STATUTORY INSTRUMENTS

2009 No. 853

FINANCIAL SERVICES AND MARKETS

The Financial Markets and Insolvency Regulations 2009

Made - - - -	*1st April 2009*
Laid before Parliament	*3rd April 2009*
Coming into force - -	*15th June 2009*

The Treasury—

(a) with the Secretary of State, in exercise of the powers conferred by sections 158(4) and (5), 185 and 186(1) of the Companies Act 1989(**a**) and now vested in them jointly(**b**),

(b) in exercise of the powers conferred by sections 155(4) and (5) and 187(3) of the Companies Act 1989(**c**) and now vested in them(**d**), and

(c) in exercise of the powers conferred by sections 286 and 428(3) of the Financial Services and Markets Act 2000(**e**), with the approval of the Secretary of State required by section 286(2) of that Act,

make the following Regulations:

Citation, commencement and transitional provision

1.—(1) These Regulations may be cited as the Financial Markets and Insolvency Regulations 2009 and shall come into force on 15th June 2009.

(2) Regulation 2 paragraphs (4), (5), (6), (7), (8), (9), (10) and (12) apply to insolvency proceedings which relate to any of the insolvency events set out in paragraph (3) which take place on or after the date on which these Regulations come into force.

(3) The insolvency events are—

(a) an application for an administration order;

(b) an application for a bank administration order under Part 3 of the Banking Act 2009;(**f**)

(**a**) 1989 c. 40. Section 158 was amended by the Enterprise Act 2002 (c. 40), section 248(3) and Schedule 17. Section 185 was amended by S.I. 2001/3649.

(**b**) The powers originally vested in the Secretary of State under sections 158(4) and (5), 185 and 186(1) of the Companies Act 1989 are now exercisable by the Secretary of State jointly with the Treasury – see the Transfer of Functions (Financial Services) Order 1992 (S.I. 1992/1315).

(**c**) Section 155 was amended by S.I. 1991/880 and S.I. 1998/1748.

(**d**) The powers originally vested in the Secretary of State under sections 155 and 187(3) are now vested in the Treasury (see S.I. 1992/1315).

(**e**) 2000 c. 8. Section 286 was amended by S.I. 2006/2975 and S.I. 2007/1262.

(**f**) 2009 c.1.

(c) the filing of a notice of intention to appoint an administrator for an appointment under paragraph 14 or 22 of Schedule B1 to the Insolvency Act 1986(**a**);

(d) where no notice of intention to appoint is filed, the appointment of an administrator under paragraph 14 or 22 of Schedule B1 to the Insolvency Act 1986;

(e) the presentation of a bankruptcy petition;

(f) the presentation of a petition for sequestration of a person's estate;

(g) the presentation of a winding up petition;

(h) an application for a bank insolvency order under Part 2 of the Banking Act 2009;

(i) the passing of a resolution for voluntary winding up;

(j) the appointment of an administrative receiver;

(k) the making of an order appointing an interim receiver.

Amendment of the Companies Act 1989

2.—(1) The Companies Act 1989 is amended as follows.

(2) In paragraph (c) of section 154 (introduction), after "such transactions" insert "or as default fund contribution, ".

(3) In section 155 (market contracts)—

(a) in subsection (2)(**b**), at the end of paragraph (a) omit "and" and for paragraph (b) substitute—

"(b) contracts entered into by the exchange, in its capacity as such, with a member of the exchange or with a recognised clearing house or with another recognised investment exchange for the purpose of enabling the rights and liabilities of that member or clearing house or other investment exchange under a transaction to be settled; and

(c) contracts entered into by the exchange with a member of the exchange or with a recognised clearing house or with another recognised investment exchange for the purpose of providing central counterparty clearing services to that member or clearing house or other investment exchange.";

(b) for subsection (2A), substitute—

"(2A) Where the exchange in question is a recognised overseas investment exchange, this Part does not apply to a contract that falls within paragraph (a) of subsection (2) (unless it also falls within subsection (3)).";

