

2023 No. 1316

FINANCIAL SERVICES

**The Financial Services and Markets Act 2023 (Resolution of
Central Counterparties: Partial Property Transfers and
Safeguarding of Protected Arrangements) Regulations 2023**

Made - - - - *4th December 2023*

Coming into force - - *31st December 2023*

The Treasury make these Regulations in exercise of the powers conferred by sections 47, 48 and 259(1) of the Banking Act 2009(a) and section 84(2) of, and paragraphs 75(2) and (3), 76(2) to (4) and 78(3) to (5) of Schedule 11 to, the Financial Services and Markets Act 2023(b).

A draft of these Regulations has been laid before and approved by a resolution of each House of Parliament in accordance with sections 47(5) and 48(6) of the Banking Act 2009 and section 84(3) of, and paragraphs 75(5), 76(6) and 78(7) of Schedule 11 to, the Financial Services and Markets Act 2023.

PART 1

General

Citation, commencement, extent and interpretation

1.—(1) These Regulations may be cited as the Financial Services and Markets Act 2023 (Resolution of Central Counterparties: Partial Property Transfers and Safeguarding of Protected Arrangements) Regulations 2023.

(2) These Regulations come into force on 31st December 2023.

(3) These Regulations extend to England and Wales, Scotland and Northern Ireland.

(4) In these Regulations—

“continuity powers” means the powers conferred by paragraph 90(2) of the Schedule (special continuity obligations: property transfers) (including that paragraph as applied by paragraph 91(2)(b) of the Schedule) (continuity obligations: onward property transfers);

“the 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(c);

(a) 2009 c. 1. Section 47 was amended by S.I. 2014/3329.

(b) 2023 c. 29.

(c) EUR 2012/648.

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

“netting arrangements” has the meaning given in paragraph 76(1)(d) and in paragraph 78(2)(d) of the Schedule (definitions of “netting arrangements”);

“the Schedule” means Schedule 11 to the Financial Services and Markets Act 2023 (central counterparties);

“set-off arrangements” has the meaning given in paragraph 76(1)(c) and in paragraph 78(2)(c) of the Schedule (definitions of “set-off arrangements”);

“title transfer collateral arrangements” has the meaning given in paragraph 76(1)(b) and in paragraph 78(2)(b) of the Schedule;

“transferable securities” has the meaning given in Article 2.1(24) of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulations (EU) No 648/2012(b), but does not include securities (within the meaning of section 14 of the Banking Act 2009(c)) issued by the CCP;

“write-down liability” means a liability which can be written down under paragraphs 34 and 35 of the Schedule, and which is not excluded under paragraph 34(4) of the Schedule or under any regulations made under paragraph 34(7) of the Schedule;

“write-down provision” means provision within the meaning of paragraph 34(2) of the Schedule (write-down power).

(5) Expressions used in Part 2 of these Regulations and in the Insolvency Act 1986(d) have the same meaning as in that Act.

PART 2

Partial Property Transfers

CHAPTER 1

Restrictions on Partial Property Transfers

Application of this Part

2.—(1) Regulations 3 to 11 apply in the following cases.

(2) Case 1 is where a partial property transfer(e) has been made by the Bank(f) in accordance with paragraph 27(2) (private sector purchaser) or 29(3) (bridge central counterparty) of the Schedule.

(3) Case 2 is where the Bank has made—

- (a) a property transfer instrument(g) in accordance with paragraph 27(2) or 29(3) of the Schedule (whether or not that instrument is a partial property transfer); and
- (b) a property transfer instrument under paragraph 67 (supplemental instruments), 68 (private sector purchaser: reverse property transfer), 69 (onward transfer) or 70 (bridge central counterparties: reverse property transfer) of the Schedule which is a partial property transfer.

(a) 1989 c. 40. Section 155 was amended by S.I. 1991/880, 1998/1748, 2009/853, 2013/504, 2013/1908, 2016/481 and 2017/1064.

(b) EUR 2014/600.

(c) 2009 c. 1. Section 14 was amended by S.I. 2013/3115 and 2018/1394.

(d) 1986 c. 45.

(e) “Partial property transfer” is defined in paragraph 75 of Schedule 11 to the Financial Services and Markets Act 2023 (restriction of partial transfers).

(f) “Bank” is defined in paragraph 154 of Schedule 11 to the Financial Services and Markets Act 2023 (c. 29) (interpretation).

