

This Decision Notice has been referred to the Upper Tribunal. The Upper Tribunal has the power to dismiss the reference or to remit the matter back to the FCA with directions.

On 5 July 2017 the FCA notified the Upper Tribunal and Alistair Rae Burns that it is no longer inviting the Upper Tribunal to impose a financial penalty on Alistair Rae Burns pursuant to section 66 of the Act in relation to any breach of Statement of Principle for Approved Person 7 arising from certain failings in TMI's advice process. This is because the Authority no longer argues that it did not have information from which the specific misconduct could be inferred more than three years before issuing a Warning Notice. The Authority continues however to invite the Tribunal to impose an appropriate penalty in relation to Alistair Rae Burns' failure to ensure that conflicts of interest at TMI were properly managed and disclosed to customers. The FCA invites the Tribunal to impose a reduced penalty of £116,830. This reflects a reduction of 50% in the financial penalty referred to in the Decision Notice.



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PURSUANT TO THE UPPER TRIBUNAL DECISION DATED 31 JULY 2018, THIS DECISION NOTICE HAS BEEN SUPERCEDED BY A FINAL NOTICE DATED 20 SEPTEMBER 2018.

Note: The following clarification provides an update in relation to matters set out in this Decision Notice. TailorMade Independent Limited ("TMI") was dissolved on 9 July 2016 and therefore cannot exercise the rights described at paragraphs 8.1, 8.3 and 8.6 of this decision notice.

DECISION NOTICE

To: Alistair Rae Burns

To: TailorMade Independent
Limited (in liquidation)

Individual Reference Number: ARB00038

Firm Reference Number: 506611

Address: RSM Restructuring Advisory LLP
Rivermeade House
7 Lewis Court
Grove Park
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Date: 22 July 2016

1. ACTION

1.1. For the reasons given in this Decision Notice, the Authority has decided to:

- (1) impose on Alistair Rae Burns a financial penalty of £233,600;
- (2) withdraw the approvals granted to Mr Burns to perform the CF1 (Director) and CF3 (Chief Executive) controlled functions at TMI; and

- (3) prohibit Mr Burns from performing any senior management function and any significant influence function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm.

2. SUMMARY OF REASONS

- 2.1. Between 22 January 2010 and 20 January 2013 (the "Relevant Period"), Mr Burns was a director and shareholder at TMI. He has been approved to hold the CF1 (Director) controlled function at TMI from 22 January 2010 to date. He has also been approved to hold the CF3 (Chief Executive) controlled function at TMI from 11 April 2013 to date.
- 2.2. During the Relevant Period, TMI provided advice to customers who were considering transferring their pension funds (i.e. moving them from an occupational pension scheme such as a Defined Benefit Pension Scheme) or switching their pension funds (i.e. moving them from a personal pension scheme) into a SIPP (a type of personal pension scheme) because they wished to use their pension funds to invest in Alternative Investments: unregulated investments that were typically high-risk, illiquid, esoteric investments, such as biofuel oil, farmland and overseas property, which were not suitable for all retail customers.

TMI's business model and Personal Recommendations Process

- 2.3. Mr Burns established the business model that was in place at TMI during the Relevant Period. TMI was one of a number of businesses, including the Unregulated Introducer, operating under the 'TailorMade' name. The vast majority of TMI's customers were referred to it by the Unregulated Introducer, whose role was to facilitate the sale of Alternative Investments to customers. Mr Burns was a director and shareholder of the Unregulated Introducer and consequently was aware of its role.
- 2.4. The Unregulated Introducer (and other Introducers) introduced customers to TMI in order that they could obtain advice on transferring or switching their pension funds into a SIPP so that they could then invest in Alternative Investments. If TMI recommended a transfer or switch into a SIPP, the customer returned to the Unregulated Introducer (or other Introducer) to purchase Alternative Investments to place into their SIPP.
- 2.5. Mr Burns, as a director of TMI, was jointly responsible for the process which TMI had in place during the Relevant Period for providing Personal Recommendations to

customers who were considering transferring or switching their pension funds into SIPPs (the "Personal Recommendations Process"). As part of the Personal Recommendations Process, TMI reviewed the customer's overall financial circumstances, assessed the customer's existing pension provision, including whether the customer was intending to transfer from a Defined Benefit Pension Scheme, and evaluated the customer's attitude to risk. However, despite these steps being taken, the Personal Recommendations Process could not be relied upon to ensure that TMI gave appropriate Personal Recommendations to its customers because the predominant factor in the Personal Recommendation given by TMI was usually the customer's desire to use pension funds to purchase Alternative Investments. As a result, in nearly all cases reviewed by the Authority, TMI recommended that the customer move their pension into a SIPP. This included cases where the customer was intending to transfer from a Defined Benefit Pension Scheme, where TMI did not apply the presumption in COBS 19.1.6G that the transfer would be unsuitable.

- 2.6. TMI's Personal Recommendations Process was therefore inadequate as, rather than taking account of the customer's individual circumstances, demands and needs, it resulted in TMI making Personal Recommendations predominantly on the basis of the customer's objective of using pension funds to purchase Alternative Investments. Further, the Personal Recommendations Process resulted in customers being misled, and not being treated fairly, because it did not meet customers' information needs and because customers would have been given the impression from the steps taken by TMI as part of the Personal Recommendations Process that the Personal Recommendation they received reflected their individual circumstances, demands and needs. As a result of the failings in the Personal Recommendations Process, TMI failed to comply with Principles 6, 7 and 9 and COBS 2.1.1R, 4.5.2R, 9.2.1R, 9.2.2R, 9.2.3R, 9.4.7R and 19.1.2R during the Relevant Period.
- 2.7. Mr Burns knew, by reason of being a director of the Unregulated Introducer, that all, or nearly all, of TMI's customers would share the same investment objective of using their pension funds to purchase Alternative Investments. As TMI's business model, which Mr Burns established, was based on TMI's customers having this objective, Mr Burns knew, or should have known, that the Personal Recommendations Process could not be relied upon to ensure that TMI gave appropriate Personal Recommendations to its customers. Despite this, Mr Burns

failed to take reasonable steps to ensure that TMI's Personal Recommendations Process complied with relevant regulatory requirements.

- 2.8. As a direct result of Mr Burns' failings, during the Relevant Period all 1,661 of TMI's customers, who went through the Personal Recommendations Process, were at significant risk of transferring or switching their pension funds into a SIPP which was not suitable for them. These 1,661 TMI customers invested a total of £112,420,985, mostly from pension funds including 517 Defined Benefit Pension Schemes, in SIPPs. Of the 1,661 customers, 923 invested in overseas property developments operated by Harlequin.

Conflicts of interest

- 2.9. The Unregulated Introducer received a financial benefit in the form of a commission payment from the providers of the Alternative Investments if a customer, following a referral by the Unregulated Introducer to TMI, purchased Alternative Investments to hold in a SIPP. During the Relevant Period Mr Burns received significant financial benefit from his positions as a director and shareholder of the Unregulated Introducer, which was paid either directly or through a remuneration trust linked to the Unregulated Introducer. In addition to his roles with the Unregulated Introducer, Mr Burns also introduced four customers in his personal capacity direct to TMI, which also resulted in commission being paid to the Unregulated Introducer. Mr Burns therefore benefitted financially from both the fees paid by customers for the advice given by TMI on the pension transfer or switch (as a director and shareholder of TMI) and also from the commission paid to the Unregulated Introducer for its role in the sale of Alternative Investments to the customer (as a director and shareholder of the Unregulated Introducer).
- 2.10. A number of other individuals at TMI were also owners of, or acted as agents of, the Unregulated Introducer. The Unregulated Introducer would only financially benefit from introducing a customer to TMI if TMI advised the customer to transfer or switch their pension funds into a SIPP. Accordingly, Mr Burns and these other individuals had a financial interest, which was distinct from the customer's interest, in the outcome of the advice given by TMI to a customer referred to TMI by the Unregulated Introducer (or by Mr Burns). There was therefore a conflict between the interests of Mr Burns and such other individuals in the outcome of TMI's advice (i.e. the Personal Recommendation) and the customer's interest in that outcome.

2.11. In accordance with Principle 8 and SYSC 10.1.7R and 10.1.8R, TMI was required to manage these conflicts of interest fairly and clearly disclose them. However, TMI failed to do this. Specifically, TMI failed to ensure that (i) customers were informed of its relationship with the Unregulated Introducer; (ii) customers were informed that directors and other individuals at TMI would benefit financially if the customer purchased Alternative Investments; and (iii) a suitable process was put in place for managing the conflicts of interest.

2.12. As a result of these failings, TMI's customers were unable to make a fully informed decision about (a) seeking advice from TMI in relation to transferring or switching their pension funds into a SIPP; (b) accepting the Personal Recommendation they received from TMI; and (c) using their existing pension funds to purchase Alternative Investments.