(c) for subsection (3)(**c**), substitute—

"(3) In relation to a recognised clearing house this Part applies to—

(a) contracts entered into by the clearing house, in its capacity as such, with a member of the clearing house or with a recognised investment exchange or with another recognised clearing house for the purpose of enabling the rights and liabilities of that member or investment exchange or other clearing house under a transaction to be settled; and

(b) contracts entered into by the clearing house with a member of the clearing house or with a recognised investment exchange or with another recognised clearing house for the purpose of providing central counterparty clearing services to that member or investment exchange or other clearing house."; and

(d) after subsection (3) insert—

(**a**) 1986 c. 45; Schedule B1 was inserted by the Enterprise Act 2002 (c. 40), section 248(2) and Schedule 16.

(**b**) Section 155(2) and (2A) were substituted for subsection (2) by S.I. 1991/880. Subsection (2)(b) was amended by S.I. 1998/1748.

(**c**) Section 155(3) was substituted by S.I. 1998/1748.

"(3A) In this section "central counterparty clearing services" means—

(a) the services provided by a recognised investment exchange or a recognised clearing house to the parties to a transaction in connection with contracts between each of the parties and the investment exchange or clearing house (in place of, or as an alternative to, a contract directly between the parties),

(b) the services provided by a recognised clearing house to a recognised investment exchange or to another recognised clearing house in connection with contracts between them, or

(c) the services provided by a recognised investment exchange to a recognised clearing house or to another recognised investment exchange in connection with contracts between them.".

(4) In subsection (2) of section 158 (modifications of the law of insolvency)—

(a) for paragraph (a) substitute—

"(a) proceedings in respect of a recognised investment exchange or a member or designated non-member of a recognised investment exchange,

(aa) proceedings in respect of a recognised clearing house or a member of a recognised clearing house, and".

(5) In section 159 (proceedings of exchange or clearing house take precedence over insolvency procedures)—

(a) in subsection (1), after "sequestration, or", insert "in the administration of a company or other body or";

(b) in subsection (4), after "or bankruptcy", insert "or in the administration of a company or other body" and after "or sequestration", insert "or in the administration of a company or other body"; and

(c) in subsection (4A)(b)(**a**), after "England and Wales," insert "or in the administration of a company or other body".

(6) In section 161 (supplementary provisions as to default proceedings)—

(a) in subsection (2), after "liquidator", insert ", administrator";

(b) in subsection (4)(**b**)—

(i) after "or paragraph", insert "40, 41,"; and

(ii) for "including paragraph 43(6) as applied by paragraph 44", substitute "including those paragraphs as applied by paragraph 44"; and

(c) in subsection (4) as it has effect, by virtue of section 249(1) of the Enterprise Act 2002, without the amendments made by paragraph 45 of Schedule 17 to that Act, for "10(1)(c), 11(3)" substitute "10, 11".

(7) In section 163 (net sum payable on completion of default proceedings)—

(a) in subsection (2)—

(i) for "or winding-up order has been made", substitute ", winding-up or administration order has been made";

(ii) in paragraph (a), for "or winding up", substitute ", winding up or administration";

(iii) in paragraph (b), after "winding up", add "or administration";

(iv) after "(within the meaning of section 247 of the Insolvency Act 1986)", insert ", or enters administration"; and

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(**a**) Subsection (4A) was inserted by S.I. 1991/880.

(**b**) Subsection (4) was amended by the Enterprise Act 2002, section 248(3), Schedule 17, paragraphs 43, 45. The amendment made by section 248(3) did not apply to special administration regimes set out in section 249 of that Act nor to specified regimes set out in S.I. 2003/2093, regulation 3.

(v) after "the date of the winding-up order" insert "or the date on which the partnership enters administration".

