

FINANCIAL SERVICES BILL

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Financial Services Bill as brought from the House of Commons on 23rd May 2012. They have been prepared by HM Treasury in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

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

SUMMARY AND BACKGROUND

Background

3. The Government is committed to putting in place a new system for financial regulation as stated in the Government's publication "*The Coalition: our programme for government*":

We will reform the regulatory system to avoid a repeat of the financial crisis. We will bring forward proposals to give the Bank of England control of macro-prudential regulation and oversight of micro-prudential regulation.

4. The Government's proposals were first set out and consulted on in Cm 7874 "*A new approach to financial regulation: judgement, focus and stability*". The Government developed its proposals further and set them out for a further period of consultation in Cm 8012 "*A new approach to financial regulation: building a stronger system*". In July 2011, the Government published a White Paper "*A new approach to financial regulation: the blueprint for reform*" setting out further policy detail and some further areas for consultation. The White Paper included a draft Bill. Copies of relevant documents, including these consultation documents are available on the Treasury's website (www.hm-treasury.gov.uk).

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5. The draft Bill published in July 2011 has been the subject of pre-legislative scrutiny by a Joint Committee of both Houses under the chairmanship of Peter Lilley MP. The Joint Committee published its report on the draft Bill on 19 December 2011. The report is available on the Parliament website (<http://www.parliament.uk>).

Summary

6. The Bill provides a new framework for financial regulation in the United Kingdom. The Bill makes the Bank of England (the Bank) responsible for ensuring and protecting the stability of financial systems in the UK and provides for an independent conduct of business regulator.

7. The Bill introduces four institutional changes:

- Establishing the Financial Policy Committee (FPC) as a committee of the Court of the Bank. The FPC will have responsibility for macro-prudential regulation; that is, regulation of the stability and resilience of the system as a whole.
- Making provision for the Prudential Regulation Authority (PRA) as an operationally independent subsidiary of the Bank with responsibility for micro-prudential regulation. The PRA will regulate institutions that manage significant risks on their balance sheets; institutions that require a sophisticated level of prudential regulation.
- Making provision for the Financial Conduct Authority (FCA) as an independent conduct of business regulator with a strategic objective of ensuring that the relevant markets function well and operational objectives focused on market integrity, consumer protection and effective competition. The FCA will among other things, perform the functions of the FSA as UK Listing Authority.
- Making the Bank responsible for the regulation of recognised clearing houses. This, taken with the Bank's responsibilities under other legislation, will ensure that the Bank is responsible for the regulation of systemically important clearing, payment and settlement infrastructure.

8. The Bill provides the objectives and principles by which the FPC, the Bank, the PRA and the FCA will operate and equips them with a range of powers. The existing powers of the Financial Services Authority will be transferred to one or more successor bodies and certain new powers are provided for in the Bill.

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9. The Bill sets out how the authorities will be held accountable for fulfilling their roles and how they will be governed, including the constitution of their governing bodies. It also sets out the role of HM Treasury in relation to the authorities.

10. The Bill requires the FCA and PRA to coordinate their functions effectively, placing a statutory duty on them to coordinate with each other and to cooperate with the Bank, and to produce a Memorandum setting out how this duty will be complied with. The Bill empowers the PRA to veto an action to be taken by the FCA if it is likely to lead to the disorderly failure of a firm or wider financial instability. The Bill details how some specific processes will be coordinated between the regulators.

11. Recognising the international nature of financial regulation, the Bill provides for mechanisms (including the maintenance of a memorandum and the establishment of a co-ordination committee) to ensure that the authorities co-ordinate effectively their functions which relate to the membership of, or relations with, international bodies such as the new European Supervisory Authorities.

12. The Bill provides for mechanisms that will define the relationships between HM Treasury, the Bank, the PRA and the FCA in the event of crisis in the financial system.

13. The Bill also provides powers to effect a transfer of consumer credit regulation from the Office of Fair Trading to the FCA.

OVERVIEW OF STRUCTURE OF THE BILL

14. The Bill contains nine Parts and twenty one Schedules. The Bill makes changes to a number of existing Acts, most notably the Financial Services and Markets Act 2000 (FSMA), the Bank of England Act 1998 and the Banking Act 2009. The general arrangement of the Bill is as follows:

Part 1	Bank of England
Part 2	Amendments of Financial Services and Market Act 2000
Part 3	Mutual Societies
Part 4	Collaboration between Treasury, Bank of England, FCA or PRA
Part 5	Inquiries and Investigations

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Part 6	Investigations of complaints against regulators
Part 7	Amendments of Banking Act 2009
Part 8	Miscellaneous
Part 9	General

TERRITORIAL EXTENT AND APPLICATION

15. The Bill's provisions extend to England and Wales, Scotland and Northern Ireland.

Scotland

16. At Introduction, this Bill contains provisions that fall within the terms of the Sewel Convention. The provisions relate to the Money Advice Service, established in the Financial Services Act 2010 as the Consumer Financial Education Body (CFEB) with a statutory function to enhance the understanding and knowledge of members of the public of financial matters and enhance the ability of members of the public to manage their own financial affairs. The Bill will extend the function of the CFEB to require it to assist members of the public with the management of debt and work with other organisations to improve debt services. This function is devolved in Scotland, in so far as it does not regulate financial services or relate to the financial system.

17. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. This has been given through a legislative consent motion in relation to the provisions mentioned above. If there are amendments relating to further matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

Wales

18. At introduction, the Bill includes provisions relating to matters which are within the legislative competence of the National Assembly for Wales. The provisions relate to the function of the Money Advice Service. The National Assembly for Wales has given its consent in relation to these provisions through a legislative consent motion.

Northern Ireland

19. At introduction, the Bill includes provisions relating to matters which are within the legislative competence of the Northern Ireland Assembly. The provisions relate to mutual societies. The consent of the Northern Ireland Assembly is being sought for these provisions.

COMMENTARY

20. In the Commentary on Part 1 of the Bill, references to “new sections” and “new Schedules” are to the sections and Schedules to be inserted into the Bank of England Act 1998 by the Bill. Elsewhere in the Commentary, except where the text indicates otherwise, references to “new sections” and “new Schedules” are to the sections and Schedules to be inserted into FSMA by the Bill. A Glossary of other terms and expressions used in the Explanatory Notes below is provided at the end of this document.

PART 1 –BANK OF ENGLAND

Clause 1: Deputy Governors

21. *Subsection (1)* amends section 1 of the Bank of England Act 1998 (the “BoE Act”) to provide for the creation of a new post of Deputy Governor for prudential regulation. The Deputy Governor for prudential regulation, like the Deputy Governors for monetary policy and financial stability, is to be a member of the Bank’s court of directors.

22. *Subsection (2)* amends section 13 to provide that the new Deputy Governor for prudential regulation is not a member of the Monetary Policy Committee.

Clause 2: The Bank’s financial stability objective

23. Under section 2A of the BoE Act, an objective of the Bank is to contribute to protecting and enhancing the stability of the financial systems of the United Kingdom. In pursuing that objective, the Bank is required to work with other relevant bodies including the Treasury and the FSA.

24. *Subsection (2)* amends the Bank’s financial stability objective in section 2A: the new objective is to protect and enhance the stability of the financial system of the United Kingdom. This change will reflect the enhanced role that the Bank will have in relation to the protection of financial stability. The amendments to section 2A also align the terminology in the BoE Act with the terminology used in FSMA. *Subsection (3)* makes a consequential amendment, replacing the reference to the Bank aiming to work with the FSA with a reference to working with the new regulators. *Subsection (4)* removes the existing requirement for the Bank’s financial stability strategy, which is replaced by new section 9A of the BoE Act inserted by clause 3.

Clause 3 and Schedule 1: Financial stability strategy and Financial Policy Committee, and other amendments of Bank of England Act 1998

25. *Subsection (1)* inserts a new Part 1A into the BoE Act.

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26. *New section 9A* supersedes section 2A(3) of the BoE Act and requires the court of directors of the Bank to determine the Bank's strategy in relation to the Bank's financial stability objective. The court of directors must consult the FPC and the Treasury on a draft of the strategy. In addition, the FPC may make recommendations to the court of directors as to the provisions of the strategy. The strategy must be reviewed at least every 3 years. The strategy, and any revised strategies, must be published.

27. *New section 9B* provides for the creation of a sub-committee of the court of directors to be known as the "Financial Policy Committee", the membership of which is set out in *subsection (1)*.

28. The procedures of the FPC are to be kept under review by the non-executive committee of the court of directors established under section 3 of the BoE Act.

29. *New section 9B(6)* introduces *new Schedule 2A*, set out in *Part 1 of Schedule 1* to the Bill, which makes further provision about the FPC.

30. *Paragraph 1* of that Schedule specifies that the term of appointment of FPC members appointed by the Governor or by Chancellor ("appointed members") is to be 3 years. *Paragraph 2* provides that a member may not be appointed by the Chancellor more than twice. Additional provision is made for initial appointments to the FPC to be shorter than 3 years; this is so that the terms of members may be staggered appropriately. Where initial appointments are shorter than 3 years, members may serve a further two terms. *Paragraph 3* allows the Chancellor to extend the term of appointment of a member appointed by him for up to 6 months. This might be appropriate to avoid a vacancy in cases where the person identified as a new member is unable to take up his post and a new recruitment exercise is required or where a member's term is due to expire at a time when a recruitment process to replace that member would not be possible or would be inappropriate. Any period of extension under this provision is to be counted towards the person's subsequent term if that person is reappointed to the FPC. *Paragraph 4* provides that appointed members may resign by written notice to the Bank (copied to the Treasury).

31. *Paragraph 6* provides that a Minister of the Crown or a person employed by a government department may not be an appointed member. A person who has been appointed by the Chancellor as a member of the Monetary Policy Committee may not be appointed to the FPC by the Chancellor.

32. *Paragraphs 7 to 9* deal with the removal of appointed members. An appointed member ceases to hold office if they become a person who could not (under paragraph 6) be appointed to the FPC. A member appointed by the Governor ceases to hold office if they

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cease to have relevant executive responsibilities within the Bank. In addition, the Bank may, with the consent of the Chancellor, remove an appointed member on the ground that the member has been absent from meetings (*paragraph 9(1)(a)*); entered a relevant insolvency process (*paragraph 9(1)(b)*); or is unable or unfit to discharge their duties (*paragraph 9(1)(c)*). In the case of a member appointed by the Chancellor, the Bank may also remove the member on grounds of conflict of interest (*paragraph 9(2)*).

33. *Paragraph 10* requires the FPC to meet at least 4 times a year. The Governor (or in the Governor's absence, the Deputy Governor for financial stability) may call a meeting at any time on reasonable notice.

34. *Paragraphs 11 to 14* deal with the proceedings of the FPC. The quorum is to be 7 (not counting the Treasury representative) and must include either the Governor or the Deputy Governor for financial stability (who is to chair the meeting) and one member appointed by the Chancellor of the Exchequer. Also, the effect of *paragraph 11(2)(b)* is that for a meeting to be quorate either the Governor and the Deputy Governor for financial stability must both be present, or one of them and another Deputy Governor. The chair is required to seek to secure that decisions are reached by consensus where possible. Where this is not possible, decisions are to be taken by a vote of members present at the meeting with the chair having a second casting vote. The Treasury's representative may not vote at the meeting. The FPC is to determine how to treat members who are not present at the meeting but are in communication with the meeting (for example via video conferencing facilities). The FPC has discretion to invite other persons to attend meetings and to determine whether they may speak at the meeting. *Paragraph 14* makes provision for disclosure and handing of conflicts of interest.

35. *New section 9C* provides that the objective of the FPC is to contribute to the achievement by the Bank of the financial stability objective provided for in section 2A of the BoE Act (as amended by *clause 2* of the Bill). *Subsection (2)* provides that the FPC is to contribute to that objective primarily by identifying, monitoring and taking action to remove or reduce systemic risks (such as those set out in *subsection (3)*) with a view to protecting and enhancing the resilience of the UK financial system. "Systemic risk" is defined in *subsection (5)*. *Subsection (6)* makes it clear that it is immaterial for these purposes whether the risk arises in the United Kingdom or elsewhere. For example, a risk arising from the exposure of banks in the UK to risky overseas assets or institutions may become a systemic risk those poses a threat to the resilience of the UK financial system. *Subsection (4)* limits the operation of *subsections (2) and (3)* by providing that they do not allow the FPC to exercise its functions in a way which would be likely to have a significant adverse effect on the capacity of the financial sector to contribute to the growth of the UK economy in the medium or long term.

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36. *New section 9D* enables the Treasury to make recommendations to the FPC. These recommendations may relate to matters that the FPC should regard as relevant to the Committee's understanding of the Bank's financial stability objective; the responsibility of the FPC in relation to the achievement of that objective; and matters to which the Treasury consider the FPC should have regard in the exercise of its functions. For example, the Treasury could recommend that the FPC take into account the experience of another country in using a particular macro-prudential measure.

37. Recommendations about the objective must be made at least once in every calendar year. *Subsection (3)* provides that the FPC must respond to the recommendation indicating what action it has taken in accordance with the recommendation, or where the recommendation is not to take action immediately, whether the FPC intends to act in accordance with the recommendation. To the extent that it does not intend to act in accordance with the recommendation, the FPC must state its reasons. The recommendations of the Treasury, and any notification by the FPC in respect of a recommendation, must be published by the Treasury and laid before Parliament.

38. *New section 9E* provides that the FPC must have regard to the financial stability strategy prepared by the court of directors under section 9A (except when exercising functions which relate to the strategy). *Subsection (2)* provides that the FPC should seek to avoid exercising its functions in a way which would prejudice the advancement by the FCA of any of its operational objectives or the advancement by the PRA of any of its objectives. This duty operates subject to the FPC's objective.

39. *Subsection (3)* sets out three further factors to which the FPC must have regard in the exercise of its functions. These are the principle of proportionality (as outlined in *paragraph (a)*); the merits of disclosure of the FPC's views and the disclosure of information (*paragraph (b)*); and the international obligations of the United Kingdom, particularly where relevant to the exercise by the FPC of its functions which relate to the PRA or FCA (*paragraph (c)*).

40. *New section 9F* sets out the functions of the FPC. These comprise the monitoring of the stability of the UK financial system; giving directions to the PRA or FCA under section 9G; making recommendations to the PRA, FCA and others; and preparing financial stability reports under section 9T.

41. *Subsection (2)* enables the court of directors to delegate further functions of the Bank to the FPC but only with the consent of the Treasury.

42. *New section 9G* enables the FPC to give a direction to the PRA or FCA. The FPC may require a regulator to exercise its functions to implement a macro-prudential measure (a

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measure prescribed by the Treasury by order made under *new section 9K*). The direction may require the regulator to implement the macro-prudential measure in relation to all regulated persons or a class of regulated persons. However the direction may not relate to a specified regulated person. “Regulated person” is defined in *subsection (2)*. *Subsection (5)* allows the FPC to refer to the opinion of the regulator (for example, to make provision such as “if the PRA considers that condition X is satisfied”) or authorise the exercise of a discretion by the regulator (for example, to make provision such as “the FCA may provide for exemptions as it considers appropriate”). *Subsection (6)* enables the FPC to give recommendations as to how and when the direction is to be implemented. The FPC may not give a direction as to how a direction is to be implemented but may give a recommendation as to implementation. Thus it will be for the regulator which receives the direction to determine, taking into account any recommendation from the FPC, how the direction is to be implemented (for example, whether it should be implemented by way of rules made under Part 9A of FSMA or requirements imposed on specific authorised persons under Part 4A of FSMA) and when the direction is to be implemented (for example, whether it is appropriate to consult on a draft of any proposed rules or whether it is appropriate to make the rules without prior consultation.) Where it gives a recommendation as to implementation, the FPC may provide for the “comply or explain” mechanism provided for in *new section 9P(3)* to apply to such recommendations. In this case, where the regulator did not implement the direction in the manner recommended by the FPC, the regulator will be required to provide the FPC with its reasons. *Subsection (8)* prevents the FPC purporting to direct a regulator to do something that it has no power to do. However in determining whether it is appropriate to exercise a power in a particular way, a regulator may have regard to the direction. For example, in determining whether a proposed rule can be said to be necessary or expedient for the purpose of advancing its objectives (see *new section 137A* of FSMA as inserted by *clause 22*), the PRA may have regard to the fact that the FPC has directed it to take certain action for the purpose of protecting or enhancing financial stability. *Subsection (9)* enables the FPC to specify matters to which the regulator is to have regard in complying with the direction, so long as those matters do not relate to a specified regulated person. *Subsection (10)* enables the FPC, when giving a direction, to make references to publications issued by the FCA, PRA or other persons in the United Kingdom or international organisations, including ambulatory references to such publications as they have effect from time to time. For example, the FPC’s direction might refer to the rate of growth of GDP, or the interest rate set by the European Central Bank.

43. *New section 9H* requires the PRA and FCA to comply with any direction from the FPC as soon as reasonably practicable. *Subsection (2)* enables the Treasury, when making an order under *section 9K*, to exclude or modify any procedural requirement which would otherwise apply under FSMA to the FCA or PRA when it is complying with a direction. For example, an order under *section 9K* which specifies a macro-prudential measure could provide that the obligation of the PRA or FCA under *new section 138I* of FSMA or *new section 138J* of FSMA (as inserted by *clause 22*) to consult on proposed rules does not apply

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to rules made to implement a direction from the FPC which relates to that macro-prudential measure.

44. *Subsection (3)* requires the regulator which has received a direction to report to the FPC on how it is complying with the direction. Under *subsection (4)*, the FPC may specify the times at which such reports are required.

45. *New section 9I* enables the FPC to revoke a direction. A direction is to be treated as being revoked if it relates to a macro-prudential measure which ceases to be a macro-prudential measure (subject to any transitional provision made under *new section 9K(4)(e)*). *Subsection (3)* provides that the revocation of direction does not affect the validity of any action taken in accordance with the direction before it was revoked.

46. *New section 9J* contains procedural matters relating to directions, including the obligation on the FPC to give a direction in writing and to give the Treasury a copy of a direction or notice of revocation of a direction. The Treasury may lay before Parliament a copy of the direction or revocation it receives from the FPC. Where the Treasury has not done so before the direction or revocation is included in the record of the FPC meeting at which the direction or revocation was given (for example, because disclosure of the direction in full would be contrary to the public interest), the Treasury must lay before Parliament the direction or revocation included in the record (which may have been redacted in accordance with *new section 9R(8)(b)*).

47. *New section 9K* enables the Treasury to prescribe, by order, what macro-prudential measures are. *Subsection (2)* provides that before making an order under *section 9K*, the Treasury must consult the FPC (or, in cases of urgency, the Governor). By virtue of *subsection (3)*, the order must specify if the measure is prescribed in relation to the PRA, the FCA or both. *Subsection (4)* sets out various matters that an order may contain including the making of ambulatory references to certain publications (for example references to publications as they have effect from time to time, rather than to the version of that publication which had effect at the time of the order) and referring to rules made by the PRA or FCA.

48. *New section 9L* requires the FPC, in relation to each macro-prudential measure prescribed under *section 9K*, to prepare and maintain a statement of the general policy that it proposes to follow in exercising its power of direction under *section 9G* in connection with that macro-prudential measure. *Subsection (3)* requires the Bank to publish each statement maintained under this provision. *Subsection (5)* provides that the FPC may exercise its power of direction under *section 9G* before it has prepared a relevant statement of policy in cases of urgency.

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49. *New section 9M* sets out the requirements for Parliamentary control of orders under *section 9K*. Such orders must be approved in draft by each House of Parliament before being made except in urgent cases where the order may be made immediately but ceases to have effect if not approved by each House within 28 sitting days.

50. *New section 9N* enables the FPC to make recommendations within the Bank. *Subsection (3)* provides that recommendations may not be made on the provision by the Bank of financial assistance to a particular financial institution or the exercise by the Bank of its powers under Parts 1 to 3 of the Banking Act 2009 in relation to a particular institution.

51. *New section 9O* enables the FPC to make recommendations to the Treasury. Those recommendations may in particular relate to the exercise by the Treasury of certain powers to make secondary legislation including *section 9K* (power to determine macro-prudential measures), *section 22* of FSMA (power to specify activities and investments), *section 22A* of FSMA (designation of activities requiring prudential regulation by the PRA) (see *clause 7*) and *section 165A(2)(d)* of FSMA (additional persons who may be required by the PRA to provide information; see also the amendment to *section 165C* made by paragraph 4 of Schedule 12 to the Bill). *Subsections (4) and (5)* make additional provision in relation to a recommendation which relates to *section 165A(2)(d)*. *Subsection (4)* provides that a recommendation may only be made if the FPC considers that the exercise by the Treasury of their power is desirable for the purposes of the exercise by the Committee of its function. *Subsection (5)* requires the FPC to consult the Treasury before giving a recommendation.

52. *New section 9P* enables the FPC to make recommendations to the FCA and PRA about the exercise of their functions. Such recommendations may relate to all regulated persons or to regulated persons of a specified description, but may not relate to the exercise of functions in relation to a particular regulated person. If the FPC so provides in its recommendation, the PRA or FCA must either act in accordance with the recommendation or explain why it has not done so.

53. *New section 9Q* enables the FPC to make recommendations to other persons, for example the Financial Reporting Council.

54. *New section 9R* requires the Bank to publish a record of each meeting of the FPC within 6 weeks of the day of the meeting. The record must set out the decisions taken at the meeting and a summary of the discussion at the meeting. Under *subsection (4)*, the record must include the text of any direction under *section 9G* (a direction to the PRA or FCA require that regulator to exercise its functions to implement a macro-prudential measure) that is given or revoked. *Subsection (5)* requires any recommendations made by the FPC to be included in the record. *Subsection (6)* requires the FPC to include in the record any

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explanation from the PRA or FPC under section 9P as to why they have not complied with a recommendation. *Subsection (7)* specifies that the record is not required to include information identifying particular members of the FPC.

55. *Subsection (8)* provides for exclusions from the record. This includes information about recommendations from the FPC to the Bank which relate to the provision by the Bank of financial assistance (*subsection (8)(a)*); information publication of which the FPC considers be contrary to the public interest (*subsection (8)(b)*); and information about a direction given to the PRA or FCA which has been revoked before the record is published (*subsection (8)(d)*).

56. *New section 9S* deals with information which has not been included in the record of a FPC meeting on the basis that its publication at that time would be against the public interest (see *section 9R(8)(b)*). In such cases, the FPC must consider whether to fix a date when the information may be published. This might be appropriate where information is to be made public by other means on a certain date, for example as part of the duty of financial institutions to publish their accounts. Where the FPC does not fix a date, it must keep under review whether publication of the information would still be contrary to the public interest, in line with a procedure to be adopted under *subsection (2)*. Publication of information previously excluded from the record is to take place at the time when the FPC next publishes a record of a meeting of the FPC.

57. *New section 9T* requires the FPC to publish reports relating to financial stability (Financial Stability Reports (FSRs)). The FPC must publish two such reports each year. Under *subsections (3) and (4)*, each report must include certain matters including the FPC's view on the stability of the UK financial system (*subsection (3)(a)*); an assessment of risks to the stability of the UK financial system (*subsection (3)(d)*); the FPC's view of the outlook for the stability of the UK financial system (*subsection (3)(e)*); a summary of the activities of the FPC in the reporting period (*subsection (4)(a)*); and an assessment of the extent to which the FPC has succeeded in achieving its objectives in the reporting period (*subsection (4)(b)*).

58. *Subsection (6)* specifies that the FPC is not required to include in the report any information publication of which would be against the public interest. *Subsections (7) to (10)* require the FPC to publish each report and to give a copy of each report to the Treasury who must lay it before Parliament.

59. *New section 9U* requires the Governor and the Chancellor of the Exchequer to meet as soon as possible after the publication of each FPC report to discuss the report and other matters relating to the stability of the UK financial system. The Treasury are to publish

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records of the meeting, except where, having consulted the Bank, the Treasury are of the view that it would be against the public interest to do so.

60. *New section 9V* enables the Bank to direct the FCA or PRA to provide the Bank with specified information or produce to the Bank specified documents. The Bank may only do so where it considers that the information or documents are reasonably required in connection with the exercise of its functions in pursuance of its Financial Stability Objective (see section 2A of the BoE Act as amended by *clause 2*). This will include the functions of the FPC and functions of the Bank under Parts 1 to 3 of the Banking Act 2009, functions in relation to systemically important market infrastructure and functions in relation to the provision of liquidity support to financial institutions.

61. *Subsection (4)* provides that the FCA and PRA may exercise their powers under sections 165 and 165A FSMA to obtain information or a document which is the subject of a direction from the Bank.

62. *New section 9W* makes further provision about direction under section 9V. *Subsection (1)* requires the Bank to have regard to the principle of proportionality. *Subsection (2)* requires the Bank to consult the PRA or FCA before giving the regulator a direction. Under *subsections (4) to (6)* a direction must be published as soon as practicable after it is given except to the extent that publication would be against the public interest; the Bank must keep under review any decision that publication is against the public interest.

63. *Clause 3(3)* introduces Part 2 of Schedule 1 which makes further amendments to the BoE Act in connection with the FPC.

64. *Paragraph 1 of Part 2 of Schedule 1* amends section 4 of the BoE Act to require the annual report by the Bank to include a report by the court of directors on the activities of the FPC.

65. *Paragraph 2 of Part 2 of Schedule 1* amends section 15 of the BoE Act to require the Monetary Policy Committee to exclude from its published minutes information which relates to the proceedings of the FPC (for example, decisions taken by the FPC) publication of which the Bank considers would be against the public interest. This reflects the basis on which the FPC may determine not to include information in the record of its meetings under section 9R(8)(b).

66. *Paragraphs 4 and 5 of Part 2 of Schedule 1* provide for appointed members of the FPC to be disqualified from being a member of the House of Commons or the Northern Ireland Assembly.

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67. *Clause 3(4)* repeals the provisions of the BoE Act which relate to the Financial Stability Committee.

Clause 4 and Schedule 2: Further amendments relating to Bank of England

68. *Clause 4* introduces *Schedule 2* to the Bill. This amends the provisions of the BoE Act which relate to the Monetary Policy Committee and the court of directors and section 244 of the Banking Act 2009 (immunity).

69. *Paragraph 1 of Schedule 2* amends Schedule 1 to the BoE Act which makes provision for the court of directors.

70. *Paragraph 1(2)* substitutes paragraph 1 of Schedule 1 to the BoE Act. The effect of the amendment is to provide that the Governor of the Bank is to serve a single term of 8 years. (Under the BoE Act currently, the Governor serves a term of office of 5 years and may be reappointed once.) *Paragraph 1(9)* specifies that this amendment does not affect any term of appointment that began before the commencement of the amendment. New paragraph 1 of Schedule 1 to the BoE Act also provides that work in a post which is required by an enactment to be held by the Governor or Deputy Governor (for example, that of the chief executive of the PRA) is to be taken as work for the Bank (and so such work will not breach the requirement that the Governor and Deputy Governors work exclusively for the Bank). *Paragraph 1(6)* makes a consequential amendment to paragraph 6 of Schedule 1 to the BoE Act.

71. *Paragraph 1(3)* provides that the term of appointment for directors of the Bank is to be 4 years or such shorter term as may be specified in the term of appointment (rather than 3 years). *Paragraph 1(9)* specifies that this amendment does not affect any term of appointment that began before the commencement of the amendment.

72. *Paragraph 1(5)* amends paragraph 5 of Schedule 1 to the BoE Act to provide that an officer or employee of the Bank, other than a person who is appointed by the Chancellor to be a member of the FPC, is disqualified for appointment to the court of directors. This amendment replaces the existing disqualification of a “servant of the Bank” for appointment as a director. The reference to “servant” is considered to be unusual and rather old fashioned, *Paragraph 1(8)* and *paragraphs 2(6), 3 and 4* makes related amendments to references to “servants” in Schedule 1 to the BoE Act.

73. *Paragraph 1(7)* ensures that the inability or unfitness of the Deputy Governor for prudential regulation to discharge the functions of being the chief executive of the PRA can be taken into account in considering his ability or fitness to be that Deputy Governor.

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74. *Paragraph 2* amends Schedule 3 to the BoE Act which makes further provision for the Monetary Policy Committee (“MPC”).

75. *Paragraph 2(4)* inserts a *new paragraph 2B* which allows the Chancellor to extend the term of appointment of a member appointed by the Chancellor to the MPC for up to 6 months. This might be appropriate to avoid a vacancy in cases where the person identified as a new member is unable to take up his post and a new recruitment exercise is required. Any period of extension under this provision is to be counted towards the person’s term if that person is reappointed to the MPC. Similar provision is made for members of the FPC who are appointed by the Chancellor in paragraph 3 of new Schedule 2A to the BoE Act.

76. *Paragraph 2(5)* amends paragraph 3 to require a member of the MPC who was appointed by the Chancellor who resigns to send a copy of his notice of resignation to the Treasury. This reflects the approach taken to a member of the FPC who has been appointed by the Chancellor under paragraph 4 of new Schedule 2A to the BoE Act.

77. *Paragraph 2(7)* inserts a *new paragraph 5A* to Schedule 3 to the BoE Act which prevents a member of the FPC who has been appointed by the Chancellor from being appointed by the Chancellor to the MPC.

78. *Paragraph 3* amends section 244 of the Banking Act 2009 (immunity) to make clear that the Bank has immunity from liability in damages (save in specified cases) in relation to the exercise or purported exercise of its regulatory functions, including those relating to recognised clearing houses (under Part 18 FSMA (recognised investment exchanges and clearing houses)) and recognised inter-bank payment systems (under Part 5 of the Banking Act 2009).

PART 2 - AMENDMENTS OF FINANCIAL SERVICES AND MARKETS ACT 2000

Financial Conduct Authority and Prudential Regulation Authority

Clause 5 and Schedule 3: The new Regulators

79. *Clause 5* replaces the provisions in Part 1 of FSMA relating to the FSA, and Schedule 1 to FSMA, with provisions relating to the FCA and the PRA. *Schedule 3* inserts *new Schedule 1ZA* and *new Schedule 1ZB* (which make provision in relation to the FCA and the PRA respectively).

The FCA

80. *New section 1A* renames the FSA the “Financial Conduct Authority”. *Subsection (4)* requires the FCA to comply with the requirements set out in *new Schedule 1ZA* which makes provision in relation to the constitution of the FCA and other matters.

81. *New section 1B* sets out how the FCA must discharge its general functions (as defined in *subsection (6)*). In particular, the FCA must, so far as reasonably possible, act in a way which is compatible with its strategic objective (described in *subsection (2)*) and advances one or more of its operational objectives (specified in *new sections 1C, 1D and 1E*). In addition, so far as is compatible with acting in a way which advances its consumer protection (*new section 1C*) or integrity (*new section 1D*) operational objective, the FCA must discharge its general functions in a way which promotes effective competition in the interests of consumers (*subsection (4)*). *Subsection (5)* provides that in discharging its general functions the FCA must also have regard to the regulatory principles which apply to the FCA and the PRA (as set out in *new section 3B*) and must have regard to the importance of taking action intended to minimise the extent to which it is possible for certain types of business to be used for a purpose connected with financial crime (as defined in *new section 1H(3)*). This duty is placed on the FCA (rather than the PRA) as the FCA is to have responsibility for regulating the conduct of business of authorised persons (and certain other entities) and is therefore best placed to take regulatory action to tackle financial crime.

82. *New section 1C* sets out the FCA’s “consumer protection” operational objective. *Subsection (2)* specifies the factors to which the FCA must have regard when it is considering what degree of protection for consumers may be appropriate in a particular instance. This list includes the “have regard” specified in *subsection (2)(c)* concerning the needs which consumers may have for the timely provision of information and advice that is accurate and fit for purpose. For example, should the FCA consider that consumers of a particular regulated financial service are not being provided with appropriate information at the right time (for example, before entering into an agreement for the provision of the service) then the FCA, in the interests of ensuring an appropriate degree of protection for those consumers, may make rules prescribing the information to be provided by firms. Similarly, the FCA could take steps in the course of discharging its general functions to specify the form in which information should be presented to certain kinds of consumers in order to ensure that it is fit for purpose, for example, in terms of being clear and fair (such as being drafted in plain English and identifying key facts) and generally being presented in a comprehensible format, or to specify that advice should cover certain matters in order to ensure that it is not misleading. The list also includes the “have regard” specified in *subsection (2)(e)* which specifies the general principle that those providing regulated financial services (as defined in *new section 1H(2)*) should be expected to provide consumers which a level of care that is appropriate having regard to the degree of risk involved in relation to the relevant investment or other transaction and the capabilities of the consumers in question.

