

# FINANCIAL SERVICES ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY

#### **Part 8 – Amendments of Banking Act 2009**

##### **Special resolution regime and bank administration**

553. Parts 1 to 3 of the Banking Act 2009 make provision for the “special resolution regime” which confers powers on the Bank and the Treasury to effect the transfer of the shares or property, rights and liabilities (“business”) of a bank which has encountered, or is likely to encounter, financial difficulties.
554. There are three “stabilisation options” established in Part 1, available to the authorities enabling: (a) the Bank to transfer the shares or some or all of the business of a bank to a commercial purchaser (section 11); (b) the Bank to transfer some or all of the business of a bank to a “bridge bank” (this is a company wholly owned by the Bank) (section 12); and (c) the Treasury to transfer the securities of a bank into temporary public ownership (section 13). The stabilisation options are effected by an exercise of the “stabilisation powers”: the share transfer powers (sections 14 to 32) and the property transfer powers (sections 33 to 48) which enable the Bank to make “transfer instruments” and the Treasury to make “transfer orders”.
555. Following an initial exercise of a transfer power under the Banking Act 2009, the relevant authority may effect supplemental, onward and reverse transfers (see sections 26 to 31 and 42 to 46). In summary “reverse transfers” can be used to transfer the securities, or property, rights and liabilities from a transferee back to a transferor. For example, where the Bank has transferred property, rights and liabilities from a failing bank to a bridge bank it may transfer some of that business back to the failing bank (it may wish to do this, for example, in order to minimise the need to capitalise a bridge bank with public funds where the assets transferred from the failing bank are found to be significantly impaired).

##### ***Section 96: objectives and conditions***

556. *Section 96* amends the Banking Act 2009. It inserts two new resolution objectives. New objective 6 is to protect client assets. New objective 7 is to minimise adverse effects on institutions that support the operation of financial markets, such as investment exchanges. *Subsections (4) to (6)* make connected and consequential changes to that Act.

##### ***Section 97: Private sector purchasers***

557. Under the Banking Act 2009, the reverse transfer powers are not available in respect of securities or property, rights and liabilities which have been transferred to a commercial purchaser. *Section 97* inserts a *new section 26A and 42A* into the Banking Act 2009 and makes other modifications to Part 1 of that Act to extend the availability of the reverse transfer powers in relation to transfers to commercial purchasers in order to provide the authorities with greater flexibility, for example to remedy the situation

in which securities or property, rights and liabilities have been transferred in error. However, in order to provide comfort to prospective acquirers of securities or property, rights and liabilities under a transfer instrument, these new reverse transfer powers may be exercised only where the person from whom the securities or property, rights and liabilities are to be transferred has given their prior consent in writing (see, for example, *new section 26A(4)*).

***Section 98: Property transfer instruments: property held on trust***

558. Section 33 of the Banking Act 2009 describes a property transfer instrument as an instrument which, in short, may provide for the property, rights or liabilities of a specified bank to be transferred; may make other provision for the purposes, or in connection with, the transfer; and may relate to some or all of the property, rights and liabilities of the failing bank.
559. A property transfer instrument may be made by the Bank for the purposes of effecting a transfer to a private sector purchaser or to a bridge bank (sections 11 and 12 respectively) and may also be made to make, for example, additional transfers from the failed bank (section 42), reverse transfers from the bridge bank to the failed bank (section 44) and onward transfers from a bridge bank to another person (section 43). For completeness, the Treasury may make property transfer orders to transfer property, rights and liabilities from a bank in temporary public ownership (section 45) and reverse transfers (see for example section 46).
560. Sections 34 and 36 to 40 of the Banking Act 2009 make provision for some of the matters which may be provided for in a property transfer instrument (or property transfer order as the case may be). Section 34(7) specifies that a property transfer instrument (or order) may make provision about property held on trust. Concerns have been raised by the Banking Liaison Panel (the Panel established under section 10 of the Banking Act 2009 to advise the Treasury about the effect to the special resolution regime on banks, building societies and the financial markets) that this subsection suggests that provision could be made in a transfer instrument or order to modify or terminate the terms of such trust arrangements for reasons other than to effect a transfer and irrespective of the consequences for the beneficiaries of the trust. Therefore *section 98(2) and (3)* makes minor amendments to this provision to clarify that the terms on which trust property is held may only be modified or altered to the extent necessary or expedient, in the opinion of the Bank, to transfer the legal or beneficial interest in that property and any powers, rights or obligations in respect of that property. *Section 98(4) and (5)* provide for the same restrictions to apply in the case of property transfer orders made by the Treasury.

***Section 99: Reports following exercise of a stabilisation power***

561. Where the Bank effects a transfer of property, rights and liabilities from a bank to a bridge bank under section 12 of the Banking Act 2009, it is required to report to the Chancellor about the activities of the bridge bank as soon as is reasonably practicable after: (a) the end of one year beginning with the date of the first transfer to the bridge bank, and (b) the end of each subsequent year (section 80(1) to (3)). The Chancellor must lay a copy of each report before Parliament (subsection (4)). The Bank must also comply with any request from the Treasury for a report on any matters in relation to a bridge bank (subsection (5)).
562. Similarly, where the Treasury makes a share transfer order under section 13(2) to transfer the shares of a bank into temporary public ownership the Treasury are required to lay reports before Parliament on the activities of the bank (section 81(1) to (3)). This reporting requirement is also applied under section 83(2)(g) in the case of a transfer of the parent undertaking of a bank (a holding company) into temporary public ownership in reliance on section 82.

563. At present, no provision is made in the Banking Act 2009 as regards the information that must be included in such reports. Therefore, potentially, reports could be produced on the operation of a bridge bank or a bank in temporary public ownership without reference to the institution's financial position. In addition, at present under the Act, the Bank is not required to prepare a report where it has exercised its transfer power under section 11(2) to transfer the business or shares in a bank to a private sector purchaser.
564. *Section 99* inserts *new sections 79A and 81A* into the Banking Act 2009 which, respectively, require the Bank to report to the Chancellor about an exercise of the transfer power under section 11(2) and for reports produced under section 80 and 81 to include accounting information about the bank in temporary public ownership of bridge bank that is the subject of the report.

### ***Section 100: groups***

565. *Section 100* extends certain powers under the Banking Act 2009 to banking group companies. "Banking group company" is defined in new section 81D, inserted by *subsection (5)* as an undertaking in the same group as a bank and which meets conditions specified in an order made by the Treasury.
566. *Subsection (4)* inserts new section 36A into the Banking Act 2009 to enable the Bank of England to exercise powers in relation to the directors (including the power to remove the director) of both the specified bank and of an undertaking which is a banking group company in respect of such a bank.
567. *Subsection (5)* inserts *new sections 81B to 81D*. *New section 81B* enables the Bank to exercise a stabilisation power involving the sale to a commercial purchaser or transfer to a bridge bank in respect of a banking group company. *New section 81B* sets out four conditions, all of which must be met before the Bank may exercise the power. The Bank must also consult the Treasury, PRA and FCA in certain cases. The Bank must have regard to the need to minimise the effect of the exercise of the powers on the rest of the group. *New section 81C* makes related modifications to the Banking Act 2009.

### ***Section 101: application to investment firms***

568. *Subsection (1)* of *section 101* extends Part 1 of the Banking Act 2009 to investment firms. Part 1 is applied to investment firms as it applies to banks, with the exception of the provisions specified in *subsection (2)* which are to be disregarded. *Subsection (6)* extends Part 3 of the Banking Act 2009 (bank administration procedure) to investment firms. *Subsection (7)* inserts new section 258A of the Banking Act 2009 which defines "investment firm" by reference to Directive [2006/49/EC](#) on the capital adequacy of investment firms and credit institutions. But "investment firm" does not include a bank, building society, credit union or other institution which is of a class or description specified by order by the Treasury. Any such order is subject to the affirmative procedure.

### ***Section 102: application to UK clearing houses***

569. *Section 102* inserts a new section 89B into the Banking Act 2009. *Subsection (1)* applies the special resolution regime provided for in Part 1 of that Act to UK clearing houses with a number of modifications. The principal modifications are as follows:
570. *Subsection (2)* substitutes a revised section 13 that applies solely to UK clearing houses. The revised section 13 provides that the "third stabilisation option" in the case of a UK clearing house will be a transfer of ownership by the Bank to any person. Any such transfer may be effected by one or more share transfer instruments. By contrast, the "third stabilisation option" provided for by section 13 in its application to banks is temporary public ownership.

