

Draft Order laid before Parliament under section 251(6) of the Banking Act 2009, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2009 No.

BUILDING SOCIETIES

The Building Societies (Financial Assistance) Order 2009

<i>Made</i>	- - - -	2009
<i>Coming into force</i>	- -	2009

This Order is made in exercise of the powers conferred by section 251(1), (2), (3), (5), (7) and (8) and section 259(1) of the Banking Act 2009(a) and by section 11 of the Banking (Special Provisions) Act 2008(b).

A draft of this Order has been laid before Parliament in accordance with section 251(6) of the Banking Act 2009 and section 13(3) of the Banking (Special Provisions) Act 2008 and approved by a resolution of each House of Parliament.

Accordingly, the Treasury make the following Order:

PART 1

Introductory

Citation and commencement

- 1.—(1) This Order may be cited as the Building Societies (Financial Assistance) Order 2009.
- (2) It comes into force on the day after the day on which it is made.

Interpretation

- 2.—(1) In this Order—
 - “the 1986 Act” means the Building Societies Act 1986(c);
 - “the Authority” means the Financial Services Authority(d);
 - “qualifying institution” means the Treasury, the Bank of England, another central bank of a Member State of the European Economic Area or the European Central Bank;
 - “relevant building society” means any building society which—

(a) 2009 c. 1.
(b) 2008 c.2.
(c) 1986 c.53.
(d) See section 1 of the Financial Services and Markets Act 2000 (c.8).

- (a) receives financial assistance^(a) from a qualifying institution,
- (b) has entered into an agreement with a qualifying institution under which it may receive financial assistance from that institution, or
- (c) has received an offer of such an agreement, or of financial assistance, from a qualifying institution;

“section 1(1)(a) function” means the function of the Authority set out in section 1(1)(a) of the 1986 Act (functions of the Authority)^(b).

(2) References in this Order to a qualifying institution include—

- (a) any person acting for or on behalf of that qualifying institution;
- (b) any person providing, offering, or entering into an agreement for the provision of, financial assistance to a building society, who does so on the basis of financial assistance that person receives from the qualifying institution in question for that purpose.

PART 2

Modified application of 1986 Act: relevant building societies

Purpose or principal purpose of building societies

3.—(1) Section 5 of the 1986 Act (establishment, constitution and powers)^(c) applies in relation to a relevant building society with the following modification.

(2) No relevant building society shall be regarded as failing to comply with section 5(1)(a) (purpose or principal purpose) by virtue of any financial assistance it receives from a qualifying institution.

(3) The powers conferred on the Authority by sections 36 and 37 of the 1986 Act (power to direct restructuring of business etc and powers to petition for winding up etc) shall not become exercisable in relation to a building society which receives financial assistance if, but for the financial assistance, they would not have become exercisable.

(4) Sections 5(4A), 36(1) and 37(1) shall be construed accordingly.

(5) The Authority shall disregard, for the purposes of its section 1(1)(a) function, a building society to which paragraph (3) applies.

The lending limit

4.—(1) Section 6(1) of the 1986 Act (the lending limit)^(d) shall not apply in relation to a relevant building society for the relevant period where—

- (a) the society receives financial assistance from a qualifying institution,
- (b) as a consequence of the financial assistance, the society transfers, assigns or otherwise disposes of any of its assets, and
- (c) that transfer, assignment or other disposal would, apart from this article, put the society in breach of section 6(1).

(2) No building society within paragraph (1) shall be regarded as failing to comply with section 5(1)(a) of the 1986 Act in the relevant period by virtue of the matters referred to in paragraph (1).

(a) See section 256 of the Banking Act 2009.

(b) Section 1 was substituted by S.I. 2001/2617.

(c) Section 5 was amended by the Building Societies Act 1997, sections 1 and 3, and by S.I. 2001/2617. The Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 (c. 26), section 1(2), inserts section 5(11) to (14), but at the time this Order was laid before Parliament in draft those amendments were not in force.

(d) Section 6 was substituted by the Building Societies Act 1997, section 4, and amended by S.I. 2001/2617, 2001/3649, and 2004/3380. Section 6(2) was modified in its application to assets of subsidiary undertakings by S.I. 2004/3200.

(3) The powers conferred on the Authority by sections 36 and 37 of the 1986 Act shall not become exercisable in relation to a building society within paragraph (1) in respect of the relevant period.

