

**THIS DECISION NOTICE HAS BEEN REFERRED TO THE UPPER TRIBUNAL IN ORDER TO DETERMINE THE APPROPRIATE ACTION FOR THE FSA TO TAKE**

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## **DECISION NOTICE**

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To: Dynamic Decisions Capital Management Ltd  
Address: 28 Ives Street  
London  
SW3 2ND

Date: 20 March 2012

### **ACTION**

1. For the reasons given in this Notice, and pursuant to section 45 of the Financial Services and Markets Act 2000, the FSA has decided to cancel the permission granted to Dynamic Decisions Capital Management Ltd, pursuant to Part IV of the Act, to carry on regulated activities.

## **DEFINITIONS**

2. The definitions below are used in this Notice.

“the Act” means the Financial Services and Markets Act 2000.

“COND” means the part of the FSA Handbook entitled Threshold Conditions.

“DEPP” means the Decision Procedure and Penalties Manual.

“DDCM” Dynamic Decisions Capital Management Limited.

“DDCM’s permission” means the permission granted to Dynamic Decisions Capital Management Ltd, pursuant to Part IV of the Act, to carry on regulated activities.

“EG” means the Enforcement Guide.

“the FSA” means the Financial Services Authority.

“the Threshold Conditions” means the conditions set out in Schedule 6 to the Act.

”the Tribunal” means the Upper Tribunal (Tax and Chancery Chamber).

## **SUMMARY OF REASONS**

3. The FSA has concluded, on the basis of the facts and matters set out below, that DDCM is failing, or is likely to fail, to satisfy the threshold conditions set out in Schedule 6 to the Act in that, in the opinion of the FSA, DDCM is not fit and proper as it has failed to ensure that its business is conducted soundly and prudently and in compliance with proper standards in breach of Threshold Condition 5 (Suitability).

## **FACTS AND MATTERS**

4. Mr Alberto Micalizzi is the Chief Executive Officer and Director of DDCM, which he founded in 2004. In connection with his role he has held controlled functions CF1 (Director) and CF3 (Chief Executive) since 10 December 2004, and controlled function CF30 (Customer) since 1 November 2007.
5. By a Decision Notice of today’s date, issued to Mr Micalizzi and DDCM in respect of

Mr Micalizzi's actions as the Chief Executive Officer and as a Director of DDCM, the FSA has decided to:

- 5.1. impose a financial penalty of £3,000,000, pursuant to section 66 of the Act in respect of Mr Micalizzi's contravention of the FSA's Statements of Principle and Code of Practice for Approved Persons;
  - 5.2. withdraw his approval to perform controlled functions in relation to DDCM pursuant to section 63 of the Act; and
  - 5.3. make an order, pursuant to section 56 of the Act, prohibiting him from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.
6. The FSA has decided to take this action as a result of Mr Micalizzi acting dishonestly and without integrity in carrying out his controlled functions. In particular:
- 6.1. in order to conceal from investors losses incurred by the funds managed by DDCM, Mr Micalizzi entered into a series of transactions for the purchase and re-sale of a bond, and authorised the payment of USD 5 million from the funds managed by DDCM for the purchase of the bond, despite being aware that the bond was not a genuine financial instrument;
  - 6.2. Mr Micalizzi paid a further USD 2.6 million from the funds managed by DDCM, knowing that these were not legitimate payments or expenses;
  - 6.3. Mr Micalizzi deliberately misled investors, and other persons, by falsely denying the existence of any agreement to resell the bond, back-dating contracts for the acquisition of the bond, and concealing the losses incurred by the funds managed by DDCM by artificially inflating the value of the bond; and
  - 6.4. during the course of the FSA's investigation into these matters, Mr Micalizzi deliberately provided false and misleading information on several occasions to the FSA.

## **FAILINGS**

7. The regulatory provisions relevant to this Notice are referred to in Annex A.
8. Having regard to all the circumstances, including DDCM's connection with Mr Micalizzi and the overall need to ensure that its affairs are conducted soundly and prudently, the FSA considers that DDCM is failing to satisfy Threshold Condition 5, in that DDCM does not have competent and prudent management and has failed to demonstrate that it has conducted its business soundly and prudently and in compliance with proper standards.
9. Consequently, DDCM is not a fit and proper person and DDCM's permission should be cancelled.

## **SANCTION**

10. For the reasons given in this notice, and pursuant to section 45 of the Act, the FSA has decided to cancel DDCM's permission.

## **REPRESENTATIONS AND FINDINGS**

11. Below is a brief summary of the key written and oral representations made by Mr Micalizzi on behalf of DDCM and how they have been dealt with. In making the decision which gave rise to the obligation to give this notice, the FSA has taken into account all of DDCM's representations, whether or not explicitly set out below.

### Admissions

12. Mr Micalizzi accepted that:
  - (a) the communications to investors in the form of the commentaries to the performance estimates were misleading as they did not refer to the losses the funds managed by DDCM had incurred (but for the transactions in the bond); he stated that he was very sorry for this and recognised that he should have made full disclosure of those losses to all investors;
  - (b) the letter dated 19 January 2009 to investors was misleading; and

(c) the due diligence undertaken on the bond prior to purchase was, with the benefit of hindsight, inadequate and in the circumstances he had misjudged the risks of entering into the transactions and failed adequately to consider the possibility that the bond might not be genuine or as valuable as he believed.

13. The FSA notes Mr Micalizzi's admissions. However, the FSA has found Mr Micalizzi's representations to be largely lacking in credibility, given the documentary evidence. Mr Micalizzi has explained his behaviour as set out in this Notice as being the result of inexperience or errors on his part, or of miscommunications and misunderstandings. The FSA has found that, in fact, Mr Micalizzi deliberately misled investors, the FSA and others, as set out above.

#### Genuineness of the bond

14. Mr Micalizzi made representations that:

(a) he acknowledged that his conduct had fallen below that expected of an approved person. With hindsight he accepted that he failed adequately to consider the possibility that the bond may not have been genuine, or as valuable as he believed – he may have been exploited by others due to his lack of experience. He should have carried out further due diligence on the bond and events have shown that the valuations applied to the bond units in the accounts were not justified. He did, however, believe at the time that those valuations reflected the value at which the bond units could be sold;

(b) various correspondence involving Mr Micalizzi, such as emails in November 2008, support his position that he believed the bond was genuine. He also openly discussed the nature of the bond with a number of third parties. He would not have taken steps to convince reputable parties and other sophisticated market participants as to the genuineness of the bond if he had expected that such interaction would be likely to raise serious concerns as to its genuineness. Further, he did not conceal the funds' losses from all of the funds' investors – he discussed them with some of those investors; and

(c) he believed at all relevant times that the bond was a genuine financial instrument, that the collateral supporting the bond existed, and that the bond units could be sold

because of the value of the collateral. If he had not believed that the bond was genuine, there would have been no reason to purchase units of the bond as they could not have provided any benefit, and could only have led to the failure of the funds managed by DDCM.

15. The FSA has found that:

(a) the bond was not a credible financial instrument. The premise and structure of the bond, as well as the purported profits, were obviously implausible. The related documentation appeared on its face to lack authenticity. Further, there was no sensible commercial rationale behind the bond transactions. In the circumstances it is clear that Mr Micalizzi chose not to carry out any meaningful due diligence on the bond as he was aware that it was not genuine;

(b) taking all of the evidence into account, Mr Micalizzi's contemporaneous correspondence does not demonstrate that he honestly believed that the bond was genuine. Much of his contact with third parties related to his efforts to make the bond more tradable, but does not demonstrate that he believed it was genuine. Further, there is no evidence that he ever informed any investors about the true position regarding the funds' losses or the amount of profit recognised on the bond transactions. He deliberately gave investors a false and misleading impression about the bond and the funds; and

(c) Mr Micalizzi was fully aware at all times that the bond was not a genuine financial instrument and therefore had no value. He used the transactions in the bond deliberately to conceal the losses otherwise incurred by the funds. Mr Micalizzi recorded profits on the bond each month which correlated extremely closely to the losses otherwise incurred by the funds, in some cases backdating contracts to record profits in earlier months. It is likely that he did so in an attempt to stave off the liquidation of the funds so that he could attempt to raise sufficient capital from further investment to keep them in operation, thus exposing further investor funds to the risk, and in the circumstances likelihood, of loss.

## Misleading the FSA

16. Mr Micalizzi made representations that:

(a) he never intended to mislead the FSA. English is not his first language and this may have contributed to some imprecision in his communications, leading to confusion;

(b) the contract for the purchase of USD 200 million of bond units was signed after the end of October but related to an agreement to purchase which was made in October 2008; he had not carefully reviewed all of the purchase and sale contracts for the bond units before his FSA interview, hence his denial that any had been backdated. The email correspondence that he had provided to the FSA, which wrongly gave the impression that the bond had been discussed earlier than was in fact the case, had been provided in an attempt to assist the FSA and, though it was misleading in the circumstances, this was simply an error on Mr Micalizzi's part; and

(c) he believed that insurance cover had been obtained for the bond when he informed the FSA of this.