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571. *Subsection (3)* substitutes revised sections 28 and 29 for sections 28 and 29 as applicable to banks. The revised section 28 provides that where the Bank has transferred securities issued by a UK clearing house by way of a share transfer instrument pursuant to the revised subsection 13(2), it will be permitted to subsequently make onward share transfer instruments in respect of securities issued by the UK clearing house in question to a third party, provided that the transferee under the original instrument is either (1) the Bank; (2) a nominee of the Treasury or (3) a company wholly owned by the Bank or the Treasury. Before making an onward share transfer instrument the Bank is under a duty to consult the FCA, and if the clearing house concerned is a PRA authorised person, the PRA.
572. The revised section 29 provides that where the Bank has transferred ownership of a UK clearing house by way of a share transfer instrument pursuant to the revised section 13(2) to another person (“the original transferee”), it will be able to make one or more reverse share transfer instruments in respect of securities issued by the UK clearing house and held by the original transferee (irrespective of whether those securities were subject to the original transfer). A reverse share transfer in such cases is a share transfer instrument that provides for the transfer of the relevant securities held by the original transferee back to the UK clearing house in question. A reverse share transfer is permissible in such instances only where the original transferee (1) is the Bank, a company wholly owned by the Bank or the Treasury or a nominee of the Treasury or (2) has given its written consent.
573. The revised section 29 also allows for securities that have been subject to an onward transfer to be transferred back to the original transferee from the onward transferee. A reverse share transfer is permissible in such instances only where the onward transferee (1) is the Bank, a company wholly owned by the Bank or the Treasury, or a nominee of the Treasury or (2) has given its written consent.
574. In either case, the relevant reverse share transfer instrument cannot be made by the Bank unless it has first consulted the FCA, and where the clearing house in question is a PRA – authorised person, the PRA.
575. *Subsection (4)* substitutes revised sections 45 and 46 for sections 45 and 46 as applicable to banks. The revised section 45 provides that where a share transfer instrument has been made in respect of securities issued by a UK clearing house in accordance with the revised section 13(2), the Bank may by one or more instruments transfer the property, rights and liabilities of the UK clearing house provided that the original instrument transferred the relevant securities to either the Bank, a company wholly owned by the Bank or the Treasury, or a nominee of the Treasury. Such a property transfer instrument may not be made by the Bank unless it has first consulted the FCA, and where the clearing house in question is a PRA – authorised person, the PRA.
576. The revised section 46 allows for any property, rights or liabilities of a UK clearing house transferred pursuant to the revised section 45 to be transferred back to the transferor by way of one or more reverse property transfer instruments. A reverse property transfer instrument can only be made where the transferee under the original instrument is (1) the Bank, a company wholly owned by the Bank or the Treasury, or a nominee of the Treasury or (2) has given its written consent. A reverse property transfer instrument may not be made by the Bank unless it has first consulted the FCA, and where the clearing house in question is a PRA – authorised person, the PRA.
577. *Subsection (5)* substitutes a revised section 81 that requires the Bank to report to the Chancellor of the Exchequer where it has made one or more share transfer instruments in respect of UK clearing houses under the revised section 13(2). The report must comply with any requirements as to content specified by the Treasury and must be made as soon as is reasonably practicable after the first anniversary of the first transfer instrument.

578. *Subsection (6)* provides for a table that makes a number of minor and consequential modifications to the special resolution regime provisions of Part 1 of the Banking Act 2009 as that regime is to apply to UK clearing houses.
579. *Subsection (6)* also provides for: a new section 89C that allows for a property transfer instrument made in respect of a UK clearing house to include provision modifying or amending the clearing house's rules in order to reflect the changes brought about by the property transfer; a new section 89D that allows for a property transfer instrument made in respect of a UK clearing house to include provisions regarding the consequences of the transfer for the clearing house's membership; a new section 89E that allows for a company to which the business of a UK clearing house has been transferred to be treated for a specified period or until a specified event occurs as if it is a recognised clearing house itself for the purposes of FSMA and a new section 89F that enables the Treasury to make orders for the purpose of the protection of transferees and others in connection with any transfer under the special resolution regime as it applies to UK clearing houses (by virtue of *Subsection (7)* any such orders are to be subject to the draft affirmative resolution procedure).
580. *Subsection (6)* also inserts a new section 89G that defines what is meant by the terms "UK clearing house"; "central counterparty clearing services" and "PRA-authorised person" for the purposes of Part of the Banking Act 2009.

