

FINANCIAL SERVICES (BANKING REFORM) ACT 2013

EXPLANATORY NOTES

COMMENTARY

Part 7 – Miscellaneous

Building Societies

Section 138: Building Societies

321. *Section 138 and Schedule 9* to the Act make amendments to the Building Societies Act 1986 (“the BS Act”).
322. *Paragraph 2* of Schedule 9 amends section 7 of the BS Act, which sets out the funding limit for building societies. The funding limit, in effect, requires that the value of shares in the society held by individuals (known as retail funds) is at least 50% of the value of the total funds of the society’s group (or total group funds).
323. *Sub-paragraphs (2) and (3) of paragraph 2* insert new section 7(3)(aa) and (3A) to alter the calculation of the funding limit so that a limited amount of the value of deposits by small businesses does not count towards the value of total group funds. New section 7(3A) sets the limit, so that no more than 10% of the value of total group funds can be disregarded in calculating the funding limit. For the purposes of this calculation, the value of total group funds will be the value it would have been without the modification made by new subsection (3)(aa), i.e. after all the other modifications required by or under section 7 had been made.
324. *Sub-paragraph (4) of paragraph 2* inserts new section 7(6ZA) to provide that a small business is assumed to be a small business if it has declared itself to be so, unless it is shown not to be the case. *Paragraph 2(5)* inserts new subsections (10) and (11) to define a small business as any person carrying on a business with an annual turnover of less than £1 million, but not including individuals acting as sole traders. For example, a small business could be a company, partnership, mutual association or other unincorporated body. Under new subsections (12) and (13) the Treasury has power to make an order to vary the amount of £1 million.
325. *Paragraph 3* makes a consequential amendment to the [Building Societies Act 1986 \(Substitution of Specified Amounts and Modification of the Funding Limit Calculation\) Order 2007 \(SI 2007/860\)](#) (“the 2007 Order”). The 2007 Order provides that a limited amount of deposits held in a society’s EEA subsidiaries are to be disregarded in calculating the funding limit. The amendment in *paragraph 3* ensures that, for the purposes of calculating the amount to be disregarded under the 2007 Order, the value of total group funds is the value it would have been without the modification made by the 2007 Order and the modification made by new section 7(3)(aa).
326. *Paragraph 4* repeals section 9B of the BS Act which restricts a building society’s power to create floating charges. Consequently, a building society will be permitted

to create floating charges over its assets. Such floating charges however will not give the holder the right to appoint an administrator or an administrative receiver (unless appointed under the Building Societies (Financial Assistance) Order 2010). An administrator cannot be appointed because Schedule B1 to the Insolvency Act 1986 (under which companies can create floating charges which enable the holder to appoint an administrator) does not apply to building societies, because societies are subject to the version of Part 2 of the Insolvency Act 1986 as it had effect before the Enterprise Act 2002 (section 249(1) and (2) of the Enterprise Act 2002). An administrative receiver cannot be appointed because Schedules 15 and 15A to the BS Act (which apply companies winding up and insolvency legislation to building societies) would continue to provide that, in the provisions of the Insolvency Act 1986 which apply to societies, a reference to an administrative receiver does not apply to a society (paragraph 3(2)(b) of Schedule 15 and paragraph 2(2)(b) of Schedule 15A to the BS Act).

327. *Sub-paragraph (2) of paragraph 4* amends Schedule 15A to the BS Act to ensure that an administration order of the court under Part 2 of the Insolvency Act 1986 applies to a floating charge. *Sub-paragraph (3) of paragraph 4* makes consequential amendments to remove references in various enactments to the restrictions in section 9B of the BS Act.
328. *Paragraph 5* amends section 74 of the BS Act so that regulations made under that section may no longer require the annual business statement published by a building society to include information about officers, past officers and persons connected with them. This will in consequence remove the duty on officers (who are not directors) of a building society to notify their interests to the society for the purposes of the annual business statement. Consequential amendments will need to be made by secondary legislation to the Building Societies (Accounts and Related Provisions) Regulations 1998.
329. *Paragraph 6* amends section 76 of the BS Act, which requires a building society to produce a summary financial statement (the “SFS”) for each financial year. The existing obligation under subsection (8) to supply the SFS and (where that subsection is applied under section 78(6)) the auditor’s report to new shareholding members will be replaced by a new requirement to publish the document(s) on a website and notify such new members of: (i) the online publication of the document(s); (ii) the website address; and (iii) where on the website, and how, the information may be accessed. The existing criminal offence in subsection (11) of section 76 is amended to reflect the amended provisions. It will be an offence to fail to publish the documents online or to notify new shareholders as required.
330. *Paragraph 7* makes consequential amendments to the BS Act to reflect the amendments to section 76.
331. *Paragraph 8* amends section 100 of the BS Act, which sets out distributions and share rights on a transfer of a society’s business. *Sub-paragraph (2)* replaces section 100(8) with a new subsection to make it clear that the subsection applies to any right (i.e. not only a priority right) to acquire shares which is conferred on members. It also makes specific provision for holders of deferred shares, a form of capital instrument issued by building societies. The result of the new subsection is be that, if a right to acquire shares is given to members on a transfer of business, then the right must be restricted to members who have held shares for at least two years, or who hold deferred shares of a class described in the transfer agreement. *Sub-paragraph (3)* amends section 100(9) so that, if a right to receive a cash distribution is given to members on a transfer of business, then the right must be restricted to shareholders who have held shares for at least two years, or who hold deferred shares of a class described in the transfer agreement.
332. *Paragraph 9* inserts new sections 115A to 115C relating to website communication by a society. New section 115A provides that a person is deemed to have agreed to access a document, information or facility on a website if: (a) the person has been asked individually and has agreed to do so; or (b) the person has been asked and

*These notes refer to the Financial Services (Banking Reform) Act
2013 (c.33) which received Royal Assent on 18 December 2013*

the society has not received a response within 28 days. The provision does not apply to every communication (section 115A(4)) and a person could revoke the agreement (section 115A(3)). New section 115B ensures that a person has a right to receive, free of charge and within 21 days of the request being received, a hard copy of any document sent by electronic or other means. If a society fails to comply with new section 115B, then it will be treated as if it has breached rules made under section 137A of FSMA, the FCA's general rule-making power. The effect of this will be that the FCA can take disciplinary measures if a society fails to comply with this new section 115B. Under new section 115C, an intended recipient could agree with a society to receive a document in a way that is not by hard copy or by electronic means.

333. *Paragraphs 10 to 14* make related amendments to existing website communication provisions in the BS Act which require a person to agree how to receive notification that a document is available online. The amendments remove references to agreeing the manner of notification, so that there is simply a duty on the society to notify the person that a document is available online.
334. *Paragraph 15* effectively replaces section 117 of the BS Act relating to the financial year of a building society. New section 117 sets out the year-end date for all building societies as at the coming into force of the provisions. *Paragraph 16* inserts new section 117A to allow a society to alter its financial year to any date in the year by notifying the FCA. *Paragraph 17* makes a consequential amendment to the BS Act.