

---

## FINAL NOTICE

---

To: **Michael Harding**

Date: **21 January 2005**

**TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives you final notice about an order prohibiting you from carrying out any controlled function relating to any regulated activity and any function in relation to any regulated activity carried on by any Authorised Person save for the giving of mortgage and general insurance advice:**

### **1. THE ORDER**

1.1. The FSA gave you a Decision Notice on 15 December 2004 which notified you that, for the reasons set out in that Notice, pursuant to section 56 of the Financial Services and Markets Act 2000 ("FSMA") the FSA had decided to make an order prohibiting you, Mr Michael Harding ("Mr Harding") from performing:

- (1) any controlled function in relation to any regulated activity carried on by any Authorised Person;
- (2) any function in relation to any regulated activity carried on by any Authorised Person save for the giving of mortgage and general insurance advice.

You have not referred the matter to the Financial Services and Markets Tribunal within 28 days of the date on which the Decision Notice was given to you.

Accordingly, for the reasons set out below, the FSA hereby makes an order pursuant to section 56 of the Act prohibiting you from performing any controlled function in relation to any regulated activity carried on by any Authorised Person and any

function in relation to any regulated activity carried on by any Authorised Person save for the giving of mortgage and general insurance advice.

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

- 2.1. The FSA has exercised its statutory power to make a prohibition order against Mr Harding because it considers his conduct, as detailed below, demonstrates a severe lack of honesty and integrity together with a blatant disregard for compliance and regulatory standards.
- 2.2. The FSA's action relates to the conduct of Mr Harding between March 1996 and June 2003 as a partner of The Michael Harding Partnership ("MHP" or "the Firm"). In particular he:
  - (1) created documents (the Firm's Pensions Review Quarterly Returns from March 1996 to March 2003 inclusive) which contained false information;
  - (2) submitted these documents to the FSA with the intention of misleading it concerning the progress that the Firm had made in respect of its Pensions Review;
  - (3) provided false or misleading information to his partner in the Firm in respect of the progress that MHP had made in respect of its Pensions Review, and
  - (4) failed to treat the customers of the Firm fairly, in that there are potentially investors that have not yet been paid redress that is due to them.
- 2.3. As a result of the above, the FSA is not satisfied that Mr Harding is a fit and proper person.

## **3. RELEVANT STATUTORY PROVISIONS AND GUIDANCE**

### **Statutory Provisions**

- 3.1. The FSA's regulatory objectives established in section 2(2) of Financial Services and Markets Act ("FSMA") include the protection of consumers.
- 3.2. Section 56 of FSMA provides that the FSA may prohibit an individual from performing functions in relation to a regulated activity carried on by an authorised person.
- 3.3. The effect of making a prohibition order is to prohibit an individual from performing functions within authorised firms and to prohibit authorised firms from employing the individual to perform specific functions. Such an order may be made:
  - (a) in relation to a specified function, a class of function or any function; and
  - (b) in relation to authorised persons generally or a class of authorised persons.
- 3.4. Section 56(1) provides that the FSA may make a prohibition order if it appears to the FSA that the individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.

- 3.5. A prohibition may therefore be partial or total and may be imposed if it appears to the FSA that the individual concerned is not a fit and proper person to perform such functions.
- 3.6. Section 64 of FSMA authorises the FSA to issue statements of principle with respect to the conduct expected of approved persons. If it does so it must also issue a code of practice for the purpose of helping to determine whether or not a person's conduct complies with the statement of principle. Such a code may specify –
- (1) descriptions of conduct which, in the opinion of the Authority, comply with a statement of principle;
  - (2) descriptions of conduct which, in the opinion of the Authority, do not comply with a statement of principle;
  - (3) factors which, in the opinion of the Authority, are to be taken into account determining whether or not a person's conduct complies with a statement of principle.

