

**DRAFT FOR CONSULTATION**

*Draft Order laid before Parliament under sections 47(5), 48(6) and 48P(8) of the Banking Act 2009, for approval by resolution of each House of Parliament.*

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**DRAFT STATUTORY INSTRUMENTS**

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**2014 No. \*\*\*\***

**BANKS AND BANKING**

**The Banking Act 2009 (Restriction of Special Bail-in Provision,  
etc.) Order 2014**

<i>Laid before Parliament</i>	***
<i>Made</i> - - - -	***
<i>Coming into force</i> - -	***

The Treasury, in exercise of the powers conferred by sections 47, 48, 48P and 259(1) of the Banking Act 2009,<sup>(a)</sup> make the following Order:

**Citation and commencement**

**1.**—(1) This Order may be cited as the Banking Act 2009 (Restriction of Special Bail-in Provision, etc.) Order 2014.

(2) This Order comes into force on \* 2014.

**Interpretation**

**2.**—(1) In this Order—

“the Act” means the Banking Act 2009;

“the Bank” means the Bank of England;

“banking institution” means—

(a) a bank (within the meaning of Part 1 of the Act);

(b) an investment firm (within the meaning of section 258A of the Act);

(c) a successor company (within the meaning of section 84A(2) of the Act (bail-in option: building societies)<sup>(b)</sup>).

“relevant banking institution” has the meaning given in article 3(2);

“special bail-in provision” means provision made in reliance on section 44B(c) or 48B of the Act.<sup>(d)</sup>

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- (a) 2009 c. 1; section 48P was inserted by the the Financial Services (Banking Reform) Act 2013 (c. 33), Schedule 2, paragraph 4.
- (b) Section 84A was inserted by the Building Societies (Bail-in) Order 2014 (S.I. 2014/\*\*\*\*). [**\*drafting note:** *This is currently in draft, and also included in the consultation.*]
- (c) Section 44B was inserted by the Financial Services (Banking Reform) Act 2013 (c. 33), Schedule 2, paragraph 5(3).
- (d) Section 48B was inserted by the Financial Services (Banking Reform) Act 2013 (c. 33), Schedule 2, paragraph 4.

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(2) References to sections of the Act include, as the context requires, those sections—

- (a) as applied or as applied and modified by virtue of section 84(b) of the Act (application to building societies);**(a)**
- (b) as applied by section 89A of the Act (application to investment firms).**(b)**

### **Application, etc.**

**3.**—(1) This Order applies to an instrument which makes special bail-in provision.

(2) In this Order “relevant banking institution” means, in relation to an instrument to which this Order applies, the banking institution in respect of which special bail-in provision is made by the instrument.

### **Set-off and netting**

**4.**—(1) An instrument to which this Order applies may not make special bail-in provision in respect of a protected liability (subject to paragraph (4)).

(2) In this article a “protected liability” is a liability which meets each of the following conditions—

- (a) Condition 1 is that the liability is owed by the relevant banking institution to a particular person (“the person”);
- (b) Condition 2 is that the liability is a liability which—
  - (i) either the person or the relevant banking institution is entitled to set-off or net under a particular set-off arrangement, netting arrangement or title transfer collateral arrangement into which the person has entered with the relevant banking institution (“the relevant arrangement”), and
  - (ii) has not been converted into a net debt, claim or obligation, whether in accordance with the relevant arrangement or through the making of special bail-in provision or otherwise;
- (c) Condition 3 is that the liability relates to a derivative, financial contract or qualifying master agreement (see article 5).

(3) For the purposes of paragraph (2), it does not matter whether—

- (a) the arrangement which permits the person or the banking institution to set-off or net the liability also permits the person or the banking institution to set-off or net rights and liabilities with another person;
- (b) the right of the person or the banking institution to set-off or net is exercisable only on the occurrence of a particular event.

(4) Paragraph (1) does not prevent special bail-in provision from being made in order to convert, or in connection with converting, the protected liability into the net debt, claim or obligation that would be due under the set-off arrangement, netting arrangement or title transfer collateral arrangement at the time the special bail-in provision providing for this is made (or an estimate of that net debt, claim or obligation).

### **Set-off and netting: meaning of “derivative”, “financial contract” and “qualifying master agreement”**

**5.**—(1) In this Order “derivative” means a derivative as defined in Article 2(5) of Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories.**(a)**

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(a) Section 84 was amended by the Building Societies (Bail-in) Order 2014 (S.I. 2014/\*\*\*\*). [**\*drafting note:** *This is currently in draft, and also included in the consultation.*]

(b) Section 89A was inserted by the Financial Services Act 2012 (c. 21), section 101(1), (5).

