



PURSUANT TO THE DECISION OF THE COURT OF APPEAL ON 21 DECEMBER 2017, THIS DECISION NOTICE HAS BEEN SUPERCEDED BY A [FINAL NOTICE](#) DATED 14 DECEMBER 2018.

DECISION NOTICE

To: Angela Burns

Individual Reference Number: AXB01363

Date: 28 November 2012

1. ACTION

1.1. For the reasons given in this notice, the Financial Services Authority ("FSA") has decided to:

- (1) make an order prohibiting Angela Burns from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm pursuant to section 56 of the Financial Services and Markets Act 2000 ("Act"); and
- (2) impose upon Angela Burns a financial penalty of £154,800 pursuant to section 66 of the Act.

2. SUMMARY OF REASONS

2.1. Angela Burns held Controlled Function 2 ("CF2") non-executive director ("NED") positions at:

- (1) Marine and General Mutual Life Assurance Society ("MGM") from 19 January 2009 until she resigned on 22 May 2011; and
- (2) Teachers Provident Society ("Teachers") from 5 May 2010 until she resigned on 31 May 2011

(collectively, "Mutual Societies").

2.2. The FSA has decided to take action against Angela Burns because she breached Statement of Principle 1 (An approved person must act with integrity in carrying out his controlled function) by recklessly, and in breach of her fiduciary position as a NED at the Mutual Societies:

- (1) failing to disclose her conflicts of interest to the Mutual Societies;
 - (2) disregarding her duties under companies legislation and under the Mutual Societies' articles of association and rules and conflicts documentation to declare her interest in the Mutual Societies' contracts (whether past or anticipated) with the investment manager (which, during the Relevant Period, was the same investment manager for both Mutual Societies – the "Investment Manager");
 - (3) telling the CEO and chairman of the board at MGM that there was no commercial arrangement nor was there any prospect of her working for the Investment Manager having suggested to the Investment Manager that she could assist it in a consulting capacity or as a non-executive director and reminding it of this; and
 - (4) failing to update the declaration of interest she executed with Teachers to inform it of her repeated attempts to engage in a business relationship with the Investment Manager.
- 2.3. These breaches began on 21 January 2009 (the first time Angela Burns attended an MGM board meeting at which the board discussed the possibility of using the Investment Manager and Angela Burns failed to declare that she was actively seeking work with the Investment Manager) and continued until 31 May 2011 (the date Angela Burns resigned from Teachers) ("Relevant Period").
- 2.4. Angela Burns' conduct is serious because she:
- (1) fell below the standards expected of a NED;
 - (2) maintained throughout that she did not have a conflict of interest;
 - (3) caused detriment to:
 - (a) the Investment Manager because her behaviour caused it to withdraw from the opportunity to secure an investment mandate with Teachers; and
 - (b) Teachers because the Investment Manager was its preferred candidate.
- 2.5. The FSA makes no criticism of the Mutual Societies or the Investment Manager in relation to the findings against Angela Burns.

3. DEFINITIONS

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

"**2008 Proposal**" – see paragraph 4.7.

"**5 November email**" – see paragraph 4.45.

"**APER**" means the part of the Handbook in High Level Standards which has the title Statements of Principle and Code of Practice for Approved Persons.

"**DEPP**" means the Decision Procedure and Penalties Manual.

"**FIT**" means the part of the Handbook in High Level Standards which has the title the Fit and Proper test for Approved Persons.

"**Investment Manager**" – see paragraph 2.2(2)

"**MGM**" – see paragraph 2.1(1)

"**Mutual Societies**" – see paragraph 2.1.

"**Relevant Period**" – see paragraph 2.3.

"**Statement of Principle 1**" – see paragraph 3.5 of the Annex.

"**Teachers**" - see paragraph 2.1(2).

4. FACTS AND MATTERS

Angela Burns

- 4.1. Angela Burns is an experienced professional in the UK investment industry and the chief executive of her own investment consultancy business. The FSA approved her to perform a CF2 non-executive director role at MGM (on 19 January 2009) and Teachers (on 5 May 2010).
- 4.2. It is her conduct in a personal capacity while a NED at MGM and Teachers, and her use of those positions for her own longer term benefit, that is the subject of this Decision Notice. She did not recognise, and therefore failed to disclose, that her interest in working for the Investment Manager and her repeated attempts to do so amounted to a conflict of interest.

The Investment Manager

2006

- 4.3. In 2006, Angela Burns, through her consultancy business, drafted a report for the Investment Manager recommending its entry into the UK investment market.
- 4.4. Having completed the report, Angela Burns emailed the Investment Manager and asked it for the "*opportunity to turn*" her proposal into a "*successful business*" in the UK.
- 4.5. A person from the Investment Manager responded saying that, depending on the direction the Investment Manager decided to take, he would be happy to discuss next steps with Angela Burns including the role Angela Burns mentioned in her note. Her interest and commitment were greatly appreciated.

2008

- 4.6. The Investment Manager contacted Angela Burns in around May 2008 to let her know that it had decided to enter the UK investment market. Angela Burns met the executive responsible for the Investment Manager's retail and institutional business in the UK in June 2008 and sent an email to him summarising the areas in which she believed she could assist the Investment Manager to achieve its goals.
- 4.7. In September 2008, Angela Burns met the head of the Investment Manager's UK business again and following that meeting put forward (through her business

consultancy) a formal written proposal outlining the consultancy work she could perform (the "2008 Proposal") for the Investment Manager. Through her business consultancy, she proposed to:

- (1) conduct private banking consultancy work in the UK and Switzerland;
- (2) "gather" assets in the institutional sector on an "ad valorem" basis; and
- (3) through "Governance Oversight" provide "non-executive services" to the Investment Manager's funds (including funds in Dublin), corporate entities and management companies.

4.8. The 2008 Proposal would have required the Investment Manager to pay Angela Burns' business consultancy, a third party, for helping it place funds under management. The Investment Manager, however, did not pay third parties for this work.

MGM

Angela Burns' role at MGM

4.9. By letter dated 9 December 2008, MGM notified Angela Burns that its board wished to appoint her as:

- (1) a NED;
- (2) the chair of their investment committee; and
- (3) its NED representative at its Dublin based subsidiary.

The Companies Act 2006

4.10. MGM is governed by the Companies Act 2006. Section 177 of the Companies Act 2006 requires a director to do three things:

- (1) if a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, to declare the "nature and extent of that interest to the other directors" (section 177(1));
- (2) if the declaration becomes inaccurate or incomplete, to make a further declaration (section 177(3)); and
- (3) make the declaration before the company enters into the transaction or arrangement (section 177(4)).

MGM's conflicts documentation

4.11. On joining MGM, the firm gave Angela Burns a copy of its Approved Persons Manual. The section entitled "Responsibilities of Approved Persons" sets out, among other things, its policies on conflicts of interest and the use of confidential or sensitive information:

"Conflict of Interests

Approved Persons must exercise care to ensure that there is no conflict between their personal interests and those of the Society or its customers. If such a conflict arises, or appears likely to arise, an Approved Person

should discuss the matter with an appropriate person; for example, the Chief Executive (for Society staff) or the chairman (for Non Executive Directors).