(g) “Property transfer instrument” is defined in paragraph 54 of Schedule 11 to the Financial Services and Markets Act 2023 (property transfer instruments).

(4) Case 3 is where the Bank has made—

- (a) a share transfer instrument^(a) in accordance with paragraph 30(2) of the Schedule (transfer of ownership); and
- (b) a property transfer instrument under paragraph 71 (transfer of ownership and private sector purchaser: property transfer) or 72 (transfer of ownership: reverse property transfer) of the Schedule.

(5) For the purposes of this Part, a property transfer instrument which purports to transfer all of the property, rights or liabilities of a CCP^(b) must be treated as having done so effectively (and so must not be treated as a partial property transfer), notwithstanding the possibility that any of the property, rights or liabilities are foreign and may not have been effectively transferred by the property transfer instrument by virtue of steps taken under paragraph 62 of the Schedule (foreign property).

Protected rights and liabilities

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

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

(3) For the purposes of paragraphs (1) and (2), rights and liabilities between P and a CCP are protected if either paragraph (4) or paragraph (5) applies.

(4) This paragraph applies where—

- (a) the CCP has established a separate default fund for a particular class or classes of financial instruments in accordance with Article 42(4) of the EMIR Regulation; and
- (b) the rights and liabilities—
 - (i) are recorded in the accounts of the CCP as positions in the class or classes of financial instruments referred to in sub-paragraph (a) or as assets held to cover those positions; or
 - (ii) arise out of the clearing member’s ^(c) contributions to the separate default fund referred to in sub-paragraph (a).

(5) This paragraph applies where—

- (a) the CCP has established a single default fund in accordance with Article 42 of the EMIR regulation; and
- (b) the rights and liabilities—
 - (i) are recorded in the accounts of the CCP; or
 - (ii) arise out of the clearing member’s contributions to the single default fund referred to in sub-paragraph (a).

(6) For the purposes of paragraph (1), a property transfer instrument which purports to transfer all of the protected rights and liabilities between P and a CCP must 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 effectively been transferred by the property transfer instrument or by virtue of steps taken under paragraph 62 of the Schedule.

(a) “Share transfer instrument” is defined in paragraph 41 of Schedule 11 to the Financial Services and Markets Act 2023 (share transfer instruments).

(b) “CCP” is defined in paragraph 154 of Schedule 11 to the Financial Services and Markets Act 2023 (interpretation).

(c) “Clearing member” is defined in paragraph 154 of Schedule 11 to the Financial Services and Markets Act 2023.

Secured liabilities

4.—(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 Part applies may not—

- (a) transfer the property or rights against which the liability is secured unless that liability and the benefit of the security are also transferred;
- (b) transfer the benefit of the security unless the liability which is secured is also transferred;
- (c) transfer the liability unless the benefit of the security is also transferred;
- (d) 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 rights.

(3) For the purposes of paragraph (2), a property transfer instrument which purports to transfer any property, rights or liabilities must be treated as having done so effectively (and so not give rise to a contravention of paragraph (2)), despite 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 by virtue of steps taken under paragraph 62 of the Schedule.

(4) Paragraph (2) does not apply if the arrangement has been entered into by the CCP in contravention of any requirement set out in regulations made pursuant to section 286(1) of the Financial Services and Markets Act 2000(a) or any rules made pursuant to sections 286(4F)(b) or 300F(c) of that Act.

Financial markets

5.—(1) Subject to paragraph (2), a partial property transfer to which this Part 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, recognised clearing house or recognised CSD; or
- (c) the rules of a recognised investment exchange, recognised clearing house or recognised CSD as to the settlement of market contracts not dealt with under its default rules.

(2) The restriction in paragraph (1) does not apply to the extent that it would contradict any provision in a relevant property transfer instrument which applies paragraph 84(10) or (11) of the Schedule (termination rights etc).

(3) In this regulation—

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

“recognised clearing house”, “recognised CSD” and “recognised investment exchange” have the meanings given by section 285 of the Financial Services and Markets Act 2000(e);

(a) 2000 c. 8. Section 286(1) was amended by paragraph 2(2) of Schedule 8 to the Financial Services Act 2012 (c. 21) and by S.I. 2017/1064.

(b) Section 286(4F) was inserted by section 30 of the Financial Services Act 2012.

(c) Section 300F was inserted by section 9 of the Financial Services and Markets Act 2023.

