

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

10th Report of Session 2013–14

**Financial Services (Banking
Reform) Bill: Clause 13 and
Government Amendments**

Ordered to be printed 9 October 2013 and published 10 October 2013

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 57

The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 15 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and
- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Andrews
Baroness Gardner of Parkes
Baroness Farrington of Ribbleton
Baroness Fookes
Lord Haskel
Countess of Mar
Lord Marks of Henley-on-Thames
Rt Hon. Lord Mayhew of Twysden QC DL
Baroness O’Loan
Baroness Thomas of Winchester (Chairman)

Registered Interests

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives. Interests related to this Report are in the Appendix.

Publications

The Committee’s reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/hldprcpublications.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at <http://www.parliament.uk/business/lords/>.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee’s email address is dpr@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that “in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion” (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, “be well suited to the revising function of the House”. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and other acts specified in the Committee’s terms of reference

Tenth Report

FINANCIAL SERVICES (BANKING REFORM) BILL: CLAUSE 13 AND GOVERNMENT AMENDMENTS

1. We considered clauses 1 to 5 of this Bill, and amendments tabled by the Government for Committee Stage in relation to those clauses, in our 8th Report (HL paper 53). In this report, we deal with the remainder of the Bill as brought from the Commons, and the remaining amendments tabled by the Government on 1 October 2013. The Treasury has submitted two supplementary memoranda explaining the further delegated powers conferred in new provisions inserted by those amendments.¹ The Government tabled further amendments for Committee Stage on 8 October, which we shall consider at a later date.

Clause 13 - Fees

2. Clause 13 inserts two new sections into the Financial Services and Markets Act 2000. The first, new section 410A, enables the Treasury by regulations subject to affirmative procedure to confer power on itself to require, by directions, the regulators (the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA) and the Bank of England) to require “relevant persons” (defined in subsection (8)) to pay fees to them. In the case of the FCA and the PRA, the requirement to pay the fees is to be imposed in their respective rules (see subsection (3)). The fees are to be payable for the purpose of enabling the Treasury to meet expenses attributable to its participation in the activities of international organisations (to be specified in regulations subject to negative resolution – see subsection (2)).
3. In our memorandum to the Parliamentary Commission on Banking Standards (PCBS) in November 2012, we commented that one significant feature of these arrangements for the delegation of this legislative power was that Parliament would have no control over the amount of the fees or over who would have to pay them, that we could see no convincing reason why the content of the proposed regulations could not be in the Bill itself, and that the four-tier structure (Act; affirmative regulations; Treasury directions; regulators’ rules) being proposed, while not necessarily inappropriate, did call for a fuller explanation. The Treasury now explains in paragraphs 107-110 of the original memorandum why it has retained the delegation arrangements from the draft Bill, notwithstanding the committee’s comments.
4. Following our earlier comments, the PCBS recommended in paragraph 300 of its First Report of Session 2012-13 (HL paper 98) that this clause should be amended “to limit the levy to recovery of subscriptions rather than unspecified expenses, so that the provision cannot be used by a future Government to recover part of the Treasury’s running costs, such as the

¹ <http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/>

salaries of civil servants involved in this work”. That recommendation is now given effect in paragraph (a) of new section 410A(2), so as to confine the provision to “expenses (including expenses of a capital nature) which are attributable to United Kingdom membership of, or Treasury participation in, the resources of the international organisation”.

5. In the light of that change, we consider that the restricted nature of the purpose for which fees may now be imposed reduces the need for Parliamentary control to the extent that we no longer regard the absence of provision for it, or the multi-tiered structure of the powers conferred by new section 410A, as inappropriate.

Government Amendment 82: Functions of FCA under competition legislation

6. The new Schedule to be inserted in the Bill by Government Amendment 82 inserts new sections 234J and 234K into the Financial Services and Markets Act 2000 to confer certain additional functions on the FCA, to be exercisable concurrently with the Competition and Markets Authority for the purposes described in paragraph 69 the Treasury’s second supplementary memorandum. The functions are exercisable in relation to “financial sector activities” which are simply defined in a new section 234I(1) to mean “the provision of financial services”. Subsection (2) confers a power on the Treasury, exercisable by affirmative order, simply “to amend this section”
7. Despite the affirmative procedure that is to apply, we have some concerns about the wholly unconstrained character of this power to amend a key definition that determines the scope of the FCA’s new competition functions (which include the power to impose very substantial financial penalties). It could, for example, be used so as to supplement the already very wide definition of “financial sector activities”, or to substitute that definition with a completely different one. In paragraph 70 of its memorandum, the Treasury explains that the power “is necessary to deal with the possibility of matters arising in the future in respect of which the use by the FCA of competition powers is warranted but where those matters do not fall within the definition of ‘financial sector activities’”. We were unable to derive from that explanation any clear impression of the nature of the possible future extension of the FCA’s new functions that the Treasury might have in mind, which leads us to the view that the power may be inappropriately wide.
8. **We accordingly draw to the attention of the House the unconstrained nature of the power conferred by new section 234I(2), including its implications in terms of the power to impose financial penalties. The House may, therefore, wish to invite the Minister to provide a more satisfactory explanation about the intended use of the power, to enable it to determine whether, and if so in what way, the power should be limited, or whether it should be removed from the Bill altogether.**

APPENDIX: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

No interests were declared at the meeting on 9 October 2013.

Attendance:

The meeting on the 9 October 2013 was attended by Baroness Farrington of Ribbleton, Baroness Fookes, Baroness Gardner of Parkes, Lord Haskel, Baroness O'Loan and Baroness Thomas of Winchester.