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## FINAL NOTICE

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To: **JONATHAN LEIGH HARDIE**

Date of Birth: **5 January 1954**

Date: **28 January 2008**

**TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London, E14 5HS ("the FSA") gives final notice about an order prohibiting Jonathan Leigh Hardie from carrying out any controlled function involving the exercise of significant influence over any person in relation to any regulated activity carried on by any other authorised person or exempt person.**

### **1. THE ORDER**

- 1.1 The FSA gave Jonathan Leigh Hardie ("Mr Hardie") a Decision Notice on 28 January 2008 which notified Mr Hardie that, pursuant to section 56 of the Financial Services and Markets Act 2000 ("the Act"), the FSA had decided to make an order prohibiting Jonathan Leigh Hardie ("Mr Hardie") from carrying out any controlled function involving the exercise of significant influence over any person in relation to any regulated activity carried on by any other authorised person or exempt person.
- 1.2 Mr Hardie agreed that he would not be referring the matter to the Financial Services and Markets Tribunal.
- 1.3 Accordingly, for the reasons set out below and having agreed with Mr Hardie the facts and matters relied on, the FSA makes an order prohibiting Mr Hardie from carrying out any controlled function involving the exercise of significant influence over any person in relation to any regulated activity carried on by any other authorised person or exempt person.

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

- 2.1 The FSA has imposed a prohibition order against Mr Hardie as it considers that his conduct, whilst a director at Primedale Financial Services Limited ("Primedale") (now in liquidation), with responsibility for apportionment and oversight and compliance, fell short of the standards required by the FSA's Statements of Principle for approved persons.
- 2.2 Specifically, Mr Hardie mishandled endowment mortgage complaints received by Primedale between January 2001 and May 2006 ("the relevant period") in carrying out his controlled functions by virtue of his failure to:
- (1) act with due skill, care and diligence in reviewing endowment mortgage complaints fully and appropriately; and
  - (2) take reasonable steps to ensure that Primedale complied with the relevant requirements of the regulatory system.
- 2.3 Owing to his conduct, the FSA is not satisfied that Mr Hardie is a fit and proper person to perform any controlled function involving the exercise of significant influence over any person in relation to any regulated activity carried on by any other authorised person or exempt person.
- 2.4 The prohibition order does not affect controlled functions which do not fall within the definition of "significant influence function", which is set out in the FSA's Handbook: Supervision Manual Chapter 10.5.

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

### **Relevant Statutory Provisions**

- 3.1 The FSA's regulatory objectives set out in section 2(2) of the Act include the protection of consumers.
- 3.2 Section 56 of the Act 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 in relation to:
- (1) a specified regulated activity, any regulated activity falling within a specified description or all regulated activities; and
  - (2) authorised persons generally or any person within a specified class of authorised person.
- 3.4 A prohibition may therefore be partial or total and may be imposed if it appears to the FSA that the individual is not a fit and proper person to perform such functions.

## **Relevant Guidance**

- 3.5 In exercising its power to issue a prohibition order, the FSA has had regard to guidance published in the FSA Handbook. The guidance that the FSA considers relevant to this case is set out below.

### **Enforcement Guide ("EG")**

- 3.6 EG 9 summarises the powers to make prohibition orders set out in the Act and the circumstances under which such action would be recommended.
- 3.7 EG 9.4 states that the FSA has the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant.
- 3.8 EG 9.5 states that the scope of a prohibition order will depend on the range of functions which the individual concerned performs in relation to regulated activities, the reasons why he is not fit and proper and the severity of the risk which he poses to consumers or the market generally.
- 3.9 EG 9.9 provides that, when the FSA decides whether to make a prohibition order against an approved person, the FSA will consider all the relevant circumstances of the case, including, but not limited to, the following:
- (1) whether an individual is fit and proper to perform functions in relation to regulated activities in accordance with the criteria contained in FIT;
  - (2) whether, and to what extent, the approved person has failed to comply with Statements of Principle or been knowingly concerned in a contravention by the relevant firm of a requirement imposed on the firm by or under the Act (including the Principles for Businesses and other rules);
  - (3) the relevance and materiality of any matters indicating unfitness;
  - (4) the length of time since the occurrence of any matters indicating unfitness;
  - (5) the particular controlled function the approved person is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates; and
  - (6) the severity of the risk which the individual poses to consumers and to confidence in the financial system.
- 3.10 In summary, the relevant considerations are whether 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.

