

**EXPLANATORY MEMORANDUM TO
THE DUNFERMLINE BUILDING SOCIETY INDEPENDENT VALUER
ORDER 2009**

2009 No. 1810

1. This explanatory memorandum has been prepared by Her Majesty's Treasury ("the Treasury") and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Dunfermline Building Society Independent Valuer Order 2009 ("the Order") makes detailed provision in relation to the independent valuer to be appointed in accordance with article 5(2) of the Dunfermline Building Society Compensation Scheme, Resolution Fund and Third Party Compensation Order 2009 ("the Compensation Order").¹

2.2 The Compensation Order sets out the compensation arrangements to be put in place, in accordance with the Treasury's obligations under the Banking Act 2009 (c.1) ("the Act"), in respect of the transfers of property, rights and liabilities from Dunfermline Building Society ("Dunfermline") to (a) Nationwide Building Society and (b) a bridge bank, by virtue of the Dunfermline Building Society Property Transfer Instrument ("the Transfer Instrument").²

2.3 The Order makes provision for:

- the remuneration of the independent valuer (article 3), and confers a power on the Treasury to make provision for the remuneration of, and payment of allowances to, certain other persons (see §4.5 below) (article 4);
- the independent valuer to determine the remuneration arrangements and other conditions of service of any staff he or she appoints (article 5);
- the independent valuer to maintain records and keep proper accounts (article 6) and confers a power on the independent valuer to make such rules as to his or her procedure (article 8);
- the independent valuer to apply to the court for information reasonably required for the purposes of conducting the functions referred to in article 4(a) or (c) of the Compensation Order (article 9) and the treatment of information obtained by the valuer (article 11);
- the right for the Treasury or any person affected by a determination of the independent valuer set out in an assessment notice (issued under paragraph 4 or 10 of Schedule 2 to the Compensation Order) to require the independent valuer to reconsider his or her determination (article 12);

¹ S.I. 2009/**.*

² The Transfer Instrument is available at:

http://www.bankofengland.co.uk/financialstability/role/risk_reduction/srr/resolutions/DunfermlineCombinatedTransferInstrument.pdf. The Transfer Instrument was made by the Bank of England in exercise of the powers conferred by sections 11(2) (private sector purchaser) and 12(2) (bridge bank) of the Act.

- the right for the Treasury or any person affected by a determination of the independent valuer set out in a revised assessment notice issued under article 12(2) of the Order to refer the matter to the Financial Services and Markets Tribunal⁵ (article 13) (articles 14 to 27 make consequential amendments to legislation relating to the Tribunal (see §4.12 below)).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 On 30 March 2009, the Bank of England (“the Bank”) exercised its powers under sections 11(2) and 12(2) of the Act to transfer property, rights and liabilities from Dunfermline to a private sector purchaser and to a bridge bank.

4.2 Where the Bank exercises its powers under the Act to transfer property, rights and liabilities of a bank or building society to a private sector purchaser or to a bridge bank, the Treasury is required to put in place compensation arrangements (section 50 (sale to a private sector purchaser) and section 52 (transfer to bridge bank) of the Act). As such, following debate of the draft Compensation Order in both Houses of Parliament, the Treasury made the Compensation Order, which makes provision for the compensation arrangements in relation to the transfers specified in §4.1.

4.3 The Compensation Order specifies that an independent valuer must be appointed to perform a number of functions in accordance with article 4 of that Order. The independent valuer is required to:

- assess the compensation, if any, due to third parties affected by the application of section 38(6) of the Act (termination rights, &c.) (see article 9(2) of, and Part 2 of Schedule 2, to the Compensation Order);
- assess the compensation, if any, due to the pre-transfer creditors³ of Dunfermline (see article 9(3) of, and Part 3 of Schedule 2, to the Compensation Order);
- assess the amount that would have been likely to have been recovered by the Financial Services Compensation Scheme had Dunfermline entered into insolvency immediately before the transfers (see article 11 of the Compensation Order); and
- certify that the costs of the Bank or the Treasury to be deducted from the Dunfermline Resolution Account⁴ have been reasonably and

⁵ The Financial Services and Markets Tribunal is an independent body established under section 132 of the Financial Services and Markets Act 2000. The Tribunal’s website is available at the following address: <http://www.tribunals.gov.uk/Finance/FinancialServicesMarkets.htm>.

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

⁴ The Dunfermline Resolution Account is the account to be set up into which the Bank of England must pay the proceeds derived from the sale of business or shares of the bridge bank.

properly incurred (see paragraph 7 of Schedule 1 to the Compensation Order).

4.4 Section 54 of the Act enabled the Treasury to make provision for the appointment of the independent valuer in the Compensation Order. Sections 55 (independent valuer: supplemental) and section 56 (independent valuer: money) of the Act enable the Treasury to make further provision relating to the independent valuer by virtue of an order subject to the negative procedure.

4.5 Article 3 of the Order makes provision for the remuneration of the independent valuer appointed in accordance with the Compensation Order and for the appointment of a monitor to supervise the arrangements for the remuneration of, and payment of allowances to, the independent valuer. Article 4 of the Order enables the Treasury to make provision for the remuneration and payment of allowances to the panel appointed under article 5(1)(b) of the Compensation Order to appoint the valuer and to the monitor.

