

Building Societies Act 1986 (Amendment) Bill

Memorandum from HM Treasury to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of amendments to the Building Societies Act 1986 (“the 1986 Act”) proposed to be made by the Building Societies Act 1986 (Amendment) Bill (“the Bill”). The Bill was introduced in the House of Commons on 6th December 2023 as a Private Member’s Bill by Julie Elliott MP. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The purpose of this Bill is to place building societies on a more equal footing with banks operating as companies under the Companies Act 2006 by modernising certain aspects of building societies legislation to ensure building societies can compete effectively with other financial services providers whilst maintaining their distinctive approach as mutually owned mortgage and savings providers. It implements some Government legislative proposals announced as part of the [Edinburgh Reforms](#) in December 2022.

3. The Bill achieves this aim by making three amendments to the 1986 Act:

- It amends section 7(3) of the 1986 Act to describe additional sources of funding (as further specified by the Treasury by regulations made by the negative resolution procedure) and within the following categories to be excluded from the building society wholesale funding limit calculation: Bank of England liquidity insurance facilities, debt instruments raised to meet the minimum requirement for own funds and eligible liabilities (MREL), and sums received under a sale and repurchase agreement with a view to complying with a specified Prudential Regulation Authority (“PRA”) rule (clause 1);
- It amends the corporate governance requirements in Schedule 2 to the Act to explicitly allow the option of real-time virtual member participation in building societies’ meetings in line with the Companies Act 1986 (clause 2); and
- It also extends HM Treasury’s power to make secondary legislation by orders by the affirmative resolution procedure amending certain provisions of the 1986 Act to align them to changes to company law to cover constitutional provisions to make provision in relation to common seals and the execution of documents (clause 3).

4. The effect of the amendments, and the subsequent orders to be made by HM Treasury, would enable building societies to compete on a more level playing field with retail banks, while still respecting their mutual ownership structure, and to benefit from limited increased flexibilities already available to companies on constitutional

requirements. This is in line with the growth objective for the UK, which seeks to encourage competition in the financial sector.

C.DELEGATED POWERS

Power to specify sources of funding within additional categories for exclusion from the building society funding limit calculation

5. This Bill would give HM Treasury the power to make secondary legislation to specify the types of funding within the following additional categories described in the Bill at clause 1(2) amending section 7(3) of the Act to be excluded from the building society funding limit calculation: Bank of England liquidity insurance facilities, debt instruments raised to meet MREL requirements, and sums received under a sale and repurchase agreement with a view to complying with a specified PRA rule.

Power conferred on: HM Treasury

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

6. Clause 1(3) of this Bill would add additional subsections (9B) to (9D) to section 7 of the 1986 Act to provide a power for the Treasury to specify by regulations made by secondary legislation types or descriptions of funding within the categories added to section 7(3) of the 1986 Act by clause 1(2) for exclusion from the wholesale funding limit calculation in section 7(1) and (2).

Justification for taking the power

7. The power being sought is a new power to enable HM Treasury to specify further the types of funding within new categories as described in this Bill and held for prudential regulatory purposes which may be excluded from the funding limit calculation. HM Treasury intends to use this power to provide more technical detail to describe the additional types of funding which are proposed to be disregarded in calculating the wholesale funding limit for building societies. The power is narrow in its scope; it can only be exercised for the purpose of defining the types or descriptions of additional funding or PRA rules. The addition of new types of funding to be excluded from the calculation will increase flexibility in raising wholesale funds and foster growth and competition with non-mutual retail banks.

8. The HM Treasury view is that this power is needed because the types of funding to be excluded are highly specific and terminologically complex descriptions relating to certain funding sources. Specifically, these include:

- the Bank of England's liquidity facilities as set out in the Bank of England Market Operations Guide. Currently these facilities include the Discount Window Facility, the Indexed Long-Term Repo and the Contingent Repo Facility.

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- debt instruments to meet the Minimum Requirement for Own Funds and Eligible Liabilities, set out in regulation 123 of the Bank Recovery and Resolution (No.2) Order 2014 (SI 2014/3348) and the Bank of England's MREL Statement of Policy issued under the Banking Act 2009; and
- sale and repurchase agreements of high-quality liquid assets entered into to comply with a specified PRA rule.

9. Furthermore, the names of these funds could be changed by the Bank of England in future. It will be necessary for HM Treasury to ensure that the excluded sources of wholesale funding set out in legislation keep pace with the latest nomenclature, to be able to provide clarity and stability to the mutuals sector. Allowing the definition of these funds to be made by secondary legislation will give HM Treasury the ability to update the requirements more efficiently and expediently, in a targeted way, including being able to respond to and exclude any new products that are introduced by the Bank of England in the future as deemed necessary and appropriate.

