INTRODUCTION

1. This memorandum concerns the Financial Services Bill as introduced in the House of Lords on 23 May 2012.

2. This memorandum builds on the delegated powers memorandum prepared the Treasury in connection with its introduction into the House of Commons on 26 January 2012 and the addendum to that memorandum that was prepared to assist the Delegated Powers and Regulatory Reform Committee and Parliamentarians in their consideration of an amendment (new clause 4\(^1\)) tabled by the Chancellor of the Exchequer to the Financial Services Bill for consideration at Report stage. It also builds on the delegated powers memorandum prepared in draft by the Treasury in connection with the draft Financial Services Bill published on 16 June 2011 by the Treasury as part of the White Paper entitled A new approach to financial regulation: the blueprint for reform (Cm8083) (the White Paper). That memorandum was submitted to the Joint Committee on the draft Financial Services Bill (the Joint Committee). The Joint Committee sent a copy of the memorandum to the Delegated Powers and Regulatory Reform Committee (DPRRC) for comment. The draft Bill was the subject of a memorandum dated 14 September 2011 from the DPRRC to the Joint Committee. The Joint Committee published its report on the draft Bill on 19 December 2011.

3. Where appropriate, this memorandum refers to the memorandum submitted by the DPRRC to the Joint Committee.

4. This memorandum has been prepared to assist the DPRRC in their consideration of the Bill. It identifies the provisions for delegated legislation in the Bill. It explains the purpose of the delegated powers taken, describes why the matter is to be left to delegated legislation, and explains the procedure selected for each power and why it has been chosen.

5. In line with the approach taken in the Financial Services and Markets Act 2000 (FSMA) the Bill confers a range of rule making powers on the regulators of financial services (the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA), and the Bank of England (the Bank)). These powers are not subject to direct Parliamentary control. However, given that these powers could be described as “legislative functions” the Treasury have also covered these powers in this memorandum. As with the delegated powers that are to be exercised by the Treasury by statutory instrument, this memorandum considers the purpose of the power taken; describes why the matter is dealt with in this way; and explains the procedure selected for each power and why it has been chosen.

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\(^1\) New clause 4 is now set out at clause 91.
Summary of the proposals contained in the Bill

6. The Bill will reform the UK system for the regulation of financial services and markets by:

- establishing a macro-prudential regulator, the Financial Policy Committee (the FPC) within the Bank to monitor and respond to systemic risks;
- transferring responsibility for prudential regulation to a focused new regulator, the PRA, established as a subsidiary of the Bank; and
- providing for a focused new conduct of business regulator, the FCA, to ensure that business across financial services and markets is conducted in a way that advances the interests of all users and participants.

7. Further detail of many of the proposals in the Bill can be found in the White Paper.

Legislative context

8. The Government has decided to amend current legislation to give effect to the reform programme set out in the White Paper. This approach, which has been supported by consultation respondents, will minimise the extent to which regulated firms and other users of the legislation in question (in particular FSMA) have to deal with legislative change. It should also allow more focused Parliamentary and stakeholder scrutiny of the key changes to the regulatory regime.

9. In this memorandum, references to “new sections” or “new Schedules” are, unless otherwise specified, references to new sections of, or new Schedules to, FSMA, as inserted by the Bill.

The Delegation of Powers

10. The delegation of powers through the Bill should be considered in light of the nature of the regulatory regime for financial services and markets. Two factors in particular are worth highlighting. First the regulation of financial services and markets is in large part highly complex and technical. In many cases, it is more appropriate to deal with technical and complex matters in secondary legislation or rules made by the regulator itself. Second, regulation operates against a background of markets for regulated products and services continuously developing, in some cases very rapidly. This means that regulation needs to be capable of changing, often at short notice, to be able to maintain effectiveness. This consideration underpins a number of the delegated powers in the Bill.

11. In deciding whether the Bill ought to delegate legislative powers to the Treasury or the regulators, we have been guided by the established principle that the regulator is best placed to deal with the operational detail of the regulatory regime. Matters such as the level of capital that a bank must hold...
or what information must be provided to a consumer before the consumer buys a contract of life insurance are better determined by the regulator itself, based on its experience of day-to-day regulation, than by Treasury Ministers.

12. However, it is appropriate for matters relating to the overall scope of regulation, and the parameters within which the regulators and other bodies will have to operate under the Bill to be determined by the Treasury, subject to appropriate Parliamentary control. That principle is enshrined in the Bill. Thus where it is appropriate to delegate powers relating to the scope of the responsibility of the PRA (see new section 22A inserted by clause 8 of the Bill) or to the scope of the FPC’s power of direction in relation to the PRA or FCA (see section 9K of the Bank of England Act 1998 inserted by clause 3 of the Bill), the Bill confers the power on the Treasury and provides for approval by both Houses.

Accountability

13. In view of the importance of the responsibilities being given to the regulators, the Bill includes a number of provisions to ensure that the legislative powers are exercised appropriately.

14. New Schedules 1ZA and 1ZB (as inserted by Schedule 3 to the Bill) make provision about the status and constitution of the regulators. Only the governing bodies of the FCA and PRA will be able to exercise the legislative functions of the regulators; it will not be possible for these to be delegated to sub-committee (see paragraph 8 of Schedule 1ZA and paragraph 16 of Schedule 1ZB). The regulators are each required to make an annual report about the discharge of their functions and other matters set out in paragraph 10 of Schedule 1ZA and paragraph 18 of Schedule 1ZB.