(b) in subsection (3)—

(i) after "sequestration or a winding-up", insert "or administration";

(ii) in each of paragraphs (a) and (b), for "or winding up", substitute ", winding up or administration"; and

(iii) after "(within the meaning of section 129 of the Insolvency Act 1986)", insert "or the date on which the body corporate enters administration";

(c) after subsection (3), insert—

"(3A) In subsections (2) and (3), a reference to the making of an administration order shall be taken to include a reference to the appointment of an administrator under—

(a) paragraph 14 of Schedule B1 to the Insolvency Act 1986 (appointment by holder of qualifying floating charge); or

(b) paragraph 22 of that Schedule (appointment by company or directors)."(**a**); and

(d) in subsection (4), at the end of paragraph (a) omit "or" , at the end of paragraph (b) insert "or", and, after paragraph (b), insert—

"(c) that an application for an administration order was pending or that any person had given notice of intention to appoint an administrator,".

(8) In section 164 (disclaimer of property, rescission of contracts, &c)—

(a) in subsection (1), at the end of paragraph (b) insert "or as default fund contribution";

(b) in subsection (3)—

(i) after paragraph (b) insert—

"(ba) the provision of default fund contribution to the exchange or clearing house,";

(ii) in paragraph (c), after "in relation to a market contract" insert "or as default fund contribution"; and

(iii) at the end of paragraph (d) insert "or as default fund contribution";

(c) in subsection (4)—

(i) after "margin in relation to a market contract" insert "or default fund contribution"; and

(ii) after "the margin" in each of the two places where the expression occurs insert "or default fund contribution"; and

(d) in subsection (5) at the end insert "or of default fund contribution".

(9) In section 165 (adjustment of prior transactions)—

(a) in paragraph (c) of subsection (4), after "clearing house", insert "in question"; and

(b) after subsection (4) insert—

"(5) This section also applies to—

(a) the provision of default fund contribution to a recognised investment exchange or recognised clearing house,

(b) any contract effected by a recognised investment exchange or recognised clearing house for the purpose of realising the property provided as default fund contribution, and

(c) any disposition of property in accordance with the rules of the recognised investment exchange or recognised clearing house as to the application of property provided as default fund contribution.".

(10) In section 167 (application to determine whether default proceedings to be taken)—

(**a**) Schedule B1 to the Insolvency Act 1986 was inserted by the Enterprise Act 2002, section 248(2) and Schedule 16.

(a) for subsections (1) and (1A)(**a**) substitute—

"(1) This section applies where a relevant insolvency event has occurred in the case of—

(a) a recognised investment exchange or a member or designated non-member of a recognised investment exchange, or

(b) a recognised clearing house or a member of a recognised clearing house.

The investment exchange, member, designated non-member or clearing house in whose case a relevant insolvency event has occurred is referred to below as "the person in default".

(1A) For the purposes of this section a "relevant insolvency event" occurs where—

(a) a bankruptcy order is made,

(b) an award of sequestration is made,

(c) an order appointing an interim receiver is made,

(d) an administration or winding up order is made,

(e) an administrator is appointed under paragraph 14 of Schedule B1 to the Insolvency Act 1986 (appointment by holder of qualifying floating charge) or under paragraph 22 of that Schedule (appointment by company or directors),

(f) a resolution for voluntary winding up is passed, or

(g) an order appointing a provisional liquidator is made.

(1B) Where in relation to a person in default a recognised investment exchange or a recognised clearing house ("the responsible exchange or clearing house")—

(a) has power under its default rules to take action in consequence of the relevant insolvency event or the matters giving rise to it, but

(b) has not done so,

a relevant office-holder appointed in connection with or in consequence of the relevant insolvency event may apply to the Authority.";

(b) in subsection (2), for "the exchange or clearing house concerned" substitute "the responsible exchange or clearing house";

(c) in subsection (3)—

(i) for "the exchange or clearing house", in each of the three places where the expression occurs, substitute "the responsible exchange or clearing house";

(ii) for "the member or designated non-member in question" substitute "the person in default"; and

(d) in each of subsections (4) and (5), for "the exchange or clearing house" substitute "the responsible exchange or clearing house".

