

Draft Order laid before Parliament under sections 47(5) and 48(6) of the Banking Act 2009, for approval by resolution of each House of Parliament.

S T A T U T O R Y I N S T R U M E N T S

2013 No.

FINANCIAL SERVICES

The Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2013

Made - - - -

Date

Coming into force - -

Date

The Treasury, in exercise of the powers conferred on them by sections 47, 48 and 89B of the Banking Act 2009^(a), make the following Order.

In accordance with sections 47(5) and 48(6) of that Act, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

PART 1

General

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2013.

(2) This Order comes into force on 1st April 2014.

(3) In this Order—

“the Act” means the Banking Act 2009;

“the Bank” means the Bank of England;

“continuity powers” means the powers conferred by section 64(2) of the Act (including that subsection as applied by section 65(2) of the Act);

“market contract” has the meaning given by section 155(1)(d) of the Companies Act 1989^(b);

“title transfer financial collateral arrangement” has the meaning given by regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003^(c).

(4) References in this Order to netting arrangements include—

^(a) 2009 c.1; section 89B was inserted by the Financial Services Act 2012 (c.12), section 102(1) and (6).

^(b) 1989 c.40; section 155(1) was substituted by S.I. 2013/504.

^(c) S.I. 2003/3226.

- (a) arrangements which provide for netting (within the meaning given by regulation 2 of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999(a); and
- (b) arrangements which include a close-out netting provision (within the meaning given by regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003).

(5) In this Order, all references to a provision in Part 1 of the Act are references to that provision as applied and modified in its application to recognised central counterparties by section 89B of the Act.

Application of this Order

2.—(1) Articles 3 to 11 of this Order apply in the following cases.

(2) Case 1 is where a partial property transfer is made by the Bank in accordance with section 11(2) or 12(2) of the Act.

(3) Case 2 is where—

- (a) the Bank has made a property transfer instrument in accordance with section 11(2) or 12(2) of the Act (whether or not that instrument is a partial property transfer); and
- (b) a property transfer instrument under section 42, 42A, 43 or 44 of the Act has been made by the Bank which is a partial property transfer.

(4) Case 3 is where—

- (a) the Bank has made a share transfer instrument in accordance with section 13(2) of the Act, and
- (b) a property transfer instrument has been made by the Bank under section 45 or 46 which is a partial property transfer.

(5) For the purposes of this Order, a property transfer instrument which purports to transfer all of the property, rights or liabilities of a recognised central counterparty shall be treated as having done so effectively (and so shall not be treated as a partial property transfer), notwithstanding the possibility that any of the property, rights or liabilities are foreign property and may not have been effectively transferred by the property transfer instrument by virtue of steps taken under section 39 of the Act.

PART 2

Restrictions on partial property transfers

Separate business lines

3.—(1) A partial property transfer to which this Order applies may not provide for the transfer of some, but not all, of the protected rights and liabilities between a particular person (“P”) and a recognised central counterparty.

(2) A partial property transfer to which this Order applies may not include provision under the continuity powers which terminates or modifies the protected rights or liabilities between P and a recognised central counterparty.

(3) For the purposes of paragraphs (1) and (2), rights and liabilities between P and a recognised central counterparty are protected if—

- (a) the recognised central counterparty has established a separate default fund for a particular class of financial instruments in accordance with Article 42(4) of the EMIR Regulation; and
- (b) the rights and liabilities—

(a) S.I. 1999/2979.

- (i) are recorded in the accounts of the recognised central counterparty as positions in the financial instruments referred to in sub-paragraph (a) or as assets held to cover those positions; or
- (ii) arise out of the clearing members' contributions to the separate default fund referred to in sub-paragraph (a).

(4) In this article—

- (a) “clearing member” has the meaning given by Article 2(14) of the EMIR Regulation;
- (b) “EMIR Regulation” means Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories^(a).

EU law

4. A partial property transfer to which this Order applies may not transfer property, rights or liabilities or include provision under the continuity powers to the extent that to do so would contravene EU law.

Secured liabilities

5.—(1) Paragraph (2) applies where an arrangement has been entered into under which one party owes a liability to the other and that liability is secured against property or rights; and it is immaterial that—

- (a) the liability is secured against all or substantially all of the property or rights of a person;
- (b) the liability is secured against specified property or rights; or
- (c) the property or rights against which the liability is secured are not owned by the person who owes the liability.

(2) A partial property transfer to which this Order applies—

- (a) may not transfer the property or rights against which the liability is secured unless that liability and the benefit of the security are also transferred;
- (b) may not include provision under the continuity powers which terminates or modifies the arrangement if the effect of that provision is to provide that the liability is no longer secured against the property or right.

Market contracts

6. A partial property transfer to which this Order applies may not transfer property, rights or liabilities or include provision under the continuity powers to the extent that to do so would render unenforceable a market contract.

Trusts

7. A partial property transfer to which this Order applies which makes provision under section 34(7)(a) of the Act may remove or alter the terms of the trust (howsoever arising) only to the extent necessary or expedient for the purpose of transferring from the recognised central counterparty to the transferee—

- (a) the legal or beneficial interest of the recognised central counterparty in the property held on trust;
- (b) any powers, rights or obligations of the recognised central counterparty in respect of the property held on trust.

(a) OJ No L 201, 27.7.2012, p1.

Termination rights

8. A partial property transfer to which this Order applies may not make provision for subsection (6) or (7) of section 38 of the Act to apply in relation to a market contract to the extent that it confers rights and liabilities which either party to the instrument is entitled to set-off or net under a set-off arrangement, netting arrangement or title transfer financial collateral arrangement.