2.13. As a CF1 (Director) at TMI, Mr Burns was required to take reasonable steps to ensure that TMI complied with, amongst other things, Principle 8 and SYSC 10.1.7R and 10.1.8R. However, during the Relevant Period, Mr Burns failed to ensure that TMI managed fairly and clearly disclosed his own personal conflicts of interest and the conflicts of interest relating to other individuals at TMI. This was despite Mr Burns being aware of the respective roles of TMI and the Unregulated Introducer and how he and other individuals at TMI benefitted from the relationship between the firms.

Mr Burns' misconduct

2.14. By reason of the above, during the Relevant Period Mr Burns breached Statement of Principle 7 in that he failed to take reasonable steps to ensure that:

- (1) TMI complied with Principles 6, 7 and 9 and COBS 2.1.1R, 4.5.2R, 9.2.1R, 9.2.2R, 9.2.3R, 9.4.7R and 19.1.2R. TMI's Personal Recommendations Process, for which Mr Burns was jointly responsible, was inadequate as, rather than taking account of the customer's individual circumstances, demands and needs, including whether they were intending to transfer from a Defined Benefit Pension Scheme, it resulted in Personal Recommendations being made predominantly on the basis of the customer's objective of using their existing pension funds to purchase Alternative Investments. Further, the Personal Recommendations Process resulted in customers being misled, and not being treated fairly, because it did not meet customers' information needs and because customers would have been given the impression from

the steps taken by TMI as part of the Personal Recommendations Process that the Personal Recommendation they received reflected their individual circumstances, demands and needs.

- (2) TMI complied with Principle 8 and SYSC 10.1.7R and 10.1.8R. Mr Burns failed to ensure that TMI managed fairly and clearly disclosed his own personal conflicts of interest and the conflicts of interest relating to other individuals at TMI.

2.15. As a consequence of his actions, Mr Burns failed to meet regulatory standards with regard to performing significant influence controlled functions. The Authority considers he is therefore not fit and proper (on the basis of his lack of competence and capability) to perform senior management functions or significant influence functions.

Sanctions

2.16. The Authority has decided to impose a financial penalty on Mr Burns in the amount of £233,600 pursuant to section 66 of the Act; to withdraw, pursuant to section 63 of the Act, the approvals given to Mr Burns under section 59 of the Act to perform the CF1 and CF3 controlled functions at TMI; and to make an order, pursuant to section 56 of the Act, prohibiting Mr Burns from performing any senior management function and any significant influence function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm.

3. DEFINITIONS

3.1. The definitions below are used in this Decision Notice.

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

"Alternative Investments" means unregulated investments that were typically high-risk, illiquid, esoteric investments, such as biofuel oil, farmland and overseas property, which were not suitable for all retail customers;

"APER" means the Statements of Principle and Code of Practice for Approved Persons part of the Handbook;

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

"COBS" means the Authority's Conduct of Business Sourcebook;

"Defined Benefit Pension Scheme" means a pension scheme as defined by article 3(1) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, namely where the amount paid to the beneficiary is based on how many years the beneficiary has been employed and the salary the beneficiary earned during that employment (rather than the value of their investments);

"DEPP" means the Authority's Decision Procedure and Penalties Manual;

"EG" means the Authority's Enforcement Guide;

"FSCS" means the Financial Services Compensation Scheme;

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

"Harlequin" means the Harlequin group of companies including, but not limited to, Harlequin Management Services (South East) Limited, an unregulated, limited company (in administration with effect from 3 May 2013 and in liquidation with effect from 20 October 2014);

"IFA" means independent financial adviser;

"Introducer" means an entity/individual that referred new SIPP business to TMI;

"Personal Recommendation" means a recommendation that is advice on investments, including the transfer or switch of pension benefits into a SIPP, and is presented as suitable for the customer to whom it is made, or is based on a consideration of the customer's circumstances;

"Personal Recommendations Process" means the process TMI had in place during the Relevant Period for providing Personal Recommendations to customers who were considering transferring or switching their pension funds into SIPPs;

the "Principles" means the Authority's Principles for Businesses;

the "Relevant Period" means 22 January 2010 to 20 January 2013 inclusive;

“SIPP” means self-invested personal pension;

“Statements of Principle” means the Authority’s Statements of Principle and Code of Practice for Approved Persons;

“SYSC” means the Senior Management Arrangements, Systems and Controls Rules part of the Handbook;

“TMI” means TailorMade Independent Limited (in liquidation with effect from 15 October 2013), a company authorised and regulated by the Authority;

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

the “Unregulated Introducer” means an unregulated company whose purpose was to facilitate the sale of Alternative Investments to customers; and

the “Warning Notice” means the warning notice given to Mr Burns and TMI dated 7 December 2015.

4. FACTS AND MATTERS

Background

TMI

- 4.1. TMI (in liquidation since 15 October 2013) is a limited company that has been authorised by the Authority since 22 January 2010.
- 4.2. Throughout the Relevant Period, TMI had permission to carry on the following regulated activities:
 - (1) agreeing to carry on a regulated activity;
 - (2) advising on investments, including advising on pension transfers and pension opt-outs;
 - (3) arranging (bringing about) deals in investments; and
 - (4) making arrangements with a view to transactions in investments.
- 4.3. In addition to the above permissions, TMI was authorised with effect from 4 January 2013 to perform certain activities in relation to regulated mortgage contracts and in relation to certain insurance mediation activities.

- 4.4. On 18 January 2013, the Authority published an alert confirming its expectations of IFAs advising on overseas property investments, including those sold by Harlequin, through a SIPP. The Authority's alert affirmed that IFAs had to provide appropriate advice to their customers and, in particular, ensure that IFAs gave careful consideration to the particular features of the investment in question and that, if recommending a SIPP knowing that the customer will sell current investments to invest in an overseas property, the suitability of the overseas property investment must form part of the advice to the customer.
- 4.5. TMI's response to the Authority's 18 January 2013 alert was to enter into a voluntary variation of permission on 13 March 2013, the result of which was that TMI was no longer permitted to carry on any regulated activities in relation to any new regulated pension contracts. In addition to the variation of permissions, Mr Burns cooperated with the Authority and proactively created a remediation plan to deal with the pipeline of TMI's customers who were affected by the variation of permissions. This plan included: undertaking training on improving director competence and suitability, director conflicts of interest, suitability of advice, financial promotions, Alternative Investments and due diligence, governance and risk, systems and controls, and valuation and loss assessment. All but the assessment of valuation and loss and those on-going actions relating to variation of permissions to remove regulated activities were completed in February and March 2013. Between April and October 2013, Mr Burns implemented the rest of the remediation plan. The total costs of the plan were £507,000 and Mr Burns injected £50,539 of his own funds to help TMI meet these costs.
- 4.6. On 29 July 2014, the FSCS announced that it had declared TMI 'in default'. The FSCS is investigating claims made by TMI's customers and certain customers have received funds from the FSCS as a result of such investigation.

Mr Burns

- 4.7. Mr Burns has been approved to hold the CF1 (Director) controlled function at TMI from 22 January 2010 to date. He has been approved to hold the CF3 (Chief Executive) controlled function at TMI from 11 April 2013 to date.
- 4.8. During the Relevant Period, the Authority considers that, as a director at TMI, Mr Burns had active management and day-to-day responsibility for the business of TMI. Mr Burns established the business model that was in place at TMI during the Relevant Period and was jointly responsible with the other TMI directors for

implementing the business model and overseeing its operation. He also had responsibility for managing and achieving an effective and meaningful business plan, and recruiting and training Introducers. Mr Burns, who had a number of other business interests apart from TMI, spent approximately 30% of his time at TMI.

The Unregulated Introducer

- 4.9. TMI was one of a number of businesses operating under the 'TailorMade' name. The other businesses included the Unregulated Introducer, whose role was to facilitate the sale of Alternative Investments to its customers. The Alternative Investments promoted by the Unregulated Introducer were often unregulated products and included overseas property investments such as those operated by, amongst others, Harlequin.
- 4.10. Mr Burns was a shareholder and director of the Unregulated Introducer throughout the Relevant Period. The Unregulated Introducer actively promoted and introduced customers to the concept of investing in Alternative Investments and provided information to those customers on which to base their decision on whether or not to invest.
- 4.11. Where a customer wanted advice on using their pension to make the investment, the customer was introduced by the Unregulated Introducer (or its agents) to TMI in order to receive regulated advice on transferring or switching their pension to a SIPP. During the Relevant Period, more than 95% of TMI's customers were introduced to TMI by the Unregulated Introducer (nearly all of TMI's other customers were referred to TMI by other Introducers). If TMI recommended a transfer or switch into a SIPP, the customer returned to the Unregulated Introducer to purchase Alternative Investments to place into their SIPP.
- 4.12. Through his role as a director and shareholder of the Unregulated Introducer, Mr Burns was fully aware of the nature of the products in which TMI's customers wished to invest. Mr Burns used his own existing pension funds to invest in some of these Alternative Investments.

