



## Supervisory Statement - **Exercising functions under the Building Societies Act 1986**

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## 1. Introduction

1.1 The purpose of this supervisory statement is to set out the expectations of the Prudential Regulation Authority (PRA) on the Building Societies Act 1986 (as amended) (1986 Act) and on various constitutional and other provisions relating to building societies.

1.2 This supervisory statement applies to building societies.

## 2. Principal purpose of a building society and related matters

2.1 A building society can only be or remain established under the 1986 Act if its purpose, or principal purpose, is making loans which are secured on residential property and funded substantially by the society's members<sup>1</sup> (the principal purpose test) (section 5 of the 1986 Act).

2.2 If an established building society no longer meets the principal purpose test, the PRA may:

- a. direct it to submit a restructuring plan designed to ensure that the society will meet the principal purpose test by a certain date and that it will continue to meet that test in the future (section 36 of the 1986 Act);
- b. direct it to submit to its members for their approval at a meeting the requisite resolutions for a transfer of the society's business to a company (section 36 of the 1986 Act); or
- c. petition the High Court for the society's winding-up (section 37 of the 1986 Act).

2.3 Building societies are subject to lending and funding limits, which help to determine their compliance with the principal purpose test (sections 6 and 7 of the 1986 Act).

2.4 Section 7 of the 1986 Act provides that at least 50% of the funds (excluding those qualifying as own funds) of a society (or, if appropriate, of the society's group) must be raised in the form of shares held by individual members of the society (excluding share

accounts held by individuals as bare trustees for corporate bodies) or by a small business.

2.5 When the PRA assesses a building society's compliance with the principal purpose test, it takes into account:

- a. whether the society is meeting, and is expected to continue to meet, its lending and funding limits (sections 6 and 7 of the 1986 Act);
- b. the actual and projected proportion of the society's gross income that is, or is expected to be, derived from activities that are related to the making of loans secured on residential property. (Income from the society's property related insurance and valuation services might be regarded as related to the making of loans secured on residential property, but income from the society's motor insurance business (if any) would not); and
- c. all other relevant quantitative and qualitative factors.

2.6 The PRA expects societies to draw up their corporate and other business plans so as to provide reasonable assurance that they will comply with the principal purpose test and their other obligations under the 1986 Act.

2.7 In particular, societies should ensure that any programme of securitisation does not threaten compliance either with the principal purpose, or with the lending or funding nature limits. Sections 6(3) and 7(3) of the 1986 Act respectively make clear that only items included in total assets or total liabilities in a society's accounts count towards the nature limits.

2.8 The adoption of International Accounting Standards by some societies changed the accounting treatment of securitised assets for those societies from 1 January 2005. The Building Societies Act 1986 (Modification of the Lending Limit and Funding Limit Calculations) Order 2004 (S.I. 2004/3200) amended the 1986 Act so that securitised assets and related liabilities may continue to be excluded from nature limit calculations, regardless of how they are included in the accounts of a society. Therefore societies which use International Accounting Standards to prepare their accounts will not be disadvantaged in relation to the nature limits.

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<sup>1</sup> Being a shareholding or borrowing member of a society



## Structural risk management restrictions

2.9 Section 9A of the 1986 Act prohibits a society or its subsidiary undertakings (subject to certain defined exemptions) from:

- a. acting as a market maker in securities, commodities, or currencies;
- b. trading in commodities or currencies; or
- c. entering into any transactions involving derivative investments.

2.10 Section 9A of the 1986 Act contains definitions of the above terms, and societies are directed particularly to section 9A(9) for the purposes of compliance monitoring.

2.11 Section 9A of the 1986 Act also includes a purpose test for entering into derivatives contracts and a safe harbour clause for society counterparties stating that any transaction in contravention of the section 9A of the 1986 Act prohibitions is not, however, thereby invalid and may be enforced against the society.

2.12 The exemptions in section 9A of the 1986 Act fall into two broad categories:

a. those which allow a society or subsidiary undertaking to provide certain retail services to its customers, including:

- i. acting as market maker in currency or securities transactions of less than 100,000;
- ii. trading in currencies (but not commodities) up to a value of 100,000 per transaction;
- iii. entering into contracts for differences in respect of customers who wish to hedge exposures arising from their own loans or deposits with the society or a connected undertaking; or
- iv. acting as market maker or entering into derivative investments in its capacity as manager of a collective investment scheme; and

b. those which allow a society or subsidiary undertaking to use derivative investments in order to limit the extent to which it, or a connected undertaking, will be affected by

changes in interest rates, exchange rates, any index of retail prices, any index of residential property prices, any index of the prices of securities, or the creditworthiness of any borrower(s)<sup>2</sup>.

2.13 The Treasury may, by negative resolution order, amend the 100,000 transaction limit and may add factors to, or remove factors from, the list found paragraph 2.12. The factor relating to credit worthiness was added to the original list in section 9A(4)(b) by the Building Societies (Restricted Transactions) Order 2001 (SI 2001/1826). The Treasury may, by affirmative resolution order, make more significant amendments to section 9A(4)(b) of the 1986 Act.

2.14 Boards should have procedures and controls to ensure that use of section 9A of the 1986 Act exemptions by their society (and subsidiary undertakings, if any) is within the law. The exemptions permitting transactions of up to 100,000 (as market-maker in currency or securities transactions, or trading currencies) may not be abused by artificially breaking up larger transactions into a number of smaller amounts falling within the 100,000 ceiling (section 9A(8) of the 1986 Act is the relevant anti-avoidance provision).

2.15 Compliance with the 1986 Act may be assisted by specifying the purposes and circumstances in which hedging transactions may be undertaken, or derivatives used, both in the financial risk management policy documents and in the internal arrangements for delegation, identifying the specific authority in section 9A of the 1986 Act. Whatever the hedging policies adopted, and however the control and authorisation arrangements are organised, it is important that they should be accurately and fully documented.

## Constitutional matters

### Constitutional form

2.16 Building societies have a particular constitutional form: they are mutuals run for the benefit of their members (i.e. their borrowers and savers). A society cannot

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<sup>2</sup> a person who is indebted to a society in respect of a loan fully, or where the Rules so provide, substantially secured on land



therefore be owned or controlled by an outside institution or major shareholder<sup>3</sup>. Society boards and management have a special responsibility to protect the interests of their members through the highest standards of corporate governance.

2.17 Although societies are not publicly quoted, they should have regard to the UK Corporate Governance Code<sup>4</sup> or the Combined Code<sup>5</sup> as appropriate when they establish and review their corporate governance arrangements.

#### Fit and proper test for directors

2.18 A building society's directors are elected by its members. Subject to certain exceptions, any natural person may be elected as a building society director (section 60 of the 1986 Act). Members have the right to nominate any candidate for election. Unless that person is subject to a prohibition order made under section 56 of the Financial Services and Markets Act 2000 (as amended) (FSMA), the board<sup>6</sup> cannot refuse to accept a candidate's nomination because the board does not regard that person as fit and proper.

2.19 Prior to the election, the board should take reasonable steps to establish whether there are any facts or matters concerning the candidate's fitness and propriety which the members should be aware of. If there are, the board should bring them to the members' attention before the election takes place. The PRA will not vet candidates for election.

2.20 A person elected as an executive or non-executive director of a building society must not exercise a controlled function<sup>7</sup> unless the PRA gives its approval (sections 59 and 60 of FSMA). The PRA will not approve a director

unless it is satisfied that he meets, and will continue to meet, the Fit and Proper Test for Approved Persons (see the Fit and Proper Test for Approved Persons sourcebook in the Handbook (FIT)). An approved person<sup>8</sup> must also comply with the requirements of the Statement of Principle and Code of Practice for Approved Persons sourcebook in the Handbook (APER).

#### Other requirements and guidance

2.21 Part VII of the 1986 Act contains requirements relating to the management of building societies.

2.22 Every building society must have at least two directors and one of the directors must be appointed chairman (section 58 of the 1986 Act). The chairman should not hold an executive position in the society. This helps to separate strategic direction from the day to day management of the business and helps the chairman to take an independent view of management issues. It also protects against undue concentration of power.

2.23 Every building society must have a chief executive (section 59(1) of the 1986 Act). The chief executive should be a member of the board.

2.24 A small building society may not need as many executive directors as a large building society, but every society should have at least one.

2.25 Given the mutual status of building societies, a clear majority of directors on a society's board should be non-executive. Non-executive directors should not be given the expectation that they will remain on the board until retirement. They should serve for a fixed term, both initially and for any subsequent term. The appropriate ratio of non-executives to executives will vary with the scale, nature and complexity of the society's business.

2.26 It will rarely be appropriate or desirable for a chief executive or other executive director to remain as a non-executive board member after his or her retirement.

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<sup>3</sup> a person holding a share in a society (by investing in one or more share accounts or holding PIBS or other deferred shares)

<sup>4</sup> the UK Corporate Governance Code, published by the Financial Reporting Council

<sup>5</sup> the Combined Code on Corporate Governance, developed by the Corporate Governance Committee of the Financial Reporting Council for accounting periods beginning before 29 June 2010

<sup>6</sup> the board of directors of a building society

<sup>7</sup> a function, relating to the carrying on of a regulated activity by a firm, which is specified, under section 59 of the Act (Approval for particular arrangements), in the table of controlled functions shown in the Supervision manual of the Handbook

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<sup>8</sup> a person approved under section 59 of FSMA (Approval for particular arrangements) to perform a controlled function



2.27 The board should have an appropriate range of skills and experience to control and direct the society's activities effectively. The composition of the board should be reviewed at regular intervals to ensure that its management and other resources are at least adequate for the society's current business and the business it proposes to undertake.

2.28 When a director is to be appointed under a formal service contract, the board should consider carefully the terms of the contract it offers. When it does so, it should take into account (for example) the need to attract and retain directors with appropriate experience, knowledge and skill; the need to preserve the boards freedom of action; the potential cost of the contract proposed; the period of notice the society will have to give, and the potential liability it will incur, if it terminates the contract other than for misconduct. The objective should be for notice or contract periods of one year or less.

2.29 The Building Societies (Accounts & Related Provisions) Regulations 1998 (SI 1998/504) (The Accounts Regulations) require a building society to give particulars of its directors and chief executives service contracts in its annual Report and Accounts. If there are no service contracts, the building society should say so.

2.30 Every building society must have a secretary (section 59(2) of the 1986 Act). The secretary should ensure that board procedures are followed and regularly reviewed. He should also provide guidance on the boards responsibilities and how they should be discharged.

#### Dealings with directors

2.31 Part VII of the 1986 Act places restrictions on certain types of dealing between a building society and its directors. For example:

- a. it requires a director, who is interested in a contract with the society, to declare that interest to the board (section 63 of the 1986 Act); and
- b. it prohibits a building society from entering into an arrangement, by which a director will acquire a non-cash asset of more than a certain value from the society, unless the

society has approved the arrangement by resolution at a general meeting.

2.32 A building society should maintain written procedures and controls which ensure compliance with these restrictions.

#### Loans to directors

2.33 The 1986 Act also restricts a building society's ability to make loans to a director or a person connected with a director (section 65 of the 1986 Act). In the circumstances, it would be inappropriate for a building society to follow its usual loan procedures when a director or connected person makes a loan application. The responsibility for approving such loans should not rest with staff members, even if the loan falls within a normal staff mandate.

2.34 A building society should have written procedures for dealing with loan applications from directors or persons connected with them and every director should be familiar with them. Those procedures should include consideration by the board, or a board committee, before any loan application is approved. That review should have regard, for example, to the terms of the proposed loan and whether it is permitted by the 1986 Act.

#### Accounting records and reporting requirements

##### Accounting records and systems

2.35 Every building society is required (by section 71 of the 1986 Act) to keep accounting records which:

- a. explain its transactions;
- b. disclose, with reasonable accuracy and promptness, the state of its business at any time; and
- c. enable the directors and the society to properly discharge their respective duties under the 1986 Act and article 4 of the IAS Regulations<sup>9</sup> (if applicable).

2.36 The accounting records should contain:

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<sup>9</sup> the Regulation of the European Parliament and of the Council of 19th July 2002 on the application of international accounting standards (1606/2002/EC)



- a. day to day entries of all sums received and paid by the society;
- b. day to day entries of every transaction which will, or may reasonably be expected to, give rise to assets or liabilities of the society; and
- c. a record of the society's assets and liabilities and, in particular, the assets and liabilities of any class specifically regulated under section 6 (the lending limit) and section 7 (the funding limit) of the 1986 Act.

#### Reporting requirements

2.37 The Accounts Regulations set out specific legal and regulatory requirements about the form and content of the financial statements which a building society and its directors must produce. A building society should ensure that the documents it presents to its members are understandable and balanced so that they report the society's setbacks as well as its successes.

2.38 The Accounts Regulations and the 1986 Act require a building society to disclose to its members, by its annual report and accounts:

- a. the interests of the society's directors;
- b. the interests of its chief executive (on the matter of service contracts) and other officers (on the matter of options to subscribe for shares or debentures);
  - i. individual directors remuneration;
  - ii. particulars of service contracts for the directors and chief executive;
  - iii. current and past directors additional retirement benefits; and
  - iv. directors interests in the shares or debentures of a connected undertaking.

2.39 In the interests of transparency, a building society should also explain whether it adheres to some or all of the UK Corporate Governance Code or the Combined Code as appropriate and, if so, in what respects.

#### Electronic communications

2.40 Paragraphs 9 to 14 of Schedule 9 to the Financial Services (Banking Reform) Act 2013 (which insert sections 115A to 115C into the 1986 Act) contain provisions relating to website communications by a society, including;

- a. that a person is deemed to have agreed to access a document, information or facility on a website if the person has been asked individually and has agreed to do so: or has been asked and the society has not received a response within 28 days. A person may revoke the agreement;
- b. the above does not apply to certain communications including Schedule 16 Statements and Transfer Statements<sup>10</sup>;
- c. a person has a right to receive a hard copy of any document received by other means (eg, electronic communications);
- d. an intended recipient may agree with a society to receive a document in a way that is not by hard copy or by electronic means.

### 3. Merger Procedures

#### Introduction

3.1 This chapter ultimately derives from the Merger Procedures Guidance Note issued by the Commission<sup>11</sup> in May 1999. It gives guidance on the requirements of the 1986 Act, as amended. Under FSMA certain functions of the Commission were transferred to the Financial Services Authority and subsequently, to the FCA<sup>12</sup> and PRA.

3.2 This chapter is not intended to be exhaustive and is not a substitute for looking at the 1986 Act as amended and the Mergers

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<sup>10</sup> the statement required by Schedule 17 to the 1986 Act to be sent in or with the notice of the meeting at which the Transfer Resolutions are to be considered or, if a Transfer Summary is sent, made available to every member entitled to notice of a meeting of the society

<sup>11</sup> the Building Societies Commission

**[Note:** the functions of the Bank of England under the Banking Act 1987, which was repealed by the Act, were transferred to the Authority by the Bank of England Act 1998. Similarly, the functions of the Commission, and of the Central Office of the Registry of Friendly Societies were transferred to the Authority by and under the Act.]

<sup>12</sup> the Financial Conduct Authority



Regulations 1987 (SI 1987/2005) as amended by the Mergers (Amendment) Regulations 1995 (SI 1995/1874), the Merger Notification Statement Regulations 1999 (SI 1999/1215), where applicable, and a society's own Rules. Nor is it a substitute for the society seeking its own legal advice. It gives a description of the relevant provisions of the 1986 Act, of the information which must be made available to the PRA and to societies' members, together with an outline of the procedures to be followed at general meetings, and the voting majorities required to pass the Merger Resolutions<sup>13</sup> which the members are to be asked to approve.

3.3 This chapter describes the role of the PRA in approving the statements to members under Schedule 16 to the 1986 Act, in its prudential supervision of mergers, and in confirmation hearings. It also gives a broad indication of the way in which the PRA may be expected to exercise its discretionary powers. Except as described otherwise, this chapter is concerned only with voluntary mergers under Sections 93 and 94 of the 1986 Act.

3.4 The 1986 Act assigns most of the functions relating to Merger Procedures to "the appropriate authority". In order to clarify this the term "PRA" is used throughout this chapter, including where guidance is being given.

3.5 It is for the boards of societies to assess the case for a merger, and they must explain and recommend their decision to their members. However the PRA's staff are available to give advice on the procedures to be followed and the information required to ensure that the members can reach fully informed decisions. Societies are strongly recommended to consult the PRA early on in the formative stages of merger discussions. Such consultation will, of course, be treated in the strictest confidence. It will also be helpful to have regard to the indicative timetable set out in paragraph 3.208.

3.6 Societies should consult their own legal advisers about the application of the provisions

of the 1986 Act, and the general law, to the particular features of a proposed merger.

3.7 This chapter considers each stage of the merger procedure in chronological order. The remainder of this section gives a synopsis of the relevant requirements of the 1986 Act, which are then discussed in more detail in subsequent sections:

a. 'Preliminary Matters' considers the rationale<sup>14</sup> for a merger and its terms and the handling of public announcements, and gives guidance on certain prudential issues.

b. 'Information Provided to Members' discusses the form and content of the statutory Schedule 16 Statement and the accompanying rationale and statements by the board of the society, and describes the form of application to be made to the PRA for approval of the Statement<sup>15</sup>.

c. 'General Meetings and Resolutions' discusses the resolutions and majorities required to pass them, the notice of meeting, the register of members and members entitlement to vote, the arrangements for general meetings and the scrutineers report. It also describes the PRA's discretionary powers.

d. 'Confirmation' describes the form of application to the PRA for confirmation of a merger, and the procedures which the PRA expects to follow in considering and hearing written and oral representations and in reaching its decision.

e. 'Transfer of Engagements under Direction', describes the modified procedure to be followed when a society has been directed by the PRA to transfer its engagements to another society and/or to proceed by board resolution.

f. 'Registration and Dissolution', briefly discusses the process of registration of amalgamations or transfers of engagements

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<sup>13</sup> the shareholding members' resolution and borrowing members' resolution required to approve a merger where no direction under section 42B(3) of the 1986 Act has been given.

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<sup>14</sup> the explanation of the reasons for a proposed merger provided to the members of a society by its board of directors

<sup>15</sup> the statutory statement required by Schedule 16 to the 1986 Act to be sent to every member entitled to notice of a meeting of the society



and dissolution of the amalgamated or transferor societies.

g. 'Timetable', reviews the expected timetable, including statutory notice periods, which may be expected to apply to a merger from start to finish.

#### Statutory requirements

3.8 The statutory provisions concerning mergers are in Sections 93 to 96 of, and Schedule 16 to, the 1986 Act, where three types of transaction are provided for:

- a. Amalgamation, where two or more societies unite to form a new successor society;
- b. Transfer of engagements, where a society (the transferor) transfers its membership and the whole of its undertaking to another (the transferee), which then continues as before; and
- c. Partial transfer of engagements, where a society transfers only a part of its membership and business to another society (for example, some outlying branches).

The procedures for all three are much the same, and the differences are explained in the relevant sections of this chapter.

3.9 The practice as described in this chapter is derived exclusively from previous experience of transfers of engagements because, so far, there have been neither amalgamations nor partial transfers under the 1986 Act. However, it is not expected that the PRA's handling of amalgamation procedures would be significantly different from what is described here.

3.10 The purposes of the provisions of the 1986 Act are to ensure that the members are given all the material information they need about the terms of the merger which they are asked to approve and a proper opportunity to cast their votes. Subsequently, they are to be given the opportunity to make representations about that process before the merger is confirmed.

3.11 The 1986 Act makes no provision for a merger to be initiated by any other means than a proposal by a board put to the society's members. It requires that each member who is entitled to receive notice of the general

meeting at which the Merger Resolutions are to be moved must also receive a copy of the Schedule 16 Statement. A merger must be approved by a shareholding members resolution and a borrowing members<sup>16</sup> resolution. There is an additional voting requirement for the approval of a partial transfer of engagements.

3.12 If the terms of a merger include provision for the payment of compensation to directors or other officers for loss of office or of income, then the proposed payments must be approved by a separate special resolution. A further special resolution may also be required if there is to be a distribution to members which exceeds the limits described in paragraph 3.107.

3.13 Sections 93 to 96 of the 1986 Act specify certain procedures for the consideration of representations by interested parties concerning confirmation, and the criteria which the PRA must consider before deciding whether or not to confirm a merger. The PRA may not consider matters concerning the merits of merger proposals or the fairness of the terms which the members have approved by passing the Merger Resolutions.

3.14 The statutory requirements of the 1986 Act are explained and discussed in more detail in subsequent sections of this chapter. In addition, societies and their advisers must have regard to the legislation mentioned below.

#### Enterprise Act 2000

3.15 Societies should inform the Office of Fair Trading of a proposed amalgamation or transfer of engagements where the UK turnover associated with the enterprise which is being acquired exceeds 70 million or the enterprises which cease to be distinct supply or acquire goods or services of any description and, as a result of the merger, together supply or acquire at least 25 per cent of all those particular goods or services of that kind supplied in the UK or in a substantial part of it.

3.16 The Office of Fair Trading (OFT) has a function to obtain and review information

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<sup>16</sup> a person who is indebted to a society in respect of a loan fully, or where the Rules so provide, substantially secured on land





relating to merger situations, and a duty to refer to the Competition Commission for further investigation any relevant merger situations where it believes that it is or may be the case that the merger may or may be expected to result in a substantial lessening of competition.

3.17 It is essential that any submission to the OFT is undertaken at the earliest possible opportunity since, should the OFT decide to refer a merger to the Competition Commission that would be a material fact to be disclosed in the Schedule 16 Statement, unless it is impracticable to put the matter to members until the Competition Commission has reported.

#### Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)

3.18 These Regulations have the effect that the employees of a transferor society automatically become the employees of the transferee society<sup>17</sup> following the merger. They require, in particular, information to be given in certain cases to employees representatives, long enough before the merger takes place, to enable consultations to be held between the society and those representatives. Failure to inform or consult in this way is a ground for reference of the matter to an employment tribunal and there are other significant provisions.

3.19 Societies are advised to consult "A Guide to the 2006 TUPE Regulations for Employees, Employers and Representatives" which explains the Regulations and which is available from the TUPE section of the Department of Trade and Industry Employment Matters webpage, under the heading "Trade Unions and collective rights" see [www.dti.gov.uk/employment/](http://www.dti.gov.uk/employment/).

#### Taxes Acts

3.20 Societies should take advice on the timing and amount of tax liabilities.

#### Electronic Communications

3.21 Societies should be aware of the provisions of sections 115A to 115C of the

1986 Act (see section 'Electronic Communications')

#### Preliminary matters

##### Rationale for a merger

3.22 It is a matter for the board to decide whether to recommend a merger to its members. The overriding duty of the board is to reach a view having regard to what is in the best interests of the society, and its members as a whole, both present and future, borrowing members and shareholding members<sup>18</sup>. The board may also reasonably consider the interests of customers who are not members, of the staff, suppliers of goods and services, and of the wider community.

3.23 A well planned and well matched merger can benefit both the shareholding and borrowing members and the staffs of both societies by producing a combined society with the financial strength and management expertise and experience needed to compete successfully in the market place. It must be recognised, however, that in many instances it will take time for economies of scale to be achieved and a careful assessment of projected costs is essential to a realistic view of whether such economies are likely to be achievable.

3.24 On the other hand, a merger between two weak and over-extended societies may produce an even weaker one. It is better to negotiate a merger from a reasonably secure position than to be obliged to seek a merger when the society has become too weak to carry on as an independent entity.

3.25 This chapter cannot deal exhaustively with all the factors to be taken into account by a board when deciding whether to recommend a merger to its members. Moreover, there will be factors peculiar to particular cases. However, the following paragraphs draw attention to those matters which the PRA expects boards to consider in all cases.

3.26 Consideration of a merger can normally be expected to emerge from the board's regular consideration of the strategic options

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<sup>17</sup> a society accepting a transfer of engagements from another society

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<sup>18</sup> a person holding a share in a society (by investing in one or more share accounts or holding PIBS or other deferred shares)



available to the society. That is not to say that merger as a transferor society should always figure as an option in every society's corporate plan. On the other hand, every board should be alive to business trends which point to, or which, if not altered, will point to, the need to consider options for merger. In short, a merger should be foreseen and planned.

3.27 Alternatively, of course, a board which wishes its society to remain independent must have a clear strategic view of how that can be achieved in a variety of realistic planning scenarios. Whether or not a board is considering a merger, it should as a matter of prudence, know how it would respond to a proposal or counterproposal to merge or to transfer its business to a commercial company.

3.28 If a board foresees the possibility of a merger, then it should plan for that eventuality. Societies which see themselves as transferees will need to consider the desired characteristics of potential partners, including, for example, geographical presence, mortgage book quality, and product market share.

3.29 Societies contemplating the transfer of their engagements will need to consider whether the interests of their members would best be served by a local or regional alliance or access to a national network of branches and services.

3.30 The board may also reasonably consider the interests of customers who are not members, of the staff, suppliers of goods and services, and of the wider community. It is also reasonable, particularly for local and regional societies, to consider the implications for the local economy, where, for example, a regional or head office may eventually be closed to achieve economies of scale.

3.31 The range of issues which both boards have to consider will vary from case to case and is for the board to decide. At one end of the scale there will be the case where a small society merges with a large one and, at the other end, where two or more societies of broadly comparable size join to form one significantly larger.

3.32 Whatever the proposal under consideration the board will necessarily have regard to this primary duty to reach a view on

what is in the best interests of the society, and its members as a whole. It will also be conscious of the need to give an account of the boards rationale in recommending the merger to members, in particular if a statutory merger statement is included in the Merger Document<sup>19</sup> (see paragraph 3.89).

#### Terms of a merger

3.33 The terms negotiated between the parties in a merger will be set out in a formal agreement. In the case of a transfer of engagements, Section 94(6) of the 1986 Act requires the extent of the transfer, and in practice the other agreed terms, to be recorded in an Instrument of Transfer<sup>20</sup>. For an amalgamation, Section 93(2) of the 1986 Act requires the parties to agree on a Memorandum<sup>21</sup> and Rules for the successor society, and each to approve the terms of the amalgamation by Merger Resolutions, so that there must be agreement on the terms.

3.34 The PRA will expect the Instrument of Transfer or amalgamation agreement<sup>22</sup> to be signed before the PRA approves the Schedule 16 statement, although it will be conditional on, among other things, approval by members and confirmation by the PRA. In both cases the boards of the societies will have approved the Instrument or agreement and the Schedule 16 statement and, in the case of an amalgamation, the Memorandum and Rules of the successor society.

3.35 Before such approval by the boards, drafts of the proposed Memorandum and Rules should have been cleared with the FCA and the PRA. The Rules<sup>23</sup> of transferee societies should provide that members of transferor societies are not disenfranchised for any period after the merger<sup>24</sup> is effected (see paragraph 2.3.16 and rule 4(9) of the BSA<sup>25</sup> Model Rules 6th edition).

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<sup>19</sup> the document or booklet containing the Schedule 16 Statement

<sup>20</sup> The Instrument of Transfer of Engagements required by section 94(6) of the 1986 Act

<sup>21</sup> the Memorandum of a building society required by paragraph 2 of Schedule 2 to the 1986 Act

<sup>22</sup> a formal agreement between societies on the terms of their amalgamation

<sup>23</sup> the Rules of a building society.

<sup>24</sup> an amalgamation or transfer of engagements

<sup>25</sup> the Building Societies Association



3.36 Although vesting of the property, rights and liabilities of the transferor society in the transferee society on completion of a transfer of engagements is a statutory process by virtue of Section 94(8) of the 1986 Act, the Instrument of Transfer performs an important function. Not only is it required by the 1986 Act, but it is required to identify the extent of the transfer (Section 94(6)), since a transfer can be of all or part of the engagements of the transferor society. Thus, on a transfer of all the engagements of a society, the Instrument of Transfer should include a specific statement that all are included.

3.37 If the transfer is of part only, then the instrument should specify precisely what is being transferred. As explained, an amalgamation agreement is required in practice for all amalgamations, but again the actual process of transferring the assets of the societies to, and vesting them in, the new society is by operation of the 1986 Act. Section 93(4) of the 1986 Act does not allow for exceptions to the vesting since the nature of an amalgamation is that all the assets of all the societies are vested in the successor society.

3.38 The Instrument of Transfer, or amalgamation agreement, will also allow matters of detail to be recorded. So it will contain, for example, provision for:

- a. any changes to the terms and conditions of CCDS, PPDS, PIBS<sup>26</sup> and share and deposit accounts, including the integration of the product lines of the transferor society(ies) into those of the transferee or successor society;
- b. any changes to the terms and conditions of mortgage accounts and other loans;
- c. any bonus to be paid to members;
- d. the terms and conditions on which staff will be employed or made redundant;
- e. pension scheme arrangements;
- f. integration of operations;
- g. the terms and conditions on which directors and other officers are to continue in office or

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<sup>26</sup> Permanent interest-bearing shares, a type of deferred share

cease to hold office, including the posts they will hold and any extra-contractual compensation to be paid for loss of office or reduction in emoluments;

h. the specified target date for completion of the merger, bearing in mind that the actual date is a product of the 1986 Act (Sections 93(3)(b) & (4) and 94(8)), and for action if that date is not achieved;

i. any conditions precedent, such as members votes and the PRA's confirmation, and for the circumstances in which the Instrument or amalgamation agreement might be terminated.

