

BANKING (SPECIAL PROVISIONS) ACT 2008

EXPLANATORY NOTES

COMMENTARY ON CLAUSES AND SCHEDULES

Introduction

Section 1: Meaning of “authorised UK deposit-taker”

10. This section defines the institutions whose securities or property, rights and liabilities may be transferred under the Act. Any UK undertaking which is authorised by the Financial Services Authority to accept deposits (principally banks and building societies¹) is an authorised UK deposit-taker for the purposes of the Act. There is an exception for any undertaking, such as a broker, that is authorised to accept deposits only for the purposes of another activity. Deposit-takers which are not incorporated in, or formed under, UK law are not authorised UK deposit-takers for the purposes of the Act. The prudential supervision of those deposit-takers is a matter for their home state regulators and not for the UK authorities.

Section 2: Cases where Treasury’s powers are exercisable

11. This section defines the circumstances in which, and the purposes for which, the Treasury may exercise its powers to make an order under section 3 or 6 to transfer securities or property, rights and liabilities of an authorised deposit-taker.
12. The Treasury may exercise these powers in relation to a deposit-taker only where it appears to the Treasury to be desirable for either or both of the purposes set out in subsection (2). The purposes are:
- a) maintaining the stability of the UK financial system where the Treasury consider that there would be a serious threat to its stability if the power were not exercised;
 - b) protecting the public interest in circumstances where financial assistance has been provided by the Treasury to the deposit-taker for the purpose of maintaining the stability of the UK financial system.
13. “Financial assistance”, in subsection (2)(b), includes-
- a) any case where the Bank of England has provided financial assistance to a deposit-taker and the Treasury have assumed a liability in respect of that assistance, the liability is of a kind of which the Treasury are expected to notify the House of Commons or the Public Accounts Committee or Treasury Select Committee of that House, and the Treasury have given notice of that liability (subsection (3) (a)). This only includes financial assistance provided by the Bank of England in respect of which the Treasury have incurred a liability, actual or contingent, and have notified the House of Commons that it has incurred that liability. It does not therefore include the Bank of England’s open market operations, nor does it include other forms of liquidity support made available on the basis of

¹ It also includes credit unions, but in practice it is extremely improbable that the purposes for exercise of the transfer powers set out in section 2 would ever be relevant to a credit union.

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(c.2) which received Royal Assent on 21st February 2008*

the Bank of England's own balance sheet, without the need for the Bank to seek an indemnity from the Treasury. So subsection (3)(a) would be engaged only in circumstances where public support was being provided to a specific institution in order to maintain the stability of the UK financial system, and where that support was significant enough to require the Bank of England to seek support from the Treasury, and the Treasury were expected to notify it; and

- b) any case where the Chancellor of the Exchequer has announced that the Treasury (whether acting alone or with the Bank of England) would if necessary put in place depositor guarantee arrangements in relation to a particular deposit-taker (as well as any case where any such arrangements have been put in place, whether or not following such an announcement) (subsection (3)(b)).
14. Subsections (4) to (6) and (11) make further provision about the giving of notice, and the meaning of the guarantee arrangements referred to in subsection (3).
15. Where an order has been made under section 3 or 6, a second or subsequent order may be made in relation to the same body whether or not one of the conditions in section 2 is met (subsection (7)). This is to ensure that subsequent orders relating to a particular institution can deal with any necessary ancillary matters, even where the circumstances giving rise to the initial order have been substantially addressed by that order.
16. The powers in sections 3 and 6 to transfer securities or property, rights and liabilities of a deposit-taker may only be exercised for a period of one year from Royal Assent, although this does not affect the continuation in force of any order made during this period (subsections (8) and (9)). Nor does it affect the powers in section 8.

Transfer of securities

Section 3: Transfer of securities

17. Where the Treasury is satisfied that it is desirable for one of the purposes set out in section 2, the Treasury may, by order under section 3, transfer the shares or other securities of a deposit-taker. The securities may be transferred to the Bank of England, a nominee of the Treasury, a company wholly owned by the Bank of England or the Treasury, or any other body corporate (which could be another bank or building society).
18. Securities are defined in section 15(1) and (2) as including shares and stock; debentures, including debenture stock, loan stock, bonds, certificates of deposit and other instruments creating or acknowledging indebtedness; warrants or other instruments entitling the holder to acquire such securities; and other rights granted by the deposit-taker which form part of its own funds for the purposes of Section 1 of Chapter 2 of Title V of the Banking Consolidation Directive (2006/48/EC).

Schedule 1

19. **Schedule 1** sets out particular provisions that may be included in an order under section 3. Such provisions may be necessary to ensure the effectiveness of the transfer of the securities. These include provision for#
- transferring the securities free from charges, trusts and other liabilities,
 - ensuring that the transfer is effective despite any restrictions imposed on the transfer of those securities, any requirements for consent, or the absence of delivery of instruments of transfer;
 - the conversion of transferred securities from one form to another (to deal, for example, with the conversion of uncertificated or bearer securities into certificated securities or the conversion of a special class of shares into ordinary shares);

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- discontinuing the listing of securities issued by the deposit-taker on a UK regulated market;
- the alteration of terms of securities issued by, or contracts involving, the relevant institution (where, for example, those terms may frustrate the purposes of the transfer);
- the modification of pension scheme rights and liabilities and the transfer of pension assets or accrued rights (which may be relevant to deal with a case where a deposit-taker which is a part of a banking group with shared pension arrangements is transferred);
- the removal or appointment of directors, the termination of their appointment and the variation of the terms and conditions of their employment.

Section 4: Extinguishment of subscription rights

20. This section applies where the Treasury has made an order under section 3 transferring securities of a deposit-taker. It enables the Treasury, by order, to extinguish share options or other rights held by persons to subscribe for, or otherwise acquire, securities of that deposit-taker, or any of its subsidiaries. This power might be necessary in a case where persons have an enforceable right to be issued with or otherwise acquire shares or other securities of the deposit-taker or any of its subsidiaries. The existence of, and exercise of, such rights might frustrate the purposes of a transfer.

Section 5: Compensation for securities transferred

21. Subsection (1) requires the Treasury to make a scheme for determining either#
- the amount of any compensation payable by the Treasury to those who held securities immediately before they were transferred to the public sector by an order under section 3, or
 - the amount of any consideration payable by the transferee to those who held securities transferred to the private sector under section 3, or
 - in relation to an order under section 3 that transfers securities to both the public and private sector, the amount of any compensation payable by the Treasury and the private sector transferee respectively.
22. Subsection (2) requires the Treasury to make provision, by order, for determining the amount of any compensation to be payable to those whose rights are extinguished under an order under section 4 (rights to subscribe to, or otherwise acquire, those securities of the deposit-taker or its subsidiaries). Compensation is payable by the Treasury in a transfer to the public sector and by the transferee in a transfer to the private sector. The order must make provision for determining the amount of any compensation payable by the Treasury or the private sector transferee where the relevant section 3 order transfers securities to both of them.
23. The Treasury may also provide for compensation of any other persons whose rights are affected by virtue of any provision made under section 3 or 4 (subsection (3)).
24. Subsection (4) sets out certain assumptions for determining the amount of any compensation payable by the Treasury. The assumptions are that all financial assistance provided by the Bank of England or the Treasury has been withdrawn; and that no further public financial assistance would be provided to the deposit-taker (apart from ordinary market assistance from the Bank on its usual terms). Any announcement by the Treasury that they would, if necessary, put guarantee arrangements in place would also be disregarded. These assumptions ensure that any value that is dependent on the public support provided to the deposit-taker is disregarded when compensation is

determined. (Section 9(2) enables the order to provide for further assumptions to be made in connection with the assessment of compensation).

25. An order must be made under section 5 within three months of the transfer to which it relates, although a second or subsequent order may be made after the end of that period (subsections (8) and (9)).