Such discussions should be recorded to ensure that the Approved Person's actions are transparent and cannot be misinterpreted.

Confidential or Sensitive Information

When undertaking a Controlled Function, an Approved Person may have access to, or otherwise become aware of, confidential or market sensitive information relating to the Society or another company outside the MGM group.

In addition to keeping such information confidential, an Approved Person must not use it for the purposes of personal gain or benefit."

2008

- 4.12. Angela Burns attended her first MGM board meeting as an observer in December 2008 in anticipation of her official appointment.
- 4.13. Shortly after attending MGM's December board meeting, Angela Burns emailed the Investment Manager on 13 December 2008 to let it know that she had joined MGM's board. In the same email she noted, *"it will be helpful to keep up to date with your plans and see where there may be opportunities."* She also attached her 2008 Proposal to the email without commenting on it specifically.

2009

- 4.14. In early January, Angela Burns sent three emails to other contacts at the Investment Manager similar to the one sent on 13 December 2008.
- 4.15. On 19 January, the FSA approved Angela Burns as a CF2 at MGM.
- 4.16. On 21 January, Angela Burns attended her first MGM board meeting as a board member. Following the discussion at that meeting about a passive fund provider, she recommended that the board should consider using the Investment Manager. Although MGM was aware that Angela Burns had done a consulting project for the Investment Manager in the past, it was unaware that she was seeking consulting work with the Investment Manager.
- 4.17. On 23 February at 19:38, Angela Burns responded to an email from MGM's CEO in an email string entitled "Reducing capital strain" and said that the Investment Manager would be:

"a good, high profile choice for the passive investment options for [its assets backed annuity] and maybe also one of several low cost passive fund providers for the back book".

- 4.18. The next morning at 9:05, Angela Burns responded to the managing director of the Investment Manager in an email string entitled "MGM". In her capacity as a NED of MGM, she updated him on the process for (what the earlier emails in the string had referred to as) the £1.5bn back book 'opportunity'. On a personal basis, she attached the 2008 Proposal she presented to the Investment Manager five months earlier and suggested that she could:

- (1) perform consultancy work for the Investment Manager; and
- (2) serve as a NED for the Investment Manager's Dublin funds.

4.19. Angela Burns said:

"I have in mind to have the new managers supporting our [MGM's Investment Product] come along to one of our Investment Committees ...; MGM execs will co-ordinate with your [i.e. the Investment Manager's] team in the coming weeks.

Had you had any further thoughts on the institutional/wealth management fund raising proposal we exchanged last September, for the UK and Swiss markets? An [sic] well-placed institutional advocate 'on the ground' here could help to accelerate your [Assets Under Management] gathering in the UK.

One aspect which has grown in importance since the Autumn has been the FSA's renewed emphasis on the importance of having appropriately experienced non-executive directors (NEDs) on the board's of financial firms.

Have you made arrangements to have one or more NEDs on the board of [the Investment Manager]? It's a function I carry out for MGM and could usefully provide for [the Investment Manager's] UK operations, to support your business growth and development here."

4.20. MGM's board met on 25 February. The attendees included Angela Burns. The board agreed at that meeting to consider the appointment of the Investment Manager and the board approved the business case for the annuity project.

4.21. On 26 February, the day after MGM's board meeting, Angela Burns responded to an email dated 20 February from the head of the Investment Manager's European and Asian business in an email string headed "MGM and [the Investment Manager]". Having addressed a matter in her capacity as a NED at MGM, she reminded him of the 2008 Proposal and continued:

"One aspect of the proposal we discussed last year, which has grown in importance since the Autumn, has been the FSA's renewed emphasis on the requirement to have appropriately experienced non-executive directors (NEDs) on the board's [sic] of financial firms.

Have you made arrangements to have one or more NEDs on the board of [the Investment Manager], [first name of the person Angela Burns is writing to]? It's a function I carry out for MGM and would be pleased to provide for [the Investment Manager's] UK operations, to support your business growth and development here."

The underlining is added to show the differences from the email of 24 February (paragraph 4.19).

4.22. On 10 June, MGM's investment committee met and agreed to recommend to MGM's board the Investment Manager as one of the fund providers under an MGM annuity product wrapper. Angela Burns was the chair of MGM's investment committee.

- 4.23. On 23 September, MGM's investment committee met to consider the recommendation to place its £350 million investment mandate with the Investment Manager. The investment committee approved the recommendation to place the £350 million mandate with the Investment Manager.

2010

- 4.24. In August, the Investment Manager asked MGM if it would speak to a newspaper about its experience using the Investment Manager's indexed funds. A director of MGM noted the request and emailed it to Angela Burns asking for her opinion. The email noted:

"The only conflict I would see would be if we introduced to them to [sic] a provider looking to put their funds into an annuity wrapper!"

- 4.25. Since MGM itself was also in the business of providing such annuity products, it was sensitive about giving publicity to the Investment Manager in this respect. With this one reservation, MGM, who had placed a £350m investment mandate with the Investment Manager, had a strong interest in ensuring that the Investment Manager succeeded in the UK.
- 4.26. On 10 August, Angela Burns forwarded the email string to the Investment Manager (without copying MGM), including the email from the Investment Manager suggesting that MGM could be 'the story', and said:

"I think it would be productive for us to have a serious talk re your UK ambitions and my ability and willingness to help. When might you be free?"

- 4.27. MGM only learned that Angela Burns had forwarded the email to the Investment Manager at an FSA interview in June 2011. When the FSA showed Angela Burns' email to MGM's director, he explained that his email to her was "private" and he was not pleased to discover that Angela Burns forwarded it to the Investment Manager, a potential competitor in this area.

2011

- 4.28. Angela Burns resigned as a NED of MGM effective 22 May 2011.

Conclusion for MGM

- 4.29. In February 2009, Angela Burns emailed the head of the Investment Manager's European and Asian business reminding him of the 2008 Proposal and offering to provide the function of a NED for the Investment Manager's UK operations "to support your business growth and development here" (see paragraphs 4.18 and 4.19). Not only had Angela Burns not told MGM of her communications with the Investment Manager, she had told MGM's CEO in early 2009 that there was no prospect of working for the Investment Manager.
- 4.30. In June and September 2009, Angela Burns participated in two significant MGM decisions without declaring to anyone at MGM, including her fellow board members and investment committee members, that she was in touch with the Investment Manager with a view to entering into a business arrangement with them (see paragraphs 4.22 and 4.23).

- 4.31. In 2010, Angela Burns maintained her contact with the Investment Manager in a personal capacity and, in that capacity, felt free to copy to them an email from MGM on a subject of some sensitivity to MGM (see paragraphs 4.24 to 4.27).

Teachers

Angela Burns' position at Teachers

- 4.32. By letter dated 10 June 2010, Teachers notified Angela Burns that it had accepted the nomination committee's recommendation to appoint her to Teachers' board as a NED, subject to approval by the FSA. Angela Burns:
- (1) had, in fact, received FSA approval for her CF2 position on 5 May 2010;
 - (2) became a member of the risk, audit and compliance committee on 10 June 2010; and
 - (3) was elected to and became the chair of Teachers' investment committee in August 2010.