15. The Bill also imposes clear restrictions on the way in which the regulators may exercise their delegated powers (in addition to any specific limitations on the extent of any particular powers):

- Importantly, the objectives of the regulators, provided for by new sections inserted into the FSMA by clause 5 of the Bill, set out clear purposes for which the general functions of each of the regulators may be discharged and the matters to which the regulators must have regard in discharging those functions. The FCA is to have a strategic objective of ensuring that the relevant markets (see new section 1F) function well (new section 1B(2)), and three operational objectives (new sections 1C to 1E): the consumer protection objective, the integrity objective and the competition objective. The PRA’s general objective is promoting the safety and soundness of PRA authorised persons (new section 2B). If the effecting or carrying out of contracts of insurance as principal is to any extent a PRA-regulated activity (see new section 22A, inserted by clause 8) the PRA will have to act in a manner compatible with its general objective and with its insurance objective (defined in new section 2C). New section 2D enables the Treasury, as part of an order under section 22A which extends the regulated
activities which are PRA-regulated activities, to provide for additional objectives for the PRA in relation to those additional PRA-regulated activities. The PRA will have to act in a manner compatible with its general objective and with that objective.

- Both regulators are required to maintain effective arrangements for consultation. The FCA must maintain effective arrangements for consulting practitioners and consumers on the extent to which its general policies and practices are consistent with its general duties under new section 1B. These arrangements must include the establishment of various practitioner and consumer panels (see new sections 1M to IR). The PRA must make and maintain effective arrangements for consulting PRA authorised persons or, where appropriate, persons appearing to represent the interests of PRA authorised persons. It may establish such panels as it thinks fit in carrying out this duty (see new section 2K).

Regulatory principles to be applied to both regulators

16. In discharging their general functions both regulators must have regard to the regulatory principles set out in new section 3B. In addition, the FCA must have regard to the importance of taking action intended to minimise the extent to which authorised persons carry on business for a purpose connected with financial crime (new section 1B(5)(b)). Both regulators also have a duty to follow principles of good governance, ensure co-ordinated exercise of their functions (see new sections 3C and 3D), and co-operate with the Bank (see new section 3P).

Rule-making procedures

17. In addition to the general duties described above, the Bill imposes a number of procedural requirements on the regulators when exercising their delegated powers. These procedures are set out in new sections 138F to 138O. These procedures are similar to the procedures provided for rule making by the FSA under FSMA as it currently stands.

18. New sections 138I and 138J provide for each regulator, before making a rule, to consult the other and, after so doing, publish the draft rules in a way appearing to it to be best calculated to bring them to the attention of the public. The draft must be accompanied by a cost benefit analysis; an explanation of the purpose of the proposed rule; a statement setting out the impact of the changes in relation to mutual societies, an explanation of the regulator’s reasons for thinking that the rules are compatible with its duties in relation to its objectives and the regulatory principles to be applied, and notice that representations may be made to it within a specified time. The regulator must publish in general terms the representations made to it about its proposals and its response to them. It must have regard to representations it receives before making proposed rules. In addition, if the rules differ from the draft published

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2 See new section 1B(1) in relation to the FCA and new section 2B, or if the case requires it, new sections 2C(1) or 2D(3) in relation to the PRA.
for consultation, the regulator must publish details of the differences; a cost benefit analysis; a statement setting out whether it thinks the impact of the rule change is different from the impact it previously identified; and in cases where it does consider there to be a difference in impact, details of that difference.

19. There are some exceptions to this procedure: a cost benefit analysis is not required in relation to certain rules as set out in new section 138I(6) and new section 138J(6). In addition, new section 138L provides for a number of general exemptions to section 138I. In cases where the FCA considers that the delay involved in complying with new section 138I(1)(b) and (2) to (5) (covering certain aspects of consultation) would be prejudicial to the interests of consumers, those provisions will not apply. Similarly, those provisions do not apply in cases where the PRA considers that the delay involved in complying with new section 138I(1)(b) and (2) to (5) would be prejudicial to the safety and soundness of PRA authorised persons, or, in a case where section 2C (insurance objective) applies, prejudicial to securing the appropriate degree of protection for policy holders. The cost benefit analysis provisions (new section 138I(2)(a) and (5)(b) and new section 138J(2)(a) and (5)(b)) do not apply if the regulator concerned considers that there will be no increase, or no significant increase in costs when comparing the effect of the proposed rule changes. New section 138L operates in a similar way to section 155 FSMA (consultation).

20. Where the FCA considers that it is necessary or expedient to make temporary product intervention rules, the consultation requirements set out in new section 138I apply. New section 138M provides for a number of general exemptions to section 138I. Subsection (1) provides for cases where the FCA considers that it is necessary or expedient not to comply with new section 138I(1)(b) and (2) to (5) (covering certain aspects of consultation) and 138K (consultation: mutual societies) in order to advance the consumer protection objective or the competition objective, or, in cases where an order under section 137C(1)(b) is in force, the integrity objective. However, rules made further to subsection (1) (temporary product intervention rules) can only remain in force for up to 12 months, and following the expiry of these rules, the FCA cannot make further, similar rules for another year under the temporary product intervention rule-making power but must undertake full formal consultation or remove the rules in question. The power to make product intervention rules is a new provision so there is no similar provision in FSMA currently.

The Financial Services Bill

21. The Bill contains 104 clauses. It builds on the existing framework for financial services regulation contained primarily in FSMA. The Bill is comprised of nine parts. Each part is summarised below. Further detail of the provision made by each Part, including the detail of each delegated legislative power, is considered below:

a) **Part 1 (Bank of England)**: Part 1 amends the Bank of England Act 1998 to provide for the creation of the FPC (including its governance and its functions); to amend certain provisions relating to the Bank itself (including
modifications to its financial stability objective and the creation of a new post of Deputy Governor for prudential regulation); and to make minor amendments to the provisions relating to the Monetary Policy Committee.

