These notes refer to the Banking Bill as introduced in the House of Commons on 4 December 2008 [Bill 6]

BANKING BILL

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Banking Bill as introduced in the House of Commons on 4 December 2008. They have been prepared by the Treasury in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

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

3. The Banking Bill was introduced in the House of Commons on 7 October 2008 and has been carried over from the previous Parliamentary Session under Standing Order No 80A. In the previous session the Bill was ordered to be read the third time. The Bill contains amendments agreed in Committee and on Report.

BACKGROUND TO BILL

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

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

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

SUMMARY AND OVERVIEW OF THE STRUCTURE

7. In October 2007 the Authorities published a discussion paper *Banking reform – protecting depositors,* which explored ways to strengthen the existing framework for financial stability and depositor protection. In three subsequent consultation documents, in January and July 2008, the Government developed its proposals for reform and announced its intention to bring forward legislation on the following:

Part 1: Special resolution regime (SRR)

8. The United Kingdom does not currently have a permanent statutory regime for dealing with failing banks. The Banking (Special Provisions) Act, passed in February 2008, provides the Treasury with powers to facilitate an orderly resolution to maintain financial stability or protect the public interest. However the substantive powers provided by the Act are temporary and lapse in February 2009, a year after the Act was passed.

9. The Banking Bill establishes a permanent special resolution regime (SRR), providing the Authorities with tools to deal with banks that get into financial difficulties. Part 1 describes the special resolution objectives and how the SRR is triggered. It sets out the three stabilisation options of the SRR (transfer to a private sector purchaser, transfer to a bridge bank and transfer to temporary public sector ownership). The stabilisation options are exercised through the stabilisation powers, which are the powers to effect the transfer of shares and other securities or property, rights and liabilities, by operation of law. Part 1 also covers the arrangements for assessing such compensation as may be payable to transferors for the shares or other property transferred and for other (third) parties affected by a transfer. The application of the SRR to building societies is also set out along with a power to apply the SRR to credit unions.

Part 2: Bank insolvency

10. This Part establishes a new bank insolvency procedure, based on existing liquidation provisions, to provide for the orderly winding up of a failed bank and to facilitate rapid FSCS payments to eligible claimants or a transfer of such accounts to another financial institution. There are also powers to extend the procedure to building societies and credit unions.

Part 3: Bank Administration

11. This Part establishes a new bank administration procedure for use where there has been a partial transfer of business from a failing bank. A bank administrator may be appointed by the court to administer the affairs of an insolvent residual bank created where part of a bank has been transferred to a private sector purchaser or to a bridge bank under the SRR.

Part 4: Financial Services Compensation Scheme

12. The FSCS operates under powers conferred by Part 15 of the Financial Services and Markets Act 2000. Under these provisions, the Financial Services Authority has the power to set the rules for the scheme, including rules which determine the eligibility for compensation under the scheme and the amounts of compensation payable. These powers are extensive and the majority of changes to the scheme that are being considered may be implemented by the Financial Services Authority under these existing powers. Part 4 of the Bill therefore largely amends the Financial Services and Markets Act 2000 to enable changes to the scheme to be made, which fall outside the scope of the existing powers.

13. However, it also makes possible three more substantial changes, including powers for the Treasury to make detailed provision by regulations in relation to:

- the introduction of pre-funding;
- the use of the Financial Services Compensation Scheme to contribute to the costs of the use of the Special Resolution Regime (see Part 1); and
- the use of the National Loans Fund to make loans to the Financial Services Compensation Scheme.

Part 5: Inter-bank payment systems

14. Payment systems are networks involving sets of rules, procedures and arrangements for the electronic transfer of money or credit between participating members of the systems. In some cases, payment systems are embedded in clearing and settlement systems for transferring securities and these involve payments in relation to the securities.

15. Payment systems are important for the functioning of financial markets and the economy. The inter-linkages between payment systems, banks and other financial intermediaries mean that problems with payment systems have the potential to spread through the financial system, ultimately affecting businesses and consumers.

16. At present, payment systems are not subject to formal regulation. Currently, the Bank of England undertakes oversight on a non-statutory basis, focusing on promoting the robustness and resilience of key UK payment systems, while the FSA has a statutory responsibility for the regulation of Recognised Clearing Houses, which contain embedded payment systems.

17. This Part aims to formalise the Bank of England’s role in the oversight of payment systems. This Part also allows the Bank of England to retain its power of informal oversight where it considers it appropriate (and where it does not have an obligation for formal oversight).

Part 6: Banknotes: Scotland and Northern Ireland

18. Pursuant to the Bank Notes (Scotland) Act 1845, the Bankers (Ireland) Act 1845 and the Bankers (Northern Ireland) Act 1928, as amended (together, "the 1845 legislation"), a limited number of commercial banks retain the right to issue their own banknotes in Scotland and Northern Ireland[1].

19. The government stands behind notes issued by the Bank of England, as the UK's central bank, but does not guarantee notes issued by commercial banks. Such notes are liabilities of the issuing banks themselves.

20. This part:

- Repeals the 1845 legislation insofar as it relates to the issue of banknotes in Scotland and Northern Ireland, and makes consequential legislative amendments and repeals.
- Prohibits the issue of banknotes in Scotland and Northern Ireland other than by the Bank of England and those commercial banks that, immediately before the coming into force of this Part, were authorised under the 1845 legislation to issue banknotes.
- Provides that, if an issuing bank chooses to discontinue the business of issuing its own banknotes, its note-issuing privilege cannot thereafter be revived.
- Empowers the Treasury to make banknote regulations. In particular, these regulations may include suitable provision protecting noteholders in the event a commercial issuing bank encounters financial difficulties. The regulations:
    - Must require commercial issuing banks to maintain backing assets;
    - May define the purpose and status of the backing assets in connection with the insolvency of a commercial issuing bank; and
    - May change the existing regulatory framework for commercial bank issuance of banknotes, including establishing new regulatory responsibilities to be assumed by the Bank of England and providing a power for the Bank to make banknote rules.

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[1] The relevant banks in Scotland are: Bank of Scotland, Clydesdale Bank and Royal Bank of Scotland. The relevant banks in Northern Ireland are: Bank of Ireland, First Trust Bank, Northern Bank and Ulster Bank.

- Makes further provision for specific matters in relation to the issue of banknotes by the authorized commercial banks.

Part 7: Miscellaneous

21. This part includes provisions relating to the governance of the Bank of England, including a new statutory financial stability objective and the establishment of a Financial Stability Committee (FSC) as a subcommittee of a smaller court of directors of the Bank. As part of the measures to permit short-term nondisclosure of the provision of emergency liquidity, the requirement for the Bank to publish a weekly return is removed. This part also covers greater information sharing between the Authorities and repeals the "funds attached" rule concerning Scottish cheques. Measures to widen the disapplication of the prohibition of building societies granting floating charges to central banks and arrangements regarding financial collateral are also covered in this section.

TERRITORIAL EXTENT

22. The Bill extends to the whole of the UK, except Clause 243 (Registration of Charges: Scotland) and Clause 244 (funds attached rule) which extend to Scotland only.

ANNEXES

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

COMMENTARY ON CLAUSES AND SCHEDULES

PART 1: SPECIAL RESOLUTION REGIME

Clause 1: Overview

24. This clause introduces the main features of the special resolution regime. The special resolution regime includes the three stabilisation options (transfer to a private sector purchaser, transfer to a bridge bank and transfer to temporary public sector ownership), the bank insolvency procedure and the bank administration procedure. The stabilisation options are exercised through the stabilisation powers, which are the powers to effect the transfer of shares and other securities or property, rights and liabilities, by operation of law. These stabilisation powers include the onward, supplemental and reverse transfer powers referred to below. Each of the Tripartite Authorities—the Bank of England, the Treasury and the Financial Services Authority—has a role in the operation of the special resolution regime.

Clause 2: Interpretation: "bank"

25. This clause defines a bank as a UK institution that has a regulatory permission, granted by the FSA under the Financial Services and Markets Act 2000, to accept deposits. It states that bank does not include a building society or a credit union, but provides how the special resolution regime is, or may be, applied to such institutions. The Treasury may, by order, add to the exclusions from this definition of bank.

Clause 3: Interpretation: other expressions

26. This clause defines the terms FSA and financial assistance

Objectives and code

Clause 4: Special resolution objectives

27. This clause sets out the SRR objectives and requires the FSA, Bank of England and the Treasury to have regard to these objectives in using or considering the use of the stabilisation powers, bank insolvency procedure or bank administrative procedure. The SRR objectives are to protect and enhance the stability of the UK's financial systems, to protect and enhance public confidence in the stability of the UK's banking systems, to protect depositors, to protect public funds and to avoid interfering with property rights in contravention of the Convention rights (of the Human Rights Act 1998, principal amongst which, in this context, is the right to the peaceful enjoyment of property, under Article 1 of the First Protocol of the European Convention on Human Rights). *Subsection (9)* makes clear that these objectives are not listed in order of priority; rather they are to be balanced in the circumstances of any given case.

Clause 5: Code of practice

28. This clause requires the Treasury to issue a code of practice about the use of the stabilisation powers, the bank insolvency procedure and the bank administration procedure. It notes the areas that the code may provide guidance on and requires that the FSA, Bank of England and HM Treasury must have regard to the code.

Clause 6: Code of practice: procedure

29. This clause requires the Treasury to consult with the FSA, the Bank of England and the FSCS before issuing the code and to lay it before Parliament as soon as possible following issue. It also gives Treasury the power to revise the code as appropriate.

Exercise of powers: general

Clause 7: General conditions

30. This clause provides that stabilisation powers can be exercised only in respect of a bank if the conditions set out in the clause are met. Those conditions essentially demarcate the boundary that must be crossed before the stabilisation powers, the bank administration procedure and (normally) the bank insolvency procedure may be applied to a bank.

31. The first condition, set out in *subsection (2)*, is that, in the opinion of the FSA, the bank is failing, or is likely to fail, to satisfy its regulatory threshold conditions (as provided in the Financial Services and Markets Act 2000).

32. The second condition, set out in *subsection (3),* is that, in the opinion of the FSA, it is not reasonably likely that action will be taken by or in respect of the bank that will enable the bank to satisfy the threshold conditions, having regard to timing and other relevant circumstances.

33. *Subsection (4)* provides that, in making this judgement, the FSA are required to discount any financial assistance provided by the Treasury or Bank of England (disregarding ordinary market assistance offered by the Bank on its usual terms). Before confirming that the second condition is met the FSA must consult the Bank of England and the Treasury. *Subsection (6)* provides that the special resolution regime objectives are not applicable to the FSA's decisions on whether a bank meets either of these conditions.

Clause 8: Specific conditions: private sector purchaser and bridge bank

34. This clause sets out alternative conditions one of which must be satisfied before the Bank of England can exercise stabilisation powers so as to effect a transfer of a bank or banking business to a private sector purchaser or to a bridge bank. It provides that the Bank of England can exercise a stabilisation power only if it is satisfied that the exercise of the power is necessary having regard to certain public interest conditions, set out in *subsection (2)*, namely the stability of the UK's financial systems, the

maintenance of public confidence in the stability of the UK's banking systems and the protection of depositors. *Subsection (3)* states that before exercising such powers the Bank must consult both the Treasury and the FSA.

35. *Subsection (4)* provides for the position where the Treasury has provided financial assistance to a bank in order to resolve or reduce a serious threat to the stability of the UK's financial systems. In this situation, as set out in *subsection (5),* the Bank of England may only exercise a stabilisation power following a recommendation from the Treasury on the basis of it being necessary to protect the public interest. The Bank then retains the discretion to consider whether the exercise of such a power is an appropriate way to provide that protection. *Subsection (6)* provides that these conditions are in addition to the conditions in clause 7.

Clause 9: Specific conditions: temporary public ownership

36. This clause provides for alternative conditions one of which must be satisfied for the Treasury to exercise stabilisation powers to take a bank into temporary public ownership.

37. *Subsection (2)* provides that the first condition is that the exercise of the power is necessary to resolve or reduce a serious threat to the stability of the financial systems of the UK.

38. *Subsection (3)* sets the second, alternative, condition as follows: if the exercise of the power is necessary to protect the public interest, where the Treasury has provided financial assistance in respect of the bank for the purposes of resolving or reducing a serious threat to the stability of the UK's financial systems. *Subsection (4)* provides that the Treasury must consult the FSA and the Bank of England before determining whether this condition is met. *Subsection (5)* provides that these conditions are in addition to the conditions in clause 7.

Clause 10: Banking Liaison Panel

39. This clause provides for a new Banking Liaison Panel to advise the Treasury on the exercise of the powers to make statutory instruments of Parts 1, 2 or 3 (excluding certain regulations and orders). The members of the Panel will include representatives of the Authorities, FSCS and from the banking, legal and insolvency sectors.

The stabilisation options

Clause 11: Private sector purchaser

40. Where both the general conditions of clause 7 and the specific conditions for the private sector purchaser stabilisation option of clause 8 are met, *subsection (1)* allows the Bank of England to sell all or part of the business of a bank to a commercial purchaser.

41. *Subsection (2)* establishes that this transfer may be effected through either a transfer of the bank's shares and other securities, or its property, rights and liabilities. Both types of transfer are executed by instruments made by the Bank (a share transfer instrument (see clause 15) or a property transfer instrument (see clause 33)).

Clause 12: Bridge bank

42. *Subsection (1)* provides that, where the general conditions (clause 7) and the specific conditions (clause 8) for the bridge bank stabilisation option are met, the Bank of England may transfer all or part of the business of a bank to a bridge bank. *Subsection (2)* establishes that a transfer to a bridge bank may be effected only through a transfer of the bank's property, rights and liabilities and is executed by one or more instrument(s) made by the Bank. As defined in subsection (1), a bridge bank is a company wholly owned by the Bank of England.

43. The code of practice to be made under clause 5(1) must address matters relating to the management and control of bridge banks, which must address certain matters specified in *subsection (3)*.

44. Under *Subsection (4)*, where a property transfer is made from a bridge bank (whether or not through means of a property transfer instrument) to a company wholly owned by the Bank of England, that company shall be treated as an 'onward bridge bank'. *Subsection (5)* provides for the nature of an onward bridge bank (by setting out the provisions of Part 1 which do and do not apply to onward bridge banks).

Clause 13: Temporary public ownership

45. Where the general conditions (clause 7) are satisfied and the Treasury is satisfied that the specific conditions for the temporary public ownership stabilisation option are met as provided in clause 9, the Treasury may take a bank into temporary public ownership.

46. *Subsection (2)* provides that the transferee may either be a nominee of the Treasury (such as the Treasury Solicitor) or a company wholly owned by the Treasury. A transfer to temporary public ownership may only be effected through a transfer of securities, and is made by a share transfer order made by statutory instrument subject to the negative procedure (see clauses 16 and 25).

47. *Subsection (3)* provides that the code of practice must include provision about the management of a bank in temporary public ownership.

Transfer of securities

Clause 14: Interpretation: "securities"

48. Share transfer powers may be used to effect the transfer of securities. This clause defines securities widely. The definition includes shares and stock; debentures; warrants or other instruments that entitle the holder to acquire such securities; and

other rights granted by a deposit-taker which form part of its own funds for the purposes of Section 1 of Chapter 2 of Title V of the Banking Consolidation Directive (2006/48/EC). The definition in this clause ensures that share transfer powers can be exercised to transfer complete control of a bank.

Clause 15: Share transfer instrument

49. Share transfer instruments are made by the Bank of England to effect the transfer of a bank to a private sector purchaser (the stabilisation option as described in clause 11). This clause describes provision that a share transfer instrument may make. The instrument may relate to either specified securities or securities with a specified description.

Clause 16: Share transfer order

50. Share transfer orders are made by the Treasury to effect the transfer of a bank to temporary public ownership. This clause describes the provision that a share transfer order may make. The order may relate to either specified securities or securities of a specified description.

Clause 17: Effect

51. This clause makes further provision about the effects of a share transfer instrument or order. *Subsection (2)* makes clear that the transfer of securities takes place by operation of law. *Subsection (3)* makes provision for the transfer to take effect regardless of any restriction (including any requirement for consent and restrictions arising by contract—such as a non-assignment clause—or legislation). Provision is also made for the share transfer instrument or order to be carried out free from any encumbrances (such as a trust), which may be extinguished under the order *(subsection (5)). Subsection (6)* allows for the extinguishment of rights to acquire securities (for example, such as share options).

Clause 18: Continuity

52. This clause states that when a share transfer instrument or order is made, provision can be made to ensure the continuity of arrangements operating in respect of a bank.

53. *Subsection (1)* enables the share transfer instrument or order to include provision that the transferee can be treated as the same person as the transferor for any purpose connected with the transfer.

54. *Subsection (2)* enables the share transfer instrument or order to include provision that agreements made or other things done by or in relation to a transferor are treated as made or done by or in relation to the transferee. This provision would enable for example, the transferred deposit taker to continue to benefit from arrangements entered into by the transferors, notwithstanding any rights triggered on the transfer.

55. *Subsection (3)* allows for transitional provision about things transferred to be continued. This can include continuation of legal proceedings by or in relation to the transferee. *Subsection (4)* allows for the modification of references to the transferor in instruments or documents. *Subsection (5)* allows for provision of information to be required or permitted between the transferor and the transferee of a share transfer instrument or order.

Clause 19: Conversion and delisting

56. This clause allows for the conversion and delisting of securities (the power applies to all of a specified bank's securities, whether transferred or not).

57. A share transfer instrument or order may make provision for the conversion of transferred securities from one form to another (to deal, for example, with the conversion of uncertificated or bearer securities into certificated securities or the conversion of a special class of shares into ordinary shares).

58. *Subsection (2)* provides that a share transfer instrument or order may make provision for discontinuing the listing of securities issued by the specified bank on a UK regulated market.

Clause 20: Directors

59. *Subsections (1) and (2)* allow for the Bank of England, in relation to a share transfer instrument, and the Treasury, in relation to a share transfer order, to take various actions with regard to directors including appointment and removal, termination and variation of service contracts.

60. Appointments made by the Treasury and Bank of England are made on terms and conditions agreed by the institution making the appointment. Provision is also made for the Bank of England and Treasury to vary or terminate service contracts of directors.

