

FINANCIAL SERVICES ACT 2012

EXPLANATORY NOTES

COMMENTARY

Part 8 – Amendments of Banking Act 2009

Further amendments

Section 106 and Schedule 17: Amendments relating to new regulators

594. *Section 106* introduces *Schedule 17* which makes a number of consequential amendments to the Banking Act 2009 as a result of the conferral of the FSA’s functions on the FCA and the PRA.
595. *Schedule 17* to the Act is divided into four Parts. *Part 1* deals with the amendments to Part 1 of the Banking Act (special resolution regime), *Part 2* deals with the amendments to Part 2 of the Act (the bank insolvency procedure), *Part 3* deals with the amendments to Part 3 of the Act (the bank administration procedure) and *Part 4* deals with the amendments to Parts 4 to 6 of the Act (financial services compensation scheme, inter-bank payment systems, and banknotes: Scotland and Northern Ireland). All section references below are to the Banking Act 2009 unless otherwise stated.
596. *Paragraph 2* amends section 1 and makes clear that the FCA and the PRA have a role in the operation of the special resolution regime and adds an additional entry into the table beneath that section (which describes the provisions in Part 1 of the Banking Act) to include the new section (inserted by *paragraph 28*) which modifies the application of Part 1 in relation to any institutions which fall within the definition of “bank” (in section 2 of the Banking Act) which are regulated only by the FCA.
597. *Paragraph 3* replaces the reference to “Part 4” of FSMA in section 2 (the definition of “bank”) to “Part 4A”.
598. *Paragraph 4* omits the definition of the FSA in section 3 (interpretation) and inserts a definition of the FCA and the PRA.
599. *Paragraph 5* amends section 4 (special resolution objectives) such that the FCA and PRA are specified as “relevant authorities” for the purposes of subsection (2) of that section and are required, therefore, to have regard to the special resolution objectives specified in that section when considering the use of the stabilisation powers (the property and share transfer powers), the bank insolvency procedure and the bank administration procedure.
600. *Paragraph 6* amends section 5(5) (code of practice about the use of the stabilisation powers, the bank insolvency procedure and the bank administration procedure) such that the FCA and the PRA are specified as “relevant authorities” for the purposes of subsection (4) which requires an authority specified as a “relevant authority” to have regard to the code, for example, in deciding between different resolution measures. *Paragraph 7* amends section 6 (code of practice: procedure) such that the Treasury is

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

required to consult the FCA and the PRA before issuing any new versions of the code of practices issued under section 5.

601. *Paragraph 8* amends section 7 (general conditions) which sets out the general conditions which must be satisfied before a stabilisation power may be exercised. The general conditions are referred to in sections 8 (private sector purchaser and bridge bank) and 9 (specified conditions; temporary public ownership). These conditions are that: (1) the bank concerned is failing, or is likely to fail to satisfy, the threshold conditions for authorisation and (2) that (ignoring the stabilisation powers) it is not reasonably likely that action will be taken by or in relation to the bank to enable the bank to satisfy the threshold conditions. In making this determination the regulator must disregard any financial assistance provided by the Treasury or the Bank of England (ignoring any ordinary market assistance offered on the Bank's usual terms) (subsection (4)) and must consult the Bank of England and the Treasury before determining whether condition 2 has been satisfied. The effect of the amendments to this section are that the PRA will be responsible for determining whether the general conditions are satisfied in relation to a bank which is a PRA-authorized person. In particular, the reference to "the threshold conditions" in condition 1 is defined by the *new subsection (4A)* (inserted by *sub-paragraph (5)*) will be defined as the threshold conditions for which the PRA is treated as responsible under *new section 55B(2)* of the FSMA (inserted by *section 9(2)*). Before determining whether or not condition 2 is satisfied the PRA will be required to consult the FCA (*sub-paragraph (6)*).
602. *Paragraphs 9 and 10* amend sections 8 (specific conditions: private sector purchaser and bridge bank) and 9 (specific conditions: temporary public ownership) such that the Bank and the Treasury (as the case may be) must consult the FCA and the PRA before determining whether the relevant specific conditions are satisfied before a stabilisation power (such as an exercise of a transfer power to transfer part of the business of a failing bank to a commercial purchaser) may be deployed in relation to a bank in relation to which the PRA (or the FCA as the case may be) has determined that the general conditions are satisfied under section 7.
603. *Paragraph 11* amends section 10(3) (membership of the Banking Liaison Panel established to advise the Treasury about, among other things, the code of practice under section 5) such that the Treasury must ensure that the Panel also includes a member appointed by the FCA and the PRA.
604. *Paragraphs 12 to 25* omit the references to the FSA in various sections of Part 1 and replace them with references to the FCA and the PRA with the general effect of requiring the Bank (or the Treasury as the case may be) to consult those regulators before making any form of transfer instrument (or order as the case may be).
605. *Paragraph 26* replaces the reference to Part 4 of the FSMA in section 57(4)(a) (the valuation principles which the Treasury can require or permit an independent valuer appointed to assess the compensation payable in relation to an exercise of the transfer powers to take into account in making his or her assessment) with a reference to Part 4A of that Act.
606. *Paragraph 27* amends section 82 (power for the Treasury to take a parent undertaking of a bank into temporary public ownership in certain conditions) to replace the reference to the FSA in section 82(2) with a reference to the PRA (which is consequential on the changes made to section 7 (see the note on *paragraph 8* above)) and to replace the reference to the FSA in subsection (5) with a reference to the FCA and the PRA such that the Treasury must consult with the FCA, the PRA and the Bank before determining whether it is necessary to take action in respect of the holding company.
607. *Paragraph 28* inserts *new section 83A* into the Banking Act which applies Part 1 in relation to any entities which fall within the definition of "bank" in section 2 and are not PRA-authorized persons within the meaning of the FSMA (i.e. are regulated only by the FCA because they do not carry on any regulated activities which have been specified

