

## **BUILDING SOCIETIES ACT 1986**

**DECISION BY THE FINANCIAL SERVICES AUTHORITY ON THE APPLICATION OF BRITANNIA BUILDING SOCIETY FOR CONFIRMATION OF A TRANSFER OF BUSINESS TO THE CO-OPERATIVE BANK PLC UNDER SECTIONS 97 AND 98 OF THE BUILDING SOCIETIES ACT 1986 AS MODIFIED BY THE MUTUAL SOCIETIES (TRANSFERS) ORDER 2009 MADE UNDER SECTION 3 OF THE BUILDING SOCIETIES (FUNDING) AND MUTUAL SOCIETIES (TRANSFERS) ACT 2007.**

**The Financial Services Authority appointed Anna Simons, a manager in Major Retail Groups' Division, to hear and decide the application on its behalf.**

### **1. INTRODUCTION**

- 1.1. The **Britannia Building Society** ("the Britannia") applied on 30 April 2009 to the Financial Services Authority ("the Authority") for confirmation of the transfer of business to the Co-operative Bank Plc ("the Co-operative Bank").
- 1.2. The Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 ("the 2007 Act") and the Mutual Societies (Transfers) Order 2009 ("the 2009 Order"), enable the transfer of the business of a mutual society to a subsidiary of a different type of mutual society. The 2009 Order modifies sections 97 to 102D of, and paragraph 30 of Schedule 2 to, the Building Societies Act 1986 ("the Act") and the Building Societies (Transfer of Business) Regulations 1998 ("the Transfer Regulations"). This is the first transaction undertaken under this new legislation.
- 1.3. References to the Act in this decision are to the Act as modified by the 2009 Order.

## **Procedure**

- 1.4. In accordance with paragraph 7 of Schedule 17 to the Act, between 2 May to 5 May 2009, the Britannia published notices in the London Gazette, the Edinburgh Gazette, the Belfast Gazette and a number of local and national newspapers stating that any interested party had the right to make representations to the Authority with respect to the proposed transfer of its business to the Co-operative Bank.
- 1.5. By the closing date of 1 June 2009 the Authority had received written representations from 20 individuals and two notices of intention to make oral representations. The hearing of those oral representations took place at the Authority's offices on 26 June 2009.

## **The purpose of Confirmation**

- 1.6. Section 98 of the Act sets out the procedure for dealing with an application for confirmation of a transfer of business. Subsection (3) provides that the Authority must confirm a transfer of business unless it considers that:
- (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 IV of the Financial Services and Markets Act 2000, 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 Authority under that Act; or
  - (d) some relevant requirement of an applicable enactment or the rules of the society was not fulfilled.

The criteria set out in (a), (b), (c) and (d) above are referred to in this Decision as the "First", "Second", "Third" and "Fourth" Criterion and collectively as the "Confirmation Criteria".

- 1.7. Section 98(4) provides that the Authority is not precluded from confirming a transfer of business by virtue only of the non-fulfilment of some relevant requirement of an applicable enactment or the rules of a society if it appears to the Authority that it could not have been material to the members' decision about the transfer and the Authority gives a direction that the failure is to be disregarded for the purposes of that section. An "applicable enactment" means sections 97 to 102 and 102B to 102D of the Act (including sections 100A and 101A), paragraph 30 of Schedule 2 and Schedule 17 to the Act, section 4 of the 2007 Act and article 7 of the 2009 Order. A "relevant requirement" means a requirement of an applicable enactment or of any rules prescribing the procedure to be followed by the Britannia in approving the transfer and its terms.
- 1.8. The material taken into account by the Authority in considering the application of the Confirmation Criteria includes the oral and written representations referred to in paragraph 1.5 of this Decision, the Britannia's responses to those representations, the Scrutineers' Report of 30 April 2009 prepared by KPMG with respect to the members' vote, the transfer agreement of 11 March 2009 and the booklet ("the Merger Document") produced by the Britannia for circulation to its members. The Merger Document contained the Transfer Statement required to be sent to members of the Britannia under paragraphs 2 and 4(1) of Schedule 17 to the Act ("the Transfer Statement"). It also included a letter from the chairman of the Britannia and notice of the Annual General Meeting ("AGM") at which the shareholding and borrowing members' resolutions were put. The Authority also had regard to a document entitled "What would you say? Members' guide to Britannia Building Society's Annual General Meeting 2009" and a booklet containing specific information about the conversion of Permanent Interest Bearing Shares to Perpetual Subordinated Bonds ("the PIBS document") which was sent to holders of such shares.

