These notes refer to the Financial Services Act 2010 (c.28) which received Royal Assent on 8 April 2010

FINANCIAL SERVICES ACT 2010

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Financial Services Act which received Royal Assent on 8 April. They have been prepared by the Treasury in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

2. These Notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

BACKGROUND TO THE ACT

3. In 1997, the Government proposed a new system of financial regulation in the UK. A structure for overseeing the UK financial system was created, with distinct roles for HM Treasury, the Bank of England and the Financial Services Authority ("the FSA") (together, "the relevant authorities") and distinct responsibilities for overall financial stability issues, which are set out in a memorandum of understanding between the relevant authorities.

4. The Bank of England Act 1998 established the arrangements for the Bank's current monetary policy responsibilities. Under the 1998 Act, the banking supervision function that had previously been undertaken by the Bank was transferred to the FSA.

5. The Financial Services and Markets Act 2000 ("FSMA") set out the framework within which the FSA operates, as the single regulator for the financial services industry. It also established the framework for the Financial Services Compensation Scheme ("the FSCS") to provide compensation for consumers in the event that a financial services firm is unable to meet its obligations to them.

6. The Banking Act 2009 built on this framework to enhance the ability of the relevant authorities to deal with crises in the banking system, to protect depositors and to maintain financial stability. The Act established a new permanent special resolution regime, providing the relevant authorities with a range of tools to deal with banks and building societies that are failing.

7. In July 2009 the Treasury published *Reforming financial markets*[1], which proposed reforms to financial regulation to enable more effective prudential regulation and supervision of firms, greater emphasis on monitoring and managing system-wide risks, and improved protection and support for consumers. In this document and following a review of consultation responses, the Government announced its intention to bring forward legislation on the following.

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1 *Reforming financial markets*, HM Treasury, 8 July 2009. http://www.hm-treasury.gov.uk/d/reforming_financial_markets080709.pdf

SUMMARY AND OVERVIEW OF THE STRUCTURE OF THE ACT

Objectives of FSA etc

8. FSMA currently sets out four objectives for the FSA. These are: maintaining confidence in the financial system; promoting public understanding of the financial system; securing the appropriate degree of protection for consumers; and reducing financial crime. As maintaining financial stability is a fundamental component of maintaining confidence in the financial system, the Act provides the FSA with an additional objective, namely an explicit financial stability objective. In considering financial stability, the FSA must have regard to the costs to the economy both of instability and of regulatory actions (taken to reduce instability). The FSA, like the Bank of England, is required to consult the Treasury when determining its strategy for financial stability.

9. The Act removes the FSA's regulatory objective of promoting public understanding of the financial system and requires the FSA to establish a new consumer financial education body whose purpose is to raise the understanding and knowledge of members of the public of financial matters (including the financial system) and improve their ability to manage their financial affairs. The new body will therefore take over responsibility for the activity previously undertaken by the FSA as part of the National Strategy for Financial Capability under its 'public understanding' objective. In addition the body will implement the national rollout of an impartial generic financial advice or 'money guidance' service, taking forward the recommendations of the Thoresen Review[2].

10. The Act provides that the FSA's powers, including its general rule-making power, can now be exercised for the purpose of meeting any of its regulatory objectives. Previously, these powers were only exercisable in pursuit of its consumer protection objective.

Remuneration of executives of authorised persons

11. The Act gives the Treasury power to make provision for executive remuneration reports, and imposes a new duty on the FSA to make general rules requiring authorised persons (or a specified class of authorised persons) to have and implement a remuneration policy and to secure that the remuneration policy satisfies the requirements set out in the Act. It also provides the FSA with other powers in relation to remuneration.

Recovery and resolution plans

12. The Act imposes on the FSA a duty to make rules requiring the production of recovery and resolution plans by authorised persons (or certain classes of authorised person) and makes other provision about such plans. A recovery plan aims to reduce the likelihood of failure of a firm by setting out what the authorised person would do in, or prior to it becoming subject to, stressed circumstances (which the FSA may specify in its rules) that would affect the ability of the authorised person to carry on all or a significant part of its business. A resolution plan is a plan covering both action to be taken in the event of failure of all or any part of the business occurring and action to be taken by a firm where failure is likely. This would include action to be taken by the relevant authorities to resolve the authorised person.

Short selling

13. The Act provides the FSA with a new power to prohibit, or require disclosure of, short selling.

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2 *Thoresen Review of Generic Financial Advice: Final Report*, HM Treasury, 3 March 2009. http://www.hm-treasury.gov.uk/d/thoresenreview_final.pdf

FSA's disciplinary powers

14. The Act provides the FSA with greater enforcement powers. The FSA has the power to fine authorised persons and approved individuals for misconduct. The Act extends these powers to enable the FSA to suspend or limit an authorised person's permission or an approved person's approval. It also enables the FSA to impose a fine on an individual performing a controlled function without approval, as well as prohibit the individual from working in the industry. Additionally, it includes provisions concerning disclosure by the FSA of decision notices.

Measures to protect consumers

15. The Act enables the FSA to make rules requiring firms to establish consumer redress schemes. Rules can be made if it appears to the FSA that (a) there may have been a widespread or regular failure by a relevant firm to comply with the requirements for carrying on an activity; (b) as a result, consumers have suffered or may suffer loss that would entitle them to redress; and (c) it is desirable to establish a scheme to secure redress for consumers.

16. The Act makes it an offence for a credit card issuer to provide credit card cheques to a customer, other than in response to a request from that customer.

Financial Services Compensation Scheme (FSCS)

17. The FSCS is the scheme established by the FSA under Part 15 of FSMA to compensate customers of authorised financial services firms when those firms are in default, that is, unable or likely to be unable to pay claims.

18. Under section 214B of FSMA, which was inserted by the Banking Act 2009, the Treasury may require the FSCS to contribute to the costs incurred in applying the stabilisation powers of the special resolution regime (established in Part 1 of the Banking Act) to a bank that is failing. The Act replaces section 214B and inserts two new sections into FSMA to provide that the "expenses" to which the FSCS may be required to contribute include interest, and that the limit up to which the FSCS may be required to contribute (which reflects the amount the FSCS would have had to pay out had no stabilisation power been used and the bank been unable to satisfy claims against it) takes into account the costs that the FSCS would have incurred in funding compensation payments if the stabilisation power had not been exercised.

19. The Act inserts a new Part 15A into FSMA to enable the Treasury to require the FSCS manager to make payments on behalf of another compensation scheme (or a government or other authority) that pays compensation in respect of institutions that provide financial services, including institutions that are not authorised financial services firms under FSMA.

Powers to require information

20. The Act confers on the FSA a power to require certain types of person to provide specified information, where the FSA considers that the information or documents in question are or might be relevant to the stability of one or more aspects of the financial system.

21. The Act provides the Treasury with the power to require information or documents from participants or proposed participants in the Asset Protection Scheme or related schemes.

Banking Act 2009

22. The Act makes some minor and technical amendments to the Banking Act 2009, including amendments that (a) make express that the property transfer power can be used to impose a liability on a residual company in place of liabilities transferred from the residual company; and (b) allow compensation orders (see section 49 for the various

orders that may be made) to include an independent valuer order in the interests of administrative efficiency.

Director of Savings

23. The Act provides for the Director of Savings to undertake functions on behalf of the Accountant General for England and Wales where appointed to do so under court funds rules.

TERRITORIAL EXTENT

24. The Act extends to the whole of the UK.

25. At Introduction the Bill for this Act contained provisions that triggered the Sewel Convention. The provisions relate to the establishment of a consumer education body. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. Legislative consent was obtained from the Scottish Parliament.

ANNEX

26. The Annex lists the standard abbreviations of enactments and technical terms used in these notes.

COMMENTARY ON SECTIONS AND SCHEDULES

Objectives of FSA etc

Section 1: Financial stability objective

27. This section amends section 2 of FSMA to give the FSA an additional regulatory objective (or 'general duty') concerning financial stability. It inserts a new section 3A in FSMA, which provides that the objective is to contribute to the protection and enhancement of the stability of the UK financial system. This is similar to the financial stability objective of the Bank of England under section 2A of the Bank of England Act 1998 (inserted by section 238 of the Banking Act 2009).

28. New section 3A of FSMA requires the FSA, in considering this objective, to have regard to the economic and fiscal consequences of instability and also to any effects on economic growth of regulatory actions taken for stability reasons. In addition the FSA, in considering this objective, must have regard to the possible impact on UK financial stability of events and circumstances outside the UK. The section also requires the FSA to develop and keep under review a strategy concerning this objective, in consultation with the Treasury.

29. *Schedule 2* makes consequential amendments to FSMA. Paragraph 2 of that Schedule substitutes the term "the UK financial system" for "the financial system" in section 3(1) of FSMA (which deals with the "market confidence" objective) and provides a definition of that term in section 3(2) of FSMA. Similar substitutions are made by paragraphs 3 and 6(2) to sections 4 and 14 of FSMA respectively. Paragraph 31 amends section 417 of FSMA (definitions) to clarify that the definition of "UK financial system" in section 3(2) of FSMA applies for the purposes of that Act.