Clause 21: Ancillary instruments: production, registration, &c.

61. This clause makes various provisions for share transfer instruments and orders concerning instruments and registration. It provides that the transfer has effect irrespective of production, delivery, transfer or other dealing with an instrument and irrespective of registration.

62. *Subsection (1)* allows for an instrument or order to make provision in relation to an instrument: a share transfer instrument or order may permit or require the execution, issue or delivery of an instrument. *Subsection (4)* allows for an instrument to be modified or annulled by a share transfer instrument or order.

63. *Subsection (2)* specifies that a share transfer instrument or order may have immediate effect, regardless of registration (of the share transfer instrument or order) or the status of an instrument. *Subsection (3)* provides that a share transfer instrument or

order may make provision for the effect of an instrument executed or issued in accordance with the provision of the share transfer instrument or order.

64. *Subsection (5)* provides for how a share transfer instrument or order may entitle a transferee to be registered or require a person to effect registration in respect of the transferred securities of the specified bank.

Clause 22: Termination rights, &c.

65. This clause sets out certain provisions in relation to default event provisions. A default event is a provision of a contract or other agreement where a specified event occurs which gives a party to that contract a certain right or rights. The rights include a right to terminate the agreement together with other types of right as set out in *subsection (1). Subsection (3)* allows for default event provisions not to be triggered in relation to a share transfer order or instrument. *Subsection (4)* provides default event provisions can be disapplied but with exceptions.

66. *Subsection (5)* means that default event provisions will be disapplied when they relate to the making of an order or instrument, anything that is to be done or may be done under or by virtue of the instrument or order and any action or decision taken or made under the Banking Bill or another enactment which resulted in or was connected to the making of the order or instrument.

Clause 23: Incidental provision

67. This clause provides for a share transfer instrument or order to include incidental, consequential or transitional provision. Such provision may be made generally or for a specified purpose or purposes.

Clause 24: Procedure: instruments

68. This clause provides the procedure for making a share transfer instrument. The Bank of England must send a copy of a share transfer instrument, as soon as reasonably practicable, to the specified bank, the Treasury, the FSA and any other persons specified in the code of practice. The Bank of England should also publish the share transfer instrument in line with the provisions of *subsection (2).*

Clause 25: Procedure: orders

69. This clause provides the procedure for making a share transfer order. Share transfer orders are made by statutory instrument by the Treasury subject to the negative procedure. The Treasury should send a copy of a share transfer order, as soon as reasonably practicable, to the specified bank, the Bank of England, the FSA and any other persons specified in the code of practice. The Treasury should also publish the share transfer order in line with the provisions of *subsection (3).*

Clause 26: Supplemental instruments

70. Where the Bank of England has made a share transfer instrument to a private sector purchaser, it may make additional supplemental share transfer instruments. These may provide for anything that a share transfer instrument may generally provide for, including a further transfer of securities meeting the description specified in subsection (3)(a).

71. The general and specific conditions (clauses 7 and 8 respectively) do not apply to supplemental transfers. The Bank must consult the FSA and the Treasury before making the instrument.

Clause 27: Supplemental orders

72. Where the Treasury has made a share transfer order to take a bank into temporary public ownership, it may make additional supplemental share transfer orders. These may provide for anything that a share transfer order may generally provide for, including a further transfer of securities meeting the description specified in subsection (3)(a).

73. The general and specific conditions (clauses 7 and 9, respectively) do not apply to supplemental transfers. The Treasury must consult the Bank of England and the FSA before making the order.

Clause 28: Onward transfer

74. Where the Treasury has made a share transfer order to bring a bank into temporary public ownership in accordance with clause 13, it may make onward share transfer orders. These may provide for two things: first, for the transfer of securities meeting the description specified in subsection (3)(a); and, second, for any provision in relation to the relevant securities. *Subsection (4)* stipulates that the transferee may not be the transferor under the original order.

75. The general and specific conditions (clauses 7 and 9, respectively) do not apply to onward transfers. *Subsection (6)* provides that the Treasury must consult the Bank of England and the FSA before making the order.

76. *Subsection (7)* provides that the Treasury may make a supplemental share transfer order (as described in clause 27) following the making of an onward share transfer order.

Clause 29: Reverse share transfer

77. Where the Treasury has made a share transfer order to bring a bank into temporary public ownership in accordance with clause 13, it may make reverse share transfer orders.

78. A reverse share transfer order may transfer securities in temporary public ownership back to the original transferors (i.e. the holders of the shares and other securities before the bank was taken into temporary public ownership). Alternatively, where there has been an onward transfer to a particular type of onward transferee, the order may transfer securities back from that onward transferee into temporary public ownership. The reverse share transfer powers could only be used in the case of an onward transfer, however, where the onward transferee was a company wholly owned by the Bank of England, a company wholly owned by the Treasury or a nominee of the Treasury. This limitation is to prevent the reverse share transfer powers from being exercisable in relation to an onward transfer to a private sector party who wished to acquire the bank from temporary public ownership.

79. The general and specific conditions (clauses 7 and 9, respectively) do not apply to reverse transfers. *Subsection (6)* provides that the Treasury must consult the Bank of England and the FSA before making the order.

80. *Subsection (7)* provides that the Treasury may make a supplemental share transfer order (as described in clause 27) following the making of a reverse share transfer order.

Clause 30: Bridge bank: share transfers

81. Where the Bank of England has made a property transfer instrument to effect the bridge bank stabilisation option, it may make bridge bank share transfer instruments. These may provide for two things: first, for securities issued by the bridge bank to be transferred; and, second, for other provision in relation to the securities of the bridge bank. Thus the Bank of England may transfer the securities of a bridge bank.

82. The general and specific conditions (clauses 7 and 8, respectively) do not apply and subsection (5) provides that the Bank of England must consult the Treasury and the FSA before making the instrument.

83. *Subsection (6)* provides that the Bank of England may make a supplemental share transfer instrument (as described in clause 26) following the making of a bridge bank share transfer instrument.

Clause 31: Bridge bank: reverse share transfers

84. Where the Bank of England has made a bridge bank share transfer instrument to a company wholly owned by the Bank of England or the Treasury, or a nominee of the Treasury, the Bank of England may make bridge bank reverse share transfer instruments. A bridge bank reverse share transfer instrument provides for the transfer of securities of a bridge bank to be transferred back from such an onward transferee.

85. The general and specific conditions (clauses 7 and 8, respectively) do not apply to reverse transfers and *subsection (5)* provides that the Bank of England must consult the Treasury and the FSA before making the instrument.

Clause 32: Interpretation: general

86. This clause defines references to "service contract" and "transfer date".

Transfer of property

Clause 33: Property transfer instrument

87. Property transfer instruments may be made by the Bank of England to effect a transfer to a private sector purchaser or to a bridge bank (clauses 11 and 12). This clause describes the provision that a property transfer instrument may make. The instrument may transfer some or all of the property, rights or liabilities of a specified bank. The instrument may relate to specified combinations of the specified bank's property, rights or liabilities, although this is subject to restrictions which may be imposed by the exercise of order making powers under clause 47.

Clause 34: Effect

88. A transfer of property, rights or liabilities is effected through a property transfer instrument (clause 33). *Subsections (3) and (4)* make provision for the transfer to take effect regardless of any legislative or contractual restriction, including requirements for consent (or any other restrictions which might render property not transferable).

Clause 35: Transferable property

89. This clause makes provision for a property transfer instrument to transfer any property, rights or liabilities. Such property, rights and liabilities are expressed to include those acquired or arising between the making of the instrument and the transfer date, and any rights and liabilities arising on or after the transfer date in respect of matters occurring before that date. Paragraphs (c) and (d) of subsection (1) provide that foreign property may be transferred. Paragraph (e) provides that rights and liabilities under enactments may be the subject of a transfer.

Clause 36: Continuity

90. This clause states that, when a property transfer instrument is made, provision can be made to ensure the continuity of arrangements operating in respect of a bank.

91. *Subsection (1)* enables the property transfer instrument to include provision that the transferee can be treated as the same person as the transferor for any purpose connected with the transfer and for the transfer to be treated as a succession.

92. *Subsection (2)* enables the property transfer instrument to include provision that agreements made or other things done by or in relation to a transferor are treated as made or done by or in relation to the transferee. This provision would enable, for example, the transferred deposit taker to continue to benefit from arrangements entered into by the transferor, notwithstanding any rights triggered on the transfer.

93. *Subsection (3)* allows for transitional provision about things relating to things transferred to be continued. This can include continuation of legal proceedings by or in relation to the transferee.

94. *Subsection (4)* allows for provision to be included in a property transfer instrument about continuity of employment.

95. *Subsection (5)* allows for the modification of references to the transferor in instruments or documents.

96. *Subsection (6)* provides that in so far as rights and liabilities in respect of anything transferred are enforceable after a transfer date, a property transfer instrument can apportion them as between the transferor and the transferee. *Subsection (7)* specifies that the property transfer instrument may apportion liability for tax between the transferor and the transferee.

97. *Subsection (8)* provides that the transferor and the transferee may, by agreement, modify a provision of the instrument. However such a modification must achieve a result that could have been achieved by the instrument, and may not transfer (or arrange the transfer of) property rights or liabilities.

98. *Subsection (9)* allows for provision of information and assistance to be required or permitted between the transferor and the transferee under a property transfer instrument.

Clause 37: Licences

99. This clause makes provision in relation to licences.

100. *Subsection (1)* provides that a licence in respect of property transferred by property instrument shall continue to have effect notwithstanding the transfer. *Subsection (2)* provides that the Bank of England may disapply subsection (1), so that a licence may be discontinued. *Subsection (3)* specifies that where a licence imposed rights or obligations, a property transfer instrument may apportion responsibility for exercise or compliances between the transferor and transferee.

Clause 38: Termination rights, &c.

101. This clause makes similar provision in relation to default event provisions for property transfers as that made for share transfers by clause 22.

Clause 39: Foreign property

102. This clause describes how a property transfer instrument may make provision for the transfer of property situated outside the United Kingdom and rights and liabilities governed by foreign law.

103. *Subsection (3)* states that both the transferor and the transferee must take any necessary steps to ensure that the transfer is effective as a matter of foreign law.

104. *Subsection (4)* makes provision for the period before a transfer may be fully effective as a matter of foreign law. For this period, the transferor must act on behalf of the transferee by holding any property or right for its benefit and discharging any liability on its behalf. Expenses incurred by the transferor in relation to these acts must be met by the transferee.

105. *Subsections (6)* and *(7)* relate to obligations imposed by the operation of this clause. Such obligations are enforceable as contracts and the Bank of England may give directions in relation to those obligations, with which the transferor must comply.

Clause 40: Incidental provision

106. This clause provides for a property transfer instrument to include incidental, consequential or transitional provision. Such provision may be made generally or for a specified purpose or purposes.

Clause 41: Procedure

107. This clause requires the Bank of England to send a copy of a property transfer instrument, as soon as reasonably practicable, to the specified bank, the Treasury, the FSA and any other persons specified in the code of practice. The Bank of England must also publish the property transfer instrument in line with the provisions of *subsection (2)*.

Clause 42: Supplemental instruments

108. Where the Bank of England has made a property transfer instrument it may make additional supplemental property transfer instruments. These may provide for two things: first, for property, rights and liabilities to be transferred from the original transferor; and, second, for anything that a property transfer instrument may otherwise provide for.

109. *Subsection (4)* provides that the general and specific conditions (clauses 7 and 8, respectively) do not apply to supplemental transfers.

110. *Subsection (5)* provides that the Bank of England must consult the FSA and the Treasury before making the instrument.

Clause 43: Onward transfer

111. Where the Bank of England has made a property transfer instrument to effect the bridge bank stabilisation option, it may make onward property transfer instruments. These may provide for two things: first, for the property, rights or liabilities of the

bridge bank to be transferred; and, second, for anything that a property transfer instrument may otherwise provide for. *Subsection (5)* provides that the Bank of England may not transfer property, rights or liabilities to the transferor under the original instrument.

112. Under *subsection (6),* the general and specific conditions (clauses 7 and 8) do not apply to onward transfers. *Subsection (7)* requires the Bank of England to consult the Treasury and the FSA before making the instrument.

113. *Subsection (8)* states that the Bank may make a supplemental property transfer instrument (as provided for in clause 42) following the making of an onward property transfer instrument.

Clause 44: Reverse property transfer

114. Where the Bank of England has made a property transfer instrument to effect the bridge bank stabilisation option, it may make reverse property transfer instruments.

115. A reverse property transfer instrument may transfer property, rights or liabilities of a bridge bank back to the original transferor (i.e. the failing bank). Alternatively, where there has been an onward transfer to a particular type of onward transferee, the instrument may transfer property back from that onward transferee to the bridge bank. The reverse property transfer powers could only be used in this case, however, where the onward transferee was a company wholly owned by the Bank of England, a company wholly owned by the Treasury or a nominee of the Treasury. This limitation is to prevent the reverse property transfer powers from being exercisable following an onward transfer to a private sector party who wished to acquire the business of a bridge bank.

116. The general and specific conditions (clauses 7 and 8, respectively) do not apply to reverse transfers. *Subsection (6)* provides that the Bank of England must consult the Treasury and the FSA before making the instrument.

117. *Subsection (7)* states that the Bank of England may make a supplemental property transfer instrument (as described in clause 42) following the making of a reverse property transfer instrument.

Clause 45: Temporary public ownership: property transfer

118. Where the Treasury have made a share transfer order to bring a bank into temporary public ownership, it may make property transfer orders. These may provide for two things: first, for the transfer of the property, rights or liabilities of the bank in temporary public ownership; and, second, for anything that a property transfer instrument may otherwise provide for. *Subsection (4)* provides that the general and specific conditions (clauses 7, 8 and 9) do not apply to property transfers from temporary public ownership. The Treasury must consult the Bank of England and the FSA before making the order.

119. *Subsection (6)* provides that a property transfer order should be treated, in procedural terms, as a share transfer order (see clause 16). In all other respects, however, it should be treated as a property transfer instrument (see clause 33).

120. *Subsection (8)* states that the Treasury may make a supplemental property transfer order (as described in clause 42) following the making of temporary public ownership property transfer order.

Clause 46: Temporary public ownership: reverse property transfer

121. Where the Treasury have made a property transfer to a company wholly owned by the Bank of England or the Treasury, or a nominee of the Treasury, the Treasury may make reverse property transfer orders.

122. A reverse property transfer order provides for the transfer of property back from such an onward transferee.

123. The general and specific conditions (clauses 7, 8 and 9, respectively) do not apply to onward transfers and *subsection (7)* provides that the Treasury must consult the Bank of England and the FSA before making the order.

Clause 47: Restriction of partial transfers

124. This power enables restrictions to be placed on the making of partial transfers through the property transfer powers. A partial transfer is the transfer of some, but not all, of a bank's property, rights or liabilities (as defined in *subsection (1)*).

125. *Subsection (2)* provides that Treasury may, by order, impose restrictions on partial transfers in the ways which are set out in *subsection (2)*, as supplemented by *subsections (3)* and *(4)*. This enables restrictions to be imposed by reference to the nature of the property, rights and liabilities which may or may not form part of the transfer. It also permits conditions to be imposed before a partial transfer can be undertaken, and can require partial transfers to include particular provisions.

126. The power is exercisable by the Treasury making an order by statutory instrument subject to the affirmative procedure *(subsection (5)),* or in the first instance the 28 day procedure, as provided by clause 249.

Clause 48: Power to protect certain interests

127. This power enables certain private law rights to be protected when the property transfer powers are exercised to effect a partial transfer. A partial transfer is the transfer of some, but not all, of a bank's property, rights or liabilities (as defined in *subsection (1)* of clause 47).

128. *Subsection (1)* broadly defines the certain interests for which the power may provide protection. The characterisation and identification of such interests may be addressed in the order (in *subsection (4)*). This provision reflects the extremely broad

range of relevant interests which exist in this field. The interests which the exercise of the power is intended to cover may include, for example, security interests (see *subsection (1)(a)*) and set-off and netting.

129. Under the power, such interests may be protected in the ways set out in *subsection (2),* as supplemented by *subsection (3)*.

130. The power is exercisable by the Treasury making an order by statutory instrument subject to the affirmative procedure (*subsection (6)*), or in the first instance the 28 day procedure, as provided by clause 249.

Compensation

Clause 49: Orders

131. This clause describes three types of orders which may be made for the purposes of providing compensation in consequence of the exercise of the stabilisation powers.

132. *Subsection (2)* describes a compensation scheme order. It may establish a scheme simply for paying compensation to transferors, or it may establish a scheme for determining whether transferors should be paid compensation. The identity of the transferor or transferors depends on the stabilisation power exercised. In the case of share transfer powers, the transferors will be the holders of the securities which were transferred under the order. In the case of property transfer powers, the transferor will be the bank from whom property, rights or liabilities were transferred.

133. *Subsection (3)* describes the resolution fund order, which establishes a scheme under which the transferors may become entitled to the proceeds of resolution of a bridge bank or of a bank in temporary public sector ownership.

134. *Subsection (4)* describes a third party compensation order, which establishes a scheme for paying compensation to third parties (persons who are not transferors), for example counterparties of a bank whose property rights are interfered with in a compensatable way (under Article 1 of the First Protocol to the European Convention on Human Rights) as a result of the transfer.

Clause 50: Sale to private sector purchaser

135. This clause requires the Treasury to make a compensation scheme order, on the exercise by the Bank of England of the private sector purchaser stabilisation option (clause 11) (a property or share transfer instrument to such a purchaser). *Subsection (3)* sets out that the order may include a third party compensation order.

Clause 51: Transfer to bridge bank

136. This clause requires, on the exercise by the Bank of England of the bridge bank stabilisation option (clause 12), the Treasury to make a resolution fund order (further

considered under clause 58 below). *Subsection (3)* provides that the order may include a compensation scheme order and a third party compensation order.

Clause 52: Transfer to temporary public ownership

137. This clause requires, on the exercise by the Treasury of the temporary public ownership stabilisation option, the Treasury to make either make a resolution fund order (which may include a compensation scheme order) or a compensation scheme order. In either case, the order may include a third party compensation scheme order.

