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STATUTORY INSTRUMENTS

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**2016 No. 1239**

**The Bank Recovery and Resolution Order 2016**

**PART 4**

Amendments of the Financial Services and Markets Act 2000

**Introduction to amendments of the Financial Services and Markets Act 2000**

**30.** The Financial Services and Markets Act 2000 <sup>M1</sup> is amended in accordance with this Part.

**Marginal Citations**

**M1** 2000 c. 8.

**General meeting**

**31.** After section 55PA (assets requirements imposed on insurance undertakings or reinsurance undertakings) <sup>M2</sup>, insert—

**“55PB Requirements relating to general meetings**

- (1) This section applies where—
  - (a) either regulator has imposed a general meeting requirement on an authorised person who is a bank, building society or investment firm,
  - (b) the authorised person has not complied with the general meeting requirement, and
  - (c) the appropriate regulator considers that the authorised person has infringed, or is likely in the near future to infringe—
    - (i) a relevant requirement within the meaning of section 204A; or
    - (ii) one or more of Articles 3 to 7, 14 to 17 or 24 to 26 of Regulation (EU) No 600/2014 of 15th May 2014 of the European Parliament and of the Council on Markets in Financial Instruments <sup>M3</sup>.
- (2) A general meeting requirement is a requirement under section 55L <sup>M4</sup> or 55M that the authorised person call a general meeting of its shareholders or members.
- (3) The appropriate regulator may call a general meeting of the shareholders or members of the authorised person.
- (4) The appropriate regulator may propose business for consideration and decision at the general meeting.
- (5) The meeting must be called in the same manner, as far as practicable, as that in which meetings are required to be called by the board of directors (or the equivalent management body) of the authorised person.

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- (6) For the purposes of this section—
- “bank” has the meaning given in section 2 of the Banking Act 2009;
  - “building society” has the meaning given in the Building Societies Act 1986;
  - “investment firm” has the meaning given in section 258A of the Banking Act 2009<sup>M5</sup>;
  - “the appropriate regulator” means the regulator who imposed the general meeting requirement.”.

#### **Marginal Citations**

- M2** Section 55PA was inserted by S.I. 2015/575.
- M3** OJ L173, 12.06.2014, p.84.
- M4** Section 55L was substituted (with sections 55A to 55Z4) for Part IV of the Financial Services and Markets Act 2000 by section 11 of the Financial Services Act 2012.
- M5** Section 258A of the Banking Act 2009 was inserted by section 101 of the Financial Services Act 2012.

### **Removal of directors and senior executives and appointment of temporary manager**

- 32.** In Part 5 (performance of regulated activities), after section 71A<sup>M6</sup> insert—

*“Removal of directors and senior executives and appointment of temporary manager*

#### **71B Removal of directors and senior executives**

(1) If the appropriate regulator is satisfied that the conditions in section 71D(1) and (2) are met in relation to a relevant firm, the appropriate regulator may require the firm to remove—

- (a) any person who is a director of the firm;
- (b) any person who is a senior executive of the firm.

(2) If the appropriate regulator imposes a requirement under subsection (1), the regulator may also require the relevant firm—

- (a) to replace a director or senior executive who has been removed, and
- (b) to take any step needed to give effect to the replacement, including, where necessary, calling a general meeting of the firm's shareholders or members.

#### **71C Temporary manager**

(1) If the appropriate regulator is satisfied—

- (a) in the case of a relevant firm, that the conditions in section 71D(1), (2) and (4) are met in relation to that firm, or
- (b) in the case of a parent undertaking which is not a relevant firm, that the conditions in section 71D(1) and (4) are met in relation to that parent undertaking,

the appropriate regulator may appoint a person to act (or one or more persons to act jointly) as a temporary manager of that firm or that parent undertaking.