b) **Part 2 (Amendments of Financial Services and Markets Act 2000)**; Part 2 amends FSMA to provide for the new regulators (including their objectives); how the regulators are to relate to each other (including a duty to co-ordinate for certain purposes); how the scope of responsibilities of the PRA is to be determined; how regulatory processes (including authorisation, imposition of requirements, approval of individuals, rule making, exercise of “passport” rights under EEA law, discipline and enforcement) are to operate; what the FCA’s role in relation to the functions conferred under Part 6 (official listing) will be; what the role of the Bank and the FSA is to be in relation to, respectively, recognised clearing houses and recognised investment exchanges; the Financial Services Compensation Scheme; the Financial Ombudsman Scheme; the role of the competition authorities in relation to the regulation of financial services; Lloyd’s of London; various amendments in relation to information gathering, investigations and disclosure; amendments to Part 22 FSMA (dealing with auditors and actuaries); the making of super-complaints to the FCA; FCA requests to the Office of Fair Trading; amendments to Part 24 FSMA (dealing with insolvency) and other miscellaneous matters.

c) **Part 3 (Mutual Societies)**; Part 3 makes provision for the transfer of functions under legislation governing mutual societies to the FCA, and PRA and the court; it also amends the legislation governing building societies to permit them to grant floating charges in connection with participation in a securities settlement system or a payment system, and to permit the regulator to direct a building society in certain circumstances to transfer its business to an existing or specially formed company owned by another mutual society.

d) **Part 4 (Collaboration between Treasury and Bank of England, FCA or PRA)**; Part 4 deals with the relationship between the Treasury, the Bank of England, the FCA and the PRA in relation to the management of a crisis. It imposes an obligation on the Bank of England to notify the Treasury of a material risk that public funds may need to be provided in connection with a threat to financial stability and provides a power for the Treasury to direct the Bank where public funds are at risk or have been expended. Part 4 also make provision about relations with international organisations (including the operation of the European Supervisory Authorities).

d) **Part 5 (Inquiries and investigations)**; Part 5 makes provision for the Treasury to appoint a person to carry out an independent inquiry about a matter relating to the regulation of financial services or markets. It also makes provision to require the regulators to carry out an investigation in relation to potential regulatory failure.

e) **Part 6 (Investigation of complaints against regulators)**; Part 6 makes provision for the regulators to set up a scheme for the investigation of complaints arising in connection with the exercise, or failure to exercise, of
any of their relevant functions; and for the appointment of an independent investigator to be responsible for the conduct of investigations.

f) Part 7 (Amendments of Banking Act 2009); Part 7 makes various amendments to the Banking Act 2009, which was considered by the DPRRC in the 2008-2009 session. In particular, clause 84 extends the availability of the “reverse transfer” powers under Part 1 of the Act (special resolution regime).

g) Part 8 (Miscellaneous); Part 8 includes a power that will be used to effect the transfer of consumer credit regulation from the Office of Fair Trading (OFT) to the FCA. It makes amendments to the power which is conferred on the Treasury and the Secretary of State under Chapter 2 of Part 21 of the Companies Act 2006 to make regulations concerning the evidencing and transfer of title to securities without written instrument (that is by way of electronic settlement). Part 8 also makes amendments to the Companies Act 1989 and makes provision for National Savings and Investments (the Director of Savings) to provide services to public bodies.

h) Part 9 (General); Part 9 deals with matters such as interpretation, consequential ad transitional provision, extent and commencement.

PART 1: AMENDMENTS OF THE BANK OF ENGLAND ACT 1998

22. Clauses 1 and 2 amend the Bank of England Act 1998 to provide for a new post of Deputy Governor for prudential regulation and to amend the Bank’s financial stability objective. These provisions do not contain any delegated powers.

23. Clause 3 inserts a new Part 1A into the Bank of England Act 1998. This new Part relates to the functions of the Bank which relate to financial stability including the creation of a new committee of the court of directors, the FPC. The FPC will contribute to the achievement of the Bank’s Financial Stability objective. Its responsibility relates primarily to identifying and monitoring, and taking action to address, risks to the stability of the UK financial system with a view to protecting and enhancing resilience. It will have authority to give recommendations to the FCA, PRA, the Treasury, the Bank itself and other persons. In limited cases, the FPC will have a power of direction in relation to the FCA and PRA. The FPC will also be responsible for producing a financial stability report twice a year.

24. The membership of the FPC will be comprised of the Governor (as Chair) and three Deputy Governors of the Bank, two Bank executive directors, the Chief Executive of the FCA, four external members, and a non-voting Treasury representative.

25. Clause 4 introduces Schedule 2 which makes various amendments to the Schedules 1, 3 and 7 to the Bank of England Act 1998 covering the court of
directors, the Monetary Policy Committee and restrictions on the disclosure of information.

**Clause 3 (financial stability strategy and Financial Policy Committee)**


*New section 9K (macro-prudential measures)*

27. **Power:** To specify what “macro-prudential measures” are for the purpose of section 9G (FPC directions to FCA or PRA)

28. **Body:** Treasury

29. **Parliamentary scrutiny:** draft affirmative procedure or in urgent cases, approval within 28 days of being laid (further detail given below)

30. Under new section 9G of the Bank of England Act 1998 the FPC may direct the FCA or PRA to exercise its functions so as to implement a macro-prudential measure in relation to a specified class of regulated persons. Section 9K gives the Treasury the power to prescribe by order what macro-prudential measures are. Thus section 9K gives the Treasury the power to determine the scope of the FPC’s power of direction in relation to the FCA or PRA.

31. The FPC was set up on an interim basis in February 2011, which will, as far as possible in the absence of formal powers, fulfill the role of the permanent FPC during the design and passage of the legislation. One of the primary tasks of the interim FPC is to analyse and evaluate potential macro-prudential measures that might be specified under section 9K and to advise the Treasury on its findings. The interim FPC provided the Treasury with an update on its analysis of potential macro-prudential measures in the minutes of its September 2011 meeting. The interim FPC’s recommendations for the statutory body’s initial toolkit are expected shortly after its March 2012 meeting. The Government intends to consult on the draft secondary legislation that will create the FPC’s toolkit under this power over the summer of 2012.