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83. The requirement to “have regard” to certain matters in assessing whether an appropriate degree of protection has been provided does not prevent the FCA from having regard to other factors as may be appropriate in a particular instance.

84. “Consumers” is defined in *new section 1G*. This definition is an extended form of the definition used in sections 425A and 425B of FSMA. This is because the definition of “general functions” in the *new section 1B* extends to those functions under Part 6 of FSMA (official listing). Therefore it is appropriate, for example, for the definition to extend to listed issuers in their capacity of “consumers” of the regulated financial services provided by sponsors and primary information providers (defined in *new section 1H(8)*). This definition does not mean that the FCA is required to take a universal approach to determining what constitutes an appropriate degree of protection for consumers. Rather, the FCA can rely on this objective to address issues relating to the interests of different types of consumer in a wide range of markets for regulated financial services. For example, the FCA could determine that it is appropriate to make rules requiring authorised persons to disclose certain types of information before selling a financial product to a “retail” consumer, but may make no similar provision for cases in which authorised persons are dealing with certain types of “wholesale” customer on the basis that the latter category of customer can be reasonably expected to have a better awareness of the risks and features of investing in the product in question.

85. None of the FCA’s objectives impose on the FCA a statutory duty to take action, for example, to secure an appropriate degree of protection for all persons who fall within the definition of “consumer” nor should they be interpreted as establishing a standard of conduct to be expected of regulated firms. Instead, the objectives provide a mandate for the FCA to take action. The FCA could take action, for example, under its consumer protection objective for the purposes of protecting only one category of person who falls within the definition of “consumer”. The FCA need not ensure that action taken for the purposes of advancing this operational objective secures an appropriate degree of protection for all persons who fall within that definition. In addition, the FCA may take action in pursuance of this operational objective which has the effect of securing an appropriate degree of protection for one or more categories of person within the definition of consumer and which also has the effect of protecting persons who fall outside the definition.

86. *New section 1D* sets out the FCA’s “integrity” objective. The term “integrity” has a non-exhaustive definition (*subsection (2)*). For example, the term “integrity” means, among other things, the soundness, stability and resilience of the financial system. Examples of action which the FCA may take in pursuance of this operational objective are: (i) the FCA may choose to exercise its powers under Part 8A of FSMA (short selling) to make rules banning the short-selling of a financial instrument for the purposes of addressing a threat to the stability of the UK financial system; (ii) the FCA may choose to make rules to address

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risks of money laundering or the use of the financial system to fund terrorist activity; and (iii) the FCA may make disclosure rules under Part 6 of FSMA imposing requirements on listed issuers of financial instruments as to the information which must be disclosed to the market.

87. *New section 1E* sets out the FCA's "competition" objective. The FCA may take action in pursuance of this operational objective to promote effective competition in the interests of consumers in the markets for services falling within the definition of "regulated financial services" (*new section 1H(2)*) and services provided by persons specified as recognised investment exchanges under Part 18 of FSMA. *Subsection (2)* lists a number of matters to which the FCA may have regard in considering the effectiveness of competition in a particular market. This is a non-exhaustive list of factors which may be relevant to the assessment of the effectiveness of competition but highlights a number of factors which are regarded as particularly indicative, including the ease with which new entrants can enter the market and the ease with which customers can switch from one product provider to another. These "have regards" help illustrate what is meant by "effective competition in the interests of consumers"- for example, whether the choice of providers of a product, or the features of a particular regulated product, match consumer demand.

88. *New section 1F* defines the term "relevant markets" for the purposes of *new section 1B(2)*. *New section 1G* defines the term "consumer" for the purposes of *new sections 1B to 1E* and *new section 1H* defines certain other terms for the purposes of *new sections 1B to 1G*. *New section 1I* defines the term "the UK financial system" for the purposes of FSMA.

89. *New section 1J* confers on the Treasury a power to make an order amending certain definitions (for example the definition of "consumer" and "regulated financial services" used for the purposes of *new section 1E(1)(a) and (b)*, *new section 1G* and *new section 1H(2) and (5) to (8)*). This power could be used, for example, to amend the definition of "consumer" by adding a new category of person to that definition in order to ensure that the FCA could rely on its "consumer protection" operational objective for the purposes of discharging its general functions (for example the power to make rules) to protect consumers of the new regulated product or service. An order under this section must be approved in draft by each House of Parliament – see *clause 46(2)(a)*.

90. *New section 1K* requires the FCA to include in general guidance issued under new section 139A (inserted by *clause 22*) guidance on how it intends to advance its operational objectives in discharging its general functions in relation to different categories of authorised persons or regulated activity. For example, the FCA must give guidance as to how it proposes to regulate authorised persons who accept deposits differently from authorised persons who effect or carry on contracts of insurance.

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91. *Subsection (1) of new section 1L* provides that the FCA must maintain arrangements for supervising authorised persons. The concept of “supervision” encompasses matters such as monitoring the activities of authorised persons in light of the FCA’s objectives, forming a view on the person’s long term strategy for doing business, providing advice and, where appropriate, warnings, monitoring compliance with regulatory requirements and taking disciplinary action where appropriate.

92. *Subsection (2) of new section 1L* requires the FCA to maintain arrangements designed to enable it to determine whether people who are not authorised persons are complying with regulatory requirements and, where appropriate, for enforcing compliance. For example, the FCA must maintain arrangements to monitor whether people are carrying on regulated activities in breach of the general prohibition in section 19 of FSMA and, where appropriate, take action against such persons.

93. *New section 1M* imposes on the FCA a duty to make and maintain effective arrangements for consulting practitioners and consumers on the extent to which its general policies and practices are consistent with its general duties specified in *new section 1B* such as the extent to which it has promoted competition in the interests of consumers in accordance with its duty under *new section 1B(4)*.

94. *New section 1N* makes provision for the Practitioner Panel and *new section 1O* places on a statutory footing the Smaller Business Practitioner Panel. *New section 1P* also establishes a Markets Practitioner Panel to represent the interests of persons likely to be affected by the exercise by the FCA of its functions relating to markets. *New section 1Q* makes provision for the Consumer Panel. *New section 1R* imposes on the FCA a duty to consider representations made in accordance with arrangements established under *new section 1M*.

95. *New section 1S* enables the Treasury to appoint an independent person to conduct a review of the economy, efficiency and effectiveness with which the FCA has used its resources in discharging certain of its functions. *New section 1T* specifies that a person conducting a review under *new section 1S* has certain rights to access information and to require a person holding, or accountable for, any such document to provide such information and explanations as are reasonably necessary for the review.

96. *Part 1 of new Schedule 1ZA (The Financial Conduct Authority)* sets out requirements for the FCA’s constitution and imposes certain obligations on the FCA. *Part 2* deals with the status of the FCA. *Part 3* makes provision in relation to penalties and fees and *Part 4* gives the FCA and those who work for it limited immunity from liability in damages and makes other miscellaneous provision such as specifying that any amount required by rules to be paid to the FCA may be recovered as a debt due to the FCA.

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97. *Paragraphs 2 to 6 of new Schedule 1ZA* make provision in relation to the constitution of the FCA.

98. The FCA must have a governing body consisting of:

- (a.) a chair and a chief executive (both appointed by the Treasury),
- (b.) the Bank's Deputy Governor for prudential regulation,
- (c.) two further members appointed jointly by the Treasury and the Secretary of State, and
- (d.) at least one further member appointed by the Treasury.

99. The majority of the members of the governing body of the FCA are to be non-executive members, including the chair (*paragraph 2(3) and (4)*). The appointment process and terms of service for the appointed members (which are determined by the Treasury) are designed to ensure the independence of the appointed members (*paragraph 3(3) and (4)*). In addition, the Bank's Deputy Governor for prudential regulation is not to take part in any discussion by, or decision of, the FCA which relates to the exercise of the FCA's functions in relation to a particular person, or a decision not to exercise those functions (*paragraph 6*). (The terms of service of the Bank's Deputy Governor in his or her capacity as a member of the governing body of the FCA will be determined by the FCA).

100. *Paragraph 5* provides for the acts of the FCA to be valid irrespective of a vacancy in the office of the chair of the FCA, the chief executive of the FCA or the Bank's Deputy Governor for prudential regulation or a defect in the appointment of a person to any of those offices or of any other person as an appointment member (as defined in *paragraph 2(6)*). This is to prevent the FCA's rules, and any action it takes in pursuit of its functions, being rendered invalid purely as a result of such a vacancy or defect in appointment.

101. *Paragraph 8* allows the FCA's functions, with the exception of its legislative functions, to be delegated. However, the governing body must discharge the legislative functions set out in *sub-paragraph (3)*; these are: rule-making; issuing codes under sections 64 and 119 of FSMA; issuing statements of policy on, for example, financial penalties and other disciplinary measures; and giving directions relating to exemptions from the general prohibition. The governing body may discharge the function of issuing general guidance to one of its members or a committee, but not to an individual officer or member of staff (*sub-paragraph (4)*).

102. *Paragraph 9* requires the FCA to maintain satisfactory arrangements for recording decisions made in exercise of its functions and the safe-keeping of those records.

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103. *Paragraph 10* requires the FCA to report at least once a year to the Treasury on the discharge of its functions, on the extent to which it has acted compatibly with its strategic objective and advanced its operational objectives. The FCA is also required to report on how far it has complied with its “competition” duty referred to in *new section 1B(4)* and its consideration of the regulatory principles and certain other matters. The Treasury is to lay the report before Parliament. *Paragraphs 11 and 12* require the FCA to hold a public meeting to discuss its annual report, and to publish a report of the meeting.

104. *Paragraph 13* provides that the Treasury may require the FCA to comply with any provisions of the Companies Act 2006 dealing with accounts and audit which would otherwise not apply to it. A Treasury direction may modify provisions of the Companies Act 2006 dealing with accounts and audit in their application to the FCA.

105. *Paragraph 14* provides for the FCA’s annual accounts to be audited by the Comptroller and Auditor General; the National Audit Office carries out audit functions of the Comptroller and Auditor General. The Treasury must lay before Parliament the certified accounts of the FCA and the report of the Comptroller and Auditor General on them.

106. *Paragraph 15* specifies that, in relation to any of its functions, the FCA is not to be regarded as acting on behalf of the Crown and its members, officers and staff are not be regarded as Crown servants.

107. The FSA is a company limited by guarantee; it is exempt by virtue of paragraph 14 of Schedule 1 to FSMA from the need to use “limited” as part of its name. *Paragraph 16* continues that exemption for the FCA.

108. *Paragraph 18(1)* provides that in determining its policy with regard to the level of penalties to impose under powers in the Act, the FCA may take no account of its expenses or anticipated expenses; there is to be no link or incentive to fund the FCA by levying penalties on the persons it regulates. *Sub-paragraph (2)* requires the FCA to operate a scheme to ensure that penalties paid to it under certain provisions are to be applied for the benefit of the persons listed in that sub-paragraph. *Paragraph 19* requires the FCA to consult on these arrangements.

109. *Paragraph 20* provides for a rule-making power for the FCA to raise fees to meet the costs it incurs in the discharge of its qualifying functions. Qualifying functions means its functions under FSMA, and its functions under certain EU legislation. It may use the fees to meet its expenses, to repay borrowing incurred, expenses incurred in connection with the commencement of the Act resulting from the Bill and to maintain adequate reserves. *Sub-*

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paragraph (6) requires that the FCA may not take into account any penalties which it has received, or expects to receive, in setting the fees under FSMA.

110. *Paragraph 21* provides that fees may not be charged when a person gives notice of their intention to exercise EEA passporting rights under Schedule 3 to FSMA or where any person whose application for approval under section 59 has been granted.

111. *Paragraph 22* provides immunity for the FCA and its staff from actions for damages except where the act or omission is shown to have been in bad faith or where damages are sought under the Human Rights Act 1998.

112. *Paragraph 23* treats the actions of an accredited financial investigator who is an employee of the FCA or undertaking an investigation for the FCA as being done in the exercise or discharge of a function of the FCA. Financial investigators are accredited by the National Policing Improvement Agency.

113. *Paragraph 24* provides that any amount (other than a fee) which is required by rules to be paid to the FCA may be recovered as a debt due to the FCA.

The PRA

114. The PRA is a limited company formed under the Companies Act 2006. *New section 2A* renames that company as the Prudential Regulation Authority, and provides for it to have the functions conferred on it under FSMA; references to its functions, for example in the application of its general objective (see *new section 2B*), include the PRA's functions under the Insolvency Act 1986, the Banking Act 2009 and this Bill; references to functions of the PRA do not include its functions under the legislation relating to mutual societies except to the extent that an order under clause 47 so provides (see *new section 2I(2)*).

115. *New section 2B* requires the PRA to discharge its general functions in a way which advances its general objective, which is the promotion of the safety and soundness of PRA-*authorised persons*. The main means of advancing that objective are by seeking to ensure that the way in which the business of PRA-*authorised persons* is carried on avoids any adverse effect on the UK financial system (*subsection (3)(a)*), and by seeking to ensure that, if a PRA-*authorised person* fails, that failure occurs in as orderly a manner as possible (*subsection (3)(b)*). *New section 2I(3)* provides further details about the meaning of "failure". It includes: insolvency; being taken for the purposes of the financial services compensation scheme as being, or being likely to be, unable to meet claims; and having a stabilisation option under Part 1 of the Banking Act 2009 implemented (for example transfer to a private sector purchaser (section 11 of that Act), transfer to a bridge bank (section 12 of that Act), or

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transfer to temporary public ownership (section 13 of that Act)). *New section 2F* emphasises that the PRA's objectives do not oblige it to ensure that no PRA-authorized person fails.

116. *New section 2C* provides for the PRA to have an additional objective which will apply if an order made under section 22A FSMA provides for certain activities relating to insurance to be PRA-regulated activities. Where the PRA is discharging its general functions in relation to PRA-authorized persons who are insurers or reinsurers, it must seek to advance its insurance objective; the insurance objective is contributing to the securing of an appropriate degree of protection for policy holders (*new section 2C*). The insurance objective and the general objective have the same legal status. When the PRA is discharging its functions in relation to such PRA-authorized persons, it must act compatibly with both the general objective and the insurance objective and act in a way which the PRA considers most appropriate for advancing both objectives.

117. *New section 2D* provides that further objectives may be specified in relation to activities that become PRA-regulated activities by order under section 22A of FSMA (see commentary on *clause 7* below).

118. *New section 2E* makes provision for how references in FSMA to the PRA's objectives should be interpreted. For example, a reference in FSMA to the PRA's objectives in the context of a function which is exercisable in relation to insurance (such as the rule-making power in *new section 137E*) is to be taken as a reference to the general objective and the insurance objective.

119. *New section 2H* requires the PRA to give guidance on how it intends to advance its objectives in relation to different categories of PRA-authorized persons or PRA-regulated activity. For example, the PRA must give guidance as to how it proposes to regulate PRA-authorized persons who accept deposits differently from PRA-authorized persons who effect or carry on contracts of insurance.

120. Definitions relevant to the PRA's general duties are set out in *new section 2I*, including a list of the PRA's "general functions".

121. *New section 2J* provides that the PRA must maintain arrangements for supervising PRA-authorized persons. The concept of "supervision" encompasses matters such as monitoring the safety and soundness of PRA-authorized persons, forming a view on the person's term strategy for doing business, providing advice and, where appropriate, warnings, monitoring compliance with regulatory requirements and taking disciplinary action where appropriate.

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122. *New sections 2K and 2L* require the PRA to make and maintain effective arrangements for consulting those who are PRA-authorized persons or who appear to the PRA to represent the interests of such persons (for example, relevant industry associations), and to consider representations made under those arrangements. The PRA must publish details of the arrangements and its responses to those representations. The PRA must include in its annual report a report of how it has complied with these sections (see *paragraph 18 of new Schedule 1ZB*).

123. *New sections 2M and 2N* make provision for independent reviews of the economy, efficiency and effectiveness with which the PRA has used its resources, and access to documents and information for the purposes of such a review.

124. *Part 1 of new Schedule 1ZB (The Prudential Regulation Authority)* sets out requirements for the PRA's constitution and imposes certain obligations on the PRA. *Part 2* deals with the status of the PRA. *Part 3* makes provision in relation to penalties and fees and *Part 4* gives the PRA and those who work for it limited immunity from liability in damages and makes other miscellaneous provision.

125. *Paragraphs 2 to 14 of new Schedule 1ZB* make provision in relation to the constitution of the PRA.

126. The PRA must have a governing body consisting of:

- (a.) the Governor of the Bank, who is to be the chair of the PRA,
- (b.) the Bank's Deputy Governor for prudential regulation, who is to be the chief executive of the PRA,
- (c.) the Bank's Deputy Governor for financial stability,
- (d.) the chief executive of the FCA, and
- (e.) appointed members.

127. The appointed members are appointed by the Bank with the approval of the Treasury. The appointment process and terms of appointment are designed to ensure the independence of the appointed members (*paragraph 11*). The majority of the governing body of the PRA are to be non-executive members (*paragraph 8*). For the purposes of determining the balance of the board, and for corporate governance purposes, the Governor of the Bank and the Deputy Governors, and any board members who are PRA staff (whether employees of the PRA or secondees from the Bank), are not to be treated as non-executive members (*paragraph 9*); this is to ensure a proper number of independent board members, and it is those members who will undertake the corporate governance roles reserved to non-executives.

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In addition, the chief executive of the FCA is not to take part in any firm-specific decisions made by the PRA (*paragraph 5*).

128. *Paragraph 4* provides for the acts of the PRA still to be valid irrespective of a vacancy in the office of the ex-officio members of its governing body (those listed at (a) to (d) above) or any defect in an appointment of an ex-officio member or an appointed member. This is to prevent the PRA's rules, and any action it takes in pursuit of its functions, being rendered invalid purely as a result of such a vacancy or defect.

129. *Paragraph 16* allows the PRA's functions, with the exception of its legislative functions, to be delegated. The legislative functions set out in *paragraph 16(3)* include: rule-making; issuing codes and statements of principle under section 64 of FSMA; issuing statements of policy under section 69 of FSMA relating to the imposition of penalties, suspensions and restrictions on approved persons; issuing statements of policy under section 210 of FSMA relating to the imposition of penalties, suspensions and restrictions on authorised persons; giving directions under section 316 of FSMA that the general prohibition or certain FSMA provisions are to apply to members of Lloyds; and giving directions under section 318 of FSMA to the Council of Lloyds.

130. *Paragraph 18* requires the PRA to report at least once a year to the Treasury on the discharge of its functions, on the extent to which the statutory objectives have been met and its regulatory principles have been taken into account, and on such other matters as directed by the Treasury. The report must set out the remuneration of the members of the governing body, and any other information or reports the Treasury may direct. It must also include an account of the how the PRA has complied with the general duty to coordinate (section 3D), an account of its consultation with practitioners (in compliance with sections 2K and 2L), the use of the PRA veto (section 3I), and how it has cooperated with regulatory bodies outside the UK. The Treasury is to lay the report before Parliament. *Paragraphs 19 and 20* require the PRA to consult publicly on its annual report; the PRA must publish a report on its consultation, including an account of representations received.

131. *Paragraph 21* provides that the Treasury may require the PRA to comply with any provisions of the Companies Act 2006 dealing with accounts and audit which would otherwise not apply to it. A Treasury direction may modify provisions of the Companies Act 2006 dealing with accounts and audit in their application to the PRA.

132. *Paragraph 22* provides for the PRA's annual accounts to be audited by the Comptroller and Auditor General; the National Audit Office carries out audit functions of the Comptroller and Auditor General. The Treasury must lay before Parliament the certified accounts of the PRA and the report of the Comptroller and Auditor General on them.

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133. The PRA is a company limited by shares; as it is not able to benefit from the exemptions available in section 60 of the Companies Act 2006 from the requirement to include “limited” in its name, *paragraph 24* exempts the PRA from having to do so. *Paragraph 25* provides for the Secretary of State to remove that exemption after consulting the Treasury, if it is inappropriate for it to continue. Similar provision was made in respect of the FSA by paragraphs 14 and 15 of paragraph 1 of Schedule 1 to FSMA.

134. *Paragraph 26(1)* provides that in determining its policy with regard to the level of penalties to impose under powers in the Act, the PRA may take no account of its expenses or anticipated expenses; there is to be no link or incentive to fund the PRA by levying penalties on the persons it regulates. *Sub-paragraph (2)* requires the PRA to operate a scheme to ensure that penalties paid to it are to be applied for the benefit of authorised persons. *Paragraph 27* provides for the PRA to consult on these arrangements.

135. *Paragraph 28* provides for a rule-making power for the PRA to raise fees for what it does in the discharge of its qualifying functions. Qualifying functions means its functions under FSMA, and its functions under certain EU provisions which have been specified for the purpose by the Treasury. It may use the fees to meet its expenses, to repay borrowing incurred in connection with the commencement of the Bill, and to maintain adequate reserves. *Sub-paragraph (5)* provides that the PRA may not take into account any penalties which it has received, or expects to receive, in setting the fees under FSMA. This will ensure that penalty setting policy is kept distinct from PRA budget setting.

136. *Paragraph 29* provides that fees may not be charged when a person gives notice of their intention to exercise EEA passporting rights under Schedule 3 to FSMA, or to persons approved under Part 5.

137. *Paragraph 30* provides immunity for the PRA and its staff from actions for damages except where they act in bad faith or where damages are sought under the Human Rights Act 1998.

138. *Paragraph 31* treats the actions of an accredited financial investigator who is an employee of the PRA or undertaking an investigation for the PRA as being done in the exercise or discharge of a function of the PRA. Financial investigators are accredited by the National Policing Improvement Agency.

Further provisions relating to the FCA and the PRA

139. *New sections 3A to 3P* contain further provisions relating to the FCA and the PRA.

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140. New section 3B lists the regulatory principles to which the regulators must have regard when discharging their general functions; for example, the principle that a burden or restriction should be proportionate to the benefit that is expected to result from the imposition of that burden or restriction, and the principle that consumers should take responsibility for their decisions. These principles do not place burdens or requirements on consumers or firms. They also demarcate the role of the regulators - for example, the principle that consumers should take responsibility for their decisions, as well as to the responsibilities of firms' senior management in relation to compliance with the regulatory requirements (including those relating to consumers), make clear that the FCA and PRA should not aim for a zero-failure regime, which would effectively obviate consumers of their responsibility to look after their own interests and of firms to manage their own business.

141. The Treasury may amend the definition of "consumer" in this context, by order; the order must be approved in draft by each House of Parliament (*subsection (4)* together with *clause 46*).

142. *New section 3C* requires the regulators to have regard to generally accepted principles of good corporate governance where relevant; for example the UK Corporate Governance Code issued by the Financial Reporting Council and, where appropriate, the corporate governance code for central government departments.

143. *New section 3D* requires the regulators to co-ordinate the exercise of the functions conferred on them by or under FSMA for three purposes: to ensure that they consult each other before exercising a function under FSMA in a way which may have a material adverse impact on advancement by the other regulator of its objectives; to ensure that they obtain advice or information from each other in connection with the exercise of their functions under FSMA in relation to matters of common regulatory interest (see *subsection (3)*), where the other regulator has relevant information or expertise; and to ensure that, in relation to matters of common regulatory interest, they have regard to the need to use resources efficiently and economically and to the proportionality principle set out in section 3B(1)(b). The duty to co-ordinate may, for example, require the regulators to co-ordinate requests for information from authorised persons, or the taking of disciplinary or enforcement measures. The duty to co-ordinate does not, however, override the requirement that each regulator discharge its general functions in a way which advances its objectives, and it does not apply where the burden on the regulators of co-ordinating the exercise of their functions would outweigh the benefits (*subsection (2)*).

144. Under *new section 3E*, the regulators must prepare a memorandum setting out their roles in relation to matters of common regulatory interest and how they will comply with the duty to co-ordinate the exercise of their functions. The memorandum may contain specific

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provision about the matters set out in *subsection (2)*. *Subsection (3)* sets out additional matters on which the memorandum must contain provision. The memorandum is to be reviewed annually; the regulators must publish the current memorandum and send a copy to the Treasury, which must lay it before Parliament. *Subsection (8)* indicates that the memorandum need not relate to matters publication of which would be against the public interest or which are technical or operational matters which do not affect the public.

145. *New section 3F* provides that the PRA (rather than the FCA) is to be responsible for measures designed to secure an appropriate degree of protection of the policyholders (including future policyholders) of with-profits policies. But the PRA will obtain advice and information from the FCA, which will have particular expertise in this area, in the discharge of that responsibility under arrangements established under *subsection (5)*. The section only applies if the activity of effecting or carrying out of contracts of insurance is a PRA-regulated activity. As the PRA will be solely responsible in this area, *subsection (3)* modifies the PRA's insurance objective in *section 2C(2)* to provide that the PRA is responsible for securing an appropriate degree of protection for policyholders in this area (rather than being responsible for "contributing to" the securing of an appropriate degree of protection).

146. *New section 3G* enables the Treasury by order to specify matters which are primarily or solely the responsibility of one or other regulator, including by amending or repealing *new section 3F*. *New section 3H* provides that such an order must be laid before Parliament in draft and approved by each House of Parliament before being made; where the order contains a statement by the Treasury as to its urgency, the order may be laid before Parliament after being made but ceases to have effect unless approved by each House of Parliament within 28 sitting days (see *subsections (4) and (5)*).

147. *New sections 3I to 3K* make provision for the PRA to direct the FCA not to exercise a regulatory power or an insolvency power in relation to PRA-authorized persons or a particular PRA-authorized person, or not to exercise it in a particular manner, if exercise of the power might threaten the stability of the UK financial system or lead to the failure of a PRA-authorized person in a disorderly manner and the PRA considers that giving a direction is necessary in order to avoid that consequence. For example, the FCA could propose to cancel a firm's deposit taking permission under Part 4A of FSMA. If the PRA determined that this could lead to the sudden and disorderly failure of the firm, the PRA could, if it deemed it necessary, give a direction under *new section 3I* to prevent the FCA from cancelling the firm's permission. The PRA must consult the FCA before giving a direction; and the direction must be published and laid before Parliament unless the PRA after consulting the Treasury decides it would be against the public interest to do so; the PRA must keep any such determination under review and publish the direction if and when it is no longer against the public interest to do so (*new section 3K(8)*). The FCA is not required to comply with a

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direction to the extent that compliance would be incompatible with an EU or international law obligation of the United Kingdom (*new section 3I(8)*). Certain functions of the FCA are excluded from this power (those relating to the giving of consent to the giving of permission under *new section 55F* or variation of permission under *new section 55I*).

148. *New sections 3L to 3O* provide that one regulator may give the other a direction in relation to the consolidated supervision of some or all of the members of the group for the purposes of relevant EU directives. The direction may require the regulator to exercise, or not to exercise, its functions in a particular way. The direction may not require the regulator to do something that it does not have the power to do. The regulator need not comply with a direction it has received if compliance with the direction would not be compatible with the EU obligations or other international obligations of the United Kingdom. Certain functions of the regulators (including rule making) are excluded.

149. The regulators are obliged to co-operate with the Bank in pursuit of its financial stability objective and the Bank's compliance with its duties under *clauses 54 and 55* of the Bill (duty to notify the Treasury of possible need for public funds). The duty to co-operate includes the sharing of information (*new section 3P*). This might include, for example, the PRA collecting information from PRA-authorized persons and passing it to the FPC for the purposes of its financial stability functions or the FCA informing the Bank that there may be a need to provide public funds in connection with an authorised person regulated only by the FCA.

150. *New section 3Q* enables the regulators to make arrangements to provide services to each other, to the Bank (or services from the Bank to the regulators), to the consumer financial education body, the financial services compensation scheme (referred to as the scheme manager) or the financial ombudsman service (referred to as the scheme operator), on such terms as may be agreed. This would allow, for example, the Bank to provide human resources (staff) to the PRA and allow the FCA to collect fees payable to the PRA on the PRA's behalf. Subsection (5) enables the FCA to enter into arrangements with local weights and measures authorities in England, Wales and Scotland for the provision of services in relation certain types of regulated activity (for example, consumer credit). This would allow the FCA to enter into a contract with a local weights and measures authority so that the authority visits firms and carries out compliance checks on behalf of the FCA. The regulators will also be able, pursuant to powers under their own constitution, to make arrangements with private sector entities for the private sector entity to provide services to the regulator, for example legal advice or the analysis of data.

151. *New section 3R* provides for the consumer financial education body to continue to have the consumer financial education function. The consumer financial education function is

to enhance (a) the understanding and knowledge of members of the public of financial matters (including the UK financial system), and (b) the ability of members of the public to manage their own financial affairs. Subsection (4) is a non exhaustive list of activities that fall within the consumer financial education function. These largely restate the activities currently set out in section 6A of FSMA. Paragraph (b) of subsection (4) differs from the wording in section 6A of FSMA to make it clear that the consumer financial education body is to promote awareness in relation to the whole lifecycle of a product not just its initial supply; and paragraphs (f) and (g) are new. These paragraphs make it clear that the consumer financial education function includes assisting members of the public with the management of debt and working with other organisations which provide debt services.

Regulated activities

Clause 6: Extension of scope of regulation

152. *Clause 6* amends section 22 of and Schedule 2 to FSMA to expand the scope of the power conferred by section 22 on the Treasury to specify by order what activities are “regulated” activities (and so subject to the general prohibition in section 19 of FSMA).

153. *Subsection (1)* inserts a new subsection (1A) to section 22 which enables the Treasury to specify as a regulated activity an activity which is carried on by way of business and which relates to information about a person’s financial standing. New Part 2A of Schedule 2 to FSMA, inserted by *subsection (5)* outlines, in general terms, the matters with respect to which provision may be made under section 22(1A). These amendments would enable being a credit reference agency or the provision of credit information services (which are currently subject to regulation by the Office of Fair Trading under the Consumer Credit Act 1974) to be specified as a regulated activity for the purposes of FSMA.

154. *Subsections (3) and (4)* amend Schedule 2 to FSMA, which sets out in general terms the matters with respect to which provision may be made under section 22(1) (specification of activities and investments which are regulated activities).

155. *Subsection (3)* substitutes paragraph 23, which currently relates to the provision of credit where the obligation of the borrower is secured on land, with a new provision which relates to the provision of credit (whether or not secured on land).

156. *Subsection (4)* amends Schedule 2 to FSMA to include a reference to rights under contracts for the hire of goods.

157. *Subsections (3) and (4)* would enable an order under section 22 to specify that activities in relation to the provision of credit and contracts for the hire of goods (which are

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currently subject to regulation by the Office of Fair Trading under the Consumer Credit Act 1974) are regulated activities for the purposes of FSMA.

Clause 7: Orders under section 22 of FSMA 2000

158. Section 22 of FSMA provides that an activity is a regulated activity for the purposes of FSMA if it is an activity of a kind specified by order made by the Treasury which is carried on by way of business and relates to an investment of a kind specified by order made by the Treasury, or, in the case of an activity of a kind which is also specified by order made by the Treasury, is carried on in relation to property of any kind. Schedule 2 to FSMA makes further provision in relation to regulated activities.

159. *Clause 7* replaces paragraph 26 of Schedule 2 to FSMA, which provides for the Parliamentary control of orders under section 22. The *new paragraph 26* provides that such an order which contains a statement by the Treasury that in their opinion the effect of the proposed order would be to expand the scope of regulation must be laid before Parliament in draft and approved by each House of Parliament before being made unless the order contains a statement by the Treasury as to its urgency whereupon the order may be laid before Parliament after being made but ceases to have effect unless approved by each House of Parliament within 28 sitting days (see *sub-paragraphs (2) to (5)*). (Paragraph 26 currently provides for the 28 day procedure to apply to all such orders, even where there is no urgency.)

Clause 8: Designation of activities requiring prudential regulation by PRA

160. *Clause 8* inserts *new sections 22A and 22B*. *New section 22A* provides for the Treasury to specify, by order, the activities that are “PRA-regulated activities” for the purposes of FSMA. The order will determine the scope of regulation by the PRA and the persons whom the PRA will regulate. The Government has announced its intention to specify accepting deposits and effecting and carrying out contracts of insurance as PRA-regulated activities.