The Friendly Societies Act 1992 and the Building Societies Act 1986

- 4.33. Teachers is governed by the Friendly Societies Act 1992 ("Friendly Societies Act"). Schedule 11, Part II of the Friendly Societies Act extends section 63 of the Building Societies Act 1986 ("BSA") to the Friendly Societies Act.
- 4.34. Section 63(1) (Directors to disclose interests in contracts and other transactions) of the BSA provides:

"It is the duty of a director of a building society who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the society to declare the nature of his interest to the board of directors of the society in accordance with the procedure set out in this section."

Teachers' conflicts documentation

- 4.35. On becoming a NED, Teachers required Angela Burns to:
- (1) review Teachers' conflicts of interest policy ("Conflicts Policy");
 - (2) review Teachers' ethics policy ("Ethics Policy"); and
 - (3) declare her interests ("Declaration of Interests").
- 4.36. Teachers' Conflicts Policy provided the following examples (among others) of conflicts of interest:
- (1) *"During your work, recommending a supplier, managing or monitoring a contract in which you have an interest".*
 - (2) *"A Financial Consultant making recommendations that serves their financial interest, rather than the one most appropriate to customer needs".*
 - (3) *"Being involved in a decision from which you personally gain".*

4.37. The Conflicts Policy also stated that Teachers:

"requires all staff at all times to act honestly and with integrity and declare any conflicts of interest"

and stated that:

"The simple rule is, 'Disclose always'".

4.38. Teachers' Ethics Policy identified the standards it requires of all staff. It expected them:

"at all times to act honestly and with integrity"

and it requires that:

"at the earliest opportunity, staff should declare any relationship, circumstance or business interest which may be seen by others to influence or impair their judgement or objectivity".

4.39. Teachers' Ethics Policy also provided *"Examples of Negative Unethical Behaviour"*. One example is:

"ignoring a potential conflict of interest".

4.40. On 21 June 2010, Angela Burns executed a clean Declaration of Interests and submitted it to Teachers' group company secretary. In doing so, she gave Teachers notice *"in compliance with the Friendly Societies Act 1992 ... and sections 175 to 177 and 182 to 187 of the Companies Act 2006"* that she had:

- (1) *"no conflict, benefit from a third party or interest in proposed transaction or arrangement"; and*
- (2) *"no interest in contracts between the Society and its subsidiary/associated companies and a third party which should be declared"*.

2010

4.41. Angela Burns knew that the investment manager which held Teachers' entire investment mandate had raised its fees and that Teachers wished to find a suitable manager to replace it.

4.42. Following a request from Teachers to recommend some suitable investment managers to include on a tender list, Angela Burns recommended three investment managers, including the Investment Manager. By November 2010, Teachers considered the Investment Manager to be the preferred candidate. The size of the investment mandate was approximately £750m.

4.43. Teachers was aware that Angela Burns had done consultancy work for the Investment Manager in 2006 but it was unaware that she was seeking consultancy work from the Investment Manager.

4.44. The Investment Manager was scheduled to make its tender presentation to Teachers on 22 November 2010.

- 4.45. However, on 5 November 2010, Angela Burns emailed the Investment Manager (the "5 November email") as set out below:

"Subject: New monies

... Later in the month, [the Investment Manager] will present to Teachers Assurance, where I am NED and chair of the Investment Committee, with a view to taking in a £700m+ passive equity and bond mandate. This follows on from the £350m mandate secured from MGM Advantage, where I am also chair of the Investment Committee.

I am delighted to help secure new institutional mandates for [the Investment Manager], having played a role in introducing [the Investment Manager] to the UK market via consultancy work in 2006.

Given that my NED positions have facilitated potentially some £1bn of new assets to your new enterprise, I feel it appropriate to reprise our earlier discussions. We had discussed previously both the prospect of my receiving 1 bps [basis points] for new monies secured, on and [sic] ad valorem basis, and my becoming a NED of your Dublin funds. The MGM Advantage mandate would amount to £35k pa, with the TA mandate taking it to £110k pa. An NED position in Dublin would add a further £20k.

Could we progress matters with your counsel?"

- 4.46. The Investment Manager:

- (1) did not 'progress matters' with Angela Burns;
- (2) viewed Angela Burns' email as a request for a payment and a NED role from it in return for Angela Burns using her positions at the Mutual Societies to facilitate the placement of investment mandates at those firms with the Investment Manager;
- (3) viewed her email as a request for payment for using her influence at Teachers to cause Teachers to place an investment mandate with the Investment Manager; and
- (4) considered that the email showed that Angela Burns had a conflict of interest.

- 4.47. In the circumstances, the Investment Manager decided that it would be unethical to continue to participate in the tender and, on 18 November 2010, it formally withdrew from the process, shortly before it was due to make its tender presentation to Teachers on 22 November 2010.

- 4.48. On 19 November, the Investment Manager wrote to Angela Burns saying –

"I must say I was a bit surprised to receive this note, as I thought it would have been clear from all the interactions you have had with the [Investment Manager] over the years that we do not pay third parties for distribution of our funds and we are not looking to add any NEDs to our Irish fund range. I apologise if there has been any misunderstanding that may have arisen out of your conversations with me or any other [Investment Manager] crew member, but I thought I should be clear about where we stand on the issue."

4.49. On the same day, Angela Burns responded –

"Well obviously [name]. Hence it may be help [sic] to get some advice on how we might co-operate in the future. One possible area which perhaps might work is where the Investment Manager may be able to provide seed capital to new funds, where no competitive/conflict of interest issues arise..."

2011

4.50. Angela Burns ceased acting as a NED at Teachers effective 31 May 2011.

Conclusion for Teachers

4.51. At no point while she was a NED at Teachers did Angela Burns tell anyone at Teachers about her ongoing attempts to procure work with the Investment Manager or her 5 November email.

4.52. Her view is that the requests to the Investment Manager set out in her 5 November email do not amount to a declarable conflict because they are proposals or *"mere preparatory steps to develop a relationship"*.

5. REGULATORY PROVISIONS

5.1. The statutory and regulatory provisions relevant to this Decision Notice are set out or referred to in the Annex to this notice.

6. REPRESENTATIONS

6.1. Angela Burns made representations in writing on 28 June 2012 and orally on 11 October 2012. What follows is a brief summary of the key representations. In making the decision which gave rise to the obligation to give this notice, the FSA has taken into account all of the representations, whether or not set out below.

6.2. The FSA was urged to adopt a common sense approach to what Angela Burns should have done in the circumstances. The general questions were 'What is the right thing for individuals to do when they have different roles or prospective different roles?' and 'At what point should a person who is maintaining relationships in a variety of sectors, and exploring ideas for future work, disclose discussions as a conflict of interest?' More specifically in this case, 'Should Angela Burns have disclosed something more to MGM and Teachers than she did about her relationship with the Investment Manager?'