Transfer of property etc

Section 6: Transfer of whole or part of undertaking

26. Where the Treasury is satisfied that it is desirable for one of the purposes set out in section 2, the Treasury may, by order under section 6, transfer property, rights and liabilities of a deposit-taker (rather than its securities). They may be transferred to a company wholly owned by the Bank of England or the Treasury, or to any other body corporate (subsection (1)). The property, rights and liabilities to be transferred may be specified in the order, or by reference to the whole or a part of the business of the institution concerned, or by identifying the manner in which they are to be determined (subsection (2)).
27. As with the powers in section 3, these powers may be used not only to transfer the business of a deposit-taker (or part of it) into public ownership, but also to effect a direct transfer to the private sector. Subsequent orders may also be made for supplementary or consequential purposes, or where it is later considered desirable to transfer other property, rights and liabilities for the purposes set out in section 2. As with section 3 orders, subsequent orders under section 6 may deal with supplementary or consequential matters without making a further transfer, and may transfer property to a different person (subsections (4) and (5)). A second or subsequent order may also transfer back property, rights and liabilities transferred by an earlier order (subsection (6)).

Schedule 2

28. [Paragraph 1](#) of Schedule 2 sets out examples of the property, rights and liabilities that may be transferred by an order under section 6. The remainder of Schedule 2 sets out particular provisions that may be included in an order under section 6. This includes provision for:
- the transfer of any interests or rights to be effective despite the absence of any consent or agreement;
 - certain interests and rights of third parties to be modified;
 - the creation of new rights between the deposit-taker and its group undertakings;
 - the modification of a pension scheme, including the transfer of property of an occupational pension scheme to another occupational scheme;
 - requiring steps to be taken to ensure the effective transfer of foreign property;
 - deeming the transferee to be an authorised person for the purposes of the Financial Services and Markets Act 2000;
 - securing the effective continuation of licences, permissions and approvals;
 - requiring disputes relating to matters arising under the order to be determined in a particular way.

Section 7: Compensation etc. for property etc. transferred

29. This section makes similar provision for compensation in relation to a transfer under section 6 as is made by section 5 in relation to a transfer under section 3. It requires the

Treasury to make provision for determining the amount of any compensation payable by the Treasury to the deposit-taker whose assets, rights and liabilities have been transferred to the public sector under section 6; or, where a transfer has been made under that section to another private sector body, for determining the amount of consideration payable by that body. The Treasury may also provide for compensation or consideration to be payable to other persons affected by provisions made under section 6. There are similar assumptions, in relation to compensation payable by the Treasury, to those in section 5. Section 9(2) applies in the same way. Again an order must be made within three months of the transfer to which it relates (subsection (6)).

Further transfers

Section 8: Further transfers

30. Where securities of a deposit-taker have been transferred to the public sector under section 3, the Treasury may, under this section, make an order transferring to any person any of those securities (subsections (1) and (2)). This would enable the institution to be transferred back to the private sector (or within the public sector). Property, rights and liabilities of the deposit-taker concerned or any of its subsidiaries may also be transferred. The securities issued by, or property, rights and liabilities of, a company wholly owned by the Bank or the Treasury may also be transferred. This gives the Treasury a legislative route for transferring all or part of the institution's business back to the private sector, or for restructuring the business within the public sector.
31. Where there has previously been a transfer of property, rights or liabilities under section 6 to a company owned by the Treasury or the Bank of England (or its subsidiary), the Treasury may transfer to any person any securities of that company or any property, rights and liabilities of the company or its subsidiary undertakings (subsection (4)). This provides a legislative route for the transfer of the business acquired under section 6, or of the whole company used to acquire the business, back to the private sector, or for restructuring the business within the public sector.
32. The powers available in sections 3 and 6 (including the provisions listed in Schedules 1 and 2) are available to the Treasury in respect of any onward transfer under section 8. The Treasury may also include provisions in an order making an onward transfer that relate to the consideration payable in respect of that transfer.
33. Unlike the transfer powers in sections 3 and 6, the powers under this section do not cease to be exercisable one year after Royal Assent.

Supplementary

Section 9: Supplementary provision about compensation schemes etc

34. Subsection (1) provides that an order under section 5, 7 or 8(6) (provisions relating to compensation or consideration) may, in particular, make provision for:
 - the manner in which compensation is to be assessed;
 - the assessment to be made by an independent valuer appointed by the Treasury;
 - the procedure for the assessment of compensation;
 - enabling persons to apply to a tribunal to review the independent valuer's compensation decisions (which may be the Financial Services and Markets Tribunal or any other tribunal appointed by the Treasury);
 - the remuneration and expenses of the valuer or of a tribunal appointed by the Treasury .