as PRA-regulated activities by way of an order under *new section 22A* of the FSMA inserted by *section 9*). This is a “future-proofing” arrangement as it is envisaged at the time of these notes going to print that the regulated activity of accepting deposits will be specified as a “PRA-regulated activity” and therefore all firms falling within the definition of “bank” in section 2 will be PRA-authorized persons.

608. *Paragraphs 29 to 45* make amendments to Part 2 of the Banking Act (the bank insolvency procedure), which makes provision for a special insolvency procedure which can be used as an alternative to an exercise of the stabilisation powers or a “normal” insolvency procedure. The purpose of the bank insolvency procedure is to facilitate the rapid payout by the Financial Services Compensation Scheme¹ (“FSCS”) of payments to eligible depositors or the transfer of such accounts to a viable bank. To achieve this, a person appointed as a bank liquidator under Part 2 has two objectives: Objective 1 is to work with the FSCS so as to ensure that as soon as is reasonably practicable each eligible depositor has the relevant account transferred to another financial institution or receives payment from, or on behalf of, the FSCS; Objective 2 is to wind up the affairs of the bank so as to achieve the best result for the bank’s creditors as a whole (section 99). Objective 1 takes precedence over Objective 2 until such time as the liquidation committee (which must consist initially of members appointed by the Bank, the FSA and the FSCS) has passed a resolution resolving that Objective 1 has been achieved (section 100(5)). This is an important measure as it means that the insolvency practitioner is obliged to prioritise the interests of eligible depositors above those of the general body of creditors thereby helping to ensure that the best outcome for depositors is achieved as quickly as possible following appointment.
609. The most notable amendments made by these paragraphs concern the changes to section 95 (application to court for an order placing a bank into the bank insolvency procedure), section 96 (grounds for applying for an order) and section 100 (liquidation committee). In summary, in relation to a bank which is a PRA-authorized person and in relation to which the conditions specified in section 7 have been determined to be satisfied, the PRA is to inherit the FSA’s power to apply to the court for a bank insolvency order. The Bank and the PRA may only apply for such an order where certain conditions are satisfied (section 96(2) and (3)); in the case of an application by the PRA, these conditions are that (i) the Bank has given its consent and the PRA is satisfied that the conditions referred to in section 7 have been met, the bank has eligible depositors and that the winding up of the bank would be in the public interest or would be fair (section 96(3)). *Paragraph 36* amends section 100 such that the liquidation committee must initially include an individual nominated by each of the FCA and the PRA.
610. *Paragraph 45* applies with modifications the provisions of Part 2 in relation to banks which are regulated only by the FCA.
611. *Paragraphs 46 to 51* amend Part 3 of the Banking Act (bank administration procedure (see the notes in relation to *section 87* (state aid))). In particular, paragraphs *47 and 48* amend sections 147 (administrator’s proposals) and 153 (successful rescue) such that copies of certain notifications given by bank administrators must be sent to the PRA. *Paragraph 50* inserts *new section 157A* which applies Part 3 (with certain modifications) in relation to banks which are regulated only by the FCA.
612. *Paragraphs 52 to 62* amend various provisions in Parts 4 to 6 of the Banking Act. In particular, *paragraph 55* amends section 232 (definitions for the purposes of investment bank insolvency regulations made under section 233) so as to enable the Treasury, by order, to amend the definition of “investment services” from time to time (and *paragraph 57* makes consequential changes in relation to section 235 (regulations: procedure)).

¹ The scheme established in accordance with Part 15 of the FSMA to compensate customers of authorised financial services firms when those firms are in default for the purposes of the scheme (i.e. when a firm is unable, or likely to become unable, to satisfy the claims against it).

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

613. *Paragraph 58* replaces the reference to the FSA in section 246 (information disclosure by the Bank) with a reference to the PRA and the FCA such that the Bank may disclose information to either or both of the new regulators which the Bank considers is relevant to the stability of individual financial institutions or one or more aspects of the financial systems of the UK.
614. *Paragraph 60* amends section 250 (duty to collect information relevant to the stability of individual financial institutions, or one or more aspects of the UK financial system) such that the PRA will be subject to this duty.