### ***Section 103: State aid***

581. Part 3 of the Banking Act 2009 creates a new administration procedure for banks in certain cases. For example, the Bank may apply to the court for an order appointing a bank administrator following a transfer under Part 1 (special resolution regime) of some of the business of a failing bank: (a) to a commercial purchaser (section 11(1)); and/or (b) to a bridge bank (section 12(1)).
582. A bank administrator has two objectives: (a) Objective 1 is to provide support to the acquirer of the transferred business in order to ensure the business can continue to be operated effectively; and (b) Objective 2 is "normal administration" (that is, to rescue the residual bank as a going concern or to achieve a better result for the bank's creditors as a whole than would be likely if the residual bank had been wound up without first being placed in bank administration). The bank administrator is required to begin working towards both objectives immediately upon appointment (section 137(2)). However, Objective 1 is to take priority over Objective 2. This means that the interests of the creditors are essentially subordinated until such time as Objective 1 has been completed.
583. *Section 103* inserts into Part 3 a *new section 145A* which confers a power on the Treasury to issue directions to a person appointed as a bank administrator for the purposes of ensuring compliance with any undertakings, commitments or conditions given or imposed in relation to the consideration and approval by the European Commission of any State aid given in connection with an exercise of transfer powers under Part 1 of the Act.
584. Article 107 of the Treaty on the Functioning of the European Union effectively prohibits Member States from using State resources to provide aid to institutions on a selective basis where such aid would distort or threaten competition (as this would be incompatible with the principles of the internal market), unless such aid is approved by the Commission, for example, where aid is provided to remedy a serious disturbance in the economy of a Member State. In many cases the resolution of an institution by way of an exercise of one or more of the stabilisation powers under Part 1 of the Act will involve the use of public funds (in other words, State resources), for example, by virtue of the provision of: (a) a capital facility to the residual of a failed institution; (b) a capital facility to a bridge bank; or (c) funding to facilitate the transfer of business from a failed institution to a private sector purchaser. Therefore, in such cases the UK will need to notify and seek the approval of the European Commission to any aid provided

and ensure compliance with any undertakings, commitments or conditions in relation to the approval of any aid granted.

585. The new power of direction ensures that the UK can secure compliance with any commitments given in connection with a State aid measure, and any undertakings given or conditions imposed on the residual of a failed institution by issuing a direction under *subsection (2)* to a bank administrator. Such a direction would give cover to a bank administrator to act in such a way as may be necessary to secure compliance with any conditions imposed by the Commission which would otherwise be incompatible with the administrator's duties towards the creditors of the failed bank (for example, a requirement for the failed bank to surrender its Part 4A permission to carry on a specific regulated activity or to cease entering into new contracts to provide a particular kind or regulated financial service which the administrator may otherwise wish to maintain/carry on for the purposes of achieving the best outcome for the creditors of the failed bank). In addition, *subsection (7)* confers a power on the Treasury to confer on the person subject to the direction immunity from liability in damages for action or inaction taken in accordance with a direction.

## **Inter-bank payment systems**

### ***Section 104: Inter-bank payment systems***

586. Part 5 of the Banking Act 2009 makes provision for regulation by the Bank of payment systems specified by the Treasury as "recognised payment systems". The Bank performs its functions under Part 5 in pursuance of its financial stability objective (specified in section 2A of the Bank of England Act 1998 as amended by *section 2*). *Section 104* makes amendments to that Part.
587. *Subsection (2)* inserts a *new section 186A* which confers a power on the Treasury to amend an order made under section 184 (recognition order) that specifies a payment system as a "recognised system". This power may be used, for example, to amend the description of the arrangements which constitute the recognised system. Before amending a recognition order the Treasury must consult the Bank and notify the operator of the relevant system and consider any representations made. In addition, in certain cases the Treasury must consult the FCA and the PRA.
588. *Subsection (3)* substitutes for section 191 (directions) a new section 191. Section 191 confers on the Bank the power to give directions to a recognised payment system. Such directions may, for example, be given for the purposes of securing the compliance with a requirement imposed under section 190 (system rules) or may be given for the purposes of addressing an immediate threat to financial stability. Where a direction is specified by the Bank as being given for the purposes of resolving or reducing a threat to the stability of the UK financial system, *new section 191(3)* provides that the operator of the system (and its officers and staff) has immunity from liability in damages in respect of action or inaction in accordance with the direction. The new arrangements reduce the administrative steps necessary for the purposes of conferring immunity from liability in damages, with the aim of enhancing the speed at which action may be taken to address threats to financial stability. Provision is also made enabling the Treasury to confer immunity from liability in damages on any person and regardless of the purpose for which the direction is to be given where the Treasury consider it appropriate (*subsection (5)*). For example, this power could enable the Treasury to grant immunity: (a) to an operator of a recognised payment system when the direction is given by the Bank for a purpose other than that of resolving or reducing a threat to the stability of the UK financial system; or (b) to a person who provides services to an operator of a recognised payment system where a direction is given for the purposes of resolving or reducing a threat to the stability of the UK financial system and action is required on the part of the operator which involves the cooperation of the service provider or action on the part of that person. The effect of this provision is essentially to continue