#### Bonus Payments to Members

3.39 Whether any bonus is to be paid to members and, if so, its amount and distribution, are matters to be agreed by the boards of the societies concerned and to be approved by their members, subject to the discretion described in paragraphs 3.149 to 3.152. However, the PRA will wish to be satisfied that the combined society will maintain a prudent level of capital resources after the bonus is paid.

3.40 A bonus may, for example, be paid to the members of a transferor society with a higher capital ratio than the transferee society so as to equalise the reserves which both bring to the combined society. If it is thought desirable also to pay a bonus to the members of the transferee society, then the reserves of the combined society may be equalised at a level below the capital ratio of the transferee society, but only if it is prudent to do so. The statutory requirements for approval of bonus payments are described in paragraph 3.107.

3.41 A bonus is a distribution of the funds of either or both societies, and may be paid by a number of methods, or some combination of them, including, for example: a flat rate lump sum; a sum calculated as a percentage of balances; or an increase or (for mortgage accounts) a decrease in the interest rates paid or charged for a limited period.

3.42 Maintenance of interest rate differentials existing before the date of completion of the merger between those offered by (say) the transferor society and the transferee society would not normally be characterised as a bonus. However, each society, and the PRA, will wish to be satisfied that any differential is



consistent with its established pricing policy and is not the result of a change adopted, for example, when the society decided to seek a merger. Each case where interest rate differentials are to be maintained, for whatever period, will need to be considered to determine whether or not it constitutes a bonus, and societies may wish to take professional advice on the matter.

#### Compensation to Directors and Other Officers

3.43 Any compensation proposed to be paid to directors or other officers must be disclosed in the Schedule 16 Statement and approved by a separate special resolution of the members (see paragraphs 3.76 and 3.105 to 3.106).

3.44 Compensation is not defined in the 1986 Act, except to the extent that section 96(8) says that it includes benefits in kind. In the PRA's opinion, compensation does not include statutory redundancy payments, damages for breach of contract or other payments, for example, falling due under the terms of a pre-existing contract of employment, or a pre-existing arrangement giving rise to a reasonable expectation. However, it does include any proposed ex-gratia payments in money or moneys worth.

3.45 Societies should consider very carefully the extent to which any proposed payment may exceed the amount provided for by statute or contract. In view of the requirement in Section 96(3) of the 1986 Act that unauthorised payments must be repaid by the recipient, societies are advised to take legal advice on any payments which are not specifically authorised by the terms of a resolution passed by the members in accordance with Section 96(1) of the 1986 Act.

3.46 All proposed payments requiring approval by such special resolution should be disclosed in the Schedule 16 Statement under the power in paragraph 1(4)(f) of that Schedule. In addition, the Schedule 16 Statement should disclose any other payments to directors or other officers arising directly from the merger. So that members are aware of the direct interest of the directors or other officers in a merger, societies should consider whether the amount, as distinct from the fact, of statutory or contractual payments should be disclosed where these arise directly from the merger.

3.47 Societies need to consider whether any

facts relevant to any director or other officer, or to any person(s) connected with them, should be disclosed where these are material to the interests of the members who are to be asked to vote on the proposed merger. In determining the amount of compensation which might be justified, the board must strike a balance between fairness to the individuals who will suffer a loss of income and the interests of the members, bearing in mind that the compensation will be at a cost either to any bonus to the members or to the reserves to be transferred to the combined society  
Public announcement

3.48 Boards of both societies may wish to announce a merger proposal as soon as agreement in principle has been reached between them and, in particular, to inform their members and staff of the proposed terms. However, boards will often wish to delay an announcement for as long as possible, perhaps for prudential or commercial reasons, or because they first wish to settle all the details of the proposed terms. Societies with listed<sup>27</sup> CCDS<sup>28</sup>, PPDS<sup>29</sup> or PIBS<sup>30</sup> will need to have regard to the FCA's requirement concerning early disclosure of information affecting the price of securities.

3.49 Subject to this, there is no objection to delay, and there may be good reasons for it. Unfortunately, experience shows that every days delay after agreement in principle has been reached carries an increasing risk of premature leak. The reasons for delay may make the merger a subject for intense speculation and increase the risks of a leak. In these circumstances then, boards must have contingency plans to make an early announcement to deal with any potentially damaging rumours and to avoid members being misled or left in a state of uncertainty.

3.50 The announcement, particularly information provided directly to members and staff, should make it clear that the merger

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<sup>27</sup> included in an official list, being (a) the list maintained by the FCA in accordance with section 74(1) of the Financial Services and Markets Act 2000 (The official list) for the purposes of Part VI of the Act (Official Listing);

(b) any corresponding list maintained by a competent authority for listing in another EEA State

<sup>28</sup> Core Capital Deferred Shares

<sup>29</sup> Profit-participating deferred shares

<sup>30</sup> Permanent interest bearing shares



proposal is subject to approval by the members and completion of the statutory procedures. Boards should be careful to avoid giving even the impression that the outcome is a foregone conclusion, and should indicate any matters of substance on which the proposed terms of the merger remain to be settled. Briefing of staff who will be responsible for responding to enquiries from members and the press should be considered carefully and prepared in advance of the announcement to avoid any risk of members being unintentionally misled.

3.51 The PRA is not required to approve the content or wording of announcements or preliminary information sent to members. However, it will be happy to comment on drafts shown to it at an early stage, and may be able to help societies to avoid unintentionally misleading statements.

#### Prudential issues

3.52 Before a firm proposal is agreed, the participating societies should consult with the PRA's staff to discover whether there is any prudential objection to the proposal. The PRA will need to be satisfied that the combined society will be managed prudently from the date of completion of the merger and comply with the Principles for Businesses and with all the relevant rules made by the PRA.

3.53 The PRA will also wish to know that post-merger arrangements and agreements provide for the proper integration or rationalisation of the operations of the combined society, and of its connected undertakings, joint ventures or arrangements with third parties (for example, for the provision of unsecured loans, insurance and investment services) and that any commercial conflicts of interest have been resolved.

3.54 In all cases, prudential information should be provided, but the amount of information will depend upon the circumstances of each case. For example, if a merger involves societies of much the same total asset size, or where the merger will result in a significant increase in the transferee society's assets, or involves a change of strategy, new kinds of business or carrying on business in a new geographical area, the PRA will expect substantial prudential information and societies should also expect this to form the basis of more detailed discussions with the PRA's staff.

3.55 On the other hand, in a merger where a small society is transferring its engagements to a very much larger one, the prudential information to be provided is likely to be that much less. In all cases the PRA will ask for the prudential information at an early stage so that there is adequate time for discussion before it is asked formally to approve the Schedule 16 Statement.

3.56 Boards should note, that while the PRA will expect the kinds of information described here, it is for the boards themselves to exercise due diligence and to be satisfied that the merger and its terms are prudent and in the interests of their members.

3.57 The PRA's need for prudential information can be expected generally to relate to prudential issues, but societies may find it helpful to note the following paragraphs which describe some of the particular issues which the PRA will expect to be addressed.

#### Direction and management

3.58 Current and future board composition and succession plans for, say, the three years immediately following the merger.

3.59 Current and future senior management and structure, indicating spans of responsibility (which may most easily be presented in chart form) and any areas where there may be a need for additional expertise or experience to be acquired by the combined society with plans and timescale for acquiring such expertise.

#### Accounting and control systems

3.60 Generally, outline plans and timetables for the integration of accounting, control and inspection systems, including the linking or harmonisation of computer systems. This may usefully be divided between initial or short term arrangements and foreseen longer term developments. More particularly, the information should include arrangements to ensure continuity and the integration of:

- a. accounting records
- b. systems of internal control, including management information systems and IT systems; and
- c. systems of inspection (internal audit)



3.61 For all significant mergers the PRA will wish to receive, prior to the effective date of the merger, a letter from the transferee society's external auditors stating whether, in their opinion, the accounting records and systems of control and of inspection established for the merged society will be effective from the effective date.

#### Business plan

3.62 The rationale for the merger will need to be explained and justified in full, including existing and potential future business and marketing opportunities, the benefits of geographical concentration or diversification of business, economies of scale (particularly administrative), and future funding and lending strategies. Proposals for rationalisation or integration of administrative offices and branches will need to be set out in full, including the implications of the proposed merger for the terms and conditions of staff employment and their future job prospects with the combined society.

#### Financial prospects

3.63 Information on the financial prospects for the combined society will need to include:

- a. estimates, broken down to an appropriate level of detail, of short term additional costs and long term savings (if any) anticipated from the merger; and
- b. revenue account, balance sheet and solvency ratio projections for the first three to five years of operation.

3.64 This information must be supported by statements of the assumptions on which it has been based. In addition, the effect of changes on those assumptions should be illustrated, from a best case to a worst case scenario.

#### Connected undertakings and agencies

3.65 The integration and future operation, management and control of connected undertakings, together with arrangements with other parties for the continuing provision of services under agency agreements, should be described in full.

### Information Provided To Members

#### Statutory requirements

3.66 Part I of Schedule 16 to the 1986 Act requires a building society which desires to merge with another society to send to every member entitled to notice of a meeting of the society a statement concerning the matters specified in the Schedule. The statement is to be included in or with the notice of the meeting at which the Merger Resolutions are to be moved. No statement shall be sent unless its contents, so far as they concern the specified matters, have been approved by the PRA. Where the transferee society has obtained the consent of the PRA to proceed by board resolution then it is exempt from this requirement (see paragraphs 3.149 to 3.152).

#### The Schedule 16 Statement

3.67 The Schedule 16 Statement must set out the present financial positions of each of the merging societies, the terms of the merger agreed between them and summarise the main provisions of the Instrument of Transfer. It must also include any other matter which the PRA may require. In the case of an amalgamation, the Statement must additionally include the proposed Memorandum and Rules of the successor society which are to be approved by the special resolution required to approve the merger (Section 93(2) of the 1986 Act), as well as the terms of the amalgamation agreement between the societies.

3.68 The Schedule 16 Statement does not have to be a discrete document. In fact it will usually be convenient to include it in a comprehensive Merger Document also containing the boards rationale for recommending the merger, the notice of the meeting at which the Merger Resolutions are to be moved, an explanation of the merger procedure (including details of the confirmation stage see section 5) and a description of the requirements of the society's Rules concerning entitlement to vote. However, the Schedule 16 Statement within the Merger Document should be clearly identified as such (either by printing it on a different colour of paper or by some other means). An example of a pro forma Merger Document is given in Appendix 1.

3.69 The required contents of the Schedule 16 Statement are discussed in detail in the following paragraphs.

#### The financial position



3.70 Paragraph 1(4)(a) of Schedule 16 to the 1986 Act requires the Statement to contain information concerning the financial position of each of the societies participating in the merger. The members should be given sufficient information to enable them to gain an accurate understanding of the key financial features of their businesses. The information will include a balance sheet, recent results and certain financial ratios; for this purpose it is necessarily rather more detailed than is required for the annual Summary Financial Statement. In addition, further information will be required concerning accounting policies and other matters, as set out in paragraph 3.75.

3.71 The information should comprise consolidated accounts of each society and its connected undertakings prepared at a common balance sheet date which should be no more than 6 months before the date on which the Statement is approved by the PRA, or the date on which the Statement is to be sent to the members if that is expected to be significantly later. Information regarding results should relate to the relevant period ending on the chosen balance sheet date.

3.72 The figures may be derived from audited or unaudited accounts. In either case, the source must be stated. If unaudited figures are used, the PRA will require a letter of comfort from the relevant society's external auditors confirming that, in their opinion:

- a. the figures have been correctly abstracted from the society's records;
- b. the financial information is not misleading in the context in which it appears; and
- c. in reviewing the data relating to the Statement, nothing has come to their attention which would cast doubt on the directors statement (see paragraph 3.73) that there has been no material change affecting the information given.

3.73 Since the financial information will necessarily relate to a period ending somewhat before the date of approval of the Schedule 16 Statement, the board is required to state whether or not there have been any material changes to the financial position in the interim. If the effect of a change cannot be quantified, it must be described so that the

members at least know that it has been identified and is relevant to their consideration of the proposed merger. Failure to disclose such changes will be relevant to the PRA's subsequent consideration of the society's application for confirmation of the merger (see paragraphs 3.157, 3.169 and 3.170).

3.74 Differences in accounting policies could result in some loss of comparability between the financial information given for each society. Some adjustments to the figures may, therefore, be necessary to give the members a proper understanding of the societies relative financial positions. Any adjustments made should be explained by way of a note. If there are no significant differences in accounting policies, then that should be stated for the avoidance of doubt.

3.75 Notes to the financial position should also provide information on the following matters:

- a. the book amounts and market values of listed securities held as liquid assets;
- b. the book amounts and current market values of land and buildings; with an indication of the basis on which current market value has been determined;
- c. any significant differences in policy or practice with regard to the depreciation and estimated asset lives of tangible fixed assets;
- d. pension arrangements of each society including, for funded schemes, details of latest actuarial valuations;
- e. summary information on the business of connected undertakings;
- f. an estimate of the costs and benefits of the proposed merger.

3.76 Subparagraphs 1(4)(b) and (c) of Schedule 16 to the 1986 Act require the Statement to disclose any interests of the directors in the merger and any compensation to be paid to them or other officers. This information must be comprehensive and clear. It should include the following:

- a. the interests of the directors in the merger, including appointment of existing directors to the main board or local board of the combined society, or to any other position with that



society, together with any significant resultant change in present or expected future levels of fees or other emoluments and benefits in kind;

- b. any compensation payable to directors or other officers for loss of office or reduction in emoluments, and the basis on which it is calculated; if a global sum is proposed to be given to a group of persons, the intended manner of apportionment should be stated (see paragraph 3.43 to 3.47);
- c. any payments to be made to directors or other officers arising from the merger, whether provided for in contracts of employment or under covenant or some arrangement giving rise to a reasonable expectation;
- d. any proposed benefits to directors or other officers by way of fees for professional services, stating the nature of the services to be provided and the anticipated annual fee income; and
- e. any other benefits to directors or other officers, or to any persons connected with them, arising from, or as a consequence of, the merger.
- f. If the directors or other officers have no material interest, either by way of change in remuneration, as widely defined above, or by payment of compensation for loss of office or in any other form, for example, a pension, this should be stated explicitly, for the avoidance of doubt.

#### Bonus Payments to Members

3.77 Paragraph 1(4)(d) of Schedule 16 to the 1986 Act requires the Statement to specify the bonus, if any, to be paid to members in consideration of the merger. The PRA's views on what may, or may not, be regarded as bonus are given in paragraph 3.41 to 3.42, and the statutory requirements for approval of bonus payments are described in paragraph 3.107.

3.78 The method of calculation of a bonus should be explained in the Schedule 16 Statement; for example, x% of the lower of the share account balances held at the end of the last financial year and those balances held on the effective date of merger (giving precise dates and times for calculating the balances), and the estimated maximum total amount payable to members. The effect on the

reserves of the combined society should be shown by stating the estimated gross and net costs of the bonus and the resulting reduction in the reserve/asset ratio (see also Appendix 1, items A.3 and B.6). The ratio of gross capital to shares and borrowing of the combined society, after allowing for the net cost of the bonus to be paid to members, should be estimated to be x%, and on the same basis of calculation, but not accounting for the bonus payment, the ratio should be estimated to be y%.

3.79 As is noted in paragraph 3.38, the Instrument of Transfer (or amalgamation agreement) will normally make provision for a number of matters in addition to those concerning the interests of directors and other officers and any bonus to be paid to the members. Such matters must be explained in the Schedule 16 Statement, together with any other matters of which the PRA may require particulars to be given (see paragraph 1(4)(f) of Schedule 16 to the 1986 Act). They are discussed in the following paragraphs.

3.80 Post-merger membership rights should be secured by the adoption of BSA Model Rules which cover this matter or a similar Rule to the same effect. The purpose of the Rule is to ensure that members of a transferor society are not disenfranchised. It provides that they are deemed to have been members of the transferee society from the date when they became members of the transferor society.

3.81 Societies' Rules, in conformity with the 1986 Act, must provide, inter alia, that a member is entitled to vote on a resolution of the society if he was a member at the end of the last financial year before the voting date and on the voting date. If, for example, a transferee society has a financial year ending on 31 December, its Annual General Meeting (AGM) in the following April and the effective date for a merger is in March, then the deemed membership Rule will enfranchise those who were members of the transferor society on or before 31 December. The existence, or absence, of this Rule must be recorded in the Schedule 16 Statement in any case where it is likely to have any significant effect on members rights.

3.82 Proposed changes to the terms and conditions of share and deposit accounts must be fully and clearly explained in the Schedule





16 Statement. In a transfer of engagements, shares and deposits held with the transferor society will become held with the transferee society. Such accounts will either be transferred into the nearest equivalent account of the transferee society, become new products of the transferee society, or continue on existing terms but be closed to new investors.

3.83 It is most helpful to tabulate the proposed integration of accounts in a schedule listing the accounts of the transferor society opposite the accounts of the transferee society to which they are to be transferred, together with the interest rates payable, or proposed to be paid, on each account. A similar presentation will be required to show the proposed integration of accounts in an amalgamation. In preparing this the provisions of Section 8 of the 1986 Act should be borne in mind.

3.84 Proposed changes to the terms and conditions of mortgage accounts must be explained (see paragraph 1(4)(e) of Schedule 16 to the 1986 Act). Alternatively, if no changes are proposed to be made, the Schedule 16 Statement must include an assurance to that effect, for the avoidance of doubt.

3.85 Terms and conditions of employment of staff, including any special bonus or other benefits in connection with the merger, as provided by the Instrument of Transfer (or amalgamation agreement), must be set out. In addition, the PRA will require the Schedule 16 Statement to include an explanation of the Boards intentions with regard to the closure or integration of head office departments and branches, any reductions in the number of staff employed and redundancies, insofar as these matters are not provided for in the Instrument of Transfer (or amalgamation agreement).

3.86 Future pension arrangements for staff, directors and other officers, as provided by the Instrument of Transfer (or amalgamation agreement), are to be set out. Finally, the conditional and termination clauses of the Instrument of Transfer (or amalgamation agreement) should be summarised.

#### Board Rationale and Statements

3.87 A board putting a merger proposal to its members has, in addition to its statutory duty

to provide a Schedule 16 Statement, a fiduciary duty to provide its members with essential factual information and a fair assessment of the issues so that they can take informed decisions on whether to approve the boards proposals. The PRA, therefore, expects that the Merger Document (see paragraph 3.68) will include an explanation by or on behalf of the board of the reasons for the merger and the choice of merger partner.

3.88 This rationale should give a fair assessment of the advantages and disadvantages of the merger and should be entirely consistent with the facts set out in the Schedule 16 Statement. In addition to explaining the rationale and its consequences for the members, it should explain the effect on the staffs terms and conditions of employment and expectations for future employment prospects. The planned timescale for integration of the businesses should also be explained.

3.89 The 1986 Act requires that members must be notified of written non-confidential proposals to their society either to merge with another society or to be taken over by a commercial company. Part II of Schedule 16 to the 1986 Act imposes a duty to send a merger statement to members, advising them of a proposal to merge, and Part IA of Schedule 17 to the 1986 Act imposes a like duty to send a transfer proposal notification, advising them of a proposed takeover<sup>31</sup>.

3.90 If a proposal of either kind has been received, then notification of the prescribed particulars must be sent to every member entitled to notice of a meeting, either separately or together with every notice of the society's annual general meeting, and (where such notification has not already been given) must be included with every notice of the special meeting at which Merger Resolutions are to be moved.

3.91 Where notification of takeover or other merger proposals accompanies the notice of a meeting to consider Merger Resolutions, then

a. any merger statement must give notice of the fact that a written merger proposal has

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<sup>31</sup> the transfer of business of a society to an existing company



been received unless notice has already been given to members, or it was received 42 or less days before the meeting, with details of the identity of the proposer, with or without particulars regarding the proposal. If the proposer requests in writing that the proposal be treated as confidential, disclosure is not required. The merger which the members are being asked to vote upon need not be the subject of a merger statement.

b. any transfer proposal notification must give notice of the fact that a written proposal has been received with details of the identity of the proposer, with or without particulars regarding the proposal. If the proposer requests in writing that the proposal be treated as confidential, disclosure is not required.

3.92 An invitation to discuss a possible proposal probably would not constitute a proposal within either Schedule. Provision of merger or transfer proposal statements is a statutory requirement. Provided they accompany the notice of meeting, they may be included in a Schedule 16 Statement, or alternatively may more conveniently be included as one or more discrete paragraphs within the boards rationale explaining its choice of merger partner.

3.93 The rationale itself is not a statutory requirement, and is not subject to approval by the PRA. However, the PRA will take account of the information it provides when considering whether to confirm the merger (see section 'Purpose of Confirmation', particularly paragraphs 3.163-3.164 and 3.169). Societies will, therefore, find it helpful to consult the PRA's staff about the drafting and content of the rationale.

3.94 The whole Merger Document should be covered by a responsibility statement by the directors of each society. This may be given along the following lines:  
The directors of Building Society and the directors of Building Society accept responsibility for the information relating to their respective societies which is contained in this document. To the best of the knowledge and belief of the directors (who have taken all reasonable care to ensure that such is the case) the information contained in this document is in accordance with the facts and does not omit anything likely to affect the import of such information.

3.95 The PRA will require the Schedule 16 Statement to include a statement as to whether or not the merger will conflict with any contractual obligations, including agency agreements, of either society or their connected undertakings.

#### Application and the PRA's Approval

3.96 A society's formal application to the PRA for approval of a Schedule 16 Statement is likely to be the culmination of many weeks of discussion with the PRA's staff who will have reviewed and commented upon a draft or successive drafts of the Statement, having had regard also to drafts of the Instrument of Transfer (or amalgamation agreement) and the prudential information described in 'Preliminary matters'. Societies should also have cleared any proposed Rule changes or, in the case of an amalgamation, the proposed Memorandum and Rules of the successor society, with the FCA and the PRA.

3.97 The probable sequence of events is described more fully in section 'Timetable'. The case where the PRA has consented to a transferee society proceeding by board resolution, and thereby exempting it from the requirement to put Merger Resolutions, and sending a Schedule 16 Statement, to its members, is described in paragraphs 3.149-3.152.

3.98 Schedule 16 Statements must be prepared to the same standards as apply to financial statements and directors reports. An application to the PRA for approval of a Schedule 16 Statement must be made in writing and should include a declaration made on behalf of the board, that the Statement is complete and includes all material information of which, in the opinion of the directors, the members should be aware. That declaration should say whether or not there have been any other merger or takeover proposals (confidential or otherwise see paragraph 3.89-3.90) and confirm that the information about them is correct. The application should be accompanied by the following documents:

- a. an authenticated copy of the executed amalgamation agreement or Instrument of Transfer, as the case may be;
- b. two authenticated copies of the final draft of the Merger Document (or documents) in



printers proof form, including the Schedule 16 Statement, the board rationale, the notice of the general meeting and Merger Resolutions (including, in the case of an amalgamation, per section 93(2)(d) of the 1986 Act, three copies of the proposed Memorandum and Rules of the successor society), any merger or transfer proposal statements as mentioned in paragraphs 3.89-3.92, and the directors responsibility statements;

c. any other documents, such as a covering letter for the Merger Document(s) and proxy voting forms<sup>32</sup>;

d. an assurance from the chairman of each society that the Schedule 16 Statement is complete, accompanied by a compliance schedule listing the requirements of the 1986 Act and of this chapter for a Schedule 16 Statement and indicating where in the statement of that society that requirement has been met and confirmation that all the interests of the directors and officers are included in it;

e. an assurance by, or on behalf, of the board that the society's systems for verification of membership records are capable of providing the information required to fulfil the relevant requirements of the 1986 Act and the Rules (see paragraph 3.122);

f. a letter of comfort from the society's external auditors as specified in paragraph 3.71-3.72;

g. the appropriate fee as specified in the current Fees Rules<sup>33</sup>;

h. confirmation that the final draft as submitted for approval does not differ from that previously seen by the PRA or, where it does, indicating each change that has been made.

3.99 Per section 93(2)(d) of the 1986 Act, in the case of an amalgamation, three copies of the proposed Memorandum and Rules of the successor society must also be sent to the FCA.

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<sup>32</sup> an instrument appointing a proxy to attend a meeting of a society and vote on the member's behalf.

<sup>33</sup> e Rules made by the FCA under paragraph 23 of schedule 1ZA and the PRA under paragraph 31 of schedule 1ZB to the Act prescribing the fees to be paid in connection with the discharge of the FCA's or the PRA's functions under the 1986 Act.

3.100 The PRA's approval of the Schedule 16 Statement will be confirmed by returning to the society one authenticated copy of the Statement with the PRA's certificate of approval signed by an authorised signatory for the PRA. There is no statutory requirement for copies of Schedule 16 Statements to be placed on the public files of societies but, because the documents are in the public domain, it will be the PRA's practice to pass copies to the FCA for filing. Were a public announcement about the merger not to be made until after the PRA had approved the Schedule 16 Statement, the PRA would not pass a copy of the Statement to the FCA until after the announcement. The supporting documents listed above will not be passed to the FCA for inclusion on the public file.

3.101 The PRA is required to consult the FCA before approving a Schedule 16 Statement.

### General Meetings and Resolutions

3.102 This section describes the requirements of the 1986 Act concerning members entitlement to vote, the register of members and the sending of notices of meetings. It also discusses general meeting arrangements, the resolutions and majorities required and the counting of votes. Finally, it gives guidance on the discretion which the PRA may exercise in these matters. The directors of each society<sup>34</sup> must satisfy themselves that they observe the general law on meetings, the relevant provisions of the 1986 Act and their own Rules.

### Resolutions and Voting Majorities

3.103 The 1986 Act provides that a merger must be approved by the requisite Merger Resolutions (Sections 93(2)(c) and 94(2) and (5)(a)) as follows:

a. a shareholding members resolution (see definition in paragraph 27A of Schedule 2 to the 1986 Act) passed on a poll by a majority of at least 75% of shareholders qualified to vote and voting; and

b. a borrowing members resolution passed on a poll by a simple majority of borrowing members qualified to vote and voting (see

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<sup>34</sup> a building society



definition in paragraph 29(1) of Schedule 2 to the 1986 Act);

provided that, in each case, notice has been duly given that the resolution is to be moved as a shareholding members resolution or a borrowing members resolution, as the case may be. A member may vote either in person at the meeting or by appointing a proxy (paragraphs 27A(b) and 29(1) of Schedule 2 to the 1986 Act do not provide that the voting on these may be conducted by postal ballot).

3.104 In the case of a partial transfer of engagements, in addition to the approval of the members as a whole by passage of the shareholding members resolution and borrowing members resolution described above, the society must obtain the approval of an affected shareholders resolution, which must be passed by the majority of the affected shareholders eligible to vote; that is, those shareholders in respect of whose shares it is proposed that the engagements should be transferred (Section 94(3) and (4)) of the 1986 Act. But note that the resolution must be passed by a majority of the affected members eligible to vote, not just a simple majority of those who actually do vote.

3.105 Section 96(1) of the 1986 Act provides that, where a society wishes to pay compensation to directors or other officers for loss of office or diminution of emoluments, such compensation must be approved by a special resolution of the society's members (see also paragraph 3.43-3.47), separate from the Merger Resolutions. The special resolution must be passed by a majority of at least 75% of those qualified to vote and voting.

3.106 The Treasury has not made regulations under Section 96(2) of the 1986 Act to set limits below which compensation may be paid without the authority of a special resolution. Therefore, in every case where compensation is proposed, the members must vote on the proposal as a separate issue from whether they approve the merger itself. Other officers include, in addition to the Chief Executive and Secretary, any persons who exercise managerial functions under the immediate authority of a director or the Chief Executive of a society (Section 119 of the 1986 Act defines manager and officer).

3.107 The members approval of bonus payments is required as part of the Merger Resolutions (see section 96(4) to (6) of the 1986 Act) and see paragraph 3.59 for the PRA's view of what may constitute a bonus). If the total gross cost of the proposed bonus(es) (i.e. without any adjustment for prospective corporation tax recovery) is within the prescribed limit, then approval for it need only be included in each of the Merger Resolutions of the society whose funds are to be distributed. If it exceeds that limit then it must be included in each of the Merger Resolutions of each participating society. The prescribed limit was changed by the Building Societies (Mergers) (Amendment) Regulations SI 1995/1874 amending SI 1987/2005 and now is:

a. in either a full transfer of engagements or an amalgamation, 5% of the total assets, as stated in the Schedule 16 Statement, of the society to whose members the bonus is to be paid;

b. in a partial transfer of engagements, 5% of the share liabilities, as given in the Schedule 16 Statement, to be transferred;

c. or a sum equal to the society's reserves after deducting its fixed assets (apportioned pro rata in respect of paragraph 3.107 b. above), whichever is the less. The Regulations should be consulted for the full detail of the calculations.

