These notes refer to the Financial Services Bill
as brought from the House of Commons on 26th January 2010 [HL Bill 26]

FINANCIAL SERVICES BILL

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Financial Services Bill as brought from the House of Commons on 26th January 2010. They have been prepared by the Treasury in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

BACKGROUND TO BILL

3. In 1997, the Government proposed a new system of financial regulation in the UK. A structure for overseeing the UK financial system was created, with distinct roles for HM Treasury, the Bank of England and the Financial Services Authority ("the FSA") (together, "the relevant authorities") and distinct responsibilities for overall financial stability issues, which are set out in a memorandum of understanding between the relevant authorities.

4. The Bank of England Act 1998 established the arrangements for the Bank's current monetary policy responsibilities. Under the 1998 Act, the banking supervision function that had previously been undertaken by the Bank was transferred to the FSA.

5. The Financial Services and Markets Act 2000 ("FSMA") set out the framework within which the FSA operates, as the single regulator for the financial services industry. It also established the framework for the Financial Services Compensation Scheme ("the FSCS") to provide compensation for consumers in the event that a financial services firm is unable to meet its obligations to them.

6. The Banking Act 2009 built on this framework to enhance the ability of the relevant authorities to deal with crises in the banking system, to protect depositors and to maintain financial stability. The Act established a new permanent special resolution regime, providing the relevant authorities with a range of tools to deal with banks and building societies that are failing.

7. In July 2009 the Treasury published *Reforming financial markets*[1], which proposed reforms to financial regulation to enable more effective prudential regulation and supervision of firms, greater emphasis on monitoring and managing system-wide risks, and improved protection and support for consumers. In this document and following a review of consultation responses, the Government announced its intention to bring forward legislation on the following.

SUMMARY AND OVERVIEW OF THE STRUCTURE

Council for Financial Stability

8. The Bill establishes a Council for Financial Stability, which replaces the current Tripartite Standing Committee. The Council will comprise the Chancellor of the Exchequer, the Governor of the Bank of England and the chairman of the FSA. It will be responsible for considering emerging risks to the financial stability of the United Kingdom and co-ordinating the appropriate response.

Objectives of FSA etc

9. FSMA currently sets out four objectives for the FSA. These are: maintaining confidence in the financial system; promoting public understanding of the financial system; securing the appropriate degree of protection for consumers; and reducing financial crime. As maintaining financial stability is a fundamental component of maintaining confidence in the financial system, the Bill provides the FSA with an additional objective, namely an explicit financial stability objective. In considering financial stability, the FSA must have regard to the costs to the economy both of instability and of regulatory actions (taken to reduce instability). The FSA, like the Bank of England, is required to consult the Treasury when determining its strategy for financial stability.

10. The Bill removes the FSA's regulatory objective of promoting public understanding of the financial system and requires the FSA to establish a new consumer financial education body whose purpose is to raise the understanding and knowledge of members of the public of financial matters (including the financial system) and improve their ability to manage their financial affairs. The new body will therefore take over responsibility for the activity previously undertaken by the FSA as part of the National Strategy for Financial Capability under the 'public understanding' objective. In addition the body will implement the recommendations of the Thoresen Review[2] for an impartial generic financial advice or 'money guidance' service.

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[1] *Reforming financial markets,* HM Treasury, 8th July 2009. http://www.hm-treasury.gov.uk/d/reforming_financial_markets080709.pdf

[2] *Thoresen Review of Generic Financial Advice: Final Report*, HM Treasury, 3rd March 2009. http://www.hm-treasury.gov.uk/d/thoresenreview_final.pdf

11. The Bill provides that the FSA's powers, including its general rule-making power, can now be exercised for the purpose of meeting any of its regulatory objectives. Previously, these powers were only exercisable in pursuit of its consumer protection objective.

12. The Bill also provides the FSA with a new duty to promote international regulation and supervision, as part of its obligation to meet its financial stability objective.

Remuneration of executives of authorised persons

13. The Bill gives the Treasury power to make provision for executive remuneration reports, imposes a new duty on the FSA to make general rules requiring authorised persons (or a specified class of authorised persons) to have and implement a remuneration policy and to secure that the remuneration policy satisfies the requirements set out in the Bill. It also provides the FSA with other powers in relation to remuneration.

Recovery and resolution plans

14. The Bill imposes on the FSA a duty to make rules requiring the production of recovery and resolution plans by authorised persons (or certain classes of authorised person), and makes other provision about such plans. A recovery plan aims to reduce the likelihood of failure of a firm by setting out what the authorised person would do in, or prior to it becoming subject to, stressed circumstances (which the FSA may specify in its rules) that would affect the ability of the authorised person to carry on all or a significant part of its business. A resolution plan is a plan covering both action to be taken in the event of failure of all or any part of the business occurring, and action to be taken by a firm where failure is likely. This would include action to be taken by the relevant authorities to resolve the authorised person.

Short selling

15. The Bill provides the FSA with a new power to prohibit, or require disclosure of, short selling.

FSA's disciplinary powers

16. The Bill provides the FSA with greater enforcement powers. The FSA has the power to fine authorised persons and approved individuals for misconduct. The Bill extends these powers to enable the FSA to suspend or limit an authorised person's permission or an approved person's approval. It also enables the FSA to impose a fine on an individual performing a controlled function without approval, as well as prohibit the individual from working in the industry.

Collective proceedings

17. The Bill enables collective proceedings to be brought in respect of financial services claims. Collective proceedings are court proceedings brought by a representative person, who does not need to have any direct interest in the proceedings, on behalf of a group of persons who

have the same, similar or related claims and who would otherwise be entitled to pursue their own individual proceedings.

Other consumer protection measures

18. The Bill enables the FSA to make rules requiring firms to establish consumer redress schemes. Rules can be made if it appears to the FSA that (a) there may have been a widespread or regular failure by a relevant firm to comply with the requirements for carrying on an activity; (b) as a result, consumers have suffered or may suffer loss that would entitle them to redress; and (c) it is desirable to establish a scheme to secure redress for consumers.

19. The Bill makes it an offence for a credit card issuer to provide credit card cheques to a customer, other than in response to a request from that customer, and to restrict the number of credit card cheques that may be provided in response to a request.

Financial Services Compensation Scheme (FSCS)

20. The FSCS is the scheme established by the FSA under Part 15 of FSMA to compensate customers of authorised financial services firms when those firms are in default, that is, unable or likely to be unable to pay claims.

21. Under section 214B of FSMA, which was inserted by the Banking Act 2009, the Treasury may require the FSCS to contribute to the costs incurred in applying the stabilisation powers of the special resolution regime (established in Part 1 of the Banking Act) to a bank that is failing. The Bill provides that the "expenses" to which the FSCS may be required to contribute includes interest, and that the limit up to which the FSCS may be required to contribute (which reflects the amount the FSCS would have had to pay out had no stabilisation power been used and the bank been unable to satisfy claims against it) takes into account the costs that the FSCS would have incurred in funding compensation payments if the stabilisation power had not been exercised.

22. The Bill enables the Treasury to require the FSCS manager to make payments on behalf of another compensation scheme (or a government or other authority) that pays compensation in respect of institutions that provide financial services, including institutions that are not authorised financial services firms under FSMA.

Powers to require information

23. The Bill confers on the FSA a power to require a person to provide specified information, where the FSA considers that the information or documents in question are or might be relevant to the stability of one or more aspects of the financial system.

24. The Bill provides the Treasury with the power to require information or documents from participants or proposed participants in the Asset Protection Scheme or related schemes.

Banking Act 2009

25. The Bill makes some minor and technical amendments to the Banking Act 2009, including amendments that (a) make express that the property transfer power can be used to impose a liability on a residual company in place of liabilities transferred from the residual company; (b) allow compensation orders (see section 49 for the various orders that may be made) to include an independent valuer order in the interests of administrative efficiency.

Director of Savings

26. This clause provides for the Director of Savings to undertake functions on behalf of the Accountant General for England and Wales where appointed to do so under court funds rules.

TERRITORIAL EXTENT

27. The Bill extends to the whole of the UK.

28. At Introduction this Bill contains provisions that trigger the Sewel Convention. The provisions relate to the establishment of a consumer education body. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. If there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

29. The Northern Ireland Assembly's legislative consent will be sought in relation to collective proceedings; restrictions on the provision of credit card cheques; and the new consumer education body.

ANNEXES

30. Annex A lists the standard abbreviations of enactments and technical terms used in these notes.

COMMENTARY ON CLAUSES AND SCHEDULES

Council for Financial Stability

Clause 1: Council for Financial Stability

31. *Subsections (1)* and *(2)* set out the membership of the Council, and that the Chancellor of the Exchequer will chair the Council.

32. *Subsections (3)* and *(4)* set out the Council's role, to review matters affecting UK financial stability both domestically and internationally, and to co-ordinate any action by the relevant authorities in order to protect or enhance that stability. *Subsection (5)* provides that a

statement issued by the Treasury may contain further provision for the Council. This statement is intended to be akin to "terms of reference" for the Council. It can provide greater detail on the Council's objectives and working practices. The intention is that this document can evolve over time as necessary.

33. *Subsection (7)* requires the Treasury to keep the statement under review. The Treasury must consult the FSA and Bank of England and lay the initial (and any revised) statement before Parliament.

Clause 2: Proceedings of the Council

34. *Subsection (1)* requires the Council to meet quarterly. It may meet more frequently.

35. *Subsection (2)* requires that when either the FSA or the Bank of England publish a report setting out its view of financial stability, for example the Bank's Financial Stability Report or the FSA's Financial Risk Outlook, then the Council must consider the report at its next quarterly meeting. *Subsection (3)* requires that the Council consider a draft of the Treasury's annual report on the Council at a quarterly meeting.

36. *Subsection (4)* requires minutes of quarterly meetings to be published. The confidential or market-sensitive nature of many discussions of the Council will mean that sometimes they will not be appropriate for publication. Accordingly, *subsection (5)* provides exemptions from publication.

37. *Subsections (7)* and *(8)* set out that a member of the Council can nominate a deputy if they are unable to attend the Council, and that the Chancellor of the Exchequer's deputy would act as chair in the Chancellor's absence.

Clause 3: Annual report

38. The Treasury must prepare an annual report on the work of the Council and important financial stability issues arising during the year and lay the report before Parliament.

39. As with minutes of proceedings of the Council in the previous clause, matters that are confidential, market-sensitive or inappropriate for publication are not to be published.

Objectives of FSA etc

Clause 5: Financial stability objective

40. This clause amends section 2 of FSMA to give the FSA an additional regulatory objective (or 'general duty') concerning financial stability. It inserts a new section 3A which provides that the objective is to contribute to the protection and enhancement of the stability of the UK financial system. This is similar to the financial stability objective of the Bank of England under section 2A of the Bank of England Act 1998 (inserted by section 238 of the Banking Act 2009).

