

BANKING ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Special Resolution Regime

Transfer of securities

Section 14: Interpretation: “securities”

50. Share transfer powers may be used to effect the transfer of securities. This section defines securities widely. The definition includes shares and stock; debentures; warrants or other instruments that entitle the holder to acquire such securities; and other rights granted by a 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). The definition in this section ensures that share transfer powers can be exercised to transfer complete control of a bank.

Section 15: Share transfer instrument

51. Share transfer instruments are made by the Bank of England to effect the transfer of a bank to a private sector purchaser (the stabilisation option as described in section 11). This section describes provision that a share transfer instrument may make. The instrument may relate to either specified securities or securities with a specified description.

Section 16: Share transfer order

52. Share transfer orders are made by the Treasury to effect the transfer of a bank to temporary public ownership. This section describes the provision that a share transfer order may make. The order may relate to either specified securities or securities of a specified description.

Section 17: Effect

53. This section makes further provision about the effects of a share transfer instrument or order. *Subsection (2)* makes clear that the transfer of securities takes place by operation of law. *Subsection (3)* makes provision for the transfer to take effect regardless of any restriction (including any requirement for consent and restrictions arising by contract—such as a non-assignment clause—or legislation). Provision is also made for the share transfer instrument or order to be carried out free from any encumbrances (such as a trust), which may be extinguished under the order (*subsection (5)*). *Subsection (6)* allows for the extinguishment of rights to acquire securities (for example, such as share options).

Section 18: Continuity

54. This section states that when a share transfer instrument or order is made, provision can be made to ensure the continuity of arrangements operating in respect of a bank.

55. *Subsection (1)* enables the share transfer instrument or order to include provision that the transferee can be treated as the same person as the transferor for any purpose connected with the transfer.
56. *Subsection (2)* enables the share transfer instrument or order to include provision that agreements made or other things done by or in relation to a transferor are treated as made or done by or in relation to the transferee. This provision would enable for example, the transferred deposit taker to continue to benefit from arrangements entered into by the transferors, notwithstanding any rights triggered on the transfer.
57. *Subsection (3)* allows for transitional provision about things transferred to be continued. This can include continuation of legal proceedings by or in relation to the transferee. *Subsection (4)* allows for the modification of references to the transferor in instruments or documents. *Subsection (5)* allows for provision of information to be required or permitted between the transferor and the transferee of a share transfer instrument or order.

Section 19: Conversion and delisting

58. This section allows for the conversion and delisting of securities (the power applies to all of a specified bank's securities, whether transferred or not).
59. A share transfer instrument or order may make provision, for example, for the conversion of 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).
60. *Subsection (2)* provides that a share transfer instrument or order may make provision for discontinuing the listing of securities issued by the specified bank on a UK regulated market.

Section 20: Directors

61. *Subsections (1)* and *(2)* allow for the Bank of England, in relation to a share transfer instrument, and the Treasury, in relation to a share transfer order, to take various actions with regard to directors including appointment and removal, termination and variation of service contracts.
62. Appointments made by the Treasury and Bank of England are made on terms and conditions agreed by the institution making the appointment. Provision is also made for the Bank of England and Treasury to vary or terminate service contracts of directors.

Section 21: Ancillary instruments: production, registration, &c.

63. This section makes various provisions for share transfer instruments and orders concerning instruments and registration. It provides that the transfer has effect irrespective of production, delivery, transfer or other dealing with an instrument and irrespective of registration.
64. *Subsection (1)* allows for an instrument or order to make provision in relation to an instrument: a share transfer instrument or order may permit or require the execution, issue or delivery of an instrument. *Subsection (4)* allows for an instrument to be modified or annulled by a share transfer instrument or order.
65. *Subsection (2)* specifies that a share transfer instrument or order may have immediate effect, regardless of registration (of the share transfer instrument or order) or the status of an instrument. *Subsection (3)* provides that a share transfer instrument or order may make provision for the effect of an instrument executed or issued in accordance with the provision of the share transfer instrument or order.

66. *Subsection (5)* provides for how a share transfer instrument or order may entitle a transferee to be registered or require a person to effect registration in respect of the transferred securities of the specified bank.

Section 22: Termination rights, &c.

67. This section sets out certain provisions in relation to default event provisions of the two types set out in the section (dealing variously with termination rights, conditions precedent to performance, &c.) *Subsection (6)* allows for default event provisions not to be triggered in relation to a share transfer order or instrument. *Subsection (7)* provides default event provisions can be disapplied but with exceptions.
68. *Subsection (8)* means that default event provisions will be disapplied when they relate to the making of an order or instrument, anything that is to be done or may be done under or by virtue of the instrument or order and any action or decision taken or made under the Banking Act or another enactment which resulted in or was connected to the making of the order or instrument.

Section 23: Incidental provision

69. This section provides for a share transfer instrument or order to include incidental, consequential or transitional provision. Such provision may be made generally or for a specified purpose or purposes.

