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**FINAL NOTICE**

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**To: Dr Albert Alphonso Carlyle Waite**

**Date: 3 May 2006**

**TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives you notice about an order prohibiting you from performing any function in relation to any regulated activity carried on by a credit union.**

**THE ORDER**

1. The FSA gave you a Decision Notice dated 27 October 2004, which notified you that pursuant to section 56 of the Financial Services and Markets Act 2000 ("FSMA"), the FSA had decided to make an order prohibiting you, Dr Albert Alphonso Carlyle Waite ("Dr Waite"), from performing any function in relation to any regulated activity carried on by a credit union.
2. On 25 November 2004, you referred the decision to the Financial Services and Markets Tribunal ("the Tribunal") on the grounds, among other things, that the alleged conduct had not been proven. The Tribunal upheld the FSA's decision under reference FIN/2004/0033 and dismissed your reference.
3. Subsequently, you made an application for the Tribunal to review its decision and failing that, for leave to appeal to the Court of Appeal. You cited among other things, that you had not been afforded sufficient time to prepare for the hearing and unfairness due to the refusal to grant an adjournment and the decision to proceed with the case in your absence. The Tribunal refused both applications.
4. On 12 October 2005, you made an application to the Court of Appeal for leave to appeal the decision of the Tribunal. On 15 March 2006, the Court of Appeal refused your application on the basis that to allow an appeal to go forward would not be the appropriate course, because an appeal has no real prospect of success
5. Accordingly and for the reasons set out below and having taken into consideration your oral representations dated 15 October 2004 to the Regulatory Decisions Committee

("RDC"), and the directions and findings made by the Tribunal in its decision, the FSA makes an order prohibiting you, Dr Waite, from performing any function in relation to any regulated activity carried on by a credit union.

## **REASONS FOR THE ACTION**

### **Summary**

6. The FSA has concluded on the basis of the facts and matters described below, the findings of the Tribunal and having considered your representations that you are not fit and proper to perform any functions in relation to any regulated activities carried on by a credit union.
7. The FSA's action relates to your activities and conduct as Chairman of London Adventist Credit Union Limited ("LACU") from March 2001 to 11 July 2004. In particular, you:
  - (1) facilitated a £100,000 investment of LACU funds by the LACU Board for the purchase and development of a property in East London ("the Property") which contravened requirements of a previous regulatory regime;
  - (2) failed to protect LACU's investment by ensuring there was adequate security for its investment and failed to disclose to LACU Board and membership the true level of risk associated with the investment;
  - (3) did not disclose to the full LACU Board or the LACU membership the full extent of your personal involvement in the property development and in particular, that you were to receive £55,000 as a result of an investment agreement with the property developer;
  - (4) had a conflict of interest between your role as the Chairman of LACU and your personal financial interest in the Property;
  - (5) put your personal financial interest in the Property ahead of the interests of LACU by failing to secure repayment of the LACU investment in the hope of making a personal return greater than the £55,000 specified in the investment agreement; and
  - (6) failed to ensure that LACU met its capital requirement as prescribed by the Credit Unions Source Book ("CRED") resulting in LACU voluntarily varying its own permission in November 2003 in order to preserve its financial position.
8. By your conduct you have demonstrated a wilful and persistent disregard for the requirements and standards of the previous and current regulatory system, and thereby a lack of fitness and propriety, such that the FSA considers it necessary to make a prohibition order in the terms proposed in order to achieve its regulatory objectives. Those include maintaining market confidence in the financial system and protection of consumers.

## RELEVANT STATUTORY AND REGULATORY PROVISIONS

### The FSA's power to make a prohibition order

9. The FSA is authorised by the FSMA to make an order (a "prohibition order"), in circumstances where it appears to the FSA that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person. A prohibition order may prohibit that individual from performing a specified regulated activity, any regulated activity falling within a specified description or all regulated activities.<sup>1</sup>
10. The procedure to be adopted in relation to prohibition orders is set out in sections 57 and 58 FSMA.

