These notes relate to the Lords Amendments to the Financial Services (Banking Reform) Bill, as brought from the House of Lords on 9 December 2013 [Bill 142]

FINANCIAL SERVICES (BANKING REFORM) BILL

EXPLANATORY NOTES ON LORDS AMENDMENTS

INTRODUCTION

1. These explanatory notes relate to the Lords Amendments to the Financial Services (Banking Reform) Bill, as brought from the House of Lords on 9th December 2013. 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 38, 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 except for Lords Amendment 41, which was opposed by the Government. (In the following Commentary, an asterisk appears in the heading to the paragraph dealing with the non-Government amendment.)

5. In these Notes the following abbreviations are used:

"BS Act" means the Building Societies Act 1986;

"CA98" means the Competition Act 1998;

"the CAT" means the Competition Appeal Tribunal;

"the CMA" means the Competition and Markets Authority;

"EA02" means the Enterprise Act 2002;

"the FCA" means the Financial Conduct Authority;

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

"the PRA" means the Prudential Regulation Authority.

COMMENTARY ON LORDS AMENDMENTS

Lords Amendment 1

6. *Lords Amendment 1* would amend the definition of "appropriate regulator" for the purposes of new section 142H of FSMA, so that it is defined in relation not only to ring-fenced bodies, but also to authorised persons who are not ring-fenced bodies.

Lords Amendment 2

7. *Lords Amendment 2* would require the PRA's review under new section 142J of its ring-fencing rules also to cover any rules that it makes as a result of Lords Amendment 157, which is explained separately below.

Lords Amendments 3 to 16, 31 and 32

8. *Lords Amendments 3 to 16 and 32* amend new sections 142M and 142N of FSMA to simplify the procedure applying to the exercise of the group restructuring powers given to the regulators in new section 142L. *Lords Amendments 3, 5, 7, 8, 12 to 14* would remove the requirement for there to be a second and third preliminary notice, would amend the contents of the preliminary notice and would make consequential changes to sections 142M and 142N. *Lords Amendment 4* would remove the requirement for the Treasury to consent to the issue of the preliminary notice. *Lords Amendments 9 and 10* would provide that where the regulator gives notice that it does not intend to exercise the group restructuring powers after the issue of the preliminary notice, that notice must be given in writing, and a copy provided to the Treasury. *Lords Amendment 11* would shorten the period within which the warning notice must be given to the period of three to six months after the expiry of the period allowed for representations after the issue of the preliminary notice. *Lords Amendments 15 and 16* would ensure that the time within which any action required by the regulator must be completed is left to the discretion of the regulator, to be set out in the decision notice and make a consequential amendment. *Lords Amendment 31* ensures the definition of "qualifying parent undertaking" given in section 142L(4) applies throughout Part 9B of FSMA. *Lords Amendment 32* would amend section 391 of FSMA so that the regulators have a discretion to publish information contained in any warning notice issued under section 142N.

Lords Amendments 17 to 30

9. *Lords Amendments 17 to 30* would widen the scope of the power given to the Treasury to make regulations requiring ring-fenced bodies to make arrangements to ensure that they are not liable and cannot become liable for the pensions liabilities of bodies that are not ring-fenced bodies. The amendments would widen the scope of

the power in the following ways, by enabling regulations made under the power—

(a) to extend to a wider range of pension schemes by removing the requirements that a relevant pension scheme must be either a multi-employer scheme or a scheme in relation to which a ring-fenced body is an employer (*Lords Amendment 17*);

(b) to enable trustees or managers of a relevant pension scheme to transfer certain liabilities and associated assets to another relevant pension scheme or segregate their pension scheme (*Lords Amendment 17*);

(c) to make provision for court applications by a ring-fenced body in any case where the ring-fenced body has not been able to reach agreement with a third party in relation to arrangements made for the purposes of the regulations (*Lords Amendment 17*);

(d) to impose obligations on trustees or managers of a pension scheme or any employer in relation to that scheme to provide information to specified persons (*Lords Amendment 20);*

(e) to modify, exclude or apply existing legislation (*Lords Amendment 23*);

(f) to require a ring-fenced body to do all that it can to obtain a clearance statement from the Pensions Regulator in relation to any arrangements made for the purpose of complying with the regulations (or with ring-fencing obligations generally) (*Lords Amendment 24)*.

10. *Lords Amendments 18, 19, 21, 22 and 25 to 30* would make a number of consequential changes to new sections 142W and 142X.

Lords Amendment 33

11. *Lords Amendment 33* would remove Clause 5. This Lords Amendment is consequential on Lords Amendments 42 and 43, which would, among other things, replace the concept of a "significant-influence function" (and which are explained separately below).

Lords Amendment 34

12. *Lords Amendment 34* would require the PRA to include additional information in the annual report it is required to make under paragraph 19 of Schedule 1ZB to FSMA. That report must provide information on how far ring-fenced bodies are either engaging in excluded activities (including dealing in investments as principal), in reliance on any exemptions provided for in secondary legislation under section 142D(2) or (4), or doing anything in reliance on exemptions from the effect of an order under section 142E.

Lords Amendment 35

13. *Lords Amendment 35* would insert a new clause into the Bill to provide for an independent review of the operation of the legislation on ring-fencing (namely the new Part 9B of FSMA and the powers given to the PRA and the FCA to impose rules on parent undertakings of ring-fenced bodies for ring-fencing purposes, and the secondary legislation made by the Treasury under Part 9B) and the ring-fencing rules made by the PRA or the FCA under section 142H, or 192JA of FSMA. This review must start before the end of 2 years after section 142G has come into force. The Treasury is required to appoint a panel of at least five people, who must be independent of the regulators, the Bank of England or the Treasury, and have no financial or other interest which might be considered to influence their views in relation to ring-fencing, following consultation with the Chair of the Treasury Committee of the House of Commons. The Treasury is also required to ensure that the panel has suitable expertise. The review panel must report to the Treasury. That report must be laid before Parliament, and published.

Lords Amendments 36, 37 and 38

14. *Lords Amendments 36, 37 and 38* relate to reviews of proprietary trading. *Lords Amendment 36* would require the PRA to carry out a review of proprietary trading by banks and PRA-regulated investment firms (relevant authorised persons). On the completion of the review, the PRA must make a written report to the Treasury setting out their conclusions on proprietary trading, and in particular on whether any kinds of proprietary trading are likely to be especially risky to relevant authorised persons, whether the PRA's powers are sufficient to deal with proprietary by relevant authorised persons (whether now or anticipated in the future), and on the effectiveness of any restrictions on proprietary trading imposed by other countries. The PRA's report would have to be completed within 9 months of the beginning of the review, delivered to the Treasury, and laid before Parliament.

15. *Lords Amendment 37* would require the Treasury (once it has received the PRA's report on proprietary trading) to make arrangements for an independent review of proprietary trading, by appointing one or more independent reviewers, following consultation with the Chair of the Treasury Committee of the House of Commons. The independent review must state whether the reviewers agree with the conclusions of the PRA's report; whether any additional restrictions should be imposed on proprietary trading by relevant authorised persons, and make any other recommendations the reviewers consider to be appropriate. As with the PRA's report, the report of the independent review must be delivered to the Treasury and laid before Parliament.

16. *Lords Amendment 38* would insert the interpretation provisions for the clauses relating to the PRA's report on proprietary trading, and the independent review on proprietary trading.

Lords Amendment 39

17. *Lords Amendment 39* would give the panel undertaking a review of ring-

fencing, and the panel reviewing proprietary trading, a right of access to any documents it may need for the purposes of its review, and to require anyone in possession of such documents to provide additional information or explanations the panel think necessary for its review. Any requirement the panel impose under this provision may be enforced by an application to the court for an injunction (or in Scotland, for an order of specific performance).

Lords Amendments 40 and 173

18. *Lords Amendments 40 and 173* would insert a new clause and Schedule making provision for a new stabilisation option ("the bail-in option") under Part 1 of the Banking Act 2009.

19. *Subsections (2) to (5)* of the new clause would give the Treasury power by order to make provision in consequence of the application of the new stabilisation option to building societies.

20. Part 1 of the new Schedule would amend the Banking Act 2009.

21. *New section 12A(1) and (2)* would describe the bail-in option which is to be the third stabilisation option in Part 1 of the Act. The bail-in option is to make one or more resolution instruments. *Subsections (3) to (5)* would describe the provision and proposals that may be make in a resolution instrument. The Bank may make special bail-in provision (see *new section 48B*) for the purposes of reducing or deferring liabilities of the bank that are not excluded liabilities (as defined in *new section 48B(8)*) and may transfer some or all of the securities of the bank to a bail-in administrator (see *new section 12B*) until such time as the bank has been stabilised and the Bank has identified transferees for the securities (for example, creditors affected by an application of the power to make special bail-in provision or private sector purchasers), following which an onward transfer resolution instrument may be made (see *new section 48R*). Resolution instruments may include any provision that may be made in a share transfer instrument (see sections 17 to 23 of the Act) and any provision that may be made in relation to the bail-in option (see *new section 12B* and *new sections 48B to 48S)*.

22. *New section 12B* would make provision about bail-in administrators. *Subsection (1)* would enable an individual or body corporate to be appointed as a bail-in administrator. A person appointed in this capacity would be appointed (a) to hold any securities of the bank that may be transferred or issued to that person in the capacity of bail-in administrator; and (b) to perform any other functions that may be conferred on the bail-in administrator under any provision of Part 1 of the Act (*subsection (2)*). It would be possible for the Bank to appoint one or more persons as a bail-in administrator. For example, one person could be appointed to hold securities, another may be appointed to prepare a business reorganisation plan under *new section 48H*. Alternatively, the Bank might choose not to transfer any securities of the bank to a bail-in administrator but may appoint a person to act as bail-in administrator for other purposes under Part 1 of the 2009 Act (for example, the

preparation of the business reorganisation plan).

23. Securities held by a bail-in administrator (whether as a result of a resolution instrument or otherwise, for example, as a result of the issue of new securities to the bail-in administrator during the course of the period in which the securities are held by the officer) would be held by the bail-in administrator as legal and beneficial owner. However, the securities would be held solely in accordance with the terms of a resolution instrument (*subsection (4)*). The securities would be held by the bail-in administrator only as long as is necessary having regard to the special resolution objectives, following which the Bank of England may transfer (using the onward securities transfer power conferred by *new section 48V*) or otherwise authorise the disposal of, the securities held by the administrator to another person.

24. *Subsection (5)* would ensure that a resolution instrument may include provision about the specified rights and obligations of the bail-in administrator with respect to all or any of the securities held by the administrator. For example, the Bank of England might choose to specify in the share transfer instrument that the administrator is to exercise shareholder rights only in accordance with directions of the Bank.

25. *Subsection (6)* would impose a requirement on the bail-in administrator to have regard, when performing their functions, to such objectives as may be specified by the Bank of England in the resolution instrument under which the administrator was appointed. *Subsection (7)* would make clear that should the Bank specify more than one objective for the officer, the objectives are to be taken to have equal status unless otherwise specified by the Bank of England.

26. *Paragraph 3* would insert a *new section 8A* into Part 1 of the 2009 Act. *New section 8A* would set out the specific condition that must be satisfied before the bail-in option may be deployed by the Bank of England. This is in addition to the conditions set out in section 7 of the Act (general conditions) in relation to failure, or likely failure, of the threshold conditions for authorisation (*subsection (4)*).

27. *Subsection (2)* would describe the condition to be satisfied: namely that the exercise of power is necessary having regard to one or more of the public interests listed in *paragraphs (a) to (d)*.

28. *Subsection (3)* would require the Bank of England, before determining whether the condition is satisfied, to consult with the PRA, the FCA and the Treasury.

29. *Paragraph 4* would insert *new sections 48B to 48W* into Part 1 of the 2009 Act.

30. *New section 48B* would enable the Bank of England to make certain provision in a resolution instrument. In particular, the Bank of England might: (a) cancel a liability of the bank; (b) modify a liability, or change the form of a liability; and (c)

provide that a contract is to have effect as if a specified right (such as a right to close out) has been exercised under it (*subsection (1)*). The purpose of this new power would be to ensure that the Bank of England can take actions, having regard to the special resolution objectives specified in section 4 of the Act, to stabilise the bank under resolution by reducing or deferring its liabilities. For example, the power would enable the Bank of England to convert all or part of the liabilities attaching to securities issued by a bank into another pre-existing or new form, type or class of securities. The power could be used, for instance, to convert a debt instrument partially into shares and partially into another type of debt security. It could also be used to modify the terms of a contract in order to suspend the bank's obligations in relation to a liability for a certain period for the purpose of, or in connection with, reducing that liability.

31. *Subsection (4)* would make clear that the power to make special bail-in provision may be exercised only for the purpose of, or in connection with, reducing, deferring or cancelling a liability of the bank. It would also make it clear that the power may not be exercised so as to affect an excluded liability (that is a liability of a kind listed in *subsection (8)*).

32. *Subsection (5)* would set out the rules which apply to the interpretation of *subsection (1)*. *Subsection (6)* would provide examples of special bail-in provision.

33. *Subsection (8)* would make provision in relation to the liabilities of the bank that are "excluded liabilities" and may not be affected by an exercise of powers under *subsection (1)*. For example, deposits covered by the Financial Services Compensation Scheme may not be affected by an exercise of these powers. Relevant terms would be defined in *new sections 48C* (defining "protected deposit") and *section 48D* (making provision for the interpretation of other specified terms).

