

FINANCIAL SERVICES ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS AND SCHEDULES

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 RRP 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 RRP to be kept in electronic or any other format.
108. *Subsection (9)* sets out that, when making rules about RRP, the FSA must also have regard to any internationally agreed standards on RRP, 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 RRP 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 RRP, 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.