Section 2: Enhancing public understanding of financial matters etc

30. *Subsections (2)(a) and (3)* of this section remove the FSA's regulatory objective of promoting public understanding of the financial system. *Subsection (2)(b)* requires the FSA to have regard to the desirability of enhancing the understanding and knowledge of the public of financial matters when the FSA discharges its general functions set out in section 2(4) of FSMA.

31. *Subsection (4)* requires the FSA, when discharging its consumer protection regulatory objective, to have regard to information provided to the FSA by the new consumer financial education body to be established under new section 6A of FSMA.

32. *Subsection (5)* inserts a new section 6A in FSMA which imposes an obligation on the FSA to establish a body, referred to as the consumer financial education body (the "CFEB"). The CFEB's function is defined in new section 6A and the main purposes are to help members of the public to:

- better understand financial matters; and
- improve their ability to manage their own financial affairs.

33. New section 6A(2) provides illustrations of the types of activity the CFEB might carry out in accordance with its function under new section 6A(1). This includes delivering the money guidance service and programmes to improve financial capability in the UK. New section 6A(2)(e) allows CFEB to deliver information and advice to members of the public. "Advice" has an ordinary meaning and does not include advice which is regulated under FSMA.

34. *Subsection (6)* introduces Schedule 1, which inserts new Schedule 1A into FSMA. Schedule 1A makes further provision for the establishment and operation of the CFEB.

35. *Paragraph 1* requires the FSA to ensure that the CFEB can undertake the activities set out in new section 6A. The FSA has a number of responsibilities under this schedule, including appointing the board, approving the CFEB's annual budget and annual plan, and making rules for the collection from FSA-regulated firms of amounts towards the CFEB's establishment and running costs. *Paragraph 1(2)* enables the FSA to provide services (such as HR or IT support) to the CFEB.

36. *Paragraph 2* provides that the CFEB must have a chair, a chief executive and a board, and that these persons (who are the CFEB's directors) are appointed by the FSA (in the case of the chair and chief executive, with the agreement of the Treasury). The FSA has the power to remove any member from the board (acting, in the case of the chair and chief executive of the board, with the agreement of the Treasury), but the terms of each board member's appointment (e.g. length of appointment, the basis on which they may be dismissed) must be sufficient for the director (and the board) to be independent from the FSA. The FSA can only appoint someone to the CFEB board if satisfied that the person has knowledge or experience likely to be relevant to the CFEB's function.

37. *Paragraph 3* provides that the CFEB and its members and employees will not be acting on behalf of the Crown and its employees will not be civil servants.

38. *Paragraph 4* makes it clear that the CFEB can arrange for others to act on the CFEB's behalf as the CFEB's agent in delivering its consumer financial education function or can support others in undertaking activities which would fall within the CFEB's function. This can include providing financial support and payment to others to undertake such activities.

39. *Paragraph 5* permits a body to undertake work for the CFEB even where it would otherwise not be able to do so. This would enable bodies (such as those established by royal charter or with limited charitable aims) to operate where otherwise their constitution may not permit them to do so.

40. *Paragraph 6* requires the CFEB when exercising its function to have regard to the importance of maintaining confidence in the financial system and the stability of the financial system.

41. *Paragraph 7* requires the CFEB to prepare a budget before the beginning of each financial year (or in its first year, as quickly as is reasonably practicable) and for the budget to be approved by the FSA. When preparing the budget or planning to vary it the CFEB must consult the persons listed in *sub-paragraph (4)*. The CFEB may vary

a budget which has been adopted, with the agreement of the FSA. It is anticipated that, in addition to the sums received by exercising the powers given to the FSA under paragraph 12 and the OFT under paragraph 13, the CFEB may receive public funds under paragraph 14. It is also anticipated that sums will be provided to the CFEB pursuant to directions issued under section 22 of the Dormant Bank and Building Society Accounts Act 2008. As the provisions of paragraphs 12 and 13 make clear, the FSA and the OFT respectively are required to take into account other anticipated sources of funding when fixing a levy on FSA-regulated and OFT-licensed firms. The CFEB is also required to publish each budget or variation of the budget, in a way the CFEB considers appropriate.

42. *Paragraph 8* requires the CFEB to prepare an annual plan before the beginning of each financial year (or in its first year, as quickly as is reasonably possible) setting out its objectives (both long and short term), the priority to be given to each objective, how it intends to allocate its resources and the tools it will use in determining the extent to which its objectives have been met. It may vary its plan at any point during that year. The annual plan and any variation of it must be approved by the FSA. When preparing the annual plan or planning to vary it the CFEB must consult the persons listed in *sub-paragraph (6)*. The CFEB is also required to publish each annual plan or variation of the annual plan, in a way the CFEB considers appropriate.

43. *Paragraph 9* requires the CFEB to prepare a report, at least annually, on its activities, setting out how it has met the objectives and priorities set out in the annual plan for the period covered by the report and annexing its latest accounts. The CFEB has to publish each report in the way it considers appropriate.

44. *Paragraph 10* exempts the CFEB and those acting on its behalf from the requirement to obtain a licence under Part 3 of the Consumer Credit Act 1974 ("CCA"). A licence is required under Part 3 for businesses (with certain exceptions) to carry on consumer credit, consumer hire or ancillary credit business. *Sub-paragraph (2)* disapplies Parts 4 and 10 of the CCA to the CFEB and those acting on its behalf. Part 4 of the CCA relates to advertising and other aspects of seeking credit business and Part 10 relates to ancillary credit business. These provisions are included because the CFEB may on occasion engage in activities which could fall within the ambit of these Parts of the CCA, for example, if a CFEB staff member or one of CFEB's agents were to help an individual to use an online credit card comparison tool during a Money Guidance session, this could be 'credit brokerage' and fall within the definition of ancillary credit business in Part 10.

45. *Paragraph 11* defines "relevant costs" for the purpose of Part 2 of Schedule 1A to mean the expenses the FSA incurs in establishing the CFEB and the costs incurred or to be incurred by the CFEB.

46. *Paragraph 12* gives the FSA the power to levy sums from persons authorised under FSMA and certain payment service providers defined in the Payment Services Regulations 2009 to meet part of the "relevant costs". The FSA levies by way of making rules to required authorised persons or payment services providers specified in the rules to pay sums to the FSA to meet the "relevant costs". The FSA will determine the amount to be levied but under *sub-paragraph (2)* must take into account other anticipated funding for the CFEB before making its rules. The FSA is required to pay sums it collects to the CFEB, but can deduct from such sums the costs of collecting the money.

47. *Paragraph 13* gives the OFT power to levy CCA licence holders and applicants for such licences to meet part of the "relevant costs". *Sub-paragraph (3)* defines the type of consumer credit licensees and applicants who can be included in a levy, by referring to those persons specified in an order made under section 226A(2)(e) of FSMA (which specifies types of business to be included in the consumer credit jurisdiction of the Financial Ombudsman Scheme). The OFT levies by way of a general notice to the relevant licence holders or applicants. Under *sub-paragraph (4)*, the OFT must take into

account other anticipated funding for the CFEB before issuing a general notice. *Sub-paragraph (5)* requires the OFT to consult the FSA, the CFEB and any other relevant persons before issuing a general notice. The OFT is also required to pay sums it collects to the CFEB, but can deduct from such sums the costs of collecting the money. *Sub-paragraph (8)* makes it clear that a general notice can impose different requirements on different licence holders or applicants and can exempt persons from a requirement to pay sums.

48. *Paragraph 14* gives the Treasury and the Secretary of State the power to make grants or loans or provide other financial assistance to the CFEB. It is intended that the powers of the Secretary of State in this Schedule will be exercised by the Secretary of State for Business, Innovation and Skills.

49. *Paragraph 15* enables the FSA to appoint an independent reviewer to review the efficiency of the CFEB's use of its resources. The FSA must consult the Treasury before making such an appointment. The reviewer must set out the results of the review and any recommendations in a written report. The FSA must publish the report in the way it considers appropriate and must meet the expenses of the review.

50. *Paragraph 16* provides the independent reviewer appointed under paragraph 15 with the right of access to documents and information held by the CFEB which are reasonably required for the review.

51. *Subsection (7)* provides that if staff of the FSA are transferred to the CFEB the Transfer of Undertakings (Protection of Employment) Regulations 2006 will apply to such a transfer.

Section 3: Meeting FSA's regulatory objectives

52. This section amends four sections of FSMA so as to broaden the ends towards which the FSA can use its rule-making, permission-varying and intervention powers. As a result of this section, these powers will be exercisable for the purpose of meeting any of the FSA's regulatory objectives and not just the consumer protection objective.

53. *Subsection (2)* amends section 44 of FSMA, which deals with the FSA's power to vary or cancel an authorised person's permission (to undertake a regulated activity) at their request. The amendment to section 44(3) provides that the FSA may refuse an application if this is desirable to meet any of its regulatory objectives.

54. *Subsection (3)* amends section 45 of FSMA, which concerns the FSA's power, on its own initiative, to modify or cancel an authorised person's permission. *Subsection (3)(a)* substitutes a new *subsection (1)(c)* which enables the FSA to use this power in pursuit of any of its regulatory objectives. *Subsection (3)(b)* inserts a provision making clear that the consumers being protected by the exercise of the power need not be consumers of services of the authorised person whose permission is being varied.

