

## **BUILDING SOCIETIES ACT 1986**

### **DECISION BY THE FINANCIAL SERVICES AUTHORITY ON THE APPLICATIONS OF STROUD & SWINDON BUILDING SOCIETY AND COVENTRY BUILDING SOCIETY FOR CONFIRMATION OF A TRANSFER OF ENGAGEMENTS UNDER SECTION 95 OF THE BUILDING SOCIETIES ACT 1986**

**The Financial Services Authority appointed Barbara Purkiss, a manager in Retail Firms Division, to hear and decide the application on its behalf.**

#### **1. INTRODUCTION**

1.1 The **Stroud & Swindon Building Society** ("the Stroud & Swindon") and the **Coventry Building Society** ("the Coventry") applied on 17 June 2010 to the Financial Services Authority ("the Authority") for confirmation of the transfer of engagements of the Stroud & Swindon to the Coventry.

#### **Procedure**

1.2 Paragraph 8 of Schedule 16 to the Building Societies Act 1986 ("the Act") requires that, where a building society applies to the Authority for confirmation of a transfer of engagements, a notice shall be published stating that interested parties have the right to make representations to the Authority with respect to the application. The notice must specify the date, determined by the Authority, before which any written representations, or notice of a person's intention to make oral representations, must be received by the Authority, and the date(s) on which the Authority intends to hear any oral representations. In the case of this proposed transfer of engagements ("the merger") notice was given:

- (i) in the Daily Telegraph, the Daily Mail, the London Gazette, the Edinburgh Gazette, the Belfast Gazette and the Coventry Telegraph by the Stroud & Swindon and the Coventry on 18 June 2010; and
  - (ii) in the Stroud Life and in the Stroud News & Journal on 23 June 2010.
- 1.3 The notices specified **7 July 2010** as the closing date for receipt by the Authority of written representations or notice of intention to make oral representations, and **23 July 2010** as the date set aside by the Authority to hear oral representations.
- 1.4 By the close of 7 July 2010 the Authority had received two written representations and no notice of intention to make oral representations. The Authority decided that, in the absence of any notice of intention to make oral representations, there were no matters which it wished to put to either society at an oral hearing, and that no oral hearing was therefore necessary. No representations were received out of time.

### **The Purpose of Confirmation**

- 1.5 Section 95(4) and (5) of the Act sets out what is required of the Authority when an application is made to it for confirmation of a transfer of engagements. Subsection (4) provides that the Authority **shall** confirm a transfer of engagements **unless** it considers that:
- (a) some information material to the members' decision about the transfer of engagements was not made available to all the members eligible to vote; or
  - (b) the vote on any resolution approving the transfer of engagements does not represent the views of the members eligible to vote; or
  - (c) some relevant requirement of the Act or the rules of any of the societies participating in the transfer of engagements was not fulfilled as regards that society.

The criteria set out in (a), (b) and (c) above are referred to subsequently in this Decision as, respectively, the "First Criterion", "Second Criterion" and "Third Criterion".

- 1.6 Subsection (5) provides that the Authority shall not be precluded from confirming a transfer of engagements by virtue only of the non-fulfilment of some relevant requirement of the Act 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 of engagements and the Authority gives a direction that the failure is to be disregarded for the purpose of this section. Section 95(11) of the Act states that a "relevant requirement", with reference to the Act or the rules of a society, means a requirement of sections 94 or 95 of the Act or of Schedule 16 to the Act or of any rules prescribing the procedures to be followed by the society in approving or effecting a transfer of engagements.
- 1.7 In considering the three criteria, referred to in paragraph 1.5 above, the Authority reconsidered the booklet ("the merger booklet") produced by the Stroud & Swindon for circulation to its members which contained the statutory statement required to be sent to members of that society under paragraph 3 of Schedule 16 to the Act ("the merger statement"). In addition to the merger statement, the merger booklet contained other information including a letter from the chairman of the Stroud & Swindon and notice of the Special General Meeting ("the SGM") at which the shareholding and borrowing members' resolutions were to be put. The Authority is entitled to look again at the confirmation stage at issues which it considered in connection with the approval of the merger statement. In doing so, it has a duty to consider any information and arguments put to it by representers and by the societies, which of their nature would not have been available earlier, as well as those arising from its own further consideration of the matter. The Authority, accordingly, cannot properly be bound at the confirmation stage to the view that it took at the time of approval of the merger statement that it did not require further factual information, or to the view which it took of the accuracy of the statement's contents. It is under a duty to re-examine the merger statement and connected issues at the time of confirmation in the light of any new information and arguments available to it. That said, the Authority would clearly only change its view if there were good reason to do so.
- 1.8 It is, however, **not** for the Authority to consider the merits of proposals which the members have approved.

## 2. **THE STROUD & SWINDON MEETING AND VOTES**

2.1 In its application for confirmation, the Stroud & Swindon declared under seal that the requisite shareholding and borrowing members' resolutions as required by section 94(2) of the Act, were passed at the SGM of the society on 16 June 2010. A certified copy of the minutes of the meeting was furnished to the Authority.

2.2 The Stroud & Swindon did not propose to pay compensation for loss of office to its directors or officers so no special resolution in accordance with section 96(1) of the Act was required.

2.3 The scrutineers for the Stroud & Swindon reported that the resolutions were passed by the required majorities and confirmed that, in their opinion and subject to certain matters (referred to in paragraph 2.7 below), the arrangements for the conduct of the voting were such as to ensure that notices of the meeting and merger statements 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.

2.4 The voting figures were:

| <b>Shareholding Members' Resolution</b>                | <b>At the Meeting</b> | <b>By Proxy</b>                                    | <b>Total</b> |
|--|-----------------------|--|--------------|
| In favour  | 18                    | 30,556   | 30,574       |
| Against  | 28                    | 3,817  | 3,845        |
| <b>Total</b>   | 46                    | 34,373   | 34,419       |
| Percentage of eligible shareholding members who voted: | 28.8%                 | Votes in favour as percentage of valid votes cast: | 88.8%        |

| <b>Borrowing Members' Resolution</b>                | <b>At the Meeting</b> | <b>By Proxy</b>                                    | <b>Total</b> |
|---|-----------------------|--|--------------|
| In favour   | 2                     | 1,799  | 1,801        |
| Against   | 6                     | 206  | 212          |
| <b>Total</b>  | 8                     | 2,005  | 2,013        |
| Percentage of eligible borrowing members who voted: | 14.3%                 | Votes in favour as percentage of valid votes cast: | 89.5%        |

2.5 By virtue of section 94(2) and (5)(a) of, and paragraph 27A of Schedule 2 to, the Act, a shareholding members' resolution must be passed by no less than three-quarters of the numbers of the shareholding members of the society qualified to vote on the

resolution and voting either in person at the meeting or by proxy on the resolution. This was secured: 88.8% of the shareholding members who voted cast their votes in favour of the shareholding members' resolution.

2.6 By virtue of section 94(2) and (5)(a) of, and paragraph 29 of Schedule 2 to, the Act, a borrowing members' resolution must be passed by a simple majority of borrowing members qualified to vote on the resolution and voting either in person at the meeting or by proxy on the resolution. This was secured: 89.5% of the borrowing members who voted cast their votes in favour of the borrowing members' resolution.

2.7 The scrutineers reported that a small number of notices of SGM and/or voting papers had been mailed without the requisite notice being given as required by the Act and the Stroud & Swindon's rules. These require 21 clear days' notice to be given expiring with the date of the SGM or, if earlier, the date specified by the Stroud & Swindon, under its rules, as a final date for receipt of instruments appointing proxies at the meeting. The rules of the Stroud & Swindon provide that the final date for receipt of proxies is not less than 2 days (or such shorter period specified in the notice of the meeting) before the date of the meeting. In this case Stroud & Swindon specified midnight at the end of 11 June 2010 as the final date for the receipt of proxies (i.e. 4 clear days before the SGM). The Stroud & Swindon should therefore have dispatched notices of the SGM and voting papers in time for them to be received by 20 May 2010. The scrutineers provided an explanation as to why notices and, where appropriate, voting papers had been dispatched outside the notice period to certain groups of members. A summary of this, and of certain other issues reported by the scrutineers (which were, as appropriate, the subject of further enquiry by the Authority in order to satisfy itself as to the nature and extent of certain issues) are set out below:

(a) **Replacement voting packs:** 13 replacement voting packs were sent to members who contacted the Stroud & Swindon to report that voting packs had not been received at the members' current address or had been discarded, lost or damaged. Replacement voting packs were sent out in these cases after 20 May 2010. The scrutineers confirmed that in cases where the SGM pack had not been received at the members' current address this had not occurred

because of a failure by Stroud & Swindon to record a change of address duly notified by the member;

- (b) **Newly eligible members:** a notice of the SGM and, where appropriate, voting forms were sent after 20 May 2010 to members determined by the Stroud & Swindon to be “newly eligible” as a result of investigation and correction of the register of members following either, unincorporated bodies providing details of the first named operator of their account, or a person incorrectly recorded as a minor contacting the society;
- (c) **Suppressed shareholding members:** following an enquiry from a member questioning why he had not been sent notice of the SGM or voting papers, an investigation was carried out which identified that errors had been made during a de-duplication exercise carried out earlier in 2010 and that 60 shareholding members who had been recorded as ineligible to vote were, in fact, eligible. However the position was clarified too late to send these 60 shareholding members notice of SGM or voting papers.

2.8 The Stroud & Swindon's scrutineers also provided an analysis of the spoilt or invalid votes (643 in respect of the shareholding members' resolution and 71 in respect of the borrowing members' resolution). The vast majority were in respect of members who abstained (vote withheld), members who ceased to be eligible after the despatch of the notice of the SGM and unsigned proxy voting forms.

### 3. THE COVENTRY'S APPLICATION

3.1 In its application for confirmation the **Coventry** declared under seal that, pursuant to the consent of the Authority in accordance with section 94(5)(b) of the Act, it had undertaken by a resolution of its Board of Directors to fulfil the engagements of the Stroud & Swindon.

3.2 Section 94(5)(b) of the Act allows a society that proposes to accept a transfer of engagements to resolve to do so by a resolution of the Board of Directors, if the Authority consents to that mode of proceeding, rather than by the passing of a

shareholding members' resolution and a borrowing members' resolution at a general meeting. The Authority has indicated, in its guidance on Merger Procedures contained in paragraphs 2.4.41 and 2.4.42 of the Building Societies Regulatory Guide (“BSOG”), the general circumstances in which it may be prepared to give such consent. The two key factors are that (i) the transferee society's assets are substantially – more than 5:1 – larger than those of the transferor society and (ii) the merger will not affect the interests of the members of the transferee society to a significant extent. The Coventry's assets are approximately 6.7 times those of the Stroud & Swindon. In addition, the Coventry explained to the Authority how the merger would not significantly affect the interests of its members. Having considered this explanation the Authority gave its consent to the Coventry on 18 March 2010. The Coventry was not required, therefore, to hold a general meeting so as to secure members' approval of its acceptance of the transfer of the Stroud & Swindon's engagements.

- 3.3 Section 96(4) of the Act does however require that any distribution of funds by a society in consideration of the transfer must, if it exceeds prescribed limits, be approved by the members' resolutions of the other society as well as by the members' resolutions of the society making the distribution. There is to be no such distribution of funds in this merger.

#### 4. **THE REPRESENTATIONS AND THE STROUD & SWINDON'S RESPONSES**

- 4.1 Paragraphs 4.2 to 4.3 of this section summarise the substance of the points made by the two representers together with the Stroud & Swindon's responses. Paragraph 4.4 refers to other issues relevant to confirmation. The points are marshalled according to the criteria in section 95 of the Act to which they appear to relate most closely.

##### **The First Criterion – Material Information**

- 4.2 One **representer** argued that the information provided in the merger booklet was not sufficient to enable a decision about the merger to be made. The **Stroud & Swindon** rejected this, asserting that it had provided all information required to be given by the Act and BSOG. In the Stroud & Swindon's view the society had provided sufficient information – including a clear explanation as to why the proposed merger was in the

best interests of the Stroud & Swindon members – to allow members of the Stroud & Swindon to make an informed and balanced decision about the merger.