17. The FSA has found that:

(a) Mr Micalizzi's English is very good, as shown in his correspondence and in person, and it is not credible that language difficulties were the cause of any of his misleading statements to the FSA, or to any other party, as set out in this Notice;

(b) Mr Micalizzi's current explanation regarding the backdating of one of the contracts does not correlate with his clear comments in interview. Further, he maintains that no other contracts were backdated, whereas in the FSA's view it is clear from the documentary evidence that they were. It is also not credible that the emails that Mr Micalizzi provided in support of his claims, which were highly misleading in the circumstances, were simply provided in error. This is particularly so where it appears that the emails provided were deliberately selected to be misleading, while at least one other email which would have clarified the position was omitted. The FSA considers that Mr Micalizzi deliberately sought to mislead the FSA in this regard; and

(c) Mr Micalizzi deliberately misled the FSA by stating that, following lengthy due diligence by a bank (which he knew had not taken place), insurance coverage had been obtained against the risk of non-performance of the bond, and that the genuineness of the bond had therefore been established.

## **PROCEDURAL MATTERS**

### **Decision maker**

18. The decision which gave rise to the obligation to give this Notice was made by the Regulatory Decisions Committee.
19. This Notice is given under section 54 and in accordance with section 388 of the Act. The following statutory rights are important.

### **The Tribunal**

20. DDCM has the right to refer the matter to which this Decision Notice relates to the Upper Tribunal (the “Tribunal”). Under paragraph 2(2) of Schedule 3 of the Tribunal Procedure (Upper Tribunal) Rules 2008, DDCM has 28 days from the date on which this Notice is given to it to refer the matter to the Tribunal. A reference to the Tribunal is made by way of a reference notice (Form FTC3) signed on behalf of DDCM and filed with a copy of this Notice. The Tribunal’s address is: The Upper Tribunal, Tax and Chancery Chamber, 45 Bedford Square, London WC1B 3DN (tel: 020 7612 9700; email [financeandtaxappeals@tribunals.gsi.gov.uk](mailto:financeandtaxappeals@tribunals.gsi.gov.uk)). 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>
21. DDCM should note that a copy of the reference notice (Form FTC3) must also be sent to the FSA at the same time as filing a reference with the Tribunal. A copy of the reference notice should be sent to Charles Kuhn and Andrew Speake at the FSA, 25 The North Colonnade, Canary Wharf, London E14 5HS.



### **Access to evidence**

22. Section 394 of the Act applies to this Notice. The person to whom this Notice is given has the right to access:
- (a) the material upon which the FSA has relied on in deciding to give this Notice; and
  - (b) the secondary material which, in the opinion of the FSA, might undermine that decision.

### **Confidentiality and publicity**

23. This 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 a person to whom this Notice is given or copied may not publish the Notice or any details concerning it unless the FSA has published the Notice or those details. The FSA may publish such information about the matter to which a Decision Notice or Final Notice relates as it considers appropriate. The facts and matters contained in this Notice may therefore be made public.

### **FSA contacts**

24. For more information concerning this matter generally, contact Charles Kuhn (direct line: 020 7066 9070) or Andrew Speake (direct line: 020 7066 5564) at the FSA.

**Martin Hagen**

**Deputy Chairman, Regulatory Decisions Committee**

## **ANNEX 1**

### **RELEVANT STATUTORY AND REGULATORY PROVISIONS**

#### **The Act**

1. The FSA's statutory objectives, set out in section 2(2) of the Act, are: market confidence; financial stability; consumer protection; and the reduction of financial crime.
2. The FSA has the power pursuant to section 45(2) of the Act to cancel an authorised person's Part IV permission where it appears that an authorised person is failing, or likely to fail, to satisfy the Threshold Conditions.