the Treasury's existing ability to confer immunity from liability in damages in a wider range of cases.

589. *Subsection (4)* makes amendments to section 186 (procedure to be followed by the Treasury before making a recognition order) such that the Treasury are required to consult the FCA before making a recognition order in respect of a payment system the operator of which is, or has applied to become, a recognised investment exchange under Part 18 of FSMA or has, or has applied for, a permission to conduct regulated activities under Part 4A of FSMA. The Treasury must also consult the PRA where the person concerned has applied for, or has, permission to carry on any PRA-regulated activities. *Subsections (5), (6) and (10)* make other similar consequential changes.
590. *Subsection (7)* inserts a *new section 202A* into the Banking Act which enables the Bank to apply to the court for an injunction in certain cases, for example, where there is a reasonable likelihood that there will be a compliance failure as defined in section 196 of the Act (compliance failure).
591. *Subsection (8)* inserts *new sections 203A and 203B* which impose certain requirements on the Bank in relation to the discharge of its functions in connection with recognised payment systems. In particular, *new section 203A* requires the Bank to maintain satisfactory arrangements for recording decisions made in the exercise of certain of its functions under Part 5 of the Banking Act; *new section 203B* requires the Bank to report to the Treasury at least once a year in relation to, among other things, the discharge of its functions under Part 5.
592. *Subsection (9)* inserts a *new subsection (1A)* into section 204 (information) which provides that the Bank can require the operator of a recognised payment system to provide information in connection with any other of the Bank's functions undertaken in pursuance of its financial stability objective. The Bank can already require persons to provide information in connection with its functions under Part 5.

### ***Section 105: International obligations***

593. *Section 105* amends the Banking Act 2009 by inserting a *new section 206B*. This new section enables the Treasury to direct the Bank in exercising its powers under Part 5 of that Act (inter-bank payment systems) not to take proposed action if it appears to the Treasury that action would be incompatible with Community obligations or any other international obligations of the United Kingdom. The Treasury may also direct the Bank to take action which it has power to take where that action is required for the purpose of implementing any such obligation. This power is similar to the power in section 410 of FSMA (international obligations).

### **Further amendments**

#### ***Section 106 and Schedule 17: Amendments relating to new regulators***

594. *Section 106* introduces *Schedule 17* which makes a number of consequential amendments to the Banking Act 2009 as a result of the conferral of the FSA's functions on the FCA and the PRA.
595. *Schedule 17* to the Act is divided into four Parts. *Part 1* deals with the amendments to Part 1 of the Banking Act (special resolution regime), *Part 2* deals with the amendments to Part 2 of the Act (the bank insolvency procedure), *Part 3* deals with the amendments to Part 3 of the Act (the bank administration procedure) and *Part 4* deals with the amendments to Parts 4 to 6 of the Act (financial services compensation scheme, inter-bank payment systems, and banknotes: Scotland and Northern Ireland). All section references below are to the Banking Act 2009 unless otherwise stated.
596. *Paragraph 2* amends section 1 and makes clear that the FCA and the PRA have a role in the operation of the special resolution regime and adds an additional entry into the

table beneath that section (which describes the provisions in Part 1 of the Banking Act) to include the new section (inserted by *paragraph 28*) which modifies the application of Part 1 in relation to any institutions which fall within the definition of “bank” (in section 2 of the Banking Act) which are regulated only by the FCA.