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35. This ensures that an order under those sections will be able to deal with all aspects of the compensation and valuation procedure.
36. Subsection (2) provides that the order may require the valuer to value compensation on the basis of one or more of the following assumptions: that the deposit-taker is unable to continue as a going concern; that it is in administration; that it is being wound up.
37. The order may enable the tribunal, where appropriate, to send a matter back to the independent valuer for reconsideration, but it may not permit the tribunal to substitute its own decision for that of the valuer (subsection (6)).

Section 10: Tax consequences

38. Subsection (1) gives the Treasury power to make regulations varying the way in which relevant taxes apply in consequence of orders under sections 3, 4, 6 and 8 (orders transferring securities, property, rights or liabilities or extinguishing rights).
39. Subsection (2) sets out the type of provision that may be made by the regulations.
40. Subsection (3) defines certain terms used in the section. In particular it defines a “relevant tax” as corporation tax, income tax, capital gains tax, stamp duty, stamp duty reserve tax and stamp duty land tax.
41. The purpose of this section is give the Treasury the flexibility to minimise or otherwise deal with the tax consequences of transfers made under such orders.

Building Societies

Section 11: Modification of legislation applying in relation to building societies

42. Subsection (1) gives the Treasury a power to make modifications of the [Building Societies Act 1986 \(c.53\)](#) to facilitate the provision of relevant financial assistance by the Bank of England to building societies. “Relevant financial assistance” is any financial assistance provided for the purpose of maintaining the stability of the financial system in the United Kingdom (subsection (2)).
43. Subsection (3) specifies particular provisions which may be modified under this section. These include provisions of the Building Societies Act 1986 which require building societies to hold at least 50% of their funding in the form of individual members’ shares (in effect deposits); and which prohibit the creation of floating charges by building societies. If the Bank of England were to give relevant financial assistance to a building society, it might be appropriate for it to receive a floating charge as security for its loan. Other provisions which might inhibit the provision of such assistance may also be modified. The subsection also includes the provisions of the Building Societies Act 1986 which apply insolvency legislation in relation to building societies.
44. The Treasury intend to use this power to modify the application of building society legislation generally, so the changes would apply to any building society which needed to seek relevant financial assistance from the Bank of England.

General

Section 12: Consequential and supplementary provision

45. Under this section, the Treasury may, by order, make supplementary, incidental, consequential or transitional provisions for the purposes of the Act, or in consequence of any provision made by or under it (subsection (1)).
46. In particular this power may be exercised to disapply any statutory provision or rule of law, to modify any statutory provision, or to dissolve any body in relation to which an order has been made under section 3 or 6 (subsections (2) and (3)(c)).

47. It may also be used to impose a moratorium on the commencement or continuation of any legal process, such as proceedings for the winding-up of an institution which is the subject of an order under section 3 or 6 (subsection (3)(a)). Exceptions may be made to such a moratorium for specific instruments or transactions, or where the leave of the court, or the consent of the Treasury or the Bank of England, is obtained (subsection (3)(b)).
48. This power may also be exercised to exempt directors of any relevant deposit-taker, or of any of its group undertakings, from liability in connection with acts or omissions in relation to the deposit-taker, or group undertaking, which are taken or omitted to be taken in their capacity as a director (subsection (3)(d)).
49. Any order under this section may make provision for the payment of compensation to persons affected by it (subsection (3)(e)).

Section 13: Orders and regulations: general

50. This section confers general powers for orders and regulations under the Act to include supplemental, incidental, consequential or transitional provisions. It also provides that orders under sections 5, 7, 8(6) and 11 must be made under the affirmative resolution procedure, while all other orders and regulations under the Act are to be made under the negative resolution procedure.