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(2) In this Order “financial contract” means any or any combination of the following (other than a derivative)—

- (a) a contract for the purchase, sale, transfer or loan of a transferable security or a group of transferable securities;
- (b) a repurchase or reverse repurchase transaction on any transferable security, group of transferable securities or index of transferable securities;
- (c) a commodities contract of a financial nature, including—
  - (i) a contract for the purchase, sale, transfer or loan of a commodity, a group of commodities or an index of commodities for future delivery;
  - (ii) a swap or option on a commodity, a group of commodities or an index of commodities;
  - (iii) a repurchase or reverse repurchase transaction on any such commodity, group or index;
- (d) a futures contract, including a contract (other than a commodities contract) for the purchase, sale or transfer of property of any description under which delivery is to be made at a future date and at a price agreed when the contract is made.

(3) In article 4(2)(c) “qualifying master agreement” means a master agreement in so far as it relates to—

- (a) a derivative,
- (b) a financial contract, or
- (c) a contract for the sale, purchase or delivery of the currency of the United Kingdom or any other country, territory or monetary union.

(4) In paragraph (2) “transferable securities” has the meaning given in Article 4.1(18) of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments,<sup>(a)</sup> but does not include securities (within the meaning of section 14 of the Act) issued by the relevant banking institution.

### EU law

6. An instrument to which this Order applies may not make special bail-in provision to the extent that to do so would contravene EU law.

### Remedy

7.—(1) This article applies where any person (“the person”) considers that an instrument to which this Order applies has been made in contravention of any provision of this Order and that as a result the liabilities owed to the person have been affected by the making of special bail-in provision.

(2) The person may give notice to the Bank of the alleged contravention of this Order.

(3) The notice under paragraph (2) (“the notice”) must—

- (a) be given within a period of 60 days beginning with the day on which the instrument was made;
- (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 is alleged to have occurred;
- (d) identify the liability to which the alleged contravention relates, and
- (e) contain or be accompanied by such information as the Bank may reasonably require.

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(a) OJ L 201, 27.7.2012, p. 1

(b) OJ L 145, 30.4.2004, p. 1.

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(4) Within the relevant period and acting in a timely way, the Bank must—

- (a) if it does not agree that a provision of this Order has been contravened in the manner specified in the notice, take the steps specified in paragraph (5);
- (b) if it agrees that a provision of this Order has been contravened in the manner specified in the notice, take the steps specified in—
  - (i) paragraph (6), where special bail-in provision is not made in conjunction with the bridge bank stabilisation option, or
  - (ii) paragraph (7), where special bail-in provision is made in conjunction with the bridge bank stabilisation option.

(5) The steps are to give reasons to the person as to why the Bank considers that no provision of this Order has been contravened in the manner specified in the notice.

(6) The steps are to remedy the contravention—

- (a) where practicable, by requiring the relevant banking institution to issue securities, or by transferring securities issued by the relevant banking institution, to the person which the Bank estimates to have a value equal to the relevant sum, or
- (b) otherwise, by requiring the relevant banking institution to transfer moneys to the person in the amount of the relevant sum;

whether by exercising a power under Part 1 of the Act or otherwise.

(7) The steps are to remedy the contravention by either—

- (a) requiring the relevant banking institution or bridge bank to issue securities, or by transferring securities issued by the relevant banking institution or bridge bank, to the person which the Bank estimates to have a value equal to the relevant sum, or
- (b) requiring the relevant banking institution or bridge bank to transfer moneys to the person in the amount of the relevant sum;

whether by exercising a power under Part 1 of the Act or otherwise.

(8) In this article—

“relevant period” has the meaning given in article 8;

“relevant sum” means such sum as the Bank considers necessary to put the person in the position the person would have been in had the contravention not occurred.

(9) In paragraph (4)(b)(ii), special bail-in provision is made in conjunction with the bridge bank stabilisation option when special bail-in provision is made in reliance on section 44B of the Act(a) in—

- (a) a property transfer instrument under section 12(2) of the Act, or
- (b) a supplemental property transfer instrument in relation to which the original instrument (as defined in section 42(1)(b) of the Act) is a property transfer instrument under section 12(2) of the Act;

and the reference in paragraph (4)(b)(i) to special bail-in provision not being made in conjunction with the bridge bank stabilisation option is to be construed accordingly.

### Remedy: relevant period

8.—(1) In article 7(4) the “relevant period” means—

- (a) a period of 120 days beginning with the day on which the notice under article 7(2) is received (“the initial period”), and
- (b) any period by which the initial period is extended under paragraph (2) or paragraphs (2) and (3).