597. *Paragraph 3* replaces the reference to “Part 4” of FSMA in section 2 (the definition of “bank”) to “Part 4A”.
598. *Paragraph 4* omits the definition of the FSA in section 3 (interpretation) and inserts a definition of the FCA and the PRA.
599. *Paragraph 5* amends section 4 (special resolution objectives) such that the FCA and PRA are specified as “relevant authorities” for the purposes of subsection (2) of that section and are required, therefore, to have regard to the special resolution objectives specified in that section when considering the use of the stabilisation powers (the property and share transfer powers), the bank insolvency procedure and the bank administration procedure.
600. *Paragraph 6* amends section 5(5) (code of practice about the use of the stabilisation powers, the bank insolvency procedure and the bank administration procedure) such that the FCA and the PRA are specified as “relevant authorities” for the purposes of subsection (4) which requires an authority specified as a “relevant authority” to have regard to the code, for example, in deciding between different resolution measures. *Paragraph 7* amends section 6 (code of practice: procedure) such that the Treasury is required to consult the FCA and the PRA before issuing any new versions of the code of practices issued under section 5.
601. *Paragraph 8* amends section 7 (general conditions) which sets out the general conditions which must be satisfied before a stabilisation power may be exercised. The general conditions are referred to in sections 8 (private sector purchaser and bridge bank) and 9 (specified conditions; temporary public ownership). These conditions are that: (1) the bank concerned is failing, or is likely to fail to satisfy, the threshold conditions for authorisation and (2) that (ignoring the stabilisation powers) it is not reasonably likely that action will be taken by or in relation to the bank to enable the bank to satisfy the threshold conditions. In making this determination the regulator must disregard any financial assistance provided by the Treasury or the Bank of England (ignoring any ordinary market assistance offered on the Bank’s usual terms) (subsection (4)) and must consult the Bank of England and the Treasury before determining whether condition 2 has been satisfied. The effect of the amendments to this section are that the PRA will be responsible for determining whether the general conditions are satisfied in relation to a bank which is a PRA-authorized person. In particular, the reference to “the threshold conditions” in condition 1 is defined by the *new subsection (4A)* (inserted by *sub-paragraph (5)*) will be defined as the threshold conditions for which the PRA is treated as responsible under *new section 55B(2)* of the FSMA (inserted by *section 9(2)*). Before determining whether or not condition 2 is satisfied the PRA will be required to consult the FCA (*sub-paragraph (6)*).
602. *Paragraphs 9 and 10* amend sections 8 (specific conditions: private sector purchaser and bridge bank) and 9 (specific conditions: temporary public ownership) such that the Bank and the Treasury (as the case may be) must consult the FCA and the PRA before determining whether the relevant specific conditions are satisfied before a stabilisation power (such as an exercise of a transfer power to transfer part of the business of a failing bank to a commercial purchaser) may be deployed in relation to a bank in relation to which the PRA (or the FCA as the case may be) has determined that the general conditions are satisfied under section 7.
603. *Paragraph 11* amends section 10(3) (membership of the Banking Liaison Panel established to advise the Treasury about, among other things, the code of practice under section 5) such that the Treasury must ensure that the Panel also includes a member appointed by the FCA and the PRA.