55. *Subsection (4)* amends section 138 of FSMA to enable the FSA to use its general rule-making power in pursuit of any of its regulatory objectives.

56. *Subsection (5)* amends section 194 of FSMA, which concerns the FSA's power to intervene in relation to an incoming firm from another EEA state. *Subsection (5)(a)* substitutes a new subsection (1)(c) enabling the FSA to use this power in pursuit of any of its regulatory objectives. *Subsection (5)(b)* makes an amendment to clarify that the power may be exercised to protect consumers who need not be consumers of the services of the firm in respect of which the FSA is intervening.

57. Schedule 2 makes consequential amendments to FSMA. These include paragraph 32 which inserts new sections 425A and 425B into FSMA, which contain definitions of "consumers" and paragraphs 11 and 35(3), which remove the existing definitions of "consumers" from section 138 of, and Schedule 4 to, FSMA respectively. Paragraphs 4, 5, 6(3), 28 and 35(4) of this Schedule insert provisions applying the definitions in

new sections 425A and 425B of FSMA (as appropriate) for the purposes of sections 5, 10, 14, 391 of, and Schedule 4 to, FSMA respectively.

Remuneration of executives of authorised persons

Section 4: Executives' remuneration reports

58. This section gives the Treasury the power to make regulations requiring the preparation of a report disclosing information on the remuneration paid to officers and employees of a person who is an authorised person under FSMA and to others with a specified connection to the authorised person. Quoted companies are already required to produce and publish a directors' remuneration report detailing all monies paid to executive and non-executive directors. This section gives the Treasury power to expand the disclosure regime beyond quoted companies, and to employees who are not directors.

59. *Subsection (1)* gives the Treasury power to make regulations on executive remuneration reports.

60. *Subsection (2)* defines "executive remuneration report" for the purposes of this section.

61. *Subsection (3)* lists the type of persons who can be considered to be executives for the purposes of the executives' remuneration report. They include any individual who has a connection with the authorised person which is specified in the regulations made by the Treasury. *Subsection (4)* provides further information on who may fall into this last category and makes it clear that the Treasury is able to require the disclosure of information in relation to remuneration given to individuals providing services to an authorised person who are not employees of that person.

62. *Subsection (5)* means that the Treasury can make regulations imposing disclosure requirements on a class of authorised person defined in the regulations. "Authorised person" is a term which encompasses a wide range of financial institutions and individuals in the financial services industry. Regulations may be made in relation to one or more sections of the financial services industry.

63. *Subsection (6)* provides that regulations made under this section must be made using the affirmative resolution procedure.

Section 5: Executives' remuneration reports: supplementary

64. This section details supplementary provisions in relation to section 4.

65. *Subsection (1)* makes it clear that the Treasury can make provision regarding the information which is required to be included, the manner in which the information is presented, and what information has to be audited.

66. *Subsection (2)* provides that the Treasury may require the executive remuneration report to contain any information corresponding to information which quoted companies could be required to include in directors' remuneration reports by regulations made by the Secretary of State under section 421 of the Companies Act 2006. The requirements for directors' remuneration reports are currently set out in Schedule 8 to the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 (S.I. 2008/410). The Treasury may also require the disclosure of comparative information, such as the ratio between the highest and lowest paid employees.

67. *Subsection (3)* provides that the Treasury can require executive remuneration reports to be filed with registrars of companies or the FSA, and provides that the FSA may publish reports filed with it.

68. *Subsection (4)* provides that regulations made by the Treasury may apply any provisions made in or under the Companies Act 2006 in respect of directors' remuneration reports to executive remuneration reports, with appropriate modifications. Under *subsection (5)*

this includes provisions creating offences for failure to comply with the requirements for directors' remuneration reports. However, it also makes it clear that the Treasury may not impose stricter penalties for offences applied to executive remuneration reports than the original offence in relation to directors' remuneration reports.

69. Under *subsection (6)* the Treasury may provide that any requirements imposed on authorised persons in the regulations are to be treated as requirements imposed on that person under FSMA. The result of such a provision would be that, if the authorised person contravened a requirement under the regulations, the disciplinary powers of the FSA under FSMA would apply, and the FSA would be able to take action against the authorised person in question.

70. *Subsection (7)* defines terms in sections 4 and 5 for the purposes of these sections.

Section 6: Remuneration rules made by FSA

71. This section inserts a new section 139A into FSMA, which imposes a new duty on the FSA in relation to remuneration.

New section 139A: General rules about remuneration

72. *Subsection (1)* imposes a duty on the FSA to make rules requiring authorised persons under FSMA, or a class of authorised persons identified in FSA rules, to have and implement a remuneration policy.

73. *Subsection (2)* defines what a "remuneration policy" is for the purposes of this section. It also lists the types of person that may be included within the scope of the authorised person's remuneration policy. They include officers, employees and any other persons of a description specified in the FSA rules.

74. *Subsection (3)* obliges the FSA to ensure, through its rules, that remuneration policies required by the rules are consistent with the effective management of risks and the Financial Stability Boards' Principles for Sound Compensation Practices Implementation Standards.

75. *Subsection (4)* means that in making rules about remuneration the FSA must have regard to any other relevant international standards about remuneration which are in force.

76. *Subsection (5)* gives the Treasury power to direct the FSA to consider whether the remuneration plans of those authorised persons described or listed in the direction comply with the requirements the FSA have imposed in relation to remuneration policies. Under *subsection (6)* the FSA must be consulted before the Treasury make such a direction.

77. *Subsection (7)* provides that where the FSA considers that a remuneration policy fails to meet these requirements, the FSA must take such steps as it considers appropriate to deal with the failure. *Subsection (8)* makes clear that the steps the FSA may take include requiring the revision of the relevant remuneration policy.

78. *Subsection (9)* provides that FSA rules may impose specific prohibitions on the way in which a person may be remunerated. They may provide that any provision of a remuneration contract which contravenes such a prohibition is void and so unenforceable, and make provision for the recovery of any payment which may have been made under such a provision.

79. *Subsection (10)* limits the FSA's power to impose such prohibitions by requiring that it may only be used to ensure consistency with the matters mentioned there.

80. *Subsection (11)* clarifies that a rule made by the FSA under *subsection (9)* which provides that a contractual provision which contravenes a prohibition on remuneration is void will not affect any provision contained in an agreement which was made before

the date the rules containing the prohibition were made. Only subsequent amendments to pre-existing contracts, and contracts made after that date, will be affected.

81. *Subsection (12)* defines terms used in this section.

82. *Subsection (13)* means that the references to "the Implementation Standards" or "international standards" in this section are references to standards that are currently in force.

Recovery and resolution plans (RRPs)

Section 7: Rules made by FSA about recovery and resolution plans

83. Section 7(1) inserts new sections 139B to 139F into FSMA. The new provisions place a duty on the FSA to make rules requiring the production of recovery and resolution plans (RRPs); give the FSA additional enforcement powers related to collection of information in relation to RRPs; require the FSA to have regard to international developments in making rules around RRPs; and require the FSA to consult the Bank of England and the Treasury in relation to the drafting of rules for RRPs of banking institutions and (in the case of resolution plans prepared by those institutions) assessment of those plans by the relevant authorities.

New section 139B - Rules about recovery plans

84. *Subsection (1)* places a duty on the FSA to make rules requiring persons authorised under FSMA to produce and maintain a recovery plan in accordance with the requirements set out in the rules. Subject to subsection (8), this requirement can apply to all authorised persons or the FSA can exercise discretion over which authorised persons are required to produce a recovery plan by specifying the firms to which the rules apply. This will allow for gradual implementation, focusing on the largest, most complex and systemically significant firms in the first instance.

85. *Subsections (2), (3)* and *(4)* define a 'recovery plan' for the purposes of the new provisions. A recovery plan aims to reduce the likelihood of failure of a firm by setting out what the authorised person would do in, or prior to it becoming subject to, stressed circumstances (which the FSA may specify in its rules) that would affect the ability of the authorised person to carry on all or a specified part of its business. Action described in the plan may include the restructuring, scaling back or sale of certain business lines or assets of the authorised person in question and the subsection therefore refers to the business not necessarily having to be carried on in the same way or by the same person. The plan is not to be for the purpose of helping an authorised person to plan for avoiding getting into difficult circumstances, but about what planning they can do to enable them to recover should they encounter such circumstances.

86. *Subsection (5)* requires the FSA to consider whether each recovery plan required by rules under subsection (1) makes satisfactory provision in relation to those matters that the plan is required to cover.

87. *Subsection (6)* provides that where the FSA considers that a recovery plan fails to make satisfactory provision in relation to those matters, the FSA must take such steps as it considers appropriate to deal with the failure. *Subsection (7)* makes clear that the steps the FSA may take include requiring the revision of the relevant recovery plan.

88. *Subsection (8)* requires the FSA to make general rules about recovery plans that apply to authorised persons in relation to whom any power under Part 1 of the Banking Act 2009 may be exercised. The FSA is required by *subsection (9)* to consult the Treasury and Bank of England before preparing a draft of those general rules.

