



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Eighth Report
of Session 2008-09**

Drawing special attention to:

Banking Act 2009 (Bank Administration) (Modification for Application to Multiple Transfers) Regulations 2009 (S.I. 2009/313)

Banking Act 2009 (Bank Administration) (Modification for Application to Banks in Temporary Public Ownership) Regulations 2009 (S.I. 2009/312)

Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 (S.I. 2009/322)

*Ordered by the House of Lords to be printed
11 March 2009*

*Ordered by the House of Commons to be printed
11 March 2009*

**HL Paper 53
HC 3-viii**

Published on 17 March 2009
by authority of the House of Lords
and the House of Commons
London: The Stationery Office Limited
£0.00

Joint Committee on Statutory Instruments

Current membership

House of Lords

Lord Campbell of Alloway (*Conservative*)
Baroness Jones of Whitchurch (*Labour*)
Lord Kimball (*Conservative*)
Countess of Mar (*Crossbench*)
Earl of Mar and Kellie (*Liberal Democrat*)
Lord Walpole (*Crossbench*)

House of Commons

David Maclean MP (*Conservative, Penrith and The Border*)
(Chairman)
Dr Roberta Blackman-Woods MP (*Labour, City of Durham*)
Mr Peter Bone MP (*Conservative, Wellingborough*)
Michael Jabez Foster MP (*Labour, Hastings and Rye*)
Mr David Kidney MP (*Labour, Stafford*)
David Simpson MP (*Democratic Unionist, Upper Bann*)

Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74, available on the Internet via www.parliament.uk/jcsi.

Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

- i. that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
- ii. that its parent legislation says that it cannot be challenged in the courts;
- iii. that it appears to have retrospective effect without the express authority of the parent legislation;
- iv. that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;
- v. that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
- vi. that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
- vii. that its form or meaning needs to be explained;
- viii. that its drafting appears to be defective;
- ix. any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

Publications

The reports of the Committee are published by The Stationery Office by Order of both Houses. All publications of the Committee are on the Internet at www.parliament.uk/jcsi.

Committee staff

The current staff of the Committee are John Whatley (*Commons Clerk*), Kath Kavanagh (*Lords Clerk*) and Jacqueline Cooksey (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank and Christine Cogger (*Commons*); Allan Roberts and Peter Milledge (*Lords*).

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, Delegated Legislation Office, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2830; the Committee's email address is: jcsi@parliament.uk.

Contents

Report	<i>Page</i>
Instruments reported	2
1 S.I. 2009/313, 312, 322: reported for defective drafting	2
Instruments not reported	2
Annex	3
Appendix	5
S.I. 2009/313, 312, 322: memorandum from the HM Treasury	5

Instruments reported

At its meeting on 11 March 2009 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to three of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memorandum is published as an appendix to this report.

1 S.I. 2009/313, 312, 322: reported for defective drafting

Banking Act 2009 (Bank Administration) (Modification for Application to Multiple Transfers) Regulations 2009 (S.I. 2009/313);
Banking Act 2009 (Bank Administration) (Modification for Application to Banks in Temporary Public Ownership) Regulations 2009 (S.I. 2009/312); and
Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 (S.I. 2009/322)

1.1 The Committee draws the special attention of both Houses to these three instruments—S.I. 2009/312, 322 and 313—on the grounds that they are defectively drafted in two respects (S.I. 2009/313), in several respects (S.I. 2009/312) and two respects (S.I. 2009/322).

1.2 Each of the instruments contains one or more drafting errors, as explained in the Memorandum from H.M. Treasury at Appendix 1. The Committee understands the necessity for speed in preparation of the instruments (explained at paragraph 2 of the Memorandum) and accepts that none of the errors gives rise to any serious doubt about the meaning of the instruments. **Nevertheless, the Committee reports the instruments for defective drafting, acknowledged by the Department.** H.M. Treasury undertakes to amend the instruments at the earliest opportunity.

Instruments not reported

The Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to the respective Houses.

Annex

Instruments to which the Committee does not draw the special attention of both Houses

- denotes that the written evidence submitted in connection with the instrument is printed with this Report
- denotes written evidence has been submitted but not printed

Instruments requiring affirmative approval

- S.I. 2009/317** Banking Act 2009 (Parts 2 and 3 Consequential Amendments) Order 2009
- S.I. 2009/319** Banking Act 2009 (Third Party Compensation Arrangements for Partial Property Transfers) Regulations 2009

Draft instruments requiring affirmative approval

- Draft S.I.** Terrorism Act 2000 (Code of Practice for Examining Officers (Revision) Order 2009