#### Entitlement to Vote

3.108 Paragraph 5 of Schedule 2 to the 1986 Act provides that no person may be a member of a building society unless he or she is a shareholding member or a borrowing member. A shareholding member is a person who holds a share in the society (that is, an investment in a share account, CCDS, PPDS or PIBS). A borrowing member is a person who is indebted to the society in respect of a loan fully secured on land. However, the Rules may provide that borrowing membership is conferred by a loan substantially secured on land, or shall cease if the loan is foreclosed or the land is taken into possession by the society. A minor (that is a person under 18 years of age) may be a member, but may not vote on any resolution.

3.109 The mandatory provisions of Schedule 2 to the 1986 Act concerning a members entitlement to vote on a resolution, which must



be reflected in societies Rules, are that the member must be a member on the voting date, must have been a member at the end of the last financial year before the voting date (paragraph 23(1) of Schedule 2) and must have attained the age of 18 years (paragraphs 5(3) and 34(2) of Schedule 2) on or before the date of the meeting. So far as borrowing members are concerned, the member is not entitled to vote in that capacity if his indebtedness to the society at any relevant date is less than £100 (paragraphs 29(2) and 36 of Schedule 2).

3.110 However, Schedule 2 specifies the following further provisions, some, none or all of which may be included in a society's Rules with respect to the entitlement of shareholding members to vote on any resolution; a person must (see Schedule 2 paragraphs 23(3) to (5) and 36):

- a. have a qualifying shareholding (which must not be set higher than £100), in one or more share accounts, CCDS, PPDS or PIBS, on the qualifying shareholding date;
- b. hold shares on the voting date; and
- c. have held shares continuously between those two dates.

3.111 The qualifying shareholding date is either the last day of the financial year preceding the voting date or, if the voting date falls during that part of a financial year which follows the conclusion of the society's Annual General Meeting commenced in that year, the first day of the period beginning 56 days before the date of the meeting. Therefore, if a society's Rules include the provisions concerning shareholding and continuity of membership described in paragraph 3.110, and if the voting date is later than the Annual General Meeting (AGM) in that year, a person to be entitled to vote on a shareholding members resolution must:

- a. have been a shareholding member on the last day of the previous financial year;
- b. have held shares to the value of at least £100 on the day 56 days before the date of the meeting;
- c. have held shares continuously from the 56th day through to the voting date; and

- d. hold shares on the voting date.

3.112 There is no requirement for continuity of shareholding between paragraphs 3.111 a. and b. (In contrast, in the case of an ordinary or special resolution, membership at paragraph 3.111 (a) may be satisfied by either borrowing or shareholding membership provided the shareholding member satisfies the other conditions of paragraph 3.111 b. to d. in order to vote in his or her capacity as a shareholder.) Note also that a person cannot meet a requirement for holding shares on a given date, or during a given period, by relying on his holding of a share account with an overdrawn balance; and a person cannot meet a requirement for being a member on a given date (for example, at paragraph 3.111 a.) by relying on his holding of such a share account.

3.113 The mandatory provisions of Schedule 2 to the 1986 Act concerning entitlement to vote on a borrowing members resolution are, as noted above, that the member must have been, and be, indebted to the society for at least 100 (whether on one or more accounts) at the end of the last financial year before the voting date, and on the voting date, in respect of an advance fully secured (or, if the Rules permit, substantially secured) on land (paragraphs 5(2), 23(1), 29(2) and 36 of Schedule 2) and have attained the age of 18 years by the date of the meeting (paragraphs 5(3) and 34(2) of Schedule 2). But note that there is no dispensation in the 1986 Act for the Rules to reduce the qualifying amount below £100, nor to provide for a continuity of membership qualification.

3.114 Schedule 2 makes provision in respect of joint shareholders (paragraph 7) and joint borrowers (paragraph 8). The only person entitled to exercise the right to vote on behalf of the joint shareholders or joint borrowers is the one who is named first in the records of the society, described respectively as the representative joint (share)holder or the representative joint borrower.

3.115 A member may vote once only on any resolution, irrespective of the number of accounts he or she may hold. The amount of the balance(s) held on an account(s) is not material, except to qualify to vote (see paragraphs 4.117 and 4.118). Thus, a member with several share accounts and/or



several mortgage accounts, whether as sole and/or representative joint shareholder or representative joint borrower, may vote once only on any resolution.

3.116 When the membership votes as a whole on an ordinary or a special resolution, each member may vote only once, whether he or she is a shareholding or a borrowing member or both. Where shareholding members and borrowing members vote separately, as on the Merger Resolutions, members entitled to vote may vote only once, if a shareholding member, on the shareholding members resolution and once, if a borrowing member, on the borrowing members resolution. A person entitled to vote both as a shareholding member and as a borrowing member may, of course, vote once on each resolution.

3.117 The voting date is defined by paragraph 23(6) of Schedule 2 as, for this purpose, either:

a. for members who appoint a proxy, the last date specified by the society for the receipt of proxy voting forms, which may not be more than 7 days before the date of the meeting (paragraph 24(6) of Schedule 2). A proxy vote remains valid if the member ceases to be a member after the proxy voting date but before the date of the meeting (paragraph 24(2) of Schedule 2); or

b. for all other members, the date of the meeting.

3.118 The guidance given in the foregoing paragraphs of this section is intended to give a general description of the provisions of the 1986 Act and of the Rules suggested by the BSA Model Rules. Societies should satisfy themselves that they observe the specific provisions of the 1986 Act and of their own Rules.

#### Register of Members

3.119 Every society is required to maintain a register of the names and addresses of its members and whether each member is a shareholding member or a borrowing member or both (paragraph 13 of Schedule 2 to the 1986 Act). The register should, so far as possible, be de-duplicated; that is, multiple account holders should be identified and their names recorded once only in the register.

3.120 A society's systems must also be capable of recognising those members who are eligible to vote by, for example, aggregating share account balances of multiple account holders to check that they have the requisite qualifying shareholding, by checking members continuity of shareholding (if and where applicable), and by identifying minors including (separately) those who will shortly attain their majority (see paragraphs 3.109 and 3.113).

3.121 Other situations requiring careful consideration are, for example, in relation to powers of attorney, personal representatives, and death of the representative joint holder or borrower. This information is required to ensure that the notice of the meeting is sent to all the members entitled to receive it and so that the scrutineers have adequate systems to validate the votes cast on the Merger Resolutions (see also paragraph 2.4.20).

3.122 It will be necessary for the directors of a society contemplating a merger to satisfy themselves, in consultation with their external auditors, that the society's systems are capable of delivering the information described above. The PRA will require an assurance on this point when the society applies for approval of the Schedule 16 Statement (see paragraph 3.98 e.). One of the criteria which the PRA has to consider at the confirmation stage is whether some relevant requirement of the 1986 Act or the Rules was not fulfilled (see paragraphs 3.172 to 3.177).

3.123 The problem of avoiding duplication in the register of members is significant for most societies of any size. It has been aggravated by the proliferation of types of account over the last decade or so. Societies generally now seek to establish, when new accounts are opened, whether or not the applicant is an existing member and, if so, which accounts are relevant to voting and other membership rights. The task of identifying multiple account holders is complicated by confidentiality requirements. For example, if two accounts are held by a Mr A Smith and a Dr A Smith, both at the same address, the society cannot know (in the absence of other information such as date of birth) whether the two accounts belong to the same person, one opened before and one after he qualified, or by the doctor and his son.



3.124 A letter of enquiry to one asking about both accounts would risk breaching customer confidentiality. If it is the same person, there is a risk that he will be given the opportunity to vote twice or, if neither account holds more than £100 but they aggregate above that qualifying amount, be denied a vote to which he is entitled.

3.125 Where a society identifies a number of accounts which appear to be held by a single member, but it cannot be sure, then it must send separate meeting notices in respect of each account. However, its systems should identify the possible multiple holding so that, if more than one vote is received in respect of that group of accounts, the scrutineers are alerted to the possibility, and can check the proxy forms for evidence of invalid duplicate votes. The voters declaration suggested by the BSA, in conformity with paragraph 34 of Schedule 2 to the 1986 Act, provides some protection against votes being cast by minors, and attempts the same for duplicate votes (see Enclosure 2 to BSA Circular 5177). It is, however, the duty of each society to make sure that its register of members is reliable.

#### General Meeting Arrangements

3.126 Paragraphs 3.127 to 3.142 consider the requirements for sending notices of meetings and Schedule 16 Statements to members, and the conduct of meetings at which Merger Resolutions are to be moved. It is for societies to satisfy themselves that they comply with the relevant requirements of the 1986 Act, their Rules and the general law on meetings.

#### Notice of Meeting

3.127 The statutory requirements concerning notices are in paragraph 22 of Schedule 2 to the 1986 Act. Notice of the meeting must be given to each shareholding and borrowing member of the society who would be eligible to vote at the meeting if the meeting were held on the date of the notice (a single date for all notices irrespective of when they are despatched).

3.128 In addition, notice must also be given to any person who will attain the age of 18 years after the date of the notice but on or before the date of the meeting, and to every person who becomes a shareholding or borrowing member of the society after the date of the notice but before the final date for receipt of proxy voting forms, and who would, in either case, be

eligible to vote at the meeting if he remained a member until then. (In practice, this may mean sending out a notice to every such person, even if they will, in fact, not be entitled to vote). The Schedule 16 Statement must be sent in or with the notices (paragraph 1(2) of Schedule 16 to the 1986 Act). Accidental omission to give notice of a meeting to any person entitled to receive it does not invalidate the proceedings at the meeting. However, accidental omission does not include a systemic failure to send notices (e.g. omitting to send notices to new members, or omission of a group or class of members from the mailing list arising from a fault in a computer programme), nor all cases of error by management see also paragraph 3.147.

3.129 The 1986 Act also provides, in paragraph 21 of Schedule 2, for the length of notice to be given to members. The period of notice given must be not less than 21 days or such longer period as the society's Rules prescribe. The precise procedures for sending notices, the way in which the days are to be counted, and presumed receipt of notices duly sent, will normally be set out in the Rules. Particular points to note are:

- a. the 21 days notice expires with the closing date for the receipt of proxy voting forms, not the date of the meeting;
- b. if reliance is to be placed on a provision in the Rules that notices can be deemed to be served 24 hours after posting, then first class post or equivalent means of delivery should be used, but it is advisable to allow a margin of at least an extra day or two, or more if second class post is used;
- c. if a society contracts with a commercial mailing firm, it must ensure that the firm is comprehensively instructed about the society's despatch and delivery requirements, and the society should carry out spot checks to satisfy itself that its instructions are being properly carried out. A failure by the contractor may invalidate the meeting, even if the society itself has used its best endeavours to police the operation.

3.130 The Schedule 16 Statement is required, by paragraph 1(2) of that Schedule, to be sent in or with the notice of the meeting to every member entitled to that notice. As is suggested in paragraph 3.68, it may be expedient to



include both in a comprehensive Merger Document.

3.131 Notices and Statements need not be sent to any member in whose case the society has reason to believe that communications sent to him at his registered address are unlikely to be received by him (paragraph 14 of Schedule 2 to the 1986 Act). However, a society is required instead to place notices of the meeting prominently in every branch office, or to place advertisements in newspapers circulating in the areas in which the society's members live. Such notices or advertisements must be placed at least 21 days before the date of the meeting, and must state where members can obtain copies of the Schedule 16 Statement, the Merger Resolutions and proxy voting forms (Schedule 2, paragraph 35(4)).

3.132 It should be noted, however, that a members registered address may not be the address shown in the society's register of members but a different address to which the member has requested that communications from the society be sent (Schedule 2, paragraph 13(4)).

#### Conduct of the Meeting

3.133 The meeting should be held at a time and place considered by the board to be most convenient for the generality of the society's members. This may well not be the same as the traditional time and place for the annual general meeting. In deciding on this, the board should take account of the geographical location of their members. For example, for a society with a majority of its members living in a compact geographical region there must be a strong presumption in favour of an evening meeting. Consideration should be given to the possibility of a larger attendance than usual at a meeting to consider a merger.

3.134 Subject to the society's Rules, its chairman will normally chair the meeting. His function as chairman of the meeting is to ensure that all views are presented and properly discussed. He is unlikely to be able to fulfil that role if he acts also as chief advocate of a merger which is controversial among members. In such cases it might be appropriate to give to another director the initial task of explaining the merger and of responding to questions from members.

3.135 Merger Resolutions or the other resolutions mentioned in paragraphs 3.102 to 3.106, cannot be amended at the meeting except in a way which does not change their substance at all. This is because an amendment to such a resolution has to be subject to the same procedure and period of notice to members as the resolution itself. If a board decides, after due notice of such a resolution has been sent to the members, that the resolution should be amended, then it will be necessary to submit the amended resolution, with due notice, to a general meeting at a later date, unless of course there is still time to fulfil the notice requirements.

#### Conduct of the Voting

3.136 The conduct of the voting must not only be fair but also be seen to be fair, otherwise the result may be called into question. So it is highly desirable that the votes are counted by independent scrutineers. The board may ask the scrutineers, in advance of the meeting, for a running tally of the number of votes being cast if it thinks it might properly encourage more members to vote if the response is low. However, to ask the scrutineers how the votes are being cast, before the time comes at the meeting to instruct proxies, carries the risk of accusations, however unfounded they may be, and possible challenge at the confirmation stage, that the board suppressed proxy votes against the resolutions, or unduly influenced members to vote in favour.

3.137 A board which asks the scrutineers for a running tally of votes, and which circulates its members with further exhortations to vote, must be prepared to argue its case in the face of such accusations at the confirmation hearing. Any circular to members sent after the Merger Document must, therefore, be very carefully considered.

3.138 Experience has demonstrated the need for societies to take the greatest care to ensure that they comply strictly with the statutory procedural requirements and their own Rules on meetings and resolutions. The chairman of the meeting should ensure that he or she is well briefed and aware of the Rules and the general law relating to procedural resolutions, such as resolutions to adjourn the meeting. The PRA will require a confirmatory report from the scrutineers on the validity of the voting procedures when the society applies for confirmation (see paragraph 3.146).





3.139 The procedures for the conduct of proxy voting will normally be provided for in the society's Rules, in conformity with paragraphs 24 and 34 of Schedule 2 to the 1986 Act which requires that every proxy form sent by a society to its members must enable the member to direct the proxy how to vote (Schedule 2 paragraph 24(4A)). To minimise the risk of the society's proxy voting procedures being misunderstood, the PRA recommends that the proxy form should include:

- a. adequate space to insert the name of a proxy other than the chairman of the meeting, and a statement (which must also appear in the notice of the meeting) that the proxy appointed need not be a member of the society (a reminder that the voting members own name should not be inserted might avoid a common problem);
- b. provision to instruct the proxy to vote either in favour of the resolution, or against it;
- c. an explicit statement that if the member does not instruct the proxy to vote for or against the resolution, then the proxy will cast the vote, or abstain, as he or she thinks fit;
- d. the declaration in accordance with paragraph 34 of Schedule 2;
- e. full recital of the text of the shareholding members resolution or borrowing members resolution or, if this is not practicable (e.g. because of space restrictions), a clear indication that the full text may be found in the notice of the meeting;
- f. instructions as to the return of the completed proxy forms, including the last date for receipt by the society or by the scrutineers. A pre-addressed and pre-paid envelope or other sealed means of return should be provided.

3.140 The 1986 Act does not require societies to send proxy voting forms to members with notices of meetings (except where directors are to be elected). However, the PRA believes that, on a matter as important as a merger, societies would be well advised to send a proxy voting form to members with the notice of meeting. This will avoid any suggestion that members were discouraged from voting, that obstacles were put in their way, or that the

society wished (for whatever reason) to be able to identify those who had requested proxy voting forms. If a society decides, nevertheless, not to send proxy forms to members entitled to vote, then it should make clear to the members that proxy voting forms can be obtained on demand from its branches and/or by application to a central point.

3.141 The arrangements for the collection of the proxy forms should be such as to secure confidentiality and to avoid the risk of loss, whether accidental or deliberate. The procedures may provide for return of proxy forms to the scrutineers either directly (if permitted by the society's Rules) or to the society's offices. Where proxy forms are returned to the society's offices, the PRA recommends that the procedures should incorporate the following features:

- a. the proxy form should be enveloped or otherwise sealed so that the members voting instructions are concealed;
- b. the envelope provided should be clearly marked so that the society can readily identify and separate it from other mail without the envelope being opened;
- c. staff responsible for receiving and sorting mail should be given specific instructions about the handling of proxy forms and the overriding importance of security;
- d. secure storage of proxy forms should be provided up to the point at which they are handed over to the scrutineers;
- e. equivalent handling and security procedures should be applied to proxy forms handed in at branches.
- f. The PRA suggests that proxy voting forms for shareholders and borrowers should be easily distinguishable, perhaps by colour coding, both as an aid to members who may be entitled to vote in each capacity, and as an aid to the scrutineers counting the votes.
- g. Members may, after submitting a proxy vote, choose to attend the meeting and vote in person. There must, therefore, be satisfactory systems in place at the meeting to identify and cancel any proxy votes they may have returned.



### Ballots

3.142 Paragraph 33 and 33A of Schedule 2 to the 1986 Act specifically exclude shareholding members resolutions and borrowing members resolutions from its permission for the Rules to provide for voting by postal or electronic ballot. This is reinforced in the definition of these resolutions in paragraphs 27A and 29 of Schedule 2. Although other resolutions associated with the merger process might be capable of being approved by ballot, in practice voting on all resolutions related to the merger will be by members voting in person or by proxy at a general meeting.

### Scrutineers Report

3.143 The scrutineers are responsible for checking the validity of votes cast in person and by proxy. Given the need to ensure that the vote represents the views of the members, the scrutineers should be independent of the society and should not have a direct interest in the result of the voting. It will usually be appropriate to appoint the society's auditors, and it is desirable that they should be appointed not just for the arithmetical count of votes but also to supervise the voting process as a whole so that they are in a position to confirm, after the vote, that all the requirements of the 1986 Act and the society's Rules have been complied with. This would include:

- a. determining and validating member mailing lists for notices of meetings and Schedule 16 Statements;
- b. despatch procedures;
- c. timing of notices and despatch of documents;
- d. form and content of proxy voting forms;
- e. receipt and custody of completed proxy voting forms;
- f. validation of completed proxy voting forms to establish that members are qualified to vote and that forms are properly completed;
- g. identification and validation of members attending and voting at the general meeting;
- h. voting procedures at the meeting including casting of proxy votes, count of votes cast in

person and aggregation of proxy and personal votes.

3.144 To fulfil the duties outlined above, it is suggested that the scrutineers would need to:

- a. examine the systems and procedures to be employed by the society, before they are implemented, to ensure that they are satisfactory;
- b. carry out such checks and tests as they consider necessary during the operation of the procedures as will enable them to be satisfied that the specified procedures are being carried out in practice;
- c. provide that where validation functions are carried out by the society's staff this is done under the direction and supervision of the scrutineers;
- d. direct and supervise the count of the votes cast both by proxy and personally at the meeting.

3.145 Validation checks during the counting of votes may be expected to include the following:

- a. only proxy forms which comply with the 1986 Act and the society's Rules have been used;
- b. the member is eligible to vote under the 1986 Act and under the society's Rules (a proxy vote may still be valid even though the member ceases to be a member after the closing date for receipt of proxies see paragraph 4.123 b.);
- c. only one proxy form per member eligible to vote is included in the count (separate forms may be sent to and returned by a person eligible to vote on both a shareholding members resolution and a borrowing members resolution);
- d. minors are excluded or that there is an explicit confirmation by each member voting by proxy that he is aged 18 or over;
- e. the proxy form is completed and signed and is otherwise valid (where a proxy voting form lacks a signature but is otherwise valid, it is usual, if time permits, for the scrutineers to



return the form to the member for signature and return in a pre-paid envelope).

3.146 The scrutineers initial report will be made to the society at the meeting (which may be adjourned for this purpose). The PRA will require, in support of a society's application for confirmation under Sections 93(2)(d), 94(7)(a) and 95(3), a report from the scrutineers on the result of the vote (distinguishing between votes cast in person and by proxy), the total number of members eligible to vote (and the proportion of that number that the votes cast represent), and also confirmation that, in the opinion of the scrutineers the arrangements for the conduct of voting were such as to ensure that:

- a. notices of the meeting and Schedule 16 Statements were sent to all those entitled to receive them, in accordance with the 1986 Act and the Rules of the society having regard, among other things, to the matters referred to in this chapter;
- b. the periods of notice given complied with the requirements of the 1986 Act and of the society's Rules, taking into consideration established conventions for the counting of days;
- c. there were satisfactory procedures to ensure confidentiality of proxy voting forms and to minimise the risk of loss or unauthorised access;
- d. there were satisfactory procedures to ensure that the count of votes cast personally at the meeting included only votes cast by members eligible to vote and who had not mandated, or had withdrawn, a proxy vote.

3.147 In relation to the notice of the meeting, the scrutineers report may properly have regard to the provision of paragraph 22(3) of Schedule 2 to the 1986 Act that accidental omission to give notice of a meeting to, or non-receipt of notice of a meeting by, any person entitled to receive notice of the meeting shall not invalidate the proceedings at that meeting. It should be noted, however, that there is authority to the effect that accidental and non-receipt would not cover all cases of error on the part of the society, for example an erroneous decision of management not to send notices to particular persons or groups of persons.

3.148 The PRA would find it helpful if the scrutineers report would also comment upon any procedural difficulties encountered and give an analysis of the reasons why votes were found to be invalid, if the numbers of invalid votes appear to be significant (see also paragraph 3.171).

#### The PRA's Discretion

3.149 The PRA has power under Section 94(5)(b) of the 1986 Act to exempt the transferee society in a transfer of engagements from the duty to call a meeting and put a Schedule 16 Statement and Merger Resolutions to its members, but to proceed instead by board resolution (see paragraph 1(1) of Schedule 16 to the 1986 Act). Before it exercises this discretion the PRA will wish to review the prudential information described in section 'Preliminary matters' and, in particular, will wish to be satisfied that the merger will not affect the interests of the members of the transferee society to any significant extent.

3.150 In assessing this last point, the PRA will consider, in particular, the reduction, if any, in the capital ratios of the merged society immediately following the merger and any plans to eliminate, or mitigate, this reduction; and any plans to remove products and services, close branches or change interest rates as a result of the merger. The PRA will also wish to know whether the merger will mean a change of policy by the society, for example by a significant move into a new geographical area or into a new business activity.

3.151 Unless it is persuaded otherwise in the circumstances of any particular case, the PRA will not normally grant this exemption unless the total assets of the transferee society are substantially larger than the total assets of the transferor society, and a total asset ratio of 5:1 will be used by the PRA as a broad first measure of relative significance. The general presumption will be that a society, being a mutual institution, should consult its members over an issue as important as a merger unless there are compelling arguments to the contrary.

3.152 However, if the transferor society proposes to pay bonuses in excess of the prescribed limit (see paragraph 3107) then, notwithstanding that the PRA has granted an exemption, the transferee society must seek



the approval of its members of a resolution on the terms of the merger (Section 96(4)(b) of the 1986 Act). Similarly, if the transferee society has to change its Rules to avoid disenfranchising members of the transferor society (see paragraph 3.80) it must do so by special resolution. It would be wrong to invite the members to approve a Rule change which was a consequence of a merger without inviting them to approve the merger itself.

### Confirmation

3.153 No merger can take effect until it has been confirmed by the PRA. This section describes the form of application and public notice required and explains the PRA's view of how the statutory Confirmation Criteria should be interpreted. Finally, it gives guidance on the procedure customarily followed by the PRA when considering confirmation applications and hearing representations. Section 93(2)(d) of the 1986 Act, on amalgamations, and Section 94(7)(a), on transfers of engagements, together with paragraph 7 of Schedule 16, provide that when the necessary Merger Resolutions have been passed the societies concerned must apply to the PRA for confirmation of the merger in such manner as the PRA may direct.

3.154 The societies are also required, by paragraph 8 of Schedule 16, to publish notices of their applications in one or more of the London, Edinburgh and Belfast Gazettes as the PRA directs, and if it so directs, in one or more newspapers. The choice of official Gazettes and national or local newspapers will, of course, have regard to the area in which the societies members live.

3.155 The parties in an amalgamation should make a joint application for confirmation to the PRA, while the parties to a transfer of engagements should make separate applications for confirmation of the transfer. These applications should specify the date on which the merger is intended to take effect and should be accompanied by two authenticated copies of the Instrument of Transfer, or the amalgamation agreement, and of the Merger Document or separate Schedule 16 Statement. In addition, in the case of an amalgamation, three signed copies of the

Memorandum and Rules of the successor<sup>35</sup> to the amalgamating societies should be sent to the PRA and the FCA. The scrutineers report described in paragraphs 3.146 to 3.148, and a certified copy of the minutes of the general meeting at which the Merger Resolutions were moved, must be enclosed with each application.

3.156 A pro forma public notice of application, and pro forma letters of application are set out in Appendix 2.

### The Confirmation Criteria<sup>36</sup>: Statutory Provisions

3.157 Section 95(3) and (4) of the 1986 Act provides that the Authority must confirm an amalgamation or transfer of engagements unless it considers that any one or more of the following Three Criteria apply:

- a. some information material to the members decision about the merger was not made available to all the members eligible to vote; or
- b. the vote on any resolution approving the merger does not represent the views of the members eligible to vote; or
- c. some relevant requirement of the 1986 Act or of the Rules of any of the societies was not fulfilled.

Section 95(5) then provides that the PRA shall not be precluded from confirming a merger by virtue only of the non-fulfilment of some relevant requirement of the 1986 Act or the Rules (the Third Criterion<sup>37</sup> in paragraph 3.157 c.) if it appears to the PRA that the failure

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<sup>35</sup> A company, whether an existing company or a specially formed company, to which the business of a society is proposed to be transferred

<sup>36</sup> means in relation to mergers- the three criteria specified in section 95(4) of the 1986 Act which the Prudential Regulator (being (a) in relation to a building society which is a PRA-authorized person, the PRA; and (b) in relation to a building society which is not a PRA-authorized person, the FCA) has to consider when deciding whether to confirm a merger of the business of one society with the business of another society; and means in relation to transfers- the four criteria specified in section 98(3) of the 1986 Act which the Prudential Regulator has to consider when deciding whether to confirm a transfer of the business of a society to a commercial company

<sup>37</sup> See "Confirmation Criteria", and relating respectively, in relation to mergers, to the criteria specified in subsections (a), (b) and (c) of section 95(4) of the 1986 Act



could not have been material to the members decision about the merger, and the PRA gives a direction under that sub-section that the failure is to be disregarded.

3.158 Where the PRA would be precluded from confirming a merger by reason of any of the defects specified in the Three Criteria<sup>38</sup>, Section 95(6) provides that it may direct a society to remedy the defects. A direction under that sub-section may require a society to call a further meeting; for example, to vote again in the light of a revised Schedule 16 Statement containing material information previously omitted, or after correction of defects in the systems for sending notices of meeting and Statements and validation of votes. If the PRA is then satisfied, having considered evidence furnished by the society, that the defects have been substantially remedied, it must confirm the merger. If not, then confirmation must be refused.

#### Scope of the PRA's powers

3.159 The PRA's powers in connection with applications for confirmation of a merger are confined to considerations of whether, in the light of the facts, any of the Three Criteria apply. It is not for the PRA to consider, or make judgements about, the merits of a proposed merger or the fairness of its terms; these matters are first for the board of a society, and then for its members to decide. Once the members have approved the merger and its terms, the PRA has no powers to require a society to make any changes to those terms. The PRA's discretionary powers are similarly confined to the matters described in paragraphs 3.157 and 3.158.

3.160 The PRA has no general power to determine disputes between a society and its members. Disputes concerning the services provided by societies in the ordinary course of their business are generally a matter, in the first instance, for a society's internal complaints procedure. They may also fall within the jurisdiction of the Financial Services Ombudsman. Disputes between a building society and a member of the society, in his

capacity as a member, in respect of any rights or obligations arising from the Rules of the society or the provisions of the 1986 Act, fall within the jurisdiction of the High Court or, in Scotland, the Court of Session (Section 85 of and Schedule 14 to the 1986 Act).

3.161 However, the FCA does have power, on the written application of an eligible member, to direct that the member has the right to obtain names and addresses from the society's register of members. Before it gives such a direction, the FCA is required to be satisfied that the member requires that right for the purpose of communicating with members of the society on a subject relating to its affairs, and must have regard to the interests of the members as a whole and to all the other circumstances (Schedule 2, paragraph 15). A fee is payable by the applicant. Chapter 1A on applications for access to the register of members explains who is eligible to apply.

#### Purpose of Confirmation

3.162 The purpose of the confirmation process is to enable:

- a. interested parties to make representations with regard to the Three Criteria;
- b. the society to respond to those representations;
- c. the PRA to make such enquiry as it considers necessary to reach informed conclusions on the Three Criteria.