34. *New section 48E* would impose a requirement on the Bank of England to produce a report where it makes a resolution instrument containing provision made in reliance on *new section 48B* (a similar reporting requirement exists where special bail-in provision has been made in property transfer instrument (see *new section 44C*)). The report must be provided to the Chancellor of the Exchequer (*subsection (2)*) who must lay in Parliament a copy of each report received from the Bank (*subsection (7)*). Each report would have to be made as soon as reasonably practicable after the making of the resolution instrument to which the report relates. The report would have, in particular, to explain any departure from the principles related to how liabilities would be treated in insolvency (*subsections (3) and (4)*), namely the order of priority on liquidation and loss bearing on an equal footing for creditors having equal priority.

35. *New section 48F* would confer on the Treasury a power, by order subject to the draft affirmative procedure, to amend the definition of "excluded liabilities" set out in *new section 48B(8)*. This power may not be used so as to amend or omit *new section 48B(8)(a) to (c)*.

36. *New section 48G* would confer on the Treasury a power, by order subject to the draft affirmative procedure, to specify matters or principles to which the Bank of England would have to have regard in making an instrument that includes special bail-in provision. These may be the insolvency treatment principles of *new section 48E(4)* or alternative principles (*subsection (2)*). *Subsection (4)* would allow the insolvency treatment principles to be amended. If new principles are specified under an order made under *new section 48G(1)*, this would allow, for example, for the insolvency treatment principles to be aligned with those principles.

37. *New section 48H* would make provision about business reorganisation plans.

38. *Subsection (1)* would specify that a resolution instrument may require a bail-in administrator, or one or more directors of the bank under resolution, to draw up a business reorganisation plan with respect of the bank, and to submit it to the Bank of England within the period allowed by or under the instrument. Other provision might also be made in the instrument in connection with provision under *subsection (1)* (*subsection (7)*).

39. *Subsection (2)* would define "business reorganisation plan". Such a plan would include specified matters, including an assessment of the factors that caused Condition 1 in section 7 of the Act (general conditions) to be satisfied in relation to the bank under resolution and a description of the measures to be adopted with a view to restoring the viability of the bank. "Viability" would be assessed by reference to the matters referred to in *subsection (8)*.

40. Each business reorganisation plan would have to be approved by the Bank of England (*subsection (3)*). Before deciding whether to approve the plan, or to require the person who has submitted the plan to amend the plan, the Bank of England would have to consult with the PRA and the FCA as the regulators responsible for the ongoing supervision of the bank (*subsection (5)*).

41. A business reorganisation plan might include recommendations on the exercise by the Bank of England of its powers under Part 1 of the Act in relation to the bank under resolution (*subsection (6)*). For example, if a bail-in administrator has identified a potential purchaser for some of the business on the bank under resolution, the bail-in administrator may recommend to the Bank of England that it make a property transfer order under *new section 41A* to effect the sale and transfer of that business. The Bank would be under no obligation to follow the recommendations of the person who has prepared the plan. However, the Bank of England may take into account these recommendations in determining what further steps to take in relation to the bank in pursuance of the special resolution objectives specified in section 4 of the Act.

42. *New sections 48I to 48K* would make provision about bail-in administrators.

43. *New section 48I* would make clear that a resolution instrument may include

further provision about the functions of a bail-in administrator. *Subsection (1)* would provide that a resolution instrument may, for example, authorise a bail-in administrator to manage the bank's business and to exercise any powers of the bank. *Subsection (2)* would provide that a resolution instrument may require a bail-in administrator to make reports to the Bank of England on such matters as may be specified in the instrument. *Subsection (3)* would specify that the instrument may provide for further requirements as to the content of any report required under *subsection (2)*. And *subsection (4)* would specify that a resolution instrument may require a bail-in administrator to consult specified persons (such as the Bank of England) or first to obtain the consent of a specified person before taking specified actions, such as exercising voting rights in relation to the securities held by the bail-in administrator.

44. *New section 48J* would make supplementary provision about bail-in administrators. *Subsection (1)* would specify that a bail-in administrator may do anything necessary or desirable for the purposes of or in connection with the performance of the functions of the office. *Subsection (2)* would make clear that a bail-in administrator is not to be regarded as a servant or agent of the Crown. *Subsection (3)* would require the Bank of England to make provision in a resolution instrument for the resignation, replacement and removal from office of a bail-in administrator.

45. *New section 48K* would make provision about the remuneration and allowances of the bail-in administrator. In particular, *subsection (2)* would specify that the Bank of England may provide that remuneration and allowances are to be paid by the Bank or by the bank under resolution. Under *subsection (3)* a bail-in administrator is protected from liability in relation to anything done in good faith, except damages awarded under section 8 of the Human Rights Act 1998.

46. *New section 48L* would make clear that a resolution instrument may cancel or modify any securities which fall within Class 1 in section 14 (*subsection (2)*) or convert any such securities from one form or class into another (see further *subsection (4)*). This section would also clarify that a resolution instrument may make provision with respect to the rights attaching to securities (for example, it may enable the Bank of England or a bail-in administrator to exercise voting rights attaching to the bank's shares during a resolution), and provide for the listing of securities issued by the bank to be discontinued (see further *subsection (6)*). *Subsection (7)* would clarify that the provision that may be made under this section is in addition to any provision that the Bank of England may make under *new section 48B* (special bail-in provision).

47. *New section 48M* would ensure that the Bank of England can make in a resolution instrument provision of a kind that may be made in a share transfer instrument or property transfer instrument under the Act for the purposes of turning off default event rights that may otherwise be triggered as a result of provision in the resolution instrument (see sections 22 and 38 of the 2009 Act).

48. *New section 48N* would ensure that the Bank of England can make the same provision in a resolution instrument as in a share transfer or property transfer instrument regarding the directors of the bank under resolution (see sections 20 and 36A).

49. *New section 48O* would confer on the Bank of England a power to issue directions to one or more directors of the bank under resolution.

50. *New section 48P* would confer on the Treasury a power to make orders, subject to the draft affirmative procedure, for safeguarding certain financial arrangements. (The power is analogous to section 48, which allows safeguards to be put in place under existing stabilisation options involving partial property transfers.)

51. *New section 48Q* would specify that a resolution instrument may make provision in relation to continuity. For example, a resolution instrument might provide for anything that relates to anything affected by the instrument that is in the process of being done before the instrument takes effect to be continued from the time the instrument takes effect.

52. *New section 48R* would specify that a resolution instrument may permit or require the execution, issue or delivery of an instrument.

53. *New section 48S* would make clear that provision specified in a resolution instrument takes effect despite any restriction arising by virtue of contract or legislation or in any other way and may include incidental, consequential or transitional provision.

54. *New section 48T* would set out the procedural arrangements that apply in relation to the making of a resolution instrument by the Bank of England. These are the same as apply where the Bank makes a share transfer instrument or property transfer instrument using its existing powers under the Act (see sections 24 and 41).

55. *New section 48U* would enable the Bank of England to make one or more supplemental resolution instruments following the making of a resolution instrument under *new section 12A(2)*. A supplemental resolution instrument might make any provision of a kind that may be made in a resolution instrument under *new section 12A(2)*.

56. *New section 48V* would confer on the Bank of England power to make one or more onward transfer resolution instruments, for example, to transfer securities that were transferred to a bail-in administrator as a result of provision in a resolution instrument under *new section 12A(2)* to such other persons as the Bank may identify (e.g. creditors affected by an application of the power to make special bail-in provision or a private sector purchaser).

57. *New section 48W* would confer on the Bank of England a power to transfer

back to the original holders any securities transferred by a resolution instrument or an onward transfer resolution instrument.

58. *Paragraph 5* of the new Schedule would make provision about the transfer of the property of a bank in relation to which the bail-in option has been deployed.

59. *Sub-paragraph (1)* would insert *new section 41A* which enables the Bank of England to transfer property, rights or liabilities of a bank to which the bail-in option has been applied. For example, this power could be exercised to transfer to a private sector purchaser a portfolio of assets in the event a commercial purchaser could be identified.

60. *Sub-paragraph (2)* would make consequential amendments to section 42 of the Act, so as to enable the Bank of England to make a supplemental property transfer instrument following the making of a property transfer instrument under *new section 41A*. *Subsection (4)* would also make consequential amendments.

61. *Sub-paragraph (3)* would insert *new sections 44A to 44C* which enable the Bank of England to make a reverse property transfer where a property transfer instrument has been made in accordance with *new section 41A(2)*. *New section 44B* would make clear that a property transfer instrument under section 12(2) or *new section 41A(2)* may make special bail-in provision of a kind described in *new section 48B*. *New section 44C* would replicate the reporting requirement which appears in *new section 48E* in relation to property transfer instruments containing special bail-in provision.

62. *Paragraph 6* would make provision about the compensation arrangements to be put in place following the making of a resolution instrument under *new section 12A(2)* and other relevant forms of instrument.

63. *Sub-paragraph (1)* would amend section 49, which describes the different forms of compensation arrangement that may be made in connection with different stabilisation options, to provide for a new form of compensation order: a "bail-in compensation order".

64. *Sub-paragraph (3)* would insert a *new section 52A* into Part 1 of the Act which provides that the Treasury must make a bail-in compensation order where the Bank of England makes a resolution instrument in accordance with *new section 12A(2)* or makes another relevant form of instrument that includes special bail-in provision.

65. *Sub-paragraph (4)* would make a number of consequential amendments to section 53 of the Act (onward and reverse transfers) to take account of the new forms of transfer instrument which the Bank of England may make. This ensures that the Treasury can make appropriate compensation arrangements following such transfers.

66. *Sub-paragraphs (5) to (7)* would make consequential amendments to sections 54, 56 and 57.

67. *Sub-paragraph (8)* would insert *new sections 60A* and *60B*. They would allow the Treasury to make regulations concerning the mandatory compensation provision to be included in the compensation arrangements to be put in place following the making of instruments by the Bank of England that include special bail-in provision. In making the regulations, *new section 60B* would require the Treasury, in particular, to have regard to the desirability of ensuring that pre-resolution shareholders and creditors do not receive less favourable treatment than they would have done had the bank entered into insolvency immediately before the coming into force of the initial instrument (e.g. in the case of the bail-in option, the first resolution instrument made under *new section 12A*). *New section 60A(5)(b)* would provide that the regulations are subject to the draft affirmative procedure.

68. *Sub-paragraphs (2), (9) and (10)* would make other consequential amendments.

69. *Paragraph 7* would insert *new section 81AB* and *new section 81CA* and amend section 81D (interpretation: "banking group company" etc).

70. *New section 81BA* would enable the Bank of England to exercise the bail-in option in relation to a banking group company where certain conditions are met. In particular, in addition to the conditions being satisfied in relation to the bank it would have, in the opinion of the Bank of England, to be necessary to take action at the level of the banking group company having regard to various public interests (see Condition 2). This would be consistent with the approach to the application of the Bank's other stabilisation options in relation to banking group companies (see section 81B of the Act (sale to a commercial purchaser and bridge bank)).

71. *New section 81CA* would specify how the provisions relating to bail-in are to be interpreted where the Bank of England deploys the bail-in option at the level of the parent undertaking of the failing bank. In most cases the provisions would be interpreted as applying to both the bank and the parent undertaking (see the "general rule" in subsection (4)). However, in certain cases, the powers would also be exercisable in relation to any other banks in the group, for example, so as to permit the Bank of England to transfer the shares of any bank in the group to a commercial purchaser (see subsection (5)(b)). This would be consistent with the approach in relation to the application of powers where the Treasury transfer the shares of a holding company of a failing bank into public ownership (see section 82 (temporary public ownership) and section 83 (supplemental) of the Act).

72. *Sub-paragraph (3)* would make consequential amendments to section 81D in order to take account of the new sections.

73. *Paragraph 8* would make certain consequential amendments in respect of new

sections inserted by the Bill as they apply to banks which are regulated only by the FCA, for instance to provide that the Bank of England need only consult the FCA and the Treasury in relation to the *new section 8A* condition in such cases unless the bank has a member of its immediate group that is a PRA-authorised person.

74. *Paragraph 9* would prevent the amendments of the 2009 Act relating to the bail-in option from applying to recognised central counterparties. This is because the bail-in tool is not designed for such entities.

75. *Paragraph 10* would amend section 120 of the Act (notice to PRA of preliminary steps to certain insolvency proceedings) so as to ensure that an order placing a bank into an insolvency proceeding may not be made unless the Bank of England has provided its consent where the bank has been placed into resolution under the bail-in option in the previous three months. The effect would be to ensure that actions can be taken to stabilise the bank under resolution without risk that they may be undermined by insolvency proceedings.

76. *Paragraph 11* would insert in the 2009 Act a *new section 256A* which confers on the Treasury a power to issue directions to a bail-in administrator in connection with the provision of State aid to the bank under resolution. This power would be similar to the power conferred by section 145A of the Act (power to direct bank administrators) in relation to bank administrators.

77. *Paragraph 12* would amend section 1 of the 2009 Act (overview) so as to take account of the bail-in option (which becomes the new "third" stabilisation option). *Paragraph 13* would make a consequential amendment to section 13 of the Act (temporary public ownership) so that stabilisation option becomes the "fourth" stabilisation option. *Paragraph 28* would make a similar amendment of section 85 of the Act (temporary public ownership).

78. *Paragraphs 14 to 16* would make consequential amendments to certain provisions of the Act to reflect the introduction of a new form of instrument- a resolution instrument.

79. *Paragraphs 17 to 20* would make consequential amendments to provisions regarding continuity obligations (sections 63 and 66 to 68 of the Act). These amendments would ensure that the general continuity provisions apply, and special continuity obligations may be applied, in relation to certain kinds of transfer in relation to an application of the bail-in stabilisation option and relevant subsequent transfers.

80. *Paragraphs 21 to 23* would make further consequential amendments to sections 71 (pensions) to 73 (disputes) of the Act.

81. *Paragraph 24* would make minor modifications to section 74 of the Act (tax) to take account of certain new transfer powers conferred on the Bank of England in

the Bill.