Instruments subject to annulment

- S.I. 2008/3115** Parliamentary Commissioner Order 2008
- S.I. 2009/189** Aerodromes (Designation) (Chargeable Air Services) (Revocation) Order 2009
- S.I. 2009/196** First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2009
- S.I. 2009/198** Immigration (Passenger Transit Visa) (Amendment) Order 2009
- S.I. 2009/200** Occupational Pension Schemes (Levy Ceiling – Earnings Percentage Increase) Order 2009
- S.I. 2009/202** Companies Act 2006 (Amendment of Schedule 2) Order 2009
- S.I. 2009/203** Police Act 1997 (Criminal Records) (Electronic Communications) Order 2009
- S.I. 2009/204** Non-Domestic Rating (Collection and Enforcement) (Local Lists) (Amendment) (England) Regulations 2009
- S.I. 2009/205** Plastic Materials and Articles in Contact with Food (England) Regulations 2009
- S.I. 2009/206** Local Authorities (Alteration of Requisite Calculations) (England) Regulations 2009
- S.I. 2009/208** National Insurance Contributions (Application of Part 7 of the Finance Act 2004) (Amendment) Regulations 2009
- S.I. 2009/209** Payment Services Regulations 2009
- S.I. 2009/212** Criminal Defence Service (Information Requests) (Prescribed Benefits) Regulations 2009
- S.I. 2009/263** General Osteopathic Council (Constitution) Order 2009
- S.I. 2009/265** Safeguarding Vulnerable Groups Act 2006 (Devolution Alignment) Order 2009

- S.I. 2009/269** Harbour Works (Environmental Impact Assessment) (Amendment) (England and Wales) Regulations 2009
- S.I. 2009/272** Health Professions Council (Registration and Fees) (Amendment) Rules 2009
- S.I. 2009/273** Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009
- S.I. 2009/274** Tribunal Procedure (Amendment) Rules 2009
- S.I. 2009/275** Appeals (Excluded Decisions) Order 2009
- S.I. 2009/276** Local Government (Structural Changes) (Further Transitional and Supplementary Provision and Miscellaneous Amendments) Regulations 2009
- S.I. 2009/305** Civil Enforcement of Parking Contraventions (County of Worcestershire) (Borough of Redditch) Designation Order 2009
- S.I. 2009/306** Civil Enforcement of Parking Contraventions (County of Staffordshire) (Districts of Cannock Chase, Lichfield, South Staffordshire and Tamworth) Designation Order 2009
- S.I. 2009/307** Gangmasters (Licensing Conditions) Rules 2009
- S.I. 2009/308** Kaupthing Singer & Friedlander Limited Transfer of Certain Rights and Liabilities (Amendment) Order 2009
- S.I. 2009/310** Heritable Bank plc Transfer of Certain Rights and Liabilities (Amendment) Order 2009
- S.I. 2009/314** Bank Administration (Sharing Information) Regulations 2009
- S.I. 2009/318** Health and Safety at Work etc. Act 1974 (Application to Environmentally Hazardous Substances) (Amendment) Regulations 2009
- S.I. 2009/320** Bradford & Bingley plc Transfer of Securities and Property etc. (Amendment) Order 2009

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2008/3009** Crime (International Co-operation) Act 2003 (Commencement No. 4) Order 2008
- S.I. 2008/3129** Naval Medical Compassionate Fund Order 2008
- S.I. 2008/3267** Charities Act 2006 (Commencement No. 5, Transitional and Transitory Provisions and Savings) Order 2008
- S.I. 2009/268** Children and Young Persons Act 2008 (Commencement No. 1 and Saving Provision) Order 2009
- S.I. 2009/280** Medical Profession (Miscellaneous Amendments) Order 2008 (Commencement No. 1) Order of Council 2009

Appendix

S.I. 2009/313, 312, 322: memorandum from the HM Treasury

Banking Act 2009 (Bank Administration) (Modification for Application to Multiple Transfers) Regulations 2009 (S.I. 2009/313);
Banking Act 2009 (Bank Administration) (Modification for Application to Banks in Temporary Public Ownership) Regulations 2009 (S.I. 2009/312); and
Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 (S.I. 2009/322)

1. This Memorandum has been prepared by Her Majesty's Treasury and contains information for the Joint Committee on Statutory Instruments.
2. It relates to three statutory instruments which have been made in order to bring into full effect provisions of the Banking Act 2009 ("the Act") which may be used to resolve failing banks. These provisions (Parts 1 to 3 of the Act) replace provisions of the Banking (Special Provisions) Act 2008, the main operative provisions (sections 3 and 6) of which expired under a sunset provision on 20 February 2009. These timing considerations explain why the Treasury considered it necessary to make these instruments under the 28 day procedure,¹ and why it was not possible to ask the Committee's Counsel to consider drafts of the instruments before they were made. This inevitably placed serious time pressure on the Treasury in preparing the instruments and in some cases revisions were being made to the terms of the instruments down to the moment that they were made, as a result of dialogue with stakeholders.
3. The Treasury is grateful for the opportunity, following discussions with the Committee's officials, to offer this memorandum to address matters which the Committee may wish to consider in its meeting of 11 March 2009.

The Banking Act 2009 (Bank Administration) (Modification for Application to Multiple Transfers) Regulations 2009 (S.I. 2009/313)

4. In Regulation 1(2), we included a definition of "bank in temporary public ownership". We were concerned that readers of the instrument who are not familiar with the provisions of the Act may be confused between banks owned by the Treasury and those that are owned by the Bank of England.
5. The reference to "a bank in temporary public ownership" is a reference to:
 - a. a failing bank the shares in which have been transferred, by way of an exercise of the share transfer power under section 13(2) of that Act, to the Treasury or a nominee of the Treasury; or

¹ Instruments made under these enabling powers are normally subject to the draft affirmative procedure, but the first exercise of these powers may be by 28 day instruments if the Treasury consider this necessary: section 259(4) and (5) of the Act.

