EXPLANATORY MEMORANDUM TO

THE BANKING ACT 2009 (BANK ADMINISTRATION) (MODIFICATION FOR APPLICATION TO MULTIPLE TRANSFERS) REGULATIONS 2009

2009 No. 313

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 149 of the Act (general application of this Part). Part 3 of the Act creates a new administration procedure for banks in certain cases.

2.2 Section 149 specifies that the Treasury may make regulations modifying Part 3 to apply where more than one property transfer instrument is made in respect of a bank. For that purpose "property transfer instrument" includes:

- supplemental instruments under section 42,
- onward property transfer instruments under section 43, and
- property transfer orders under section 45 of the Act.

2.3 Regulation 2 specifies that the modifications to Part 3 of the Act listed in the Schedule to the Regulations apply where the Bank of England makes more than one property transfer instrument to transfer part of a business of a bank to a commercial purchaser ("private sector purchaser"), or to bank to a bridge bank (see section 136(2) of the Act (overview)).

2.3 Regulation 3 specifies that the modifications to Part 3 of the Act listed in the Schedule to the Regulations apply where Part 3 is applied with modifications by regulations made under section 152 of the Act (property transfer from temporary public ownership), and the Treasury make more than one property transfer instrument.[1]

2.4 Section 152 applies bank administration where the Treasury:

- make a share transfer order, in respect of securities issued by a bank (or a bank's holding company), in accordance with section 13(2) of the Act (temporary public ownership), and
- later make a property transfer order from the bank in temporary public ownership under section 45(2) to transfer business of the bank (which may include property, rights and liabilities) to a private sector

[1] In these Regulations, in accordance with section 149(2), a reference to a "property transfer instrument" made by the Treasury includes a property transfer order under section 45(2) and a supplemental property transfer order under section 42 (supplemental instrument) as applied by section 45(7).

purchaser, a company wholly owned by the Treasury or a nominee of the Treasury, or a company wholly owned by the Bank of England.

Regulations have been made in exercise of the power conferred by section 152(3) (the Banking Act 2009 (Bank Administration) (Modification for Application to Banks in Temporary Public Ownership) Regulations 2009 (S.1. 2009/312).

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 of the Act in accordance with section 149(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. 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 Authorities exercise their property transfer powers under Part 1 of the Act (for example, under section 11(2)(b) or section 45(2) of the Act), it is appropriate that Part 3 is modified in order to make provision for cases where more than one property transfer instrument (within the meaning of section 149(2) of the Act) is made. Therefore, it is necessary to make these Regulations modifying the application of Part 3 of the Act to the such situations.

3.6 The Act received Royal Assent on 12th February 2009. It is necessary for this statutory instrument 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.

4.2 Part 3 of the Act sets out a new administration procedure for banks to be used in relation to a residual bank (the bank from whom business has been transferred) where:

- the Bank of England transfers, or intends to transfer, part of a bank's business to a private sector purchaser or bridge bank, or
- the Treasury makes, or intends to make a transfer of the bank's business, in the circumstances described in paragraph 4.5 below.

4.3 Where part of the business of a bank is transferred to a bridge bank or a private sector purchaser (or such a transfer is intended to be made) 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 be come unable to pay its debts, the Bank of England may apply, under the provisions in Part 3 of the Act, to the court for a bank administration order (section 143 (grounds for applying)).

4.4 A bank administrator appointed in accordance with a 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). Objective 1 places a duty on the bank administrator to ensure the supply of necessary services and facilities to the bridge bank or to the commercial purchaser, in order to allow the business transferred from it to continue to operate effectively.

4.5 Section 152(3) of the Act 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.[2]

4.7 In order to ensure that the Authorities have available to them the appropriate powers and procedures to deal with the varying circumstances in which a bank may fail and the way in which a bank resolution is conducted, it is also appropriate to modify the application of the provisions of Part 3 to apply to cases where more than one property transfer instrument (within the meaning of section 149(2) of the Act) is made by the Authorities. This will enable the bank administration procedure to work where parts of the business of a bank are transferred, for example, to more than one private sector purchaser.

[2] Regulations have been made in exercise of this power, modifying the provisions of Part 3 to apply to this situation (see paragraph 2.4 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 Multiple Transfers) 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 partial sale or transfer of the business of a bank to a private sector purchaser or bridge bank under the powers in Part 1 of the Act, the residual bank may be placed into bank administration. That 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 Separate regulations (as noted in paragraph 2.4) modify the procedure of bank administration to apply where the Treasury makes a property transfer order under section 45(2) of the Act in respect of a bank in temporary public ownership.

7.3 These Regulations modify the provisions of Part 3 of the Act in circumstances where the Bank of England or the Treasury make more than one property transfer instrument (within the meaning of section 149(2) of the Act). This ensure that the provisions made for bank administration accommodate effectively situations where multiple property transfers are made in respect of the business of a bank, for example, to transfer that business to different private sector purchasers.

7.4 The general process of bank administration set out in Part 3 of the Act will work in the same way in relation to multiple transfers as it does where a transfer is effected by a single property transfer instrument. However, these Regulations make necessary modifications, primarily to make clear the bank administrator's Objectives and the duration of the Objectives, so that it is clear that the bank administrator is under a duty to ensure the provision of services and facilities from the residual bank, where required, to each of the transferees.

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 where more than one property transfer instrument is made. The Treasury does not propose to issue specific guidance in relation to these Regulations. However, under section 5 of the Act, 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 where more than one property transfer instrument is made in respect of a bank. The definition of a bank for these purposes is given in section 2 of the Act and the bank administration 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

Lucy French, Financial Stability and Banking Reform Team, HM Treasury, Tel: 020 7270 4479 or email: lucy.french@hm-treasury.x.gsi.gov.uk; HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ. Also contactable through the Treasury Switchboard at HM Treasury Tel: 020 7270 4558 or email: public.enquiries@hm-treasury.gsi.gov.uk.