3.163 The PRA, in reaching its view on each of the Three Criteria, has to assess not only the points made to it in representations, and the society's responses, but also to make such further enquiries as it considers necessary. In deciding how far it should pursue such enquiries, the PRA has to have regard to the role and effect of confirmation, and to the mischief which it is intended to prevent. The PRA considers that one role of confirmation is to provide a protection to members against the provision to them by the society of information which is inadequate, obscure or misleading, and against voting irregularities: in other words to ensure that the vote represents the informed decision of the members.

3.164 The PRA would hope that this safeguard would work in the majority of cases by raising relevant issues early by causing the board of a

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<sup>38</sup> the criteria prescribed by section 95(4) of the 1986 Act which the Prudential Regulator has to consider when deciding whether to confirm a merger

[Note: the Three Criteria are varied in certain circumstances see section 6 of chapter 2 of this Guide.]



society to take care not to put confirmation at risk on this account rather than by the PRA finding that it needed to withhold confirmation at the last stage. In considering the First Criterion<sup>39</sup>, the PRA will have regard to the totality of the information provided to the members by the board of a society and not exclusively to the Schedule 16 Statement.

3.165 The task of the PRA is accordingly:

- a. to reach a considered view on each of the Three Criteria;
- b. if that view is that none applies, to confirm;
- c. if either of the First Two Criteria apply to direct the appropriate remedial action, or to refuse confirmation;
- d. if the Third Criterion applies, to consider whether it is appropriate to direct that any failure be disregarded: if not, to direct the appropriate remedial action or to refuse confirmation.

3.166 In considering the Three Criteria, the PRA may well have to look again at the Schedule 16 Statement, or at issues which were considered in connection with approving that Statement. In doing so, it has a duty to consider information and arguments put to it by representers and by the society, which of their nature were not available earlier, as well as those arising from its own further consideration of the criteria.

3.167 The PRA would clearly only change the view reached at the time of approval of the Schedule 16 Statement if there were good reasons to do so. But it is under a duty to examine the Statement and connected issues at the time of confirmation in the light of any new information and arguments which become available. Accordingly, the PRA cannot be bound at the confirmation stage to the view that was taken at the earlier stage as to whether further factual information should be included in the Schedule 16 Statement or as to the accuracy of its contents.

3.168 The task of considering each of the Three Criteria is still necessary even if there are no representations. Without such enquiry and consideration the confirmation process would not properly be carried out. The PRA's view of how the Three Criteria should be interpreted and applied is given in the following paragraphs.

#### The First Criterion

3.169 This criterion requires the PRA to consider whether some material information was not made available to the members. The PRA's own view, in which it concurs with the view developed by the Commission in its confirmation decisions, can be summed up as follows:

a. the words made available to all the members eligible to vote mean that the criterion is mainly, if not exclusively, directed to the information provided by a society to the generality of its members;

b. the extent of information not made available can reasonably be assessed by considering how far the totality of information made available falls short of what might be expected to be put to its members by a financial institution of standing and repute seeking to put sufficient information and a fair and balanced assessment of it, and the board's conclusions, to the members to enable them to take an informed decision;

c. the words material to the members decision require the PRA then to focus on whether it is within the bounds of reasonable possibility that the members decision would have been different, had any deficiency in information been made good, i.e. whether it could have changed the decisions on voting of sufficient members to lead to a different conclusion. If it is within the bounds of reasonable possibility that the deficiency might have changed the outcome, it is not for the PRA to determine whether it would actually have done so it should put the decision back to the members. This test requires the PRA to take account both of the size of the vote and of the size of the majority within it;

d. the relevance of a particular piece of information to an investor and to a borrower may well be different. Accordingly, it is necessary to consider materiality separately in relation to the shareholding members

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39 See "Confirmation Criteria", and relating respectively, in relation to mergers, to the criteria specified in subsections (a), (b) and (c) of section 95(4) of the 1986 Act



resolution and the borrowing members resolution.

3.170 The PRA's approach to determining whether this criterion is met will accordingly be:

a. to review the material put to members, in the light of the members representations made and the society's responses, but also taking points of its own accord;

b. to consider, on the basis of that review, what information relevant to the decision of shareholders, or of borrowers, or both, might reasonably have been expected to be put to members by the board of a society of repute considering its fiduciary duty, and the extent to which (if at all) the information actually put falls short of that;

c. to consider separately in relation to the shareholding members resolution and in relation to the borrowing members resolution, whether any deficiency so identified was sufficient to amount to information material to the members decision.

#### The Second Criterion<sup>40</sup>

3.171 This criterion requires the PRA to consider whether the votes on the Merger Resolutions do not represent the views of the members. The main mischief to which it appears to be directed is a merger approved by a small and unrepresentative vote. However, a very low turnout, of itself, does not necessarily mean that the criterion applies. It has to be considered in the context of the other criteria, and of any other factors which may have affected the turnout: for example, whether all the members entitled to vote were fully and clearly informed of the terms of the merger proposal and its consequences; whether the members were afforded adequate facilities and opportunity to cast their votes; and the scrutineers report on the conduct and counting of votes, including the number of, and reasons for, invalid proxy votes.

#### The Third Criterion

3.172 This criterion requires the PRA to consider whether the relevant requirements of

the 1986 Act and the Rules have been fulfilled. The phrase some relevant requirement of this Act or the rules of the society appears explicitly three times in Section 95 of the 1986 Act:

a. sub-section (4)(c) in the specification of this criterion;

b. sub-section (5) which gives the PRA power to disregard certain non-fulfilments;

c. sub-section (10) which provides that a failure to meet such a relevant requirement shall not invalidate a transfer of engagements, although such failure by a society without a reasonable excuse is a criminal offence. The interpretation of the phrase is also directly relevant to sub-section (6) the power of the PRA to give the society a direction to remedy defects specified in paragraphs (a) to (c) of sub-section (4).

3.173 Sub-section (11) defines relevant requirement:

'In this section relevant requirement, with reference to this Act or the rules of a society, means a requirement of section 93 or 94 or this section or of Schedule 16 to this Act or of any rules prescribing the procedure to be followed by the society in approving or effecting an amalgamation or transfer of engagements.'

3.174 The PRA considers that this sub-section should be read naturally. The words prescribing the procedure to be followed by the society in approving or effecting a merger apply only to the Rules, in order to specify which of the Rules of the society are relevant requirements. They do not apply as a matter of normal construction of the sentence to the applicable provisions of this Act: nor is it necessary that they should do so, since those provisions are specified in the sub-section.

3.175 The PRA recognises that the interpretation of relevant requirement of FSMA, which it considers stems from the natural construction of Section 95(11) of the 1986 Act and which is necessary to give effect to Parliament's intentions for Section 95(6) and (10), does not quite fit Section 95(5). The test which the PRA has to apply in the case of sub-section (5) to a non-fulfilment of a relevant requirement of the 1986 Act is:

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<sup>40</sup> See "Confirmation Criteria", and relating respectively, in relation to mergers, to the criteria specified in subsections (a), (b) and (c) of section 95(4) of the 1986 Act.



if it appears to the PRA that it could not have been material to the members decision about the amalgamation or transfer<sup>41</sup>. That test clearly is designed to relate to a failure to meet a procedural requirement or to some other failure which might have an effect on the voting.

3.176 The wording of Section 95 of the 1986 Act is such that no construction of the phrase is entirely free from difficulty. The PRA view is that the wording, and the intentions of Parliament, are best met by following the natural construction of sub-section (11), as a result applying a wide interpretation in sub-sections (4), (6) and (10), but only considering that it is open to the PRA to make a direction under sub-section (5) in relation to non-fulfilment of a procedural requirement or other failure to which the test in that sub-section is apposite.

3.177 The PRA considers that the relevant requirements of the Rules are those which prescribe the procedure to be followed that is, in particular, the Rules concerning membership, special meetings, notice of meetings, procedure at meetings, entitlement of members to vote on resolutions, appointment of proxies and joint shareholders and borrowers.

#### Procedure

3.178 The procedure to be followed in the confirmation process is prescribed by Part III, paragraphs 7 to 9, of Schedule 16 to the 1986 Act. Any interested party has the right to make written representations, and/or to give notice of intention to make oral representations to the PRA with respect to a society's application for confirmation. Written representations are to be copied to the participating societies, which are to be afforded the opportunity to comment on them in writing or orally at the hearing of their applications. (The PRA will in general be prepared to use electronic rather than paper-based communication if requested by the society or a prospective representer and some of the following procedures may have to be adapted accordingly.)

#### Representations

3.179 Persons making representations should state why they claim to be interested parties,

for example their category of membership of the society, and the ground or grounds for their representations by reference to the Three Criteria discussed above. Written representations, or notice of a persons intention to make oral representations, or both, must be in writing. They must reach the PRA at the address, and by the date, given in the Merger Document issued to members and subsequently published by notice in the official Gazettes and newspapers as required by the 1986 Act.

3.180 Persons who make written representations and who subsequently decide also to make oral representations must, nevertheless, give notice of that intention in writing to the PRA by the same date. Representations received out of time will not be considered unless, exceptionally and at the sole discretion of the PRA, they appear to the PRA to raise matters of substance relevant to the Three Criteria which are not already under consideration.

3.181 Representations or notices to the PRA will fall into one of the following three categories:

- a. written representations only
- b. written representations with notice of intention to make oral representations
- c. notice of intention to make oral representations only.

3.182 The PRA will acknowledge the receipt of each representation or notice and will send a copy of Appendix 5, on merger confirmation procedures, to each representer. It will send copies of all written representations to the societies concerned and will afford them an opportunity to comment on them.

3.183 Copies of the society's comments on representations in the category set out in paragraph 3.181 b. will be sent to those who made the representations so that they may concentrate their oral representations on the points which they consider to remain at issue. Persons making written representations who wish to see the society's response must, therefore, give notice of intention to make oral representations. The PRA will consider the written representations in the category set out in paragraph 3.181 a. and the societies

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<sup>41</sup> a conversion or takeover or both, as the context requires





responses to them in advance of the date set for hearing oral representations.

3.184 The society may, exceptionally, apply to put to the PRA in confidence documents which the society considers to be commercially sensitive: the PRA will decide on the merits of each case whether, and on what terms, to accept them as being confidential. Persons in the category set out in paragraph 3.181 c. will be asked to inform the PRA, in advance of the hearing, of the subject and general grounds of the representations they intend to make and their responses will be copied to the society.

3.185 Interested parties may join together in making collective representations and they may also appoint a person, either one of their number or another, to represent them at the hearing. They should notify the PRA in advance if this is what they intend to do.

#### Conduct of the hearing

3.186 The PRA may appoint one or more persons to hear and decide applications on its behalf. In the absence of notices of intention to make oral representations the PRA would expect to decide the applications having regard to the written representations, the societies responses and other information available to it, without the need for an oral hearing.

3.187 The PRA will notify the societies and those making oral representations of the time and place of the hearing. If there are a significant number of persons wishing to make oral representations, then the hearing may extend beyond one day and may be adjourned from time to time and from place to place. The PRA will try to advise participants of the day when they may expect to make their representations and when the societies representatives may be expected to respond.

3.188 The PRA expects that hearings will be in public. Members of the general public and the press will be asked to wait outside at the outset of the hearing. The participants will then be asked if any of them has good reason to object to the admission of the general public and the press (such as, for example, the need to refer to personal financial affairs). The PRA may decide that parts of the hearing shall be in private if that appears to it to be desirable. If there are no reasonable objections, the general public and the press will then be

admitted, within the limits of the space available.

3.189 The procedure will be informal. While all participants will be invited to speak concisely and to avoid repetition the PRA will be considerate towards those who are not professionally represented. The individual or panel taking the hearing on behalf of the PRA may question the participants as the hearing proceeds. The sequence of events will be broadly as follows:

a. any preliminary matters (such as the admission of the public or other procedural questions) will be dealt with;

b. the person(s) appointed to hear the applications will introduce the proceedings;

c. the representatives of the societies will be invited to present their applications for confirmation, including a description of the events at the meetings at which the Merger Resolutions were put to the members, the statement of the voting on the resolutions, as well as any other matters which they wish to introduce at that stage;

d. the other participants will be invited to make their representations; where appropriate the PRA would expect to call them in a list marshalled, so far as possible, by subject matter;

e. the representatives of the societies (or of the relevant society) will be invited to reply to, or comment on, the points made by the other participants;

f. the other participants will be invited to comment on the societies replies in so far as those replies raise new issues.

3.190 The above procedure may be varied according to the circumstances at the hearing, and is intended only as a guide to the probable order of events. The hearing may be adjourned if the PRA considers that is necessary to enable facts to be checked or additional information to be obtained.

#### The PRA's decision

3.191 The PRA will not normally give an oral decision at the end of the hearing and may be expected to reserve its decision to be issued later in writing, setting out its reasons. Copies



of the written decision will be sent to the participants and, on request, to any other person. The decision may also be published, and the PRA usually asks the FCA to place copies on the public files of the participating societies.

3.192 The PRA is required to consult the FCA before confirming an amalgamation or transfer of engagements or making a direction under section 95 of the 1986 Act. The PRA will notify the FCA if it confirms an amalgamation or transfer of engagements and will furnish the FCA with a copy of any direction it makes.

### Transfer of Engagements Under Direction

3.193 This section describes the PRA's powers to direct a society to transfer all its engagements to one or more other societies and/or to proceed by board resolution, and the modified merger procedure consequently prescribed by the 1986 Act. Section 42B of the 1986 Act provides that, if the PRA considers it expedient to do so to protect the investments of shareholders or depositors, it may direct a society, among other things, to transfer all its engagements to one or more other societies within a specified period (subsection (1)(a)). In such a case, or where the PRA would have directed a transfer of engagements, but for the fact that negotiations were already under way, the PRA may also direct that the approval of the transfer of engagements by the transferor society may be by board resolution rather than by Merger Resolution.

3.194 In these circumstances, because neither a Schedule 16 Statement nor Merger Resolutions are required, the 1986 Act requires the society instead to send to every member entitled to notice of a meeting a Merger Notification Statement<sup>42</sup> before it applies for confirmation of the transfer of engagements, (paragraphs 3 and 4 of Schedule 8A to the 1986 Act). Finally, in these circumstances, the First and Second Criteria concerning information made available to, and the views of, the members (see section 'Confirmation') are replaced by a single criterion: the members or a proportion of them would be unreasonably prejudiced by the

transfer; (paragraph 5 of Schedule 8A to the 1986 Act).

3.195 The PRA is required to consult the FCA before giving a direction under section 42B of the 1986 Act.

3.196 Where a society is proceeding under a Section 42B(3) direction by board resolution, the Schedule 16 Statement is replaced by a Merger Notification Statement and a general meeting of the society is not required. The contents of the Merger Notification Statement are prescribed by The Building Societies (Merger Notification Statement) Regulations 1999 (SI 1999/1215).

3.197 The Merger Notification Statement must have been approved by the PRA before it is sent to the members, and must be sent within the specified time limit. Applications for approval should, in general, follow the procedure described in paragraph 3.73, and the final draft of the Merger Notification Statement should be accompanied by the relevant documents listed in paragraph 3.98, but as appropriate to the particular case and the less extensive information the statement is required to contain. The statement must include particulars of any compensation payable to directors or other officers of the transferor society to which the PRA has given its consent under paragraph 2(1) of Schedule 8A to the 1986 Act.

3.198 'General Meetings and Resolutions' from 3.102 does not apply, except that the directors will need to be satisfied that the society's register of members is correct to enable the society to send Merger Notification Statements to those entitled to receive them.

3.199 When the board has resolved to transfer the society's engagements and Merger Notification Statements have been sent to its members, the society may apply to the PRA for confirmation of the transfer of engagements, but using an adaptation agreed with the PRA of the pro forma in Appendix 3. The procedure described in section 'Confirmation' is to be followed, including the publication of notices in the official Gazettes and newspapers and the form of application. However, the lapse of time between each stage of the procedure may be modified according to the particular circumstances of a

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<sup>42</sup> a statement sent to members in the circumstances described in chapter 2 of this Guide



case, and having regard to the need to protect the investments of shareholders or depositors.

3.200 While a scrutineers report will not be required, the PRA will require a report from the society's external auditors on the adequacy of the society's systems to fulfil the requirements of the 1986 Act and the Rules with regard to the sending of Merger Notification Statements. This is, of course, relevant to the PRA's consideration of the Third Criterion.

3.201 As is noted in paragraph 3.193, the First and Second Criteria are replaced, in those circumstances, by a single criterion as to whether the members or a proportion of them would be unreasonably prejudiced by the transfer. Whether this special criterion applies will be a matter of judgement for the PRA to make in the light of any representations made to it and its own enquiries in respect of the particular case. It follows also that, in considering the Third Criterion, the PRA will take account of the modified procedure.

### Registration And Dissolution

3.202 When the PRA has confirmed a merger (whether voluntary or under direction) it will notify the FCA and the societies concerned.

3.203 In the case of an amalgamation, the FCA is required to be satisfied as regards the proposed Rules, Memorandum and name of the successor society. The amalgamating societies are, therefore, advised to clear drafts of the proposed Rules and Memorandum with the FCA at an early stage (see paragraph 3.96). When they apply to the PRA for confirmation under Section 93(2) of the 1986 Act, the amalgamating societies must send three signed copies of the Rules and Memorandum to the PRA and the FCA (Section 93(2)(d)). If the FCA is satisfied on these matters it will, upon confirmation by the PRA, register the successor society and issue to it a certificate of incorporation specifying the date (the specified date) from which the incorporation takes effect, and will return to it one copy each of the Rules and Memorandum together with a certificate of registration. Copies are placed on the public file of the successor society.

3.204 On the specified date of the amalgamation, all the property, rights and

liabilities of the amalgamating societies are transferred to the successor society, the successor is given such permission under Part 4A of FSMA as the PRA considers appropriate, and the amalgamated societies are dissolved and their registrations cancelled by the FCA, having consulted the PRA (Section 93, sub-sections (4), (5) and (6) and Section 103(1) of the 1986 Act). In deciding on the appropriate terms of the permission for the successor society, the PRA will have regard to the terms of the permissions of the amalgamating societies, including any limitations or requirements. It will also have regard to the business plan for the successor society.

3.205 In the case of a transfer of engagements, the FCA will register a copy of the Instrument of Transfer and issue a registration certificate to the transferee society. A copy of the Instrument of Transfer and the registration certificate are placed on the public file of the transferee society. On the date specified in the registration certificate, the property, rights and liabilities of the transferor society are transferred to the transferee society, by virtue of Section 94(8) of the 1986 Act, the transferor society's authorisation is revoked by the FCA, and the society itself is dissolved (Section 94(10)). The transferor society's registration is subsequently cancelled by the FCA, having consulted the PRA, under Section 103(1).

### Timetable

3.206 The time taken to complete a merger will vary from case to case. As a general rule of thumb, it is unlikely that a merger can proceed from board decision through approval of the Schedule 16 Statement, general meeting and confirmation hearing, to the effective date, in less than 6 months. It is essential to the good and orderly management of a merger that the societies concerned meet with the PRA's staff as soon as their boards have resolved to seek a merger, and agree upon a provisional timetable. This can then be fixed by the time the Schedule 16 Statement is approved. The members can then be notified, as they must be, of the date provisionally set for the confirmation hearing and of the proposed date of completion of the merger in the Merger Document.



3.207 The likely sequence of events is as follows:

Stage 1	Informal consultations with the PRA's supervisory staff on both substance and timing of the proposed merger.
Stage 2	Submission to the PRA of:
	(a) prudential information: this should be available to the PRA for discussion with the society well before the Schedule 16 Statement is submitted for approval;
	(b) written details of the proposed terms of the merger: it will be helpful for both the societies and the PRA to be clear about these matters as soon as possible after Stage 1 and well before Stage 3 is reached.
	Submission to the FCA and the PRA, in the case of an amalgamation, of preliminary draft Rules and Memorandum, noting any unresolved issues.
Stage 3	Submission to the PRA and, in respect of (b) below, to the FCA, in draft, of the following:
	(a) the Instrument of Transfer or amalgamation agreement embodying the merger terms provisionally agreed by the respective boards of directors;
	(b) in the case of an amalgamation, the proposed Rules and Memorandum of the successor society;
	(c) the Merger Document, including the Schedule 16 Statement, unless consent to proceed by way of board resolution is being sought in respect of the transferee society, together with the explanations of change, comparability and commitments referred to in paragraph 3.73 to 3.75 and 3.95;
	(d) notice of the meeting at which the Merger Resolutions are to be moved, which may form part of (c) above;

	(e) the proxy voting forms to be used.
	After examination of these drafts, the PRA or, as the case may be, the FCA will return them with any comments and, if necessary, will discuss them with the societies and their advisers. Any clearance by the PRA at this stage is provisional, and the PRA may seek further modification of the documents in the light of later information. Similarly, any clearance given by the FCA is subject to review of the proofs submitted at stage 4. If the transferee society is applying for consent to proceed by way of board resolution, formal application to do so (with supporting justification) should be made to the PRA at this stage.
Stage 4	Submission of printers proofs of the above draft documents.
Stage 5	Informal clearance of near-final proofs (particularly of the Schedule 16 Statement(s)) by the PRA. Informal clearance of proof copies of Rules and Memorandum by the FCA and the PRA, in the case of an amalgamation.
Stage 6	Formal submission of the Schedule 16 Statement(s) for approval by the PRA. The covering letter should include a declaration on behalf of the board of the society either:
	(a) that there has been no material change in the financial position of the society since the date of the information provided in the Schedule 16 Statement; or
	(b) that there has been such a change and that it is fairly reflected in the wording of the statement.
	This submission should be accompanied by:
	(c) a certified copy of the Instrument of Transfer or amalgamation agreement as executed;
	(d) two copies of the final printers proof of the Schedule 16 Statement signed by the secretaries of each society;



	(e)	a final printers proof of the complete Merger Document to be sent to members, together with any covering letter and other documents to be sent with it, including proxy voting forms;
	(f)	an assurance from the chairman of each society that the Schedule 16 Statement is complete and that all material interests of directors and officers are disclosed in it;
	(g)	an assurance by or on behalf of the board on systems.
	(h)	letter of comfort from the society's external auditors when required (see BSOG 2.3.7 G);
	(i)	confirmation that drafts submitted for approval are identical to those seen at stage 5;
	(j)	the fee payable by each society to the PRA.
NB Schedule 16 Statements should not be printed for distribution to members until after Stage 7.		
Stage 7	Approval by the PRA of the Schedule 16 Statement, or the PRA's consent to proceed by board resolution. Approval or consent will be given by letter and one proof copy of the Schedule 16 Statement, with the certificate of approval signed on behalf of the PRA, will be returned to the society.	
Stage 8	Printing and circulation of documents to members in time to be received by them at least 21 days before the voting date for the meeting at which the Merger Resolutions are to be moved (see BSOG 2.4.12 G, BSOG 2.4.19 G and BSOG 2.4.20 G).	
Stage 9	The meetings at which the Merger Resolutions are moved.	
Stage 10	If the Merger Resolutions have been passed, application to the PRA for confirmation and publication of notices of that application in the London and Edinburgh or Belfast Gazettes, and in other newspapers (as the PRA directs). The application must notify the PRA of the specified effective date	

		for the merger, and be accompanied by two authenticated copies of the Instrument of Transfer or amalgamation agreement. In addition, in an amalgamation, three signed copies, each, of the Memorandum and Rules of the successor society, should be sent to the FCA, and to the PRA. The societies must report to the PRA on the outcome of their meetings.
Stage 11	Notification by the PRA of the time and place of the confirmation hearing, if it is necessary to hold an oral hearing. The societies should allow sufficient time before the proposed effective date for the PRA to consider and write its decision, and in case it proves necessary to adjourn the hearing.	
Stage 12	Confirmation hearing and decision by the PRA whether to confirm the merger. The PRA must consult the FCA before confirming an amalgamation.	
Stage 13	Registration by the FCA to give effect to the amalgamation or transfer of engagements.	

3.208 The following table indicates the likely minimum time to be taken by the main stages outlined above:

Pre Day 1	Board Resolution to Merge Initial discussions with PRA re timetable and prudential information Submission of terms and initial prudential information to PRA Submission of draft Rules and Memorandum to the FCA and PRA (amalgamations)
Day 1	First draft of Schedule 16 Statement and chairman's letter and notice of meetings, draft Rules and Memorandum (amalgamations) (Stage 3)
Day 28	PRA gives informal approval to Schedule 16 Statement, Instrument of Transfer signed (Stage 5)
Day 35	Formal Schedule 16 approval by the PRA (Stage 7)
Day 35-	Printing, enveloping and mailing of Schedule 16 Statement and notice of



43	meetings (Stage 8)
Day 65-70	Last date for receipt of proxy votes (depending on Act and Rules)
Day 72	SGM <sup>43</sup> (Stage 9)
Day 75	Application to PRA for confirmation (Stage 10) and submission of Rules and Memorandum to the FCA and PRA (amalgamations)
Day 93	Closing date for receipt of representations
Day 114	Confirmation hearing (Stage 12)
Day 142	PRA's Decision on Confirmation (Stage 12)
Day 160	Effective Date

3.209 Notes:

- a. Within the above timetable prudential information is to be submitted.
- b. A significant amount of financial information needs to be assessed by the PRA prior to approval of Schedule 16 Statement.
- c. Prior to approval of Schedule 16 Statement a plan/timetable for integration of systems to be drawn up. Auditors sign off required prior to effective date.
- d. Where the PRA is the PRA it is under a statutory obligation to consult the FCA in respect of approval of the Transfer Statement and Confirmation. This consultation will take place within the above timetable.

## 4 Transfer Procedures

- 4.1 This chapter provides information on the requirements of the 1986 Act relevant to, and on the procedures to be followed by, a building society proposing to

transfer its business to a company having permission under FSMA to carry on those regulated activities which it will undertake as a result of the transfer. It is not intended to be exhaustive, and is not a substitute for looking at the 1986 Act and the Transfer Regulations<sup>44</sup>, on which a society should seek its own legal advice.

- 4.2 This chapter describes the relevant provisions of the 1986 Act, and the information which must be made available to the PRA, the FCA, and to the society's members, and outlines the procedures to be followed at general meetings, including the voting majorities required to pass the Transfer Resolutions<sup>45</sup>.
- 4.3 The chapter also describes the role of the PRA in approving the Transfer Statement which must be sent to the members and in the confirmation procedure, together with its ongoing prudential supervision during the transfer process. The Transfer Summary<sup>46</sup>, which a society may send to its members instead of the Transfer Statement, is also discussed.
- 4.4 This chapter considers each stage of the transfer procedure in chronological order. The remainder of this section gives a synopsis of the relevant requirements of the 1986 Act, which are then discussed in more detail in subsequent sections.
- 4.5 It is for the directors of a society to assess the case for transfer, and they must explain and recommend their decision to the members. However, the PRA's is willing to discuss with a society the procedures to be followed and the information required to ensure that the

<sup>43</sup> Special General Meeting

<sup>44</sup> the Building Societies (Transfer of Business) Regulations 1998 (SI 1998/212)

<sup>45</sup> the shareholding members' resolution and borrowing members' resolution required to approve a transfer where no direction under section 42B(4) of the 1986 Act has been given

<sup>46</sup> The summary of the Transfer Statement which may, in accordance with Schedule 17 to the 1986 Act, be sent, instead of the Transfer Statement, in or with the notice of the meeting at which the Transfer Resolutions are to be considered, to every member entitled to receive that notice



members can reach fully informed decisions. Societies are strongly recommended to consult the PRA early on in the formative stages of transfer proposals. Such consultation will be treated in the strictest confidence. It will be helpful, also, to have regard to the indicative timetable set out in section 'Timetable'.

#### Statutory requirements

4.6 The provisions of the 1986 Act concerning transfers are in sections 97 to 102D of, and paragraph 30 of Schedule 2 and Schedule 17 to the 1986 Act, where two types of transfer of business are provided for:

- a. to a specially formed company<sup>47</sup>, known as conversion<sup>48</sup>; or
- b. to an existing company<sup>49</sup>, known as a takeover.

4.7 The procedures are the same in each case, except that the specification of the turnout required to pass the shareholding members' resolution to approve a takeover is, in effect, higher than is required to approve a conversion. The 1986 Act provides that a company shall have qualified protection from takeover for up to five years after the vesting date<sup>50</sup>. A takeover may take the form of a transfer of business of a society to a subsidiary of the society which is an existing

company carrying on business as a going concern.

4.8 One of the principal purposes of the provisions of the 1986 Act is to ensure that the members are given all the material information they need about the terms of the transfer which they are asked to approve, and proper opportunity to cast their votes. They will be given the opportunity to make representations about that process before the transfer is confirmed. The 1986 Act also prescribes certain mandatory terms, and places restrictions on certain permitted terms, of a transfer.

4.9 The 1986 Act makes no provision for a transfer to be initiated by any means other than a recommendation of an agreed proposal put by the board of a society to its members and the Transfer Regulations require the board of a society to give particulars, in the Transfer Statement, of the options for the future conduct of the society's business which it considered before deciding to recommend the transfer to the members and of the reasons why it recommends the proposed terms.

4.10 Each member who is entitled to receive notice of the general meeting at which the Transfer Resolutions are to be moved must also receive (or have made readily available to him if the Transfer Summary is provided) a copy of a statutory Transfer Statement. A transfer must be approved by a shareholding members' resolution and a borrowing members' resolution. The majorities required to pass these resolutions are described in section 'General Meetings and Resolutions'.