(4) Sections 5(4A), 36(1) and 37(1) shall be construed accordingly.

(5) In the relevant period the Authority shall disregard, for the purposes of its section 1(1)(a) function, a building society within paragraph (1).

(6) In this article “the relevant period” is the period commencing on the date on which paragraph (1) is first satisfied in relation to the society and ending—

(a) one year after that date, or

(b) if later, on the date on which the financial assistance referred to in paragraph (1) is no longer provided.

The funding limit

5.—(1) Section 7 of the 1986 Act (the funding limit)(a) applies to a relevant building society with the following modification.

(2) There shall be disregarded for the purposes of section 7(2) any financial assistance the society receives from a qualifying institution.

Raising funds and borrowing

6. Section 8(1)(c) of the 1986 Act (raising funds and borrowing)(b) shall not apply to a relevant building society in relation to any financial assistance the society receives from, or is offered by, a qualifying institution.

Floating charges

7.—(1) Section 9B(1) of the 1986 Act (restriction on creation of floating charges)(c) shall not apply to a relevant building society in relation to any relevant floating charge.

(2) Section 9B(2) shall not apply to any relevant floating charge.

(3) In this article a “relevant floating charge” is a floating charge created by a relevant building society in favour of a qualifying institution in connection with any financial assistance the society receives from that qualifying institution.

Memorandum and rules

8.—(1) Schedule 2 to the 1986 Act (establishment, incorporation and constitution of building societies) applies in relation to a relevant building society with the following modifications.

(2) Paragraph 2 (the memorandum)(d) shall have effect as if, after sub-paragraph (4), there were inserted—

“(4A) However, no provision of the memorandum of a building society shall be binding on any member or officer of the society, or on any person claiming on account of a member

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- (a) Section 7 was substituted by the Building Societies Act 1997, section 8, and amended by S.I. 2001/2617. Section 7(2) was modified in its application to liabilities of subsidiary undertakings by S.I. 2004/3200; section 7(2) and (3) were modified in their application to eligible debt securities by S.I. 2003/1633, and in their application to the liabilities of EEA subsidiary undertakings by S.I. 2007/860. The Building Societies (Funding) and Mutual Societies (Transfers) Act 2007, section 1(1), inserts section 7(6A) to (6C) and (8A), but at the time this Order was laid before Parliament in draft those amendments were not in force.
- (b) Section 8 was substituted by the Building Societies Act 1997, section 9, and amended by S.I. 2001/2617. It was modified, in its application to eligible debt securities, by S.I. 2003/1633. Section 8(9) was amended by the Income Tax Act 2007 (c.3), section 1027 and Schedule 1 paragraph 273.
- (c) Section 9B was inserted by the Building Societies Act 1997, section 11.
- (d) Paragraph 2(1) and (2) of Schedule 2 were substituted, for paragraphs (1) to (3) as originally enacted, by the Building Societies Act 1997, section 43 and Schedule 7, paragraph 56(3). Paragraph 2(5) was repealed by the Building Societies Act 1997, sections 43 and 46(2), Schedule 7 paragraph 56(4), and Schedule 9.

or under the rules, to the extent that it would prevent the society (whether acting through its officers or otherwise) from—

- (a) receiving any financial assistance from a qualifying institution, or
- (b) entering into any transaction connected with the receipt of such financial assistance,

and sub-paragraph (4) shall be construed accordingly.

(4B) In sub-paragraph (4A)—

- (a) “financial assistance” has the same meaning as in section 256 of the Banking Act 2009^(a) and “qualifying institution” means the Treasury, the Bank of England, another central bank of a Member State of the European Economic Area or the European Central Bank; and
- (b) references to a qualifying institution include—
 - (i) any person acting for or on behalf of that institution, and
 - (ii) any person providing, offering, or entering into an agreement for the provision of, financial assistance to a building society, who does so on the basis of financial assistance that person receives from the qualifying institution for that purpose.”.

(3) Paragraph 3 (the rules)^(b) shall have effect as if, after sub-paragraph (2), there were inserted—

“(2A) However, nothing in the rules of a building society shall be binding on any member or officer of the society, or on any person claiming on account of a member or under the rules, to the extent that it would prevent the society (whether acting through its officers or otherwise) from—

- (a) receiving any financial assistance from a qualifying institution, or
- (b) entering into any transaction connected with the receipt of such financial assistance,

and sub-paragraph (2) shall be construed accordingly.