161. *Subsection (2)* sets out further provision as to what an order under section 22A may include. In particular, such an order may confer powers on the Treasury, FCA or PRA. This power will be necessary in light of the Government’s announcement of its intention to confer on the PRA a power to designate activities carried on by particular investment banks as PRA-regulated activities where certain criteria have been satisfied and subject to procedural safeguards.

162. The procedure for orders under *new section 22A* reflects that for orders made under section 22 (regulated activities) as amended by *clause 7*. *New section 22B* provides that the first order under *new section 22A* must be laid before Parliament in draft and approved by each House of Parliament before being made unless the order contains a statement by the

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Treasury as to its urgency whereupon the order may be laid before Parliament after being made but ceases to have effect unless approved by each House of Parliament within 28 sitting days. The same procedure is to apply to any subsequent order which, in the Treasury's opinion, makes a regulated activity into a PRA-regulated activity or removes a regulated activity from the list of PRA-regulated activities or which amends primary legislation. Other orders made under section 22A are subject to the negative procedure.

163. A definition of "PRA-regulated activity" is inserted into section 417 FSMA (definitions) by *clause 45* (see below).

Permission to carry on regulated activities

Clause 9: Permission to carry on regulated activities

164. *Clause 9* replaces Part 4 of FSMA with a new *Part 4A* dealing with the application, granting, limitation, variation and cancellation of permission to carry on regulated activities (as defined in section 22 of FSMA). *Part 4A* replicates Part 4 with modifications reflecting the replacement of the FSA by the new regulators.

165. *New section 55A* provides that permission to carry on a regulated activity can be granted to individuals, bodies corporate, partnerships and unincorporated associations. In the case of some regulated activities, there are specific constraints on the type of person which may be given permission under the threshold conditions in Schedule 6.

166. Permission may cover a number of regulated activities. *Subsection (3)* prevents an authorised person who already has permission under Part 4A from making a further application: once permission is granted, it can be varied to include further (or exclude certain) regulated activities (see *sections 55H to 55J*). Similarly, under *subsection (4)* EEA firms who could exercise rights derived from the single market directives listed in paragraph 1 of Schedule 3 to carry on regulated activities in the UK are precluded from applying for permission.

167. Applications for permission are to be made to the "appropriate regulator"; this means the FCA, unless the regulated activities to which the application relates are or include PRA-regulated activities. Thus where any of the activities for which permission is sought is a PRA-regulated activity, permission should be sought from the PRA. The PRA is also the appropriate regulator where the applicant is a PRA-authorised person otherwise than by virtue of permission under Part 4A (for example, an EEA firm carrying on a PRA-regulated activity and qualifying for authorisation under Schedule 3).

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168. *New section 55B* relates to the threshold conditions in Schedule 6 as read with any threshold condition code made by the regulators under new section 137M. The threshold conditions are the minimum conditions which a regulator must ensure that the person concerned (for example, the person making the application for authorisation) will satisfy when the regulator makes a decision relevant to that person under Part 4A. Where the person concerned is, or is seeking to become, a PRA-authorised person, each regulator will be responsible for separate threshold conditions, as provided for in Schedule 6. But the requirement to ensure that the person concerned will satisfy the threshold conditions is not to prevent the FCA from taking steps to advance any of its operational objectives (see *new section 1B(3)*) or the PRA from advancing any of its objectives (see *new sections 2B to 2D*). For example, the PRA might delay for a short period the cancellation of the permission of a deposit taker which does not satisfy its threshold conditions to allow preparations to be made to ensure that the failure of the deposit taker is orderly.

169. *New section 55C* enables the Treasury by order to amend Schedule 6. Such an order may in particular make provision in relation to the discharge of functions of each regulator, provide for different conditions for different regulated activities and provide for different provision in relation to persons who are or are seeking to, carry on PRA-regulated activities.

170. *Paragraph 5 of Schedule 20* requires the Treasury to make an order under *new section 55C* prior to the commencement of clause 9 which makes provision as to which of the conditions set out in Schedule 6 are to relate to the discharge by each regulator of its functions. In other words, the Treasury must, prior to commencement, make an order which provides for separate threshold conditions for the PRA and the FCA.

171. *New section 55D* makes provision for where a regulator is considering whether a person from outside the EEA is satisfying or will satisfy, and continue to satisfy, any one or more of the threshold conditions for which that regulator is responsible, for example where a firm authorised in Singapore applies for permission to undertake regulated activity in the UK. In that situation, *new section 55D* provides that the regulator can have regard to a view of (for example) the Singaporean regulator which is relevant to compliance with the threshold condition, such as a view on the adequacy of a firm's resources. But, if the FCA or the PRA takes the view of a non-UK regulator into account, it must, in considering how much weight to give that opinion, have regard to the nature and scope of the supervision exercised in relation to the non-EEA firm by the overseas regulator.

172. *New sections 55E and 55F* provides that the regulators may grant permission for all the activities applied for, or just some of them, may impose limitations (for example, limitations on the class of consumer to whom the authorised person may provide services or limiting the type of insurance contracts that an authorised person could write to a particular

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class) and may permit activities which are wider or narrower than the activities as described in the application.

173. Although the FCA may give permission for a regulated activity which was not included in the application, it may not give permission for such an activity if it is a PRA-regulated activity. And the FCA must always consult the PRA if the application is from a member of a group which includes a PRA-authorized person.

174. The PRA requires the FCA's consent to give permission in all cases. This is because all PRA-authorized persons will also be regulated by the FCA. The FCA may make its consent conditional; for example, if the FCA has concerns about the applicant, it may give consent conditional on the PRA imposing a limitation on the permission given to the applicant that addresses those concerns. The PRA may not give permission that results in the person being an authorized person who is not a PRA-authorized person.

175. *New section 55G* makes provision for special cases. *Subsection (2)* deals with the situation where a person who is exempt from the general prohibition in section 19 (that is, the prohibition on carrying on a regulated activity in the United Kingdom unless the person in question is authorized or exempt) by virtue of an order under section 38 or by virtue of being an appointed representative (see section 39) makes an application for permission to carry on another regulated activity. This reflects the existing principle that a person cannot be both exempt and regulated at the same time. In those cases, the regulator is to treat the application as an application to carry on all the regulated activities in question, that is both the activities from which the person is exempt and the activities for which permission is applied for. This means that the regulator must assess the ability of the firm to meet the threshold conditions for both the exempt activity and the new (regulated) activity, rather than just the new activity. This might happen if an appointed representative who gives mortgage advice wishes to provide advice on other matters (for example entering into contracts of insurance). If the appointed representative's principal firm does not have permission to carry on the activity of providing advice on entering into contracts of insurance, or does not want to allow the appointed representative to do so, the appointed representative would have to apply for permission from the FCA. If the application were granted, the person would cease to be an appointed representative. In such cases, the person is treated as applying for permission to carry out both the activity which he carries out as an appointed representative (mortgage advice) and the additional activity he wishes to carry out (advice on entering into contracts of insurance), and will be assessed for its ability to do both activities as part of the authorisation process.

176. *Subsection (3)* provides that recognised investment exchanges and recognised clearing houses which make an application for permission to carry on a regulated activity are assessed

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only in respect of the application and not as to their activities as an investment exchange or clearing house (in relation to which they are exempt from the general prohibition). *Subsection (4)* makes similar provision in respect of members of Lloyd's. *Subsection (6)* deals with cases where an application was made to the wrong regulator, or made to the right regulator but refused, and a similar application is subsequently submitted: it requires the regulator dealing with the new application to have regard to the desirability of minimising the additional work and processing time for the applicant.

177. *New sections 55H and 55I* make provision for authorised person to apply for a variation or cancellation of their permission, in terms parallel to the provisions dealing with applications for permission. Thus under *new section 55H* an authorised person who is not a PRA-authorized person may apply to the FCA to vary his permission either by adding a regulated activity (other than a PRA-regulated activity) to the permission, removing a regulated activity from permission or varying the description of regulated activity for which permission has been given. An application may also be made to cancel the permission. The FCA may refuse an application if it considers it desirable to do so to advance one of its operational objectives. The FCA must consult with the PRA on an application if the applicant is a member of a group which includes a PRA-authorized person.

178. *New section 55I* makes similar provision for the PRA to vary or cancel the permission on the application of a PRA-authorized person. The PRA may only vary permission in such cases with the consent of the FCA and must consult the FCA before cancelling permission. An authorised person who is not a PRA-authorized person may apply to the PRA for a variation of his permission to add a PRA-regulated activity to his permission. The PRA must obtain the consent of the FCA before granting such an application.

179. *New sections 55J and 55K* permit the regulators to vary or cancel permission without an application from the authorised person. This "own-initiative variation power" may only be exercised by the regulator: if the authorised person is not satisfying or is likely not to satisfy the threshold conditions for which that regulator is responsible; if the authorised person has not carried on for at least 12 months a regulated activity within its permission (so the regulators can remove permission for a regulated activity which the authorised person is no longer undertaking); or if desirable to advance the regulator's objectives. For example, the FCA might vary a firm's permission on its own initiative to prevent a firm taking new deposits relating to a particular product, where in the FCA's view the firm in question does not have adequate processes in place to protect consumers purchasing these products. The own-initiative power may also be exercised at the request of an overseas regulator (*new section 55Q*).

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180. *New sections 55L to 55P* permit the regulators to impose or vary requirements on an authorised person, including requirements relating to the holding or disposal of assets. The PRA must always consult the FCA before imposing a requirement. The FCA must consult the PRA before imposing or varying a requirement on a person who is (or will become) a PRA-authorised person or is the member of a group which includes a PRA-authorised person. Unlike the power to vary permission on the regulator's own initiative (dealt with under section 55J), this "own-initiative requirement power" may be used to impose requirements which do not relate to the regulated activity which an authorised person has permission to carry on. For example, the PRA might require a firm to dispose of a particular loan portfolio, where retention of that portfolio might undermine the firm's safety and soundness. The power replicates the power in section 43 of FSMA to impose requirements as part of permission, with the exception of the new provision in *new section 55N(5)* which enables a requirement to refer to the past conduct of the person concerned. This could be used by either regulator to require an authorised person to carry out a review of its past conduct (for example, to identify customers who have been treated unfairly).

181. *New section 55R* provides that the regulators must have regard to relevant relationships of an authorised person or an applicant for permission when exercising their powers under Part 4A, for example other members of the authorised person's group. In circumstances prescribed in regulations by the Treasury, the regulator must also consult the home state regulator of any EEA firm in the applicant's or the authorised person's group (except where the EEA firm is an insurance intermediary or a reinsurance intermediary).

182. Where an EEA firm or Treaty firm has permission under Part 4A in addition to qualifying for permission under Schedule 3 or 4, *new section 55S* provides that, in considering the exercise of own initiative powers in relation to the permission granted under Part 4A, the regulators must take account of the relevant EU law and of the home state authorisation of the person concerned. Such consideration may inform the regulator's view on whether the firm or scheme is fit and proper to continue to hold the additional permissions in question, or its view on whether the cancellation or variation it proposes is appropriate in light of the wider assessment of the firm which the home State regulator is responsible for making. The FCA must also take these matters into account in exercising its own initiative power in relation to an additional Part 4A permission of a collective investment scheme operator, trustee or depositary.

183. *New section 55T* provides that in exercising their functions in relation to a particular person to protect the interests of another person, there need not be a relationship between the particular person and the person whose interests are being protected. For example, where authorised person Y is refusing to provide services to authorised person Z which are

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necessary for the continued provision of financial services to Z's customers, the FCA could impose a requirement on Y to protect the interests of the customers of Z.

184. *New sections 55U to 55W* make provision relating to the making and content of applications for permission, the timescale for determining applications (which is six months from the date of receipt of the application where the application is a complete application), and for the PRA to notify the FCA of the receipt or withdrawal of an application for permission or an application for the variation or cancellation of a permission or a requirement. *New section 55V(4)* confirms that an applicant may withdraw an application at any time, and *new section 55V(5)* requires the regulator to issue a written notice when it grants an application for permission, an application for a variation or cancellation of permission or an application for variation or cancellation of a requirement.

185. *New section 55X* requires the regulators to give a warning notice where they propose to refuse an application, or where they propose to grant the application but with requirements, with limitations, or with a description of regulated activity different from that specified in the application. No warning notice need be given if the applicant is an EEA firm which could exercise an EEA right to carry on the activity (see Schedule 3 to FSMA). The issue of a warning notice provides an opportunity for the applicant to make representations to the regulator if the applicant wishes to do so. *Subsection (4)* requires the regulator to issue a decision notice where it grants or varies permission in response to an application but with requirements, with limitations, or with a description of regulated activity different from that specified in the application; the regulator must also issue a decision notice where it refuses the application. In addition, the FCA must issue a warning notice if it proposes to impose a requirement on an applicant whose application was made to the PRA, and must issue a decision notice when it imposes the requirement.

186. *New section 55Y* sets out the procedural requirements relating to the exercise of the regulators' own-initiative powers. The variation of permission, or the variation or imposition of a requirement, may take effect immediately or on a specified date if the regulator considers it necessary for it to do so having regard to the ground on which the regulator is exercising the power. If the regulator does not specify a date, the variation will take effect only after the time for referring the matter to the Tribunal has expired and any reference and further appeal has been finally determined (see the definition of "open to review" in section 391(8) of FSMA). The regulator must give the authorised person a written notice which gives the details of the variation, the date on which it takes effect, the reasons for the variation and for the choice of date. The notice must also inform the person of his right to make representations to the regulator within a specified period, and to refer the matter to the Tribunal. *Subsections (7) to (11)* require the regulator to give further written notice of its response to any representations which are made. This can be a decision not to proceed with the variation (or to cancel it if it

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has already taken effect), to propose a different variation (in which case the original notice procedure must be repeated), or to proceed with the variation (in which case the person concerned has a further right to refer the matter to the Tribunal).

187. *New section 55Z* requires the regulator to issue warning and decision notices regarding, respectively, the proposal to cancel permission and the cancellation of a permission.

188. *New section 55ZI* confers a right to refer to the Tribunal matters under Part 4A, such as a decision to refuse an application for permission, to impose conditions or to vary a permission other than in the way requested. On such a reference, the applicant is not limited to challenging the regulator which has taken the decision which the applicant is concerned about. Thus on a reference in relation to a refusal by the PRA to give permission, the applicant may challenge the decision of the FCA to refuse to give consent to the grant of permission.

Passporting

Clause 10 and Schedule 4: Passporting: exercise of EEA rights and Treaty rights

189. *Clause 10* introduces Schedule 4 which amends sections 34 and Schedule 3 (EEA passport rights), section 35 and Schedule 4 (Treaty rights) and Part 13 of FSMA (incoming firms: powers of intervention). Section 34 and Schedule 3 provide that EEA firms which are authorised by their home state regulator in accordance with the relevant single market directive (see paragraph 1 of Schedule 3) may establish a branch or provide services in the UK without requiring permission under Part 4A; this is known as “passporting”. Section 35 and Schedule 4 make similar provision in relation to EEA persons where there is no such right under a single market directive but the law of their home state affords equivalent protection or there is European Community law providing for coordination or harmonisation of Member States’ laws and administrative procedures in relation to the activity in question.

190. *Paragraphs 2 to 8 of Schedule 4* make amendments to Schedule 3 to FSMA which relate to the exercise of passport rights by EEA firms under the single market directives (defined in paragraph 1 of Schedule 3 to FSMA).

191. Notices in relation to the exercise of passport rights to establish a branch or provide services in the UK must be given to the “appropriate UK regulator”. The United Kingdom will specify which of the PRA and FCA is the appropriate regulator in relation to each of the single market directives listed in paragraph 1, by the provision of notice to the European Commission. The PRA must pass all notices it receives in relation to the exercise of passporting rights to the FCA; the FCA must pass copies of such notices it receives to the

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PRA in prescribed circumstances. The circumstances to be prescribed will, for example, relate to the activities described in the order under section 22A. The FCA will supervise all incoming EEA firms; the PRA will have to supervise incoming EEA firms which are PRA-
authorised persons or intend to undertake PRA-regulated activities.

192. *Paragraphs 9 to 21* make amendments to Schedule 3 to FSMA which relate to the exercise of passport rights under the single market directives by UK firms.

193. Notices in relation to the exercise of passport rights must be given to the “appropriate UK regulator”. Where the authorised person is a PRA-
authorised person, the appropriate regulator is the PRA. In other cases, the appropriate regulator is the FCA.

194. The amendments made by *paragraph 10(3)* to paragraph 19 of Schedule 3 and the amendments made by *paragraph 11(3)* to paragraph 20 of Schedule 3 deal with co-ordination between the regulators. Where the PRA is the appropriate regulator, it must consult the FCA before deciding whether to give a consent notice in connection with the exercise of passporting rights (except in relation to the establishment of a branch under the insurance mediation directive). Where the FCA is the appropriate regulator and the immediate group of the authorised person includes a PRA-
authorised person, the FCA must consult the PRA. New paragraph 24A of Schedule 3, inserted by *paragraph 17* makes further provision for co-ordination. It enables the PRA and FCA to make arrangements about how they will consult with each other when required. The arrangements may provide for one regulator to be required to obtain the consent of the other before giving a consent notice or exercising functions in relation to the ongoing supervision of such UK firms.

195. *Paragraphs 22 to 26* make amendments to Schedule 4 to FSMA which relate to the exercise of Treaty rights. Notifications by incoming Treaty firms are to be made to the FCA or PRA. The PRA must give a copy of any notifications it receives to the FCA. The FCA must give a copy of notifications it receives to the PRA where the notification relates to a permitted activity which is a PRA-
regulated activity, a PRA-
authorised person, a person whose immediate group includes a PRA-
regulated activity or in circumstances specified by the Treasury. The powers and duties in relation to Treaty firms are conferred on the PRA where the firm is a PRA-
authorised person or carrying on a PRA-
authorised person, and on the FCA in other cases.

196. *Paragraphs 27 to 43* amend sections 34 and 35 and Part 13 of FSMA (powers of intervention). Where the incoming firm is a PRA-
authorised person, both the PRA and FCA may exercise the powers of intervention. In other cases, only the FCA may exercise the powers of intervention. By virtue of section 196 of FSMA as substituted by *paragraph 36*, the FCA must consult the PRA before exercising its powers of intervention under Part 13 in

relation to a PRA-authorized person or a member of a group which includes a PRA-authorized person. The PRA must consult the FCA before exercising its powers of intervention under Part 13 in all cases.

Performance of regulated activities

Clause 11: Prohibition orders

197. *Clause 11* makes amendments to sections 56 and 57 of FSMA consequential on the replacement of the FSA by the new regulators. It also imposes requirements for the FCA to consult the PRA (where a PRA-authorized person, or a person who is an exempt person in relation to a PRA-regulated activity, is concerned), and for the PRA to consult the FCA, before issuing a warning notice to an individual that it proposes to make a prohibition order, and before revoking or varying such an order.

Clause 12: Approval for particular arrangements

198. *Clause 12* makes amendments to sections 59, 63 and 64 of FSMA consequential on the replacement of the FSA by the new regulators; it also inserts *new sections 59A and 59B*.

199. Section 59 provides that authorized persons must take reasonable care not to allow persons to perform certain functions without the approval of the regulator; a person in respect of whom approval is given is an “approved person”. The effect of the amendments made by *clause 12* is that each regulator will specify in rules the functions in respect of which approval must be sought from that regulator. Both regulators may specify “significant-influence functions” (defined in new subsection (7B) of section 59) but only the FCA may specify “customer-dealing functions” (defined in new subsection (7A) of section 59). The PRA may only give approval in relation to a significant-influence function specified by the PRA with the consent of the FCA (but see *new section 59B*, below). Also, the PRA may only specify functions performed in relation to the carrying on of regulated activities by a PRA-authorized person.

200. *New section 59A* requires the regulators to consult each other before specifying significant-influence functions and for the FCA to keep its power to specify such functions under review and to exercise that power in a way designed to minimise the need for a person to be approved by both regulators. Thus the FCA should generally not specify as a significant-influence function a function which has already been specified by the PRA. Where the PRA specifies a function which the FCA has specified as a significant-influence function, the FCA should generally revoke its specification of that function.

201. *New section 59B* provides that the regulators may enter into arrangements under which the PRA does not need to obtain the consent of the FCA before giving approval to a person to

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carry on a significant-influence function under section 59. Such arrangements must be in writing, and the regulators must publish them. This will allow the regulators to dispense with the requirement to obtain FCA consent where the FCA has insufficient interest in the performance of the function to justify the PRA obtaining the FCA's consent.

202. Under section 63 (as amended by *subsection (3)*), either regulator may withdraw approval from a person who is carrying on a significant-influence function in connection with a PRA-authorized person, regardless of which regulator gave approval. Only the FCA can withdraw approval to carry on a customer-dealing function.

203. Under section 64 (as amended by *subsection (4)*) both regulators may issue statements of principle with respect to the conduct expected of persons who have been given approval (from either regulator) to perform a significant-influence function in relation to carrying on of a regulated activity by a PRA-authorized person. Only the FCA can issue statements of principle about the conduct expected of other approved persons.

Clause 13 and Schedule 5: Further amendments relating to performance of regulated activities

204. *Clause 13* introduces Schedule 5, which makes amendments to Part 5 of FSMA (performance of regulated activities) consequential on the replacement of the FSA by the new regulators.

205. *Paragraph 2* of Schedule 5 makes consequential amendments to section 58 of FSMA (prohibition orders).

206. *Paragraphs 3 to 18* amend sections 59 to 70 of FSMA (approval). The amendments are primarily consequential on the amendments made by *clause 12*.

207. *Paragraph 5(6)* amends the timetable for determining an application for approval set out in section 61 of FSMA. The amendment provides that where the application is made by a person who is also applying for permission under Part 4A, the application must be determined by the date by which the application for permission must be determined (see new section 55V) or 3 months after the application is received, whichever is the later.

208. *Paragraph 7* amends section 63 of FSMA (withdrawal of approval) to ensure that both regulators may withdraw approval. The withdrawal does not have to be by the regulator that gave the approval provided that the application for approval could have been made to that regulator.

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209. *Paragraph 13* amends section 65 of FSMA (statements and codes: procedure) to require the FCA and PRA to consult each other before issuing a statement or code under section 64. The definition of “cost benefit analysis” in section 65(11) is also amended so that the regulator need only provide an analysis of the costs and benefits arising from the proposal rather than an estimate of those costs and benefits where the regulator is of the opinion that the costs or benefits cannot be reasonably estimated or it is not reasonably practicable to produce an estimate but must then provide a statement with an explanation of its opinion.

210. *Paragraph 14* amends section 66 of FSMA (disciplinary powers) to provide that a person is guilty of misconduct for the purposes of each regulator (and so amenable to action by that regulator under section 66) if a person has failed to comply with a statement of principle issued by that regulator. Thus each regulator may take action only in relation to a breach of its own statement. In addition, each regulator may take action in relation to breach of directly applicable EU regulation.

Official listing

211. Part 6 of FSMA sets out the regime under which the “competent authority” is responsible for: (a) maintaining the official list of securities admitted to trading on a regulated market in the UK (the “Official List”); (b) regulating the admission of securities to the Official List; and (c) monitoring compliance with requirements imposed on issuers of securities (and other relevant persons) by or under the Part or by directly applicable European measures. Currently, the FSA is the “competent authority” and is known in this context as the UK Listing Authority (“UKLA”).

212. Part 6 has been substantially amended as a result of a number of developments in European law. For example, in addition to performing the functions as the competent authority for listing, the UKLA now has responsibility for making the prospectus rules (section 84) and the disclosure and transparency rules (section 89A and 96A) which are derived from Directive 2003/6/EC on insider dealing and market manipulation (market abuse) and Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading.

Clause 14: FCA to exercise functions under Part 6 of FSMA

213. At the time FSMA was enacted it was unclear whether the FSA would undertake, on a permanent basis, some or all of the functions as the competent authority under Part 6. Therefore Part 6 was prepared as a self-contained Part and Schedule 7 to the FSMA makes modifications to that Act in its application to the FSA as the competent authority under Part 6. Paragraph 2 of Schedule 7 carves out the FSA’s functions under Part 6 from the application of the FSA’s general duties (which are specified in section 2 of FSMA). In addition Schedule 8

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to FSMA (transfer of functions under Part VI) confers on the Treasury a power to confer on another body some or all of the functions under Part 6.

214. Under the new regulatory arrangements, the FCA is to undertake all of the FSA's functions under Part 6. Therefore *clause 14(2) to (12)* changes the references in that Part from the "competent authority" to the "FCA". In addition, the power to confer on any other body some or all of the functions under Part 6 of FSMA is removed (*subsection (13)(l)*) and other provisions no longer needed (for example, bespoke arrangements relating to fees and penalties (*subsection (13)(c) and (d)*) are omitted as the general provisions in FSMA relating to the FCA will now extend to the functions under Part 6.

215. The FCA's general duties, including the requirement to act compatibly with its strategic objective (specified in *new section 1B*) when discharging the rule and guidance-making functions under Part 6.

Clause 15: Discontinuance or suspension at the request of the issuer: procedure

216. Section 77 of FSMA (as amended by *clause 14(5)*) provides that the FCA may discontinue or suspend the listing of securities where there are special circumstances which preclude normal regular dealings with them. ("Discontinuance" and "suspension" are defined in section 78(13) and (14).) Section 78 describes the procedural arrangements which apply where the FCA, of its own doing, proposes or decides to discontinue or suspend the listing of securities. Section 78A sets out the procedure to be followed where the issuer applies to the FCA for listing to be discontinued or suspended.

217. The requirement imposed by section 78A(2) to issue a written notice where the FCA decides to discontinue or suspend the listing of securities at the request of the issuer is onerous in practice as the FCA may wish to act very quickly in response to the request. Therefore *clause 15(2)* makes some minor and technical changes to section 78A to enable the FCA to give notice in writing or orally where the FCA decides to take the action requested by the issuer. *Subsection (2)(c)* substitutes section 78A(3) and sets out the information which should be included in a notification.

218. *Subsection (3)* makes a consequential change to section 395 which sets out provision in relation to the procedural arrangements which must be put in place by the FCA so that an oral notification under section 78A constitutes a "supervisory notice" for the purposes of that section.

Clause 16: Listing rules: disciplinary powers in relation to sponsors

219. Section 88(1) enables the FCA to make listing rules requiring issuers to make arrangements with "sponsors" for certain purposes. A "sponsor" is a person who is approved

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for the purposes of the rules and whose role, in broad terms, is to advise an issuer on the listing and disclosure requirements imposed by or under Part 6.

220. *Subsection (2)(a)* extends the provision which may be made in listing rules such that the rules may specify that the FCA may grant approval, or make an existing approval, subject to such limitations or other restrictions as may be specified by the FCA. The rules may also specify that the FCA may agree to suspend (rather than cancel) a person's approval as a sponsor. An approval may be suspended, for example, where a person has not undertaken a certain form of transactional work for some considerable time (and is not considered to have the relevant up-to-date expertise in a particular area) and will last until the sponsor has demonstrated the competencies necessary to undertake this work.

221. If the FCA proposes to impose limitations or other restrictions to which a person's approval relates (in accordance with rules made under the *new section 88(3)(e)*), the FCA must issue a warning notice. If the FCA decides not to impose such limitations or restrictions following consideration of any representations received from the person concerned, it must issue a written notice. If the FCA decides to impose such limitations or restrictions, the FCA must issue a decision notice. *Subsection (2)(h)* inserts a *new subsection (8)* into section 88 which lists the different forms of application which may be made under "sponsor rules". For example, where the FCA has imposed a limitation or other restriction in relation to a person's approval as a sponsor, that person may apply for the withdrawal or variation of such limitation or restriction. *Subsection (3)* provides that the power for the FCA to impose limitations or other restrictions on the services to which an approval relates is available in relation to persons who were approved as sponsors prior to the coming into force of *subsection (2)(a)*.

222. Section 89 of FSMA (public censure of a sponsor) enables the FSA to make provision in listing rules enabling it to issue a public censure where the sponsor has been found to have contravened a requirement imposed by rules under section 88(3)(c). *Subsection (4)* substitutes for section 89 *new sections 88A, 88B, 88C, 88D, 88E and 88F*.

223. *New section 88A(1) and (2)* extend the types of disciplinary sanction that may be imposed on sponsors and the circumstances in which such action may be taken. *New section 88A(4) to (6)* make provision in relation to suspensions or restrictions imposed by way of a disciplinary measure and *section 88A(7)* makes clear that the FCA may not take disciplinary action in relation to a contravention once the limitation period has expired; the limitation period is three years starting on the day that the FCA first knew of the contravention (*subsections (8) and (9)*). A suspension or restriction imposed under this section is not to have effect for a period of more than 12 months (*subsection (3)*). This is consistent with the provision made in relation to suspensions or restrictions of a person's authorisation to conduct

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regulated activities (section 206A of FSMA (suspending permission to carry on regulated activities etc)).

224. *New section 88B* specifies the procedure which the FCA must follow before taking action against a sponsor under *new section 88A*. In the event that the FCA decides to take any of the forms of action specified in *new section 88A(2)*, the person subject to the measure has the right to refer the matter to the Tribunal (*subsection (9)*). These arrangements are consistent with the procedure to be followed in relation to disciplinary measures imposed on authorised persons (see sections 205 to 208 of FSMA).

225. *New section 88C* requires the FCA to prepare and issue a statement of its policy with respect to the imposition of penalties, suspensions, or restrictions under *new section 88A* to which it must have regard in exercising or deciding whether to exercise its powers under *new section 88A*. A copy of the statement must be given to the Treasury. *Subsection (2)* specifies the matters to which the FCA must have regard in determining its policy with respect of the action. A statement issued under this section can be altered and replaced (*subsection (3)*) and the FCA may charge a reasonable fee for providing copies of a statement (*subsection (7)*).

226. *New section 88D* sets out the procedures to be followed by the FCA in respect of statements issued under *new section 88C*. In particular, before a statement is issued it must be published in draft and a response given to any representations made about it.

227. *New section 88E* confers a new power on the FCA to suspend, for such period as it considers appropriate, a sponsor's approval, or to impose, for such period as it considers appropriate, such limitations or other restrictions in relation to the performance of services to which the sponsor's approval relates. The power can be used where the FCA considers it appropriate to do so for the purposes of advancing one or more of its operational objectives.

228. *New section 88F* sets out the procedure to be followed where the FCA proposes or decides to take action under the power conferred by *new section 88E*. Under *subsection (1)(a)* action may take effect immediately or on such later date as may be specified in a written notice. This aligns with the procedure to be followed in relation to variations of an authorised person's permission to carry on regulated activities.

Clause 17: Primary information providers

229. *Clause 17* inserts *new sections 89P, 89Q, 89R, 89S, 89T, 89U and 89V* into Part 6 of FSMA.

230. *New section 89P* enables the FCA to make rules which may require the issuers of financial instruments to use primary information providers for the purposes of disseminating

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information to the market. A “primary information provider” is defined in *subsection (2)* as a person approved by the FCA for the purposes of *section 89P*. *Subsection (4)* specifies that Part 6 rules made by virtue of *subsection (1)* may provide for the FCA to maintain a list of providers, impose requirements on a provider in relation to the giving of information or information of a specified description and other matters. *Subsections (5) to (9)* make similar provision to that made by section 88 (as amended by clause 16(2)) in relation to sponsors.

231. *New sections 89R to 89V* make similar provision in the case of primary information providers to that made by new sections 88A to 88F, which confer on the FCA new supervisory and disciplinary powers in relation to sponsors.

Clause 18: Penalties for breach of Part 6 rules

232. Section 91 of FSMA specifies the types of penalties which may be imposed by the FCA in relation to a breach of Part 6 rules. Section 91(6) provides that the FCA may not take action against a person for a breach of Part 6 rules after the end of the period of two years following the date on which the FCA knew of the contravention. Proceedings are treated as having been begun within that period when a warning notice is given under section 92 (procedure). The amendment made by this clause extends the period to three years. This is in order to achieve consistency with section 66(4) which deals with penalties imposed on approved persons.

Clause 19: Repeal of competition scrutiny power

233. *Clause 19* repeals section 95 of FSMA. The power conferred by that section is no longer needed as the provisions in Chapter 4 of Part 9A (inserted by clause 22) will apply.

