These notes relate to the Lords Amendments to the Financial Services Bill, as brought from the House of Lords on 5th December 2012 [Bill 101]

FINANCIAL SERVICES BILL

EXPLANATORY NOTES ON LORDS AMENDMENTS

INTRODUCTION

1. These explanatory notes relate to the Lords Amendments to the Financial Services Bill, as brought from the House of Lords on 5th December 2012. They have been prepared by the Treasury in order to assist the reader of the Bill and the Lords Amendments and to help inform debate on the Lords Amendments. They do not form part of the Bill and have not been endorsed by Parliament.

2. These notes, like the Lords Amendments themselves, refer to HL Bill 25, the Bill as first printed for the Lords.

3. These notes need to be read in conjunction with the Lords Amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the effect of the Lords Amendments.

4. All the Lords Amendments were in the name of the Minister. Lords Amendment 79 results from an amendment in the name of the Minister at report in relation to which the Government supported an amendment in the name of Lord Eatwell and Baroness Hayter.

5. In the notes below:

"the 1998 Act" means the Bank of England Act 1998;

"the Bank" means the Bank of England;

"the FCA" means the Financial Conduct Authority;

"the FPC" means the Financial Policy Committee;

"the FSA" means the Financial Services Authority;

Bill 101—EN 55/2

"FSMA 2000" means the Financial Services and Markets Act 2000;

"the OFT" means the Office of Fair Trading;

"the PRA" means the Prudential Regulation Authority; and

"the Treasury" means Her Majesty's Treasury.

COMMENTARY ON LORDS AMENDMENTS

Lords Amendments 1, 2, 158 to 165, 170, 177, 178, 258 and 288

6. Lords Amendments 1, 2, 158 to 165, 170, 177, 178 and 258 would amend the terminology relating to the court of directors, the governing body of the Bank of England. Currently, the court of directors is comprised of up to 9 directors and 3 Bank executives (namely, the Governor and the two Deputy Governors). The executives are not "directors" of the Bank; and the legislation does not specify that the directors are to play a non-executive role. These amendments provide that all members of the court are "directors" and clarifies that those who are not Bank executives are non-executive members of court.

7. Lords Amendment 288 would repeal a spent provision relating to directors of the Bank.

Lords Amendments 3, 6 to 9, 148, 149, 151, 152, 154, 155, 169, 171 to 173 and 194 to 196

8. Lords Amendment 3 would provide for there to be a sub-committee of the court of directors of the Bank to be known as the Oversight Committee. The functions of the Committee would be to keep under review the Bank's performance in relation to its objectives, the duty of the FPC under new section 9C of the 1998 Act (inserted by clause 4 of the Bill) and the Bank's strategy, including its financial stability strategy. The Committee would also have functions in relation to financial management and the internal financial controls of the Bank. The Committee would be comprised of the non-executive directors of the Bank and would be chaired by the chair of the court of directors. In discharging its functions, the Committee would be able to arrange for reviews to be carried out. Copies of the reports of certain reviews (those falling within the definition of a "performance review" in new section 3C(3) inserted by Lords Amendment 3) would have to be provided to the Treasury who would be required to lay the report before Parliament and published (unless laying and publication would, in the view of the court of directors be against the public interest). The Committee would have access to the documents considered or to be considered by the FPC or Monetary Policy Committee. One or two members of the Committee would be able to attend the meetings of either of those Committees.

9. The amendment would replace section 3 of the 1998 Act which provides for the creation of a sub-committee of the court of directors comprised only of the

directors of the Bank. This sub-committee would cease to be required by statute.

10. Lords Amendments 6 to 9, 148, 149, 151, 152, 154, 155, 169, 171 to 173 and 194 to 196 would provide for functions which are currently exercised by the court of directors or the non-executive committee provided for in section 3 of the 1998 Act to be exercisable by the Oversight Committee. These functions would include the function of keeping the procedures followed by the FPC and the Monetary Policy Committee under review and determining the terms and conditions on which external members of the FPC or Monetary Policy Committee are to be appointed. The amendments would make consequential amendments of various references to "Committee" to make it clear which Committee is being referred to.

Lords Amendments 4, 5, 150, 156, 157

11. Lords Amendments 4 and 5 would reduce the number of Bank executives who sit on the FPC by one. The person with executive responsibility for the analysis of markets would no longer be a member of the FPC. Amendment 150 would make a related consequential amendment. Lords Amendments 156 and 157 would reduce the quorum of the FPC from 7 to 6 in consequence of the smaller size of the FPC.

Lords Amendments 10 to 15 and 18

12. Lords Amendment 10 would provide that, subject to contributing to the achievement by the Bank of the Bank's Financial Stability Objective, the FPC must exercise its functions with a view to supporting the economic policy of the Government.

13. Lords Amendment 13 would insert into the 1998 Act a new section which would enable the Treasury, by notice in writing, to specify to the FPC what the economic policy of the Government is to be taken to be. The Treasury would be required to give such a notice at least once a year. Any such notice would need to be published and laid before Parliament. Lords Amendment 14 would enable the Treasury, at any time, to give a recommendation to the FPC about the responsibility of the FPC in relation to support for the economic policy of the Government.

14. Lords Amendments 11, 12, 15 and 18 would make consequential changes to references to the FPC's objectives.

Lords Amendments 16, 17 and 19 to 21

15. Lords Amendment 16 would require the FPC to prepare an explanation of the reasons for the FPC's decision to give a direction or to make a recommendation to the PRA, FCA or Treasury or to the Bank in relation to its regulatory responsibilities. The explanation must also set out the FPC's reasons for believing that the exercise of the power is compatible with the FPC's objectives in new section 9C (inserted by clause 3 of the Bill) and the duty on the FPC to have regard to the matters set out in new section 9F (also inserted by clause 3). The explanation would also have to include an estimate of the costs and benefits of the action unless the FPC considers that it is not

reasonably practicable to do so.

16. Lords Amendment 17 would require the FPC to undertake reviews of each direction it has given and each recommendation it has made unless the direction has been revoked or the recommendation has been withdrawn. The purpose of the review is to determine whether the direction should be revoked or the direction should be withdrawn. In the case of directions, the FPC is required to review them on an annual basis unless they have been revoked. For recommendations, the FPC is required to maintain arrangements to review regularly any recommendations that have continuing relevance.

17. Lords Amendments 19 and 20 would require the FPC to publish in the next financial stability report prepared and published by the FPC under new section 9T of the 1998 Act (inserted by clause 3 of the Bill) any explanation produced as a result of Lords Amendment 16 and a summary of any report completed by virtue of Lords Amendment 17.

18. Lords Amendment 21 would make a consequential amendment.

Lords Amendments 22, 23, 33 and 34

19. These Lords Amendments would amend new sections 1A and 2A of FSMA 2000 (inserted by clause 5 of the Bill). The effect of the amendments would be to treat the functions of the FCA or PRA conferred under provisions of EU law which are specified by the Treasury by order as functions conferred on the regulators by or under FSMA 2000. The provisions which the Treasury are likely to specify for this purpose are provisions of directly applicable EU law such as European Market Infrastructure Regulation or the Capital Requirements Regulation. This would mean that the regulators' objectives and other provisions such as the regulators' statutory immunity would apply to the exercise of functions under provisions of EU law that have been specified.