(2B) In sub-paragraph (2A)—

- (a) “financial assistance” and “qualifying institution” have the same meanings as in paragraph 2(4A) (see paragraph 2(4B)); and
- (b) references to a qualifying institution include—
 - (i) any person acting for or on behalf of that institution, and
 - (ii) any person providing, offering, or entering into an agreement for the provision of, financial assistance to a building society, who does so on the basis of financial assistance that person receives from the qualifying institution for that purpose.”.

(4) No member of a building society may bring proceedings under paragraph 16(2) (capacity of society not limited by its memorandum)^(c) to restrain the doing of any act by a building society for or in connection with the receipt of financial assistance from a qualifying institution.

(5) Paragraph 16(3) shall not operate so as to—

- (a) require the directors to observe any limitations on their powers flowing from the society’s memorandum which would, apart from this article, prevent them entering into any transaction for or in connection with the receipt of financial assistance by the society from a qualifying institution, or

(a) 2009 c.xx.

(b) Paragraph 3(3) was amended by S.I. 2001/2617. Paragraph 3(4) was amended by the Building Societies Act 1997, section 43 and Schedule 7, paragraph 56(5). Paragraph 3(5) was inserted by S.I. 2003/404.

(c) Paragraph 16 was substituted by the Building Societies Act 1997, section 3(2) and Schedule 1.

- (b) require any such action by the directors which, but for paragraph 16(1), would be beyond the society's capacity, to be ratified by the society by special resolution.

Application of companies winding up legislation to building societies

9.—(1) Schedule 15 to the 1986 Act (application of companies winding up legislation to building societies) applies in relation to a relevant building society with the following modifications.

- (2) In paragraph 3(2)(a), omit paragraph (b).
- (3) In paragraph 33, for “subsections (2) and (4) to (6)” substitute “subsections (2), (5) and (6)”.
- (4) In paragraph 55E(b), for “paragraphs (2) and (4) to (6)” substitute “paragraphs (2), (5) and (6)”.

Application of other companies insolvency legislation to building societies

10. Section 90A of the 1986 Act (application of other companies insolvency legislation to building societies)(c) applies in relation to a relevant building society as if—

- (a) after “England and Wales” in paragraph (c) there were inserted “, Scotland”;
- (b) after “receivers and managers” in that paragraph there were inserted “, receivers or administrative receivers”.

11.—(1) Schedule 15A to the 1986 Act (application of other companies insolvency legislation to building societies)(d) applies in relation to a relevant building society with the following modifications.

- (2) In paragraph 1(2)(a)(e), for “Chapter I of Part III” substitute “Chapters I, II and III of Part III”.
- (3) In paragraph 2(2), omit paragraph (b).
- (4) In paragraph 11(f)—
 - (a) in sub-paragraph (2), for “is a reference to the Authority” substitute “includes a reference to the Authority”;
 - (b) omit sub-paragraph (3).
- (5) Omit paragraphs 12, 13, 18 and 20.
- (6) For paragraph 27, substitute—

“**27.**—(1) Subsection (3) of section 40 of the Act (payment of debts out of assets subject to floating charge) as applied to a building society has effect as if the reference to general creditors included a reference to holders of shares in the society.

(2) Subsection (3) of section 59 of the Act (priority of debts) as applied to a building society has effect as if the reference to ordinary creditors included a reference to holders of shares in the society.

27A. Subsection (1) of section 46 of the Act (information to be given by administrative receiver) or subsection (1) of 65 of the Act (information to be given by receiver) as applied to a building society has effect as if the reference to all the creditors of the society included a reference to all the holders of shares in the society.

27B. Subsection (2) of section 47 of the Act (statement of affairs to be submitted) or subsection (2) of section 66 of the Act (building society's statement of affairs) as applied to

(a) Paragraph 3(2)(b) was substituted by the Building Societies Act 1997, section 43 and Schedule 7, paragraph 65.
(b) Paragraph 55E was substituted, together with paragraphs 34 to 55D, by S.I. 1989/2405 (N.I. 19).
(c) Section 90A was inserted by the Building Societies Act 1997, section 39(1).
(d) Schedule 15A was inserted by the Building Societies Act 1997, section 39(2) and Schedule 6.
(e) Paragraph 1(2)(a) was amended by the Insolvency Act 2000 (c. 39), section 2(b) and Schedule 2, paragraph 14.
(f) Paragraph 11 was amended by S.I. 2001/2617.

a building society has effect as if the reference to its creditors included a reference to all holders of shares in the society.