Clause 53: Onward and reverse transfers

138. Where there is an onward or reverse transfer from either a bridge bank or a bank in temporary public sector ownership, this clause enables the Treasury to make a compensation order or a third party compensation order.

Clause 54: Independent valuer

139. *Subsection (1)* allows a compensation scheme order and a third party compensation order (by virtue of *subsection (6))* to include provision for the amount of compensation to be determined by an independent valuer. *Subsection (2)* requires the Treasury to appoint a person to appoint the independent valuer, and in practice the Government anticipates that an appointments panel will be convened for this purpose. Two different methods for appointing the valuer are provided in *subsection (3)*; namely, for the Treasury to arrange to identify candidates or provide that another person will arrange to appoint a valuer.

140. *Subsection (4)* states that the independent valuer can be removed only on grounds of incapacity or serious misconduct. The removal must be made by a person specified by the Treasury in accordance with the order. *Subsection (5)* states that the order must include provision for resignation and replacement of the independent valuer.

Clause 55: Independent valuer: supplemental

141. *Subsection (1)* enables the independent valuer to do anything necessary or desirable in relation to the performance of his functions. *Subsections (2)* to *(4)* enable the Treasury by order to make provision to assist the independent valuer in the discharge of his functions, for example by providing him with certain powers.

142. *Subsection (4)* gives the independent valuer the power to appoint staff.

143. *Subsection (6)* requires the order to provide for the reconsideration of the decisions of the valuer, and for onward rights of appeal from the valuer to a court or tribunal.

144. Under *Subsection (7)* the independent valuer and his staff are not servants of the Crown, and *subsection (8)* provides that the records of the independent valuer are public records for the purposes of the Public Records Act 1958.

Clause 56: Independent valuer: money

145. *Subsection (1)* allows the order to make provision for the remuneration and allowances of the independent valuer, his staff, appointing persons or monitors. Although such payments will be made by the Treasury, the order will require the Treasury to appoint a person to monitor the arrangements made for the remuneration and allowances *(subsection (2)).* Further functions may be conferred on the monitor, such as requiring his approval to certain actions.

146. *Subsections (2)(c)*and *(d)* give the Treasury a power to include provision in the order about records, accounts and staff resources. This clause also provides that the independent valuer and his staff are not liable for damages for anything done in good faith when undertaking their respective roles in relation to independent valuation (save in respect of awards of damages under the Human Rights Act 1998, for unlawful actions under that Act).

Clause 57: Valuation principles

147. *Subsection (1)* allows a compensation scheme order and a third party compensation order (by virtue of *subsection (6))* to specify valuation principles to be applied during the determination of the amount of compensation. *Subsection (2)* establishes that valuation principles may require an independent valuer to apply specific methods of valuation, assess values at specified dates or periods, take specified matters into account or not take specified matters into account.

148. *Subsection (3)* requires the valuer to disregard actual or potential financial assistance provided by the Bank of England or Treasury (other than ordinary market assistance offered by the Bank on its usual terms).

149. *Subsection (4)* sets out assumptions as to the position of the bank that can or may be required to be taken into account by the valuer. These include that the bank has had a permission under Part 4 of Financial Services and Markets Act 2000 varied or cancelled; that it is unable to continue as a going concern; that it is in administration; or that it is being wound up. *Subsection (5)* provides that there is nothing to prevent the application of valuation principles from resulting in no compensation being payable.

Clause 58: Resolution fund

150. A resolution fund order may provide for persons to share in the proceeds of the disposal of things transferred (for example, the full or partial sale of a bridge bank whether through business or share transfer). *Subsection (1)* further provides for the order to provide for how proceeds and shares are to be calculated.

151. *Subsection (2)* allows for any payments to be net of resolution costs, which include public financial assistance or administrative expenses.

152. *Subsection (3)* provides that a third party compensation order may include provisions for arranging to appoint an independent valuer and to apply the valuation principles. *Subsection (4)* provides that a resolution fund order can confer discretion on persons and *subsection (5)* may include provision for the determination of disputes about the application of its provisions.

153. *Subsection (6)* allows the Treasury to place a management duty on the Bank of England in managing the bridge bank and set out how the Bank is to meet this duty. This management duty will be subservient to the SRR objectives. *Subsection (7)* enables a similar duty to be imposed on the Treasury, in cases where the Treasury elects to make a resolution fund order following a transfer of a bank to temporary public ownership.

Clause 59: Third party compensation: discretionary provision

154. *Subsection (1)* provides that a third party compensation order is about setting up a scheme for determining any compensation to be paid to persons other than a transferor, for example, any creditors of the failed bank who have suffered compensatable interference with a property right. Compensation for transferors is dealt with under compensation scheme orders.

155. *Subsection (2)* provides that a third party compensation order can be a part of a compensation scheme order or a resolution fund order or may be separate.

156. *Subsection (3)* provides that a third party compensation order may include provisions for arranging to appoint an independent valuer and to apply the valuation principles.

Clause 60: Third party compensation: mandatory provision

157. This clause contains a power to make regulations about third party compensation orders made in the circumstances where a partial transfer of the property of a failed bank has taken place.

158. *Subsection (2)* sets out the principle that where a residual bank enters an insolvency procedure following such a transfer, pre-transfer creditors (defined in *subsection (3)(b))* should not receive less favourable treatment they would have received than had the bank entered an insolvency procedure prior to the partial transfer. The Treasury are to have regard to the principle in making regulations under the clause.

159. *Subsection (4).* The regulations may require a third party compensation order to be made. The regulations may also require a third party compensation order to include certain provisions or the regulations may make provisions that are deemed to be a part of the third party compensation orders.

160. *Subsection (5)* enables the regulations to provide for whether compensation is to be paid, its amount and the factors upon which the determination of the amount is to be

made. Any factors could be included, particular factors are, in part, the amount payable under a resolution fund order, contingent events and a determination by an independent valuer.

161. The regulations are to be made by the affirmative procedure, or in the first instance the 28 day procedure, as provided by clause 249.

Clause 61: Sources of compensation

162. This clause confers an express power on the Treasury to make provision as to who should pay compensation under a compensation scheme order, resolution fund order, third party compensation order or under regulations made under clause 60 . It enables provision to be made for the FSCS, the Treasury or another person (e.g. a purchaser) to pay compensation. Any provision requiring the FSCS to pay compensation is subject to the provisions of clause 168 of the Bill.

Clause 62: Procedure

163. The procedure for a compensation scheme order, a resolution fund order and a third party compensation order is that they must be made by statutory instrument subject to the draft affirmative procedure.

Incidental functions

Clause 63: General continuity obligation: property transfers

164. This clause provides for services to be provided to a transferee from the transferor and other companies within the group through means of a general obligation, following a transfer of property. *Subsection (5)* provides that the obligation is not limited to the provision of services and facilities directly to the transferee.

165. *Subsection (2)* provides that the residual bank and each group company (as defined in *subsection (1)*) must provide such services and facilities as required to enable the transferee to operate the transferred business effectively. This duty may be enforced as a contract *(subsection (3)*).

166. As provided by *subsection (6)*, the Bank of England may, with the consent of the Treasury, by notice to the residual bank or group company require specific activities to be undertaken (or provide that activities are to be undertaken on specific terms).

167. *Subsection (4)* provides that the residual bank or group company has a right to reasonable consideration.

Clause 64: Special continuity obligations: property transfers

168. This clause provides for the Bank of England, through a property transfer instrument, to create or vary rights and obligations between a transferee, a residual bank and group companies. It applies following the exercise of property transfer powers.

169. *Subsection (2)* describes the particular provision which the Bank of England can make in a property transfer instrument in this connection.

170. *Subsection (3)* provides that the Bank of England shall aim to preserve or include provision for reasonable consideration and terms.

171. *Subsection (4)* provides that the powers under *subsection (2)* may be exercised only in so far as the Bank of England thinks it necessary to ensure the provision of such services and facilities as are required to operate the transferred business effectively. The Treasury must consent to the exercise of this power.

Clause 65: Continuity obligations: onward property transfers

172. This clause provides for the Bank of England or the Treasury to extend the general continuity obligation of clause 63 or special continuity obligations of clause 64 in the circumstances of an onward transfer of property, rights or liabilities (so, for example, continuity obligations could be owed to the onward transferee).

173. *Subsection (1)* defines the terms "onward transfer" and "onward transferee". *Subsection (4)* provides onward obligations may be imposed on an original transferee, a residual bank, a bank transferred by share transfer or anything which is or was a group undertaking of the foregoing. *Subsection (5)* provides that onward obligations may be in addition to, or replace, initial obligations.

174. The power under this clause may only be exercisable by giving a notice (both to each person on whom a continuity obligation is to be imposed, and the person who is expected to benefit from it). The Bank of England may exercise the power only with the consent of the Treasury.

Clause 66: General continuity obligation: share transfers

175. This clause makes provision for services to be provided in respect of a bank transferred by share transfer from former group companies through means of a general obligation. *Subsection (5)* provides that the obligation is not limited to the provision of services and facilities directly to the transferee.

176. *Subsection (2)* provides that each former group company (as defined in *subsection (1)*) must provide such services and facilities as required to enable the transferred bank to operate effectively. This duty may be enforced as a contract (*subsection (3)*).

177. As provided by *subsection (6)*, the Treasury or Bank of England (with the consent of the Treasury), may by notice to the former group company (as described in *subsection (7)*), state that specific activities on specific terms should be undertaken.

178. *Subsection (4)* provides that the former group company has a right to reasonable consideration.

Clause 67: Special continuity obligations: share transfers

179. This clause provides for the relevant authority, through share transfer instrument or order, to create or vary rights and obligations between a transferred bank and former group companies. It applies following the exercise of share transfer powers.

180. *Subsection (2)* provides for how the Treasury or the Bank of England (with the consent of the Treasury) may create, modify or cancel contracts between the transferee, and the group company (as defined in clause 63).

181. *Subsection (3)* provides that the continuing authority shall aim to preserve or include provision for reasonable consideration and terms.

182. *Subsection (4)* provides that the powers under subsection (2) may be exercised only in so far as the Bank of England or Treasury thinks it necessary to ensure the provision of such services and facilities as are required to enable the transferred bank to operate effectively.

Clause 68: Continuity obligations: onward share transfers

183. This clause provides for the Bank of England or the Treasury to extend the general continuity obligation of clause 66 or special continuity obligations of clause 67 in the circumstances of an onward transfer of securities (so, for example, continuity obligations could be owed to the transferred bank following the onward transfer).

184. *Subsection (1)* defines the term "onward transfer". *Subsection (4)* provides onward obligations may be imposed on the bank, anything which is or was a group undertaking of the bank, anything which is or was a group undertaking of a residual bank, or any combination. *Subsection (5)* provides that onward obligations may be in addition to, or replace, initial obligations.

185. The power under this clause may only be exercisable by giving a notice (both to each person on whom a continuity obligation is to be imposed, and the person who is expected to benefit from it). The Bank of England may exercise the power only with the consent of the Treasury.

Clause 69: Continuity obligations: consideration and terms

186. This clause provides the Treasury with a power, by order, to specify matters which are to be or not to be considered in determining what amounts to reasonable consideration for the purposes of general continuity obligations. Secondary legislation may also specify matters which are to be or not to be considered in determining what provisions would be expected in arrangements concluded between parties dealing at arm's length (with regard to special continuity obligations).

187. The power is subject to the negative resolution procedure.

Clause 70: Continuity obligations: termination

188. This clause provides that the continuity authority may by notice terminate a general continuity obligation.

Clause 71: Pensions

189. This clause allows for a share transfer instrument or order or a property transfer instrument to make provision in relation to pensions. The power may be exercised to make provision about the consequences of a transfer of securities or property etc. for pension schemes. For example, the need to make such provision could arise when the pension schemes of employees who are subject to the transfer form part of the pension scheme of a wider corporate group.

190. *Subsection (5)* provides that this power may be exercised only by the Bank of England, with the consent of the Treasury.

Clause 72: Enforcement

191. The purpose of this clause is to enable provision to be made as to the enforcement obligations arising under share transfer instruments and orders and property transfer instruments.

192. It allows for provision to be made for enforcement of an obligation under the share transfer order or instrument.

193. Provision may not include creating a criminal offence or impose a penalty, but may impose jurisdiction on a court or tribunal, this may include a creating an enforceable private law right or statutory duty.

Clause 73: Disputes

194. This clause makes provision for share transfer orders or instruments or property transfer orders made by the Treasury to include a method for disputes to be determined. Such a method may include conferring jurisdiction on a particular court or tribunal or discretion on a specified person.

Clause 74: Tax

195. This clause enables the Treasury to make regulations including provision in relation to tax in connection with the exercise of powers in this Part of the Bill.

196. *Subsection (2)* sets out the taxes in relation to which provision may be made.

197. *Subsections (3), (4), (5)* and *(6)* set out the effects which the regulations may have. The regulations may have retrospective effect but only up to three months before the date the stabilisation power is first exercised in relation to the bank concerned.

198. *Subsection (7)* allows the Treasury to change the taxes listed in subsection (2) by order. *Subsections (8), (9)* and *(10)* set out the procedures to be followed in making regulations and orders.

Clause 75: Power to change law

199. This clause enables the Treasury to modify legislation (both primary and secondary, excluding, however, the provisions of the Bill, and secondary legislation to be made under it) and the provisions of common law for the purpose of enabling the powers in Part 1 to be used effectively, having regard to the objectives of the special resolution regime. *Subsection (3)* establishes that such an order may make provision which has retrospective effect.

200. The power is to be exercised by order and is subject to the affirmative procedure. In cases of necessity (in practice, where the power needed to be exercised urgently), the clause makes provision for the Treasury to make the order immediately, following which there are 28 days for both Houses of Parliament to approve the order, failing which, the order would lapse.

Treasury

Clause 76: International obligation notice: general

201. This clause describes the role of the Treasury in meeting international obligations when the stabilisation powers are being exercised

202. *Subsection (1)* provides that the Treasury, by notice in writing, may require the Bank of England not to exercise a stabilisation power where that exercise would be likely to contravene an international obligation of the UK. *Subsection (2)* sets out the procedure for such notices. *Subsection (3)* provides that, if the Treasury gives notice that an action would be likely to contravene an international obligation, then the Bank of England must consider alternative actions, which both pursue the SRR objectives and avoid the objections on which Treasury's notice or refusal was based. *Subsection (4)* allows the Treasury, by notice, to disapply the requirement to consider alternative actions (as set out in subsection (3)). Such notice may be revoked.

Clause 77: International obligation notice: bridge bank

203. This clause describes the role of the Treasury with regard to meeting international obligations when controlling a bridge bank.

204. *Subsection (2)* states that the Bank of England must comply with any notice provided by the Treasury, for the purpose of ensuring compliance by the UK with its international obligations, to take or not to take specified action in respect of a bridge bank

205. *Subsection (3)* sets out the procedure for such notices

206. *Subsection (4)* provides that a notice may include requirements on timing

Clause 78: Public funds: general

207. This clause describes the role of the Treasury with regard to public funds when the stabilisation powers are being exercised. It provides that the Bank of England may not exercise a stabilisation power without the Treasury's consent if the exercise would be likely to have implications for public funds.

208. *Subsection (2)* defines public funds and implications for public funds

209. *Subsection (3)* provides the Treasury with the power, by order, to specify considerations that should or should not be taken into account in determining whether action has implications for public funds

210. *Subsection (4)* requires the Bank to consider another exercise of the stabilisation powers if the Treasury has refused consent. In doing so the Bank must pursue the special resolution regime objectives and avoid the objections that the Treasury first made.

211. *Subsection (5)* allows the Treasury, by notice, to disapply the requirement to consider alternative actions (as set out in subsection(4)). Such notice may be revoked.

Clause 79: Public funds: bridge bank

212. This clause describes the role of the Treasury with regard to public funds when controlling a bridge bank

213. *Subsection (2)* states that the Bank of England may not take any action in respect of the bridge bank without the Treasury's consent if the action would be likely to have implications for public funds.

214. *Subsection (3)* applies clause 78(2) and (3) for the purpose of this clause.

Clause 80: Bridge bank: report

215. This clause sets out requirements for the Bank of England to report to the Treasury on the activities of a bridge bank.

216. *Subsections (2) and (3)* requires the first report to be made as soon as is reasonably practicable after the end of one year and each subsequent year.

217. *Subsection (4)* requires the Chancellor of the Exchequer to lay a copy of the reports mentioned in subsections (2) and (3) before Parliament.

218. *Subsection (5)* requires the Bank of England to comply with any request of the Treasury for a report dealing with specified matters in relation to the bridge bank. The request may include the content or timing (*subsection (6)*).

Building societies

Clause 81: Application of Part I: general

219. This clause applies the SRR clauses (with modifications) to building societies. The table sets out these provisions where modifications are made, namely that for a private sector purchaser of a building society a share transfer instrument cannot be made, that there is a separate provision for the temporary public sector ownership tool and that a property instrument for building societies may cancel shares in the building society may confer rights and impose liabilities in place of the cancelled shares and deemed shares, and also confer rights and impose liabilities through actual or deemed shares in a building society.

220. It also provides that a property transfer instrument may have effect without causing parts of the Building Societies Act 1986 to apply (see paragraph 82). A compensation scheme order or a third party compensation order may be made to compensate a building society and its creditors. However, a resolution fund order may not be made for temporary public sector ownership of building societies.

Clause 82: Temporary public ownership

221. This clause provides the powers to take a building society into temporary public ownership.

222. *Subsection (1)* sets out the procedure and provides that the Treasury may make an order to arrange for deferred shares of a building society to be publicly owned, to cancel private membership rights in the building society, to allow the building society to continue business while in public ownership and for the eventual winding up or dissolution of the building society.

223. *Subsection (2)* allows the Treasury by order to arrange for the transfer of existing deferred shares or provide for the issue of new deferred shares.

224. *Subsection (3)* sets out the specific powers for the arranging for the transfer of existing deferred shares, and *subsection (4)* does the same for the purpose of providing for the issue of new deferred shares by the Treasury on behalf of the building society for a specified recipient.