Section 24: Procedure: instruments

70. This section provides the procedure for making a share transfer instrument. The Bank of England must send a copy of a share transfer instrument, as soon as reasonably practicable, to the specified bank, the Treasury, the FSA and any other persons specified in the code of practice. The Bank of England should also publish the share transfer instrument. The Treasury is also required to lay a copy of the transfer instrument before Parliament.

Section 25: Procedure: orders

71. This section provides the procedure for making a share transfer order. Share transfer orders are made by statutory instrument by the Treasury subject to the negative procedure. The Treasury should send a copy of a share transfer order, as soon as reasonably practicable, to the specified bank, the Bank of England, the FSA and any other persons specified in the code of practice. The Treasury should also publish the share transfer order in line with the provisions of *subsection (3)*.

Section 26: Supplemental instruments

72. Where the Bank of England has made a share transfer instrument to a private sector purchaser, it may make additional supplemental share transfer instruments. These may provide for anything that a share transfer instrument may generally provide for, including a further transfer of securities meeting the description specified in *subsection (3)(a)*.
73. The general and specific conditions (sections 7 and 8 respectively) do not apply to supplemental transfers. The Bank must consult the FSA and the Treasury before making the instrument.

Section 27: Supplemental orders

74. Where the Treasury has made a share transfer order to take a bank into temporary public ownership, it may make additional supplemental share transfer orders. These may provide for anything that a share transfer order may generally provide for, including a further transfer of securities meeting the description specified in *subsection (3)(a)*.

75. The general and specific conditions (sections 7 and 9, respectively) do not apply to supplemental transfers. The Treasury must consult the Bank of England and the FSA before making the order.

Section 28: Onward transfer

76. Where the Treasury has made a share transfer order to bring a bank into temporary public ownership in accordance with section 13, it may make onward share transfer orders. These may provide for two things: first, for the transfer of securities meeting the description specified in *subsection (3)(a)*; and, second, for any provision in relation to the relevant securities. *Subsection (4)* stipulates that the transferee may not be the transferor under the original order.
77. The general and specific conditions (sections 7 and 9, respectively) do not apply to onward transfers. *Subsection (6)* provides that the Treasury must consult the Bank of England and the FSA before making the order.
78. *Subsection (7)* provides that the Treasury may make a supplemental share transfer order (as described in section 27) following the making of an onward share transfer order.

Section 29: Reverse share transfer

79. Where the Treasury has made a share transfer order to bring a bank into temporary public ownership in accordance with section 13, it may make reverse share transfer orders.
80. A reverse share transfer order may transfer securities in temporary public ownership back to the original transferors (i.e. the holders of the shares and other securities before the bank was taken into temporary public ownership). Alternatively, where there has been an onward transfer to a particular type of onward transferee, the order may transfer securities back from that onward transferee into temporary public ownership. The reverse share transfer powers could only be used in the case of an onward transfer, however, where the onward transferee was a company wholly owned by the Bank of England, a company wholly owned by the Treasury or a nominee of the Treasury. This limitation is to prevent the reverse share transfer powers from being exercisable in relation to an onward transfer to a private sector party who wished to acquire the bank from temporary public ownership.
81. The general and specific conditions (sections 7 and 9, respectively) do not apply to reverse transfers. *Subsection (6)* provides that the Treasury must consult the Bank of England and the FSA before making the order.
82. *Subsection (7)* provides that the Treasury may make a supplemental share transfer order (as described in section 27) following the making of a reverse share transfer order.

Section 30: Bridge bank: share transfers

83. Where the Bank of England has made a property transfer instrument to effect the bridge bank stabilisation option, it may make bridge bank share transfer instruments. These may provide for two things: first, for securities issued by the bridge bank to be transferred; and, second, for other provision in relation to the securities of the bridge bank. Thus the Bank of England may transfer the securities of a bridge bank.
84. The general and specific conditions (sections 7 and 8, respectively) do not apply and *subsection (5)* provides that the Bank of England must consult the Treasury and the FSA before making the instrument.
85. *Subsection (6)* provides that the Bank of England may make a supplemental share transfer instrument (as described in section 26) following the making of a bridge bank share transfer instrument.

*These notes refer to the Banking Act 2009 (c.1)
which received Royal Assent on 12 February 2009*

Section 31: Bridge bank: reverse share transfers

86. Where the Bank of England has made a bridge bank share transfer instrument to a company wholly owned by the Bank of England or the Treasury, or a nominee of the Treasury, the Bank of England may make bridge bank reverse share transfer instruments. A bridge bank reverse share transfer instrument provides for the transfer of securities of a bridge bank to be transferred back from such an onward transferee.
87. The general and specific conditions (sections 7 and 8, respectively) do not apply to reverse transfers and *subsection (5)* provides that the Bank of England must consult the Treasury and the FSA before making the instrument.

Section 32: Interpretation: general

88. This section defines references to “service contract” and “transfer date”.