(11) In section 170 (certain overseas exchanges and clearing houses) for subsection (1)(**b**) substitute—

"(1) The Secretary of State and the Treasury may by regulations provide that this Part applies in relation to contracts connected with an overseas investment exchange or overseas clearing house which—

(a) is not a recognised investment exchange or recognised clearing house, but

(b) is approved by the Treasury in accordance with such requirements as may be so specified,

as it applies in relation to contracts connected with a recognised investment exchange or recognised clearing house.".

(**a**) Subsection (1) was amended by S.I. 2001/3649. Subsection (1A) was inserted by the Enterprise Act 2002, section 248(3) and Schedule 16.

(**b**) Subsection (1) was amended by S.I. 2001/3649.

(12) In section 175(**a**) (administration orders, &c) as it has effect, by virtue of section 249(1) of the Enterprise Act 2002, without the amendments made by paragraph 47 of Schedule 17 to that Act, for subsection (1) substitute—

"(1) The following provisions of the Insolvency Act 1986 (which relate to administration orders and administrators) do not apply in relation to a market charge—

(a) sections 10 and 11 (effect of application for administration order and of an administration order), and

(b) section 15(1), (2) and (3) (power of administrator to deal with charged property).".

(13) In section 177 (application of margin not affected by certain other interests)—

(a) in the heading, after "margin" insert "or default fund contribution";

(b) in each of subsection (1) and (2), at the end insert "or as default fund contribution"; and

(c) in subsection (3), after "as margin" insert "or as default fund contribution".

(14) In subsection (1) of section 180(**b**) (proceedings against market property by unsecured creditors)—

(a) after "as margin in relation to market contracts", insert "or as default fund contribution,"; and

(b) in paragraph (a), after "for margin", insert "or as default fund contribution".

(15) In section 188 (meaning of "default rules" and related expressions)—

(a) in subsection (1) after "person" insert "(including another recognised investment exchange or recognised clearing house)"; and

(b) after subsection (3), insert—

"(3A) In this Part "default fund contribution" means—

(a) contribution by a member or designated non-member of a recognised investment exchange to a fund which—

(i) is maintained by that exchange for the purpose of covering losses arising in connection with defaults by any of the members of the exchange, or defaults by any of the members or designated non-members of the exchange, and

(ii) may be applied for that purpose under the default rules of the exchange;

(b) contribution by a member of a recognised clearing house to a fund which—

(i) is maintained by that clearing house for the purpose of covering losses arising in connection with defaults by any of the members of the clearing house, and

(ii) may be applied for that purpose under the default rules of the clearing house;

(c) contribution by a recognised clearing house to a fund which—

(i) is maintained by a recognised investment exchange or another recognised clearing house (A) for the purpose of covering losses arising in connection with defaults by recognised clearing houses or recognised investment exchanges other than A or by any of their members, and

(ii) may be applied for that purpose under A's default rules; or

(d) contribution by a recognised investment exchange to a fund which—

(i) is maintained by a recognised clearing house or another recognised investment exchange (A) for the purpose of covering losses arising in connection with defaults by recognised investment exchanges or recognised clearing houses other than A or by any of their members, and

(ii) may be applied for that purpose under A's default rules.".

(**a**) Subsections (1), (1A) and (2A) were inserted, and section (2) amended, by section 248(3) of the Enterprise Act 2002 (c.40), Schedule 17, paragraph 47. The amendment made by section 248(2) did not apply to special administration regimes set out in section 249 of that Act nor to specified regimes set out in S.I. 2003/2093, regulation 3.

(**b**) Subsection (1) is amended by the Tribunals, Courts and Enforcement Act 2007, section 62(3), Schedule 13, paragraph 91.

(16) In section 191(**a**) (index of defined expressions), after the expression "cover for margin", insert—

"default fund contribution section 188(3A)".

Amendment of the Financial Markets and Insolvency Regulations 1991

3.—(1) The Financial Markets and Insolvency Regulations 1991(**b**) are amended as follows.

(2) After paragraph (1) of regulation 2 (interpretation: general), insert—

"(1A) In these Regulations "the Recognition Requirements Regulations" means the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001(**c**).".

