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STATUTORY INSTRUMENTS

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**1988 No. 777**

**BUILDING SOCIETIES**

**The Building Societies (Supplementary Capital) Order 1988**

<i>Made</i>	- - - -	<i>20th April 1988</i>
<i>Laid before Parliament</i>		<i>26th April 1988</i>
<i>Coming into force</i>	- -	<i>18th May 1988</i>

The Building Societies Commission, with the consent of the Treasury, in exercise of the powers conferred on it by section 45(5) of the Building Societies Act 1986(1); and of all other powers enabling it in that behalf, hereby makes the following Order:—

**Citation and commencement**

1. This Order may be cited as the Building Societies (Supplementary Capital) Order 1988 and shall come into force on 18th May 1988.

**Interpretation**

2. In this Order—

“the Act” means the Building Societies Act 1986,

“aggregated” means aggregated for the purposes of the first criterion in section 45(3) (criteria of prudent management) of the Act,

“balance sheet” means a balance sheet within annual accounts a copy of which has been sent to the Commission and the central office under section 81(2) (laying and furnishing accounts) of the Act,

“society” means a building society, and

“supplementary capital” means a description of capital resource which is by virtue of and subject to the provisions of this Order to be aggregated with the reserves of a society.

**Specification of supplementary capital**

3. The Schedule to this Order shall have effect for the specification of supplementary capital and for determining the extent to which, subject to Article 4 below, it is to be aggregated with the reserves of the society.

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(1) 1986 c. 53; section 7 was amended by the Building Societies (Non-Retail Funds and Deposits) Order 1987 (S.I.1987/378) and by the Building Societies (Banking Institutions) Order 1987 (S.I. 1987/1670).

### **Overall limit on extent of aggregation**

4.—(1) In determining the extent to which supplementary capital of a society is to be aggregated with the reserves of the society there shall be disregarded the amount (if any) by which the total of the relevant amounts of the society's supplementary capital as identified in accordance with paragraph 2(2) and (3) of Part I of the Schedule to this Order exceeds half the amount of the society's primary capital as shown in the society's latest balance sheet.

(2) For the purposes of paragraph (1) above—

(a) “primary capital” means—

(i) where there is no revaluation reserve shown in the society's latest balance sheet, the total reserves so shown, and

(ii) where a revaluation reserve is shown therein, those total reserves less that revaluation reserve, and

(b) where a society has been formed by the amalgamation of two or more societies under section 93 (amalgamations) of the Act and, as such, has no latest balance sheet, any amount in the latest balance sheet of the society shall be taken to mean the total of the corresponding amounts in the latest respective balance sheets of those two or more societies.

### **Revocation of existing Order**

5. The Building Societies (Designated Capital Resources) Order 1988(2) is hereby revoked.

In witness whereof the common seal of the Building Societies Commission is hereunto fixed, and is authenticated by me, a person authorised under paragraph 14 of Schedule 1 to the Building Societies Act 1986, on 19th April 1988.

L.S.

*Mrs. P. H. Gevers*  
Secretary to the Commission

We consent to this Order.

*Mark Lennox-Boyd*  
*Peter Lloyd*  
Two of the Lords Commissioners of Her  
Majesty's Treasury

20th April 1988

SCHEDULE

Article 3

SUPPLEMENTARY CAPITAL

PART I

specification of supplementary capital and extent of aggregation

**Specification of supplementary capital**

1.—(1) Subject to the following subparagraphs of this paragraph supplementary financial resources relating to subordinated long term debt of which a society is the borrower are specified as supplementary capital of that society to be aggregated with its reserves to the extent set out in paragraph 2 below.

(2) Supplementary financial resources relating to subordinated long term debt are not specified as supplementary capital for the purposes of subparagraph (1) above where the issue terms relating to that subordinated long term debt contain any disqualifying term.

(3) Part II to this Schedule lists the terms which are disqualifying terms for the purposes of subparagraph (2) above.

**Extent of aggregation of supplementary capital**

2.—(1) Subject to article 4 above supplementary capital of a society shall be aggregated with the reserves of the society to the extent represented by the relevant amount of that supplementary capital as identified in accordance with the remainder of this paragraph.