(2) Where the appropriate regulator makes an appointment under subsection (1) in relation to a parent undertaking which is not a relevant firm, the regulator may also require the undertaking to remove—

- (a) all of its directors;

- (b) all of its senior executives.
  - (3) A temporary manager may be appointed under subsection (1)—
    - (a) to replace the directors of a relevant firm or a parent undertaking where they have been removed in compliance with a requirement imposed under section 71B or subsection (2), or
    - (b) to work with the directors of a relevant firm or a parent undertaking.
  - (4) A temporary manager has the functions specified in the instrument of appointment (see section 71F).
  - (5) The functions which may be specified include (amongst other things)—
    - (a) ascertaining the financial position of the relevant firm or the parent undertaking;
    - (b) managing the business or part of the business of the relevant firm or the parent undertaking in order to preserve or restore the financial position of the firm or the parent undertaking;
    - (c) taking measures to restore the prudent management of the relevant firm or the parent undertaking;
    - (d) any function of the directors.
  - (6) The temporary manager may, with the consent of the appropriate regulator—
    - (a) require the directors to call a general meeting of the shareholders or members of the relevant firm or the parent undertaking, or
    - (b) in the case where all of the directors have been removed in compliance with a requirement imposed under section 71B or subsection (2), call a general meeting of the shareholders or members of the relevant firm or the parent undertaking.
  - (7) The temporary manager may propose business for consideration at the general meeting.
  - (8) If the temporary manager is being appointed to work with the directors, the appropriate regulator—
    - (a) may require the directors not to exercise specified functions during the period of appointment;
    - (b) may require the directors to consult the temporary manager, or obtain the consent of the temporary manager, before taking specified decisions or specified action.
- “Specified” means specified in the requirement.

#### **71D Sections 71B and 71C: conditions**

- (1) The condition in this subsection is met in relation to a relevant firm or a parent undertaking if—
  - (a) there is a deterioration in the financial situation of the relevant firm or the parent undertaking which is a significant deterioration, or
  - (b) there is a serious infringement by the relevant firm or the parent undertaking of—
    - (i) a relevant requirement, or
    - (ii) its memorandum or articles of association or other constituent instrument.
- (2) The condition in this subsection is met in relation to a relevant firm if it is not reasonably likely that the deterioration would be reversed or the infringement would be brought to an end by any measure of a kind described in Article 27(1) of the recovery and resolution directive which could be taken by the appropriate regulator under the provisions listed in subsection (3).

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- (3) The provisions mentioned in subsection (2) are—
- (a) section 55J (variation or cancellation on initiative of regulator),
  - (b) section 55L (imposition of requirements by FCA),
  - (c) section 55M (imposition of requirements by PRA),
  - (d) section 55PB (requirements relating to general meetings),
  - (e) section 56 (prohibition orders),
  - (f) section 63 (withdrawal of approval),
  - (g) section 63ZA (variation of senior manager's approval at request of authorised person)<sup>M7</sup>,
  - (h) section 63ZB (variation of senior manager's approval on initiative of regulator),
  - (i) section 63A (power to impose penalties)<sup>M8</sup>,
  - (j) section 66 (disciplinary powers)<sup>M9</sup>,
  - (k) Part 12A (powers exercisable in relation to parent undertakings)<sup>M10</sup>, or
  - (l) Part 14 (disciplinary measures).
- (4) The condition in this subsection is met if the following action would not be sufficient to reverse the deterioration or bring the infringement to an end—
- (a) in the case of a relevant firm, the imposition of one or more requirements under section 71B (removal and replacement of directors and senior executives); or
  - (b) in the case of a parent undertaking which is not a relevant firm, the exercise of any of the appropriate regulator's powers under Part 12A.
- (5) For the purposes of this section—
- (a) “relevant requirement” has the meaning given in section 204A;
  - (b) a deterioration in the financial situation of the relevant firm or the parent undertaking is significant if—
    - (i) in the case of a relevant firm, or a parent undertaking which is an authorised person, it no longer satisfies, or is likely to fail to satisfy, the threshold conditions relating to its financial resources which apply to it under Schedule 6;
    - (ii) in the case of a parent undertaking which is not an authorised person, the deterioration threatens the viability of the parent undertaking.