(3) In regulation 7 (interpretation of Part V), after the definition of "CGO Service member", insert—

""default fund contribution" has the same meaning as in section 188(3A) of the Act;".

(4) In regulation 10 (extent to which charge granted in favour of recognised investment exchange to be treated as market charge)—

(a) at the end of paragraph (1)(a), insert "or over property provided as a default fund contribution to the exchange"; and

(b) in paragraph (1)(b), for the words from "the net sum referred to" to the end, substitute—

"any sum due to the exchange from a member or designated non-member of the exchange or from a recognised clearing house or from another recognised investment exchange in respect of unsettled market contracts to which the member, designated non-member, clearing house or investment exchange is a party under the rules referred to in paragraph 12 of the Schedule to the Recognition Requirements Regulations".

(5) In regulation 11 (extent to which charge granted in favour of recognised clearing house to be treated as market charge)—

(a) at the end of paragraph (a), insert "or over property provided as a default fund contribution to the clearing house"; and

(b) in paragraph (b), for "the net sum referred to in paragraph 9(2)(a) of Schedule 21 to the Act", substitute—

"any sum due to the clearing house from a member of the clearing house or from a recognised investment exchange or from another recognised clearing house in respect of unsettled market contracts to which the member, clearing house or investment exchange is a party under the rules referred to in paragraph 25 of the Schedule to the Recognition Requirements Regulations".

(6) In regulation 16 (circumstances in which member or designated non-member dealing as principal to be treated as acting in different capacities)—

(a) for paragraph (1)(a), substitute—

"(a) a market contract, effected as principal by a member or designated non-member of a recognised investment exchange or a member of a recognised clearing house, in relation to which money received by the member or designated non-member is—

(i) clients' money for the purposes of rules relating to clients' money, or

(ii) would be clients' money for the purposes of those rules were it not money which, in accordance with those rules, may be regarded as immediately due and payable to the member or designated non-member for its own account; and";

(**a**) Section 191 was amended by S.I. 2001/3649.
(**b**) S.I. 1991/880; amended by S.I. 1992/716, 1999/2109, 2001/3649 and 2006/3386.
(**c**) S.I. 2001/995; amended by S.I. 2005/381 and 2006/3386.

(b) after paragraph (1) insert—

"(1A) In addition "relevant transaction" means a market contract entered into by a recognised clearing house effected as principal in relation to which money is received by the recognised clearing house from a recognised investment exchange or from another recognised clearing house.

(1B) In addition "relevant transaction" means a market contract entered into by a recognised investment exchange effected as principal in relation to which money is received by the recognised investment exchange from a recognised clearing house or from another recognised investment exchange.

(1C) Where paragraph (1A) or (1B) apply paragraph (1) applies to the recognised clearing house or recognised investment exchange as it does to a member of the clearing house or investment exchange, and as if the clearing house or investment exchange were subject to the rules referred to in paragraph (1)(a)(i).

(1D) In paragraph (1), "rules relating to clients' money" are rules made by the Financial Services Authority, in particular, under section 138 or 139 of the Financial Services and Markets Act 2000.";

(c) for paragraph (2) substitute—

"(2) For the purposes of section 187(1) of the Act (construction of references to parties to market contracts)—

(a) a recognised investment exchange or a member or designated non-member of a recognised investment exchange, or

(b) a recognised clearing house or a member of a recognised clearing house,

shall be treated as effecting relevant transactions in a different capacity from other market contracts it has effected as principal."; and

(d) omit paragraphs (3) and (4).

Amendment of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001

4.—(1) The Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001(**a**) are amended as follows.

(2) In paragraph (1) of regulation 3 (interpretation), after the definition of "credit institution", insert—

""default fund" means the sum of the default fund contributions by the members or designated non-members of a recognised investment exchange to that exchange or by one recognised investment exchange to another or by the members of a recognised clearing house to that clearing house or by one recognised clearing house to another to the extent those contributions have not been returned or otherwise applied;

"default fund contribution" has the same meaning as in section 188(3A) of the Companies Act;".