SIPPs

- 4.13. Following its authorisation on 22 January 2010, TMI focussed its business model on providing advice to customers who were considering transferring or switching their

pension funds into a SIPP because they wished to use their pension funds to invest in Alternative Investments.

4.14. A SIPP is a trust-based wrapper for an individual's pension investment. It gives tax relief on an individual's contributions and tax-free growth and offers much wider investment powers than are generally available for personal pensions and group personal pensions. The investment powers allow an individual to invest in a wide range of assets. In addition, a SIPP offers a greater degree of control over where and when funds are invested or moved than is permitted by traditional pension arrangements run by investment management and life assurance companies or Defined Benefit Pension Schemes.

4.15. For TMI's customers, a SIPP was a way of investing their pension into Alternative Investments which were typically not permitted by their existing pension schemes. These investments often offered the potential for higher returns than customers' existing pension schemes, however they carried a far higher risk, including the risk that unregulated products are not covered by the FSCS and risks arising from their illiquidity. As a result of the risks posed by the Alternative Investments, it was especially important that TMI ensured, and Mr Burns as a CF1 (Director) of TMI took reasonable steps to ensure, that where TMI provided Personal Recommendations to customers to transfer or switch their pension funds into a SIPP, they reflected the customers' individual circumstances, demands and needs rather than just the customers' initial objective of seeking to self-invest pension funds in order to purchase Alternative Investments.

TMI's Personal Recommendations Process

4.16. In making Personal Recommendations, TMI was required to comply with regulatory requirements including Principles 6, 7 and 9 and COBS 2, 4, 9 and 19. As a director of TMI, Mr Burns was jointly responsible with the other TMI directors for ensuring that TMI's Personal Recommendations Process complied with these regulatory requirements.

4.17. Upon referral to TMI from the Unregulated Introducer (or, occasionally, another Introducer), a customer:

- (1) was contacted by TMI and a 'fact find' would be completed in order to establish the customer's investment needs and objectives. This would include asking the customer to complete an 'attitude to risk' questionnaire and provide details of their knowledge and experience of financial

products. The customer also received TMI's client agreement, which set out, amongst other things, TMI's fees;

- (2) provided TMI with details about their existing pension providers so that TMI could gather information on those existing pensions;
- (3) had an appointment with TMI where the TMI 'suitability report' and the SIPP providers' 'key features' documents were discussed with the customer. This included an explanation of TMI's recommendation for the most suitable SIPP for the customer and a Personal Recommendation relating to the transfer or switch of the customer's existing pension funds into the SIPP. Typically, when selecting the most suitable SIPP provider for the customer, TMI assessed, amongst other things, whether the SIPP provider was able to invest in the specific Alternative Investment the customer wished to invest in (if this was known to TMI), as well as the set-up and ongoing fees charged by the SIPP provider. The appointment was also an opportunity for TMI to answer any questions that the customer might have; and
- (4) completed a SIPP application which TMI submitted to the SIPP provider on the customer's behalf. TMI then informed the customer when the SIPP had been established.

4.18. For the initial advice service provided by TMI, as described at paragraph 4.17, the customer paid a fee which was typically £1,000 per personal pension being switched. However, if a Defined Benefit Pension Scheme was being transferred, the amount was 3% of the total transfer value or £1,500 (whichever was the greater). These amounts were usually deducted from the funds being transferred or switched into the SIPP.

4.19. TMI also charged customers an annual management charge if the customer wished to have an annual review. The annual review service provided by TMI in return for that fee consisted of consolidating statements from the SIPP provider and providing an up-to-date statement of the customer's investments. Over 90% of TMI's customers opted to receive this annual review service and so paid to TMI between 1% and 1.25% of their net asset fund value for that service. For example, a customer with a net asset fund value of £100,000 typically paid between £1,000 and £1,250 per annum for this annual review service.

Failings in TMI's Personal Recommendations Process

4.20. Mr Burns explained in interview that customers approached TMI for advice on whether to transfer or switch their pensions funds into a SIPP because they wished to use their pension funds to invest in Alternative Investments:

"I use the McDonald's analogy, which is that people came to us because they wanted a SIPP to invest in the underlying investment. Just like when they go into McDonald's they expect to come out with a McDonald's, not a KFC. Does that make sense? I'm questioning myself now. But what I'm -- the point I'm trying to make is: people were sold the underlying investment. They came to us because they needed regulated advice about whether it was in their interests to invest, to move their preserved pensions into a SIPP. And then what they did with it was a matter of self-investment."

4.21. The Authority has reviewed 26 suitability reports, relating to 20 customers, which were produced by TMI during the Relevant Period. These, along with other materials prepared by TMI, indicate that customers were given Personal Recommendations on whether to transfer or switch their existing pension funds into SIPPs once TMI had:

- (1) conducted a review of the customer's overall financial circumstances;
- (2) assessed what pension provision the customer had, including whether the customer was intending to transfer from a Defined Benefit Pension Scheme; and
- (3) evaluated the customer's attitude to investment risk.

4.22. The suitability reports reviewed by the Authority typically followed a consistent format:

- (1) In the section entitled "Introduction", the suitability reports confirmed that the overall financial circumstances of the customer were being considered in producing a Personal Recommendation. They contained variations of the following wording: *"Further to your telephone conversation with our office on xx/xx/xxxx, I would like to take the opportunity to outline my recommendations, confirming the suitability and reasons for them, when considering your overall financial circumstances";*

- (2) In the section entitled "Current Situation", the suitability reports confirmed that the customer's existing pension provision was being taken into account. For example: *"With regards to your own individual investment experience you confirmed that you are familiar with the fact that values of funds can fall as well as rise as you are currently invested in various funds within your personal pension. You are also familiar with bank and building society accounts and you have experience of ISA's... You have a deferred [Defined Benefit Pension Scheme] and a Stakeholder Plan..., the combined transfer value of these two plans based on the latest information we have received from your providers is £[an amount]. You also have [another Defined Benefit Pension Scheme], however, they are unable to release information at present so you have agreed to complete the transfer of your [Defined Benefit Pension Scheme and Stakeholder Plan] and then reassess the [transfer of the other Defined Benefit Pension Scheme] in the future. You have confirmed these are the only pension plans you have."*
- (3) In the section entitled "Objectives" or "Aims and Objectives" the reports confirmed that TMI was aware of the investment objective that had prompted the introduction to TMI. For example: *"In particular you have expressed an interest in using your pension fund to purchase a commercial property and using this property to increase the funding potential of your pension from its rental income."*
- (4) In the section entitled "Attitude to Risk", the suitability reports indicated that TMI was evaluating attitude to risk in preparing the Personal Recommendation. For example: *"Your risk is "highest medium" and "Your priority is likely to be making higher returns on your investments but you are still concerned about losing money due to rises and falls."* However, the suitability reports typically concluded: *"Although you have agreed that your overall attitude to risk is as above [e.g. highest medium] you would prefer to adopt a more self select approach as to where your money is invested. For example, you have indicated that more of your available fund may go into [e.g. purchasing an overseas commercial property]."*
- (5) In the section entitled "Conclusion" the suitability reports invariably explained the basis for the Personal Recommendation as follows: *"We note that you are personally seeking the option to self-invest and it is this factor which has predominately prompted our advice. We feel that a Self Invested*

Personal Pension would be more suitable for your needs and would meet your objectives as previously stated."

- (6) The suitability reports were signed by a member of TMI's staff referred to as a "Pension Transfer Specialist".
- 4.23. Notwithstanding the fact that the 26 suitability reports (relating to 20 customers) reviewed by the Authority typically stated that TMI took all of the customer's financial circumstances into account (along with the customer's attitude to risk and current pension provision), the above excerpts demonstrate that the factor that predominated in providing the Personal Recommendation to transfer or switch into a SIPP was the customer's wish to purchase Alternative Investments. The suitability reports reveal that 16 of the 20 customers were given a Personal Recommendation to transfer or switch their existing pension funds into a SIPP (see paragraph 4.24(4) in respect of the other four customers). The customer's wish to purchase Alternative Investments was the predominant factor in the Personal Recommendation for 14 of these 16 customers, while it was one of the main reasons given for the Personal Recommendation for the other two customers (who were both recommended to transfer or switch their pension funds into a Capped Drawdown Pension plan with a SIPP facility).
- 4.24. In addition to the above, the Authority's review of the 26 suitability reports disclosed the following:
- (1) 11 of the 20 customers wished to transfer out of a Defined Benefit Pension Scheme. For all of these customers, the Personal Recommendations Process was not suitable as the suitability report it produced did not comply with COBS 19.1.2.R, which, amongst other things, requires a firm not only to compare the benefits to be paid under a Defined Benefit Pension Scheme with the benefits afforded by a personal pension scheme, but also to ensure that the comparison includes enough information for the customer to be able to make an informed decision, and ensure that the customer understands the firm's comparison and its advice. Further, the Personal Recommendations Process did not apply the presumption in COBS 19.1.6G that the transfer would be unsuitable. For six of these 11 customers, the Personal Recommendation was predominantly based on the customer's objective of using pension funds to purchase Alternative Investments. One of the other five customers was recommended to transfer their pension funds into a Capped Drawdown Pension plan with a