6.3. Although Angela Burns had aspirations of working for the Investment Manager, and was seeking to 'reignite' the interest of the Investment Manager in her 2008 Proposal, she was firmly of the view that no disclosable interest had 'crystallised'. There was no 'traction' in the discussions. There was no engagement from the Investment Manager. Her approaches were no more than 'feelers'. As there was nothing concrete to say to MGM and Teachers, there was nothing to disclose.

6.4. Representatives from MGM and Teachers had said in interviews that they would have expected Angela Burns to have made a further disclosure to them if she had, or would have, benefitted financially from her discussions with the Investment Manager by for example, soliciting fees. A director of one of them made it clear that Angela Burns did not in any way influence the outcome of the decision-making process.

- 6.5. The 5 November email was badly worded and written in haste from a Blackberry but it was not what it seemed on the face of it, namely a demand for payment. The reference to fees was illustrative. The email was an attempt to resurrect or reinvigorate the dormant discussions for future work as set out in the 2008 Proposal. It was an attempt to clarify the position. The suggestion that counsel should be involved was made for this purpose. It was not unacceptable for an email to be sent to further personal business interests so long as it was properly couched.
- 6.6. Given that the Investment Manager was 'back on the radar' after a period of silence concerning the 2008 Proposal, it was the ideal time to raise the matter again. The fact that the Investment Manager had not come back to Angela Burns suggested that this was something they were still considering.
- 6.7. Angela Burns said that the misunderstanding of the Investment Manager was understandable even though the recipient understood the context in which the email was written. As is evident from her email of 19 November (paragraph 4.49), Angela Burns tried immediately to correct the misunderstanding.
- 6.8. In hindsight, the 5 November email would have been worded differently and Angela Burns would have read through her emails more carefully. Also, she would have asked for a separate email address for each of the Mutual Societies rather than using the email address of her own business.
- 6.9. When Angela Burns told a director of MGM in early 2009 that there was 'no prospect' of working with the Investment Manager, it had to be seen in the context of the failure of the Investment Manager to respond 'yes' or 'no' to the 2008 Proposal. The height of any declaration which she could have made, namely that there had been some discussion which had led nowhere, would not have amounted to a declarable interest. Any disclosure would have been very nebulous.
- 6.10. Some of the emails did contain a mix of personal and NED business but they were all unobjectionable when seen in context. There was nothing significant in the timing of them.
- 6.11. The 2008 Proposal related to a different area of business to the business of the Mutual Societies. There was always a separation between the two mandates which were up for discussion and the 2008 Proposal.
- 6.12. There was clear evidence that Angela Burns did not play any inappropriate part in any selection process. It was ironic that Teachers went out of its way to appoint a firm to make the decision on the mandate so that there would be seen to be independence and objectivity.
- 6.13. Most of the FSA cases involving a breach of Principle 1 involve deliberate or intentional misconduct. Where they do not, it is where a person has turned a blind eye to the very damaging obvious. There is no suggestion that Angela Burns had been dishonest or engaged in deliberate misconduct. Nor is there any evidence that Angela Burns deliberately closed her mind to the risk. Her conduct should not be seen as reckless and improper conduct designed to further her personal interests. Angela Burns accepts, however, that a finding of breach of Principle 1 would lead to a prohibition. If a fine was to be imposed, it should be proportionate and consistent with similar fines.
- 6.14. Angela Burns had over 25 years' worth of experience as a professional. The evidence is that she is well respected and trusted.

- 6.15. Angela Burns said that, as an experienced professional, her understanding of a conflict of interest was that it arose when a person had more than one interest and, in pursuing one interest, it negatively impacted upon the other. One interest may impair the person's judgement or be seen to impair the person's judgement. Or it may prevent the person in some way acting in the best interests of both of the person's interests.
- 6.16. The situations which are the subject of this notice involved judgement calls which were not easy to make and Angela Burns took the view, based on her long experience, that there was nothing to disclose.
- 6.17. The FSA had to be satisfied that there was evidence of the utmost clarity and persuasiveness to support a finding that Angela Burns lacks integrity. That evidence was not there. The case law spoke of a real and substantial interest rather than one which is theoretical. Angela Burns had disclosed her previous work for and contact with the Investment Manager. The interests here were too remote. They were contingent on third parties and entirely prospective. There was not a real, sensible possibility of conflict.
- 6.18. Angela Burns felt that she had conducted herself in a loyal way with MGM and to the benefit of policy holders of which she was one. It is certainly true that MGM benefitted in its dealings with the Investment Manager because of the past relationship of Angela Burns with the company. Both MGM and Teachers were tiny compared to the Investment Manager. If there was a pattern of conduct, Angela Burns felt strongly that she had shown her loyalty to both companies in terms of supporting them in dealing with an organisation such as the Investment Manager.

7. FINDINGS

- 7.1. It is clear to the FSA that Angela Burns should have disclosed to MGM and Teachers her communications with the Investment Manager. Given her role as a director and chair of the investment committees, the interest of MGM and Teachers in giving a significant investment mandate to the Investment Manager and their interest in being given it, her role was pivotal and highly sensitive. She gave no indication that she was alive to the sensitivities either at the time or subsequently.
- 7.2. The position of non-executive directors is critical to the effective functioning of a board and to maintaining the confidence of customers. The essence of the non-executive is that they have a degree of independence from the executive and can challenge proposals with the benefit of an experience which generally has a wider perspective than the focussed perspective of the executive. By almost uniform practice, the non-executive will have a portfolio of interests and will have had to have spent time building it up. The diverse and independent perspective is its strength. When this happens properly and openly it brings benefit to the firm and confidence to its customers: a focussed executive balanced and appropriately challenged by a non-executive voice on the board.
- 7.3. Both the executive and the non-executive director have the same duty to disclose a conflict of interest but for the non-executive with a portfolio of appointments there are more interests to consider. Whether the time spent building or maintaining a portfolio gives rise to a conflict of interests, either personally in the maintenance of the portfolio or one appointment with another, will depend wholly on the circumstances. In a sense, as Angela Burns said in her representations, for a professional person maintaining a number of appointments, everyone is a potential client. The dividing line between acceptable contact and unacceptable

contact may sometimes be difficult to discern. Where there is doubt, as Teachers say in their Conflicts Policy:

"The simple rule is, 'Disclose always'".

