

Draft Order laid before Parliament under section 62(2) of the Banking Act 2009, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2009 No. ***

BANKS AND BANKING

The Dunfermline Building Society Compensation Scheme, Resolution Fund and Third Party Compensation Order 2009

Made - - - - ***** 2009**
Coming into force - - ***** 2009**

The Treasury make this Order in exercise of the powers conferred by sections 49, 50, 52, 54, 57 to 59, 61 and 259 of the Banking Act 2009(1) and in accordance with regulation 3 of the Banking Act 2009 (Third Party Compensation Arrangements for Partial Property Transfers) Regulations 2009(2).

A draft of this Order has been laid before and approved by a resolution of each House of Parliament in accordance with section 62(2) of that Act.

PART 1

General

Citation and commencement

1. This Order may be cited as the Dunfermline Building Society Compensation Scheme, Resolution Fund and Third Party Compensation Order 2009 and shall come into force on the day after the day on which it is made.

Interpretation

2. In this Order—

“Account Holder” has the meaning given in paragraph 1(2) of Schedule 1;

“the Act” means the Banking Act 2009;

“Bridge Bank” means DBS Bridge Bank Limited, a company with the registered number SC356970 whose registered office is Caledonia House, Carnegie Avenue, Dunfermline KY11 8PJ;

“Bridge Bank business” means the property, rights and liabilities transferred from Dunfermline to the Bridge Bank by virtue of paragraph 12 of the Transfer Instrument and any property, rights and liabilities transferred from Dunfermline to the Bridge Bank by virtue of a supplemental property transfer instrument(3);

“Dunfermline” means Dunfermline Building Society, a building society incorporated (or deemed to be incorporated) under the Building Societies Act 1986(4) and authorised and regulated by the Financial Services Authority (Reg no: 158765);

“Dunfermline Resolution Account” means the account established in accordance with article 6(1);

“Financial Services Compensation Scheme” means the scheme established under Part 15 of the Financial Services and Markets Act 2000(5);

“financial year” means the twelve months ending with 31st March;

“independent valuer” means the person appointed in accordance with article 5(2);

“Nationwide business” means the property, rights and liabilities transferred from Dunfermline to Nationwide Building Society (incorporated under the Building Societies Act 1986 with registered number 355B) by virtue of paragraph 3 of the Transfer Instrument;

“Transfer Instrument” means the Dunfermline Building Society Property Transfer Instrument 2009(6);

PART 2

Dunfermline Compensation Scheme

Transfer of the Nationwide business: determination of amount of compensation

3. The amount of compensation payable to Dunfermline in respect of the Nationwide business is determined as nil.

PART 3

Independent valuer

Functions of the independent valuer

4. An independent valuer must be appointed to perform the functions specified in—
- (a) article 9 (third party compensation);
 - (b) article 11 (assessment of recoveries by the Financial Services Compensation Scheme);

(3) Where the Bank of England has made a property transfer instrument in accordance with section 11(2) or 12(2) of the Act, the Bank of England may make a supplemental property transfer instrument in exercise of the power conferred by section 42 of the Act.

(4) 1986 c.53.

(5) 2000 c.8.

(6) The Transfer Instrument was made by the Bank of England in exercise of the powers conferred on it by sections 11(2) and 12(2) of the Act (as applied by section 89). The Transfer Instrument is available on the Bank of England’s website: www.bankofengland.co.uk.

- (c) paragraph 7 of Schedule 1 (certification of costs of the Bank of England or the Treasury to be deducted from the Dunfermline Resolution Account).

Appointment of the independent valuer

5.—(1) The Treasury must—

- (a) make arrangements to identify candidates for the office of independent valuer and must publish the details of those arrangements on their website⁽⁷⁾;
- (b) make arrangements for a panel to appoint the independent valuer (“the Appointment Panel”).

(2) The Appointment Panel shall have the function of selecting and appointing an independent valuer from a list of the candidates identified by the Treasury in accordance with paragraph (1)(a).

(3) The Treasury must ensure that the Appointment Panel comprises no fewer than four members, of which—

- (a) one member is the Chief Executive of the Institute of Chartered Accountants in England and Wales, who must be the chair of the Appointment Panel; and
- (b) one member is a representative of the Treasury, who shall be a non-voting member of the Appointment Panel.