New section 139C – Rules about resolution plans

89. *Subsection (1)* places a duty on the FSA to make rules requiring persons authorised under FSMA to produce and maintain a resolution plan in accordance with the requirements set out in the rules. Subject to subsection (9), this requirement can apply to all authorised persons or the FSA can exercise discretion over which authorised persons are required to produce a recovery plan by specifying the firms to which the rules apply. This will allow for gradual implementation, focusing on the largest, most complex and systemically significant firms in the first instance.

90. *Subsections (2), (3)* and *(4)* define a 'resolution plan'. They clarify that a "resolution plan" should cover both action to be taken in the event of failure of all or any part of the business occurring, and action to be taken by a firm where failure is likely.

91. *Subsection (4)* clarifies that a resolution plan may require a firm to identify obstacles to the application of possible resolution tools by the authorities or to the carrying out of the functions of an insolvency official in the event of the authorised person's failure and to set out what action that may be required to facilitate the application of those tools or carrying out of those functions. This could include provisions to ensure that a 'data room' can be set up quickly and effectively. It could also mean information about the simplification of legal structures ahead of a resolution being triggered.

92. *Subsection (5)* makes clear that information that would facilitate planning by the Treasury or Bank of England in relation to the possible exercise of their powers under Part 1, 2 or 3 of the Banking Act 2009 may be required by rules to be included in a resolution plan.

93. *Subsection (6)* requires the FSA to consider whether each resolution plan makes satisfactory provision in relation to those matters that the plan is required to cover.

94. *Subsection (7)* provides that where the FSA considers that a resolution plan fails to make satisfactory provision in relation to those matters, the FSA must take such steps as it considers appropriate to deal with the failure. *Subsection (8)* makes clear that the steps the FSA may take include requiring the revision of the relevant resolution plan.

95. *Subsection (9*requires the FSA to make general rules about resolution plans that apply to authorised persons in relation to whom any power under Part 1 of the Banking Act 2009 may be exercised. The FSA is required by *subsection (10)* to consult the Treasury and Bank of England before preparing a draft of those general rules.

New section 139D – Sections 139B and 139C: interpretation

96. *Subsection (1)* clarifies that references in new section 139B and new section 139C (see subsection (3) in each case) to taking action include action not only by the authorised person but by other members of the same group or partnership of which it is a member. This is to ensure that the duties in subsection (1) of new sections 139B and 139C include a duty to make rules requiring a recovery or resolution plan, as the case may be, to include specified information relating to action to be taken by other members of the group or partnership of which the authorised person is a member. For this purpose, the wide meaning of "group" in section 421(1) of FSMA is narrowed by *subsection (2)* to exclude entities of which the authorised person (or other members of its group) may not necessarily have majority ownership or control.

97. *Subsection (3)* sets out some of the scenarios that constitute 'failure' of an authorised person for the purposes of new section 139C which the FSA may require to be covered in a resolution plan.

98. *Subsection (4)* widens the potential scope of a recovery or resolution plan by providing that the references in section 139B (see subsections (3) and (4)) and section 139C (see subsection (3)) to the "business" of the authorised person include the business of other

persons in its group (including a holding company) or a partnership of which it is a member.

99. *Subsection (5)* provides that the term "specified" which is used in new sections 139B and C, means "specified" in general rules made by the FSA.

100. *Subsection (6)* makes clear that the references in new section 139D to "insolvency" and "administration" include the new procedures in Parts 2 and 3 respectively of the Banking Act 2009.

139E Rules about recovery and resolution plans: supplementary provision

101. *Subsection (1)* clarifies that the FSA can specify in its rules on RRPs that a resolution or recovery plan should set out the action which the authorised person is to take to collect, and maintain up-to-date, information of a specified description. This is to ensure that rules may require an authorised person quickly to establish and maintain a 'data room', which contains adequate data for interested third parties to perform due diligence on all or parts of the business, should circumstances require a sale.

102. Subsection (2) ensures that that where the FSA considers that an authorised person has failed to comply with the requirement referred to in subsection (1), the FSA may require the authorised person to appoint a skilled person to collect, and maintain up-to-date, the information that is needed.

103. *Subsection (3)* aligns the definition of a 'skilled person' with that of the existing section 166 of FSMA on 'skilled persons'.

104. *Subsection (4)* enables the 'skilled person' to require others to assist in the collection or updating of information. That requirement may be enforced in the manner described in *subsection (5)*.

105. To prepare a recovery or resolution plan an authorised person is likely to need to obtain information from persons connected to it and others. *Subsection (6)* facilitates the flow of information to the authorised person for the purposes of preparing a recovery or resolution plan from other parties, for example other parties in the group, or persons such as service providers. This subsection enables other parties, where the request or requirement to provide information has been approved in advance by the FSA, to disclose information relevant to preparing or maintaining a recovery or resolution plan to the authorised person without being in breach of any duty or obligation of confidence (whether imposed by contract or otherwise).

106. *Subsection (7)* clarifies the extent of the confidentiality obligations of an authorised person that receives confidential information under new section 139E(6) or already holds such information. The provision makes clear that an authorised person may, for example, include such information in its recovery or resolution plan and submit it to the FSA without having to seek the consent of a third party. *Paragraph 26 of Schedule 2* amends section 348(5)(d) of FSMA so that a skilled person appointed under new section 139E is treated in the same way as a person appointed to make a report under section 166 of FSMA.

107. *Subsection (8)* enables the FSA to require RRPs to be kept in electronic or any other format.

108. *Subsection (9)* sets out that, when making rules about RRPs, the FSA must also have regard to any internationally agreed standards on RRPs, including, but not limited to, the standards being developed by the Financial Stability Board ("FSB"). The FSB, through its Working Group on Cross-border Crisis Management, is piloting an internationally agreed template for RRPs on the major firms with cross-border crisis management groups and the template, redeveloped in line with the outcome of the pilot, will form the basis of the internationally agreed standards for RRPs, which are expected by the end of 2010.

New section 139F – Special provision in relation to resolution plans

109. *Subsection (1)* requires the FSA to consult the Treasury and the FSA about the adequacy of resolution plans required to be prepared by general rules so far as those plans relate to any matter which may be relevant to the exercise by the Treasury or Bank of England of any power under Part 1, 2 or 3 of the Banking Act 2009.

110. Under *subsection (2)* the Treasury or the Bank of England may, after that consultation, notify the FSA that, in their opinion, a resolution plan fails to make satisfactory provision in relation to any such matter and, if they do so, must give their reasons.

111. *Subsection (3)* requires the FSA to have regard to any notification given under subsection (2).

112. *Subsection (4)* requires the FSA, if it receives a notification under subsection (2) but considers that the resolution plan makes satisfactory provision, to give reasons for its opinion to the person who gave the notification.

113. Section 7(2) of the Act enables the Treasury, by order, to specify a date by which the FSA must make rules requiring authorised persons of a description specified in the order to prepare recovery or resolution plans. This subsection enables the Treasury to provide for a staged approach by making different orders in relation to authorised persons of different descriptions. Before making an order the Treasury is required under subsection (3) to consult the FSA. Subsection (4) provides that any order will be subject to the negative resolution procedure.

Short selling

Section 8: Power of FSA to prohibit, or require disclosure of, short selling

114. This section inserts a new Part 8A into FSMA, consisting of ten new sections (sections 131B to 131K). These sections provide the FSA with a new power to prohibit, or require disclosure of, short selling.

New section 131B: short selling rules

115. *Subsection (1)* provides that the FSA may make rules banning short selling in relation to certain financial instruments by prohibiting persons from engaging in this practice. These rules would apply to all persons, whether authorised by the FSA or not. These powers would not enable the FSA to ban a single firm from short selling a particular financial instrument while permitting other firms to do so.

116. *Subsection (2)* provides that the FSA may make rules requiring the disclosure of information relating to short selling in relation to specified financial instruments. This disclosure regime would apply to all persons, whether authorised by the FSA or not, who have engaged in short selling.

117. *Subsection (3)* sets out some of the provisions that may be included by the FSA in rules establishing a disclosure regime for short selling, in particular, when disclosures are to be made and the way in which disclosures are to be made.

118. *Subsection (4)* ensures that the FSA is able to obtain information about short selling which has taken place before the rules are made where the person concerned still has a short position when the rules are made. This will occur, for example, when the short seller (S) has sold financial instruments which S did not own, and has not at the time the rules are made purchased the instruments concerned in order to deliver them to the buyer or return them to the lender (if the sale was settled with borrowed instruments), and so closed out the short position or otherwise reduced their short position to a level below the disclosure threshold specified by the FSA.

119. *Subsection (5)* ensures that, where there is any doubt, what is meant by "a short position being open" will be determined in accordance with the FSA's short selling rules.

120. *Subsection (6)* makes it clear that rules under this section may apply in relation to short selling taking place wholly outside the UK by persons outside the UK, but only in relation to financial instruments admitted to trading on markets in the UK. FSA rules may also apply to short selling:

- by any person in the UK (including persons temporarily in the UK), or
- through an intermediary present in the UK, or
- in relation to shares admitted to trading in the UK (even if dual or multi-listed elsewhere in the world).

121. *Subsection (7)* allows the short selling rules described in this Part to be targeted at a particular form of financial instrument issued by a specified company.

122. *Subsection (8)* provides that rules made under section 131B are referred to as "short selling rules".

123. *Subsection (9)* requires the FSA to take account of any international agreement on short selling measures when it makes any rules in relation to short selling.