4.11 If the terms of a transfer include provision for the payment of compensation to directors or other officers for loss of office or of income attributable to the transfer, then the proposed payments must be authorised by a separate special resolution. If the terms include provision for any director or other officer to receive increased emoluments in consequence of the transfer, then an ordinary resolution

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<sup>47</sup> a company formed by a society (and by no other than its nominees) for the purpose of assuming and conducting the society's business in its place, which is a company within the meaning of the Companies Act<sup>5</sup> 2006<sup>5</sup> and is a public company limited by shares, or is incorporated in an EEA State other than the United Kingdom and has power to offer its shares or debentures to the public.

<sup>48</sup> the transfer of business of a society to a specially formed company

<sup>49</sup> A company which is a company within the meaning of the Companies Act<sup>5</sup> 2006<sup>5</sup> and is a public company limited by shares, or is incorporated in an EEA State other than the United Kingdom and has power to offer its shares and debentures to the public, and which is carrying on business as a going concern on the date of the Transfer Agreement

<sup>50</sup> the date on which all the property, rights and liabilities of the society making the transfer, except any shares in the successor company, are transferred to the successor company



approving that provision must be put before a meeting of the society.

- 4.12 The 1986 Act specifies certain procedures for the consideration of representations by interested parties concerning confirmation, and the criteria which the PRA must consider before deciding whether or not to confirm a transfer. The matters which the PRA may consider do not include the merits of the transfer proposals, nor the fairness of the terms, which the members will have approved by passing the Transfer Resolutions.

- 4.13 The statutory requirements of the 1986 Act are explained and discussed in more detail in subsequent sections of this chapter. However, as is stated in paragraph 4.1, this chapter is not exhaustive and is not a substitute for considering, and taking professional advice on, the primary documents, which include: the Building Societies Act 1986, as amended by or under other legislation, including:

(a) the Building Societies (Joint Account Holders) Act 1995 the Building Societies (Distributions) Act 1997, the Building Societies Act 1997, the Financial Services and Markets Act 2000 (in particular by the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001), the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, the Financial Services and Markets Act (Mutual Society) Order, the Building Societies (Transfer of Business) Regulations 1998 (SI 1998/212) and Paragraph 8 of Schedule 9 to the Financial Services (Banking Reform) Act 2013.

(b) Judgments of the High Court in: *Abbey National Building Society v The Building Societies Commission* [1989] 5 BCC 259, *Cheltenham & Gloucester Building Society v The Building Societies Commission* [1994] 4 All ER 65, [1995] Ch 185, and [1994] 3 WLR 1238, *The Building Societies Commission v Halifax Building Society and Leeds Permanent Building Society* [1995] 3 All ER 193 and *R v The*

*Building Societies Commission, ex parte Whitmey*, unreported, 16 April 1997, *Lightman J* (relating to the *Alliance & Leicester Confirmation Decision*).

(c) *Building Societies Commission Confirmation Decisions on applications by Abbey National Building Society* (5 June 1989), *Cheltenham & Gloucester Building Society* (5 July 1995), *National & Provincial Building Society* (3 July 1996), *Alliance & Leicester Building Society* (11 March 1997), *Woolwich Building Society* (16 May 1997), *Halifax Building Society* (23 May 1997), *Bristol and West Building Society* (9 July 1997), *Northern Rock Building Society* (18 July 1997), *Birmingham Midshires Building Society* (18 March 1999) and *Bradford & Bingley Building Society* (28 September 2000).

- 4.14 *Electronic Communications Societies* should be aware of the provisions of paragraphs 9 to 14 of Schedule 9 to the *Financial Services (Banking Reform) Act 2013* (see section 'Electronic Communications').

## Preliminary Matters

### Rationale for a Transfer

- 4.15 It is a matter for the board of a society to decide whether to recommend a transfer to its members. The overriding duty of the board is to reach a view having regard to what is in the best interests of the society in the short and long term, including the interests of the members as a whole, both present and future, as members of a building society, both borrowing members and shareholding members. The board of a society may also reasonably consider the interests of customers who are not members, of the staff, of suppliers of goods and services, and of the wider community.
- 4.16 The decision of the board to recommend a transfer must be based on a proper evaluation of the issues in relation to a strategic assessment of how the society can best serve its members. One





element of that assessment will be the forward business plan of the successor company<sup>51</sup> (including, in the case of a takeover, how the successor company plans to integrate the business of the society) which will be relevant to:

- a. the presentation of the case to the members; and
  - b. the submission to the Banking Regulator<sup>52</sup> for permission to carry on the regulated activities which it will undertake as a result of the transfer.
- 4.17 Copies of the plan should be provided to the PRA and to the Banking Regulator (if the latter is a different authority in another member state).
- 4.18 Neither conversion nor takeover are likely to figure routinely as options in societies' corporate plans. However, a board may develop the society's business in ways which point to the need to consider the transfer option: in which case, a transfer should be foreseen and emerge from the board's strategic plans. If a board is considering the options of conversion or merger with another society, it should, as a matter of prudence, consider how it would respond to a counter proposal and develop appropriate contingency plans.
- 4.19 When a board is seriously considering conversion or a takeover, the range of issues which it will need to assess will vary from case to case and is for the board to decide. However, the board will necessarily have regard to its primary duty to reach a view on what is in the best interest of the members, as members of a building society, and not only their short-term interests. It will also be conscious of the requirement to give, in the Transfer Statement, a factual account of the options which it considered and of the reasons why it

decided to recommend to the members the terms of any proposed transfer and of the qualifying conditions for any distribution of funds or shares in the successor company in consideration of the transfer.

#### Public Announcement

- 4.20 A board will usually wish to announce its proposals as soon as possible after it has decided to recommend a transfer to the society's members. In particular, the board will no doubt wish to inform the members and staff of the proposed terms so that they do not then operate their accounts, or otherwise act, in ignorance of proposals which would have affected their behaviour.
- 4.21 The board will also wish to avoid misleading potential investors and borrowers; and societies with listed CCDS, PPDS or PIBS must have regard to the FCA's requirements concerning early disclosure of any information which might affect the price of securities. However, a board may not feel able to make an immediate announcement, perhaps for prudential or commercial reasons, or because it first wishes to settle all the details of the proposed terms. In these circumstances, the board must have contingency plans to make an early announcement to deal with any potentially damaging rumours and to avoid members being misled or left in a state of uncertainty. In considering the timing and terms of an announcement, the board will wish to minimise the risk of destabilising flows of funds.
- 4.22 The announcement, particularly information provided directly to members and staff, should make it clear that the proposal is subject to approval by the members and completion of the statutory procedures. It should also be made clear, in the case of a takeover, and if such is the case, that the proposal is subject to completion of due diligence investigations by the acquirer and, in either a conversion or takeover when shares in the successor company are to be issued, that the proposal is subject to the shares being listed on the London Stock Exchange or elsewhere.

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<sup>51</sup> A company, whether an existing company or a specially formed company, to which the business of a society is proposed to be transferred

<sup>52</sup> the Prudential Regulator or other competent authority in another EEA state, as the case may be



- 4.23 The PRA expects that Boards should be careful to avoid appearing to assume that the outcome is a foregone conclusion, and should identify any matters of substance on which the proposed terms of the transfer remain to be settled. Briefing of staff who will be responsible for responding to enquiries from members and the Press should be considered carefully and prepared in advance of the announcement to avoid any risk of members being unintentionally misled.
- 4.24 A Freephone helpline may be desirable for members' enquiries about whether they qualify for any distribution under the proposed transfer scheme, but again the staff must be well briefed. It is essential that the announcement, and subsequent information given to members before they are sent the statutory Transfer Statement, or Summary, and in any briefing of the Press, is entirely consistent with what will appear in that Statement.
- 4.25 In particular, members should be advised to await the Transfer Summary, and especially the Transfer Statement which will contain full details of the proposals and the information relevant to their decision on how they wish to vote. The PRA is happy to comment on drafts shown to it at an early stage, and may be able to help societies to avoid unintentionally misleading statements
- 4.26 The board should consult the PRA and, if a different body, the Banking Regulator at an early stage in its consideration of transfer proposals, and certainly no later than its decision in principle to seek a transfer. The complexities of the statutory provisions are such that it is necessary to have the proposed transfer terms specified very closely indeed before it is possible for the PRA to take a view on whether the proposals are fully in conformity with the 1986 Act.
- 4.27 The Banking Regulator will not be in a position, at this early stage, to give positive assurances as to the permission to be given to the successor company. However, a prudent board will seek the views of the PRA, and also, if different, of the Banking Regulator, before it decides to announce its transfer proposals to the members.
- 4.28 This preliminary discussion with the PRA will necessarily cover the proposed structure of the successor company or group and a written specification of the transfer terms, particularly the scheme for distribution of any consideration to be offered to the members for the loss of their membership rights in the society, which members and other persons are to benefit, and the criteria for qualification.
- 4.29 Should there be a difference of view between the PRA and the society as to whether a scheme, or a particular feature of it, is in conformity with the 1986 Act, it may prove desirable to apply to the High Court for a declaration. It will then be necessary for any preliminary announcement of the board's proposals to make the position clear, and for it to allow sufficient time in its proposed timetable for the application to be heard, and for any appeal.

#### Prudential Issues

- 4.30 In addition to information about the proposed transfer scheme, the PRA expects the board to provide it with information about its plans for ensuring the prudent management of the society through to the proposed vesting date. That information will be consistent with what the board itself will require, bearing in mind that it is for the board to exercise due diligence and to be satisfied that the society's business continues to be directed and managed prudently. The information required is:
- the names and responsibilities of senior managers assigned to manage the transfer process;
  - an assessment of the systems requirements of the transfer process, together with the specification of work to be done by consultants (e.g. the external auditors/scrutineers) and their report(s);



- c. contingency plans, with sensitivity and risk assessments, for managing funding and liquidity during the transitional period; and
- d. copies of the business plans of the successor company as submitted in connection with its permission to carry on the regulated activities which it will undertake as a result of the transfer.
- 4.31 The PRA will also wish to have a letter from or on behalf of the society's board, which consents to the PRA discussing the society's affairs with the Banking Regulator (if a different body) and the competent authority for listing in the UK (if a different body from the PRA and an issue of shares in the successor company is intended to be made in connection with the transfer).
- 4.32 A transfer is exceptionally time-consuming for senior management. The PRA expects to be satisfied that the society has sufficient management resources to cover both the transfer and its day-to-day business within its proposed transfer timetable. It will usually be necessary for the society severely to limit new business developments and initiatives during the transitional period.
- 4.33 It should be noted that the requirements for information to be provided to members mean that full disclosure will be required in the Transfer Statement of any negotiations in progress on acquisition or other links during the transfer process. The Banking Regulator must be kept fully informed of any such plans because any changes to the society's business, structure, controls etc. may well be relevant to the terms of its successor company's permission.
- 4.34 The PRA will appoint a project team, responsible for operational management of the PRA's functions in relation to the transfer process. The expectation would be that the team will include the Manager responsible for the society's supervision and one of the PRA's legal advisers. Names and contact numbers will be provided to the society.
- 4.35 The PRA expects a society to appoint a project team, headed by a senior manager responsible to the board for management of the whole process and with authority to control the drafting and verification of the Transfer Document<sup>53</sup>, other briefing and information to members, and responses to representations at the confirmation stage. Strong central control under the direction of the board is, in the PRA's view, essential for effective management of a transfer.
- 4.36 The PRA expects the society to provide a systems report from its auditors together with an action plan to remedy any shortcomings. The Banking Regulator, if a different body, may have similar requirements. This report is only part of the full information package which the Banking Regulator will (or is likely to) require in connection with the successor company's permission to carry on the regulated activities which it will undertake as a result of the transfer and which will be needed so that the PRA can be satisfied in relation to its requirements up to the vesting date.
- 4.37 The society will need to develop plans to deal with a number of possible contingencies; for example, receipt of a counter-offer (whether private or public) during the transfer process, changes in market conditions or financial results which materially affect the information given in the Transfer Statement, failure to obtain the members' approval, delay of the planned vesting date and of any flotation, and greater exposure to liquidity risk during the transitional period.
- 4.38 The Transfer Agreement<sup>54</sup> should include provision for its termination if, for any reason, flotation does not take place

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<sup>53</sup> the document or booklet containing, inter alia, either the Transfer Statement or the Transfer Summary

<sup>54</sup> the agreement required by section 97(4)(b) of the 1986 Act between a society and its successor company on the terms of the transfer



within a specified period after confirmation, and for the board to decide not to proceed if market conditions or other developments mean that it would not be reasonable to do so having regard to the basis on which it secured the approval of the members. The PRA expects to see the society's contingency plans.

- 4.39 Before it approves the Transfer Statement, the PRA will need to be satisfied that the successor company is expected to have permission to carry on such regulated activities as will enable it to undertake the business it will have as result of the transfer. It will also ask the Banking Regulator, if different, to confirm that the information given in the draft Transfer Statement appears to be consistent with, and has no material omission of, information available to the Banking Regulator.

#### Terms of a Transfer

- 4.40 This section discusses the provisions of the 1986 Act which prescribe the terms of a transfer which must be included in the Transfer Agreement and the restrictions on terms which may be included. It also discusses the formation of, and protective provisions for, specially formed companies and the status of existing companies.
- 4.41 Section 97(4) of the 1986 Act provides that in order to transfer its business to a company, inter alia, a society must agree conditionally with its successor in a Transfer Agreement on the terms of the transfer which, in so far as they are "regulated terms" (as defined in Section 97(12)), comply with Sections 99 and 100 of the 1986 Act and with the Transfer Regulations. In the case of a specially formed company, a society must also secure that the articles of association of the successor company have the requisite protective provisions prescribed by Section 101(2) of the 1986 Act.

#### The Qualifying Day<sup>55</sup>

- 4.42 The choice of Qualifying Day is important because it is a determining factor in deciding which members must have conferred upon them a right to the Statutory Cash Bonus<sup>56</sup> provided by Section 100 of the 1986 Act. It may also be relevant in deciding which members may receive certain rights under a proposed distribution of funds or of shares in the successor company. The Commission's view was that there can be only one Qualifying Day for these purposes, which must be clearly distinguished from any other "reference dates" which may be chosen by a society for the purposes of its transfer scheme.
- 4.43 Subsection (13) of Section 100 defines the Qualifying Day as the day specified in the Transfer Agreement as the qualifying day for the purposes of that subsection. This does not appear to restrict the society's choice of qualifying day. A number of arguments for such a restriction have been advanced, including that the use of the past tense "which expired with the qualifying day" in subsection (9), read in the context of Section 100 as a whole, indicates that the Qualifying Day must pre-date the Transfer Agreement. The PRA has not been required to express a view on the matter (and see paragraphs 4.20 and 17.4 of the Commission's Decision to confirm the transfer of the business of Cheltenham & Gloucester Building Society to a subsidiary of Lloyds Bank plc)..
- 4.44 The PRA takes the view that the conditional Transfer Agreement must have been signed by the society and its successor company and commenced (albeit conditionally) before the PRA can approve the Transfer Statement. The PRA must be satisfied, before it

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<sup>55</sup> the day specified in the Transfer Agreement as the qualifying day for the purposes of section 100 of the 1986 Act

<sup>56</sup> the bonus required by section 100(2)(b) and (4) of the 1986 Act to be paid to every shareholder of the society who held shares on the Qualifying Day and was not eligible to vote on the requisite shareholding members' resolution.



approves the Transfer Statement that the Statement correctly describes the proposed terms of the transfer as provided by the Transfer Agreement, and the Agreement cannot properly be said to exist until it has been signed by the parties concerned.

- 4.45 The Transfer Agreement, as is made clear by its definition in Section 97(12) of the 1986 Act, is necessarily conditional, *inter alia*, on the society's members' approval of the Transfer Resolutions under Section 97(4)(c), and confirmation of the transfer by the PRA (which includes confirmation by the Banking Regulator that it expects to authorise the successor company) under Section 98(2) of the 1986 Act.

#### Share Accounts

- 4.46 Section 100(2)(a) and (3) of the 1986 Act provide that the terms of a transfer must require the successor company to assume as from the vesting date a liability in respect of a deposit to every member of the society equal to the value of the shares held by such member immediately before the vesting date. In other words, amounts held in share accounts on the eve of the vesting date must become identical amounts held in deposit accounts from the start of the vesting date.

#### Statutory Cash Bonus

- 4.47 Section 100(2)(b) and (4) of the 1986 Act provide that the terms of a transfer must confer a right to a distribution of funds by way of bonus, whether paid by the society or its successor company, on every member of the society who held shares in the society on the Qualifying Day but was not eligible to vote on the shareholding members' resolution. Where the account is in joint names, Schedule 2 to the 1986 Act and the Rules of a society prescribe who is eligible to vote.
- 4.48 Broadly speaking, members who are not entitled to vote on the resolution are those who are under 18 years of age on the date of the meeting or, if the Rules so provide, those who had less than the qualifying shareholding (usually £100) on the qualifying shareholding date or

who ceased to hold shares in the period between the qualifying shareholding date and the voting date. However, the High Court declared in *Abbey National Building Society v The Building Societies Commission* that, in order to qualify for the Statutory Cash Bonus, in addition to having held shares in the society on the Qualifying Day, a member also must have held shares continuously between the Qualifying Day and the vesting date.

- 4.49 In coming to this judgement, the Vice Chancellor found the sequence of tenses used in subsection (4) of Section 100 of the 1986 Act to be illuminating: "It says that a member is ... a qualifying member if he held ... shares in the society on the qualifying day and was not ... eligible to vote ... The subsection is therefore looking at somebody who at a particular point of time is a member and who had certain qualifications in the past ... the relevant date for establishing membership is the vesting day ... it is implicit in subsection (4) that the person ... must have been a member on the qualifying day and have remained a member thereafter continuously through until the vesting day". In settling the terms of the declaration, the Vice Chancellor confirmed that when referring to the member remaining a member between the two dates, he intended to mean as a member holding shares.
- 4.50 The bonus is to be calculated as that proportion which the society's reserves bear to its total liability to its members in respect of shares, as shown in the latest balance sheet of the society, applied to the value of the shares held by the member on the Qualifying Day. If a Transfer Statement is approved and sent to the members just before, or shortly after, the end of the financial year of the society, it will be important to note that the Annual Report and Accounts for the year will have been published by the vesting date, when qualifying membership has to be established and the bonus is due to be paid. In those circumstances, "the latest balance sheet of the society" will be that published in the most recent Annual



Accounts. The same considerations may apply when a society publishes half-yearly results.

- 4.51 The PRA may direct, however, where it confirms a transfer of a society's business to an existing company (i.e. only in a takeover), that no Statutory Cash Bonus is paid or that a lesser amount is paid than that referred to in paragraph 4.50, having regard to what is equitable between the members.

#### Distributions to Members

- 4.52 Section 100(1) of the 1986 Act provides that:

"Subject to subsections (2) to (10), the terms of a transfer of business by a building society to the company which is to be its successor may include provision for part of the funds of the society or its successor to be distributed among, or other rights in relation to shares in the successor conferred on, members of the society, in consideration of the transfer".

- 4.53 In respect of rights to shares, Section 100(8) of the 1986 Act provides that:

"The terms of a transfer of a society's business may confer a right to acquire shares in the successor on a member of the society only if the member (a) held shares in the society throughout the period of two years ending with the qualifying day, or (b) on that day hold deferred shares in the society that are of a class described in the transfer agreement; and it is unlawful for any right in relation to shares to be conferred in contravention of this subsection"; and, in respect of a distribution of funds, Section 100(9) of the 1986 Act provides that:

"Where the successor is an existing company, any distribution of funds to members of the society, except for the distribution required by subsection (2)(b), shall only be made to those members who (a) held shares in the society throughout the period of two years ending with the qualifying day, or (b) on that day, hold deferred shares in the society that are of a class described

in the transfer agreement ; and it is unlawful for any distribution to be made in contravention of the provisions of this subsection"; while, in respect of a transfer to a specially formed company, Section 100(10) of the 1986 Act provides:

"The following restrictions apply to any distribution of funds, or any conferring of rights in relation to shares, in connection with the transfer of its business from the society to its successor where the successor is a company specially formed by the society, that is to say:

- a. no distribution shall be made except that required by subsection (2)(b); and
- b. where negotiable instruments acknowledging rights to shares are issued by the successor within the period of two years beginning with the vesting date, no such instruments shall be issued to former members of the society unless they are also issued, and on the same terms, to all other members of the company; and it is unlawful for any distribution of funds to be made in contravention of the provisions of this subsection".

4.54 The meanings of subsections (1), (8), (9) and (10) of Section 100 of the 1986 Act (before the amendments to subsections (8) and (9) were made by paragraph 8 of Schedule 9 to the Financial Services (Banking Reform) Act 2013) have been considered by the High Court in four cases: *Cheltenham & Gloucester Building Society v The Building Societies Commission*, in relation to distributions of funds, and *Abbey National Building Society v The Building Societies Commission*, *The Building Societies Commission v Halifax Building Society and Leeds Permanent Building Society* and *R v The Building Societies Commission, ex parte Whitmey* in relation to share distributions. These judgments related to specific proposals and may not necessarily be directly relevant in all respects to transfer schemes proposed by other societies in the future.



4.55 A society must obtain its own advice when formulating proposals for a cash or share distribution scheme. In particular, they may not be relevant having regard to the wording of section 100(8) and (9) of the 1986 Act brought in by paragraph 8 of Schedule 9 to the Financial Services (Banking Reform) Act 2013.

4.56 As is explained in paragraph 4.26-4.28, the PRA will have to see a fully specified description of the distribution scheme before it can form its own view of whether it is in conformity with the 1986 Act. The PRA expects the society to enclose copies of the legal advice it has received when submitting a scheme for consideration.

#### Joint Share Account Holders

4.57 Paragraph 7 of Schedule 2 to the 1986 Act deals with joint shareholders and defines the "representative joint holder" as "that one of the joint holders who is named first in the records of the society". Paragraphs 7(5) and (5A) of that Schedule provide that, for the purposes of Sections 87 and 93 to 102 of the 1986 Act, the shares shall be treated as held by the representative joint holder alone and, accordingly, joint holders, other than the representative joint holder, shall not be regarded as members of the society by reason only of being a joint holder of those shares.

4.58 The effect of this provision (but subject to the provisions of Section 102A) is that if, for example, the representative joint holder dies, or the order of names on the account is changed in the two years preceding the Qualifying Day, any rights to a distribution under a transfer scheme, which are conferred on those who have held shares for two years up to the Qualifying Day, cannot devolve upon any other joint account holder, unless that holder is in his or her own right, by virtue of another account holding, a two-year shareholding member.

4.59 Section 102A, however, provides that, in certain circumstances, second named joint holders, who have themselves held shares in the society continuously during the two year qualifying period,

whether as sole or joint holders of shares, may qualify for a right which otherwise could only have gone to a first named holder.

4.60 Cases which would be covered by the provisions of Section 102A include: the death of the first named holder, including where, for example, a third named joint account holder would move up the scale if both the previous first named and second named holders were killed in the same car accident; the creation of a joint account, for example, on marriage; the division of a joint account on divorce or separation, or for any other reason, where the previous first named holder has ceased to hold shares in the society; and when there has been a change in the order of names within an account.

4.61 Section 102A applies only to joint share account holders (joint borrowers are not affected) and is only relevant where the application of the two year qualifying period prescribed by Section 100 is relevant to a proposed distribution of funds or conferring of rights to shares. The provisions of Section 102A are permissive, not mandatory (see paragraphs 13.2 to 13.5 of the Commission's Confirmation Decision on the application by National & Provincial Building Society) and are not "relevant requirements" of the 1986 Act (see paragraph 4.179).

4.62 It is for the society's board when proposing a transfer scheme to decide whether to incorporate in its distribution scheme none, some, or all of the cases where Section 102A allows membership of a joint account, other than as the first named holder, to count towards the two year qualifying period. Finally, these provisions do not affect the position of the personal representatives or beneficiaries of deceased sole holders of share accounts. Societies should obtain their own advice on all these matters when considering how they wish to construct the terms of a proposed distribution scheme.



#### Trustee Account Holders<sup>57</sup>

- 4.63 A member who holds funds in a share account, or holds a mortgage account, on trust for another person is not a Trustee Account Holder unless the following conditions are satisfied. Sections 102B to D of the 1986 Act require that, if the terms of a transfer include distributions of funds or of rights to shares to members of the society, then each Trustee Account Holder shall be treated by the society and its successor as not being disentitled from receiving, in addition to any distribution to which he or she may be entitled in any other capacity, a separate distribution in respect of each account which he or she holds in trust for certain categories of beneficiaries (provided that, as holder of that account, he or she meets the conditions for receipt of a distribution under the scheme).
- 4.64 An account may be either a share account or a mortgage account of which the Trustee Account Holder may be the sole or representative joint holder. A member may receive only one distribution for each account he or she holds as a Trustee Account Holder (irrespective of the number of account holders or beneficiaries of that account) and a member who holds only one account may receive only one distribution in respect of that account whether as a member or, if he or she so decides, as a Trustee Account Holder.
- 4.65 If a person is a qualifying beneficiary of more than one account held by a Trustee Account Holder (referred to in Section 102D(5) as "duplicate accounts"), then only a single

distribution is required to be paid in respect of the duplicate accounts whether or not there are other qualifying beneficiaries of those accounts. A change in the identity of the Trustee Account Holder during any qualifying period for a distribution does not affect the entitlement to a distribution in respect of the account. The categories of qualifying beneficiaries of such accounts are persons who cannot reasonably practicably act in relation to the accounts themselves by reason of ill-health or old age or any physical or mental incapacity or disability.

- 4.66 A society will need to take its own legal advice as to the interpretation of these Sections and whether and, if so, what advice it should give to its members to help them decide whether they are Trustee Account Holders. The PRA expects to see that advice to help it reach a view on whether the society's proposals appear to it to be lawful, while recognising that only the courts can interpret the law. With that important proviso in mind, the PRA has taken the view that a scheme may provide that a member is a Trustee Account Holder if the funds (or debt) in the relevant account are held either wholly or partly for one or more qualifying beneficiaries. CCDS, PPDS and PIBS do not appear to be share "accounts" as described by Sections 102B to D so that a person could not be a Trustee Account Holder in respect of a holding of PIBS.
- 4.67 A society is not required to notify its members of these provisions. However, unless it does so, it will not gain the protection of Section 102B(4) which provides that a Trustee Account Holder will not be entitled to a distribution in that capacity if the society has notified him that he must make a statutory declaration and the Trustee Account Holder has not made such a declaration before the date specified in the society's notice to him. Moreover, the Transfer Regulations require that the Transfer Statement must contain a forecast of the amount and proportion of the total consideration which is expected to be distributed to Trustee Account Holders.