#### **71E Temporary manager: further provisions in relation to the appointment**

- (1) Before appointing a person to act as a temporary manager, the appropriate regulator must be satisfied that the person—
- (a) has the qualifications, ability and knowledge to carry out the functions to be given to the temporary manager, and
  - (b) would not be subject to any conflict of interest as a result of the appointment.
- (2) A person may not be appointed to act as a temporary manager for a period longer than one year, but is eligible for re-appointment (or further re-appointment) if subsection 71C(1) continues to apply in relation to the relevant firm or parent undertaking.
- (3) The appropriate regulator may vary the terms of the appointment of a temporary manager, or remove the temporary manager, at any time.

(4) A temporary manager is not liable for damages in respect of anything done in good faith for the purposes of or in connection with the functions of the appointment (subject to section 8 of the Human Rights Act 1998).

#### **71F Temporary manager: instrument of appointment**

- (1) The power in section 71C(1) is to be exercised by an instrument of appointment.
- (2) The instrument of appointment must—
  - (a) specify the functions of the temporary manager,
  - (b) specify the date on which the appointment of the temporary manager has effect,
  - (c) specify the period for which the temporary manager is appointed, and
  - (d) make provision for the resignation and replacement of the person who is appointed as the temporary manager.
- (3) The instrument of appointment may—
  - (a) require the temporary manager to consult the appropriate regulator or other specified person before exercising specified functions,
  - (b) specify particular matters on which the appropriate regulator or other specified person must be consulted, and
  - (c) provide that the temporary manager is not to exercise specified functions without the consent of the appropriate regulator or other specified person.
- (4) The instrument of appointment may require the temporary manager to make reports to the appropriate regulator, at specified times or intervals, on—
  - (a) the financial position of the relevant firm or the parent undertaking,
  - (b) the actions taken by the temporary manager during the course of the temporary manager's appointment,
  - (c) any other specified matters.
- (5) In subsections (3) and (4), “specified” means specified in the instrument of appointment.
- (6) The instrument of appointment may provide for the payment of remuneration and allowances to a temporary manager.
- (7) Provision under subsection (6) may provide that the amounts are—
  - (a) to be paid by the appropriate regulator, or
  - (b) to be determined by the appropriate regulator and paid by the relevant firm or the parent undertaking.
- (8) If a temporary manager—
  - (a) is appointed to replace the directors of the relevant firm or the parent undertaking, or
  - (b) is appointed to work with the directors of the relevant firm or the parent undertaking and has the power to represent that firm or parent undertaking,the appropriate regulator must publish the instrument of appointment on its website.

#### **71G Right to refer matters to the Tribunal**

- (1) A relevant firm which is aggrieved by—
  - (a) the imposition of a requirement on that firm under section 71B, or

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(b) the appointment, or the terms of the appointment, of a person to act as a temporary manager of that firm under section 71C(1),

may refer the matter to the Tribunal.

(2) A parent undertaking which is aggrieved by—

(a) the imposition of a requirement on that parent undertaking under section 71C(2), or

(b) the appointment, or the terms of the appointment, of a person to act as a temporary manager of that parent undertaking under section 71C(1),

may refer the matter to the Tribunal.

(3) A director (or a former director) of a relevant firm or a parent undertaking who is aggrieved by the imposition of a requirement on that director under section 71C(8) may refer the matter to the Tribunal.

(4) A director or senior executive (or a former director or senior executive) of a relevant firm or a parent undertaking who is aggrieved by the imposition of a requirement on that firm or parent undertaking under section 71B or 71C(2) may refer the matter to the Tribunal.

### **71H Removal of directors and senior executives and appointment of temporary manager: procedure**

(1) A requirement under section 71B or 71C(2) or (8) or the appointment of a temporary manager under section 71C(1) may be expressed to take effect immediately or on a specified date only if the appropriate regulator, having regard to the grounds for imposing the requirement or making the appointment, reasonably considers that it is necessary for the requirement or the appointment to take effect immediately or on that date.

(2) If either regulator proposes to impose a requirement on a relevant firm under section 71B or a parent undertaking under section 71C(2), or imposes such a requirement with immediate effect, it must give written notice—

(a) to that firm or parent undertaking, and

(b) to each of the directors or senior executives to whom the requirement relates (“the interested parties”).

