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**FINAL NOTICE**

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**To: Timothy Patrick Higgins**

**Date of Birth: 16 December 1936**

**IRN: TPH01040**

**Date: 2 July 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. ACTION**

1.1. The FSA gave you, Timothy Patrick Higgins, a Decision Notice on 26 February 2010 which notified you that the FSA had decided to:

- (1) make a prohibition order pursuant to section 56 of the Financial Services and Markets Act 2000 (the "Act"), to prevent you from performing any function in relation to any regulated activity carried out by an authorised person, exempt person or exempt professional firm; and
- (2) withdraw the approval given to you to perform controlled functions pursuant to section 63 of the Act.

1.2. The FSA considers that your conduct merits a substantial financial penalty of £600,000 but in the circumstances of this case, due to severe financial hardship you would suffer, this amount has been reduced to nil.

- 1.3. You did not refer the matter to the Upper Tribunal within 28 days of the date on which the Decision Notice was given to you.
- 1.4. Accordingly, for the reasons set out below, the FSA hereby 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 or exempt person or exempt professional firm (the "Prohibition Order").
- 1.5. The prohibition order takes effect from 2 July 2010.

## **2. REASONS FOR THE ORDER**

- 2.1. The FSA has concluded that you lacked integrity in the performance of your controlled functions at Surety Guarantee Consultants Limited ("SGC") in breach of Principle 1, in that between 1 January 2005 and 21 August 2006 ("the relevant period") you:
  - (1) conspired together with Clifford Felstead and Ralph Brunswick to defraud QBE Insurance (Europe) Limited ("QBE"), Amalfi Underwriting Limited ("Amalfi") and Markel International Insurance Company Limited ("Markel") in order to obtain a secret profit;
  - (2) were involved in the writing of bonds in the name of Markel and QBE/Amalfi in excess of SGC's authority;
  - (3) were involved in the creation of bordereaux which deliberately misstated the details of the bonds written by SGC; and
  - (4) deliberately failed to account fully to Markel and QBE/Amalfi in respect of the premiums due on the bonds written in their names, using General Commercial Limited ("GCL") as a vehicle for receiving secret profits made from the perpetration of the fraud you committed.
- 2.2. The FSA regards this conduct as serious because it involved the deliberate deception of SGC's clients, exposing them to substantial potential losses.
- 2.3. By virtue of such conduct, and having regard to the FSA's regulatory objectives, including the severity of the risk that you pose to the confidence in the financial system and the reduction of financial crime, the FSA considers that it is necessary and proportionate to exercise its power to make a Prohibition Order against you.
- 2.4. The FSA also considers that your conduct merits a substantial financial penalty of £600,000 but in the circumstances of this case, due to the severe financial hardship you would suffer, this amount has been reduced to nil.

## **3. RELEVANT STATUTORY PROVISIONS, REGULATORY REQUIREMENTS AND GUIDANCE**

### **Statutory Provisions**

- 3.1. 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.

### ***Penalties***

- 3.2. Section 66 of the Act provides:

“(1) *The Authority may take action against a person under this section if –*

- (a) it appears to the Authority that he is guilty of misconduct; and*
- (b) the Authority is satisfied that it is appropriate in the circumstances to take action against him.”*

“(2) *A person is guilty of misconduct if, while an approved person –*

- (a) He has failed to comply with a statement of principle issued under section 64...”*

“(3) *If the Authority is entitled to take action under this section against a person, it may –*

- (a) impose a penalty on him of such amount as it considers appropriate...”*

### ***Prohibition***

- 3.3. The FSA has the power, by section 56 of the Act, to make an order prohibiting you from performing a specified function, any function falling within a specified description, or any function, if it appears to the FSA that you are 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 firm. Such an order may relate to a specified regulated activity, any regulated activity falling within a specified description or all regulated activities.

### ***Withdrawal of Approval***

- 3.4. The FSA has the power, by section 63 of the Act, to withdraw the approval given to you if it considers that you are not a fit and proper person to perform the function to which the approval relates. When considering whether to withdraw its approval, the FSA may take into account any matter which it could take into account if it were considering an application made under section 60 of the Act (‘application for approval’) in respect of the performance of the function to which the approval relates.

### **Relevant regulatory requirements and guidance**

- 3.5. The FSA has issued the Statements of Principle and Code of Practice for Approved Persons (“APER”) under section 64 of the Act.