New section 131C: Short selling rules: definitions etc

124. This section defines the terms used in section 131B.

125. *Subsection (2)* defines short selling for the purposes of the short selling rules. Short selling will include any case in which a person sells a financial instrument which that person does not own, and will make a profit if the price of that instrument falls before the person has to buy the instrument to deliver it to the buyer or to return to the lender (where the sale was settled with borrowed financial instruments). It will also include any case in which a person enters into a transaction in a different financial instrument to the shorted instrument (whether the first-mentioned financial instrument was in existence before the transaction, or was created as a result of the transaction), where the effect of the transaction entered into is that that person will make a profit if there is a fall in value in the shorted instrument. For example, S may buy an equity put option giving S the right to sell 1,000 shares in ABC plc for £10 a share. If the price of the shares falls to £5, S will be able to buy 1,000 shares in the market for £5,000, exercise the option and sell the same shares for £10,000, making a profit of gross £5,000. Alternatively, S may enter into a contract for difference ("CFD") which provides that S will pay to B the difference between the current value of a financial instrument and its value at the date on which the contract for difference matures if the price increases (if the price falls, B pays the difference to S). The transaction will create a financial instrument (the CFD) and S will have engaged in short selling the financial instrument to which the CFD relates because he will make a profit if the value of the financial instrument falls before that date.

126. *Subsections (3)* and *(4)* define "financial instrument" and "relevant financial instrument". *Subsections (5)* and *(6)* contain supplementary definitions. The definition of "relevant financial instrument" ensures that the FSA may make rules regulating short selling in relation to financial instruments admitted to trading in EEA markets, or which have any other connection to EEA markets which may be specified in the rules, as well as financial instruments admitted to trading in the UK.

127. *Subsection (7)* ensures that where a financial instrument is admitted to trading both on a UK or EEA market and markets elsewhere in the world the FSA may make short selling rules in relation to that instrument on any or all of the markets on which it is admitted to trading. Under *subsection (8)* the same applies where related financial instruments are admitted respectively to trading on an EEA market and a market elsewhere in the world.

An instrument will be related for these purposes if the price or value of one instrument depends on the price or value of the other, as would be the case in relation to an equity share and a depositary receipt issued in relation to that share.

128. *Subsection (9)* defines "regulated market". *Subsection (10)* clarifies the meaning of references to a "market" in a particular territory.

New section 131D: Short selling rules: procedure in urgent cases

129. New section 131D provides for the procedure to be followed by the FSA where the FSA is making urgent restrictions on engaging in short selling.

130. *Subsection (1)* gives the FSA the power to make short selling rules, and subsequently to amend those rules, without going through the normal consultation process, where it is necessary to do so to protect the stability of the financial system, or to maintain confidence in the financial system.

131. *Subsection (2)* provides that initially these emergency short selling rules may last for no more than three months. However, under *subsections (3)* and *(4)* the FSA is given power to extend these rules for a further three months provided that it still considers them to be necessary to protect the stability of the financial system or to maintain confidence in the financial system at the time when the direction is given. Under *subsection (5)*, this direction must be published.

132. *Subsection (6)* provides that nothing prevents the FSA from revoking emergency rules before the end of the periods referred to in subsections (2) or (3).

New section 131E: Power to require information

133. This section gives the FSA a power to require the production of information or documents in order to ascertain whether there has been a breach of any short selling rules.

134. *Subsection (1)* gives the FSA the power to require information or documents to be produced. This applies whether or not the person concerned is an "authorised person" under FSMA. *Subsection (2)* sets out the scope of this power – the FSA may only impose such a requirement on a person if the information or documents are required in order to enable the FSA to determine whether that person or any person connected to that person, has breached any provision of the short selling rules.

135. *Subsections (3)* to *(5)* allow the FSA to specify the time and form in which the information must be provided. They may also require the person providing the information to take reasonable steps specified by the FSA to verify the information provided. *Subsection (7)* defines what is meant by a "connected person" for the purpose of this section.

New section 131F: Power to require information: supplementary

136. This section contains provisions corresponding to the provisions of section 175 of FSMA.

137. *Subsection (1)* enables the FSA to compel the production of a document by a person who is holding a document on behalf of another person if they would have the power to compel the latter to produce the document under new section 131E. Under *subsection (2)* a document, once obtained under new section 131E, may be copied or have extracts taken from it, and the person producing the document, or any other relevant person, may be required to explain it. *Subsection (3)* defines "relevant person" for these purposes.

138. Under *subsection (4)*, if any person required to produce a document fails to do so, they may be compelled to state where, to the best of their knowledge, the document is. Under

subsection (5) lawyers may be compelled to provide the name and address of their clients.

139. Under *subsection (6)* documents subject to banking confidentiality may be withheld unless the person holding the information, or the person to whom the duty of confidence is owed, is the person under investigation or a related company, or the person to whom the duty is owed consents to its disclosure. *Subsection (7) provides that* the production of a document does not affect any lien a third party may have over it.

New section 131G: Power to impose penalty or issue censure

140. *Subsections (1) to (3)* set out the penalty for contravention of the short selling rules, or failure to comply with an information requirement imposed under new section 131E, or new section 131F. The FSA may impose an unlimited fine on any person, whether or not that person is an authorised person, if it is satisfied that the person has contravened any part of the short selling rules or an information requirement. The FSA may alternatively decide not to impose a fine, but to publish a statement of censure instead.

141. *Subsections (4) to (6)* impose a three-year time limit on the FSA's ability to take such enforcement action against a person, unless, before the end of the three-year period, the FSA has given a warning notice to the person concerned under section 131H. The three-year period within which the FSA can act begins with the first day that the FSA knew that a person contravened any provision of the short selling rules or the information requirement.

New section 131H: Procedure and right to refer to Tribunal

142. *Subsections (1)* to *(3)* provide that a person must be given a warning notice detailing the amount of the fine or the terms of the public censure (as applicable) if the FSA proposes to take action against them.

143. *Subsections (4)* to *(6)* provide that a person must be given a decision notice detailing the amount of the fine or the terms of the public censure (as applicable) if the FSA decides to take action against them.

144. *Subsection (7)* provides that a person may refer the matter to the Tribunal if the FSA decides to take action against them.

New section 131I: Duty on publication of statement

145. This section requires the FSA to send a copy of any public censure to the person concerned and to any other person who was given a copy of the decision notice.

New section 131J: Imposition of penalties under section 131G: statement of policy

146. This section requires the FSA to issue a statement of its policy in relation to the imposition and amount of penalties. The policy set out in the statement must take account of the factors set out in *subsection (2).*

147. Under *subsection (3)* the FSA is given power to alter or replace the statement of policy. If it does so, it must, under *subsection (4),* issue the revised statement.

148. *Subsections (5)* and *(6)* require the FSA to give the Treasury a copy of any statement of policy it publishes, and to publish the statement so as to ensure that it is brought to public attention.

149. *Subsection (7)* enables the FSA to charge a fee for providing a copy of the statement of policy.

150. *Subsection (8)* requires the FSA to have regard to the statement in force at the time of the misconduct when imposing penalties under new section 131G.

New section 131K: Statement of policy: procedure

151. This section sets out the procedure for issuing a statement under new section 131J. Before deciding on its policies, or changing those policies, the FSA will be required to consult the public on its proposals.

FSA's disciplinary powers

Section 9: Suspending permission to carry on regulated activities etc

152. Sections 205 and 206 of FSMA set out the disciplinary measures available to the FSA in respect of a contravention by an authorised person of a requirement imposed by or under FSMA or a directly applicable EU regulation made under the markets in financial instruments directive.

153. This section inserts a new section 206A into FSMA providing the FSA with additional sanctions to deal with such breaches. Those additional sanctions are the power to suspend, limit or otherwise restrict an authorised person's permission for up to a maximum of 12 months.

154. The section permits the FSA to impose one or more of the available sanctions in respect of the same contravention.

155. Sections 207 and 208 of FSMA set out the procedure for taking disciplinary measures, namely a warning notice followed by a decision notice and right of referral to the Tribunal. *Paragraphs 18 and 19 of Schedule 2* make consequential amendments to those sections to apply the same procedure to the imposition of the new sanctions.

156. Section 210 of FSMA requires the FSA to issue a statement of policy regarding the imposition of a financial penalty under section 206. *Paragraph 20 of Schedule 2* makes a consequential amendment to that section so that the statement of policy must also cover the length of any suspensions or restrictions imposed under the new s206A.

Section 10: Removal of restriction on imposing a penalty and cancelling authorisation

157. Section 206(2) of FSMA prohibits the FSA from both imposing a penalty on an authorised person under that section and withdrawing a person's authorisation under section 33 in respect of the same contravention. This section repeals this prohibition thus enabling the FSA to stop an authorised person from continuing to carry on a regulated activity at the same time as imposing a financial penalty on that person.

Section 11: Performance of controlled function without approval

158. Section 59 of FSMA requires an authorised person ('A') to take reasonable care to ensure that no person ('P') performs a controlled function under an arrangement entered into by A or A's contractor in relation to the carrying on by A of a regulated activity, unless P has been approved by the FSA to do so. There is currently no prohibition on a person performing a controlled function without FSA approval.