(4) The independent valuer is to hold and vacate office in accordance with the terms of his or her appointment.

(5) The independent valuer may be removed from office only—

- (a) by the Appointment Panel, excluding the member who is a representative of the Treasury, and
- (b) on the grounds of incapacity or serious misconduct.

(6) In the event of the death of the independent valuer, or if the independent valuer is removed from office or resigns, a new independent valuer must be appointed.

(7) In the event that a member of the Appointment Panel is unable to sit on the Appointment Panel to perform the function in paragraph (5), the Treasury must appoint another member to replace that member of the first Appointment Panel.

(8) The provisions of this Order apply to the replacement of the independent valuer as to the first independent valuer appointed.

PART 4

Dunfermline Resolution Fund

Transfer of the Bridge Bank business: resolution fund

6.—(1) The Treasury must establish an account to be known as the Dunfermline Resolution Account.

(2) Part 1 of Schedule 1 makes provision for the arrangements for the Dunfermline Resolution Account.

(7) The website is available at the following address: www.hm-treasury.gov.uk.

Payments into the resolution fund

7. Part 2 of Schedule 1 makes provision for the arrangements for paying money into the Dunfermline Resolution Account.

Entitlement to the moneys in the resolution fund and payments out of the resolution fund

8. Part 3 of Schedule 1 makes provision in respect of—
- (a) entitlements to the moneys standing to the credit of the Dunfermline Resolution Account; and
 - (b) the arrangements for making payments from the Dunfermline Resolution Account.

PART 5

Third Party Compensation

Third party compensation

9.—(1) Schedule 2 makes provision for the arrangements to be put in place for the assessment of any compensation payable to persons other than Dunfermline.

(2) The independent valuer must determine, in accordance with Part 2 of Schedule 2, the amount of any compensation payable to any person who was affected by the application of section 38(6) of the Act (termination rights, &c.) (by virtue of paragraph 6 of the Transfer Instrument).

(3) The independent valuer must determine, in accordance with Part 3 of Schedule 2, the amount of any compensation payable to pre-transfer creditors⁽⁸⁾ of Dunfermline⁽⁹⁾.

Payment of compensation

10. Any compensation determined by an independent valuer to be payable in accordance with this Order must be paid by the Treasury in accordance with paragraph 13 of Schedule 2.

PART 6

Financial Services Compensation Scheme

Assessment of recoveries

11. The independent valuer must perform the function in regulation 8(1) of the Financial Services and Markets Act 2000 (Contribution to Costs of Special Resolution Regime) Regulations 2009⁽¹⁰⁾ in order to assess the amount that would have been likely to be recovered by the Financial Services Compensation Scheme from Dunfermline.

⁽⁸⁾ “Pre-transfer creditor” is defined in section 60(3)(b) of the Act.

⁽⁹⁾ Part 3 of Schedule 2 makes provision in accordance and in connection with the Banking Act 2009 (Third Party Compensation Arrangements for Partial Property Transfers) Regulations 2009. Those Regulations specify the provisions which must or may be included in a third party compensation order made in accordance with section 59 of the Act in cases where those regulations apply.

⁽¹⁰⁾ S.I. 2009/807.

Draft Legislation: This is a draft item of legislation and has not yet been made as a UK Statutory Instrument. This draft has been replaced by a new draft, The Dunfermline Building Society Compensation Scheme, Resolution Fund and Third Party Compensation Order 2009 ISBN 978-0-11-148073-1

Date

[Name]
[Name]
Two of the Lords Commissioners of Her
Majesty's Treasury

SCHEDULE 1

The Dunfermline Resolution Fund

PART 1

Arrangements for the Dunfermline Resolution Account

The Dunfermline Resolution Account

1.—(1) The Dunfermline Resolution Account shall be held at the Bank of England and must be an interest bearing account.

(2) The Dunfermline Resolution Account must be held in the name of an independent person appointed by the Treasury (“the Account Holder”).

Annual report and accounts

2.—(1) The Account Holder must prepare accounts in relation to the operation of the Dunfermline Resolution Account—

- (a) in such form, and in such manner, as the Treasury specify, and
- (b) as soon as is reasonably practicable after the end of each financial year in which the Dunfermline Resolution Account is open.