Lords Amendments 24 and 41

20. Lords Amendment 24 would provide that in considering what degree of protection for consumers may be appropriate, the FCA may have regard to the differing expectations that consumers may have in relation to different kinds of investment or other transaction. For example, a consumer may chose to invest in a product that is specifically designed to provide both a financial reward to the investor and a benefit to society or the environment. In such a case, the consumer may expect a lower financial return.

21. Lords Amendment 41 would require both the FCA and PRA, when discharging their general functions, to have regard to the desirability where appropriate of each regulator exercising its functions in a way that recognises the differences in the nature and objectives of businesses carried on by different persons. For example, a business which is designed to produce a benefit to society or the environment will have different objectives to a business which is designed solely to

produce a high rate of return to its investors. Similarly, a deposit taker which is a building society or credit union is different from a deposit taker which is a company.

Lords Amendment 25

22. Lords Amendment 25 would provide that the FCA must have regard, in considering the effectiveness of competition in the market for any services for the purposes of the FCA's competition objective in section 1E, to the ease with which consumers who may wish to use those services can access them. The FCA would be required in particular to have regard to the ease with which consumers in areas affected by social or economic deprivation can access such services.

Lords Amendments 26 and 27

23. Lords Amendments 26 and 27 would amend the non-exhaustive definition of "financial crime" in section 1H(3) to provide that "financial crime" includes the financing of terrorism.

Lords Amendments 28 to 32, 37, 38 and 199

24. Lords Amendment 38 would require the PRA to establish and maintain a panel of practitioners known as the PRA Practitioner Panel, and to appoint such persons representing PRA-authorised persons as it considers appropriate. Lords Amendment 37 is consequential on Lords Amendment 38. Lords Amendment 199 would remove the need for the PRA to include in its annual report a report on its compliance with the duty to make and maintain arrangements for consulting PRA-authorised persons.

25. Lords Amendments 28 to 32 would rename the Practitioner Panel which the FCA is obliged to establish and maintain under section 1N as the "FCA Practitioner Panel". These amendments are consequential on Lords Amendment 38.

Lords Amendments 35 and 197

26. Lords Amendment 35 would amend the Bill to specify that the governing body of the PRA must set and publish its strategy in relation to its objectives, after consulting the Bank of England, and must review the strategy annually. Lords Amendment 197 would amend the Bill to provide that the governing body of the PRA cannot delegate its responsibility for setting the strategy.

Lords Amendments 36, 39, 42, 200 and 202

27. Lords Amendment 36 would require the PRA, when discharging its general functions, to have regard to the need to minimise any adverse effect on competition in relevant markets that might result from the manner in which the PRA discharges its functions. For example, in considering the approach to take to giving permission to new deposit takers, the PRA would have to consider the need to minimise any adverse effect on competition. Lords Amendments 39 and 42 would make consequential amendments.

28. Lords Amendment 200 would require the PRA to include in its annual report an analysis of how it has complied with the duty inserted by Lords Amendment 36 to

have regard to the need to minimise any adverse effect on competition that might result from the manner in which the PRA discharges its functions. Lords Amendment 202 would require the PRA, in its consultation on its annual report, to consult on the extent to which it has complied with that duty.

Lords Amendment 40

29. Lords Amendment 40 would require the FCA and the PRA, when discharging their general functions, to have regard to the desirability of sustainable growth in the economy of the United Kingdom in the medium or long term.

Lords Amendments 43 to 56, 91, 105, 181 and 201

30. Lords Amendment 43 would replace the proposed new section 3F of FSMA 2000. As currently drafted, the proposed section 3F provides for the PRA (rather than the FCA) to have responsibility for securing an appropriate degree of protection for those who are or may become policyholders in relation to decisions by insurers relating to the making of discretionary payments under with-profits policies. This change would ensure that the FCA would have responsibility in this area, and would provide that the FCA and PRA must prepare and maintain a memorandum of understanding which describes how they will co-ordinate their regulatory responsibilities in relation to the regulation of with-profits insurers. It would also define a with-profits policy for this purpose as a policy under which an individual is entitled to receive financial benefits (rather than just payments) at the discretion of the insurer. The Treasury would be able to amend the definition by order. Lords Amendment 105 would provide that any such order is subject to the affirmative resolution procedure.

31. Lords Amendment 44 would make a consequential change.

32. Lords Amendment 45 would enable the PRA to issue a direction to the FCA to require the FCA to refrain from proposed action in relation to a particular with-profits insurer (such as imposing a requirement) or in relation to with-profits insurers in general or a class of them (such as making a rule). The PRA would only be able to give a direction if the FCA proposes to exercise its powers in relation to the provision, amount, timing or distribution of with-profits benefits or the entitlement to future benefits, and the PRA is of the opinion that the giving of the direction is desirable in order to advance the PRA's general objective or its insurance objective.

33. Lords Amendments 46 to 48 would enable the PRA to at any time revoke a direction to the FCA.

34. Lords Amendments 49 to 55 would make further provision about the procedure for a direction. The effect of the amendments would be that the PRA must consult the FCA before issuing a direction. A direction must be given in writing, with a statement of reasons. Any revocation must be given in writing. The PRA would be required to publish a direction in such manner as it sees fit and, where the direction relates to a particular authorised person or insurer, give a copy to the person or

insurer. If, after consulting the Treasury, the PRA decides that it is not in the public interest to publish a direction, it would be able to refrain from doing so. However the PRA would be required to keep non-publication under review, and publish the direction when it is no longer against the public interest to do so.

35. Lords Amendments 56 and 91 would provide that directions given by the FCA in relation to supervision of consolidated groups or in relation to change of control applications are subject to any directions given by the PRA in relation to with-profits insurers by virtue of Lords Amendment 43.

36. Lords Amendment 181 would require the FCA to include in its annual report a report on any direction it has received under the new direction making power. Lords Amendment 201 would require the PRA to include in its annual report a report on any direction it has given under the new direction making power.

Lords Amendment 57

37. Lords Amendment 57 would enable the FCA to enter into arrangements with local weights and measures authorities or, in Northern Ireland, the Department of Enterprise, Trade and Investment for the provision by that authority or Department to the FCA of services. The services could only relate to activities that relate to the provision of credit or related activities.

Lords Amendments 58, 59 to 62 and 132

38. Lords Amendments 59 to 62 would amend section 22 of and Schedule 2 to FSMA 2000 to allow activities connected with the setting of a benchmark, such as the London Inter-Bank Offered Rate ("LIBOR"), to be regulated activities under FSMA 2000. Lords Amendment 60 would insert a definition of benchmark into section 22. Lords Amendment 62 would set out in Schedule 2 the scope of activities related to benchmarks that may be regulated. The exact benchmarks and activities that would become regulated under these provisions would be specified by the Treasury by Order. The activities which the Treasury currently intend to specify for this purpose are submitting to and administering LIBOR. Lords Amendments 58 and 132 would make consequential changes.

Lords Amendments 63 and 232

39. Lords Amendment 63 would insert a new clause after clause 8. The new clause would amend section 39 of FSMA 2000 which deals with appointed representatives. Currently, under FSMA 2000 an authorised person cannot be an appointed representative. The new clause would provide that an authorised person who has permission only in relation to a "qualifying activity" may carry on other regulated activities as an appointed representative. "Qualifying activity" would mean a regulated activity prescribed in regulations by the Treasury. The Treasury would only be able to prescribe an activity for this purpose if it relates to loans or other forms of credit (except where the obligation of the borrower to repay is secured on land). Lords Amendment 232 would be a consequential amendment to section 20 of

FSMA 2000.