(d) Section 188 was amended by S.I. 2009/853, 2013/504, 2013/1908, 2017/1064 and 2017/1247.

(e) Section 285 was amended by section 28 of the Financial Services Act 2012, and by S.I. 2013/504, 2017/1064, 2018/135, 2018/1184 and 2019/662.

“relevant property transfer instrument” means any instrument made for the purposes of effecting a partial property transfer to which these Regulations apply.

Trusts

6. A partial property transfer to which this Part applies which makes provision under paragraph 55(7)(a) of the Schedule (effect of property transfer instrument) 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 CCP to the transferee—

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

Additional restrictions on reverse transfers

7.—(1) This regulation applies to a partial property transfer to which this Part applies which is made by the Bank under paragraph 70 or 72 of the Schedule.

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

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

(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^(a) which applies by virtue of the original instrument;
- (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;
- (c) a transfer of a claim for damages or an award of damages against the CCP which was in existence immediately before the original instrument was made;
- (d) a transfer to an undertaking which has not entered into insolvency; or
- (e) a transfer under regulation 11(7).

(4) In this regulation—

- (a) “original instrument” has the meaning given by paragraph 70 or 72 of the Schedule; 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.

CCP group companies

8.—(1) A partial property transfer—

(a) “Default event provision” is defined in paragraph 84 of Schedule 11 to the Financial Services and Markets Act 2023 (termination rights etc).

- (a) to which this Part applies; and
- (b) under which the transferor is a relevant company,

may not transfer property, rights or liabilities of the company unless the property, rights or liabilities are necessary for the carrying on of relevant business.

(2) For these purposes it does not matter whether relevant business has been transferred by a property transfer instrument.

(3) In this regulation—

“financial institution” has the meaning given by point (26) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and the Council of 26th June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012(a);

“relevant business” means the business, or any part of the business, of a CCP which is (or, but for the exercise of a stabilisation power, would be) in the same group as the relevant company; and

“relevant company” means a company, other than a financial institution, which—

- (a) is a CCP group company(b) in relation to which this Part has effect by virtue of paragraph 118 of the Schedule (paragraph 117: supplemental); and
- (b) is not a parent undertaking of the CCP in the same group in respect of which the Bank is satisfied for the purposes of paragraph 117(2) of the Schedule (sale to commercial purchaser, transfer to bridge central counterparty and transfer of ownership: conditions for group companies) that the general conditions for the exercise of a stabilisation power(c) are met.

(4) For the purpose of the definition of “relevant business”, undertakings are in the same group if they are group undertakings in respect of each other.

(5) Expressions defined in the Companies Act 2006(d) have the same meaning in this regulation as in that Act.

CHAPTER 2

Remedies

Market contracts and continuity powers

9.—(1) This regulation applies where a partial property transfer has been made in contravention of regulation 5 (financial markets) or any other provision of this Part which relates to the exercise of the continuity powers.

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

Set-off and netting

10.—(1) This regulation applies where a partial property transfer has been made in contravention of regulation 3 (protected rights and liabilities) unless the contravention relates to the exercise of the continuity powers (in which case, regulation 9 (market contracts and continuity powers) applies).

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

(a) EUR 2013/575, as amended by section 1(7)(a) of, and paragraphs 2(1) and (4) of Part 1 of Schedule 1 to, the Financial Services Act 2012 and by S.I. 2019/1232.

(b) “CCP group company” is defined in paragraph 156 of Schedule 11 to the Financial Services and Markets Act 2023 (interpretation: “CCP group company”, etc).

(c) The general conditions for the exercise of a stabilisation power are set out in paragraph 17 of Schedule 11 to the Financial Services and Markets Act 2023 (general conditions).

(d) 2000 c. 46.

Contravention of other provisions of this Part

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

(2) This regulation does not apply to the extent that regulation 9 (market contracts and continuity powers) or 10 (set-off and netting) applies.

(3) P may give notice to the Bank of the alleged contravention of this Part.

(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 Part 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.

(5) P must also, on request, provide such additional information as the Bank may reasonably require.

(6) 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 Part has been contravened in the manner specified in the notice given under paragraph (3), take the steps specified in paragraph (7);
- (b) if it does not agree that a provision of this Part has been contravened in the manner specified in the notice given under paragraph (3), take the steps specified in paragraph (8).

(7) The steps are to remedy the contravention by transferring property, rights or liabilities to the transferee or the transferor under the partial property transfer.