(2) The accounts must set out the details of each payment from the Dunfermline Resolution Account.

(3) The Comptroller and Auditor General must examine, certify and report on the accounts.

(4) The Account Holder must send a copy of the accounts to the Treasury as soon as is reasonably practicable.

(5) The Treasury shall lay a copy of the accounts before each House of Parliament.

PART 2

Arrangements for making payments into the Dunfermline Resolution Account

Payments into the resolution fund

3.—(1) The Bank of England must pay into the Dunfermline Resolution Account—

- (a) any distribution made to the Bank of England—
 - (i) by the Bridge Bank (whether made following the disposal of some or all of the business of the Bridge Bank or otherwise);
 - (ii) by a liquidator appointed to wind up the Bridge Bank;
- (b) any consideration received for shares in the Bridge Bank.

(2) The Bank of England may require the Bridge Bank, a liquidator of the Bridge Bank or a purchaser of the shares in the Bridge Bank to make payment of amounts under paragraph (1) direct to the Dunfermline Resolution Account, and any such payment shall constitute a good discharge to the Bridge Bank, liquidator of the Bridge Bank or purchaser as the case may be.

PART 3

Arrangements for making payments from, and entitlements to, the Dunfermline Resolution Account

Payments from the resolution fund

4.—(1) The Account Holder may only make payments from the Dunfermline Resolution Account in accordance with a direction issued by the Treasury.

(2) The Treasury may direct the Account Holder to make a payment to—

- (a) Dunfermline;
- (b) the Treasury;
- (c) the Bank of England.

(3) The Treasury must not direct the Account Holder to make a payment from the Dunfermline Resolution Account if making the payment would cause the balance of the Dunfermline Resolution Account to fall below zero.

(4) A direction under sub-paragraph (2) must be in writing and the Treasury must send a copy of the direction to—

- (a) Dunfermline, and
- (b) the Bank of England.

Payments to the Treasury and the Bank of England

5.—(1) The Treasury may direct the Account Holder to make a payment to the Treasury or the Bank of England only where—

- (a) the payment is to be made for the purposes of reimbursing the Treasury or the Bank of England (as the case may be) for any costs (including liability for tax) incurred in relation to, or in consequence of, any of the following—
 - (i) the transfer of the Bridge Bank business;
 - (ii) the incorporation, authorisation and operation of the Bridge Bank;
 - (iii) the sale of the Bridge Bank, or some or all of the property, rights or liabilities of the Bridge Bank, to a purchaser;
 - (iv) the winding up of the Bridge Bank;
- (b) the independent valuer has certified, in accordance with paragraph 7, that the costs were properly and reasonably incurred by the Bank of England or the Treasury (as the case may be); and
- (c) the direction is made within 12 months of the date of—
 - (i) the completion of the winding up of the Bridge Bank; or
 - (ii) if earlier, the sale of shares in the Bridge Bank.

(2) In the event that the Bank of England (as sole member of the Bridge Bank) passes a resolution to wind up the Bridge Bank, the Bank of England must, as soon as is reasonably practicable after the passing of the resolution, send a copy of the resolution to—

- (a) Dunfermline, and
- (b) the Treasury.

Entitlement to the resolution fund: Dunfermline

6.—(1) The Treasury must notify the Account Holder when no further (if any) directions are to be made under paragraph (4)(2)(b) or (c) (as the case may be).

(2) As soon as is reasonably practicable after the notification specified in sub-paragraph (1) has been made the Treasury must direct the Account Holder to pay to Dunfermline any moneys remaining in the Dunfermline Resolution Account.

Certification of costs

7.—(1) Where the Treasury consider that any costs specified in paragraph 5(1)(a) may be paid from the Dunfermline Resolution Account, the Treasury must supply to the independent valuer—

- (a) any invoices in relation to the costs,
- (b) an explanation of the reasons for the costs, and
- (c) any other information the independent valuer reasonably requests for the purpose of assessing whether the costs were reasonably and properly incurred.

(2) Within 30 days of receipt of the information specified in sub-paragraph (1), the independent valuer must—

- (a) inform the Treasury by notice in writing whether, in the independent valuer's opinion, the costs were reasonably and properly incurred for the purposes specified in paragraph 5(1)(a); or
- (b) request further information from the Treasury or the Bank of England (as the case may be).