82. *Paragraphs 25 and 26* would make provision in relation to reporting requirements where the Bank of England make one or more resolution instruments under *new section 12A(2)*. In particular, the Bank would have to report to the Treasury about the matters referred to in subsection (2) of new section 80A. The Chancellor would be required to lay before Parliament a copy of each report provided to the Treasury under subsection (2).

83. *Paragraphs 28 and 29* would modify Part 3 of the Act (bank administration) so as to enable a bank subject to the exercise of powers described in *new section 152A(2)* to be placed into the bank administration procedure in accordance with section 143 (grounds for applying) and section 144 (grounds for making) of the Act.

84. *Paragraph 30* would modify section 220 of the Act (insolvency etc) so as to make clear that the transfer of ownership of a bank to a bail-in administrator has no effect as regards its permission to issue banknotes pursuant to Part 6 of the Act.

85. *Paragraph 31* would make minor modifications to section 259 of the Act (statutory instruments) to take account of new statutory instruments which may be made pursuant to modifications of the Act as provided for in the Bill.

86. *Paragraph 32* would make minor modifications to section 261 of the Act (index of defined terms).

87. *Paragraph 33* would modify the Investment Bank Special Administration Regulations 2011 in their application to cases where a resolution instrument has been made with respect to an investment bank.

Lords Amendment 41

88. *Lords Amendment 41* would insert new section 65A into FSMA. This section would require the regulator to introduce a licensing regime applying to all approved persons in all sectors of the financial services industry with, among other things, minimum requirements for integrity, professional qualifications, continuous professional development and adherence to a recognised code of conduct. The regulator would also have to require all those licensed to be "revalidated" whenever the regulator saw fit and to have their competence checked annually.

Lords Amendments 42 to 59, 160 and 174

89. These amendments would insert new clauses and a Schedule which together amend Part 5 of FSMA (performance of regulated activities) to provide for the introduction of a new regime for senior managers and banking standards. The amendments would implement the recommendations of the Parliamentary Commission on Banking Standards in this area.

90. *Lords Amendment 42* would insert a new clause amending section 59 of

FSMA. Under section 59, the appointments of all individuals who are to perform certain roles in a financial services firm require the prior approval of the regulator (the FCA or the PRA) that has specified that role as a "controlled function" in its rules. *Subsection (2)* would omit section 59(5) of FSMA. This would have the effect of enabling the FCA to designate any role in any authorised person as a controlled function. If the FCA specifies a role in relation to a "relevant authorised person" which meets the definition of a senior management function in new section 59ZA, new section 59(6A) (inserted by subsection (4)) provides that the controlled function must be designated as a senior management function in the FCA's rules. "Relevant authorised person" is defined by section 71A of FSMA, which would be inserted by *Lords Amendment 57*. Under new section 71A, "relevant authorised person" for the purposes of Part 5 of FSMA includes all deposit-takers, including building societies and credit unions, and those investment firms which are authorised by the PRA. It does not include any insurers which have a deposit-taking permission under FSMA. The term "relevant authorised person" for the purposes of Part 5 is also restricted to institutions that are incorporated in the UK (in the case of bodies corporate such as companies), or formed under the law of any part of the UK (in the case of other classes of institution such as a partnership). However, *Lords Amendment 57* also gives the Treasury power by order to extend the definition of "relevant authorised person" to include branches of non-UK credit institutions and investment firms of a specified description. *Lords Amendment 160* would provide for this order-making power to be subject to draft affirmative procedure.

91. *Subsection (3)* of the new clause would insert into FSMA a new section 59(6) providing for the PRA to have the power only to specify as controlled functions roles in PRA-authorised persons which meet the definition of a senior management function in new section 59ZA. If the PRA does so and the authorised person is a relevant authorised person, new section 59(6B) (inserted by subsection (4)) provides that the controlled function must be designated as a senior management function in the PRA's rules.

92. *Lords Amendment 43* would insert into FSMA a new section 59ZA to provide the definition of "senior management function". Although the definition is of general application, it is only when the function is a designated senior management function in relation to a relevant authorised person that the new regime for senior managers and banking standards will apply (that is, mandatory statements of responsibility (see *Lords Amendment 44*), a reverse burden of proof (see *Lords Amendment 56*), and special register entries for senior managers (see *Lords Amendment 58)).*

93. *Section 59ZA(3)* would make clear that "managing" must be understood widely, to include anyone who participates in decision-making for the authorised person. The concept of a "senior manager" will therefore include non-executive directors of the firm itself and may also include, in relation to a firm, persons who are employed outside the firm – for example, directors of its parent undertaking – if they are involved in decisions that affect the business of the firm.

94. *Lords Amendment 44* would amend section 60 of FSMA. Section 60 sets out the process for making applications for approval to perform a controlled function. The amendments to section 60 would provide that, if an application is made for someone to perform a designated senior management function in relation to a relevant authorised person, it must be accompanied by a statement of responsibilities for that person, which sets out the aspects of the business of the firm which that person will be responsible for managing.

95. *Lords Amendment 45* would insert a new clause into the Bill, requiring any relevant authorised person (defined in section 71A of FSMA) to be satisfied that anyone in relation to whom they propose to apply to the regulator for approval to carry on a controlled function is a "fit and proper" person to undertake that function before they make the application. It also sets out the considerations to which the authorised person in question must have regard in making that determination.

96. *Lords Amendment 46* would insert a new clause into the Bill, amending section 61 of FSMA, to include the personal characteristics of candidates for approval in the factors to be considered by the regulator in determining whether or not to grant approval.

97. *Lords Amendment 47* would amend section 61 of FSMA. Section 61 provides for the circumstances in which a regulator may grant an application for approval made under section 60, and provides that the firm or the candidate may appeal under standard FSMA procedures if an application is rejected.

98. *Subsection (2)* would insert a new section 61(1) which would provide that, if a regulator receives an application for an individual to perform a designated senior management function in relation to a relevant authorised person, the regulator could grant the approval in two cases. The first case restates the existing FSMA test which applies to all applications: the regulator can grant approval if it is satisfied the individual is fit and proper. The second case adds a new test: the regulator can grant approval if it is satisfied that the candidate will be fit and proper if the application is granted subject to conditions. This test would only apply in relation to applications to perform senior management functions in relevant authorised persons.

99. *Subsection (4)* would insert new subsections (2B), (2C) and (2D) into section 61. *Section 61(2B)* would provide that, for an application to perform a senior management function in a relevant authorised person, the regulators may grant approval conditionally or subject to time limits. *Section 61(2C)* would provide that a regulator may only exercise the new powers where it is desirable to do so to advance an appropriate regulatory objective.

100. *Lords Amendment 48* would insert new section 62A into FSMA to provide for the updating of statements of responsibilities when there has been a significant change in the responsibilities of a senior manager. *Section 62A(2)* would provide that the authorised person concerned (not the senior manager) must give the appropriate

regulator a revised statement of responsibilities if there is a significant change in the senior manager's responsibilities. (Where the senior manager is taking up a new role performing a different controlled function, the firm will need to submit an application for approval to perform the new controlled function. If this function is a designated senior management function in a relevant authorised person, a new statement of responsibilities will be required under section 60(2A).)

101. *Section 62A(3)* would provide that the regulators can require the firm to provide information in a form which the regulator directs, and to verify that information in a way which the regulator directs. This corresponds to the power the regulators have in section 60(4) over the form and verification of information supplied in an initial application for approval to perform a controlled function.

102. *Lords Amendment 49* would insert a new clause into the Bill, amending section 63 of FSMA to require relevant authorised persons to consider at least once a year for each of the people who have been approved by the regulator whether any grounds have arisen which might cause the regulator to withdraw that approval, and to notify the regulator if this is the case.

103. *Lords Amendment 50* would insert new sections 63ZA, 63ZB and 63ZC into FSMA. These sections provide for the variation of a senior manager's approval at the request of a relevant authorised person or on the regulator's own initiative, and the procedure to be followed in those cases.

104. *Section 63ZA* would provide that, if an approval to perform a designated senior management function in relation to a relevant authorised person has been granted subject to conditions, the firm that made the application may apply for the permission to be varied by adding, removing or varying the conditions. *Subsections (4) and (5)* would provide that the regulators have a fixed 3-month period within which to grant the application or, if they propose to refuse it, to give a warning notice. *Subsections (6) and (7)* would provide that the regulators may refuse such an application if desirable to advance their regulatory objectives. *Subsection (8)* would apply procedural provisions about an application for approval to perform a controlled function, about how the regulators must determine an application and about the giving of warning and decision notices.

105. *Section 63ZB* would allow a regulator to vary an approval where it considers this is desirable in order to advance its operational objectives (in the case of the FCA), and any of its objectives (in the case of the PRA). *Subsection (1)* would provide that the FCA may vary an approval it, or the PRA, has given in relation to a designated senior management function being performed in relation to a relevant authorised person. *Subsection (2)* would provide that the PRA may vary an approval it gave itself, or an approval given by the FCA in relation to a PRA-authorised person. *Subsection (3)* would provide that an approval can be varied by imposing, varying or removing a condition, or by the imposition of time limits on an approval.

106. *Section 63ZC* would set out the procedure a regulator must follow when varying an approval. *Subsections (2) and (3)* would provide that a proposed variation will take effect on the date specified in the first notice sent by the regulator to the interested parties or when the matter is no longer open for review, but that, if a regulator reasonably considers it is necessary, the variation may take immediate effect. *Subsections (4) and (5)* would require a regulator proposing to vary an approval to give a written notice setting out prescribed information to the interested parties listed in subsection (6). *Subsections (8) and (9)* would require a regulator to give written notices to the interested parties when, after considering their representations, it has decided whether or not to proceed with a proposed variation, or to vary an approval in a different way from that initially proposed. *Subsection (10)* would provide that a notice confirming that a variation will be made, or maintained, must let the interested parties know about their right to refer the matter to the Tribunal. *Subsection (11)* would provide that, if a regulator proposes to vary an approval in a different way, it must set out in the written notice the information required to be set out for the initially proposed variation (so the process of entertaining representations is repeated for the new proposal to vary). *Subsection (13)* explains that whether a matter is open to review is be determined in accordance with the standard FSMA provisions in section 391(8). (A matter remains open to review until either it is too late to refer it to the Tribunal, or it has been referred to the Tribunal and dealt with, and the period for an appeal against the Tribunal's decision has elapsed.)

107. *Lords Amendment 51* would insert new sections 63ZD and 63ZE into FSMA. These sections would require the regulators to prepare and issue statements of policy about the giving of approvals subject to conditions or time limits.

108. *Section 63ZD* would require both regulators to prepare and issue a policy about how they will use the power to give conditional approval for performance of a designated senior management function in relation to a relevant authorised person, and how they will vary such approvals after they have been given (whether on application by a firm or on their own initiative). The regulators would be free to update their policy at any time, but they must always ensure the most recent policy has been published (so that it is accessible to those who it may affect).

109. *Section 63ZE* would set out the procedure to be followed before issuing a statement of policy. *Subsection (1)* would require the regulators to consult each other before publishing a statement of policy (or revising a previously published statement). However, the FCA only has to consult the PRA where the policy relates to FCA-designated senior management functions in PRA-authorised persons. *Subsection (1)* would also require a regulator to publish a draft of a statement of policy. The draft policy must be accompanied by a notice inviting representations within a specified time (*subsection (3)*). The issuing regulator must have regard to any representations made (*(subsection (4)*) and, if it goes ahead and issues the statement, it must also publish a general account of the representations made to it and its response to them (*subsection (5)*). The process must be repeated if the regulator decides to proceed

with a significantly different policy and it must also publish details of the differences (*subsection (6)*). If a regulator proposes to alter or replace an existing statement it must also follow the procedural requirements set out in this section.

110. *Lords Amendment 52* would amend sections 63A and 66 of FSMA to extend the limitation periods for imposing sanctions for misconduct. Section 63A allows the regulators to impose penalties on persons who perform a controlled function without the appropriate regulator's approval. Section 66 provides for the regulators to impose penalties, suspensions or restrictions on an approved person, or to publicly censure that person when the approved person is guilty of misconduct.

111. In each case, the period within which the regulator may commence proceedings (that is, issue a warning notice) is increased from three years to six years after the regulator knew of the contravention, provided the contravention occurs after the new provisions come into force. The existing three-year limitation periods are retained for action in respect of contraventions occurring before that date.

112. *Lords Amendment 53* would insert new sections 63E and 63F into FSMA. Under *new section 63E*, relevant authorised persons may not employ a person to do any function within their firms which has been designated by the regulator as a "significant-harm" function (that is, a function which might give rise to a risk of significant harm either to the firm or to its customers) unless the relevant authorised person has been able to certify under *new section 63F* that the person concerned is a fit and proper person to do that function. The regulators are required to keep the exercise of the power to designate particular functions as "significant-harm functions" under review, with a view to minimising the risks that anyone would be employed to perform a significant-harm function within a relevant authorised person which they are not fit and proper persons to perform.

113. *New section 63F* would set out the rules under which a relevant authorised person ("RAP") may issue a certificate to one of its employees. The RAP must be satisfied that the person concerned is a fit and proper person to perform the function covered by the certificate, having considered whether they have the qualifications, training, level of competence and personal characteristics required by rules made by the regulators in relation to the function in question. The certificate will describe the functions to which the person concerned is being appointed, and confirm that they are fit and proper to perform that function. It will be valid for twelve months. Where the RAP decides not to issue such a certificate, it must give the person concerned written notice of that fact, including details of the steps the RAP proposes to take in consequence and the reasons for them.