### Sections 12(1), 12(3) and 13(1) of the Credit Unions Act 1979

11. At the time LACU agreed to invest in the property, and prior to 2 July 2002, credit unions were supervised by the Registry of Friendly Societies ("RFS") and subject to the provisions of the Credit Union Act 1979 (the "CU Act").
12. From 2 July 2002 credit unions have been regulated under the provisions of FSMA. Rules and guidance for credit unions are set out in the Credit Unions Sourcebook ("CRED").
13. Under Section 13(1) of the CU Act,<sup>2</sup> credit unions were prevented from investing surplus funds except in a manner authorised by an order made by the Chief Registrar of Friendly Societies. The Credit Unions (Authorised Investments) Order 1993 lists authorised investments. The investment in the property does not fall within the type of investments authorised by the relevant order.
14. Section 12 of the CU Act prescribes the narrow circumstances in which a credit union may hold land.

Section 12(1) Credit Unions Act provides that:

*"A credit union may hold, purchase or take on lease in its own name any land for the purpose of conducting its business thereon but, subject to subsection (3) below, for no other purpose, and may sell, exchange, mortgage or lease any such land, and erect, alter or pull down buildings on it."*

Section 12(3) states:

*"A credit union shall have power to hold any interest in land so far as is necessary for the purpose of making loans to its members on the security of an interest in land and of enforcing any such security."*

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<sup>1</sup> FSMA, section 56

<sup>2</sup> Repealed on 2 July 2002 by SI 2002/1501, art 2(1), (9).

## The Credit Unions Source Book ("CRED")

15. Similar provisions exist in CRED in respect of permitted investments<sup>3</sup> and in relation to the restricted circumstances in which a credit union may hold land.<sup>4</sup>
16. CRED R 8.3.1 imposes on a credit union a requirement that it must at all times maintain a positive amount of capital.

### Relevant Guidance

17. In making the order, the FSA has had regard to the guidance published in the FSA Handbook, and in particular to Chapter 8 of the Enforcement manual ("ENF") and Chapter 2 of the Fit and Proper Test for Approved Persons ("FIT").

- (1) ENF 5.1A sets out the FSA's policy on when a prohibition order (as opposed to other action) may be appropriate as follows:

*The FSA will consider in each case whether its regulatory objectives ... can adequately be achieved by withdrawing approval or disciplinary sanctions, for example, public censure or financial penalties, or by issuing a private warning. The FSA considers that a prohibition order generally has more serious consequences than the withdrawal of approval because a prohibition order will usually be wider in scope ... It is therefore likely that the FSA will consider making a prohibition order against approved persons only in the more serious cases of lack of fitness and propriety where it considers that the other powers available to it are not sufficient to achieve the FSA's regulatory objectives.*

- (2) ENF 8.5.2 sets out those factors which the FSA will consider when deciding whether to make a prohibition order against an approved person. They include:

- (i) 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 contained in FIT 2.1 (Honesty, integrity and reputation); FIT 2.2 (Competence and capability) and FIT 2.3 (Financial soundness). The criteria include:

- (a) honesty, integrity and reputation, including the individual's openness and honesty in dealing with consumers, market participants and regulators and ability and willingness to comply with regulatory requirements placed on him by or under the Acts as well as with other legal and professional obligations and ethical standards;

- (b) competence and capability; this includes an assessment of the individual's skills to carry out the controlled functions that he is performing

- (ii) whether and to what extent, the approved person has:

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<sup>3</sup> CRED R 7.2.1

<sup>4</sup> CRED R 7.2.8

- (a) failed to comply with the Statements of Principle; or
  - (b) 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 and other rules);
  - (iii) the relevance, materiality and length of time since the occurrence of any matters indicating unfitness;
  - (iv) severity of the risk which the individual poses to confidence in the financial system.
18. The FSA has also had regard to the Statements of Principle and Code of Practice for Approved Persons ("APER").

## **FACTS AND MATTERS RELIED ON**

19. You were Chairman of LACU throughout the relevant period, from March 2001 when the investment in the Property was made, until 11 July 2004. You were an Approved Person<sup>5</sup> and held the elected position of Chairman of LACU for approximately 11 years.