(3) In the event the independent valuer determines that the costs, or a proportion of the costs, were not properly or reasonably incurred, within 14 days of the receipt of the notification, the Treasury may require, by notice in writing, the independent valuer to reconsider his or her determination.

(4) Where the independent valuer is required to reconsider his or her determination, the independent valuer must issue a revised notice within 14 days of receipt of the notice specified in sub-paragraph (3).

(5) Where the independent valuer determines that only a proportion of the costs were properly or reasonably incurred for the purposes specified in paragraph 5(1)(a), the Treasury may issue a direction, under paragraph 4(2)(b) or (c) (as the case may be), only in relation to that proportion of the costs.

SCHEDULE 2

The Dunfermline Third Party Compensation Scheme

PART 1

General provisions

Citation

1. This scheme may be cited as the Dunfermline Third Party Compensation Scheme.

Interpretation

2. In this Schedule—

“actual treatment” means the treatment pre-transfer creditors have received, are receiving or are likely to receive if no (or no further) compensation is paid;

“assessment notice” means a notice issued by the independent valuer in accordance with paragraph 4 or 10 of this Schedule;

“insolvency treatment” means the treatment which pre-transfer creditors would have received had Dunfermline entered insolvency⁽¹¹⁾ immediately before the relevant time;

“relevant time” means 8am on 30 March 2009, which is the time the Transfer Instrument came into force;

“remaining creditors” has the meaning given in paragraph 5(b);

“transferred creditors” has the meaning given in paragraph 5(a).

PART 2

Determination of amount of compensation: third parties affected by the application of section 38(6) of the Act

Third party compensation: persons affected by the application of section 38(6) of the Act

3.—(1) Subject to sub-paragraph (4), the amount of any compensation payable to persons whose default event provisions⁽¹²⁾ were affected by the application of section 38(6) of the Act (by virtue of paragraph 6 of the Transfer Instrument) must be determined by the independent valuer in accordance with this paragraph.

(2) The amount of any compensation payable to a person must be such compensation as may be fair and equitable in respect of the effect on that person’s property, rights or liabilities of the application of section 38(6) of the Act.

(3) In determining any compensation payable, the independent valuer must take into account—

- (a) any diminution in the value of the person’s property or rights; or
- (b) any increase in the burden of any liability on that person,

which is attributable to the application of section 38(6) of the Act.

(4) Compensation is payable only if it is required to be paid to comply with the Convention rights (within the meaning of section 1 of the Human Rights Act 1998⁽¹³⁾).

Assessment notice

4.—(1) Where the independent valuer makes a determination in accordance with paragraph 3, the independent valuer must issue an assessment notice to—

- (a) the person affected by the application of section 38(6) of the Act, and
- (b) the Treasury.

(2) An assessment notice must contain the following information—

- (a) the date on which the assessment notice is issued;

⁽¹¹⁾ See section 60(3) of the Act.

⁽¹²⁾ “Default event provision” is defined in section 38(1) of the Act.

⁽¹³⁾ 1998 c.42.

- (b) the amount of any compensation payable;
- (c) the reasons for the independent valuer's decision.

PART 3

Determination of amount of compensation: pre-transfer creditors

Third party compensation: pre-transfer creditors of Dunfermline

5.—(1) The amount of any compensation payable to—

- (a) pre-transfer creditors whose rights were transferred by virtue of the Transfer Instrument (“transferred creditors”) shall be determined in accordance with paragraph 7;
- (b) pre-transfer creditors whose rights were not transferred by virtue of the Transfer Instrument (“remaining creditors”) shall be determined in accordance with paragraph 8.

(2) The independent valuer, in conducting his or her functions in accordance with this Part, may make determinations in respect of all pre-transfer creditors, a class of pre-transfer creditor or a particular pre-transfer creditor as the independent valuer considers appropriate.

(3) The independent valuer must have regard to any information provided by a pre-transfer creditor which is relevant to the conduct of his or her functions under this Part and in particular must have regard to any information which relates to the assessment of—

- (a) the insolvency treatment;
- (b) the actual treatment.

