EXPLANATORY MEMORANDUM TO

THE BANKING ACT 2009 (BANK ADMINISTRATION) (MODIFICATION FOR APPLICATION TO BANKS IN TEMPORARY PUBLIC OWNERSHIP) REGULATIONS 2009

2009 No. 312

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The instrument makes modifications to Part 3 of the Banking Act 2009 ("the Act") as applied by section 152 of the Act (property transfer from temporary public ownership).

2.2 Part 3 of the Act creates a new administration procedure for banks in certain cases.

2.3 The provisions of Part 3 as drafted on the face of the Act apply where the Bank of England sells part of a business of a bank to a commercial purchaser in accordance with section 11 of the Act (private sector purchaser) or transfers part of a bank to a bridge bank in accordance with section 12 (bridge bank) (see section 136(2) of the Act (overview)).

2.4 In accordance with section 152(3), the Regulations modify the provisions of Part 3 to apply in cases where the Treasury:

- make a share transfer order in respect of the securities issued by a bank (or a bank's holding company) to transfer those securities into temporary public ownership (in accordance with section 13(2) of the Act (temporary public ownership)), and
- later make a property transfer order in accordance with section 45(2) (temporary public ownership: property transfer) to transfer property, rights and liabilities ("the business") of a bank in temporary public ownership to another person (such as a private sector purchaser or a company wholly owned by the Bank of England).

2.5 Regulations 3 and 4 make general modifications to Part 3 of the Act. Tables 1 and 2 of the Schedule make modifications to the specific provisions listed in those tables.

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

3.1 The instrument is the first use of the powers of Her Majesty's Treasury to make Regulations to modify the application of Part 3 in accordance with section 152(3).

3.2 Accordingly, these Regulations have been made by the Treasury and laid before Parliament under sections 259(4) to (6) of the Act, for approval by resolution of each House of Parliament during the period of 28 days (ignoring periods of dissolution, prorogation or adjournment of either House for more than 4 days) beginning with the day on which the Regulations are made.

3.3 The Treasury are satisfied that it is necessary to exercise this power without laying a draft of the Regulations for approval.

3.4 The provisions in Part 1 of the Act (the special resolution regime) confer powers on the Authorities (the Bank of England and the Treasury) to resolve banks ("bank" is defined in section 2 of the Act). These powers come into force on 21st February 2009 and are intended to replace the powers under sections 3 and 6 of the Banking (Special Provisions) Act 2008 (c. 2), which are subject to a sunset clause and largely cease to be exercisable on 20th February 2009. Given the current financial instability, it is essential that the Authorities have adequate powers to make provision in relation to failing banks.

3.5 As such, in the event that the Treasury exercises its property transfer powers under Part 1 of the Act (for example, by virtue of section 45(2)) in respect of a bank that has been transferred into temporary ownership,[1] it is appropriate that the Treasury should be able to apply to the court for a bank administration order where, in the opinion of the Treasury, as a result of the property transfer the residual bank (i.e. the bank from whom the business has been transferred) is unable to pay its debts, or is likely to become unable to pay its debts. Therefore, it is necessary to make these Regulations modifying Part 3 of the Act to apply to such situation.

3.6 The Act received Royal Assent on 12th February 2009. It is necessary for these Regulations to be in force as soon as possible after 21st February 2009 to ensure that the Authorities have, if required, all the necessary and appropriate powers and procedures available to them under Parts 1 and Part 3 of the Act.

4. Legislative Context

4.1 Part 1 of the Act confers powers on the Bank of England and the Treasury to resolve a bank (defined in section 2 of the Act) that meets with the conditions in section 7 of the Act (general conditions) and where the specific conditions in sections 8 (specific conditions: private sector purchaser and bridge bank) and section 9 (specific conditions: temporary public ownership), as appropriate, are met.

[1] By virtue of an exercise of the share transfer power in section 13(2) of the Act.

4.2 The Bank of England may exercise the private sector purchaser and bridge bank (which is a company wholly owned by the Bank of England) stabilisation options (respectively, section 11 (private sector purchaser) and section 12 of the Act (bridge bank)). In particular, the Bank may transfer the business of a bank to a private sector purchaser or bridge bank by making a property transfer instrument (section 33).

4.3 Where the business of a bank is transferred to a bridge bank or a private sector purchaser and, as a result of the transfer, the Bank of England is satisfied that the residual bank is unable to pay its debts, or is likely to become unable to pay its debts, the Bank of England may apply to the court for a bank administration order (section 143 (grounds for applying)).