41. New section 3A of FSMA requires the FSA, in considering this objective, to have regard to the economic and fiscal consequences of instability and also to any effects on economic growth of regulatory actions taken for stability reasons.

42. In addition the FSA, in considering this objective, must have regard to the possible impact on UK financial stability of events and circumstances outside the UK.

43. The section also requires the FSA to develop and keep under review a strategy concerning this objective, in consultation with the Treasury.

44. *Schedule 2* makes consequential amendments to FSMA. Paragraph 2 of that Schedule, substitutes the term "the UK financial system" for "the financial system" in section 3(1) of FSMA (which deals with the "market confidence" objective) and provides a definition of that term in section 3(2) of FSMA. Similar substitutions are made by paragraphs 3 and 6(2) to sections 4 and 14 of FSMA respectively. Paragraph 30 amends section 417 of FSMA (definitions) to clarify that the definition of "UK financial system" in section 3(2) of FSMA applies for the purposes of that Act.

Clause 6: Enhancing public understanding of financial matters etc

45. *Subsections* (2) and (3) of this clause remove the FSA's regulatory objective of promoting public understanding of the financial system.

46. *Subsection (4)* inserts a new section 6A in FSMA which imposes an obligation on the FSA to establish a body, referred to in this Bill as the consumer financial education body ("the CFEB"). The CFEB's functions are defined in set out in new section 6A and the main purposes are to help members of the public to:

- better understand financial matters; and
- improve their ability to manage their own financial affairs.

47. Section 6A(2) provides illustrations of the types of activity the CFEB might carry out in delivering a money guidance service and programmes to improve financial capability in the UK. 6A(2e) allows CFEB to deliver information and advice to members of the public. "Advice" has an ordinary meaning and does not include advice which is regulated under FSMA.

48. *Subsection (5)* introduces Schedule 1, which inserts new Schedule 1A to FSMA. Schedule 1A makes further provision for the establishment and operation of the CFEB.

49. *Paragraph 1* requires the FSA to ensure that the CFEB can undertake the activities set out in new section 6A(1). The FSA has a number of responsibilities under this schedule, including appointing the board, approving the CFEB's annual budget and annual plan, and making rules for the collection of amounts from FSA-regulated firms towards the CFEB's establishment

and running costs. *Paragraph 1(2)* enables the FSA to provide services (such as HR or IT support) to the CFEB.

50. *Paragraph 2* provides that the CFEB must have a chair, a chief executive and a board, and that these persons (who are the CFEB's directors) are appointed by the FSA (in the case of the chair and chief executive, with the agreement of the Treasury). The FSA has the power to remove any member from the board (acting, in the case of the chair and chief executive of the board, with the agreement of the Treasury), but the terms of each board member's appointment (e.g. length of appointment, the basis on which they may be dismissed) must be sufficient for the director (and the board) to be independent from the FSA.

51. *Paragraph 3* provides that the CFEB and its members and employees will not be acting on behalf of the Crown and its employees will not be civil servants.

52. *Paragraph 4* makes it clear that the CFEB can arrange for others to act on the CFEB's behalf as the CFEB's agent in delivering its consumer financial education function or can support others in undertaking activities which would fall within the CFEB's functions. This can include providing financial support and payment to others to undertake such activities.

53. *Paragraph 5* permits a body to undertake work for the CFEB even where it would otherwise not be able to do so. This would enable bodies (such as those established by royal charter or with limited charitable aims) where otherwise their constitution may not permit them to do so.

54. *Paragraph 6* requires the CFEB when exercising its functions to have regard to the importance of maintaining confidence in the financial system and the stability of the financial system.

55. *Paragraph 7* requires the CFEB to prepare a budget before the beginning of each financial year (or in its first year, as quickly as is reasonably practicable) and for the budget to be approved by the FSA. When preparing the budget or planning to vary it the CFEB must consult the FSA and the persons listed in *sub-paragraph (4)*. The CFEB may subsequently vary this budget with the agreement of the FSA. It is anticipated that, in addition to the sums received by exercising the powers given to the FSA under paragraph 12 and the OFT under paragraph 13, the CFEB may receive public funds under paragraph 14. It is also anticipated that sums will be provided to the CFEB pursuant to directions issued under section 22(3) of the Dormant Bank and Building Society Accounts Act 2008. As provision in paragraphs 12 and 13 make clear, the FSA and the OFT respectively are required to take into account other anticipated sources of funding when fixing a levy on FSA-regulated and OFT-licensed firms. The CFEB is also required to publish each budget or variation of the budget, in a way the CFEB considers appropriate.

56. *Paragraph 8* requires the CFEB to prepare an annual plan before the beginning of each financial year (or in its first year as quickly as is reasonably possible) setting out its objectives, the priority to be given to each objective, and how it intends to allocate its resources. It may vary its plan at any point during that year. The annual plan and any

variation of it must be approved by the FSA. When preparing the annual plan or planning to vary it the CFEB must consult the persons listed in *sub-paragraph (5)*. The CFEB is also required to publish each annual plan or variation of the annual plan, in a way the CFEB considers appropriate.

57. *Paragraph 9* requires the CFEB to prepare a report, at least annually, into its activities, setting out how it has met the objectives and priorities set out in the annual plan for the period covered by the report and annexing its latest accounts. The CFEB has to publish each report in the way it considers appropriate.

58. *Paragraph 10* exempts the CFEB and those acting on its behalf from the requirement to obtain a licence in Part III of the Consumer Credit Act 1974 ("CCA"). A licence is required under Part III for businesses (with certain exceptions) to carry on consumer credit, consumer hire or ancillary credit business. *Sub-paragraph (2)* disapplies Parts IV and X of the CCA to the CFEB and those acting on its behalf. Part IV of the CCA relates to advertising and other aspects of seeking credit business and Part X relates to ancillary credit business. These provisions are included because the CFEB may on occasion engage in activities which could fall within the ambit of these Parts of the CCA; for example, if a CFEB staff member or one of CFEB's agents were to help an individual to use an online credit card comparison tool during a Money Guidance session, this could be 'credit brokerage' and within the definition of ancillary credit business in Part X.

59. *Paragraph 11* defines "relevant costs" for the purpose of Part 2 of Schedule 1A, to mean the expenses the FSA incurs in establishing the CFEB, and the costs incurred or to be incurred by the CFEB.

60. *Paragraph 12* gives the FSA the power to levy sums from persons authorised under FSMA to meet part of the "relevant costs". The FSA levies by way of making rules to required authorised persons specified in the rules to pay sums to the FSA to meet the "relevant costs". The FSA will determine the amount to be levied but under *sub-paragraph (2)* must take into account other anticipated funding for the CFEB before making rules. The FSA is required to pay sums it collects under these notices to the CFEB, but can deduct from such sums the costs of collecting the money.

61. *Paragraph 13* gives the OFT power to levy Consumer Credit Act licence holders and applicants for such licences to meet part of the "relevant costs". The OFT levy is exercisable by way of a general notice. *Sub-paragraph (3)* defines the type of consumer credit licences and applicants who can be included in a levy, by referring to those persons specified in an order made under section 226A(2)(e) (which specifies types of business to be included in the consumer credit jurisdiction of the Financial Ombudsman Scheme). The OFT levies by way of a general notice to such licence holders or applicants as it specifies. Under *sub-paragraph (4)*, the OFT must take into account other anticipated funding for the CFEB before issuing a notice. *Sub-paragraph (5)* sets out that the OFT must consult the FSA, the CFEB and any other relevant persons before issuing a general notice. The OFT is also required to pay sums it collects under these notices to the CFEB, but can deduct from such sums the costs of

collecting the money. *Sub-paragraph (8)* makes it clear that a particular notice can impose different requirements on different licence holders or applicants and can exempt persons from a requirement to pay sums.

62. *Paragraph 14* gives the Treasury and the Secretary of State the power to make grants, loans or other financial assistance to the CFEB. In this Schedule it is intended that the powers of the Secretary of State will be exercised by the Secretary of State for Business, Innovation and Skills.

63. *Paragraph 15* enables the FSA to appoint an independent reviewer to review the CFEB's efficient use of its resources. The FSA must consult the Treasury before making such an appointment. The reviewer, when the review has been competed, must set out the results and any recommendations in a written report. The FSA must publish the report in the way it considers appropriate and must meet the expenses of the review.

64. *Paragraph 16* provides the independent reviewer appointed under paragraph 15 with the right of access to documents and information held by the CFEB and reasonably required for the review.

65. *Subsection (6)* provides that if staff of the FSA are transferred to the CFEB the Transfer of Undertakings (Protection of Employment) Regulations 2006 will apply to such a transfer.

Clause 7: Meeting FSA's regulatory objectives

66. This clause amends four sections of FSMA so as to broaden the ends towards which the FSA can use its rule-making, permission-varying, and intervention powers. As a result of this clause, these powers will be exercisable for the purpose of meeting any of the FSA's regulatory objectives.

67. *Subsection (2)* amends section 44 of FSMA, which deals with the FSA's power to vary or cancel a firm's permission (to undertake a regulated activity) at the firm's request. The amendment to section 44(3) provides that the FSA may refuse an application if this is desirable to meet any of its regulatory objectives.

68. *Subsection (3)* amends section 45 of FSMA, which concerns the FSA's power, on its own initiative, to modify or cancel a firm's permission. *Subsection (3)(a)* substitutes a new *subsection (1)(c)* which enables the FSA to use this power in pursuit of any of its regulatory objectives.

69. *Subsection (3)(b)* inserts a provision making clear that the consumers being protected by the exercise of the power need not be consumers of services of the firm whose permission is being varied.

70. *Subsection (4)* amends section 138 of FSMA to enable the FSA to use its general rule-making power in pursuit of any of its regulatory objectives.

71. *Subsection (5)* amends section 194 of FSMA, which concerns the FSA's power to intervene in relation to an incoming firm from another EEA state. *Subsection (5)(a)* substitutes a new subsection (1)(c) enabling the FSA to use this power in pursuit of any of its regulatory objectives.

72. *Subsection (5)(b)* makes an amendment to clarify that the power may be exercised to protect consumers who need not be consumers of the services of the firm in respect of which the FSA is intervening.

73. Schedule 2 makes consequential amendments to FSMA. These include paragraph 31 which inserts new sections 425A and 425B of FSMA which contain definitions of "consumers" and paragraphs 11 and 34(3) which remove the existing definitions of "consumers" from section 138 of, and Schedule 4 to, FSMA respectively. Paragraphs 4, 5, 6(3), 27 and 34(4) of this Schedule insert provisions applying the definitions in new sections 425A and 425B of FSMA (as appropriate) for the purposes of sections 5, 10, 14, 391 and Schedule 4 of FSMA respectively.

Clause 8: Promotion of international regulation and supervision

74. This clause inserts a new section 6B of FSMA, which will provide the FSA with a new duty to promote international regulation and supervision.