- 3.6. APER sets out the Statements of Principle in respect of approved persons and conduct which, in the opinion of the FSA, constitutes a failure to comply with them. Statement of Principle 1 requires an approved person to act with integrity in carrying out his controlled function. In deciding to take the proposed action, the FSA has taken into account the factors set out in APER relevant to determining whether an approved person's conduct complies with a particular Statement of Principle. The relevant factors are set out in Annex A to this notice.
- 3.7. In deciding on the action proposed, the FSA has also had regard to guidance published in the FSA Handbook and set out in the Regulatory Guides, in particular in the Decision Policies and Procedures Manual ("DEPP"), the Enforcement Guide ("EG"), and The Fit and Proper Test for Approved Persons ("FIT"). The relevant parts of this guidance are set out in Annex A. In considering the financial penalty, the FSA has also had regard to the provisions of the Enforcement Manual ("ENF"), which was in force throughout the relevant period.

#### **4. FACTS AND MATTERS RELIED ON**

- 4.1 SGC was an underwriting agent engaged in the surety bond business that was incorporated on 6 February 2004. From 14 January 2005, it was authorised to hold and control client money only in respect of non-investment insurance contracts. SGC ceased trading on 11 January 2007 when it varied its part IV permissions to remove all regulated activities. It has since been placed into liquidation.
- 4.2 Throughout the relevant period you were a director of SGC and were approved to hold the controlled function of Director (CF1).
- 4.3 The following individuals were also involved in SGC's surety bond business:
- (1) Barry Williams, a director of SGC;
  - (2) Clifford Felstead, an employee of SGC; and
  - (3) Ralph Stephen Brunswick, who had a beneficial interest in SGC and was a director of Templeton Insurance Company Limited ("Templeton"), an insurance company incorporated in the Isle of Man, from June 1994 until June 2006.

##### ***Surety bonds***

- 4.4 Surety bonds are undertakings given at the request of a client by the surety (usually an insurance company or a bank) to pay the beneficiary a sum of money (up to a stated limit) in certain events, usually the failure by the client to discharge his contractual obligations to his customer, the beneficiary. A premium is paid by the clients to the surety as the surety's fee for bearing the risk implicit in issuing the surety bonds.

##### ***Binding authorities***

- 4.5 A binding authority is established when one party (usually an agent) has been given the right and commensurate authority to represent another party (usually an insurer) in

effecting or creating an insurance contract. The terms of the binding authority will set limits on the authority granted to the agent.

- 4.6 During the relevant period, binding authorities were granted to SGC by Markel authorising the writing of surety bonds on their behalf. QBE also granted a binding authority to Amalfi authorising the writing of surety bonds, and Amalfi entered into an underwriting management agreement with SGC to provide surety bonds in accordance with its binding authority with QBE.

### ***The High Court Proceedings***

- 4.7 QBE, Amalfi and Markel issued proceedings against you and others in the High Court of Justice, Commercial Court, in which the trial took place between 11 February 2008 and 13 March 2008. In the judgment handed down on 3 June 2008 Mr Justice Teare found that you conspired to defraud Markel, QBE and Amalfi, and in so doing you breached your fiduciary duty towards them, you procured the breach of SGC's contracts with them, and you dishonestly assisted SGC in breaching its fiduciary duty towards them.

- 4.8 Mr Justice Teare found the following facts proved in relation to SGC's business with Markel:

- (1) *"In December 2004 Markel decided to grant a Binding Authority to SGC subject to limits of £1M any one bond and £2.5M any one contractor." Another document was subsequently agreed which "provided for reporting arrangements by means of monthly bordereaux to be provided by SGC to Markel and for ordered files to be kept by SGC."*
- (2) *"SGC commenced to write bonds pursuant to the Binding Authority. Some were not within the financial limits of the Binding Authority... 33 bonds were written with values in excess of the agreed financial limits between 11 February and 14 November 2005."*
- (3) *"The bordereaux produced over the period ... did not show that the Markel exposure on any bond was in excess of the agreed financial limits (save for two which were shown as being slightly over...)"*
- (4) *"The Markel Binding Authority was terminated by letter dated 1 November 2005 which gave 30 days notice. On 7 November 2005 Markel requested that no bonds be written during the notice period. However, on 14 November 2005 a bond was written ...in the sum of Euros 4.7m signed by Mr Williams and Mr Felstead. It did not feature in the bordereaux. On 29 November Mr Williams ... confirmed that no bonds had been written since 31 October."*
- (5) *"In December 2005 Markel requested an audit of the risks which had been bound and arranged for this to be done on 15 December 2005. In the same month Mr Brunswick of Templeton signed documents ("the Templeton Bonds") that purported to be bonds in favour of beneficiaries of many of the Markel bonds for*