### **Relevant Guidance**

#### ***The FSA Handbook***

- 3.7. In exercising its power to issue a prohibition order the FSA must have regard to guidance published in the FSA Handbook. The relevant considerations in relation to the action specified above are set out below.
- 3.8. The Fit and Proper Test for Approved Persons (“FIT”) identifies three criteria as being the most important considerations, namely:
- (1) honesty, integrity and reputation (FIT 2.1): This includes an individual's openness and honesty in dealing with consumers, market participants and regulators and ability and willingness to comply with requirements placed on him by or under the Act as well as with other legal and professional obligations and ethical standards;
  - (2) competence and capability (FIT 2.2): This includes an assessment of the individual's skills in carrying out the controlled function that he is performing, and
  - (3) financial soundness (FIT 2.3).
- 3.9. The Statements of Principle and Code of Conduct for Approved Persons (“APER”) set out the Statements of Principle in respect of approved persons and descriptions of conduct which, in the opinion of the FSA, do not comply with a Statement of Principle. It further describes factors which, in the opinion of the FSA, are to be taken into account in determining whether or not an approved person's conduct complies with a Statement of Principle.
- 3.10. The guidance provided in APER 3.1.3 stipulates that, when establishing compliance with or a breach of a Statement of Principle, account will be taken of the context in

which a course of conduct was undertaken, the circumstances of the individual case, the characteristics of the particular controlled function and the behaviour to be expected in that function. APER 3.1.4 provides guidance that an approved person will only be in breach of a Statement of Principle if he is personally culpable, that is in a situation where his/her conduct was deliberate or where his/her standard of conduct was below that which would be reasonable in all the circumstances.

- 3.11. Statement of Principle 1 provides that:

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

- 3.12. APER 4.1 lists types of conduct which do not comply with Statement of Principle 1. In particular, 4.1.3 states that deliberately misleading (or attempting to mislead) a client, his firm, or the FSA is conduct which breaches Statement of Principle 1. APER 4.1.4 provides that this behaviour could include:

- (1) *falsifying documents;*
- (10) *providing false or inaccurate information to the firm;*
- (11) *providing false or inaccurate information to the FSA.*

APER 4.1.8 includes “*deliberately preparing inaccurate or inappropriate records or returns in connection with a controlled function*” as a further ground for assessing whether there has been a breach of Statement of Principle 1.

- 3.13. Statement of Principle 2 states that:

*An approved person must act with due skill, care and diligence in carrying out his controlled function.*

- 3.14. APER 4.2.3 includes failing to inform the firm of material information in circumstances where the approved person was aware of such information as a ground for conduct which does not comply with Statement of Principle 2. APER 4.2.4(4) considers such conduct to include providing inaccurate or inadequate information to a firm.

- 3.15. Statement of Principle 4 provides that:

*An approved person must deal with the FSA and with other regulators in an open and cooperative way and must disclose appropriately any information of which the FSA would reasonably expect notice.*

- 3.16. APER 4.4.4 states failing to promptly report, in accordance with the firm’s internal procedures, information which would reasonably be of material significance to the FSA as conduct which does not comply with Statement of Principle 4. The guidance at APER 4.4.5 provides that there is no duty on an approved person to such information directly to the FSA unless he is one of the approved persons responsible within the firm for reporting matters to the FSA.

- 3.17. APER 4.4.9(1) includes failing without good reason to inform a regulator of information of which the approved person was aware in response to questions from that regulator is conduct which is in breach of Statement of Principle 4.