Lords Amendments 64, 65 and 81

40. Lords Amendments 64, 65 and 81 would ensure that references to the threshold conditions include threshold conditions set out in Schedule 6 itself or specified under the power conferred by paragraph 8 of that Schedule.

Lords Amendment 66

41. Lords Amendment 66 would ensure that the language used in section 55H of FSMA (which refers to the FCA being able to refuse an application if it "considers" that it is desirable to do so) is aligned with the language used in section 55I of FSMA (which refers to the PRA being able to refuse an application if it "appears" to the PRA that it is desirable to do so).

Lords Amendments 67, 77, 80, 235 and 239

42. The Recognised Auction Platforms Regulations 2011, SI 2011/2699, which came fully into force on 18th June 2012, made amendments to FSMA 2000. The Regulations implemented the obligations in Articles 35, 36 and 43 of Commission Regulation (EU) 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances. These Lords Amendments would amend the Bill to reflect the amendments to FSMA 2000 made by the Recognised Auction Platforms Regulations 2011.

Lords Amendments 68 and 69

43. Lords Amendments 68 and 69 would ensure that the Bill preserves the legal effect of section 44 of FSMA in relation to the refusal of applications by the FCA and PRA by making it clear that the FCA or PRA may refuse an application in relation to a requirement imposed by that regulator if it appears that it is desirable to do so in order to advance any of its objectives (or operational objectives, in the case of the FCA).

Lords Amendments 70 and 71

44. Lords Amendments 70 and 71 would reflect more clearly the current legal position that a requirement imposed by a regulator on a firm under Part 4A may have an indefinite duration.

Lords Amendments 72, 75, 76, 211 to 221, 226, 229 and 242

45. The Financial Services (Omnibus 1 Directive) Regulations 2012, SI 2012/916, which came into effect on 16th April 2012 and implemented in part Directive 2010/78/EU of the European Parliament and the Council of 24 November 2010, made changes to FSMA 2000 in relation to the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority. These Lords Amendments would make amendments to the Bill to reflect the amendments made to FSMA 2000 by the Financial Services (Omnibus 1 Directive) Regulations 2012.

Lords Amendments 73 and 74

46. Lords Amendments 73 and 74 would amend the Bill to reflect changes made to FSMA 2000 by the Prospectus Regulations 2012, SI 2012/1538, which came into effect on 1st July 2012 and which implemented in part Directive 2010/73/EU (OJ No L 327, 11.12.2010, p1) of the European Parliament and of the Council.

Lords Amendments 78 and 86

47. Lords Amendment 78 would confer an express power on the FCA to make rules which prohibit authorised persons from entering into a regulated credit agreement that provides for the payment by the borrower of charges of a specified description or rules which prohibit the imposition of such charges. "Charges" includes the payment of interest. It also includes charges payable in connection with the provision of credit, regardless of whether the charge is made under the regulated credit agreement or whether the charge is payable to the lender. The FCA would also be able to make rules prohibiting the entering into of a regulated credit agreement which is capable of remaining in force after the end of a specified period (including taking into account any connected or "rolled over" agreements).

48. The FCA would be able to provide that any agreement entered into, or obligation imposed, in contravention of the agreement is unenforceable. The FCA would also be able to provide for the restitution of money or other property transferred under the agreement and for compensation to be paid.

49. Lords Amendment 86 would make a consequential amendment to disapply the provision of FSMA that provides that contravention of an FCA rule does not result in an agreement becoming unenforceable.

Lords Amendment 79

50. Lords Amendment 79 would enable the FCA to make rules which require authorised persons to participate in the setting of a benchmark. Such rules may in particular make ambulatory references to a code or other document issued by the person responsible for the setting of the benchmark (i.e. references which continue to operate effectively if a document is changed). This would enable the FCA to rely on the person responsible for setting the benchmark to specify the detail of what activities are required under the rules (e.g. what form the information is to be supplied in and when it is to be supplied).

Lords Amendments 82, 83, 115 to 121, 142, 234 and 245 to 248

51. Lords Amendment 121 would repeal section 397 of FSMA 2000 (misleading statements and practices). Lords Amendments 115 to 117 would create three new offences in its place.

52. Lords Amendment 115 would largely restate section 397(2) of FSMA 2000. The offence would relate to the making of a false or misleading statement with a view to inducing another person to enter into market activity.

53. Lords Amendment 116 would restate and extend section 397(3). The offence would relate to the creation of a false or misleading impression (whether by making a statement or otherwise) with a view to inducing a person to engage in market activity (reflecting section 397(3)) or obtaining a profit or avoiding a loss (a new provision).

54. Lords Amendment 117 would create a new offence relating to the making of a false or misleading statement, or the creation of a false or misleading impression, in connection with the setting of a specified benchmark. It would be immaterial for this offence what the motive of the person is (i.e. there is no requirement that the person be acting with the intention of inducing a person to engage in market activity or with the intention of making a gain or avoiding a loss).

55. The investments and benchmarks that are relevant to these three offences would be specified by the Treasury by order, subject to the affirmative procedure.

56. Lords Amendments 118 to 120 would make related provisions in respect of penalties, interpretation and the procedure for orders specifying which benchmarks and investments are the subject of these offences.

57. Lords Amendments 82, 83, 142, 234, and 245 to 248 would make further amendments that are consequential on the other amendments in this group.

Lords Amendment 84

58. Lords Amendment 84 would mean that the FCA would have a discretion rather than a duty to publish information about a direction requiring a financial promotion to be withdrawn. Without this amendment, the FCA would have to publish information about the matter, even if it subsequently decided that the promotion was, after all, acceptable.

Lords Amendments 85, 87 to 90, 237, 238 and 255

59. These Lords Amendments would amend the Bill to reflect changes made to FSMA 2000 by the Financial Services and Markets Act 2000 (Short Selling) Regulations 2012, SI 2012/2554, which came into effect on 1st November 2012 and which implemented certain Articles of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ No L 86, 24.3.2012, p 1).

Lords Amendments 92 and 93

60. Lords Amendments 92 and 93 would provide that the powers in Part 12A of FSMA 2000 (as inserted by clause 25) could be exercised in relation to a parent undertaking of a qualifying authorised person or a recognised UK investment exchange if the parent undertaking has a place of business in the United Kingdom – rather than only where the parent undertaking is incorporated in the United Kingdom.

Lords Amendments 94 to 97 and 223

61. Lords Amendments 94 and 96 would provide that the FCA or PRA may give a

direction to a qualifying parent undertaking of a qualifying authorised person or a recognised UK investment exchange if it considers it desirable to give the direction to advance one or more of its operational objectives (in the case of the FCA) or any of its objectives (in the case of the PRA). Lords Amendment 223 would provide that the Bank may give a direction to a qualifying parent undertaking if it considers it desirable for the purpose of the effective regulation of one or more recognised clearing houses in the group of the qualifying parent undertaking.

62. Lords Amendment 95 would provide that the power of direction would also be exercisable for the purpose of the effective consolidated supervision of the group.