### Fit and Proper Test for Approved Persons ("FIT")

- 3.11 The FSA has issued specific guidance on the fitness and propriety of individuals in FIT. The purpose of FIT is to outline the main criteria for assessing the fitness and propriety of a candidate for a controlled function and FIT is also relevant in assessing the continuing fitness and propriety of approved persons.
- 3.12 FIT identifies three criteria as being the most important consideration, 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 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).

### Statements of Principle and the Code of Conduct for Approved Persons ("APER")

- 3.13 Section 64 of the Act 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 Statements of Principle. Such a code may specify:
- (1) descriptions of conduct which, in the opinion of the FSA, do not comply with a Statement of Principle; and
  - (2) factors which, in the opinion of the FSA, are to be taken into account in determining whether or not a person's conduct complies with a Statement of Principle.
- 3.14 APER sets out the Statements of Principle as they relate to 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.
- 3.15 APER 3.1.3G states 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.
- 3.16 APER 3.1.4G provides 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 conduct was deliberate or where his standard of conduct was below that which would be

reasonable in all the circumstances.

3.17 Statement of Principle 2 provides that:

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

3.18 APER 4.2 lists types of conduct which do not comply with Statement of Principle 2.

3.19 APER 4.2.3E states that failing to inform a customer of material information in circumstances where he was aware, or ought to have been aware, of such information, and of the fact that he should provide it is conduct which breaches Statement of Principle 2. APER 4.2.4E(4) considers such conduct includes but is not limited to providing inaccurate or inadequate information.

3.20 Statement of Principle 7 provides that:

*"An approved person performing a significant influence function must take reasonable steps to ensure that the business of the firm for which he is responsible in his controlled function complies with the relevant requirements and standards of the regulatory system."*

3.21 APER 4.7 lists types of conduct which do not comply with Statement of Principle 7.

3.22 APER 4.7.7E states that failing to take reasonable steps to ensure that procedures and systems of control are reviewed and, if appropriate, improved, following the identification of significant breaches (whether suspected or actual) of the relevant requirements and standards of the regulatory system relating to its regulated activities is conduct which breaches Statement of Principle 7.

#### Dispute Resolution: Complaints ("DISP")

3.23 DISP sets out detailed requirements for handling complaints fairly, consistently and promptly.

3.24 DISP 1.2.1R states that a firm must have in place and operate appropriate and effective internal complaint handling procedures (which must be written down) for handling any expression of dissatisfaction, whether oral or written, and whether justified or not, from or on behalf of an eligible complainant.

3.25 DISP 1.2.16R states that a firm's internal complaint handling procedures under DISP 1.2.1R must make provision for:

- (1) complaints to be investigated by an employee of sufficient competence who, where appropriate, was not directly involved in the matter which is the subject of the complaint (DISP 1.2.16R(1)); and
- (2) responses to complaints to address adequately the subject matter of the complaint and, where a complaint is upheld, to offer appropriate redress (DISP 1.2.16R(3)).

3.26 DISP 1.2.22R states that a firm must put in place appropriate management controls and take reasonable steps to ensure that in complying with DISP 1.2.1R it handles complaints fairly, consistently and promptly and that it identifies and remedies any recurring or systemic problems, as well as any specific problem identified by a complaint.

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

##### **Mr Hardie and Primedale**

4.1 Mr Hardie was one of four directors of Primedale, a small investment firm that was also permitted to carry on mortgage advisory and general insurance business. Primedale sold approximately 3,000 endowment policies between 1988 and 1999 and received 389 endowment mortgage complaints during the relevant period.