***Enforcement Policy***

- 3.18. ENF 8.4 summarises the powers to make prohibition orders set out in FSMA and the circumstances under which Enforcement will consider recommending such action. In particular ENF 8.4.2(3) states that the scope of a prohibition order will depend on the range of functions which the individual concerned carries out in relation to regulated activities, the reasons why he is not fit and proper and the severity of the risk which he poses to consumers or the market generally.
- 3.19. ENF 8.6 gives specific guidance in relation to prohibition orders against individuals employed or formerly employed by firms who are not approved persons. ENF 8.6.1 states that the FSA, when considering making a prohibition order against such individuals may make an order only on the grounds that the individual is not fit and proper to carry out functions in relation to regulated activities.
- 3.20. ENF 8.6.2 provides that the following specific criteria, as set out in ENF 8.5.2, should be considered when determining the fitness and propriety of an individual employed or formerly employed by a firm who is not an approved person:
- (1) whether the individual is fit and proper to perform the functions in relation to regulated activities in accordance with the criteria contained in FIT, and;
  - (2) whether and to what extent the individual has failed to comply with the Statements of Principle or been knowingly concerned in a contravention by the relevant firm of a requirement imposed on the firm by or under FSMA;
  - (3) the relevance, materiality and length of time since the occurrence of any matters indicating unfitness;
  - (4) the severity of the risk which the individual poses to consumers and to confidence in the financial system, and, if relevant;
  - (5) whether the conduct in question occurred while the individual was an approved person, the previous disciplinary record and general compliance history of the individual.
- 3.21. In summary, the relevant considerations are whether, in terms of honesty, integrity, competence and capability, the relevant individual is fit and proper to perform functions in relation to regulated activities and, if not, the severity of the risk posed by them. Having established these matters, it can be determined whether prohibition will be necessary to achieve the FSA's regulatory objectives and what degree of prohibition would best serve the achievement of those objectives in each case.

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

##### **The Michael Harding Partnership**

- 4.1. MHP was an independent financial adviser partnership with 2 partners, operating in Beckenham Junction, Kent. MHP was initially regulated by FIMBRA, followed by the Personal Investment Authority ("PIA"), and, since 1 December 2001, by the FSA. Up to 3 March 2004 MHP's permitted regulated activities were advising on investments, agreeing to carry on a regulated activity, arranging deals in investment and making arrangements.
- 4.2. In June 1998 MHP was given a Private Warning by the PIA Disciplinary Committee for persistent failures to submit its Pensions Review Quarterly Returns on time. The Private Warning noted that in 1996 disciplinary proceedings had been initiated by the PIA against the firm for the same issue, but were not concluded. There is no record of any other disciplinary issues relating to MHP or Mr Harding.
- 4.3. At the time of the conduct in question Mr Harding owned 60% of MHP. The completion of the Pensions Review was his sole responsibility.

##### **MHP's Conduct of the Pensions Review**

- 4.4. From 1995 firms regulated by the PIA could be required to carry out a review of any aspect of their investment business with a view to determining whether redress should be offered to any investor who had suffered loss or damage as a result of a failure by a member to comply with its relevant duties.
- 4.5. The PIA subsequently published guidance ("the Priority Review Guidance") which provided the standards and specification enabling member firms to meet their respective responsibilities to review relevant past pension opt-out, pension non-joiner and pension transfer business. The Pensions Review was divided into two phases, Phase 1 and Phase 2. Firms carrying out the review were required to submit Quarterly Returns to the regulator detailing their progress.
- 4.6. Completion of the Pensions Review became a requirement for firms regulated by the FSA by virtue of transitional arrangements set out in the Financial Services and Markets Act 2000 (Transitional Provisions) (Review of Pensions Business) Order 2000, which treats a failure to carry out the Review as a failure to comply with FSA Rules. The deadline for completion of Phase 1 of the Review was 31 December 1998 and for Phase 2 it was 30 June 2002 (or 31 March 2003 where investors had received a windfall payment from the demutualization of the personal pension provider). Completion for this purpose meant that redress had been paid to relevant customers or that offers of redress had been made to them.
- 4.7. In the period from March 1996 to March 2003, Mr Harding submitted a total of 32 Pensions Review Returns on behalf of MHP. On several occasions he submitted them after the PIA's deadline for submission. The Returns included information indicating MHP's progress with Phase 1 and Phase 2 of the Pensions Review. On the basis of the information contained in the Return submitted in respect of the quarter ended 31 December 2000 Phase 1 of the Review was signed off as complete. After the firm submitted the Phase 2 Return for the quarter ended 30 September 2001 it failed to

submit further Phase 2 Returns until it provided one for the quarter ended 31 March 2003.