(2) The relevant amount of supplementary capital is identified for the purposes of this paragraph by—

- (a) establishing as the gross amount the supplementary fund relating to (or, as the case may be, the total of the supplementary funds relating to the instalments of principal of) the subordinated debt the supplementary financial resources relating to which comprise that supplementary capital,
- (b) establishing as the net amount the gross amount less each supplementary fund (if any) relating to a relevant debt element the initial maturity period relating to which is less than five years and one day,
- (c) establishing each constituent supplementary fund within that net amount,
- (d) taking the entirety of each such constituent supplementary fund relating to a relevant debt element the residual maturity period relating to which equals or exceeds five years,
- (e) taking the relevant component of each such constituent supplementary fund relating to a relevant debt element the residual maturity period relating to which is less than five years, and
- (f) adding the totals taken in paragraphs (d) and (e) above to each other.

(3) For the purpose of subparagraph (2)(e) above the relevant component of a supplementary fund relating to a relevant debt element the residual maturity period relating to which is less than five years is

$$\frac{A \times B}{C}$$

where—

a A is the supplementary fund,

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- b B is the number of days in the residual maturity period, and
- c C is the number of days in the five years ending on the last day of the residual maturity period.

## PART II

### disqualifying terms

#### **Repayment in currency other than sterling**

1. An issue term which requires or permits subordinated debt to be repaid otherwise than in sterling is a disqualifying term for the purposes of paragraph 1(2) of Part I of this Schedule.

#### **Inhibition on merger or business transfer**

2.—(1) Subject to subparagraph (2) below, an issue term the effect of which is to prohibit, restrict or impose any sanction against the taking by the borrower of any steps towards—

- (a) amalgamation with another society under section 93 of and Schedule 16 (mergers: supplementary provisions) to the Act,
- (b) transfer of its engagements to any extent to another society in accordance with section 94 (transfer of engagements) of and Schedule 16 to the Act, or
- (c) transfer of the whole of its business to a company in accordance with section 97 (transfer of business to a commercial company) and the other applicable provisions (as so described in section 97) of the Act,

is a disqualifying term for the purposes of paragraph 1(2) of Part I of this Schedule.

(2) None of the following are disqualifying terms for those purposes:

- (a) a provision which requires notification of any other person of a proposal to take any of those steps;
- (b) a provision which requires the consent of the lender (or, where the lender comprises more than one person, of all or some of them), or of a person acting on behalf of the lender, to a transfer of engagements of the borrower where that transfer is not a transfer of all its engagements;
- (c) a provision, in a case where the interests of the lender are represented by a trustee, which requires a borrower which proposes to transfer its business to a company to satisfy that trustee that the transferee of the business will be or (as the case may be) remain an authorised institution or (if that trustee is not so satisfied) to obtain the consent of the lender (or, where the lender comprises more than one person, of all or some of them) to the transfer;
- (d) a provision which, in connection with a transfer of the business of the borrower to a company, requires or permits issue terms to be varied or supplemented where and only where—
  - (i) that variation or supplement is not one which would or might cause any of the supplementary financial resources to which those issue terms relate and which comprise supplementary capital to be excluded from the financial resources considered appropriate by the Bank of England for the purposes of paragraph 4(2) of Schedule 3 (minimum criteria for authorisation) of the Banking Act 1987(3), and

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(3) 1987 c. 22.

- (ii) the circumstances in which that variation or supplement may take place are restricted by one of the qualifying restrictions set out in subparagraph (3) below.
- (3) For the purposes of subparagraph (2)(d) above the qualifying restrictions are:—
- (a) a restriction to the effect that the variation or supplement of the issue terms referred to in that subparagraph is limited to dealing with matters arising out of the procedure by which the transfer takes place and the constitution of the transferee;
  - (b) a restriction that the issue terms may be varied or supplemented to an extent beyond the limits specified in paragraph (a) only if the Bank of England consents to that variation or supplement.

## PART III

### interpretation

#### References to borrower and lender

1.—(1) Any reference in this Schedule to the borrower in respect of any subordinated debt shall be interpreted as meaning the person to whom the subordinated debt was advanced or, to the extent that some other person has succeeded to the rights and obligations of the recipient of the advance under the issue terms relating to the subordinated debt, that other person, and any reference to the lender shall, subject to subparagraph (2) below, be interpreted similarly as meaning the person by whom the subordinated debt was advanced or his successor.

(2) For the purposes of this paragraph, in circumstances where a debt is evidenced by a transferable instrument and the issue terms relating to the debt provide for the right to enforce the debt to be exercisable, or exercisable in circumstances provided for in those issue terms, by a trustee for creditors rather than the holder of the instrument, the holder of the instrument and not the trustee shall be regarded as the lender in respect of the debt.

