



# HM Treasury

## **Financial Services (Banking Reform) Bill**

### **Amendments – Lords Report**

Briefing for Peers

November 2013

The amendments tabled on 11 November by the Government are largely technical changes (other than those relating to the Claims Management Regulator – see separate briefing). They are intended to ensure that the amendments tabled at Lords Committee stage properly deliver their policy intention.

#### **Payments Regulator**

The amendments:

- provide for a restriction on the disclosure of the sharing of confidential information by the Regulator and those working for or on behalf of it, or by anyone who receives the information directly or indirectly. Criminal penalties are included to enforce the restriction, and provision is included to allow disclosure under Treasury regulations with certain other relevant bodies. This is to mirror the position for the FCA under the Financial Services and Markets Act (FSMA) 2000;
- clarify that HMT is required to publish its decisions in relation to designation orders and is not required to make such orders by statutory instrument;
- refine the Regulator's direction-giving power and power to require operators to take, or not take, action in respect of rules concerning payment systems so that directions and requirements can be given to or imposed on participants of specified descriptions (e.g. operators of "inter-bank" payment systems or operators of card schemes such as Visa or MasterCard), and an amendment to broaden the meaning of a "general direction";
- delete redundant definitions of "concurrent functions" in the clauses giving the regulator concurrent competition powers;
- add a further condition which, if satisfied, allows the PRA to veto a regulatory act of the Regulator (where such an act threatens the continuity of core services in the UK);
- provide that the Regulator can use a sum equal to its enforcement costs to benefit participants in regulated payment systems, by reducing their levy the following year by a pro rata amount (i.e. copying paragraph 21 of Schedule 1ZA to FSMA);
- ensure the fee levying power extends to levying an amount to build up reserves (copying provision in FSMA);

- ensure the FCA doesn't have to do conduct cost benefit analysis when it draws up fee levying rules (as is the case under FSMA);
- insert some extra definitions of CAT-appealable decisions (i.e. those decisions of the Regulator appealable to the Competition Appeals Tribunal to a judicial review standard of scrutiny) and CMA-appealable decisions (i.e. those decisions of the Regulator appealable to the Competition and Markets Authority to a full merits level of scrutiny);
- provide for the Bank of England to be able to disclose certain restricted information to the Regulator; and
- Make consequential amendments to other legislation to include references to the Regulator.

### **FCA concurrent powers**

The amendments do three things. First, they remove the power to amend the definition of "financial sector activities" in the clauses that provide the FCA with additional competition powers. This definition defined the matters in respect of which the FCA could exercise its new competition powers. This amending power was there to future-proof the legislation, so, for example, the definition could be expanded to capture new developments. It has been decided in response to concerns from the Delegated Powers Committee that the definition of "financial sector activities" is sufficiently wide and that there is no need for this amending power.

Second, the amendments ensure that provisions concerning the treatment of confidential information that already apply to information obtained by the FCA under its existing powers in the FSMA do not apply in respect of confidential information received by the FCA as a result of its new competition powers. This is because as there is already provision in the Enterprise Act 2002 that will apply to this information so there is no need for two sets of confidentiality provisions to apply to the same information.

Third, an amendment is made to make it clear in FSMA 2000 that the FCA's "functions" includes its new competition functions. This is important to ensure, for example, that the FCA can levy fees to cover the costs of exercising its competition functions.

### **Deletion of Clause 5**

The existing Clause 5 would require that the PRA always designate all directors of ring-fenced banks as senior managers. This requirement was originally imposed in the context of the old 'approved persons' system, which is now being replaced with the new senior managers regime recommended by the PCBS. Central to the new regime will be ensuring that senior bank managers are individually responsible for the action of the firms they run. The PRA and FCA are currently considering how best to achieve individual accountability, including through a more narrowly targeted regime, to address the risk that collective responsibility in practice means that no individuals are held to account for their actions. Requiring that all ring-fenced bank directors must always be senior managers would prejudge the regulators' decisions over how individual accountability is best achieved. The PRA and FCA will consult on the implementation of the new senior managers regime next year.

### **Definition of supply in clause 104**

Part 6 of the Bill provides for a special administration regime for operators of payment and settlement systems and their service providers. Within Part 6, there is a continuity of supply provision (clause 104). This provision restricts the early termination of contracts by crucial third party suppliers to operators of payment and settlement

systems. The crucial suppliers are specified within clause 104. These are: computer hardware or software, financial data, data processing, infrastructure permitting electronic communication services and access to secure data networks. This amendment adds staff to this list of suppliers. Staff are critical to the functioning of a payment and settlement systems and several payment systems are staffed entirely by third parties. The early termination of a contract to supply staff would likely result in discontinuation of the provision of critical services by the payment system. This amendment will ensure that staff continue to be supplied during administration. It is expected that the administrator will pay for the provision of staff during the administration.

## **Bail-in**

The Government is making a small number of minor and technical amendments to the bail-in provisions (Schedule 2), following further consideration of these issues and discussions with interested parties. These amendments:

- specify that special bail-in provision can be made in relation to contracts under which a banking group company has a liability, for example, to release guarantees provided by other banking group companies in consequence of the making of special bail-in provision in relation to the liabilities of the bank under resolution;
- amend the provisions on State Aid in new section 256A to be inserted into the Banking Act 2009 to ensure that the Treasury can make provision to ensure that any person acting under the direction of the Treasury in accordance with this section is immune from liability in damages, save in relation to actions in bad faith or in breach of the ECHR;
- Extend new section 48H(7)(c) to be inserted into the Banking Act 2009 to include provision to enable the Bank of England to enter into an agreement with the director or directors of the bank with regard to the preparation of the business reorganisation plan consistent with the arrangements where a bail-in administrator is appointed to prepare the plan.
- In new section 48D(3) to be inserted into the Banking Act 2009, to make a minor drafting amendment to replace the words “was a result of” with the words “resulted from”.

## **Minor and Technical**

The government is making a number of further minor and technical amendments the Bill. These amendments:

- clarify that regulations made under section 142W may enable trustees or managers to transfer to another relevant pension scheme all of the pension liabilities arising in connection with persons’ service before the date on which ring fencing comes into effect, together with all of the scheme’s assets, and not only part of those liabilities and assets;
- clarify the meaning of “qualifying parent undertaking” for Part 9B of FSMA (as inserted by this Bill);
- ensure that the definition of “regulator” in section 3A of FSMA does not affect the meaning of “regulator” in new sections 410A and 410B (where “regulator includes, in relation to some institutions, the Bank of England, not just the PRA and the FCA);
- make general provision about the way in which the powers given to the Treasury or the Secretary of State in the Bill to make orders or regulations must be exercised, and ensure that they can make

different provision for different cases, and provisions which are incidental or transitional provision to what is being done in the order or regulations.

All policy briefs on amendments made to the Bill at Lords Committee and Report have been published on the Gov.uk website at: <https://www.gov.uk/government/publications/banking-reform-bill-government-notes-on-amendments>

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### **Further Enquiries**

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