10. There is no intention to use these powers to facilitate the dilution of the unique character of building societies; rather, these are intended to be used to assist their ability to grow and compete successfully should the case be made out for further adjustments to the types of funding to be disregarded in calculating the wholesale funding limit.

Justification for the procedure

11. HM Treasury is proposing that the regulations are subject to negative resolution procedure, which would give Parliament the appropriate level of scrutiny and is consistent with the procedure applicable to other powers in the 1986 Act which are for the purpose of providing for further definition. See for example the power at section 42B(8) for HM Treasury to make regulations for the purpose of specifying as prescribed matters the matters which are to be included in a statement by a building society to its members under paragraph 3 or 9 of Schedule 8A where a direction has been given under section 42B(3) or (4) by the appropriate authority on a transfer of the engagements or business of the building society.

12. The power is also limited. It only allows for the specification of the description of the sources of funding which fall within the categories at new subsection (9B)(a), (b) and (c) of section 7. The sources of funding themselves are defined in primary legislation.

Power to align constitutional provisions in the 1986 Act with changes made to company law by the Companies Act 2006 for the purpose of making provision on common seals and the execution of documents

13. Clause 3 of this Bill amends section 104(2) of the 1986 Act to broaden an existing HM Treasury power to make secondary legislation to align constitutional provisions in the 1986 Act with changes made to company law by the Companies Act

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2006 and other legislation relating to companies only for the purpose of making provision on common seals and the execution of documents.

Power conferred on: HM Treasury

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure (Henry VIII power)

Context and Purpose

14. Clause 3 of this Bill would amend section 104(2) of the 1986 Act to extend the current power in section 104(1) for HM Treasury to make secondary legislation to amend provisions in the 1986 Act for the purpose of assimilating company law and building society law to the constitutional provisions in Part 2 of the Act, solely for the purpose of making provision on common seals and the execution of documents.

Justification for taking the power

15. The overall purpose of this clause of the Bill is to ensure that building societies can benefit from the same flexibilities afforded to banks operating as companies in the use of a common seal and the execution of documents. The 1986 Act as enacted by Parliament already provides a Henry VIII power to amend it for the purpose of assimilating to changes to companies law. Companies law is updated on a more regular basis, and so the corresponding provisions for building societies may need to be amended from time to time. The Government has [announced](#) its support for a Law Commission review of the law of deeds, although the timing for the project is subject to overall Government and Law Commission priorities. In light of the potential for future changes, it is the view of HM Treasury that it would be sensible to expand the existing section 104 power to cover changes relating to common seals and the execution of documents.

16. The existing section 104 power has a safeguard in place that it can only be exercised for the purpose of assimilating to changes to companies law. The proposed expansion of the power does not affect this, and will be similarly constrained.

17. Current companies law provides a detailed code for the use of seals and the execution of documents, including:

- a relaxation on the common law requirement for a document to be executed under seal under the law of England and Wales or Northern Ireland (section 44, Companies Act 2006);
- provision for documents to be executed either under seal or by signature by two directors or by one director and a secretary or by signature by a single director if that signature is witnessed and attested (section 44(2) and (3) of Companies Act 2006);
- a requirement that if a company does have a seal, it must have the company's name engraved on it (section 45(2), Companies Act 2006). Failure to comply constitutes an offence, which carries a liability on summary conviction to a fine (section 45(3) Companies Act 2006).

18. The Companies Act 2006 also makes provision in relation to the execution of deeds in Northern Ireland (section 46 Companies Act 2006); the execution of deeds or other documents by attorney on behalf of a company under the law of England and

Wales and Northern Ireland (section 47 Companies Act 2006); official seal for use outside the UK (section 49 Companies Act 2006); and Pre-incorporate contracts, deeds and obligations (section 51 Companies Act 2006).

19. In contrast, the 1986 Act does not currently contain a coherent set of provisions concerning the execution of deeds and other documents. HM Treasury intend to work with the sector in assimilating the relevant parts of companies law given the level of technical detail and operational complexity. Clause 4(3) of the Bill enables HM Treasury to amend building societies law under section 104 of the 1986 Act as proposed to be amended by clause 3 to be in line with modifications to companies law as already enacted when the Bill comes into force, as well as with subsequent modifications.

20. The Bill contains a further safeguard in so far as the power under section 104 as proposed to be amended by clause 3 can only amend Part 2 of the Act for the purpose of making provision in relation to common seals and the execution of documents. There is no intention or ability for HM Treasury to use this power to facilitate the dilution of the unique character of building societies (and indeed this would not be feasible given its limits) but rather to assist their ability to grow and compete successfully.

Justification for the procedure

21. The power at section 104 is already subject to the affirmative procedure. HM Treasury considers this procedure remains appropriate to ensure Parliament can scrutinise any proposals put forward to make provision for common seals and the execution of documents and consider the impact and effect this may have on building societies.

HM Treasury
12 January 2024