**Reasons for taking the power**

32. It is important that the scope of the power of direction conferred on the FPC in relation to the FCA and PRA is carefully circumscribed and defined in an appropriately clear and specific manner. This suggests that the specification of macro-prudential measures is likely to be detailed and technical and so more appropriate for secondary legislation. In addition, the kinds of measures which it may be appropriate for the FPC to direct the FCA or PRA to implement are likely to change over time as greater expertise is developed.

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3 A direction may not require the measure to be implemented in relation to a specified regulated person (see section 9G(4)).
(both in the UK and internationally) as to what macro-prudential measures are effective. The need to be able to change the macro-prudential measures available to the FPC, including potentially at short notice, indicates that taking a power is appropriate.

Effect

33. Section 9K confers a broad power to prescribe macro-prudential measures.

34. The Treasury must specify whether a measure is specified in relation to the FCA, the PRA or both regulators (section 9K(3)). This reflects the fact that some measures might be relevant only in relation to one regulator (for example, the imposition of additional liquidity requirements on banks would be a matter for the prudential regulator of banks, which the Government has announced will be the PRA) whereas other measures might be relevant to both regulators (for example, the imposition of additional capital requirements on all authorised persons which would be a matter both for the PRA and the FCA).

35. Section 9L (a provision which was not included in the draft Bill) requires the FPC to maintain, in relation to each macro-prudential measure prescribed under section 9K, a statement of the general policy that it proposes to follow in relation to the exercise of its power of direction under section 9G. All such statements must be published by the Bank. This will ensure that the regulators and authorised persons have a clearer understanding of how the power of direction in section 9G may be exercised.

36. The order may confer a discretion on the FPC, the FCA or PRA or refer to rules made by the FCA or PRA (section 9K(4)(b) and (c)). Thus the order may make provision such as “the FPC may provide for exceptions” or “the measure may be applied to authorised persons whom the PRA is satisfied meet the following criteria” or “this measure applies to those authorised person subject to the following FCA rules”.

37. The order may refer to publications issued by the FCA, the PRA, other bodies in the UK or international organisations, including ambulatory references to those publications as they have effect from time to time (section 9K(4)(d)). For example, it might be appropriate to refer to statements issued by the Financial Stability Board or to guidance issued by the FCA, as those amendments are amended from time to time. This avoids the need to amend the order made under section 9K every time an amendment is made to a publication which is referred to in the order.

38. The order may also make transitional provisions and savings (section 9K(4)(e)). This may be appropriate where the Treasury amends an existing order under section 9K to remove a macro-prudential measure. Without a saving provision, any direction given by the FPC in relation to that measure would be treated as being revoked by the FPC (see section 9I(2)). Section 9K(4)(e) enables provision to be made where this outcome would be inappropriate.
39. By virtue of section 9H(2), an order under section 9K may exclude or modify any procedural requirement which the FCA or PRA would otherwise be subject to under FSMA where the regulator is exercising its functions to implement a particular macro-prudential measure. This power may be appropriate where the nature of the macro-prudential measure is such that the procedural requirement is inappropriate. For example where the measure is very specific and the regulator will have little or no discretion as to how the measure is implemented, it may be appropriate to disapply the requirement on the regulator to consult on draft rules which implement the measure (see new sections 138J and 138K). In such cases, consultation by the regulator on how it proposes to implement the direction would not be constructive; the regulator would have no discretion as to how it acts and so could not modify its proposed course of action in light of consultation responses. For example, were counter-cyclical capital buffers to be specified as a measure for these purposes, it is likely that the PRA and FCA would have no meaningful discretion as to how to implement the measure; the FPC would indicate what level of additional capital is to be required. Alternatively, it may be appropriate to provide for additional procedural requirements to apply where the regulator is exercising its functions to implement a particular macro-prudential measure. For example it may be appropriate to require the regulator to consult a particular third party.

40. Before making an order under section 9K the Treasury must consult the FPC (or, in cases of urgency, the Governor of the Bank of England) (see section 9K(2)).

Parliamentary scrutiny

41. Given the significance of the power and the potential impact on the FCA and PRA and those it regulates, the Treasury consider that the order making power should only be exercisable if a draft of the order has been approved by each House.

42. However, there may be cases where additional macro-prudential measures need to be prescribed on an urgent basis, for example where the FPC needs additional powers to deal effectively on an urgent basis with a serious emerging systemic risk. In light of this, the Treasury propose that in cases of urgency it should be possible for the Treasury to make an order under section 9K without prior Parliamentary approval. In such cases, the order should lapse 28 days later unless it has been approved by both Houses. (In calculating the 28 days, no account is to be taken of any periods of dissolution, prorogation or adjournments of more than 4 days.) The Treasury consider that this approach strikes the appropriate balance between the need for appropriate Parliamentary scrutiny and the need to be able to react effectively and quickly in a crisis. This acknowledges the points made by the DPRRC in their memorandum to the Joint Committee.
PART 2: AMENDMENTS OF FINANCIAL SERVICES AND MARKETS ACT 2000

43. This Part makes amendments to FSMA. For an explanation of what these amendments do, please see the Explanatory Notes to the Bill.

Clause 5 (the new regulators)

44. In Clause 5 sections 1 to 18 of FSMA are replaced with sections 1A to 3R.

New section 1A (the Financial Conduct Authority) and Schedule 1ZA

45. New section 1A introduces Schedule 1ZA which sets out requirements as to the FCA’s constitution and certain other matters including the publication of an annual report and audit arrangements. Paragraph 18 provides for the FCA to prepare and operate a scheme for ensuring that penalties imposed by it under the Act are applied for certain purposes and paragraph 20 provides for the FCA to make rules providing for the payment of fees in connection with the discharge of any of its functions or as a result of the Act or specified EU legislation. These paragraphs make provision analogous to paragraphs 16 and 17 of Schedule 1 to FSMA.