*a sum equal to the difference between the value of the Markel bonds and the agreed limit of Markel's liability in the Binding Authority."*

- (6) *"At about the same time copies of the Markel bonds in the bond files of SGC were replaced with copies of documents ("the Markel dummy bonds") that purported to be bonds written in Markel's name but for a sum which did not exceed the agreed limit of Markel's liability in the Binding Authority. The debit notes referring solely to Markel were also replaced by debit notes making reference to Templeton also. Premium advice notes addressed to Templeton were also placed on the file."*
- (7) *"Neither the Templeton bonds nor the Markel dummy bonds were delivered to the beneficiaries."*
- (8) *"The Markel audit took place. The bonds which had been issued for sums in breach of the limits were not discovered. They were not in the file. In their place were the Markel dummy bonds and the Templeton bonds."*
- (9) *"In May 2006 Markel conducted a further audit of SGC's Markel files. As in December 2005, the bonds which had been issued for sums in breach of the limits were not discovered because they were not in the file. In their place were the Markel dummy bonds and the Templeton bonds."*
- (10) *"SGC failed to account fully to Markel for the premium that was due to them. The extent of such failure has been assessed as being £963,304, \$285,406 and Euros 73,281."*

4.9 Mr Justice Teare found the following facts proved in relation to SGC's business with QBE and Amalfi:

- (1) *"On 22 and 23 September 2005 respectively, an Underwriting Management Agreement was entered into between Amalfi and SGC and a Binding Authority was entered into between QBE and Amalfi. The commencement date of each was 1 October 2005".*
- (2) *Prior to this, "QBE required a New Proposal Questionnaire to be completed by SGC. One of the sections asked whether any of the "principle personnel (sic) have any criminal convictions for dishonesty or breach of trust." The reply which was returned ... said "none"."*
- (3) *"The Binding Authority between QBE and Amalfi authorised Amalfi to "bind surety bonds" for QBE. The limits were the same as in the Binding Authority between Markel and SGC" save as to timing. "The Management Agreement between Amalfi and SGC authorised SGC "to submit for approval Surety Bonds". Such bonds were subject to the same limits as those between QBE and Amalfi."*
- (4) *"In late October 2005, QBE received information that an employee of SGC had a conviction for fraud...An email dated 27 October 2005 from Amalfi's underwriter*

*states that he asked [Mr Higgins and Mr Felstead] “have you ever been convicted of insurance fraud”? Both replied “no, never”.*

- (5) *You subsequently informed Amalfi that Mr Felstead would “leave SGC with immediate effect” and have “no further involvement with the issuance of bonds and/or the administration of our bond account.” “Nevertheless Mr Felstead not only remained physically in the office ... but continued to be involved in SGC’s surety bond business.”*
- (6) *“Bonds were written in the name of QBE/Amalfi which exceeded the financial limits.” There were 30 such bonds, as set out in Annex 2 to Mr Justice Teare’s judgment.*
- (7) *In late December 2005/January 2006 Templeton bonds were signed by Mr Brunswick in favour of certain of the beneficiaries of the QBE/Amalfi bonds (for a sum equal to the difference between the QBE/Amalfi bond and the agreed limit of QBE/Amalfi’s liability under the Management Agreement) but were not delivered to the beneficiaries.”*
- (8) *“Throughout the life of the agreement between SGC and Amalfi monthly bordereaux were prepared ... and presented. ...there was not shown on any bordereaux a bond issued in the name of QBE/Amalfi which exposed QBE/Amalfi to liability for a sum in excess of the limits set out in the Management Agreement.”*
- (9) *“In June 2006 Amalfi began an audit of SGC. This did not reveal any bonds which had been written in excess of the agreed limits because the files contained copies of documents that purported to be bonds written within the limits (“the QBE Dummy Bonds”). However the audit was unsatisfactory because of the poor state of SGC’s records. The Management Agreement between Amalfi and SGC was terminated by Amalfi by letter dated 21 August 2006”.*
- (10) *“SGC failed to account fully to QBE/Amalfi for the premium that was due to them. The extent of such failure has been assessed as being £864,170.53.”*