225. *Subsection (5)* provides powers to cancel private membership rights in the building society and to allow the rights and liabilities attached to those cancelled shares to be conferred in place of cancelled shares. This would allow, for example, rights attached to shares to be cancelled and replaced with rights to deposits of the same value.

226. *Subsection (5)* prevents any further issue or acquisition of shares in the building society otherwise than under the Treasury's order.

227. *Subsection (6)* allows the Treasury to make any provision that it thinks desirable to allow the building society to continue in business while it is in public ownership.

228. *Subsection (7)* allows the order to disapply or modify the memorandum or rules of a building society in respect of the transfer into public ownership and to make any consequential changes to building society legislation.

229. *Subsection (8)* applies most provisions relating to the making of share transfer orders to orders made under this clause.

Clause 83: Distribution of assets on dissolution or winding up

230. This clause allows the Treasury to make provision by order for the distribution of surplus assets of a building society that is subject to a property transfer and then later wound up or dissolved. The order may, for example, also alter priorities on a building society's dissolution or winding up.

231. *Subsection (4)(c)* makes an order under this clause subject to the affirmative procedure.

Clause 84: Interpretation

232. This clause states that expressions used in this group of clauses (81 to 85) have the same meaning as in the Building Societies Act 1986. It further states that an order under section 119(1) of the Building Societies Act may make special provision for the meaning of deferred shares with regard to this group of clauses.

Clause 85: Consequential provision

The Treasury may, by order, make any consequential provisions to primary and secondary legislation (but not Acts of the Scottish Parliament or secondary legislation made under those acts) required as a result of the application of the special resolution regime to building societies. Any order made under this clause is subject to the affirmative procedure.

Clause 86: Credit Unions

233. This clause allows the Treasury, by secondary legislation, to apply the SRR clauses to credit unions. An order for this purpose may disapply, modify or apply any enactment, which relates to credit unions in respect of this Part. The order is made by affirmative resolution procedure.

PART 2: BANK INSOLVENCY

Introduction

Clause 87: Overview

234. This clause outlines the main features of the bank insolvency procedure which is based largely on the existing liquidation provisions of the Insolvency Act 1986,

with modifications where required. The Government's principle reason for seeking to introduce a new insolvency procedure for banks (as an alternative to existing insolvency processes) is to ensure that, where a bank fails, depositors who are eligible claimants under the terms of the Financial Services Compensation Scheme are paid out promptly[2].

235. The equitable treatment of creditors as a whole is a key feature of the UK's insolvency regime, and the bank insolvency procedure has therefore been designed to enable rapid compensation payments to depositors without creating a regime in which those depositors receive preference over other creditors.

Clause 88: Interpretation: "bank"

236. This clause limits the application of the bank insolvency procedure to UK institutions with permission to accept deposits under the provisions of the Financial Services and Markets Act 2000. The procedure may be extended by secondary legislation to building societies and credit unions (clauses 127 and 128). The Treasury may, by order, add to the exclusions from this definition of bank

Clause 89: Interpretation: "the court"

237. The bank insolvency procedure can only commence by an order of the court and the process is subject to the general supervision of the court. Due to the size and complexity of the UK's banks, the higher courts will supervise the process.

Clause 90: Interpretation: other expressions

This clause defines some terms used in this part of the bill, including the meaning of the Financial Services Authority (FSA), the Financial Services Compensation Scheme (FSCS) and "eligible depositors" (which means those persons eligible under the FSCS. The persons so eligible for compensation are set out in the FSA Handbook, which is available online.[3]).

238. *Subsection (4)* defines "inability to pay debts" and applies existing definitions from sections 367(4) and (5) of the Financial Services and Markets Act 2000 (as applied by subsection 4(a)) and section 123 of the Insolvency Act 1986 (as applied by subsection (4)(b)).

239. *Subsections (5)-(6)* provide that the expressions used generally throughout this part of the bill and also in insolvency and company legislation have the same meaning,

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[2] The Financial Services Compensation Scheme was established under Part XV of the Financial Services and Markets Act 2000.

[3] The FSA handbook is available from http://fsahandbook.info/. The Compensation section of the handbook sets out the rules governing eligibility under, and levies for, the FSCS (reference code: COMP).

except that *subsection (8)* provides that "fair" is used in this part instead of the somewhat antiquated term "just and equitable" (used in the Insolvency Act 1986).

Bank insolvency order

Clause 91: The order

240. Where the court makes a bank insolvency order a qualified insolvency practitioner, who has formally agreed to accept the position, will be appointed as the bank liquidator. This post is restricted to insolvency practitioners because the Government considers that their resource capabilities and practical experience of dealing with assets in complex insolvencies will be vital to ensure that the objectives of the bank insolvency procedure can be achieved and returns to creditors maximised.

Clause 92: Application

241. The Bank of England, the FSA (with the Bank of England's consent) or the Secretary of State may make an application to the court for a bank insolvency order and that application must nominate a qualified insolvency practitioner to be appointed as the bank liquidator.

242. To ensure compatibility with Human Rights legislation, such an application must be served on the directors of the company prior to a court hearing for a bank insolvency order and those service requirements will be specified in secondary legislation (Rules) to support the bank insolvency procedure.

Clause 93: Grounds for applying

243. *Subsection (1)* sets out the three grounds on which an application for a bank insolvency order may be based. The first of these is on the grounds of insolvency – that is, a bank is unable or is likely to become unable to pay its debts. An application may also be made where winding up the affairs of the bank would be in the public interest or fair (for the meaning of "fair" see the note to clause 90(8)).

244. In addition to these grounds, as the bank insolvency procedure has been designed to ensure rapid compensation payments to depositors under the terms of the FSCS, an application for a bank insolvency order may be made only where a bank has eligible depositors, as per *subsections (2)(b)(i), (3)(b)(ii)* and *(4)(a).*

245. *Subsection (2)* provides that where the FSA notifies the Bank of England that the appropriate conditions for entry to the Special Resolution Regime have been met (see the note to clause 7 on the general conditions for triggering the special resolution regime tools) and the Bank of England may make an application to the court for a bank insolvency order on the grounds either that the bank is insolvent or that winding up would be fair.

246. Given the role of the Bank of England in the Special Resolution Regime, *subsection (3)* provides that the FSA may apply for a bank insolvency order only where the Bank

of England consents. The grounds for an application for a bank insolvency order by the FSA are otherwise the same as those on which the Bank of England may present an application.

247. It may be that a bank is not technically insolvent, but to protect a bank's customers and the public generally, *subsection (4)* allows the Secretary of State to apply for a bank insolvency order where he or she considers that winding up the affairs of a bank is in the public interest. This provision reflects the Secretary of State's existing powers under section 124A of the Insolvency Act 1986 to present a winding-up petition against a company where that is considered to be in the public interest.

Clause 94: Grounds for making

248. In keeping with existing insolvency provisions, on the hearing of an application for a bank insolvency order the court may make such an order, adjourn the application or dismiss it.

249. To make the order, the court must be satisfied that the bank against which the application has been presented has eligible depositors. In addition, where the application has been brought by the Bank of England or the FSA, the court must be satisfied either that the bank is either insolvent or that the winding up of the bank would be fair; where an application is made by the Secretary of State, the court must be satisfied that the winding up of a bank would be in the public interest and fair.

Clause 95: Commencement

250. Under the provisions of section 129 the Insolvency Act 1986, where a winding-up order is made the proceedings are deemed to have commenced at the time of the presentation of the winding-up petition.

251. This clause therefore provides that where a bank insolvency order is made on an application by the Bank of England or the FSA following the presentation of a petition for a winding-up order or application for an administration order by a third party, the proceedings are deemed to have commenced at the time that petition or application was submitted.

252. Where the Bank of England, the FSA or the Secretary of State makes an application for a bank insolvency order without any notice of intended insolvency proceedings being received under the provisions of clause 117, a bank insolvency order is treated as commencing at the time that application was made.

Process of bank liquidation

Clause 96: Objectives

253. A bank liquidator has two statutory objectives. The first is to work with the FSCS to ensure that either the accounts of eligible depositors are transferred to another financial institution or payments are made to eligible depositors. The second objective

provides that the bank liquidator is also obliged to wind up the affairs of the failed bank in the interests of creditors as a whole.

254. *Subsection (4)* provides that while objective 1 takes precedence, the bank liquidator should also take all the immediate steps that he or she would in an ordinary liquidation to protect the interests of creditors generally, for example identifying and collecting in the assets of the failed bank.

255. To ensure that the objectives of the bank insolvency procedure may be met, as in an ordinary liquidation, joint bank liquidators may be appointed - see clause 100 which (among other provisions) applies section 231 of the Insolvency Act 1986.

256. Once objective 1 has been achieved, or has been substantially completed, the process of liquidation will continue in much the same way as a normal winding up with the liquidator calling a meeting of creditors, realising the assets of the failed bank and distributing the proceeds to creditors.

Clause 97: Liquidation committee

257. During the course of ordinary winding up proceedings creditors may resolve at a meeting to form a liquidation committee. That committee can require the liquidator to report to them on matters relating generally to the winding up of a company and the liquidator may take certain actions only with the committee's approval.

258. In this modified procedure, to facilitate a bulk transfer of accounts or prompt payments to eligible depositors, the bank insolvency procedure provides for a two-stage committee process. In the first stage of the procedure, representatives from the Bank of England, the FSA and the FSCS are obliged to form a liquidation committee.

259. Once the initial liquidation committee has passed a "full payment resolution" – that is, it resolves that objective 1 has been achieved (or that process is substantially complete) the bank liquidator is obliged to call a meeting of creditors. At that meeting the creditors may resolve to elect new members to the liquidation committee. At this stage, the representatives from the Bank of England and the FSA will be obliged to stand down from the committee, although the FSCS (as it will be a significant creditor in the insolvency having taken over the claims of the eligible depositors) will have the option to retain its presence.

Clause 98: Liquidation Committee: supplemental

260. *Subsection (1)* provides that a meeting of the liquidation committee may be called by any of the members of the committee or the bank liquidator.

261. *Subsection (2)* specifies that a meeting of the initial liquidation committee (formed by representatives from the Bank of England, the FSA and the FSCS) is able to conduct its business only when all of the members are present.

262. To protect the interests of creditors and other stakeholders generally, *subsection (3)* enables the actions of the initial liquidation committee to be challenged in court. In addition, *subsection (4)* allows the bank liquidator to apply to the court for an order to deem that the committee has passed a full payment resolution option and *subsection (5)* provides further scope for the liquidator to apply to the court for an or order or directions where he believes that objective 1 has been achieved but the liquidation committee is failing to act accordingly.

263. *Subsection (6)* provides that the Bank of England, the FSA or the FSCS may replace their representative on the liquidation committee at any time.

264. *Subsection (7)* provides certain ongoing entitlements to the FSA and the Bank of England, for instance they will be able to attend future meetings of the liquidation committee and may participate in legal proceedings relating to the bank insolvency.

Clause 99: Objective 1: (a) or (b)?

265. This clause provides that the initial liquidation committee (made up of the Bank of England, the FSA and the FSCS) must advise the bank liquidator as to whether to pursue a bulk transfer of accounts or to work with the FSCS to enable prompt payments to eligible depositors. The committee may also recommend that certain accounts be transferred while others paid out. In reaching that decision, the liquidation committee must balance the need for quick action to achieve objective 1 with the general interests of creditors of the bank as a whole.

266. *Subsection (3)* establishes that, if the liquidation committee thinks the bank liquidator is failing to comply with their recommendations it must apply to court for directions. The bank liquidator may also apply to the court for directions if the liquidation committee fails to make a recommendation as to how he should proceed to achieve objective 1.

Clause 100: General powers, duties and effect

267. *Subsection (1)* empowers the bank liquidator to do anything necessary or expedient for the pursuit of the objectives in clause 96.

268. *Subsections (2)-(5)* provide that the powers and duties of a bank liquidator and the general process of winding up is in keeping with existing provisions of Part IV of the Insolvency Act 1986 by applying the general provisions relating to liquidators and winding up to bank liquidators and bank insolvency (*subsection(2))*

269. In order to adhere to general insolvency law and practice, *subsection (6)* sets out an extensive table of applied provisions. Many of the existing sections of Part IV and other relevant sections of the Insolvency Act 1986 are applied directly to the bank insolvency procedure with minor modifications where necessary. Those modifications have been kept to a minimum, reflecting that the bank insolvency procedure has much in common with the process of an ordinary liquidation.

270. Changes have been made in order to support the unique objectives of the bank insolvency procedure and to reflect the roles of the Authorities and the FSCS in the early stages of the bank insolvency procedure up to the point that a full payment resolution has been passed.

271. As the bank liquidator can only be an insolvency practitioner, references to the Official Receiver have been removed or replaced throughout. The application, with modification, of section 135 of the Insolvency Act 1986 allows for the appointment of a provisional bank liquidator by the court in the period between the submission of an application for a bank insolvency order and the court hearing for the making of such an order.

272. An ordinary liquidator is able to bring action before the court to pursue certain antecedent recoveries such as transactions at an undervalue and preferences given in specified periods prior to the commencement of the winding up proceedings. In order to support the high-level objectives of the special resolution regime, provisions have been made to prevent such actions being brought before the court by a bank liquidator where those relate to the prior exercise of any of the pre-insolvency stabilisation tools under Part 1 of the Bill. This also applies to actions in respect of transactions defrauding creditors under section 423 of the Insolvency Act 1986.

Clause 101: Additional general powers

273. A bank liquidator has the same general powers as a liquidator under Schedule 4 to the Insolvency Act 1986 (powers of a liquidator in a winding up) and for completeness and clarity this clause sets out some additional specific powers drawn from Schedule 1 to that Act (powers of administrator or administrative receiver).

274. *Subsection (2)* adds the power to effect and maintain insurances.

275. *Subsection (3)* adds a power to do all things necessary for the realisation of property.

276. *Subsection (4)* adds a power to make certain payments.

Clause 102: Status of bank liquidator

277. This provision makes it clear that a bank liquidator, like any liquidator in a compulsory liquidation, is an officer of the court.

Tenure of bank liquidator

Clauses 103-109: Tenure of bank liquidator

278. These clauses reflect existing provisions of the Insolvency Act 1986 and deal with matters such as the death, replacement, resignation or removal of the bank liquidator, what happens where the bank liquidator ceases to be qualified to act as an insolvency practitioner, and the effect of release.

279. Modifications have been made to ensure that the unique objectives of the bank insolvency procedure can be achieved, for example a meeting of creditors may resolve to remove or replace a liquidator only after a full payment resolution has been passed.

Termination of process etc.

Clauses 110 – 113: Termination of process, etc.

280. On the completion of ordinary liquidation proceedings, that is where all the assets of the company have been realised and the proceeds distributed to creditors and all the necessary formalities have been completed as regards to reporting to creditors and obtaining release, the company is normally dissolved and ceases to have legal existence. In exceptional circumstances, however, it may be possible to rescue a company in liquidation where that would be in the best interests of its creditors as a whole through administration or a company voluntary arrangement.

281. **Clauses 110 and 111** provide for alternative exit routes from the bank insolvency procedure via a company voluntary arrangement under Part 1 of the Insolvency Act 1986 (for example, such an arrangement might be appropriate to maximise returns to creditors) or administration where a rescue is considered viable and in the best interests of creditors.

282. A bank liquidator may therefore submit proposals to creditors for a company voluntary arrangement or apply to the court for the making of an administration order but both of these steps are made subject to certain conditions; a key provision being that either all eligible depositors have received their compensation or that arrangements have been made with the FSCS with regard to any outstanding payments.

283. These provisions ensure that alternative insolvency procedures may only be exercised once the primary objective of the bank insolvency procedure has been achieved and prevent the possibility of alternative courses of action being taken which might lead to delays in payments being made to eligible depositors.

284. **Clauses 112 and 113** allow for the dissolution of the company where the bank insolvency procedure has been completed and set out the conditions that must be met prior to dissolution.

Other processes

Clause 114: Bank insolvency as alternative order

285. This clause allows the court to make a bank insolvency order on the hearing of a third party’s winding up petition or an application for an administration order where representations are made by either the Bank of England or the FSA.

Clause 115: Voluntary winding up

286. This clause is similar to provisions in existing special insolvency regimes and provides that voluntary winding up proceedings cannot commence unless approved by the court. This provision supports the notification requirements for normal insolvency procedures set out in clause 117.

Clause 116: Exclusion of other procedures

287. This clause allows the court to dismiss a pending winding-up petition. This is to cover the scenario in which on receiving notice of a third party petition for winding up, the Bank of England or the FSA instead successfully apply to the court for the making of a bank insolvency order. Paragraph 42 of Schedule B1 - moratorium on insolvency proceedings - is also applied with necessary modifications.

Clause 117: Notice to FSA of preliminary steps

288. This clause ensures that ordinary insolvency proceedings can only commence where appropriate notice has been given to the FSA. *Subsection (7)* provides that insolvency applications covered by the clause cannot be determined until the period of two weeks has elapsed or the Bank and the FSA have informed the notifier that they do not intend to apply for bank insolvency. This will allow the Authorities, in the unlikely event that they were unaware that a bank was in difficulties, to step in and trigger the Special Resolution Regime where they consider one or more of those tools an appropriate alternative, given all the circumstances, to ordinary insolvency proceedings.

Clause 118: Disqualification of directors

289. The provisions of the Company Directors Disqualification Act 1986 are applied, with necessary modifications, to the bank insolvency procedure to ensure that, where appropriate, action can be taken in the public interest against the directors of a failed bank. As prescribed in that legislation, a wide range of matters may be considered in determining whether a director’s conduct has been such that action should be taken to bar him or her from acting as a director (and holding certain other offices) for a period of between 2 and 15 years.

Clause 119: Application of insolvency law

290. This clause provides for future amendments to insolvency legislation to be applied to the bank insolvency procedure and provides a power to apply, or amend, other existing insolvency provisions. An order would be made jointly by the Secretary of State and the Treasury.

Miscellaneous Provisions

Clause 120: Role of FSCS

291. This clause makes provision for the funding of compensation payments to eligible depositors or a transfer of accounts, requires the bank liquidator to provide information to the FSCS and allows the FSCS to participate in court proceedings relating to a bank insolvency order.