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604. *Paragraphs 12 to 25* omit the references to the FSA in various sections of Part 1 and replace them with references to the FCA and the PRA with the general effect of requiring the Bank (or the Treasury as the case may be) to consult those regulators before making any form of transfer instrument (or order as the case may be).
605. *Paragraph 26* replaces the reference to Part 4 of the FSMA in section 57(4)(a) (the valuation principles which the Treasury can require or permit an independent valuer appointed to assess the compensation payable in relation to an exercise of the transfer powers to take into account in making his or her assessment) with a reference to Part 4A of that Act.
606. *Paragraph 27* amends section 82 (power for the Treasury to take a parent undertaking of a bank into temporary public ownership in certain conditions) to replace the reference to the FSA in section 82(2) with a reference to the PRA (which is consequential on the changes made to section 7 (see the note on *paragraph 8* above)) and to replace the reference to the FSA in subsection (5) with a reference to the FCA and the PRA such that the Treasury must consult with the FCA, the PRA and the Bank before determining whether it is necessary to take action in respect of the holding company.
607. *Paragraph 28* inserts *new section 83A* into the Banking Act which applies Part 1 in relation to any entities which fall within the definition of “bank” in section 2 and are not PRA-authorized persons within the meaning of the FSMA (i.e. are regulated only by the FCA because they do not carry on any regulated activities which have been specified as PRA-regulated activities by way of an order under *new section 22A* of the FSMA inserted by *section 9*). This is a “future-proofing” arrangement as it is envisaged at the time of these notes going to print that the regulated activity of accepting deposits will be specified as a “PRA-regulated activity” and therefore all firms falling within the definition of “bank” in section 2 will be PRA-authorized persons.
608. *Paragraphs 29 to 45* make amendments to Part 2 of the Banking Act (the bank insolvency procedure), which makes provision for a special insolvency procedure which can be used as an alternative to an exercise of the stabilisation powers or a “normal” insolvency procedure. The purpose of the bank insolvency procedure is to facilitate the rapid payout by the Financial Services Compensation Scheme<sup>1</sup> (“FSCS”) of payments to eligible depositors or the transfer of such accounts to a viable bank. To achieve this, a person appointed as a bank liquidator under Part 2 has two objectives: Objective 1 is to work with the FSCS so as to ensure that as soon as is reasonably practicable each eligible depositor has the relevant account transferred to another financial institution or receives payment from, or on behalf of, the FSCS; Objective 2 is to wind up the affairs of the bank so as to achieve the best result for the bank’s creditors as a whole (section 99). Objective 1 takes precedence over Objective 2 until such time as the liquidation committee (which must consist initially of members appointed by the Bank, the FSA and the FSCS) has passed a resolution resolving that Objective 1 has been achieved (section 100(5)). This is an important measure as it means that the insolvency practitioner is obliged to prioritise the interests of eligible depositors above those of the general body of creditors thereby helping to ensure that the best outcome for depositors is achieved as quickly as possible following appointment.
609. The most notable amendments made by these paragraphs concern the changes to section 95 (application to court for an order placing a bank into the bank insolvency procedure), section 96 (grounds for applying for an order) and section 100 (liquidation committee). In summary, in relation to a bank which is a PRA-authorized person and in relation to which the conditions specified in section 7 have been determined to be satisfied, the PRA is to inherit the FSA’s power to apply to the court for a bank insolvency order. The Bank and the PRA may only apply for such an order where certain conditions are satisfied (section 96(2) and (3)); in the case of an application by the PRA,

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<sup>1</sup> The scheme established in accordance with Part 15 of the FSMA to compensate customers of authorised financial services firms when those firms are in default for the purposes of the scheme (i.e. when a firm is unable, or likely to become unable, to satisfy the claims against it).

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these conditions are that (i) the Bank has given its consent and the PRA is satisfied that the conditions referred to in section 7 have been met, the bank has eligible depositors and that the winding up of the bank would be in the public interest or would be fair (section 96(3)). *Paragraph 36* amends section 100 such that the liquidation committee must initially include an individual nominated by each of the FCA and the PRA.

610. *Paragraph 45* applies with modifications the provisions of Part 2 in relation to banks which are regulated only by the FCA.
611. *Paragraphs 46 to 51* amend Part 3 of the Banking Act (bank administration procedure (see the notes in relation to *section 87* (state aid))). In particular, paragraphs *47 and 48* amend sections 147 (administrator's proposals) and 153 (successful rescue) such that copies of certain notifications given by bank administrators must be sent to the PRA. *Paragraph 50* inserts *new section 157A* which applies Part 3 (with certain modifications) in relation to banks which are regulated only by the FCA.
612. *Paragraphs 52 to 62* amend various provisions in Parts 4 to 6 of the Banking Act. In particular, *paragraph 55* amends section 232 (definitions for the purposes of investment bank insolvency regulations made under section 233) so as to enable the Treasury, by order, to amend the definition of "investment services" from time to time (and *paragraph 57* makes consequential changes in relation to section 235 (regulations: procedure)).
613. *Paragraph 58* replaces the reference to the FSA in section 246 (information disclosure by the Bank) with a reference to the PRA and the FCA such that the Bank may disclose information to either or both of the new regulators which the Bank considers is relevant to the stability of individual financial institutions or one or more aspects of the financial systems of the UK.
614. *Paragraph 60* amends section 250 (duty to collect information relevant to the stability of individual financial institutions, or one or more aspects of the UK financial system) such that the PRA will be subject to this duty.