4.10 Mr Justice Teare found that *“General Commercial Limited (“GCL”) is a company registered in the British Virgin Islands”, and that “two sums [of 200,000 and £288,000] paid to GCL represented premium income in respect of which there had been no accounting to Markel or QBE/Amalfi”.*

## **5. REPRESENTATIONS**

5.1. The FSA was informed that you had been diagnosed with Alzheimer’s disease and that your condition had deteriorated to such an extent that you did not have capacity to take part or deal personally with this matter. You are also no longer capable of understanding these proceedings or able to give any meaningful instructions to representatives on your behalf. Representations were therefore made on your behalf.

- 5.2. The FSA notes that the written representations made on your behalf were made by your legal advisers who were acting on your instructions. Furthermore, the additional representations made to the FSA by a close member of your family, reiterated either the earlier representations or your Defence to the civil proceedings. The FSA notes that Mr Justice Teare, who presided over the civil proceedings in the High Court, was aware of your medical condition, as presented at that time but considered you to have capacity to be able to deal with those proceedings.
- 5.3. In relation to the substantive case, the FSA was informed that you believed you had been used by Mr Felstead as a figurehead for the business. You argued that the judgment in the civil proceedings was wrong to attribute any fault to you and that in any event, if the FSA sought to impose a substantial fine it would cause you severe financial hardship.
- 5.4. You confirmed to the FSA that you had been made bankrupt on 10 November 2009 and that the Official Receiver was currently looking into your financial affairs. Aside from the bankruptcy you represented that you had not worked for a substantial period of time and that the civil proceedings had drained you of all your savings. As a result you said you would suffer severe financial hardship if the FSA sought to impose any financial penalty on you.
- 5.5. In all the circumstances, while you did not contest the basis on which this matter is presented or the evidence relied on by the FSA, you represented that given your medical and financial position, no further action should be taken by the FSA.

## **6. CONCLUSION**

- 6.1. The FSA finds that you acted dishonestly in performing your controlled functions and that accordingly you are not fit and proper to be an approved person. In reaching this decision the FSA notes that your medical condition limits your ability to understand and fully participate in these proceedings. However, in the circumstances of the case, including the fact that the FSA is not proposing to impose a punitive penalty, the FSA concludes that your medical condition does not affect the procedural regularity of the FSA's decision.
- 6.2. The FSA's decision is based on the judgement of the High Court as upheld by the Court of Appeal. Mr Justice Teare made the following findings against you:
- (1) That you were "*aware of the limits in the Binding Authority with Markel and in the Management Agreement with QBE/Amalfi*";
  - (2) That you were "*involved in the writing of bonds in the name of Markel and QBE/Amalfi which were in breach of those limits*";
  - (3) That you were "*involved in the creation of the bordereaux which misstated the details of the bonds written by SGC*";
  - (4) That you were "*involved in the failure to account fully to Markel and QBE/Amalfi for the premium which was due on the bonds written in their name*";



- (5) That you “*had an interest in the monies improperly received by GCL*”;
  - (6) That you “*owed duties as a fiduciary to Markel [and] to QBE/Amalfi*” and that you “*plainly did act in breach of those duties. [You] conspired to defraud Markel and QBE/Amalfi*”; and
  - (7) That you “*knowingly assisted SGC to breach its duties as a fiduciary by the making of a secret profit. [You] acted dishonestly*”.
- 6.3. In reaching this decision Mr Justice Teare took account of your medical condition. Those proceedings were fully contested by you and you were represented throughout. In light of the judgement against you, you were not in a position to advance a positive case on the facts, regardless of your health. The FSA is also satisfied that it has received representations on your behalf as would assist it make its decision in this matter.
  - 6.4. The FSA has therefore concluded that you lacked honesty and integrity in carrying out your controlled functions as director, in that you were party to a deliberate fraud on the customers of SGC, and hence that you failed to comply with Statement of Principle 1.
  - 6.5. The FSA has further concluded that you are not fit and proper to perform any functions in relation to any regulated activities carried on by any authorised person, exempt person or exempt professional firm.
  - 6.6. The FSA considers this misconduct very serious because you abused the trust and confidence QBE, Amalfi and Markel placed upon you to secure a profit for yourself and your co-conspirators. You participated in the perpetration of a fraud over an extended period of time, exposing them to significant losses.
  - 6.7. The FSA notes your representations on your financial circumstances, in particular the impact of your bankruptcy and your ill health. If it was not for these circumstances, the FSA would have imposed a financial penalty of £600,000 but has decided to reduce the amount you are required to pay to nil.