New section 6B: Duty of Authority to promote international regulation and supervision

75. *Subsection (1)* specifies that the FSA is to take the necessary steps to promote international regulation and supervision as part of its obligation to meet its financial stability objective. This would include the FSA playing a role in international regulatory and supervisory coordination, for example, the FSA's contribution to the work of the Financial Stability Board, which promotes co-ordination and information exchange among authorities responsible for financial stability and is one of the main coordinating international bodies.

76. *Subsection (2)* specifies that the steps taken by the FSA should include representing, where appropriate, the UK's interests when participating in international discussions related to international financial regulation and supervision.

77. *Subsection (3)* specifies that when the FSA is discharging its duty under subsection (1) it should have regard to best practice in relation to international financial regulation and supervision and the desirability of maintaining the competitive position of the UK.

78. *Subsection (4)* makes clear that 'international financial regulation and supervision' covers both national and multinational financial regulation and supervision.

79. *Subsection (5)* explains what is meant by 'financial system' for the purposes of new section 6B.

Remuneration of executives of authorised persons

Clause 9: Executives' remuneration reports

80. This clause gives the Treasury the power to make regulations requiring the preparation of a report disclosing information on the remuneration paid to officers and employees of a person who is an authorised person under FSMA and to others with a specified connection to the authorised person. Quoted companies are already required to produce and publish a Directors' Remuneration Report detailing all monies paid to executive and non-executive directors. This clause gives the Treasury power to expand the disclosure regime beyond quoted companies, and to employees who are not directors.

81. *Subsection (1)* gives the Treasury power to make regulations on executive remuneration reports.

82. *Subsection (2)* defines "executive remuneration report" for the purposes of this clause.

83. *Subsection (3)* lists the type of person who can be considered to be executives for the purposes of the executives' remuneration report. They include any individual who has a connection with the authorised person which is specified in the regulations made by the Treasury. *Subsection (4)* provides further information on who may fall into this last category, and makes it clear that the Treasury is able to require the disclosure of information in relation to remuneration given to individuals providing services to an authorised person who are not employees of that person.

84. *Subsection (5)* means that the Treasury can make regulations imposing disclosure requirements on a class of authorised person defined in the regulations. "Authorised person" is a term which encompasses a wide range of financial institutions and individuals in the financial services industry. Regulations may be made in relation to one or more sections of the financial services industry.

85. *Subsections (6)* to *(8)* set out the parliamentary procedure to be followed by regulations made under this clause. The affirmative resolution procedure must be followed the first time regulations are made. Subsequently, under *subsection (7)* the affirmative resolution procedure continues to apply unless regulations are made which reduce the amount of information which has to be disclosed, and do not make the requirements on companies more onerous. Such regulations will be subject to the negative resolution procedure.

Clause 10: Executives' remuneration reports: supplementary

86. This clause details supplementary provisions in relation to clause 9.

87. *Subsection (1)* makes it clear that the Treasury can make provision regarding the information which is required to be included, the manner in which the information is presented, and what information has to be audited.

88. *Subsection (2)* provides that the Treasury may require the executive remuneration report to contain any information corresponding to information which quoted companies could be required to include in directors' remuneration reports by regulations made by the Secretary of State under section 421 of the Companies Act 2006. The requirements for directors' remuneration reports are currently set out in Schedule 8 to the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 (S.I. 2008/410). The Treasury may also require the disclosure of comparative information, such as the ratio between the highest and lowest paid employees.

89. *Subsection (3)* provides that the Treasury can require executive remuneration reports to be filed with registrars of companies or the FSA, and provides that the FSA may publish reports filed with it.

90. *Subsection (4)* provides that regulations made by the Treasury may apply any provisions made in or under the Companies Act 2006 in respect of directors' remuneration reports to executive remuneration reports, with appropriate modifications. Under *subsection (5)* this includes provisions creating offences for failure to comply with the requirements for directors' remuneration reports. However, it also makes it clear that the Treasury may not impose stricter penalties for offences applied to executive remuneration reports than the original offence in relation to directors' remuneration reports.

91. Under *subsection (6)* the Treasury may provide that any requirements imposed on authorised persons in the regulations are to be treated as requirements imposed on that person under FSMA. The result of such a provision would be that, if the authorised person contravened a requirement under the regulations, the disciplinary powers of the FSA under that Act would apply, and the FSA would be able to take action against the authorised person in question.

92. *Subsection (7)* defines terms in clauses 9 and 10 for the purposes of these clauses.

Clause 11: Remuneration rules made by FSA

93. This clause inserts a new section 139A into FSMA, which imposes a new duty on the FSA in relation to remuneration.

New section 139A: General rules about remuneration

94. *Subsection (1)* imposes a duty on the FSA to make rules requiring authorised persons under FSMA, or a class of authorised persons identified in FSA rules, to have and implement a remuneration policy.

95. *Subsection (2)* defines what a "remuneration policy" is for the purposes of this clause. It also lists the types of person that may be included within the scope of the authorised person's remuneration policy. They include officers, employees and any other persons of a description specified in the FSA rules.

96. *Subsection (3)* obliges the FSA to ensure, through its rules, that remuneration policies required by the rules are consistent with the following: the effective management of risks, and the Financial Stability Boards' Principles for Sound Compensation Practices Implementation Standards.

97. *Subsection (4)* means that in making rules about remuneration the FSA must have regard to any other relevant international standards about remuneration which are in force.

98. *Subsection (5)* gives the Treasury power to direct the FSA to consider whether the remuneration plans of those authorised persons described or listed in the direction comply with the requirements the FSA have imposed in relation to remuneration policies. Under *subsection (6)* the FSA must be consulted before the Treasury make such a direction.

99. *Subsection (7)* provides that where the FSA considers that a remuneration policy fails to meet these requirements, the FSA must take such steps as it considers appropriate to deal with the failure. *Subsection (8)* makes clear that the steps the FSA may take include requiring the revision of the relevant remuneration policy.

100. *Subsection (9)* provides that FSA rules may impose specific prohibitions on the way in which a person may be remunerated. They may provide that any provision of a remuneration contract which contravenes such a prohibition is void and so unenforceable, and make provision for the recovery of any payment which may have been made under such a provision.

101. *Subsection (10)* limits the FSA's power to impose such prohibitions by requiring that it may only be used to ensure consistency with the matters mentioned there.

102. *Subsection (11)* clarifies that a rule made by the FSA under *subsection (9)* which provides that a contractual provision which contravenes a prohibition on remuneration is void will not affect any provision contained in an agreement which was made before the date the rules containing the prohibition were made. Only subsequent amendments to pre-existing contracts, and contracts made after that date will be affected.

103. *Subsection (12)* defines terms used in this clause.

104. *Subsection (13)* means that the references to "the Implementation Standards" or "international standards" in this clause are references to standards that are currently in force.

Recovery and resolution plans (RRPs)

Clause 12: Rules made by FSA about recovery and resolution plans

105. Clause 12(1) inserts new sections 139B to 139F into FSMA. The new provisions place a duty on the FSA to make rules requiring the production of recovery and resolution Plans (RRPs); give the FSA additional enforcement powers related to collection of information in relation to RRPs; require the FSA to have regard to international developments in making rules around

RRPs; and require the FSA to consult the Bank of England and the Treasury in relation to the drafting of rules for RRPs of banking institutions and (in the case of resolution plans prepared by those institutions) assessment of those plans by the relevant authorities.

New section 139B - Rules about recovery plans

106. *Subsection (1)* places a duty on the FSA to make rules requiring persons authorised under FSMA to produce and maintain a recovery plan in accordance with the requirements set out in the rules. Subject to subsection (8), this requirement can apply to all authorised persons or the FSA can exercise discretion over which authorised persons are required to produce a recovery plan by specifying the firms to which the rules apply. This will allow for gradual implementation, focusing on the largest, most complex and systemically significant firms in the first instance.

107. *Subsections (2), (3)* and *(4)* define a 'recovery plan' for the purposes of the new provisions. A recovery plan aims to reduce the likelihood of failure of a firm by setting out what the authorised person would do in, or prior to it becoming subject to, stressed circumstances (which the FSA may specify in its rules) that would affect the ability of the authorised person to carry on all or a specified part of its business. Action described in the plan may include the restructuring, scaling back or sale of certain business lines or assets of the authorised person in question and the subsection therefore refers to the business not necessarily having to be carried on in the same way or by the same person. The plan is not to be for the purpose of helping authorised persons to plan for avoiding getting into difficult circumstances, but about what planning they can do to enable them to recover should they encounter such circumstances.

108. *Subsection (5)* requires the FSA to consider whether each recovery plan required by rules under subsection (1) makes satisfactory provision in relation to those matters that the plan is required to cover.

109. *Subsection (6)* provides that where the FSA considers that a recovery plan fails to make satisfactory provision in relation to those matters, the FSA must take such steps as it considers appropriate to deal with the failure. *Subsection (7)* makes clear that the steps the FSA may take include requiring the revision of the relevant recovery plan.

110. *Subsection (8)* makes clear that the FSA must make general rules under subsection (1) that apply to authorised persons in relation to whom any power under Part 1 of the Banking Act 2009 may be exercised. The FSA is required by *subsection (9)* to consult the Treasury and Bank of England before preparing a draft of those general rules.

New section 139C – Rules about resolution plans

111. *Subsection (1)* places a duty on the FSA to make rules requiring persons authorised under FSMA to produce and maintain a resolution plan in accordance with the requirements set out in the rules. Subject to subsection (9), this requirement can apply to all authorised persons or

the FSA can exercise discretion over which authorised persons are required to produce a recovery plan by specifying the firms to which the rules apply. This will allow for gradual implementation, focusing on the largest, most complex and systemically significant firms in the first instance.

112. *Subsections (2), (3)* and *(4)* define a 'resolution plan'. They clarify that a "resolution plan" should cover both action to be taken in the event of failure of all or any part of the business occurring, and action to be taken by a firm where failure is likely.

113. *Subsection (4)* clarifies that a resolution plan may require a firm to identify obstacles to the application of possible resolution tools by the authorities or to the carrying out of the functions of an insolvency official in the event of the authorised person's failure and to set out what action that may be required to facilitate the application of those tools or carrying out of those functions. This could include provisions to ensure that a 'data room' can be set up quickly and effectively. It could also mean information about the simplification of legal structures ahead of a resolution being triggered. *Subsection (5)* sets out as an example of information within subsection (4) information that would facilitate planning by the Treasury or Bank of England in relation to the possible exercise of their powers under Part 1, 2 or 3 of the Banking Act 2009.

114. *Subsection (6)* requires the FSA to consider whether each resolution plans required by rules under subsection (1) makes satisfactory provision in relation to those matters that the plan is required to cover

115. *Subsection (7)* provides that where the FSA considers that a resolution plan fails to make satisfactory provision in relation to those matters, the FSA must take such steps as it considers appropriate to deal with the failure. *Subsection (8)* makes clear that the steps the FSA may take include requiring the revision of the relevant resolution plan.