63. Lords Amendment 97 would provide that a requirement imposed by a direction under the new section 192C may (but need not) be expressed to expire at the end of a specified period. The amendment would also make express provision for the direction to be revoked by the regulator and for the direction to cease to have effect if the recipient ceases to be a qualifying parent undertaking.

Lords Amendments 98, 224, 225, 230, 264 to 266, 268, 269, 271, 272 and 275

64. These Lords Amendments would confer further powers on the Bank in its capacity as regulator of recognised clearing houses.

65. Lords Amendments 98 and 225 would insert a new Part 2A into the new Schedule 17A to FSMA 2000. The new Part 2A would make provision requiring the Bank to be notified of the commencement of insolvency proceedings relating to a UK clearing house and would confer upon the Bank a power to direct insolvency practitioners appointed in relation to a company that is, or has been, a UK clearing house. This power of direction would operate without prejudice to the existing statutory requirements relating to company insolvency.

66. Lords Amendment 224 would insert a new paragraph 23A into Schedule 17A which would apply to the Bank in its capacity as regulator of recognised clearing houses various powers conferred by Part 24 of FSMA 2000 upon the regulator of authorised persons in the event of the insolvency of an authorised person. These powers principally relate to participation in insolvency proceedings.

67. Lords Amendment 230 would amend section 313 of FSMA 2000 in order to define the term "UK clearing house" for the purposes of Part 18 of FSMA 2000.

68. Lords Amendments 264 to 266, 268, 269, 271, 272 and 275 would expand the scope of Part 24 of FSMA 2000 (which makes provision about the insolvency of authorised persons and the involvement of regulators in related insolvency proceedings) to include the insolvency of a recognised investment exchange.

Lords Amendments 99 and 227

69. Lords Amendment 99 would insert a new clause into the Bill after clause 28 which would insert a new section 296A into Part 18 of FSMA 2000. This new

provision would empower the Bank to direct a UK clearing house to follow a specified course of action where it is of the view that it is necessary to give the direction, having regard to various specified public interests. This new power of direction would be additional to the existing power of direction provided for by the current section 296 of FSMA 2000, and the additional power of direction provided for by the new section 296A would not be available in circumstances where a direction could be given under section 296. Any direction under the new section 296A would be enforceable by way of injunction (in England, Wales and Northern Ireland) or by an order for specific performance (in Scotland). Lords Amendment 227 would apply the procedures applicable to directions made under section 296 of FSMA 2000 to directions made under the new section 296A.

Lords Amendments 100, 141, 243 and 244

70. Lords Amendment 100 would permit the Treasury, by order, to replace amendments to FSMA 2000 made by the Bill (which permit regulators to publish information about warning notices) with section 391(1) of FSMA 2000 as it currently stands (which prohibits publication). The Lords Amendment would also allow consequential repeals of FSMA to be made. The order would be subject to the affirmative resolution procedure (see Lords Amendment 141).

71. The effect of Lords Amendment 243 would be to amend section 395 of FSMA 2000 to require the FCA and PRA to determine and issue a statement on their procedure for taking decisions relating to publication of information about a matter to which a warning notice relates. Lords Amendment 244, while restating the procedural requirements currently in the Bill, would in addition require the procedure for a decision relating to publication of information about a matter to which a warning notice relates to ensure that such a decision is taken by a person other than the person by whom the decision was first proposed, or by two or more persons not including the person by whom the decision was first proposed, and in accordance with a procedure which is, as far as possible, the same as that applicable to a decision to issue a warning notice.

Lords Amendments 101 to 103

72. These Lords Amendments would make amendments to provisions in Part 19 of FSMA 2000 (which relates to Lloyds of London) which are consequential on amendments currently contained in the Bill.

Lords Amendments 104, 106, 231, 233, 236, 267, 270, 273, 274 and 276

73. Lords Amendment 233 would amend section 23 of FSMA 2000 to create a new criminal offence of carrying on a credit-related regulated activity without having permission to do so, regardless of whether the person has permission to carry on another regulated activity. The amendment would confer power on the Treasury to designate an activity as a "credit-related regulated activity" by order. Lords Amendment 106 would apply the affirmative procedure to such an order. The Treasury would only be able to designate activities related to the entering into or administering of a credit agreement or enforcing debts under a credit agreement as

credit-related regulated activities for this purpose, but not activities related to agreements under which the borrowing is secured on land (for example, mortgages).

74. Lords Amendment 233 would also insert a new section 26A of FSMA 2000 which would relate to the enforceability of an agreement entered into by a person carrying on a credit-related regulated activity without the necessary permission. It would ensure that the borrower is not required to repay the funds advanced under the loan.

75. Lords Amendment 233 would also insert new section 28A of FSMA 2000 which would make provision for agreements relating to credit which are rendered unenforceable by FSMA 2000 to be enforced where the FCA is satisfied that it is just and equitable to allow this.

76. Lords Amendment 231 is consequential on Lords Amendment 233.

77. The effect of Lords Amendment 233 is that carrying on a credit-related regulatory activity without the appropriate permission could result in criminal proceedings and regulatory sanctions. Lords Amendment 236 would require the regulators to include in their statement of policy under section 210 of FSMA 2000 (statement of policy in relation to disciplinary measures) provision explaining how the regulators will use those powers in relation to conduct which is also a criminal offence under new section 23(1A) (which would be inserted by Lords Amendment 233).

78. Lords Amendments 267, 270, 273, 274 and 276 would require an insolvency practitioner or liquidator to notify the FCA in circumstances where it appears that an authorised person has carried out a credit-related regulated activity without permission.

79. Lords Amendment 104 would insert into FSMA 2000 a new definition of "credit-related regulated activity".

Lords Amendments 107 to 110

80. Clause 48 permits an order under clause 47 (an order transferring to the FCA and/or the PRA functions of the FSA conferred under legislation governing mutual societies) to apply the regulators' objectives under FSMA 2000 to their functions under the legislation governing mutual societies. It is possible that in future, new objectives might be given to the PRA by an order made under new section 2D of FSMA 2000, which provides an express power to impose additional objectives, or by an order under new section 22A of FSMA 2000 specifying activities as PRA-regulated activities. These Lords Amendments would permit such new objectives to be applied to the PRA's (non-FSMA 2000) functions in relation to mutual societies.

Lords Amendments 111 to 113

81. Lords Amendments 111 and 112 would provide that where the Treasury

consider that it is in the public interest that either regulator should undertake an investigation into any relevant events (as defined by clause 73 of the Bill) and the regulator does not appear to have undertaken, or to be undertaking, such an investigation, the Treasury must (rather than may) direct the regulator to carry out an investigation.

82. Lords Amendment 113 would provide that the Treasury must lay before Parliament and publish any direction it gives to a regulator that provides that the regulator is not required to carry out an investigation under Part 5 of the Bill or which relates to the conduct of such an investigation.

Lords Amendment 114

83. Clause 80(5) of the Bill defines the PRA's legislative functions for the purposes of the clause, and includes a reference to its functions of giving directions under section 328 of FSMA 2000. However, the PRA will not have functions under section 328 so this Lords Amendment would remove this otiose reference.

Lords Amendments 122 and 126

84. Part 1 of the Banking Act 2009 establishes a special resolution regime (SRR), providing statutory tools to deal with banks and building societies that get into financial difficulties. Lords Amendments 122 and 126 would amend the special resolution regime in Part 1 of the Banking Act 2009 and extend it to investment firms.