## **7. SANCTIONS**

### **Prohibition and withdrawal of approval**

- 7.1. The FSA has considered whether you are a fit and proper person to perform any functions in relation to regulated activities. In doing so, the FSA has had regard to its regulatory requirements and relevant guidance. In assessing your honesty, integrity and reputation for the purpose of considering whether you are a fit and proper person, the FSA has had regard to your part in the conspiracy to defraud Markel and QBE/Amalfi and the breaches of the fiduciary duty owed to them by SGC and by you personally.

- 7.2. The FSA considers that you are not a fit and proper person to perform any functions in relation to regulated activities. The seriousness of your misconduct means that if you continued to perform any functions you would pose a substantial serious risk to the FSA's statutory objectives of maintaining confidence in the financial system and reducing financial crime.
- 7.3. The FSA therefore considers it necessary to make the Prohibition Order, pursuant to section 56 of the Act, to prevent you from performing any function in relation to any activity carried out by any authorised person, exempt person or exempt professional firm, and to withdraw the approval you currently hold.

### **Financial Penalty**

- 7.4. In determining the appropriate level of financial penalty, the FSA has had regard to the following provisions of the Decision and Penalties Manual ("DEPP"). The FSA has also had regard to the provisions of the Enforcement Manual ("ENF"), in particular ENF 13.3.3 G, which were in force at the time of your misconduct and which are similar to the provisions of DEPP quoted here.

#### *Deterrence: DEPP 6.5.2G (1)*

- 7.5. The principal purpose of the imposition of the financial penalty is to promote high standards of regulatory conduct by deterring approved persons from acting in this way.
- 7.6. The FSA has had regard to the need to ensure those who are approved persons act with integrity and do not abuse their positions in the financial services industry. The FSA considers that a significant penalty should be imposed to demonstrate to you and others the seriousness with which the FSA regards such behaviour.
- 7.7. In determining this penalty, the FSA has also had regard to the FSA's financial crime objectives in ensuring that behaviour by individuals, which undermines confidence in the financial system, is not tolerated.

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

- 7.8. You have demonstrated your lack of integrity by issuing bonds in breach of the limits agreed with QBE, Amalfi and Markel. You played a central role in the fraud perpetrated against Markel and QBE/Amalfi, and profited personally by doing so. As a result of the above actions, the FSA considers that you pose a serious risk to clients and to confidence in the financial system.

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

- 7.9. The FSA considers that your decisions and/or actions were deliberate actions taken by you without concern for the risk posed to clients and to the confidence in the financial system. In this regard they amounted to deliberate misconduct. Your actions were below the standard of behaviour that could reasonably be expected of an approved person.

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

- 7.10. The FSA recognises that the financial penalty imposed on you is likely to have a significant impact on you as an individual but it is considered to be proportionate in relation to the seriousness of the misconduct.

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

- 7.11. The FSA has taken account of your representations on your financial circumstances and the effect of the penalty in causing you severe financial hardship.

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

- 7.12. The FSA has had regard to the substantial benefit you received from your misconduct.

*Difficulty of detecting the breach DEPP 6.5.2G (7)*

- 7.13. In determining the appropriate level of penalty, the FSA has also had regard to the fact that you committed this breach in such a way as to reduce the risk that the breach would be discovered, namely, by misstating the details of the bonds written in the bordereaux and by creating the QBE Dummy Bonds and the Markel Dummy Bonds.

*Disciplinary record and compliance history: DEPP 6.5.2G (9)*

- 7.14. The FSA has not previously taken any disciplinary action against you.

- 7.15. Having regard to the factors outlined above, the FSA considers that the misconduct identified in this Notice merits the imposition of a financial penalty of £600,000. However, having taken account of your representations on your financial circumstances, in particular the impact of your bankruptcy and your ill health the amount you are required to pay has been reduced to nil.

## **8. DECISION MAKERS**

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

## **9. IMPORTANT**

- 9.1. This Final Notice is given to you in accordance with section 390(1) of the Act.