Control of business transfers

234. Part 7 of FSMA sets a court process which enables insurance business, banking business or reclaim fund business to be transferred from one person to another without requiring the approval of all those who may be affected by the transfer (e.g. the consent of all relevant policyholders or account holders). The process is compulsory for insurance business transfer schemes (section 104 (control of business transfers)) but remains optional in the case of banking business transfer schemes and reclaim fund business transfer schemes (the different types of “scheme” are defined in sections 105, 106 and 106A respectively) as a result of the partial commencement of that provision.

235. The Part 7 process involves an application to court for an order sanctioning the transfer scheme. The application may be made by the transferor (otherwise known in Part 7 as “the authorised person concerned”), the transferee or both entities (section 107(1) and (2)). Applications concerning insurance business transfer schemes must be accompanied by a

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report on the terms of the scheme (“a scheme report”). This report must be in a form approved by the FSA and made by a person (a) appearing to the Authority to have the skills necessary to enable him to make a proper report; and (b) nominated or approved by the Authority for that purpose (section 109). There is no similar requirement in relation to banking business transfer schemes or reclaim fund business transfer schemes. The FSA has a right to be heard at the court hearing along with any person who alleges that he would be adversely affected by the transfer scheme (section 110).

236. The court may only make an order sanctioning the transfer where it is satisfied that: (a) the “appropriate certificates” have been obtained from the relevant regulatory (generally the FSA); (b) the transferee has the relevant authorisation to enable the business to be carried on (section 111(2)), and (c) considers that, in all the circumstances, it is appropriate to sanction the transfer scheme. Schedule 12 to the FSMA sets out the “appropriate certificates” for the purpose of sections 111(2).

Clause 20 and Schedule 6: Control of business transfers

237. *Clause 20(1)* omits certain words from *section 104* (control of business transfers), which has (at the date of publication of these notes) been brought into force only in relation to insurance business transfers. The effect of the partial commencement of section 104 is that the Part 7 procedure must be used in relation to insurance business transfers but need not be used in relation to banking business or reclaim fund business transfers. It is undesirable to continue to rely on the partial commencement of a provision of FSMA. Therefore the amendment made by *subsection (1)* preserves this position and ensures that the Part 7 procedure is only mandatory in relation to insurance business transfer schemes. The effect of section 107 (application for order sanctioning transfer scheme) is that the Part 7 process can be used in relation to banking business transfer schemes or reclaim fund business transfer schemes or, alternatively, other processes (such as a Private Bill) may be used.

238. *Subsection (2)* introduces *Schedule 6* which makes a number of amendments to Part 7 of, and Schedule 12 to, FSMA.

239. *Paragraph 2 of Schedule 6* inserts a new *section 103A* into FSMA which defines the term “the appropriate regulator” for the purposes of Part 7. The effect of this change is that where the transfer scheme concerns business to be transferred from a transferor (the “authorised person concerned”) who is a PRA-authorized person, the PRA is to be the appropriate regulator; in any other case, the FCA is to be “the appropriate regulator”.

240. *Paragraph 3* amends section 109 (scheme reports) to specify that an application to court made under section 107 in relation to an insurance business transfer scheme must be accompanied by a report on the terms of the scheme which has been prepared by a person

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appearing to the “appropriate regulator” to have the appropriate skills to produce the report or has been nominated or approved by the regulator for the purpose of producing the report. As such, where the authorised person concerned is a PRA-authorised person the PRA will be responsible for nominating or approving the person to conduct the report (and the form of the report). However, as a result of the amendments made to the section (*sub-paragraph (3)*), before nominating or approving a person to produce the report or approving the form of the report the PRA is required to consult the FCA (*new subsection (4)*). Where the FCA is “the appropriate regulator” it is required to consult the PRA where the transferee is a PRA-authorised person or where the authorised person concerned or the transferee has in its immediate group a PRA-authorised person (*new subsections (5) and (6)*).

241. *Paragraph 4* amends section 110 (right to participate in proceedings) such that the “appropriate regulator” has the right to participate in court proceedings concerning a transfer scheme in relation to which an application to court has been made. Where the authorised person concerned is a PRA-authorised person or a person who is regulated only by the FCA but has in its immediate group a PRA-authorised person (or where the transferee is a PRA-authorised person or has in its immediate group a PRA-authorised person) both the FCA and the PRA may participate in the proceedings. In other cases the FCA may participate in the proceedings.

242. If an insurance business or banking business transfer scheme is sanctioned by the court, the transferee is required to deposit two copies of the court order with the Authority within 10 days of the making of the order albeit that the Authority may extend that period (section 112(10) and (11)) (effect of order sanctioning a business transfer scheme). *Paragraph 5* amends the references to “the Authority” in subsections (10) and (11) to refer to “the appropriate regulator”. *Paragraph 6* inserts *new section 112ZA* after section 112 which requires the appropriate regulator to give a copy of any order received under section 112(10) to the other regulator in certain cases (for example, where the authorised person concerned is a PRA-authorised person the PRA must give a copy of the order to the FCA).

243. *Paragraph 7* replaces the references to “the Authority” in section 113 (appointment of an actuary in relation to the reduction of benefits). The amendments to this section enable the PRA and the FCA to apply to a court for an order appointing an actuary to investigate the business transferred under a scheme and to report to the relevant regulator on any reduction in benefits payable in relation to policies entered into by the transferor that, in the opinion of the actuary, ought to be made. *Sub-paragraph (3)* inserts a *new subsection (3)* which makes clear the circumstances in which an application may be made by the PRA.

244. Section 111 (sanction of the court for business transfer schemes) provides that the court may only sanction a transfer scheme where it is satisfied that the relevant certification

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(specified in Schedule 12 to FSMA (transfer schemes: certificates)) has been obtained and that, in all the circumstances, it is appropriate to sanction the scheme. *Paragraph 8* amends section 115 (certificates for the purposes of insurance business transfers overseas) to replace the reference to “the Authority” with a reference to “the appropriate regulator”. *Paragraphs 9 to 19* amend the references to “the Authority” in Schedule 12 such that the “appropriate regulator” or (where appropriate) the prudential regulator of the transferee is specified as being the authority responsible for providing the relevant certification under that Schedule.

Hearings and appeals

Clause 21: Proceedings before Tribunal

245. Many provisions of FSMA confer on a person subject to certain decisions of the FSA the right to refer the matter to the Tribunal (defined in section 417(1) of FSMA as the Upper Tribunal). For example, section 92(7) confers such a right on a person subject to a decision of the FSA to impose a financial penalty in respect of a breach of rules made under Part 6. Part 9 of FSMA makes provision for proceedings before the Tribunal. Section 133(5) specifies that, in relation to a reference or appeal, the Tribunal must determine what (if any) is the appropriate action for the decision-maker (that is, the FSA) to take in relation to the matter referred or appealed to the Tribunal. This means that the Tribunal may substitute for the opinion of the FSA its own view as to the precise nature of regulatory action, such as a variation of a permission to carry on regulated activities under Part 4, which the FSA should take.

246. *Subsection (2)(a)* makes consequential amendments to section 133(1)(a) as a result of the conferral of functions on the FCA and the PRA.

247. *Subsection (2)(b)* replaces section 133(5) and (6) with *new subsection (5) to (6A)*, and *subsection (2)(c)* inserts *new subsection (7A)*. These amendments have the effect of preserving the arrangements under FSMA as regards the consideration of certain types of decisions of the FCA, the PRA and the Bank and the determinations which may be made by the Tribunal in respect of such decisions. The decisions within this category are decisions concerning punitive measures designed to discipline a person for a contravention of a relevant requirement (see the *new subsections (5) and (7A)*). For example, a person subject to a decision by the FCA to impose a penalty under section 206 (financial penalties) may refer the matter to the Tribunal which, on determining the matter and deciding that the FCA’s decision should not be upheld, must remit the matter to the FCA with such directions (if any) as it considers appropriate for the purposes of giving effect to its determination as to the action which should be taken by the FCA. These directions could, for example, specify that, in light of new evidence put before the Tribunal, the most appropriate course of action would be for

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the FCA to impose a financial penalty of £150,000 in respect of a contravention, rather than the £100,000 set out in the decision notice referred to the Tribunal.

248. In relation to other matters which may be referred or appealed to the Tribunal, the scope of the determinations which may be made by Tribunal is more limited (see *new subsections (6) and (6A)*). For example, in relation to a decision by the PRA to vary a person's permission to carry on regulated activities, the Tribunal will no longer be able to reach its own view as to the precise nature of the variation which should be made by the PRA. Instead, if the Tribunal were not to uphold the PRA's decision, the Tribunal would be required to remit the matter to the PRA with a direction to reconsider the matter and reach a decision in accordance with the findings of the Tribunal. Such findings may only concern certain matters (listed in the *new subsection (6A)*) such as issues of fact or law. This distinction is drawn between "disciplinary" and other measures, as in line with the new judgement-based approach to supervision, the FCA the PRA and the Bank are best placed to form a view as to the precise nature of supervisory action taken in pursuance of wider public-policy aims such as financial stability in the case of the PRA and the Bank or consumer protection, market integrity and competition in the case of the FCA.

249. *Subsections (3) to (5)* make consequential changes to various provisions of Part 9.

Rules and guidance

Clause 22: Rules and guidance

250. *Clause 22* replaces Part 10 of FSMA with a *new Part 9A* which re-enacts Part 10 with amendments. *Chapter 1 of new Part 9A* sets out the general rule-making powers of the FCA and the PRA; *Chapter 2* deals with the modification, waiver and contravention of rules, and procedural provisions; *Chapter 3* makes provision for the FCA to issue guidance; *Chapter 4* makes provision for competition scrutiny; and *Chapter 5* makes provision for consequential amendments of references to rules in primary and secondary legislation.

251. *New section 137A* provides for the FCA to issue general rules applying to authorised persons. The rules may relate to the carrying on of regulated activities, and to the carrying on of activities which are not regulated; for example, rules may restrict authorised persons, or a particular description of authorised person (see *new section 137R*) from engaging in a particular activity. Any rules made by the FCA under this section must appear to the FCA to be necessary or expedient to advance one or more of its operational objectives. However, there need not be a direct relationship between the authorised persons to whom the rules apply and the persons who are protected by the rules. Examples might be rules that address a firm's behaviour towards its competitors, potential clients or its beneficiaries.

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252. *New section 137B* makes provision about general rules which relate to the handling of clients' money.

253. *New section 137C* provides that the FCA's power to make general rules includes power to make rules that prohibit or restrict authorised persons from exposing consumers to an economic interest in specified products ("product intervention rules"). The power is limited to being exercised where the FCA considers that it is necessary or expedient to do so, for the purpose of securing an appropriate degree of protection for consumers or promoting effective competition or, if the Treasury so provides by way of order made under *subsection (1)(b)*, the integrity objective. The procedure for making such an order is set out in *new section 137D* and *new section 90(2)(d)* of the Bank of England Act 1998 (inserted by *clause 3*) provides that the FPC may give the Treasury advice about the exercise of this order making power. *Section 137C* does not limit the general rule making power in *section 137A* (see section 415A of FSMA).

254. *New section 137C(2)* lists the things that the FCA can specify as prohibited in its product intervention rules. These include: entering into specified agreements with any person or specified person; entering into specified agreements with any person or specified person unless requirements specified in the rules have been satisfied; doing anything else that might result in (a) the entering into of specified agreements by persons or specified persons or (b) the holding by them of a beneficial or other kind of economic interest in a specified agreement; or doing anything else unless certain requirements in the rules are met.

255. The power is intended to enable the FCA to impose restrictions in relation to specified products, or to ban them outright, where the FCA considers this is necessary or expedient to advance the consumer protection or the competition objective. The restrictions may include mandating the inclusion or exclusion of specific product features. They may also include specifying a class of consumer who may not be exposed to a particular product, or should only be exposed to it if certain conditions are met. When exercising this power the FCA must also have regard to the regulatory principles in *new section 3B*, including that the principle that a burden or restriction should be proportionate to the benefits which are expected to result from it. In accordance with these principles, the FCA would, for example, consider whether it is more appropriate to place restrictions on products than to ban them outright.

256. *Subsection (7)* provides that the FCA may attach specific provisions to such rules as to the effect of contravention of such rules including that agreements entered into in breach of rules made under this provision are rendered automatically void and unenforceable against a consumer. These provisions would only apply to contracts entered into after the product intervention rules had come into force; they would not apply to contracts entered into before that date.

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257. Consumers who have entered into agreements concerning “products” that are later “banned” or “restricted” would not be able to rely on new rules (that postdate their contracts) in order for their contracts to be rendered void and to establish their automatic entitlement to a refund or compensation. However, such consumers may seek redress from existing provisions of FSMA or rules made under the powers in FSMA. For example the FSA Handbook would apply to agreements entered into prior to product intervention rules coming into force.

258. The PRA may make general rules under *new section 137E*. The PRA’s general rules may only apply to PRA-authorized persons, but may relate to the carrying on of both regulated activities and activities which are not regulated. Any rules made by the PRA under this section must appear to the PRA to be necessary or expedient to advance any of its objectives. However, there need not be a direct relationship between the authorized persons to whom the rules apply and the persons who are protected by the rules.

259. General rules made by either regulator can impose restrictions on the remuneration of staff and others (*new section 137F*), and may provide (i) that provisions in an agreement which breach the restrictions are void and (ii) for the recovery of payments made or property transferred under a void provision.

260. General rules may also require authorized persons to have and comply with a remuneration policy (*new section 137G*). If rules contain a requirement for such a policy the Treasury may direct the regulator to review the compliance by a specified authorized person, or description of authorized persons, with the rules on remuneration policies. If there is non-compliance, the regulator must take such steps as it considers appropriate to deal with the non-compliance, for example requiring the authorized person to review its remuneration policy.

261. Part 1 of the Banking Act 2009 establishes a special resolution regime (SRR), providing statutory tools to deal with banks and building societies that get into financial difficulties. General rules made by either regulator under FSMA may require those in respect of whom the SRR may be exercised (such as banks and building societies) to prepare recovery plans. Recovery plans are plans setting out action to be taken to secure the carrying on of the business, or information to facilitate the carrying on of the business. Action described in the plan may include the restructuring, scaling back or sale of certain business lines or assets of the authorized person in question. The purpose of a recovery plan is not to help an authorized person to avoid getting into difficult circumstances, but to plan what they can do to enable them to recover should they encounter such circumstances.

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262. *New section 137H* provides that, before they prepare rules about recovery plans, the regulators must consult the Treasury and the Bank, both of whom have roles under Part 1 of the Banking Act 2009.

263. Similarly, *new section 137I* provides that the PRA must consult the Treasury and the Bank before making general rules requiring the preparation of resolution plans. A resolution plan is a plan setting out (i) steps to be taken in the event of it becoming likely that the business will fail or in the event of it failing, and/or (ii) information to facilitate anything that falls to be done in consequence of the failure of the business. Resolution plans might include provisions to ensure that a “data room” can be set up quickly and effectively, or contain information about the simplification of legal structures ahead of a resolution being triggered. *Subsection (6)* confirms that information that would facilitate planning by the Treasury and the Bank for the exercise of their powers under the Banking Act 2009 is eligible for inclusion in a resolution plan. Where the PRA has made rules requiring the preparation of resolution plans, *new section 137K* requires it to consult the Treasury and the Bank about the adequacy of the plans prepared.

264. *New section 137L* makes further provision in respect of recovery plans and resolution plans. To prepare a recovery or resolution plan, an authorised person or a skilled person appointed under section 166A is likely to need to obtain information from various other persons. *Subsection (1)* facilitates the flow of information to the authorised person, or the skilled person, for the purposes of preparing a recovery or resolution plan, for example other companies in the group, or persons such as service providers, without there being a breach of any duty or obligation of confidence. *Subsection (2)* provides that an authorised person that has received confidential information under subsection (1) may, for example, include such information in its recovery or resolution plan and submit it to the relevant regulator without having to seek the consent of a third party.

265. *New section 137M* enables each regulator to make rules (to be known as “threshold condition codes”) which supplement the threshold conditions which are set out in Schedule 6 and expressed to be relevant to the discharge of that regulator’s functions. Under *new section 55B*, references to the “threshold conditions” means the conditions set out Schedule 6 as read with any threshold condition code made by the regulators in relation to those conditions. *Subsection (3)* provides that a threshold condition code may in particular specify requirements a person must satisfy to be regarded as satisfying a particular condition and specify matters which are, or are not, relevant in determining whether a particular condition is satisfied. *Subsection (5)* provides that a threshold condition code cannot be enforced otherwise than by reference to the threshold conditions. For example a financial penalty could not be imposed on an authorised person by reference to a contravention of threshold condition code.

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266. *New section 137N* provides that the regulators may make rules about the disclosure and use of information held by an authorised person. These rules are commonly known as “Chinese walls” rules. Chinese walls are barriers in the form of procedures, systems, management and physical separation which firms may employ in order to ensure that information obtained by one part of a firm is not communicated in inappropriate circumstances to another part of the firm (for example, where it would advantage one client at the expense of another). Under *subsection (2)(a) and (c)*, rules may require that information be withheld or not used for a customer’s benefit where it would otherwise have to be disclosed or used, while *subsection (2)(b) and (d)* provide that rules may specify circumstances in which an authorised person may withhold or not use information which would otherwise have to be disclosed or used. This means that, if an authorised person maintains Chinese walls in accordance with rules made under the section, then the authorised person will not be subject to obligations as to the disclosure and use of information that would otherwise apply.

267. Section 397 of FSMA makes it an offence to make a misleading statement, promise or forecast to induce the entry or the refraining from entry into relevant agreements (as defined in section 397) or the exercise or the refraining from exercise of rights conferred by relevant investments (as defined in section 397). Section 397(5) provides a defence where the person in question reasonably believed their actions were not misleading, were acting for the purpose of stabilising the price of investments and in accordance with price stabilisation rules.

268. *New section 137O* confers a power on the FCA to make rules specifying when and how authorised persons may take steps to stabilise the price of investments, and are to be treated as acting in accordance with price stabilisation rules.

269. Section 21 of FSMA prohibits financial promotion (the communication, in the course of business, of an invitation or inducement to engage in investment activity) other than by or with the approval of an authorised person. *New section 137P* confers a power on the FCA to make rules applying to authorised persons in relation to the regulation of financial promotion. *Subsection (7)* enables the Treasury to restrict this rule-making power.

270. *New section 137Q* enables the FCA to direct a firm to withdraw a financial promotion that the FCA considers has breached or is likely to breach its rules concerning financial promotions, and to disclose the fact that it has done so. This provision is intended to enable the FCA to take swift action to minimise consumer detriment. It includes power to take action in relation to a financial promotion, if it was made or approved by an authorised person. The FCA can direct the firm to refrain from making a promotion, to withdraw a promotion, to publish details of it, or to do anything else the FCA directs it to do in relation to the promotion. It is envisaged this might include, for example, contacting consumers who have

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acted upon the promotion. *Subsection (3)* is intended to prevent firms from making promotions that are materially the same as the promotion in relation to which a direction already exists.

271. The FCA must give the person to whom written notice of a direction under *subsection (5)* is addressed an opportunity to make representations, during which time the fact of the notice cannot be published by the FCA. After this period, the FCA will amend (*subsection (7)*), revoke (*subsection (10)*) or confirm (*subsection (8)*) its original direction. At this stage, the FCA must publish such details of the action it has taken as it considers appropriate. There is nothing to prevent a firm from publishing details about the matter from the moment the FCA makes the direction. A firm must publish any details about the promotion that the FCA requires it to under *subsection (2)(c)*.

272. *New section 137R* makes supplementary provision in relation to the rule-making powers of the FCA and the PRA, including provision permitting rules of one regulator to cross-refer to rules of the other regulator.

273. *New sections 138A and 138B* provide for the regulators to give directions waiving or modifying rules applicable to an authorised person, at the request of an authorised person or with their consent; but threshold condition code, trust scheme rules and scheme particular rules may not be waived or modified. *Subsection (4) of new section 138A* sets out the conditions which must apply for each regulator to give a direction. Waivers or modifications of rules can have indefinite effect, or can be revoked or varied. *New section 138B* provides that the regulator should publish the direction unless it is inappropriate or unnecessary: *subsection (3)* sets out the factors the regulator must consider in determining whether publication of the direction is inappropriate or unnecessary. Those factors include consideration of whether a breach of the rule in question would give rise to a right of action by a person under *new section 138D*: persons affected by the modification or waiver will include clients of the authorised person, and other authorised persons who might wish to benefit from similar arrangements.

274. *New section 138C* enables the regulators to disapply in relation to specific rules the normal consequences of contravention, such as the disciplinary provisions in Part 14 of FSMA. For example, a PRA rule on capital requirements could provide that contravention of the rule does not lead to the disciplinary consequences that would normally attach to breach of that rule, provided that contravention may be relied on as tending to establish contravention of another specified PRA rule. The regulators may not, however, disapply the normal consequences of a breach of threshold condition code or rules made under *new section 192J* (provision of information by parent undertakings).

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275. *New section 138D* sets out the circumstances in which persons who suffer loss as a result of the breach of a rule by an authorised person have a right of action for damages for resulting losses. It does not remove any common law cause of action which a person might otherwise have. Breach of an FCA rule (unless the rule provides otherwise) will give private persons who suffer loss as a result of the breach a right of action for damages: they will need only show that there has been a breach of a rule as a result of which they have suffered loss rather than having to rely on that breach as evidence of negligence. PRA rules may provide for the same effect. There is a presumption that persons other than private persons do not have a right of action for damages, although the Treasury may by regulations specify that breaches of certain rules are actionable by non-private persons. “Private persons” will be defined by the Treasury by regulations. The section does not apply to listing rules, threshold condition code, short selling rules, rules made under *new section 192J* (provision of information by parent undertakings) or capital adequacy rules.

276. *New section 138E* provides that a breach of rules is not an offence, and that it does not make a transaction unenforceable or void.

277. If either regulator makes, amends or revokes any rules, it must immediately notify the Treasury and the Bank in writing (*new section 138F*).

278. *New section 138G* provides that rules must be made in writing and specify the provision under which they are made. Each regulator must publish its rules; if a person can show that a rule had not been made available at the time they are alleged to have contravened it, *subsection (6)* provides that the person is not to be taken as having contravened the rule.

279. *New section 138I* provides that, before the FCA makes any rules, it must consult the PRA and then publish a draft of the rules accompanied by various materials, including a cost benefit analysis, an explanation of the rules and an explanation of how making the rules is compatible with its objectives and with the regulatory principles set out in *new section 3B*. It must invite representations on the draft rules. A “cost benefit analysis” is an analysis of the costs and of the benefits that will result from the rule being made and the analysis should include an estimate of the costs and of the benefits where possible. If the FCA is of the opinion that it is not possible to produce an estimate of the costs and benefits, it must publish a statement with an explanation of that opinion. The FCA must have regard to any representations it receives on the draft rules, and publish an account of those representations and its response to them. If the issued rules differ from the draft rules, the FCA must publish details of the differences and a further cost benefit analysis.

280. *New section 138J* makes corresponding provision for rules made by the PRA.

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281. *New section 138K* provides that, where a rule proposed by the FCA or PRA is to apply both to mutual societies (as defined in *subsection (5)*) and other authorised persons, the regulator must publish with the draft rule a statement saying whether the rule will affect mutual societies significantly differently from other authorised persons and, if so, how. It must also publish a statement when the rule is made if the rule differs from the draft rule. In this case the statement must explain the effect of the difference on mutual societies, and on mutual societies as compared with other authorised persons.

282. Where delay would prejudice the interests of consumers, *new section 138L* provides the FCA does not need to observe these procedural requirements (though it must always consult the PRA), except in relation to short selling rules; and where there would be no or minimal increase in costs, the FCA does not need to publish a cost benefit analysis. Similarly, where delay would prejudice the safety and soundness of PRA authorised persons or, where *new section 2C* (the insurance objective) applies, the appropriate degree of protection for policyholders. The PRA does not need to observe these procedural requirements. Again, the PRA must in all cases consult the FCA.

283. *New sections 138M to 138O* specify the circumstances in which an exemption can be made from the obligation to consult and prepare a cost-benefit analysis on proposed rules where the FCA proposes to make product intervention rules under *new section 137C*. This provision enables the FCA to intervene more quickly in relation to a product where it considers it necessary or expedient not to do so for the purposes of advancing its consumer protection or competition objective (or its integrity objective, if the Treasury so provides by order). Any rules made pursuant to these provisions are temporary and must cease to have effect within 12 months of the day on which they come into force. It is open to the FCA to revoke any such rules before the 12 month period expires. But the FCA may not within the following year make further temporary product intervention rules which are substantially the same as temporary rules which have lapsed.

284. *New section 138O* requires the FCA to issue a statement of policy with respect to the making of temporary product intervention rules. This will describe, amongst other things, the circumstances in which the FCA will make temporary product intervention rules and the factors that it will generally consider before doing so. Under *new section 138O* the FCA must consult on any such statement before it publishes it (and it follows logically that, unless there are exceptional circumstances, it should do so before it may make temporary product intervention rules). The FCA is expected to make temporary product intervention rules that fall within the limits set out in a statement published under *new section 138O*. If the FCA seeks to make temporary rules that go beyond what is envisioned in the statement, it is anticipated it will generally be appropriate to consult upon and publish a revised statement before doing so, as required under *new section 138O*.

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285. The FCA may give guidance under *new section 139A* about the operation of FSMA or specified parts of it, and of any rules the FCA has made; guidance may relate to the FCA's functions or any other matter the FCA considers relevant. The guidance need not be published, though the FCA may do so; and if the FCA gives guidance in response to a request, it may make a reasonable charge for that guidance (*subsection (6)*).

286. If the FCA intends to give guidance on its rules to FCA regulated persons generally or to a class of FCA regulated persons ("general guidance"), it must consult the PRA and then publish a draft of the guidance, inviting representations on it. The FCA must have regard to any representations received and publish an account of those representations and its response to them (*subsections (3) and (4)*). As with the making of rules, the FCA does not need to observe these procedural requirements if doing so would prejudice the interests of consumers. *New section 139B* requires the FCA to notify the Treasury if it issues, amends or revokes its general guidance.

287. *New clauses 140A to 140H* relate to the scrutiny of the regulators' regulating provisions and practices by the competition authorities (the Office of Fair Trading ("OFT") and the Competition Commission).

288. Under *new section 140B*, where the OFT gives advice to the PRA or FCA under section 7 of the Enterprise Act 2002, the regulator is required to respond to the advice within 90 days if the advice states that the OFT considers that the regulating provisions or practices of either regulator (or a combination of both) may cause or contribute to the prevention, restriction or distortion of competition in the supply or acquisition of goods and services in the United Kingdom. Similar provision applies where the Competition Commission makes a recommendation to the regulator in a report under section 136 of the Enterprise Act 2002 (reports on market investigation references). The regulator is not required to accept and act on the advice but must have regard to the advice and state, with its reasons, how it proposes to deal with the advice. Any response from the regulator must be published.

289. Under *new section 140H* if, having considered the response of the regulator, the OFT or Competition Commission continues to consider that the regulating provisions or practices of either regulator (or a combination of both) may cause or contribute to the prevention, restriction or distortion of competition in the supply or acquisition of goods and services in the United Kingdom, the OFT or Competition Commission may refer the matter to the Treasury. The Treasury may, having considered the advice given by the competition authority and the regulator's response and having consulted the regulator, give a direction to the regulator requiring the regulator to take specified action.

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290. *New section 141A* confers on the Treasury and the Secretary of State an order-making power to amend legislation which makes reference to rules of either regulator or to guidance issued by the FCA. This power only allows the Treasury or the Secretary of State to amend such references where the regulator has altered or revoked its rules. Under section 429 of FSMA, such orders will be subject to the negative procedure.

Clause 23: Short selling rules

291. Part 8A of FSMA confers on the FSA a power to make rules to prohibit, or require the disclosure of information about, short selling (section 131B(1) and (2)). “Short selling” is defined in section 131C(2) and concerns a transaction one of the effects of which is to confer a financial advantage on a person in the event of the decline in the value of a listed financial instrument.

292. *Clause 23(1)* amends Part 8A for the purposes of conferring on the FCA the FSA’s powers under Part 8A.

293. *Clause 23(2)* amends section 131D, which enables rules to be made using an urgent procedure where the FCA considers it necessary to advance one or more of its operational objectives. Currently section 131D enables the FSA to make rules under the urgent procedure where the necessary to do so: (a) to maintain confidence in the UK financial system; or (b) to protect the stability of the UK financial system. As the FCA is to have differing statutory objectives to the FSA, the grounds for making emergency rules, and extending the period in which they have effect, require amendment. Rules made under this procedure may only have effect for a period of three months, although section 131D(3) enables the FCA to extend the period to a maximum of six months.

Control over authorised persons

294. Part 12 of FSMA is primarily designed to implement European requirements in respect of acquisitions or increases of control over certain types of firm such as credit institutions, investment firms and insurance undertakings. In summary, Part 12 requires a person (the “section 178 notice-giver”) who decides to acquire or increase control over a UK authorised person to give notice to the FSA before making the acquisition (the “section 178 notice”) (section 178(1) (obligation to notify the Authority: acquisitions of control)).

295. “Acquiring control” is defined in section 181 and includes cases in which the notice-giver intends to hold 10% or more of the shares of an authorised person or 10% or more of the shares in the parent undertaking of the authorised person. “Increasing control” is defined in section 182 as a circumstance in which a person increases the percentage of shares or voting power in the authorised person above certain thresholds (for example, a person who decides to

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move from a shareholding of 19% to 22 % is required to give a section 178 notice). A notice is also required to be submitted where a person reduces control (as defined in section 183) or ceases to have control (section 191D(1)). Part 12 also confers certain powers to take action where, for example, a person breaches the requirement to give a section 178 notice.

Clause 24: Control over authorised persons

296. *Clause 24(2)* amends the references in Part 12 to the “Authority” to references to the “appropriate regulator”. *Subsection (3)* inserts into section 178 a *new subsection (2A)* which provides that the PRA, as the prudential regulator of a PRA-authorised persons, is the “appropriate regulator” in cases concerning the change of control over PRA-authorised persons. The FCA is the “appropriate regulator” in other cases. Therefore, in the case of a person who wishes to acquire control in a PRA-authorised person, that person would need to submit a section 178 notice to the PRA.

297. *Subsection (4)* amends section 179 (requirements for section 178 notices) with the effect of imposing on the PRA and the FCA a requirement to publish a list of requirements as to the form, information and accompanying documents for a section 178 notice.

298. *Subsection (5)* amends section 187 (approval with conditions) by inserting a *new subsection (2)*. *Paragraph (a) of new subsection (2)* replicates the effect of the existing subsection (2) which specifies that a regulator may grant approval of a change of control subject to conditions where, if it were not to impose those conditions, it would propose to object to the application (on the grounds specified in section 185 (assessment: general)). *Paragraph (b)* is new and provides that the appropriate regulator may grant conditional approval where it is required to do so by virtue of a direction issued by the other regulator under *new section 187A(3)(b)* or the *new section 187B(3)* (as the case may be).

299. *Subsection (6)* inserts *new sections 187A to 187C* into FSMA.

300. *New section 187A(1)* requires the PRA to consult the FCA before approving or objecting to an acquisition of control over a PRA-authorised person and to supply to the FCA relevant information. These requirements ensure that the FCA can consider and, if necessary, make representations to the PRA concerning the acquisition of control over a firm regulated by the FCA on a conduct of business basis. *Subsection (3)* confers a power on the FCA, where it considers there are reasonable grounds for objecting to the acquisition on the basis of the assessment criteria specified in section 186(f) (this provision concerns the risk of money laundering or terrorist financing being committed or attempted), to direct the PRA (a) to object to the acquisition; or (b) to grant approval subject to any conditions specified by the FCA. The FCA, in its capacity as the conduct of business regulator, will be best placed to make this assessment. If the PRA is subject to a direction from the FCA under *subsection (3)*

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the PRA must indicate to the notice-giver any representations received from the FCA. The effect of *subsection (7)* is that the PRA could exercise its power under *new section 3I* to prevent the FCA from giving a direction under *subsection (3)*.