- 7.4. Angela Burns made no adequate disclosure of her interest in working for the Investment Manager and her repeated attempts to do so. No reason was given for not disclosing her interest, other than that there was no conflict. Had the matter been openly discussed, there is every reason to suppose that Angela Burns would have complied with her duty of disclosure.
- 7.5. In this case, a number of factors taken together make it quite clear that the communications should have been disclosed, including:
- the position of Angela Burns;
 - the importance of the mandates to both parties;
 - the unequivocal terms of some of the emails;
 - the extent of her contact with the Investment Manager;
 - the timing of some the initiatives to enter into a commercial arrangement with the Investment Manager;
 - the evident attraction to Angela Burns, and her acknowledged aspirations, of working for the Investment Manager;
 - the dominance in her thoughts that the Investment Manager had not responded clearly one way or another to the 2008 Proposal; and
 - the leverage of her positions in her approaches to the Investment Manager.
- 7.6. The common sense approach the FSA was invited to adopt is supported by the position at law to which the FSA was directed in the representations. In Dominion International Group plc (No 2) [1996] 1 BCLC 572, a 'real and substantial' interest is contrasted to a theoretical and insubstantial interest. Angela Burns had identified the areas of work in a written proposal and had assumed, by an absence of response, that it was still being considered. In her experience, it would be typical for the Investment Manager to be slow to respond. Her interest was still very real, and it was substantial. Similarly, this was not a situation where one could imagine some situation arising which might, in some conceivable possibility in events, result in conflict (Boardman v Phipps [1967] 2 A.C. 46). The outcome had been described in detail and was being actively pursued in the hope of success.
- 7.7. On the difference between an actual conflict and a potential conflict, the FSA follows what the Upper Tribunal has said:
- "Nor do we accept that for this purpose there can be any distinction between a conflict of interest and a potential conflict of interest. If the use of "potential" is intended to denote a circumstance where a person may become entitled to receive benefit from an interest that could be in conflict with a duty, but at the material time there has been no such receipt, then that in our judgment is a real and present conflict, notwithstanding that the benefit has not crystallised, or indeed may never do so."* (First Financial Advisers Limited v The FSA (FS/2010/0038))
- 7.8. Angela Burns did not act deliberately or dishonestly. However, she was not only aware of the risks of not declaring a conflict of interest but the evidence was that she gave a talk on Corporate Governance which included a slide on conflicts of

interest. It was not clear from the evidence whether Angela Burns continuously and consciously considered her position and came to the view that there was no conflict or did not think about the issue, or a mixture of the two. The FSA has come to the conclusion that she closed her mind to the issue and in doing so acted recklessly. In essence, a person is reckless when he acts in the knowledge that there is a clear and substantial risk of wrongdoing or where he deliberately closes his mind to that risk (R v G [2004] 1 AC 1034, HL).

- 7.9. The FSA accepts that the 5 November email was not a demand for money. In coming to this conclusion, the FSA has accepted the frank admission that the email was poorly worded. The extent of how poorly worded it was is measured by the reaction of the Investment Manager and their withdrawal of interest from seeking the mandate. However, it does not matter whether this was a demand for money or not. The conflict is in the motive behind the communication without disclosure. The fact that Angela Burns tried immediately to correct the misunderstanding does not affect this.
- 7.10. In considering whether a conflict arose, the FSA was particularly conscious of the importance of the mandates. The investment mandate for MGM was worth £350m (paragraph 4.23). The investment mandate for Teachers was worth £750m (paragraph 4.42). When anyone has a part to play in the process for such contracts, the utmost sensitivity is called for. When the person having the part to play has a responsibility as a director and chair of the investment committee, the need for utmost sensitivity is all the more. The evidence of the conduct and representations of Angela Burns gives no sense of an appreciation of the sensitivity which was called for. Instead, she concentrated on the silence from the Investment Manager and the need to resolve what to her was an unresolved matter. There was no indication that she ever considered that silence since September 2008 could itself have indicated the level of their interest in her proposal.
- 7.11. Whether viewed from the point of view of her fiduciary position as a director, the legislative provisions applying to her or the very clear contractual obligations applied to her under the internal policies of MGM and Teachers, it is clear that the obligations on Angela Burns were high. There is no evidence, or no adequate evidence, that she considered her position in the light of these duties placed upon her. Although this was presented to the FSA as giving rise to difficult decisions involving judgement calls, there is no evidence that she discussed her position with anyone else to resolve any uncertainty as to whether her communications amounted to a disclosable interest. The FSA was invited to rely on her judgement borne out of many years of experience in the financial services sector (see paragraphs 6.15 and 6.16). If she did consider her position in this respect, her judgement fell short of the standards expected of a non-executive director in her position. In reaching this conclusion, the FSA acknowledges the evident regard held for Angela Burns by others in the testimonials given on her behalf but does not feel that these can displace the clear conclusions it has come to on the evidence before it.
- 7.12. The reaction of those interviewed from MGM and Teachers was used in support of the argument that there was no expectation of a declaration of conflict to be made. The FSA does not accept that there is no other interpretation of their evidence but whatever the response, and whatever the circumstances in which the responses were made, the test for a conflict is not the reaction of others. The point of disclosure is to give others the opportunity of considering what effect, if any, the disclosure has. The point is the interest of the other party, not the judgement of the person in, or possibly in, conflict nor the reaction itself of the person to whom the disclosure is made. A disclosure gives the other person a

choice. No disclosure denies that person the opportunity of coming to a view on a matter which is of interest to them. In Angela Burns' representations (see, for example, paragraph 6.15), the acknowledgement of the interests of MGM and Teachers was absent.

7.13. Looking more particularly at the Facts and Matters in section 4 of this notice, Angela Burns breached Statement of Principle 1 by failing to disclose her conflicts of interest to the Mutual Societies when she:

- (1) attended her first meeting with MGM on 21 January 2009 and suggested that MGM consider using the Investment Manager, but failed to declare that she was trying to obtain work with the Investment Manager (see paragraph 4.16);
- (2) reiterated her view that the Investment Manager would be an appropriate choice to provide investment management in two areas of MGM's business in an email she sent to MGM's CEO on 23 February 2009, but failed to declare that she was trying to obtain work with the Investment Manager (see paragraph 4.17);
- (3) participated in discussions concerning the Investment Manager at MGM's board meeting on 25 February 2009, but failed to declare that she was trying to obtain work with the Investment Manager (see paragraph 4.20);
- (4) participated in a decision to use the Investment Manager at an MGM investment committee meeting on 10 June 2009, but failed to declare that she was trying to obtain work with the Investment Manager (see paragraph 4.22);
- (5) participated in a decision to use the Investment Manager at an MGM investment committee meeting on 23 September 2009, but failed to declare that she was trying to obtain work with the Investment Manager (see paragraph 4.23); and
- (6) recommended to Teachers that it include the Investment Manager on the tender list, but failed to declare that she was trying to obtain work with the Investment Manager (see paragraph 4.42).

7.14. Angela Burns further breached Statement of Principle 1 by attempting to use her fiduciary position as a NED at the Mutual Societies to benefit herself when she:

- (1) notified the Investment Manager of the potential business opportunity at MGM and in the same email (dated 24 February 2009) reminded the Investment Manager of her interest in obtaining consultancy work and a NED position from the Investment Manager (see paragraph 4.18);
- (2) reminded the Investment Manager of the potential business opportunity at MGM and in the same email (dated 26 February 2009) asked the Investment Manager to consider her for a role as a NED (see paragraph 4.21); and
- (3) attempted to use her fiduciary position as a NED at the Mutual Societies to benefit herself when, with bad timing and ambiguous language, she reminded the Investment Manager of the 2008 Proposal (see paragraphs 4.45 and 4.7).