292. *Subsection (1)* specifies that compensation payments may be made or arranged by the FSCS, rather than being funded from the assets of the failed bank. Alternatively, where a transfer of accounts to another financial institution is possible so that depositors have continued access to their funds and banking services generally, the FSCS can make monies available to fund that transfer.

293. *Subsection (2)* allows the FSCS to make provision about expenditure in respect of compensation payments or a transfer of accounts and also explains how Part 2 relates to the provisions of Part XV of the Financial Services and Markets Act 2000.

294. *Subsection (4)* mirrors section 215(4) of the Financial Services and Markets Act 2000 and gives the FSCS the same rights as those enjoyed by the FSA under section 371 of that Act to be heard at any court hearing concerning any matters arising during the course of the bank insolvency procedure.

295. *Subsection (5)* provides for a bank liquidator to be obliged to supply information to the FSCS in support of achieving objective 1 of the bank insolvency procedure.

296. *Subsection (6)* makes it clear that the FSCS can delegate functions to the bank liquidator under its power in section 221A of the Financial Services and Markets Act 2000.

297. *Subsection (7)* provides that for the purposes of section 213(9) of the Financial Services and Markets Act 2000, an eligible depositor can still collect their payment of compensation from the FSCS even if the bank in question has had its authorisation as a deposit taker withdrawn by the FSCS.

Clause 121: Transfer of accounts

298. Where the bank liquidator, acting on advice from the liquidation committee, comes to a contractual arrangement for a bulk transfer of the accounts of eligible depositors to another financial institution (that is, objective 1(a) is achieved), this clause allows such arrangements to override other contractual provisions or legislation. This will allow transfer arrangements (where feasible) to be put into place quickly for the benefit of all eligible depositors. For example, there will be no need for the bank liquidator to seek consent from all relevant customers agreeing to such a transfer. As a safeguard for depositors, in coming to an agreement for the bulk transfer of accounts the bank liquidator should seek to ensure (by agreement with the institution accepting the accounts) that depositors will be able to access their accounts within a reasonable

timescale following the transfer. This will provide continuity of banking services and allow customers to switch their funds to another institution should they wish to do so.

Clause 122: Rules

299. This clause amends section 411 of the Insolvency Act 1986 to allow secondary legislation (Rules) to be made to give effect to the bank insolvency procedure. The first set of Rules will be consulted on with an appropriate panel of experts rather than the Insolvency Rules Committee.

Clauses 123-126: Miscellaneous

300. These clauses deal with miscellaneous matters such as the fixing of insolvency fees, the admissibility of statements of affairs as evidence, and co-operation between courts in different jurisdictions.

301. They are all based on existing insolvency provisions and modifications are made where necessary.

302. Clause 124 provides that as in any other compulsory liquidation in England and Wales, proceeds from the realisation of assets in the bank insolvency procedure must be paid into the Insolvency Services Account. For consistency of approach, this will also be a requirement for the bank liquidator of a Scottish bank.

Clause 127: Building societies

303. The Treasury is given a power to apply the bank insolvency procedure to building societies (with any necessary modifications) and that will be achieved by secondary legislation, subject to the affirmative procedure, or in the first instance the 28 day procedure, as provided by clause 249.

Clause 128: Credit unions

304. As with building societies, the Treasury will have the power to apply the bank insolvency procedure (with any necessary modifications) to credit unions by secondary legislation, subject to the affirmative procedure.

Clause 129: Partnerships

305. This allows the Lord Chancellor, with the agreement of the Secretary of State and Lord Chief Justice, to modify the provisions of the bank insolvency procedure for banks that are partnerships rather than limited companies. This reflects existing powers under section 420 of the Insolvency Act 1986.

Clause 130: Scottish partnerships

306. The Secretary of State may modify the bank insolvency procedure in its application to Scottish Partnerships

Clause 131 Northern Ireland

307. This clause makes specific provisions in the application of the bank insolvency procedure to banks registered in Northern Ireland.

Clause 132: Consequential provisions

286. The Treasury may, by secondary legislation, make any consequential provisions required to legislation required as a result of the creation of the bank insolvency procedure. Any order is subject to the affirmative procedure, or in the first instance the 28 day procedure, as provided by clause 249.

PART 3: BANK ADMINISTRATION PROCEDURE

Introduction

Clause 133: Overview

308. This clause outlines the main features of the bank administration procedure which is based largely (with modifications where required) on the existing administration provisions of the Insolvency Act 1986 as amended by the Enterprise Act 2002.

309. Where part of a failing bank's business, assets or liabilities are transferred to either a bridge bank or a private sector purchaser the residual part of the bank may be left as an insolvent entity. In such circumstances, an application may be made to the court by the Bank of England for a Bank Administration Order. The bank administration procedure is designed to apply to an insolvent residual company to ensure that any essential services and facilities that cannot be immediately transferred to a bridge bank or private sector purchaser continue to be provided for a period of time.

310. Once the primary objective has been achieved, the procedure would continue in a similar way to an ordinary administration although to keep down costs, maximise returns to creditors and provide for a variety of outcomes, some of the existing powers of a liquidator have been built in to the procedure.

Clause 134: Objectives

311. The bank administrator has specific statutory objectives. First, either to provide support to the bridge bank or private sector purchaser. Once such support is no longer required, the objective is to achieve either of the two principle aims of an ordinary administration - either to rescue the company as a going concern or to achieve a better result for creditors than in an immediate liquidation.

312. *Subsection (2)* establishes that, while objective 1 has priority, there are some elements of an ordinary administration that may be begun immediately where they do not

conflict with the primary objective, and subsection (2) therefore obliges a bank administrator to pursue both of the objectives in parallel.

Clause 135: Objective 1: supporting private sector purchaser or bridge bank

313. As outlined above, the primary objective of the bank administration procedure is to provide services and facilities where a partial transfer to either a private sector purchaser or a bridge bank has been effected. *Subsection (2)* provides that this obligation also includes acting as a transferor or transferee in relation to any subsequent property transfers between the residual company and either the bridge bank or the private sector purchaser.

314. In the event of a partial transfer to a private sector purchaser, *subsection (3)* requires that in trying to achieve objective 1 a bank administrator should act in accordance with the terms of any service agreement drawn up between the residual company and the commercial purchaser and the court will act as the arbiter in the event of any dispute or uncertainty.

315. Under *subsection (4),* where a partial transfer is effected to a bridge bank, the bank administrator is required to work with the Bank of England to effect appropriate service arrangements. To protect the interests of creditors, the bank administrator should ensure that, as far as reasonably practicable in light of his duty to pursue objective 1, payments for any services provided to the bridge bank are made at a fair market value.

316. *Subsection (5)* provides that where the bank administrator requires the prior agreement of the Bank of England to take certain actions, the Bank of England may only block actions which would be adverse to the continuing provision of services of facilities to a bridge bank.

Clause 136: Objective 1: duration

317. Once the Bank of England informs the bank administrator, by way of an "Objective 1 Achievement Notice", that the continued provision of services and facilities to the bridge bank or commercial purchaser is no longer required (or that such support was never required – see *subsection (3))* the administration should continue in much the same way as an ordinary administration.

318. *Subsection (2)* provides that, where the bank administrator is of the opinion that objective 1 has been achieved or is no longer applicable, the administrator may seek directions from the court as to how to proceed. The court may give the Bank directions to consider whether to give the bank liquidator a notice that objective 1 no longer applies.

Clause 137: Objective 2: "normal" administration

319. Objective 2 of the bank administration procedure is based on the existing provisions of paragraphs 3(1)(a) and 3(1)(b) of Schedule B1 to the Insolvency Act 1986.

320. In keeping with those provisions, *subsection (2)* obliges a bank administrator to seek to rescue the residual bank as a going concern unless he or she considers that this not a viable outcome or a better result would be achieved for the bank's creditors by following some other courses of action.

321. To ensure that the bank administrator does not realise any assets that may be essential to achieving objective 1, *subsection (3)(a)* provides that only assets specified by agreement between the administrator and the Bank of England may be sold. Once objective 1 has been achieved, this is no longer applicable and the administrator will be free to deal with the assets of the bank to facilitate a rescue as a going concern and/ or to realise those assets for the benefit of the bank's creditors.

Process

Clause 138: Bank Administration Order

322. To ensure compatibility with human rights legislation, a bank administration may commence only by an order of the court and the making of such an order will be subject to the satisfaction of notice requirements to be specified in secondary legislation.

323. *Subsections (2) and (3)* ensure that only a qualified insolvency practitioner, who is willing to accept the position, may be appointed as a bank administrator.

Clause 139: Application

324. Entry into bank administration is by virtue of an application to court. *Subsection (3)* provides that notice of the application must be given in accordance with the rules made under section 411 of the Insolvency Act 1986.

Clause 140: Grounds for applying

325. Only the Bank of England, as the authority responsible for administering the SRR, will be able to apply to the court for a bank administration order.

326. An application may be made only where a partial transfer has been effected by virtue of *subsection (3),* where the residual banking company is left as an insolvent entity; that is, it is unable, or is likely to become unable, to pay its debts.

327. By the application of paragraphs 44(1)(a) and 44(5) of Schedule B1 to the Insolvency Act 1986 in clause 142, as in an ordinary administration, on the making of the application an interim moratorium will take effect so that creditors will not be able to enforce their security over the residual company's property and no legal proceedings may be taken against the company (except with the leave of the court).

Clause 141: Grounds for making

328. The court may grant the Bank's application, adjourn it or dismiss it.

Clause 142: General powers, duties and effect

329. This clause is based largely on existing insolvency law and practice, with Table 1 drawing on the existing administration provisions of Schedule B1 to the Insolvency Act 1986.[4]

330. By the application of paragraphs 44(1)(a) and 44(5) of Schedule B1 to the Insolvency Act 1986, as in an ordinary administration on the making of the application an interim moratorium will take effect so that creditors will not be able to enforce their security over the residual company's property and no legal proceedings may be taken against the company (except with the leave of the court).

331. A bank administrator will have powers and duties similar to those of an ordinary administrator, but modifications have been made where necessary to ensure that the unique statutory objectives of the bank administration procedure can be achieved. Many of these modifications also reflect the supervisory role that the Bank of England will have in the initial stages of the procedure in place of a creditors' committee up until the point that the primary objective has been achieved.

332. The provisions of Schedule B1 to the Insolvency Act 1986 relating to a meeting of creditors and the functions of a creditors' committee will not apply until an Objective 1 Achievement Notice has been served. Once an Objective 1 Achievement Notice has been issued by the Bank of England, the procedure will continue in much the same way as an ordinary administration; a meeting of creditors should be called to consider the administrator's proposals for the progression of the administration and at this stage the creditors will be able, among other resolutions, to form a creditors' committee. The need for the Bank administrator to obtain the consent of the Bank of England to take certain actions will therefore also lapse at this point.

333. Other relevant provisions of the Insolvency Act 1986 are also applied by Table 2 and these largely mirror provisions also applied to the bank insolvency procedure by Clause 100. It should be noted that clause 142(4)(f) provides that where Insolvency Act provisions have been applied with modifications to both Part 2 and Part 3 of the Banking Bill, the modifications in clause 100 in part 2 should be read across to the applied provisions in part 3, with references to bank administration rather than to bank insolvency.

334. Some of the powers that only a liquidator currently has have been applied to the bank administration procedure to create a flexible, stand-alone, procedure to maximise returns to creditors. The Bank Administrator is therefore given powers to disclaim onerous property (see *subsection (6)* entry in table 2 for section 178), subject to requiring consent from the Bank of England to do so until objective 1 has been achieved, and to bring action before the court in respect of fraudulent or wrongful trading (see table 2 entries for sections 213 and 214 of the Insolvency Act 1986).

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[4] Inserted by the Enterprise Act 2002.

335. Through the application, with modifications, of section 135 of the Insolvency Act 1986, the court will be able to appoint a provisional bank administrator in the period between the submission of an application for a bank administration order and the court hearing for the making of that order. The powers of a provisional bank administrator will be determined by the court but will be limited to functions required to achieve objective 1 as set out in clause 135.

336. Once an Objective 1 Achievement Notice has been issued by the Bank of England, the bank administrator will be able to pay dividends, where possible, to unsecured creditors without requiring permission from the court to do so.

Clause 143: Status of bank administrator

337. A bank administration can only be commenced by an order of the court and this clause specifies that as in an ordinary administration (see paragraph 4 of Schedule B1 to the Insolvency Act 1986) the bank administrator is an officer of the court.

Clause 144: Administrator's proposals

338. *Subsections (1) to (4)* provide that, prior to the achievement of objective 1, a bank administrator must agree with the Bank of England a statement of proposals for achieving the objectives of the bank administration and (under *subsection (5)*) any matters of disagreement on the content of that statement may be referred to the court. As in an ordinary administration, under *subsection (7),* those proposals may subsequently be revised.

339. *Subsection (8)* provides that, except for the differences specified in this clause, the proposals should generally be dealt with in the same way as in an ordinary administration and copies of the document must therefore also be circulated to creditors and members of the company and a copy filed at Companies House. *Subsection (6)* stipulates that the FSA should also be sent a copy of the proposals.

340. Once objective 1 has been achieved, as for a normal administration, the bank administrator will then produce a statement of proposals for the achievement of objective 2 of the bank administration which should be circulated to creditors for their consideration at a meeting of creditors and filed at Companies House in the usual way.

Clause 145: Sharing information

341. Where a partial transfer is effected to a bridge bank, this clause provides for the sharing of information between the bank administrator, the Bank of England and also the bridge bank.

342. *Subsection (2)* requires the Bank of England to provide the bank administrator with details of the financial situation of both the residual bank and the bridge bank. This provision ensures that the Bank of England's acquired knowledge in effecting a

partial transfer is supplied to the bank administrator so that he or she can produce an appropriate statement of proposals to the Bank of England.

343. Given the linkages between a bridge bank and the residual company, and because the resolution of the bridge bank will impact on the timing and amount of any distribution to creditors of the failed bank, *subsection (3)* obliges the bridge bank to supply information to the bank administrator.

344. *Subsection (4)* similarly obliges a bank administrator to provide information to the Bank of England and the bridge bank on the financial position of the residual company.

345. *Subsections (5) and (6)* require the Treasury to specify by secondary legislation what sort of information and class of record will be relevant in a particular case. The regulations are subject to the negative procedure.

Multiple Transfers

Clause 146: General application of this Part

346. This clause enables special provisions to be made, where necessary, in cases involving multiple property transfers from a residual bank or a bridge bank.

347. In such circumstances, the Treasury may make regulations modifying the application of the bank administration procedure. Those regulations would be subject to the affirmative procedure, or in the first instance the 28 day procedure, as provided by clause 249.

Clause 147: Bridge bank to private purchaser

348. Where a partial transfer to a bridge bank is effected and part or all of the bridge bank's business is subsequently acquired by a private sector purchaser, the continued provision of services and facilities from the residual company to the commercial purchaser may still be essential to ensure a successful resolution. In those circumstances, this clause continues to bind a bank administrator to achieving objective 1.

Clause 148: Property transfer from a bridge bank

349. This clause applies where a property transfer instrument has been exercised to transfer property to a bridge bank and following that the Bank makes or proposes to make a further (onward) property transfer instrument from the original bridge bank.

350. *Subsection (2)* has the effect that both the original residual bank and the bridge bank, which will itself be a residual bank following the onward transfer, may be put into the bank administration procedure and ensure the continued provision of necessary services and/or facilities to the transferee.

Clause 149: Property transfer from temporary public sector ownership

351. This clause applies in the case where the Treasury brings a bank into temporary public ownership and later makes an onwards property transfer order from the transferred bank.

352. *Subsection (2)* provides that the bank administration procedure applies to the residual bank left in temporary public ownership following the transfer under the property transfer order.

353. Under *subsection (3)* the Treasury may make regulations modifying the application of the bank administration procedure. The regulations are subject to the affirmative procedure, or in the first instance the 28 day procedure, as provided by clause 249.

Termination

Clause 150: Successful rescue

354. This clause provides a way to terminate a bank administration where objective 1 has been achieved and the bank has also, in the opinion of the bank administrator, been rescued as a going concern.

Clause 151: Winding-up or voluntary arrangement

355. This provision allows for the dissolution of the residual banking company where the objectives of the bank administration procedure have been achieved and the bank's affairs have been fully wound up.

356. Alternatively, where it would be in the best interests of creditors, the bank administrator may make proposals to creditors for a company voluntary arrangement under Part 1 of the Insolvency Act 1986. These provisions mirror some of the current exit routes from an ordinary administration.

357. As the bank administrator is given some additional powers usually only available to a liquidator (see the note to clause 142), it is not necessary to provide for conversion to a creditors' voluntary liquidation to effect a distribution to unsecured creditors.

Miscellaneous

Clause 152: Disqualification of directors

358. As with the bank insolvency procedure (see the note to clause 118) and normal administration proceedings, the provisions of the Company Directors Disqualification Act 1986 are applied to the bank administration procedure.

Clause 153: Application of other law

359. This clause provides for future amendments to insolvency legislation (including administration) to be applied, with any required modifications, to the bank

administration procedure; and provides a power (to be exercised by the Secretary of State and the Treasury) to amend other existing insolvency provisions (including administration) as a consequence of the introduction of the bank administration procedure. Any such amendments may be effected by secondary legislation subject to the affirmative procedure, or in the first instance the 28 day procedure, as provided by clause 249.

Clause 154: Other processes

360. The Financial Services and Markets Act 2000 gives the Financial Services Authority powers to present an administration application to the court, or file a winding-up petition, against a bank. Given the Bank of England's role as the authority responsible for the SRR, the FSA will only be able to make such an application or file such a petition against a residual bank where appropriate notice has been given to the Bank of England. The Bank of England will also be entitled to appear at any consequent court hearing and make representations.

Clause 155: Building Societies

361. This gives the Treasury a power to apply the bank administration procedure to building societies (with any necessary modifications) by secondary legislation subject to the affirmative procedure, or in the first instance the 28 day procedure, as provided by clause 249.

Clause 156: Credit Unions

362. This gives the Treasury a power to apply the bank administration procedure to credit unions (with any necessary modifications) by secondary legislation subject to the affirmative procedure.