### **Publicity**

- 9.2. 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. 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.

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

**FSA contacts**

- 9.4. For more information concerning this matter generally, you should contact Paul Howick (direct line: 020 7066 7954) of the Enforcement and Financial Crime Division of the FSA.

Signed:

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**Tom Spender**  
Head of Department  
FSA Enforcement and Financial Crime Division

## **Annex A**

### **RELEVANT REGULATORY REQUIREMENTS AND GUIDANCE**

#### **1. The Statements of Principle and Code of Practice for Approved Persons**

- 1.1 In determining whether an individual's conduct amounts to a breach of the Statements of Principle, the FSA has had regard to the guidance and examples in APER 4.1, in particular;
- (1) APER 4.1.2 E says that in the opinion of the FSA, conduct of the type described below does not comply with Statement of Principle 1:
- 1.2 APER 4.1.3 E: Deliberately misleading (or attempting to mislead) by act or omission a client, or his firm (or its auditors or an actuary appointed by his firm under SIP 4 (Actuaries)), or the FSA;
- 1.3 APER 4.1.4 E: Falsifying documents, misleading a client about the risks of an investment, providing false or inaccurate documentation or information, including details of training, qualifications, past employment record or experience, providing false or inaccurate information to the firm all fall within APER 4.1.3 E.
- 1.4 APER 4.1.6E: Deliberately failing to inform, without reasonable cause, a customer, his firm (or its auditors or an actuary appointed by his firm under SIP 4 (Actuaries)) or the FSA of the fact that their understanding of the material issue is incorrect, despite being aware of their misunderstanding, falls within APER 4.1.2E.
- 1.5 APER 4.1.8 E: Deliberately preparing inaccurate or inappropriate records or returns in connection with a controlled function, falls within APER 4.1.2 E.
- 1.6 APER 4.1.9 E: Behaviour of the type referred to in APER 4.1.8 E includes, but is not limited to, deliberately preparing inaccurate trading confirmations, contract notes or other records of transactions or holdings of securities for a customer, whether or not the customer is aware of these inaccuracies or has requested such records.
- 1.7 APER 4.1.12 E: Deliberately designing transactions so as to disguise breaches of requirements and standards of the regulatory system falls within APER 4.1.2 E.

#### **2. Guidance on exercise of disciplinary powers**

- 2.1 When exercising its powers, the FSA seeks to act in a way it considers most appropriate for the purpose of meeting its regulatory objectives, which are set out in section 2(2) of the Act.
- 2.2 Guidance on the FSA's exercising of its disciplinary powers is set out in section 6.2.1 G and sections 6.2.4 G to 6.2.9 G of the FSA's Decision Procedure and

Penalties manual (DEPP), which is part of the FSA's Handbook. DEPP 6.2.1 G states that the FSA will consider the full circumstances of each case and that the criteria listed are not exhaustive. In particular, DEPP 6.2.4 G states that the FSA may take disciplinary action against an approved person where there is evidence of personal culpability on his part, which arises where the behaviour was deliberate or where the standard of behaviour was below that which would be reasonable in all the circumstances at the time of the conduct concerned.

2.3 The FSA has also had regard to its Enforcement Guide (EG), in particular, EG 2.2(2) states that the FSA will seek to exercise its enforcement power in a manner that is transparent, proportionate and consistent with its publicly stated policies.

2.4 In considering the financial penalty to impose the FSA has had regard to the appropriate provisions in Chapter 13 of the FSA's Enforcement Manual ("ENF"), which applied during the period in which your misconduct occurred. ENF 13.1.1 G (2) states that the Act empowers the FSA to impose a financial penalty on an approved person, where the FSA considers that he is guilty of misconduct; this is defined in the Act as failure to comply with a Statement of Principle issued by the FSA under section 64 (Conduct: statements and codes), or being knowingly concerned in a contravention by the relevant firm of a requirement imposed on that firm by or under section 66 of the Act (Disciplinary powers). The FSA is also empowered to take into account whether there is verifiable evidence of severe financial hardship if the person were to pay the level of penalty determined to be appropriate for the particular misconduct.

