
EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations restrict the making of certain instruments where stabilisation powers are exercised under Schedule 11 (central counterparties) of the Financial Services and Markets Act 2023 (c. 29). Schedule 11 (“the Schedule”) makes provision establishing a special resolution regime for central counterparties (“CCPs”). It provides the Bank of England with stabilisation powers to exercise various stabilisation options where a CCP has encountered, or is likely to encounter, financial difficulties, as set out in paragraph 1 of the Schedule. This includes the power to make property transfer instruments, and write-down instruments.

Prior to the Financial Services and Markets Act 2023, the provisions relating to resolution of banks and other financial institutions in Part 1 (special resolution regime) of the Banking Act 2009 (c. 1) (“the 2009 Act”) applied to CCPs (with modifications). As set out below, statutory instruments were made which restricted the circumstances in which the Bank, in exercising its powers under Part 1, could make instruments which included partial property transfers or special bail-in provision. A partial property transfer instrument provides for the transfer of some, but not all, of the property, rights and liabilities of an entity subject to resolution, and the Schedule contains similar powers in this respect to those in Part 1 of the 2009 Act. Additionally, paragraphs 34 and 35 of the Schedule create a power for the Bank of England to make instruments which write-down liabilities of a CCP in resolution, which is similar to the special bail-in provision in section 12A of the 2009 Act.

Part 2 of these Regulations restricts the making of partial property transfer instruments under the Schedule and also makes provision to protect certain interests where a partial property transfer has been made in respect of a CCP, including security interests, set-off arrangements and netting arrangements. This Part broadly replicates the provisions in the Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2014 (S.I. 2014/1828) for the purposes of the new special resolution regime for CCPs in the Schedule.

Regulation 2 sets out the circumstances in which these restrictions apply.

Regulation 3 provides that where a CCP operates separate default funds for different classes of financial instruments, all the rights and liabilities that attach to each separate default fund must be transferred together, and that where a CCP operates a single default fund, all rights and liabilities attaching to the single default fund must be transferred together.

Regulation 4 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.

Regulation 5 prohibits a partial property transfer (or the exercise of any related continuity power) from rendering unenforceable a market contract (within the meaning of section 155(1)(d) of the Companies Act 1989 (c. 40)).

Regulation 6 places limitations on the exercise of the power provided in paragraph 55(7)(a) of the Schedule (effect of property transfer instrument). This power 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.

Regulation 7 provides for additional limits to apply to reverse property transfers under paragraphs 70 or 72 of the Schedule. These protections limit what property may (or may not be) transferred under a reverse transfer.

Regulation 8 restricts partial property transfers in respect of the property, rights or liabilities of a company that is in the same group as the CCP. Any such transfers may only be made where they are

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necessary for carrying on the business, or any part of the business, of any CCP which is (or, but for the exercise of a stabilisation power, would be) in the same group as the company.

Regulations 9 to 11 provide for remedies for contraventions of the provisions in Part 2 of the Regulations.

Part 3 of these Regulations imposes restrictions on the making of write-down provision (as defined in paragraph 34(2) of the Schedule) in instruments made under the Schedule. This Part broadly replicates the provisions in the Banking Act 2009 (Restriction of Special Bail-in Provision, etc) Order 2014 (S.I. 2014/3350), insofar as it applied to CCPs, for the purposes of the new special resolution regime for CCPs in the Schedule.

Regulation 13 provides that write-down provision cannot be made in respect of protected liabilities. Protected liabilities are liabilities subject to set-off or netting, which are not excluded from protection under regulation 13(3), and in the case of liabilities relating to derivatives, other financial contracts or certain master agreements, which have not been set-off or netted. Regulation 13 does not prevent write-down provision from being made to convert the protected liability into the net sum that would be due following set-off or netting (or into an estimate of the net sum). Regulation 14 provides definitions for certain terms used in regulation 13.

Regulations 15 and 16 provide the remedy for contraventions of the provisions in Part 3 of the Regulations.

Part 4 of these Regulations contains provision revoking the Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2014 (see regulation 17). Regulation 18 makes transitional provision in respect of this revocation, so that the 2014 Order will continue to apply in respect of any relevant instruments made by the Bank before 31st December 2023, or on or after 31st December 2023 in reliance on any regulations made under section 83 or 84 of the Financial Services and Markets Act 2000 where a CCP entered into special resolution under the 2009 Act before that date.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen. These Regulations will largely replicate the effects of existing legislation, as set out above.