Clause 157: Rules

363. This clause amends section 411 of the Insolvency Act 1986 to allow secondary legislation to be made to make the bank administration procedure work in practice. The first set of Rules will be consulted on with an appropriate panel of experts rather than the Insolvency Rules Committee.

Clause 158: Fees

364. Section 414 of the Insolvency Act 1986, which deals with the setting of fees to apply to insolvency proceedings, is amended to ensure that those provisions apply to the bank administration procedure.

Clause 159: Evidence

365. Section 433 of the Insolvency Act 1986 which deals with the admissibility of statements of affairs as evidence is applied to the bank administration procedure.

Clause 160: Partnerships

366. This allows the Lord Chancellor, with the agreement of the Secretary of State and Lord Chief Justice, to modify the provisions of the bank administration procedure for banks that are partnerships rather than limited companies. This reflects existing powers under section 420 of the Insolvency Act 1986.

Clause 161: Scottish partnerships

367. This gives the Secretary of State the power to modify the bank administration procedure in its application to Scottish Partnerships

Clause 162: Co-operation between courts

368. Section 426 of the Insolvency Act 1986, which provides for co-operation between certain insolvency courts in different jurisdictions, is amended to ensure that these provisions apply to the bank administration procedure.

Clause 163: Interpretation: general

369. Due to the size and complexity of the UK's banks and the nature of the partial transfer tool, *subsection (1)* provides that only the higher courts may make a Bank Administration Order and that they will supervise the process.

370. *Subsection (3)* defines "inability to pay debts" and applies existing definitions from sections 367(4) and (5) of the Financial Services and Markets Act 2000 (as applied by subsection 4(a)) and section 123 of the Insolvency Act 1986 (as applied by subsection (4)(b)).

371. *Subsections (4) to (5)* provide that the expressions used generally throughout this part of the bill and also in insolvency and company legislation have the same meaning.

Clause 164: Northern Ireland

372. This clause makes specific provisions in the application of the bank administration procedure to banks registered in Northern Ireland.

Clause 165: Consequential provisions

373. The Treasury may, by secondary legislation, make any consequential provisions required to legislation required as a result of the creation of the bank administration procedure.

PART 4: FINANCIAL SERVICES COMPENSATION SCHEME

Clause 166: Overview

374. This clause introduces Part 4 of the Bill.

Clause 167: Contingency Funding

375. This clause inserts new *section 214A* into the Financial Services and Markets Act 2000.

376. This new section confers a power on the Treasury to make regulations to permit the Financial Services Compensation Scheme (the FSCS) to impose levies to build up contingency funds in advance of possible defaults by firms which would give rise to the payment of compensation under the scheme ("pre-funding"). It also sets out certain matters which may be covered in those regulations and allows the Financial Services Authority (the FSA) to make rules relating to contingency funds provided they are compatible with the regulations the Treasury has made.

Clause 168: Special resolution regime

377. This clause inserts new *section 214B* into the Financial Services and Markets Act 2000.

378. This new section confers a power on the Treasury to require the FSCS to contribute to the costs incurred in applying the stabilisation powers of the special resolution regime (see Part 1 of the Bill) to banks which are encountering financial difficulties. The clause allows upfront payments if deemed appropriate. It imposes a duty on the Treasury to make regulations setting out the costs for which a contribution may be required, how the contribution is to be calculated and other matters, including provision for the costs to be independently verified. New *section 214B (4)* requires that the scheme's contributions must not exceed the amount of the compensation which the scheme would have had to pay to eligible claimants if the bank had been unable to satisfy claims against it, taking into account any amounts the scheme is likely to have recovered from the insolvent bank's estate. New *section 214B(5)* requires the appointment of an independent valuer to calculate this amount of recovery. This person may be the same person as the independent valuer appointed under clause 52 of Part 1 of the Banking (No.2) Bill. New *section 214B(7)* allows the Financial Services Authority to make rules relating to contingency funds provided they are compatible with the regulations the Treasury has made.

Clause 169: Investing in National Loans Fund

379. This clause inserts new *section 223A* into the Financial Services and Markets Act 2000.

380. This section enables the FSCS to invest the levies collected to build up contingency funds in the National Loans Fund and provides for that investment to be treated as money borrowed by the Treasury.

Clause 170: Borrowing from the National Loans Fund

381. This clause inserts new *section 223B* into the Financial Services and Markets Act 2000.

382. This section allows the Treasury to make loans from the National Loans Fund to the FSCS and to make regulations about the amount that can be borrowed and the collection of levies to secure its repayment. It also allows the FSA to make rules relating to borrowing from the National Loans Fund provided they are compatible with the regulations the Treasury has made.

Clause 171: Procedure for claims

This clause inserts new *sections 214(1A)*, *214(1B)* and *214(1C)* into the Financial Services and Markets Act 2000. The purpose of these provisions is to facilitate the speedy payment of compensation to depositors or to facilitate the speedy transfer of their accounts to another bank under Part 2 of this Bill.

383. New *section 214(1A)* allows the FSA to make rules to enable the FSCS to deem claims under the scheme to have been made, to avoid the need to wait for actual claims to be made.

384. New *section 214(1C)* allows the FSA to make rules to enable the FSCS to deal with certain kinds of claim without having to make calculations of the entitlement of individual claimants.

Clause 172: Rights in insolvency

385. This clause amends section 215 of the Financial Services and Markets Act 2000 to make it clear that the FSA may make rules which enable the FSCS to recover compensation it has paid from any person from whom a claimant under the scheme could have obtained damages in respect of the loss he had suffered.

Clause 173: Information

386. This clause inserts new *section 218A* into the Financial Services and Markets Act 2000 and amends section 219.

387. New *section 218A* confers a power on the FSA to make rules allowing it to obtain information that will assist the FSCS in carrying out its work, or in preparing for a possible need to pay compensation (even when no default is imminent). It also allows the FSA to use its existing power to require individual authorised persons to provide information to obtain information that would be of use to the FSCS.

388. The amendments to section 219 allow the FSCS to obtain information from authorised persons or certain other persons from the time the authorised person could be declared in default for the purposes of the scheme. They also allow the FSCS to obtain information from a bank which is subject to the special resolution regime (or from the Bank of England) to enable the maximum amount the FSCS would be able to contribute to the costs of the special resolution regime to be calculated.

Clause 174: Payments in error

389. This clause inserts new *section 223C* into the Financial Services and Markets Act 2000.

390. This section provides that levies collected by the FSCS can be used to cover the costs of any compensation payments made in error. The new provision does not cover payments made in bad faith.

Clause 175: Regulations

391. This clause amends section 429 of the Financial Services and Markets Act 2000 to provide that regulations made by the Treasury under new sections 214A and 214B are subject to the affirmative resolution procedure (Regulations under the new section 223B will be subject to the negative resolution procedure.).

Clause 176 Delegation of functions

392. This clause inserts new *section 221A* into the Financial Services and Markets Act 2000.

393. This section provides that the FSCS can make arrangements with a third party to carry out any of its functions. This does not change the scheme's responsibility for the decisions that are taken. Before entering into an arrangement the FSCS must be satisfied that the person is competent to carry out the function and has been given sufficient directions.

Clause 177: Functions under this Act

394. This clause inserts new *section 224A* into the Financial Services and Markets Act 2000.

395. This section provides that the new functions of the FSCS conferred in this Bill, for example, those functions of the Financial Services Compensation Scheme under Part 2, are to be regarded as among its functions under the Financial Services and Markets Act 2000.

PART 5: INTER-BANK PAYMENT SYSTEMS

Introduction

Clause 178: Overview

396. This clause summarises the purpose of this Part. This Part establishes a new regulatory regime for the oversight of inter-bank payment systems, in particular, it confers on the Bank of England a formal role of oversight over such systems.

Clause 179: Interpretation: "inter-bank payment system"

397. *Subsection (1)* defines the use of the term "inter-bank payment system" in Part 5. It refers to arrangements that enable the transfer of money (including credit, *see subsection (4)*) between participant financial institutions (defined in *subsection (3)* as banks and building societies). It does not include internal bank systems or correspondent banking arrangements.

398. *Subsection (2)* provides that the fact that non-financial institutions participate in a payment system does not prevent it being considered to be an inter-bank payment system.

399. *Subsection (5)* ensures that the definition extends to payment systems operating wholly or mainly outside of the United Kingdom.

Clause 180: Interpretation: other expressions

400. This clause defines other terms used in this Part.

401. In particular, *subsection (a)* defines the use of the term "operator" of an inter-bank payment system as a person with "responsibility under the system for managing or operating it".

Recognised systems

Clause 181: Recognition order

402. *Subsection (1)* gives the Treasury the power to designate an inter-bank payment system as a recognised system. Once a payment system is 'recognised', the Bank of England's powers of formal oversight apply.

403. *Subsection (2)* provides that a recognition order must include as much detail as possible of the arrangements that constitute the inter-bank payment system.

404. *Subsection (3)* provides that a payment system operated solely by the Bank of England (for example, the Real Time Gross Settlement System), is not to be recognised.

Clause 182 Recognition criteria

405. *Subsection (1)* provides that the Treasury may make a recognition order only if it is satisfied that any deficiencies in the design of the inter-bank payment system, or any disruption of its operation, would be likely to threaten the stability of, or confidence in the UK financial system (consequences of a "systemic nature") or could have serious consequences for business or other interests throughout the United Kingdom ("system-wide consequences").

406. *Subsection (2)* stipulates the considerations that the Treasury must have regard to when deciding whether to make a recognition order in relation to an inter-bank payment system. These criteria include the volume and value of the transactions processed (or potentially processed) by the system (see *subsection (2)(a)*), the nature of these transactions (see *subsection (2)(b)*), the availability of alternative systems that could handle the transaction in the case of a system failure (see *subsection (2)(c)*), the relationship of the system with other systems (such as interdependence), (see *subsection (2)(d)*) and whether the Bank of England uses the system in its role as a monetary authority (as defined in *clause 234(2)(c)*).

Clause 183 Procedure

407. This clause sets the procedure for the making of recognition orders. In particular, the Treasury must first consult the Bank of England and the operator of the inter-bank payment system and consider representations made *(see subsection (1)).* It must also consult the FSA where the operator is or has applied to become a recognised investment exchange, a recognised clearing house or has, or has applied for, a Part 4 permission under FSMA *(see subsection (2)).*

408. *Subsection (3)* allows the Treasury to rely on information supplied to it by the Bank of England to inform its consideration of whether to recognise a particular inter-bank payment system.

Clause 184: De-recognition

409. *Subsection (1)* gives the Treasury the power to revoke a recognition order.

410. *Subsection (2)* provides that the Treasury must revoke a recognition order if the criteria under which recognition was made (clause 182) are no longer met.

411. *Subsections (3) and (4)* set out the process involved in revoking a recognition order. This process involves the same consultation process as required for the making a recognition order.

412. *Subsection (5)* ensures that if an operator of a recognised payment system requests that its recognition order made under this Part be revoked, the Treasury must consider the request.

Regulation

Clause 185: Principles

413. *Subsection (1)* gives the Bank of England the power to publish principles that operators of recognised payment systems must have regard in the operation of their systems. This formalises an aspect of the existing structure of oversight, under which the Bank of England currently expects payment systems to take account of the Committee on Payment and Settlement Systems' "Core Principles for Systemically Important Payment Systems". The Bank of England will be able to reflect such principles and other relevant internationally agreed recommendations and best practice in setting its principles.

414. The publication of such principles must first be approved by the Treasury (see *subsection (2)*).

Clause 186: Codes of practice

415. This clause gives the Bank of England the power to publish codes of practice for recognised inter-bank payment systems. Codes of practice are intended to set out binding requirements on operators, whereas principles (made under clause 185) are intended to provide high-level over-arching guidance. Codes of general application may be published, alternatively, codes of practice may be tailored to particular operators.

Clause 187: System rules

416. Payment systems operate by way of rules for their members. This clause gives the Bank of England power to require the operator of a recognised inter-bank payment system to establish or change system rules, to notify the Bank of changes and to make changes only with the approval of the Bank.

Clause 188: Directions

417. This clause gives the Bank of England power to give directions to the operator of a recognised inter bank payment system (See subsection *(1)*). This may include requiring or prohibiting the taking of certain actions in relation to the system or setting standards to be met in the operation of the system (See subsection *(2)*).

Clause 189: Role of FSA

418. Subsection (1) ensures that the Bank of England, when exercising its powers under this Part, has regard to the powers of the FSA for taking action. Subsection (2) specifies that the Bank of England must consult the FSA before taking action in respect of an embedded inter-bank payment system. Subsection (3) specifies that if the FSA gives the Bank of England notice that it is considering taking action on an issue that affects an embedded payment system, the Bank may not take action itself without the FSA's consent or unless the notice is withdrawn.

Enforcement

Clause 190: Inspection

419. This clause gives the Bank of England the power to appoint inspectors, whose role it is to inspect the operation of a recognised inter-bank payment system (See *subsection (1)*). This power allows the Bank to appoint an inspector to check that codes of practice, principles, system rules or directions are being complied with, or that the recognised inter-bank payment system is being operated in a satisfactory manner.

420. *Subsection (2)* requires the co-operation of the operator of the recognised inter-bank payment system with an inspector, including granting access to the premises on or from which a payment system is operated.

Clause 191: Inspection: warrant

421. This clause provides that an inspector may apply for a warrant for the inspector or a constable to enter premises from which any part of a recognised payment system is operated. The application is to a justice of the peace (or in Scotland, to a justice of the peace or a sheriff; in Northern Ireland, to a lay magistrate), who can issue the warrant only if any of the conditions set out in *subsections (2), (3), (4)* and *(5)* are fulfilled:

- Condition 1: If the Bank of England has issued a notice under Information clause 201 and the requirement has not been complied with, and it is reasonable to believe that required documents or information are on the premises;

- Condition 2: If an information requirement were to be imposed under clause 201, there is reason to suspect that it would not be complied with or that the documents or information would be destroyed or tampered with;

- Condition 3: If an inspector appointed under clause 190, having given reasonable notice, has been refused entry to the premises of a payment system or infrastructure provider;

- Condition 4: If the payment system or infrastructure provider has failed to co-operate with the inspector.

422. *Subsection (6)* provides for the warrant to allow the inspector or constable to enter the premises, to search and take possession of relevant documents or information, take copies and require explanation of documents or information, and for a constable to use reasonable force.

423. *Subsection (7)* incorporates sections 15(5) to (8) and 16 of the Police and Criminal Evidence Act 1984 that allows a warrant to authorise persons to accompany the constable executing it and for that person to have the same powers as the constable in

relation to the warrant. *Subsections (8)* and *(9)* make provision about the application of this clause in Scotland and Northern Ireland.

Clause 192: Independent Report

424. *Subsection (1)* enables the Bank of England to require that the operator of a recognised inter-bank payment system appoint an expert to provide a report on the effectiveness of the recognised inter-bank payment system.

425. *Subsection (2)* specifies that the Bank of England can only impose this requirement where the Bank thinks that the operator is not adhering sufficiently to the principles (as set out in clause 185), or where the operator is failing to comply with a code of practice (as set out in clause 186), or where the Bank of England feels that such a report is necessary to help it carry out its functions in accordance with this Part.

426. *Subsection (3)* enables the Bank of England to make certain stipulations such as the nature of the expert the operator of the payment system must appoint (for example experience and qualifications), the content of the expert's report, how the report is subsequently treated (including whether or not it is to be published), and the timeframe within which the report must be produced.

Clause 193: Compliance failure

427. This clause defines the use of the term "compliance failure" throughout this Part. A compliance failure is taken to mean the failure of an operator of a recognised inter-bank payment system to comply with a code of practice (clause 186), with a requirement regarding system rules (clause 187), with a direction made by the Bank of England (clause 188) or with a requirement made with regard to producing an independent report (clause 192).

Clause 194: Publication

428. This clause gives the Bank of England the power to publish details of a compliance failure. This is, in effect, a power of public censure. *Subsection (2)* gives the Bank of England the power to publish details of a sanction imposed under clauses 195 to 197.

Clause 195: Penalty

429. In the event of a compliance failure, *subsection (1)* gives the Bank of England the right to impose on the operator of a recognised inter-bank payment system a financial penalty.

430. *Subsection (2)* provides that the financial penalty is to be paid to the Bank of England and is enforceable as a debt.

Clause 196: Closure

431. This clause enables the Bank of England to give a closure order to an operator of a recognised inter-bank payment system.

432. *Subsection (1)* provides that the Bank of England may make a closure order only if it is satisfied that any deficiencies in the design of the system, or any disruption of its operation, would be likely to threaten the stability of, or confidence in the UK financial system (consequences of a "systemic nature") or could have serious consequences for business or other interests throughout the United Kingdom ("system-wide consequences").

433. Under *subsection (2),* the Bank of England can specify that the payment systems must cease operation for a specified time, until further notice, or permanently. The nature of the closure order will depend on the seriousness of the threat to financial stability or to other business interests in the UK and the individual circumstances of the case. *Subsection (3)* provides that a closure order may apply to some or all of the payment system in question.

434. *Subsection (4)* makes it an offence for an operator to fail to comply with a closure order. A financial penalty may be imposed on a person found guilty of contravening the order.

Clause 197: Management disqualification

435. This clause enables the Bank of England to make an order to disqualify a person from being an operator of a recognised inter-bank payment system (see *subsection (1)*) or from holding a position of management responsibility within such a system (see subsection *(2)*).

436. Under *subsection (3)* it is an offence to breach a prohibition as set out *subsections (1) or (2)*. A financial penalty may be imposed on a person found guilty of contravening the order.

Clause 198: Warning

437. This clause requires the Bank of England to give a warning notice of its intention to impose a sanction (clauses 194(1)-197 (see *subsection 2*)) and allow 21 days for representations, which it must then consider before it imposes various sanctions under this Part. The Bank of England must issue a decision notice stating whether or not it intends to impose the sanction.

438. In certain circumstances the Bank of England has the power, under *subsection (3)*, to take immediate action (without giving notice) and to give a closure order under clause 196 or to make a disqualification order under clause 197. The Bank of England may make such orders if, for instance, the operator of a recognised inter-bank payment system is committing a compliance failure of such a serious nature that it poses an imminent threat to the stability of the UK financial system.