- 7.15. Angela Burns disregarded her duties under the relevant companies legislation, articles of association and conflicts documentation to declare her interest in obtaining work from the Investment Manager to both Mutual Societies (see paragraphs 4.16, 4.17, 4.20, 4.22, and 4.42).
- 7.16. Angela Burns breached her fiduciary position of trust when she told MGM's CEO that she had no "prospect" of working for the Investment Manager while at the same time she was trying to obtain work from the Investment Manager (see paragraph 4.29).
- 7.17. Angela Burns failed to update the declaration of interest she executed with Teachers to inform it of her ongoing attempts to procure work with the Investment Manager from the period she originally recommended the Investment Manager to Teachers until she resigned as a NED (see paragraphs 4.42 and 4.50).
- 7.18. The FSA is satisfied that the evidence before it is clear and persuasive. Angela Burns was a director and chair of the investment committee in both Mutual Societies. By failing to declare her conflict of interest to them, she acted in breach of her fiduciary position as a non-executive director and breached Statement of Principle 1.

8. SANCTION

- 8.1. As an approved person carrying out the controlled function of a non-executive director (CF2) for both MGM and Teachers, Angela Burns failed to act with integrity within the meaning of Statement of Principle 1 for the reasons given in section 7 above.
- 8.2. This conduct warrants the imposition of a prohibition order and a financial penalty.

Prohibition order

- 8.3. Under section 56 of the Act, the FSA is able to impose a prohibition order on a person who is not a fit and proper person. FIT guidance sets out the criteria for assessing fitness and propriety. The criteria include the person's honesty and integrity.
- 8.4. Angela Burns demonstrated a lack of integrity for the reasons given above. Angela Burns' conduct is serious for the reasons set out in paragraph 2.4.
- 8.5. For these reasons, it is appropriate to prohibit Angela Burns from carrying out any function in relation to any regulated activity carried out by an authorised person, exempt person or exempt professional firm.

Financial penalty

- 8.6. The conduct at issue took place both before and after 6 March 2010. As set out at paragraph 2.7 of the FSA Policy Statement 10/4, when calculating a financial penalty where the conduct straddles penalty regimes, the FSA must have regard both to the penalty regime which was effective before 6 March 2010 (the "old penalty regime") and the penalty regime which was effective after 6 March 2010 (the "new penalty regime").
- 8.7. The FSA adopted the following approach:
 - (1) calculated the financial penalty for Angela Burns' misconduct from January

2009 to 5 March 2010 by applying the old penalty regime to that misconduct;

- (2) calculated the financial penalty for Angela Burns' misconduct from 6 March 2010 by applying the new penalty regime to that misconduct; and
- (3) added the penalties calculated under (1) and (2) to produce the total penalty.

Financial penalty under the old regime

- 8.8. The FSA's policy on the imposition of financial penalties relevant to the misconduct prior to 6 March 2010 is set out in the version of Chapter 6 of DEPP that was in force prior to 6 March 2010. All references to DEPP from this paragraph to paragraph 8.15 are references to that version of DEPP.
- 8.9. For the purpose of the calculating the penalty under the old regime, Angela Burns' relevant misconduct is that described at paragraphs 4.16 to 4.23 of this Notice.
- 8.10. To determine whether a financial penalty is appropriate, the FSA considers all the relevant circumstances of a case. DEPP 6.5.2G sets out a non-exhaustive list of factors that may be relevant to determine the level of a financial penalty. Applying those factors here, the appropriate level of penalty to be imposed under the old regime is £75,000. The following factors are particularly relevant to this case.

Deterrence (DEPP 6.5.2G(1))

- 8.11. The FSA has had regard to the need to ensure that those who are approved persons exercising significant influence functions act in accordance with regulatory requirements and standards. The principal purpose of the imposition of this penalty is to promote high standards of regulatory conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches and demonstrating generally the benefits of compliant behaviour.

The nature, seriousness and impact of the breaches (DEPP 6.5.2G(2))

- 8.12. Angela Burns' conduct was serious because she was in a position of trust and responsibility and she abused that position of trust over an extended period.

The extent to which the breach was deliberate or reckless (DEPP 6.5.2G(2))

- 8.13. Angela Burns was reckless in the way she used her fiduciary position. Her conflict of interest at MGM was obvious and she failed to act in accordance with MGM's conflicts procedures. DEPP 6.5.2G(2) notes that where the FSA decides that a breach was deliberate or reckless it is more likely to impose a higher penalty on a person than otherwise.

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

- 8.14. When determining the appropriate level of financial penalty, the FSA will take into account the fact that: an individual will not always have the same resources as a body corporate; an enforcement action may have a greater effect on an individual; and that it may be possible to achieve effective deterrence by imposing a smaller penalty on an individual rather than a body corporate. The

FSA will also consider whether the status, position and/or responsibilities of the individuals are such to make a breach committed by the individual more serious and whether the penalty should therefore be set at a higher level.

- 8.15. The FSA recognises that the financial penalty is likely to have a significant effect on Angela Burns as an individual. However, given Angela Burns' position as a significant influence function holder and professional experience, the level of penalty is proportionate.

Financial penalty under the new penalty regime

- 8.16. All references to DEPP in from this paragraph to paragraph 8.34 are references to the version of DEPP implemented as of 6 March 2010 and currently in force. Under the new penalty regime, the FSA applies a five-step framework to determine the appropriate level of financial penalty. DEPP 6.5B sets out the details of the five-step framework that applies to financial penalties imposed on individuals in non-market abuse cases.
- 8.17. For the purpose of calculating the penalty under the new penalty regime, Angela Burns' relevant misconduct is that described at paragraphs 4.32 to 4.50 of this Notice.

Step 1: disgorgement

- 8.18. DEPP 6.5B.1G provides that at Step 1, the FSA will deprive an individual of the financial benefit he derived from the breach where it is practicable to quantify it.
- 8.19. The FSA has not identified any financial benefit that Angela Burns derived as a result of her breaches. The Step 1 figure is therefore £0.

Step 2: the seriousness of the breach

- 8.20. DEPP 6.5B.2G provides that at Step 2 the FSA 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 the individual received from the employment (if any) in connection with the breach and for the period of the breach.
- 8.21. The period of Angela Burns' breach for the purposes of calculating her penalty under the new penalty regime is the period from 6 March 2010 to 31 May 2011. Angela Burns' relevant income for this period is £66,500. This figure is her combined annual remuneration from MGM and Teachers. This figure does not take into account earnings from any other positions Angela Burns held.
- 8.22. In deciding on the percentage of the relevant income that forms the basis of the step 2 figure, the FSA considers the seriousness of the breach and chooses a percentage between 0% and 40%. This range is divided into five fixed levels which increase with the seriousness of the breach. For penalties imposed on individuals in non-market abuse cases, there are five levels:

Level 1 – 0%

Level 2 – 10%

Level 3 – 20%

Level 4 – 30%

Level 5 – 40%

8.23. To assess the seriousness level, the FSA takes into account various factors which reflect the impact and nature of the breach, and considers whether the subject committed the breach deliberately or recklessly. DEPP 6.5B.2G(12) lists factors likely to be considered 'level 4 or 5 factors'. Of these, the following are relevant:

(1) Impact of breach:

- (a) as noted above, Angela Burns did not receive any payment as a result of her emails including the 5 November email. Had the Investment Manager made a payment calculated along the lines suggested in the 5 November email, she would have earned approximately £120,000 per annum (£100,000 as a result of the investment mandates placed with MGM and Teachers and approximately £20,000 as a result of a NED position); and
- (b) as a result of the 5 November email, the Investment Manager withdrew from the Teachers tender process (paragraph 4.47). The Investment Manager was Teachers' preferred investment manager (paragraph 4.42).