Section 14: Orders and regulations: retrospective provisions

51. Orders made under sections 3, 4, 6 and 12 of the Act may provide for any provision to have retrospective effect from a specified time on the date of a statement by the Treasury of their intention to make such an order in relation to a deposit-taker, or on the date on which any transfer was made under a previous relevant order. The order may also nullify the effect of transactions or events that took place after that time.
52. It might be necessary to make retrospective provision in a case where a transfer order had been made under section 3 and then a subsequent order under that section made supplementary provision in connection with the transfer under the previous order. It might be desirable for the supplementary provisions to have effect as from the date of the transfer.
53. The power under paragraph 4 of Schedule 1 to nullify the effect of instruments might be used retrospectively where, for example, announcement of the intention to use the power triggered rights to terminate loans to a deposit-taker or other relevant contracts.
54. Tax provisions made under section 10 may have retrospective effect to a time three months before Royal Assent. This would enable any such provisions to be backdated to a reasonable time before Royal Assent, to deal with the tax consequences of any transactions taking place in that period.

Section 15: Interpretation

55. This section defines certain terms used in the Act.
56. “Financial assistance” includes assistance provided by way of loan, guarantee or indemnity, and also assistance provided by way of a transaction involving the sale and repurchase of securities. This kind of transaction is a form of lending between institutions.
57. “Securities” includes a range of instruments in addition to shares. These are mainly debt instruments and instruments which form part of an institution’s “own funds” for regulatory capital purposes (subsections (1) and (2)). Deposit-takers are required to hold a certain amount of this type of capital, for prudential supervision purposes, to ensure their solvency. In certain circumstances it may be appropriate to acquire these types of instrument by means of a transfer under section 3 or 6.

58. Subsection (4) is designed to ensure that, if an order is made under section 3 or 6 in relation to an institution, the powers in the Act can be exercised in relation to that institution even if it is no longer an authorised deposit-taker.
59. Subsection (5) provides that a group or subsidiary undertaking of a deposit-taker includes any undertaking which was a group or subsidiary undertaking of that deposit-taker immediately before an order was made under section 3 or 6 in relation to that deposit-taker.
60. Subsection (6) defines a company wholly owned by the Bank of England or the Treasury for the purposes of the Act. Such a company is either one of which the Bank, or a nominee of the Treasury, is the sole member, or a wholly-owned subsidiary of such a company.

Section 16: Financial Provision

61. This section provides for any expenditure incurred by the Treasury in the following connections to be paid from money provided by Parliament:
 - in connection with the provision of financial assistance to any body in relation to which a section 3 or 6 order is made, or to any person to whom a transfer is made;
 - in connection with the giving of an indemnity to the directors of a body in relation to which a section 3 or 6 order is made, to the directors of any body to which a transfer is made, or to the directors of a group undertaking of such a body;
 - in connection with the giving of an indemnity to the Bank of England in relation to any lending or other financial assistance to such a body;
 - in connection with the giving of an indemnity to a valuer appointed under section 9; or
 - otherwise incurred by virtue of the Act.
62. Subsection (3) provides that it is immaterial whether the indemnity or arrangements mentioned in subsection (1) were given or put in place before or after the passing of the Act.
63. In line with accepted practice set out in *Managing Public Money*², a Department which takes on contingent liabilities should report these to Parliament at the earliest opportunity and should consider backing such liabilities with statutory cover. This is because Parliament has the same interest in any expenditure which arises because of a contingent liability as in any other form of expenditure.
64. The Treasury announced on 20th September 2007 that it would put in place guarantee arrangements for existing deposits in Northern Rock plc. The Treasury made a further announcement on 11th October, explaining that it would extend the guarantee arrangements announced on 20th September. It also announced that it had agreed to indemnify the Bank of England in respect of facilities advanced by the Bank of England and any other liabilities that might arise from the Bank of England's role in the extended guarantee arrangements and additional facilities. On 18th December the Treasury announced that the guarantee arrangements were to be extended to a number of unsubordinated wholesale obligations. The full text of all these announcements can be found on the Treasury website.
65. Parliament has been kept informed about these announcements. The contingent liabilities described in these announcements have not crystallised.
66. The Treasury may also wish to provide financial assistance while a deposit-taker in public ownership in a variety of ways including – but not limited to – providing

² See Annex 2.5 of *Managing Public Money*, published on the Treasury's website www.hm-treasury.gov.uk.

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grants, loans or guarantees to the company, indemnifying directors, or giving a capital injection.

67. This section provides the necessary statutory cover for the existing and possible future financial assistance provided to Northern Rock plc. It would also cover financial assistance provided to any other authorised UK deposit-taker affected by the Act.