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<sup>57</sup> a person who is a shareholding or borrowing member of a society, by virtue of being the sole or representative joint holder of an account which he holds in trust for another person or persons any one or more of whom cannot reasonably practicably act in relation to that account themselves by reason of ill-health or old age or any physical or mental incapacity or disability, as provided by section 102D of the 1986 Act, whether or not the account holder is a shareholding or borrowing member in respect of any other accounts





- 4.68 The PRA expects the final date for receipt of statutory declarations from Trustee Account Holders to be shortly before the vesting date so that declarations may take account of any changes in the identity of the account holder or the status of the beneficiary or beneficiaries. Trustee Account Holders must also be able to make an informed judgement as to whether the terms of the distribution scheme are such that making a statutory declaration will be in the best interests of the beneficiary or beneficiaries of an account; they cannot do this until the full terms of the proposed scheme have been published in the Transfer Statement and made available for inspection in the Transfer Agreement.
- 4.69 The PRA expects, therefore, that societies will issue notices under section 102B to Trustee Account Holders not later than despatch of notices of the SGM at which the Transfer Resolutions are to be considered, and that the specified date for returning statutory declarations by Trustee Account Holders will be on, or shortly before, the vesting date or, in any event, not less than 1 month after the despatch of the notices.
- 4.70 No regulations have been made by the Treasury under Section 102D(11). However, to meet the requirement that the Transfer Statement must contain a forecast of distributions to Trustee Account Holders, and so that it can determine the qualifying conditions for, and estimate the value of distributions to members generally, and individually, particularly if the scheme includes a variable element, the PRA expects that a society will need to write to all its members at least 2 months before the Transfer Statement is expected to be issued advising them of the procedures for dealing with distributions to Trustee Account Holders, perhaps also with the notices envisaged by Section 102B(4), and asking them, if appropriate, to register their interest in making statutory declarations as Trustee Account Holders
- 4.71 In a conversion, the successor company must be specially formed by the society (and by no others than its nominees) wholly or partly for the purpose of assuming and conducting the society's business in its place and must be a company within the meaning of the Companies Act 2006 which is a public company limited by shares (Section 97(12) of the 1986 Act) or a body corporate incorporated in another EEA State with power to offer its shares or debentures to the public (Section (97(13))).
- 4.72 Section 98(3) of the 1986 Act provides that the PRA shall not confirm the transfer if there is a substantial risk that the successor will not have such permission under FSMA as will enable it to carry on the business which it will have as a result of the transfer. The society must secure that the successor company is formed having articles of association with the "requisite protective provisions" (Section 97(4)(a) of the 1986 Act)
- 4.73 The terms of the transfer must include provision to secure that the society ceases to hold any shares in the specially formed successor company by the date on which the society is to dissolve (Section 100(11) of the 1986 Act). The provisions of the 1986 Act concerning the dissolution of the society and the disposal of any shares in its successor are discussed in section 'Notification and Dissolution'.
- 4.74 The terms of the transfer must include provision to secure that the society ceases to hold any shares in the specially formed successor company by the date on which the society is to dissolve (Section 100(11) of the 1986 Act). The provisions of the 1986 Act concerning the dissolution of the society and the disposal of any shares in its successor are discussed in section 'Notification and Dissolution'.
- 4.75 The requisite protective provisions are the provisions of Section 101 of the 1986 Act which require the successor company to ensure that it does not allow one person, or two or more persons



- acting in concert, to hold more than 15% of the shares of the company during the period from the company's incorporation until 5 years after the vesting date. The purpose of this provision is, clearly, to protect the newly converted bank from takeover. The provisions will cease to apply if the PRA so directs, or if the successor company acquires another financial institution, as defined in Section 101(6), or if the shareholders resolve to that effect by a majority representing at least 75% of the nominal value of shares giving voting rights. The PRA is required to consult the FCA before making a direction under section 101.
- 4.76 For a takeover, an existing company, which is to assume and conduct the society's business in its place, is defined in Section 97(12) and (13) of the 1986 Act as a company as defined in section 1(1) of the Companies Act 2006, which is a public company limited by shares, or a body corporate incorporated in another EEA State with power to offer shares or debentures to the public, "carrying on business as a going concern on the date of the transfer agreement".
- 4.77 Section 98(3) provides that the PRA shall not confirm the transfer if there is a substantial risk that the successor will not have such permission under FSMA as will enable it to carry on the business which it will have a result of the transfer. The effect of these provisions is that the business of a society may be transferred to a body corporate incorporated in another EEA State which, at the date of the Transfer Agreement, is a going concern and which is acceptable as a deposit taker to the appropriate regulatory authority. To be a going concern, the company must actively be carrying on a business before it can enter into an agreement to acquire the business of a society. Conversely, it would not seem possible to use a company which carries on no substantive business, other than employing its capital, simply as a vehicle for taking over a society.
- 4.78 The successor company does not need to have the required permission under FSMA at the time of the takeover offer or the Transfer Agreement; but it must be carrying on business as a going concern. However, the subsequent obtaining of the necessary permission is a key criterion. An offer will not be credible unless the company has first obtained an indication from the PRA or other EEA competent authority that it is prepared to authorise, or to continue the authorisation of, the successor company, upon transfer on terms which will enable it to carry on the business it will have following the transfer. As a practical matter, the authorities would find it difficult to authorise an institution whose business from the time of authorisation was not predominantly banking or deposit taking and would require to be satisfied that the parent company (if any) as controller was fit and proper.
- Compensation For Loss of Office and Increased Emoluments**
- 4.79 Any compensation for loss of office or diminution of emoluments attributable to the transfer which is proposed to be paid to directors and other officers must be approved by a separate special resolution, in addition to the Transfer Resolutions required to approve the terms of transfer as a whole (Section 99 of the 1986 Act). Loss of office includes loss of office in any other body held by virtue of the director's or other officer's position in the society. "Compensation" is not defined in the 1986 Act, except to the extent that Section 99(6) says that it includes benefits in kind.
- 4.80 In the PRA's opinion, compensation does not include statutory redundancy payments, damages for breach of contract, or other payments, for example, falling due under the terms of a pre-existing contract of employment, or a pre-existing arrangement giving rise to a reasonable expectation. However, it does include any proposed ex-gratia payments or other provision of benefits in money or money's worth. Societies should consider very carefully the extent to which any proposed payment may exceed the amount provided for by



statute or contract. In view of the requirement in Section 99(4) that unauthorised payments must be repaid by the recipient, societies are advised to take legal advice on any payments which are not specifically authorised by the terms of a special resolution passed by the members in accordance with Section 99(2)(a). The Treasury has not made any regulations under Section 99(2)(b) and (3).

- 4.81 All proposed payments requiring approval by special resolution must be disclosed in the Transfer Statement. In addition, the PRA expects disclosure in the Transfer Statement of any other payments to directors or other officers arising directly from the transfer. So that members are aware of the direct interest of the directors or other officers in a transfer, societies should consider whether the amount, as distinct from the fact, of any statutory or contractual payments should be disclosed where these arise directly from the transfer. More generally, societies need to consider whether any facts relevant to any director or other officer, or to any person(s) connected with any director, should be disclosed where these are material to the decision of the members who are to be asked to vote on the proposed transfer.
- 4.82 Increased emoluments are defined by Section 99A of the 1986 Act as an increase in consequence of the transfer, and included in the terms of the transfer, for any director or other officer, whether by way of increased remuneration or the grant of share options or otherwise. The PRA expects this formulation to include the receipt of distributions of funds or of rights to shares in consideration of the transfer which are made to directors or other officers in their capacity as employees or pensioners of the society or any of its subsidiaries. However, this is a matter which can only be conclusively determined by the courts.
- 4.83 Any such increase in emoluments is required by Section 99A(2) of the 1986 Act to be put before a meeting of the society in an ordinary resolution approving such provision. However,

although such an ordinary resolution must be put to a meeting, it is not required to be passed in order to authorise such increases which will be authorised by the general approval of the transfer and its terms provided by the passage of the Transfer Resolutions. Neither is it required that the ordinary resolution be put before the meeting which is to consider the Transfer Resolutions. However, as is explained below, any proposed increase in emoluments will have to be explained in the Transfer Statement, and the PRA will have to be satisfied that the requisite ordinary resolution was put before a meeting of the society when it considers a society's application for confirmation of a transfer.

#### Information provided to Members

##### Statutory Requirements

- 4.84 Section 98(1) of and Part I of Schedule 17 to the 1986 Act require a building society which desires to transfer its business to a company to send a statement relating to the proposed transfer to every member entitled to notice of a meeting of the society. This may be either a Transfer Statement or a Transfer Summary, and is to be included in or with the notice of the meeting at which the Transfer Resolutions are to be moved. If a Transfer Summary is sent, then the society must also make the Transfer Statement available forthwith, free of charge, to every member who asks for it. The Treasury has power to make regulations for the purpose of specifying the matters of which Transfer Statements and Transfer Summaries are to give particulars. No Transfer Statement shall be sent or made available unless its contents, so far as they concern the matters so specified, and any other matters which the PRA may require in the case of a particular transfer, have been approved by the PRA. The Transfer Summary, however, is not required to be approved by the PRA.

##### The Transfer Statement

- 4.85 The Transfer Statement has to contain the particulars of the "prescribed matters" which are set out in Schedule 1



to the Transfer Regulations. It must also include particulars of any other matters which the PRA may require (paragraph 3(1)(b) of Schedule 17 to the 1986 Act). Note that Regulation 3(2) of the Transfer Regulations provides that if a particular matter is not ascertainable at the time, a forecast may be given; for example, of the percentage amount of the Statutory Cash Bonus, or of the division of any distribution of shares or cash among different classes of recipient (see subparagraph (c)).

4.86 The principal matters the PRA expects a Transfer Statement to contain can be summarised as follows:

(a) a factual statement of the strategic options considered by the board and the reasons why it decided to recommend the particular proposals being put to the members. In the case of a takeover, the board must also provide a valuation of the business compared with the consideration which is proposed to be paid by the successor company, and state whether it considers the offer price to be fair and reasonable;

(b) disclosure of the names of any building societies or companies from which written proposals for merger or takeover were received within the preceding 12 months as required by Regulation 3 of the Transfer Regulations. The fact of the proposal, the name of the proposer and the terms of the proposal must be disclosed, unless the proposer has requested either that the whole matter, or just the terms of the proposal, be treated as confidential. An invitation to discuss a possible merger or takeover would probably not constitute a "proposal". A society should consider carefully, and take advice on, whether any approach it has received does qualify as a disclosable proposal. If no proposals have been received that fact could be stated in the Transfer Statement, for the avoidance of doubt;

(c) details of any share and/or cash distribution scheme, as provided by the Transfer Agreement, and showing

separately the estimated amount of the benefits (if any) to be conferred on members, Trustee Account Holders, and on others such as employees and pensioners of the society, and giving information about the value of any shares including, if unquoted ordinary shares, an illustrative estimate of the market price of the shares if they had been issued at some specified date within the previous 6 months;

(d) the consequences of the transfer for members of the society, including a clear explanation of the potential effects on interest rates and containing, in particular, a factual statement of changes in the factors relevant to the determination of interest rates on retail deposits and loans by the successor company compared with the society (having regard to the need for the company to pay dividends to its shareholders), and including any change in the terms on which deposits are to be held and any changes in the applicable terms of the statutory protection scheme and complaints handling arrangements;

(e) the consequences of the transfer for employees of the society, including any changes in the branch structure or economies in head office departments;

(f) the financial interests of the directors and other officers arising from, or as a consequence of, the transfer. If directors or other officers have no financial interests in the transfer, either by way of increased emoluments, compensation or other benefits, this should be stated explicitly, for the avoidance of doubt;

(g) the main features of the published consolidated annual accounts of the society group for the last 3 financial years and its current financial position, including the amount of the society's reserves, at a date not more than 6 months prior to the date of the Transfer Statement;

(h) in the case of a takeover, the main features of the published annual accounts of the successor company



group for the last 3 financial years, its current financial position at a date not more than 6 months prior to the date of the Transfer Statement, and key business indicators of the society group and the successor company group for each of the past 3 financial years. If the successor company is a significant subsidiary within a group, the PRA may require corresponding information about the company alone to be given;

- (i) the future financial prospects of the successor company;
- (j) the intended range and relative importance of the activities of the successor company and any change proposed following the transfer;
- (k) in the case of a takeover, the structure and activities of any group to which the successor company belongs;
- (l) a summary of the provisions of the Transfer Agreement concerning the conditions precedent to its completion and providing for its termination;
- (m) a statement as to whether the transfer will conflict with any contractual obligations of the society (which would include agency agreements);
- (n) the total estimated costs and expenses of the transfer, together with (if applicable) the estimated amount of, and the terms on which, fees and disbursements will be paid to advisers, such as merchant bankers, relating to the valuation of the business;
- (o) responsibility statements by the directors of the society and the successor company, and opinions of the external auditors and any other experts, such as merchant bank advisers;
- (p) if a Transfer Summary is issued, a statement that the full Transfer Statement will be provided free and on request and how it can be obtained.

#### The Transfer Summary

- 4.87 A Transfer Summary may be sent, instead of the Transfer Statement, in or with the notice of the meeting at which the Transfer Resolutions are to be considered, to every member entitled to that notice. As its title indicates, the Transfer Summary must contain information derived from the Transfer Statement, particulars of which are prescribed by Schedule 2 to the Transfer Regulations: principally, that is, the matters described in paragraph 4.85-4.86, in summary form, excepting detailed financial information and terms of the Transfer Agreement.
- 4.88 The basic qualifying conditions for a distribution of funds or shares might, for example, be summarised in the form of flow charts. More complex information, such as that relating to successors to deceased members, or second named joint account holders, should also be summarised with affected persons being referred to the Transfer Statement and, perhaps, special leaflets on particular terms.
- 4.89 Unlike the Transfer Statement, the Transfer Summary does not have to be approved by the PRA. It is to be compiled by, and on the responsibility of, the directors of the society and of the successor company. If a society decides to send a Transfer Summary, rather than the Transfer Statement, with the notice of the meeting, then the Transfer Summary must contain the director's responsibility statements and state that it has not been approved by the PRA while the full Transfer Statement, which has been so approved, is on request available free of charge, to any member of the society to whom the Transfer Summary was sent, at any branch or office of the society or by post.

#### The Transfer Document

- 4.90 The Transfer Statement or Transfer Summary does not have to be a separate document. In practice it will usually be convenient to include it in a comprehensive Transfer Document which will also contain the notice of the meeting at which the Transfer Resolutions are to be moved, an



- explanation of the transfer procedure (including details of the confirmation stage - see section 'Confirmation') and a description of the requirements of the society's Rules concerning entitlement to vote.
- 4.91 It may also be convenient to include additional material required by the PRA in connection with a flotation. However, the statutory Transfer Statement or Transfer Summary within the Transfer Document should be clearly identified as such (either by printing it on a different colour of paper or by some other means). An illustrative example of the structure of a Transfer Document containing a Transfer Statement is given in Appendix 1. A Transfer Document containing a Transfer Summary should take much the same form (in that case, the Transfer Statement made available to the members on request could be a separate document).
- 4.92 If shares in the successor company are proposed to be offered to members, either for subscription or free of charge, the society will need to consider whether and, if so, how it should combine the information relevant to the members decision on the proposed transfer, and that relevant to the share offer, in one document. The two requirements differ, particularly in extent. Combining the Transfer Statement and share prospectus may run the risk of confusing the issues for some members.
- 4.93 The PRA and its staff may be willing, but only if time and its resources permit, to comment informally on material additional to the statutory Transfer Statement which the board proposes to put to the members. The PRA considers that, if asked, it can best help the board and the members' by making informal comments at the formative stage. However, it will only comment on the clear understanding that the final decision on what information to put to the members without the Transfer Statement is for the board to decide. The PRA is conscious that it may have to assess such additional material in the light of representations on the society's application for confirmation of the proposed transfer, and any comments which it does offer are without prejudice to its position in those proceedings.
- 4.94 However, the PRA cannot undertake the additional work of reviewing and commenting upon the draft Transfer Summary. As is noted in paragraph 4.89, the board alone is responsible for ensuring that the Summary fairly and accurately summarises the prescribed information in the Transfer Statement, and that it fulfils the requirements of the 1986 Act and the Transfer Regulations. As with the other information provided to the members in addition to the Transfer Statement, the PRA will review the Transfer Summary at the confirmation stage of the transfer procedure.
- #### Board Statements
- 4.95 The Transfer Regulations, deliberately confine the particulars required to be included in the statutory Transfer Statement to information which is factual and which can be verified by a society and its professional advisers, including factual statements of the reasons why the board decided to recommend the transfer and its terms (which may include statements of the board's belief and opinions, clearly identified as such) and the options it considered for the future conduct of the society's business, all of which can be verified by reference to the board's minutes and papers. A board may choose to engage in more general advocacy of the merits or fairness of its proposals elsewhere in the documents sent to members, in which case, the PRA may have to have regard to whether such material is consistent with the information given in the statutory Transfer Statement when it comes to consider an application for confirmation.
- 4.96 The PRA expects the whole Transfer Document to be covered by responsibility statements by the directors of the society and the successor company. This may be given along the following lines (either a joint statement or separate statements by each board):



"The directors of ... Building Society and the directors of ... accept responsibility for the information relating respectively to the society and the company which is contained in this document. To the best of the knowledge and belief of the directors (who have taken all reasonable care to ensure that such is the case) the information contained in this document is in accordance with the facts and does not omit anything likely to affect the import of such information".

#### Application and PRA Approval

- 4.97 It will be helpful to both the society and the PRA for the society to consult the PRA about the outline structure of, and main features to be contained in, the Transfer Document at an early, formative stage. The PRA will also be prepared to consider a full specification of the proposed cash or share distribution scheme. Thereafter, a formal written application for approval of the statutory Transfer Statement must be made to the PRA by, or on behalf of, the board and accompanied by a draft Transfer Statement which should be as complete as is reasonably practicable at that stage, together with the fee prescribed by the current Fees Rules.
- 4.98 The PRA will then consider the application and decide whether or not to approve the Transfer Statement. It must satisfy itself that:
- a. in its opinion, the terms of the transfer scheme described in the Transfer Statement are consistent with the 1986 Act;
  - b. the Transfer Statement contains particulars of the matters required by the Transfer Regulations
  - c. there is no further material information which it appears to the PRA, on the basis of what it knows at that time, is relevant to the decision of the members and is appropriate to the Transfer Statement (since that Statement carries the explicit approval of the PRA);
  - d. the information in the Transfer Statement is presented clearly, in a balanced way, is consistent with the

facts as known to the PRA, and is supported by responsibility statements from the directors and by opinions from the society's auditors and advisers.

For that purpose, the PRA will require supporting documentary information, including, in particular:

- e. the draft Transfer Agreement, which will incorporate a full specification of the transfer distribution scheme (the Transfer Statement by itself being an inadequate basis for considering the legal issues);
- f. a description, supported by opinions of the society's auditors and legal advisers, of the terms of the proposed scheme of distributions of funds or shares to members, Trustee Account Holders and others, including the systems and procedures required to make the distributions and copies of the notices and other documents to be used;
- g. in the case of a specially formed company, the draft articles of association of the successor company (including the requisite protective provisions);
- h. the Rules of the society (6 copies);
- i. the full accounts and auditors' reports on which the financial information is based;
- j. a checklist of the information required by the Transfer Regulations showing where each item may be found in the draft Transfer Statement.

- 4.99 Before approving a Transfer Statement the PRA is required to consult the FCA. The process of consideration will consist of discussions and correspondence between the PRA and the society, which are likely to lead to the production by the society of one or more redrafts of the Transfer Statement to take account of the PRA's comments, and refinements proposed by the society, to improve the clarity, completeness and drafting of the Statement.



- 4.100 The time necessary to complete this process will depend upon the quality and completeness of the draft Statement submitted with the first application, the complexity of the proposed terms of the transfer and whether they include any novel features, and whether it proves necessary to apply to the High Court for the determination of any legal issues. The PRA will seek to deal with the process efficiently and expeditiously. However, its speed of response will necessarily be affected by the factors referred to above as well as the commitments and priorities of the PRA relevant resources. The draft Transfer Statement must also be fully verified, to the satisfaction of the board, which process may be expected to take up to 6 weeks.
- 4.101 The Fees Rules provide that a further fee is payable by the society each time it submits a revised draft Transfer Statement to the PRA for approval. However, the PRA may waive or reduce the additional fee where it is satisfied that the revisions to the original, or previous, draft are not substantial.
- 4.102 When the society has settled on the final draft of a Transfer Statement which the PRA is minded to approve, the society should submit two authenticated copies of the final draft Transfer Statement to the PRA with the following documents
- a. a certified copy of the Transfer Agreement made between the society and the successor company;
  - b. the Memorandum and articles of association of the successor company;
  - c. a checklist of the information required to be included in the Transfer Statement pursuant to the Transfer Regulations;
  - d. certified copy of an opinion from the society's auditors pursuant to paragraph 17 of Part I of Schedule 1 to the Transfer Regulations;
  - e. certified copies of any other experts' reports or opinions which appear or are referred to in the Transfer Statement;
  - f. certified copy of an opinion from the successor company's auditors pursuant to paragraph 17 of Part I of Schedule 1 to the Transfer Regulations;
  - g. statutory accounts of the society and its connected undertakings for the previous 3 financial years, together with a reconciliation between those accounts and the figures appearing in the Transfer Statement;
  - h. in the case of an existing company, consolidated statutory accounts of the company/group for the previous 3 financial years, together with a reconciliation between those accounts and the figures appearing in the Transfer Statement;
  - i. certified copy of a letter of consent from the society's auditors relating to the issue of the Transfer Statement;
  - j. in the case of an existing company, certified copy of a letter of consent from the successor company's auditors relating to the issue of the Transfer Statement;
  - k. certified copy of a letter of consent from the Banking Regulator relating to the issue of the Transfer Statement with the inclusion of a statement as to the willingness of the Banking Regulator to authorise or, as the case may be, to continue to authorise the successor company on terms which will enable it to carry on the business it will have as a result of the transfer;
  - l. certified copies of letters of consent from any other experts relating to the issue of the Transfer Statement with the inclusion of any reports or opinions referred to in paragraph 4.102 (e);
  - m. certified copies of responsibility letters signed by the directors of the society (see paragraph 4.96);
  - n. certified copies of responsibility letters signed by the directors of the





- successor company (see paragraph 4.96);
- o. certified copies of the minutes of the boards of the society and the successor company approving the Transfer Statement, the Transfer Agreement and related documents and approving the release of the responsibility letters mentioned in paragraphs 4.102 m. and 4.102 n. (respectively) to the PRA;
- p. an assurance from the directors of the society concerning the society's register of members and its systems (see paragraph 4.102);
- q. a declaration by the directors of the society, and a similar declaration (as appropriate) by the directors of the successor company, in accordance with the declaration in Appendix 1.
- 4.103 The PRA's statement of approval of the Transfer Statement will be given as is set out in Appendix 1. The PRA's approval of the Transfer Statement will be confirmed by returning to the society one authenticated copy of the Transfer Statement with the PRA's certificate of approval signed by an authorised signatory for the PRA. The society will be asked to give 50 copies of the printed Transfer Document and Transfer Summary, if any, to the PRA when they are available. There is no statutory requirement for copies of the Transfer Statement and Transfer Summary to be placed on the public file of a society but, because they are both public documents, the PRA will arrange for copies of the Transfer Document and Transfer Statement, if printed separately, to be placed on the public file.
- 4.104 If a public announcement of the transfer proposal is not to be made until after the PRA has approved the Transfer Statement, or until the Transfer Document is sent to the society's members, the Document and Statement will not be placed on the public file until after the announcement. None of the other documents referred to in paragraph 4.102 above will be placed on the public file.
- 4.105 The number of copies of the Transfer Statement to be printed will, of course, depend upon whether a society intends to distribute a Transfer Summary to its members with the notice of the general meeting. In that case, the society must make its own judgement about the number of copies of the full Transfer Statement to be printed, bearing in mind the requirements of paragraph 4(2) of Schedule 17 that sufficient copies must be available at every office or branch of the society and for despatch by mail.
- A Note on Style**
- 4.106 A Transfer Document is bound to be lengthy and somewhat complex. It has to contain a lot of information, but its complexity will depend to a large extent on the terms of the transfer, particularly the transfer distribution scheme, proposed by the board. Bearing in mind that the purpose of the Transfer Statement is to provide information to the generality of members, it should be written in a clear and concise style and, so far as possible, in plain English. The PRA expects that, because the statutory Transfer Statement is largely concerned with matters of fact, those matters are presented clearly and unambiguously.
- 4.107 To the extent that it is necessary to include statements of the opinion or belief of the board, those statements should be clearly identified as such in the Transfer Statement. The board's views on the fairness and merits of the proposed transfer and its terms will form a separate part of the Transfer Document, as discussed in paragraph 4.95.
- 4.108 Appendix 1 suggests a structure for the Transfer Document which is designed to present its readers with a clear and logical sequence of topics. The PRA suggests that one of the main tasks of the society's project manager (see paragraph 4.34) should be to ensure that the Transfer Document is drafted in a clear and concise style. This will be a great help in achieving the PRA



approval of the Transfer Statement, and the board's verification of the whole Transfer Document, without undue difficulty and within a reasonable timescale.

## General Meetings and Resolutions

### Resolutions and Voting Majorities

4.109 This section describes the requirements of the 1986 Act concerning members' entitlement to vote, the register of members and the sending of notices of meetings. It also discusses general meeting arrangements, the resolutions and majorities required and the counting of votes.

4.110 The directors of a society must satisfy themselves that they observe the general law on meetings, the relevant provisions of the 1986 Act and the society's own Rules. The 1986 Act provides that a transfer must be approved by the requisite Transfer Resolutions in accordance with paragraph 30 of Schedule 2 (Section 97(4)(c)) as follows:

a. a borrowing members' resolution passed on a poll by a simple majority of borrowing members qualified to vote and voting (see paragraph 29(1) of Schedule 2 for the definition of a borrowing members' resolution); and

b. a shareholding members' resolution (see definition in paragraph 27A of Schedule 2) passed on a poll by a majority of at least 75% of shareholders qualified to vote and voting, and on which:

i. in the case of a conversion, not less than 50% of shareholders qualified to vote on a shareholding members' resolution voted; or

(ii) in the case of a takeover, not less than 50% of shareholders qualified to vote on a shareholding members' resolution (or shareholders so eligible who held not less than 90% of the total share balances held on the voting date by all shareholders qualified to vote) voted in favour;

provided that, in each case, notice has been duly given that the resolution is to be moved as a shareholding members' resolution or a borrowing members' resolution, as the case may be, and, in the case of the shareholding members' resolution, that the resolution will not be effective unless it satisfies the requirements specified in 3.5.1 (2) A member may vote either in person at the meeting or by appointing a proxy, and paragraphs 33(1) and 33A of Schedule 2 provides that the voting on Transfer Resolutions may not be conducted by postal ballot or by electronic ballot.

4.111 Section 99(2) of the 1986 Act provides (see paragraph 4.79) that, where a society proposes to pay compensation to directors or other officers for loss of office or diminution of emoluments, attributable to the transfer, such compensation must be approved by a special resolution of the society's members; that is, a resolution passed by a majority of at least 75% of members (both shareholding and borrowing members together) qualified to vote and voting (paragraph 27 of Schedule 2 to the 1986 Act).

4.112 This resolution is separate from the Transfer Resolutions required to approve the other terms of transfer. The Treasury has not made regulations under Section 99(3) of the 1986 Act to set limits below which compensation may be paid without the authority of a special resolution. Therefore, in every case where compensation is proposed, the members must vote on the proposal as a separate issue from whether they approve the proposed transfer itself. "Other officers" include, in addition to the Chief Executive and Secretary, any persons who exercise managerial functions under the immediate authority of a director or the Chief Executive of a society (see "manager" and "officer" in Section 119 of the 1986 Act).



4.113 As is described in paragraphs 4.82 and 4.83, if the terms of a transfer include provision for increased emoluments of directors or other officers in consequence of the transfer, an ordinary resolution approving any such provision must be put before a meeting of the society. An ordinary resolution is passed by a simple majority of members (both shareholding and borrowing members voting together) qualified to vote and voting. However, it is not required that the resolution must be put to the same meeting as the Transfer Resolutions, neither is approval of the ordinary resolution required to authorise such increased emoluments which, as terms of the transfer, are authorised by the passage of the Transfer Resolutions. The purpose of Section 99A of the 1986 Act is to give the members an opportunity to express their views on these matters separately from their decision on whether or not to approve the transfer and its terms.

#### Notice of the Meeting

4.114 Paragraph 22 of Schedule 2 to the 1986 Act requires that notice of a meeting shall be given to every member of a society who would be eligible to vote at the meeting. The notice is also to be given to every member who will attain the age of 18 years on or before the date of the meeting, and to every person who becomes a shareholding or borrowing member of the society after the date of the notice but before the date specified by the society as the final date for the receipt of proxy voting forms. Note also that the Transfer Statement or the Transfer Summary, as the case may be, must also be sent to every member entitled to notice of the meeting (paragraphs 2 and 4(1) of Schedule 17 to the 1986 Act).

#### Entitlement to Vote

4.115 Paragraph 5 of Schedule 2 to the 1986 Act provides that no person may be a member of a building society unless he or she is a shareholding member or a borrowing member. A shareholding member is a person who holds a share in the society (that is, an investment in a share account or CCDS, PPDS or

PIBS). A borrowing member is a person who is indebted to the society in respect of a loan fully secured on land.

However, the Rules may provide that borrowing membership is conferred by a loan substantially secured on land, or shall cease if the loan is foreclosed or the land is taken into possession by the society. A minor (that is a person under 18 years of age) may be a member, but may not vote on any resolution.

4.116 The mandatory provisions of Schedule 2 to the 1986 Act concerning a member's entitlement to vote on a resolution, which must be reflected in societies' Rules, are that the member must be a member on the voting date, must have been a member at the end of the last financial year before the voting date (paragraph 23(1) of Schedule 2) and must have attained the age of 18 years (paragraphs 5(3) and 34(2) of Schedule 2) on or before the date of the meeting. So far as borrowing members are concerned, the member is not entitled to vote in that capacity if his indebtedness to the society at any relevant time is less than £100 (paragraphs 29(2) and 36 of Schedule 2).

4.117 However, Schedule 2 specifies the following further provisions, some, none or all of which may be included in a society's Rules with respect to the entitlement of shareholding members to vote on any resolution; a person must (see Schedule 2 paragraphs 23(3) to (5) and 36):

a. have a qualifying shareholding (which must not be set higher than £100), in one or more share accounts or CCDS, PPDS or PIBS, on the "qualifying shareholding date";

b. hold shares on the voting date; and

c. have held shares continuously between those two dates.

4.118 The "qualifying shareholding date" is either: the last day of the financial year preceding the voting date; or, if the voting date falls during that part of a financial year which follows the



conclusion of the society's AGM commenced in that year, the first day of the period beginning 56 days before the date of the meeting. Therefore, if a society's Rules, following the BSA Model Rules (Sixth Edition), include the provisions concerning shareholding and continuity of membership, described in paragraph 4.117, and if the voting date is later than the AGM in that year, a person to be entitled to vote on a shareholding members' resolution must:

- a. have been a shareholding member on the last day of the previous financial year;
- b. have held shares to the value of at least £100 on the day 56 days before the date of the meeting;
- c. have held shares continuously from the 56th day through to the voting date; and
- d. hold shares on the voting date.