#### Calculation of principal amount advanced

2. In calculating for the purposes of this Schedule the principal amount of any subordinated debt advanced, any deduction of the incidental costs of obtaining finance (within the meaning of section 77 (incidental costs of obtaining loan finance) of the Income and Corporation Taxes Act 1988(4)) relating to the advance of that subordinated debt shall be disregarded.

#### Determination of effect of issue terms

3. In determining for the purposes of this Schedule the effect of issue terms any right of a borrower capable of being exercised without contravening those terms shall be disregarded to the extent that—

- (a) the person who is the borrower has undertaken in writing to the supervisory authority not to exercise that right while that person remains the borrower, and
- (b) that person has neither exercised that right nor indicated an intention or a possible intention to do so.

#### Other Expressions

4. In this Schedule—

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(4) 1988 c. 1.

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“assessment date A” means a date on which, and “assessment date B” means a date in respect of which, there falls to be assessed whether a society is satisfying the first criterion in section 45(3) (criteria for prudent management) of the Act,

“authorised institution” means an institution which is an authorised institution for the purposes of the Banking Act 1987,

“creditors”, in relation to a society, extends to members holding shares in the society as regards the principal of their shares and any interest due in respect of those shares,

“initial maturity period”, in relation to any relevant debt element, means the period beginning—

- (a) where the relevant debt element comprises or is included in subordinated debt which falls under its issue terms to be advanced on a single day, on that day,
- (b) where the relevant debt element comprises or is included in subordinated debt which falls under its issue terms to be advanced over a number of days—
  - (i) where the entirety of the debt has been advanced, on the last day on which an advance of any of the debt was made, and
  - (ii) where the entirety of the debt has not been advanced, on the latest possible day on which an advance of any of the debt may be made,

and ending on the key date,

“instalment”, in relation to the principal of subordinated debt required by the issue terms relating to that subordinated debt to be repaid, means any amount less than the entirety of that principal which the borrower is, by those issue terms, required or permitted to repay at any one time,

“issue terms” means the provisions of a document which sets out, or of a connected series of documents which set out, the rights and obligations of the borrower, the lender and the other persons (if any) in relation to any debt,

“key date” means—

- (a) in relation to an initial maturity period, the earliest possible date at which, under the issue terms, and
- (b) in relation to a residual maturity period, the earliest possible date at which, under the issue terms as read—
  - (i) where assessment date A falls before the assessment date B on which the residual maturity period begins, at assessment date A, and
  - (ii) otherwise, as at that assessment date B,

the relevant debt element could fall to be repaid (or, in the case of subordinated phased debt, to be repaid in full) otherwise than in pursuance of recognised repayment term A or B,

“recognised repayment event” means—

- (a) the commencement of the winding up of the borrower,
- (b) the commencement of the dissolution of the borrower where the borrower is dissolved otherwise than by virtue of section 93(5), 94(10) or 97(9) or (10) of the Act,
- (c) the cancellation of registration of the borrower under the Act otherwise than under section 103(1)(a) thereof (which deals with cancellation following dissolution by virtue of one of those sections),
- (d) failure by the borrower to pay any sum of money which under the issue terms the borrower is obliged to pay, or

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(e) any event which can happen only after one or more of the other recognised repayment events,

“recognised repayment term A” means an issue term which requires or permits any subordinated debt to be repaid with the relevant consent of the supervisory authority,

“recognised repayment term B” means an issue term which requires or permits any subordinated debt to be repaid following a recognised repayment event without the relevant consent of the supervisory authority in satisfaction of the borrower’s liabilities in its winding up or in the dissolution of the borrower in circumstances where that subordinated debt would not have been required or permitted to be repaid had that winding up or dissolution not taken place,

“relevant consent” means consent applied for by the borrower otherwise than in consequence of a provision among the issue terms requiring the borrower so to apply or granting a benefit to the borrower for so applying or imposing a sanction against failure by the borrower so to apply,

“relevant debt element” means the principal or (as the case may be) the instalment of principal of subordinated debt to which a supplementary fund relates,

“repayment”, in relation to subordinated debt the issue terms relating to which require the borrower to pay principal in excess of the principal advanced to the borrower, extends to payment by the borrower of that excess, and “repay” shall be construed accordingly,

“residual maturity period”, in relation to any relevant debt element, means the period beginning on an assessment date B and ending on the key date,

“shares” means shares which are not deferred shares within the meaning of section 119 of the Act or Schedule 1 to the Building Societies (Authorisation) Regulation 1981(5) or to the Building Societies (Authorisation) Regulations (Northern Ireland) 1982(6),

