

# FINANCIAL SERVICES ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY

#### **Part 8 – Amendments of Banking Act 2009**

#### **Special resolution regime and bank administration**

#### *Section 102: application to UK clearing houses*

569. *Section 102* inserts a new section 89B into the Banking Act 2009. *Subsection (1)* applies the special resolution regime provided for in Part 1 of that Act to UK clearing houses with a number of modifications. The principal modifications are as follows:
570. *Subsection (2)* substitutes a revised section 13 that applies solely to UK clearing houses. The revised section 13 provides that the “third stabilisation option” in the case of a UK clearing house will be a transfer of ownership by the Bank to any person. Any such transfer may be effected by one or more share transfer instruments. By contrast, the “third stabilisation option” provided for by section 13 in its application to banks is temporary public ownership.
571. *Subsection (3)* substitutes revised sections 28 and 29 for sections 28 and 29 as applicable to banks. The revised section 28 provides that where the Bank has transferred securities issued by a UK clearing house by way of a share transfer instrument pursuant to the revised subsection 13(2), it will be permitted to subsequently make onward share transfer instruments in respect of securities issued by the UK clearing house in question to a third party, provided that the transferee under the original instrument is either (1) the Bank; (2) a nominee of the Treasury or (3) a company wholly owned by the Bank or the Treasury. Before making an onward share transfer instrument the Bank is under a duty to consult the FCA, and if the clearing house concerned is a PRA authorised person, the PRA.
572. The revised section 29 provides that where the Bank has transferred ownership of a UK clearing house by way of a share transfer instrument pursuant to the revised section 13(2) to another person (“the original transferee”), it will be able to make one or more reverse share transfer instruments in respect of securities issued by the UK clearing house and held by the original transferee (irrespective of whether those securities were subject to the original transfer). A reverse share transfer in such cases is a share transfer instrument that provides for the transfer of the relevant securities held by the original transferee back to the UK clearing house in question. A reverse share transfer is permissible in such instances only where the original transferee (1) is the Bank, a company wholly owned by the Bank or the Treasury or a nominee of the Treasury or (2) has given its written consent.
573. The revised section 29 also allows for securities that have been subject to an onward transfer to be transferred back to the original transferee from the onward transferee. A reverse share transfer is permissible in such instances only where the onward transferee (1) is the Bank, a company wholly owned by the Bank or the Treasury, or a nominee of the Treasury or (2) has given its written consent.

*These notes refer to the Financial Services Act 2012  
(c.21) which received Royal Assent on 19 December 2012*

574. In either case, the relevant reverse share transfer instrument cannot be made by the Bank unless it has first consulted the FCA, and where the clearing house in question is a PRA – authorised person, the PRA.
575. *Subsection (4)* substitutes revised sections 45 and 46 for sections 45 and 46 as applicable to banks. The revised section 45 provides that where a share transfer instrument has been made in respect of securities issued by a UK clearing house in accordance with the revised section 13(2), the Bank may by one or more instruments transfer the property, rights and liabilities of the UK clearing house provided that the original instrument transferred the relevant securities to either the Bank, a company wholly owned by the Bank or the Treasury, or a nominee of the Treasury. Such a property transfer instrument may not be made by the Bank unless it has first consulted the FCA, and where the clearing house in question is a PRA – authorised person, the PRA.
576. The revised section 46 allows for any property, rights or liabilities of a UK clearing house transferred pursuant to the revised section 45 to be transferred back to the transferor by way of one or more reverse property transfer instruments. A reverse property transfer instrument can only be made where the transferee under the original instrument is (1) the Bank, a company wholly owned by the Bank or the Treasury, or a nominee of the Treasury or (2) has given its written consent. A reverse property transfer instrument may not be made by the Bank unless it has first consulted the FCA, and where the clearing house in question is a PRA – authorised person, the PRA.
577. *Subsection (5)* substitutes a revised section 81 that requires the Bank to report to the Chancellor of the Exchequer where it has made one or more share transfer instruments in respect of UK clearing houses under the revised section 13(2). The report must comply with any requirements as to content specified by the Treasury and must be made as soon as is reasonably practicable after the first anniversary of the first transfer instrument.
578. *Subsection (6)* provides for a table that makes a number of minor and consequential modifications to the special resolution regime provisions of Part 1 of the Banking Act 2009 as that regime is to apply to UK clearing houses.
579. *Subsection (6)* also provides for: a new section 89C that allows for a property transfer instrument made in respect of a UK clearing house to include provision modifying or amending the clearing house’s rules in order to reflect the changes brought about by the property transfer; a new section 89D that allows for a property transfer instrument made in respect of a UK clearing house to include provisions regarding the consequences of the transfer for the clearing house’s membership; a new section 89E that allows for a company to which the business of a UK clearing house has been transferred to be treated for a specified period or until a specified event occurs as if it is a recognised clearing house itself for the purposes of FSMA and a new section 89F that enables the Treasury to make orders for the purpose of the protection of transferees and others in connection with any transfer under the special resolution regime as it applies to UK clearing houses (by virtue of *Subsection (7)* any such orders are to be subject to the draft affirmative resolution procedure).
580. *Subsection (6)* also inserts a new section 89G that defines what is meant by the terms “UK clearing house”; “central counterparty clearing services” and “PRA-authorised person” for the purposes of Part of the Banking Act 2009.