(2) Nature of breach:

Angela Burns is an experienced industry professional. She held a senior position with the Mutual Societies, failed to act with integrity and abused a position of trust as indicated in section 7 of this notice.

(3) Whether the breach was reckless:

- (a) Angela Burns sent the 5 November 2010 email recklessly without giving consideration to whether it was, or might be taken as, an obvious and considered request for payment from which Angela Burns expected to benefit financially.
- (b) Angela Burns acted recklessly throughout the Relevant Period by failing to recognise and declare obvious conflicts of interest.
- (c) Angela Burns did not (and still does not) recognise that she had obviously declarable conflicts of interest at MGM and Teachers and that her 5 November 2010 email was an obvious sign of such conflict. Her failure to manage such conflicts was reckless. Guidance in DEPP notes that "*factors which are likely to be considered 'level 4 factors' or level 5 factors' include ... the individual failed to act with integrity.*"

8.24. The FSA has taken the factors identified in paragraph 8.23 into account, identified the seriousness of the breach as level 4 (paragraph 8.22), and applied the level 4 seriousness percentage (30%) to the relevant income £66,500 (paragraph 8.21).

8.25. This results in a Step 2 figure of £19,950 (30% of £66,500).

Step 3: mitigating and aggravating factors

8.26. DEPP 6.5B.3G provides that at Step 3 the FSA 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.

- 8.27. There are no relevant mitigating or aggravating factors that justify a change to the Step 2 figure.

Step 4: adjustment for deterrence

- 8.28. DEPP 6.5B.4G provides that if the FSA considers that the Step 3 figure is insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches, the FSA may increase the penalty.
- 8.29. Angela Burns was a NED who had a significant level of responsibility at the Mutual Societies. One of the key obligations of a NED is to act with integrity and in the best interests of a company at which she holds a significant influence function. Angela Burns failed to discharge this obligation.
- 8.30. Given the importance of the role of non-executive directors in the financial sector, the Step 3 figure of £19,950 is insufficient to meet the FSA's credible deterrence objective. Consequently, it is appropriate to apply a Step 4 multiple of 4 to the Step 3 figure. In doing so, the FSA takes into account that this notice means that Angela Burns is unlikely to be in a position to work as a NED in the financial sector again and that deterrence for her is less of an issue. For others, not heeding the lessons of this notice, the multiple may be higher.
- 8.31. On this basis, the penalty at Step 4 increases to £79,800 (4 x £19,950).
- 8.32. DEPP 6.5D.2G provides that the FSA will consider reducing the amount of a penalty if an individual will suffer serious financial hardship as a result of having to pay the entire penalty. Angela Burns has confirmed she does not wish to provide any evidence of serious financial hardship and the FSA does not therefore propose to reduce the Step 4 figure.

Step 5: settlement discount

- 8.33. This is not applicable so the step 5 figure remains £79,800.

Conclusion on financial penalty

- 8.34. The FSA considers that combining the two separate penalties calculated under the old and new penalties regimes produces a figure which is proportionate and consistent with similar fines. The FSA therefore imposes on Angela Burns a financial penalty of £154,800.

9. PROCEDURAL MATTERS

Decision maker

- 9.1. The decision which gave rise to the obligation to give this Decision Notice was made by the Regulatory Decisions Committee.
- 9.2. This Decision Notice is given under sections 57 and 66 of the Act and in accordance with section 388 of the Act. The following statutory rights are important.

The Upper Tribunal

- 9.3. Angela Burns has the right to refer the matter to which this Decision Notice relates to the Upper Tribunal (the "Tribunal"). The Tax and Chancery Chamber is the part of the Upper Tribunal, which, among other things, hears references

arising from decisions of the FSA. Under paragraph 2(2) of Schedule 3 of the Tribunal Procedure (Upper Tribunal) Rules 2008, Angela Burns has 28 days from the date on which this Decision Notice is given to refer the matter to the Tribunal.

- 9.4. A reference to the Tribunal is made by way of a reference notice (Form FTC3) signed by Angela Burns (or on her behalf) and filed with a copy of this Notice. The Tribunal's contact details are The Upper Tribunal, Tax and Chancery Chamber, 45 Bedford Square, London WC1B 3DN (tel: 020 7612 9700; email:

financeandtaxappeals@tribunals.gsi.gov.uk).

- 9.5. Further details are contained in "Making a Reference to the UPPER TRIBUNAL (Tax and Chancery Chamber)" which is available from the Upper Tribunal website:

<http://www.tribunals.gov.uk/financeandtax/FormsGuidance.htm>

- 9.6. A copy of Form FTC3 must also be sent to Anthony Monaghan at the FSA, 25 The North Colonnade, Canary Wharf, London E14 5HS at the same time as filing a reference with the Tribunal.

Access to evidence

- 9.7. Section 394 of the Act applies to this Decision Notice. Angela Burns the right to access to:

- (1) the material upon which the FSA has relied on in deciding to give this Notice; and
- (2) any secondary material which, in the opinion of the FSA, might undermine that decision.

- 9.8. There is no such secondary material.

Confidentiality and publicity

- 9.9. Angela Burns should note that 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). The effect of section 391 of the Act is that neither Angela Burns nor a person to whom this notice is copied may publish it or any details concerning it unless the FSA has published the notice or those details. The FSA must publish such information about the matter to which a Decision Notice or Final Notice relates as it considers appropriate. Angela Burns should be aware, therefore, that the facts and matters contained in this notice may be made public.

FSA contacts

- 9.10. For more information concerning this matter generally, contact Anthony Monaghan (direct line: 020 7066 6772) or Maria Gouvas (direct line: 020 7066 3552) of the Enforcement and Financial Crime Division at the FSA.

Andrew Long

Acting Chairman, Regulatory Decisions Committee

STATUTORY AND REGULATORY PROVISIONS

1. Statutory objectives

- 1.1. **Section 2(2) of the Act** sets out the FSA's statutory objectives. The statutory objectives relevant to this matter are: the protection of consumers and the reduction of financial crime.

2. The prohibition order

- 2.1. The citations in this section relate to the prohibition order the FSA has decided to impose against Angela Burns. It begins with section 56 of the Act and then examines the relevant regulatory guidance in FIT and the Enforcement Guide ("EG").

Statutory provisions related to the prohibition order

- 2.2. **Section 56 of the Act** gives the FSA the power to issue an order prohibiting Angela Burns from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm. Section 56 of the Act provides that:

“(1) Subsection (2) applies if it appears to the Authority that an individual is not a fit and person to perform functions in relation to a regulated activity carried on by an authorised person.

