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STATUTORY INSTRUMENTS

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**2009 No. 319**

**BANKS AND BANKING**

**The Banking Act 2009 (Third Party Compensation  
Arrangements for Partial Property Transfers) Regulations 2009**

*Approved by both Houses of Parliament*

<i>Made</i>	- - - -	<i>19th February 2009</i>
<i>Laid before Parliament</i>		<i>20th February 2009</i>
<i>Coming into force</i>	- -	<i>21st February 2009</i>

The Treasury, in exercise of the powers conferred by sections 60(1) and 259(1) of the Banking Act 2009(2), make the following Regulations.

The power in section 60 of the Banking Act 2009 is being exercised for the first time and the Treasury are satisfied, in accordance with section 259(4) of that Act, that it is necessary to exercise it without laying a draft for approval.

**Citation, commencement and interpretation**

1.—(1) These Regulations may be cited as the Banking Act 2009 (Third Party Compensation Arrangements for Partial Property Transfers) Regulations 2009.

(2) These Regulations come into force on 21st February 2009.

(3) In these Regulations—

“the Act” means the Banking Act 2009;

“the Bank” means the Bank of England;

“banking institution” means—

(a) a bank (within the meaning of Part 1 of the Act(3));

(b) a building society (within the meaning of section 119 of the Building Societies Act 1986(4)); or

(c) a holding company(5);

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(1) See also section 83(4) of the Act.

(2) 2009 c.1.

(3) See section 2 of the Act.

(4) 1986 c.53.

(5) “Holding company” is defined in section 82(1) of the Act. By virtue of section 11 of the Interpretation Act 1978 (c.30), expressions used in these Regulations have, unless the contrary intention appears, the meaning which they bear in the Banking Act 2009.

“relevant time” means—

- (a) in relation to Case 1 (as specified in regulation 2(2)), the time at which the partial property transfer<sup>(6)</sup> took effect;
- (b) in relation to Case 2 (as specified in regulation 2(3)), the time at which the property transfer instrument made in accordance with section 11(2) or 12(2) of the Act took effect;
- (c) in relation to Case 3 (as specified in regulation 2(4)), the time at which the share transfer order made in accordance with section 13(2) of the Act (including that section as applied by section 82 of the Act) took effect;

“third party compensation order in relation to a partial property transfer” has the meaning given in regulation 3(2).

### **Application of these Regulations**

2.—(1) These Regulations apply in the following cases.

(2) Case 1 is where a partial property transfer has been made by the Bank in accordance with section 11(2) or 12(2) of the Act.

(3) Case 2 is where—

- (a) the Bank has made a property transfer instrument in accordance with section 11(2) or 12(2) of the Act which is not a partial property transfer; but
- (b) an onward property transfer instrument has been made by the Bank in accordance with section 43 of the Act which is a partial property transfer.

(4) Case 3 is where—

- (a) the Treasury have made a share transfer order in accordance with section 13(2) of the Act (including that section as applied by section 82 of the Act); and
- (b) a property transfer order has been made by the Treasury in accordance with section 45(2) of the Act (including that section as modified by section 83 of the Act) which by virtue of section 45(5)(b) of the Act is to be treated as a partial property transfer.

(5) For the purposes of these Regulations, a property transfer instrument or property transfer order which purports to transfer all property, rights and liabilities of an undertaking shall be treated as having done so effectively (and so shall not be treated as a partial property transfer), notwithstanding the possibility that any of the property, rights or liabilities are foreign property and may not have been effectively transferred by the property transfer instrument or order or by virtue of steps taken under section 39 of the Act.

### **Requirement to include a third party compensation order**

3.—(1) A compensation scheme order<sup>(7)</sup> or a resolution fund order<sup>(8)</sup> made in the cases in which these Regulations apply must include a third party compensation order<sup>(9)</sup>.

(2) Regulations 4 to 9 set out provisions which must be included in a such a third party compensation order (“a third party compensation order in relation to a partial property transfer”); regulation 10 sets out provisions which may be included in such an order.

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(6) “Partial property transfer” is defined in section 47(1) of the Act. See also section 42 (supplemental instruments), section 43 (onward transfer), section 44 (reverse property transfer), 45 (temporary public ownership: property transfer) and sections 82 and 83 (temporary public ownership of holding companies).

(7) “Compensation scheme order” is defined in section 49(2) of the Act.

(8) “Resolution fund order” is defined in section 49(3) of the Act.