114. *Lords Amendment 54* would repeal sections 64 and 65 of FSMA, and insert new sections 64A and 64B into FSMA. *Subsection (1)* of section 64A would give the FCA the power to make rules about the conduct of persons it has approved to perform a controlled function and of anyone employed in the relevant authorised person, at whatever level. *Subsections (2) and (3)* give the PRA a power to make rules about the

conduct of persons it has approved to perform senior management functions in PRA-authorised firms and of anyone employed in a relevant authorised person that is PRA-authorised. (The FCA can approve people to perform controlled functions in relation to PRA-authorised firms and the PRA can make rules of conduct applying to such people, if they are performing a senior management function.) *Subsections (4) and (5)* make clear that the rules can only relate to the conduct of individuals while working for the authorised person who applied for their approval to perform controlled functions, or, if the individual is not an approved person, his or her employer. *Subsection (6)* ensures that the definition of "employee" will be broad enough to capture someone who, although they are formally self-employed or employed by some other person, are in practice in a position equivalent to an employee, e.g. sub-contractors, employees of sub-contractors or employees of a company in the same group as the firm which is responsible for employing the staff who work for group companies.

115. *New section 64B* imposes an obligation on RAPs to notify all their employees, and approved persons, of any rules which the regulators have made under section 64A of FSMA which relate to them, and to ensure that the persons concerned understand how the rules apply to them. Where the RAP becomes aware (or suspects) that any of their employees, or approved persons, has breached the rules, the RAP must inform the regulator of this fact.

116. *Lords Amendment 55* would insert new section 64C into FSMA. Under this new section, RAPs would be under a duty to inform the regulator in the event that they issue a formal written warning to any of their employees or approved persons, suspend or dismiss any of them, or take any clawback action in relation to the remuneration of any of them.

117. *Lords Amendment 56* would insert a new clause into the Bill amending section 66 of FSMA and inserting new sections 66A and 66B. *Subsection (1)(a)* would insert a new subsection (1A) in section 66. Subsection (1A) defines misconduct by reference to section 66A (for the purposes of action by the FCA) and section 66B (for the purposes of action by the PRA). *Subsection (1)(b)* omits subsections (2), (2A), (6) and (7) of section 66, which contain the existing definitions of misconduct for the purpose of action by the regulators.

118. *Subsection (2)* inserts sections 66A and 66B into FSMA. *Section 66A* would provide that the FCA may take enforcement action (following standard FSMA procedures) against a person if any of conditions A, B and C apply. *Subsection (2)* sets out condition A which allows the FCA to take enforcement action against an approved person or an employee of a relevant authorised person who has failed to comply with rules of conduct made by the FCA under section 64A. *Subsection (3)* sets out condition B which allows the FCA to take enforcement action against an approved person or an employee of a relevant authorised person, if they were knowingly concerned in a breach of a relevant requirement (defined in *subsection (4)*) by the authorised person for whom they work. *Subsection (5)* sets out condition C

which allows the FCA to take enforcement action against senior managers in a relevant authorised person if a regulatory contravention occurs in a part of the business for which they are responsible. This is subject to *subsection (6)*, which provides that a senior manager will not be guilty of misconduct if he or she can show they took such steps to prevent the contravention as could reasonably be expected of a person in their position. *Subsections (7) and (8)* provide the definitions of "senior manager", "approved person" and "employee" (which has the wide meaning given in section 64A, so including persons who are in an equivalent position to an employee).

119. *Section 66B* would make equivalent provision allowing the PRA to take enforcement action (following standard FSMA procedures) against a person if the same conditions apply.

120. *Lords Amendment 58* would insert a new clause into the Bill amending section 347 of FSMA. Section 347 requires the FCA to maintain a publicly available record of financial services firms and approved persons and sets out the information that must be included in the record.

121. *Subsection (2)* would amend section 347(2) to require the FCA to record whether an approved person in relation to a relevant authorised person is a senior manager, whether the senior manager has been sent any final notice, and any published information about the matter to which the final notice relates. (A 'final notice' is a final notice of actions that a regulator can take, such as the imposition of a penalty for misconduct.) *Subsection (3)* inserts section 347(8A) which provides definitions of "senior manager", "bank" and "designated senior management function".

122. *Lords Amendments 59 and 174* would insert a new clause and Schedule making various minor and consequential amendments to FSMA and the Financial Services Act 2012 which are necessary in connection with *Lords Amendments 45 to 56*.

123. *Paragraph 1 and 4* of the new Schedule would make consequential amendments to sections 59 and 63A of FSMA respectively, arising from the introduction of the power for the regulators to give conditional approval to an application to perform a senior management function in relation to a relevant authorised person.

124. *Paragraph 2* of the Schedule would amend section 59A of FSMA, which requires the FCA and the PRA to co-ordinate how they specify controlled functions. It would remove references in section 59A to the concept of a 'significant-influence' function and replace them with references to a 'senior management function'.

125. *Paragraph 3* of the Schedule would amend section 63 of FSMA, replacing references to a significant-influence function with references to a senior management function. The effect is that the PRA can withdraw a person's approval if they were

approved by the FCA but the function is a senior management function performed in relation to a PRA-authorised person.

126. *Paragraph 5* of the Schedule would make consequential amendments to section 66 of FSMA, which sets out the disciplinary powers of the regulators in relation to approved persons. It would give regulators the power to impose conditions rather than 'restrictions', reflecting the regulators' power to grant conditional approvals.

127. *Paragraph 6* of the Schedule would make consequential changes to section 67 of FSMA, which sets out the procedure the regulators must follow when taking disciplinary action against approved persons. The changes are consequential on the changes to section 66 of FSMA. It would also require the regulators, if they propose to limit the time for which an approval has effect, to state in a warning notice how long the approval would have effect for (*paragraph 6(4)).* The same information would also have to be provided in a decision notice about limiting the period of an approval (*paragraph 6(7)).*

128. *Paragraph 7* of the Schedule would make consequential changes to section 69 of FSMA, which requires the regulators to issue statements of policy about the imposition of penalties on approved persons. These changes would also reflect the grant to the regulators of the power to give conditional approvals.

129. *Paragraphs 8 and 9* of the Schedule would make changes necessary to reflect the power for the regulators to make rules of conduct under new section 64A. *Paragraph 8* would ensure that the regulators may not modify or waive rules of conduct made under section 64A in relation to a particular person. *Paragraph 9* would ensure that a private person cannot bring an action for damages if they suffer loss as the result of a contravention by an approved person of a rule of conduct made under section 64A.

130. *Paragraph 10* of the Schedule removes references to section 64 from section 140A, a consequential change required by the repeal of section 64.

131. *Paragraph 11* of the Schedule would make a consequential amendment to section 347 of FSMA (which makes provision about the record of authorised persons to be kept by the FCA), by replacing references to a "relevant authorised person" in that section with references to an "authorised person concerned" (defined in subsection (9), as inserted by *Lords Amendment 58*), to avoid confusion with the definition in section 71A.

132. *Paragraphs 12 to 14* of the Schedule would make consequential changes to the provisions of FSMA setting out what must be included in a decision notice and a warning notice, and to the provisions of FSMA requiring the regulators to determine their procedure for making decisions which would require them to issue a supervisory

notice.

133. *Paragraph 15* of the Schedule would make consequential changes to section 415B of FSMA, which makes provision about consultation between the regulators about the taking of certain enforcement action.

134. *Paragraphs 16 and 17* of the Schedule make consequential changes to Schedules 1ZA and 1ZB to FSMA to ensure that the issuing of a policy about the grant and variation of conditional approvals by the PRA or the FCA is treated as a legislative function which must be done through their governing bodies.

135. *Paragraphs 18 and 19* of the Schedule make consequential changes to the Financial Services Act 2012 to ensure that issuing a policy about the grant and variation of conditional approvals by the PRA or the FCA is a relevant function for the purposes of a complaints scheme under section 85 of that Act. This means that the regulators must make arrangements for the investigation by an independent person of complaints relating to the exercise of this function.

Lords Amendment 60

136. *Lords Amendment 60* would create a new criminal offence of taking a decision that results in the failure of certain types of financial institution. These are: a UK incorporated bank or building society or a UK investment firm that is regulated by the PRA (a "relevant financial institution"). This new clause defines the offence and specifies the penalties applicable to those found guilty of it.

137. *Subsection (1)(a)* of the new clause would provide that only those individuals who are senior managers in relation to a relevant financial institution ("F") can commit the offence. Senior management functions will be designated by the PRA or the FCA under the powers which would be granted to them by *Lords Amendments 45 to 57*. The conduct for which an individual can be prosecuted is taking a decision on behalf of F, or failing to prevent a decision being taken on behalf of F, where the decision leads to the failure of F or another relevant financial institution in the same group as F. *Subsection (1)(b)* provides that in either case the person concerned must be aware that the decision may cause the failure.

138. *Subsection (1)(c)* would provide that the individual's behaviour in taking the decision in question must be far below that which could reasonably be expected of a person performing the senior management function that the individual performs.

139. *Subsection (1)(d)* would make it an essential requirement of the offence that the implementation of the decision for which the person is being prosecuted causes the relevant financial institution to fail. ('Failure' would be defined in subsections (9) and (10) of the new clause inserted by *Lords Amendment 61*.)

140. *Subsection (2)* would define "group institution" It has the effect that a senior manager can be prosecuted for causing the failure not only of F (the relevant financial

institution which they manage), but also of any other relevant financial institution in the same group as F.

141. *Subsection (4)* sets out the maximum penalties for the offence. The maximum penalties on summary conviction vary according to the different powers of the lower courts in different parts of the United Kingdom. The maximum penalty on conviction on indictment (in all parts of the United Kingdom) is 7 years imprisonment or an unlimited fine (or both).

Lords Amendment 61

142. *Lords Amendment 61* would provide for the interpretation of the terms used in the offence. *Subsections (1) to (6)* would provide that the offence applies to senior managers in UK institutions which have permission to carry on the regulated activity of accepting deposits (other than insurers and credit unions) and UK investment firms which are authorised by the PRA. This means that the offence would cover only the failure of banks, building societies and PRA-authorised investment firms which are incorporated in the UK or formed under the law of part of the UK.

143. *Subsection (7)* would define "senior manager" for the purpose of the offence, limiting it to individuals performing a function which has been designated as a senior management function by the FCA or the PRA. The FCA and the PRA would be given power to designate senior management functions by *Lords Amendment 42*.

144. *Subsections (9)* and *(10)* would define when a relevant financial institution is to be regarded as having failed for the purposes of the offence.

Lords Amendment 62

145. *Lords Amendment 62* would set out who may bring proceedings for the offence. *Subsections (2) and (3)* would provide that in England, Wales and Northern Ireland, prosecutions could be brought by the FCA, PRA, Secretary of State, and the Director of Public Prosecutions (in Northern Ireland this is the Director of Public Prosecutions for Northern Ireland). Others may bring prosecutions with the consent of the Director of Public Prosecutions. In Scotland, prosecutions could (in any event) only be brought by the Procurator Fiscal.

146. *Subsections (4) and (5)* would allow the Treasury to restrict the regulators' powers to prosecute, both generally and with regard to specific proceedings or categories of proceedings, providing it does so in writing.

Lords Amendments 63 to 134, 175 and 176

147. *Lords Amendments 63* to *134, 175 and 176* would insert in the Bill a new Part 5 which establishes a regulatory regime for payment systems in the United Kingdom.

Lords Amendments 64 and 175

148. *Lords Amendment 64* would require the FCA to establish the Payment Systems Regulator and to take such steps as are necessary to ensure that the Payment Systems

Regulator can exercise its functions. The amendment would allow the FCA to provide staff and services to the Payment Systems Regulator. *Lords Amendment 175* would insert a new Schedule which would, amongst other things: include provision for the constitution of, appointment to and removal from the board of the Payment Systems Regulator; provide for how it is to be funded; and provide for arrangements for the delegation of its functions, including to the FCA.

Lords Amendments 65 and 66

149. *Lords Amendment 65* would insert a new clause defining a payment system. The Treasury would have a power to add, vary or remove descriptions of arrangements which were excluded from the definition. *Lords Amendment 66* would insert a clause defining three classes of persons to be regarded as "participants" in a payment system: "operators", "infrastructure providers" and "payment service providers". Subsection (6) would describe what it means for a payment service provider to have "direct access" to a payment system. Subsection (7) would make provision for what the term "participation" may include in relation to operators of, and payment service providers with direct access to, payment systems. Subsection (8) would ensure that the Bank of England would not be regarded as any category of participant.

Lords Amendments 67 to 72

150. *Lords Amendment 67* would give the Treasury a power to issue a "designation order" to designate a payment system, to bring that system into the scope of regulation by the Payment Systems Regulator. *Lords Amendments 68 to 72* set out the procedural requirements for making, amending and revoking such orders. Orders could only be made where the Treasury were satisfied that certain criteria were met in respect of the system, and the Treasury would be required to take into account the matters set out in subsection (2) of the clause inserted by *Lords Amendment 68* when assessing whether the criteria were met. The Treasury would have a duty to consider any request by the operator of a regulated payment system for the amendment or revocation of its designation order. The Treasury would also be required to publish any designation order, any amended designation order and any revocation of a designation order.

Lords Amendments 73 to 77

151. *Lords Amendment 73* would establish the general duties and objectives of the Payment Systems Regulator, which would be required, so far as is reasonably possible, to act in a way that advances one or more of its "payment systems objectives": the "competition objective", the "innovation objective" and the "service-user objective". The amendment would set out matters which the Payment Systems Regulator would be required to take into account in discharging its "general functions". *Lords Amendments 74*, *75* and *76* would insert three new clauses into the Bill providing definitions for the "competition objective", the "innovation objective" and the "service-user objective" and *Lords Amendment 77* would insert a new clause setting out the regulatory principles to which the Payment Systems Regulator would

be required to have regard.

