

2009 No. 322

BANKS AND BANKING

**The Banking Act 2009 (Restriction of Partial Property
Transfers) Order 2009**

Approved by both Houses of Parliament

Made - - - - 19th February 2009

Laid before Parliament 20th February 2009

Coming into force - - 21st February 2009

The Treasury, in exercise of the powers conferred by sections 47(a), 48 and 259(1) of the Banking Act 2009(b), make the following Order.

The powers in sections 47 and 48 of the Banking Act 2009 are being exercised for the first time and the Treasury are satisfied, in accordance with section 259(4) of that Act, that it is necessary to exercise those powers without laying a draft for approval:

PART 1

General

Citation, commencement and interpretation

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

(2) This Order comes into force on 21st February 2009.

(3) 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)(c);

(b) an undertaking which was a bank immediately before the making of a share transfer order under section 13(2) of the Act;

(c) a bridge bank(a);

(a) See also section 83(4) of the Act.

(b) 2009 c.1.

(c) See section 2 of the Act.

(d) a building society (within the meaning of section 119 of the Building Societies Act 1986**(b)**); or

(e) a holding company**(c)**;

“continuity powers” means the powers conferred by section 64(2) of the Act (including that subsection as applied by sections 65(2) and 83(2)(f) of the Act) and section 67(2) of the Act (including that subsection as applied by sections 68(2) and 83(2)(f) of the Act);

“deposit” has the meaning given by article 5 of the Regulated Activities Order**(d)** (disregarding the exclusions in articles 6 to 9AA of that Order**(e)**);

“eligible claimant” has the meaning given by rule 4.2.1 of the Compensation Sourcebook made by the Financial Services Authority under the Financial Services and Markets Act 2000**(f)**;

“excluded rights” means rights—

(a) which relate to a retail deposit made with a banking institution;

(b) which relate to a retail liability owed to a banking institution;

(c) which relate to a contract which was entered into by or on behalf of a banking institution otherwise than in the course of carrying on of an activity which relates solely to relevant financial instruments;

(d) which relate to a claim for damages, an award of damages or a claim under an indemnity which arose in connection with the carrying on by a banking institution of an activity which relates solely to relevant financial instruments; or

(e) which relate to subordinated debt;

and “excluded liabilities” shall be interpreted accordingly;

“financial instrument” means any instrument listed in Section C of Annex I to Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments**(g)**, read with Chapter VI of the Commission Regulation 1287/2006/EC**(h)**;

“Regulated Activities Order” means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001**(i)**;

“relevant authority” means—

(f) in relation to Case 1 or 2 (as specified in article 2(2) and (3)), the Bank;

(g) in relation to Case 3 (as specified in article 2(4)), the Treasury;

“relevant financial instrument” means—

(h) a financial instrument;

(i) a deposit;

(j) a loan; or

(k) an instrument which falls within article 77 of the Regulated Activities Order (disregarding the exclusions in article 77(2)(b) to (d));

“retail deposit” means a deposit in relation to which the condition in paragraph (a) or (b) is satisfied—

(l) the depositor is an eligible claimant; or

(a) “Bridge bank” is defined in section 12(1) of the Act. By virtue of section 11 of the Interpretation Act 1978 (c.30), expressions used in this Order have, unless the contrary intention appears, the meaning which they bear in the Banking Act 2009.

(b) 1986 c.53.

(c) “Holding company” is defined in section 82(1) of the Act. By virtue of section 11 of the Interpretation Act 1978 (c.30), expressions used in this Order have, unless the contrary intention appears, the meaning which they bear in the Banking Act 2009.

(d) Article 5 was amended by SI 2002/682.

(e) Articles 6 to 9AA were amended by SI 2001/3544; SI 2002/682; SI 2002/1310; and SI 2002/1776.

(f) 2000 c.8.

(g) OJ L145 30.4.2004 p.1.

(h) OJ L241 2.9.2006 p.1.

(i) SI 2001/544.

(m) the deposit is held in an account of a particular class or brand provided by a particular banking institution which either—

(i) is mainly used by eligible claimants; or

(ii) has been mainly marketed by the banking institution to eligible claimants;

“retail liability” means a liability which is owed to a banking institution by an eligible claimant;

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

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

(a) arrangements which provide for netting (within the meaning given by regulation 2(1) of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999(b)); 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).

Application of this Order

2.—(1) This Order applies in the following cases.

(2) Case 1 is where a partial property transfer(c) has been 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, 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 Treasury have made a share transfer order in accordance with section 13(2) of the Act (including that section as applied by section 82 of the Act); and

(b) a property transfer instrument has been made by the Treasury under section 45 or 46 of the Act (including those sections as applied and modified by section 83 of the Act) which by virtue of section 45(5)(b) or 46(5)(b) of the Act is to be treated as a partial property transfer.

(5) For the purposes of this Order, a property transfer instrument or order which purports to transfer all of the property, rights and liabilities of a banking institution 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 or order or by virtue of steps taken under section 39 of the Act.