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

(9) If the Bank considers that the matters raised in the notice given under paragraph (3) are of such complexity that it is impractical to take a decision under paragraph (6) 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 given under paragraph (3), inform P of the extension and the duration of the extension.

(10) The property, rights or liabilities which are transferred under paragraph (7) may be the same property, rights or liabilities which were, in contravention of this Part, 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 Bank, are equivalent to those property, rights or liabilities.

PART 3

Restriction of Write-down Provision

Application

12. This Part applies to an instrument which makes write-down provision.

Set-off and netting

13.—(1) An instrument to which this Part applies may not make write-down provision in respect of a protected liability (subject to paragraph (6)).

(2) In this regulation, a “protected liability” is a write-down liability which is not within paragraph (3), and meets the following conditions—

- (a) condition 1 is that the liability is owed by the CCP to a person (“P”);
- (b) condition 2 is that the liability is a liability which either P or the CCP is entitled to set-off or net under set-off arrangements, netting arrangements or title transfer collateral arrangements into which P has entered with the CCP (“the relevant arrangements”);
- (c) condition 3 is that—
 - (i) where the liability relates to a derivative, financial contract or qualifying master agreement (see regulation 14 (meaning of “derivative”, “financial contract” and “qualifying master agreement”)), it has not been converted into a net debt, claim or obligation, whether in accordance with the relevant arrangements or through the making of a write-down provision or otherwise;
 - (ii) where the liability relates to any other type of contract, it has neither been converted nor treated as if it had been converted into a net debt, claim or obligation, whether in accordance with the relevant arrangements or through the making of write-down provision or otherwise.

(3) The following liabilities are not protected liabilities—

- (a) liabilities in relation to an unsecured debt instrument which is a transferrable security issued by that CCP, and for these purposes a “debt instrument” is any instrument falling within article 77 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(a) (instruments creating or acknowledging indebtedness);
- (b) liabilities in relation to a capital instrument issued by that CCP;
- (c) liabilities owed in relation to subordinated debt;
- (d) unsecured liabilities in relation to any instrument or contract which—
 - (i) at the date on which it was issued or made, had a maturity period of 12 months or more; and
 - (ii) is not a derivative, financial contract or qualifying master agreement;
- (e) unsecured liabilities owed to another member of the same group as the relevant CCP which are not owed in relation to derivatives, financial contracts or qualifying master agreements;
- (f) liabilities which relate to a claim for damages or an award of damages or a claim under an indemnity.

(4) For the purposes of paragraph (2)—

- (a) it does not matter whether—
 - (i) the arrangements which permit P or the CCP to set-off or net the liability also permit P or the CCP to set-off or net rights and liabilities with another person;
 - (ii) the right of P or the CCP to set-off or net is exercisable only on the occurrence of a particular event;
- (b) a liability is treated as if it is converted into a net debt, claim or obligation if the amount due in relation to the liability is reduced by reference to any sums which the debtor would be able to set off against the liability in the event that the debtor decided to exercise set-off or netting rights.

(5) For the purposes of paragraph (3), undertakings are in the same group if they are group undertakings in respect of each other, and “group undertaking” has the meaning given in section 1161(5) of the Companies Act 2006(b).

(6) Paragraph (1) does not prevent write-down provision from being made in order to convert, or in connection with converting, the protected liability into—

(a) S.I. 2001/544. Article 77 was amended by S.I. 2010/86 and 2011/133.

(b) There are amendments to section 1165 which are not relevant.

- (a) the net debt, claim or obligation that would be due under the set-off arrangements, netting arrangements or title transfer collateral arrangements at the time the write-down provision providing for this is made; or
- (b) an estimate of that net debt, claim or obligation.

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

14.—(1) In this Part—

- (a) “derivative” means a financial instrument referred to in paragraphs 4 to 10 of Part 1 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(a);
- (b) “financial contract” means any or any combination of the following (other than a derivative)—
 - (i) a contract for the purchase, sale, transfer or loan of a transferrable security, a group of transferrable securities or index of transferrable securities;
 - (ii) a repurchase or reverse repurchase transaction on any transferable security, group of transferable securities or index of transferable securities;
 - (iii) a commodities contract of a financial nature, including—
 - (aa) a contract for the purchase, sale, transfer or loan of a commodity, a group of commodities or an index of commodities for future delivery;
 - (bb) a swap or option on a commodity, a group of commodities or an index of commodities;
 - (cc) a repurchase or reverse repurchase transaction on a commodity, a group of commodities or index of commodities;
 - (iv) 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.