27C. Section 48 of the Act (report by administrative receiver) or section 67 of the Act (report by receiver) as applied to a building society has effect as if—

- (a) the reference in subsection (1) to the Authority included a reference to the scheme manager;
- (b) the reference in subsection (1)(d) to other creditors included a reference to holders of shares in the society;
- (c) the references in paragraphs (a) and (b) of subsection (2) to unsecured creditors of the society included references to holders of shares in the society; and
- (d) the reference in subsection (2) to a meeting of the society's unsecured creditors included a reference to a meeting of holders of shares in the society.

27D. Subsection (1) of section 49 or 68 of the Act (committee of creditors) as applied to a building society has effect as if the reference to a meeting of creditors included a reference to a meeting of holders of shares in the society.”.

(7) In paragraph 33(a)—

- (a) in sub-paragraph (2), for “is a reference to the Authority” substitute “includes a reference to the Authority”;
- (b) omit sub-paragraph (3).

(8) Omit paragraphs 34, 35, 40 and 42.

(9) For paragraph 49, substitute—

“**49.** Paragraph (3) of Article 50 of the Order (payment of debts out of assets subject to floating charge) as applied to a building society has effect as if the reference to general creditors included a reference to holders of shares in the society.

49A. Paragraph (1) of Article 56 of the Order (information to be given by administrative receiver) as applied to a building society has effect as if the reference to all the creditors of a society included a reference to all the holders of shares in the society.

49B. Paragraph (2) of Article 57 of the Order (statement of affairs to be submitted) as applied to a building society has effect as if the reference to its creditors included a reference to all holders of shares in the society.

49C. Article 58 of the Order (report by administrative receiver) as applied to a building society has effect as if—

- (a) the reference in paragraph (1) to the Authority included a reference to the scheme manager;
- (b) the reference in paragraph (1)(d) to other creditors included a reference to holders of shares in the society;
- (c) the references in sub-paragraphs (a) and (b) of paragraph (2) to unsecured creditors of the society included references to holders of shares in the society; and
- (d) the reference in paragraph (2) to a meeting of the society's unsecured creditors included a reference to a meeting of holders of shares in the society.

49D. Paragraph (1) of article 59 of the Order (committee of creditors) as applied to a building society has effect as if the reference to a meeting of creditors included a reference to a meeting of holders of shares in the society.”.

(a) Paragraph 33 was amended by S.I. 2001/2617.

Consequential and supplementary provision

12. Regulation 14 of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999(a) applies in relation to a relevant building society as if—

- (a) the references in paragraphs (5) and (6) to paragraph 99(3) of Schedule B1 to the Insolvency Act 1986(b) were references to section 19(4) of that Act;
- (b) the references in those paragraphs to paragraph 100(3) of Schedule B1 to the Insolvency (Northern Ireland) Order 1989(c) were references to Article 31(4) of that Order.

PART 3

Modified application of 1986 Act: floating charges

Modified application of 1986 Act: floating charges

13.—(1) Section 9B(1) of the 1986 Act (restriction on creation of floating charges) shall not apply to a building society in relation to a floating charge which is created—

- (a) by that society in favour of a participant in a designated system,
- (b) over realisable assets (including money), and
- (c) for the purpose of securing rights and obligations potentially arising in connection with that designated system.

(2) Section 9B(2) of the 1986 Act shall not apply to any floating charge created in accordance with paragraph (1).

(3) In this article “participant” and “designated system” have the meanings given by regulation 2(1) of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999(d).