But note that there is no requirement for continuity of shareholding between 4.118 a. and b. (In contrast, in the case of an ordinary or special resolution, membership at 4.118 a. may be satisfied by either borrowing or shareholding membership provided the shareholding member satisfies the other conditions of b. to d. in order to vote in his or her capacity as a shareholder.) A person cannot meet a requirement for "holding shares" on a given date, or during a given period, by relying on his holding of a share account with an overdrawn balance; and a person cannot meet a requirement for being a "member" on a given date (for example, at 4.118 a) by relying on his holding of such a share account.

- 4.119 The mandatory provisions of Schedule 2 concerning entitlement to vote on a borrowing members' resolution are, as noted above, that the member must have been, and be, indebted to the society for at least £100 (whether on one or more accounts) at the end of the last financial year before the voting date, and on the voting date, in respect of an advance fully secured (or, if the Rules

permit, substantially secured) on land (paragraphs 5(2), 23(1), 29(2) and 36 of Schedule 2) and have attained the age of 18 years by the date of the meeting (paragraphs 5(3) and 34(2) of Schedule 2). There is however no dispensation in the 1986 Act for the Rules to reduce the qualifying amount below £100, nor to provide for a continuity of membership qualification.

- 4.120 Schedule 2 makes provision in respect of joint shareholders (paragraph 7) and joint borrowers (paragraph 8). The only person entitled to exercise the right to vote on behalf of the joint shareholders or joint borrowers is the one who is named first in the records of the society, described respectively as the "representative joint holder" or the "representative joint borrower".
- 4.121 A member may vote once only on any resolution, irrespective of the number of accounts he or she may hold. The amount of the balance(s) held on account(s) is not material, except to qualify to vote - see paragraphs 3.109 to 3.112. Thus, a member with several share accounts and/or several mortgage accounts, whether as sole and/or representative joint holder, may vote once only on any resolution.
- 4.122 When the membership votes as a whole on an ordinary or a special resolution, each member may vote only once, whether he or she is a shareholding or a borrowing member or both. Where shareholding members and borrowing members vote separately, as on the Transfer Resolutions, members entitled to vote may vote only once, if a shareholding member, on the shareholding members' resolution and once, if a borrowing member, on the borrowing members' resolution. A person entitled to vote both as a shareholding member and as a borrowing member may of course, vote once on each resolution.
- 4.123 The "voting date" is defined by paragraph 23(6) of Schedule 2 as, for this purpose, either:



a. for members who appoint a proxy, the last date specified by the society for the receipt of proxy voting forms, which may not be more than 7 days before the date of the meeting (paragraph 24(6) of Schedule 2). A proxy vote remains valid if the member ceases to be a member after the proxy voting date but before the date of the meeting (paragraph 24(2) of Schedule 2); or

b. for all other members, the date of the meeting.

4.124 The information given in the foregoing paragraphs of this section is intended to give a general description of the provisions of the 1986 Act and of the Rules suggested by the BSA Model Rules. Societies are advised to satisfy themselves that they observe the specific provisions of the 1986 Act and of their own Rules.

#### Register of Members

4.125 Every society is required to maintain a register of the names and addresses of its members and whether each member is a shareholding member or a borrowing member or both (Schedule 2, paragraph 13). The register should, so far as possible, be "de-duplicated"; that is, multiple account holders should be identified and their names recorded once only in the register.

4.126 A society's systems must also be capable of recognising those members who are eligible to vote by, for example, aggregating share account balances of multiple account holders to check that they have the requisite qualifying shareholding, by checking members' continuity of shareholding, and by identifying minors (see paragraphs 3.108, 3.109 and 3.110). This information is required to ensure that the notice of the meeting is sent to all the members entitled to receive it, and that the scrutineers have adequate systems to validate the votes cast on the Transfer Resolutions.

4.127 The directors of a society contemplating a transfer must satisfy themselves, in

consultation with their external auditors, or other advisers, that the society's systems are capable of delivering the information described above. The PRA will require an assurance on this point when the society applies for approval of the Transfer Statement. One of the criteria which the PRA has to consider at the confirmation stage is whether some relevant requirement of the 1986 Act or the Rules was not fulfilled (see section 'Confirmation').

4.128 The problem of avoiding duplication in the register of members is significant for most societies of any size. Societies generally now seek to establish, when new accounts are opened, whether or not the applicant is an existing member and, if so, which accounts are relevant to voting and other membership rights. The task of identifying multiple account holders is complicated by confidentiality requirements. For example, if two accounts are held by a Mr A Smith and a Dr A Smith, both at the same address, the society cannot know (in the absence of other information such as date of birth) whether the two accounts belong to the same person, one opened before and one after he qualified, or by the doctor and his son.

4.129 A letter of enquiry to one asking about both accounts would risk breaching customer confidentiality. If it is the same person, there is a risk that he will be given the opportunity to vote twice or, if neither account holds more than £100 but they aggregate above that qualifying amount, be denied a vote to which he is entitled. It is good practice for a society, when it has announced its intention to transfer its business, to write to all its members individually setting out the information about them which it holds on its records, inviting them to confirm that the information is correct and to say whether they have received more than one such letter as a shareholder or as a borrower.

4.130 Where a society identifies a number of accounts which appear to be held by a single member, but it cannot be sure, then it must send separate meeting notices in respect of each account which



satisfies the qualifying conditions for entitlement to vote. Where such accounts do not separately entitle the member to vote but would do so if aggregated (by satisfying the £100 minimum shareholding condition) the society may consider it advisable to send separate notices in respect of each account with the warning that, on the information available to it, the society believes that the member is not eligible to vote. However, its systems should identify the possible multiple holding so that, if more than one vote is received in respect of that group of accounts, the scrutineers are alerted to the possibility, and can check the proxy forms for evidence of invalid duplicate votes.

- 4.131 The voter's declaration suggested by the BSA Model Rules, in conformity with paragraph 34 of Schedule 2 to the 1986 Act, provides some protection against votes being cast by minors, but none against duplicate votes. It is, however, the duty of each society to make sure that its register of members is reliable.

#### Notice of Meeting

The statutory requirements concerning notices to members are in paragraph 22 of Schedule 2 to the 1986 Act. Notice of the meeting must be given to each shareholding and borrowing member of the society who would be eligible to vote at the meeting if the meeting were held on the date of the notice (a single date for all notices irrespective of when they are despatched). In addition, notice must also be given to any person who will attain the age of 18 years after the date of the notice but on or before the date of the meeting, and to every person who becomes a shareholding or borrowing member of the society after the date of the notice but before the final date for receipt of proxy voting forms, provided, in each case, that the member will be entitled to vote.

- 4.132 The Transfer Statement or Transfer Summary must be sent in or with the notice to every person entitled to receive it (paragraphs 2 and 4 of Schedule 17 to the 1986 Act). Accidental omission to give notice of a meeting to any person entitled to receive it does not invalidate the proceedings at the meeting. However, "accidental omission" does not

include a systemic failure to send notices (e.g. omitting to send notices to new shareholders or borrowers, or omission of a group or class of members from the mailing list arising from a fault in a computer programme), nor all cases of error by management - see also paragraph 4.153.

- 4.133 The 1986 Act also provides, in paragraph 21 of Schedule 2, for the length of notice to be given to members. The period of notice given must be not less than 21 days or such longer period as the society's Rules prescribe. The precise procedures for sending notices, the way in which the days are to be counted, and presumed receipt of notices duly sent, will normally be set out in the Rules. Particular points to note are:

a. the 21 days' notice expires with the closing date for the receipt of proxy voting forms, not the date of the meeting;

b. if reliance is to be placed on a provision in the Rules that notices can be deemed to be served 24 hours after posting, then first class post or equivalent means of delivery should be used. However, it is advisable to allow a margin of at least an extra day or two, but more if second class post is used;

c. if a society contracts with a commercial mailing firm, it must ensure that the firm is comprehensively instructed about the society's despatch and delivery requirements, and the society should carry out spot checks to satisfy itself that its instructions are being properly carried out. A failure by the contractor may invalidate the meeting, even if the society itself has used its best endeavours to police the operation.

- 4.134 The Transfer Statement or Transfer Summary is required, by paragraph 4(1) of Schedule 17 to the 1986 Act, to be sent "in or with" the notice of the meeting to every member entitled to that notice.



4.135 Notices and Statements or Summaries need not be sent to any member in whose case the society has reason to believe that communications sent to him at his registered address are unlikely to be received by him (paragraph 14 of Schedule 2 to the 1986 Act). In those circumstances, a society is required to place notices of the meeting prominently in every branch office, or to place advertisements in newspapers circulating in the areas in which the society's members live. Such notices or advertisements must be published at least 21 days before the date of the meeting, and must state where members can obtain copies of the Transfer Summary, the Transfer Statement, the Transfer Resolutions and proxy voting forms (paragraph 35 of Schedule 2 to the 1986 Act).

4.136 It should be noted, however, that a member's "registered address" may not be the address shown in the society's register of members but a different address to which the member has requested that communications from the society be sent (paragraph 13(4) of Schedule 2 to the 1986 Act).

#### Conduct of the Meeting

4.138 The meeting should be held at a time and place considered by the board to be most convenient for the generality of the society's members. This may not necessarily be the same as the traditional time and place for the AGM. In deciding on this, the board should take account of the geographical location of their members, and the probability that an unusually large number of members may wish to attend a meeting to consider a proposed transfer.

4.139 Subject to the society's Rules, its chairman will normally chair the meeting. His function as chairman of the meeting is to ensure that all views may be presented and properly discussed. He is unlikely to be able to fulfil that role if he acts also as chief advocate of proposals which are controversial among members. In such cases it might be appropriate to give to another director the tasks of explaining the board's recommendations and of responding to questions from members.

4.140 A Transfer Resolution cannot be amended at the meeting except in a way which does not change its substance at all. This is because an amendment to such a resolution has to be subject to the same procedure and period of notice to members as the resolution itself. If a board decides, after due notice of such a resolution has been sent to the members, that the resolution should be amended, then it will be necessary to submit the amended resolution, with due notice, to a general meeting at a later date, unless of course there is still time to fulfil the notice requirements.

#### Conduct of the Voting

4.141 The conduct of the voting must not only be fair but also be seen to be fair, otherwise the result may be called into question by representers at the confirmation stage. The votes must be counted by independent scrutineers. The board may ask the scrutineers, in advance of the meeting, for a running tally of the number of votes being cast if it thinks it might properly encourage more members to vote if the response is low. However, to ask the scrutineers how the votes are being cast, before the time comes at the meeting to instruct proxies, carries the risk of accusations, however unfounded they may be, and possible challenge at the confirmation stage on the grounds that the board suppressed proxy votes against the Resolutions, or unduly influenced members to vote in favour.

4.142 A board which asks the scrutineers for a running tally of votes, and which circulates its members with further exhortations to vote, must be prepared to argue its case in the face of such accusations at the confirmation hearing. Any circular to members sent after the Transfer Document was sent to them must, therefore, be very carefully considered.

4.143 Experience has demonstrated the need for societies to take the greatest care to ensure that they comply strictly with the statutory procedural requirements and their own Rules on meetings and resolutions. The person chairing the meeting should ensure that he or she is well briefed and aware of the Rules and the general law relating to procedural resolutions, such as resolutions to adjourn the meeting. The PRA will require a confirmatory report from the scrutineers on the validity of the voting procedures when the



society applies for confirmation (see paragraph 3.143).

4.144 The procedures for the conduct of proxy voting will normally be provided for in the society's Rules, in conformity with paragraphs 24 and 34 of Schedule 2. The 1986 Act requires that every proxy form sent by a society to its members must enable the member to direct the proxy how to vote (paragraph 24(4A)). In addition, to minimise the risk of the society's proxy voting procedures being misunderstood, the PRA recommends that the design of the proxy form is carefully considered (preferably a self-contained form clearly to be returned intact) and that it should include:

- a. adequate space to insert the name of a proxy other than the chairman of the meeting, and a statement (which must also appear in the notice of the meeting) that the proxy appointed need not be a member of the society (a reminder that the voting member's own name should not be inserted will also be helpful);
- b. an explicit statement that if the member does not instruct his proxy to vote for or against the resolution, then the proxy will cast the vote, or abstain, as he thinks fit;
- c. the declaration, as provided by the Rules, in accordance with paragraph 34 of Schedule 2;
- d. full recital of the text of the shareholding members' or borrowing members' resolution(s) or, if this is not practicable (e.g. because of space restrictions), a clear indication that the full text may be found in the notice of the meeting;
- e. instructions as to the return of completed proxy forms, including the last effective date for receipt by the society or by the scrutineers. A pre-addressed and pre-paid envelope or other sealed means of return should be provided.

4.145 The 1986 Act does not require societies to send proxy voting forms to members with notices of meetings. However, the PRA believes that, on a matter as important as a transfer, and bearing in mind the 50% turnout (conversion) and 50% support (takeover) requirements on the shareholding members' resolutions, societies would be well advised to

send a proxy voting form to members with the meeting notice. If a society decides, nevertheless, not to send proxy forms to members entitled to vote, then it should make clear to the members that proxy voting forms can be obtained on demand from its branches and/or by application to a central point.

4.146 The arrangements for the collection of the proxy forms should be such as to secure confidentiality and to avoid the risk of loss, whether accidental or deliberate. The Rules may provide for return of proxy forms to the scrutineers either directly or to the society's principal office. Where proxy forms are returned to the society's offices, the PRA recommends that the procedures should incorporate the following features:

- a. the proxy form should be enveloped or otherwise sealed so that the members' voting instructions are concealed;
- b. the envelope provided should be clearly marked so that the society can readily identify and separate it from other mail without the envelope being opened;
- c. staff responsible for receiving and sorting mail should be given specific instructions about the handling of proxy forms and the overriding importance of security;
- d. secure storage of proxy forms should be provided up to the point at which they are handed over to the scrutineers;
- e. equivalent handling and security procedures should be applied to proxy forms handed in at branches.

4.147 The PRA expects proxy voting forms for shareholders and borrowers to be easily distinguishable, perhaps by colour coding, both as an aid to members who may be entitled to vote in each capacity, and as an aid to the scrutineers counting the votes.

4.148 Members may attend the meeting and vote in person. There must, therefore, be satisfactory systems in place in accordance with the Rules to identify and cancel any proxy votes they may previously have returned.

#### Scrutineers' Report

4.149 The scrutineers are responsible for checking the validity of votes cast in person





and by proxy. The scrutineers must be independent of the society and not have a direct interest in the result of the voting. For example, they should not be officers expecting to receive compensation or appointments under the terms of the transfer. It will usually be appropriate to appoint the society's auditors, and it is desirable that they should be appointed not just for the arithmetical count of votes but also to supervise the voting process as a whole so that they are in a position to confirm, after the vote, that all the requirements of the 1986 Act and the society's Rules have been complied with. This would include:

- a. determining and validating member mailing lists for notices of the meeting and Transfer Statements or Transfer Summaries and for Trustee Account Holders (see paragraphs 4.63 and 4.114);
- b. despatch procedures;
- c. timing of notices and despatch of documents;
- d. form and content of proxy voting forms;
- e. receipt and custody of completed proxy voting forms;
- f. validation of completed proxy voting forms to establish that members are qualified to vote and that forms are properly completed;
- g. identification and validation of members attending and voting at the general meeting;
- h. voting procedures at the meeting including casting of proxy votes, count of votes cast in person and aggregation of proxy and personal votes cast on the Transfer Resolutions, and on any special resolution required to authorise the payment of compensation to directors or other officers;
- i. voting procedures at the meeting, or at another meeting, as the case may be, and the count of votes on any ordinary resolution to approved increased emoluments of directors or other officers (if required).

4.150 To fulfil the duties outlined above, the PRA expects that the scrutineers would need to:

- a. examine the systems and procedures to be employed by the society, before they are implemented, to ensure that they are satisfactory;

- b. carry out such checks and tests as they consider necessary during the operation of the procedures as will enable them to be satisfied that the specified procedures are being carried out in practice;
- c. provide that where validation functions are carried out by the society's staff this is done under the direction and supervision of the scrutineers;
- d. direct and supervise the count of the votes cast both by proxy and personally at the meeting.

4.151 Validation checks during the counting of votes may be expected to include the following:

- a. only proxy forms which comply with the 1986 Act and the society's Rules have been used;
- b. the member is eligible to vote under the 1986 Act and under the society's Rules (NB a proxy vote may still be valid even though the member has ceased to be entitled to attend and vote at the meeting after the closing date for receipt of proxies - see paragraph 4.123 a.);
- c. only one proxy form per member eligible to vote is included in the count (separate forms may be sent to and returned by a person eligible to vote on both the shareholding members' resolution and the borrowing members' resolution);
- d. minors are excluded and that there is an explicit confirmation by each member voting by proxy that he is aged 18 or over;
- (5) the proxy form is completed and signed and is otherwise valid (where a proxy form lacks a signature but is otherwise valid, it is usual, if time permits, for the scrutineers to return the form to the member for signature and return in a pre-paid envelope).

4.152 The scrutineers' initial report will be made to the society at the meeting (which may be adjourned for this purpose). The PRA will require, in support of a society's application for confirmation under Sections 97(4)(d) and 98 of the 1986 Act, a report from the scrutineers on the result of the vote on each Resolution (distinguishing between votes cast in person and by proxy), the total number of members eligible to vote (and the proportion of that number that the votes cast represent), the



numbers of invalid votes cast and also confirmation that, in the opinion of the scrutineers, the arrangements for the conduct of the voting were such as to ensure that:

- a. notices of the meeting and Transfer Statements or Transfer Summaries were sent to all those entitled to receive them, in accordance with the 1986 Act and the Rules of the society having regard, inter alia, to the matters referred to in this chapter;
- b. the periods of notice given complied with the requirements of the 1986 Act and of the society's Rules, taking into consideration established conventions for the counting of days;
- c. there were satisfactory procedures to ensure the security of proxy voting forms and to minimise the risk of loss or unauthorised access;
- d. there were satisfactory procedures to ensure that the count of votes cast personally at the meeting included only votes cast by members eligible to vote and who had not mandated, or had withdrawn, a proxy vote.

4.153 In relation to the notice of the meeting, the scrutineers' report may properly have regard to the provision of paragraph 22(3) of Schedule 2 to the 1986 Act that "accidental omission to give notice of a meeting to, or non-receipt of notice of a meeting by, any person entitled to receive notice of the meeting does not invalidate the proceedings at that meeting". It should be noted, however, that there is authority to the effect that "accidental" and "non-receipt" would not cover all cases of "error" on the part of the society, for example an erroneous decision of management not to send notices to particular persons or groups of persons.

4.154 The PRA expect the scrutineers' report to comment upon any procedural difficulties encountered and, if the numbers of invalid votes appear to be significant, give an analysis of the reasons why votes were found to be invalid (see also section 'Confirmation').

### Confirmation

4.155 No transfer can take effect until it has been confirmed by the PRA. This section first describes the form of application and public notice required. It then explains the PRA view of how the statutory Confirmation Criteria

should be interpreted. Finally, it gives guidance on the procedure customarily followed by the PRA when considering confirmation applications and hearing representations. Sections 97(4)(d) and 98(2) of, together with Part II of Schedule 17 to the 1986 Act, provide that when the necessary Transfer Resolutions have been passed the society must apply to the PRA for confirmation of the transfer in such manner as the PRA may direct.

4.156 The society is also required, by paragraph 7 of Schedule 17, to publish notices of its application in one or more of the London, Edinburgh and Belfast Gazettes as the PRA directs and, if it so directs, in one or more newspapers. The choice of official Gazettes and national or local newspapers will, of course, have regard to the area in which the society's members live.

4.157 The application should specify the date on which the transfer is intended to take effect and should be accompanied by two authenticated copies of the Transfer Agreement. The scrutineers' report described in section 'General Meetings and Resolutions', and a certified copy of the minutes of the general meeting at which the Transfer Resolutions were moved, together with a transcript of the meeting, must also be enclosed with the application, together with 10 copies each of the Transfer Document and the Transfer Summary (if sent), and copies of all other documents sent to members and any advertising material in connection with the proposed transfer. If a Transfer Summary was sent, the application should also be accompanied by a checklist of the information prescribed by Schedule 2 to the Transfer Regulations showing where each item may be found in the Transfer Summary.

4.158 A pro forma public notice of application, and pro forma letter of application are at Appendix 2. The appropriate fee is payable with the application, and a further fee is payable by the society if there is an oral hearing of the application, as prescribed by the Fees Rules.

### The Confirmation Criteria: Statutory Provisions

4.159 Section 98(2) and (3) of the 1986 Act provides that the PRA must confirm a proposed transfer unless it considers that any



one or more of the following four Confirmation Criteria apply:

- a. some information material to the members' decision about the transfer was not made available to all the members eligible to vote; or
- b. the vote on any resolution approving the transfer does not represent the views of the members eligible to vote; or
- c. there is a substantial risk that the successor will not have -
  - i. such permission under Part 4A of FSMA or
  - ii. such permission under paragraph 15 of Schedule 3 to FSMA (as a result of qualifying for authorisation under paragraph 12 of that Schedule), as will enable it to carry on the business which it will have as a result of the transfer without being taken (by virtue of section 20 of FSMA) to have contravened a requirement imposed on it by the PRA under FSMA; or
- d. some relevant requirement of the 1986 Act or of the Rules of the society was not fulfilled.

4.160 Section 98(4) of the 1986 Act then provides that the PRA shall not be precluded from confirming a transfer of business by virtue only of the non-fulfilment of some relevant requirement of the 1986 Act or the Rules (the Fourth Criterion in paragraph 4.159 d.) if it appears to the PRA that the failure could not have been material to the members' decision about the transfer, and the PRA gives a direction under that subsection that the failure is to be disregarded. Section 98(7) then provides that a failure to comply with a relevant requirement of the 1986 Act or the Rules shall not invalidate a transfer, once confirmed.

4.161 Where the PRA would be precluded from confirming a transfer by reason of any of the defects specified in the Confirmation Criteria, Section 98(5) and (6) of the 1986 Act provides that it may direct a society to remedy the defects. A direction under Section 98(5) may, amongst other things, require a society to:

- a. call a further meeting; for example, to vote again in the light of a revised Transfer Statement containing material information previously omitted or after correction of defects in the systems for sending meeting notices

- and Transfer Statements or Transfer Summaries and validation of votes;
- b. secure the variation of the Transfer Agreement; or
- c. secure the alteration of the protective provisions in the articles of association of a specially formed successor company.

4.162 If the PRA is then satisfied, having considered evidence furnished by the society, that the defects have been substantially remedied, it must confirm the transfer. If not, then confirmation must be refused. The PRA is required to consult the FCA before confirming a transfer.

#### Scope of the PRA's Powers

4.163 The PRA powers in connection with applications for confirmation of a transfer are confined to considerations of whether, in the light of the facts, any of the Confirmation Criteria apply. It is not for the PRA to consider, or make judgements about, the merits of a proposed transfer or the fairness of its terms; these matters are first for the board of a society, and then for its members, to decide. Once the members have approved the transfer and its terms, the PRA has no powers to require a society to make any changes to those terms, although it may direct a society to remedy any failure to comply with a relevant requirement of the 1986 Act as a condition of confirmation.

4.164 The PRA has no general power to determine disputes between a society and its members, nor to seek to enforce other legislation or the general law. Disputes concerning services provided by societies in the ordinary course of their business are generally a matter, in the first instance, for a society's internal complaints procedure. They may also fall within the jurisdiction of the Financial Services Ombudsman Scheme. Disputes between a building society and a member of the society, in his or her capacity as a member, in respect of any rights or obligations arising from the Rules of the society or the provisions of the 1986 Act, fall within the jurisdiction of the High Court or, in Scotland, the Court of Session (Section 85 of and Schedule 14 to the 1986 Act).

4.165 However, the FCA does have power, on the written application of certain members, to direct that the member has the right to obtain



names and addresses from the society's register of members. Before it gives such a direction, the FCA is required to be satisfied that the member requires that right for the purpose of communicating with other members of the society on a subject relating to its affairs, and must have regard to the interests of the members as a whole and to all the other circumstances (paragraph 15 of Schedule 2 to the 1986 Act). A fee is payable by the applicant. Chapter 1A of this Supervisory Statement gives guidance on applications for access to the register of members.

#### Purpose of Confirmation

4.166 The purpose of the confirmation process is to enable:

- a. interested parties to make representations with regard to the Confirmation Criteria;
- b. the society to respond to those representations;
- c. the PRA to make such enquiry as it considers necessary to reach informed conclusions on each of the Confirmation Criteria.

4.167 The PRA, in reaching its view on each of the Confirmation Criteria, has not only to assess the points made to it in representations, and the society's responses, but also to make such further enquiries as it considers necessary. In deciding how far it should pursue such enquiries, the PRA has to have regard to the role and effect of confirmation, and to the mischiefs which it is intended to prevent.

4.168 The PRA considers that one role of confirmation is to provide a protection to members against the provision to them by the society of information which is inadequate, obscure or misleading, and against voting irregularities: in other words to ensure that the vote represents the informed decision of the members. The PRA would hope that this safeguard would work in the majority of cases by causing the board of a society to take care during the preparation of the Transfer Statement not to put confirmation at risk on this account; otherwise the PRA might find that it had to withhold confirmation at the last stage. In considering the First Criterion, the PRA will have regard to the totality of the information provided to the members by the

board of a society, and not exclusively to the Transfer Statement and Transfer Summary.

4.169 The task of the PRA is accordingly:

- a. to reach a considered view on each of the Confirmation Criteria;
- b. if that view is that none applies, to confirm;
- c. if one or more of the First Three Criteria apply, to direct the appropriate remedial action, or to refuse confirmation;
- d. if the Fourth Criterion applies, to consider whether it is appropriate to direct that failure be disregarded; if not, to direct the appropriate remedial action or to refuse confirmation.

4.170 In considering the Confirmation Criteria, the PRA may well have to look again at the Transfer Statement, or at issues which were considered in connection with approving that Statement. It may also then have to consider the adequacy of the Transfer Summary. In doing so, it has a duty to consider information and arguments put to it by representers and by the society, which of their nature were not available earlier, as well as those arising from its own consideration of the Criteria.

4.171 The PRA would clearly only change the view reached at the time of approval of the Transfer Statement if there were good reason to do so. But it is under a duty to examine the Statement and connected issues at the time of confirmation in the light of any new information and arguments which become available. Accordingly, the PRA cannot be bound at the confirmation stage to the view that was taken at the earlier stage as to whether further factual information should be included in the Transfer Statement or as to the accuracy of its contents or the view taken as to the legality of the scheme.

4.172 The task of considering each of the Confirmation Criteria would still be necessary even if there were no representations. Without such enquiry and consideration the confirmation process would not properly be carried out. The PRA view of how the Confirmation Criteria should be interpreted and applied is given in the following paragraphs.

#### The First Criterion

4.173 This criterion requires the PRA to consider whether some material information



was not made available to the members. The PRA own view, in which it concurs with the view previously adopted by the Commission in its confirmation decisions, can be summarised as follows:

a. the words "made available to all the members eligible to vote" mean that the criterion is mainly, if not exclusively, directed to the information provided by a society to the generality of its members;

b. the extent of "information ... not made available" can reasonably be assessed by considering how far the totality of information made available falls short of what might be expected to be put to its members by a financial institution of standing and repute seeking to put sufficient information and a fair and balanced assessment of it, and the board's conclusions, to the members to enable them to take an informed decision;

c. the words "material to the members' decision" require the PRA then to focus on whether it is within the bounds of reasonable possibility that the members' decision would have been different had any deficiency in the information been made good, i.e. whether it could have changed the decisions on voting of sufficient members to lead to a different conclusion. If it is within the bounds of reasonable possibility that the deficiency might have changed the outcome, it is not for the PRA to determine whether it would actually have done so - it should put the decision back to the members. This test requires the PRA to take account both of the size of the vote and of the size of the majority within it;

d. the relevance of a particular piece of information to an investor and to a borrower may well be different. Accordingly, it is necessary to consider materiality separately in relation to the shareholding members' resolution and the borrowing members' resolution.

4.174 The PRA's approach to determining whether this criterion is met is accordingly:

a. to review the material put to members, in the light of the representations made and the society's responses, but also taking points of its own accord;

b. to consider, on the basis of that review, what information relevant to the decision of shareholders, or of borrowers, or both, might reasonably have been expected to be put to members by the board of a society of repute considering its fiduciary duty, and the extent to which (if at all) the information actually put falls short of that;

c. to consider separately in relation to the shareholding members' resolution and in relation to the borrowing members' resolution, whether any deficiency so identified was sufficient to amount to "information material to the members' decision".

#### The Second Criterion

4.175 This criterion requires the PRA to consider whether the votes on the Transfer Resolutions do not represent the views of the members. The main mischief to which it appears to be directed is a resolution approved by a small and unrepresentative vote.

#### The Third Criterion

4.176 This criterion is concerned with a matter of fact, to be established by reference to the Banking Regulator if a different body.