### **3. FSA's policy for exercising its power to make a prohibition order and withdraw approval**

3.1 The FSA's approach to exercising its powers to withdraw approval and to make prohibition orders is set out at Chapter 9 of the Enforcement Guide ("EG"). EG 9.1 states that the FSA's power under sections 56 of the Act helps it work towards achieving its regulatory objectives. The FSA may exercise this power where it considers that, to achieve any of those objectives, it is appropriate either to prevent an individual from performing any functions in relation to regulated activities or to restrict the functions which he may perform. EG 9.2 states that the FSA's effective use of its power to withdraw approval will also help ensure high standards of regulatory conduct. It further states that the FSA may prohibit an approved person in addition to withdrawing their approval whether it considers this is appropriate.

3.2 EG 9.4 sets out the general scope of the FSA's powers in this respect, which include 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. EG 9.5 provides that the scope of a prohibition order will vary according to 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 risk which he poses to consumers or the market generally.

3.3 In circumstances where the FSA has concerns about the fitness and propriety of an approved person, EG 9.8 to 9.14 provides guidance. In particular, EG 9.8 states that the FSA may consider whether it should prohibit that person from performing functions in relation to regulated activities, withdraw that person's approval or both. In deciding whether to withdraw approval and/or make a prohibition order, the FSA will consider whether its regulatory objectives can be achieved adequately by imposing disciplinary sanctions.

3.4 EG 9.9 states that the FSA will consider all the relevant circumstances when deciding whether to make a prohibition order against an approved person and/or to withdraw that person's approval. Such circumstances include, but are not limited to, the following:

- (1) the matters set out in section 61(2) of the Act;
- (2) whether the individual is fit and proper to perform functions in relation to regulated activities. The criteria for assessing the fitness and propriety are set out in the module of the FSA Handbook entitled "The Fit and Proper Test for Approved Persons" ("FIT"), in particular in FIT 2.1 (Honesty, integrity and reputation), FIT 2.2 (Competence and capability) and FIT 2.3 (Financial soundness);
- (3) whether, and to what extent, the approved person has:
  - (a) failed to comply with the Statements of Principle issued by the FSA with respect to the conduct of approved persons; or
  - (b) been knowingly concerned in a contravention by the relevant firm of a requirement imposed on the firm by or under the Act (including the Principles and other rules);
- (4) the relevance and materiality of any matters indicating unfitness;
- (5) the length of time since the occurrence of any matters indicating unfitness;
- (6) 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
- (7) the severity of the risk which the individual poses to consumers and to confidence in the financial system.

3.5 EG 9.12 provides a number of examples of types of behaviour which have previously resulted in the FSA deciding to issue a prohibition order or withdraw the approval of an approved person. The examples include:

- (1) severe acts of dishonesty, for example those which may have resulted in financial crime; and

- (2) serious breaches of the Statements of Principle and Code of Practice for Approved Persons, such as providing misleading information to clients, consumers or third parties.

#### **4. The Fit and Proper Test for Approved Persons (“FIT”)**

- 4.1 The purpose of FIT is to outline the 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.
- 4.2 In this instance the criteria set out in FIT are relevant in considering whether the FSA may exercise its powers to make a prohibition order against an individual, in accordance with EG 9.9.
- 4.3 FIT 1.3 provides that the FSA will have regard to a number of factors when assessing a person’s fitness and propriety. One of the most important considerations will be the person’s honesty, integrity and reputation.
- 4.4 In determining a person’s honesty, integrity and reputation, FIT 2.1 provides that the FSA will have regard to matters including, but not limited to, those set out in FIT 2.1.3 G, which include:
  - (1) whether the person has been the subject of any adverse finding or any settlement in civil proceedings, particularly in connection with investment or other financial business, misconduct, fraud or the formation or management of a body corporate (FIT 2.1.3 G (2));
  - (2) whether the person has contravened any of the requirements and standards of the regulatory system or the equivalent standards or requirements of other regulatory authorities (including a previous regulator), clearing houses and exchanges, professional bodies, or government bodies or agencies; (FIT 2.1.3 G (5));
  - (3) whether the person has been the subject of any justified complaint relating to regulated activities (FIT 2.1.3 G (6));
  - (4) whether the person has been a director, partner, or concerned in the management of a business that has gone into insolvency, liquidation or administration while the person has been connected with that organisation or within one year of that connection; (FIT 2.1.3 G (9));
  - (5) whether the person, or any business with which the person has been involved, has been investigated, disciplined, censured or suspended or criticised by a regulatory or professional body, a court or tribunal, whether publicly or privately (FIT 2.1.3 G (10)).