Assessment of insolvency treatment

6.—(1) The independent valuer must assess the insolvency treatment of the pre-transfer creditors of Dunfermline.

(2) In making the assessment of the insolvency treatment, the independent valuer must determine the insolvency process it is likely Dunfermline would have entered had the Transfer Instrument not been made.

Assessment of compensation: transferred creditors

7.—(1) The independent valuer must assess the actual treatment of transferred creditors (including any payment of compensation to be made in accordance with a determination of the independent valuer under paragraph 3).

(2) If the independent valuer considers that, in relation to any transferred creditor, the actual treatment is less favourable than the insolvency treatment, the independent valuer must determine the amount of compensation payable to the transferred creditor.

(3) The independent valuer must assess the compensation payable—

- (a) by reference to the difference between the insolvency treatment and the actual treatment; and
- (b) on the basis of the fair and equitable value of that difference in treatment.

Assessment of compensation: remaining creditors

8.—(1) The Treasury must notify the independent valuer as soon as is reasonably practicable after giving the notification under paragraph 6(1) of Schedule 1 that the notification has been made.

(2) As soon as is reasonably practicable following the receipt of the notification under subparagraph (1) the independent valuer must assess the actual treatment of remaining creditors, including by virtue of any payment to be made—

- (a) to Dunfermline from the Dunfermline Resolution Account; and
- (b) in accordance with a determination of the independent valuer under paragraph 3.

(3) If the independent valuer considers that, in relation to any remaining creditor, the actual treatment is less favourable than the insolvency treatment, the independent valuer must determine the amount of compensation payable to the remaining creditor.

(4) The independent valuer must assess the compensation payable—

- (a) by reference to the difference between the insolvency treatment and the actual treatment; and
- (b) on the basis of the fair and equitable value of that difference in treatment.

Valuation principles

9. In making the assessment of the insolvency treatment as required under paragraph 6(1), the independent valuer must determine the amount of compensation payable in accordance with the following valuation principles (in addition to the principle which applies by virtue of section 57(3) of the Act)—

- (a) that Dunfermline was failing, or was likely to fail, to satisfy its threshold conditions (within the meaning of section 41(1) of the Financial Services and Markets Act 2000⁽¹⁴⁾ (permission to carry on regulated activities));
- (b) that Dunfermline would have entered insolvency immediately before the relevant time;
- (c) the Transfer Instrument has not been made and that no other order or instrument under Part 1 of the Act would have been made in relation to or in connection with Dunfermline; and
- (d) that no financial assistance⁽¹⁵⁾ would have, after the relevant time, been provided to Dunfermline by the Bank of England or the Treasury.

Assessment notice

10.—(1) Where the independent valuer makes an assessment in accordance with paragraph 7 or 8, the independent valuer must issue an assessment notice to—

- (a) the pre-transfer creditor;
- (b) the building society special administrator of Dunfermline; and
- (c) the Treasury.

(2) An assessment notice must contain the following information—

- (a) the date on which the notice is issued,
- (b) the amount of any compensation payable, and
- (c) the reasons for the independent valuer's decision.

Interim payments

11.—(1) The independent valuer may determine that the Treasury must make interim payments to pre-transfer creditors, a class of pre-transfer creditors or all pre-transfer creditors on account of compensation determined to be payable under this Schedule (“payments on account”).

⁽¹⁴⁾ 2000 c.8.

⁽¹⁵⁾ “Financial assistance” is defined in section 257 of the Act.

(2) The independent valuer may make a determination under sub-paragraph (1) at any time before the assessment required by paragraph 7(1) or paragraph 8(2) has been made.

(3) Subject to sub-paragraph (4), the independent valuer may make such provision as to payments on account as he or she thinks fit (including a requirement that payments are to be made in instalments).

(4) Payments on account must be made subject to the following conditions—

- (a) that the acceptance of such a payment by the pre-transfer creditor reduces any obligation (whether in existence at the time of the payment or not) on the Treasury to pay compensation to the pre-transfer creditor by the amount of the payment on account;
- (b) that, where the independent valuer, in accordance with paragraph 12, determines that the pre-transfer creditor should make a balancing payment to the Treasury, the pre-transfer creditor is liable to pay that amount.