301. *New section 187B(1)* requires the FCA to consult with the PRA before approving or objecting to an acquisition of control over an FCA-authorized person where (a) the firm to which the section 178 notice relates has a PRA-authorized person as a member of its “immediate group” (defined in *section 421ZA* (inserted by *clause 45(2)*)) or (b) the section 178 notice-giver is a PRA-authorized person. *Subsection (2)* enables the PRA to make representations to the FCA on any of the matters set out in section 185(2) and section 186 (the criteria against which a notice must be assessed). *Subsection (3)* confers on the PRA a power (a) to direct the FCA to object to the acquisition; or (b) to direct the FCA to grant approval subject to any conditions specified by the PRA. This power is available where the PRA considers that, on the basis of “relevant matters” (defined in *subsection (4)* and including the ability of the firm to meet its prudential requirement following the acquisition) there are reasonable grounds to object to the acquisition.

302. *New section 187C* provides that where one regulator has directed the other to impose conditions, it may direct the variation or cancellation of those conditions; and the other regulator may not vary or cancel conditions other than in accordance with the direction without first consulting the regulator which gave the direction.

303. *Subsection (7)* inserts a *new subsection (4A) and (4B)* into section 191A which require the PRA and FCA to consult with one another before giving a warning notice objecting to the acquisition of control in certain cases. *Subsections (8) and (9)* make similar amendments in relation to sections 191B and 191C, which deal with restriction notices and applications to court for orders for the sale of shares.

304. *Subsection (10)* requires the PRA and the FCA (as the case may be) to provide a copy of a notice received under section 191D (regarding a disposition of control) in certain cases.

305. *Subsections (11) and (12)* make minor amendments to section 191E and 191G.

Clause 25: Powers of regulators in relation to parent undertakings

306. *Clause 25* provides confers powers on the regulators in relation to unregulated parent undertakings. It inserts a new Part 12A comprising of sections 192A to 192N into FSMA.

307. *New section 192A* defines a “qualifying authorised person” as a body corporate incorporated in any part of the UK, which is a PRA-authorized person or an investment firm.

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Subsections (4) to (9) make provision for the Treasury to amend aspects of this definition by order.

308. *New section 192B* defines “qualifying parent undertaking” for the purposes of new Part 12A. To be a qualifying parent undertaking, the person must be the parent undertaking of a qualifying authorised person or recognised investment exchange (which is not an overseas investment exchange as defined by section 313(1) of FSMA (interpretation of Part 18)); must be a UK person (other than an individual or a partnership); must not be an authorised person, recognised investment exchange or recognised clearing house (see section 286 of FSMA); and must be a financial institution of a kind prescribed by the Treasury by order.

309. *New section 192C* provides that the FCA or PRA may give a direction to a qualifying parent undertaking if one of two conditions are satisfied. The first condition, set out in *subsection (2)*, is that the regulator considers that the acts of the qualifying parent undertaking are having or may have a material adverse effect on the ability of the regulator to regulate qualifying authorised persons or recognised investment exchanges, in pursuance of the regulator’s objectives. The second condition, set out in *subsection (3)*, is that the regulator concerned is under EU law responsible for consolidated supervision of the members of a group which contains a qualifying authorised person and the regulator considers that the acts of the qualifying parent undertaking are having or may have a material adverse effect on the effectiveness of that consolidated supervision. This condition might be met where, for example, the acts of the qualifying parent undertaking are having an adverse effect on the ability of the regulator to carry out effectively consolidated supervision of persons who are not authorised persons (for example, subsidiaries established in other Member States). *Subsection (5)* requires the regulator to consider whether it could use powers in relation to authorised persons or recognised investment exchanges rather than this power, and to consider the principle of proportionality.

310. *New section 192D* gives more detail as to the requirements that may be imposed under section 192C.

311. *New section 192E* sets out the procedural requirements relating to the giving of directions. If the regulator proposes to give a direction, it must first issue a warning notice to the qualifying parent undertaking and to any authorised person or recognised investment exchange it thinks will be significantly affected, giving the details set out at *subsection (5)*. The direction may take effect immediately or on a specified date if the regulator considers it necessary for it to do so. If no date is specified in this way, the direction will take effect only after the time for referring the matter to the Tribunal has expired and any reference and further appeal has been finally determined (see the definition of “open to review” in section 391(8)). *Subsections (7) and (8)* require the regulator to give further written notice of its

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response to any representations which are made to the proposed direction. The regulator can decide not to give the direction (or to cancel it if it has already taken effect), to propose a different direction (in which case the original notice procedure must be repeated), or to proceed with the direction (in which case the person concerned has a further right to refer the matter to the Tribunal). *New section 192F* also requires consultation between the regulators (and the Bank of England where the direction is to be given to a person who is also a parent undertaking of a recognised clearing house) before the issuing of notices under *new section 192E*.

312. *New section 192G* confers a right to refer to the Tribunal an exercise of a regulator's powers in relation to the issuing of directions.

313. *New section 192H* requires each regulator to publish a statement of policy on the exercise of its powers to issue directions, and to give a copy of the statement to the Treasury. Under *new section 192I*, before publishing a statement of policy, the regulators must first consult each other and the Bank of England and publish a draft for public consultation; they must also publish an account of what representations they received and their response to them.

314. *New section 192J* enables the FCA and PRA to make rules requiring qualifying authorised person (as defined by new section 192B) to provide information or documents to the regulator.

315. *New section 192K* requires the FCA and PRA to impose penalties on, or publish a statement of censure in relation to, a qualifying authorised person who has breached a direction given under new section 192C or rules made under new section 192J. Such action may not be taken outside the limitation period (as defined in *subsection (5)*).

316. *New section 192L* sets out the procedure the FCA and PRA must follow before taking action under section 192K. *Subsection (7)* provides that a person who has received a penalty or been the subject of a statement of censure may refer the matter to the Tribunal.

317. *New section 192M* requires a regulator to provide a copy of any statement of censure to certain persons (including the person in respect to whom it is made).

318. *New section 192N* requires the FCA and PRA to prepare a statement of policy with respect to the imposition of, and amount of, penalties under new section 192K. The regulator must have regard to any such statement when exercising its power to impose a penalty. The procedural requirements set out in section 192I (including the requirement to consult on a draft of the policy) apply.

Recognised investment exchanges and clearing houses

319. Part 18 of FSMA sets out the regime under which “recognised clearing houses” and “recognised investment exchanges” (together “recognised bodies”) are regulated. A person specified as a recognised body is exempt, for certain purposes, from the general prohibition in section 19 of FSMA from carrying on regulated activities (section 285 (exemption for recognised investment exchanges and clearing houses)).

320. Under the new arrangements, the Bank is to be responsible for the regulation of recognised clearing houses and the FCA is to be responsible for the regulation of recognised investment exchanges. The Bank is to conduct its functions under Part 18 in pursuance of its financial stability objective (as amended by *clause 2*).

Clause 26: Exemption for recognised investment exchanges and recognised clearing houses

321. Clause 26 makes amendments to section 285 of FSMA. Section 285 defines “recognised investment exchange” and “recognised clearing house” for the purposes of FSMA and also describes in subsections (2) and (3) the exemption which each type of recognised body has from the general prohibition specified in section 19 of FSMA (the prohibition from carrying on regulated activities without authorisation). Subsection (2), for example, provides that a recognised investment exchange is exempt from the general prohibition as respects any regulated activity which is (a) carried on as a part of the exchange’s business as an investment exchange; or (b) which is carried on for the purposes of, or in connection with, the provision of clearing services by the exchange. (As a result, a recognised investment exchange need not be separately recognised as a recognised clearing house in order to provide clearing services.)

322. *Subsection (2)* replaces subsection (2)(b) (the second limb of the exemption for recognised investment exchanges which is referred to in the preceding paragraph). *Subsection (3)* makes provision in relation to subsection (3) (the exemption for recognised clearing houses). The general effect of these amendments is that a recognised investment exchange will need to apply for the status of, and be specified by the Bank of England as, recognised clearing house in order to provide clearing services. However, recognised investment exchanges will continue to benefit from an exemption in relation to any regulated activities carried on for the purposes of facilitating the provision of clearing services by another person. Recognised clearing houses will also (expressly) benefit from this exemption. An example could be where clearing services are provided by a related company (which might be regulated outside the UK) and the UK recognised clearing house or recognised investment exchange routes trades not arranged using its facilities to a separate clearing house.

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323. *Subsection (4)* inserts a *new subsection (4)* into section 285 which confers on the Treasury a power to amend *new subsection (2)(b)* and *new subsection (3)(b)* from time to time (for example, to expand or narrow the activities for which a recognised body has exemption from the general prohibition). *Clause 46(2)(a)* amends section 429 of FSMA (Parliamentary control of statutory instruments) to provide that orders under this subsection can only be made where a draft of the order has been laid before Parliament and approved by a resolution of each House.

Clause 27 and Schedule 7: Powers in relation to recognised investment exchanges and clearing houses

324. *Clause 27(1)* inserts *new section 285A*. *New section 285A* provides that for the purposes of Part 18, the FCA is the “appropriate regulator” in relation to recognised investment exchanges, and that the Bank is the “appropriate regulator” in relation to recognised clearing houses. *Subsection (2)* inserts *new Schedule 17A* to FSMA as set out in *Schedule 7 to the Bill*.

325. *Paragraph 1* of *new Schedule 17A* requires the Bank and the FCA to prepare and maintain a memorandum describing how they will work together in exercising their functions. *Sub-paragraph (2)* specifies the matters which must be included in the memorandum. *Sub-paragraph (3)* provides that a reference in *paragraph 1* to a “function” of the Bank and FCA means any function however conferred. For example, it may be the case that a person specified as a recognised investment exchange is also the operator of a recognised payment system under Part 5 of the Banking Act 2009. In such a case the person would be regulated by both the Bank (under Part 5 of the Banking Act 2009) and the FCA (under Part 18). Therefore it is appropriate that the memorandum makes provision to ensure the authorities cooperate effectively whether in the discharge of functions under Part 18 of FSMA or, for example, under directly applicable European measures.

326. *Paragraph 2* requires the Bank, the FCA and the PRA to enter into a memorandum setting out how they will work together in exercising their functions in relation to persons who are recognised bodies and who are also PRA-authorized persons, or are members of a group in which a member is a PRA-authorized person. The exemption from the requirement to be authorised to carry on regulated activities, which is conferred on a person as a result of recognition under Part 18, extends only to activities which are carried on for the purposes of, or in connection with, a person’s business as an investment exchange or a person’s business which consists of the provision of clearing services. Therefore, if a person wishes to carry on a regulated activity which is not part of such business that person will need to seek authorisation from the FCA (or PRA and FCA as the case may be) and may be regulated by more than one body. This memorandum ensures the effective co-ordination of the regulation of such persons.

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327. *Paragraph 3* requires the Bank and the FCA (and, if relevant, the PRA) to review a memorandum entered into under *paragraph 1* or *paragraph 2* at least once each calendar year. Each memorandum made under these paragraphs (and any revised memoranda) must be sent to the Treasury (*paragraph 4*) and made public (*paragraph 6*). The Treasury are required to lay in Parliament a copy of each memorandum they receive under *paragraph 4* (*paragraph 5*).

328. *Paragraph 7* requires the FCA to notify the Bank where it has issued a direction under section 128 (suspension of investigations) to a recognised clearing house to suspend or to refrain from conducting an inquiry under its rules. Such a direction may be given where the FCA considers it desirable or expedient in connection with the exercise or possible exercise of a power relating to market abuse.

329. *Paragraph 8* requires the FCA to notify the Bank of any requirement imposed on a recognised clearing house under section 313A (power to require suspension or removal of financial instruments from trading).

330. *Part 2 of the new Schedule 17A* applies certain provisions of FSMA to the Bank in its capacity as the regulator of recognised clearing houses. These powers are available to the FCA in relation to the regulation of recognised investment exchanges and are therefore explicitly made available to the Bank in relation to recognised clearing houses subject to certain modifications (including as made by *paragraph 9(2)*).

331. *Paragraph 10* applies certain provisions of the *new Part 9A (rules and guidance)* in relation to rules made by the Bank under any provision made by or under FSMA, for example in relation to rules made under section 293(1) (notification requirements) or under any power conferred by the Treasury in regulations made under section 286 (as modified by *clause 28* (recognition requirements: power of FCA and Bank to make rules)). For example, *sub-paragraph (1)(i)* applies *new section 138J* which requires the Bank to consult before making rules unless the Bank considers that the delay in complying would be detrimental to financial stability (*sub-paragraph (3)*).

332. *Paragraph 11* makes available to the Bank the powers conferred by section 165(1) and (3), to require a recognised clearing house, or a person connected to a recognised clearing house, to provide specified information and to produce specified documents which are reasonably required in connection with the exercise by the Bank of the functions conferred on it under Part 18, any of its other functions in pursuance of its financial stability objective (so the Bank could require a recognised clearing house to provide information reasonably required by the FPC) (*sub-paragraph (2)*) or which would facilitate the discharge by the FCA of its regulatory functions.

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333. *Paragraph 12* makes available to the Bank the power conferred by section 166 in order that it may require a recognised clearing house to provide a report to the Bank on any matter in relation to which the Bank may require information under section 165 as applied by *paragraph 11*.

334. *Paragraph 13* makes available to the Bank the power to appoint persons to carry out investigations into the nature, conduct or state of the business of a recognised clearing house, a particular aspect of that business, or the ownership or control of a recognised clearing house. *Sub-paragraph (2)* provides that a person appointed as an investigator is to have the powers conferred by section 172 (additional power of person appointed as a result of section 168(1) and (4)) and 173 (powers of persons appointed as a result of section 168(2)). For example, an investigator may require a person who is not the subject of the investigation or is not connected with the person under investigation to attend a meeting with the investigator.

335. *Paragraph 14* makes available to the Bank the power to appoint investigators under section 168(5) in particular cases, for example if there are circumstances suggesting that a clearing house, in the context of an application to be a recognised body, has given the Bank false or misleading information.

336. *Paragraph 15* provides that an overseas regulator may require the Bank to require information to be provided (in exercise of the power conferred by section 165 as applied by *paragraph 11*) or may require the appointment of one or more competent persons to investigate a matter.

337. *Paragraph 16* applies section 176 (entry of premises under warrant) such that a justice of the peace may issue a warrant if satisfied that there are reasonable grounds for believing that a person on whom an information requirement has been imposed by the Bank, or by a person appointed by the Bank, has failed to comply with it.

338. *Paragraph 17* applies, with certain modifications, *new sections 192C to 192N* (inserted by *clause 25*) to the Bank such that the Bank may issue a direction to a UK incorporated parent undertaking of a recognised clearing house which is not an overseas clearing house (within the meaning of section 313(1) of FSMA) where it considers that the acts or omissions of the parent undertaking are having or may have a material adverse impact on the regulation by the Bank of one or more recognised clearing houses. As a result of the application of *new section 192J*, the Bank may make rules requiring qualifying parent undertakings of recognised clearing houses to provide specified information or to produce documents of a specified description and makes available the disciplinary powers under *new sections 192K to 192N*. *Sub-paragraph (6)* imposes on the Bank a requirement to consult the FCA or the PRA before issuing directions under *section 192E* in certain cases (for example

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where the parent undertaking concerned is also the parent undertaking of a PRA-authorized person).

339. *Paragraphs 18 to 21* apply sections 342 to 345E in relation to auditors of recognised clearing houses or persons with close links to such persons.

340. *Paragraph 18* applies section 342 (information given by an auditor to a regulator) such that a person who is, or has been, an auditor of a recognised clearing house does not contravene any duty to which he is subject merely because he or she gives to the Bank information on a matter on which he has, or had, become aware in his capacity as an auditor of a recognised clearing house, or his opinion on any matter. Section 342(5) (as applied) confers on the Treasury a power to make regulations prescribing the circumstances in which an auditor must communicate matters to the Bank. *Paragraph 19* applies section 343 (information given by auditor: person with close links) which makes similar provision in relation to auditors of persons with close links with recognised clearing houses (as defined in subsection (8) as applied, for example, a parent undertaking of a recognised clearing house).

341. *Paragraph 20* applies section 344 (duty of auditor resigning to give notice) such that an auditor of a recognised clearing house is required to give notice to the Bank where he resigns from office, or is removed from office by the recognised clearing house concerned.

342. *Paragraph 21* applies new sections 345A to 345E (inserted into FSMA by *paragraph 6 of Schedule 13*) so as to make available to the Bank (in the event that an order is made by the Treasury under section 345A(1)) disciplinary powers in relation to relevant auditors who have, for example, failed to comply with a requirement to disclose information prescribed in regulations made by the Treasury under section 342 (as applied by *paragraph 18*).

343. *Paragraph 22* applies section 347 (as amended by *paragraph 37 of Schedule 8*) to require the Bank to maintain a record of every recognised clearing house.

344. *Paragraph 23* applies sections 348 (restriction on disclosure of confidential information by Authority etc) to 350 (disclosure of information by Inland Revenue) and 353 (removal of other restrictions on disclosure) in relation to any information received by the Bank. This has the effect, for example of requiring the Bank to keep information received in the discharge of its functions under Part 18 in confidence, save where specified gateways are available.

345. *Paragraph 24* gives the Bank the power to make an application to court under section 380(1), (2) or (3) for an injunction, for example, in the event that the Bank consider it

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reasonably likely that a recognised clearing house will contravene a relevant requirement (which is defined in *sub-paragraph (2)*).

346. *Paragraph 25* makes available to the Bank the power to apply to the court for an order requiring a person to make a payment where it is satisfied that a person has contravened a relevant requirement and that profits have accrued as a result of the contravention. The definition of “relevant requirement” for this purpose is set out in *paragraph 19(2)*.

347. *Paragraph 26* gives the Bank the power to require a recognised clearing house to make a payment where the condition in *sub-paragraph (2)(a) or (b)* is met.

348. *Paragraph 27* applies the provisions of Part 26 (notices) in relation to warning or decision notices given by the Bank under *new section 312G* (proposal to issue a public censure or impose a financial penalty) and *new section 312H* (decision to issue a public censure or impose a financial penalty) (inserted by *clause 30*). For example, section 387 sets out the matters which must be included in a warning notice.

349. *Paragraph 28* applies section 398 such that it is an offence for a person, who, in purported compliance with a requirement listed in that paragraph knowingly or recklessly gives the Bank information which is false or misleading.

350. *Paragraph 29* provides that the Bank may initiate proceedings with regard to the prosecution of certain offences under the Act (as specified in *sub-paragraph (1)*).

351. *Paragraph 30* applies *paragraph 17 of Schedule 1ZB* which has the effect of requiring the Bank to put in place arrangements for the recording of decisions made by the Bank in the exercise of its functions relating to recognised clearing houses.

352. *Paragraph 31* applies *paragraph 18 of Schedule 1ZB* and has the effect of requiring the Bank to produce an annual report concerning the discharge of its functions relating to recognised clearing houses. The Bank is required to provide the Treasury with a copy of the report, which the Treasury must lay before Parliament.

353. *Paragraph 32* provides that the Bank may require recognised clearing houses to pay fees in connection with the discharge of its functions under or as a result of Part 18.

354. *Paragraph 33* provides that any fees owed to the Bank under *paragraph 32* may be recovered as a debt due to the Bank.

Clause 28: Recognition requirements: power of FCA and Bank to make rules

355. This clause inserts a new *subsection (4F)* into section 286 of FSMA (qualification for recognition) which confers on the Treasury a power to make regulations setting out the requirements which must be satisfied by an investment exchange or a clearing house in order for it to qualify as a recognised body. *Subsection (4F)* provides that the Treasury may make provision in regulations made under section 286 for the purposes of conferring on the Bank or the FCA (as the case may be) the power to make rules for the purposes of the regulations or any specified provision made by the regulations. This power will enable the Treasury to confer on the appropriate regulator the power to make rules relating to the recognition requirements whether those requirements are specified under directly applicable European regulation (and only referred to in the domestic regulations) or are set out in the domestic regulations. This enables further, or more prescriptive requirements (for example, concerning what constitutes “adequate resources”), to be imposed if necessary.

Clause 29: Recognised bodies: procedure for giving directions under s.296 etc

356. *Clause 29* sets out the procedural arrangements to be followed before the Bank or the FCA (as the case may be) may (a) give directions to a recognised body or (b) revoke a recognition order. These changes are designed to simplify the powers.

357. *Subsection (2)* omits paragraphs (b) and (c) of subsection (1) and as a result the Bank and the FCA will no longer need to take steps to bring to the attention of the members of the recognised body, and any other persons which it considers are likely to be affected, its proposal to issue a direction or revoke a recognition order. *Subsections (3) and (5)* make provision consequential on the change to subsection (1).

358. *Subsection (4)* replaces subsection (4) such that the minimum period for making representations in response to a notice issued by the Bank or the FCA (as the case may be) setting out its intention to issue a direction is such period as is specified in the notice, rather than a minimum period being set out on the face of the legislation. This will enable the appropriate regulator to prescribe a shorter period than is currently the case under FSMA (which prescribes a minimum period of two months), for example, where the Bank needs to act urgently in the interests of addressing a potential threat to financial stability.

359. *Subsection (6)* amends subsection (7) so as to enable the appropriate regulator to give a direction without following the procedure set out in section 298 where it reasonably considers it necessary. This aligns the circumstances in which the power can be used with those in which the PRA and the FCA may vary, with immediate effect, a person’s permission to carry on authorised activities (see *new sections 55J and 55Y(3)* inserted by *clause 9*).

Clause 30: Power to take disciplinary measures against recognised bodies

360. *Clause 30* inserts into FSMA *new sections 312E to 312K*. *New sections 312E and 312F* confer on the Bank and the FCA new disciplinary powers.

361. *New section 312E* confers on the FCA and the Bank the power to publish a statement that a recognised body has contravened a relevant requirement (defined in *subsections (2) and (3)* respectively). This is consistent with the power available to the FCA and the PRA to issue public censures in relation to authorised persons (section 205 (public censure)).

362. *New section 312F* confers on the Bank and the FCA the power to impose on a recognised clearing house or recognised investment exchange (as the case may be) a financial penalty. This is consistent with the power available to the FCA and the PRA in relation to authorised persons (section 206 (financial penalties)).

363. *New section 312G* requires the Bank and the FCA, before publishing a statement under section 312E, or imposing a financial penalty, to issue a warning notice. This is consistent with the requirement imposed on the PRA and the FCA (section 207 (proposal to take disciplinary measures)). If, after considering any representations received in response to the warning notice, the Bank or the FCA decide to take the proposed disciplinary step, the relevant regulator must issue a decision notice in accordance with the requirement imposed by the *new section 312H*. Again, this is consistent with the requirement imposed on the FCA and the PRA in relation to a decisions to take disciplinary measures in relation to authorised persons (section 208 (decision notice)). A person who receives a decision notice under this section has the right to refer the matter to the Tribunal (*subsection (4)*).

364. *New section 312I* requires the Bank and the FCA (as the case may be) to provide a copy of a statement published under section 312E to the recognised body concerned, and to any person to whom a copy of the decision notice was given under section 393(4) (third party rights).

365. *New section 312J* requires the Bank and the FCA to prepare and issue a statement of policy with respect to the imposition of financial penalties under *new section 312F* and the amount of penalties under that section. The policy as regards the amount of a penalty must include having regard to the seriousness of the contravention in question and the extent to which the contravention was deliberate or reckless. Before issuing a statement of policy under this section, the Bank and the FCA are required to publish a copy of the statement in draft form and conduct a consultation exercise (*new section 312K*).

Clause 31: Repeal of special competition regime

366. *Clause 31* omits Chapter 2 (competition scrutiny) and Chapter 3 (exclusion from the Competition Act 1998) of Part 18.

367. Chapter 2 of Part 18 makes provision for the scrutiny by the OFT and the Competition Commission of regulatory provisions issued by a recognised body and sets out various roles for the Treasury and Chapter 3 disapplies certain provisions of the Competition Act 1998.

368. Chapter 2 is now considered to be redundant, particularly as a result of the coming into force of section 290A (refusal of recognition on ground of excessive regulatory provision), which permits the appropriate regulator to refuse to make a recognition order if it appears that an existing or proposed regulatory provision of the applicant (in connection with relevant business) imposes or will impose an excessive requirement on a person affected directly or indirectly by it. The repeal of Chapter 2 means there is no need to maintain the exclusions from the Competition Act 1998 in Chapter 3.

Clause 32 and Schedule 8: Sections 26 to 31: minor and consequential amendments

369. *Clause 32* introduces *Schedule 8* which makes minor amendments to FSMA in consequence of the conferral of the functions under Part 18 on the Bank (in relation to recognised clearing houses) and the FCA (in relation to recognised investment exchanges).

370. *Paragraphs 2 to 36 of Schedule 8* make amendments to *Part 18* mainly to amend references to the FSA to the Bank or the FCA (as appropriate). The effect of the amendments made by *paragraphs 11, 14(3)(b) and 15(3)(c)* is that the Bank and the FCA (as the case may be) may take certain forms of action to enforce such directly applicable requirements (specified in European law) as are specified in an order made by the Treasury.

371. *Paragraph 37* makes amendments to section 392 (warning and decision notices: application of provisions relating to third party rights and access to evidence) so that sections 393 (third party rights) and 394 (access to material of the relevant regulator) apply where a warning notice or decision notice is given under the *new section 312G or 312H*.

372. *Paragraph 38* makes amendments to section 412A of FSMA (approval and monitoring of trade-matching and reporting systems) to transfer to the FCA the FSA's functions under that section and *paragraph 39* makes similar amendments to section 412B (procedure for approval and suspension or withdrawal of approval).

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Suspension and removal of financial instruments from trading

Clause 33: Suspension and removal of financial instruments from trading

373. *Clause 33* makes amendments to Part 18A of FSMA to confer on the FCA the FSA's functions under that Part.

374. Part 18A implements certain requirements set out in the Markets in Financial Instruments Directive (Directive 2004/39/EC). The power conferred under Part 18A will enable the FCA to require an institution to suspend or remove a financial instrument from trading in order to protect the interests of investors or the orderly functioning of the financial markets (section 313A).

Discipline and enforcement

Clause 34 and Schedule 9: Discipline and enforcement

375. *Clause 34* introduces *Schedule 9* which contains various amendments to various Parts of FSMA which confer powers relating to disciplinary and enforcement measures.

376. *Part 2 of Schedule 9* amends section 20 (authorised persons acting without permission). The effect is that a person who is authorised by the FCA to conduct regulated activities, and who carries on a regulated activity or purports to do so otherwise than in accordance with the permission, is to be taken to have contravened a requirement imposed by the FCA. This means that the FCA could, for example, take disciplinary action under Part 14 of FSMA (see below) in relation to that contravention. Also, a PRA-authorized person who carries on a regulated activity or purports to do so otherwise than in accordance with the permission is to be taken to have contravened a requirement imposed by the FCA and the PRA, which means that either regulator could take disciplinary action in relation to the contravention.

377. *Part 3 of Schedule 9* makes certain amendments to Part 8 of FSMA (market abuse). Part 8 confers powers on the FSA to impose penalties for market abuse (see section 118) and to publish the Code of Market Conduct (section 119). Under the new arrangements, the FCA is to assume the FSA's functions under Part 8; therefore, *paragraph 3 of the Schedule* amends FSMA and replaces references to the "Authority" with references to the "FCA" in the relevant places.

378. *Part 4 of Schedule 9* amends Part 14 of FSMA (disciplinary measures). Part 14 confers powers to issue a statement that a person has contravened a requirement (section 205), impose a financial penalty (section 206) or suspend, or impose a restriction on, a person's authorisation under Part 4 of FSMA to carry on regulated activities (section 206A)) These

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powers may be exercised where, currently, the FSA considers that an authorised person has contravened a requirement imposed by or under the Act or by any directly applicable Community regulation made under the markets in financial instruments directive (Directive 2004/39/EC).

379. The amendments give the PRA and the FCA powers to take action in relation to contraventions of requirements imposed by or under the Act or a qualifying EU provision (see *new section 425C*, inserted by *clause 45*). *New section 204A* sets out when the powers are available to the FCA and when they are available to the PRA.

380. *Part 5 of Schedule 9* makes amendments to Part 25 of FSMA (injunctions and restitution). *Paragraph 13* amends section 380 (under which the court may grant an injunction where, for example, it is satisfied that there is a reasonable likelihood that any person will contravene a relevant requirement) to enable the PRA (in specified cases) and the FCA (in other cases) to make an application to court for an injunction.

381. *Paragraph 14* amends section 381 which confers a power to apply for an injunction to prevent threatened or continuing market abuse, to require a person to remedy the consequences of market abuse or to prevent the disposal of assets. As the FCA is to assume the FSA's functions under Part 8 relating to market abuse, the powers under section 381 are also transferred to the FCA.

382. *Paragraph 15* amends section 382 to enable the PRA and the FCA (as the case may be) to apply to the court for an order requiring a person to pay a sum by way of restitution. Section 382 (as amended) enables the relevant regulator to apply to the court for an order requiring a person to pay to the authority such sum as the court considers to be just having regard to (a) the profits appearing to have accrued as a result of a contravention of a relevant requirement; (b) the extent of the loss or other adverse effect arising as a result of the contravention. Any amount received by the regulator as a result of an order issued by the court under subsection (2) must be paid to such qualifying person (for example a consumer who suffers loss as a result of the contravention) as the regulator may direct. Section 383 provides for applications for restitution orders in cases of market abuse so powers under this section are transferred to the FCA.

383. *Paragraph 17* amends section 384 so as to enable the PRA and the FCA (as the case may be) to require a person to make payments by way of restitution where the relevant regulator is satisfied that the person has, for example, contravened a relevant requirement (defined in subsection (7)) and: (a) that profits have accrued to that person as a result of the contravention; or (b) that one or more persons have suffered loss or have been otherwise

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adversely affected as a result of the contravention. *Paragraphs 18 and 19* make consequential changes to sections 385 and 386.

384. *Part 6 of Schedule 9* makes amendments in relation to Part 26 of FSMA (notices). Part 26 makes provision in relation to the different types of notices which are required to be given in specified circumstances under the Act (for example, where a relevant regulator proposes to impose on a person a financial penalty).

385. Section 387 sets out the matters which must be included in a warning notice (for example, the notice must specify the period in which the subject of the notice may make representations to the relevant regulator regarding the proposed action described in the notice). Section 388 makes similar provision in relation to decision notices which are required to be given where the relevant regulator has decided to take the action described in the warning notice. In the event that an authority decides not to take the action set out in the warning notice, or the action to which a decision notice relates, a “notice of discontinuance” must be issued (section 389). Section 390 makes provision for final notices which are required to be given where a decision notice has been given and the matter has not been referred to the Tribunal within the time limit specified in the notice, or where the matter has been referred to the Tribunal and has been dealt with in appropriate in accordance with any directions of the Tribunal.

386. *Paragraphs 20 to 23* make consequential changes to make clear that the requirements regarding notices under these sections are to apply to the PRA and the FCA (as the case may be). In addition *paragraph 20(4)* changes the minimum time period within which a person must have an opportunity to make representations to the FCA or the PRA (as the case may be) concerning matters referred to in a warning notice (such period may be extended by the relevant regulator). This period is to be reduced from 28 days to 14 days in order to enable the regulators to take disciplinary action more expeditiously (for example, in relation to contraventions which have been admitted by an authorised person), albeit that each regulator may extend this period on a case-by-case basis. A corresponding reduction in the period in which representations may be made is made in section 393 (third party rights).

387. Section 391 imposes a general prohibition on the FCA and PRA (and any person to whom a warning notice or decision notice is given) from publishing a warning or decision notice or details concerning the notice. However, in the case of decision notices, this prohibition is lifted where the FCA or PRA (as the case may be) has published the notice or details concerning the notice (see subsection (1A) which was inserted by section 13(1) of the Financial Services Act 2010). *Paragraph 24(2)* replaces section 391(1) and relaxes the general prohibition on the publication of information about warning notices given under the sections referred to in the *new subsection (1ZB)* such that the FCA or the PRA (as the case

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may be) may publish information about warning notices given in certain cases. Before publishing such information the relevant authority must consult the person to whom the notice is given or copied, and must be of the view that the publication of the information would not, for example, be unfair to the person with respect to whom the action is proposed to be taken (see *new subsection (6) and (6A)*).