(3) If either regulator—

(a) proposes to appoint a person to act as a temporary manager under section 71C or to vary the terms on which such a person is appointed, or

(b) makes such an appointment or variation with immediate effect,

the regulator must give written notice to the relevant firm or the parent undertaking concerned.

(4) If either regulator proposes to impose a requirement on the directors under section 71C(8), or imposes such a requirement with immediate effect, the regulator must give written notice to each director.

(5) A notice given under subsection (2) must—

(a) give details of the requirement,

(b) identify each of the directors or senior executives to whom the requirement relates,

(c) give the regulator's reasons for imposing the requirement—

(i) in the case of a notice given to the relevant firm or the parent undertaking, in relation to each interested party;

- (ii) in the case of a notice given to an interested party, in relation to that interested party,
  - (d) inform the relevant firm or the parent undertaking and the interested parties that each of them may make representations to the regulator within such period as may be specified in the notice (whether or not the matter has been referred to the Tribunal),
  - (e) state when the requirement takes effect, and
  - (f) inform the relevant firm or the parent undertaking and each of the interested parties of their right to refer the matter to the Tribunal.
- (6) A notice given under subsection (3) must—
- (a) state when the appointment or variation takes effect, and be accompanied by the instrument, or revised instrument, of appointment,
  - (b) give the regulator's reasons for making the appointment or variation,
  - (c) inform the relevant firm or the parent undertaking that it may make representations to the regulator within such period as may be specified in the notice (whether or not the matter has been referred to the Tribunal), and
  - (d) inform the relevant firm or the parent undertaking of its right to refer the matter to the Tribunal.
- (7) A notice given under subsection (4) must—
- (a) give details of the requirement,
  - (b) give the regulator's reasons for imposing the requirement,
  - (c) state when the requirement takes effect,
  - (d) inform the director that the director may make representations to the regulator within such period as may be specified in the notice (whether or not the matter has been referred to the Tribunal), and
  - (e) inform the director of the director's right to refer the matter to the Tribunal.
- (8) The regulator may extend the period allowed by the notice given under subsection (2), (3) or (4) for making representations.
- (9) If, having considered any representations made by a person to whom notice (the “original notice”) has been given under subsection (2), (3) or (4), the regulator decides—
- (a) to impose the requirement, make the appointment or vary the terms of an appointment in accordance with the original notice, or
  - (b) not to rescind the imposition of any such requirement or the making of any such appointment or variation which has already taken effect,
- the regulator must give written notice to each person to whom the original notice was given.
- (10) A notice under subsection (9) must inform the person to whom it is given of the right of that person to refer the matter to the Tribunal and give an indication of the procedure on such a reference.
- (11) If, having considered any representations made by a person to whom notice (the “original notice”) has been given under subsection (2), (3) or (4), the regulator decides—
- (a) to impose a requirement, make an appointment or vary the terms of an appointment in a way that is different from the requirement, appointment or variation described in the original notice,
  - (b) not to impose the requirement, make the appointment or vary the terms of an appointment in accordance with the original notice, or

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- (c) to rescind the imposition of any such requirement, or the making of any such appointment or variation that has already taken effect,  
the regulator must give written notice to each person to whom the original notice was given.
- (12) A notice under subsection (11)(a) about the imposition of a requirement under section 71B or 71C(2) must comply with subsection (5).
- (13) A notice under subsection (11)(a) about the appointment of a person as a temporary manager or the variation of the terms of the appointment of a person as a temporary manager must comply with subsection (6).
- (14) A notice under subsection (11)(a) about the imposition of a requirement under section 71C(8) must comply with subsection (7).
- (15) In this section, any reference to “appointment” includes “re-appointment”.