4.4 A bank administrator appointed in accordance with the bank administration order has two objectives (Objective 1: support for the purchaser of the bridge bank and Objective 2: "normal administration") (see sections 138 to 140 of the Act).

4.5 Part 3 of the Act sets out the bank administration procedure applying to the situation described in paragraph 4.3 above. However, section 152(3) confers a power on the Treasury to make regulations applying Part 3 where the Treasury:

- make a share transfer order in respect of the securities issued by a bank (or a bank's holding company) to transfer those securities into temporary public ownership (in accordance with section 13(2) of the Act (temporary public ownership); and
- later make a property transfer order in accordance with section 45(2) (temporary public ownership: property transfer) to transfer property, rights and liabilities of a bank in temporary public ownership to another person.

4.6 These Regulations modify the provisions of Part 3 to apply to the situation described in paragraph 4.5 above.

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, Ian Pearson, has made the following statement regarding Human Rights:

"In my view the provisions of the Banking Act 2009 (Bank Administration) (Modification for Application to Banks in Temporary Public Ownership) Regulations 2009 are compatible with the Convention rights".

7. Policy background

7.1 Part 3 of the Act provides that where the Bank of England makes, or intends to make, a sale or transfer of the business of a bank to a private sector purchaser or a bridge bank under the powers in Part 1 of the Act, the Bank of England may apply to the court for a bank administration order to place the bank into bank administration. The bank administration process is based, with modifications where required, on the procedure of administration set out in Schedule B1 to the Insolvency Act 1986 (c. 45).

7.2 These Regulations modify the provisions of Part 3 of the Act to apply where the Treasury make a property transfer order to transfer part of the business of a bank in temporary public ownership to a company wholly owned by the Treasury or a nominee of the Treasury, a company wholly owned by the Bank of England, or a private sector purchaser ("a transferee").

7.3 In such a scenario, the Treasury may apply to the court for a bank administration order to put the residual of the bank in temporary public ownership into bank administration. A bank administrator would be appointed in accordance with the order to fulfil the objectives set out in section 137 of the Act as modified in these Regulations. Objective 1 provides that the bank administrator must ensure the supply from the residual bank to a transferee of such services and facilities as are required to enable it, in the opinion of the Treasury, to operate effectively.

7.4 These Regulations support the Government's policy of having a flexible special resolution regime in place to be able to deal effectively with the varying circumstances in which intervention might be required to deal with a failing bank.

8. Consultation outcome

8.1 The measures in Part 3 of the Act were subject to a number of consultations and Part 3 has been developed in consultation with stakeholders, the Bank of England and the Financial Services Authority. Given these Regulations merely modify the application of Part 3 to cases where the Treasury exercises property transfer powers, and due to the need to implement this instrument promptly to coincide with the coming into force of provisions of Parts 1 and 3 of the Act on 21st February, immediately after the expiry of the powers in sections 3 and 6 of the Banking (Special Provisions) Act 2008, no public consultation was carried out.

9. Guidance

9.1 These Regulations apply, with modifications, the provisions of Part 3 of the Act to the situation described in paragraph 2.4 above. The Treasury does not propose to issue specific guidance in relation to these Regulations. However, under section 5 of the Act (code of practice), the Treasury is obliged to issue a code of practice about the use of the stabilisation powers, the bank insolvency procedure and the bank administration procedure.

10. Impact

10.1 These Regulations apply, with modifications, Part 3 of the Act to the situation described in paragraph 2.4. The definition of a bank for these purposes is given in section 2 of the Act and the bank administration procedure cannot be used in relation to other businesses, charities or voluntary bodies.

10.2 Part 3 of the Act and has been developed in consultation with stakeholders, the Bank of England and the Financial Services Authority.

10.3 Separate Regulations will be introduced dealing with safeguards in relation to partial transfers, including compensation arrangements, and an impact assessment is to be drafted for those Regulations.

10.4 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The bank administration procedure set out in Part 3 of the Act may only be used in relation to a transfer of a bank's business to a company wholly owned by the Bank of England or the Treasury or a nominee of the Treasury or a or private sector purchaser. For these purposes, bank is defined in section 2 of the Act. As such, it is not considered these Regulations will have an impact on small businesses.

12. Monitoring & review

12.1 The Act requires the Treasury to make arrangements for a panel to advise the Treasury about the effect of the special resolution regime on banks, persons with which banks do business and the financial markets (section 10 of the Act (Banking Liaison Panel)). In particular, the Panel may advise the Treasury about the exercise of powers to make certain statutory instruments. This Panel will keep these Regulations under review and, were appropriate, provide advice to the Treasury about these Regulations.

13. Contact

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