PART 2

Restrictions on partial property transfers

Set-off and netting

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

(a) SI 2003/3226.

(b) SI 1999/2979.

(c) “Partial property transfer” is defined by section 47(1) of the Act. See also section 42 (supplemental instruments), section 43 (onward transfer), section 44 (reverse property transfer), 45 (temporary public ownership: property transfer) and sections 82 and 83 (holding companies: temporary public ownership).

banking institution under a particular set-off arrangement^(a), netting arrangement^(b) or title transfer financial collateral arrangement.

(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 banking institution.

(3) For the purposes of paragraphs (1) and (2), rights and liabilities between P and a banking institution are protected if they are rights and liabilities which either P or the banking institution is entitled to set-off or net under a set-off arrangement, netting arrangement or title transfer financial collateral arrangement which P has entered into with the banking institution so long as they are not excluded rights or excluded liabilities.

(4) For the purposes of paragraph (1), a property transfer instrument or order which purports to transfer all of the protected rights and liabilities between P and a banking institution under a particular set-off arrangement, netting arrangement or title transfer financial collateral arrangement shall be treated as having done so effectively (and so not give rise to a contravention of paragraph (1)), notwithstanding the possibility that any of the protected rights or liabilities are foreign property and may not have been effectively transferred by the property transfer instrument or order or by virtue of steps taken under section 39 of the Act.

(5) For the purposes of paragraph (3), it is immaterial whether—

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

(6) In this article, “excluded rights” and “excluded liabilities” have the meanings given in article 1 except that the reference to subordinated debt shall be treated as if it were a reference to subordinated debt issued by P or by the banking institution.

Community 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 Community law.

Secured liabilities

5.—(1) Subject to paragraph (5), paragraphs (2), (3) and (4) apply 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 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.

(3) A partial property transfer to which this Order applies may not transfer the liability unless the benefit of the security is also transferred.

(4) A partial property transfer to which this Order applies 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.

(a) “Set-off arrangements” is defined in section 48(1) of the Act.
(b) “Netting arrangements” is defined in section 48(1) of the Act.

(5) Paragraphs (2), (3) and (4) do not apply if the arrangement has been entered into by a banking institution in contravention of a rule prohibiting such arrangements made by the Financial Services Authority under the Financial Services and Markets Act 2000 or otherwise than in accordance the Part 4 permission (within the meaning of that Act) of the banking institution.

(6) For the purposes of paragraphs (2) and (3), a property transfer instrument or order which purports to transfer any property, rights or liabilities shall be treated as having done so effectively (and so not give rise to a contravention of paragraph (2) or (3)), notwithstanding the possibility that any of those property, rights or liabilities are foreign property and may not have been effectively transferred by the property transfer instrument or order or by virtue of steps taken under section 39 of the Act.

Capital market arrangements

6.—(1) Subject to paragraph (3), a partial property transfer to which this Order applies may not provide for the transfer of some, but not all, of the property, rights and liabilities which are or form part of a capital market arrangement to which the banking institution is a party.

(2) Subject to paragraph (3), a partial property transfer to which this Order applies may not include provision under the continuity powers which terminates or modifies property, rights or liabilities which are or form part of a capital market arrangement to which the banking institution is a party.

(3) Paragraphs (1) and (2) do not apply where the only property, rights and liabilities transferred or not transferred, or terminated or modified (as the case may be) are property, rights and liabilities which relate to deposits.

(4) For the purposes of paragraph (1), a property transfer instrument or order which purports to transfer all of the property, rights and liabilities which are or form part of a capital market arrangement to which the banking institution is a party shall be treated as having done so effectively (and so not give rise to a contravention of paragraph (1)), notwithstanding the possibility that any of those property, rights or liabilities are foreign property and may not have been effectively transferred by the property transfer instrument or order or by virtue of steps taken under section 39.

(5) For the purposes of this article, “capital market arrangement” has the meaning given by paragraph 1 of Schedule 2A to the Insolvency Act 1986(a).

Financial markets

7.—(1) A property transfer order 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 have the effect of modifying, modifying the operation of or rendering unenforceable—

- (a) a market contract;
- (b) the default rules of a recognised investment exchange or recognised clearing house; or
- (c) the rules of a recognised investment exchange or recognised clearing house as to the settlement of market contracts not dealt with under its default rules.

(2) For the purposes of this article—

“default rules” has the meaning given by section 188 of the Companies Act 1989(b);

“market contract” has the meaning given by section 155 of the Companies Act 1989;

“recognised clearing house” and “recognised investment exchange” have the meanings given by section 285 of the Financial Services and Markets Act 2000.

(a) 1986 c.45; Schedule 2A was inserted by the Enterprise Act 2002, Schedule 18 and amended by SI 2003/1468.

(b) 1989 c.40.

Additional restrictions on reverse transfers

8.—(1) This article applies to a partial property transfer to which this Order applies which is made—

- (a) by the Bank under section 44 of the Act; or
- (b) by the Treasury under section 46 of the Act.