4.6 Section 55(4) of the Act provides that the independent valuer may appoint staff. Article 5 of the Order enables the independent valuer to determine the remuneration, allowances and other conditions of service of any staff so appointed. Article 5(4) provides that the independent valuer must seek the approval of the Treasury of any such arrangements.

4.7 Article 6 of the Order requires the independent valuer to maintain records and to keep proper accounts.

4.8 Article 8 of the Order specifies that the independent valuer may make such rules as to the procedure to be applied in performing his or her functions referred to in article 4 of the Compensation Order. The independent valuer may also make such rules as to the procedure to be adopted in relation to the reconsideration of any determination of the independent valuer set out in an assessment notice issued under paragraph 4 or 10 of Schedule 2 to the Compensation Order (regarding the assessment of any compensation payable to, respectively, third parties affected by the application of section 38(6) of the Act (termination rights, &c.) and pre-transfer creditors of Dunfermline).

4.9 Article 9 of the Order confers a power on the independent valuer to apply to the court for information reasonably required for the purposes of conducting the functions referred to in article 4(a) or (c) of the Compensation Order (the assessment of third party compensation and the certification of costs of the Bank or the Treasury to be deducted from the Dunfermline Resolution Account (see articles 6 to 8 of, and Schedule 1 to, that Order)).

4.10 Article 10 of the Order specifies that a person who provides information to the independent valuer is not, by that reason only, to be liable in any proceedings relating to a breach of an obligation of confidence. Article 11 specifies that information provided to the independent valuer or his staff shall not be disclosed, save in certain cases, without the consent of the person from whom the valuer obtained the information and, if different, the person to whom the information relates.

4.11 Article 12 enables the Treasury or a person affected by the determination of the independent valuer set out in an assessment notice issued in accordance with paragraphs 4 or 10 of Schedule 2 to the Compensation Order to require the independent valuer to reconsider his or her determination and to issue a revised assessment notice.

4.12 If the Treasury or a person affected by the determination of the independent valuer set out in a revised assessment notice is dissatisfied with the determination of the valuer, article 13 of the Order enables the Treasury or that person to refer the matter to the Financial Services and Markets Tribunal. Articles 14 to 27 apply, and make modifications to Part 9 of, and Schedule 13 to, the Financial Services and Markets Act 2000 (c.8) (regarding the Tribunal) and the Financial Services and Markets Tribunal Rules 2001 (S.I. 2001/2476).

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As the Order is subject to negative resolution procedure and does not amend primary legislation (other than applying the Financial Services and Markets Act 2000 with minor modifications in relation to references under article 13 of the Order to the Financial Services and Markets Tribunal), no statement is required.

7. Policy background

7.1 Part 1 of the Act, which came into force on 21 February 2009, creates a special resolution regime (SRR), which gives the Tripartite Authorities – the Treasury, the Bank and the Financial Services Authority (“the FSA”)- tools for dealing with failing banks and building societies.

7.2 The Bank exercised its powers on 30 March 2009 to transfer some of Dunfermline’s business to Nationwide in order to protect depositors and safeguard financial stability, as well as to protect the interests of the taxpayer and transfer Dunfermline’s social housing book (and related deposits) to a bridge bank where the business was to be held until a longer term solution could be identified.

7.3 Sections 49 to 62 of the Act make provision for the compensation arrangements to be put in place where the Bank or the Treasury have exercised their transfer powers (the powers to transfer the shares or some or all of the business of a bank or building society). This is necessary to secure the compatibility of the actions with the European Convention on Human Rights.

7.4 The Compensation Order sets out the compensation arrangements to be put in place in respect of the transfers of property, rights and liabilities from Dunfermline to Nationwide and to the bridge bank and confers certain

functions on an independent valuer. Section 55 and 56 enable the Treasury to make further provision about the independent valuer appointed in accordance with that Order.

8. Consultation outcome

8.1 The compensation provisions of the Act were subject to consultation, and were developed in consultation with stakeholders, the Bank and the FSA. Given that the Order is made in exercise of the powers conferred by the Act, no public consultation has been carried out. However, the Bank has been consulted.

9. Guidance

9.1 The Treasury does not propose to issue specific guidance in relation to the Order. However, under section 5 of the Act (code of practice), the Treasury are obliged to issue a code of practice about the use of the stabilisation powers including compensation arrangements, which is available at: http://www.hm-treasury.gov.uk/bankingact09_codeofpractice.htm

10. Impact

10.1 The impact on business, charities or voluntary bodies is zero.

10.2 The impact on the public sector is zero.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply small business.

12. Monitoring & review

12.1 The Treasury will keep the Order under review.

13. Contact

Jamil Mohamed, Financial Stability Resolution Team, HM Treasury can answer any queries on this instrument. Jamil is contactable by email: Jamil.Mohamed@hm-treasury.x.gsi.gov.uk and by telephone 0207 270 6434 or in writing at HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ.