EXPLANATORY MEMORANDUM TO

THE AMENDMENTS TO LAW (RESOLUTION OF DUNFERMLINE BUILDING SOCIETY) (NO. 2) ORDER 2009

2009 No. [XXXX]

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This Order amends the Dunfermline Building Society Property Transfer Instrument 2009 ("the Property Transfer Instrument"),[1] made by the Bank of England on 30 March 2009.

2.2 The Transfer Instrument included a definition used to exclude Dunfermline Building Society's ("Dunfermline") commercial property portfolio (of approximately £660m) from the transfer of part of Dunfermline's business to Nationwide Building Society ("Nationwide"). The effect of the definition as drafted in the Transfer Instrument, however, was to transfer a significant proportion of this commercial property portfolio and a small number of social housing loans to Nationwide. The loans transferred were not included in the transaction agreed between HM Treasury, the Bank of England, and Nationwide.

2.3 The amendments made by this Order make the necessary corrections.

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

3.1 Section 75(4)(c) of the Banking Act 2009 specifically provides that orders under section 75 may, amongst other things, be used to amend property transfer instruments made by the Bank of England. This is the first time this power has been exercised.

3.2 The correction made by this Order is given retrospective effect to the time at which the Property Transfer Instrument came into force. This has the effect that the Property Transfer Instrument will be treated as having included the corrected definition at the time of the transfer of part of Dunfermline's business to Nationwide, which was 8 a.m. on 30 March 2009.

4. Legislative Context

4.1 The correction is made with retrospective effect because the basis of the transfer agreed between the Bank of England and Nationwide was to exclude Dunfermline's commercial property portfolio. Subsequent due diligence

[1] Which was made by the Bank of England (in accordance with sections 11(2)(b) and 12(2) of the Banking Act 2009 as applied by section 84) and which is published on the Bank of England's internet website (www.bankofengland.co.uk) and which was laid before Parliament by the Treasury (in accordance with section 41 of that Act as applied by section 84).

undertaken by the Bank of England and the special administrators of Dunfermline has demonstrated that the original definition adopted was not apt to achieve this aim, such that left uncorrected a proportion of the commercial loan portfolio (together with a limited number of social housing loans) would have been transferred to Nationwide.

4.2 The Treasury consider, in particular, that it is necessary and desirable to make the change, having had regard to the fact that it is in the public interest to avoid retrospective legislation.

4.3 In particular, the Treasury consider the use of the power in this case falls within one of the principal examples given by the responsible Minister of why section 75 orders needed to be capable of having retrospective effect. During Report, Lord Davies of Oldham said (HL Deb., 3 February 2009, col. 564):

> However, there may be cases where the parties all intended to achieve a particular effect and have proceeded on the basis of that intention, but looking at the instrument may reveal that the text itself is ambiguous or even wrong. In such cases it may be entirely appropriate to correct the drafting with retrospective effect to ensure that the parties who have signed up to the resolution are indeed in the position that they intended to be in when they gave their agreement.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Financial Services Secretary, Lord Myners, has made the following statement regarding Human Rights:

In my view the provisions of the Amendments to Law (Resolution of Dunfermline Building Society) (No. 2) Order is compatible with the Convention rights.

7. Policy background

- ***What is being done and why***

7.1 The order specifies the loans to be excluded from the original transfer to Nationwide. The new definition uses reference numbers, which are unique to each loan, and are used in the Dunfermline Building Society's mortgage processing information system.

- ***Consolidation***

7.2 This instrument has been prepared in consultation with Nationwide and the administrators, and on the advice of the Bank of England.

8. Consultation outcome

8.1 N/A

9. Guidance

9.1 N/A

10. Impact

10.1 The Property Transfer Instrument (and therefore this Order which amends it) is not standing legislation, but was used to resolve the specific circumstances of Dunfermline. Accordingly, there is no general impact on business, charities or voluntary bodies, or the public sector.

10.2 This instrument enables the Treasury to make the recoveries (as a creditor) through the administration of Dunfermline that were envisaged in the transaction.

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

11. Regulating small business

11.1 The legislation does not apply, on a standing basis, to small business.

12. Monitoring & review

12.1 N/A

13. Contact

Alec Brown at HM Treasury Tel: 020 7270 4825 or email: alec.brown@hm-treasury.x.gsi.gov.uk can answer any queries regarding the instrument.