85. Lords Amendment 122 would add two new special resolution regime objectives, by *subsection (3)*. The first of these, Objective 6, is the protection of client assets. *Subsection (2)* of the new clause defines client assets as "assets which an institution has undertaken to hold for a client (whether or not on trust, and whether or not the undertaking has been complied with)"; for example, securities held for an investor. The special resolution regime in the Banking Act already provides for the protection of depositors (Objective 3); the new Objective 6 would provide for investor protection and would be relevant for the exercise of stabilisation powers under the special resolution regime in respect both of banks that provide investment services and of investment firms that are not banks. The second new objective, Objective 7, would be to minimise the adverse effect on financial market infrastructure (such as investment exchanges and clearing houses) of the use of stabilisation powers. For example, in exercising stabilisation powers in respect of an investment firm, the new Objective 7 would require the resolution authorities (namely, the Bank, the FCA, the PRA and HM Treasury) to consider the impact of their actions on the default provisions of exchanges and clearing houses in which the investment firm was a participant.

86. The public interest test in section 8 of the Banking Act 2009 for the exercise of stabilisation powers currently refers to the protection of depositors. *Subsection (4)* would add reference to the protection of client assets. In line with the extension of the special resolution regime beyond banks, subsection (4) would also amend the reference to the "banking systems of the UK" in the public interest test in section 8 to

a reference to the UK's financial systems.

87. Section 47 of the Banking Act 2009 empowers the Treasury to make an order providing for safeguards in a partial transfer of the business of a bank in respect of which stabilisation powers are exercised, including safeguards in relation to deposits. *Subsection (5)* would add a reference to client assets.

88. *Subsection (6)* would make a consequential amendment to the index of defined terms in the Banking Act 2009.

89. Lords Amendment 126 would insert a new clause extending the special resolution regime to investment firms. *Subsection (7)* of the new clause would provide the definition of "investment firm" in the new section 258A which would be inserted into the Banking Act 2009. It defines "investment firm" by reference to European Union Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions, but limits the stabilisation powers in the special resolution regime to UK investment firms.

90. Banks, building societies and credit unions are excluded from being "investment firms"; Part 1 of the Banking Act already provides for a resolution regime for such entities. The new section 258A would therefore include a power for the Treasury to exclude by order categories of investment firm that would otherwise be caught by the definition. The order-making power would be subject to the affirmative procedure, but an order could be made immediately in an emergency provided that it was approved by approval of both Houses within 28 sitting days. For example, the order-making power could be used to exclude all firms with initial capital of less than 730,000 euros.

91. *Subsections (2) to (5)* of the new clause would apply the special resolution regime for banks and group companies to investment firms and group companies, with necessary modifications. The effect of the amendments is that references in the legislation to banks would be taken as references to investment firms – including in section 10 which provides for the Banking Liaison Panel: the Panel would need to include a representative of investment banks.

92. *Subsection (6)* of the new clause would apply the special administration regime in Part 3 of the Banking Act 2009 to investment firms. (Part 3 provides for the administration of the remainder of a bank when its business or part of its business has been transferred to a private sector purchaser or to a bridge bank owned by the Bank of England. The objectives of the special administrator (in order of priority) are to provide necessary services or facilities to the private sector purchaser or the bridge bank, and to wind up the bank.)

93. *Subsections (8) and (9)* of the new clause would make consequential amendments.

Lords Amendment 123 and 124

94. Lords Amendments 123 and 124 would amend provisions in the Bill relating to the special resolution regime and bank administration. Where the holding company of a failing bank has been taken into public ownership, Lords Amendment 123 would allow shares that have been transferred, whether within public ownership or to a private sector purchaser, to be transferred back to their original ownership. Lords Amendment 124 is a consequential amendment, reflecting the insertion of a new section 81A into the Banking Act by clause 86(2).

Lords Amendments 125 and 278

95. Lords Amendment 125 would insert a new clause conferring powers on the Bank in respect of group companies. The Bank has powers to sell all or part of the business of a failing bank to a private sector purchaser (section 11 of the Banking Act 2009), and powers to transfer all or part of the business of a failing bank to a 'bridge bank' owned by the Bank (section 12). *Subsection (5)* of the new clause would insert new sections 81B to 81D into the Banking Act 2009, which would extend these powers to companies in the same group as the failing bank. The powers would be exercisable both in relation to companies in the same group as a failing bank and (by virtue of Lords Amendment [193F]) the companies in the same group as a failing investment firm. (The stabilisation powers are exercisable not to resolve the group company, but to facilitate the resolution of the failing company.)

96. The new section 81B would set out conditions that must be satisfied for the stabilisation power to be exercised in relation to the group company. The conditions mirror the conditions which already apply in respect of the failing bank; for example, the public interest test and the limitation to UK entities. But the conditions also require the Bank to be satisfied that it is necessary to exercise share or property transfer powers in relation to the group company, for example because it would not be sufficient to exercise powers only in respect of the failing entity, or (where financial assistance has been provided) that exercising share or property transfer powers in relation to the group company is an appropriate way to protect the public interest.

97. New section 81B would also impose the requirement that, if the Bank exercises (or is considering exercising) share or transfer powers in respect of a group company, it must have regard to the need to minimise the adverse effect on the rest of the group. For example, if a bank's business is reliant on a data centre which is owned by another group company and the Bank is considering transferring the data centre along with the failing bank's business to a commercial purchaser, the Bank must consider the effect of doing so on the rest of the group and seek to minimise that effect.

98. New section 81C would treat references to "banks" as including references to group companies. In particular, subsection (2) of new section 81C applies that treatment so that stabilisation powers (share transfer powers and property transfer powers) are available to the Bank in respect of group companies of the failing entity, and so that the administration regime in Part 3 of the Banking Act is available in

respect of a group company where the Bank has exercised a stabilisation power in respect of that company.

99. New section 81D would provide the definition of "group company". This adopts definitions from the Companies Act 2006, but allows the Treasury to specify, by order, conditions which must be met. The order would subject to the affirmative procedure, but could be made (without approval) in an emergency provided it was approved by each House within 28 sitting days. This power would enable the Treasury to specify, for example, that the business of the holding company and/or its subsidiaries must be wholly or mainly financial services; and that the Bank should operate at the lowest level of holding company/group possible.

100. *Subsections (3) and (4)* of the new clause would give the Bank powers similar to those available to the Treasury to remove or vary the appointments of directors of failing entities, and (if necessary) group companies, where it exercises stabilisation powers.

101. *Subsections (2), (6) and (7)* of the new clause would make minor amendments consequential on the above.

102. Lords Amendment 278 would amend the modifications of the Banking Act contained in Schedule 17 to the Bill. It deals with the situation where the failing entity is FCA-authorised but not PRA-authorised; for example, an investment firm that is not PRA-authorised but whose failure is considered to pose risk to the financial stability of the UK. In that case, it will be for the FCA to determine that the firm is failing to meet the threshold conditions, but for the Bank to act as the resolution authority (as normal).