PART 4

Revocation

Revocation of Building Societies (Financial Assistance) Order 2008

14. The Building Societies (Financial Assistance) Order 2008(e) is revoked.

	<i>Name</i>
	<i>Name</i>
Date	Two of the Lords Commissioners of Her Majesty’s Treasury

EXPLANATORY NOTE

(This note is not part of the Order)

This Order modifies the application of the Building Societies Act 1986 (c. 53) (“the 1986 Act”), in specified circumstances, to facilitate the provision of financial assistance by a qualifying

- (a) S.I. 1999/2979; paragraphs (5) and (6) of regulation 14 were amended by S.I. 2003/2096, 2006/50 and 2007/832.
- (b) 1986 c. 45; Schedule B1 was inserted by the Enterprise Act 2002 (c. 40), section 248.
- (c) S.I. 1989/2405 (N.I. 19); Schedule B1 was inserted by S.I. 2005/1455 (N.I. 10).
- (d) S.I. 1999/2979. There are amendments to regulation 2(1) but none are relevant.
- (e) S.I. 2008/1427.

institution to building societies. It is made under sections 251 and 259 of the Banking Act 2009 (c.1). Section 257 of the Banking Act 2009 states that financial assistance “includes giving guarantees or indemnities and any other kind of financial assistance (actual or contingent)”.

Part 1 makes provision concerning commencement, citation and interpretation.

Article 2 defines terms used in the Order. It also provides that references to a qualifying institution include any person acting for or on behalf of the institution or providing financial assistance to a building society on the basis of financial assistance from the institution. This could include another institution which provides financial assistance to a building society on the basis of, for example, an indemnity or guarantee from the qualifying institution, provided the conditions in article 2(2)(b) are met.

Part 2 sets out modifications to the 1986 Act which apply in relation to a building society which receives, or may receive, financial assistance from the Treasury, the Bank of England, another central bank of a state in the European Economic Area, or the European Central Bank (a “qualifying institution”).

Article 3 modifies the application of section 5 of the 1986 Act so that no building society shall be regarded, by virtue of any financial assistance it receives from a qualifying institution, as failing to comply with the requirement that its purpose or principal purpose is that of making loans which are secured on residential property and funded substantially by its members.

Article 4 disapplies section 6 of the 1986 Act where, as a consequence of any financial assistance received from a qualifying institution, a building society has transferred, assigned or otherwise disposed of any of its assets, and the society would otherwise be in breach of the lending limit in section 6.

Article 5 modifies the application of section 7 of the 1986 Act, so that any financial assistance a society receives from a qualifying institution is disregarded for the purposes of the funding limit in that section.

Article 6 disapplies section 8(1)(c) of the 1986 Act, so that the restriction in that section on raising funds from a body corporate does not apply in relation to financial assistance from a qualifying institution.

Article 7 disapplies section 9B of the 1986 Act, so that a building society may create a floating charge in favour of a qualifying institution in connection with financial assistance received from it.

Article 8 makes various modifications to the application of Schedule 2 to the 1986 Act, to remove any restrictions on the receipt of financial assistance arising from the memorandum or rules of a building society.

Articles 9, 10 and 11 make various modifications to the application of section 90A of, and Schedules 15 and 15A to, the 1986 Act. These ensure that the relevant law on administrative receivers applies, with the appropriate modifications, in relation to any administrative receiver appointed by a qualifying institution under the terms of a loan secured by a floating charge. Schedule 15A already provides that references in the applicable insolvency legislation to “company” and “the registrar of companies” have effect as references to “building society” and “the Financial Services Authority” respectively: see paragraph 2(1) of Schedule 15A.

Article 12 makes a consequential modification to the application of regulation 14 of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (S.I. 1999/2979). This is necessary as the administration provisions in Part 2 of the Insolvency Act 1986 (1986 c. 45) and Part 3 of the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405 (N.I. 19)), rather than the provisions in Schedule B1 to that Act and to that Order, apply in relation to a building society.

Part 3 disapplies section 9B of the 1986 Act (restriction on creation of floating charges) in relation to floating charges created by a building society in favour of a participant in a designated system, over realisable assets (including money) and for the purpose of securing rights and obligations potentially arising in connection with that system. The terms “participant” and “designated

system” have the same meaning as in the Financial Markets and Insolvency (Settlement Finality) Regulations (S.I. 1999/2979).

Part 4 revokes the Building Societies (Financial Assistance) Order 2008 (S.I. 2008/1427), which was made under the Banking (Special Provisions) Act 2008 (c.2).

An impact assessment of the effect that this instrument will have on the costs of business is available from the Savings and Investments team at HM Treasury, 1 Horse Guards Road, London SW1A 2HQ, and is annexed to the Explanatory Memorandum which is available alongside the instrument on the OPSI website (www.opsi.gov.uk).