388. *Paragraphs 26 and 27* make consequential amendments to sections 393 and 394 in order to apply them to the FCA and the PRA (as the case may be). Section 393 imposes a requirement to give a copy of a warning notice or decision notice to which the section applies to a third party where any reasons set out in the notice relate to a matter which identifies that person and where, in the opinion of the relevant authority, any of those reasons are prejudicial to the third party. A person who receives a copy of the notice has certain rights (see, for example, subsections (3) and (12)). Section 393 confers a right on a person who has received a warning or decision notice to which section 394 applies to access the material on which the relevant authority has relied in taking the decision which gave rise to the notice; and any secondary material, which, in the opinion of the relevant regulator, might undermine that decision.

389. Section 395 deals with how the procedure to be followed in relation to the giving of supervisory notices (defined in subsection (13)), warning notices and decision notices is to be determined. Section 395 currently prohibits procedures which permit a person who has been involved in gathering evidence for a decision to be involved in making that decision. *Paragraph 28(3) and (4)* make amendments to section 395 so as to permit the regulators to adopt procedures which allow decisions of a kind described in section 395(1) to be taken by a person who has been directly involved in establishing the evidence on which the decision is based provided that at least one person is involved in making the decision who was not directly involved in establishing the evidence. *Paragraph 28* also makes consequential amendments to this section so that it applies to both the FCA and the PRA.

390. *Part 7 of Schedule 9* makes provision in relation to specific offences which, currently, the FSA has the power to prosecute.

391. *Paragraph 30* makes consequential amendments to section 398 (misleading the Authority: residual cases) such that a person who, in purported compliance with a requirement imposed by or under FSMA knowingly or recklessly gives the PRA or the FCA (as the case may be) information which is false or misleading in a material particular is taken to have committed an offence.

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392. *Paragraphs 31 and 32* make amendments to sections 401 and 402 and specify the circumstances in which the PRA and the FCA have the power to prosecute offences under FSMA and in certain other cases.

393. *Part 8 of Schedule 9* inserts *new section 415B* which requires the PRA and the FCA (as the case may be) to consult with the other authority before taking certain qualifying steps (specified in *subsection (3)* of that section).

Financial Services Compensation Scheme

Clause 35 and Schedule 10: The Financial Services Compensation Scheme

394. *Clause 35 and Schedule 10* amend Parts 15 and 15A of FSMA (the Financial Services Compensation Scheme and other schemes). The amendments to section 213 provide for the Treasury to make rules covering persons who have assumed responsibility for liabilities arising from acts or omissions of relevant persons (“successors”) in cases where they are unable, or likely to be unable, to satisfy claims against them that are based on those acts or omissions. They also provide for the Treasury to make an order specifying which scheme rules the FCA will be responsible for and which scheme rules the PRA will be responsible for. The order must be approved in draft by each House of Parliament (see *clause 46*).

395. Each regulator must consult the other before making scheme rules. And *new section 3E(3)(c)*, inserted by *clause 5*, requires the regulators to set out in their memorandum how they will exercise their functions in relation to the Financial Services Compensation Scheme (FSCS).

396. *New clause 217A* provides for the FCA, PRA and the FSCS (referred to as “the scheme manager”) to co-operate with each other in relation to the FSCS. The regulators and the scheme manager must also prepare and maintain a memorandum describing how they will do this. The memorandum must be published by the scheme manager.

397. *New clause 217B* requires the scheme manager to prepare and publish an annual plan.

398. The amendments to section 218 of FSMA (annual report) allows the Treasury to direct the scheme manager to comply with provisions of the Companies Act 2006 dealing with accounts and audit which would otherwise not apply to it. The direction may modify provisions of the Companies Act 2006 dealing with accounts and audit in their application to the scheme manager.

399. *New section 218ZA* provides for the accounts of the FSCS to be audited by the National Audit Office. The National Audit Office carries out audit functions of the

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Comptroller and Auditor General. The Treasury must lay before Parliament the certified accounts of the FSCS and the report of the Comptroller and Auditor General on them.

400. *Clause 34(2)* makes a consequential amendment to section 224F of FSMA, in respect of the power to make rules in connection with the exercise by the FSCS scheme manager of functions in respect of relevant schemes (as defined in section 224B).

Financial ombudsman service

Clause 36 and Schedule 11: The financial ombudsman service

401. *Clause 36* and Schedule 11 amend the provisions of FSMA relating to the Financial Ombudsman Service (FOS).

402. Section 228(6) of FSMA provides that a complainant is treated as having rejected an ombudsman's determination if the complainant does not accept or reject the determination by a date specified by the ombudsman. New *subsection (6A)* enables a complainant to accept a determination after the deadline has passed, if certain conditions are met. It is intended that the FOS (referred to as "the scheme operator") will make rules specifying the circumstances in which complainants will not be treated as having rejected a determination.

403. *New section 230A* places a duty on the scheme operator of the FOS to publish reports of determinations. However, a report (or part of a report) must not be published if the ombudsman making the determination informs the scheme operator that publication of the report (or part of it) is inappropriate. The report of a determination will not include the name of the complainant or any particulars which the scheme operator deems likely to identify the complainant, unless the complainant agrees.

404. *New section 232A* requires the scheme operator of the FOS to disclose information to the FCA in circumstances where it considers that the information might be of assistance to the FCA in advancing one or more of its operational objectives.

405. *New section 1C(2)(g)* (see *clause 5*) places a duty on the FCA to have regard to any information which the scheme operator of the FOS has provided to the FCA pursuant to new *clause 232A* (in considering what degree of protection for consumers may be appropriate, for the purposes of securing the FCA's consumer protection objective).

406. *Paragraph 11* inserts a *new clause 234B*. This provision provides that a "successor firm" that takes over liability for the acts or omissions of a predecessor firm can be a respondent to a complaint made under the FOS regarding a predecessor firm. The aim of this provision is not to require a firm which acquires the business of another to accept liability for

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subsequent FOS claims but to ensure that where the firm has agreed to accept such liability, it also becomes a potential respondent to a complaint before the ombudsman scheme. The amendment applies equally to businesses that fall under the consumer credit jurisdiction and the voluntary jurisdiction.

407. *Paragraph 15* inserts a *new paragraph 3A* into schedule 17 FSMA (the ombudsman scheme). This provides for co-operation between the scheme operator of the FOS and the FCA in the exercise of their separate functions. It reflects the fact that some co-operation is necessary for the FCA and the scheme operator of the FOS to each carry out their functions as effectively and as efficiently as possible. It makes co-operation compulsory but is silent as to the form that co-operation should take (except for the requirement to prepare and maintain a memorandum).

408. *Paragraph 16* allows the Treasury to direct the scheme operator to comply with provisions of the Companies Act 2006 dealing with accounts and audit which would otherwise not apply to it. The direction may modify provisions of the Companies Act 2006 dealing with accounts and audit in their application to the scheme operator.

409. *Paragraph 17* provides for the accounts of the scheme operator to be audited by the National Audit Office. The National Audit Office carries out audit functions of the Comptroller and Auditor General. The Treasury must lay before Parliament the certified accounts of the scheme operator and the report of the Comptroller and Auditor General on them.

Lloyd's

Clause 37: Lloyd's

410. *Clause 37* amends Part 19 of FSMA which imposes duties and confers powers on the FSA in relation to Lloyd's of London. The effect of clause 37 is to impose these duties and confer these powers on both the FCA and the PRA.

411. *Subsection (2)* amends section 314 to require the FCA and PRA to keep themselves informed about the way in which the Council of Lloyd's supervises and regulates the market at Lloyd's and the way in which regulated activities that the regulator regulates are being carried on in that market. The duty only applies in so far as it is appropriate for the purpose of, for the FCA, advancing its operational objectives and, for the PRA, for advancing its general objective and insurance objective (if effecting or carrying out of contracts of insurance is a PRA-regulated activity such that new section 2C applies).

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412. *Subsection (3)* inserts new section 314A which modifies the application of the PRA's objectives and related provisions such as *new section 3I* (power of PRA to require FCA to refrain from specified action) so that the reference to PRA-authorized persons includes a reference to the Society of Lloyd's and its members, taken together, notwithstanding the fact that the members of Lloyd's are not authorized persons. Thus the general objective applies to require the PRA to promote the safety and soundness of the Society and its members, taken together, and the power in section 3I may be exercisable where the PRA is of the opinion that the exercise by the FCA of a proposed power may result in the disorderly failure of the Society and its members taken together.

413. *Subsection (4)* substitutes section 315 of FSMA. It provides that if an activity carried on by the Society is a regulated activity, the order made under section 22 of FSMA may make provision disapplying any requirement of FSMA which relates to the registered office of a body corporate.

414. *Subsection (5)* amends section 316 FSMA. The effect of the amendments is to provide that either the PRA or FCA may exercise the power of direction if it considers that it is necessary or expedient to do so for the purpose of advancing its operational objectives (in the case of the FCA) or general objective or, if applicable, insurance objective (in the case of the PRA). The subsection also inserts *new subsection (1B)* which provides that if a direction would apply the general prohibition to members of Lloyd's (i.e. require members of Lloyd's to be authorized persons), it may be given only with the consent of the other regulator.

415. *Subsection (6)* amends section 318 FSMA. The effect of the amendments is to provide that either the PRA or FCA may exercise the power of direction to the Council or Society if it considers that it is necessary or expedient to do so for the purpose of advancing its operational objectives (in the case of the FCA) or general objective or, if applicable, insurance objective (in the case of the PRA).

416. *Subsection (7)* amends section 319 (consultation in connection with the exercise of the powers under section 316 and 318). Each regulator must consult the other before exercising a power of direction under section 316 or 318. Provision is made to allow the regulator to dispense with the duty to consult publicly on a proposed direction (in the case of the FCA, on the basis that to comply with the duty would be prejudicial to the interests of consumers, and in the case of the PRA, on the basis that to comply with the duty would be prejudicial to the safety and soundness of the Society and the members of the Society, or if applicable, its insurance objective). Subsection (7) also amends the definition of "cost benefit analysis" in section 319(10).

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417. *Subsection (8)* amends section 320 (former underwriting members). The power to impose requirements on former underwriting members is conferred on the PRA (unless the activity of effecting or carrying out of contracts of insurance is not a PRA-regulated activity in which case the power is exercisable by the FCA). *Subsection (9)* makes related amendments to section 321 (procedure for requirements imposed under section 320) including requiring the PRA to consult the FCA before giving notice under section 320.

418. *Subsection (10)* amends section 322 (rules applicable to former underwriting members). The power to make rules imposing requirements on former underwriting members is conferred on the PRA (unless the activity of effecting or carrying out of contracts of insurance is not a PRA-regulated activity in which case the power is exercisable by the FCA).

Information

Clause 38 and Schedule 12: Information, investigations, disclosure etc.

419. *Clause 38* introduces *Schedule 12* which makes various amendments to FSMA including amendments relating to information gathering and investigations (*Part 1*) and the public record, disclosure of information and co-operation (*Part 2*)).

420. *Paragraphs 1 to 5* of *Schedule 12* amend sections 165 to 166 of FSMA, transferring the information gathering powers of the FSA under these sections to the new regulators, or to the relevant regulator as the case may be (for example, the FCA in certain of the amendments to section 165(7) made by *paragraph 1(6)*, or the PRA in relation to the power to obtain information relating to financial stability under sections 165A and 165B as amended by *paragraphs 2 and 3*). The power in section 166 to require an authorised person to appoint a “skilled person” to produce a report is also extended so that the regulators may appoint such a skilled person directly and recover the cost from the authorised person in question.

421. *Paragraph 4* amends section 165C of FSMA. This relates to the making of an order by the Treasury under section 165A(2)(d) of FSMA to prescribe persons in relation to whom the PRA may impose a requirement to provide information or produce a document in connection with financial stability. The amendment provides that, in addition to the existing basis on which this power may be exercised (the activities carried on by the person pose or would be likely to pose a serious threat to the stability of the UK financial system), the Treasury may make such an order to implement a recommendation made by the FPC under section 90 of the BoE Act. Section 90(4) of that Act (as inserted by clause 3) provides that the FPC may only give such a recommendation if it considers that the making of an order under section 165A(2)(d) of FSMA in the manner recommended is desirable for the purposes of the FPC’s functions.

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422. *Paragraph 6* inserts a *new section 166A* which confers a power on the regulators to require an authorised person to appoint a “skilled person” to collect or update information which the authorised person was required (but failed) to collect or maintain under rules imposed by that regulator, for example in relation to recovery plans; it also confers a power for the regulators to make the appointment directly and to recover the cost from the authorised person. As with *new section 137L*, *new section 166A* facilitates the collection of confidential information from others (for example, other members of the authorised person’s group) (*subsection (6)*) and enables the authorised person to disclose confidential information if required (*subsection (7)*).

423. *Paragraphs 7 to 14* amend sections 167 to 176 of FSMA, transferring powers of the FSA under these sections to the new regulators, or the relevant regulator as the case may be, including powers in relation to investigations, information and documents, and entry to premises under warrants.

424. *Paragraph 13(3)* also amends section 175 to provide that where a regulator or investigator has obtained documents under information-gathering powers set out in Part 11 of FSMA, they may retain the originals for as long as necessary for the purpose for which they were requested, or until any legal proceeding are concluded. The effect of *paragraph 14(3)* is to place on a statutory footing in a uniform way across the United Kingdom the provisions relating to the execution of warrants and the powers exercisable by those accompanying the constable in the execution of the warrant, for example FCA or PRA staff who accompany a constable in entering and searching premises under a warrant. And *paragraph 15* inserts *new section 176A* which provides for original documents seized under a warrant to be retained as long as may be necessary, but for the owner to be able to apply for a court order requiring their return; this replaces the three month limit for retention set out in section 176(8) (though that limit is extended if criminal proceedings are commenced within that period).

425. Section 347 of FSMA requires the FSA to maintain a publicly available record of certain details about authorised persons (and other categories of persons set out in subsection (1)), including details of the services provided by authorised persons, their addresses, and any other information the FSA thinks is appropriate. *Paragraph 16* transfers the function of maintaining the record of authorised persons (including PRA-authorized persons) to the FCA; the public record to be maintained by the FCA will not include recognised clearing houses (*sub-paragraphs (2) and (3)*). *Paragraph 17* inserts a *new section 347A*, which requires the PRA to give the FCA information needed to maintain the record.

426. *Paragraphs 18 to 23* make consequential amendments to sections 348, 349 and 353 of FSMA, replacing references to the FSA with references to the new regulators; these sections deal with restrictions on disclosure of information. *Paragraph 20* also amends section 350 so

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that HMRC may provide information to the FCA and the PRA for any of the FCA's or the PRA's functions, rather than only for the purposes of an investigation under section 168.

427. *Paragraph 24* inserts *new section 353A* which protects information about monetary policy, financial stability operations and private banking services that has been provided by the Bank of England. The regulators must not disclose this information (*subsection (1)*) though they may, for example, disclose such information to each other (*subsection (6)(a)*) and to investigators (*subsections (7) and (8)*).

428. Section 354 of FSMA imposes a duty on the FSA to co-operate with various bodies. *Paragraph 24* replaces section 354 with *new sections 354A and B*, imposing duties on the new regulators to co-operate with the persons listed in those new sections.

429. *New section 354C* requires the PRA to provide information to the Bank to assist the Bank in achieving its financial stability objective set out in section 2A(1) of the Bank of England Act 1998, which is to contribute to protecting and enhancing the stability of the financial systems of the United Kingdom.

Auditors and actuaries

Clause 39 and Schedule 13: Auditors and actuaries

430. *Clause 39* introduces *Schedule 13* which amends Part 22 of FSMA (auditors and actuaries).

431. *Paragraph 2 of Schedule 13* confers on the PRA and FCA the FSA's existing powers: to make rules requiring the appointment of an auditor or actuary: to impose duties on auditors and actuaries; and to require authorised persons to produce periodic financial reports, and to have them reported on by an auditor or actuary.

432. *Paragraphs 3 and 4* make consequential amendments to sections 342 and 343 of FSMA, so that auditors and actuaries may provide information to the PRA and the FCA that is relevant to their functions, notwithstanding ordinary duties of confidentiality. Amendments are also made to subsections (1) and (3) to extend the provision to auditors of recognised investment exchanges such that auditors of such bodies (or persons with close links to such bodies (see the amendments to section 343 (information given by auditor or actuaries: persons with close links) (*paragraph 4*)) may disclose information to the FCA without breaching confidentiality requirements to which they are subject. *Paragraph 5* makes consequential amendments section 344, so that auditors and actuaries who resign, who are removed from office or who are not reappointed must give notice to the FCA or the PRA as appropriate.

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433. *Paragraph 6* replaces section 345 and the existing power in section 345 for the FSA to disqualify an auditor or actuary from acting for any authorised person or class of authorised person or recognised investment exchange as the case may be. *New section 345* establishes that where an auditor or actuary has failed to comply with a duty imposed by FCA rules, or to pass information to the FCA when required under FSMA to do so, the FCA may disqualify them from acting for any authorised person or class of authorised person or recognised investment exchange or class or recognised investment exchange, impose a fine, or publicly censure them.

434. The PRA will be able to have equivalent powers under *new section 345A*. But these powers will only be exercisable if an order made by Treasury provides for the relevant provisions to have effect. The power of the PRA to disqualify an auditor or actuary will be limited to disqualification from acting for any PRA-authorised person or class of PRA-authorised person. But where a PRA disqualification is in force, the FCA will be able under *new section 345(3)* to widen the disqualification to any FCA-authorised person or class of FCA-authorised person.

435. *New section 345B* provides for warning notices and decision notices to be issued in respect of the exercise of powers conferred by *new sections 345 and 345A*; the procedural provisions in Part 26 will apply to such notices; and the auditor or actuary will have a right to appeal to the Tribunal (*new section 345B(7)*). *New sections 345D and E* require the regulators to consult on, and publish, a statement of policy on the imposition of penalties. *Paragraph 7* brings the disciplinary powers over auditors and actuaries within sections 393 and 394 (third party rights and access to evidence).

Consumer protection and competition

Clause 40: Provision about consumer protection and competition

436. *Clause 40* inserts new Part 16A (sections 234C to 234H) into FSMA. These provisions relate to complaints and references which may be made to the FCA in relation to competition or matters which adversely affect the interests of consumers.

437. *New section 234C* enables bodies which represent the interests of consumers and which have been designated by the Treasury to make a complaint to the FCA that a feature of the market in the United Kingdom for financial services or combination of features is or appears to be significantly damaging to the interests of consumers. Sections 425A and 425B (meaning of “consumers”) apply for the purposes of this section but those who are authorised persons are not to be treated as consumers for this purpose. This means that bodies which represent the interests of authorised persons cannot be designated for these purposes. This

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provision is similar to the mechanism in section 11 of the Enterprise Act 2002 for designated consumer bodies to make “super-complaints” to the Office of Fair Trading.

438. *New section 234D* enables the scheme operator under Part 16 of FSMA (the Financial Ombudsman Scheme) or “regulated persons” (which is defined as authorised persons and certain other financial institutions) to make a reference to the FCA. References may be made on two separate bases. First a reference may be made where it appears that there may have been regular failure by one or more regulated persons to comply with requirements and as a result consumers have suffered, or may suffer, loss of damage in respect of which a remedy or relief could be obtained in legal proceedings. Second a reference may be made where it appears that one or more regulated persons has on a regular basis acted in such a way that were a complaint made under the ombudsman scheme it is likely that the complaint would be determined in favour of the complainant and also that the ombudsman would be likely to make an award or give a direction in favour of the complainant (provided the ombudsman has power to make awards or give directions). In either case, where the reference is made by a regulated person, the reference must relate to his own failure. *New section 234E* deals with the response by the FCA to a complaint under section 234C or a reference under section 234D. The FCA must within 90 days publish a response stating how it proposes to deal with the matter and in particular whether it has decided to take any action. There may be a range of responses open to the FCA. For example, the FCA could indicate that it proposes to consult on making rules on a particular matter or that it is still considering the matter and proposes to carry out further analysis of the matter referred to in the complaint or reference. The FCA may also wish to set out a timetable for taking action which would allow the Financial Ombudsman Service to consider how to proceed with complaints which have been made to it which relate to the subject matter of the reference. Alternatively, it may be that having examined the issue it does not consider that it merits detailed investigation.

439. The response must include a copy of the complaint or reference and must state the FCA’s reasons for its proposals.

440. *New section 234F* provides for a limited exception to the duty to respond where a reference has been made under new section 234D by a regulated person. The FCA need not respond in the manner provided for in new section 234E if the FCA considers that the reference is frivolous, vexatious or has been made in bad faith. For example, where a reference has been made by a regulated person with the deliberate intention of frustrating or delaying action that the FCA is, or is proposing to, take in relation to the regulated person for breach of a regulatory requirement, the FCA might consider that it is inappropriate to provide a response to the reference under new section 234E. Similarly, it may be appropriate for the FCA to decide not to provide a response under section 234E where the reference has been

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made with the intention of delaying or frustrating the determination by the ombudsman service of complaints made to it.

441. *New section 234G* requires the FCA to give guidance under section 139A of FSMA about the presentation of a complaint under section 234C or a reference under section 234C.

442. *New section 234H* enables the FCA to ask the OFT to consider whether a feature of the market in the United Kingdom for financial services may prevent, restrict or distort competition in the United Kingdom. The OFT is required to respond within 90 days explaining how it proposes to respond to the request. The OFT is not however required to take any specified action in response to the request. The FCA might make such a request where, for example, it did not have the powers to address the potential problem in the market or where the FCA considered that the matter would benefit from the competition expertise of the OFT.

Insolvency

Clause 41 and Schedule 14: Insolvency

443. *Clause 41* introduces Schedule 14 which amends Part 24 of FSMA (insolvency).

444. The existing provisions for the FSA powers to instigate or take part in insolvency proceedings are applied, in respect of PRA-authorized persons, to both the FCA and the PRA. In respect of other authorized persons, the provisions are applied to the FCA alone. However, the ability of the FSA to appoint an actuary under section 376 (continuation of contracts of long-term insurance where insurer in liquidation) is transferred to the PRA under *paragraph 24* (or the FCA if that long-term insurance is not PRA-regulated activity). *Paragraphs 8 and 9 of Schedule 14* amend sections 362 and 362A to refer to partnerships, as well as companies, in the provisions relating to administration.

Miscellaneous amendments of FSMA 2000

Clause 42 and Schedule 15: The consumer financial education body

445. *Clause 42 and Schedule 15* amend Schedule 1A FSMA (further provision about the consumer financial education body).

446. *Paragraph 4 of Schedule 15* amends paragraph 4 of Schedule 1A FSMA by referring to *new section 3R*. *New section 3R(4)* lists a number of activities covered by the consumer financial education function.

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447. *Paragraph 6* inserts three new paragraphs (paragraphs 6, 6A and 6B) into Schedule 1A FSMA. *New paragraph 6* requires the CFEB to have regard to the FCA's duty to advance its operational objectives when discharging its function. *New paragraph 6A* provides for the CFEB and the FCA to co-operate with each other in the exercise of their functions under FSMA. The CFEB and the FCA must also prepare and maintain a memorandum describing how they will do this. The memorandum must be published by the CFEB. *New paragraph 6B* requires the CFEB to disclose information to the FCA in circumstances where it considers that the information might be of assistance to the FCA in advancing one or more of its operational objectives.

448. *New section 1C(2)(f)* (see *clause 5*) places a duty on the FCA to have regard to any information which the CFEB has provided to the FCA pursuant to *new paragraph 6A* (in considering what degree of protection for consumers may be appropriate, for the purposes of securing the FCA's consumer protection objective).

449. *Paragraph 9* amends paragraph 9 of Schedule 1A FSMA. This amendment allows the Treasury to direct the CFEB to comply with provisions of the Companies Act 2006 dealing with accounts and audit which would otherwise not apply to it. The Treasury may modify the application of any provision of the Companies Act 2006 covering accounts and audit in their application to the CFEB.

450. *Paragraph 10* inserts a new paragraph 9A into Schedule 1A FSMA. *New paragraph 9A* provides for the CFEB's annual accounts to be audited by the Comptroller and Auditor General; the National Audit Office carries out audit functions of the Comptroller and Auditor General. The Treasury must lay before Parliament the certified accounts of the CFEB and the report of the Comptroller and Auditor General on them.

Clause 43 and Schedule 16: Members of the professions

451. *Clause 43* introduces Schedule 16 which makes amendments to Part 20 FSMA (provision of financial services by members of the professions). Part 20 provides that members of a profession may, subject to certain conditions, carry on regulated activities without authorisation where the activity is incidental to the provision of professional services which are supervised and regulated by a professional body which has been designated by the Treasury (see section 327, which disapplies the general prohibition in section 19, that is, the prohibition from carrying on regulated activities unless the person in question is authorised or exempt).

452. *Paragraph 1 of Schedule 16* amends section 325 of FSMA to require the FCA to keep itself informed about the way in which designated professional bodies supervise and regulate

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the carrying on of exempt regulated activities by their members and the way in which such members are carrying on exempt regulated activities.

453. *Paragraph 2* amends section 328 (directions in relation to the general prohibition) to enable the FCA to direct that the exemption under section 327 is not to apply; a direction under section 328 may be given in relation to different classes of person or different descriptions of regulated activity; and where a direction is in force, any classes of person specified in the direction would need authorisation under Part 4A of FSMA to carry on any activities specified in the direction. *Paragraph 4 of Schedule 15* makes related amendments to section 330 (consultation on directions under section 328). Paragraph 4 also amends the definition of “cost benefit analysis” in section 330(10).

454. *Paragraph 3* amends section 329 (orders in relation to the general prohibition) to enable the FCA to make an order disapplying section 327 (disapplication of the general prohibition) in relation to a person whom the FCA considers is not fit and proper to carry on regulated activities in accordance with section 327. *Paragraph 5* makes related amendments to section 331 (procedure on making or varying orders under section 329).

455. *Paragraph 6* amends section 332 (rules relating to persons to whom the general prohibition does not apply) to enable the FCA to make rules applicable to persons to whom, as a result of section 327, the general prohibition does not apply.

Clause 44: International obligations

456. *Clause 44* amends section 410 of FSMA. Section 410 enables the Treasury to direct “relevant persons” not to take proposed action if it appears to the Treasury that action would be incompatible with European Union obligations or any other international obligations of the United Kingdom. The Treasury may also direct a relevant person to take action which that person has power to take where that action is required for the purpose of implementing any such obligation.

457. The effect of *clause 44* is to provide that the FCA, the PRA and the Bank of England when exercising functions conferred on it by Part 18 of FSMA are “relevant persons” for this purpose and so can be the subject of a direction under section 410.

Clause 45: Interpretation of FSMA 2000

458. *Subsection (1)* amends section 417 of FSMA (definitions). In particular, definitions of “the FCA”, “Part 4A permission”, “the PRA”, “PRA-authorized person” and “PRA-regulated activity” are inserted. *Subsection (2)* inserts new section 421ZA which provides a definition of “immediate group”. *Subsection (3)* inserts a new section 425C which defines “qualifying EU provision”.

Clause 46: Parliamentary control of statutory instruments

459. *Clause 46* amends section 429 of FSMA to make provision for the Parliamentary control of statutory instruments made under powers created by the Bill. Where no express provision is made in clause 46 or in other provisions of the Bill as to the procedure that applies, the negative procedure applies (which means that the instrument will be subject to annulment by resolution of either House of Parliament: see section 429(8) of FSMA).

PART 3 – MUTUAL SOCIETIES

Clause 47: Mutual societies: power to transfer functions

460. The FSA currently exercises functions in relation to mutual societies. For example, the FSA is responsible for the registration of building societies under Schedule 2 to Building Societies Act 1986. *Clause 47* provides for the Treasury to make orders amending the legislation relating to mutual societies which is listed in *subsection (2)*. But no order can be made unless a draft of the order has been laid before, and approved by, each House of Parliament (see *clause 97(2)*). The purpose of such orders is to provide that functions of the FSA may be exercisable by FCA, the PRA, or by both of them. Orders may also provide for functions of a Northern Ireland department and of the Registrar of Credit Unions under the Industrial and Provident Societies Act (Northern Ireland) 1969 and the Credit Unions (Northern Ireland) Order 1985 to be transferred to the FCA, the PRA, or both; functions under that Order relating to the determination of disputes may also be transferred to the Court.

Clause 48: Further provision that may be included in orders under section 48

461. *Clause 48* provides for orders under clause 47 to contain incidental, supplemental, consequential and transitional provisions (*subsection (2)*). Orders under clause 47 may, for example, apply to transferred functions any provision of FSMA that would not otherwise apply, or disapply any provision that would otherwise apply (*subsection (3)*).

Clause 49: Evidence

462. Orders under *clause 47* may include provision transferring property held in connection with the function transferred. *Clause 49* provides that a certificate issued by the Treasury that property vested in a person immediately before a transfer order takes effect has been transferred as a result of the order is conclusive evidence of the transfer; such a certificate may be necessary, for example, for registration purposes.

Clause 50: Repeals in Part 21 of FSMA 2000

463. *Clause 50* repeals various provisions in Part 21 of FSMA. These provisions enabled the transfer of functions to the FSA on the implementation of FSMA and are no longer needed. The repeal of an enabling power automatically revokes any subordinate legislation

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made under it; *subsection (2)* therefore preserves the effect of orders made under the repealed provisions.

Clause 51: Building societies: creation of floating charges

464. Section 9B of the Building Societies Act 1986 prohibits the creation of floating charges on the undertaking or property of a building society. *Clause 51* amends section 9B so as to allow the creation of a floating charge in connection with participation in a securities settlement or a payment system.

Clause 52: Power to direct transfer of building society's business

465. Section 97 of the Building Societies Act 1986 makes provision in relation to the transfer by a building society of its business to a company. Section 3 of the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 (the "2007 Act") gives Treasury the power to simplify and modify the procedure for the transfer of the business of a mutual society (including a building society) to a company if that company is the subsidiary of a mutual. The Mutual Societies (Transfers) Order 2009, S.I. 2009/509 (the "2009 Order"), made on the basis of the powers in section 3 of the 2007 Act, put in place a modified procedure for the transfer of the business of a building society to a company that is the subsidiary of another mutual.

466. Section 42B of the Building Societies Act gives the FSA the power to direct a building society, in certain circumstances, to transfer its business to an existing company (section 42B(1)(b)), and the power to dispense with the requirement to have the transfer approved by members' resolutions and to have it approved instead by a resolution of the board of the society (section 41B(4)).

467. *Clause 52* amends section 42B so as to give to the FSA, in addition to the powers described above, an additional power to direct a building society to transfer its business to a company that is the subsidiary of a mutual, under the modified procedure established by the 2009 Order.

PART 4 – COLLABORATION BETWEEN TREASURY AND BANK OF ENGLAND, FCA OR PRA

Clause 54: Duty of Bank to notify Treasury of possible need for public funds

468. *Subsection (1)* requires the Bank of England to notify the Treasury where it appears to the Bank that there is a material risk of circumstances arising in which public funds may be needed. *Clause 61* provides for provision as to what the Treasury and the Bank regard as a "material risk" for these purposes to be included in a memorandum prepared by the Treasury, Bank and PRA.

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469. The duty arises in three specified cases: where the Treasury or Secretary of State might reasonably be expected to regard it as appropriate to provide financial assistance to or in respect of a financial institution or institutions (*subsection (3)*); where it is reasonably to be expected that a power under Parts 1 to 3 of the Banking Act 2009 may be exercised and that the Treasury might reasonably be expected to regard it as appropriate to incur expenditure in connection with the exercise of that power (*subsection (4)*); or where the scheme manager of the Financial Services Compensation Scheme might reasonably be expected to request a loan from the National Loans Fund or other financial assistance from the Treasury in order to meet expenses of the Scheme (*subsection (5)*).

Clause 55: Duty of Bank to notify Treasury of changes

470. Where the Bank has given a notification under *clause 54* and there is a substantial change in the matters which gave rise to the notification, the Bank must notify the Treasury. The Bank must also notify the Treasury where the Bank is of the opinion that the risk to which the notification relates has ceased.

Clause 56: Circumstances in which Treasury power of direction exercisable

471. *Clause 57* confers a power of direction on the Treasury. *Clause 56* sets out preconditions for the exercise of that power. First, *subsection (2)* provides that the power is exercisable by reference to a public funds notification unless the Bank has provided a notification that the risk to which the notification relates has ceased. Second, *subsection (3)* provides that the power is exercisable by reference to the provision by the Treasury or Secretary of State of qualifying financial assistance (as described in *subsection (5)*) which has not been recovered. *Subsection (6)* sets out certain cases in which qualifying financial assistance is to be taken to have been recovered but it is not an exhaustive list and therefore does not address all possible kinds of assistance.