4.2 From 3 October 1985 until 1 June 2006, Mr Hardie was the controlling Director of Primedale, his functions included apportionment and oversight (CF8) and compliance oversight (CF10). He also had sole responsibility for dealing with endowment mortgage complaints received by Primedale during the relevant period.

##### **Thematic Work**

4.3 The FSA's Supervision Division ("Supervision") visited Primedale in April 2005 as part of a thematic project looking at complaints handling. Supervision identified the following deficiencies:

- (1) Mr Hardie was not assessing complaints fully or correctly by failing to investigate missing information or consider the suitability of recommendations;
- (2) Mr Hardie was not handling complaints fairly by including his opinion and relying on assumptions of what was said, or not said, at the time of sale in Primedale's final response letters;
- (3) Mr Hardie was not taking steps to identify and remedy problems in Primedale's endowment mortgage complaints handling procedures; and
- (4) Mr Hardie was reviewing complaints for which he was the original adviser.

4.4 Following the visit, Supervision wrote to Mr Hardie setting out their detailed findings. Supervision informed Mr Hardie that it was not satisfied that Primedale was reviewing its complaints in an appropriate manner.

4.5 Primedale's only adviser resigned on 13 December 2005 and Primedale went into voluntary liquidation on 1 June 2006. At the date that Primedale went into voluntary liquidation, of the 389 complaints received by Primedale during the relevant period, 34 cases were found in favour of the customers by the Financial Ombudsman Service ("the FOS"), 37 cases were still pending with the FOS and a further 155 cases were referred to the Financial Services and Compensation Scheme.

- 4.6 The matter was referred to the FSA's Enforcement Division ("Enforcement") for investigation on 21 February 2007.

### **Enforcement Investigation**

- 4.7 Enforcement found that Mr Hardie failed to consider his regulatory responsibilities when dealing with complaints and, as a result, endowment mortgage complaints received by Primedale were not handled appropriately. Consequently, customers were exposed to the risk that they would not receive compensation to which they were entitled.

### **Failing to act with due skill, care and diligence in reviewing complaints**

- 4.8 Mr Hardie was responsible for ensuring that Primedale reviewed and responded to complaints fully and fairly. However, Mr Hardie did not deal with endowment mortgage complaints against Primedale properly as he failed to investigate complaints adequately and he did not conduct reviews with fairness.

### ***Inadequate investigation of complaints***

- 4.9 Mr Hardie did not attempt to investigate the suitability of recommendations or take sufficient steps to gather relevant information to reconstruct files (given that in many cases Primedale no longer maintained any records) for establishing a customer's attitude to risk or to ascertain a customer's circumstance at the time of sale. As such he was unable to assess complaints fully, effectively or fairly.
- 4.10 Prior to Supervision's visit in April 2005, Mr Hardie was not aware that the FOS endowment mortgage questionnaire, or a form of it, could be used to gather missing information from customers for assessing complaints. However, even in circumstances where the FOS endowment mortgage questionnaire was issued, Mr Hardie failed to use the information obtained to determine the suitability of the endowment product sold.

### ***Unfair handling of complaints***

- 4.11 Mr Hardie did not ensure that Primedale's final response letters addressed adequately the subject matter of a complaint, contrary to the requirements of DISP 1.2.16R(2). Specifically, he did not consider or address the suitability of recommendations. Instead Mr Hardie included his opinion and assumptions about the expected performance of the Stock Market and the impact this would have on the value of a customer's endowment policy. Primedale's final response letters included the following common reasons for rejecting a complaint:
- (1) the recommendation was such a long time ago that Primedale did not have any records for making an adequate assessment of the complaint;
  - (2) it had never been Primedale's policy to guarantee that an endowment policy would repay the mortgage and that there would be a surplus at maturity;

- (3) Primedale had relied on letters received from the Product Providers which assumed certain growth rates;
- (4) Primedale cannot be held responsible for "severe market conditions"; and
- (5) the endowment policy could be converted to a repayment mortgage or start a Cash ISA.