(3) In the Schedule—

(a) in paragraph 10 after sub-paragraph (3) insert—

"(4) Sub-paragraph (5) applies where the exchange has arrangements for transacting business with, or in relation to common members of, a recognised clearing house or another recognised investment exchange.

(5) A recognised investment exchange must have default rules which in the event of the clearing house or the investment exchange being or appearing to be unable to meet its obligations in respect of one or more market contracts, enable action to be taken in respect of unsettled market contracts to which that person is a party.";

(**a**) S.I. 2001/995; amended by S.I. 2005/381 and 2006/3386.

(b) in paragraph 12—

(i) in sub-paragraph (1) after "155(2)(b)", insert "or (c)";

(ii) in sub-paragraph 2(b) after "different contracts" insert "entered into by the defaulter in one capacity for the purposes of section 187 of the Companies Act";

(iii) after sub-paragraph (2)(b), insert—

"(bb) if relevant, for that sum to be aggregated with, or set off against, any sum owed by or to the investment exchange by or to AP under an indemnity given or reimbursement or similar obligation in respect of a margin set off agreement in which the defaulter chose to participate so as to produce a net sum.";

(iv) for sub-paragraph (2)(c), substitute—

"(c) for the net sum referred to in paragraph (b) or, if relevant, the net sum referred to in paragraph (bb)—

(i) if payable by the defaulter to the exchange, to be set off against—

(aa) any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property);

(bb) to the extent (if any) that any sum remains after set off under paragraph (aa), any default fund contribution provided by the defaulter remaining after any application of such contribution;

(ii) to the extent (if any) that any sum remains after set off under paragraph (i), to be paid from such other funds, including the default fund, or resources as the exchange may apply under its default rules;

(iii) if payable by the exchange to the defaulter, to be aggregated with—

(aa) any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property);

(bb) any default fund contribution provided by the defaulter remaining after any application of such contribution;"; and

(v) after sub-paragraph (2), insert—

"(2A) In sub-paragraph (2), "margin set off agreement" means an agreement between the exchange and AP permitting any eligible position to which the Participant Member is party with the exchange and any eligible position to which the Participant Member is party with AP to be taken into account in calculating a net sum owed by or to the Participant Member to either the exchange or AP and/or margin to be provided to, either or both, the exchange and AP.

(2B) In sub-paragraph (2)—

"AP" means a recognised clearing house or another recognised investment exchange of whom a Participant Member is a member;

"eligible position" means any position which may be included in the set off calculation;

"Participant Member" means a person who—

(a) is a member of the exchange;

(b) is a member or participant of AP; and

(c) chooses to participate, in accordance with the rules of the exchange, in such agreement.

(2C) The property, contribution, funds or resources referred to in paragraph (2)(c), against which the net sum is to be set off (or with which it is to be aggregated) are subject to any unsatisfied claims arising out of the default of a defaulter before the default in relation to which the calculation is being made.";

(c) after paragraph 12, insert—

"**12A.** The rules of the exchange must provide that, in the event of a default, any default fund contribution provided by the defaulter shall only be used in accordance with paragraph 12(2)(c)(i) or (ii).";

(d) in paragraph 14 at the end insert—

"or the default of a recognised clearing house or another recognised investment exchange";

(e) in paragraph 15(1), at the end insert, "other than a client account of the defaulter.";

(f) after paragraph 15(2), insert—

"(3) For the purposes of this paragraph, "client account of the defaulter" means an account held by the exchange in the name of the defaulter in which relevant transactions effected by the defaulter have been recorded.

(4) In sub-paragraph (3) "relevant transaction" has the same meaning as in regulation 16(1) of the Financial Markets and Insolvency Regulations 1991.";

(g) in paragraph 24 after sub-paragraph (2) insert—

"(3) Sub-paragraph (4) applies where the clearing house has arrangements for transacting business with, or in relation to common members of, a recognised investment exchange or another recognised clearing house.