159. This section inserts new sections 63A to 63D into FSMA. New section 63A(1) enables the FSA to impose a financial penalty on a person if it is satisfied that that person has performed a controlled function without approval and that the person knew or could reasonably be expected to have known that he or she was performing a controlled function without approval.

160. New section 63B sets out the procedure for imposing a financial penalty, namely issuing a warning notice followed by a decision notice. There is a right of referral to the Tribunal.

161. New section 63C requires the FSA is required to consult on and publish a statement of its policy on the imposition of penalties and the amount of such penalties.

162. New section 63D sets out the procedure to be followed by the FSA before issuing such a policy statement.

163. Section 168 of FSMA enables the FSA to carry out investigations in particular cases, including the circumstances listed in subsection (4). *Paragraph 16 of Schedule 2* makes a consequential amendment to subsection (4) to provide for the FSA to appoint an investigator if it thinks that a person may have performed a controlled function without approval.

Section 12: Approved persons guilty of misconduct

164. Section 66 of FSMA sets out the FSA's disciplinary powers in respect of misconduct by approved persons. Approved persons are persons who have approval from the FSA to carry out controlled functions. Controlled functions are set out in FSA rules and include, for example, having responsibility for compliance with FSA rules or being a director.

165. This section amends section 66 of FSMA to add to the current sanctions (financial penalty and public censure) that the FSA can impose for misconduct. It enables the FSA to suspend an approved person from carrying on certain functions, and / or impose restrictions on that person's performance of certain functions, for a maximum period of 2 years.

166. Paragraphs 9 and 10 of Schedule 2 make consequential amendments to sections 67 (disciplinary measures: procedure and right to refer to Tribunal) and 69 (statements of policy) so that they apply to the new sanctions.

167. *Subsection (4)* amends section 66(4) to increase the limitation period on the FSA taking disciplinary action against an approved person from two to three years.

Section 13: Publication of decision notices

168. This section amends section 391 of FSMA, which establishes common rules on publication of notices by the Authority, to widen the categories of supervisory notices that may be published.

169. *Subsection (2)* removes the prohibition on the publication of decision notices.

170. *Subsection (3)* inserts a new subsection (1A) which provides that the person to whom a decision notice is given may only publish such details of the notice as the FSA has published.

171. *Subsection (4)* amends section 391(4) to require the FSA to publish such information about decision notices (as well as final notices) as it considers appropriate. This new requirement will be subject to section 391(6).

Measures to protect consumers

Section 14: Consumer redress schemes

172. The existing section 404 of FSMA enables the Treasury, subject to Parliamentary approval, to authorise the FSA to require firms to conduct a review of past business and, if liable, to pay compensation to consumers. Section 14 replaces section 404 with new sections 404 and 404A to 404G, conferring new powers for the FSA to make rules requiring firms to establish and operate consumer redress schemes.

New section 404: Consumer redress schemes

173. *Subsections (1)* and *(3)* provide that the FSA may make section 404 rules if it appears to it that (a) there may have been a widespread or regular failure by a relevant firm (defined

in *subsection (2)* as an authorised person or payment service provider) to comply with the requirements for carrying on an activity; (b) as a result, consumers have suffered or may suffer loss for which redress would be available in legal proceedings; and (c) it is desirable to establish a scheme to secure redress for consumers.

174. 'Consumers' is defined in new section 404E.

175. New section 404F(5) provides that references to a relevant firm include a person who was, but is no longer, an authorised person or payment service provider and a person who has assumed a liability incurred by a relevant firm.

176. *Subsections (4)* to *(7)* of new section 404 define 'consumer redress scheme' as one in which a firm is required to take one or more of the following steps:

- investigate whether it has failed to comply with its obligations in carrying out a specified activity;
- if it determines that it has failed to comply with an obligation, determine the nature and extent of the failure, and whether the failure has caused or may cause any loss to consumers;
- if it determines that consumers have suffered loss, to make appropriate redress.

New section 404A: Rules under section 404: supplementary

177. Section 404A sets out matters for which section 404 rules may make provision. This includes requiring firms to provide the FSA with information about their investigation and the matters under investigation, and for the FSA (or a competent person appointed by it) to conduct the investigation and other relevant steps instead of the firm, including determining its liability and the redress the firm should make to consumers. Where the rules provide for a scheme to be conducted by someone other than the firm itself, they must also include provision for warning and decision notices and a right of referral to the Tribunal (*subsection (8)).*

178. *Subsection (2)* limits the FSA's power in *subsection (1)(b)* to define by way of example what amounts to a failure to comply with a requirement to that which a court has found or would find constitutes a failure. *Subsection (3)* similarly limits the FSA's power in *subsection (1)(c)* to set out matters which should be taken into account by firms in assessing evidence or determining causation to those matters which a court has taken, or would take, into account. *Subsection (4)* provides that the FSA may require firms to make such redress as is just in relation to that description of case, having regard (among other things) to the nature and extent of the losses in question. It is not limited to the remedy or relief which would be available in legal proceedings.

New section 404B: Complaints to the ombudsman scheme

179. This section enables a consumer who is not satisfied with any determination by a firm under a scheme to make a complaint to the Financial Ombudsman Service (FOS). It requires the FOS to assess such a complaint (or a complaint about an underlying act or omission which falls to be dealt with by a consumer redress scheme) in accordance with the terms of the consumer redress scheme rather than its 'fair and reasonable' jurisdiction under section 226(8) of FSMA. Complaints under this section will form part of the FOS' compulsory jurisdiction set out in Schedule 17 to FSMA.

New section 404C: Enforcement

180. This section provides that the FSA's disciplinary powers in Part 14 of FSMA (public censure or financial penalty) will apply to relevant firms which are not (or no longer) authorised persons. This ensures that the scheme can be enforced against payment service providers or firms which are no longer authorised.

New section 404D: Applications to Tribunal to quash rules or provision of rules

181. This section enables a person to apply to the Tribunal for a review of any rules made by the FSA under section 404. The general rule is that the Tribunal is to apply judicial review principles to such applications. On an application relating to an example set out in the rules of things done or omitted which firms are to regard as constituting a failure to comply with a requirement (under section 404A(1)(b)) the Tribunal may determine whether the example does in fact constitute a failure. On an application relating to matters the FSA requires firms to take into account for the purpose of assessing evidence or determining causation under section 404A(1)(c)), the Tribunal may determine whether, in its view, these are matters that firms should be required to take into account. The section gives the Tribunal jurisdiction to quash any rules made under section 404 or any provision of those rules.

New section 404G: Power to widen the scope of consumer redress schemes

182. This section gives the Treasury a power to widen the scope of the FSA's power to establish a consumer redress scheme by amending the definition of relevant firms or consumers.

Section 15: Restrictions on provision of credit card cheques

183. This section inserts new sections 51A and 51B into the Consumer Credit Act 1974. New section 51A makes it an offence for a credit card issuer to send credit card cheques to a customer other than in response to a request from that customer.

184. The request may be entirely at the instigation of the customer or the credit card issuer may offer to send cheques (for example via a mail shot). However, the customer cannot be considered to have requested cheques simply because he has not said he does not want them. The credit card issuer may not send more than three cheques to a customer in response to a request (but must send fewer than three if requested). The customer cannot make an ongoing request, for example, he cannot ask for one cheque per month for the next year or indefinitely. The restrictions on meeting requests apply at the level of the agreement rather than the customer, so the customer can request and be sent cheques on more than one card at the same time.

185. Credit card cheques are provided by many credit card issuers to those to whom they have issued credit cards. They are very similar in appearance to ordinary bank current account cheques and can be used in any situation where a current account cheque can be used (but they are not guaranteed by the credit card as a current account cheque is guaranteed by a cheque guarantee card). Once used, the cheque appears on the credit card statement in the same way as an item purchased with the card or a cash withdrawal on the card. In the new section 51A, credit card cheques are defined by reference to the provision of credit under a credit-token agreement. A credit-token agreement is defined in section 14 of the Consumer Credit Act 1974 as a regulated agreement to provide credit in connection with the use of a credit-token. Credit-tokens include credit cards.

186. New section 51B provides that new section 51A does not apply to credit card cheques issued to business customers.

Financial Services Compensation Scheme

187. The FSCS is the scheme established by the FSA under Part 15 of FSMA to compensate customers of authorised persons when they firms are in default, that is, unable or likely to be unable to pay claims.

Section 16: Contribution to costs of special resolution regime

188. This section inserts new sections 214B, 214C and 214D into FSMA to replace the existing section 214B (inserted by section 171 of the Banking Act 2009).

189. Existing section 214B confers a power on the Treasury to require the Financial Services Compensation Scheme ("the FSCS") to contribute to the costs incurred in applying the stabilisation powers of the special resolution regime ("the SRR") (established in Part 1 of the Banking Act 2009) to a bank that is failing. The amount that the FSCS can be required to contribute is limited to the amount of compensation that the FSCS would have had to pay to depositors if the failing bank had entered into insolvency (i.e. if the SRR powers had not been used), net of any amounts the FSCS would have recovered in that insolvency. The section provides for an independent valuer to be appointed to calculate this likely amount of recovery.