Clause 199: Appeal

439. This clause provides for appeals against Bank of England's decisions to impose sanctions under this Part (clause 198(1)(d)), or against the imposition of a sanction without notice (clause 198(3)), to be made to the Financial Services and Markets Tribunal.

440. *Subsection (3)* applies Part 9 of the Financial Services and Markets Act 2000 with necessary modifications

Miscellaneous

Clause 200: Fees

441. This clause enables the Bank of England to require the operators of recognised inter-bank payment systems to pay fees (see *subsection (1))* but only in accordance with a scale of fees set by the Treasury in Regulations (see *subsection (2)*). Fees may be charged by the Bank of England to cover expenses incurred in undertaking its functions under this Part, for example, the cost of appointing an inspector under clause 190.

442. *Subsection (4)* allows the Bank of England to enforce a fee as a debt.

Clause 201: Information

443. This clause gives the Bank of England a statutory power to gather information which it considers will help the Treasury in its decisions about recognition orders or which the Bank requires in connection with its functions under this Part.

444. *Subsection (2)* allows the Bank of England to impose a requirement on recognised inter-bank payment systems to notify it of certain events.

445. The Bank of England may, under *subsection (3)*, require this information to be provided in a specified form or manner, at a specified time, or in respect of a specified period.

446. Subsection (4) allows the Bank of England to share information obtained under this clause with the Treasury and the FSA; the Treasury's, the FSA's or the Bank's international equivalents; the European Central Bank; and the Bank for International Settlements. Subsection (5) provides that the Bank of England may disclose information in accordance with this clause irrespective of contractual rights or other confidentiality requirements.

447. Under *subsection (6)* the Treasury can, by regulations, specify other persons with whom the Bank of England may share the information. *Subsection (7),* specifies that the Bank of England may publish information obtained under this clause, subject to any regulations concerning the manner and extent of publication, made by the

Treasury under (*subsection (8)*). The Bank currently publishes an annual Payment Systems Oversight Report and this clause can be used to enable such a report to be published.

448. *Subsection (10)* makes it an offence to fail to comply with a requirement under this clause or to knowingly give false information under this clause. A financial penalty may be imposed on a person found guilty of such conduct (see *subsection (11)*).

Clause 202: Pretending to be recognised

449. This clause makes it an offence for the operator of a non-recognised inter-bank payment system to assert or otherwise do anything to suggest that their system is recognised. A financial penalty may be imposed on a person found guilty of such conduct (see *subsection (2)*).

Clause 203: Saving for informal oversight

450. This clause ensures that the Bank of England can continue to engage in informal oversight of inter-bank payment systems (see *subsection (1)*) and to use means of oversight other than the provisions in this Part in relation to recognised inter-bank payment systems (see *subsection (2)*).

PART 6: BANKNOTES: SCOTLAND AND NORTHERN IRELAND

Introduction

Clause 204: Overview

451. This Part repeals certain existing provisions about permission to issue banknotes in Scotland and Northern Ireland, and replaces them (but only for banks which already have permission to issue banknotes).

Key terms

Clause 205: "Banknote"

452. This clause defines what is meant in Part 6 by the term "banknote".

Clause 206: "Issue"

453. This clause defines, for the purposes of this Part, when a banknote is "issued". The definition ensures that a banknote is regarded as issued once it enters circulation, even if it enters circulation in error or as the result of theft.

454. A banknote does not come out of circulation until it is returned to its issuing bank or its agent. If the note is subsequently put back into circulation, it is again regarded as "issued".

Clause 207: "Authorised bank"

455. This clause defines what is meant in Part 6 by the term "authorised bank". An "authorised bank" is a bank that, immediately before the coming into force of this Part, was authorised to issue banknotes in Scotland or Northern Ireland. References to "authorised bank" in these explanatory notes have the same meaning.

Clause 208 "Commencement"

456. This clause defines what is meant in Part 6 by the term "commencement". "Commencement" means the date set in an order made by the Treasury under clause 253 for the coming into force of clause 209.

Authorisation to issue

Clause 209: Repeal of old authorising enactments

457. Authorised banks were given permission to issue banknotes by certain provisions of the Bank Notes (Scotland) Act 1845 and the Bankers (Ireland) Act 1845, as subsequently amended. This clause repeals those provisions.

Clause 210: Saving for existing issuers

458. This clause ensures that authorised banks may still continue to issue banknotes, provided that they meet the requirements set out in this Part. No other banks may start issuing banknotes in Scotland or Northern Ireland. Authorised banks may issue banknotes only in the part of the United Kingdom in which they were authorised to do so before commencement of this Bill as enacted.

Clause 211: Consequential repeals and amendments

459. This clause sets out the further legislative repeals and amendments that are required as a result of the provisions of clause 209.

Regulations and rules

Clause 212: Banknote regulations

460. *Subsections (1)* and *(2)* require the Treasury to set out in secondary legislation provisions concerning the treatment, holding and issuing of banknotes by authorised banks. This secondary legislation is referred to as the "banknote regulations" in Part 6 and also in these explanatory notes. The banknote regulations are subject to the affirmative resolution procedure.

461. By virtue of clause 249, the banknote regulations may make provision generally or only for specified cases or circumstances. Where they do make provision for specified cases or circumstances, they may make different provision for different cases or circumstances.

Clause 213: Banknote rules

462. *Subsections (1)* and *(2)* provide that the banknote regulations may require or permit the Bank of England to make rules about any aspect of the treatment, holding or issuing of banknotes by authorised banks.

463. The banknote rules may make provision generally or only for specified cases or circumstances. Where they do make provision for specified cases or circumstances, they may make different provision for different cases or circumstances.

Specific issues

Clause 214: Backing assets

464. *Subsection (1)* provides that the banknote regulations must require authorised banks to have backing assets.

465. *Subsection (2)* defines "backing assets". The term means those assets of a kind specified in the banknote regulations. This may include Bank of England banknotes, UK coins, or funds held in a specified bank account at the Bank of England or another institution or class of institution.

466. *Subsection (3)(a)* requires the banknote rules to include provision for determining the value of backing assets to be held.

467. *Subsections (3)(b)* and *(3)(c)* provide that the banknote regulations must require certain backing assets to be held at certain prescribed locations. Bank of England notes may be held only by the Bank of England or at locations approved by the Bank of England. UK coin may be held only at locations approved by the Bank of England. Approval will be subject to compliance with conditions determined by the Bank of England pursuant to clause 223.

468. *Subsection (4)* provides a broad power for the Treasury to make further provisions in the banknote regulations about backing assets, in particular for the purposes set out in paragraphs (a) to (d).

469. *Subsection (5)* provides that the banknote regulations may make provision about the treatment of backing assets in relation to insolvency (as defined in *subsection (6)*). In particular, the banknote regulations may modify insolvency law to ensure that the backing assets are "ring-fenced" and are available only to noteholders for a certain specified period. The regulations may allow the Treasury to extend this period if

required. The regulations may also make provision for a note exchange programme, in which noteholders would exchange their notes for Bank of England notes and coins, or for funds paid directly into their bank account.

Clause 215: Information

470. *Subsection (1)* permits the banknote regulations or rules to make provision about certain information to be provided by the authorised banks to the Bank of England. This power may be exercised to require authorised banks to submit reports to the Bank of England about the treatment, holding or issue of banknotes, or in respect of compliance with the banknote regulations or rules. It may also be used to require information to be given by the authorised bank or its agent more generally.

471. *Subsection (2)* permits the banknote regulations to make provision enabling the publication or disclosure of information provided to the Bank of England. Such information may include the value of authorised banks' notes in circulation, notes with the potential to enter circulation and backing assets held, and any action taken by the Bank of England in connection with non-compliance with the regulations or rules. The regulations may also make provision enabling the publication or disclosure of anything done in contravention of this Part or banknote regulations or rules, and also details of any action taken under clause 218 (Offence: unlawful issue), clause 219 (Financial penalty), clause 220 (Termination of right to issue) or clause 221 (Application to court).

472. *Subsection (3)* requires Her Majesty's Revenue and Customs (HMRC) to transfer to the Bank of England all information held by HMRC in connection with HMRC's functions under the 1845 legislation (as defined in paragraph 18 above). *Subsection (4)* limits the use of that information by the Bank of England to purposes in connection with the performance of its regulatory responsibility for commercial bank issuance of banknotes.

Clause 216: Ceasing the business of issuing notes

473. *Subsection (1)* provides that, if an authorised bank discontinues the issue of banknotes, its note-issuing privilege cannot thereafter be revived.

474. *Subsection (2)(a)* provides for the banknote regulations or rules to prescribe the procedures to be followed in connection with an authorised bank's voluntary discontinuation of note issuance. *Subsection (2)(b)* provides that the banknote regulations or rules may apply to an authorised bank for two years after it stops issuing bank notes. This is designed to ensure, in particular, that authorised banks maintain sufficient backing assets until their notes leave circulation.

Clause 217: Insolvency, &c

475. *Subsection (1)* provides that the regulations may make provision in connection with the application of the special resolution regime to an authorised bank, or a provision about insolvency(as defined in clause 213(6))..

476. *Subsection (2)* provides that the banknote regulations may make provision for the destruction of un-issued and exchanged banknotes, and for the extinction of any claim to or interest in such banknotes.

477. *Subsection (3)* provides that the issuing rights of an authorised bank (as provided for in clause 210) cannot be transferred or acquired, particularly in connection with anything done under Part 1 of this Bill. This is consistent with the prohibition in this Part preventing any new commercial banks from issuing banknotes.

478. *Subsection (4)* is included to provide clarity concerning a bank taken into temporary public ownership. It ensures that, where an authorised bank is taken into temporary public ownership, that does not of itself deprive the bank from issuing notes. (However, if the bank is insolvent, then *subsection (5)* will deprive it of the right to issue notes).

479. Subsection (5) provides that an authorised bank that enters insolvency (within the meaning of clause 214(6)) will lose the right to issue notes.

480. *Subsection (6)* permits the banknote regulations to make transitional provision where an authorised bank loses the right to issue notes.

481. *Subsection (7)* provides that a reference in this clause to "special resolution regime", includes a reference to any law of another country that the Treasury identifies in banknote regulations as serving a similar purpose.

Enforcement

Clause 218: Offence: unlawful issue

482. *Subsection (1)* makes it a criminal offence to issue banknotes in Scotland or Northern Ireland otherwise than in reliance on clause 210.

483. *Subsection (2)* sets out the penalties applicable to a person convicted of the unlawful issue of banknotes in Scotland or Northern Ireland.

484. *Subsections (3)* to *(5)* provide that the officers of an authorised bank may also be guilty of a criminal offence if the bank issues banknotes otherwise than in reliance on clause 210. "Officer" is defined in *subsections (4)* and *(5)*, and the circumstances in which they may commit a criminal offence are set out in *subsection (3).*

485. *Subsection (6)* specifies the authorities in England and Wales, and Northern Ireland, who may prosecute an offence under this section. No provision is necessary for

Scotland because, in Scotland, responsibility for the prosecution of crime resides solely with the Lord Advocate (Ministerial Head of the Crown Office and Procurator Fiscal Service).

Clause 219: Financial penalty

486. *Subsection (1)* provides that the banknote regulations may enable the Bank of England to impose a financial penalty on an authorised bank where the bank has breached the banknote regulations or rules.

487. *Subsection (2)* provides that financial penalties imposed by the Bank of England shall be paid to the Bank of England and are enforceable as a debt.

Clause 220: Termination of right to issue

488. *Subsections (1)* to *(4)* confer a power on the Treasury, following consultation with the Bank of England, to terminate an authorised bank's note-issuing rights if:

- the bank has failed to comply with the banknote regulations or rules; and
- having regard to the nature of that failure, the bank should no longer be permitted to issue banknotes.

489. *Subsection (5)* provides that an authorised bank loses the right to issue notes if it ceases to have permission under Part IV of the Financial Services and Markets Act 2000 to carry out the regulated activity of accepting deposits.

490. *Subsection (6)* provides that the reference in *subsection (5)* to Part IV of the Financial Services and Markets Act 2000 includes a reference to a law of a foreign country that the Treasury may identify in banknote regulations as serving a similar purpose.

491. *Subsection (7)* provides that the banknote regulations may make transitional provision where an authorised bank loses the right to issue notes.

Clause 221: Application to court

492. This clause provides that the banknote regulations may permit the Bank of England to apply to the High Court or, in Scotland the Court of Session, for relief in respect of a failure to comply with the banknote regulations or rules, or for any order designed to ensure, or facilitate monitoring of, compliance with a provision of the banknote regulations or rules.

Bank of England

Clause 222: Organisation

493. This clause provides that costs incurred, and sums received (for example, from fines),

by the Bank of England in the course of carrying out its functions under this Part constitute expenses and receipts of the Bank's Issue Department.

Clause 223: Discretionary functions

494. This clause provides that banknote regulations may confer a discretionary power on the Bank of England. In particular, the regulations may require compliance with conditions imposed by the Bank of England, or make a permission or option subject to the approval of the Bank of England. By way of example, matters in which such a discretion may be exercised could include the approval of locations for the holding of un-issued banknotes or backing assets by the authorised banks.

Clause 224: Exemption

495. This clause provides that clause 218(1), which prohibits the unauthorised issue of banknotes in Scotland and Northern Ireland, does not affect the Bank of England's entitlement to put its own notes into circulation in Scotland and Northern Ireland.

PART 7: MISCELLANEOUS

Treasury support for banks

Clause 225: Consolidated Fund

496. This clause provides for any expenditure incurred by the Treasury in connection with the exercise of the powers in Parts 1 to 3 of this Bill, in connection with the giving of financial assistance to banks or other financial institutions more generally or in connection with the provision of financial assistance to the Bank of England to be paid from money provided by Parliament. Financial assistance includes giving guarantees or indemnities. The clause also provides statutory cover where the expenditure has been incurred or the guarantee or indemnity given before Royal Assent.

Clause 226: National Loans Fund

497. This clause allows the Treasury to draw money from the National Loans Fund for the purpose of making a loan to a bank or other financial institution. It may do this when the loan is required urgently, for example in circumstances where it would not be possible to delay the loan until Parliament had approved an Estimate for the purpose of making a loan under clause 225.

Clause 227: "Financial institution"

498. This clause allows the Treasury to define "financial institution" for the purposes of clauses 225 and 226 by statutory instrument.

Bank of England

Clause 228: UK Financial Stability

499. This clause amends Part 1 of the Bank of England Act 1998, which relates to constitution of the Bank and the functions of the Court of Directors, to include provision relating to a financial stability objective. *Subsection (1)* inserts three new sections as 2A to 2C and *subsection (2)* amends the current section 2.

500. New *section 2A(1)* provides that the Bank has an objective of contributing to the protection and enhancement of financial stability in the United Kingdom.

501. New *section 2A(2)* provides that the Bank's strategy in relation to Financial Stability shall be determined and reviewed by the Court of Directors of the Bank of England. The Court must consult the Treasury before it sets the strategy. (See also new *section 2B(2)* in relation to recommendations from the Financial Stability Committee.)

502. New *section 2B(1)* requires there to be a new sub-committee of the Court of directors of the Bank of England – the *Financial Stability Committee.* This Committee is to be chaired by the Governor of the Bank of England (when present), with other membership consisting of the two deputy Governors and 4 directors of the Bank's Court, who are to be appointed by the Chair of the Court of Directors.

503. New *section 2B(2)* sets out the functions of the Committee. One function is to make recommendations to the Court regarding the Bank's financial stability strategy, which the Court must consider. Other functions include advising the Bank whether and how it should use the stabilisation powers conferred on it as part of the special resolution regime in Part 1 of this Act and advise on the actions the Bank should take in respect of a particular institution. This is most likely to be necessary in the case of a bank or building society that has entered, or is about to enter, the SRR. Another function of the committee is to monitor the Bank's oversight of inter-bank payment systems. It also provides for the Court of Directors to delegate other functions to the Committee, as it considers appropriate for pursuing the Financial Stability Objective.

504. *New section 2B (3)* and *(4)* allow the Treasury to appoint a non-voting member to the Committee and the Committee to co-opt other non-voting members.

505. *New subsection 2B (5)* allows the Chair of Court to replace the 'non-executive' members of the Committee, drawn from the membership of the Court of Directors.

Financial stability committee: supplemental

506. *New section 2C (2) and (3)* set the procedure to be followed if a member of the Committee has an interest in a matter to be considered by the Committee. Any such interest must be disclosed and the member has no vote unless the Committee resolves that there is no conflict of interest. Members must not vote and must be absent during any debate of any matter in which the member is concerned.

507. *New section 2C(4*) provides for the Committee to delegate certain of its functions to two or more of the voting members on the Committee.

508. *Subsection (2)* amends section 2 of the Bank of England Act 1998 by adding a new *subsection (5)* which makes the Bank's powers to determine its objectives subject to the statutory objectives relating to monetary policy and financial stability.

Clause 229: Number of Directors

509. This clause amends the Bank of England Act 1998, and provides that the maximum size of the Court of Directors reduces from nineteen to twelve. As well as the Governors and two deputy Governors of the Bank of England it allows for there to be a maximum of nine other directors. In practice, these are likely to be non-executive directors, who are not employees of the Bank.

510. *Subsection (4)* provides that when this provision comes into force, the then current directors of the Bank must vacate office (but will be eligible for re-appointment).

Clause 230: Meetings

511. This clause amends the Bank of England Act 1998 (at paragraph 12 of Schedule 1) to provide that the Court of Directors of the Bank of England must meet at least 7 times in each calendar year, rather than monthly as at present.

512. *Subsection (3)* enables the Governor or, in his absence, a Deputy Governor or the Chair of Court to summon a meeting of the Court.

Clause 231: Chair of Court

513. This clause amends the Bank of England Act 1998 (at paragraph 13 of Schedule 1) with a new sub-paragraph (3) which provides that the Chancellor of the Exchequer designates a member of Court as the Chair of Court (the current Act required the Governor to be the chair of Court). It also provides for the Chancellor to designate deputies to serve in the absence of the Chair.

514. *Subsection (2)* substitutes a new section 3(4) of the Act to provide that the Chair of Court (when present) is to chair the sub-committee of non-executive directors established under the Bank of England Act.