116. *Subsection (9)* makes clear that the FSA must make general rules under subsection (1) that apply to authorised persons in relation to whom any power under Part 1 of the Banking Act 2009 may be exercised. The FSA is required by *subsection (10)* to consult the Treasury and Bank of England before preparing a draft of those general rules.

New section 139D – Sections 139B and 139C: interpretation

117. *Subsection (1)* clarifies that references in section 139B and section 139C (see subsection (3) in each case) to taking action include action not only by the authorised person but by other members of the same group and a partnership of which it is a member. This is to ensure that the duty in subsection (1) of section 139B and of section 139C includes a duty to make rules requiring a recovery or resolution plan, as the case may be, to include specified information relating to action to be taken by other members of the group of which the authorised person is a member. For this purpose, the wide meaning of "group" in section 421(1) of FSMA is narrowed by *subsection (2)* to exclude entities of which the authorised person (or other members of its group) may not necessarily have majority ownership or control.

118. *Subsection (3)* sets out some of the scenarios that constitute 'failure' of an authorised person for the purposes of section 139C and which the FSA may require to be covered in a resolution plan.

119. *Subsection (4)* widens the potential scope of a recovery or resolution plan by providing that the references in section 139B (see subsections (3) and (4)) and section 139C (see subsection (3)) to the "business" of the authorised person include the business of other persons in its group (including a holding company) or a partnership in which it is a member.

120. *Subsection (5)* provides that the term "specified" which is used in new sections 139B and C, means "specified" in general rules made by the FSA.

121. *Subsection (6)* makes clear that the references in new section 139D to "insolvency" and "administration" include the new procedures in Parts 2 and 3 respectively of the Banking Act 2009.

139E Rules about recovery and resolution plans: supplementary provision

122. *Subsection (1)* clarifies that the FSA can specify in its rules on RRPs that a resolution or recovery plan should set out the action which the authorised person is to take to collect, and maintain up-to-date, information of a specified description. This is to ensure that rules may require an authorised person quickly to establish and maintain a 'data room', which contains adequate data for interested third parties to perform due diligence on all or parts of the business should circumstances require a sale.

123. Subsection (2) ensures that that where the FSA considers that an authorised person has failed to comply with the requirement referred to in subsection (1), the FSA may require the authorised person to appoint a skilled person to collect, and maintain up-to-date, the information that is needed.

124. *Subsection (3)* aligns the definition of a 'skilled person' with that of the existing section 166 on 'skilled persons'.

125. *Subsection (4)* enables the 'skilled person' to require others to assist in the collection or updating of information. That requirement may be enforced in the manner described in *subsection (5).*

126. To prepare a recovery or resolution plan an authorised person is likely to need to obtain information from persons connected to it and others. *Subsection (6)* facilitates the flow of information to the authorised person for the purposes of preparing a recovery or recovery or resolution plan from other parties, for example other parties in the group, or persons such as service providers. This subsection enables other parties, where the request or requirement to provide information has been approved in advance by the FSA, to disclose information relevant to preparing or maintaining a recovery or resolution plan to the authorised person

without being in breach of any duty or obligation of confidence (whether imposed by contract or otherwise).

127. *Subsection (7)* enables the FSA to require RRPs to be kept in electronic or any other format.

128. *Subsection (8)* sets out that, when making rules about RRPs, the FSA must also be have regard to any internationally agreed standards on RRPs, including, but not limited to, the standards being developed by the Financial Stability Board. The FSB, through its Working Group on Cross-border Crisis Management ('CBCM'), is piloting an internationally agreed template for RRPs on the major firms with cross-border crisis management groups, and the template, redeveloped in line with the outcome of the pilot, will form the basis of the internationally agreed standards for RRPs, which are expected by the end of 2010.

New section 139F – Special provision in relation to resolution plans

129. *Subsection (1)* requires the FSA to consult the Treasury and the FSA about the adequacy of resolution plans required to be prepared by general rules so far as those plans relate to any matter which may be relevant to the exercise by the Treasury or Bank of England of any power under Part 1, 2 or 3 of the Banking Act 2009.

130. Under *subsection (2)* the Treasury or the Bank of England may, after that consultation, notify the FSA that, in their opinion, a resolution plan fails to make satisfactory provision in relation to any such matter and, if they do so, must give their reasons.

131. *Subsection (3)* requires the FSA to have regard to any notification given under subsection (2).

132. *Subsection (4)* requires the FSA, if it receives a notification under subsection (2) but considers that the resolution plan makes satisfactory provision, to give reasons for being of that opinion to the person who gave the notification.

133. Clause 12(2) enables the Treasury, by order, to specify a date by which the FSA must make rules requiring authorised persons of a description specified in the order to prepare recovery or resolution plans. The clause enables the Treasury to provide for a staged approach by making different orders in relation to authorised persons of different descriptions. Before making an order the Treasury is required under clause 12(3) to consult the FSA. Any order will be subject to the negative resolution procedure.

Short selling

Clause 13: Power of FSA to prohibit, or require disclosure of, short selling

134. This clause inserts a new Part 8A, consisting of nine new sections (sections 131B to 131J), into in FSMA. These new sections provide the FSA with a new power to prohibit, or require disclosure of, short selling.

New section 131B: short selling rules

135. *Subsection (1)* provides that the FSA may make rules banning short selling in relation to certain financial instruments by prohibiting persons from engaging in this practice. These rules would apply to all persons, whether authorised by the FSA or not. These powers would not enable the FSA to ban a single firm from short selling a particular financial instrument while permitting other firms to do so.

136. *Subsection (2)* provides that the FSA may make rules requiring the disclosure of information relating to short selling in relation to specified financial instruments. This disclosure regime would apply to all persons, whether authorised by the FSA or not, who have engaged in short selling.

137. *Subsection (3)* sets out some of the provisions that may be included by the FSA in rules establishing a disclosure regime for short selling: when disclosures are to be made; and the way in which disclosures are to be made.

138. *Subsection (4)* ensures that the FSA is able to obtain information about short selling which has taken place before the rules are made where the person concerned still has a short position when the rules are made. This will occur, for example, when the short seller (S) has sold financial instruments which S did not own, and has not at the time the rules are made purchased the instruments concerned in order to deliver them to the buyer or return them to the lender (if the sale was settled with borrowed instruments), and so close out the short position or otherwise reduced their short position to a level below the disclosure threshold specified by the FSA.

139. *Subsection (5)* ensures that, where there is any doubt, what is meant by "a short position being open" will be determined in accordance with the FSA's short selling rules.

140. *Subsection (6)* prevents the FSA making rules under this section in relation to short selling taking place wholly outside the UK by persons outside the UK except in relation to financial instruments admitted to trading on markets in the UK. FSA rules may extend to short selling:

- by any person in the UK (including persons temporarily in the UK), or
- through an intermediary present in the UK, or
- in relation to shares admitted to trading in the UK (even if dual or multi-listed elsewhere in the world).

141. *Subsection (7)* allows the short selling rules described in this Part to be targeted at a particular form of financial instrument issued by a specified company.

142. *Subsection (8)* provides that rules under the section are referred to as "short selling rules".

New section 131C: Short selling rules: definitions etc

143. This clause defines the terms used in section 131B.

144. *Subsection (2)* defines short selling for the purposes of these short selling rules. Short selling will include any case in which a person sells a financial instrument which that person does not own, and will make a profit if the price of that instrument falls before the person has to buy the instrument to deliver it to the buyer or to return to the lender (where the sale was settled with borrowed financial instruments). It will also include any case in which a person enters into a transaction in a different financial instrument to the shorted instrument (whether the first-mentioned financial instrument was in existence before the transaction, or was created as a result of the transaction), where the effect of the transaction entered into is that that person will make a profit if there is a fall in value in the shorted instrument. For example, S may buy an equity put option giving S the right to sell 1,000 shares in ABC plc for £10 a share. If the price of the shares falls to £5, S will be able to buy 1,000 shares in the market for £5,000, exercise the option and sell the same shares for £10,000, making a profit of gross £5,000. Alternatively, S may enter into a contract for difference ("CFD") which provides that S will pay to B the difference between the current value of a financial instrument and its value at the date on which the contract for difference matures if the price increases (if the price falls, B pays the difference to S). The transaction will create a financial instrument (the CFD) and S will have engaged in short selling the financial instrument to which the CFD relates because he will make a profit if the value of the financial instrument falls before that date.

145. *Subsections (3) and (4)* define "financial instrument" and "relevant financial instrument". The definition of "relevant financial instrument" ensures that the FSA may make rules regulating short selling in relation to financial instruments admitted to trading in EEA markets, or which have any other connection to EEA markets which may be specified in the rules, as well as financial instruments admitted to trading in the UK.

146. *Subsection (7)* ensures that where a financial instrument is admitted to trading both on a UK or EEA market and markets elsewhere in the world the FSA may make short selling rules in relation to that instrument on any or all of the markets on which it is admitted to trading. Under *subsection (8)* the same applies where related financial instruments are admitted respectively to trading on an EEA market and a market elsewhere in the world. An instrument will be related for these purposes if the price or value of one instrument depends on the price or value of the other, as would be the case in relation to an equity share and a depositary receipt issued in relation to that share.

147. *Subsection (10)* clarifies the meaning of references to a "market" in a particular territory.

New section 131D: Short selling rules: procedure in urgent cases

148. New section 131D provides for the procedure to be followed by the FSA where the FSA is making urgent restrictions on engaging in short selling.

149. *Subsection (1)* grants the FSA the power to make short selling rules, and subsequently to amend those rules, without going through the normal consultation process, where it is necessary to do so to protect the stability of the financial system, or to maintain confidence in the financial system.

150. *Subsection (2)* provides that initially these emergency short selling rules may last for no more than three months. However, under *subsections (3)* and *(4)* the FSA is given power to direct that emergency restrictions can extend these rules for a further three months provided that it still considers them to be necessary to protect the stability of the financial system or to maintain confidence in the financial system at the time when the direction is given. Under *subsection (5),* this direction must be published.

151. *Subsection (6)* states that nothing prevents the FSA from revoking emergency rules before the end of the periods referred to here.

New section 131E: Power to require information

152. This section gives the FSA a power to require the production of information or documents in order to ascertain whether there has been a breach of any short selling rules.

153. *Subsection (1)* gives the FSA the power to require information or documents to be produced. This applies whether or not the person concerned is an "authorised person" under FSMA. *Subsection (2)* sets out the scope of this power – the FSA may only impose such a requirement on a person if the information or documents are required in order to enable the FSA to determine whether that person or any person connected to that person, has breached any provision of the short selling rules.

154. *Subsections (3)* to *(5)* allow the FSA to specify the time and form in which the information must be provided. They may also require the person providing the information to take reasonable steps specified by the FSA to verify the information provided. *Subsection (7)* defines what is meant by a "connected person" for the purpose of this section.

New section 131F: Power to impose penalty or issue censure

155. *Subsections (1) to (3)* set out the penalty for contraventions of short selling rules, or failure to comply with an information requirement imposed under section 131E. The FSA may impose an unlimited fine on any person, whether or not that person is an authorised person, if it is satisfied that the person has contravened any part of the short selling rules or an information requirement. The FSA may alternatively decide not to impose a fine, but to publish a censure to this effect.