190. New sections 214B to 214D restate the provisions of existing section 214B with corrections and clarifications, and make provision for the calculation of amounts owed by the FSCS. *Subsection (2)* of section 16 provides for the amended provisions to apply with retrospective effect from 19 November 2009 (the date of introduction of this Act) to allow interest to be taken into account in calculating FSCS contributions from that date onwards in cases where a stabilisation power was exercised before the commencement of this section.

191. New section 214B allows the Treasury to include interest costs in the calculation of expenses incurred in connection with the exercise of the stabilisation power. *Subsection (6)* provides for the Treasury to set the rate at which that interest is to be calculated and the interest rate to be used in calculating the maximum amount the FSCS may be required to contribute.

192. New section 214C provides for the maximum amount that the FSCS may be required to contribute. This is limited to the notional net expenditure, which is the amount that the FSCS would have paid in the hypothetical scenario where the stabilisation power had not been exercised and the bank had entered insolvency proceedings, minus the actual net expenditure (i.e. any actual payments the FSCS has made in respect of the resolution, net of any recoveries made). *Subsections (5)* and (6) allow for interest to be taken into account in calculating this expenditure.

193. New section 214D makes further provision supplementing new sections 214B and 214C. New provisions include an express obligation on the FSCS to calculate the amount and the timing of compensation payments in the hypothetical scenario; provision for appointment of an independent valuer to calculate the timings of recoveries likely to be made by the FSCS in that scenario and provision for the Treasury to specify principles to be taken into account by the independent valuer and the FSCS when making such calculations. *Subsection (6)* extends the existing subsection 214B(3)(b) by providing for independent verification of other matters as well as the expenses incurred in section 214B(2). *Subsections (8)* and *(9)* make revised provision for the situation when the FSCS is required to contribute to the costs of resolution before the end of the resolution.

Section 17: Power to require FSCS manager to act in relation to other schemes

194. This section, which inserts new Part 15A into FSMA (comprising sections 224B to 224F), extends the scope of the FSCS manager's powers to enable it to make payments on behalf of another compensation scheme or arrangement that pays compensation in respect of institutions that provide financial services, including institutions that are not authorised persons under FSMA.

195. New section 224B defines the terms used, including the kinds of scheme or arrangement under which the Treasury can require the FSCS manager to act on behalf of another person paying compensation to customers of financial services firms ("the relevant scheme"). *Subsection (9)* makes clear that the provisions of new Part 15A apply equally in cases where the relevant scheme is operated by the UK Government. New section 224C provides that if compensation is payable under a relevant scheme, the Treasury may issue a notice requiring the FSCS manager to act on behalf of the relevant

scheme's manager. The notice will specify the functions to be performed by the FSCS manager on behalf of the manager of the relevant scheme.

196. Section 224D provides that the FSCS manager may decline to act if a ground in section 224E is met, and a notice to this effect is given to the Treasury. The grounds are: where the FSCS manager is not satisfied that it will be able to obtain the necessary information, advice or assistance from the administrator to comply with the notice; where it is not satisfied that funding is being provided to meet the expenditure that it will incur in acting on behalf of the relevant scheme manager; where it is of the opinion that complying with the notice would detrimentally affect the exercise of its FSCS functions; where the manager of the relevant scheme has not given an undertaking not to bring proceedings against the FSCS manager; or where there are no arrangements for the reimbursement of expenses arising out of claims brought against the FSCS manager by third parties.

197. New section 224F enables the FSA to make rules in connection with FSCS manager acting as a paying agent on behalf of relevant schemes. This includes conferring a power on the FSCS manager to impose levies to cover its expenses under this section; however if the FSA do impose such a power, it may be exercised only if the FSCS manager has tried and failed to obtain reimbursement of its expenses elsewhere.

Powers to require information

Section 18: Information relating to financial stability

198. This section inserts new sections 165A-165C and 169A into FSMA providing the FSA with new powers to require a person to provide specified information.

New section 165A: Authority's power to require information: financial stability

199. *Subsection (1)* provides that the FSA may, by giving written notice, require that a person provides the FSA with information or documents described in the notice.

200. *Subsection (2)* sets out the categories of people who may be required to provide information or documents under subsection (1). They include the owners or managers of investment funds and any persons connected to them. Section 165A(2)(d) confers on the Treasury a power to prescribe further categories of persons in respect of which the power under section 165A(1) may be exercised.

201. *Subsection (3)* sets out the test which will enable the FSA to require information: the FSA must consider that the information or documents in question are or might be, relevant to the stability of one or more aspects of the financial system.

202. *Subsection (4)* provides an additional test where a requirement is being imposed on a service provider or a person who is connected with a service provider. In this case, no requirement may be imposed unless the FSA considers that a failure by the provider to provide all or part of the services is likely to pose a serious threat to the stability of the financial system.

203. *Subsection (5)* gives the FSA power to determine the place at which, and the time within which, the information must be provided. The FSA must allow a reasonable period for the provision of the information.

204. *Subsection (6)* gives the FSA power to determine the form in which information must be provided to them.

205. *Subsection (7)* gives the FSA power to require any information provided to be verified or authenticated, by, for example, a firm's auditors.

206. *Subsection (8)* and (9) defines "relevant investment fund" for the purposes of this section, and sets out the other definitions used.

207. *Subsection (10)* defines "connected person" for the purposes of this section. .

New section 165B: Safeguards etc in relation to exercise of power under section 165A

208. This section sets out the procedural safeguards which will apply to the exercise of the power in new section 165A. Under *subsection (1)* the FSA must give a person on whom it proposes to impose a requirement written notice in advance.

209. Under *subsection (2)* the written notice must give the FSA's reasons for proposing to impose the requirement; and specify a reasonable timescale within which the person may make representations to the FSA. Once this period has expired, the FSA must, under s*ubsection (3)* decide within a reasonable period whether the requirement should be imposed.

210. *Subsection (4)* provides that subsections (1), (2) and (3) do not apply where the FSA is satisfied that it is necessary for the information to be provided urgently.

211. *Subsection (5)* requires the FSA to give its reasons when it imposes a requirement under this section.

212. *Subsection (6)* requires the FSA to prepare a statement of its policy with respect to the exercise of the power conferred by section 165A. Under *subsections (7)* and *(8)* this statement requires the approval of the Treasury and must be published. Under *subsection (9)*, this power may not be exercised before the statement has been approved and published.

New section 165C: Orders under section 165A(2)(d)

213. Section 165C sets out the conditions under which the Treasury may exercise the power given in section 165A(2)(d) to add a further category of persons who may be required to provide information under section 165A, and the procedure to be followed. Under *subsection (1)* the Treasury may only make such an order if it considers that the activities carried on by the prescribed person or the failure to carry on those activities (or any part of them), might pose a serious threat to the stability of the financial system.

214. *Subsection (2)* provides the general rule that an order made under section 165A(2)(d) will be subject to the normal affirmative resolution procedure, being laid in draft and approved by a resolution of each House.

215. *Subsections (3)* to *(7)* provide, as an exception to this rule, that where the Treasury considers that it is necessary, an order under section 165A(2)(d) will be subject to a modified form of the affirmative resolution procedure under which it must be laid before Parliament after being made and ceases to have effect at the end of a period of 28 days unless it is approved by a resolution of each House before the end of that period.

216. *Subsection (8)* ensures that no order under section 165A(2)(d) will be treated as a hybrid instrument for the purposes of the Standing Orders of either House of Parliament.

New section 169A: Support of overseas regulator with respect to financial stability

217. *Subsection (1)* provides that the FSA may exercise a corresponding section 165A power at the request of an overseas regulator.

218. *Subsection (2)* defines "overseas regulator" for the purposes of this section.

219. *Subsection (3)* defines "corresponding section 165A power" as a modified form of the power given in section 165A, with references to the stability of the financial system referring to the financial system operating in the country, or in a territory (such as Gibraltar or the Channel Islands) of the overseas regulator, and the reference to the UK in section 165A being replaced by a reference to that country or territory.

220. *Subsection (4)* sets out which provisions of section 165A are to apply to the corresponding section 165A power given in relation to overseas regulators.

221. *Subsection (5)* defines "financial system" for the purposes of this section.

Section 19: Asset protection scheme etc

222. The Asset Protection Scheme (APS) was announced by the Treasury in January 2009. Under the terms of the APS the Treasury provides, in return for a fee, protection against future credit losses incurred by an eligible UK-incorporated authorised deposit-takers on one or more portfolios of defined assets.

223. This section gives the Treasury the power to require information or documents it reasonably requires from participants or proposed participants in the APS or related schemes ('qualifying schemes').

224. *Subsection (2)* defines the asset protection scheme as the scheme which was subject to a statement made by the Chancellor of the Exchequer to Parliament on 26 February 2009.

225. *Subsections (3) and (8)* enable the Treasury to specify in an order that this section applies to schemes that the Treasury considers correspond to, or are connected with, the asset protection scheme. The section also applies to information or documents required in relation to the agreements entered into with participants in connection with the asset protection scheme or a qualifying scheme (*subsection (4)*).

226. *Subsections (5) and (6)* allow the Treasury to specify when and where the information and documents should be provided, and the form the information should take.

227. The Treasury can seek to enforce the requirements under this section by way of an injunction, or in Scotland, by way of an order for specific performance.