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(a) Section 44B was inserted by the Financial Services (Banking Reform) Act 2013 (c. 33), Schedule 2, paragraph 5(3).

(b) Section 42 was amended by the Financial Services (Banking Reform) Act 2013 (c. 33), Schedule 2, paragraph 5(2)

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(2) The Bank may extend the initial period by a period of up to 120 days if the condition in paragraph (4) is met (“the initial period and first extended period”).

(3) The Bank may extend the initial period and first extended period by a period of up to 120 days if the condition in paragraph (4) is met.

(4) The condition in this paragraph is that the Bank considers that the matters raised in the notice under article 7(2) are of such complexity that it is impracticable to take a decision without granting the extension.

(5) Where the Bank extends time under paragraph (2) or (3), the Bank must in a timely way inform the person who gave the notice of the extension and the duration of the extension.

### Amendments

9. The Schedule contains amendments to the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009.(a)

*\*Name 1*

*\*Name 2*

\*Date

Two of the Lords Commissioners of Her Majesty’s Treasury

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(a) S.I.2009/322; as amended by S.I. 2009/1826, S.I. 2011/1043; S.I. 2013/472.

## **SCHEDULE**

Article 9

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

- 1.** The Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 is amended as follows.
- 2.** In article 1(3), in the definition of “relevant authority”, for “Case 1 or 2 (as specified in article 2(2) and (3))” substitute “for Case 1, 2 or 2A (as specified in article 2(2), (3) and (3A))”.
- 3.** After article 2(3) insert—

“(3A) Case 2A is where—

  - (a) the Bank has made a resolution instrument in accordance with section 12A(2) of the Act, and
  - (b) a property transfer instrument has been made under section 41A (transfer of property subsequent to resolution instrument), 42 (supplemental instruments) or 44A (bail in: reverse property transfer) of the Act which is a partial property transfer.”
- 4.** In article 8—
  - (a) in paragraph (1)(a) after “section 44” insert “or 44A”;
  - (b) in paragraph (4)(a) after “section 44” insert “or 44A (as the case may be)”.
- 5.** Omit article 9 (termination rights).
- 6.** In article 10(1) omit “or 9”.
- 7.** In article 12(6) after “section 44” insert “or 44A”.

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### EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order is made under the Banking Act 2009 (c. 1) (“the Act”), as amended by the Financial Services (Banking Reform) Act 2013 (c. 33) (which introduced a new stabilisation power, the power to make special bail-in provision).

The Order imposes restrictions on the making of special bail-in provision (whether made under the bail-in stabilisation option of section 12A of the Act, or in conjunction with the bridge bank stabilisation option of section 12 of the Act) (article 3). Special bail-in provision can be made in relation to banks, investment firms and—in relation to building societies—the ‘successor company’ that will take the place of the building society under section 84A of the Act. This Order will also apply where special bail-in provision is made in respect of banking group companies (by virtue of section 81CA(2) of the Act).

Article 4 provides that special bail-in provision cannot be made in respect of protected liabilities. Protected liabilities are liabilities subject to set-off or netting, which have not been set-off or netted and which relate to derivatives, other financial contracts or certain master agreements. Article 4 does not prevent special bail-in provision from being made to convert the protected liability into the net sum that would be due following set-off or netting (or an estimate of the net sum).

Set-off or netting may take place under set-off arrangements, netting arrangements or title transfer collateral arrangements (as defined in section 48P(2) of the Act). Liabilities secured by title transfer collateral arrangements are also excluded liabilities, benefiting from direct protection under the Act, to the extent they are so secured (see section 48B(4)(b) and (8)(b) and section 48D).

Article 5 defines derivatives by reference to Article 2(5) of Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (EMIR), as is the case under Article 2(56) of the final compromise text of the Directive establishing a framework for the recovery and resolution of credit institutions and investment firms (published on 18 December 2013) (“BRRD”).<sup>(a)</sup> Financial contracts are defined to include certain securities contracts (including repos), commodities contracts (including repos) and futures contracts. The definition is adapted in part from the definition of financial contracts in Article 2(87) of the BRRD (although elements of this definition that clearly fall exclusively within the definition of derivatives are excluded). Master agreements for derivatives, financial contracts and certain currency contracts are specifically included.

Article 6 provides that special bail-in provision may not be made to the extent that to do so would contravene EU law.

Article 7 (as supplemented by article 8) provides the remedy for contraventions of the provisions of the Order.

The Schedule amends the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 (S.I. 2009/322), to address new powers to make partial property transfers in relation to the bail-in stabilisation option and to remove the restriction relating to termination rights.

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(a) [\*drafting note: This reference will be updated following the publication of the final text in the Official Journal.]