CF Arch cru Funds, his espousal of a matrix and portfolio heavily weighted in favour of those Funds, and his recommendation to Mr A to invest almost all his available funds for pension investment into the CF Arch cru Funds, demonstrates such a poorly-directed ethical compass in the case of Mr Danner as to amount to a lack of integrity on his part.

121. We do not consider that the proposed supervisory regime can eliminate the concerns as to Mr Danner's integrity."

2.10. In relation to Mr Danner's competence and capability, at paragraphs 100 to 114 the Tribunal set out certain matters that it considered to be relevant as to Mr Danner's knowledge and understanding of particular investments that were being recommended to SDAM's clients. In light of those matters, at paragraph 114 of its judgment the Tribunal held as follows in respect of Mr Danner's competence and capability:

> "114. For these reasons we accept Ms Clarke's submission that Mr Danner was guilty of a serious failing of competence and capability. His conduct in espousing the CF Arch cru Funds in the way he did, in tailoring the matrix and portfolio towards such investments, and in recommending investments in the Funds to a Low/Cautious pension investor in the case of Mr A, all fall short of what the investing public are entitled to expect from a competent and capable IFA."

2.11. The Tribunal also considered the question of whether the proposed supervisory arrangements were sufficient to ameliorate/address its concerns as to Mr Danner's competence and capability. It concluded as follows at paragraphs 115 and 116 of its judgment:

> "115. The question remains whether the supervisory regime proposed by the Applicant is such as to eliminate future concerns as to the competence and capability of Mr Danner. We have referred earlier – in the context of our discussion of conflicts of interest – to the remote nature of that supervision model. We accept that the Applicant would not sanction Mr Danner recommending investments of the same nature as the CF Arch cru Funds. But that does not resolve the issue whether Mr Danner is a fit and proper person to perform the CF30 function.
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> 116. In this regard we have the same reservations as we expressed in relation to conflicts of interest. Mr Danner has, in our judgment, failed to recognise or acknowledge the errors of judgement on his part that we have found were made in relation to the risks attaching to the Funds, the construction of the matrix and portfolio and the investment recommendations for Mr A. We do not consider that our concerns as to Mr Danner's competence and capability can be allayed by the supervisory approach proposed by the Applicant, or accordingly that our conclusions in these respects can be disturbed."

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2.12. In light of the various matters set out in its judgment (including those set out above), the Tribunal concluded at paragraph 123 that "[i]n the light of our conclusions on the issues of conflicts of interest and knowledge and understanding, and our overall conclusions as regards Mr Danner's competence and capability, and his integrity, we are not satisfied that Mr Danner is a fit and proper person to perform Controlled Function CF30."

Facts and matters relied upon

2.13. The facts and matter relied on are set out more fully in the Tribunal's decision and are incorporated herein by reference.

3. CONCLUSION

3.1. On the basis of the facts and matters described above, the FSA is not satisfied that Mr Danner is a fit and proper person to perform the controlled function to which the Application relates

4. IMPORTANT NOTICES

4.1. This Final Notice is given to you pursuant to Section 390(2) of the Act

Publication

4.2. Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this Final Notice relates. Under those provisions the FSA must publish such information about the matter to which the Final Notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.

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

FSA contact

4.4. For more information concerning this matter generally, you should contact Pat Knox, Manager, Approved Persons & Reporting Department at the FSA (direct line: 020 7066 4868 / e-mail: pat.knox@fsa.gov.uk).

Graeme McLean
Head of Department, Approved Persons & Reporting

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ANNEX A – REGULATORY PROVISIONS RELEVANT TO THIS FINAL NOTICE

Relevant Statutory Provisions

1. The FSA may grant an application for approval under section 60 of the Act only if it is satisfied that the person in respect of whom the application is made is a fit and proper person to perform the controlled function to which the application relates (section 61(1) of the Act).

Relevant provisions of the FSA's Handbook

2. The Fit and Proper test for Approved Persons ("FIT") sets out the criteria that the FSA will consider when assessing the fitness and propriety of a person to perform a particular controlled function. The most important considerations are the person's honesty, integrity and reputation; competence and capability; and financial soundness (FIT 1.3.1G)

3. If a matter comes to the FSA's attention which suggests that the person might not be fit and proper, the FSA will take into account how relevant and important that matter is (FIT 1.3.4G).

4. In determining a person's honesty, integrity and reputation, the matters to which the FSA will have regard include:

   (1) 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 system and with other legal, regulatory and professional requirements and standards. FIT 2.1.3 (13)

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

   (1) whether the person satisfies the relevant FSA training and competence requirements in relation to the controlled function the person performs or is intended to perform;

   (2) whether the person has demonstrated by experience and training that the person is suitable, or will be suitable if approved, to perform the controlled function;

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