## 2. THE BRITANNIA MEETING AND VOTES

2.1. In its application for confirmation, the Britannia declared under seal that the requisite shareholding and borrowing members' resolutions were passed at the AGM of the society on 29 April 2009, in accordance with section 97(4)(c) of, and paragraph 30 of Schedule 2 to, the Act. A certified copy of the minutes was furnished to the Authority.

2.2. The scrutineers for the Britannia confirmed that, in their opinion, subject to the matters referred to in section 3 of this Decision, the arrangements for the conduct of the voting were such as to ensure that notices of the meeting and Transfer Statement were sent to all those entitled to receive them, with the requisite periods of notice being given, in accordance with the Act and the society's rules, and that there were satisfactory procedures to ensure the safe custody and proper counting of the votes.

2.3. The voting figures were:

<b>Shareholdings Members' Resolution regarding the Transfer of Business</b>	<b>At the meeting</b>	<b>By Proxy</b>	<b>Total</b>
In favour	96	375,276	375,372
Against	24	48,480	48,504
<b>Total</b>	120	423,756	423,876
Percentage of eligible shareholding members who voted: 31.99%		Votes in favour as percentage of valid votes cast: 88.56%	

<b>Borrowing Members' Resolution regarding the Transfer of Business</b>	<b>At the meeting</b>	<b>By Proxy</b>	<b>Total</b>
In favour	28	27,243	27,271
Against	2	4,385	4,387
<b>Total</b>	30	31,628	31,658
Percentage of eligible borrowing members who voted: 22.73%		Votes in favour as percentages of valid votes cast: 86.14%	

- 2.4. By virtue of paragraph 27A of Schedule 2 to the Act, a shareholding members' resolution must be passed by no less than three-quarters of the number of the shareholding members of the society eligible to vote on the resolution and voting on the resolution either in person or by proxy at the meeting. This was secured: 88.56% of the shareholding members who voted cast their votes in favour of the shareholding members' resolution.
- 2.5. By virtue of paragraph 29 of Schedule 2 to the Act, a borrowing members' resolution must be passed by a simple majority of borrowing members eligible to vote on the resolution and voting on the resolution either in person or by proxy at the meeting. This was secured: 86.14% of the borrowing members who voted cast their votes in favour of the borrowing members' resolution.

### **3. THE AUTHORITY'S CONCLUSIONS**

3.1. The Authority is required to confirm a proposed transfer of business unless it considers that any of the Confirmation Criteria apply. The Authority's conclusions relating to the application of the Confirmation Criteria are set out below.

#### **(i) The First Criterion – Material Information**

3.2. In the light of the material put to members, representations made by interested parties, and the Britannia's responses, the Authority does not consider that information material to the members' decision about the transfer was not made available to all members of the Britannia eligible to vote.

3.3. A number of representers objected to the use of the term "merger" to describe the transaction on the basis that this was inaccurate and may have misled members.