Lords Amendments 127

103. Lords Amendment 127 would insert a new clause following clause 86 which would make amendments to the Banking Act 2009 in order to apply (with modifications) the special resolution regime provided for in Part 1 of that Act to UK clearing houses. This would mean that stabilisation powers could be exercised by the Bank in respect of a UK clearing house in instances where (1) the clearing house is failing, or is likely to fail to satisfy the recognition requirements, and (2) where the clearing house is a provider of critical clearing services, there is no real likelihood of action being taken that would allow the clearing house to maintain those services while continuing to meet the recognition requirements. Before exercising a stabilisation power in respect of a UK clearing house, the Bank would additionally have to be satisfied that it is necessary to use the power, having regard to the public interest in (a) the stability of the financial systems of the UK or (b) the maintenance of public confidence in the stability of UK clearing houses. The stabilisation powers that would be available to the Bank in these circumstances include: the power to transfer ownership of a UK clearing house to any person by way of share transfer instrument; the power to transfer the property, rights and liabilities of a UK clearing house and the power to modify or amend a clearing house's rules and make provision about its

membership where a property transfer has taken place. Power would also be conferred on the Treasury to make compensation orders in respect of transfers made in respect of UK clearing houses.

Lords Amendments 128, 131 and 133

104. Lords Amendment 128 would provide that an order made by the Treasury under clause 91 could make provision for various provisions of the Consumer Credit Act 1974 relating to the powers of Consumer Credit Act enforcement authorities to apply in relation to compliance with FSMA 2000 so far as relating to relevant regulated activities, in relation to an investigation by those bodies into the commission or suspected commission of a relevant offence under FSMA 2000 or to other things done in the exercise of any of those provisions applied by the order. Lords Amendments 131 and 133 would make consequential amendments.

Lords Amendments 129 and 134

105. Lords Amendment 129 would enable the Treasury, by order made under clause 91, to enable the Department of Enterprise, Trade and Investment to institute proceedings in Northern Ireland for an offence under FSMA 2000 which relates to the provision of credit or related activities. Lords Amendment 134 would provide that such provision could only be made with the consent of that Department.

Lords Amendments 130 and 135 to 137

106. Lords Amendment 130 would provide that, if the Treasury makes an order under the powers in clause 91(2) such that regulatory sanctions under FSMA 2000 would be available in relation to acts which are subject to criminal sanctions under the Consumer Credit Act, the order must provide that a person may not subsequently be convicted if they have been the subject of regulatory sanctions under FSMA 2000.

107. Lords Amendment 136 would provide that, in exercising the powers in clause 91(2), the Treasury must have regard to the importance of securing an appropriate degree of protection for consumers and the principle that a burden imposed should be proportionate to its benefits. Lords Amendments 135 and 137 are related consequential amendments.

Lords Amendments 138 and 147

108. Lords Amendment 138 would amend the Consumer Credit Act 1974 to enable the OFT to suspend a licence given under that Act with immediate effect. The amendment would insert new sections 32A, 32B and 34ZA of the Consumer Credit Act 1974. New section 32A would enable the OFT, if it appears to the OFT to be urgently necessary for the protection of consumers that a licence should cease to have effect immediately or on a specified date, to suspend the licence.

109. A suspension under new section 32A would have to have a duration of no more than 12 months or to state that the duration of the suspension is to be provided for by new section 32B. Where a notice provides for section 32B to apply, the suspension lasts for 12 months unless (a) the OFT ends the suspension before then or

(b) the OFT has given notice that it is minded to revoke the licence, in which case, provided certain conditions are satisfied, the suspension can last for longer than 12 months.

110. New section 32A would require the OFT, when it suspends a licence under section 32A, to invite the licensee (or the original applicant in the case of a group licence) to make representations. New section 34ZA would require the OFT to reconsider its determination under new section 32A and determine whether to confirm it or revoke it, having taken into account any representations received.

111. Lords Amendment 147 would provide that the new clause would come into force 2 months after Royal Assent to the Bill.

Lords Amendments 139, 140, 146, 182, 203 and 205

112. Lords Amendment 139 would insert a new clause in the Bill to provide for new arrangements to apply to the FSA in relation to penalty receipts (the amounts received by the FSA by way of penalties imposed under FSMA 2000) received from 1 April 2012. The FSA would be required to pay penalty receipts to the Treasury after deducting enforcement costs.

113. *Subsection (3)* would define enforcement costs in terms of the exercise of or consideration of the exercise of its enforcement powers in particular cases. The general costs of the FSA's enforcement capability which are not attributable to case work (e.g. the cost of senior management or enforcement policy work) would not be treated as an "enforcement cost". *Subsection (4)* would define what "enforcement powers" means. The definition would include powers to impose penalties or issue statements of public censure; powers under any other enactment specified by the Treasury by order; and powers in relation to the investigation and prosecution of relevant offences specified in *subsection (6),* such as offences under FSMA 2000 and subordinate legislation and any other offences specified by the Treasury by order. *Subsections (7) to (9*) would enable the Treasury to give a direction to the FSA as to how the FSA is to comply with its duty under this provision. *Subsection (10)* would require the Treasury to pay any sums received into the Consolidated Fund. *Subsection (11)* would provide that the FSA's existing scheme for applying the penalties received under FSMA 2000 (whereby penalties are applied for the benefit of authorised persons) should only be applied in respect of the receipts it is allowed to retain in relation to enforcement costs. Lords Amendment 146 would provide for commencement of the new clause on Royal Assent to the Bill.

114. Lords Amendment 140 would insert a new clause providing for similar arrangements to apply to the Bank in relation to its powers to issue penalties in respect of payment systems and recognised clearing houses. These arrangements would apply only to penalty receipts received after commencement of the new clause. Unlike the FSA currently and the FCA and PRA in future, the Bank will not be required to operate a penalty scheme.

115. Lords Amendment 182 would provide for arrangements for the FCA similar to those provided for the FSA in Lords Amendment 132. It would also require the FCA to operate a scheme to ensure the receipts it retains are used for the benefit of regulated persons. The penalty scheme would be required to provide that those who have become liable to pay a penalty do not receive any benefit under the scheme the following year.

116. Lords Amendments 203 and 205 would provide for arrangements for the PRA similar to those provided for the FCA in amendment 132.

Lords Amendments 143 to 145

117. Lords Amendment 143 would amend the indicative list of provisions which a transitional order under clause 100 might include. As presently drafted, clause 100(4)(b) provides that an order might make provision treating any rules made, permission given or other thing done by the FSA as having been done by the PRA or the Bank. The effect of Lords Amendment 143 would be that the order might provide that the FCA, the PRA and the Bank could adopt relevant regulatory materials (as defined by Lords Amendment 145) made by the FSA, and could make any necessary changes to them, for example, numbering and cross-referencing changes. Lords Amendment 144 is consequential on Lords Amendment 143: because the regulators would themselves designate the FSA rules that each will adopt, there is no need for the transitional order to do so.

Lords Amendments 153

118. Lords Amendment 153 would permit an external member of the FPC to be removed from office if they are the subject of a debt relief order.

Lords Amendments 166 and 188 to 193

119. Lords Amendments 188 to 193 would provide that certain functions currently conferred by the Bill on the "Bank" are to be exercised by the court of directors itself (rather than delegated to a sub-committee or executive within the Bank). They are: arranging for additional functions to be exercised by the Oversight Committee (new section 3A(3) of the 1998 Act); the decision as to whether reports produced by the Oversight Committee are to be published in full and the review of any non-publication (new section 3D of the 1998 Act); the function of being consulted by the PRA on the PRA's strategy (new section 2DA(2) of FSMA 2000); and the function of appointing members of the PRA (paragraphs 6 to14 of new Schedule 1ZB to FSMA 2000).