### **71I Sections 71B to 71H: interpretation**

- (1) For the purposes of sections 71B to 71H “relevant firm” means—
- (a) a bank as defined in section 2 of the Banking Act 2009,
  - (b) a building society as defined in section 119 of the Building Societies Act 1986, or
  - (c) an investment firm as defined in section 258A of the Banking Act 2009<sup>M11</sup>.
- (2) For the purposes of sections 71C to 71H, “parent undertaking” means an institution, financial holding company or mixed financial holding company which—
- (a) is incorporated in, or formed under the law of, any part of the United Kingdom,
  - (b) is an EEA parent, and
  - (c) either—
    - (i) has a subsidiary which is an institution, or
    - (ii) holds a participation (within the meaning given by Article 4.1(35) of the capital requirements regulation) in an institution.
- (3) For the purposes of subsection (2), an institution, financial holding company or mixed financial holding company is an EEA parent if it is not itself the subsidiary of an institution, financial holding company or mixed financial holding company set up in any EEA state.
- (4) In subsections (2) and (3)—
- “institution” means a credit institution or an investment firm as defined in Article 2.1(2) and 2.1(3) of the recovery and resolution directive;
- “financial holding company” and “mixed financial holding company” have the meanings given in Article 4.1(20) and 4.1(21) of the capital requirements regulation.
- (5) For the purposes of sections 71B to 71H—
- “appropriate regulator” means—
- (a) in relation to a PRA-authorized person, the PRA,
  - (b) in relation to any other authorised person, the FCA,
  - (c) in relation to a parent undertaking that is not an authorised person—
    - (i) the PRA, where the PRA is the consolidating supervisor in relation to that undertaking;
    - (ii) the FCA, where the FCA is the consolidating supervisor in relation to that undertaking;



“consolidating supervisor” means the competent authority responsible for the exercise of supervision on the basis of the consolidated situation (within the meaning of Article 4.1(47) of the capital requirements regulation) of an institution which is an EEA parent;

“director” includes, in relation to an undertaking which has no board of directors, a member of the equivalent management body responsible for the management of the undertaking concerned;

“the recovery and resolution directive” means Directive 2014/59/EU of the European Parliament and of the Council of 15th May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms<sup>M12</sup>;

“senior executive”, in relation to a relevant firm or a parent undertaking, means a person who—

- (a) exercises executive functions within that firm or that undertaking; and
- (b) is responsible, and directly accountable to the directors, for the day to day management of that firm or that undertaking.”.

#### Marginal Citations

- M6** Section 71A was inserted by the [Financial Services \(Banking Reform\) Act 2013 \(c. 33\)](#), [section 33](#).
- M7** Section 63ZA was inserted, with sections 63ZB and 63ZC, by section 26 of the [Financial Services \(Banking Reform\) Act 2013](#).
- M8** Section 63A was inserted by section 11 of the [Financial Services Act 2010](#).
- M9** Section 66 was amended by sections 12 and 24 of, and paragraphs 1 and 8 of Schedule 2 to, the [Financial Services Act 2010](#), paragraph 14 of Schedule 5 to the [Financial Services Act 2012](#), sections 28 and 32 of, and paragraph 5 of Schedule 3 to, the [Financial Services \(Banking Reform\) Act 2013](#) and by [S.I. 2013/1773](#).
- M10** Part 12A was inserted by section 27 of the [Financial Services Act 2012](#).
- M11** Section 258A was inserted by section 101 of the [Financial Services Act 2012](#), and amended by [S.I. 2013/3115](#).
- M12** [OJ L173](#), 1.6.2014, p.190.

#### Assessment and resolution

**33.**—(1) In section 189 (assessment: procedure), in subsection (6) insert at the beginning “ Unless section 190A applies ”.

(2) After section 190, insert—

##### “190A Assessment and resolution

- (1) This section applies if—
  - (a) the appropriate regulator receives a section 178 notice in relation to a credit institution, investment firm or banking group company,
  - (b) as a result of a direction under section 189(1A)<sup>M13</sup> or the application of section 189(1ZB)<sup>M14</sup>, the appropriate regulator is required to act under this Part in a timely manner in relation to that notice, and
  - (c) the appropriate regulator does not complete the assessment required by section 185 before a relevant transfer instrument has been made by the Bank of England which transfers shares issued by, or voting power in, that credit institution, investment firm or banking group company.

