EXPLANATORY MEMORANDUM TO

THE AMENDMENTS OF THE LAW (RESOLUTION OF SILICON VALLEY BANK UK LIMITED) ORDER 2023

2023 No. 319

1. Introduction

1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of this instrument is to make certain amendments to the law, in order to enable powers under Part 1 of the Banking Act 2009 to be used effectively in connection with the sale of Silicon Valley Bank UK Limited to HSBC UK Bank plc.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Committee is asked to note that the Treasury have determined that it is necessary to make this Order without a draft of it having been approved by a resolution of each House of Parliament, in accordance with section 75(8) of the Banking Act 2009. Accordingly, it is made under the 28-day affirmative procedure.

3.2 The Treasury further considered it necessary to make the Order before laying it before Parliament, and gave notification and explanation of this to the Speakers of both Houses.

3.3 In connection with the conclusions in paragraphs 3.1 and 3.2, the Treasury note that the Order needed to be in force in connection with the resolution of Silicon Valley Bank UK Limited under the Banking Act 2009 and in particular that it needed to come into force alongside the share transfer instrument, made by the Bank of England in exercise of its powers under the Banking Act 2009, which itself needed to come into force before business hours on Monday 13 March 2023.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the whole of the United Kingdom

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the whole of the United Kingdom

5. European Convention on Human Rights

5.1 The Economic Secretary to the Treasury has made the following statement regarding Human Rights:

"In my view the provisions of the Amendments of the Law (Resolution of Silicon Valley Bank UK Limited) Order 2023 are compatible with the Convention rights.":

6. Legislative Context

6.1 This instrument is made under Part 1 of the Banking Act 2009, which established a special resolution regime. The special resolution regime establishes a framework within which the Bank of England, the Prudential Regulation Authority (PRA), the Financial Conduct Authority (FCA), and the Treasury, can effectively resolve failing banks and business societies, while protecting depositors, taxpayers and the wider economy. The tools available under the special resolution regime include the power to make orders to transfer shares or property, rights and liabilities of a failing firm to a private sector purchaser or a bridge bank (a company wholly owned by the Bank of England), to bail-in a failing firm, or to place a failing firm into temporary public ownership.

6.2 Specifically, this Order is made under section 75 of the Banking Act 2009, which allows primary and secondary legislation and common law to be modified, where it is necessary to do so to enable the effective use of the powers in Part 1.

7. Policy background

What is being done and why?

7.1 On Monday 13 March, the Bank of England exercised its power under section 11 (private sector purchaser) of the Banking Act 2009 to transfer the shares of Silicon Valley Bank UK Limited to HSBC UK. The Bank of England exercised its power after consulting the PRA, FCA and the Treasury and determining that it was necessary to make the transfer, having regard to the public interest in the matters set out in section 7 (general conditions) of the Banking Act 2009.

7.2 In order to facilitate the Bank of England's exercise of this power, it has been determined that a number of amendments to the law are required. These amendments are judged to be necessary in order to ensure that the transfer of shares from SVB Bank Ltd to HSBC UK is effective and executed in a way that best meets the public interest.

Ring-fencing

7.3 Firstly, this Order amends the Financial Services and Markets Act 2000 (Excluded and Prohibited Activities) Order 2014 (S.I. 2014/2080) (EAPO) in connection with the application of ring-fencing rules, permitting the provision of liquidity from HSBC UK Bank plc to Silicon Valley Bank UK Limited.

What are the current rules and what do they seek to achieve?

7.4 Under current rules, ring-fenced banks (RFBs) are prohibited from incurring exposures to "relevant financial institutions" (RFIs), which include banks, subject to certain exemptions. Article 14(4)(b)(i) EAPO provides an exemption for an RFB to incur exposures to RFIs that are in its own group where the exposure is not otherwise prohibited by regulator rules and arises out of a "commercial transaction conducted on arm's length terms". This means that an RFB cannot provide cheaper than market rates lending or funding to RFIs within its group, restricting its ability to provide liquidity to other RFIs in the ring-fenced banking group. These rules protect retail banking services on which customers rely, such as retail deposits held in RFBs, by limiting the extent to which RFBs are exposed to risk-taking and failure in RFIs.

How are the current rules being changed and why is the change necessary?