Clause 232: Quorum

515. This clause amends the Bank of England Act 1998 to allow for the Committee of non-executive directors, and the Court of Directors to determine their own quorums.

Clause 233: Tenure

516. *Subsection (1)* of this clause provides for someone appointed as a Governor of the Bank or a Deputy to serve no more than two terms in either role. This does not stop a person serving in one role for two terms subsequently serving in another.

517. *Subsection (3)* provides that those members of the Monetary Policy Committee who are appointed by the Chancellor, rather than those appointed by the Governor, may serve a maximum of two terms.

Clause 234: Immunity

518. This clause provides that the Bank of England has legal immunity in its capacity as a monetary authority, which includes its functions as a central bank and its financial stability functions. This provides immunity from legal claims for damages. The clause protects the Bank, its directors, officers, and servants (or purporting to act as such). The immunity does not extend to actions taken in bad faith or actions taken in contravention of the European Convention on Human Rights.

519. The Government does not intend that the Bank of England shall have statutory immunity in its role as an employer, procurer of contracted services or in other roles not related to its statutory duties, as laid out in the Bank of England Act, 1998, or in this Bill.

Clause 235: Weekly return

520. This clause removes the requirement, established in the Bank Charter Act, 1844, that the Bank of England must produce a weekly return of accounts. As a result, the Bank of England will be able to determine whether, and in what form, it produces a return.

Clause 236: Information

521. This clause permits the Bank of England to disclose information relating to the financial stability of the individual financial institutions or aspects of the financial system of the United Kingdom. It may disclose information to HM Treasury, the Financial Services Authority, the Financial Services Compensation Scheme, and overseas central banks and regulators. The provision overrides other confidentiality requirements and is without prejudice to any other power to disclose information.

522. This will enable the Bank of England to share relevant information that it may have received in relation to its financial stability functions, for example from an institution administered under the special resolution regime.

Clause 237: Bank of England Act 1946

523. This clause states that nothing in the Bill affects the generality of the powers in section 4 of the Bank of England Act 1946.

Financial Services Authority

Clause 238: Variation of permission

524. This clause amends section 45(1)(c) of the Financial Services and Markets 2000 to specify when the Financial Services Authority can use its power on its own initiative to vary the permission relating to the regulated activities which an authorised person may has permission to undertake, or to impose or change a restriction upon the authorised person. The Authority may use this power if it considers it desirable to do so to protect the interests of consumers. The amendment specifies that this means consumers relating to the authorised person in question or other authorised persons.

Clause 239: Functions

525. This clause modifies the application of references to the functions of the Financial Services Authority to encompass the functions in the Bill.

526. *Subsection (1)* specifies that references to functions of the Authority by or under the Financial Services and Markets Act, 2000 are taken to include a reference to functions conferred under the Bill.

527. *Subsection (2)* specifies that any other references to functions of the Authority in an enactment are taken to include a reference to the functions under the Bill.

528. *Subsection (3)* enables the Treasury by Order to disapply subsections (1) or (2), in case of a reference to functions which needs to be given a narrower meaning.

Clause 240: Information

529. This clause requires the Financial Services Authority to collect information relevant to financial stability of financial institutions or the financial system and enables it to use its powers in section 165 of the Financial Services and Markets Act 2000 for this purpose. The Authority may also use other existing powers to collect information as it sees fit. This information (which the Authority will be able to share under its existing powers) will be used to support the Authorities' oversight of financial stability and will inform the work of the Financial Stability Committee of the Bank of England which is established in this Bill.

Central banks

Clause 241: Financial assistance to building societies

530. This clause provides HM Treasury with power to make amendments to the Building Societies Act, 1986 and certain consequential amendments with regard to the provision of financial assistance to building societies.

531. *Subsection (1)* provides a power to modify the Building Societies Act 1986 and that the financial assistance under the clause may be provided by HM Treasury, the Bank of England, and other central banks (including the European Central Bank).

532. This clause concerns the facilitation of those listed in subsection (1) to provide liquidity assistance to building societies where necessary.

533. The Building Societies Act 1986 (c.53) includes various provisions that deal with the ability of building societies to grant floating charges and other provisions which impose limits on what building societies can lend and how they fund themselves.

534. Section 11 of the Banking (Special Provisions) Act 2008 (c.2) makes similar provision to this clause, but in relation to financial assistance provided by the Bank of England, the new provisions applies in addition to the Treasury and other central banks (including the ECB) and removes the reference to financial assistance provided for the purpose of maintaining financial stability, which in the context of a provision which removes restrictions where there is a public interest in providing financial assistance to building societies may be too narrow.

535. *Subsection (2)* sets out the purpose of the modifications of the 1986 Act, which is to modify provisions which would be capable of preventing, impeding or affecting the provision of financial assistance under the clause. The subsection sets out examples of the matters which may be modified in the 1986 Act, which include provisions about establishment, constitution or powers, restrictions on raising funds or borrowing, provision about security and the application of insolvency law and other legislation concerning companies to building societies.

536. *Subsection (3)* provides that the order may disapply or modify the provisions referred to in subsection (2). The provisions can be by way of textual amendment or modification of the effect of a provision. An order to modify the Building Societies Act 1986 under this clause is subject to the affirmative resolution procedure.

537. *Subsection (7)* provides that the Treasury may, by order, make further provision to modify or disapply the prohibition on floating charges in section 9B of the Building Societies Act 1986 beyond provision in relation to the institutions listed in subsection (1), if the Treasury think it is likely to help building societies to use, give effect to or take advantage of financial assistance offered by one of the institutions listed in subsection (1).

Clause 242: Registration of charges

538. This clause disapplies the requirements in Part 25 of the Companies Act, 2006, that institutions must register certain charges that they enter into at Companies House and in a public register at their office. The clause provides that the requirements do not apply to charges granted in favour of the Bank of England, other central banks or the European Central Bank. This is because registration could otherwise lead to early disclosure of liquidity support.

539. Subsection (2) provides that the reference to Part 25 of the Companies Act 2006 also covers related provisions in the 2006 Act with reference to the registration requirements placed upon overseas companies in relation to certain charges. The reference to the 2006 Act is also treated as including reference to the corresponding provisions of the Companies Act 1985, which will remain in force generally until 1st October 2009. Further, the subsection provides that this clause is also treated as referring to the corresponding provisions of companies law in Northern Ireland which remain generally in force until 1st October 2009.

Clause 243: Registration of charges: Scotland

540. This clause is consequential to clause 242 above, and provides that the disapplication of Part 25 of the Companies Act (and related provisions) as provided for in clause 242, shall also apply to the Bankruptcy and Diligence (Scotland) Act 2007 (the 2007 Act) which introduces a registration scheme for Scottish floating charges. This clause therefore disapplies certain provisions of the 2007 Act, where these provisions would restrict the efficacy of clause 242 above and for the same reasons as Part 25 of the Companies Act 2006 is disapplied.

541. Subsection (2) amends the 2007 Act such that, where floating charges covered by the Act are to be granted to a central bank, they are considered to have been created when the document creating the charge is executed. This alters the standard provisions with regard to the 2007 Act which stipulates that floating charges subject to the 2007 Act are created only when registered on the Scottish Register of Floating Charges. This provision will continue to apply except for cases where the charge is in favour of a 'central institution', that is, the Bank of England or another central bank (as defined in subsection (7)).

542. Subsections (3) to (6) further amend the 2007 Act in such a way as to ensure that floating charges issued in favour of a central institution are not required to be registered, by disapplying the appropriate provisions of that Act.

Funds attached rule (Scotland)

Clause 244: Abolition for cheques

543. *Subsection (1)* explains what is meant by the "funds attached" rule. It describes the rule of Scots law whereby, when a bill of exchange (e.g. a cheque) is presented for payment, the amount stated on the bill is assigned to the holder of the bill. Where insufficient funds are available to satisfy the bill, such lesser amount as is available is assigned to the holder of the bill.

544. *Subsection (2)* provides for the abolition of the "funds attached" rule in relation to cheques. The abolition has effect only in relation to cheques presented for payment after this clause comes into force.

545. *Subsection (3)* establishes that the meanings of terms used in this clause are as defined in the Bills of Exchange Act 1882. Specifically:

- "bill of exchange" has the meaning given in section 3 of the Act, namely "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer"; and
- "cheque" means "a bill of exchange drawn on a banker payable on demand" as defined in section 73 of the Act.

546. *Subsection (4)(a)* amends section 53(2) of the Bills of Exchange Act 1882, in which the "funds attached" principle is set out. The amendment provides that section 53(2) no longer applies in relation to cheques.

547. *Subsection (4)(b)* repeals section 75A of the Bills of Exchange Act 1882, which was inserted by section 11 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 to deal with a problem that arose in relation to stopped cheques in the context of the operation of the "funds attached" rule. With the abolition of the rule in relation to cheques, the problem which section 75A addressed ceases to arise.

548. *Subsection (5)* repeals section 11 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. See also paragraph 520 above.

549. In accordance with clause 253 in Part 8, this section will come into force automatically two months after the Banking Bill receives Royal Assent.

Financial collateral arrangements

Clause 245: Regulations

550. This clause concerns a power to make regulations concerning financial collateral arrangements. Financial collateral arrangements are arrangements between specified types of persons, often involved in the financial markets, where the obligations under an agreement are secured by the provision of collateral (under the Directive, cash and financial instruments, such as shares) either by way of creating security over collateral or by title transfer of the collateral.

551. The background to the power is the EU Financial Collateral Arrangements Directive (2002/47/EC). The Directive covers the ground of removing formalities in relation to financial collateral arrangements, making provisions in relation to how such arrangements may be enforced, how they must be capable of taking effect, in particular in relation to the effect of insolvency proceedings and of choice of law in relation to particular forms of financial collateral arrangements.

552. This Directive is implemented in UK law by the Financial Collateral Arrangements (No.2) Regulations 2003, S.I. 2003/3226 (the 2003 Regulations). The power

exercised to make the regulations was section 2(2) of the European Communities Act 1972 (ECA). The power under the ECA relates to the scope of the Directive and the new power, as noted in subsection (3), extends beyond provision in connection with the Directive.

553. *Subsection (2)* sets out the scope of what are financial collateral arrangements, that collateral may be cash, securities or in any other form and that an arrangement can be by way of security or title transfer.

554. *Subsection (3)* sets out that the power enables the Treasury to cover the ground relating to the Directive, but also to go beyond that field to include provisions that the Treasury thinks are necessary or desirable for the purpose of enabling financial collateral arrangements to be commercially useful and effective.

555. *Subsection (4)* sets out examples of the provision that may be made under the power to disapply or modify legislation, the scope relates to the scope of the Directive and the 2003 Regulations.

556. The clause also includes power to make provision on a retrospective basis.

Clause 246: Supplemental

557. This clause provides the Parliamentary procedure applicable to the regulations made under the previous clause concerning financial collateral arrangements together with incidental, consequential and transitional provision that may be made.

PART 8: GENERAL

Clause 247: "Financial assistance"

558. This clause provides a partial definition of financial assistance and allows the Treasury further to define financial assistance for the purposes of the Bill by statutory instrument.

Clause 248: "Enactment"

559. This clause defines the meaning of enactment to include Acts of the Scottish Parliament, Scottish subordinate legislation and Northern Ireland legislation.

Clause 249: Statutory instruments

560. This clause provides that the statutory instruments made under this Act can apply generally or to specific cases and can be of any type or form, but that they cannot be treated as hybrid instruments.

561. This clause also provides a list of powers which may be exercised by the 28 day affirmative procedure instead of the draft affirmative procedure. This will be possible only the first time that the power is exercised and where the person exercising the power is satisfied that it is necessary to do so.

Clauses 250-255: General

562. This part gives an index of which sections contain important definitions.

563. The short title of the legislation is the Banking Act 2008.

FINANCIAL EFFECTS OF THE BILL

564. The financial effects of this Bill are largely related to the administration of the special resolution regime. As described in the Impact Assessment (which will be placed in the Vote Office), the Bank of England, given its central role in the SRR tools, is likely to need to invest in additional resources to enable it to carry out its functions. However, dealing with failing banks is already a responsibility of the Authorities and, as such, this should not impose an additional cost on total public expenditure.

565. In terms of the costs associated with resolving failing banks, it is anticipated that the provisions in this Bill will lessen the risk posed to public expenditure by the need to resolve failing banks. First, allowing the resolution to take place in the most orderly and efficient manner possible and second, by providing that, where appropriate, the Financial Services Compensation Scheme will fund the resolution costs, capped to the amount that it would have paid out to depositors if the bank had gone into insolvency or administration.

566. Allowing the National Loans Fund to make loans to the FSCS would occasion expenditure on the part of the NLF only if the FSCS were to take out a loan or loans. This is clearly a contingent cost and will vary depending on the magnitude and terms of the particular loans.

567. There are no other significant financial effects of the Bill.

EFFECTS OF THE BILL ON PUBLIC SERVICE MANPOWER

568. As discussed in the Impact Assessment, the Bank of England is continuing to work up its operational plan as the lead SRR authority, liaising closely with international counterparts to learn from best practice. At this time, however, the Bank of England estimates that the model will be based on a limited standing staff whose role will be to

monitor situations and contingency plans for the SRR tools. When the SRR is

invoked, these staff will be supplemented by external professionals such as lawyers, insolvency professionals and banking experts.

SUMMARY OF THE IMPACT ASSESSMENT

569. The Impact Assessment was published with the draft Bill.

570. As described in the Impact Assessment, the Government expects this Bill to benefit the UK economy by preventing costs associated with financial instability and loss of confidence in the financial system. The majority of the policies that are implemented in this Bill impose minimal costs. Others reduce costs by simplifying existing processes. The only policy that could impose significant costs is the power to allow pre-funding of the Financial Services Compensation Scheme. The possible costs of this proposal are examined in the Impact Assessment. However, the Government will not use this power until the market circumstances made it appropriate to do so – in which case, the statutory instrument to implement it will be subject to a full consultation and impact assessment.

EUROPEAN CONVENTION ON HUMAN RIGHTS

571. The measures in Parts 1-3 of the Bill will make important changes to the legal and insolvency arrangements for banks operating in the UK and give rise to a number of significant human rights considerations. In particular, the rights under Article 1 Protocol 1 ("A1P1") (right to property), Article 6 (right to a fair trial) and, to a much lesser extent, Article 8 (right to respect for private and family life) and Article 14 (right not to be discriminated against) European Convention on Human Rights are engaged.

572. Most significantly, an exercise of the stabilisation powers, for example to transfer compulsorily shares in a distressed bank to a private sector purchaser, will constitute an interference in a person's A1P1 right, which specifies that every natural or legal person is entitled to the peaceful enjoyment of his possessions.[5] This right is not absolute. Instead, a State may interfere in that right, particularly when acting for economic and public policy reasons, where that interference is lawful, proportionate and justified in the public interest.

[5] Three classes of persons may be considered "victims" of an exercise of the stabilisation powers: (i) In the case of share transfers, the victims will be the former shareholders in the distressed bank whose shares will be transferred compulsorily ("expropriated") from the shareholders. (ii) In the case of property transfers, the victim will be the distressed bank from whom property etc will be expropriated. (iii) Creditors and other third parties may also be victims, for example, if they have their contractual rights interfered with if they have certain contractual rights interfered with.

573. The Government is of the view that the substantive limitations on the exercise of the stabilisation powers and the procedural steps the Authorities are obliged to take before exercising the stabilisation powers will ensure that the stabilisation powers are only used where there are significant and legitimate public interest justifications for doing so (for example, the public interests in protecting financial stability, and the protection of depositors). The Government therefore considers that any interference with Convention rights will be for a legitimate aim. There are in addition a number of safeguards in the Bill to ensure that any interference with Convention rights is proportionate. In particular, provision is made in the Bill for compensation to be paid for compensatable interferences in property rights arising as a result of an exercise of the stabilisation powers.[6]

574. The exercise of the powers conferred by Parts 1-3 may also engage Article 6 (for example, the determination of compensation constitutes a determination of a "civil right" for Article 6 purposes). The Government is content that the procedural safeguards in place satisfy the "fair trial" requirements of that Article.

575. Parts 4-7 of the Bill also engage A1P1, Article 6, Article 8 and Article 14 ECHR. However, the Government is content that the provisions of the Bill are compatible or can be exercised in a way that is compatible with Convention rights.

[6] We note that it is normally a case that expropriations of property, and, in some cases, serious interferences in property rights falling short of total deprivations, without compensation will constitute a disproportionate interference in property rights.

ANNEX A: LIST OF ABBREVIATIONS

ATMs – Automated Teller Machines

Bacs – Bankers' Automated Clearing Services

BAO – Bank Administration Order

BCA – Bank Charter Act 1844

BCD – Banking Consolidation Directive

BERR – Department for Business, Enterprise and Regulatory Reform

BIS - Bank for International Settlements

BSPA/ SPA - Banking (Special Provisions) Act 2008

CHAPS – Clearing House Automated Payment System

CDDA – Company Directors Disqualification Act 1986

CPSS – Committee on Payment and Settlement Systems

ECA – European Communities Act 1972

ECB – European Central Bank

ECHR – European Convention on Human Rights

EA – Enterprise Act 2002

FSA – Financial Services Authority

FSCS –Financial Services Compensation Scheme

FSC – Financial Stability Committee

FSMA – Financial Services and Markets Act 2000

HMRC – Her Majesty's Revenue and Customs

HMT – Her Majesty's Treasury

MPC – Monetary Policy Committee

NLA – National Loans Act

NLF – National Loans Fund

RTGSS - Real Time Gross Settlement System

SFD – Settlement Finality Directive

SRA – Special Resolution Authority

SRR – Special Resolution Regime

TARP – Troubled Asset Recovery Program

The Tripartite/ The Authorities – The Treasury, FSA and Bank of England

The 1845 legislation – Bank Notes (Scotland) Act 1845, the Bankers (Ireland) Act 1845 and the Bankers (Northern Ireland) Act 1928

BANKING BILL

EXPLANATORY NOTES

These notes refer to the Banking Bill
as introduced in the House of Commons on 4 December 2008 [Bill 6]

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