- 4.3 One **representer** said that some statements in the merger booklet could not be reconciled, giving as an example what was said in the merger booklet about the alleged good value products (seemingly a reference made to products offered by the Stroud & Swindon) compared to the statements about the benefits members will receive from changing to the Coventry's products. The **Stroud & Swindon** responded that it purposefully did not state that its products were “market leading” or always the best priced products available at any time. However it believes its savings products offer “good value” to members and this is supported, in its view, by frequent appearances in the “Best Buy” tables. It also believes that as a result of the merger there will be an immediate improvement in rates for a large proportion of its membership. Here it referred to the merger booklet which identifies four Stroud & Swindon savings accounts where the equivalent Coventry savings account will, at the date of the merger, have a higher interest rate than the named Stroud & Swindon account. Stroud & Swindon members with these accounts will benefit from the rate on their account being equalised with the higher interest rates on the equivalent Coventry savings account.

### **Representations on Other Matters**

- 4.4 The **representers** made two other points, namely that the merger booklet repeated much of what had been given in past “so called mergers” and in the knowledge that the Authority would rubber stamp the merger (no evidence or information was given in support of this assertion) and that directors of the Stroud & Swindon should be disciplined for causing the society to run at a loss.
- 4.5 In the view of the Authority the representations referred to in paragraph 4.4 are not relevant to the three confirmation criteria.

## **5. THE AUTHORITY'S CONCLUSION**

- 5.1 The Authority is **required** to confirm a proposed transfer of engagements **unless** it considers that any of the three criteria referred to in paragraph 1.5 above apply. The Authority's own view of the way in which it interprets the three criteria is summed up

below, followed by its respective conclusions on the representations made and on other matters relevant to the three criteria.

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

- 5.2 This criterion is mainly, if not exclusively, directed to the information provided by a society to the generality of its investing and borrowing members. The totality of information provided to members has to be assessed, recognising that the relevance of a particular piece of information to an investor and a borrower might be different, and the extent to which, if at all, it falls short of what might be expected and whether it is within the bounds of reasonable possibility that the members' decision on voting would have been different had any deficiency in information been made good. If it is considered that such a deficiency might have changed the outcome of the vote the Authority should put the decision back to the members. But this requires the Authority to take account both of the size of the vote and of the size of the majority.
- 5.3 In determining whether this criterion applies, the Authority will have regard to the material put to members, the representations made, the societies' responses and, if appropriate, taking points of its own accord. It will consider whether information provided to members is what might reasonably have been expected of a society considering its fiduciary duty and the extent to which, if at all, it falls short, and whether any deficiency identified was sufficient to amount to information that was material to members' decision.
- 5.4 As explained in paragraphs 3.1 and 3.2 above, the Coventry obtained, and relied on, the Authority's consent to proceeding by way of Board Resolution. It was therefore not required to put a shareholding members' resolution and a borrowing members' resolution to a Special General Meeting, or to circulate a statutory statement to its members, and did not do so. The First Criterion cannot therefore apply to the Coventry in relation to the merger.
- 5.5 The Authority considered, having regard to the representations summarised in paragraphs 4.2 and 4.3 above, whether the criterion applied in this case to the Stroud

& Swindon. In doing so it reconsidered the merger booklet, and has reached the following conclusions:

- (i) the Authority finds that the merger booklet contained sufficient information in order for a member of the Stroud & Swindon to make an informed decision on the merger proposal. In particular the Authority notes that the merger booklet covered all the matters required to be included in that document by the Act and by BSOG and that the representer provided no evidence as to why, in his view, the information set out in the merger booklet was not sufficient;
- (ii) the Authority finds that the merger booklet gave sufficient information about the impact of the merger on share accounts and mortgage accounts and that it was not inappropriate to refer to Stroud & Swindon products as offering “good value” in the context in which this comment was made. The fact that the Coventry pays better rates of interest than the Stroud & Swindon on some equivalent products does not invalidate the society’s statement as regards “good value”. In addition the FSA notes that Stroud & Swindon explained in the merger booklet that without a merger the society “would not be able to continue to provide the same range of good value products...”

5.6 Having considered the representations falling under the First Criterion as set out above, the Authority finds no evidence to support the claim that the merger booklet was one-sided and did not give sufficient information to allow members to reach an informed decision on the proposed transfer of engagements. The Authority finds, therefore, that the **First Criterion does not apply.**

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

5.6 The main mischief to which this criterion appears to be directed is a resolution carried by a small and unrepresentative number of votes. In the case of the Coventry no members' resolutions were put (as previously explained) and so the Second Criterion cannot apply to the Coventry in relation to the merger.