- 4.8. The FSA's Pensions Department's examination of this Return indicated a number of anomalies. As a result the Pensions Department conducted a visit to MHP on 2 September 2003. During the visit Mr Harding informed the Pensions Department that he had not mailed any investors as required under the Pensions Review, that MHP's Returns had been completed with false statistics and that he had not even begun the Pensions Review.
- 4.9. Mr Harding remained a partner until April 2004 when the partnership was dissolved. He ceased to be an Approved Person on 3 March 2004.
- 4.10. On 8 March 2004, Investigators were appointed to carry out an investigation into Mr Harding's conduct as an Approved Person carrying on regulated activities.
- 4.11. During the investigation Mr Harding admitted that he had completed all Pension Review Quarterly Returns, after the first one he submitted, with false information. He said that he had originally intended to carry out the Review and had identified the customers of the firm whose cases should be included in the work. He had never carried out the work however and could provide no explanation of why he had not done so, except that it was due to pressure of work and the fact that he is a poor administrator.
- 4.12. Mr Harding also admitted providing the same false information to his PI insurers as he had provided to the FSA, thereby rendering it highly unlikely that the insurers would meet any claim arising under the Review.

## **5. CONCLUSIONS**

- 5.1. Having regard to its regulatory objectives and having taken into consideration the representations made on Mr Harding's behalf, the facts and matters described above lead the FSA to the following conclusions.
- 5.2. In his capacity as a partner of MHP, Mr Harding was responsible for the conduct of the Pensions Review, which included the completion of Pensions Review Quarterly Returns, their submission to the FSA and dealing with clients and the Firm's Professional Indemnity Insurers in relation to offers and payment of redress.
- 5.3. By submitting false Pensions Review Quarterly Returns to the FSA from March 1996 up to and including March 2003 Mr Harding deliberately misled the FSA into believing that MHP had made progress with the Pensions Review when it had made no progress. Mr Harding also misled his partner into the same belief. Mr Harding has therefore breached Statement of Principle 1 in that he:
  - (1) completed the Pensions Review Quarterly Returns from March 1996 up to and including March 2003 with false information;
  - (2) provided false or inaccurate information to the firm in relation to the progress of the Pensions Review; and

- (3) submitted the falsified Pensions Review Quarterly Returns to the FSA over a period of seven years with the intention of misleading the FSA as to MHP's progress of the Pensions Review.
- 5.4. Mr Harding has breached Statement of Principle 2 by providing inaccurate or inadequate information regarding the progress of the Review to the other partner of MHP as explained in 5.3 above.
- 5.5. Mr Harding was the approved person within MHP responsible for the conduct for the Pensions Review, including the completion and submission of the Returns. Thus, by failing to report the true extent of MHP's Review to the FSA, Mr Harding is in breach of Statement of Principle 4.
- 5.6. By breaching the Statements of Principle and by failing to ensure that the Firm continued to fulfil its obligation to complete the Pensions Review from 1996 onwards Mr Harding has failed to act with the honesty, integrity and competence required of Approved Persons and has breached Fit and Proper Criteria FIT 2.1 and FIT 2.2

## **6. IMPORTANT NOTICES**

- 6.1 This Final Notice is given to you pursuant to section 390 of the Act.

### **Publicity**

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

### **Third party rights**

- 6.4 This Final Notice will be given to Mr Kenneth Brooke, your former partner in MHP, as a third party identified to whom in the opinion of the FSA the matter is prejudicial.

### **FSA Contacts**

- 6.5 For more information concerning this matter generally, you should contact Sylvia Levi in the Enforcement Division (direct line: 020 7066 1422/fax: 020 7066 1423).



John Winfield  
FSA Enforcement Division