3.4. The Authority considers, however, that the use of the word "merger" in this context is not misleading and does not trigger the application of the first criterion. The Authority noted the following:

- (a) The legal nature of the transaction was explained at several points in the Merger Document, including references to a transfer of the Britannia's business to Co-operative Bank in the Chairman's Letter, Parts A and B of the Merger Document and also in the Members Guide.
- (b) The definition of the term "Merger" in Part D of the Merger Document indicated that it referred to the proposed transfer of business to Co-operative Bank under section 97 of the Act.
- (c) The description of the transaction as a merger is consistent with the fact that that the membership rights in the Co-operative Group Limited will be made available to most members of the Britannia; that it is envisaged that 7 out of the 22 members of the Co-operative Financial Services Limited ("CFS") board will be individuals who are currently directors of Britannia; and that the current chief executive of the Britannia will become the new chief executive of CFS.
- (d) The shareholding and borrowing members' resolutions, which were set out in the Merger Document and were considered and passed at the Britannia's

AGM on 29 April 2009 referred to “the transfer of the whole of the Society’s business to the Co-operative Bank p.l.c”.

- (e) The natural, ordinary meaning of the word “merger” is consistent with the features of this transaction and as such the use of the term “merger” is not misleading or inappropriate.
- (f) The Act, the 1998 Regulations, the 2007 Act and the 2009 Order do not forbid the use of the term “merger” to describe a transfer of business.

3.5. Some representers suggested that the Merger Document should not have referred to CFS as the merger partner, but rather to Co-operative Bank. As outlined above, it is transparent in the Merger Document that the proposed transfer of business is to Co-operative Bank. In addition, the Authority notes that Co-operative Bank is an operating subsidiary of CFS and shares a management structure with CFS. On this basis, the Authority does not consider that references in the Merger Document to a merger with CFS represented a failure to make all material information available to members.

3.6. The Authority received representations that the information presented to members in the Merger Document was insufficient for a number of other reasons. In relation to those reasons, the Authority considered, however, that:

- (a) The Transfer Statement contained sufficient information relating to directors’ compensation in line with the Transfer Regulations (page 36 of the Transfer Statement).
- (b) The table in Schedule 1 to the Transfer Statement allowed members to compare the rights and benefits they currently enjoyed as members of the Britannia with the rights and benefits that would be made available to them as Co-operative Group members and to evaluate the attractiveness of the respective memberships.
- (c) A comparison of reserves between the Britannia and the Co-operative Group is not a “prescribed matter” set out in Schedule 1 to the Transfer Regulations and there is, therefore, no statutory obligation for this information to be included. Further, the Authority does not consider that such a comparison is material information for the purposes of section 98 of the Act. The Authority notes that the Transfer Statement makes it clear in section 2.3 that on a solvent

dissolution or winding up of the Co-operative Bank any surplus assets would be transferred to other co-operatives and not distributed to Co-operative members.

- (d) The names of the independent advisers to both CFS and the Britannia do not constitute material information for the purposes of the first criterion.
- (e) The information provided in the Transfer Statement about the financial position of CFS and the Co-operative Bank (particularly in section 5.3 at pages 52 to 57) was sufficiently detailed and up-to-date.
- (f) Paragraph 4.2 of the Transfer Statement set out information relating to the management, activities and operations of the Co-operative Bank following the proposed transaction. There is no need or requirement for the Britannia to have included a business plan in the Merger Document. The Authority notes that the Merger Document refers to the integration of the two businesses including the work that will be required on computer systems.
- (g) Information about the distinctive features of the regulatory framework for building societies, that would cease to apply to the business of Britannia if it were transferred to the Co-operative Bank, was made available to members of the Britannia. In accordance with the Transfer Regulations, paragraph 4.4 of the Transfer Statement explained that, as a building society, the Britannia is subject to certain special statutory requirements (including the lending limit and the funding limit) which do not apply to the Co-operative Bank.

3.7. The Authority also received representations that there was a lack of balance in the Merger Document because it failed to fully explain the advantages of the alternative options identified in paragraph 1.2 of the Merger Document and the disadvantages of the proposed transaction. The Authority considers that the Transfer Statement provided appropriate disclosure of the options for the future conduct of the business considered by the board of Britannia. The Authority notes that the Transfer Regulations required the Britannia to set out the reasons why the board recommended the transfer on the terms proposed. With this in mind, the Authority does not consider that the presentation of the strategic options in paragraph 1.2 of the Transfer Statement was inappropriately unbalanced in favour of the proposed transaction. It is not for the Authority to make judgements about the merits of those strategic options; these matters are first for the board of a society, and then for its members to decide.



