

EXPLANATORY MEMORANDUM

THE FINANCIAL SERVICES (BANKING REFORM) ACT 2013 (COMMENCEMENT (No. 8) AND CONSEQUENTIAL PROVISIONS) ORDER 2015

2015 No. 428 (C. 25)

1. This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument commences paragraph 4 of Schedule 9 to the Financial Services (Banking Reform) Act 2013 to allow building societies to create floating charges, and makes consequential provision.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The power to create floating charges is given to a building society by commencing paragraph 4 of Schedule 9 to the Financial Services (Banking Reform) Act 2013, which repeals the prohibition against the creation of floating charges in section 9B of the Building Societies Act 1986.

4.2 The more extensive and complicated consequential provisions in the Order are concerned with applying the law of Scotland that governs floating charges, which is statutory law rather than common law, as in England and Wales and Northern Ireland. This law is presently found in Part 18 of the Companies Act 1985, but Part 18 has been repealed (though the repeal is not yet in force) by Part 2 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp. 3). The Order provides for the application of Part 2 (which concerns the creation, effect etc. of floating charges) upon the repeal of Part 18.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Economic Secretary to the Treasury has made the following statement regarding Human Rights:

“In my view the Financial Services (Banking Reform) Act 2013 (Commencement (No. 8) and Consequential Provisions) Order 2015 is compatible with the European Convention on Human Rights.”

7. Policy background

7.1 This Order allows building societies in the UK to create floating charges without a registration scheme.

7.2 In July 2012 HM Treasury launched a consultation on the future of building societies, seeking views on how to maintain the distinctiveness of building societies while creating a level playing field and removing unnecessary barriers to growth. One of the proposals that came out of this was that building societies should be able to create floating charges over their assets (as well as fixed charges, which they are already able to create). A floating charge is a security interest over the non-fixed assets of a company, which enables the company to continue to use and dispose and exchange those assets in the course of its business. In the case of a building society, those assets include its mortgage book, whatever mortgages happen to be held at any time.

7.3 Removing the statutory restriction on floating charges is in line with the Government’s commitment to allow mutuals to compete on a level playing-field, as banks are already able to undertake this activity. This measure removes the risk that fixed charges may be re-categorised as floating charges which has the potential to cause legal uncertainty around the status of a charge. As our impact assessment outlines, allowing for this collectively saves building societies approximately £2m per year against no additional costs.

7.4 This proposal was implemented by paragraph 4 of Schedule 9 to the Financial Services (Banking Reform) Act 2013, which is being commenced by the Order. It repeals the restriction which is in section 9B of the Building Societies Act. The vast majority of stakeholders were in favour this change, but commencement has awaited further consultation about the proposal for the creation of floating charges without registration.

7.5 The Government has found that the case for not having a registration scheme is compelling across the entire UK and has received strong support from most English stakeholders, including the building society sector itself. In Scotland, with its distinct legal system, the proposal raised additional issues for consideration, but following further consultation, it has found the support of the Scottish Government.

7.6 Although aspects of insolvency law, including floating charges, are devolved matters in Scotland, the Government is satisfied that the Order concerns the powers of building societies to create floating charges, which is a matter within the competence of the UK Government. The Scottish Government has confirmed that no devolution issues arise.

8. Consultation outcome

8.1 See above.

9. Guidance

9.1 HM Treasury do not plan to issue guidance.

10. Impact

10.1 Our impact assessment shows that this measure will produce a saving for building societies without adding to costs for the sector or other parties. Removal of the prohibition on floating charges will ensure that building societies are able to create floating charges over their assets, as banks can. The existing restrictions on a society's power to create a floating charge put societies at a disadvantage, e.g. banks will not offer building societies access to delivery by value transactions because of the risk that the bank's security over the society's account could be re-characterised as a floating charge, rather than a fixed charge, and therefore that the security would be void.

10.2 Without this access to delivery by value transactions, societies are required to hold more cash in overnight deposit or reserve accounts with the Bank of England, instead of holding gilts. Typically the yield of reserve/holding accounts is 0.2% lower than the yield on the gilt book.

10.3 It is estimated that societies may have to hold £1bn in reserve/holding accounts rather than gilts. With a missed yield of 0.2%, this would mean that between £1m and £4m is saved per annum across the whole sector. As a central estimate, it's likely that around £2m per annum would be saved by the building society sector. The impact assessment was approved by the FST 16 December 2013.

11. Regulating small businesses

11.1 This SI only affects building societies, which are unlikely to meet with the definition of a small or medium sized enterprise (SME).

12. Monitoring & review

12.1 The Treasury have no formal plans to review this legislation, but are likely to do so if there is a compelling case for doing so in future.

13. Contact

Mark Pickard at HM Treasury Tel: 0207 270 1444 or email: mark.pickard@hmtreasury.gsi.gov.uk can answer any queries regarding this instrument.