#### **Regulatory requirements and guidance**

3. In deciding on the action, the FSA has had regard to relevant guidance published in the FSA Handbook and set out in the regulatory guides, in particular in the Enforcement Guide ("EG") and the Threshold Conditions ("COND").
4. Section 41 and Schedule 6 to the Act set out the Threshold Conditions which are conditions that the FSA must ensure a firm will satisfy and continue to satisfy, in relation to the regulated activities for which it has permission.
5. Paragraph 5 of Schedule 6 to the Act states that the person concerned must satisfy the FSA that he is fit and proper having regard to all the circumstances including (a) his connection with any person; (b) the nature of any regulated activities that he seeks to carry on or carries on; and (c) the need to ensure his affairs are conducted soundly and prudently (Threshold Condition 5: Suitability).
6. The FSA is authorised pursuant to sections 45(1) and (2) of the Act to cancel an authorised person's Part IV permission where it appears that an authorised person is failing, or likely to fail, to satisfy the Threshold Conditions.

## **FSA's policy on exercising its power to cancel a Part IV permission**

7. The FSA's policy on exercising its power to cancel a Part IV permission is set out in Chapter 8 of the Enforcement Guide ("EG").
8. EG 8.13(1) states that the FSA will consider cancelling a firm's Part IV permission in circumstances including where the FSA has very serious concerns about a firm, or the way its business is or has been conducted.
9. EG 8.14 sets out general grounds for the exercise of the section 45 power to cancel a Part IV permission. It states that the grounds on which the FSA may exercise its power to cancel an authorised person's permission under section 45 of the Act are set out in section 45(1) (which includes where it appears to the FSA that the authorised person is failing, or is likely to fail, to satisfy the threshold conditions in relation to one or more, or all, of the regulated activities for which the authorised person has Part IV permission).

### **Guidance concerning Threshold Condition 5: Suitability (Paragraph 5, Schedule 6 to the Act) – COND 2.5**

10. COND 2.5.1UK states that the person concerned must satisfy the FSA that he is a fit and proper person having regard to all the circumstances including (a) his connection with any person; (b) the nature of any regulated activity that he carries on or seeks to carry on; and (c) the need to ensure that his affairs are conducted soundly and prudently.
11. COND 2.5.2G(1) provides that Threshold Condition 5 requires the firm to satisfy the FSA that it is 'fit and proper' to have Part IV permission having regard to all the circumstances, including its connection with other persons, the range of its regulated activities and the overall need to be satisfied that its affairs are and will be conducted soundly and prudently.
12. COND 2.5.3G(1) further provides that the emphasis of the Threshold Conditions is on the suitability of the firm itself (the suitability of each person who performs a controlled function will be assessed by the FSA under the approved persons regime). However, COND 2.5.3G(2) permits the FSA, when assessing this Threshold

Condition in relation to a firm, to have regard to any person appearing to it to be, or likely to be, in a relevant relationship with the firm, as permitted by section 49 of the Act (Persons connected with the applicant). The guidance in COND 2.5.3G(2) also refers to COND 2.4.3G, which sets out examples of persons in a relevant relationship with the firm, including a firm's controllers, its directors or partners, other persons with close links to the firm and other persons that exert influence on the firm which might pose a risk to the firm's satisfaction of the Threshold Conditions and would, therefore, be in a relevant relationship with the firm.

13. COND 2.5.4G provides that in determining whether the firm will satisfy and continue to satisfy Threshold Condition 5, the FSA will have regard to all relevant matters arising including whether a firm has or will have a competent and prudent management (COND 2.5.4G(2)(b)) and whether it can demonstrate that it conducts, or will conduct, its business with integrity, with due skill, care and diligence and in compliance with proper standards (COND 2.5.4G(2)(a) and (c)).
14. COND 2.5.6G, in giving guidance on the interpretation of whether a firm will satisfy and continue to satisfy Threshold Condition 5 in respect of conducting its business with integrity and in compliance with proper standards, gives examples of relevant matters which include:
  - (1) whether the firm has been open and co-operative in all its dealings with the FSA, and is ready willing and organised to comply with the requirements under the regulatory system (COND 2.5.6G(1));
  - (2) whether the firm has contravened, or is connected with any person who has contravened any provisions of the Act or the regulatory system (COND 2.5.6G(4)); and
  - (3) whether the firm has taken reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory system applicable to it (COND 2.5.6G(6)).
15. COND 2.5.7G provides guidance on the matters that are relevant to determining a firm satisfying and continuing to satisfy Threshold Condition 5 in respect of it having competent and prudent management and exercising due skill, care and diligence.

Such matters include whether the firm has conducted enquiries that are sufficient to give it reasonable assurance that it will not be posing unacceptable risks to consumers or the financial system (COND 2.5.7G(9)).