Whilst members may have disagreed with the Britannia board's recommendation members were provided with the option to vote against these recommendations at the Britannia's AGM.

- 3.8. It was also suggested by one representer that the information made available to members was deficient because it omitted any consideration of other more attractive business models for the Britannia going forwards. The Authority does not consider, however, that the information set out in paragraph 1.2 of the Transfer Statement relating to the strategic options for the future of the Britannia fell short of what might reasonably have been expected to be put to members by the board of Britannia, bearing in mind their fiduciary duty to members, to enable them to take an informed decision. The Authority notes that some of the business models proposed by the representer appeared to be similar in substance to the options referred to in paragraph 1.2 of the Transfer Statement.
- 3.9. A number of representers objected to the fact that the Merger Document did not disclose the support given by the Co-operative Group to the Labour Party. The Authority took into account the fact that this is not a prescribed matter for Transfer Statements as set out in schedule 1 to the Transfer Regulations. CFS has confirmed to the Authority that neither the Co-operative Bank nor CFS make any donations, or provide other support, to any political party. Donations to the Co-operative Party and the Labour Party are made by the Co-operative Group and these donations represent just over 0.3% of the Co-operative Group's profit before payments to and on behalf of members. In these circumstances, the Authority finds that information relating to the Co-operative Group's political donations was not material information for the purposes of the Act.
- 3.10. It was also suggested that the first criterion applies because the PIBS Document was sent only to PIBS holders. The Authority notes that the Merger Document sent to all Britannia members eligible to vote (subject to the points made below) included details of the two issues of PIBS by the Britannia and of the conversion of those PIBS into Perpetual Subordinated Bonds upon the proposed transfer of business. The Merger Document also set out a summary of the principal commercial differences between the PIBS and the Perpetual Subordinated Bonds, and indicated that a copy of the

separate PIBS Document was available upon request. The PIBS Booklet contained certain additional technical information that was relevant for the PIBS holders, including the precise Terms and Conditions of the Perpetual Subordinated Bonds, a summary of the more technical differences between the PIBS and the Perpetual Subordinated Bonds and a description of certain tax consequences of the conversion. The extra information set out in the PIBS Document that was not included in the Merger Document was specific to PIBS holders. The Authority considers that it would not have been relevant to other shareholding members or borrowing members. Against this background, the authority does not consider that the fact that the PIBS Document was sent only to PIBS Holders has the consequence that there was a failure to make available material information to all Britannia members eligible to vote.

3.11. The Authority finds, therefore, that the First Criterion does not apply.

**(ii) The Second Criterion – The Views of Members**

3.12. It was asserted that the vote of the Britannia members was not representative of the Britannia membership and compared unfavourably to the size of member turnouts at meetings to vote on previous building society transfers. The Authority notes that the provisions of paragraph 30 of Schedule 2 to the Act relating to the procedure for approving the requisite transfer resolutions have been modified by the 2009 Order. In line with the modified requirements set out in paragraphs 2.4 and 2.5 of this Decision, the borrowing members' resolution and the shareholding members' resolution regarding the transfer of business were passed at the Britannia's AGM. The Authority notes that 31.99% (423,876 votes cast) of the total population of eligible shareholding members voted and 22.73% (31,658 votes cast) of the total population of eligible borrowing members voted. Against this background, the Authority does not consider that the transfer resolutions were carried by a small and unrepresentative number of votes.

3.13. Having regard to the representations referred to in paragraph 1.5 of this Decision, the Scrutineers' Report and the other matters referred to above, the Authority does not consider that the vote on either resolution approving the transfer of the Britannia's business does not represent the views of the members eligible to vote. The second criterion does not, therefore, apply.

**(iii) The Third Criterion – Authorisation**

- 3.14. The Authority does not consider that there is a substantial risk that the Co-operative Bank will not have such permission under Part IV of the Financial Services and Markets Act 2000 as will enable it to carry on the business which it will have as a result of the transfer without being taken to have contravened a requirement imposed on it by the Authority under that Act.
- 3.15. On this basis, the third criterion does not apply.