### **Unauthorised Investment**

20. Section 13(1) of the CU Act prevented credit unions investing surplus funds except in a manner authorised by an order made by the Chief Registrar of Friendly Societies. The order restricted investments to specific securities and deposits in low risk categories.
21. Under section 12(1) of the CU Act credit unions are permitted to use surplus funds to purchase premises for the purpose of conducting its business, i.e. for use as an office.
22. You were the moving force behind LACU's decision to invest in the property and strongly recommended that decision to the Board.
23. You were aware that LACU had previously attempted to obtain premises for use by the credit union. However the RFS had previously prevented the LACU Board from taking on premises that were larger than the size of the business could either justify or sustain.
24. By a letter dated 22 March 2001 you and a property developer were granted planning permission, in accordance with the original proposal, for a property in east London to be converted into eight residential flats.
25. Three days later, on 25 March 2001, the LACU Board decided unanimously to invest £100,000 of credit union funds in the development of that property. The investment was solicited from LACU by you, its Chairman. You had a business relationship with the property developer and a personal financial interest in the development. In

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<sup>5</sup> CF1 Director and CF8 Apportionment and Oversight

reaching its decision to invest, the Board relied entirely on information supplied by you.

26. You stated to the LACU Board that the purpose of the investment was to acquire one of the flats for use as the LACU registered office. Notwithstanding this stated aim you knew that the development was residential.
27. You did not establish whether a residential flat could be used as an office by LACU, or explore the prospect of obtaining a change in the permitted use.
28. The £100,000 investment was made on an unsecured basis and was used to purchase the Property in your name and that of the developer and to secure additional finance from a finance company. The investment was not a deposit or a part payment on one of the flats, nor did it secure a specified purchase price. The investment only purported to secure LACU an option to purchase a flat.
29. After the LACU Board voted to invest the £100,000 you signed an agreement with the developer whereby you would facilitate the investment from LACU and personally receive £55,000 from the proceeds of the development. In the event that LACU did not purchase a flat it was to be repaid its investment and an additional £20,000.
30. The investment in a residential property was not authorised under the CU Act. The true purpose of the investment was to obtain a £55,000 return for you and a £20,000 return for LACU.
31. In assessing your competence and capability, the FSA is required to assess your skills to carry out the controlled functions that you are performing. In acting in relation to the transaction you failed to exhibit the degree of competence which is expected of a chairman of a credit union.
32. In assessing your honesty, integrity and reputation the FSA is required to have regard to your openness in dealing with consumers and regulators and ability and willingness to comply with regulatory requirements placed on you by or under the Acts as well as with other legal and professional obligations and ethical standards and whether you contravened any of the requirements and standards of the present or previous, regulatory system<sup>6</sup>. As the chairman of LACU you were required both by the CU Act and the LACU rules to ensure that LACU's surplus funds were invested in an authorised manner.

**Failure to protect LACU's investment by ensuring there was adequate security and failure to inform LACU about the true nature of the risk.**

33. You did not take steps to protect LACU by ensuring there was adequate security for its investment. You were aware that the fact that the Property had been purchased in your name was not adequate security because you and the Property developer had granted a first ranked charge over the Property to the finance company. The charge secured the finance to purchase and develop the Property and allowed for the finance company to recover all monies lent against the Property.

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<sup>6</sup> FIT 2.1.3 G (5)

34. The £100,000 LACU invested was included in the loan application submitted to the finance company by you and the developer as funds provided from your own resources, which is untrue.
35. You did not take proper steps to ensure that LACU's interests were safeguarded by ensuring that LACU took separate legal advice prior to entering into the transaction. You did not seek to protect LACU's £100,000 investment by obtaining an enforceable security such as a charge over the property. Consequently the £100,000 was invested into the development on an unsecured basis.
36. You did not disclose to LACU the true level of the risk of the investment. In particular:
  - (1) you represented to the LACU Board that the investment was secure on the basis that the Property had been purchased in your name; and
  - (2) you did not disclose the contents of an agreement signed with the developer on 11 April 2001 ("the Investment Agreement"), either when it was negotiated or after it had been concluded, which expressly recognised you as "only an investor in the development".
37. You should have ensured that a member of the Board of LACU, other than yourself, was responsible for recovering LACU's monies.