Clause 57: Treasury power of direction

472. *Clause 57* confers on the Treasury a power to give a direction to the Bank relating to the provision by the Bank of financial assistance to financial institutions, the exercise by the Bank of any of the stabilisation powers (as defined by section 1(4) of the Banking Act 2009) or the exercise of the Bank's powers under Part 3 of the Banking Act 2009 (the bank administration regime). The power must have become exercisable as described in *clause 56*. A direction may not be given in relation to the provision by the Bank of ordinary market assistance. In general, ordinary market assistance means the assistance provided by the Bank under its normal published frameworks. The Treasury may only give a direction if the direction is necessary to resolve or reduce a serious threat to the stability of the financial system of the United Kingdom, or (where the power of direction is exercisable by virtue of qualifying financial assistance having been provided) if the direction is necessary to protect the public interest where the qualifying financial assistance was provided for the purpose of

resolving or reducing a serious threat to the stability of the financial system in the United Kingdom.

Clause 58: Directions under section 57: supplementary provisions

473. *Clause 58* deals with supplementary matters. *Subsection (2)* requires the Treasury to consult the Bank before giving a direction. *Subsection (3)* provides that the Bank must give a report (or reports) to the Treasury on how it is complying or (where the direction relates to action to be taken in the future) intends to comply with the direction. *Subsection (6)* provides that a direction remains in force even if the public funds notification by reference to which it was made has been superseded. *Subsection (7)* provides that a direction can remain in force even if the qualifying financial assistance by reference to which it was made has been recovered.

Clause 59: Duty to lay direction etc before Parliament

474. *Clause 59* requires the Treasury to lay before Parliament a copy of a direction given under clause 57 any report provided by the Bank under clause 58 and any notice of the revocation of a direction before Parliament. The Treasury is not required to do so where the Treasury consider that the publication would be against the public interest. Where the Treasury reach such a view, they must from time to time review that decision and, if they decide that publication is no longer against the public interest, the Treasury must comply with the duty to publish.

Clause 60: Duty of Treasury, Bank and PRA to co-ordinate discharge of functions

475. *Clause 60* requires the Treasury (on the one hand) and the Bank of England and the PRA (on the other) to co-ordinate the discharge of their respective relevant functions so far as they relate to the stability of the UK financial system and affect the public interest. *Subsection (2)* requires the authorities to which the duty applies to have regard in particular to the importance of co-ordination where the Bank has given, or is considering whether to give, a public funds notification.

Clause 61: Memorandum of understanding: crisis management

476. *Subsection (1)* requires the Treasury on the one hand and the Bank of England and the PRA on the other to prepare and maintain a memorandum describing how they will comply with their duties under clause 60. *Subsection (2)* specifies that the memorandum must address: what the Treasury and the Bank regard as a material risk for the purposes of clause 54(1); the steps to be taken when the Bank has given a public funds notification under clause 54(1) or 55(2); the respective roles of the Treasury, the Bank and the PRA in relation to the taking of steps to resolve or reduce threats to the stability of the UK financial system how the Treasury, the Bank and the PRA will co-operate in fulfilling those roles; the use by the Treasury of their powers under *clause 57*; matters connected with the Bank's compliance with a direction from

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the Treasury; and the obtaining and sharing of information. In addition, the Treasury, Bank and PRA may agree to include in the memorandum other matters relating to financial stability or the regulation of financial services and which affect the public interest. For example, the memorandum could include provisions about the regulation of a financial institution which might seriously affect diplomatic relations between the United Kingdom and a foreign country.

477. The memorandum is to relate to how the Treasury, the PRA and the Bank are to co-ordinate their functions. However, *subsection (4)* provides that the memorandum need not relate to the relationship between the PRA and the Bank and so need not contain provision relating to, for example, how the PRA and Bank will share information or keep each other informed about matters of common interest.

478. *Subsection (5)* enables the parties to the memorandum to include in the memorandum provisions which relate to the functions of certain other persons, where that person consents. *Subsection (6)* specifies the persons whose functions may be included in the memorandum (the FCA, the Financial Services Compensation Scheme and any other body exercising functions in relation to the regulation of financial services or the stability of the UK financial system). This means, for example, that if the situation being managed under the provisions of the memorandum involves the payment of compensation from the FSCS, the memorandum could set out how the FSCS would coordinate with the PRA, the Bank and the Treasury in those circumstances.

479. *Subsection (7)* requires the Treasury to publish and to lay before Parliament a copy of the memorandum.

Clause 62: Memorandum of understanding: international organisations

480. *Subsection (1)* requires the Treasury, the Bank of England, the FCA and the PRA to prepare and maintain a memorandum describing how they will co-ordinate the exercise of relevant functions so far as they relate to membership of, or relations with, international organisations. “Relevant functions” for these purposes are defined in clause 62(3).

481. *Subsection (4)* sets out the purpose of the memorandum. *Subsection (5)* sets out the matters which must be included in the memorandum. These include the requirement that, to the extent appropriate, the UK authorities agree consistent objectives in relation to matters of common interest and the requirement that the memorandum must provide for a committee to co-ordinate to exercise by the UK authorities of the functions which are subject to the memorandum. A representative of the Treasury is to chair the Committee. *Subsection (8)* requires the Treasury to publish and to lay before Parliament a copy of the memorandum.

Clause 63: Interpretation of Part 4

482. *Subsection (3)* defines “financial assistance” for the purposes of Part 4 of the Bill.

483. *Subsection (4)* enables the Treasury by order to provide that a specified activity or transaction, or class of activity or transaction, is or is not to be treated as financial assistance. This will enable the Treasury to clarify how a particular activity or transaction, or class of activity or transaction, is to be treated.

PART 5 – INQUIRIES AND INVESTIGATIONS

Inquiries

Clause 64: Cases in which Treasury may arrange independent inquiries

484. *Clause 64* enables the Treasury to appoint a person to carry out an inquiry. The power is exercisable where events have occurred which give rise to concern and which relate to collective investment schemes, the carrying out of regulated activities, the issue of listed securities, recognised clearing houses or recognised inter-bank payment systems, and these events may not have occurred but for a serious failure in the legislative regime for regulation or its operation.

Clause 65: Power to appoint person to hold an inquiry

485. Where this clause applies (see *clause 64*), the Treasury may appoint a person to hold an inquiry. The Treasury may, under *subsection (2)*, give a direction to that person on a range of matters including the postponement or suspension of the inquiry.

Clause 66: Powers of appointed person and procedure

486. *Clause 66* makes provision for the procedure to be followed on an inquiry and for the person holding the inquiry to be able to obtain information and documents and require the attendance of witnesses which are relevant to the inquiry.

Clause 67: Conclusion of inquiry

487. *Subsection (1)* requires the person holding the inquiry to provide to the Treasury a written report at the end of the inquiry. The duty of the Treasury to publish the report is dealt with in *clause 77* (see below).

Clause 68: Obstruction and contempt

488. *Clause 68* makes provision about those persons who have obstructed an inquiry such as by failing to comply with a request by the person holding the inquiry (for example, a request to provide information or documents). If the person’s behaviour would have amounted

to contempt of court (if the inquiry had been court proceedings), a court may deal with the person as if in contempt.

Investigations

Clause 69: Duty of FCA to investigate and report on possible regulatory failure

489. *Clause 69* requires the FCA to investigate events and to report to the Treasury on the result of the investigation. The duty applies where events have occurred which relate to those who are regulated by the FCA or within its regulatory remit (see *subsection (5)*), which have or may have caused serious harm to the values underpinning the FCA's operational objectives (the appropriate degree of protection for consumers, the integrity of the UK financial system, effective competition in the interests of consumers), and where those events may not have occurred but for a serious failure in the legislative regime for regulation or its operation. The duty applies where the FCA itself is satisfied that the test is met (unless the Treasury directs the FCA that an investigation is not required) or where the Treasury direct the FCA that the test is met.

Clause 70: Duty of PRA to investigate and report on possible regulatory failure

490. *Clause 70* requires the PRA to investigate events and to report to the Treasury on the result of the investigation. The duty applies where events have occurred which relate to PRA-authorized persons, which have or may have caused serious harm to the values underpinning the PRA's objectives (the safety and soundness of those persons or the adequate degree of protection for policyholders) or where relevant public expenditure (as defined in *clause 71*) has been incurred in respect of a PRA-authorized person, and where those events may not have occurred but for a serious failure in the legislative regime for regulation or its operation. The duty applies where the PRA itself is satisfied that the test is met (unless the Treasury directs the PRA that an investigation is not required) or where the Treasury direct the PRA that the test is met.

Clause 71: Interpretation of section 70

491. *Clause 71* defines terms for the purposes of *clause 70*, including "relevant public expenditure". "Relevant public expenditure" is incurred for these purposes in three cases: where the Treasury or Secretary of State have provided financial assistance to or in respect of a PRA-authorized person for financial stability reasons (for example where the Treasury have provided a guarantee to a PRA-authorized person); where the Treasury have incurred expenditure in relation to a PRA-authorized person in connection with the exercise of powers under Parts 1 to 3 of the Banking Act 2009 (for example, by giving an indemnity to the Bank in connection with the operation of a bridge bank); or where the scheme manager of the Financial Services Compensation Scheme has received a loan from the National Loans Fund

or financial assistance from the Treasury for the purposes of funding expenses incurred in connection with a PRA-authorised person.

Clause 72: Modification of section 70 in relation to Lloyd's

492. *Clause 72* modifies the application of clause 70 in so far as it applies to Lloyd's. These modifications are necessary as Lloyd's members are not authorised persons and so clause 70 would not, without modification, apply in an appropriate manner in relation to the exercise by the PRA of its functions in relation to Lloyd's.

Clause 73: Power of Treasury to require FCA or PRA to undertake investigation

493. *Clause 73* enables the Treasury to require the FCA or PRA to carry out an investigation and provide the Treasury with a report if the Treasury consider that it is in the public interest to do so. The investigation must relate to "relevant events" as defined within the meaning of *subsections (2) and (3)*.

Clause 74: Conduct of investigation

494. *Clause 74* provides that it is for the regulator carrying out the investigation to decide how it is to be carried out, subject to any direction given by the Treasury under *subsection (5)*. The regulator in carrying out an investigation, and the Treasury in exercising the power to direct the conduct of the investigation, must have regard to the desirability of minimising any adverse effect that the carrying out of the investigation may have on the exercise by the regulator of any of its other functions. For example, the Treasury may consider it appropriate to direct the regulator to postpone the start of the investigation until enforcement action being carried out by the regulator has been completed, where an investigation might adversely affect the carrying on of the enforcement action. *Subsection (3)* enables the regulator to postpone the start of, or suspend an investigation if it considers it necessary to do so to avoid a material adverse effect on the exercise by it of its functions. The regulator must notify the Treasury that it has done so and indicate when the investigation will begin or resume. Such notification may be given in general terms such as "when the Tribunal has made a determination and the period for an appeal against the Tribunal's determination has expired".

Clause 75: Conclusion of investigation

495. On the conclusion of the investigation, the regulator must provide to the Treasury a written report setting out the result of the investigation, any lessons it (the regulator) has learnt and any recommendations it wishes to make. Publication of the report is dealt with in *clause 77*.

Clause 76: Statements of policy

496. Clause 76 requires each regulator to prepare and publish a statement of policy as to how it intends to discharge its duties under clause 68 to 75. Subsection (4) requires that the regulators seek the consent of the Treasury before issuing this policy statement.

Publication of Reports

Clause 77: publication of reports of inquiries and investigations

497. *Clause 77* deals with the publication of reports made to the Treasury under clause 67 or 75. In each case the Treasury must lay the report before Parliament and publish it in full subject to a power to withhold matters on the grounds specified in *subsections (3) and (4)*. Where the Treasury fail to publish the report in full, they must lay before Parliament and publish a statement explaining their reasons.

Supplementary

Clause 78: Interpretation and supplementary provision

498. *Clause 78* contains definitions relevant to Part 5.

PART 6 – INVESTIGATION OF COMPLAINTS AGAINST REGULATORS

Clauses 79 to 81: Arrangements for the investigation of complaints

499. *Clause 79* requires the FCA, the PRA and the Bank (for the purpose of this Part, “the regulators”) to put in place a scheme for the prompt, independent investigation of complaints made against them in respect of their relevant functions (as defined in *clause 80*), for example complaints about maladministration. They must appoint an investigator, with the approval of the Treasury, on terms and conditions reasonably designed to ensure independence from the regulators, and to ensure that complaints will be investigated under the scheme without favouring the regulators. *Clause 81* requires the regulators to consult publicly on a draft of the proposed scheme or any revision to the complaints scheme, and to publish up-to-date details of the complaints scheme.

Clause 82: Investigation of complaints

500. *Clause 82* deals with the operation of the complaints scheme. The investigator may decide not to investigate a complaint in accordance with the scheme where it considers that the complaint would be dealt with more appropriately in another way, for example by reference to the Tribunal. A regulator may make an initial investigation of a complaint, but it must then refer any complaint it is investigating to the investigator, and notify the investigator of complaints it has decided not to investigate; the investigator may choose to investigate a complaint which the regulator has decided not to investigate. The investigator must report to

the regulator and the complainant on the investigation, and the investigator can recommend that the regulator makes a compensatory payment to the complainant or remedies the matter, or both. The investigator can publish all or part of the report if the investigator thinks that it ought to be brought to the attention of the public and, if a report is critical of the regulator, the regulator must inform the investigator and the complainant of the steps it proposes to take in response and the investigator may require the regulator to publish all or part of that response. *Subsection (8)* permits the investigator to appoint a person to investigate on its behalf but, to ensure the independence of investigations, *subsection (9)* prevents the investigator from appointing officers and employees of the regulator against which the complaint was made.

Clause 83: Exemption from liability in damages

501. *Clause 83* confers on the investigator and persons appointed by the investigator immunity from actions for damages except where they act in bad faith or where damages are sought under the Human Rights Act 1998.

PART 7 – AMENDMENTS OF BANKING ACT 2009

Special resolution regime and bank administration

Clause 84: Private sector purchasers

502. Parts 1 to 3 of the Banking Act 2009 make provision for the “special resolution regime” which confers powers on the Bank and the Treasury to effect the transfer of the shares or property, rights and liabilities (“business”) of a bank which has encountered, or is likely to encounter, financial difficulties.

503. There are three “stabilisation options” established in Part 1, available to the authorities enabling: (a) the Bank to transfer the shares or some or all of the business of a bank to a commercial purchaser (section 11); (b) the Bank to transfer some or all of the business of a bank to a “bridge bank” (this is a company wholly owned by the Bank) (section 12); and (c) the Treasury to transfer the securities of a bank into temporary public ownership (section 13). The stabilisation options are effected by an exercise of the “stabilisation powers”: the share transfer powers (sections 14 to 32) and the property transfer powers (sections 33 to 48) which enable the Bank to make “transfer instruments” and the Treasury to make “transfer orders”.

504. Following an initial exercise of a transfer power under the Banking Act 2009, the relevant authority may effect supplemental, onward and reverse transfers (see sections 26 to 31 and 42 to 46). In summary “reverse transfers” can be used to transfer the securities, or property, rights and liabilities from a transferee back to a transferor. For example, where the Bank has transferred property, rights and liabilities from a failing bank to a bridge bank it may transfer some of that business back to the failing bank (it may wish to do this, for example, in

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order to minimise the need to capitalise a bridge bank with public funds where the assets transferred from the failing bank are found to be significantly impaired).

505. Under the Banking Act 2009, the reverse transfer powers are not available in respect of securities or property, rights and liabilities which have been transferred to a commercial purchaser. *Clause 84* inserts a *new section 26A and 42A* into the Banking Act 2009 and makes other modifications to Part 1 of that Act to extend the availability of the reverse transfer powers in relation to transfers to commercial purchasers in order to provide the authorities with greater flexibility, for example to remedy the situation in which securities or property, rights and liabilities have been transferred in error. However, in order to provide comfort to prospective acquirers of securities or property, rights and liabilities under a transfer instrument, these new reverse transfer powers may be exercised only where the person from whom the securities or property, rights and liabilities are to be transferred has given their prior consent in writing (see, for example, *new section 26A(4)*).

Clause 85: Property transfer instruments: property held on trust

506. Section 33 of the Banking Act 2009 describes a property transfer instrument as an instrument which, in short, may provide for the property, rights or liabilities of a specified bank to be transferred; may make other provision for the purposes, or in connection with, the transfer; and may relate to some or all of the property, rights and liabilities of the failing bank.

507. A property transfer instrument may be made by the Bank for the purposes of effecting a transfer to a private sector purchaser or to a bridge bank (sections 11 and 12 respectively) and may also be made to make, for example, additional transfers from the failed bank (section 42), reverse transfers from the bridge bank to the failed bank (section 44) and onward transfers from a bridge bank to another person (section 43). For completeness, the Treasury may make property transfer orders to transfer property, rights and liabilities from a bank in temporary public ownership (section 45) and reverse transfers (see for example section 46).

508. Sections 34 and 36 to 40 make provision for some of the matters which may be provided for in a property transfer instrument (or property transfer order as the case may be). Section 34(7) specifies that a property transfer instrument (or order) may make provision about property held on trust. Concerns have been raised by the Banking Liaison Panel (the Panel established under section 10 of the Banking Act 2009 to advise the Treasury about the effect to the special resolution regime on banks, building societies and the financial markets) that this subsection suggests that provision could be made in a transfer instrument or order to modify or terminate the terms of such trust arrangements for reasons other than to effect a transfer and irrespective of the consequences for the beneficiaries of the trust. Therefore *clause 85(2) and (3)* makes minor amendments to this provision to clarify that the terms on which trust property is held may only be modified or altered to the extent necessary or

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expedient, in the opinion of the Bank, to transfer the legal or beneficial interest in that property and any powers, rights or obligations in respect of that property. Subsections (4) and (5) provide for the same restrictions to apply in the case of property transfer orders made by the Treasury.

Clause 86: Reports following exercise of a stabilisation power

509. Where the Bank effects a transfer of property, rights and liabilities from a bank to a bridge bank under section 12 of the Banking Act 2009, it is required to report to the Chancellor about the activities of the bridge bank as soon as is reasonably practicable after: (a) the end of one year beginning with the date of the first transfer to the bridge bank, and (b) the end of each subsequent year (section 80(1) to (3)). The Chancellor must lay a copy of each report before Parliament (subsection (4)). The Bank must also comply with any request from the Treasury for a report on any matters in relation to a bridge bank (subsection (5)).

510. Similarly, where the Treasury makes a share transfer order under section 13(2) to transfer the shares of a bank into temporary public ownership the Treasury are required to lay reports before Parliament on the activities of the bank (section 81(1) to (3)). This reporting requirement is also applied under section 83(2)(g) in the case of a transfer of the parent undertaking of a bank (a holding company) into temporary public ownership in reliance on section 82.

511. At present, no provision is made in the Banking Act 2009 as regards the information that must be included in such reports. Therefore, potentially, reports could be produced on the operation of a bridge bank or a bank in temporary public ownership without reference to the institution's financial position. In addition, at present under the Act, the Bank is not required to prepare a report where it has exercised its transfer power under section 11(2) to transfer the business or shares in a bank to a private sector purchaser.

512. *Clause 86* inserts *new sections 79A and 81A* into the Banking Act 2009 which, respectively, require the Bank to report to the Chancellor about an exercise of the transfer power under section 11(2) and for reports produced under section 80 and 81 to include accounting information about the bank in temporary public ownership of bridge bank that is the subject of the report.

Clause 87: State aid

513. Part 3 of the Banking Act 2009 creates a new administration procedure for banks in certain cases. For example, the Bank may apply to the court for an order appointing a bank administrator following a transfer under Part 1 (special resolution regime) of some of the business of a failing bank: (a) to a commercial purchaser (section 11(1)); and/or (b) to a bridge bank (section 12(1)).

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514. A bank administrator has two objectives: (a) Objective 1 is to provide support to the acquirer of the transferred business in order to ensure the business can continue to be operated effectively; and (b) Objective 2 is “normal administration” (that is, to rescue the residual bank as a going concern or to achieve a better result for the bank’s creditors as a whole than would be likely if the residual bank had been wound up without first being placed in bank administration). The bank administrator is required to begin working towards both objectives immediately upon appointment (section 137(2)). However, Objective 1 is to take priority over Objective 2. This means that the interests of the creditors are essentially subordinated until such time as Objective 1 has been completed.

515. *Clause 87* inserts into Part 3 a *new section 145A* which confers a power on the Treasury to issue directions to a person appointed as a bank administrator for the purposes of ensuring compliance with any undertakings, commitments or conditions given or imposed in relation to the consideration and approval by the European Commission of any State aid given in connection with an exercise of transfer powers under Part 1 of the Act.

516. Article 107 of the Treaty on the Functioning of the European Union effectively prohibits Member States from using State resources to provide aid to institutions on a selective basis where such aid would distort or threaten competition (as this would be incompatible with the principles of the internal market), unless such aid is approved by the Commission, for example, where aid is provided to remedy a serious disturbance in the economy of a Member State. In many cases the resolution of an institution by way of an exercise of one or more of the stabilisation powers under Part 1 of the Act will involve the use of public funds (in other words, State resources), for example, by virtue of the provision of: (a) a capital facility to the residual of a failed institution; (b) a capital facility to a bridge bank; or (c) funding to facilitate the transfer of business from a failed institution to a private sector purchaser. Therefore, in such cases the UK will need to notify and seek the approval of the European Commission to any aid provided and ensure compliance with any undertakings, commitments or conditions in relation to the approval of any aid granted.

517. The new power of direction ensures that the UK can secure compliance with any commitments given in connection with a State aid measure, and any undertakings given or conditions imposed on the residual of a failed institution by issuing a direction under *subsection (2)* to a bank administrator. Such a direction would give cover to a bank administrator to act in such a way as may be necessary to secure compliance with any conditions imposed by the Commission which would otherwise be incompatible with the administrator’s duties towards the creditors of the failed bank (for example, a requirement for the failed bank to surrender its Part 4A permission to carry on a specific regulated activity or to cease entering into new contracts to provide a particular kind or regulated financial service which the administrator may otherwise wish to maintain/carry on for the purposes of

achieving the best outcome for the creditors of the failed bank). In addition, *subsection (7)* confers a power on the Treasury to confer on the person subject to the direction immunity from liability in damages for action or inaction taken in accordance with a direction.

Inter-bank payment systems

Clause 88: Inter-bank payment systems

518. Part 5 of the Banking Act 2009 makes provision for regulation by the Bank of payment systems specified by the Treasury as “recognised payment systems”. The Bank performs its functions under Part 5 in pursuance of its financial stability objective (specified in section 2A of the Bank of England Act 1998 as amended by *clause 2*). *Clause 88* makes amendments to that Part.

519. *Subsection (2)* inserts a *new section 186A* which confers a power on the Treasury to amend an order made under section 184 (recognition order) that specifies a payment system as a “recognised system”. This power may be used, for example, to amend the description of the arrangements which constitute the recognised system. Before amending a recognition order the Treasury must consult the Bank and notify the operator of the relevant system and consider any representations made. In addition, in certain cases the Treasury must consult the FCA and the PRA.

520. *Subsection (3)* substitutes for section 191 (directions) a new section 191. Section 191 confers on the Bank the power to give directions to a recognised payment system. Such directions may, for example, be given for the purposes of securing the compliance with a requirement imposed under section 190 (system rules) or may be given for the purposes of addressing an immediate threat to financial stability. Where a direction is specified by the Bank as being given for the purposes of resolving or reducing a threat to the stability of the UK financial system, *new section 191(3)* provides that the operator of the system (and its officers and staff) has immunity from liability in damages in respect of action or inaction in accordance with the direction. The new arrangements reduce the administrative steps necessary for the purposes of conferring immunity from liability in damages, with the aim of enhancing the speed at which action may be taken to address threats to financial stability. Provision is also made enabling the Treasury to confer immunity from liability in damages on any person and regardless of the purpose for which the direction is to be given where the Treasury consider it appropriate (*subsection (5)*). For example, this power could enable the Treasury to grant immunity: (a) to an operator of a recognised payment system when the direction is given by the Bank for a purpose other than that of resolving or reducing a threat to the stability of the UK financial system; or (b) to a person who provides services to an operator of a recognised payment system where a direction is given for the purposes of resolving or reducing a threat to the stability of the UK financial system and action is required

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on the part of the operator which involves the cooperation of the service provider or action on the part of that person. The effect of this provision is essentially to continue the Treasury's existing ability to confer immunity from liability in damages in a wider range of cases.

521. *Subsection (4)* makes amendments to section 186 (procedure to be followed by the Treasury before making a recognition order) such that the Treasury are required to consult the FCA before making a recognition order in respect of a payment system the operator of which is, or has applied to become, a recognised investment exchange under Part 18 of FSMA or has, or has applied for, a permission to conduct regulated activities under Part 4A of FSMA and the PRA where the person concerned has applied for, or has, permission to carry on any regulated activities specified as PRA-authorized activities. *Subsections (5), (6) and (10)* make other similar consequential changes.

522. *Subsection (7)* inserts a *new section 202A* into the Banking Act which enables the Bank to apply to the court for an injunction in certain cases, for example, where there is a reasonable likelihood that there will be a compliance failure as defined in section 196 of the Act (compliance failure).

523. *Subsection (8)* inserts *new sections 203A and 203B* which impose certain requirements on the Bank in relation to the discharge of its functions in connection with recognised payment systems. In particular, *new section 203A* requires the Bank to maintain satisfactory arrangements for recording decisions made in the exercise of certain of its functions under Part 5 of the Banking Act; *new section 203B* requires the Bank to report to the Treasury at least once a year in relation to, among other things, the discharge of its functions under Part 5.

524. *Subsection (9)* inserts a *new subsection (1A)* into section 204 (information) which provides that the Bank can require the operator of a recognised payment system to provide information in connection with any other of the Bank's functions undertaken in pursuance of its financial stability objective. The Bank can already require persons to provide information in connection with its functions under Part 5.

Clause 89: International obligations

525. *Clause 89* amends the Banking Act 2009 by inserting a *new section 206B*. This new section enables the Treasury to direct the Bank in exercising its powers under Part 5 of that Act (inter-bank payment systems) not to take proposed action if it appears to the Treasury that action would be incompatible with Community obligations or any other international obligations of the United Kingdom. The Treasury may also direct the Bank to take action which it has power to take where that action is required for the purpose of implementing any such obligation. This power is similar to the power in section 410 of FSMA (international obligations).

Further amendments

Clause 90 and Schedule 17: Amendments relating to new regulators

526. *Clause 90* introduces *Schedule 17* which makes a number of consequential amendments to the Banking Act 2009 as a result of the conferral of the FSA's functions on the FCA and the PRA.

527. *Schedule 17* to the Bill is divided into four Parts. *Part 1* deals with the amendments to Part 1 of the Banking Act (special resolution regime), *Part 2* deals with the amendments to Part 2 of the Act (the bank insolvency procedure), *Part 3* deals with the amendments to Part 3 of the Act (the bank administration procedure) and *Part 4* deals with the amendments to Parts 4 to 6 of the Act (financial services compensation scheme, inter-bank payment systems, and banknotes: Scotland and Northern Ireland). All section references below are to the Banking Act 2009 unless otherwise stated.

528. *Paragraph 2* amends section 1 and makes clear that the FCA and the PRA have a role in the operation of the special resolution regime and adds an additional entry into the table beneath that section (which describes the provisions in Part 1 of the Banking Act) to include the new section (inserted by *paragraph 28*) which modifies the application of Part 1 in relation to any institutions which fall within the definition of "bank" (in section 2 of the Banking Act) which are regulated only by the FCA.

529. *Paragraph 3* replaces the reference to "Part 4" of FSMA in section 2 (the definition of "bank") to "Part 4A".

530. *Paragraph 4* omits the definition of the FSA in section 3 (interpretation) and inserts a definition of the FCA and the PRA.

531. *Paragraph 5* amends section 4 (special resolution objectives) such that the FCA and PRA are specified as "relevant authorities" for the purposes of subsection (2) of that section and are required, therefore, to have regard to the special resolution objectives specified in that section when considering the use of the stabilisation powers (the property and share transfer powers), the bank insolvency procedure and the bank administration procedure.

532. *Paragraph 6* amends section 5(5) (code of practice about the use of the stabilisation powers, the bank insolvency procedure and the bank administration procedure) such that the FCA and the PRA are specified as "relevant authorities" for the purposes of subsection (4) which requires an authority specified as a "relevant authority" to have regard to the code, for example, in deciding between different resolution measures. *Paragraph 7* amends section 6

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(code of practice: procedure) such that the Treasury is required to consult the FCA and the PRA before issuing any new versions of the code of practices issued under section 5.

533. *Paragraph 8* amends section 7 (general conditions) which sets out the general conditions which must be satisfied before a stabilisation power may be exercised. The general conditions are referred to in sections 8 (private sector purchaser and bridge bank) and 9 (specified conditions; temporary public ownership). These conditions are that: (1) the bank concerned is failing, or is likely to fail to satisfy, the threshold conditions for authorisation and (2) that (ignoring the stabilisation powers) it is not reasonably likely that action will be taken by or in relation to the bank to enable the bank to satisfy the threshold conditions. In making this determination the regulator must disregard any financial assistance provided by the Treasury or the Bank of England (ignoring any ordinary market assistance offered on the Bank's usual terms) (subsection (4)) and must consult the Bank of England and the Treasury before determining whether condition 2 has been satisfied. The effect of the amendments to this section are that the PRA will be responsible for determining whether the general conditions are satisfied in relation to a bank which is a PRA-authorized person. In particular, the reference to "the threshold conditions" in condition 1 is defined by the *new subsection (4A)* (inserted by *sub-paragraph (5)*) will be defined as the threshold conditions for which the PRA is treated as responsible under *new section 55B(2)* of the FSMA (inserted by *clause 9(2)*). Before determining whether or not condition 2 is satisfied the PRA will be required to consult the FCA (*sub-paragraph (6)*).

534. *Paragraphs 9 and 10* amend sections 8 (specific conditions: private sector purchaser and bridge bank) and 9 (specific conditions: temporary public ownership) such that the Bank and the Treasury (as the case may be) must consult the FCA and the PRA before determining whether the relevant specific conditions are satisfied before a stabilisation power (such as an exercise of a transfer power to transfer part of the business of a failing bank to a commercial purchaser) may be deployed in relation to a bank in relation to which the PRA (or the FCA as the case may be) has determined that the general conditions are satisfied under section 7.

535. *Paragraph 11* amends section 10(3) (membership of the Banking Liaison Panel established to advise the Treasury about, among other things, the code of practice under section 5) such that the Treasury must ensure that the Panel also includes a member appointed by the FCA and the PRA.

536. *Paragraphs 12 to 25* omit the references to the FSA in various sections of Part 1 and replace them with references to the FCA and the PRA with the general effect of requiring the Bank (or the Treasury as the case may be) to consult those regulators before making any form of transfer instrument (or order as the case may be).

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537. *Paragraph 26* replaces the reference to Part 4 of the FSMA in section 57(4)(a) (the valuation principles which the Treasury can require or permit an independent valuer appointed to assess the compensation payable in relation to an exercise of the transfer powers to take into account in making his or her assessment) with a reference to Part 4A of that Act.

538. *Paragraph 27* amends section 82 (power for the Treasury to take a parent undertaking of a bank into temporary public ownership in certain conditions) to replace the reference to the FSA in section 82(2) with a reference to the PRA (which is consequential on the changes made to section 7 (see the note on *paragraph 8* above)) and to replace the reference to the FSA in subsection (5) with a reference to the FCA and the PRA such that the Treasury must consult with the FCA, the PRA and the Bank before determining whether it is necessary to take action in respect of the holding company.

539. *Paragraph 28* inserts *new section 83A* into the Banking Act which applies Part 1 in relation to any entities which fall within the definition of “bank” in section 2 and are not PRA-authorized persons within the meaning of the FSMA (i.e. are regulated only by the FCA because they do not carry on any regulated activities which have been specified as PRA-regulated activities by way of an order under *new section 22A* of the FSMA inserted by *clause 7*). This is a “future-proofing” arrangement as it is envisaged at the time of going to print that the regulated activity of accepting deposits will be specified as a “PRA-regulated activity” and therefore all firms falling within the definition of “bank” in section 2 will be PRA-authorized persons.