**(iv) The Fourth Criterion – Requirement of the Act and the Rules**

- 3.16. It was suggested that the format of the voting form was confusing, and that it was defective because it deprived Britannia members who appointed the chairman of the AGM as their proxy to direct him how to vote on the transfer resolutions.
- 3.17. There was also an objection to the fact that the voting form did not allow for a free choice between all five strategic options set out in the Merger Document.
- 3.18. The Authority considers, however, that the voting form complied with the relevant requirements of paragraph 24(4A) of Schedule 2 to the Act and rule 37 (2) of the Britannia rules (which relate to the appointment of proxies). The Authority notes that instructions on how to complete the voting forms were provided on the form itself and also in the accompanying “quick guide to voting”.
- 3.19. The Authority also considers that it was not inappropriate for the board of Britannia to put to a vote of Britannia members only the strategic option that the board considered to be in the best interests of Britannia’s membership. This is in line with the procedures contemplated by section 97 of the Act.
- 3.20. A representer stated that the directors of the Britannia were precluded by Rule 21(2) of the Britannia’s rules from voting on the Transfer Agreement, as they had an interest in it, and that the proposed transfer is invalid for this reason. The Authority has concluded that, as the proposed transfer of business is conditional on the passing of the transfer resolutions by Britannia members, any benefits the directors of the

Britannia will or may acquire on completion of the transaction are not interests precluding them from voting on the conditional transfer agreement under Rule 21 (2) of the Britannia's rules. This is consistent with the decision of Sir Donald Nicholls V.-C in *Cheltenham and Gloucester Building Society v Building Societies Commission* [1995] Ch. 185. The Authority notes that, in accordance with the Transfer Regulations, the Transfer Statement sent to members set out the interest of the directors of the Britannia in the transfer including their prospective interests in the Co-operative Bank and CFS.

3.21. A representer commented on their surprise at the absence of a vote for members of the Co-operative Group. The statutory provisions relating to the proposed transfer do not require the holding mutual (CFS) or the parent of the holding mutual (the Co-operative Group Limited) to approve the transaction by a resolution of the members. The rules of the Co-operative Group and CFS similarly do not require a members' vote. On this basis, as indicated in Part A of the Merger Document, the merger proceeded by way of resolutions of the boards of directors of the Co-operative Bank, CFS and the Co-operative Group.

3.22. The scrutineers reported that some matters had arisen out of the scrutineering process with respect to the two resolutions considered and passed at the AGM on 29 April 2009, including:

**(a) PIBS shareholders:** on 24 April 2009 the Society identified an error that had resulted in 112 PIBS accounts not being mailed as shareholding members. The Society took the decision not to mail the 112 members affected as there was insufficient time to allow votes to be submitted and counted. In respect of these 112 members, the Authority notes (i) the number of members who received no notice of the AGM and voting papers was a very small proportion of the total membership, (ii) the shareholding members voted for the merger by a significant majority (paragraphs 2.4 and 2.5 above refer) and (iii) the impact of the votes of the 112 members affected, however they were cast, could have made no difference to the outcome. The Authority also notes that paragraph 22(3) of Schedule 2 to the Act provides 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 the meeting. There is a similar provision in rule 32(9) of the Britannia's rules.

- 3.23. The Authority finds that there was a failure on the part of the Britannia to give notice of the AGM and the Transfer Statement to all members entitled to receive them. However, as this failure was in respect of a small proportion of the membership, the Authority is satisfied that this would not have had a material effect on the outcome of the vote. It appears to the Authority that the failure could not have been material to the members' decision about the transfer. The Authority considers that it is appropriate to give a direction that the failure is to be disregarded for the purposes of section 98 of the Act.