156. *Subsections (4) to (6)* impose a four-year time limit on the FSA's ability to take such enforcement action against a person, unless, before the end of the four-year period, the FSA has given a warning notice to the person concerned under section 131G. The four-year period

within which the FSA can act begins with the first day that the FSA knew that a person contravened any provision of the short selling rules or the information requirement.

New section 131G: Procedure and right to refer to Tribunal

157. *Subsections (1)* to *(3)* provide that a person must be given a warning notice detailing the amount of the fine or the terms of the public censure (as applicable) if the FSA proposes to take action against them.

158. *Subsections (4)* to *(6)* provide that a person must be given a decision notice detailing the amount of the fine or the terms of the public censure (as applicable) if the FSA decides to take action against them.

159. *Subsection (7)* provides that a person may refer the matter to the Tribunal if the FSA decides to take action against them.

New section 131H: Duty on publication of statement

160. This section requires the FSA to send a copy of any public censure to the person concerned and to any other person who was given a copy of the decision notice.

New section 131I: Imposition of penalties under section 131F: statement of policy

161. This section requires the FSA to issue a statement of its policy in relation to the imposition and amount of penalties. The policy set out in the statement must take account of the factors set out in *subsection (2).*

162. Under *subsection (3)* the FSA is given power to alter or replace the statement of policy. If it does so, it must, under *subsection (4),* the FSA must issue the revised statement.

163. *Subsections (5)* and *(6)* require the FSA to give the Treasury a copy of any statement of policy it publishes, and to publish the statement so as to ensure that it is brought to public attention.

164. *Subsection (7)* enables the FSA to charge a fee for providing a copy of the statement of policy.

165. *Subsection (8)* requires the FSA to have regard to the statement in force at the time of the misconduct when imposing penalties under section 131E.

New section 131J: Statement of policy: procedure

166. This section sets out the procedure for issuing a statement under section 131I. Before deciding on its policies in these areas, or changing those policies, the FSA will be required to consult the public on its proposals.

FSA's disciplinary powers

Clause 14: Suspending permission to carry on regulated activities etc

167. Sections 205 and 206 of FSMA set out the disciplinary measures available to the FSA in respect of a contravention by an authorised person of a requirement imposed by or under FSMA or a directly applicable EC regulation made under the markets in financial instruments directive.

168. This clause inserts a new section 206A into FSMA providing the FSA with additional sanctions to deal with such breaches. Those additional sanctions are the power to suspend, limit or otherwise restrict an authorised person's permission for up to a maximum of 12 months.

169. The clause permits the FSA to impose one or more of the available sanctions in respect of the same contravention.

170. Sections 207 and 208 of FSMA set out the procedure for taking disciplinary measures, namely a warning notice followed by a decision notice and right of referral to the Tribunal. *Paragraphs 18 and 19 of Schedule 2* make consequential amendments to those sections to apply the same procedure to the imposition of the new sanctions.

171. Section 210 of FSMA requires the FSA to issue a statement of policy regarding the imposition of a financial penalty under section 206. *Paragraph 20 of Schedule 2* makes a consequential amendment to that section so that the statement of policy must also cover the length of any suspensions or restrictions imposed under the new s206A.

Clause 15: Removal of restriction on imposing a penalty and cancelling authorisation

172. Section 206(2) of FSMA prohibits the FSA from both imposing a penalty on an authorised firm under that section and withdrawing a person's authorisation under section 33 in respect of the same contravention. This clause repeals this prohibition thus enabling the FSA to stop an authorised person from continuing to carry on a regulated activity at the same time as imposing a financial penalty on that person.

Clause 16: Performance of controlled function without approval

173. Section 59 of FSMA requires authorised persons ('A') to take reasonable care to ensure that no person ('P') performs a controlled function under an arrangement entered into by A or A's contractor in relation to the carrying on by A of a regulated activity, unless P has been approved by the FSA to do so. There is currently no prohibition on a person performing a controlled function without FSA approval.

174. This clause inserts new sections 63A to 63D of FSMA. New section 63A(1) enables the FSA to impose a financial penalty on a person if it is satisfied that that person has performed a controlled function without approval.

175. New section 63A(2) provides that the FSA may not impose a penalty if there are reasonable grounds for it to be satisfied that the person did not know or could not reasonably be expected to have known that he or she was performing a controlled function without approval.

176. New section 63B sets out the procedure for imposing a financial penalty, namely issuing a warning notice followed by a decision notice. There is a right of referral to the Tribunal.

177. New section 63C requires the FSA is required to consult on and publish a statement of its policy on the imposition of penalties and the amount of such penalties.

178. Section 168 of FSMA enables the FSA to carry out investigations in particular cases, including the circumstances listed in subsection (4). *Paragraph 16 of Schedule 2* makes a consequential amendment to subsection (4) to provide for the FSA to appoint an investigator if it thinks that a person may have performed a controlled function without approval.

Clause 17: Approved persons guilty of misconduct

179. Section 66 of FSMA sets out the FSA's disciplinary powers in respect of misconduct by approved persons. Approved persons are persons who have approval from the FSA to carry out controlled functions. Controlled functions are set out in FSA rules and include, for example, having responsibility for compliance with FSA rules or being a director.

180. This clause amends section 66 of FSMA to add to the current sanctions (financial penalty and public statement of misconduct) that the FSA can impose for misconduct. It enables the FSA to suspend an approved person from carrying on certain functions, and / or impose restrictions on that person's performance of certain functions, for a maximum period of 2 years.

181. Paragraphs 9 and 10 of Schedule 2 make consequential amendments to sections 67 (procedures for disciplinary measures) and 69 (the issue of statements of policy with respect to the imposition of disciplinary measures) so that they apply to the new sanctions.

182. *Subsection (4)* amends section 66(4) to increase the limitation period on the FSA taking disciplinary action against an approved person from two to four years.

Collective proceedings

Clause 18: Collective proceedings orders

183. This clause provides that the court can authorise collective proceedings to be brought on behalf of a group of financial services claims that share the same, similar or related issues of fact or law. Collective proceedings may be brought by a representative body with no direct interest in the proceedings, such as a consumer group, or by a person who would be able to

bring their own claim directly. Regulations or rules of court may require the court, when considering whether to authorise the bringing of collective proceedings, to consider matters set out in the regulations or rules.

Clause 19: Collective proceedings: "opt-in" and "opt-out" bases

184. S*ubsection (2)* provides that the court must determine whether collective proceedings should take place on an opt-in basis or an opt-out basis.

185. In opt-in proceedings it is necessary for any person who wishes their claim to be represented in the collective proceedings to identify themselves to the representative by a certain time which will be set by the court. In opt-out proceedings everyone with a suitable claim will be comprised in the represented group without any need to identify themselves. They will, however, be able to opt out of the group within a certain period of time which will also be set by the court. A full definition of the opt-in and opt-out bases is contained in *subsections (5) and (6).*

186. *Subsection (3*) enables issues in opt-out proceedings to be determined on an opt-in basis. For example, the court may consider it appropriate to consider generic issues of liability on an opt-out basis. It may then decide that other issues such as the amount of compensation to which represented persons are entitled should be resolved on an opt-in basis.

187. Persons who are not domiciled in the United Kingdom at a time specified by the court may have their claims included in collective proceedings. The effect of *subsection (6)(b)* is, however, that where proceedings are to take place on an opt-out basis for other group members non-domiciled persons will instead be required to opt-in by a time specified by the court. This ensures that persons who are not domiciled in the United Kingdom, who are less likely to be aware of notices given in respect of collective proceedings, will not be prejudiced. *Subsection (8)* defines "domicile" for the purposes of *subsection (6)(b).*

Clause 20: Judgments and orders: effect on represented persons in collective proceedings

188. When giving a judgment or making an order in collective proceedings the court will need to determine in accordance with *subsection (1)* whether it will bind represented persons and if so whether it will bind all represented persons. While judgments and orders in respect of any issues ought normally to be binding on represented persons, because their claims are being conducted collectively by the representative, there may be orders that should not be binding in this way, for example, where orders relate to obligations that should be borne only by one of the parties or by individual group members.

Clause 21: Meaning of "financial services claim"

189. Financial services claims are defined by reference to the description of the defendant and the type of activities giving rise to the claim. Potential defendants include authorised persons, appointed representatives, payment service providers and those engaged in consumer credit

activities such as those with a standard credit licence. Claims may arise from regulated activities, consumer credit activities mentioned in section 226A(3) of FSMA, payment services and a relevant ancillary service set out in the financial instruments directive. By virtue of *subsection (5)* the Treasury may provide that additional claims relating to financial services or ancillary activities can be represented in collective proceedings. It may also provide, by virtue of *subsection (2)*, that claims of a specified description are not financial services claims for these purposes and therefore can not be included in collective proceedings. In accordance with *subsection (4)* financial services claims, including those that may be included or excluded by Treasury order, include claims that arose before the commencement of these provisions.

Clause 22: Regulations about collective proceedings

190. The Treasury has a general power by virtue of *subsection (1)* to make regulations about collective proceedings. This power includes particular powers, examples of which are set out in *subsection (2).*

191. There is a particular power to require that the FSA, the OFT and the Ombudsman scheme operator may be heard on an application for authorisation of collective proceedings. This will enable the court to consider representations from these bodies including, if necessary, whether there are more appropriate ways for the claims to be dealt with.

192. The power includes a power to require the court, when making a collective proceedings order, to have regard to prescribed matters, and only to make an order when prescribed criteria or circumstances exist. This will enable the Treasury to make provision relating to particular features of financial services claims that are unlikely to be mentioned in court rules. For example, it enables the Treasury to identify, where appropriate, any circumstances relating to actual or contemplated regulatory intervention that ought to be taken into account. The power will also allow the Treasury to stipulate any specific tests that should be applied by the court when considering whether to authorise collective proceedings.

193. The power mentioned in *subsection (2)(d)* will enable the Treasury to exclude financial services claims of certain persons or against certain persons or provide that claims can only be included in certain circumstances. This power might be exercised to ensure that certain persons such as, say, certain public authorities are not within the scope of these provisions or are within the scope only in prescribed circumstances. Provision can also be made affecting the position of prescribed classes of person.

194. *Subsections (2)(e) and (3)* confer powers to change the effect of limitation provisions. The powers could be used, for example, to stop time running in respect of claims made in collective proceedings and in respect of any other periods. The Treasury may confer on the court a power to direct that periods are to be disregarded for limitation purposes.

195. There is a power to make provision about damages. This includes the powers mentioned in clause 23.

196. The Treasury may make provision about notices that may need to be given in relation to collective proceedings and in particular, in accordance with *subsection (4)*, must secure that notices are given to group members is a way that is appropriate for bringing them to the attention of group members. Where the notice is given in accordance with any direction of the court the court will be able to determine the appropriateness of the notice for these purposes.