SIPP facility and their wish to purchase Alternative Investments was one of the main reasons given for the Personal Recommendation. The Personal Recommendations given to the other four customers are explained in paragraph 4.24(4) below;

- (2) seven customers received a suitability report which identified specific Alternative Investments, with four of these seven customers receiving a suitability report which could have given the appearance that TMI was advising on the suitability of these investments. These suitability reports were therefore unclear and likely to mislead customers about the extent to which the Personal Recommendation related to the investments to be held in the SIPP. The other suitability reports also had the potential to be misleading as, although they did not purport to advise on the suitability of types of Alternative Investments for the customer, they all described the types of Alternative Investments that were available to be placed in a SIPP in the context of making a Personal Recommendation, and so the customer may have been unclear about the extent to which the Personal Recommendation related to the investments to be held in the SIPP;
- (3) only one customer had a high-risk attitude. The other customers' risk attitudes were described in the suitability reports as "cautious", "balanced", "growth", "medium", "high medium" or "highest medium". Notwithstanding this, in respect of 15 of the 19 customers who did not have a high-risk attitude, TMI made a Personal Recommendation to the customer to transfer or switch their existing pension funds into a SIPP with the awareness in each case that the SIPP was to be used to invest in Alternative Investments (see paragraph 4.24(4) in respect of the other four customers). In each of these cases, Alternative Investments were unlikely to be suitable for the customer in the light of the customer's risk attitude; and
- (4) four customers received a suitability report with a Personal Recommendation not to transfer out of their Defined Benefit Pension Scheme because *'any transfer of benefits at the present time would almost certainly reduce the pension income you receive in retirement'*. However, despite these recommendations, three of these customers later received a further suitability report containing a Personal Recommendation to transfer their pension funds into a SIPP. TMI informed the Authority that in these cases its 'insistency process' was applied: the customer wrote to TMI and

insisted that TMI proceed with the pension transfer despite its recommendation not to do so; and in response to this 'insistency letter', TMI provided the customer with a new suitability report which included a Personal Recommendation that the customer transfer their Defined Benefit Pension Scheme into a SIPP, with the predominant factor for the recommendation being the customer's wish to use pension funds to purchase Alternative Investments.

4.25. Further, the Authority concludes that the majority of the suitability reports it reviewed were lengthy, contradictory and confusing to the customer. As each suitability report either specified or described the types of Alternative Investments that were available to be placed in a SIPP, there was a risk that a customer would consider that, in giving advice, TMI had some regard to the suitability of these investments, unless it was explained verbally and clearly by the TMI member of staff advising on the transfer or switch that this was not the case. The Authority has not seen any evidence that any such verbal clarification was offered.

4.26. As a consequence of the failings noted in paragraphs 4.24 and 4.25 above, the Authority concludes that TMI's Personal Recommendations Process produced suitability reports that did not meet the information needs of its customers, in breach of Principle 7 and COBS 4.5.2R, 9.2.1R, 9.2.2R, 9.2.3R and 9.4.7R.

4.27. When the suitability reports (that the Authority has reviewed) are read as a whole it is clear that:

- (1) In nearly all cases TMI recommended that the customer transfer or switch their pension funds into a SIPP because the predominant factor in making a Personal Recommendation was the customer's objective of using pension funds to purchase the Alternative Investments. Further, the Personal Recommendations did not take account of all of the customer's relevant circumstances and the suitability reports did not clearly demonstrate that the transfer or switch to a SIPP was in the customer's best interests. TMI's Personal Recommendations Process was therefore inadequate as, rather than taking account of the customer's individual circumstances, demands and needs, it resulted in TMI making Personal Recommendations predominantly on the basis of the customer's objective of using pension funds to purchase the Alternative Investments. The Personal Recommendations were also unsuitable, and misleading, in that customers would have been given the impression that the Personal Recommendation

they received was based on a consideration of their overall individual circumstances. For this reason TMI did not treat customers fairly. TMI therefore failed to comply with Principles 6, 7 and 9 and COBS 2.1.1R, 4.5.2R, 9.2.1R, 9.2.2R, 9.2.3R and 9.4.7R.

- (2) In cases where the customer was intending to transfer from a Defined Benefit Pension Scheme, the Personal Recommendations Process did not comply with COBS 19.1.2R. Further, TMI did not apply the presumption in COBS 19.1.6G that the transfer from a Defined Benefit Pension Scheme would be unsuitable.

4.28. As the outcome of the Personal Recommendations Process depended predominantly on TMI's customers' common investment objective, as opposed to each customer's individual circumstances, demands and needs, the Personal Recommendations Process could not be relied upon to ensure that TMI gave appropriate Personal Recommendations to its customers. As a result of the failings in the Personal Recommendations Process, there was a risk that TMI would make Personal Recommendations which were inadequate, misleading and unfair.

4.29. Mr Burns knew, by reason of him being a director of the Unregulated Introducer, that all, or nearly all, of TMI's customers shared the same investment objective of using their pension funds to purchase Alternative Investments. As TMI's business model, which Mr Burns established, was based on TMI's customers having this objective, Mr Burns knew, or should have known, that TMI's Personal Recommendations Process could not be relied upon to ensure that TMI gave appropriate Personal Recommendations to its customers. Despite this, Mr Burns failed to take reasonable steps to ensure that TMI's Personal Recommendations Process complied with relevant regulatory requirements.

4.30. During the Relevant Period, TMI advised 1,661 customers to transfer or switch their pensions into SIPPs in order to purchase Alternative Investments, with amounts ranging from £5,000 to £440,000 each in, or via, a SIPP. Those customers transferred £112,420,985 in total into SIPPs. The vast majority of this money came from the customers' existing pensions. 517 of the 1,661 customers transferred their existing Defined Benefits Pensions into SIPPs. Of these 1,661 customers, 923 invested in overseas property developments operated by Harlequin.

4.31. As a direct result of Mr Burns' failings, during the Relevant Period all 1,661 of TMI's customers, who went through TMI's Personal Recommendations Process, were at significant risk of transferring or switching their pension funds into SIPPs which were not suitable for them.

4.32. During the Relevant Period, TMI generated £3,081,740 in revenue from its SIPP business. Mr Burns' total proceeds received directly and indirectly from TMI's business were £324,531.

Conflicts of Interest

4.33. The Unregulated Introducer received a financial benefit in the form of a commission payment from the providers of the Alternative Investments if a customer, following a referral by the Unregulated Introducer to TMI, purchased Alternative Investments to hold in a SIPP. During the Relevant Period, Mr Burns received significant financial benefit from his positions as a director and shareholder of the Unregulated Introducer, which was paid either directly or through a remuneration trust linked to the Unregulated Introducer.

4.34. In addition to his roles with the Unregulated Introducer, Mr Burns directly introduced four customers to TMI. As a result of these direct introductions, Mr Burns was entitled to receive a proportion of the commission for his part in facilitating the sale of Alternative Investments to customers through the Unregulated Introducer. Mr Burns did not take that commission directly, but left it as part of the financial resources of the Unregulated Introducer (which he benefitted from as a director and shareholder of the Unregulated Introducer).

4.35. Mr Burns therefore benefitted financially from both the fees paid by customers for the advice given by TMI on the SIPP transfer or switch (as a director and shareholder of TMI), and also from the financial benefits he received from the Unregulated Introducer (as a director and shareholder of the Unregulated Introducer), for his role, and the Unregulated Introducer's role, in the sale of Alternative Investments to the customer.

4.36. A number of other individuals at TMI were also owners of, or acted as agents of, the Unregulated Introducer. The Unregulated Introducer would only financially benefit from introducing a customer to TMI if TMI advised the customer to transfer or switch their pension into a SIPP. Accordingly, Mr Burns and these other individuals had a financial interest, which was distinct from the customer's interest, in the outcome of the advice given by TMI to a customer referred to TMI by the

Unregulated Introducer (or by Mr Burns). There was therefore a conflict between the interests of Mr Burns and such other individuals in the outcome of TMI's advice (i.e. the Personal Recommendation) and the customer's interest in that outcome.

4.37. Throughout the Relevant Period, TMI's client agreement contained an express provision that conflicts of interest would be disclosed to customers. However, TMI did not inform customers about the financial interests of Mr Burns and the other individuals within TMI in the outcome of TMI's advice.