Paragraph 13 of Schedule 1ZA (application of Companies Act 2006 provisions in relation to accounts and their audit)

46. Power: To require the FCA to comply with any provisions of the Companies Act 2006 about accounts and their audit which would not otherwise apply, and direct that any provision of the Companies Act 2006 about accounts and their audit is to apply with such modifications as are specified in that direction, whether or not the provision would otherwise apply to the FCA.

47. This power is replicated for each of the PRA, the Consumer Financial Education Body, the Financial Services Compensation Scheme and the FOS.4 The reasons for taking the power, effect and parliamentary procedure are the same as for the FCA.

48. Body: Treasury

49. Parliamentary Scrutiny: none

Reasons for taking the power

50. In considering this power, the Treasury have considered the comments of the DPRRC in their memorandum to the Joint Committee.

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4 The PRA provision can be found at paragraph 21 of new schedule 1ZB.
The Consumer Financial Education Body provision can be found at paragraph 9 of Schedule 15.
The Financial Ombudsman Service provision can be found at paragraph 10 of Schedule 10.
51. The FCA is a company limited by guarantee and would, unless provision were made to the contrary, be subject to the provisions of the Companies Act 2006 relating to accounts and audit. However the accounts of the FCA will be subject to audit by the Comptroller and Auditor General (see paragraph 14 of Schedule 1ZA). The operation of the provisions of the Companies Act 2006 relating to audit and accounts would be insufficient to ensure that the accounts of the FCA can effectively be subject to audit by the Comptroller and Auditor General. In particular, the Companies Act 2006 would not provide for sufficient information to be provided to enable the Comptroller and Auditor General to properly consider the economy, efficiency and effectiveness of the FCA. In light of this, paragraph 14(4) of Schedule 1ZA disapplies Part 16 of the Companies Act 2006 (audit).

52. Paragraph 13 enables the Treasury, by direction, to require the FCA to comply with any provisions of the Companies Act 2006 about accounts and their audit which would not otherwise apply, and direct that any provision of the Companies Act 2006 about accounts and their audit is to apply with such modifications as are specified in that direction, whether or not the provision would otherwise apply to the FCA. This enables the Government to ensure that the FCA accounts are prepared in a manner which enables the Comptroller and Auditor General to effectively scrutinise the accounts of the FCA. In particular, a direction may be used to require the accounts to provide disclosure of any material expenditure or income that has not been applied for the purposes of Parliament or material transactions that have not conformed to the authorities that govern them. It can also be used to ensure that financial reporting policy is reflected consistently across the public sector by requiring the body to comply with the Treasury’s guidance on financial reporting. For example, a direction could be used to impose additional disclosure requirements to support transparency e.g. the FCA might be required to prepare a Directors Remuneration Report. Only quoted companies are required to do this under the Companies Act 2006.

53. There are a number of situations in which such a power could be used. For example, section 430 Companies Act 2006 (quoted companies: annual

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5 The other bodies referred to in paragraph 47 are also companies limited by guarantee and subject to the provisions of the Companies Act 2006.
6 The other bodies referred to in paragraph 47 will also be subject to audit by the Comptroller and Auditor General. The PRA provision can be found at paragraph 22 of new schedule 1ZB. The Consumer Financial Education Body provision can be found at new paragraph 9A of Schedule 1A to FSMA. The Financial Ombudsman Service provision can be found in new section 218ZA.

7 The PRA provision can be found at paragraph 22(5) of new schedule 1ZB. The Consumer Financial Education Body provision can be found at new paragraph 9A(5) of Schedule 1A to FSMA. The Financial Ombudsman Service provision can be found in new section 218ZA(5).

8 The PRA provision can be found at paragraph 21 of new schedule 1ZB. The Consumer Financial Education Body provision can be found at new paragraph (5) of paragraph 9 of Schedule 1A to FSMA. The Financial Ombudsman Service provision can be found in new paragraph (4) of section 218 FSMA.
accounts and reports to be made available on website) would not by default apply to the FCA, which will not be a quoted company. The Treasury might want to apply it. Similarly, the Treasury might want to modify the period for filing accounts in relation to the FCA (see section 442 Companies Act 2006). Similarly the Treasury might consider it appropriate to apply some provisions on reports (covered by Part 15) that would not otherwise apply (e.g. section 420 duty to prepare a directors’ remuneration report and the associated filing duty) or to modify some provisions on reports in their application to the FCA (e.g. section 416 contents of directors’ report).

54. There are also EU law issues in this area, as audit of company accounts is governed by EU directives (with carve-outs for public authorities). Therefore the provision is required to ensure that the Treasury have the flexibility to comply with EU law in the future.

55. There are a number of precedents for this approach. Paragraph 13 is based on paragraph 10(4) of Schedule 1 to FSMA which provides for the Treasury (a) to require the Authority to comply with any provisions of the Companies Act 2006 about accounts and their audit which would not otherwise apply to it; or (b) direct that any such provision of that Act is to apply to the Authority with such modifications as are specified in the direction. Such directions are not subject to Parliamentary procedure. The provision in the Bill goes slightly further in relation to paragraph (b), enabling the Treasury to direct that any provision of that Act about accounts and their audit is to apply to the FCA with such modifications as are specified in the direction, whether or not the provision would otherwise apply to the FCA. We think this is necessary given that the scope of accounting directions will not usually be limited to the application of provisions which would not otherwise apply. For example it may be necessary to be able to ensure the bodies concerned compile accounts to a financial year ending 31st March, particularly for those bodies which need to be consolidated into the Treasury’s Departmental Resource Accounts. It would not be possible to make such a direction through a power that was limited to provisions that would not otherwise apply and we have therefore made amendments to remove any ambiguity about the scope of the power.