7.5 This Order uses the Treasury's power under section 75 of the Banking Act 2009 to apply article 14(4)(b)(i) EAPO with modification in relation to the exposures incurred by HSBC to SVB UK only. The modification means that, in this context, article 14(4)(b)(i) is to be read as if the words "conducted on arms-length terms" were omitted. This will allow HSBC's RFB (HSBC UK) to provide preferential intra-group lending or funding to SVB UK, supporting the effective operation of SVB UK in the future. This exemption was critical to ensure the sale proceeded. It enables HSBC to provide liquidity to SVB UK, thereby facilitating the smooth operation of SVB UK going forward. In this way, this Order ensures that the Bank of England's use of the power under section 11 of the Banking Act 2009 is effective.

7.6 Separately, the government intends to lay in due course another statutory instrument to make further changes to the ring-fencing regime with regards to HSBC's purchase of SVB UK. SVB UK has become a subsidiary of HSBC's ring-fenced bank. The ring-fencing regime provides a four-year transition period for an entity acquired as part of a resolution process before it becomes subject to the ring-fencing requirements. As a result of this existing provision in legislation, SVB UK is not currently subject to the ring-fencing requirement.

7.7 The upcoming statutory instrument will permit SVB UK to remain exempt from the ring-fencing rules, beyond the four-year transition period, subject to conditions. This exemption was also crucial to the success of the sale as it ensures that SVB UK can remain a commercially viable stand-alone business as part of HSBC group. HSBC itself remains subject to the ring-fencing regime.

PRA and FCA rule-making powers

7.8 Secondly, this Order makes modifications to certain sections of the Financial Services and Markets Act 2000 (FSMA) with respect to PRA and FCA rule-making powers and duties to consult on rule changes, in relation to Silicon Valley Bank UK Limited.

What are the current rules and what do they seek to achieve?

7.9 Article 3 of the Order refers to a number of provisions in FSMA, which set out general rules exercised by the PRA and FCA, as well as PRA rules that apply to holding companies. Article 4 of the Order sets out provisions in FSMA regarding consultation requirements on the PRA and FCA where they make changes to their rules. PRA and FCA rules set out a range of requirements on financial services firms, which the PRA and FCA use in order to regulate the financial sector effectively. The duty to consult on changes to rules ensures the financial sector is given sufficient notice and ability to input into the PRA and FCA's rule-making process.

How are the current rules being changed and why is the change necessary?

7.10 The provisions under article 3 of the order modify the PRA and FCA's rule-making powers to ensure they are exercisable in connection with the instrument that the Bank of England used to write-down SVB UK shareholders and certain bondholders and transfer SVB UK's shares to HSBC. The provisions in article 4 exempt the duties of the FCA and PRA to consult on rule changes where those relate to the aforementioned Bank of England instrument. These amendments were necessary to support the use of the Bank of England's power under section 11 of the Banking Act 2009, by ensuring that the Bank of England's write-down and transfer powers in relation to SVB UK could be used effectively, helping to facilitate the sale of SVB UK to HSBC.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 Consolidation is not a relevant consideration for this instrument.

10. Consultation outcome

10.1 Due to the circumstances and urgency under which the Bank of England's powers have been exercised and the need to make urgent amendments to the law to facilitate exercise of those powers, no consultation has been carried out with regards to the making of this instrument.

11. Guidance

11.1 No guidance has been issued in relation to this instrument.

12. Impact

12.1 This Order has no, or no significant, impact on business as the changes it has made are intended to allow wider measures taken under Part 1 of the Banking Act 2009 to operate effectively. The sale itself has some impact on business as HSBC's purchase of SVB UK enabled the latter's customers to continue accessing banking services that they require, but this impact does not derive from the changes made by this Order specifically. There is no, or no significant, impact on charities or voluntary bodies

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because the instrument is intended to allow measures taken under Part 1 of the Banking Act 2009 to operate effectively

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 Monitoring and review is not applicable for this instrument.

15. Contact

15.1 Salvatore Ferrara, Head of Ring-fencing Policy, HM Treasury: 07815 991204 or email: salvatore.ferrara@hmtreasury.gov.uk.

15.2 James Fairburn, Deputy Director for Financial Stability, HM Treasury can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Economic Secretary to the Treasury can confirm that this Explanatory Memorandum meets the required standard.