4.38. In accordance with Principle 8 and SYSC 10.1.7R and 10.1.8R, TMI was required to manage the conflicts of interest fairly and clearly disclose them. Customers who approached TMI following referrals from the Unregulated Introducer should have been made fully aware of the links between the two firms and the financial interests of Mr Burns and the other individuals within TMI in the outcome of TMI's advice. If this was not possible, TMI should have taken steps to reconsider its business model to address these conflicts of interest and the risk of customer detriment arising from its business model.

4.39. However, TMI failed to comply with its regulatory obligations to manage conflicts of interest fairly and clearly disclose them. Specifically, TMI failed to ensure that:

- (1) customers were informed of its relationship with the Unregulated Introducer;
- (2) customers were informed that directors and other individuals at TMI would benefit financially if the customer purchased Alternative Investments; and
- (3) a suitable process was put in place for managing the conflicts of interest.

4.40. As a result of these failings, TMI's customers were unable to make a fully informed decision about:

- (1) seeking advice from TMI in relation to transferring or switching their pension funds into a SIPP;
- (2) accepting the Personal Recommendation they received from TMI; and
- (3) using their existing pension funds to purchase Alternative Investments.

4.41. In addition, during the majority of the Relevant Period, TMI did not have a formal conflicts of interest register in place to assist in identifying potential conflicts of interest within the firm. When a conflicts of interest register was put in place at

TMI towards the end of the Relevant Period, TMI still did not use the information recorded on that register to ensure that it managed fairly, and clearly disclosed, those conflicts.

4.42. As a CF1 (Director) at TMI, Mr Burns was required to take reasonable steps to ensure that TMI complied with, amongst other things, Principle 8 and SYSC 10.1.7R and 10.1.8R. However, during the Relevant Period, Mr Burns failed to ensure that TMI managed fairly and clearly disclosed Mr Burns' personal conflicts of interest and the conflicts of interest relating to other individuals at TMI, despite being aware of the respective roles of TMI and the Unregulated Introducer and how he and other individuals at TMI benefitted from the relationship between the firms.

4.43. Mr Burns recognised, in hindsight, the potential for confusion among customers dealing with the various TailorMade entities. He stated that *"there was too much scope in our model, with hindsight, for client confusion...they have common directors, but they have different names"*. However, Mr Burns told the Authority that *"TMI didn't advise on the products, so from a conflicts point of view, in my mind, there wasn't a conflict there"*.

4.44. Mr Burns' failings are compounded by the fact that, during the Relevant Period, TMI's external compliance consultant warned TMI of the need to disclose conflicts of interest within TMI. In April 2012 a compliance report from the external compliance consultant recommended that all TMI staff should be made aware of potential conflicts of interest issues, that these be discussed at regular board and compliance meetings and that TMI should ensure that an annual conflicts of interest questionnaire be completed. As a CF1 Director, Mr Burns should have acknowledged and acted upon this warning. However, Mr Burns only appears to have taken action in relation to this warning towards the end of October 2012 when conflicts of interest were first noted on a register. Mr Burns has accepted that, in hindsight, there was a lack of appropriate management of conflicts of interest.

5. FAILINGS

5.1. The regulatory provisions relevant to this Decision Notice are referred to in Annex A.

5.2. By reason of the facts and matters referred to above, during the Relevant Period Mr Burns breached Statement of Principle 7 in that he failed to take reasonable steps to ensure that:

(1) TMI complied with Principles 6, 7 and 9 and COBS 2.1.1R, 4.5.2R, 9.2.1R, 9.2.2R, 9.2.3R, 9.4.7R and 19.1.2R. TMI's Personal Recommendations Process, which Mr Burns was jointly responsible for, was inadequate, as, rather than taking account of the customer's individual circumstances, demands and needs, including whether they were intending to transfer from a Defined Benefit Pension Scheme, it resulted in Personal Recommendations being made predominantly on the basis of the customer's objective of using their existing pension funds to purchase Alternative Investments. Further, the Personal Recommendations Process resulted in TMI's customers being misled, and not being treated fairly, because it did not meet customers' information needs and because customers would have been given the impression from the steps taken by TMI as part of the Personal Recommendations Process that the Personal Recommendation they received reflected their individual circumstances, demands and needs.

(2) TMI complied with Principle 8 and SYSC 10.1.7R and 10.1.8R. Mr Burns failed to ensure that TMI managed fairly and clearly disclosed Mr Burns' personal conflicts of interest and the conflicts of interest relating to other individuals at TMI.

5.3. As a consequence of his actions, Mr Burns failed to meet regulatory standards with regard to performing significant influence controlled functions. The Authority considers he is therefore not fit and proper (on the basis of his lack of competence and capability) to perform senior management functions or significant influence functions.

6. SANCTION

6.1. In determining the financial penalty, the Authority has had regard to its policy on the imposition of financial penalties which is set out in Chapter 6 of DEPP and forms part of the Handbook.

6.2. On 6 March 2010, the Authority's new penalty framework came into force. Mr Burns' misconduct took place both before and after 6 March 2010. However, as most of his misconduct occurred after 6 March 2010, the Authority has assessed the financial penalty under the regime in force after 6 March 2010.

6.3. DEPP 6.5B sets out the details of the five-step framework that applies in respect of financial penalties imposed on individuals in non-market abuse cases.

Step 1: disgorgement

- 6.4. Pursuant to DEPP 6.5B.1G, at Step 1 the Authority seeks to deprive an individual of the financial benefit derived directly from the breach where it is practicable to quantify this.
- 6.5. The Authority has not identified any financial benefit that Mr Burns derived directly from his misconduct in connection with regulated activities.
- 6.6. Step 1 is therefore £0.

Step 2: the seriousness of the breach

- 6.7. Pursuant to DEPP 6.5B.2G, at Step 2 the Authority determines a figure that reflects the seriousness of the breach. That figure is based on a percentage of the individual's relevant income. The individual's relevant income is the gross amount of all benefits received by the individual from the employment in connection with which the breach occurred, and for the period of the breach.
- 6.8. The period of Mr Burns' breach was from 22 January 2010 to 20 January 2013 inclusive. The Authority considers Mr Burns' relevant income for this period to be £324,531. This figure includes both amounts that Mr Burns earned directly from TMI, as well as amounts he received through a remuneration trust linked to TMI. The Authority has assessed that, on the facts of this case, the amounts that Mr Burns received through the remuneration trust mechanism should be included in the amounts that the Authority considers to be 'relevant income' for the purposes of assessing any financial penalty to be imposed on him (those amounts being a benefit received by him from the employment in connection with which the breaches occurred).
- 6.9. In deciding on the percentage of the relevant income that forms the basis of the Step 2 figure, the Authority considers the seriousness of the breach and chooses a percentage between 0% and 40%. This range is divided into five fixed levels which represent, on a sliding scale, the seriousness of the breach; the more serious the breach, the higher the level. For penalties imposed on individuals in non-market abuse cases there are the following five levels:

Level 1 – 0%

Level 2 – 10%

Level 3 – 20%

Level 4 – 30%

Level 5 – 40%

6.10. In assessing the seriousness level, the Authority takes into account various factors which reflect the impact and nature of the breach, and whether it was committed deliberately or recklessly. The Authority considers the following factors to be relevant.

Impact of the breach

6.11. As a direct result of Mr Burns' failings, during the Relevant Period, 1,661 of TMI's customers, who went through the Personal Recommendations Process, were at significant risk of transferring or switching their pension funds into SIPPs which were not suitable for them. These 1,661 TMI customers invested a total of £112,420,985, mostly from pension funds including 517 Defined Benefit Pension Schemes, in SIPPs. Of the 1,661 customers, 923 invested in overseas property developments operated by Harlequin.

6.12. The majority of TMI's customers invested in Alternative Investments that are unregulated and therefore not typically covered by the FSCS. Customers investing in unregulated investments are therefore at risk of losing all of their investments. There was therefore a significant risk of customer loss associated with Mr Burns' failings.

6.13. Mr Burns' failings did not have an adverse effect on markets.

Nature of the breach

6.14. Mr Burns' failings occurred over a sustained period (over three years) and resulted in the risk of loss of £112,420,985 for the 1,661 customers that went through the Personal Recommendations Process.

Whether the breach was deliberate and/or reckless

- 6.15. The Authority does not consider the breach by Mr Burns to be deliberate or reckless. Mr Burns relied on the advice of an external compliance consultant, plus qualified, experienced and approved TMI Board colleagues who did not raise concerns relating to TMI's business model.
- 6.16. The breach was as a result of a lack of competence rather than being intentional and there was no attempt by Mr Burns to conceal the breach.
- 6.17. Mr Burns did not fail to act with integrity or abuse a position of trust and has not previously been disciplined by the Authority.
- 6.18. Taking all of these factors into account, the Authority considers the seriousness of the breach to be level 3 and so the Step 2 figure is 20% of £324,531.
- 6.19. Step 2 is therefore £64,906.