Clause 23: Regulations under section 22(1): damages

197. In accordance with *subsection (2)* the court may be empowered to make an award of damages without undertaking an assessment of the amount of damages recoverable in respect of each financial services claim. It would therefore, as mentioned in *subsection (3)*, be able to award a lump sum based on its estimate of the damages that would be likely to be recoverable in each claim. The court will therefore not be required to hear evidence in respect of the individual losses incurred in respect of each claim comprised in the proceedings. The court will also be able to order that group members should be able to share in the damages in accordance with a formula that will apply to the calculation of individual group members' entitlements. A person may therefore receive a greater or lesser amount that they might receive were their losses to be assessed individually.

198. The Treasury must make provision, by virtue of *subsection (4)*, that the damages are to be paid to the representative or to such other person as the court directs. There can also be provision about the way that damages can be held and dealt with including, for example, that the damages are to be held on trust and that the court can give directions about payments to represented persons. *Subsection (5)(b)* enables provision to be made for the court to direct the payment of any surplus be applied for charitable or other purposes.

Clause 24: Rules of court about collective proceedings

199. *Subsection (1)* provides that rules of court may make provision about collective proceedings. This power specifically includes powers, mentioned in *subsection (2)*, to make provision about applications for collective proceedings orders, to set out the criteria to be applied by the court in making a collective proceedings order and to provide that in specified circumstances a person is to be treated as having opted-out or not having opted in. Additionally, the court can make provision about representatives, costs, counterclaims, evidence, appeals and notices.

200. Among the purposes for which this power can be used is therefore the restriction of any appeal procedures that may be available to group members by virtue of their claims being affected by judgments or orders in collective proceedings. It may be regarded as unnecessary and counter productive for group members to have the right to appeal judgments and orders. This is because they are being represented for these purposes by a person who will make such decisions on their behalf.

201. The provision that may be made about costs includes a power for court rules to be made in relation to costs incurred by the representative in connection with holding and dealing with any payment of damages, including costs incurred in determining whether to make payments

to represented persons. Provision may also be made requiring any specified costs to be met out of the payment of damages received by the representative. This provision therefore ensures that the costs of holding and distributing the damages may be met by the defendants, the fund of damages or in any other way that is appropriate.

202. Provision may be made about counterclaims so that they can be defended by the representative in collective proceedings. The rules could for example set out the kinds of counterclaims that may be made (for example, any requirement that they raise similar or related issues of fact or law).

203. Court rules may also provide in relation, for example, to the stay or dismissal of collective proceedings and what should then happen to represented claims. Court rules may make provision in relation to represented claims proceeding separately.

204. Additionally court rules must secure that any notice given under the rules to represented persons is given in a way that is appropriate for bringing the notice to the attention of represented persons. Where the notice is given in accordance with a direction of the court, the court will itself ensure that notice is given in a way that is appropriate. This ensures that the represented persons can get proper notice of represented proceedings so that, for example, they can exercise their rights to opt-out or opt-in to the collective proceedings.

Clause 25: Definitions

205. The definition of court in *subsection (2)* includes the High Court or county court, or in Scotland, the Court of Session. It will therefore be possible to bring proceedings in most courts within the United Kingdom.

206. There is a power in subsection (8) to amend the definition of "the court" so that, in Scotland, it includes the sheriff. This will allow collective proceedings to keep pace with developments in court practice in Scotland.

Other consumer protection measures

Clause 26: Consumer redress schemes

207. The existing section 404 of FSMA enables the Treasury, subject to Parliamentary approval, to authorise the FSA to require firms to conduct a review of past business and, if liable, to pay compensation to consumers. Clause 26 replaces section 404 with new sections 404 and 404A to 404F, conferring new powers for the FSA to make rules requiring firms to establish and operate consumer redress schemes.

New section 404: Consumer redress schemes

208. *Subsections (1)* and *(3)* provide that the FSA may make section 404 rules if it appears to it that (a) there may have been a widespread or regular failure by a relevant firm (defined in *subsection (2)* as an authorised person or payment service provider) to comply with the

requirements for carrying on an activity; (b) as a result, consumers have suffered or may suffer loss for which redress would be available in legal proceedings; and (c) it is desirable to establish a scheme to secure redress for consumers.

209. 'Consumers' is defined in new section 404D as persons who have used (or may have contemplated using), or have rights or interests in, services provided by: (a) authorised persons carrying on regulated activities; (b) authorised persons carrying on consumer credit business in connection with the regulated activity of accepting deposits; (c) authorised persons carrying on financial promotion activities; (d) authorised persons who are investment firms or credit institutions providing relevant ancillary services (within the meaning of section 138(1C) of FSMA); (e) persons acting as appointed representatives; or (f) payment service providers providing payment services within the meaning of the Payment Services Regulations 2009.

210. New section 404E(5) provides that references to a relevant firm includes a person who was, but is no longer, an authorised person or payment service provider and a person who has assumed a liability incurred by a relevant firm (section 404E(5)).

211. *Subsections (4)* to *(7)* of a new section 404 define 'consumer redress scheme' as one in which a firm is required to take one or more of the following steps:

- investigate whether it has failed to comply with its obligations in carrying out a specified activity;
- if it determines that it has failed to comply with an obligation, determine the nature and extent of the failure, and whether the failure has caused or may cause any loss to consumers;
- if it determines that consumers have suffered loss, to make appropriate redress.

New section 404A: Rules under section 404: supplementary

212. Section 404A sets out those matters which section 404 rules may provide for. This includes requiring firms to provide the FSA with information about their investigation and the matters under investigation, and for the FSA (or a competent person appointed by it) to conduct the investigation and other relevant steps instead of the firm, including determining its liability and the redress the firm should make to consumers. Where the rules provide for a scheme to be conducted by someone other than the firm itself, they must also include provision for warning and decision notices and a right of referral to the Tribunal (*subsection (8)).*

213. *Subsection (2)* limits the FSA's power in *subsection (1)(b)* to define by way of example what amounts to a failure to comply with a requirement to that which a court has found or would find constitutes a failure. *Subsection (3)* similarly limits the FSA's power in *subsection (1)(c)* to set out matters which should be taken into account by firms in assessing evidence or determining causation to those matters which a court has taken, or would take into account.

Subsection (4) provides that the FSA may require firms to make such redress as is just in relation to that description of case, having regard (among other things) to the nature and extent of the losses in question. It is not limited to the remedy or relief which would be available in legal proceedings.

New section 404B: Complaints to the ombudsman scheme

214. This section enables a consumer who is not satisfied with any determination by a firm under a scheme to make a complaint to the Financial Ombudsman Service (FOS). It requires the FOS to assess such a complaint (or a complaint about an underlying act or omission which falls to be dealt with by a consumer redress scheme) in accordance with the terms of the consumer redress scheme rather than its 'fair and reasonable' jurisdiction under section 226(8) of FSMA. Complaints under this section will form part of the FOS' compulsory jurisdiction set out in Schedule 17 to FSMA.

New section 404C: Enforcement

215. This section provides that the FSA's disciplinary powers in Part 14 of FSMA (public censure or financial penalty) will apply to relevant firms which are not (or no longer) authorised persons. This ensures that the scheme can be enforced against payment service providers or firms which are no longer authorised.

New section 404F: Power to widen the scope of consumer redress schemes

216. This section gives the Treasury a power to widen the scope of the FSA's power to establish a consumer redress scheme by amending the definition of relevant firms or consumers.

Clause 27: Restrictions on provision of credit card cheques

217. This clause inserts new sections 51A and 51B into the Consumer Credit Act 1974. New section 51A would make it an offence for a credit card issuer to send credit card cheques to a customer other than in response to a request from that customer.

218. The request may be entirely at the instigation of the customer or the credit card issuer may offer to send cheques (for example via a mail shot). However, the customer cannot be considered to have requested cheques simply because he has not said he does not want them. The credit card issuer may not send more than three cheques to a customer in response to a request (but must send fewer than three if requested). The customer cannot make an ongoing request; he cannot ask for, say, a cheque a month for the next year or indefinitely. The restrictions on meeting requests apply at the level of the agreement rather than the customer, so the customer can request and be sent cheques on more than one card at the same time.

219. Credit card cheques are provided by many credit card issuers to those to whom they have issued credit cards. They are very similar in appearance to ordinary bank current account cheques and can be used in any situation where a current account cheque can be used (but

they are not guaranteed by the credit card as a current account cheque is guaranteed by a cheque guarantee card). Once used, the cheque appears on the credit card statement in the same way as an item purchased with the card or a cash withdrawal on the card. In the new section 51A, credit card cheques are defined by reference to the provision of credit under a credit-token agreement. A credit-token agreement is defined in section 14 of the Consumer Credit Act 1974 as a regulated agreement to provide credit in connection with the use of a credit-token. Credit-tokens include credit cards.

220. New section 51B provides that new section 51A does not apply to credit card cheques issued to business customers.

Financial Services Compensation Scheme

Clause 28: Contribution to costs of special resolution regime

221. This clause inserts new sections 214B, 214C and 214D into the Financial Services and Markets Act 2000 to replace the existing section 214B (inserted by section 171 of the Banking Act 2009).

222. Existing section 214B confers a power on the Treasury to require the Financial Services Compensation Scheme ("the FSCS) to contribute to the costs incurred in applying the stabilisation powers of the special resolution regime (established in Part 1 of the Banking Act 2009) to a bank that is failing. The amount that the FSCS can be required to contribute is limited to the amount of compensation that the FSCS would have had to pay to depositors if the failing bank had entered into insolvency (i.e. if the SRR powers had not been used), net of any amounts the FSCS would have recovered in that insolvency. The section provides for an independent valuer to be appointed to calculate this likely amount of recovery.

223. New sections 214B to 214D restate the provisions of existing section 214B with corrections and clarifications, and make provision for the calculation of amounts owed by the FSCS. *Subsection (2)* of clause 28 provides for the amended provisions to apply with retrospective effect from 19th November 2009 (the date of introduction of this Bill) to allow interest to be taken into account in calculating FSCS contributions from that date onwards in cases where a stabilisation power was exercised before the commencement of this section.

224. New section 214B allows the Treasury to include interest costs in the calculation of expenses incurred in connection with the exercise of the stabilisation power. *Subsection (6)* provides for the Treasury to set the rate at which that interest is to be calculated and the interest rate to be used in calculating the maximum amount the FSCS may be required to contribute.

225. New section 214C provides for the maximum amount that the FSCS may be required to contribute. This is limited to the notional net expenditure, which is the amount that the FSCS would have paid in the hypothetical scenario where the stabilisation power had not been exercised and the bank had entered insolvency proceedings; minus the actual net expenditure (i.e. any actual payments the FSCS has made in respect of the resolution, net of any recoveries

made). *Subsections (5)* and (6) allow for interest to be taken into account in calculating this expenditure.