(2) In regulation 13 (set-off and netting), “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.

Remedy

15.—(1) This regulation applies where any person (“P”) considers that an instrument to which this Part applies has been made in contravention of any provision of this Part and that as a result the liabilities owed to P have been affected by the making of write-down provision.

(2) P may give notice to the Bank of the alleged contraventions of this Part.

(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 Part which is alleged to have been contravened and the manner in which that contravention is alleged to have occurred; and
- (d) identify the liability to which the alleged contravention relates.

(a) Amended in relevant part by S.I. 2006/3384, 2017/488 and 2018/1403.

(4) P must also, on request, provide such additional information as the Bank may reasonably require.

(5) Within the relevant period and acting as soon as reasonably practicable, the Bank must—

- (a) if it does not agree that a provision of this Part has been contravened in the manner specified in the notice, take the steps specified in paragraph (6);
- (b) if it agrees that a provision of this Part has been contravened in the manner specified in the notice, take the steps specified in—
 - (i) paragraph (7), where the Bank has not exercised the bridge central counterparty stabilisation option^(a) in addition to making write-down provision; or
 - (ii) paragraph (8) where, in addition to having made write-down provision, the Bank has at any time exercised the bridge central counterparty stabilisation option.

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

(7) The steps are to remedy the contravention—

- (a) where practicable—
 - (i) by requiring the CCP to issue securities; or
 - (ii) by transferring securities issued by the CCP, which the Bank estimates to have a value equal to the relevant sum, to P; or
- (b) otherwise, by requiring the CCP to transfer the relevant sum to P,

whether by exercising a power under the Schedule or otherwise.

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

- (a) requiring the CCP or bridge central counterparty to issue securities which the Bank estimates to have a value equal to the relevant sum to P;
- (b) transferring securities issued by the CCP or bridge central counterparty which the Bank estimates to have a value equal to the relevant sum to P; or
- (c) requiring the CCP or bridge central counterparty to transfer the relevant sum to P,

whether by exercising a power under the Schedule or otherwise.

(9) In this regulation—

“relevant period” has the meaning given in regulation 16;

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

Remedy: relevant period

16.—(1) In regulation 15(5) (remedy), the “relevant period” means—

- (a) a period of 120 days beginning with the day on which the notice under regulation 15(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).

(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.

(a) The bridge central counterparty stabilisation option is set out in paragraph 29 of Schedule 11 to the Financial Services and Markets Act 2023 (bridge central counterparty).

(4) The condition is that the Bank considers that the matters raised in the notice under regulation 15(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 as soon as reasonably practicable inform the person who gave the notice under regulation 15(2) of the extension of time and the duration of the extension.

PART 4

Revocation and transitional provision

Revocation of the Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2014.

17. The Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2014(a) is revoked.

Transitional provision

18.—(1) The revocation (by regulation 17) of the Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2014 does not apply in relation to any instrument made by the Bank in relation to a CCP in exercise of the share transfer powers or the property transfer powers—

- (a) before 31st December 2023; or
- (b) on or after 31st December 2023 in reliance on any regulations made under section 83 or 84 of the Financial Services and Markets Act 2023 (power to make consequential provision and power to make transitional or saving provision etc) which provide for the continued application of the share transfer powers or property transfer powers.

(2) In paragraph (1), “the share transfer powers” and “the property transfer powers” have the meaning given in section 1(4) of the Banking Act 2009(b).

Scott Mann
Stuart Anderson

4th December 2023

Two of the Lords Commissioners of His Majesty’s Treasury

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

(a) S.I. 2014/1828.

(b) Section 1(4) was amended in relevant part by paragraph 12(4)(c) of Part 1 of Schedule 2 to the Financial Services (Banking Reform) Act 2013 (c. 33).

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 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 2023 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.

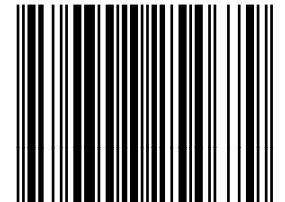
© Crown copyright 2023

Printed and published in the UK by The Stationery Office Limited under the authority and superintendence of Jeff James, Controller of His Majesty's Stationery Office and King's Printer of Acts of Parliament.

£8.14

<http://www.legislation.gov.uk/id/uksi/2023/1316>

ISBN 978-0-34-825467-9



9 780348 254679