56. Paragraph 10 of Schedule 13 to the Companies Act 2006 itself also makes similar provision (in relation to a body exercising functions on behalf of the Secretary of State under section 1152). Such a direction is not subject to Parliamentary procedure.

57. More generally, it is common to take a statutory power of direction in relation to the accounts of public bodies or bodies exercising public functions which are not Government Departments. The Treasury does not issue an accounts direction under the provisions of the Government Resources and Accounting Act 2000 in relation to such bodies. The power of direction is therefore needed to ensure that financial reporting policy is reflected consistently across the public sector and that an appropriate range of information is provided for the benefit of Parliament. Examples include paragraph 15 of Schedule 3 to the Apprenticeships, Skills, Children and Learning Act 2009, paragraph 16 of Schedule 1 to the Access to Justice Act 1999 and section 15 of the Civil
Aviation Act 1982. Such powers of direction are not subject to Parliamentary procedure (albeit because such entities are not subject to the Companies Act 2006, no power is taken to apply, with modifications, the provisions of the Companies Act).

Effect

58. As set out above the Treasury envisages using this provision to ensure that provisions of the Companies Act 2006 can be applied (with or without modifications) as appropriate, and that the FCA is not required to comply with the requirements of Part 16 of the Companies Act 2006, except to the extent that the Treasury consider that certain requirements should be applied to it.

Parliamentary scrutiny

59. None. The provision is a power of direction which is limited in scope to applying, or modifying the application of, accounts and audit provisions of the Companies Act 2006. The power of direction cannot be used to disapply provisions of the Companies Act 2006. It is envisaged that this power will be used to make technical provision as to how its accounts should be prepared. The Treasury therefore consider that it is unnecessary to provide for Parliamentary procedure. They note that there is precedent for this approach.

Paragraph 20(2) of Schedule 1ZA (power to specify functions under EU provisions)

60. Power: To specify functions under or as a result of a qualifying EU provision (as defined by new section 425C) in connection with which the FCA may make rules providing for the payment to it of fees

61. Body: Treasury

62. Parliamentary Scrutiny: negative procedure

Reasons for taking the power

63. An increasing volume of EU legislation is being adopted by way of directly applicable regulations. For example, a number of EU Directives (including Directive 2004/39/EC on markets in financial instruments and Directive 2009/65/EC relating to undertakings for collective investment in transferable securities) confer powers on the Commission to make regulatory technical standards or implementing technical standards. Such measures could be adopted by way of directly applicable regulations. In addition, a number of current proposals for European legislation take the form of regulations (including the proposed Capital Requirements Regulation and the proposed European Market Infrastructure Regulation).

64. Whilst the UK would not need to implement such regulations into UK law, the UK is required to provide for adequate means of enforcement of such regulations (see the amendments made to section 66, discussed below). Thus the FCA will discharge functions in relation to such European legislation and will incur costs as a result. It is therefore appropriate to enable the FCA to make rules providing for the payment of fees in connection with the discharge of its functions under or as a result of such EU legislation.

65. To provide legal certainty both for the FCA and those persons who may be required to pay fees to the FCA, the Treasury propose to take a power to specify what specific provisions of EU law are relevant for these purposes.

66. The power can be used to specify qualifying EU provisions (defined in new section 425C) by name or by way of description.

Effect

67. The order making power will be used to specify qualifying EU provisions in connection with which the FCA may make rules requiring the payment of fees.

Parliamentary scrutiny

68. The Treasury consider that it is appropriate that orders under this provision should be subject to the negative procedure. This reflects the technical nature of the power.

New section 1J (power to amend objectives)

69. Power: To amend: (a) new section 1E(1)(a) and (b) so as to change the list of markets for different kinds of service for the purposes of the FCA’s “competition” operational objective; (b) the list of persons who fall within the definition of “consumer” for the purposes of the FCA’s “consumer protection” and “competition” operational objectives; and (c) section 1H(2) and (5) to (8) so as to amend certain definitions for the purposes of sections 1B to 1G including the definitions of “regulated financial services” for the purposes of the FCA’s “competition” operational objective and the FCA’s strategic objective.

70. Body: Treasury

71. Parliamentary scrutiny: draft affirmative procedure

Reasons for taking the power

72. This power provides important flexibility enabling the Treasury to add or omit persons or services from the scope of the definitions of certain terms for the purposes of the FCA’s general duties, including the operational objectives.
73. For example, the Bill creates a new regime for the regulation of persons who act as primary information providers (“PIPs”) on behalf of issuers (see the new section 89P inserted by clause 17 of the Bill). In order to provide the FCA with a strong mandate to make rules governing the conduct of PIPs it is appropriate to capture the services offered by PIPs in the “consumer protection” and “competition” operational objectives. In this context, the FCA could make rules, for example, requiring PIPs to maintain back-up systems to ensure that information can be disseminated to the market even in the event of the failure of the PIP’s main operating system. Such rules would help protect the issuer (as consumer) by ensuring the continuing functioning of the services offered by the PIP. In the future similar cases may arise as a result of which the Treasury may wish the FCA to be able to discharge its general functions for the purposes of securing an appropriate degree of protection for other types of consumers or for the purposes of promoting competition within the market for different types of services which are not referred to in the current definitions. Therefore, this power ensures that the scope of the relevant objectives is “future-proof” and that the relevant definitions can be changed from time to time (by way of the addition or omission of one or more aspects of the relevant definitions).