(2) The Authority may make an order ('a prohibition order') prohibiting the individual from performing a specified function, any function falling within a specified description or any function”.

Regulatory guidance related to the prohibition order

- 2.3. **FIT 1.2.4G** states “The Act does not prescribe the matters which the FSA should take into account when determining fitness and propriety. However, section 61(2) states that the FSA may have regard (among other things) to whether the *candidate* or *approved person* is competent to carry out a *controlled function*.”
- 2.4. **FIT 1.1.2G** states that “The purpose of FIT is to set out and describe the criteria that the FSA will consider when assessing the fitness and propriety of a *candidate* for a *controlled function* (see generally SUP 10 on *approved persons*). The criteria are also relevant in assessing the continuing fitness and propriety of *approved persons*. The criteria that the FSA will consider in relation to an *authorised person* are described in COND.”
- 2.5. **FIT 1.3.1G** states that “The FSA will have regard to a number of factors when assessing the fitness and propriety of a *person* to perform a particular *controlled function*. The most important considerations will be the *person's*:
- (1) honesty, integrity and reputation;
 - (2) competence and capability; and
 - (3) financial soundness.”

Honesty, integrity and reputation under FIT

- 2.6. **FIT 2.1.1G** states, in part, that "In determining a *person's* honesty and integrity and reputation, the FSA will have regard to all relevant matters including, but not limited to those set out in FIT 2.1.3G which may have arisen either in the *United Kingdom* or elsewhere."

The Enforcement Guide's policy on the prohibition order

- 2.7. Two chapters of EG are relevant to these proceedings, i.e. Chapter 2 (The FSA's approach to enforcement) and Chapter 9 (Prohibition Orders and withdrawal of approval).
- 2.8. **EG 2.31** states that: "... where senior managers are themselves responsible for misconduct, the FSA will, where appropriate, bring cases against individuals as well as *firms*."
- 2.9. **EG 2.32** states that: "... the FSA is mindful that an individual will generally face greater risks from enforcement action, in terms of financial implications, reputation and livelihood than would a corporate entity. As such, cases against individuals tend to be more strongly contested, and at many practical levels are harder to prove. They also take longer to resolve. However, taking action against individuals sends an important message about the FSA's *regulatory objectives* and priorities and the FSA considers that such cases have important deterrent values. The FSA is therefore committed to pursuing appropriate cases robustly, and will dedicate sufficient resources to them to achieve effective outcomes."
- 2.10. **EG Chapter 9** describes the FSA's policy on making prohibition orders under section 56 of the Act.
- 2.11. **EG 9.3** states that: "In deciding whether to make a *prohibition order* . . . the FSA will consider all the relevant circumstances including whether other enforcement action should be taken or has been taken already against that individual by the FSA. As is noted below, in some cases the FSA may take other enforcement action against the individual in addition to seeking a *prohibition order* and/or withdrawing its approval. The FSA will also consider whether enforcement action has been taken against the individual by other enforcement agencies or *designated professional bodies*."
- 2.12. **EG 9.9** states that when it decides whether to make a prohibition order against an approved person the FSA will consider all the relevant circumstances. The considerations relevant to this matter are set out below.
- (1) The matters set out in section 61(2) of the Act.
 - (2) Whether the individual is fit and proper to perform functions in relation to regulated activities. The criteria for assessing the fitness and propriety of approved persons are set out in FIT 2.1 (Honesty, integrity and reputation); FIT 2.2 (Competence and capability) and FIT 2.3 (Financial soundness).
 - (3) Whether and to what extent, the approved person has "failed to comply with the *Statements of Principle* issued by the FSA with respect to the conduct of *approved persons*".
 - (5) The relevance and materiality of any matters indicating unfitness.

- (7) The particular controlled function the approved person is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates.
 - (8) The severity of the risk which the individual poses to consumers and to confidence in the financial system.
- 2.13. **EG 9.11** explains that due to the diverse nature of firms the FSA regulates, it is not possible to produce a definitive list of matters which the FSA might take into account when considering whether an individual is not a fit and proper person to perform a particular, or any, function in relation to a particular, or any, firm.
- 2.14. **EG 9.12** provides examples of the types of behaviour which have previously resulted in the FSA deciding to issue a prohibition order including, at EG 9.12(5), serious breaches of the Statements of Principle for approved persons.
- 2.15. **EG 9.13** explains that "Certain matters that do not fit squarely, or at all, within the matters referred to above may also be considered. In these circumstances the FSA will consider whether the conduct or matter in question is relevant to the individual's fitness and propriety."

3. The financial penalty

- 3.1. The following citations relate to the penalty the FSA against Angela Burns.

Statutory provisions related to the penalty (section 66 of the Act)

- 3.2. The FSA has imposed a financial penalty against Angela Burns under section 66(3)(a) of the Act.
- 3.3. **Section 66(1) of the Act** provides that the FSA may take action against a person under this section if: (a) it appears that he is guilty of misconduct; and (b) the Authority is satisfied that it is appropriate in all the circumstances to take action against him.
- 3.4. **Section 66(2)(a) of the Act** provides that 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.
- 3.5. The relevant Statement of Principle is Statement of Principle 1 which provides that:

"An approved person must act with integrity in carrying out his controlled function."

APER: Code of Practice for Approved Persons

- 3.6. APER 4.1.2E sets out a non-exhaustive list of examples of behaviour which fall outside of compliance with Statement of Principle 1. APER 4.1.13E: Deliberately failing to disclose the existence of a conflict of interest in connection with dealings with a client falls within APER 4.2.1E.

4. FSA policy in relation to financial penalties

- 4.1. **Section 201(8) of the Act** provides that when the FSA imposes a financial penalty it must "*have regard to any [statement of penalty policy] published and in force at the time when the contravention in question occurred*".

- 4.2. **Chapter 6 of DEPP** sets out the FSA's statement of policy with respect to the imposition and amount of penalties under the Act.
- 4.3. The FSA has revised Chapter 6 of DEPP. One version of Chapter 6 was in force up to and including 5 March 2010, and another version was in force on and after 6 March 2010.
- 4.4. In this matter, the conduct at issue occurred between January 2009 and May 2011. So, it was necessary to determine which version of DEPP applied.
- 4.5. **Policy Statement 10/4** (March 2010) relates to enforcement financial penalties. At paragraph 2.7 relating to the transitional application of the new penalties regime it was noted that, "*...when a breach begins before 6 March 2010 (when the new penalties regime takes effect) and continues after that date, two different penalty regimes will apply. The penalty regime in place before 6 March 2010 will apply to conduct before that date and the new penalties regime will apply to conduct from that date onwards.*"
- 4.6. As the conduct at issue in these proceedings occurred between January 2009 up to and including May 2011, the FSA must apply both regimes to assess the penalty.
- 4.7. To calculate the penalty under the old regime, the FSA had regard to Chapter 6 of the version of DEPP which was in force up to and including 5 March 2010.
- 4.8. To calculate the penalty under the new regime, the FSA had regard to Chapter 6 of the version of DEPP which was in force on and after 6 March 2010.