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- (2) The transfer of shares or voting takes effect in accordance with the terms of the relevant transfer instrument, but the right of the person who acquires shares under that instrument (“the acquirer”) to exercise the voting power represented by those shares is suspended.
- (3) During the suspension, the voting power represented by the shares in question may be exercised by the Bank (and only by the Bank).
- (4) If the appropriate regulator issues a decision notice under section 189(7) objecting to the acquisition, the Bank may direct the acquirer to sell the shares within a period specified by the Bank in the direction (“the sale period”).
- (5) In determining the sale period, the Bank must take account of prevailing market conditions.
- (6) The suspension provided for in subsection (2) ends—
- (a) if the appropriate regulator gives notice under section 189(4)(a) or (b)(i) that it approves the acquisition, on the date of that notice, or
  - (b) if the Bank gives a direction under subsection (4), on the earlier of the day on which the sale period ends and the day on which the shares are sold.
- (7) In this section a “relevant transfer instrument” means an instrument made by the Bank acting in the exercise of its functions under sections 6A to 6C of the Banking Act 2009 or under the special resolution regime under Part 1 of that Act, which transfers, or has the effect of transferring, shares issued by, or voting power in, the credit institution, investment firm or banking group company.”
- (3) In section 191B (restriction notices), after subsection (3) insert—
- “(3A) Subsection (3)(a) and (b) does not apply where the voting power represented by the shares in question is suspended under section 190A(2).”
- (4) In section 191C (orders for sale of shares), after subsection (6), insert—
- “(7) The appropriate regulator must obtain the consent of the Bank of England before making an application under this section in relation to shares if the Bank has the power to direct the sale of those shares under section 190A(4).
- (8) The appropriate regulator may not make an application under this section in relation to shares if the Bank of England has given a direction for the sale of those shares under section 190A(4).”
- (5) In section 191F (offences under this Part) <sup>M15</sup>—
- (a) in subsection (2) at the end insert “ or section 190A applies ”;
  - (b) after subsection (4) insert—
- “(4A) A person who fails to comply with a direction given by the Bank of England under section 190A(4) is guilty of an offence.”;
- (c) in subsection (9), after “(4)” insert “ or (4A) ”.
- (6) In section 401—
- (a) in subsection (3A)(g) <sup>M16</sup>, after “191F(2) to” insert “ (4) and (5) to ”;
  - (b) after subsection (3A) insert—
- “(3AB) For the purposes of subsections (2)(a) and (3)(a), the Bank of England is the “appropriate regulator” in respect of an offence under section 191F(4A).”

#### **Marginal Citations**

**M13** Subsection (1A) was inserted into section 189 by [S.I. 2014/3329](#).

- M14** Subsection (1ZB) was inserted by paragraph 39 of Schedule 2 to the [Bank of England and Financial Services Act 2016 \(c.14\)](#).
- M15** [Section 191F](#) was substituted, with sections 178 to 191G, for the original sections 178 to 191 by [S.I. 2009/534](#), and amended by section 26 of the Financial Services Act 2012.
- M16** Subsection (3A) was inserted into section 401 by paragraph 38 of Schedule 9 to the Financial Services Act 2012.

### Restrictions on disclosure of confidential information

**34.** In section 348(5) (restrictions on disclosure of confidential information by FCA, PRA etc)<sup>M17</sup>, after paragraph (c) insert—

“(zd) a person appointed to act as a temporary manager by the FCA or the PRA under section 71C;”.

#### Marginal Citations

**M17** [Section 348\(5\)](#) was amended by paragraphs 1 and 26 of Schedule 2 to Financial Services Act 2010.

### Supervisory notices

**35.** In section 395 (supervisory notices)<sup>M18</sup>, in subsection (13), after paragraph (aa) insert—

“(ab) 71H(2), (3), (4), (9) or (11)(a);”.

#### Marginal Citations

**M18** [Section 395\(13\)](#) has been amended by [S.I. 2005/381](#); 2005/1433; 2009/534; 2007/1973; [sections 17, 18, 19](#) and 24 of, and paragraphs 1 and 34 of Schedule 9 to, the Financial Services Act 2012; [paragraph 14](#) of Schedule 3 to the Financial Services (Banking Reform) Act 2013; [S.I. 2013/1388](#).

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