**Effect**

74. This clause enables the Treasury by order to omit or add to the categories of person who fall within the definition of “consumer” for the purposes of the FCA’s “consumer protection” operational objective, and to omit or add to the categories of service for the purposes of the FCA’s “competition” operational objective. The power also enables the Treasury to amend or refine other relevant definitions from time to time

**Parliamentary scrutiny**

75. The Treasury consider it appropriate that an order made under new section 1J be subject to the draft affirmative procedure. The Treasury are conscious that this is a significant power which could be used to extend or narrow the scope of two of the FCA’s objectives, and therefore its mandate to act in discharging its general functions. Therefore the Treasury consider that the only appropriate procedure for such orders is the draft affirmative procedure (see clause 46(2)(a)(i) which amends section 429 of FSMA (parliamentary control of statutory instruments)).

**New section 1L (duty of FCA in relation to supervising, monitoring and enforcing)**

76. New section 1L requires the FCA to maintain arrangements designed to enable it to determine whether persons other than authorised persons are complying with requirements imposed on them by or under FSMA and by qualifying EU provisions specified by the Treasury. The FCA is also required to maintain arrangements for enforcing compliance. Thus for example the FCA is required to maintain capacity to monitor and enforce section 19 of FSMA (requirement to be authorised or exempt to carry on a regulated activity).
77. **Power:** To specify qualifying EU provision (as defined by new section 425C) in relation to which arrangements must be maintained

78. **Body:** Treasury

79. **Parliamentary scrutiny:** negative procedure

**Reasons for taking the power**

80. An increasing volume of EU legislation is being adopted by way of directly applicable regulations. For example, a number of EU Directives (including Directive 2004/39/EC on markets in financial instruments and Directive 2009/65/EC relating to undertakings for collective investment in transferable securities) confer powers on the Commission to make regulatory technical standards or implementing technical standards. Such measures could be adopted by way of directly applicable regulations. In addition, a number of current proposals for European legislation take the form of regulations (including the proposed Capital Requirements Regulation and the proposed European Market Infrastructure Regulation).

81. Whilst the UK would not need to implement such regulations into UK law, the UK is required to provide for adequate means of enforcement of such regulations (see the amendments made to section 66, discussed below). Some of these provisions will relate to persons who are not authorised (for example the directors of an authorised person). Thus the FCA need to be able to monitor and enforce compliance with such requirements.

82. To provide legal certainty both for the FCA and those persons who may be required to pay fees to the FCA, the Treasury propose to take a power to specify what specific provisions of EU law are relevant for these purposes.

83. The power can be used to specify qualifying EU provisions (defined in new section 425C) by name or by way of description.

**Effect**

84. The order making power will be used to specify qualifying EU provisions in connection with which the FCA must maintain arrangements to monitor and enforce compliance by unauthorised persons.

**Parliamentary scrutiny**

85. The Treasury consider that it appropriate that orders under this provision should be subject to the negative procedure. This reflects the technical nature of the power.

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10 Published by the Commission on 20 July 2011: http://ec.europa.eu/internal_market/bank/regcapital/index_en.htm
New section 2A (the Prudential Regulation Authority)

86. New section 2A introduces Schedule 1ZB which sets out the PRA’s constitution and certain other matters including the publication of an annual report and audit arrangements. Paragraph 26 provides for the FCA to prepare and operate a scheme for ensuring that penalties can be imposed by it under the Act and paragraph 28 provides for the PRA to make rules providing for the payment of fees in connection with the discharge of any of its functions or as a result of the Act or specified EU legislation. These paragraphs make provision analogous to paragraphs 16 and 17 of Schedule 1 to FSMA.

Paragraph 28 of Schedule 1ZB (power to specify functions under EU provisions)

87. Power: To specify functions under or as a result of a qualifying EU provision (as defined by new section 425C) in connection with which the PRA may make rules providing for the payment to it of fees

88. Body: Treasury

89. Parliamentary Scrutiny: negative procedure

90. This power is identical to the power in paragraph 20 of Schedule 1ZA in relation to the ability of the FCA to make rules requiring the payment of fees which is discussed above.

New section 2D (power to provide for additional PRA objectives)

91. This new section makes provision in relation to orders under new section 22A (inserted by clause 7), and therefore is discussed under Clause 7 below.

New section 3B (Regulatory principles to be applied by both regulators)

92. Power: to amend by order the definition of “consumer” in new section 3B(2)

93. Body: Treasury

94. Parliamentary scrutiny: draft affirmative procedure

95. New section 3B(4) enables the Treasury to make an order amending the definition of “consumer” for the purposes of section 3B(2).

Reasons for taking the power

96. The Bill currently provides that the definition of “consumer” in the regulatory principles listed in new section 3B(1) is that provided in new section 1G. It may be appropriate to provide a different definition of “consumer” for the purpose of the regulatory principles as applicable to both regulators; or for the purpose of the regulatory principles as applicable to the PRA in its discharge of its functions (for example, because the class of persons regulated by the
PRA is narrower than that regulated by the FCA); or, conceivably, for the purpose of the regulatory principles as applicable to the FCA (for example if it becomes apparent that a different definition would be preferable as regards the FCA’s other operational objectives).

**Effect**

97. An order under section 3B(4) would amend the definition of “consumer” in section 3B(2) of FSMA by expanding or narrowing the scope of the definition.

**Parliamentary scrutiny**

98. The Treasury consider it appropriate for an order made under new section 3B(4) to be subject to the draft affirmative procedure (see clause 46(2)(a)(i) which amends section 429 of FSMA) because of its impact on the regulatory principles applicable to the PRA and the FCA when discharging their general functions and against which the new regulators will be measured both in terms of the expectations of consumers and the regulated community but also in relation to Parliamentary scrutiny of the conduct of the regulators (including when considering the annual reports of each regulator, which must include provision on the relevant regulator’s consideration of the principles (see, for example, paragraph 10(1)(f) of new Schedule 1ZA)).