Lords Amendments 78 to 82

152. *Lords Amendments 78* to *82* would set out the regulatory powers of the Payment Systems Regulator. The Payment Systems Regulator would have the following powers: to give directions to participants in regulated payment systems; to impose certain requirements on the operator of a regulated payment system concerning the rules of the system; to order the provision of access to a regulated payment system; to vary the fees and charges payable under, and other terms and conditions of, an agreement concerning access to a regulated payment system; and to require the disposal of an interest in the operator of a regulated payment system. The powers to order the provision of access to a payment system and to vary agreements could only be exercised where an application had been received by the Payment Systems Regulator. The power to order a disposal of an interest in a regulated payment system could only be exercised if the Payment Systems Regulator were satisfied that, if the power were not exercised, there would likely be a restriction or distortion of competition in the market for payment systems or for services they provide. The exercise of this power would also be subject to the consent of the Treasury.

Lords Amendments 83 to 91

153. *Lords Amendment 83* would confer on the Payment Systems Regulator certain of the competition functions of the CMA under Part 4 of EA02, so far as those functions relate to participation in payment systems. The Payment Systems Regulator would only have a market study function concurrently exercisable with the CMA (whose Board exercises this function); the Payment Systems Regulator does not have the concurrent function of conducting market investigations, which remains solely that of the CMA (which convenes a group to conduct such investigations). The Payment Systems Regulator would be able to conduct a market study the purpose of which is, amongst other things, to consider the extent to which a matter in relation to participation in payment systems used to provide services in the United Kingdom has or may have effects adverse on the interests of consumers. Having conducted a market study, the Payment Systems Regulator can then refer the relevant market to the CMA which has the power to conduct a market investigation and, if necessary, use its powers in Part 4 of the EA02 to remedy any distortion or restriction of competition that it finds in the market. Certain functions of the CMA (relating to the maintenance of registers and publishing of guidance) contained in Part 4 of EA02 would be excluded from those that the Payment Systems Regulator may exercise concurrently.

154. *Lords Amendment 84* would impose a requirement on the CMA and the Payment Systems Regulator to consult each other before exercising any of their concurrently exercisable competition functions. *Subsection (2)* would prevent one exercising functions in relation to a matter if the other had already exercised those functions in relation to that matter. *Subsections (4) and (5)* would make similar provisions for co-ordination between the Payment Systems Regulator and the FCA, which would also have concurrent competition functions under Part 4 of EA02 as a

consequence of *Lords Amendments 153 and 179* (which are explained separately below).

155. *Lords Amendment 85* would confer on the Payment Systems Regulator certain competition functions under Part 1 of CA98. Such functions would be exercisable concurrently by the Payment Systems Regulator and the CMA. Those functions would concern investigations of, and powers to address, restrictions and distortions of competition, so far as the agreements, decisions, concerted practices or conduct in question related to participation in payment systems. *Subsection (3)* of this new clause, in conjunction with *subsection (5)*, would exclude certain functions of the CMA contained in Part 1 of CA98 from those that the Payment Systems Regulator could exercise concurrently.

156. *Lords Amendment 86* would impose a requirement on the Payment Systems Regulator to consider whether it would be more appropriate to take action under its new powers in CA98 before exercising certain powers, set out in *subsection (2)* of this new clause. *Subsection (3)* would prohibit the Payment Systems Regulator from exercising these powers if it considered that it would be more appropriate to proceed under CA98.

157. *Lords Amendments 87* to *91* would make further provision concerning the Payment Systems Regulator's competition powers, including requiring it to provide relevant information and assistance to a CMA group carrying out a market investigation in response to a market investigation reference made by the Payment Systems Regulator. It would also be required to keep under review the market for payment systems and the markets for services provided by payment systems. In the new clause inserted by *Lords Amendment 91,* subsection (1) would have the effect of giving the Payment Systems Regulator the power to apply to the court to make a disqualification order against a person who is a director of a company which has committed a breach of competition law. *Subsection (2)* would have the effect of ensuring that the Payment Systems Regulator is a National Competition Authority for the purposes of EU competition law. *Subsection (3)* would amend section 136 of EA02, to ensure that the Payment Systems Regulator would have to receive a copy of a CMA report where the CMA Board had made a market investigation reference, for consideration by a CMA group, concerning participation in payment systems. *Subsection (4)* would amend section 52 of the Enterprise and Regulatory Reform Act 2013 so that the power for the Secretary of State to remove from a regulator any of its concurrent competition functions would extend to the Payment Systems Regulator's concurrent competition functions. *Subsection (5)* would ensure that the CMA would be required to report on the exercise by the Payment Systems Regulator of its concurrent competition powers.

Lords Amendments 92 to 94

158. *Lords Amendments 92* to *94* would make provision for complaints to be made to the Payment Systems Regulator by representative bodies designated by the Treasury, where it appears a matter concerning payment systems is significantly

damaging the interests of payments system service users.

Lords Amendments 95 to 103 and 176

159. *Lords Amendments 95* to *99* would include provision for the enforcement of decisions made by the Payment Systems Regulator. The Payment Systems Regulator would have the power to require a participant in a regulated payment system to pay a penalty in respect of a compliance failure (as defined in the clause inserted by *Lords Amendment 95*) and could publish details of compliance failures and penalties it imposes. Before imposing a penalty or publishing details of a compliance failure, the Payment Systems Regulator would have to issue a warning notice to the person concerned, provide at least 21 days for representations to be made, consider any representations received and give notice in writing stating whether or not it intended to impose the sanction. The Payment Systems Regulator would also be able to apply to the court to issue injunctions to prevent the occurrence or continuation of a compliance failure or to order a participant who has committed a compliance failure to take steps to remedy it.

160. *Lords Amendments 100 to 103 and 176* would make provision about appeals against decisions of the Payment Systems Regulator. *Lords Amendment 100* would provide that certain decisions are classed as "CAT-appealable decisions" and would have to be appealed to the CAT along with appeals concerning penalties. Other decisions would qualify as "CMA-appealable decisions" and would have to be appealed to the CMA. Appeals to the CMA would only be possible where the CMA had granted permission. *Lords Amendments 101 and 102* make provision about the procedure for appeals to the CAT, and *Lords Amendments 103 and 176* make provision about the procedure for appeals to the CMA, including the power of the CMA to suspend the decision in question pending the outcome of the appeal, and the CMA's powers to obtain information relevant to the determination of the appeal. Appeals of CAT-appealable decisions would be heard to a judicial review standard. Appeals against a CMA-appealable decision could result, if the CMA decided to quash whole or part of a decision, in the CMA substituting its own decision for that of the Payment Systems Regulator.

Lords Amendment 104

161. *Lords Amendment 104* would provide for the enforcement of decisions of the Payment Systems Regulator to exercise its power to require a disposal of an interest in the operator of a payment system.

Lords Amendments 105 to 114

162. *Lords Amendments 105* to *107* would confer information and investigation powers. The Payment Systems Regulator would have the power to require the provision of information or documents which it thinks would help the Treasury in determining whether to designate a payment system, or which the Payment Systems Regulator would require in performing its functions under Part 5 of the Bill. The Payment Systems Regulator would also have the power to require a participant in a regulated payment system to provide a report on any matter relating to the person's

participation in the system, or to appoint a person other than a participant to provide this report. The Payment Systems Regulator could appoint one or more competent persons to investigate any aspect of the business of any participant in a regulated payment system, if the Payment Systems Regulator thought that it was desirable to do so to advance any of its payment systems objectives. The Payment Systems Regulator could also appoint one or more competent persons to investigate circumstances that suggest a compliance failure may have taken place.

163. *Lords Amendments 108* to *111* would make general provision regarding notification requirements when a person is appointed to conduct an investigation, as well as provisions conferring on investigators the power to require certain persons to give evidence, and provisions concerning the admissibility as evidence of information provided pursuant to information requirements imposed by an investigator under the powers contained in the new clauses inserted by *Lords Amendments 109* and *110*.

164. *Lords Amendments 112* to *114* would provide for the enforcement of requirements to provide information or documents to the Payment Systems Regulator or any investigator. Under these provisions, a justice of the peace, having been satisfied that certain conditions are met, could issue a warrant to permit the entry of premises of a person who has failed to provide information required by the Payment Systems Regulator or an investigator. The provisions would set out the powers of a constable under a warrant and would provide that the warrant may authorise persons accompanying a constable to exercise these powers under the supervision of a constable. It would also be provided that the court may in certain circumstances treat failures to comply with information requirements as contempt of court. Certain activities would be criminalised, including the intentional falsification, concealment or destruction of relevant information, the intentional provision of false or misleading information and the obstruction of a person acting under a warrant.

Lords Amendments 115 to 119

165. *Lords Amendments 115 to 119* would make provision about the treatment of confidential information by the Payment Systems Regulator and others. There would be a restriction on the disclosure of confidential information without the consent of the person who provided it, or the person to whom it related, by the Payment Systems Regulator, the FCA, their employees and service providers and certain others (each a "primary recipient"), as well as any person who had obtained the confidential information directly or indirectly from a primary recipient. Provision would be made for what is and is not to be considered "confidential information" and to ensure that the restriction would not apply to information received by a primary recipient in connection with the discharge of the Payment Systems Regulator's concurrent competition functions. Instead, the provisions contained in Part 9 of the Enterprise Act 2002, which deals with the disclosure of specified information, would apply.

166. It would also be provided that disclosure of confidential information would be permitted if it was for the purpose of facilitating the carrying out of a public function and is permitted by regulations made by the Treasury. A definition of "public

functions" would be included, and *Lords Amendment 116* would set out the matters for which Treasury regulations made under this power could make provision.

167. The restrictions on disclosing confidential information would be enforced by making it a criminal offence by *Lords Amendment 117* to disclose confidential information in contravention of the restriction and, where information has been disclosed to a person in accordance with regulations made by the Treasury, for that person to use the information in contravention of any provision of those regulations.

168. It would also be provided that the Payment Systems Regulator and the FCA would be restricted from disclosing to any person "specially protected information" (defined in *Lords Amendment 118*) received from the Bank of England. The provision would also set out the circumstances in which disclosure of such information would not be subject to the restriction.

169. *Lords Amendment 119* would amend section 246 of the Banking Act 2009 to allow the Bank of England to disclose restricted information to the Payment Systems Regulator.

Lords Amendment 120

170. *Lords Amendment 120* would insert a new clause enabling the Payment Systems Regulator to issue guidance consisting of such information and advice as it considers appropriate with respect to those matters set out in the amendment.

Lords Amendment 121

171. *Lords Amendment 121* would insert a new clause giving the Payment Systems Regulator the power to prepare and publish a report into any matter relevant to the exercise of its functions under Part 5 of the Bill where it considers that it is desirable to do so in order to advance any of its payment systems objectives.

Lords Amendments 122 to 126

172. *Lords Amendments 122* to *126* would insert new clauses making provision concerning the relation between the Payment Systems Regulator and other regulators. The Payment Systems Regulator, the Bank of England, the FCA and the PRA would be required to co-ordinate the exercise of their relevant functions (as defined in subsection (5) of the clause inserted by *Lords Amendment 122)*. It would be provided that the duty to co-ordinate only applies to the extent that compliance is compatible with the advancement by each regulator of any of its objectives and does not impose a burden on the regulators that is disproportionate to the benefits of compliance. The Payment Systems Regulator, the Bank of England, the FCA and the PRA would be obliged to draw up a memorandum of understanding which describes their respective roles and how they intend to comply with the duty to co-ordinate the exercise of their functions. The Bank, the FCA and the PRA would each have a power, where certain conditions were satisfied, to give the Payment Systems Regulator a direction not to exercise a power or not to exercise it in a specified manner.

Lords Amendments 127 to 131

173. *Lords Amendments 127* to *131* would insert new clauses imposing consultation obligations on the Payment Systems Regulator, as well as providing for its accountability and oversight of its activities. The Payment Systems Regulator would be required to make and maintain effective arrangements for consulting relevant persons (that is, participants in regulated payment systems and those who use or are likely to use services provided by those systems) about the extent to which the Payment Systems Regulator's general policies and practices are consistent with its general duties and how its payment systems objectives may be best achieved. Where the Payment Systems Regulator were considering imposing a generally applicable requirement (that is, a general direction under *Lords Amendment 78* or a generally-imposed requirement under *Lords Amendment 79*) the Payment Systems Regulator would be under a duty to consult the Bank of England, the FCA and the PRA. After doing so, the Payments Systems Regulator would have to publish a draft of the proposed requirement, publish a cost-benefit analysis together with an explanation of the purpose of the proposed requirement, and have regard to any representations made. Further provision would be made for the steps the Payment Systems Regulator would have to take if the direction or requirement it was intending to impose differed significantly from the draft it had published.

174. *Lords Amendment 129* would make amendments of the Financial Services Act 2012 having the effect of establishing a new set of circumstances in which the Treasury may arrange independent inquiries: to inquire into a failure in the system of regulation of payment systems by the Payment Systems Regulator. *Lords Amendment 130* would make further amendments of that Act so as to impose a duty on the Payment Systems Regulator to investigate possible regulatory failures and report to the Treasury accordingly. It would also be provided that the Payment Systems Regulator would be required to carry out such an investigation where it appears to the Treasury that the conditions for initiating an investigation are satisfied.

175. *Lords Amendment 131* would insert a new clause ensuring that the CMA could advise the Payment Systems Regulator if the CMA is of the opinion that the Payment Systems Regulator's regulatory activities (or regulatory omissions) may cause or contribute to the prevention, restriction or distortion of competition in connection with the supply or acquisition of goods or services in the UK or in part of the UK.

Lords Amendments 132 to 134

176. *Lords Amendments 132* to *134* would insert new clauses which contain miscellaneous and supplemental provision. The purpose of the clause inserted by *Lords Amendment 132* would be to ensure that the Payment Systems Regulator's powers could not be exercised incompatibly with EU law and to avoid the powers themselves consequently being held to be incompatible with EU law.