226. New section 214D makes further provision supplementing new sections 214B and 214C. New provisions include an express obligation on the FSCS to calculate the amount and the timing of compensation payments in the hypothetical scenario; the independent valuer to calculate the timings of recoveries likely to be made by the FSCS in that scenario and the Treasury to specify principles to be taken into account by the independent valuer and the FSCS when making such calculations. *Subsection (6)* extends the existing subsection 214B(3)(b) by providing for independent verification of other matters as well as the expenses incurred in section 214B(2). *Subsections (8)* and *(9)* make revised provision for the situation when the FSCS is required to contribute to the costs of resolution before the end of the resolution.

Clause 29: Power to require FSCS manager to act in relation to other schemes

227. The Financial Services Compensation Scheme (FSCS) is the scheme established by the Financial Services Authority (FSA) under Part 15 of the Financial Services and Markets Act (FSMA) to compensate customers of authorised financial services firms when those firms are in default, that is, unable or likely to be unable to pay claims.

228. This clause, which inserts new Part 15A into FSMA (comprising sections 224B to 224F), extends the scope of the FSCS manager to enable it to make payments on behalf of another compensation scheme or arrangement that pays compensation in respect of institutions that provide financial services, including institutions that are not authorised financial services firms under FSMA.

229. New section 224B defines the terms used, including the kinds of scheme or arrangement the Treasury can require the FSCS manager to act on behalf of ("the relevant scheme"). New section 224C provides that if compensation is payable under a relevant scheme, the Treasury may issue a notice requiring the FSCS manager to act on behalf of the relevant scheme's manager. The notice will specify the functions to be performed by the FSCS manager on behalf of the manager of the relevant scheme.

230. Section 224D provides that the FSCS manager may decline to act if a ground in section 224E is met, and a notice to this effect is given to the Treasury. Such grounds include: where the FSCS manager is not satisfied that it will be able to obtain the necessary information, advice or assistance from the administrator to comply with the notice; where it is not satisfied that funding is being provided to meet the expenditure that it will incur in acting on behalf of the relevant scheme manager; where it is of the opinion that complying with the notice would detrimentally affect the exercise of its FSCS functions; where the manager of the relevant scheme has not given an undertaking not to bring proceedings against the FSCS manager; or where there are no arrangements for the reimbursement of expenses arising out of claims brought against the FSCS manager by third parties.

231. New section 224F enables the FSA to make rules in connection with FSCS manager acting as a paying agent on behalf of relevant schemes. This includes conferring a power on the FSCS manager to impose levies to cover its expenses under this clause; however if the FSA do impose such a power, it may be exercised only if the FSCS manager has tried and failed to obtain reimbursement of its expenses elsewhere.

Powers to require information

Clause 30: Information relating to financial stability

232. The clause inserts new sections into FSMA providing the FSA with new powers to require a person to provide specified information.

New section 165A: Authority's power to require information: financial stability

233. *Subsection (1)* provides that the FSA may, by giving written notice, require that a person covered by the section to provide the FSA with information or documents described in the notice.

234. *Subsection (2)* sets out the categories of people who may be required to provide information or documents under subsection (1). They include the owners or managers of investment funds, and any persons connected to them. Section 165A(2)(d) confers on the Treasury a power to prescribe further categories of persons in respect of which the power under section 165A(1) may be exercised.

235. *Subsection (3)* sets out the test which will enable the FSA to require information: the FSA must consider that the information or documents in question are or might be, relevant to the stability of one or more aspects of the financial system.

236. *Subsection (4)* provides an additional test where a requirement is being imposed on a service provider or a person who is connected with a service provider. In this case, no requirement may be imposed unless the FSA considers that a failure by the provider to provide all or part of the services is likely to pose a serious threat to the stability of the financial system.

237. *Subsection (5)* gives the FSA power to determine the place at which, and the time within which, the information must be provided. The FSA must allow a reasonable period for the provision of the information.

238. *Subsection (6)* gives the FSA power to determine the form in which information must be provided to them.

239. *Subsection (7)* gives the FSA power to require any information provided to be verified or authenticated, by, for example, a firm's auditors.

240. *Subsection (8)* and (9) defines "relevant investment fund" for the purposes of this clause, and sets out the other definitions used.

241. *Subsection (10)* defines "connected person" for the purposes of this clause. .

New section 165B: Safeguards etc in relation to exercise of power under section 165A

242. This section sets out the procedural safeguards which will apply to the exercise of the power. Under *subsection (1)* the FSA must give a person on whom it proposes to impose a requirement written notice in advance.

243. Under *subsection (2)* the written notice must give the FSA's reasons for proposing to impose the requirement; and specify a reasonable timescale within which the person may make representations to the FSA. Once this period has expired, the FSA must, under s*ubsection (3)* decide within a reasonable period whether the requirement should be imposed.

244. *Subsection (4)* provides that subsections (1), (2) and (3) do not apply where the FSA is satisfied that it is necessary for the information to be provided urgently.

245. *Subsection (5)* requires the FSA to give its reasons when it imposes a requirement under this clause.

246. *Subsection (6)* requires the FSA to prepare a statement of its policy with respect to the exercise of the power conferred by section 165A. Under *subsections (7)* and *(8)* this statement requires the approval of the Treasury, and must be published. Under *subsection (9)*, this power may not be exercised before the statement has been approved and published.

New section 165C: Orders under section 165A(2)(d)

247. Section 165C sets out the conditions under which the Treasury may exercise the power given in section 165A(2)(d) to add a further category of persons who may be required to provide information under section 165A, and the procedure to be followed. Under *subsection (1)* the Treasury may only make such an order if it considers that the activities carried on by the prescribed person or the failure to carry on those activities (or any part of them), might pose a serious threat to the stability of the financial system.

248. *Subsection (2)* provides the general rule that an order made under section 165A(2)(d) will be subject to the normal affirmative resolution procedure, being laid in draft and approved by a resolution of each House.

249. *Subsections (3)* to *(7)* provide, as an exception to this rule, that where the Treasury considers that it is necessary, an order under clause 165A(2)(d) will be subject to a modified form of the affirmative resolution procedure under which it must be laid before Parliament after being made and ceases to have effect at the end of a period of 28 days unless it is approved by a resolution of each House before the end of that period.

250. *Subsection (8)* ensures that no order under clause 165A(2)(d) will be treated as a hybrid instrument for the purposes of the Standing Orders of either House of Parliament.

New section 169A: Support of overseas regulator with respect to financial stability

251. *Subsection (1)* provides that the FSA may exercise a corresponding section 165A power at the request of an overseas regulator.

252. *Subsection (2)* defines "overseas regulator" for the purposes of this section.

253. *Subsection (3)* defines "corresponding section 165A power" as a modified form of the power given in section 165A, with references to the stability of the financial system referring to the financial system operating in the country, or in a territory (such as Gibraltar or the Channel Islands) of the overseas regulator, and the reference to the UK in section 165A being replaced by a reference to that country or territory.

254. *Subsection (4)* sets out which provisions of section 165A are to apply to the corresponding section 165A power given in relation to overseas regulators.

Clause 31: Asset protection scheme etc

255. This clause gives the Treasury the power to require information or documents it reasonably requires from participants or proposed participants in the asset protection scheme or related schemes ('qualifying schemes').

256. Subsection (2) defines the asset protection scheme as the scheme which was subject to a statement made by the Chancellor of the Exchequer to Parliament on 26th February 2009.

257. Subsections (3) and (8) enable the Treasury to specify in an order that this clause applies to schemes that the Treasury considers correspond to, or are connected with, the asset protection scheme. The clause also applies to information or documents required in relation to the agreements entered into with participants in connection with the asset protection scheme or a qualifying scheme (subsection (4)).

258. Subsections (5) and (6) allow the Treasury to specify when and where the information and documents should be provided, and the form the information should take.

259. The Treasury can seek to enforce the requirements under this clause by way of an injunction, or in Scotland, by way of an order for specific performance.

Banking Act 2009

Clause 32: Services forming part of recognised inter-bank payment systems

260. This clause inserts a new section 206A into Part 5 of the Banking Act 2009 (the Act) (inter-bank payment systems).

New section 206A: Services forming part of recognised inter-bank payment systems

261. *Subsection (1)* confers a power on the Treasury to make order(s) applying (and modifying (*subsection (7)*) any sections under Part 5 of the Act to "service providers". "Service providers" are defined in *subsection (2)* as persons who supply services (such as telecommunication and IT systems) that form part of the arrangements of an inter-bank payment system that is specified by the Treasury as a recognised system under section 184(1) of the Act. The Bank of England may not be regarded as a service provider (*subsection (5)*).

262. An order under *subsection (1)* may be made only after consultation (*subsection (6)*) and only if a draft has been approved by each House of Parliament (*subsection (8)*).

263. It is envisaged that any order made applying Part 5 to service providers would make provision for the role of the FSA and the Bank of England in relation to persons who are subject to the oversight of the FSA, either as a person who has a permission under Part 4 of FSMA, or is a recognised persons under Part 18 of that Act.

264. In the event an order is made applying provisions of Part 5 to service providers, the Treasury must specify in any recognition orders made under section 184 of the Act the service providers who are to be subject to the Bank of England's oversight under Part 5 of the Act (as applied) (*subsection (2(b)*). Before specifying any person as a service provider, the Treasury must consult with various parties, including the person whom the Treasury proposes to specify (*subsection (4)*).

Clause 33: Minor amendments of provision made by Banking Act 2009

265. Parts 1 to 3 of the Banking Act 2009 (the Act) establish a permanent special resolution regime (SRR), providing the Authorities with tools to deal with banks and building societies that are failing to meet the conditions for authorisation to perform deposit-taking activities (and credit unions if applied by section 89 of that Act). This clause makes technical amendments to certain provisions in Parts 1 to 3 and to a provision in Part 15 of FSMA (which was inserted by Part 4 of the Banking Act 2009).

266. The Act includes property transfer powers, which may used to effect a transfer of some or all of the property, rights or liabilities of a failing institution; and to make provision for the purposes of, in connection with, or in consequence of such a transfer. *Subsection (2)* inserts a new section 48A (creation of liabilities) in the Act, expressly stating that this includes the power to create liabilities. This could be used, for example, where more liabilities than assets are transferred from a failing institution to a commercial purchaser and public funds are provided to make the transfer commercially viable. A liability may then be imposed on the residual of the failing institution in respect of these monies. New section 48A(2) makes clear that this liability can be determined by reference to another instrument such as an agreement with the transferee, which may make provision for the calculation of the amount of the liability.

267. The Act confers various powers on the Treasury to put in place compensation measures following an exercise of the stabilisation powers (see section 49), which may include provision for the appointment of independent valuers. These orders are subject to the draft affirmative procedure. The Treasury may make also additional provision for valuers, for example, their remuneration and procedure in separate orders, subject to the negative procedure. *Subsection (3)* allows for orders, subject to the draft affirmative procedure, that provide for the appointment of a valuer to contain this supplementary provision.