540. *Paragraphs 29 to 45* make amendments to Part 2 of the Banking Act (the bank insolvency procedure), which makes provision for a special insolvency procedure which can be used as an alternative to an exercise of the stabilisation powers or a “normal” insolvency procedure. The purpose of the bank insolvency procedure is to facilitate the rapid payout by the Financial Services Compensation Scheme¹ (“FSCS”) of payments to eligible depositors or the transfer of such accounts to a viable bank. To achieve this, a person appointed as a bank liquidator under Part 2 has two objectives: Objective 1 is to work with the FSCS so as to ensure that as soon as is reasonably practicable each eligible depositor has the relevant account transferred to another financial institution or receives payment from, or on behalf of, the FSCS; Objective 2 is to wind up the affairs of the bank so as to achieve the best result for the bank’s creditors as a whole (section 99). Objective 1 takes precedence over Objective 2

¹ The scheme established in accordance with Part 15 of the FSMA to compensate customers of authorised financial services firms when those firms are in default for the purposes of the scheme (i.e. when a firm is unable, or likely to become unable, to satisfy the claims against it).

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until such time as the liquidation committee (which must consist initially of members appointed by the Bank, the FSA and the FSCS) has passed a resolution resolving that Objective 1 has been achieved (section 100(5)). This is an important measure as it means that the insolvency practitioner is obliged to prioritise the interests of eligible depositors above those of the general body of creditors thereby helping to ensure that the best outcome for depositors is achieved as quickly as possible following appointment.

541. The most notable amendments made by these paragraphs concern the changes to section 95 (application to court for an order placing a bank into the bank insolvency procedure), section 96 (grounds for applying for an order) and section 100 (liquidation committee). In summary, in relation to a bank which is a PRA-authorized person and in relation to which the conditions specified in section 7 have been determined to be satisfied, the PRA is to inherit the FSA's power to apply to the court for a bank insolvency order. The Bank and the PRA may only apply for such an order where certain conditions are satisfied (section 96(2) and (3)); in the case of an application by the PRA, these conditions are that (i) the Bank has given its consent and the PRA is satisfied that the conditions referred to in section 7 have been met, the bank has eligible depositors and that the winding up of the bank would be in the public interest or would be fair (section 96(3)). *Paragraph 36* amends section 100 such that the liquidation committee must initially include an individual nominated by each of the FCA and the PRA.

542. *Paragraph 45* applies with modifications the provisions of Part 2 in relation to banks which are regulated only by the FCA.

543. *Paragraphs 46 to 51* amend Part 3 of the Banking Act (bank administration procedure (see the notes in relation to *clause 87* (state aid)). In particular, paragraphs *47 and 48* amend sections 147 (administrator's proposals) and 153 (successful rescue) such that copies of certain notifications given by bank administrators must be sent to the PRA. *Paragraph 50* inserts *new section 157A* which applies Part 3 (with certain modifications) in relation to banks which are regulated only by the FCA.

544. *Paragraphs 52 to 62* amend various provisions in Parts 4 to 6 of the Banking Act. In particular, *paragraph 55* amends section 232 (definitions for the purposes of investment bank insolvency regulations made under section 233) so as to enable the Treasury, by order, to amend the definition of "investment services" from time to time (and *paragraph 57* makes consequential changes in relation to section 235 (regulations: procedure)).

545. *Paragraph 58* replaces the reference to the FSA in section 246 (information disclosure by the Bank) with a reference to the PRA and the FCA such that the Bank may disclose information to either or both of the new regulators which the Bank considers is relevant to the

stability of individual financial institutions or one or more aspects of the financial systems of the UK.

546. *Paragraph 60* amends section 250 (duty to collect information relevant to the stability of individual financial institutions, or one or more aspects of the UK financial system) such that the PRA will be subject to this duty.

PART 8 – MISCELLANEOUS

Consumer credit

Clause 91: Power to make further provision about regulation of consumer credit

547. The amendments to section 21 and Schedule 2 made by *clause 6* will enable the Treasury to make an order the effect of which would be that the provision of credit would become a regulated activity and therefore within the scope of FSMA. *Clause 91* confers a power on the Treasury to make further provision by order about the regulation of consumer credit. It is intended to be used as part of a package of measures to provide for the transfer of responsibility for the regulation of consumer credit from the Office of Fair trading (OFT) to the FCA.

548. *Subsection (1)* sets out the circumstances in which the power can be exercised. The power can only be used in circumstances where the Treasury have made an order under section 22 of FSMA after the passing of the Bill which has the effect that an activity (a “transferred activity”) ceases to be an activity for which a licence under section 21 of the CCA is required, or would have been required but for a relevant exemption, and becomes a regulated activity for the purposes of FSMA.

549. *Subsection (2)* sets out what the Treasury may use the order to do, including:

- to transfer OFT functions under any provision of the CCA to the FCA, for example all or some of the general functions of the OFT set out in section 1 of the CCA (*paragraph (a)*);
- to apply the enforcement powers of the FCA under FSMA (for example, section 205 (public censure) and section 206 (financial penalties)) to contraventions of the CCA (*paragraph (b)*). This could be used to enable the FCA to impose unlimited fines on firms for breach of a requirement imposed by or under a specified provision of the CCA;

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- to require the FCA to issue a statement of policy in relation to the exercise of powers conferred on it by virtue of *paragraph (b)*. This could be used to ensure that the FCA's enforcement policy is clear so that firms will know what powers and sanctions the FCA are likely to use;
- to provide that a person may not be convicted of an offence under the CCA in relation to an act or omission which has already been the subject of sanction under FSMA (*paragraph (d)*). This could be used to ensure that a person cannot receive a sanction twice (once under the CCA and once under FSMA) in relation to the same action;
- to transfer to the Treasury any functions under CCA previously exercisable by the Secretary of State (*paragraph (e)*); and
- to enable local weights and measures authorities to institute proceedings in England and Wales for a relevant offence without obtaining the consent of the Director of Public Prosecutions (*paragraph (g)*).

550. *Subsection (4)* confers on the Treasury a power, having regard to FCA's operational objectives, to repeal or exclude the application of any provision of the CCA in relation to a transferred activity.

551. *Subsection (5)* provides for orders under subsection (2) to make such consequential provision as the Treasury consider appropriate, and to amend any enactment, including any provision of, or made under, the Bill.

Amendments to the Companies Act 1989

Clause 92: Amendments to the Companies Act 1989

552. *Clause 92* amends section 166 of the Companies Act 1989 (power of Secretary of State to give directions to persons specified as recognised investment exchanges or recognised clearing houses under Part 18 of FSMA).

553. *Subsections (2) and (3)* replace references to the "Authority" (i.e. the FSA) in section 166 with references to "the appropriate regulator", which is defined in *new subsection (9)* as the FCA in the case of recognised investment exchanges and the Bank in the case of recognised clearing houses (*subsection (8)*). These amendments are consequential on the amendments to Part 18 of FSMA (see, in particular, the amendments made by *clause 27*).

554. *Subsection (4)* amends subsection (3) so as to make provision for two new grounds on which a direction may be given to a recognised body under subsection (2). Such directions

may require the recognised body concerned to take action or to refrain from taking action under its default rules and may only be given where the relevant regulator is satisfied that it is necessary to give the direction for the purposes of any of the grounds specified in subsection (3) following consultation with the recognised body concerned. These changes will provide additional flexibility for the relevant regulators to take action to address risks to financial stability or to help facilitate a proposed, possible, or actual exercise of a power under section 1 of the Banking Act 2009 (special resolution regime).

555. Section 166 confers a power of direction which applies where the exchange or clearing house has taken action under its default rules (without being directed to do so under subsection (2)) or has taken action following such a direction. Subsection (7) provides for an appropriate regulator to direct that the exchange or clearing house do or refrain from doing things it has power to do under its default rules. *Subsections (5) and (6)*, respectively, make amendments to subsection (7) and insert *new subsections (7A) and (7B)*. The general effect of these amendments is to remove, in certain circumstances, the restriction that applies to the exercise of the power of direction in subsection (7) (that the direction will not adversely affect default proceedings).

Settlement systems

Clause 93: Evidencing and transfer of title to securities without written instrument

556. Chapter 2 of Part 21 of the Companies Act 2006 (evidencing and transfer of title to securities without written instrument) confers on the Treasury and the Secretary of State the power to make (either on a joint or concurrent basis) regulations concerning: (a) the procedures for recording and transferring title to “securities” (defined in section 783); and (b) the regulation of those procedures and the persons responsible for, or involved in the operation of relevant systems (section 785(2)). The Uncertificated Securities Regulations 2001, S.I. 2001/3755 (the “Regulations”) were made under this power.

557. The Regulations enable title to securities to be transferred without a written instrument (that is, in “dematerialised” or “uncertificated” form). In addition, the Regulations set out the regulatory framework for the operators of settlement systems which provide for the electronic transfer of title (see Part 2 (the operator) and Schedule 1 to the Regulations (requirements for approval of a person as an operator)).

558. Currently, certain functions (for example, concerning the approval of a person as an operator) are conferred on the Treasury under the Regulations. However, the Treasury has exercised its power under regulation 11 (delegation of Treasury functions) to delegate to the Authority (defined as the FSA) all of the functions conferred by Part 2 of the regulations (for

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example, responsibility for approving systems as “relevant systems”) save for those specified in regulation 12 (international obligations).

559. As part of the regulatory reforms, it is intended that the Bank is to assume the FSA’s functions under the Regulations. This is to be achieved by making new regulations conferring the relevant functions directly on the Bank. In order to facilitate this, minor amendments to the enabling power in section 785 are needed. *Clause 93* inserts a *new subsection (7)* into section 785 of the Companies Act 2006 in order to enable provision to be made in the regulations for the purposes of conferring functions directly on the Bank (or any other person), and ensuring that the Bank could be given the power to make guidance or issue codes of practice or rules in relation to any provision made by the regulations. In addition, a *new subsection (8)* is inserted which will enable provision to be made in the regulations which confers immunity from liability in damages in specified cases (for example, in cases in which action is taken in the interests of addressing a threat to financial stability).

Director of Savings

Clause 94: Provision of services by Director of Savings

560. *Clause 94* enables National Savings and Investments (the Director of Savings) to enter into arrangements with other public bodies for it or persons authorised by it to provide services to those bodies.

PART 9 - GENERAL

Further amendments and repeals

Clause 95 and Schedules 18 and 19: Further minor and consequential amendments and repeals

561. *Clause 95 and Schedules 18 and 19* make amendments and repeals consequential on the provisions of the Bill.

Orders

Clause 96: Orders: general

562. *Clause 96* provides that the Treasury is to exercise their order-making powers in the Bill by statutory instrument.

Clause 97: Orders: Parliamentary control

563. *Clause 97* sets out the Parliamentary procedure that is to apply to statutory instruments made under the Bill.

Interpretation

Clause 98: Interpretation

564. *Clause 98* sets out definitions of some terms used in the Bill.

Consequential and transitional provisions

Clause 99: Power to make further consequential amendments etc.

565. *Clause 99* provides for amendments to be made to legislation which are consequential on the provisions of the Bill, or on provisions made under it, by order made by the Treasury or the Secretary of State. The order may amend, repeal, revoke or apply legislation with modifications where the Secretary of State considers it necessary or expedient to do so. Orders may only amend legislation passed or made before the passing of Bill, or on or before the last day of the Parliamentary Session in which the Bill is passed.

Clause 100 and Schedules 20 and 21: Transitional provisions and savings

566. *Clause 100* introduces *Schedules 20 and 21* and provides for transitional and saving provisions to be made by the Treasury by order. For example, an order might make provision for the continuation of legal or disciplinary proceedings instituted by the FSA and which are in train at the time that the Bill comes into effect and the FCA and PRA take up those functions.

567. *Schedule 20* makes transitional provision in relation to various matters including the interpretation of references to the FSA in documents such as contracts, and the ability for the FCA and the PRA to rely on consultation undertaken by the FSA, the Bank or both before commencement of the relevant provisions in the Bill or before Royal Assent, for example consultation on rules or consultation on a statement of policy in connection with the first order made under section 22A to designate activities as PRA-regulated activities.

568. *Part 1 of Schedule 21* provides that the FSA must make one or more transfer schemes for the transfer of property, rights and liabilities to the PRA and the Bank, subject to the Treasury's approval of the scheme. An FSA scheme could, for example, provide that contractual rights currently exercisable by the FSA are to be exercisable by each of the FCA and the PRA. Where a scheme provides for the transfer of staff, it must provide for the Transfer of Undertakings (Protection of Employment) Regulations 2006 to apply as if the transfer were a relevant transfer for the purposes of those Regulations; and the FSA scheme could provide for employees to transfer from the FSA to the Bank in connection with functions which transfer from the FSA to the PRA. A transfer scheme could make provision in relation to functions transferred by the Bill or under it, such as by an order under *clause 47* (mutual societies).

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569. *Part 2 of Schedule 21* provides that if the Treasury makes an order specifying that an activity or activities regulated under the Consumer Credit Act 1974 are to instead become regulated activities for the purposes of FSMA, the OFT must make one or more transfer schemes for the transfer of property, rights and liabilities to the FCA. The approval of both the Treasury and the Secretary of State is needed for an OFT scheme. As with an FSA scheme, an OFT scheme could be used to transfer contractual rights and, if it provides for the transfer of staff, must provide for the Transfer of Undertakings (Protection of Employment) Regulations 2006 to apply as if the transfer were a relevant transfer for the purposes of those Regulations.

Final provisions

Clause 101: Financial provision

570. *Clause 101* contains financial provisions.

Clause 102: Extent

571. The Bill extends to the whole of the United Kingdom.

Clause 103: Commencement

572. The only provisions of the Bill that are to come into force on the day on which the Bill receives Royal Assent are those dealing with interpretation, extent, commencement and the short title to the Bill. Clause 94 (provision of services by the Director of Savings) comes into force two months after that day. All the other provisions of the Bill will only come into force on the day or days appointed by the Treasury by order.

Clause 104: Short title

573. The short title of the Bill when enacted will be the Financial Services Act 2012.

FINANCIAL EFFECTS

574. There will be no significant effects on spending by Government departments met from money voted by Parliament. The effects on expenses incurred by the FSA, Bank of England and, when they are established, the FCA and PRA are considered in the impact assessment.

PUBLIC SECTOR MANPOWER

575. The Bill will have no impact on manpower in Government departments.

SUMMARY OF THE IMPACT ASSESSMENT

576. The purpose of this Bill is to restructure the tripartite system of financial regulation. The impact assessment considers 2 options:

(a) Do nothing. This would leave the regulatory system unchanged and not address the failings that were identified;

(b) Two regulator option. This is the preferred option. It requires the creation of two new regulators (the PRA – concentrating on the prudential regulation of deposit-takers, insurers and investment firms which manage significant risks on their balance sheets – and the FCA concentrating on regulating the conduct of all firms in their dealing with other persons and regulating market conduct more generally). The Bank of England takes responsibility for the regulation of systemically important infrastructure. There will also be a Financial Policy Committee (FPC) which will have responsibility for macro-prudential regulation.

577. The preferred option is the most cost-effective way of meeting the Government's objectives. There will be transitional costs for the existing authorities and the new regulators, and for regulated firms, particularly for those firms (about 1,700) which will be regulated by both the FCA and PRA. There are likely to be some extra ongoing administrative costs for the new regulators (in comparison with the do nothing option i.e. the continuation of the present system). Costs cannot be estimated precisely. The benefits (for which only illustrative estimates can be given in the impact assessment) should exceed the cost in the preferred option.

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

578. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions in the Bill with the Convention rights (as defined by section 1 of that Act).

579. Lord Sassoon, Commercial Secretary to the Treasury, has made the following statement: "In my view the provisions of the Financial Services Bill are compatible with the Convention rights."

580. The vast majority of the provisions of the Bill do not give rise to any new issues as regards the compatibility of the powers available under FSMA with the Convention rights (as defined in section 1 of the Human Rights Act 1998). However, relevant amendments are discussed below.

New powers to take disciplinary and supervisory action

581. The new powers for the FCA to take disciplinary and supervisory action in relation to sponsors and primary information providers (*clauses 16 and 17*); for the Bank and the FCA to take disciplinary action in relation to recognised clearing houses and recognised investment exchanges (*clause 30*); and for the FCA, the PRA and the Bank (as the case may be) to take disciplinary action in relation to auditors and actuaries of certain persons (*clause 39* which introduces *Schedule 13* (see in particular paragraph 6 of that Schedule); see also paragraphs 18 to 21 of new Schedule 17A inserted by Schedule 7 to the Bill) will or may engage Article 1 Protocol 1 (“A1P1”), Article 6 and Article 8 of the Convention.

582. A1P1 specifies that “every natural or legal person is entitled to the peaceful enjoyment of his possessions” and “no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law...” Where A1P1 is engaged, the Government considers that an interference in property rights is justifiable as a means of securing compliance with regulatory requirements and ensuring that, for example, the FCA can take any necessary action to maintain market integrity and protect investors from harm (both of which concern the operational objectives of the FCA).

583. Article 6 specifies, among other things: “*In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*”. An exercise of the new disciplinary and supervisory powers referred to above is likely to engage Article 6(1) as it is, or is likely to, amount to a determination of a civil right or obligation (Le Compte, Van Leuven and De Meyere v Belgium (1982) 4 E.H.R.R. 1, ECHR). The Government considers that the arrangements under the Bill are adequate to secure compliance with Article 6. In particular, the Government notes that a person subject to such a decision has the right to refer the matter to the Upper Tribunal.

584. Article 8 may be engaged in relation to a decision to issue a public censure in relation to a recognised body, a sponsor, a PIP or an auditor or actuary. Article 8 specifies that “*everyone has the right to respect for his private and family life, his home and his correspondence*.” Interferences in this right may be justified, for example, by what is in the interests of the economic well-being of the country (Hatton v UK (2003) 37 E.H.R.R. 28, ECHR). In this case the Government considers that interferences can be justified by reference to the need to ensure that the relevant authority can take proportionate action for the purposes of securing compliance with regulatory requirements imposed in pursuance of legitimate public policy aims.

Changes to the arrangements for challenging “supervisory” decisions taken by the PRA and the FCA

585. In the context of the shift towards a more judgment-led approach to regulation the Government has decided to include in the Bill measures which modify the action that the Tribunal may take where a reference in relation to “supervisory” decision is successful. The effect of the Bill is that, in such cases, the Tribunal must remit the matter to the decision maker with a direction to reconsider the matter in accordance with the findings of the Tribunal. Except in relation to disciplinary references, the Tribunal may not itself determine what is the appropriate action for the decision maker to take. No change is being made to the scope of review by the Tribunal, including the grounds on which a challenge to a supervisory action may be brought (see *clause 21*).

586. The Government considers that the right to refer a “supervisory” decision to the Tribunal complies with Article 6 notwithstanding the limitation introduced by the *new section 133(6A)* (inserted by *clause 21*). The Government notes that the Tribunal will remain able to determine disputes of fact, consider questions of law (for example, whether the relevant authority has interpreted accurately the scope of its powers), and assess whether the authority has acted reasonably and proportionately. For completeness, the Government is not proposing to make any changes to the existing arrangements for the consideration of decisions concerning “disciplinary” measures referred to in the *new section 133(7A)*.

Powers for the FCA, the PRA and the Bank in relation to parent undertakings of authorised persons, recognised investment exchanges and recognised clearing houses (clause 25 and see also paragraph 17 of the new Schedule 17A inserted by Schedule 7 to the Bill)

587. *Clause 25* amends the FSMA to provide for the FCA and the PRA to have additional powers (in particular, a power of direction and a power to make rules imposing requirements to disclose to the relevant regulator information or documents) in relation to parent undertakings of PRA-authorized persons and (in the case of the FCA) powers in relation to parent undertakings of recognised investment exchanges. These powers are also available to the Bank in relation to parent undertakings of recognised clearing houses (*paragraph 17 of new Schedule 17* to the FSMA). Powers are also conferred on the regulators enabling each regulator to impose a financial penalty or issue a public censure in relation to non-compliance with a direction or provision of rules made under *new section 192J* (see *new section 192K*).

588. An exercise of the power to give a direction may engage A1P1 and, in limited circumstances, may engage Article 8; a dispute about the exercise of the power of direction is likely to engage Article 6. An exercise of the power to take disciplinary action is likely to engage A1P1 and Article 6 and may, in limited circumstances, engage Article 8.

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589. The Government consider that the proposed power of direction is capable of being exercised by the regulators in a manner which is compatible with A1P1 and Article 8. In addition to being satisfied that the conditions outlined above are met, the regulator must have regard to the desirability where practicable of exercising its powers in relation to firm in question rather than the parent undertaking (see new section 192C(5)(a)). The regulator is also required to have regard to the principle that a burden or restriction which is imposed on a person must be proportionate to the resulting benefits (see new section 192C(5)(b)). Each regulator is also required to prepare and consult on a statement of policy as to its exercise of the power of direction (sections 192H and 192I as applied to the Bank by paragraph 17(1)(e) of Schedule 17A)) and of course the Bank, the FCA, the PRA will be subject to section 6 of the Human Rights Act 1998.

590. For the reasons given above in relation to the new disciplinary and supervisory powers, the Government consider that the powers to issue a censure or impose a financial penalty are capable of being exercised in a manner that is compatible with the Convention rights.

Power to make rules banning products (clause 22 (new section 137C))

591. A ban on the provision of a financial services “product”, or the imposition of a restriction in exercise of the powers conferred by the new section 137C has the potential to interfere with a person’s peaceful enjoyment of their “possessions” and is likely therefore to engage A1P1. The Government considers that an interference in a person’s A1P1 rights is justifiable by reference to the need to ensure that the FCA can take appropriate steps to protect consumers. The Government also notes that an exercise of the powers may be referred to the court for judicial review which provides an appropriate mechanism for challenging an exercise of the FCA’s rule-making powers.

Power to make public the fact that a warning notice has been issued (clause 34 and paragraph 24 of Schedule 9)

592. A decision to exercise the new power to publish the fact that a warning notice, in relation to a disciplinary measure, has been issued is likely to engage Article 8. The Government considers that the measures included in the Bill, in particular the requirement for the relevant authority to consult the person concerned before publishing information about the notice, will ensure that full account is taken of the impact of publication on the person concerned.

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Expansion of the circumstances in which information may be required to be produced (paragraphs 11 and 12 of the new Schedule 17A to FSMA as inserted by clause 27(2)), and the duty on the PRA to provide information to the Bank under the new section 354C (as inserted by paragraph 24 of Schedule 12)

593. A number of provisions of the Bill make changes to the powers available to the PRA, the FCA and the Bank to require a person to produce information. These powers either engage Article 8 or may engage that Article. The Government considers that any interference in a person's Article 8 right arising as a result of an exercise of these powers is justifiable by reference to the need to ensure that the regulators have the necessary information to perform effectively their functions in pursuance of broader public policy aims.

Amendments to the Banking Act 2009 (clauses 84 and 87)

594. *Clause 84* expands the circumstances in which the "reverse transfer" powers are available to the Bank and Treasury in order provide flexibility for the authorities to transfer business acquired by a commercial purchaser back to the original transferor.

595. A1P1 will be engaged in relation to an exercise of the reverse transfer powers, noting that the term "possessions" has been found by the ECtHR to have a broad meaning and shares and contractual rights have been found to be "possessions" for the purposes of A1P1 (Bramelid & Malstrom v Sweden (1982) 29 DR 64 and Bäck v Finland ECtHR (2004)).

596. In relation to A1P1 it is notable that a reverse transfer can only be made from a commercial purchaser where that person has granted their consent in writing (see, for example, new section 26A(4)). As such the transfer of shares or business from the relevant person should not constitute an interference in the A1P1 rights of the original transferee. However, the exercise of powers may interfere in the rights of other persons, for example counterparties whose default rights are "turned off" as a result of provision in the transfer instrument or order.

597. Although the Government consider that the new powers are capable of being used in a way that is compatible with the Convention, the amendments to section 53 of the Act (which specify that the Treasury may make a compensation scheme order (as defined in 49(2) of the Act) and/or a third party compensation order (as defined in section 49(4) of the Act) following an exercise of the onward and reverse transfer powers) will enable the Treasury to put in place arrangements for the assessment of compensation payable following an exercise of the new reverse transfer powers, should they consider it necessary in the circumstances.

598. Finally, consistent with the arrangements in relation to the other transfer powers under Part 1 (i.e. an exercise of a discretionary power of an administrative authority), anyone affected by an exercise of the new transfer powers (e.g. a creditors whose default rights are

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“turned off”) may apply to the court for permission to challenge the decision to make the transfer instrument or order by way of judicial review. The Treasury consider that these arrangements are sufficient for the purposes of Article 6.

599. *Clause 87* inserts a new section 145A into Part 3 of the Act which confers a power on the Treasury to issue directions to a person appointed as a bank administrator for the purposes of ensuring compliance with any undertakings, commitments or conditions given or imposed in relation to the consideration and approval by the European Commission of State aid given in connection with an exercise of transfer powers under Part 1 of the Act. The power of direction may engage A1P1 (for example, in relation to contractual rights of the failed bank or its creditors) and any dispute regarding a decision to exercise the power of direction will engage Article 6. The Government consider that the power of direction is capable of being used in a way which is compatible with A1P1 and note that anyone affected by an exercise of the power would be able to apply to the court for permission for the judicial review of the decision (a procedure which we regard as adequate for the purposes of Article 6). However, the Government also note that where a partial property transfer has been effected the Treasury are required to put in place compensation arrangements (see sections 50 and 52 to the Act). In particular, the Treasury are required to put in place what are known as the “no creditor worse off” arrangements in relation to any third parties affected by the transfer.² Therefore even if the compliance with a direction given by the Treasury lead to the diminution in the value of business left behind in the residual company in such a way which prejudiced the interests of its creditors, the compensation arrangements are flexible enough to take account of this and for any necessary compensation to be paid, which would secure compatibility with A1P1.

Power to apply disciplinary powers under FSMA to breaches of the Consumer Credit Act 1974 (clause 91(2)(b))

600. *Clause 91(2)(b)* enables provisions of FSMA which relate to the powers of the FCA to impose sanctions in relation to breaches of requirements imposed by or under FSMA (for example, section 205 (public censure) and section 206 (financial penalties)) to apply in relation to contraventions of the CCA.

601. The application of these powers would supplement the enforcement provisions set out in the CCA including in certain cases criminal sanctions (see, for example, sections 45 and 47). This would provide additional flexibility for the FCA to impose civil sanctions where appropriate or to take action in relation to a contravention using powers under the CCA.

² See the Banking Act 2009 (Third Party Compensation etc) Regulations 2009 (S.I. 2009/319).

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602. The Treasury have considered Article 4 of Protocol 7 of the ECHR which states at paragraph (1) that no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. The Treasury take the view that there is no inherent difficulty in making available the full range of criminal and civil penalties for a particular contravention of the CCA. Indeed, subsection (2) of *clause 91* enables the Treasury to put in place a number of safeguards to ensure that the availability of any additional powers is fair and proportionate, and the FCA will be required to issue a statement of policy in relation to the exercise of powers conferred on it by virtue of an order made under this provision.

Power for the Bank and the FCA to issue directions to recognised clearing houses and recognised investment exchanges (clause 92(4))

603. *Clause 92* amends section 166 of the Companies Act 1989 (power of Secretary of State to give directions to persons specified as recognised investment exchanges or recognised clearing houses under Part 18 of FSMA) to expand the range of circumstances in which that power is available.

604. It is possible that the power of direction may engage A1P1 and any dispute regarding a decision to *exercise* the power of direction will engage Article 6. However the Treasury are satisfied that, as per the existing arrangements under the Companies Act 1989 it is possible for the power to be exercised in a way which is compatible with the Convention.

605. In particular, the Government note that before exercising the power of direction conferred by section 166(2) (as amended) the Bank and the FCA (as the case may be) must consult the recognised body concerned, thereby providing an opportunity for a person to make representations in relation to the proposed exercise of the power. Any person affected by an exercise of the power (which would constitute an exercise of administrative discretion) may apply to the court for permission for judicial review of the decision. Examples of cases in which the ECtHR has found judicial review to be the appropriate standard of review in relation to exercises of regulatory decisions include Kingsley v UK (Application no. 35605/97, 28 May 2002) (decision to revoke a person's licence to carry on regulated gaming business) and X v UK (Application no. 28530/95, 19 January 1998) (decision to issue a notice of objection which had the effect of preventing a person from taking up a post as chief executive of an insurance company on the basis that the person was not considered to be fit and proper to take up the post).

COMMENCEMENT

606. The only provisions of the Bill that are to come into force on the day on which the Bill receives Royal Assent are those dealing with interpretation, extent, commencement and the

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short title to the Bill. Clause 94 (provision of services by the Director of Savings) comes into force two months after that day. All the other provisions of the Bill will come into force on the day or days appointed by the Treasury by order.

GLOSSARY OF TERMS AND EXPRESSIONS

authorised person	<p>Section 31 of FSMA (as amended by the Bill) defines an authorised person as:</p> <ul style="list-style-type: none"> • a person who has permission under Part 4A to carry on one or more regulated activities • an EEA firm qualifying for authorisation under Schedule 3 • a Treaty firm qualifying for authorisation under Schedule 4 • a person who is otherwise authorised by or under FSMA (for example, an operator, trustee or depositary or a recognised collective investment scheme; see paragraph 1(1) of Schedule 5 to FSMA)
the Bank	The Bank of England
the BoE Act	The Bank of England Act 1998
EEA firm	<p>Paragraph 5 of Schedule 3 to FSMA defines as EEA firm as:</p> <ul style="list-style-type: none"> • an investment firm as defined in the Markets in Financial Instruments Directive (Directive 2004/39/EC) • a credit institution as defined in the Banking Consolidation Directive (Directive 2006/48/EC) • a financial institution as defined in the Banking Consolidation Directive (Directive 2006/48/EC) which is a subsidiary of a kind mentioned in Article 24 of that Directive • an undertaking pursuing the activity of direct insurance as defined in the Life Assurance Consolidation Directive

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	<p>(Directive 2002/83/EC) or the First Non-Life Insurance Directive (Directive 73/239/EC) which has received authorisation from its home state regulator</p> <ul style="list-style-type: none"> • an undertaking pursuing the activity of reinsurance as defined in the Reinsurance Directive (Directive 2005/68/EC) which has received authorisation from its home state regulator • an insurance intermediary as defined in the Insurance Mediation Directive (Directive 2002/92/EC) which is registered with its home state regulator • a management company as defined in the UCITS Directive (Directive 2009/65/EC) which is registered by its home state regulator <p>An EEA firm must not have its head office (or, in the case of an insurance intermediary, its registered office) in the United Kingdom.</p> <p>Paragraphs 12 to 18 of Schedule 3 to FSMA set out the circumstances in which an EEA firm is authorised to establish a branch or provide services in the UK.</p>
FCA	The Financial Conduct Authority
FOS	The Financial Ombudsman Service
FPC	The Financial Policy Committee of the Bank of England
FSA	The Financial Services Authority
FSCS	The Financial Services Compensation Scheme
FSMA	The Financial Services and Markets Act 2000
PRA	The Prudential Regulation Authority

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PRA-authorised person	See new section 2B(5) (clause 5): a PRA-authorised person is an authorised person who has permission to carry on regulated activities which consist of or include one or more PRA-regulated activities (i.e. regulated activities specified in an order made by the Treasury under new section 22A)
regulated activity	Activity of a kind specified by order made by the Treasury under section 22 of FSMA; see, for example, the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, S.I. 2001/544
the regulators	The FCA and the PRA
Treaty firm	Paragraph 1 of Schedule 4 defines a Treaty firm as one whose head office is situated in an EEA State other than the United Kingdom and which is recognised under the law of that State as a national of that State. Paragraphs 2 to 3 of that Schedule set out the circumstances in which a Treaty firm is authorised to carry on a regulated activity.
the Tribunal	The Upper Tribunal
UKLA	United Kingdom Listing Authority (the name under which the FSA operates in discharging its functions relating to official listing and other matters under Part 6 of FSMA).

FINANCIAL SERVICES BILL

EXPLANATORY NOTES

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