(5) In considering whether to require payments on account to be made in accordance with this paragraph, the independent valuer must have regard to the merits of ensuring that pre-transfer creditors receive compensation in a timely manner.

Balancing payments

12.—(1) Where the independent valuer has determined that the Treasury must make interim payments in accordance with paragraph 11, the independent valuer must determine what balancing payments, if any, are appropriate to ensure that each pre-transfer creditor receives the relevant amount of compensation, if any, determined to be payable in accordance with paragraph 7(1) or 8(2) (and no more than that amount).

(2) The independent valuer must make a determination under sub-paragraph (1) as soon as is reasonably practicable after the assessment required by paragraph 7(1) or 8(2) has been made.

(3) Where the independent valuer determines that it is necessary for—

- (a) the Treasury to make a balancing payment to a pre-transfer creditor, the independent valuer must notify in writing the Treasury of—
 - (i) the need to make that payment, and
 - (ii) the amount of the payment to be made;
- (b) the pre-transfer creditor to make a balancing payment to the Treasury, the independent valuer must notify in writing—
 - (i) the pre-transfer creditor of—
 - (aa) the need to make that payment, and
 - (bb) the amount of the payment to be made;
 - (ii) the Treasury of the entitlement to receive that payment.

PART 4

Payment of compensation

Payment of compensation

13.—(1) The Treasury must, as soon as is reasonably practicable following receipt of an assessment notice, pay to the person entitled the amount of any compensation set out in that assessment notice.

(2) But where an order under section 55(6) of the Act is in force and a person affected by the determination of the independent valuer—

(a) requires the reconsideration of the determination;

(b) appeals to a court or tribunal against a determination of the independent valuer;

the Treasury will not be required to make payment of the compensation payable (if any) until the matter has been finally disposed of.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order is made under the Banking Act 2009 (c. 1) (“the Act”).

This Order makes provision for the compensation arrangements to be put in place in respect of the transfers of property, rights and liabilities from Dunfermline Building Society (“Dunfermline”) to Nationwide Building Society and to a bridge bank (wholly owned by the Bank of England) by virtue of the Dunfermline Building Society Property Transfer Instrument 2009 (“the Transfer Instrument”).

The Transfer Instrument was made by the Bank of England on 30th March 2009 in exercise of the powers conferred on it by sections 11(2) and 12(2) of the Act.

Article 3 makes provision for a compensation scheme. The Treasury is required to make provision for a compensation scheme where the Bank of England has exercised its power to transfer property, rights and liabilities to a private sector purchaser (section 50(2) of the Act).

Articles 4 and 5 make provision for an independent valuer to be appointed to perform certain functions under this Order.

Articles 6 to 8 and Schedule 1 make provision for the Dunfermline Resolution Fund. Section 52(2) requires the Treasury to make a resolution fund order where the Bank of England has made a transfer to a bridge bank.

Articles 9 and 10 and Schedule 2 make provision for third party compensation. The Treasury is required to make provision for third party compensation as the Bank of England has made transfers of some, rather than all, of Dunfermline’s property, rights and liabilities (sections 50(4) and 52(4) of the Act).

Article 9(2) and Part 2 of Schedule 3 make provision for the assessment by the independent valuer of the compensation, if any, to be paid to persons affected by the application of section 38(6) of the Act (by virtue of paragraph 6 of the Transfer Instrument)(16).

Article 9(3) and Part 3 of Schedule 2 make provision for the assessment by the independent valuer of the compensation, if any, to be paid to pre-transfer creditors of Dunfermline. These provisions include the mandatory provision for third party compensation arrangements prescribed in the Banking Act 2009 (Third Party Compensation Arrangements for Partial Property Transfers) Regulations 2009 (S.I. 2009/319).

Article 11 provides that the independent valuer must perform the function specified in regulation 8(1) of the Financial Services and Markets Act 2000 (Contribution to Costs of the Special Resolution Regime) Regulations 2009 (S.I. 2009/807), which requires the independent valuer to assess the

(16) Section 38 of the Act deals with default events.

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amount the Financial Services Compensation Scheme (“FSCS”) would have received from the insolvency estate had Dunfermline entered into insolvency immediately before the transfers. This is relevant to the calculation of the amount the FSCS may be required to contribute to the costs of the resolution of Dunfermline.