Step 3: mitigating and aggravating factors

- 6.20. Pursuant to DEPP 6.5B.3G, at Step 3 the Authority may increase or decrease the amount of the financial penalty arrived at after Step 2, but not including any amount to be disgorged as set out in Step 1, to take into account factors which aggravate or mitigate the breach.
- 6.21. The Authority does not consider there to be any factors that aggravate the breach.
- 6.22. In assessing the potential mitigating factors that may apply, the Authority notes that as a direct result of the Authority's alert of 18 January 2013, Mr Burns took immediate steps to address the issues it highlighted at TMI. As a result of his actions, TMI voluntarily suspended advising customers on SIPPs on 20 January 2013, and on 13 March 2013 TMI voluntarily varied its permissions such that TMI no longer carried on regulated activities. In addition to the variation of permissions, Mr Burns cooperated with the Authority and proactively created and implemented a remediation plan to deal with the pipeline of TMI's customers who were affected by the variation of permissions. The total costs of the plan were £507,000 and Mr Burns injected £50,539 of his own funds to help TMI meet the costs of the plan. The Authority considers that the immediate steps taken by Mr Burns following the 18 January 2013 alert and the injection of his own funds to help TMI meet the costs of the remediation plan are factors which mitigate the breach.

6.23. The Authority also notes that on 4 March 2013 Mr Burns undertook a training course entitled 'Director of a Regulated Financial Services Company' in response to the Authority's January 2013 alert. Mr Burns successfully completed the course, and received an assessment of 'competent' from the provider of the training. The Authority considers that this aspect of the remediation plan is an additional factor which mitigates the breach.

6.24. As a result, the Authority considers that the Step 2 figure should be reduced by 10%.

6.25. Step 3 is therefore £58,415.

Step 4: adjustment for deterrence

6.26. Pursuant to DEPP 6.5B.4G, if the Authority considers the figure arrived at after Step 3 is insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches, then the Authority may increase the penalty.

6.27. The Authority considers that the Step 3 figure of £58,415 does not represent a sufficient deterrent to Mr Burns and others, and so has increased the penalty at Step 4. In deciding this, the Authority has taken particular note of the significant financial benefit received by Mr Burns from his positions as a director and shareholder of the Unregulated Introducer, which was paid either directly or through a remuneration trust linked to the Unregulated Introducer. As Mr Burns' breach of Statement of Principle 7 occurred in connection with his employment at TMI, and not in connection with his employment at the Unregulated Introducer, this financial benefit has not been taken into account in the calculation of Mr Burns' relevant income set out in paragraph 6.8 above. The Authority therefore has increased the Step 3 figure by a multiple of 4.

6.28. Step 4 is therefore £233,660.

Step 5: settlement discount

6.29. Pursuant to DEPP 6.5B.5G, if the Authority and the individual on whom a penalty is to be imposed agree the amount of the financial penalty and other terms, DEPP 6.7 provides that the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the Authority and the

individual reached agreement. The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1.

6.30. The Authority and Mr Burns have not reached a settlement agreement during stage 1 or stage 2.

6.31. Step 5 is therefore £233,660.

Penalty

6.32. Having applied the five-step framework set out in DEPP, the Authority has decided that the appropriate level of financial penalty to be imposed on Mr Burns is £233,600 (rounded down to the nearest £100) for breaching Statement of Principle 7.

Withdrawal of approvals and prohibition

6.33. The Authority has had regard to the guidance in Chapter 9 of EG and considers it is appropriate and proportionate in all the circumstances to withdraw Mr Burns' CF1 (Director) and CF3 (Chief Executive) controlled functions at TMI. The Authority also considers it appropriate and proportionate to prohibit Mr Burns from performing any senior management function or significant influence function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm. This is because Mr Burns is not a fit and proper person to hold such functions on account of his lack of competence and capability.

7. REPRESENTATIONS

7.1. Annex B contains a brief summary of the key representations made by Mr Burns and how they have been dealt with. In making the decision which gave rise to the obligation to give this Decision Notice, the Authority has taken into account all of the representations made by Mr Burns, whether or not set out in Annex B.

8. PROCEDURAL MATTERS

8.1. This Decision Notice is given to Mr Burns under sections 57, 63 and 67 of the Act. It is also given to TMI as an interested party pursuant to section 63 of the Act. It is given to Mr Burns and TMI in accordance with section 388 of the Act.

Decision maker

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

The Tribunal

- 8.3. Mr Burns and TMI have the right to refer the matter to which this Decision Notice relates to the Tribunal. Under paragraph 2(2) of Schedule 3 of the Tribunal Procedure (Upper Tribunal) Rules 2008, Mr Burns and TMI have 28 days from the date on which this Decision Notice is given to them to refer the matter to the Tribunal. A reference to the Tribunal is made by way of a signed reference form (Form FTC3) filed with a copy of this Notice. The Tribunal's contact details are: The Upper Tribunal, Tax and Chancery Chamber, Fifth Floor, Rolls Building, Fetter Lane, London EC4A 1NL (tel: 020 7612 9730; email: fs@hmcts.gsi.gov.uk).

- 8.4. Further information on the Tribunal, including guidance and a link to 'Forms and leaflets' which include Form FTC3 and notes on that form, can be found on the HM Courts and Tribunal Service website:

<http://www.justice.gov.uk/tribunals/tax-and-chancery-upper-tribunal>

- 8.5. A copy of Form FTC3 must also be sent to the Financial Conduct Authority (25 The North Colonnade, Canary Wharf, London E14 5HS) at the same time as filing a reference with the Tribunal.

Access to evidence

- 8.6. Section 394 of the Act applies to this Decision Notice. In accordance with section 394, Mr Burns and TMI have the right to access:

- (1)** the material upon which the Authority has relied in deciding to give this Decision Notice. This material was enclosed with the Warning Notice given to Mr Burns on 7 December 2015; and
- (2)** any secondary material which, in the opinion of the Authority, might undermine that decision. This material was provided to Mr Burns on 10 February 2016.

Confidentiality and publicity

- 8.7. This Decision Notice may contain confidential information and should not be disclosed to a third party (except for the purpose of obtaining advice on its contents). In accordance with section 391 of the Act, a person to whom this Decision Notice is given or copied may not publish the Decision Notice or any details concerning it unless the Authority has published the Decision Notice or those details.
- 8.8. However, the Authority must publish such information about the matter to which a decision notice or final notice relates as it considers appropriate. Mr Burns and TMI should be aware, therefore, that the facts and matters contained in this Decision Notice may be made public.

Beverley Walker, DMC Secretariat Manager, on behalf of

Peter Hinchliffe

Deputy Chair, Regulatory Decisions Committee

ANNEX A

Relevant statutory and regulatory provisions

1. Relevant statutory provisions

- 1.1 The Authority's operational objectives, set out in section 1B(3) of the Act, include the consumer protection objective.
- 1.2 Section 63 of the Act provides that the Authority may withdraw an approval issued under section 59 of the Act in relation to the performance by a person of a function if the Authority considers that the person is not a fit and proper person to perform the function. If the Authority decides to withdraw an approval, it must give each of the interested parties a notice. Each interested party may refer the matter to the Tribunal.
- 1.3 Section 66 of the Act provides that the Authority may take action against a person if it appears to the Authority that he is guilty of misconduct and the Authority is satisfied that it is appropriate in all the circumstances to take action against him. A person is guilty of misconduct if, while an approved person, he has failed to comply with a statement of principle issued under section 64 or section 64A of the Act, or has been knowingly concerned in a contravention by a relevant authorised person of a relevant requirement imposed on that authorised person.
- 1.4 Section 56 of the Act provides that the Authority may 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 Authority 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. Such an order may relate to a specified regulated activity, any regulated activity falling within a specified description, or all regulated activities.

2 Relevant regulatory provisions

- 2.1 Unless otherwise stated, the regulatory provisions set out below are the versions that were in force on 20 January 2013 (i.e. the last day of the Relevant Period).

Principles for Businesses

2.2 The Principles are a general statement of the fundamental obligations of firms under the regulatory system and are set out in the Handbook. They derive their authority from the Authority's rule making powers set out in the Act.

2.3 Principle 6 states:

"A firm must pay due regard to the interests of its customers and treat them fairly."

2.4 Principle 7 states:

"A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading."

2.5 Principle 8 states:

"A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client."

2.6 Principle 9 states:

"A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment."

Statements of Principle and Code of Practice for Approved Persons

2.7 The Authority's Statements of Principle have been issued under section 64 of the Act.

2.8 Statement of Principle 7 states:

"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."

The Fit and Proper Test for Approved Persons (as in force at the date of this Notice)

2.9 The part of the Handbook entitled "The Fit and Proper Test for Approved Persons" ("FIT") sets out the criteria that the Authority will consider when 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.