- b. a bank that is indirectly owned by the Treasury or a nominee of the Treasury by virtue of the transfer of the shares in the bank's holding company to the Treasury or a nominee of the Treasury (in accordance with section 82(1) of the Act).
6. This is to be distinguished from a bank or company owned by the Bank of England, referred to in the regulations, as a "bridge bank" or "onward public sector transferee". The reference to an onward public sector transferee may, of course, also apply to a company other than a bank in temporary public ownership that is wholly owned by the Treasury (see the definition in Regulation 1(2)) to which property, rights and liabilities of the bank in temporary public ownership may be transferred in accordance with section 45 of the Act.
 7. The definition in Regulation 1(2) was accordingly inserted for clarity. However, we accept that it is inappropriate to define a term that is only used in the heading of a provision (in this case, Regulation 3).
 8. Regulation 2(a) refers to section 149 of the Act. This was intended to be clarificatory.
 9. We draw the Committee's attention to Regulation 3(1) where we explain how the modifications in the Table to the Schedule apply and make clear that Part 3 (bank administration) is applied by virtue of the powers in both section 149 (general application of Part 3 in cases where there are multiple transfers) and section 152 of the Act (where Part 3 is applied in cases where the Treasury makes a property transfer from a bank in temporary public ownership).
 10. In order to make clear how the provisions of Part 3 are applied in cases where the Bank of England makes more than one property transfer instrument, the reference to section 149 was also included in Regulation 2(b). We realise that this reference may be redundant, noting in particular the reference to the section in view of Regulation 2(a). However, the application of Part 3, which in itself modifies provisions of insolvency law to apply in certain cases to a range of scenarios, is not necessarily clear to the reader, so this provision was included to assist the reader. We accept that such clarification should have been provided in a different form (whether in the explanatory note, or through a parenthetical reference in Regulation 2).

The Banking Act 2009 (Bank Administration) (Modification for Application to Banks in Temporary Public Ownership) Regulations 2009 (S.I. 2009/312)

11. The Treasury would like to explain why, in Table 1 of the Schedule:
 - a. the following words are redundant:
 - i. "the" before "private sector transferee" in the modifications to section 138(1) and section 139;
 - ii. "a" before "company" and "the" before "Treasury" in the second set of modifications to section 148;
 - b. the following words were omitted:
 - i. "the" before "bridge bank" in the modification to section 138(4); and
 - ii. "a" before "bridge bank" in the modification to section 140.

12. In response to the points in §11(a) and (b), we accept that these drafting errors, though, in our view, they do not give rise to difficulties in the interpretation of the modifications to Part 3 of the Act, which are specified in Table 1.
13. The reference to “bridge bank” in section 148(1) of the Act should be modified in the same way as is specified for subsection (3).
14. In paragraph (d) of the modifications to section 148, the reference should be to subsection (4)(c), (d) and (f), and not (e) as drafted. We do not consider, however, that these errors could lead to a misinterpretation of the modifications specified in Table 1.

The Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 (S.I. 2009/322)

15. In the definition of “retail deposit” in article 1(3), the conditions referred to as paragraph (a) and (b) in the definition of “retail deposit”, appear immediately after the word “satisfied” in that definition. Unfortunately, as a result of what appears to be an error with the paragraph numbering in the template, the paragraphs are listed as “(l)” and “(m)”. We also note that the same difficulty occurs in relation to the definitions of “relevant authority” and “relevant financial instrument” and appears on page 4 of S.I. 2009/312. We accept that the problem with the template numbering has resulted in drafting errors.
16. We apologise to the Committee for this drafting error and undertake to correct the error at the earliest practicable opportunity. We should note that we anticipate that this instrument, which makes highly technical provision in relation to complex commercial matters, is likely to be the subject of a further period of review by the Treasury in consultation with the Banking Liaison Panel (established under section 10 of the Act) and wider stakeholders.
17. In article 8(3)(a) there is a reference to a “default event provision”. This expression is defined in section 38(1) of the Act. We recognise that, as the expression is only defined for the purposes of that section, it would have been desirable to include parenthetical words referring to section 38.

Further comments/assistance

18. If the Committee were minded to report the Treasury for defective drafting, we note that we do not wish to have any further opportunity to provide further comments or explanation to the Committee. The Treasury apologises for the drafting errors noted in this memorandum and undertakes to amend the instruments, at the earliest practicable opportunity. Any subsequent instruments made in accordance with sections 47, 149 and 152 will be made in accordance with the draft affirmative procedure.
19. Should the Committee require any further assistance on the matters specified in this memorandum, the Committee may contact Alec Brown (020 7270 4825) or Elisabeth Noble (020 7270 5059) of Treasury Legal Advisers.