(9) “Third party compensation order” is defined in section 49(4) of the Act.

### **Mandatory provisions - appointment of independent valuer**

4. A third party compensation order in relation to a partial property transfer must include provision for a person (“an independent valuer”) to be appointed to determine—

- (a) whether all pre-transfer creditors<sup>(10)</sup>, a class of pre-transfer creditors or a particular pre-transfer creditor should be paid compensation; and
- (b) if compensation should be paid, what amount is to be paid,

(and, by virtue of section 59(3)(a) of the Act, sections 54 to 56 (appointment etc. of independent valuer) apply to the independent valuer appointed in accordance with this regulation).

### **Mandatory provisions – assessment of insolvency treatment**

5.—(1) A third party compensation order in relation to a partial property transfer must include the following provisions (subject to any necessary modifications).

(2) The independent valuer must assess the treatment (“the insolvency treatment”) which pre-transfer creditors would have received had the banking institution in relation to which or in connection with which the partial property transfer has been made entered insolvency<sup>(11)</sup> immediately before the relevant time.

(3) The independent valuer must assess the treatment (“the actual treatment”) which pre-transfer creditors have received, are receiving or are likely to receive (as specified in the order) if no (or no further) compensation is paid.

(4) If the independent valuer considers that, in relation to any pre-transfer creditor, the actual treatment assessed under paragraph (3) is less favourable than the insolvency treatment assessed under paragraph (2), the independent valuer must determine that compensation be paid to that pre-transfer creditor.

(5) The amount of compensation payable by virtue of paragraph (4) must be determined by the independent valuer by reference to the difference in treatment assessed under paragraph (4) and on the basis of the fair and equitable value of that difference in treatment.

### **Mandatory provisions – choice of insolvency process**

6. A third party compensation order in relation to a partial property transfer must include either—

- (a) a provision specifying that the independent valuer must assess the insolvency treatment as required under regulation 5(2) on the basis that the banking institution had entered a particular insolvency process specified in the order; or
- (b) a provision specifying that the independent valuer must determine what insolvency process it is likely that the banking institution would have entered, had the following instrument or order not been made—
  - (i) in the case of Case 1 (as specified in regulation 2(2)), the partial property transfer;
  - (ii) in the case of Case 2 (as specified in regulation 2(3)), the property transfer instrument made in accordance with section 11(2) or 12(2) of the Act;
  - (iii) in the case of Case 3 (as specified in regulation 2(4)), the share transfer order made in accordance with section 13(2) of the Act (including that section as applied by section 82 of the Act).

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<sup>(10)</sup> “Pre-transfer creditor” is defined in section 60(3)(b) of the Act.

<sup>(11)</sup> See section 60(3)(c) of the Act.

### **Mandatory provisions – valuation principles**

7.—(1) A third party compensation order in relation to a partial property transfer must include the following provisions (subject to any necessary modifications).

(2) In making the assessment of the insolvency treatment as required under regulation 5(2), the independent valuer must determine the amount of compensation in accordance with the following principles (in addition to the principle which applies by virtue of section 57(3) of the Act)—

- (a) that the banking institution in relation to which or in connection with which the partial property transfer has been made would have entered insolvency immediately before the relevant time;
- (b) that the partial property transfer has not been made and that no other order or instrument under Part 1 of the Act would have been made in relation to or in connection with the banking institution (or, in appropriate cases, any of the banking institutions);
- (c) that no financial assistance<sup>(12)</sup> would have, after the relevant time, been provided by the Bank or the Treasury.

### **Mandatory provisions – interim payments**

8.—(1) A third party compensation order in relation to a partial property transfer must include the following provisions (subject to any necessary modifications).

(2) The independent valuer may determine that payments should be made to a pre-transfer creditor, a class of pre-transfer creditors or all pre-transfer creditors on account of compensation to be payable under the third party compensation order (“payments on account”).

(3) The independent valuer may make such a determination at any time before the determination required by regulation 5(5) has been made.

(4) Once the determination required by regulation 5(5) has been made, the independent valuer must determine what balancing payments are appropriate to ensure that the pre-transfer creditor receives the amount of compensation determined under regulation 5(5) (and no more than that amount).

(5) Subject to paragraph (6), the independent valuer may make such provision as to payments on account as he thinks fit (including a requirement that payments be made in instalments).