“subordinated debt” means a sum in sterling borrowed on issue terms which have the effect that no repayment will be made to the lender following the commencement of the winding up except where at least all sums due from the borrower to other creditors (apart from any sums due in respect of other subordinated debts) are paid to those creditors in full,

“subordinated long term debt” means subordinated debt comprising or including any relevant debt element the initial maturity period relating to which is at least five years and one day,

“subordinated phased debt” means subordinated debt borrowed on issue terms which also have the effect that—

- (a) the amount of principal advanced is the same as the amount of principal required to be repaid,
- (b) the entirety of that amount of principal is required to be repaid in a number of equal instalments,
- (c) those equal instalments are required to be repaid at quarterly, half-yearly or annual intervals,
- (d) there are, if those instalments are required to be repaid—
  - (i) at quarterly intervals, no less than 12 and no more than 20 such instalments,
  - (ii) at half yearly intervals, no less than 6 and no more than 10 such instalments, and
  - (iii) at annual intervals, no less than 3 and no more than 5 such instalments, and
- (e) the initial maturity period relating to that subordinated debt is not less than the total reached by adding the period of five years and one day to the period beginning on the

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(5) S.I. 1981/1488, revoked by the Building Societies Act 1986.

(6) S.R. (N.I.) 1982 No. 155, revoked by the Building Societies Act 1986.

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day on which the first and ending on the day on which the last such instalment is required to be repaid,

“supervisory authority” means—

- (a) in relation to a borrower which is a society, the Commission, and
- (b) in relation to a borrower which is an authorised institution, the Bank of England,

“supplementary financial resources”, in relation to subordinated debt, means financial resources of a borrower which are derived from the advance to the borrower of that subordinated debt,

“supplementary fund” means—

- (a) in relation to subordinated debt which is either subordinated debt the principal of which is neither required nor permitted under the issue terms (save in pursuance of recognised repayment term A or B) to be repaid in instalments or subordinated phased debt, an amount calculated as equal to the principal amount of the subordinated debt advanced to, and not repaid by, the borrower, and
- (b) in relation to each instalment of principal of subordinated debt, other than subordinated phased debt, required or permitted under the issue terms (otherwise than in pursuance of recognised repayment term A or B) to be so repaid, an amount equal to such proportion of the amount calculated in subparagraph (a) of this definition as that instalment bears to the total of those instalments, and

“transferable instrument” means an instrument which is a transferable bearer instrument or a transferable non-bearer instrument for the purposes of section 7 (power to raise funds and borrow money and limit on non-retail funds and borrowing) of the Act.

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## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order specifies supplementary capital as a description of capital resource of building societies. Section 45 of the Building Societies Act 1986 requires, among other things, the maintenance of adequate reserves and other designated capital resources. Section 45(5) provides that the Commission may specify descriptions of capital resources of building societies for this purpose, by order, with the consent of the Treasury. That order may specify the extent to which capital resources may be aggregated with reserves and may make aggregation subject to conditions. In specifying supplementary capital as a description of capital resource, this Order sets limits on the extent of its aggregation.

Supplementary capital derives from supplementary financial resources, that is to say the resources derived from sums received from a lender on terms which have the effect of subordinating the lender’s rights to receive the debt due to him in the event of a winding up to the rights of other creditors including shareholders in the society as respects the principal of their shares and interest due on them.

The main requirements which must be met are that the debt has an initial maturity of at least five years and one day and that it must be denominated in sterling. The exceptions to the maturity requirement



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are that the terms may provide first for early repayment with the consent of the supervisory authority, and secondly for automatic early repayment following winding up or dissolution.

The extent to which the resource can be counted as capital amounts to the principal received less the principal repaid but—

- (i) the amount counted must not exceed 50 per cent of the amount of a society's reserves (excluding revaluation reserves); and
- (ii) from the time when the residual maturity falls to five years, the amount to be counted is progressively reduced to zero over that five years. Where the lender is to be repaid by instalments of principal, the residual maturity reduction is applied to each instalment separately, save where repayment is by equal instalments over a prescribed period commencing more than five years after the full principal is received.

There are additional provisions that the terms of the instrument governing the debt must not include restrictions on amalgamation, transfer of engagements or transfer of business to an authorised institution.

The Building Societies (Designated Capital Resources) Order 1988 which is revoked by this Order provided for aggregation of the principal amount outstanding of the debt and neither allowed for automatic early repayment following a winding up nor included the additional provisions mentioned in the previous paragraph. It also did not provide for separate application of residual maturity reduction to instalments.