As Mr Hardie failed to provide customers with proper, fair and balanced reasons, this might have persuaded customers not to pursue their complaints further.

- 4.12 Mr Hardie assessed complaints having already decided that Primedale had never knowingly mis-sold an endowment policy and therefore it would be difficult for Primedale to admit liability. The result was that endowment mortgage complaints were rejected inappropriately since Mr Hardie failed to deal with them in a fair and objective manner.
- 4.13 Mr Hardie sent a standard response in the majority of cases where customers complained. Instead of dealing with the complaints, by gathering and assessing relevant information, Mr Hardie informed customers that they could take their complaints to the FOS. By doing so, he transferred the responsibility for handling endowment mortgage complaints against Primedale to the FOS. This imposed an additional burden on customers seeking redress who were entitled to have their complaints fairly dealt with by Primedale in the first instance.

#### Failing to take reasonable steps for ensuring Primedale's compliance with regulatory requirements

- 4.14 Mr Hardie was also responsible for ensuring that Primedale had in place appropriate complaint handling procedures for dealing with any expression of dissatisfaction from customers. However, Mr Hardie did not operate appropriate complaint handling procedures, contrary to the requirements of DISP 1.2.1R. Mr Hardie also failed to observe relevant requirements of the regulatory system in dealing with complaints.

#### *Failings in management controls*

- 4.15 Despite the requirements of DISP 1.2.22R, Mr Hardie failed to take reasonable steps to identify and remedy recurring problems relating to the assessment of complaints. Specifically, he did not appear to absorb any lessons learned following judgements made by the FOS. In particular, he rejected new complaints where the facts appeared identical or similar to existing complaints that had been upheld in favour of a customer by the FOS. He did not examine or evaluate the steps taken, or the rationale adopted, by the FOS so as to make any improvements to Primedale's complaint handling processes and practices for ensuring fair and consistent handling of endowment mortgage complaints.

#### *Failing to observe regulatory requirements*

- 4.16 Mr Hardie reviewed complaints for which he was the provider of the original advice,



contrary to the requirements of DISP 1.2.16R(1). Given that Mr Hardie failed to consider complaints objectively, customers were exposed to the risk that their complaints would not be handled properly or treated fairly.

## **5. CONCLUSIONS**

5.1 The facts and matters described above lead the FSA to the conclusion that Mr Hardie's conduct fell short of the standards required of an approved person performing any controlled function involving the exercise of significant influence function over any person in relation to any regulated activity carried on by any authorised person or exempt person. As such, he is not fit and proper in terms of his competence and capability. In particular his conduct constituted breaches of the following Statements of Principle:

(1) Statement of Principle 2 by reason of the facts and matters referred to in paragraphs 4.9 to 4.13 above, he failed to act with due skill, care and diligence in carrying out his controlled functions. In particular, he failed to review appropriately, and to respond adequately, to complaints; and

(2) Statement of Principle 7 by reason of the facts and matters referred to in paragraphs 4.15 to 4.16 above, he failed to take reasonable steps to ensure the business of Primedale, for which he was responsible, complied with the relevant requirements of the regulatory system. In particular, he failed to ensure that Primedale had in place appropriate complaints handling procedures.

5.2 The FSA considers that, to achieve its regulatory objectives which include the protection of consumers, it should exercise its powers to make a prohibition order in the terms proposed.

## **6. DECISION MAKERS**

6.1 The decision which gave rise to the obligation to give this Final Notice was made by the Settlement Decision Makers on behalf of the FSA.

## **7. IMPORTANT**

7.1 This Final Notice is given to Mr Hardie in accordance with section 390 of the Act.

### **Confidentiality and Publicity**

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

7.3 The FSA intends to publish such information about the matter to which this Final

Notice relates as it considers appropriate.

**FSA Contacts**

- 7.4 For more information concerning this matter generally, please contact Russell Clifton at the FSA (direct line: 020 7066 5304 / fax: 020 7066 5305).

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Jonathan Phelan  
Head of Department  
FSA Enforcement Division