#### **Failure to disclose personal financial interest in the investment**

38. You failed to inform LACU and the LACU Board that, following LACU Board's decision to invest in the development and after the £100,000 had been paid by LACU into your personal account you had negotiated a personal return from the investment. It was a further term of the Investment Agreement that you would receive a sum of £55,000 from the proceeds of the sale of the flats.
39. You should not have attended board meetings whilst the decision to enter into the option agreement relating to the Property was discussed, or indeed whilst the recovery of the £100,000 LACU investment was being considered.
40. You failed to report fully or adequately to the LACU Board on the nature the negotiations between the finance company, the developer and yourself, and failed to ensure that LACU was separately advised and represented.

#### **Conflict of Interest**

41. You had a conflict of interest between your role as Chairman of LACU and your personal financial interest in the Property. This conflict manifested itself when you prevented LACU from being repaid because of a dispute with the property developer over the amount you personally should receive from the proceeds of the development.
42. Central to the dispute was your attempt to obtain a further £45,000 in addition to the £55,000 referred to in the Investment Agreement. The developer refused to pay this further sum and by a letter dated 1 July 2002 he sought to:

- (1) Pay LACU the £120,000 plus interest specified in the Investment Agreement;
  - (2) Pay you the £55,000 specified in the Investment Agreement; and
  - (3) End your interest in the Property by obtaining a transfer of your interest in the freehold of the Property.
43. You refused to transfer the freehold interest without first unreasonably insisting on personally obtaining a greater share of the proceeds and unreasonably rejected offers of compromise.
  44. The offer was repeated in a letter from the developer to the LACU Board dated 14 July 2002 but you refused to relinquish your interest in the freehold of the Property. As a result of you putting your personal interest ahead of the interests of the credit union, you failed to secure the repayment of LACU's £100,000 investment.
  45. After members of the Board became concerned about the investment you tried to hinder the investigation carried out by members of LACU who tried to inquire into the circumstances surrounding the investment of £100,000, your involvement in the Property and its development.
  46. As at the date of the hearing you still failed to recognise and understand that LACU's interest and your own conflicted.

#### **Failure to ensure LACU met capital requirements**

47. LACU's audited year end accounts for both 2001 and 2002 reported uncertainty as to whether the £100,000 deposit was an asset or whether a loss of £100,000 would be incurred by LACU. Both sets of accounts were qualified in this respect.
48. LACU's 2003 accounts were corrected to show the £100,000 investment as a loss to LACU. As a result of your failure to ensure adequate security for the investment, and your failure to accept the developer's offer to repay LACU's investment (owing to the conflict outlined above) LACU failed to meet the capital requirement under CRED R 8.3.1 which imposes on credit unions a requirement that they must at all times maintain a positive amount of capital.

#### **Conclusions**

49. The FSA considers that by your conduct you have demonstrated that you are not fit and proper to perform any function in relation to any regulated activity carried on by a credit union and, in particular, that you do not satisfy the criteria of honesty, integrity and reputation. You have demonstrated a lack of openness and honesty in dealing with the Board of the credit union of which you were Chairman and that you are not ready and willing to comply with regulatory requirements and other legal obligations and ethical standards.
50. The FSA considers that your conduct posed a risk to confidence in the financial system. Given the nature of that risk, the FSA considers that it is necessary to make a prohibition against you in the terms proposed in order to achieve its regulatory objectives, including market confidence and the protection of consumers.



## **IMPORTANT**

This Final Notice is given to Dr Waite in accordance with section 390 of the Act.

### **Publicity**

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 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 you or prejudicial to the interests of consumers. The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

### **FSA contacts**

For more information concerning this matter generally, you should contact Francesca Harte at the FSA (direct line 020 7066 1482 / fax: 020 7066 1483)

**Jonathan Phelan**  
**Head of Division**  
**FSA Enforcement Division**