(2) Subject to paragraph (3), a partial property transfer to which this article applies may not provide for the transfer of—

- (a) any property, rights or liabilities which were not transferred under the original instrument or order;
- (b) any liability which was not, at the time immediately before the original instrument or order was made, a liability owed by the banking institution; or
- (c) rights or liabilities under a financial instrument.

(3) Paragraph (2) does not apply to—

- (a) a transfer of property, rights or liabilities which have accrued, become or ceased to become payable, changed or lapsed as a result of the application of a default event provision which applies by virtue of the original instrument or order;
- (b) a transfer of property, rights or liabilities to which consent has been given by the transferee, the transferor and any other person whose consent for the transfer would be required were the transfer not being effected by a property transfer instrument or order;
- (c) a transfer of a claim for damages or an award of damages against the banking institution which was in existence immediately before the original instrument or order was made;
- (d) a transfer to an undertaking which has not entered insolvency; or
- (e) a transfer under article 12(6).

(4) In this article—

- (a) “original instrument” has the meaning given by section 44 of the Act and “original order” has the meaning given by section 46 of the Act; and
- (b) the reference to insolvency includes a reference to (i) liquidation, (ii) bank insolvency, (iii) administration, (iv) bank administration, (v) receivership, (vi) a composition with creditors, and (vii) a scheme of arrangement.

Termination rights

9. 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) a relevant financial instrument 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 except in so far as those rights and liabilities are excluded rights or excluded liabilities; or
- (b) a set-off arrangement, netting arrangement or title transfer financial collateral arrangement to the extent that it confers a right to set-off or net rights and liabilities under a relevant financial instrument except in so far as those rights and liabilities are excluded rights or excluded liabilities.

PART 3

Remedies

Financial markets, termination rights and continuity power

10.—(1) This article applies where a partial property transfer has been made in contravention of article 7 or 9 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 is made in contravention of those provisions of the Order.

Set-off and netting

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

- (a) article 3; or
- (b) article 4, to the extent that the contravention relates to set-off arrangements, netting arrangements or title transfer financial collateral arrangements,

unless the contravention relates to the exercise of the continuity powers (in which case article 10 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

12.—(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 10 or 11 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 relevant authority may reasonably require.

(5) Subject to paragraph (8), within 60 days of receipt of a notice under paragraph (3), the relevant authority 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 relevant authority considers that the matters raised in the notice under paragraph (3) are of such complexity that it is impracticable to take a decision under paragraph (5) within 60 days of receipt of the notice, the relevant authority 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.

Dave Watts
Steve McCabe

19th February 2009

Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Order)

This Order restricts the making of partial property transfer instruments and orders (“partial property transfers”) under the Banking Act 2009 (c.1) (“the Act”). The Order also makes provision to protect certain interests including security interests, set-off arrangements and netting arrangements.

Article 2 sets out the cases in which the Order applies.

Article 3 provides protection for rights and liabilities under a particular set-off arrangement, netting arrangement or title transfer financial collateral arrangement. Certain rights and liabilities are excluded from these protections including rights and liabilities which relate to a retail deposit or retail liability (as defined in article 1). These protections limit what property may be (or may not be) transferred under a partial property transfer and what provision may be made under the powers conferred by sections 64 to 67 of the Act (“the continuity powers”).

Article 4 provides that a property, rights or liabilities may not be transferred and provision may not be included under the continuity powers, to the extent that to do so would contravene Community law.

Article 5 provides for protections for secured liabilities. These protections limit what property may be (or may not be) transferred under a partial property transfer and what provision may be made under the continuity powers. In particular, article 5 provides that liabilities (whether owed by or to the banking institution) and the benefit of security relating to those liabilities may not be separated by any transfer of the banking institution’s property, rights and liabilities.

Article 6 provides for protections for capital market arrangements (within the meaning given by paragraph 1 of Schedule 2A to the Insolvency Act 1986 (c.45)). These protections limit what property may be (or may not be) transferred under a partial property transfer and what provision may be made under the continuity powers.

Article 7 provides for protections for financial markets including the default rules of recognised investment exchanges and recognised clearing houses and market contracts. These protections limit what property may be (or may not be) transferred under a partial property transfer and what provision may be made under the continuity powers.

Article 8 provides for additional limits to apply to reverse property transfers under sections 44 and 46 of the Act. These protections limit what property may be (or may not be) transferred under a reverse transfer.

Article 9 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 certain instruments and arrangements.

Articles 10 to 12 provide for remedies for contraventions of the provisions of the Order.

A full Impact Assessment of the effect that this instrument will have on the costs of business and the voluntary sector has been prepared. It may be obtained from the Banking Reform Team, HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ. It is also available on HM Treasury’s website (www.hm-treasury.gov.uk) and is annexed to the Explanatory Memorandum published alongside this instrument on the OPSI website (www.opsi.gov.uk).

STATUTORY INSTRUMENTS

2009 No. 322

BANKS AND BANKING

The Banking Act 2009 (Restriction of Partial Property
Transfers) Order 2009

£5.00