**(b) Newly eligible members:** The scrutineers reported that 55 members, determined by the Britannia to be "newly eligible" as a result of investigation and correction of the register of members following individual member queries, received AGM mailing packs outside of the statutory notice period. The Authority notes that (i) in all cases the members were sent notice in time to be able to cast their vote at the AGM or by proxy if entitled to do so, (ii) the number of members who received late notice of the AGM and/or voting papers was a very small proportion of the total membership and (iii) the shareholding members voted for the merger by a substantial majority.

- 3.24. The Authority finds that there was a failure on the part of the Britannia to give sufficient notice of the AGM to all members eligible to vote or to all members entitled to receive notice of the AGM as required by the Act and the Britannia's rules. However the Authority is satisfied that this would not have had a material effect on the outcome of the vote. It appears to the Authority that the failure could not have been material to the members' decision about the transfer. The Authority has concluded that it should give a direction that the failure is to be disregarded for the purposes of section 98 of the Act.

- 3.25. **The Authority finds the Fourth Criterion applies in respect of three failures to fulfil relevant requirements of the Act and/or the Rules of the Britannia. These failures relate to (i) the requirement to give notice of the AGM to all members**

**eligible to vote, (ii) the requirement to give at least 21 clear days' notice of a meeting, calculated from the final date for the receipt of proxies, to every member eligible to vote, and (iii) the requirement to give notice of a meeting to every member eligible to receive notice. The Authority considers it appropriate to give a direction under section 98(4) of the Act that these failures should be disregarded. Except for these failures, the Authority finds that the matters referred to in paragraphs 3.16 to 3.24 do not disclose a failure to fulfil a relevant requirement of an applicable enactment or the rules of Britannia.**

**(v) Representations on Other Matters**

- 3.26. Representations were made in relation to a number of other issues including (among other things): concerns of members that savings rates would adversely affected by the merger, that the proposed merger was a ‘defensive’ move and that losing a building society is not in the national interest.
- 3.27. The Authority does not consider, however, that the issues referred to in these representations cause any of the Confirmation Criteria to apply.

**(vi) Other Matters**

- 3.28. As indicated in paragraph 2.13 of the Transfer Statement, section 100 (2) (b) of the Act requires that certain members, who held shares in the Britannia on the qualifying day and were not eligible to vote, are entitled to a “statutory cash bonus” unless the Authority directs otherwise. The Britannia and CFS asked the Authority to give a direction that no statutory cash bonus is required to be paid, on the basis that no distribution of funds will be paid to Britannia members eligible to vote on the transfer resolutions to preserve the capital in the Co-operative Bank following the proposed transaction. Having regard to what is equitable between the members of the society, the Authority thinks it is appropriate to direct under section 100 (7) of the Act that no cash bonus in pursuance of section 100 (2) (b) of the Act shall be made.

#### **4. DIRECTIONS**

- 4.1. The Authority, having considered the application by Britannia Building Society for confirmation of the transfer of business to the Co-operative Bank plc has concluded, having regard to the information available to it, that there were failures to fulfil a relevant requirement of an applicable enactment and/or rules of the Britannia Building Society, in connection with:
- (a) 112 PIBS shareholders not being mailed as shareholding members;
  - (b) 55 newly eligible members being sent late notice of the AGM and/or voting papers.
- 4.2. **It appears to the Authority that these failures could not have been material to the members' decision about the transfer. The Authority directs accordingly under section 98(4) of the Act that these failures are to be disregarded for the purposes of section 98 of the Act.**
- 4.3. **Having regard to what is equitable between the members of the society, the Authority directs under section 100 (7) of the Act that no bonus distribution of funds in pursuance of section 100 (2) (b) of the Act shall be made.**

## **5. DECISION**

- 5.1. **The Authority has considered the application of Britannia Building Society for confirmation of the transfer of business of Britannia Building Society to Co-operative Bank plc. Having regard to the information available to it, and to the directions contained in section 4 above, the Authority confirms the transfer of business.**

For and on behalf of the  
**FINANCIAL SERVICES AUTHORITY**

**ANNA SIMONS**

**23<sup>rd</sup> July 2009**

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