177. The Payment Services Regulations 2009 (the "2009 Regulations") implement Directive 2007/64/EC of the European Parliament and of the Council of 13th November 2007 on payment services in the internal market (the "Directive"). Under

Article 28(1) of the Directive, Member States are required to ensure that "the rules on access of authorised or registered payment service providers to payment systems are objective, non-discriminatory and proportionate..." There is also a prohibition on payment systems imposing on payment service providers, on payment service users or on other payment systems certain restrictive rules governing access to and participation in payment systems. The references in Article 28(1) to "payment systems" do not, however, include all payment systems. For example, those systems designated under Directive 98/26/EC of the European Parliament and of the Council of 19th May 1998 on settlement finality in payment and securities settlement systems are excluded from the scope of Article 28(1).

178. Part 8 of the 2009 Regulations implements Article 28 of the Directive. Regulation 97 of the 2009 Regulations prohibits restrictive rules or conditions governing access to, or participation in, a payment system (other than those to which Article 28(1) does not apply) by "authorised payment institutions", "EEA authorised payment institutions" and "small payment institutions", as defined in the 2009 Regulations.

179. The Directive is a "maximum harmonisation" measure: Member States are not permitted under EU law to adopt any measures which go beyond the measures contained in the Directive. If the Payment Systems Regulator were able to exercise any power for the purposes of enabling a "relevant person" (that is, authorised payment institutions, EEA authorised payment institutions and small payment institutions) to obtain access to, or otherwise participate in, a payment system to which Part 8 of the 2009 Regulations does not apply, that would mean that the maximum harmonisation principle would be contravened. *Lords Amendment 132* would serve to prevent the possibility of such a contravention and would therefore serve to ensure the powers themselves were compatible with the maximum harmonisation principle.

180. *Lords Amendment 133,* inserting a new clause would ensure that the provisions in Schedules 1ZA and 1ZB to FSMA which exempt from liability in damages the FCA, PRA and their employees for anything done or omitted in the discharge, or purported discharge, of the FCA's and the PRA's functions would extend to the FCA's and PRA's functions under Part 5 of the Bill.

Lords Amendments 135 to 152, 177, 178

181. *Lords Amendments 135 to 152, 177 and 178* would establish a new special administration regime known as "FMI administration". This would apply to "infrastructure companies", as defined in *Lords Amendment 136,* that become insolvent. The new Part would also restrict powers of persons other than the Bank of England in the event of the insolvency of an infrastructure company.

182. *Lords Amendment 136* would define the term "infrastructure company". The following companies would be "infrastructure companies": recognised inter-bank payment systems and securities settlement systems. This amendment would also allow

the Treasury to designate a company as an "infrastructure company" where the company is a key service provider to a recognised inter-bank payment system or a securities settlement system.

183. *Lords Amendments 137 and 151* would define a number of terms for the purposes of the new Part 6.

184. *Lords Amendment 138* would define the term "FMI administration order" for the purposes of the new Part 6. FMI administration orders would be made by the court and would have the effect of appointing an "FMI administrator" to manage the affairs of the infrastructure company.

Lords Amendment 139

185. *Lords Amendment 139* would set out the objective of FMI administration. The objective would be (1) to ensure that the relevant recognised inter–bank payment system or securities settlement system is maintained and operated as an efficient and effective system; (2) in instances where the operator of any such system is also a recognised clearing house which provides clearing services without doing so as a central counterparty, to ensure that certain services that it carries on in that capacity continue to be maintained, and (3) to ensure that either as a result of the rescue of the infrastructure company as a going concern or as a result of a transfer of all or part of the undertaking of the infrastructure company to another company or companies, it becomes no longer necessary for the FMI administration to continue.

Lords Amendment 140

186. *Lords Amendment 140* would provide that (1) a FMI administration order can only be made upon the application of the Bank of England, (2) that when making the application, the Bank of England must nominate the FMI administrator and (3) that the infrastructure company must give notice of the application in accordance with rules that would be made for the purpose of FMI administration.

Lords Amendment 141

187. *Lords Amendment 141* would specify the three cases in which a court could make a FMI administration order: (1) where an infrastructure company is insolvent; (2) where an infrastructure company is likely to become insolvent or (3) the case is one where the Secretary of State could petition the court for the infrastructure company to be wound up on public interest grounds. It further specifies what action the court may take in relation to an application for an FMI administration order.

Lords Amendment 142

188. *Lords Amendment 142* would provide that FMI administrators are to be officers of the court and that when acting in relation to an infrastructure company, will act as the infrastructure company's agent. This amendment would furthermore place FMI administrators under a duty to manage the infrastructure company so as to achieve the objective of FMI administration as quickly and efficiently as possible. It would also provide that, insofar as it is possible to do so whilst acting consistently

with the objective of FMI administration, FMI administrators should act in a way which best protects the company's creditors. This amendment would also establish a related and secondary requirement that the FMI administrator should also act where possible in the interests of the company's members as whole.

Lords Amendment 143

189. *Lords Amendment 143* would provide that in instances where an infrastructure company has entered into arrangements with a supplier of certain specified goods and services prior to a FMI administration order being made, the supplier would only be able to terminate the supply (1) where charges in respect of supplies made after the date of the making of the FMI administration order have remained unpaid for more than 28 days; (2) with the consent of the FMI administrator or (3) with the court's permission. This amendment would also operate to render void any provision in a relevant supplier's terms and conditions that purports to allow the supplier to terminate the supply agreement in the event of the infrastructure company entering into FMI administration.

Lords Amendment 144

190. *Lords Amendment 144* would confer a power on the Bank of England to direct a FMI administrator to take, or to refrain from taking, specified action. When considering whether to make any such direction, the Bank of England would have to have regard to the public interest in the protection and enhancement of the stability of the financial system and the maintenance of public confidence in that system. This amendment would also confer immunity from liability in damages upon certain specified persons arising from compliance with any such direction.

Lords Amendments 145 to 152, 177 and 178

191. *Lords Amendments 145, 177 and 178* would add to the Bill: (1) a new Schedule which would apply to FMI administration specified provisions of Schedule B1 to the Insolvency Act 1986 and certain other enactments which apply to ordinary administration and (2) a new Schedule which sets out the detail as to how transfer schemes to achieve the objective of FMI administration will operate. *Lords Amendment 145* would also provide that the rule making power conferred by section 411(1B) of the Insolvency Act 1986, which allows rules to be made for the purposes of bank administration, could also be used for the purposes of giving effect to FMI administration.

192. *Lords Amendment 146* would operate to restrict the circumstances in which any person other than the Bank of England might petition for the winding-up of an infrastructure company and to prohibit the voluntary winding-up of an infrastructure company without prior notice to the Bank of England and the permission of the court.

193. *Lords Amendment 147* would operate to prevent ordinary administration orders being made in respect of an infrastructure company if a FMI administration order has already been made in respect of that company. It would also provide that a court could not determine an application for an ordinary administration order in

respect of an infrastructure company unless the Bank of England has had 14 days' notice of the application for the order.

194. *Lords Amendment 148* would require that any person seeking to enforce a security over an infrastructure company to give the Bank of England 14 days' prior notice of any step taken to enforce the security.

195. *Lords Amendment 149* would allow the Treasury to make loans to an infrastructure company in respect of which a FMI administration order has been made for the purposes of achieving the objective of FMI administration. The Treasury would have discretion as to the terms upon which any such loan is made and any sums repaid would have to be paid into the Consolidated Fund.

196. *Lords Amendment 150* would permit the Treasury to indemnify certain persons (e.g. employees of the FMI administrator) in respect of liabilities arising and losses or damages sustained as a result of action taken by a FMI administrator in the course of his or her duties, on whatever terms the Treasury considers to be appropriate. Any such indemnity agreement should be laid before Parliament, and the infrastructure company would be under a duty to pay to the Treasury the whole amount, or part of the amount (as directed by the Treasury), of any sum paid pursuant to any such indemnity.

197. *Lords Amendment 151* would insert interpretative provisions relating to FMI administration.

198. *Lords Amendment 152* would make provision about the application to Northern Ireland of the provisions on FMI administration.

Lords Amendments 153, 179 and 182

199. *Lords Amendments 153* and *179* would insert a new Schedule giving the FCA new competition powers. *Paragraph 2* of the Schedule would repeal section 234H of FSMA. This section gives the FCA a power to ask the Office of Fair Trading to consider whether a feature, or combination of features, of a market in the United Kingdom for financial services may prevent, restrict or distort competition in connection with the supply or acquisition of any financial services in the United Kingdom or a part of the United Kingdom. These provisions are no longer necessary now that the FCA is to have concurrent competition functions.

200. *Paragraph 3* of the Schedule would insert sections 234I to 234O into FSMA. *New section 234I* would make some of the functions of the CMA under Part 4 of EA02 functions exercised concurrently by the FCA. *Subsection (2)* would provide that the CMA's functions under Part 4 are exercised concurrently, so far as those functions relate to the provision of financial services. The effect of *subsection (2)* is that the FCA only has a market study function concurrently exercisable with the CMA (whose Board exercises this function); the FCA does not have the concurrent function of conducting market investigations, which remains solely that of the CMA (which

convenes a group to conduct such investigations).

201. The effect of *subsections (2) and (4)* would be to enable the FCA to conduct a market study the purpose of which is, amongst other things, to consider the extent to which a matter in relation to the provision of financial services provided or received in the United Kingdom has or may have effects adverse on the interests of consumers. Having conducted a market study, the FCA can then refer the relevant market to the CMA which has the power to conduct a market investigation and, if necessary, use its powers in Part 4 of the EA02 to remedy any distortion or restriction of competition that it finds in the market.

202. *Subsection (3)*, in conjunction with *subsection (5),* would exclude certain functions of the CMA (relating to the maintenance of registers and publishing of guidance) contained in Part 4 of EA02 from those that the FCA may exercise concurrently.

203. *Subsection (6)* would modify section 130A of EA02 in its application to the FCA. This section requires the CMA to publish a market study notice when they are proposing to conduct a market study, which, among other things, sets the time frame within which the market study must be completed. The effect of *subsection (6)* would therefore be to ensure that when the FCA exercises its concurrent market study function, the statutory time frame applies.

204. *Subsections (7) and (8)* impose a requirement on the CMA and the FCA to consult each other before exercising any of their concurrently-held functions and to ensure they do not both exercise the same functions in relation to the same matter.

205. *New section 234J* would provide that the functions under Part 1 of CA98 specified in *subsection (2),* so far as they relate to the provision of financial services, are functions exercisable by the FCA concurrently with the CMA. This would ensure that the FCA will have powers to address restrictions and distortions in competition so far as those arise in the context of financial sector activities. *Subsection (3)* excludes those functions of the CMA relating to the publishing of guidance and statements of policy from those that the FCA may exercise concurrently.

206. *New section 234K* ensures that the FCA is required to consider the use of its new powers in CA98 before exercising the powers in FSMA listed in *subsection (3).* These powers are powers which the FCA could exercise in respect of particular firms rather than generally.

207. *New section 234L* would ensure that for the purposes of assisting a CMA group to carry out a market investigation in response to a reference from the FCA under section 131, the FCA must provide the CMA with any information relevant to the investigation and with any other assistance that the CMA might reasonably require. It also ensures that the CMA group must take note of information provided

by the FCA.

208. *New section 234M* would confer on the FCA the function of keeping under review those markets in which it may exercise its concurrent competition functions so that it may take informed decisions and carry out its other functions effectively.

209. *New section 234N* would ensure that where the FCA exercises any of its concurrent competition functions, its general duties under section 1B of FSMA do not apply. This is to ensure that the FCA is free to exercise its new competition functions in relation to the provision of financial services without being bound by general duties to which the CMA would not itself be subject when exercising those functions. However, this would not prevent the FCA taking account of the matters relevant to its general duties if the CMA would be able to take those matters into account.

210. *New section 234O* would require the Treasury to settle any questions that arise as to whether, by virtue of the FCA's concurrent competition functions, any functions may be exercised by the FCA in relation to a particular case. This provision would provide a mechanism for determining whether the FCA or CMA should exercise competition powers in a particular case. It would also ensure that no-one can object to the FCA taking action under its competition powers just because the CMA could have taken that action.

211. *Paragraph 4* of the Schedule would amend section 3I of FSMA, to ensure that the PRA does not have the power to require the FCA to refrain from a specified action in relation to the exercise of its concurrent competition powers.

212. *Paragraph 5* of the Schedule would ensure that the restriction contained in section 348 of FSMA on the FCA disclosing confidential information would not apply in respect of information received by the FCA when discharging its competition powers. Instead, the provisions contained in Part 9 of the Enterprise Act 2002, which deals with the disclosure of specified information obtained by those regulators with concurrent competition functions, would apply.

213. *Paragraph 6* of the Schedule would amend the FCA's duty to co-operate with other regulators with similar functions under section 354A of FSMA, so that that duty does not apply where the FCA has made a competition reference under section 131 of EA02. This does not affect the FCA's duty to share information with the CMA under new section 234L of FSMA.

214. *Paragraph 7* of the Schedule would amend paragraph 8 of Schedule 1ZA to FSMA, ensuring that the power in sub-paragraph (1) of paragraph 8 which allows the FCA to delegate its functions to committees, officers or members of staff does not override any provisions relating to delegation contained in CMA rules made under section 51 of CA98. It would also amend paragraph 23 of that Schedule to make it clear that the FCA may charge fees to cover the cost of exercising its new competition

functions.