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

Conduct of Business Rules

2.11 The following rules in COBS are relevant regarding the suitability of advice given to customers:

COBS 2.1.1R – The client's best interests rule

- (1) A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).
- (2) This rule applies in relation to designated investment business carried on:
 - (a) for a retail client; and
 - (b) in relation to MiFID or equivalent third country business, for any other client.
- (3) For a management company, this rule applies in relation to any UCITS scheme or EEA UCITS scheme the firm manages.

COBS 4.5.2 – General Rule

A firm must ensure that information:

- (1) includes the name of the firm;
- (2) is accurate and in particular does not emphasise any potential benefits of relevant business or a relevant investment without also giving a fair and prominent indication of any relevant risks;
- (3) is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received; and

- (4) does not disguise, diminish or obscure important items, statements or warnings.

COBS 9.2.1R – Assessing suitability: the obligations

- (1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.
- (2) When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:
- (a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;
 - (b) financial situation; and
 - (c) investment objectives;
- so as to enable the firm to make the recommendation, or take the decision, which is suitable for him.

COBS 9.2.2R

- (1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:
- (a) meets his investment objectives;
 - (b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and
 - (c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.
- (2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

- (3) The information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

COBS 9.2.3R

The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:

- (1) the types of service, transaction and designated investment with which the client is familiar;
- (2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;
- (3) the level of education, profession or relevant former profession of the client.

COBS 9.4.1R - Providing a suitability report

A firm must provide a suitability report to a retail client if the firm makes a personal recommendation to the client and the client:

...

- (2) buys, sells, surrenders, converts or cancels rights under, or suspends contributions to, a personal pension scheme or a stakeholder pension scheme;...
- (4) enters into a pension transfer or pension opt-out.

COBS 9.4.7R – Contents [of a suitability report]

The suitability report must, at least:

- (1) specify the client's demands and needs;

- (2) explain why the firm has concluded that the recommended transaction is suitable for the client having regard to the information provided by the client; and
- (3) explain any possible disadvantages of the transaction for the client.

COBS 9.4.8G

A firm should give the client such details as are appropriate according to the complexity of the transaction.

COBS 19.1.2R – Preparing and providing a transfer analysis

1.2. A firm must:

- (1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme with the benefits afforded by a personal pension scheme or stakeholder pension scheme, before it advises a retail client to transfer out of a defined benefits pension scheme;
- (2) ensure that that comparison includes enough information for the client to be able to make an informed decision;
- (3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, no later than when the key features document is provided; and
- (4) take reasonable steps to ensure that the client understands the firm's comparison and its advice.

COBS 19.1.3G

In particular, the comparison should:

- (1) take into account all of the retail client's relevant circumstances;
- (2) have regard to the benefits and options available under the ceding scheme and the effect of replacing them with the benefits and options under the proposed scheme;
- (3) explain the assumptions on which it is based and the rates of return that would have to be achieved to replicate the benefits being given up; and

- (4) be illustrated on rates of return which take into account the likely expected returns of the assets in which the retail client's funds will be invested.

COBS 19.1.6G – Suitability

When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests.

COBS 19.1.7G

When a firm advises a retail client on a pension transfer or pension opt-out, it should consider the client's attitude to risk in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up.

COBS 19.1.7AG

When giving a personal recommendation about a pension transfer, a firm should clearly inform the retail client about the loss of the fixed benefits and the consequent transfer of risk from the defined benefits pension scheme to the retail client, including:

- (1) the extent to which benefits may fall short of replicating those in the defined benefits pension scheme;
- (2) the uncertainty of the level of benefit that can be obtained from the purchase of a future annuity and the prior investment risk to which the retail client is exposed until an annuity is purchased with the proceeds of the proposed personal pension scheme or stakeholder pension scheme; and
- (3) the potential lack of availability of annuity types (for instance, annuity increases linked to different indices) to replicate the benefits being given up in the defined benefits pension scheme.

COBS 19.1.7BG

In considering whether to make a personal recommendation, a firm should not regard a rate of return which may replicate the benefits being given up from the defined benefits pension scheme as sufficient in itself.

COBS 19.1.8G

When a firm prepares a suitability report it should include:

- (1) a summary of the advantages and disadvantages of its personal recommendation;
- (2) an analysis of the financial implications (if the recommendation is to opt-out); and
- (3) a summary of any other material information.

COBS 19.2.2R

When a firm prepares a suitability report it must:

- (1) (in the case of a personal pension scheme), explain why it considers the personal pension scheme to be at least as suitable as a stakeholder pension scheme; and
- (2) (in the case of a personal pension scheme, stakeholder pension scheme or FSAVC) explain why it considers the personal pension scheme, stakeholder pension scheme or FSAVC to be at least as suitable as and facility to make additional contributions to an occupational pension scheme, group personal pension scheme or group stakeholder pension scheme which is available to the retail client.

SYSC rules**SYSC 10.1.7R**

A firm must maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps to prevent conflicts of interest as defined in SYSC 10.1.3R from constituting or giving rise to a material risk of damage to the interests of its clients.

SYSC 10.1.8R

(1) If arrangements made by a firm under SYSC 10.1.7R to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of a client will be prevented, the firm must clearly disclose the general nature and/or sources of conflicts of interest to the client before undertaking business for the client.

(2) The disclosure must:

(a) be made in a durable medium; and

(b) include sufficient detail, taking into account the nature of the client, to enable that client to take an informed decision with respect to the service in the context of which the conflict of interest arises.

The Authority's policy for exercising its power to make a prohibition order

2.12 The Authority's policy in relation to prohibition orders is set out in Chapter 9 of EG.

2.13 EG 9.1.1 (as in force at the date of this Notice) states that the Authority may exercise this power where it considers that, to achieve any of its regulatory 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.

DEPP

2.14 Chapter 6 of DEPP sets out the Authority's statement of policy with respect to the imposition and amount of financial penalties under the Act.

ANNEX B
REPRESENTATIONS

1. Mr Burns' representations (in italics), and the Authority's conclusions in respect of them, are set out below:

Limitation in respect of the failings in TMI's Personal Recommendations Process

2. *The misconduct alleged in the Warning Notice with regards to the failings in TMI's Personal Recommendations Process is a recast version of the misconduct alleged in the draft warning notice sent to Mr Burns on 3 July 2015 (the "Draft Warning Notice") and in the Preliminary Investigation Report dated 7 August 2015 (the "PIR"). The essence of the alleged misconduct is the failure by TMI to advise customers on the suitability of the Alternative Investments. The allegation that TMI's Personal Recommendations Process was inadequate makes little sense if it does not include an allegation that TMI failed to advise customers on the suitability of the Alternative Investments. This is because TMI's Personal Recommendations Process cannot be judged without considering whether TMI advised on the Alternative Investments. Therefore, the misconduct for the purpose of assessing limitation is the failure to advise on the Alternative Investments at all.*
3. *Mr Burns told the Authority that TMI did not provide advice as to the suitability of the Alternative Investments as far back as 2010 and at the latest at a meeting with the Authority on 16 January 2012. Therefore, the Authority had the relevant knowledge for the purposes of limitation (as set out in section 66(4) FSMA) more than three years before the Warning Notice was given to Mr Burns. Accordingly, the Authority has no power to impose a financial penalty on Mr Burns in respect of Mr Burns' alleged failure to take steps to ensure that TMI's Personal Recommendations Process complied with regulatory requirements.*
4. The Authority's initial view, as set out in the Draft Warning Notice and in the PIR, was that Mr Burns' misconduct related to a failure by TMI to advise customers on the suitability of the Alternative Investments. However, after reviewing the relevant evidence, the Authority (through its Regulatory Decisions Committee) concluded that the evidence most strongly supported the misconduct described in the Warning Notice (and in this Decision Notice). This misconduct concerns Mr Burns' failure to take reasonable steps to ensure that TMI's Personal Recommendations Process complied with regulatory requirements. It does not include, and does not rely upon,

a finding that TMI failed to advise customers on the suitability of the Alternative Investments. Instead, the Authority's finding is that Mr Burns failed to take reasonable steps to ensure that TMI's Personal Recommendations Process was adequate because, rather than taking account of the customer's individual circumstances, demands and needs, the Personal Recommendations Process resulted in TMI making Personal Recommendations predominantly on the basis of the customer's objective of using pension funds to purchase Alternative Investments. This is a specific finding of misconduct, which is separate from any allegation that Mr Burns failed to ensure that TMI gave advice on the Alternative Investments.

5. The Authority does not agree that, if it had knowledge that TMI did not advise on the Alternative Investments, that would constitute knowledge from which the Authority could reasonably infer that Mr Burns had committed the misconduct described in the Warning Notice and in this Decision Notice. Therefore, it is not necessary for the Authority to reach a conclusion as to when the Authority became aware that TMI did not advise on the suitability of the Alternative Investments.
6. For these reasons, the Authority does not accept Mr Burns' arguments on limitation.