268. Subsection (4) makes a minor amendment to section 56 of the Act (independent valuer: money) providing for a power for the Treasury to make provision for the payment of remuneration and allowances of persons appointed to remove an independent valuer from office, correcting an oversight in the Act.

269. Subsection (5) provides that the Treasury can make a third party compensation order where a building society has been taken into temporary public ownership by way of a subscription to new deferred shares in the society, correcting an oversight in the Act.

270. Part 3 of the Act establishes a new bank administration procedure, which incorporates provisions of the Insolvency Act 1986 through a table listing all relevant sections, schedule and paragraphs that need to be included. *Subsection (6)* substitutes an entry relating to paragraph 79 of Schedule B1 of the Insolvency Act for the one relating to paragraph 80 of that Schedule. Paragraph 79 provides for the discharge of an administrator appointed by the court, and therefore is more apt for bank administration than paragraph 80, which provides for the discharge of an administrator appointed in other ways. *Subsection (7)* makes consequential changes to section 153 of the Act.

271. The Act inserts new sections into FSMA requiring the FSCS to contribute to special resolution regime costs and providing for information to be given to the FSCS in that case. Section 219(3A) of FSMA refers only to a "bank", although it is intended to refer to all the institutions subject to the special resolution regime i.e. banks, building societies and credit unions. *Subsection (8)* amends the provision so it refers to all of these institutions.

Director of Savings

Clause 34: Administration of court funds by Director of Savings

272. This clause provides for the Director of Savings to undertake functions on behalf of the Accountant General for England and Wales where appointed to do so under court funds rules. The rules in question are the court funds rules made under section 38(7) of the Administration of Justice Act 1982.

273. *Subsection (1)* defines the term "relevant function", for the purposes of this clause, as being a function of the Accountant General of the Senior Courts under court funds rules. *Subsection (4)* defines what is meant by the term "court funds rules". For these purposes, court funds rules are the rules as to the administration and management of funds in court made under

section 38(7) of the Administration of Justice Act 1982. (The court funds rules currently in force are the Court Funds Rules 1987.)

274. *Subsection (2)* provides that the Director of Savings ("the Director") may carry out a relevant function if appointed by the Accountant General under court funds rules to do so. Section 38(8)(a) of the Administration of Justice Act 1982 provides that the court funds rules may enable the Accountant General to appoint a person or persons to discharge functions conferred on the Accountant General under the rules (i.e. functions relating to the administration and management of funds in court). This provision, therefore, enables the Director to carry out functions relating to the administration and management of funds in court where the Accountant General appoints the Director, under the court funds rules to do so.

275. *Subsection (3)* makes clear that the power of the Director, under the court funds rules, to carry out relevant functions falls within section 69(1)(a) of the Deregulation and Contracting Out Act 1994. This means that such power may be included in an order made under section 69(2) of that Act enabling the Director to contract out the power to such person as the Director may authorise to do so.

General

Clause 35: Orders or regulations

276. This clause contains provision about orders and regulations under the Bill.

Clause 36: Minor and consequential amendments

277. This clause introduces *Schedule 2* and confers a power to make consequential amendments.

FINANCIAL EFFECTS OF THE BILL

278. The financial effects of this Bill are minimal, and largely limited to the creation of the CFEB and Money Guidance. On indicative budget forecasts, the costs of the CFEB, including delivery of Money Guidance and projects which form part of the National Strategy for Financial Capability, could rise from £37 million in 2010-11 to £56 million in 2014-15. It is expected that the costs of the CFEB to decline slowly thereafter, once the Money Guidance service is at 'steady state'. The financial services industry, through a levy on FSA-regulated firms and OFT-licensed consumer credit firms, will provide the principal funding for the CFEB's activity. However, it is expected that the Government will pay up to half of the costs of the Money Guidance component of the CFEB's costs (up to £20 million by 2014-15) through dormant accounts funds and public funds.

279. There are no other significant financial effects of the Bill. National Savings and Investments administration of the Court Funds Office's IT functions will have no additional financial

effects, given that that Office's expenditure already falls within the remit of the Consolidated Fund.

EFFECTS OF THE BILL ON PUBLIC SERVICE MANPOWER

280. This Bill has no significant effect on public service manpower. Some measures relate to redeploying some public sector staff from one organisation to another, with no impact on the overall level of public service manpower.

SUMMARY OF THE IMPACT ASSESSMENT

281. The impact assessment is published with the Bill. Members of Parliament can obtain a copy of the impact assessment from the Vote Office.

282. The Government expects this Bill to benefit the UK economy by helping prevent future financial instability and the associated costs and loss of confidence in the financial sector. The majority of the policies implemented in this Bill impose minimal costs. The minority of measures that do involve more substantial cost are the establishment of the Consumer Finance Education Body and Money Guidance service (though the measure has little impact on manpower as the CFEB's staff will be made up of redeployed FSA staff), new consumer redress mechanisms, and allowing the cost of funding the exercise of the special resolution regime powers to be transferred to FSCS levy payers. The possible costs of these and other proposals are examined in the Impact Assessment, though the costs for levy payers of the latter provision depends on the size of any future resolution, and cannot therefore be estimated.

EUROPEAN CONVENTION ON HUMAN RIGHTS

283. The Financial Services Secretary to the Treasury, Lords Myners, has made the following statement under section 19(1)(a) of the Human Rights Act 1998 ('HRA'):

"In my view the provisions of the Financial Services Bill are compatible with the Convention rights."

284. The Bill confers a number of powers on the FSA, Treasury, the courts and other public authorities. In exercising those powers, those public authorities will be subject to the duty imposed by section 6(1) HRA not to act in a way that is incompatible with the Convention rights (subject to the limited exceptions in section 6(2)).

285. Set out below are details of the most significant human rights issues thought to arise from the Bill.

286. The Bill contains provisions conferring powers to obtain information (whether pursuant to secondary legislation or directly) (clauses 9, 10, 13, 30 and 31 and paragraph 16 of new Schedule 1A to FSMA) and provision for information to be provided notwithstanding that it is held subject to a duty of confidence (clause 12). The Government considers it unlikely that

information sought or provided would be of a type protected by Article 8(1) of the European Convention on Human Rights ('ECHR'). To the extent that Article 8(1) is engaged, the Government considers that any interference will be potentially justifiable under Article 8(2) on the grounds that it is in accordance with the law, necessary for the economic well-being of the country and proportionate.

287. Clauses 14 to 17 extend the FSA's disciplinary powers under FSMA. Where Article 6(1) is engaged, the entitlement granted by that Article to a fair and public hearing by an independent and impartial tribunal is satisfied by the availability of the right to refer a finding in disciplinary proceedings for determination by the Financial Services and Markets Tribunal (the 'Tribunal'). Suspension or imposition of restrictions on an approved person under clause 17 is likely to engage Article 8(1). The Government considers that, to the extent that Article 8(1) is engaged, the interference will be potentially justifiable on the grounds that it is in accordance with the law, necessary for the economic well-being of the country and in the interests of the protection of the rights and freedom of others and proportionate.

288. Certain provisions confer power to levy sums or require the payment of penalties or contribution to costs (see clauses 15, 16, 28 and 29 and paragraphs 12 and 13 of the new Schedule 1A to FSMA). Exercise of these powers might be considered a "control [on] the use of property" within the meaning of Article 1 of the First Protocol ('A1P1') to the ECHR. The Government considers that any interference with property rights will be potentially justifiable on the ground that it is in the general interest, is proportionate and strikes a fair balance between the interests of the general community and the protection of the fundamental rights of those that may be required to pay the relevant sums. In relation to clause 28, the Government considers that, to the extent A1P1 is engaged, any interference will be potentially justifiable notwithstanding that clause 28(2) makes provision for calculations to be made by reference to circumstances existing on or after 19th November 2009 (being a date before commencement). The Government made an announcement on that date so that those potentially affected by any retrospective change in the law will be aware of the position in advance of that change.

289. Clauses 18 to 25 provide for a new form of "collective proceedings" in respect of certain "financial services claims". Article 6(1) is engaged by the measure in clause 20(1) providing for represented persons to be bound by a judgment or order in the proceedings. Article 6(1) is also likely to be engaged by provision in regulations under clause 23(3) for aggregated damages and provision in court rules under clause 24(2)(k) restricting rights of appeal. The Government considers that any interference with rights protected under Article 6(1) will be potentially justifiable on the grounds that it does not impair the essence of those rights and that any such interference represents a rational way of pursuing the legitimate aim of increasing access to justice. The Government considers that any interference with claimants' rights will be proportionate: claimants will be under no obligation to be represented in collective proceedings and, if they are not included, will be free to bring their own proceedings. The Government considers that any interference with defendants' rights will

also be proportionate. Limitations on defendants' rights to defend proceedings individually will be offset by the benefits of legal certainty and potential saving of costs.

290. Clause 26 replaces the existing section 404 of FSMA with new provision for the FSA to require firms to carry out a past business review and make redress to consumers. To the extent that Article 6(1) is engaged by rules establishing a consumer redress scheme, the Government considers that the availability of judicial review is sufficient to ensure that the process is compliant with that Article. Where rules under section 404 make the provision referred to in section 404A(1)(k), the Government considers that the requirement in section 404A(8) for rules to confer rights on firms to refer matters to the Tribunal ensures that any resulting determination of the firm's civil rights and obligations will meet the requirements of Article 6(1). Clause 26(2) provides for clause 26 to have effect in relation to relevant failures occurring before commencement. The Government considers that rules that make provision in relation to such a failure will be potentially justifiable. Rules establishing a consumer redress scheme may be made only in cases where a remedy or relief is available in respect of the relevant loss or damage in legal proceedings.

291. Clause 10(5) makes provision for regulations applying provisions made by or under the Companies Act 2006 to include provision creating offences (though the penalty imposed may not be more onerous than under the provision being applied). Clause 27 creates a new criminal offence for breaches of new section 51A of the Consumer Credit Act 1974. Any prosecution for such offences would be compatible with the Convention rights because the ordinary provisions of the criminal system already secure the right to a fair trial guaranteed by the ECHR.

COMMENCEMENT DATES

292. Clause 38 sets out the provisions that come into force on Royal Assent, and the provisions that come into force two months after Royal Assent. The remaining provisions come into force on an appointed day.

ANNEX A: LIST OF ABBREVIATIONS

APS – The Asset Protection Scheme

CCA – Consumer Credit Act 1974

CFEB – Consumer Financial Education Body

ECHR – European Convention on Human Rights

FSA – Financial Services Authority

FSCS – Financial Services Compensation Scheme

FSMA – Financial Services and Markets Act 2000

HMT – Her Majesty's Treasury

NS&I – National Savings and Investments

OFT – Office of Fair Trading

RRP – Recovery and Resolution Plan

the relevant authorities – The Treasury, FSA and Bank of England

FINANCIAL SERVICES BILL

EXPLANATORY NOTES

These notes refer to the Financial Services Bill
as brought from the House of Commons on 26th January 2010
[HL Bill 26]

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