215. *Paragraphs 8 to 12* of the Schedule would make consequential amendments to the Company Directors Disqualification Act 1986, the Competition Act 1989, the EA02 and the Enterprise and Regulatory Reform Act 2013. *Paragraph 8* would make the FCA a "specified regulator" for the purposes of section 9B of the Company Directors Disqualification Act 1986, able to bring actions for disqualification of directors under that section. *Paragraph 9* would make the FCA a "regulator" for the purposes of Part 1 of the Competition Act 1989. *Paragraph 10* would make the FCA one of the "relevant sectoral regulators" for the purposes of section 136 of EA02. *Paragraph 11* would add the FCA to the list of sectoral regulators in section 52 of the Enterprise and Regulatory Reform Act 2013 from whom the Secretary of State may remove powers exercisable concurrently by the regulator concerned and the CMA and *paragraph 12* would amend paragraph 16 of Schedule 4 to that Act to require the CMA to report on the arrangements for co-operation between the CMA and the FCA in relation to the FCA's concurrent competition powers.

216. *Lords Amendment 182* would make consequential amendments to Schedule 1ZA to FSMA to ensure that the costs the FCA incurs in enforcing the concurrent competition powers given to it in the new Schedule are "enforcement costs" for the purposes of Part 3 of Schedule 1ZA, and may therefore be deducted from the penalty receipts the FCA is required to pay to the Treasury.

Lords Amendment 154

217. *Lords Amendment 154* inserts a new clause into the Bill. *Subsection (1)* provides the PRA with a new, secondary, competition objective, by substituting section 2H of FSMA. The new *section 2H* provides that, in exercising its general functions, such as making rules, in a way which advances its general objective (and where relevant, its insurance objective), the PRA must act in a way which, as far as is reasonably possible, facilitates effective competition in the markets in which PRA-authorised persons operate. It also restates the existing requirement that, in exercising its general functions, the PRA must also have regard to the regulatory principles in section 3B. *Subsection (2)* amends paragraphs 19 and 20 of Schedule 1ZB to FSMA to require the PRA to include information on its compliance with the new competition objective in its annual report, and to invite representations on whether it has facilitated effective competition.

Lords Amendment 155

218. *Lords Amendment 155* would impose a duty on the FCA to make rules under section 137C(1)(a)(ii) and (b) of FSMA to impose a cap on the charges which may be imposed in relation to high-cost short-term credit in order to give borrowers appropriate protection against excessive charges, and to consult the Treasury before doing so. The first rules would have to be made no later than 2 January 2015, and apply to credit agreements which are entered into on or after that date (though if the FCA makes rules coming into force before that date, it will not be prevented from applying the rules to agreements entered into before that date). This Lords

Amendment would also require the FCA to include information in its annual report on the rules it has made under section 137C, and the types of regulated credit agreements to which those rules apply.

Lords Amendment 156

219. *Lords Amendment 156* would amend section 1Q of FSMA to provide that the FCA Consumer Panel established under that section may make its views on any matter which it is considering which it believes may be relevant to the PRA known to that regulator. This ensures that the PRA may benefit from the expertise of the FCA Consumer Panel even though it is not under an obligation to consult the Panel. This Lords Amendment would also enable the PRA to reimburse the FCA in respect of FCA expenditure relating to the FCA Consumer Panel, if the expenditure in question relates to communications between the FCA Consumer Panel and the PRA.

Lords Amendment 157

220. *Lords Amendment 157* would insert a new clause into the Bill. *Subsection (1)* of that clause would insert new sections 192JA and 192JB into FSMA, giving the PRA and the FCA powers to make certain rules relating to parent undertakings which are not themselves authorised persons. Under *new section 192JA*, the regulators would be able to make rules applying to any company incorporated in the UK which is a parent undertaking of a ring-fenced body. This will include not only the immediate holding company of the ring-fenced body, but also any ultimate holding company of the ring-fenced body. The regulators would be given the power to subject such parent undertakings to any rules which the regulators consider are necessary or expedient in order to achieve the group ring-fencing purposes, set out in new section 142H(4), which are designed to ensure that the ring-fenced body is able to operate independently of the other companies in its group.

221. *New section 192JB* would give the regulators a further power to make rules in relation to "qualifying parent undertakings", as defined in section 192B of FSMA (which comprise the parent undertakings of UK companies authorised by the PRA, UK investment firms, or recognised investment exchanges where the parent undertaking is itself a UK company or has a place of business in the UK). The regulators would be able to make rules requiring qualifying parent undertakings to make any arrangements if the regulators consider that those arrangements might facilitate the exercise of the resolution powers in Parts 1 to 3 of the Banking Act 2009 (or any similar powers exercisable by overseas authorities).

222. *Lords Amendment 157* would also amend section 192K of FSMA to ensure that the regulators' powers to impose a penalty or issue a censure where a qualifying parent undertaking has contravened rules made by the regulators under section 192J also apply if the qualifying parent undertaking has breached rules made under new section 192JB, or if a parent undertaking of a ring-fenced body has breached rules made under new section 192JA.

Lords Amendment 158

223. *Lords Amendment 158* would insert two new sections into Part 22 of FSMA. *New section 339B* would require each of the regulators to meet with the auditors of certain authorised persons at least once a year. *New section 339C* defines those authorised persons to which this duty applies, namely UK banks and UK investment firms which are regulated by the PRA (but not insurers or credit unions), and which are, in the opinion of the PRA, important to the financial stability of the United Kingdom.

Lords Amendment 159

224. *Lords Amendment 159* would clarify that the definition of "regulator" given in section 3A of FSMA does not apply in relation to sections 410A and 410B, where "regulator" includes, in certain cases, the Bank of England.

Lords Amendments 161, 170 and 180

225. *Lords Amendments 161 and 180* would introduce a new Schedule to the Bill to make amendments to the Building Societies Act 1986 ("the BS Act"), which makes provision with respect to building societies. *Lords Amendment 170* would provide for the coming into force of the new provisions.

226. *Paragraph 2* of the new Schedule to the Bill would amend section 7 of the BS Act, which sets out the funding limit for building societies. The funding limit, in effect, requires that the value of shares in the society held by individuals (known as retail funds) is at least 50% of the value of the total funds of the society's group (or total group funds).

227. *Sub-paragraphs (2) and (3) of paragraph 2* would insert new section 7(3)(aa) and (3A) to alter the calculation of the funding limit so that a limited amount of the value of deposits by small businesses would not count towards the value of total group funds. New section 7(3A) would set the limit, so that no more than 10% of the value of total group funds could be disregarded in calculating the funding limit. For the purposes of this calculation, the value of total group funds would be the value it would have been without the modification made by new subsection (3)(aa), i.e. after all the other modifications required by or under section 7 had been made.

228. *Sub-paragraph (4) of paragraph 2* would insert new section 7(6ZA) to provide that a small business is assumed to be a small business if it has declared itself to be so, unless it is shown not to be the case. *Paragraph 2(5)* would insert new subsections (10) and (11) to define a small business as any person carrying on a business with an annual turnover of less than £1 million, but not including individuals acting as sole traders. For example, a small business could be a company, partnership, mutual association or other unincorporated body. Under new subsections (12) and (13) the Treasury would have power to make an order to vary the amount of £1 million.

229. *Paragraph 3* of the new Schedule would make a consequential amendment to the Building Societies Act 1986 (Substitution of Specified Amounts and Modification

of the Funding Limit Calculation) Order 2007 (SI 2007/860) ("the 2007 Order"). The 2007 Order provides that a limited amount of deposits held in a society's EEA subsidiaries are to be disregarded in calculating the funding limit. The amendment in *paragraph 3* would ensure that, for the purposes of calculating the amount to be disregarded under the 2007 Order, the value of total group funds would be the value it would have been without the modification made by the 2007 Order and the modification made by new section 7(3)(aa).

230. *Paragraph 4* of the new Schedule would repeal section 9B of the BS Act which restricts a building society's power to create floating charges. Consequently, a building society would be permitted to create floating charges over its assets. Such floating charges however would not give the holder the right to appoint an administrator or an administrative receiver (unless appointed under the Building Societies (Financial Assistance) Order 2010). An administrator cannot be appointed because Schedule B1 to the Insolvency Act 1986 (under which companies can create floating charges which enable the holder to appoint an administrator) does not apply to building societies, because societies are subject to the version of Part 2 of the Insolvency Act 1986 as it had effect before the Enterprise Act 2002 (section 249(1) and (2) of the Enterprise Act 2002). An administrative receiver cannot be appointed because Schedules 15 and 15A to the BS Act (which apply companies winding up and insolvency legislation to building societies) would continue to provide that, in the provisions of the Insolvency Act 1986 which apply to societies, a reference to an administrative receiver does not apply to a society (paragraph 3(2)(b) of Schedule 15 and paragraph 2(2)(b) of Schedule 15A to the BS Act).

231. *Sub-paragraph (2) of paragraph 4* would amend Schedule 15A to the BS Act to ensure that an administration order of the court under Part 2 of the Insolvency Act 1986 would apply to a floating charge. *Sub-paragraph (3) of paragraph 4* would make consequential amendments to remove references in various enactments to the restrictions in section 9B of the BS Act.

232. *Paragraph 5* of the new Schedule would amend section 74 of the BS Act so that regulations made under that section may no longer require the annual business statement published by a building society to include information about the financial information of officers, past officers and persons connected to them. This would in consequence removed the duty on officers (who are not directors) of a building society to notify their interests to the society for the purposes of the annual business statement. Consequential amendments would need to be made by secondary legislation to the Building Societies (Accounts and Related Provisions) Regulations 1998 so that disclosure requirements do not apply to such officers.

233. *Paragraph 6* of the new Schedule would amend section 76 of the BS Act, which requires a building society to produce a summary financial statement (the "SFS") for each financial year. The existing obligation under subsection (8) to supply the SFS and (where that subsection is applied under section 78(6)) the auditor's report to new shareholding members would be replaced by a new requirement to publish the

document(s) on a website and notify such new members of: (i) the online publication of the document(s); (ii) the website address; and (iii) where on the website, and how, the information may be accessed. The existing criminal offence in subsection (11) of section 76 would be amended to reflect the amended provisions, i.e. it would be an offence to fail to publish the documents online or to notify new shareholders as required.

234. *Paragraph 7* of the new Schedule would make consequential amendments to the BS Act to reflect the amendments to section 76.

235. *Paragraph 8* of the new Schedule would amend section 100 of the BS Act, which sets out distributions and share rights on a transfer of a society's business. *Sub-paragraph 2* would replace section 100(8) with a new subsection to make it clear that the subsection applies to any right (i.e. not only a priority right) to acquire shares which is conferred on members. It would also make specific provision for holders of deferred shares, a form of capital instrument issued by building societies. The result of the new subsection would be that, if a right to acquire shares is given to members on a transfer of business, then the right must be restricted to members who have held shares for at least two years, or who hold deferred shares of a class described in the transfer agreement. *Sub-paragraph 3* would amend section 100(9) so that, if a right to receive a cash distribution is given to members on a transfer of business, then the right must be restricted to shareholders who have held shares for at least two years, or who hold deferred shares of a class described in the transfer agreement.

236. *Paragraph 9* of the new Schedule would insert new sections 115A to 115C relating to website communication by a society. New section 115A would provide that a person is deemed to have agreed to access a document, information or facility on a website if: (a) the person has been asked individually and has agreed to do so; or (b) the person has been asked and the society has not received a response within 28 days. The provision would not apply to every communication (section 115A(4)) and a person could revoke the agreement (section 115A(3)). New section 115B would ensure that a person has a right to receive, free of charge and within 21 days of the request being received, a hard copy of any document sent by electronic or other means. If a society failed to comply with new section 115B, then it would be treated as if it has breached rules made under section 137A of FSMA, the FCA's general rule-making power. The effect of this would be that the FCA can take disciplinary measures if a society fails to comply with this new section 115B. Under new section 115C, an intended recipient could agree with a society to receive a document in a way that is not by hard copy or by electronic means.

237. *Paragraphs 10 to 14* of the new Schedule would make related amendments to existing website communication provisions in the BS Act which require a person to agree how to receive notification that a document is available online. The amendments would remove references to agreeing the manner of notification, so that there is simply a duty on the society to notify the person that a document is available

online.

238. *Paragraph 15* of the new Schedule would effectively replace section 117 of the BS Act relating to the financial year of a building society. New section 117 would set out the year-end date for all building societies as at the coming into force of the provisions. *Paragraph 16* would insert new section 117A to allow a society to alter its financial year to any date in the year by notifying the FCA. *Paragraph 17* would make a consequential amendment to the BS Act.

Lords Amendment 162

239. *Lords Amendment 162* would enable the Secretary of State to make regulations which allow the Claims Management Regulator to impose a financial penalty, in addition to the Regulator's current powers to make regulations in relation to imposing conditions on or suspending or cancelling an authorisation.

240. Subsection (7) of the new clause inserted by the amendment would also provide that regulations made by the Secretary of State in relation to financial penalties shall include provision about how the amount of the penalty is to be calculated and may specify a maximum and minimum amount. It would also require any such regulations to provide that the income received from the financial penalties be paid into the Consolidated Fund. The regulation-making power would also allow for costs of enforcement or collection of the financial penalty to be deducted before the income is paid into the Consolidated Fund. Regulations may also provide that financial penalties may be enforced as a debt.

241. Subsection (8) of the clause inserted by the amendment would extend the jurisdiction of the First-tier Tribunal to include consideration of appeals against a decision of the Claims Management Regulator to impose a financial penalty, the amount of a penalty or any date by which it is required to be paid. The Tribunal would be able to require an authorised person to pay a penalty and would also be able to vary the date by which any payment, or part of it, is due. This would be in addition to the Tribunal's existing powers to impose or remove conditions, suspend or cancel an authorisation or to remit the matter to the Claims Management Regulator.