Banking Act 2009

Section 20: Services forming part of recognised inter-bank payment systems

228. This section inserts a new section 206A into Part 5 of the Banking Act 2009 (the Act) (inter-bank payment systems).

New section 206A: Services forming part of recognised inter-bank payment systems

229. *Subsection (1)* confers a power on the Treasury to make order(s) applying (and modifying (*subsection (7)*) any sections under Part 5 of the Act to "service providers". "Service providers" are defined in *subsection (2)* as persons who supply services (such as telecommunication and IT systems) that form part of the arrangements of an inter-bank payment system that is specified by the Treasury as a recognised system under section 184(1) of the Act. The Bank of England may not be regarded as a service provider (*subsection (5)*).

230. An order under *subsection (1)* may be made only after consultation (*subsection (6)*) and only if a draft has been approved by each House of Parliament (*subsection (8)*).

231. It is envisaged that any order made applying Part 5 to service providers would make provision for the role of the FSA and the Bank of England in relation to persons who are subject to the oversight of the FSA, either as a person who has a permission under Part 4 of FSMA, or is a recognised persons under Part 18 of that Act.

232. In the event an order is made applying provisions of Part 5 to service providers, the Treasury must specify in any recognition orders made under section 184 of the Act the service providers who are to be subject to the Bank of England's oversight under Part 5 of the Act (as applied) (*subsection (2(b)*). Before specifying any person as a service

provider, the Treasury must consult with various parties, including the person whom the Treasury proposes to specify (*subsection (4)*).

Section 21: Minor amendments of provision made by Banking Act 2009

233. Parts 1 to 3 of the Act establish a permanent special resolution regime (SRR), providing the Authorities with tools to deal with banks and building societies that are failing to meet the conditions for authorisation to perform deposit-taking activities (and credit unions if applied by section 89 of that Act). This section makes technical amendments to certain provisions in Parts 1 to 3 and to a provision in Part 15 of FSMA (which was inserted by Part 4 of the Banking Act 2009).

234. The Act includes property transfer powers, which may be used to effect a transfer of some or all of the property, rights or liabilities of a failing institution; and to make provision for the purposes of, in connection with, or in consequence of such a transfer. *Subsection (2)* inserts a new section 48A (creation of liabilities) into the Act, expressly stating that this includes the power to create liabilities. This could be used, for example, where more liabilities than assets are transferred from a failing institution to a commercial purchaser and public funds are provided to make the transfer commercially viable. A liability may then be imposed on the residual of the failing institution in respect of these monies. New section 48A(2) makes clear that this liability can be determined by reference to another instrument such as an agreement with the transferee, which may make provision for the calculation of the amount of the liability.

235. The Act confers various powers on the Treasury to put in place compensation measures following an exercise of the stabilisation powers (see section 49), which may include provision for the appointment of independent valuers. These orders are subject to the affirmative procedure. The Treasury may make also additional provision for valuers, for example, their remuneration and procedure in separate orders, subject to the negative procedure. *Subsection (3)* allows for orders, subject to the affirmative procedure, that provide for the appointment of a valuer to contain this supplementary provision.

236. *Subsection (4)* makes a minor amendment to section 56 of the Act (independent valuer: money) providing a power for the Treasury to make provision for the payment of remuneration and allowances of persons appointed to remove an independent valuer from office, correcting an oversight in the Act.

237. *Subsection (5)* provides that the Treasury can make a third party compensation order where a building society has been taken into temporary public ownership by way of a subscription to new deferred shares in the society, correcting an oversight in the Act.

238. Part 3 of the Act establishes a new bank administration procedure, which incorporates provisions of the Insolvency Act 1986 through a table listing all relevant sections, schedule and paragraphs that need to be included. *Subsection (6)* substitutes an entry relating to paragraph 79 of Schedule B1 of the Insolvency Act for the one relating to paragraph 80 of that Schedule. Paragraph 79 provides for the discharge of an administrator appointed by the court, and therefore is more apt for bank administration than paragraph 80, which provides for the discharge of an administrator appointed in other ways. *Subsection (7)* makes consequential changes to section 153 of the Act.

239. The Act inserts new sections into FSMA requiring the FSCS to contribute to special resolution regime costs and providing for information to be given to the FSCS in that case. Section 219(3A) of FSMA refers only to a “bank”, although it is intended to refer to all the institutions subject to the special resolution regime i.e. banks, building societies and credit unions. *Subsection (8)* amends the provision so it refers to all of these institutions.

Director of Savings

Section 22: Administration of court funds by Director of Savings

240. This section provides for the Director of Savings to undertake functions on behalf of the Accountant General for England and Wales where appointed to do so under court funds rules. The rules in question are the court funds rules made under section 38(7) of the Administration of Justice Act 1982.

241. *Subsection (1)* defines the term "relevant function" for the purposes of this section as being a function of the Accountant General of the Senior Courts under court funds rules. *Subsection (4)* defines what is meant by the term "court funds rules". For these purposes, court funds rules are the rules as to the administration and management of funds in court made under section 38(7) of the Administration of Justice Act 1982. (The court funds rules currently in force are the Court Funds Rules 1987.)

242. *Subsection (2)* provides that the Director of Savings ("the Director") may carry out a relevant function if appointed by the Accountant General under court funds rules to do so. Section 38(8)(a) of the Administration of Justice Act 1982 provides that the court funds rules may enable the Accountant General to appoint a person or persons to discharge functions conferred on the Accountant General under the rules (i.e. functions relating to the administration and management of funds in court). This provision, therefore, enables the Director to carry out functions relating to the administration and management of funds in court where the Accountant General appoints the Director, under the court funds rules to do so.

243. *Subsection (3)* makes clear that the power of the Director, under the court funds rules, to carry out relevant functions falls within section 69(1)(a) of the Deregulation and Contracting Out Act 1994. This means that such power may be included in an order made under section 69(2) of that Act enabling the Director to contract out the power to such person as the Director may authorise to do so.

General

Section 23: Orders or regulations

244. This section contains provision about orders and regulations under the Act.

Section 24: Minor and consequential amendments

245. This section introduces *Schedule 2* and confers a power to make consequential amendments.

FINANCIAL EFFECTS OF THE ACT

246. The financial effects of this Act are minimal, and largely limited to the creation of the CFEB and Money Guidance. On indicative budget forecasts, the costs of the CFEB, including delivery of Money Guidance and projects which form part of the National Strategy for Financial Capability, could rise from £37 million in 2010-11 to £56 million in 2014-15. It is expected that the costs of the CFEB to decline slowly thereafter, once the Money Guidance service is at 'steady state'. The financial services industry, through a levy on FSA-regulated firms and OFT-licensed consumer credit firms, will provide the principal funding for the CFEB's activity. However, it is expected that the Government will pay up to half of the costs of the Money Guidance component of the CFEB's costs (up to £20 million by 2014-15) through dormant accounts funds and public funds.

COMMENCEMENT DATES

247. Section 26 sets out the provisions that come into force on Royal Assent, and the provisions that come into force two months after Royal Assent. The remaining provisions come into force on an appointed day.

HANSARD REFERENCES

248. The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament.

Stage	***Date***	***Hansard Reference***
House of Commons		
Introduction	19 November 2009	19 Nov 2009 : Column 142
Second Reading	30 November 2009	30 Nov 2009 : Column 872
Committee	8 December 2009 to 14 January 2010	Financial Services Bill Public Bill committee: 8 December 2009: Column number 1 8 December 2009: Column number: 27 10 December 2009: Column number: 69 10 December 2009: Column number: 91 15 December 2009: Column number: 115 15 December 2009: Column number: 153 5 January 2010: Column number: 187 5 January 2010: Column number: 225 7 January 2010: Column number: 273 7 January 2010: Column number: 295 12 January 2010 : Column number: 339 12 January 2010: Column number: 375 14 January 2010: Column number: 413 14 January 210: Column number: 437
Report and Third Reading	25 January 2010	25 Jan 2010 : Column 555
		25 Jan 2010 : Column 641
House of Lords		
Introduction	25 January 2010	26 Jan 2010 : Column 1374
Second Reading	23 February 2010	23 Feb 2010 : Column 943
Committee	10 March 2010, 15 March 2010, 7 April 2010	10 Mar 2010 : Column 245
		15 Mar 2010 : Column 502
		7 Apr 2010 : Column 1504
Report and Third Reading	8 April 2010	8 Apr 2010 : Column 1663
House of Commons		
Commons consideration of Lords amendments	8 April 2010	8 Apr 2010 : Column 1242

Stage	***Date***	***Hansard Reference***
Royal Assent	8 April 2010	House of Lords Hansard
		8 Apr 2010 : Column 1738
		House of Commons Hansard
		8 Apr 2010 : Column 1256

ANNEX: LIST OF ABBREVIATIONS

APS – The Asset Protection Scheme

CCA – Consumer Credit Act 1974

CFEB – Consumer Financial Education Body

ECHR – European Convention on Human Rights

FSA – Financial Services Authority

FSCS – Financial Services Compensation Scheme

FSMA – Financial Services and Markets Act 2000

HMT – Her Majesty's Treasury

NS&I – National Savings and Investments

OFT – Office of Fair Trading

RRP – Recovery and Resolution Plan

the relevant authorities – The Treasury, FSA and Bank of England