120. Lords Amendment 166 would provide that the court of directors could not delegate functions which are expressly conferred on it by any enactment.

Lords Amendments 167 and 180

121. Lords Amendment 167 would require the Bank to publish a record of each meeting of the court within 6 weeks of the day of the meeting, unless no meeting of the court is held in that period in which case publication is required within 2 weeks of the day of the next meeting. This arrangement reflects the expectation that the court of

directors will approve the record of each meeting at the subsequent meeting. The court of directors meets on a monthly basis except during the summer when there is one month where no meeting is held. The record must specify any decisions taken at the meeting and must set out in relation to each decision a summary of the discussion. Publication of information where publication would, in the opinion of the court of directors, be against the public interest is not required.

122. Lords Amendment 180 would impose an obligation on the FCA to publish a record of each meeting of its governing body. The details of the duty to publish are similar to those set out above in relation to Lords Amendment 167.

Lords Amendment 168

123. Lords Amendment 168 would provide that a member of the court of directors of the Bank who is the Governor or a Deputy Governor of the Bank may not be designated by the Chancellor of the Exchequer as chair of the court or as deputy chair.

Lords Amendments 174 to 176

124. Lords Amendments 174 to 176 would ensure that the Bank of England's immunity under section 244 of the Banking Act 2009 covers all of its functions under FSMA 2000, both its regulatory functions in relation to recognised clearing houses and any other functions conferred on it by FSMA 2000 as amended by the Bill, including functions in relation to the PRA.

Lords Amendment 179

125. Lords Amendment 179 would ensure that the definition of "functions" in relation to the FCA in Schedule 1ZA is drafted consistently with the parallel definition of "functions" in relation to the PRA in Schedule 1ZB.

Lords Amendments 183, 184, 206 and 207

126. These Lords Amendments would amend the fee raising powers of the regulators to ensure that they cover the functions of the regulators under enactments other than FSMA 2000, such as the Banking Act 2009, and certain functions conferred under EU law, such as the European Market Infrastructure Regulation or the Capital Requirements Regulation.

Lords Amendments 185 and 208

127. Lords Amendment 185 would ensure that the members of the FCA have immunity from claims for damages in their capacity as members, distinct from their position as directors: this would preserve the current position of FSA board members under FSMA 2000. Lords Amendment 208 would make similar provision in respect of the PRA.

Lords Amendments 186 and 209

128. Lords Amendment 186 would provide that if the FCA or a member, officer or member of staff of the FCA is appointed to carry out an investigation, their actions and omissions would be treated as actions and omissions in the discharge of functions

under FSMA 2000 by the FCA. For example, if the FCA, or a member of its staff, were appointed as an investigator or as a skilled person by the PRA or the Bank, they would be covered by the FCA's statutory immunity. Lords Amendment 209 would make parallel provision in respect of the PRA, or a member, officer or member of its staff.

Lords Amendments 187, 210, 249 to 252, 257, 259, 277 and 280

129. FSMA 2000 uses the terms "officer", "director" and "board member" in various places. The meaning of "officer" generally encompasses the other two terms. These Lords Amendments would remove any doubt on this point by ensuring consistency of terminology.

Lords Amendment 198

130. Lords Amendment 198 would amend the Bill to provide that the PRA may only set its budget with the approval of the Bank.

Lords Amendment 204

131. Lords Amendment 204 would amend the provisions relating to the PRA's financial penalty scheme to reflect the fact that the PRA may only impose penalties on PRA-authorised persons (and not on persons who are authorised but not PRA-authorised).

Lords Amendments 222 and 254

132. Lords Amendment 222 would provide that the PRA may impose penalties under section 63A of FSMA (performance of controlled functions without approval) without obtaining the prior consent of the FCA.

133. Lords Amendment 254 would clarify, in the amendments being made to section 168 FSMA (investigations), that the FCA may carry out an investigation where it appears to it that there are circumstances suggesting that a person in relation to whom the PRA has given its approval under section 59 may not be a fit and proper person.

Lords Amendment 228

134. Lords Amendment 228 would ensure that all four references to "the Authority" in section 300B of FSMA 2000 are amended to "the appropriate regulator", not just the first three references.

Lords Amendments 240 and 241

135. Lords Amendments 240 and 241 would amend the procedural arrangements that apply when a non-disciplinary decision made by a regulator under FSMA 2000 is remitted back to the regulator by the Upper Tribunal. The amendments would require the relevant regulator to issue a second decision notice in all such cases (rather than a final notice) once it has considered the Tribunal's direction and reached a new decision in accordance with the findings of the Tribunal. Second (and subsequent) decision notices may, like the first decision notice, be referred to the Upper Tribunal;

a final notice may only be challenged by judicial review, in the High Court.

Lords Amendment 253

136. Lords Amendment 253 is a consequential amendment relating to the new criminal offences created by Lords Amendment 233 (carrying on a credit-related regulated activity without permission) and Lords Amendments 115 to 121 (false or misleading statements and false or misleading impressions).

Lords Amendment 256

137. Lords Amendment 256 would maintain the current position under FSMA 2000 whereby the FSA may disclose information obtained from HMRC for the purposes of a criminal prosecution, without the consent of HMRC.

Lords Amendments 260 to 263

138. Lords Amendments 260 would insert a new section 339A into FSMA 2000 which would require the PRA, as part of the arrangements it must maintain under section 2K for supervising PRA-authorised persons, to have arrangements for sharing information and opinions with auditors of PRA-authorised persons. The PRA would have to make a code of practice setting out how it will comply with this duty, publish the code, and send a copy of the code to the Treasury; the Treasury must lay the code before Parliament.

139. Lords Amendment 261 would require the PRA to make rules imposing duties on auditors of PRA-authorised persons in relation to co-operation with the PRA in its supervision of those persons. (The amendment also restates the provisions in the Bill which permit the FCA and the PRA to make other rules imposing duties on auditors.)

140. Lords Amendments 262 and 263 are consequential amendments.

Lords Amendment 279

141. Lords Amendment 279 would amend section 120 of the Banking Act 2009 to reflect the terminology of Scottish law under which documents are lodged with the Court. Section 120 deals with notice to the regulators of administration and winding-up proceedings in relation to banks.

Lords Amendment 281

142. Paragraph 8 of Schedule 6 to FSMA 2000 applies to a person who has his head office outside the EEA and appears to the FSA to be seeking to carry on a regulated activity related to insurance business, and requires that person to satisfy specified additional conditions. Lords Amendment 281 would amend the Bill so that it replaces the reference to "the Authority" – that is, the FSA – in paragraph 8 of Schedule 6 to FSMA 2000 with a reference to the FCA or PRA – that is, whichever of the FCA or PRA is specified by the Treasury by order.

Lords Amendments 282 and 284 to 287

143. These Lords Amendments would make further consequential amendments to

other primary legislation so that they refer to the new regulators or to FSMA 2000 as amended by the Bill.