PART 3

Remedies

Market contracts, termination rights and continuity powers

9.—(1) This article applies where a partial property transfer has been made in contravention of article 6 or 8 or any other provision of this Order which relates to the exercise of the continuity powers.

(2) The partial property transfer is void in so far as it was made in contravention of those provisions of the Order.

Set-off and netting

10.—(1) This article applies where a partial property transfer has been made in contravention of article 4—

- (a) to the extent that the contravention relates to set-off arrangements, netting arrangements or title transfer financial collateral arrangements, and
- (b) unless the contravention relates to the exercise of the continuity powers (in which case, article 9 applies).

(2) The partial property transfer does not affect the exercise of the right to set-off or net.

Contravention of other provisions of the Order

11.—(1) Subject to paragraph (2), this article applies where any person (“P”) considers that a partial property transfer has been made in contravention of any provision of this Order and that as a result the property, rights or liabilities of P have been affected.

(2) This article does not apply to the extent that article 9 or 10 applies.

(3) P may give notice to the relevant authority of the alleged contravention of this Order.

(4) The notice under paragraph (3) must—

- (a) be given within 60 days of the day on which the partial property transfer took effect;
- (b) be in writing;
- (c) specify the provision of this Order which is alleged to have been contravened and the manner in which that contravention has occurred;
- (d) identify the property, rights or liabilities to which the alleged contravention relates; and
- (e) contain or be accompanied by such information as the Bank may reasonably require.

(5) Subject to paragraph (8), within 60 days of receipt of a notice under paragraph (3), the Bank must—

- (a) if it agrees that a provision of this Order has been contravened in the manner specified in the notice given under paragraph (3), take the steps specified in paragraph (6);
- (b) if it does not agree that a provision of this Order has been contravened in the manner specified in the notice given under paragraph (3), take the steps specified in paragraph (7).

(6) The steps are to remedy the contravention by transferring property, rights or liabilities to the transferee or the transferor under the partial property transfer (whether by means of an onward property transfer instrument under section 43 of the Act, a reverse property transfer under section 44, a property transfer order under section 45, a reverse property transfer under section 46 or by other means).

(7) The steps are to give reasons to P as to why it considers that no provision of this Order has been contravened in the manner specified in the notice under paragraph (3).

(8) If the Bank considers that the matters raised in the notice under paragraph (3) are of such complexity that it is impractical to take a decision under paragraph (5) within 60 days of receipt of the notice, the Bank may extend the period of 60 days by no more than 60 days; in such cases it must, within 60 days of receipt of the notice under paragraph (3), inform P of the extension and the duration of the extension.

(9) The property, rights or liabilities which are transferred under paragraph (6) may be the same property, rights or liabilities which were, in contravention of this Order, transferred or not transferred (as the case may be) or, if the transfer of such property, rights or liabilities is not practicable, property, rights or liabilities which, in the opinion of the relevant authority, are equivalent to those property, rights or liabilities.

PART 4

Amendments to the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009

12.—(1) The Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009(a) is amended as follows.

(2) In article 2 (application of this Order), after paragraph (5) insert—

“(6) This Order does not apply in the case of a partial property transfer made under Part 1 of the Act as applied and modified by section 89B of the Act.”.

Name

Name

Two of the Lords Commissioners of Her Majesty’s Treasury

Date

EXPLANATORY NOTE

(This note is not part of the Order)

This Order restricts the making of partial property transfer instruments (“partial property transfers”) under the Banking Act 2009 (c.1) (“the Act”) insofar as such partial property transfers relate to recognised central counterparties (“RCCPs”). The Order also makes provision to protect certain interests where a partial property transfer has been made in respect of a RCCP, including security interests, set-off arrangements and netting arrangements.

Article 2 sets out the cases in which the provision made in articles 3 to 11 of the Order apply.

Article 3 provides protection where a RCCP operates separate business lines for different classes of financial instruments. It requires business lines to be transferred intact.

Article 4 provides that a partial property transfer may not be made, nor the related continuity powers provided for in sections 64 and 65 of the Act (“the continuity powers”) exercised, in a way that would contravene EU law.

Article 5 prohibits a partial property transfer or the exercise of any related continuity power from separating from any transferred liability any security that attaches to that liability.

(a) S.I. 2009/322.

Article 6 prohibits a partial property transfer or the exercising of any related continuity power from rendering unenforceable a market contract (within the meaning of section 115(1)(d) of the Companies Act 1989 (c.40)).

Article 7 places limitations on the exercise of the power provided for in section 34(7)(a) of the Act. Section 34(7)(a) of the Act allows for a partial property transfer to remove or alter the terms of any trust upon which the transferred property was held prior to the transfer.

Article 8 provides that provision may not be made in a partial property transfer for section 38(6) or (7) of the Act (termination rights etc.) to apply to market contracts where the effect of applying that provision would be to alter certain specified rights and liabilities arising pursuant to such contracts.

Articles 9 to 11 provide for remedies for contraventions of the Order.

Article 12 amends the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 (S.I. 2009/322) (“the 2009 Order”) so as to make it explicit that the provision in the 2009 Order does not apply to partial property transfers made under Part 1 of the Act as modified in its application to RCCPs by section 89B of the Act.

A full impact assessment of the effect that these Regulations will have on the costs of business and the voluntary sector is available from, Her Majesty’s Treasury, 1 Horse Guards Road, London SW1A 2HQ or on <http://www.hm-treasury.gov.uk/> and is published alongside the Regulations on <http://www.legislation.gov.uk/>.