(4) A recognised clearing house must have default rules which in the event of the investment exchange or the clearing house being or appearing to be unable to meet its obligations in respect of one or more market contracts, enable action to be taken in respect of unsettled market contracts to which that person is a party.";

(h) in paragraph 25—

(i) in sub-paragraph (1)(b), after "different contracts" insert "entered into by the defaulter in one capacity for the purposes of section 187 of the Companies Act";

(ii) after sub-paragraph (1)(b), insert—

"(bb) if relevant, for that sum to be aggregated with, or set off against, any sum owed by or to the clearing house by or to AP under an indemnity given or reimbursement or similar obligation in respect of a margin set off agreement in which the defaulter chose to participate so as to produce a net sum.";

(iii) for sub-paragraph (1)(c), substitute—

"(c) for the net sum referred to in paragraph (b) or, if relevant, the net sum referred to in paragraph (bb)—

(i) if payable by the defaulter to the clearing house, to be set off against—

(aa) any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property);

(bb) to the extent (if any) that any sum remains after set off under paragraph (aa), any default fund contribution provided by the defaulter remaining after any application of such contribution;

(ii) to the extent (if any) that any sum remains after set off under paragraph (i), to be paid from such other funds, including the default fund, or resources as the clearing house may apply under its default rules;

(iii) if payable by the clearing house to the defaulter, to be aggregated with—

(aa) any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property);

(bb) any default fund contribution provided by the defaulter remaining after any application of such contribution; and"; and

(iv) after sub-paragraph (1), insert—

"(1A) In sub-paragraph (1), "margin set off agreement" means an agreement between the clearing house and AP permitting any eligible position to which the Participant Member is

party with the clearing house and any eligible position to which the Participant Member is party with AP to be taken into account in calculating a net sum owed by or to the Participant Member to or by either the clearing house or AP and/or margin to be provided to, either or both, the clearing house and AP.

(1B) In sub-paragraph (1A)—

"AP" means a recognised investment exchange or another recognised clearing house of whom a Participant Member is a member;

"eligible position" means any position which may be included in the set off calculation;

"Participant Member" means a person who—

(a) is a member of the clearing house;

(b) is a member or participant of AP; and

(c) chooses to participate, in accordance with the rules of the clearing house, in such agreement.

(1C) The property, contribution, funds or resources referred to in paragraph (1)(c), against which the net sum is to be set off (or with which it is to be aggregated) are subject to any unsatisfied claims arising out of the default of a defaulter before the default in relation to which the calculation is being made.";

(i) after paragraph 25, insert—

"**25A.** The rules of the clearing house must provide that in the event of a default, any default fund contribution provided by the defaulter shall only be used in accordance with paragraph 25(1)(c)(i) or (ii).";

(j) in paragraph 27 at the end insert—

"or the default of a recognised investment exchange or another recognised clearing house";

(k) in paragraph 28(1), at the end insert, "other than a client account of the defaulter."; and

(l) after paragraph 28(2), insert—

"(3) For the purposes of this paragraph, "client account of the defaulter" means an account held by the clearing house in the name of the defaulter in which relevant transactions effected by the defaulter have been recorded.

(4) In sub-paragraph (3) "relevant transaction" has the same meaning as in regulation 16(1) of the Financial Markets and Insolvency Regulations 1991.".

Dave Watts
Steve McCabe
31st March 2009 — Two of the Lords Commissioners of Her Majesty's Treasury

Pat McFadden
Parliamentary Under Secretary of State
1st April 2009 — Department for Business Enterprise and Regulatory Reform

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations change the insolvency regime that applies to any exchange which is a "recognised investment exchange" ("RIE") and any central counterparty clearing house which is a "recognised clearing house" ("RCH") within the meaning of the Financial Services and Markets Act 2000 (c. 8) (see Part 18 of that Act). They do so by amending Part 7 of the Companies Act 1989 (c. 40) ("Part 7"); the Financial Markets and Insolvency Regulations 1991 (S.I. 1991/880) (the "1991 Regulations") and the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001 (S.I. 2001/995) (the "2001 Regulations").

