

EXPLANATORY MEMORANDUM TO
THE BANK ADMINISTRATION (ENGLAND AND WALES) RULES 2009
2009 No. 357

1. This explanatory memorandum has been prepared by Her Majesty's Treasury and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.
2. **Purpose of the instrument**
 - 2.1 The instrument introduces rules for the bank administration procedure set out in Part 3 of the Banking Act 2009 (“the Act”).
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 Because of the unique circumstances surrounding the instrument, it has not in this case been possible to comply with the 21-day rule and the instrument will come into force on 25th February.
 - 3.2 The Act replaces the powers to resolve failing banks conferred by the Banking (Special Provisions) Act 2008. The operative provisions of that Act cease to be exercisable on 21 February 2009. Given the current financial instability, it is vital that powers to resolve failing banks and certain other financial institutions continue to be available and that there is no period of time where such powers cannot be exercised effectively.
 - 3.3 The Banking Act 2009 received Royal Assent on 12 February 2009. It is necessary for this statutory instrument to be in force as soon as possible after 21 February to enable Part 3 of the Act to be exercised in an effective manner, if required.
4. **Legislative Context**
 - 4.1 The instrument is the first use of the powers of the Lord Chancellor under section 411 (1B) of the Insolvency Act 1986 as introduced by section 160 of the Act to make rules, with the concurrence of Her Majesty's Treasury and the Lord Chief Justice, to give effect to the bank administration procedure.
 - 4.2 Part 3 of the Act provides that where the Bank of England has made or intends to effect a partial sale or transfer to a commercial purchaser or bridge bank, the residual bank may be put into bank administration.
 - 4.3 This procedure is based, with modifications where required, on the provisions of administration set out in Schedule B1 to the Insolvency Act 1986.
 - 4.4 These rules give effect to that procedure and are based, with necessary modifications, on the rules set out in Part 2 of the Insolvency Rules 1986; with

rules in Parts 4, 7, 8, 9, 11, 12 and 13 applied in relation to the powers of a bank administrator, court procedure and practice, dividend payments, and miscellaneous and general provisions. These rules follow the order of the Insolvency Rules 1986.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 Part 3 of the Act provides that where the Bank of England makes, or intends to make, a partial sale or transfer to a commercial purchaser or bridge bank under the powers in Part 1 of that Act, the residual bank may be placed into bank administration. That process is based on the procedure of administration set out in Schedule B1 to the Insolvency Act 1986.

7.2 These rules, which are based on the rules for administration set out in Part 2 of the Insolvency Rules 1986, give effect to the bank administration procedure and many of the existing rules for the process of administration have been applied with little or no modification.

7.3 New rules and modifications to existing rules have been introduced in order to facilitate the achievement of the unique objectives of the bank administration procedure and to reflect the role of the Bank of England in exercising a partial transfer.

7.4 In keeping with ordinary administration, only an insolvency practitioner may be appointed as bank administrator.

7.5 The objectives of a bank administrator are to provide support services or facilities to a commercial purchaser or bridge bank (so to allow the transferred part to operate successfully) and to administer the company in such a way to achieve the best result for creditors.

7.6 Because of its role within the Special Resolution Regime set out in Part 1 of the Act, only the Bank of England may apply to the court for a bank administration order and the rules provide for a hearing to be held quickly. This will be essential to help ensure successful resolution through a partial transfer to a commercial purchaser or bridge bank. The rules also add detail to the appointment of a provisional bank administrator in any period between the submission of an application for a bank administration order and the court hearing for the making of such an order.

- 7.7 In order to facilitate the achievement of objective 1 of the bank administration procedure, the Bank of England will have an important role to play in the process and will be responsible for agreeing the bank administrator's initial proposals; the Bank will also initially fulfil the sort of functions usually carried out by a creditors' committee.
- 7.8 Once there is no requirement for the residual bank to continue providing services or facilities to a commercial purchaser or a bridge bank, the process will continue in much the same way as an ordinary administration. A bank administrator is, however, also given powers normally only available to a liquidator, for example to disclaim onerous property, and these rules therefore apply, with modifications where needed, certain provisions of Part 4 of the Insolvency Rules 1986.
- 7.9 The format of the instrument is based on the order of the Insolvency Rules 1986. It is acknowledged that the general format of the instrument is stylistically different to that taken for the Bank Insolvency Rules 2009 which are being introduced at the same time to give effect to the procedure of bank insolvency procedure set out in Part 2 of the Act. The differences in style largely stem from the differences in the style of the underlying legislation of the Insolvency Act on which the two schemes are based - the compulsory liquidation provisions in the Insolvency Act 1986 versus the administration procedure set out in Schedule B1 to that Act; however it must be acknowledged that differences also arise from the reduced timescales that have been available to put the necessary Rules in place from the commencement of Parts 2 and 3 of the Act. These differences do not alter the legal effect of the rules.
- 7.10 The Insolvency Service is currently carrying out a review of the Insolvency Rules 1986 and is considering ways to both modernise and consolidate that instrument. It is expected that the new consolidated Rules will be introduced in the autumn. As the Bank Administration Rules draw heavily on the current Insolvency Rules, it will be necessary to review and make any required amendments to this instrument and therefore, where possible, an element of "future-proofing" has been introduced, for example references to affidavits have been replaced with witness statements. That exercise will also provide an opportunity to introduce greater consistency of approach for the Rules relating to Parts 2 and 3 of the Act

8. Consultation outcome

- 8.1 Due to the need to implement this instrument promptly to coincide with the coming into effect of the Act on the expiry of the Banking (Special Provisions) Act 2008, no public consultation was carried out; though drafts of the instrument were consulted on with the Bank of England, the FSA, the FSCS, the Insolvency Service and the Chancellor of the High Court.
- 8.2 As this is the first set of Rules to be made in relation to the bank administration procedure, in accordance with section 160(6) of the Act, the Insolvency Rules Committee have not been consulted.

9. Guidance

- 9.1 No guidance is being issued on the instrument since it is largely based on existing insolvency rules and practice which will be familiar to insolvency practitioners and their advisers.

10. Impact

- 10.1 The bank administration procedure set out in Part 3 of the Act may only be instituted in connection with the powers to effect a partial transfer of a bank's business to a bridge bank or private sector purchaser. The definition of a bank is given in section 2 of the Act and the procedure to which these rules give effect could not be used in relation to other businesses, charities or voluntary bodies.
- 10.2 The Bank of England will have an important role to play in effecting a partial transfer and the operation of a bridge bank. Part 3 of the Act and these Rules have been developed in consultation with the Bank of England and the Financial Services Authority.
- 10.3 Separate Regulations will be introduced dealing with safeguards in relation to partial transfers, including compensation arrangements, and an impact assessment is to be drafted for those Regulations.
- 10.4 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The bank administration procedure set out in Part 3 of the Act may only be used in relation to a partial transfer of a bank's business to a bridge bank or private sector purchaser. For these purposes, bank is defined in section 2 of the Act.

12. Monitoring & review

- 12.1 The Bank Administration Rules apply many of the existing provisions of the Insolvency Rules 1986, with amendments where required. It is expected that as a result of the consolidation and modernisation project mentioned above, a new version of the Insolvency Rules will be introduced this autumn. It will therefore be necessary to reconsider this instrument to ensure consistency with the new Insolvency Rules.
- 12.2 Bank administration can only be used in relation to a partial transfer under the powers set out in Part 1 of the Act. Partial transfers are one of the special resolution regime tools introduced by Part 1 of the Act, and the Banking Liaison Panel created in accordance with section 10 of the Act will monitor the impact of this new regime.

13. Contact

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