Conflicts of interest failings

7. *During the Relevant Period, Mr Burns believed that any potential conflicts of interest were appropriately managed, as advisers at TMI were not remunerated by TMI on the basis of the volume of SIPPs they sold.*
8. At least one adviser at TMI was remunerated on the basis of TMI's financial performance, which was dependent upon the volume of SIPPs sold. Further, how TMI's advisers were remunerated was not sufficient to manage the conflict arising from the financial interest of Mr Burns and other individuals at TMI in the outcome of the advice given by TMI to its customers. In addition, Mr Burns failed to ensure that TMI disclosed this conflict to its customers.

Serious financial hardship

9. *Mr Burns does not have the funds to pay a fine now, or in the foreseeable future. Mr Burns' outgoings are substantially greater than his income and a financial penalty would result in him being declared bankrupt.*
10. *Mr Burns submitted that payment of the proposed financial penalty would cause him serious financial hardship. The Authority's assessment of whether payment of the*

penalty would cause Mr Burns serious financial hardship is flawed in the following respects:

- a. It is inaccurate and is based on out-of-date figures.*
- b. The assessment is unfair in that the calculations are based on the value of unrealisable assets and/or assets that are not readily realisable.*
- c. It excludes loans from remuneration trusts linked to TMI and the Unregulated Introducer, and a legal charge over Mr Burns' property placed by the remuneration trust linked to the Unregulated Introducer.*
- d. It uses high end valuations.*
- e. It takes little or no account of the circumstances outlined in the explanatory note accompanying the statement of means form submitted by Mr Burns on 10 August 2015.*

11. The Authority has assessed whether the financial penalty should be reduced on the ground that it would cause Mr Burns serious financial hardship in accordance with the approach set out in DEPP 6.5D and does not accept that it has acted unfairly. DEPP 6.5D states that when considering a claim that a financial penalty would cause serious financial hardship, the starting point is that the individual will suffer serious financial hardship only if his net annual income will fall below £14,000 and his capital will fall below £16,000 as a result of payment of the penalty. Unless the Authority believes that both the individual's income and capital will fall below these respective thresholds as a result of payment of the penalty, the Authority is unlikely to be satisfied that the penalty will result in serious financial hardship.

12. The Authority has carried out its assessment on the basis of the financial information provided by Mr Burns in August 2015. On the basis of that information, the Authority has assessed that payment of a financial penalty of £233,600 would not cause Mr Burns' capital to fall below £16,000. As a result, the Authority considers that payment of the financial penalty would not cause Mr Burns serious financial hardship.

13. The Authority, in carrying out its assessment, did not treat the loans Mr Burns received from the remuneration trusts linked to TMI and the Unregulated Introducer as liabilities, because Mr Burns, as a director of the remuneration trusts' management companies, had control over enforcing the terms of the loans. Further, even if the loans were to be repaid, Mr Burns could receive all of the funds back

immediately in the form of further loans from the remuneration trusts. The Authority has excluded as a liability the legal charge placed on Mr Burns' property by the remuneration trust linked to the Unregulated Introducer (as security for the loans) for similar reasons.

14. The Authority has noted Mr Burns' assertion that the Authority's assessment is inaccurate and is based on out-of-date figures. However, DEPP 6.5D.1(3)G states that the onus is on the individual to satisfy the Authority that payment of the penalty will cause serious financial hardship. Therefore, it was for Mr Burns to provide up-to-date and verifiable information to the Authority, but he has not done so since August 2015.

15. The Authority considered the matters outlined in Mr Burns' explanatory note of 10 August 2015. However, on the basis of the evidence available to the Authority, Mr Burns' capital will not fall below £16,000 and therefore the Authority does not consider that the financial penalty is likely to cause Mr Burns serious financial hardship.

Mr Burns' fitness and propriety

16. *The Authority is wrong to assert that Mr Burns is not a fit and proper person. Mr Burns' fitness and propriety should be judged in the light of his actions after the Authority's alert on 18 January 2013. In particular:*

- a. Mr Burns took immediate steps to address the issues highlighted by the Authority and immediately suspended TMI's business.*
- b. Mr Burns co-operated with the Authority during the investigation.*
- c. Mr Burns pro-actively implemented a remediation plan to deal with the pipeline of customers who were affected by the cessation of business.*
- d. Mr Burns undertook a Director Competence Assessment on 4 March 2013 and was assessed as competent as a director of a regulated financial services firm.*

These actions demonstrate Mr Burns' competence and capability to perform the CF1 (Director) and CF3 (Chief Executive) controlled functions.

17. The Authority considers that Mr Burns' breach of Statement of Principle 7 demonstrates a serious lack of competence and capability. The actions Mr Burns took following the Authority's alert are not sufficient to allay the Authority's concerns. The

Authority is therefore not satisfied that Mr Burns is a fit and proper person to perform any senior management or significant influence functions, including the CF1 (Director) and CF3 (Chief Executive) controlled functions.

18. The Authority has taken into account Mr Burns' actions after the Authority's alert in determining the amount of the financial penalty that should be imposed on him.

Prohibition order

19. *The Authority is wrong to consider that a prohibition order, in these circumstances, is either appropriate or proportionate. The prohibition order would end Mr Burns' ability to earn a livelihood within financial services. Mr Burns has a long and unblemished record and he has admitted and apologised for his misconduct in relation to conflicts of interest. In the circumstances, Mr Burns does not represent a risk to consumers.*
20. *The Authority should have regard to the comments made by the Tribunal in Andrew Wilkins v FCA that a prohibition order is a "draconian penalty" which is likely to be more appropriate in lack of integrity cases. The Authority did not find that Mr Burns acted without integrity nor did it find that his breach was deliberate or reckless. A prohibition order is not appropriate in these circumstances.*
21. The Authority considers that it is appropriate, in order to support the Authority's regulatory objective of securing an appropriate degree of protection for consumers, to prohibit Mr Burns from performing any significant management function and any significant influence function on account of his breach of Statement of Principle 7.
22. The Authority has taken into account the Tribunal's comments in *Andrew Wilkins v FCA*. In particular, the Authority notes the Tribunal's comment that "[in] the case of lack of competence, a prohibition order would be rare other than in cases where the lack of competence demonstrated was such that the person is likely to represent a risk to the public in the future". The Authority considers that Mr Burns' breach of Statement of Principle 7 demonstrates a serious lack of competence and capability such that, were Mr Burns to continue to hold senior management or significant influence functions, he would pose a risk to consumers in the financial services industry. In accordance with EG 9.6, should Mr Burns, following the issue of any final notice, make an application in the future for the revocation of the prohibition order, the Authority would take into account all relevant circumstances, including any evidence provided by Mr Burns that his unfitness, arising from his lack of competence and capability, had been remedied.

23. The prohibition order is limited to senior management functions and significant influence functions. It does not prohibit Mr Burns from holding other types of controlled functions or from performing unregulated roles within the financial services market.

Decisions to issue the Warning Notice and publish the Warning Notice Statement

24. *The Authority's Regulatory Decisions Committee made the decision to issue the Warning Notice, and to publish a Warning Notice Statement, without having seen 26 of the 37 documents comprising the potentially undermining material.*

25. *The Authority published the Warning Notice Statement when it was not necessary or appropriate to do so.*

26. The Authority's Regulatory Decisions Committee did not see the 26 potentially undermining documents due to an oversight which was brought to its attention after the Warning Notice had been issued and the Warning Notice Statement had been published. The Authority has apologised to Mr Burns for this oversight. The Authority has taken full account of all of the potentially undermining material in reaching the decision to issue this Decision Notice.

27. The Authority followed its appropriate procedures and policies, set out in DEPP chapter 3 and EG chapter 6, in making its decision to publish the Warning Notice Statement. These included providing Mr Burns with a draft of the Warning Notice Statement and giving him the opportunity to make representations on it. In response, Mr Burns informed the Authority that he did not object to the publication of the Warning Notice Statement.

Conduct of the Authority

28. *The Authority acted improperly in the following respects:*

a. The Authority's Supervision Division delayed in referring the case to the Authority's Enforcement and Market Oversight Division. In doing so, the Authority misled Mr Burns about the gravity of the misconduct and the consequences that would follow.

b. Supervision did not provide Enforcement with all the relevant documents relating to the case.

- c. Enforcement did not inform Mr Burns of important new evidence which affected the case.*
- d. The Authority's investigation resulted in several of Mr Burns' banks accounts being closed by the bank.*
- e. Enforcement delayed in interviewing Authority staff members in relation to the limitation issue and attempted to influence Authority staff members during the interviews.*

29. The Authority does not consider that any of Mr Burns' allegations regarding the conduct of the Authority undermine the evidence relied upon by it in reaching its decision (which has been made by the Regulatory Decisions Committee, a committee of the Authority which is independent from the Authority's Supervision Division and Enforcement and Market Oversight Division). Mr Burns' allegations may be pursued by him using the Complaints Scheme established under the Financial Services Act 2012, and the Authority does not address their substance in this Decision Notice.