#### The Fourth Criterion

4.177 This criterion requires the PRA to consider whether the relevant requirements of the 1986 Act and the Rules have been fulfilled. The phrase "relevant requirement of this Act or the rules of the society" appears explicitly three times in Section 98 of the 1986 Act:

a. sub-section (3)(d) in the specification of this criterion;

b. sub-section (4) which gives the PRA power to disregard certain non-fulfilments;

c. sub-section (7) which provides that a failure to meet such a relevant requirement shall not invalidate a transfer of business, although such failure by a society without a reasonable excuse is a criminal offence.

4.178 The interpretation of the phrase is also directly relevant to sub-section (5) - the power of the PRA to give the society a direction to remedy defects specified in paragraphs (a) to (d) of sub-section (3).

4.179 Sub-section (8) defines "relevant requirement" as:



"a requirement of the applicable provisions of this Act or of any rules prescribing the procedure to be followed by the society in approving the transfer and its terms."

Section 97(2) in turn defines "the applicable provisions" other than Section 97 as:

"section 98, section 99, section 99A, section 100, section 101, section 102, sections 102B, 102C and 102D, paragraph 30 of Schedule 2 and Schedule 17."

4.180 Section 102A (joint account holders) of the 1986 Act is not an applicable provision and, thus, not a relevant requirement. The PRA considers that sub-section (8) of Section 98 should be read naturally. The words "prescribing the procedure to be followed by the society in approving the transfer and its terms" apply only to the Rules, in order to specify which of the Rules of the society are "relevant requirements". They do not apply as a matter of normal construction of the sentence to the "applicable provisions of this Act"; nor is it necessary that they should do so, since those provisions are specified in Section 97(2).

4.181 In the PRA's view, the above interpretation of "relevant requirement of the 1986 Act" stems from the natural construction of Sections 98(8) and 97(2) which, in turn, is necessary to give effect to Parliament's intentions for Section 98(5), (6) and (7). The PRA recognises that this interpretation does not quite fit Section 98(4). The test which the PRA has to apply in the case of sub-section (4) to a non-fulfilment of a relevant requirement of the 1986 Act is: "if it appears to the PRA that it could not have been material to the members' decision about the transfer".

4.182 That test is designed to relate to a failure to meet a procedural requirement or to some other failure which might have an effect on the voting. The wording of Section 98 is such that no construction of the phrase is entirely free from difficulty. The PRA view is that the wording, and the intentions of Parliament, are best met by following the natural construction of sub-section (8), as a result applying a wide interpretation in sub-sections (3), (5) and (7), and implicitly in (6), but only considering that it is open to the PRA to make a direction under sub-section (4) in relation to non-fulfilment of a procedural

requirement or other failure to which the test in that sub-section is apposite.

4.183 The PRA accordingly considers that the relevant requirements are those in:

- a. sections 97 to 102, and 102B to D of, together with paragraph 30 of Schedule 2 to and Schedule 17 to the 1986 Act;
- b. the Transfer Regulations; and
- c. the Rules which prescribe the procedure to be followed; that is, in particular, the Rules concerning: membership; special meetings; notice of meetings; procedure at meetings; entitlement of members to vote on resolutions; appointment of proxies; and joint shareholders and borrowers.

#### Procedure

4.184 The procedure to be followed in confirmation proceedings is prescribed by Part II of Schedule 17 to the 1986 Act. Any interested party has the right to make written and/or oral representations to the PRA with respect to a society's application for confirmation. Written representations are to be copied to the society, which is to be afforded the opportunity to comment on them orally at the hearing of its application or in writing. (The PRA will in general be prepared to use electronic rather than paper-based communication if requested by the society or a prospective representer and some of the following procedures may have to be adapted accordingly.)

#### Representations

4.185 Persons making representations should state why they claim to be interested parties, for example, their category of membership of the society, and the ground or grounds for their representations by reference to the Confirmation Criteria discussed above. Notice of a person's intention to make oral representations must be in writing.

4.186 Such notices and written representations must reach the PRA at the address, and by the specified date customarily given in the Transfer Document issued to members and subsequently confirmed by notice published in the official Gazettes and newspapers as required by the 1986 Act. Persons who make written representations but subsequently decide also to make oral representations must, nevertheless, give notice of that intention in writing to the PRA by



the same date. Representations received out of time will not be considered unless, exceptionally and at the sole discretion of the PRA, they appear to the PRA to raise matters of substance relevant to the Confirmation Criteria which are not already under consideration.

4.187 Representations or notices to the PRA will fall into one of the following three categories:

- a. written representations only;
- b. written representations with notice of intention to make oral representations;
- c. notice of intention to make oral representations only.

4.188 The PRA will acknowledge the receipt of each representation or notice and will send a copy of the chapter of this Supervisory Statement on confirmation procedures to each representer. It will send copies of all written representations and notices to the society and will afford it an opportunity to comment on the written representations.

4.189 The PRA will consider the written representations in the category set out in paragraph 4.187 a. and the society's responses to them in advance of the date set for hearing oral representations. Copies of the society's comments on representations in the category set out in paragraph 4.187 b. will be sent to those who made the representations so that they may concentrate their oral representations on the points which they consider to remain at issue. A person making written representations who also wishes to see the society's response must, therefore, also give notice of intention to make oral representations.

4.190 The society may, exceptionally, apply to put to the PRA in confidence documents which the society considers to be commercially sensitive: the PRA will decide on the merits of each case whether, and on what terms, to accept them as being confidential. Persons in the category set out in paragraph 4.187 c. will be asked to inform the PRA, in advance of the hearing, of the subject and general grounds of the representations they intend to make, and their responses will be copied to the Society.

4.191 Interested parties may join together in making collective representations and they

may also appoint a person, either one of their number or another, to represent them at the hearing. They should notify the PRA in advance if this is what they intend to do.

#### Conduct of the hearing

4.192 The PRA will usually appoint one or more persons to hear and decide an application on its behalf. In the absence of notices of intention to make oral representations the PRA would expect to decide the application, having regard to the written representations, the society's responses and other information available to it, without the need for a public hearing. If there is a public hearing, an additional fee is payable by the society.

4.193 The PRA will notify the society and those making oral representations of the time and place of the hearing. If there are a significant number of persons wishing to make oral representations, then the hearing may extend beyond one day and may be adjourned from time to time and from place to place. The PRA will try to advise participants of the day when they may expect to make their representations and of when the society's representatives may be expected to respond.

4.194 The PRA expects that hearings will be in public. Members of the general public and the press will be asked to wait outside at the outset of the hearing. The participants will then be asked if any of them has good reason to object to the admission of the general public and the press (such as, for example, the need to refer to personal financial affairs). The PRA may decide that parts of the hearing shall be in private if that appears to it to be desirable. If there are no reasonable objections, the general public and the press will then be admitted, within the limits of the space available. Only the representatives of the society and those who have given due notice of intention to make oral representations may address the PRA.

4.195 The procedure will be informal. While all participants will be invited to speak concisely and to avoid repetition, the PRA will be considerate towards those who are not professionally represented. The panel taking the hearing on behalf of the PRA may question the participants as the hearing proceeds. The sequence of events will be broadly as follows:



- a. any preliminary matters (such as the admission of the public or other procedural questions) will be dealt with;
- b. the chairman of the PRA panel will introduce the proceedings;
- c. the representatives of the society will be invited to present the application for confirmation, including a description of the events at the meeting at which the Transfer Resolutions were put to the members, the voting on the Resolutions, and any other matters which they wish to introduce at that stage;
- d. the other participants will be invited to make their representations; where appropriate the PRA would expect to call them in a list marshalled, so far as possible, by subject matter;
- e. the representatives of the society will be invited to reply to, or comment on, the points made by the other participants;
- f. the other participants will be invited to comment on the society's replies insofar as those replies raised new issues.

4.196 This procedure may be varied according to the circumstances at the hearing, and is intended only as a guide to the probable order of events. The hearing may be adjourned if the PRA considers that necessary to enable facts to be checked or additional information to be obtained.

#### The PRA's decision

4.197 The PRA will not give an oral decision at the end of the hearing, and will reserve its decision to be issued later in writing, setting out its reasons. Copies of the written decision will be sent to the participants, and can be purchased by any other person. The PRA will ask the FCA to place a copy on the public file of the society.

#### Transfers under Direction

4.198 This section describes the PRA's powers to direct a society to transfer its business to a company, and to proceed by board resolution, and the modified transfer procedure consequently prescribed by the 1986 Act. Section 42B of the 1986 Act provides that, if the PRA considers it expedient

to do so to protect the investments of shareholders or depositors, it may direct a society, inter alia, to transfer its business to a company within a specified time (subsection (1)(b)).

4.199 The PRA must consult the FCA before giving a direction under section 42B of the 1986 Act. In such a case, or where the PRA would have directed a transfer, but for the fact that negotiations were already under way, the PRA may also direct that the approval of the transfer shall be by board resolution rather than the Transfer Resolutions. In these circumstances, because neither a Transfer Statement nor Transfer Resolutions are required, the 1986 Act requires the society instead to send to every member entitled to notice of a meeting a statement (referred to below as a "transfer notification statement") before it applies for confirmation of the transfer (paragraphs 9 and 10 of Schedule 8A to the 1986 Act).

4.200 Finally, in these circumstances, the first two Confirmation Criteria concerning information made available to, and the views of, the members (see section 6) are replaced by a single criterion: "the members or a proportion of them would be unreasonably prejudiced by the transfer;" (set out in paragraph 11 of Schedule 8A to the 1986 Act).

4.201 Where a society is proceeding under a Section 42B direction by board resolution, the Transfer Statement is replaced by a transfer notification statement and a general meeting of the society is not required. The contents of the transfer notification statement are prescribed by Schedule 3 to the Transfer Regulations. In brief, the members are to be informed that the statement is issued on the responsibility of the directors of the society and the successor company, and:

- a. that the board, acting under direction of the PRA, has resolved to transfer the business;
- b. of the confirmation procedure, including the last date for receipt by the PRA of written representations and notices of intention to make oral representations and the expected date of the hearing of the society's application;





- c. of the name, address and nature of the successor company, and the proposed vesting date;
- d. of the consequences for the members, including the loss of membership rights in the society, any changes in the terms and conditions of share and mortgage accounts, and deposit protection schemes;
- e. the terms of any distribution of funds or shares in the successor company and of the Statutory Cash Bonus; and
- f. of the interests of the directors and other officers of the society in the transfer, including any compensation or increase in emoluments to which the PRA has given its consent under paragraphs 7 and 8 of Schedule 8A to the 1986 Act.

4.202 The transfer notification statement must have been approved by the PRA before it is sent to the members. Applications for approval should, in general, follow the procedure described in paragraphs 4.97 to 4.103, and the final draft of the statement should be accompanied by the relevant documents listed in paragraph 4.102, but as appropriate to the particular case and the less extensive information the statement is required to contain.

4.203 Section 'General Meetings and Resolutions' does not apply, except that the directors will need to be satisfied that the society's register of members is correct to enable the society to send transfer notification statements, and notices under Section 102B (Trustee Account Holders) of the 1986 Act, to those to whom they must be sent if the society is to gain the protection of Section 102B(4).

4.204 When the board has resolved to transfer the business and transfer notification statements have been sent to its members, the society may apply to the PRA for confirmation of the transfer, but using an adaptation agreed with the PRA of the pro forma in Appendix 4. The procedure described in section 'Confirmation' is to be followed, including the publication of notices in the official Gazettes and newspapers and the form of application. However, the lapse of time between each stage of the procedure may be modified according to the particular circumstances of a case, and having regard to the need to protect the investments of shareholders or depositors.

4.205 While a scrutineer's report will not be required, the PRA will require a report from the society's external auditors on the adequacy of the society's systems to fulfil the requirements of the 1986 Act and the Rules with regard to the sending of transfer notification statements and notices to Trustee Account Holders. This is relevant to the PRA's consideration of the Fourth Confirmation Criterion.

4.196 As is noted in paragraph 4.198-4.200, the First and Second Confirmation Criteria are replaced, in those circumstances, by a single criterion as to whether the members or a proportion of them "would be unreasonably prejudiced by the transfer". Whether this special criterion applies will be a matter of judgement for the PRA to make in the light of any representations made to it and its own enquiries in respect of the particular case. In making its judgement, the PRA will also have regard to the view it then takes as to whether it should exercise its discretion under Section 100(7) of the 1986 Act to direct that no Statutory Cash Bonus, or a reduced bonus, is to be paid "having regard to what is equitable between the members of the society". It follows also that, in considering the Fourth Criterion, the PRA will take account of the modified procedure.

4.197 The Fees Rules provide that fees are to be paid to the PRA:

- a. with an application for approval of a transfer notification statement under paragraph 9(4) of Schedule 8A to the 1986 Act, and a further fee with any subsequent substantial revision;
- b. with an application for confirmation under Section 97(4)(d) of, paragraph 6 of Schedule 17 and Schedule 8A to, the 1986 Act; and a further fee if oral representations are to be heard.

#### Notification and Dissolution

4.198 When the PRA has confirmed a transfer (whether voluntary or under direction) it will notify the FCA and the society concerned. Section 97(8) of the 1986 Act requires the society to notify the PRA and the FCA of the vesting date, and it must do so no later than 7 days before that date, and, unless a notice is given under subsection (10), subsection (9) provides that the society shall be dissolved on that date. Subsection (10) provides that, if



necessary for the purpose of facilitating the disposal of its shares in its successor, the society may include, in the notice of the vesting date, notice of a later date for the dissolution of the society, and it is on this later date that the society is dissolved. A society which gives such a notice must cease to transact any business as from the notified vesting date, except such as may be necessary to dispose of its shares in its successor.

4.199 Section 97(7) of the 1986 Act provides that, where a society continues to hold shares in its successor after the vesting date, the consideration for the disposal of those shares, together with any other property, rights or liabilities of the society acquired or incurred after that date, shall be transferred to and vested in the successor company on the date specified for the society's dissolution. All other property, rights and liabilities of the society are to be transferred to the successor company on the vesting date.

4.200 The FCA will record the relevant date, or dates, notified to the PRA and the FCA by the society. The society will be dissolved on the vesting date or on the later date for dissolution referred to in paragraph 4.198, and its registration will subsequently be cancelled by the FCA under the provisions of Section 103(1)(a) of the 1986 Act having consulted the PRA.

### Timetable

4.201 The PRA expects the society to draw up a project plan covering the key elements in the transfer process and the relationships between them, and specifying when it wishes to receive the necessary clearances from the PRA. The time needed for the process will depend, among other things, on the length of time it takes to settle the final terms of the distribution scheme, the complexity of those terms and whether the scheme raises new legal issues (perhaps requiring resolution by application to the High Court), and the time needed to verify the register of members and the record of Trustee Account Holders.

4.202 It will also be affected by the facility with which the society and its advisers can develop satisfactory documents and respond to enquiries and representations. The plan and the timetable will need to cover all that will be

required of the society, and the successor company, in relation to the requirements of the Banking Regulator, and of the FCA concerning the listing of any shares in the successor company.

4.203 The PRA expects the society to discuss its plans with it during their formative stages, when the PRA will be prepared to give a view on their feasibility. However, although the PRA may agree that a planned timetable appears to be manageable, it cannot undertake to meet any deadlines set by the society. In particular, the PRA cannot be constrained in the proper performance of its statutory functions by, for example, the society's wish to put the Transfer Resolutions to a SGM on or before the date of the AGM in that year, or the planned flotation date.

4.204 The PRA will be mindful of the need to ensure that there is adequate time, compatible with its other business and commitments, to:

- a. consider whether the proposed distribution scheme is in conformity with the 1986 Act;
- b. consider and approve the Transfer Statement, including time to deal with renewed applications if significant changes have to be made;
- c. give interested parties an opportunity to make considered representations at the confirmation stage, for the society to respond to those representations, and for the PRA to consider all the evidence and arguments, including making any necessary further enquiries of its own, and to meet any statutory requirement for consultation; and
- d. write a reasoned confirmation decision.

4.205 The likely sequence of events is as follows:

Stage 1 Informal preliminary discussions with the PRA and, if different, the Banking Regulator on both substance and timing of the proposed transfer.

Stage 2 Public announcement of the transfer proposals. The PRA will be ready to comment on drafts of the announcement and any supporting material, although the terms of the announcement are for the society to



decide and the PRA is not required to approve them.

**Stage 3** Consultation with the PRA on the outline structure of, and main features to be contained in, the Transfer Statement, and on the full specification of the proposed cash and/or share distribution scheme.

**Stage 4** Submission to the PRA of the prudential information described in section 'Preliminary Matters'.

**Stage 5** Initial application to the PRA, with the appropriate fee, for approval of a full draft of the Transfer Statement, contained within a draft Transfer Document, supported by the material described in paragraph 4.98.

**Stage 6** Consideration by the PRA, and discussion with the society and its advisers, of the draft documents, including submission by the society of revised drafts as necessary. At this stage, the PRA's staff will also be ready to comment informally on draft proxy forms and other material proposed to be sent to the members with, or in advance of, the Transfer Document. By this stage also, the society ought to have undertaken any mailing to members which it thinks necessary to verify its register of members (see paragraphs 4.125 to 4.131), and to notify them of the rights of Trustee Account Holders (See paragraph 4.131).

**Stage 7** (if necessary) Further application to the PRA, with a further fee, for approval of a significantly revised Transfer Statement (see paragraph 4.101).

**Stage 8** Production of printer's proofs of the draft documents. At this stage it will be advisable for the society to determine, perhaps by mailing to a sufficient number of staff, whether the notice and Transfer Document pack (especially if it contains the Transfer Statement) is deliverable through domestic letter boxes.

**Stage 9** Informal indication by the PRA that it is satisfied with near-final proofs of the Transfer Statement, and the Transfer Agreement.

**Stage 10** Formal submission to the PRA of the final draft of the Transfer Statement,

together with the supporting documents described in paragraph 4.102.

**Stage 11** Approval by the PRA of the Transfer Statement. One proof copy of the Statement, identified and signed on behalf of the PRA, will be returned to the society.

**Stage 12** Printing and distribution of meeting notice and Transfer Document to members of the society in time to be received by them at least 21 days before the last date for receipt of proxy forms for the meeting at which the Transfer Resolutions are to be moved. The PRA would appreciate being provided with a number (to be agreed) of copies of the final printed Transfer Document and any Transfer Summary and of the Transfer Statement if printed separately for distribution on request. Although not required by the 1986 Act, one copy of each will be passed to the FCA to be placed on the public file of the society.

**Stage 13** The meeting at which the Transfer Resolutions are moved.

**Stage 14** If the Transfer Resolutions are passed, application to the PRA for confirmation and publication of notices of that application in the official Gazettes and newspapers. The application should be accompanied by the requisite fee and the material specified in paragraph 4.157.

**Stage 15** Last date for receipt by the PRA of representations with respect to the applications. A minimum of four weeks should be allowed between Stages 14 and 15 and a further four weeks to Stage 16 (with extra time allowed for any public holidays which intervene). Representations will be copied to the society for its comments as and when they are received. The PRA will then require sufficient time before the hearing to consider and assess all the representations and the society's responses, and to make any further enquiries which it may think necessary.

**Stage 16** The confirmation hearing.

**Stage 17** Notification to the society and representers, and publication, of the PRA's Decision. It is advisable to allow a minimum of four weeks between Stages 16 and 17, again allowing extra time for any public holidays.



Stage 18 Notification by the society to the PRA and the FCA of the vesting date and, if later, the date of dissolution of the society.

Stage 19 Vesting date and, if later –

Stage 20 Dissolution of the society.

4.206 When considering the proposed vesting date, the society will no doubt consult its merchant bank advisers as to timing, particularly when shares are to be offered for subscription to raise new capital, having regard to other possible major share offers.

4.207 The PRA is required to consult the FCA before approving a merger. This will happen before Stage 17.



## Appendix 1 - Transfer Document

This Appendix consists only of one or more forms. Forms are to be found through the following address:

*Transfer Document - [bsog\\_chapter3\\_ann1.pdf](#)*



## Appendix 2 - Pro forma

This Appendix consists only of one or more forms. Forms are to be found through the following address:

*Pro forma* - [bsog\\_chapter3\\_ann2.pdf](#)



### **Appendix 3 - Notice of Application**

This Appendix consists only of one or more forms. Forms are to be found through the following address:

*Notice of Application* - [bsog\\_chapter3\\_ann2.pdf](#)



## Appendix 4 Application to the Authority for confirmation

This Appendix consists only of one or more forms. Forms are to be found through the following address:

*Application to the Authority for confirmation - [bsog\\_chapter3\\_ann2.pdf](#)*





## Appendix 5 - Transfer Confirmation Procedures

1	Introduction	
1.1	This Appendix is for the use of those making written representations to the PRA and/or those participating in oral confirmation hearings. It sets out the procedures which the PRA intends to follow.	
1.2	The 1986 Act provides that when a society has approved the transfer of its business to a plc by passing the transfer resolutions, it must then obtain confirmation by the PRA and its terms (Section 97(4) of the 1986 Act). If the PRA confirms the transfer, then all the property, rights and liabilities of the society, except any shares in its successor company, transfer on the vesting date to the successor company (Section 97(6) of the 1986 Act), which date is specified in or determined by the transfer agreement between the society and the successor company.	
2	The role of confirmation	
2.1	The criteria to which the PRA has to have regard are limited. It is not within the PRA's power to make any judgment about the merits or fairness of the proposals which the members have approved.	
2.2	Section 98(2) and (3) of the 1986 Act provide that the PRA must confirm a transfer unless it considers that:	
	(1)	some information material to the members' decision about the transfer was not made available to all the members eligible to vote; or
	(2)	the vote on any resolution approving the transfer does not represent the views of the members eligible to vote; or,
	(3)	there is a substantial risk that the successor will not have -
	(i)	such permission under Part 4A of FSMA, or
	(ii)	such permission under paragraph 15 of Schedule 3 to that Act (as a result of qualifying for authorisation under paragraph 12 of that schedule), as will enable it to carry on the business which it will have as a result of the transfer without being taken (by virtue of section 20 of that Act) to have contravened a requirement imposed on it by the PRA under that Act; or
	(4)	some relevant requirement of the 1986 Act or the rules of the society was not fulfilled.
2.3	These are the only grounds on which the PRA may refuse confirmation, or direct the society to remedy any defects. If the PRA finds that there are defects it may direct the society to take steps to remedy them. If the PRA is then satisfied that the defects have been substantially remedied, it must confirm the transfer; if not, it must refuse confirmation (Section 98(5) and (6) of the 1986 Act).	
2.4	In the case of the ground mentioned in paragraph 2.2(4), the PRA may direct that non-fulfillment of some relevant requirement of the 1986 Act or of the rules of the society is to be disregarded, if it appears to the PRA that the failure could not have been material to the members' decision (Section 98(4) of the 1986 Act). "Relevant requirement" in this context means a requirement of the provisions of the 1986 Act applicable to the transfer of a society's business (which are Sections 97 to 102 and 102B to D, paragraph 30 of Schedule 2, Schedule 17 and the Transfer Regulations made under the 1986 Act) and any Rules prescribing the procedure to be followed by the society in approving the transfer and its terms (that is, generally, the rules concerning: membership; special meetings; notice of meetings;	



	procedure at meetings; entitlement of members to vote on resolutions; appointment of proxies; and joint shareholders and borrowers).
2.5	The 1986 Act provides that any accidental omission to give the notice of the meeting to, or non-receipt of the notice by, a person entitled to receive it does not invalidate the proceedings at the special general meeting (Schedule 2, paragraph 22(3)).
3	Purpose of the hearing
3.1	The purpose of the hearing is to enable interested parties to make representations, and to enable the PRA to make such enquiry as it considers necessary, both of the society and of those making representations, in order to reach an informed view. The PRA will examine all the representations, whether written or oral, in relation to the four statutory criteria described in paragraph 2.2. In the light of that examination, and consideration of all the representations and the society's response, and after any consultation required by the 1986 Act, the PRA will make its decision.
4	Making representations to the PRA
4.1	Any interested party has the right to make written and oral representations to the PRA with respect to the society's application for confirmation. Those making written representations and those giving notice of intention to make oral representations should state clearly why they claim to be interested parties (e.g. the category of their membership of the society). Those making written representations should also identify the ground or grounds, in paragraph 2.2, to which their representations are directed and it will be helpful if those giving notice of intention to make oral representations will do likewise.
4.2	Written representations, or written notice of a person's intention to make oral representations, or both, must be addressed to the Prudential Regulation Authority and must reach the PRA at 20 Moorgate, London, EC2R 6DA by the date quoted in the transfer documentation issued to members. Unwritten representations and notice (for example by telephone) cannot be accepted. Persons who make written representations but subsequently decide also to make oral representations must, nevertheless, give notice of that intention, in writing, to the PRA at the above address by the same date (paragraph 7 of Schedule 17 to the 1986 Act). The PRA will in general be prepared to use electronic rather than paper-based communication for notices and written representations if requested by the society or a prospective representer. A specific electronic address will be provided for that purpose, and some of the relevant procedures may have to be adapted accordingly.
4.3	Representations or notices to the PRA will fall into one of the following three categories:
	(1) written representations only;
	(2) written representations with notice of intention to make oral representations;
	(3) notice of intention to make oral representations only.
4.4	The PRA will send copies of all written representations to the society, and will afford it an opportunity to comment on them (paragraph 8 of Schedule 17 to the 1986 Act). The PRA will consider the written representations in 1 the categories set out in paragraph 4.3 (1) and (2), and the society's responses to them. A synopsis of the representations (probably in the form of a summary of each of the main points made and the numbers of persons making each point) and the society's responses may be made available to those participating in the oral hearing. This is intended to inform those making oral representations of the points already under consideration by the PRA with a view to avoiding unnecessary repetition.
4.5	Copies of the society's comments on representations in <sup>1</sup> the category set out in 4.3 (2) will be sent to those who made the representations in time for the oral hearing so that they may concentrate their oral representations on the points which they consider to remain at issue. A



	<p>person making written representations who wishes to see the society's comments must, therefore, also give notice of intention to make oral representations. Any documents referred to in the society's comments will be made available by the society for inspection at a specified place which will be notified to those making oral representations. (The society may, exceptionally, apply to put to the PRA in confidence documents which the society considers to be commercially sensitive: the PRA will decide on hearing argument whether, and on what terms, to accept them as being confidential). Persons in 1the category set out in 4.3 (3) will be asked to inform the PRA, in advance of the oral hearing, of the subject and general grounds of the representations they intend to make; the PRA will copy any response to the society.</p>
4.6	<p>Interested parties may join together in making collective representations and they may also appoint a person, either one of their number or another, to represent them at the oral hearing. They should notify the PRA in advance if this is what they intend to do. The PRA will notify this to the society.</p>
5	<p>Panel taking the hearing</p>
5.1	<p>A Panel will be appointed by the PRA to consider and decide the application on its behalf. The panel will conduct the oral hearing if one is required.</p>
6	<p>Time and place</p>
6.1	<p>Oral hearings will normally start at about mid-morning on the date quoted in the transfer documentation sent to members and at a place which will be notified to the participants. If there is a significant number of persons wishing to make oral representations, then the hearing may extend beyond one day and may be adjourned from time to time and from place to place. The PRA will try to advise participants of the day when they may expect to make their representations, and of when the society's representatives may be expected to respond.</p>
7	<p>Procedure at the hearing</p>
7.1	<p>The PRA expects that oral hearings will be held in public. Members of the general public and the press will be asked to wait outside at the commencement of the hearing. The participants will then be asked if any of them has good reason to object to the admission of the general public or the press (such as, for example, the need to refer to personal financial affairs). Unless an objection by a participant is upheld by the PRA, the press and the general public will then be admitted, within the limits of the space available. However, the PRA may decide that parts of the hearing shall be in private if that appears to it to be desirable.</p>
7.2	<p>The procedure will be informal. All participants will be expected to speak concisely and avoid repetition. The PRA will be considerate towards those who are not professionally represented. Members of the Panel taking the hearing may question the participants. The sequence of events will be broadly as follows:</p>
(1)	<p>any preliminary matters (such as the admission of the public or other procedural questions) will be dealt with;</p>
(2)	<p>the chairman of the Panel will introduce the proceedings;</p>
(3)	<p>the representatives of the society will be invited to speak to the application, including a description of the events at the meeting at which the transfer resolutions were put to the members, a statement of the voting on the resolutions, and any other matters which they wish to introduce at that stage;</p>
(4)	<p>the other participants will be invited to speak to their representations. The PRA expects to call them in a list marshalled, so far as possible, by subject matter;</p>



	(5)	the representatives of the society will be invited to reply to, or comment on, the points made by the other participants;
	(6)	the other participants will be invited to comment on the society's replies.
7.3	This procedure may be varied according to the circumstances at the hearing, and is intended only as a guide to the probable order of events. The hearing may be adjourned if the PRA considers that necessary to enable facts to be checked or additional information to be obtained.	
8	The PRA decision	
8.1	At the end of the oral hearing, the PRA will reserve its decision. A copy of its written decision, including its findings on the points made in representations, will be published and copies will be sent to the society, and to those making written and/or oral representations.	