(6) Payments on account must be made subject to the following conditions—

- (a) that the acceptance of such a payment by the pre-transfer creditor reduces any obligation (whether in existence at the time of the payment or not) on the Treasury, the Financial Services Compensation Scheme or any other person (as the case may be) to pay compensation to the pre-transfer creditor by the amount of the payment on account;
- (b) that, where the independent valuer, in accordance with paragraph (4) determines that the pre-transfer creditor should make a balancing payment to the Treasury, the Financial Services Compensation Scheme or any other person (as the case may be), the pre-transfer creditor is liable to pay that amount.

(7) In considering whether to require payments on account to be made in accordance with this regulation, the independent valuer must have regard to the merits of ensuring that pre-transfer creditors receive compensation in a timely manner.

### **Mandatory provisions – valuations provided by creditors**

9. A third party compensation order in relation to a partial property transfer must make provision requiring the independent valuer to have regard to any information provided by a pre-transfer creditor

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(12) “Financial assistance” is defined in section 257 of the Act.

which is relevant to the exercise of the independent valuer's functions under the order; in particular, the independent valuer must have regard to any information which relates to the assessment of the insolvency treatment required by regulation 5(2) or the assessment of the actual treatment required by regulation 5(3).

#### **Optional provisions – valuation principles**

**10.**—(1) A third party compensation order in relation to a partial property transfer may make any of the following provisions (subject to any necessary modifications).

(2) In making the assessment of the insolvency treatment required by regulation 5(2), the independent valuer must assume that property specified in the order (or property of a class specified in the order) would have been sold for the price specified in the order or calculated by reference to criteria specified in the order.

(3) In making the assessment of the insolvency treatment required by regulation 5(2), the independent valuer must assume that property specified in the order (or property of a class specified in the order) would have been treated in the manner specified in order.

19th February 2009

*Dave Watts*  
*Steve McCabe*  
Two of the Lords Commissioners of Her  
Majesty's Treasury

## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations are made under the Banking Act 2009 (c.1) (“the Act”).

The Regulations specify provisions which must, or which may, be included in a third party compensation order made in accordance with section 59 of the Act in the case of a partial property transfer (as defined by section 47 of that Act) (“a third party compensation order in relation to a partial property transfer”). These Regulations relate in particular to the treatment of those who were creditors of a banking institution immediately before a partial property transfer took effect (“pre-transfer creditors”).

Regulation 2 sets out the cases in which the Regulations apply.

Regulation 3 provides that a compensation scheme order or resolution fund order made in relation to the cases in which these Regulations apply must include provision for a third party compensation order. Such an order must comply with the provisions of these Regulations.

Regulation 4 provides that a third party compensation order in relation to a partial property transfer must provide for the appointment of an independent valuer to determine whether pre-transfer creditors should be paid compensation and if so, what amount is to be paid.

Regulation 5 provides that the third party compensation order in relation to a partial property transfer must require the independent valuer to assess the treatment actually received by pre-transfer creditors and the treatment they would have received had the banking institution entered insolvency. If the independent valuer determines that the actual treatment received by pre-transfer creditors is less favourable than the insolvency treatment pre-transfer creditors would have received, he must determine that compensation is payable. The amount of compensation is to be determined by the independent valuer by reference to the fair and equitable value of that difference in treatment.

Regulation 6 provides that a third party compensation order in relation to a partial property transfer must either specify what insolvency process the independent valuer should apply for the purposes of assessing the insolvency treatment or that the independent valuer must determine which insolvency process it is likely that the banking institution would have entered had the relevant order or instrument not been made.

Regulation 7 makes provision for the valuation principles which the independent valuer must apply.

Regulation 8 provides that a third party compensation order in relation to a partial property transfer must include a provision enabling the independent valuer to make provision for payments to be made on account of compensation to be payable under the order.

Regulation 9 provides that a third party compensation order in relation to a partial property transfer must require an independent valuer to have regard to information provided by a pre-transfer creditor which is relevant to the exercise of the independent valuer’s functions under the order.

Regulation 10 provides that a third party compensation order in relation to a partial property transfer may make provision as to the assumptions the independent valuer must make as to how certain property of the banking institution would have been treated under an insolvency process.

A full Impact Assessment of the effect that this instrument will have on the costs of business and the voluntary sector has been prepared. It may be obtained from the Banking Reform Team, HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ. It is also available on HM Treasury’s website ([www.hm-treasury.gov.uk](http://www.hm-treasury.gov.uk)) and is annexed to the Explanatory Memorandum published alongside this instrument on the OPSI website ([www.opsi.gov.uk](http://www.opsi.gov.uk)).