Lords Amendment 163

242. *Lords Amendment 163* relates to the provisions in section 161 of the Legal Services Act 2007 that give the Office for Legal Complaints jurisdiction over complaints about claims management services. Persons providing such services are regulated by the Claims Management Regulator under the Compensation Act 2006. Subsections (1) to (3) of the new clause inserted by *Lords Amendment 163* would amend paragraph 7 of the Schedule to the Compensation Act 2006 to make it clear that the Claims Management Regulator may charge fees in respect of the costs the Claims Management Regulator incurs in meeting the costs of the Office for Legal Complaints in dealing with complaints about claims management services.

243. *Lords Amendment 163* would also insert a new section 174A into the Legal

Services Act 2007, which is to have effect at any time when no one is designated as the Claims Management Regulator (when, as at present, no person is designated as the regulator section 5(9) of the Compensation Act 2006 provides that the Secretary of State is to act as the regulator). New section 174A(2) would ensure that there is no cross-subsidisation by the legal profession of the costs incurred and income received by the Office for Legal Complaints in handling complaints about claims management services. It does this by providing that the costs incurred and income received by the Office for Legal Complaints in connection with the exercise of its functions in relation to complaints about claims management services would be disregarded from the calculation of the expenditure of the Office for Legal Complaints that can be levied against the regulators of the legal profession.

244. New section 174A(3) would enable the Lord Chancellor to make regulations, to charge fees for those providing regulated claims management services for the purpose of meeting the costs the Lord Chancellor incurs in respect of the expenditure of the Office for Legal Complaints related to claims management services.

245. New section 174A(5) would provide that the regulations made by the Lord Chancellor under section 174A(3) may include, amongst other things, provision about how the fees are to be calculated and collected and specify the consequences of failure to pay the fees.

246. Subsection (6) of the new clause would make the regulations made by the Lord Chancellor under section 174A(3) subject to the affirmative procedure.

Lords Amendment 164

247. *Lords Amendment 164* would insert a new clause making general provision about orders and regulations made under the Bill, by the Treasury, the Secretary of State or the Lord Chancellor. With the exception of orders designating payment systems, all orders and regulations made under the Bill by Ministers would be made by statutory instrument. Any order or regulation made under the Bill may make different provision in different cases, or transitional provision.

Lords Amendment 165

248. *Lords Amendment 165* would amend clause 17 of the Bill to specify the procedures applying to statutory instruments made under the new powers, providing that the affirmative resolution procedure will apply to:

(a) Orders made by the Treasury to exclude certain systems from the definition of "payment systems" for the purposes of the new clauses establishing the new Payments Systems Regulator;

(b) Orders to make consequential amendments to other primary legislation; and

(c) Orders made under paragraph 6 of the Schedule on the conduct of

Financial Market Infrastructure administration, which allows the Treasury to make further modifications to primary legislation to make appropriate provision for FMI administration.

Lords Amendment 166

249. *Lords Amendment 166* enables the Treasury, the Secretary of State and the Lord Chancellor to make amendments to other primary and secondary legislation considered necessary or expedient in consequence of any provision made by or under the Bill.

Lords Amendments 167 and 168

250. *Lords Amendments 167 and 168* would extend the existing provision for the Treasury to make transitional, transitory or saving provisions by order, in connection with the commencement of any provision made by or under the Bill, to the Secretary of State and the Lord Chancellor.

Lords Amendment 169

251. *Lords Amendment 169* would provide that the amendments relating to preferential debts, penalties for claims management service providers and the recovery of the expenditure of the Office for Legal Complaints in connection with claims management services have the same extent as the Acts which they amend (for example, the amendments relating to the expenditure of the Office for Legal Complaints extend only to England and Wales, as do the relevant parts of the Legal Services Act 2007 and the Compensation Act 2006).

Lords Amendments 171 and 172

252. *Lords Amendment 171* would enable the Secretary of State by order to commence the amendments to the Compensation Act 2006 made by *Lords Amendments 162 and 163. Lords Amendment 172* would enable the Lord Chancellor by order to commence the amendments to the Legal Services Act 2007 made by *Lords Amendment 163.*

Lords Amendment 181

253. *Lords Amendment 181* would extend the definition of "relevant requirement" in sections 380, 382 and 384 of FSMA to include the offences created under Part 7 of the Financial Services Act 2012, which deal with misleading statements, misleading impressions, and misleading statements in relation to benchmarks such as LIBOR. This would enable the regulators to exercise the powers conferred by sections 380, 382 and 384 to seek an injunction or restitution in relation to these offences.

Lords Amendments 183 and 184

254. These amendments extend the long title of the Bill to refer to payment systems and securities settlement systems (*Lords Amendment 183),* and to claims management service providers (*Lords Amendment 184*).

FINANCIAL EFFECTS OF THE LORDS AMENDMENTS

255. There would be no direct impact on public sector expenditure as a result of *Lords Amendments 40 and 173* (on the new stabilisation option). However, it is possible, for example, that it may be necessary for the National Loans Fund to make loans to the Financial Services Compensation Scheme in relation to any recourse that may be had to the FSCS in connection with the costs of resolving a relevant institution under the contribution to costs of the special resolution regime arrangements under section 214B of FSMA.

256. *Lords Amendment 41 to 59 and 174* (on conduct) would have no significant effects on spending by Government departments met from money voted by Parliament.

257. The establishment by *Lords Amendments 63 to 134* of a regulatory regime for payment systems is not expected to result in any expenditure out of the Consolidated Fund. Spending by the new Regulator will be met by fee income. When there is a shortfall in fee income, this will be financed by short-term borrowing which will be repaid by future fees.

258. *Lords Amendments 153 and 179* would have the effect of adding to the powers exercisable by the FCA in the financial services sector certain competition powers, which it will be able to exercise concurrently with the CMA. Any costs which the FCA incurs in exercising these powers, and enforcing decisions it makes under them, will be met from the fees paid to it under FCA fee rules. Giving the FCA concurrent competition powers will not entail any expenditure out of the Consolidated Fund, require any drawings on the National Loan Fund or otherwise entail public expenditure.

259. *Lords Amendment 162* would amend the Compensation Act 2006 to allow for regulations to be made providing the Claims Management Regulator with the power to impose financial penalties on regulated claims management companies. Any costs which the Claims Management Regulator incurs in issuing a financial penalty or from enforcing an unpaid penalty, will be met from fees paid to it by regulated claims management companies (as provided for by the Compensation (Claims Management Services) Regulations 2006) or may be deducted from the penalty amounts collected before the remainder is paid into the Consolidated Fund.

260. *Lords Amendment 163* would enable the costs the Office for Legal Complaints would incur in dealing with complaints about claims management services to be recovered from the regulated claims management sector.

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

261. *Lords Amendments 40 and 173* give rise to a number of significant human

rights considerations. In particular, the rights under Article 1 Protocol 1 ("A1P1") (right to property) and Article 6 (right to a fair trial) of the European Convention on Human Rights are engaged.

262. An exercise of the new stabilisation option by the Bank of England, for example to transfer compulsorily shares in a failing bank to the bail-in administrator will involve an expropriation of the property of the original holder of the shares and an exercise of the powers conferred by *new section 48B* (e.g. to reduce a creditor's claim against the bank under resolution) will constitute an interference in the creditor's property rights contrary to A1P1, which specifies that every natural or legal person is entitled to the peaceful enjoyment of his possessions.

263. The rights established by A1P1 are not absolute and may be interfered with in the public interest (in this case, for example, financial stability reasons). However, any interference must be lawful and proportionate. To secure proportionality it may be necessary for compensation to be paid in some instances albeit the European Court of Human Rights has recognised that a wide margin of appreciation should be afforded to States when dealing with serious events such as threats to financial stability.

264. Consistent with the existing stabilisation options under the Act, the Government is of the view that the substantive limitations on the exercise of the new stabilisation options and the powers available to the Bank of England in relation to that option, and the procedural steps the Bank is obliged to take before exercising the stabilisation powers, will ensure that the stabilisation option will be used only where there are legitimate public interest justifications for doing so. The Government therefore considers that any interference with Convention rights will be for a legitimate aim. There are in addition a number of safeguards in the Bill to ensure that any interference with Convention rights is proportionate. In particular, provision is made in the Bill for compensation to be paid for compensatable interferences in property rights arising as a result of an exercise of the stabilisation powers.

265. Article 6 ECHR may also be engaged, for example, in relation to the determination of compensation, which constitutes a determination of a "civil right" for Article 6 purposes. The Government is content that the procedural safeguards in place satisfy the "fair trial" requirements of that Article.

266. Accordingly, the Government is of the opinion that the provisions added to the Bill by Lords Amendments 40 and 173 are compatible with the Convention rights.

267. *Lords Amendments 41 to 59* give rise to questions of compatibility with the European Convention on Human Rights. In particular, the rights under Article 1 Protocol 1 ("A1P1") (right to property) and Article 6 (right to a fair trial) of the European Convention on Human Rights are engaged.

268. Lords Amendment 54 would introduce the possibility of proceedings against a senior manager in which a reverse burden of proof is applied, in that a senior manager

will be taken to be responsible for any contravention of a relevant requirement in relation to any activities for which that manager is responsible, unless he satisfies the FCA that he had taken such steps as could reasonably be expected to avoid the contravention taking place. Such proceedings would engage Article 6.

269. Under Article 6(2) "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". However, this would only apply if a charge of misconduct under section 66A was considered to be a criminal charge. The Government does not consider that this would be the case. The charge of misconduct would only be brought in regulatory proceedings against senior managers in relation to their work in the financial services industry – a very limited class of people. The penalties which may be imposed are limited (and in particular do not include a prison sentence). Therefore the government does not consider that these proceedings would be considered to be criminal proceedings for the purposes of Article 6(2).

270. Such proceedings may involve the determination of civil rights, and must therefore satisfy the requirements of Article 6. Regulatory proceedings against senior managers will be subject to all the procedural safeguards which apply to other proceedings brought by the regulator against authorised or approved persons. These include a right to receive notice of the proceedings through a warning notice, a right to make representations to the regulator, and a right of appeal to the Upper Tribunal against any decision made by the regulator, and from the Upper Tribunal to the courts on a point of law. The Government consider that these safeguards are sufficient to ensure that the requirements of Article 6 are satisfied.

271. *Lords Amendments 60 and 61* raise issues under Article 7 of the European Convention on Human Rights. They create a new offence relating to decisions which result in the failure of a bank. Under Article 7, of the ECHR a criminal offence must be clearly defined in the law. This test is satisfied if "the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable". The government consider that the offence satisfies this test. The elements of the offence will be identified and set out in primarily legislation, accessible to all. The offence may only be committed by a "senior manager" – that is, a person who performs a designated senior management function under section 59ZA of FSMA. All senior managers must be individually approved by the regulator, and everyone who is within the class of potential defendants will therefore be well aware of this.

272. The *actus reus* of the offence will consist of taking a decision as to the way in which the business of the bank is carried on – or failing to take steps which the manager concerned could take to prevent such a decision being taken. Any decisions which relate to the way in which the business of the bank is carried on may form the subject matter of the offence – but only if the implementation of that decision caused the failure of the bank. This requirement is clear, and whether the decision caused the failure of the bank in any particular case will be a question of fact, to be considered by

the jury.

273. At the time the decision was taken, the manager must have been aware that there was a risk that the implementation of that decision would cause the failure of the bank. This requires actual knowledge – it will not be sufficient that the manager in question ought to have known of such a risk. The senior manager will therefore always be in a position to take steps to regulate their conduct so as to avoid the risk of criminal liability.

274. Finally, the manager's conduct in relation to the taking of the decision must have fallen far below what could reasonably be expected of a person in his or her position, a test which is similar to that used in section 1(4)(b) of the Corporate Manslaughter and Corporate Homicide Act 2007. There may be a question of fact in any particular case as to whether this test is met, but it will be clear what the test is, and by the nature of the role, everyone who is acting in the position of a senior manager should have an understanding of what is expected from them. The government therefore considers that the requirements of Article 7 are satisfied.

275. *Lords Amendment 162* gives rise to questions of compatibility with the European Convention on Human Rights. In particular, the rights under Article 1 Protocol 1 ("A1P1") (right to property) and Article 6 (right to a fair trial) of the European Convention on Human Rights are engaged.

276. Lords Amendment 162 would introduce the possibility for the Claims Management Regulator to issue a monetary penalty to an authorised person such as a claims management company. The imposition of such a penalty is likely to engage A1P1 as the penalty may impact on the authorised person's economic interest (value of business and client base). It is the Government's view that any such interference would be lawful and justified. Firstly, the imposition would be lawful if permitted by primary and secondary legislation. Secondly it would serve a legitimate aim of protecting consumers by helping to maintain a claims management regime which ensures companies act within the law. Thirdly, it is proportionate and strikes a fair balance as it would be an alternative to existing regulatory powers, and may be seen to be the most moderate power as it allows the authorised person to continue to pursue their economic activities.

277. The imposition of a financial penalty on an authorised claims management company may amount to the determination of a civil right or obligation under Article 6, and must therefore satisfy the requirements of a fair trial set out in Article 6(1). The burden of proof in establishing grounds for the imposition of a financial penalty, such as a breach of conditions of authorisation, is on the Claims Management Regulator. It is the intention that these regulatory proceedings will be subject to all the existing procedural safeguards which apply to other proceedings brought by the Regulator against authorised claims management companies. These include a written notice of the intended proceedings, a right to make representations to the Regulator and a right of appeal to the First-tier Tribunal (General Regulatory Chamber) against any

decision made by the Regulator. The Government considers that these safeguards are sufficient to ensure that the requirements of Article 6 are satisfied.

278. The other Lords Amendments do not raise any issues in relation to the Convention Rights.

LORDS AMENDMENTS TO THE FINANCIAL SERVICES (BANKING REFORM) BILL

EXPLANATORY NOTES

These notes refer to the Financial Services (Banking Reform) Bill as first printed for the Lords [HL Bill 38].

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