5.7 The Stroud & Swindon is, as explained in paragraphs 2.5 and 2.6 above, subject to:

- (i) the requirements in section 94(2) and 5(a) and paragraph 27A of Schedule 2 of the Act that a shareholding members' resolution approving the terms of the merger must be passed by not less than three-quarters of the number of shareholding members of the society qualified to vote on the resolution and voting either in person at the meeting or by proxy on the resolution; and
- (ii) the requirements in section 94(2) and 5(a) and paragraph 29 of Schedule 2 to the Act that a borrowing members' resolution approving the terms of the merger must be passed by a simple majority of borrowing members qualified to vote on the resolution and voting either in person at the meeting or by proxy on the resolution.

5.8 The scrutineers' report confirms that both these requirements have been satisfied. Having regard to the voting figures reported by the scrutineers (set out in paragraph 2.4 above) and to the absence of any representations alleging that the result of the vote did not represent the views of the members, the Authority finds that **the Second Criterion does not** apply.

**(iii) The Third Criterion - Requirements of the Act and the Rules**

5.9 As explained in paragraph 1.6 above, the relevant requirements of the Act are those set out in sections 94 and 95 of the Act and in Schedule 16 to the Act and the relevant requirements of the Rules are those prescribing the procedures to be followed by the society in approving or effecting a transfer of engagements. The rules of the Stroud & Swindon of particular relevance are Rules 31 (Special Meetings), 32 (Notice of Meetings), 36 (Entitlements of Members to Vote on Resolutions) and 40 (Counting of Votes).

5.10 In proceeding by way of board resolution the Coventry is relying on the Authority's consent under section 94(5)(b) of the Act. These matters are covered in paragraphs 3.1 to 3.3 above.

5.11 As explained in paragraph 2.7 above, the scrutineers reported that 60 members did not receive notice of the SGM. Under the Stroud & Swindon's rules, and in conformity with the Act, the society must give at least 21 clear days' notice of a meeting to all members eligible to vote at the meeting. However, the Authority notes that the

number of members who received late notice of the SGM was a very small proportion of the total membership and that the members voted for the merger by a significant majority.

5.12 The Authority finds that there was a failure on the part of the Stroud & Swindon to give notice of the SGM to all members eligible to vote, as required by the Act and the society's Rules. 60 members eligible to vote were not sent notices of the SGM. However the Authority is satisfied that this would not have had a significant effect on the outcome of the vote. **The Authority has, therefore, concluded that the failure could not have been material to the members' decision about the transfer and that it should give a direction under section 95(5) of the Act that the failure is to be disregarded.**

5.13 **The Authority finds that the Third Criterion applies in respect of one failure to fulfil relevant requirements of the Rules of the Stroud & Swindon. This failure relates to the requirement to give notice of a meeting to every member eligible to vote. The Authority considers it appropriate to give a direction under section 95(5) of the Act that the failure should be disregarded.**

## 6. **DIRECTION**

The Authority, having considered the applications by the Stroud & Swindon Building Society and the Coventry Building Society for confirmation of the transfer of engagements of the Stroud & Swindon Building Society to the Coventry Building Society has concluded, having regard to the information available to it, that there was one failure to fulfil a relevant requirement of the Act and of the Rules of the Stroud & Swindon Building Society in that 60 members eligible to vote and entitled to receive notice of the SGM , did not receive notice of the meeting.

**The Authority is satisfied that this failure could not have been material to the members' decision about the transfer. The Authority accordingly directs under section 95(5) of the Building Societies Act 1986 that this failure is to be disregarded for the purposes of section 95.**

**7. DECISION**

**The Authority has considered the applications of the Stroud & Swindon Building Society and the Coventry Building Society for confirmation of the transfer of engagements of the Stroud & Swindon Building Society to the Coventry Building Society. Having had regard to the information available to it, and to the direction under section 95(5) of the Act contained in section 6 above, the Authority confirmed the transfer of engagements on 3 August 2010.**

For and on behalf of the  
Financial Services Authority

**BARBARA PURKISS**

**3 August 2010**

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