These Regulations amend Part 7, the 1991 Regulations and the 2001 Regulations so that they provide further protection for the actions of RIEs and RCHs in the event of default by any of their members on the obligations they have entered into in the course of buying or selling financial instruments. The amendments comprise:

(a) a broadening of the definition of "market contracts" to which Part 7 applies;

(b) inclusion of default fund contributions within the protections of Part 7;

(c) provisions amending Part 7 so that it takes account of administration on a basis equivalent to bankruptcy and winding up;

(d) provision to ensure default rules refer to and take into account cross margining agreements; and

(e) provisions enabling the extension of the default rules of RIEs and RCHs so that a surplus held on a house account of a member may be used to make up a deficit on the client account of the same members.

Regulation 2 amends Part 7 as follows.

Paragraph (2) makes a consequential amendment to section 154. Paragraph (3) amends section 155 (market contracts). The effect of these amendments is that market contracts no longer have to relate only to transactions in investments. They will also include contracts with members for the provision of central counterparty clearing services, and contracts which make provision to allow for interoperability arrangements (including parallel clearing and margin set-off agreements) between RIEs and RCHs. Paragraphs (4) to (7), (10) and (12) amend various sections of Part 7 so that they take account of administration on an equivalent basis to bankruptcy and winding up. Paragraphs (8) and (9), (13) and (14) amend various sections of Part 7 so that where certain provisions of the Insolvency Act 1986 are disapplied in relation to margin, they are also disapplied in relation to default fund contribution (as defined by the amendment in paragraph (15)). This provides for equivalent protection in the application by a RIE or RCH of property held as default fund contribution as for property held as margin.

Regulation 3 amends the 1991 Regulations as follows.

Paragraph (4) amends paragraph (1) of regulation 10 (extent to which charge granted in favour of recognised investment exchange to be treated as market charge) so that it also applies to a charge granted over property provided as default fund contribution to a RIE and, in the case of a recognised UK investment exchange, it secures the obligation to pay to the exchange any sum due to it from a member in respect of unsettled market contracts. Paragraph (5) amends regulation 11 (extent to which charge granted in favour of recognised clearing house to be treated as market charge) in the same way in relation to RCHs. Paragraph (6) amends regulation 16 (circumstances in which member or designated non-member dealing as principal to be treated as acting in different capacities) omitting paragraphs (3) and (4) to remove the definition of relevant investment (to which the reference in sub-paragraph (a) is also removed) to broaden the scope of contracts falling within the regulation. The reference to client rules is updated to refer to the clients' money rules made by the Financial Services Authority, and a consequential amendment is made to cover interoperability arrangements between RIEs and RCHs.

Regulation 4 amends the 2001 Regulations as follows.

Paragraph (3) amends the Schedule to the 2001 Regulations. Sub-paragraphs (a) to (f) amend the requirements relating to default rules in respect of market contracts with RIEs in Part 2 of the Schedule. These amendments change the requirements for the default rules relating to set off and aggregation so that, where applicable and in the prescribed order, they must also take account of a defaulter's house account surpluses, margin set off agreements and default fund contribution. There is also provision that where an RIE has specified arrangements with another RIE or RCH its default rules must provide rules dealing with default of such other exchanges and clearing houses. The RIE and RCH must also be able and willing to share information with the Secretary of State (who is responsible for insolvency), any relevant insolvency practitioner and other specified authorities and bodies in relation to the default of another RIE or RCH. Sub-paragraphs (g) to (l) make equivalent amendments to the requirements relating to default rules in respect of market contracts with RCHs in Part 4 of the Schedule.

An impact assessment of the effect of this instrument on the costs to business, charities or voluntary bodies has been prepared. It may be obtained from the Financial Stability Resolution Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ. It is also available on HM Treasury's website (www.hm-treasury.gov.uk), and is annexed to the Explanatory Memorandum which is published alongside this instrument on the OPSI website (www.opsi.gov.uk). Copies of the impact assessment have also been placed in the libraries of both Houses of Parliament.

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