Lords Amendment 283

144. Lords Amendment 283 would clarify a consequential amendment being made to the Companies Act 1985.

Lords Amendments 289 and 290

145. Paragraph 9 of Schedule 20 to the Bill makes provision enabling the FSA to disclose information to the PRA to enable it to prepare for its regulatory responsibilities. Lords Amendment 289 and 290 would make parallel provision enabling the FSA to disclose information to the Bank of England to enable it to prepare for the functions conferred on the Bank by the Bill.

FINANCIAL EFFECTS OF THE LORDS AMENDMENTS

146. The Lords Amendments would not, in general, significantly affect spending by Government departments met from money voted by Parliament.

147. However, Lords Amendments 125, 126, and 127 have the potential to result in expenditure for the Treasury. These amendments extend the special resolution regime in Part 1 of the Banking Act 2009 to UK investment firms and to clearing houses, and to group companies of banks, investment firms and clearing houses; they also extend the administration procedure in Part 3 of that Act to investment firms, and to group companies of banks and investment firms. Lords Amendment 122 adds two new special resolution objectives, which might similarly result in expenditure for the Treasury.

148. It is not possible to quantify what expenditure is likely to be incurred, nor when such expenditure might be incurred. The powers will only be exercised, and the associated expenditure will only arise, if and when an entity over which the powers may be exercised fails (that is, the entity is failing or is likely to fail to satisfy its threshold conditions under FSMA, and it is not reasonably likely that, ignoring the stabilisation powers, action will be taken by or in respect of the entity that will enable the entity to satisfy its threshold conditions). Unless such an entity fails, and stabilisation powers are exercised, no expenditure will arise.

149. In the event that the Treasury, or other persons (for example, the Bank), do incur expenditure in the exercise of stabilisation powers, provision made under the Banking Act 2009 provides for costs to be recovered from the Financial Services Compensation Scheme, up to an amount equal to that which the Financial Services Compensation Scheme would itself have expended in the event that the entity had become insolvent. The effect of this provision is that should the Treasury use funds taken from voted money or the Consolidated Fund to pay for expenditure from the exercise of resolution powers, certain of those costs can be recovered, for example

legal costs or the costs of appointing an independent valuer to discharge functions under the Banking Act, subject to the limit just mentioned.

150. Lords Amendment 139 makes provision for FSA to pay to the Treasury the penalty income it receives under FSMA 2000, net of its enforcement costs, in the financial year beginning on 1 April 2012 and for each subsequent financial year. It is not possible to estimate at this stage what payment the FSA will be required to make to the Treasury in the 2012-13 year under this provision as it is not yet certain what the FSA's penalty receipts or its enforcement costs will be.

151. Lords Amendment 140 makes similar provision in respect of the Bank; Lords Amendment 182 makes similar provision in respect of the FCA; and Lords Amendments 203 and 205 make similar provision in respect of the PRA. It is not possible to indicate with precision what payments the FSA, the Bank, the FCA and the PRA would be required to make to the Treasury as a result of these amendments in the future as the amounts paid to the regulator by way of penalties and the expenses incurred by the regulators in the discharge of their enforcement costs is likely to vary significantly from year to year.

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Lords Amendments 94 to 97, 99, 223 and 227

152. Lords Amendment 99 would empower the Bank to direct a UK clearing house to follow a specified course of action where it is of the view that it is necessary to give the direction, having regard to various specified public interests. Lords Amendment 227 would provide for the procedure applicable to such directions.

153. The new direction power for the Bank, a regulator of recognised clearing houses, is capable of being exercised in a manner that is compatible with the European Convention on Human Rights, noting in particular that the Bank may only exercise the power where they consider it desirable in pursuance of one or more compelling public interests set out in subsection (1) of the new clause, and that the Bank will also be bound by section 6 of the Human Rights Act 1998 in exercising this power.

154. Among other things, the power of direction could be used, to require a clearing house to provide the Bank with information reasonably required in its capacity as a resolution authority, to make changes to its default rules (the rules which apply in the event a member bank defaults on its obligations as a member of the clearing house) or to take other such action as the Bank considers desirable having regard to the public interest considerations specified in subsection (1) of the new clause. It is possible that an exercise of the power of direction may engage Article 1 of Protocol 1, or Article 8. However, if these rights are engaged in any given case any interference may be justified by reference to the public interest considerations referred to in subsection (1)

of the new clause.

155. In the event of a breach of a direction, the Bank could impose sanctions (see new sections 312E to 312K as inserted by clause 30) in addition to considering revocation of the clearing house's status as a recognised body. The imposition of a civil sanction will engage Article 6 and possibly Article 1 of Protocol 1. However, the procedure for imposing civil sanctions satisfies Article 6 particularly as a decision to impose such a penalty may be referred to the Upper Tribunal for review on the facts and merits consistent with the exercise of other disciplinary powers under FSMA 2000.

156. Accordingly, the proposed powers can be exercised compatibly with the European Convention on Human Rights.

Lords Amendments 122 to 127, and 278

157. These Amendments would apply, with minor modifications, the provisions of Part 1 and Part 3 of the Banking Act 2009 to investment firms, to UK clearing houses, and to group companies.

158. The Banking Act 2009 confers on the Treasury and the Bank powers to resolve failing banks (defined in section 2 of that Act) through the provisions set out in Part 1 of that Act (the special resolution regime), and makes provision for two new insolvency procedures (the bank insolvency procedure (Part 2) and the bank administration procedure (Part 3)). The powers available under Part 1 of the Act comprise the stabilisation powers which enable:

a. the Bank to transfer the securities or property, rights and liabilities of a failing bank to a private sector purchaser (section 11);

b. the Bank to transfer the property, rights or liabilities of a failing bank to a bridge bank (wholly owned and controlled by the Bank) (section 12);

c. the Treasury to transfer the securities of a failing bank into public ownership (section 13); and

d. the Treasury, as a last resort, to transfer the securities of a failing bank into public ownership following which certain transfer powers may be applied in relation to the parent undertaking or any banks in the group (sections 82 and 83).

159. These powers are capable of being exercised in a manner that is compatible with the European Convention on Human Rights, noting in particular that:

a. the exercise of the stabilisation powers may result in deprivations of property or interferences in property rights referred to in Article 1

Protocol 1 of the ECHR of the bank under resolution, its shareholders and/or creditors;

b. the Article 1 Protocol 1 right is not absolute, however interferences in property rights must be lawful and justified in the public interest. A fair balance must be struck between the public and private interest and the means employed in pursuing the public interest aim must be proportionate. In assessing whether a fair balance has been struck between the public and private interest, it is necessary of course to consider the extent to which an individual is compensated for the interference in his property rights;

c. the powers may be exercised only following the satisfaction of a regulatory and "public interest" test (sections 7 and 8) and extensive provision is made regarding compensation arrangements (sections 49 to 62).

160. These arrangements are also compatible with Article 6 of the ECHR (right to a fair trial). For example, the arrangements concerning the determination of any civil right to compensation, are compatible with Article 6 as an independent valuer must be appointed to make the determination and his determination is capable of being referred to the Upper Tribunal for review.

161. Bearing in mind that the provisions of Part 1 to 3 of the Banking Act (including the power to make an order imposing restrictions in the case of partial property transfers and the powers to put in place arrangements concerning the compensation to be paid to persons affected by an exercise of the stabilisation powers) would be applied with only minor modifications, the powers conferred by these Lords Amendments can be exercised in a manner that is compatible with the ECHR.

LORDS AMENDMENTS TO THE
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