**New section 3G (Power to establish boundary between FCA and PRA responsibilities)**

99. **Power**: to specify by order matters that are to be (or are primarily to be) the responsibility of one regulator rather than the other in relation to the exercise of their functions relating to PRA-authorised persons

100. **Body**: Treasury

101. **Parliamentary scrutiny**: draft affirmative procedure, or in urgent cases, approval within 28 days of being laid (further detail given below)

102. New section 3G(1) enables the Treasury to make an order specifying that, in relation to the exercise of their functions relating to PRA-authorised persons, certain matters are to be, or are primarily to be, the responsibility of one regulator rather than the other. Subsection (2) provides that the order may provide that one regulator is or is not to have regard to specified matters when exercising specified functions; the order may also require one regulator to consult the other.

**Reasons for taking the power**

103. The Bill contains a number of provisions which relate to the distinct roles and functions of each regulator and how the FCA and PRA are to relate to each other (see in particular the objectives of each regulator as set out in Chapters 1 and 2 of new Part 1A of FSMA, the duty to co-ordinate in new section 3D and the power in new section 22A for the Treasury to specify
which regulated activities are to be subject to prudential regulation by the PRA). In addition, the Bill makes express provision in relation to the responsibilities of the FCA and PRA in relation to securing an appropriate degree of protection for those who are or may become policyholders in relation to decisions by insurers relating to the making of discretionary payments under with-profits policies; new section 3F provides that this responsibility is that of the PRA rather than the FCA. This has proved necessary because both regulators will have responsibility for regulatory supervision of insurers: the PRA in relation to prudential regulation and the FCA in relation to conduct regulation. The PRA’s general objective and its insurance objective are both relevant. The FCA’s consumer protection objective is also potentially relevant to protection of the interests of policyholders. New section 3F therefore removes any duplication or risk of conflict in the regulatory responsibilities of the regulators by providing that protection for the reasonable expectations of policyholders is to be the responsibility of the PRA.

104. The Treasury are not aware of any other areas where additional provision may be needed to clarify the responsibilities of the regulators. However, in the future circumstances may emerge which suggest that it is appropriate to make provision similar to that made in new section 3F in respect of other issues. This may arise in particular should the remit of the PRA change by virtue of an order under new section 22A (see clause 8). A power has been taken to allow for this; without the power it would be necessary to amend FSMA by primary legislation.

**Effect**

105. An order under new section 3G would specify matters, yet to be identified, which potentially fall within the remit of both regulators but which might more appropriately be made the responsibility of one regulator rather than the other, or made primarily the responsibility of one or the other. Ancillary provision can be made to require one regulator to have regard (or not have regard) to particular considerations or to consult the other regulator.

106. The Treasury consider that in normal circumstances the draft affirmative procedure would be appropriate for this power. The Treasury recognises that the negative procedure would not be appropriate for an order which would alter the regulatory remits of the regulators determined by Parliament on the face of the Bill and as supplemented by orders under sections 22 and 22A (both made with the approval of Parliament). However, given that the draft affirmative procedure can take several months between laying and approval; it may be necessary for an order under section 3G to take effect more quickly than that. The Treasury consider that in urgent cases it appropriate that an order made under new section 3G should be approved within 28 days of being laid (taking no account of periods during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days). This procedure strikes a balance between the potential need to act quickly, and the recognition of the need for Parliamentary approval of orders amending or modifying primary legislation.
This approach also reflects the procedure for secondary legislation which changes the scope of the regulatory remit of the PRA (orders made under section 22A FSMA, discussed below).

**Parliamentary scrutiny**

107. The Treasury, having considered the comments of the DPRRC in its memorandum to the Joint Committee, consider that it is appropriate that the procedure for orders under new section 3G be subject to the draft affirmative procedure unless the order needs to be made on an urgent basis. In cases of urgency, an order made under new section 3G should be approved within 28 days of being laid (taking no account of periods during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days). This acknowledges the points made by the DPRRC in their memorandum to the Joint Committee.

**Clause 6 (extension of scope of regulation)**

108. Clause 6 amends section 22 of, and Schedule 2 to, FSMA.

109. **Power: to enable activities in relation to the provision of credit, contracts for the hire of goods and activities related to information about person’s financial standing to be specified as regulated activities for the purposes of FSMA**

110. **Body: Treasury**

111. **Parliamentary scrutiny: draft affirmative procedure, or in urgent cases, approval within 28 days of being laid (see further detail below)**

112. The new section 22(1A) enables the Treasury to specify as a regulated activity for the purposes of FSMA an activity which is carried on by way of business and relates to information about a person’s financial standing. Such activities might include being a credit reference agency. This power is supplemented by new Part 2A of Schedule 2 which sets out in general terms the matters to which provision may be made in an order under section 22(1A). The new Part 2A of Schedule 2 operates as an indicative list of the kinds of matter which may be specified in an order under section 22(1A). There is no requirement that an order made under section 22(1A) reflect precisely the drafting of, or scope of, the matters specified in Part 2A. However, matters which are materially different in kind to those specified in new Part 2A could not be specified under section 22(1A).

113. Clause 6 also modifies other parts of Schedule 2 so as to extend the scope of the power under section 22(1). In particular, clause 6 amends Schedule 2 to specify in general terms, as a matter to which provision may be made under section 22(1) the loans and other forms of credit and contracts for hire of goods.
Reasons for taking the power

114. Under section 22(1), it is for the Treasury to specify activities which if carried on by way of business in relation to specified investments are regulated activities for the purposes of FSMA. Thus the scope of FSMA regulation is set out in secondary legislation.

115. Taken together, the amendments made by clause 6 to section 22 and Schedule 2 would permit the Treasury to make an order which specified that the activities which are currently subject to regulation by the OFT under the Consumer Credit Act 1974 are to be regulated activities. The amendments to Part 2 of Schedule 2 are necessary to enable an order to be made under section 22(1) which specifies the provision of any credit or loan is a specified investment. (Under paragraph 23 of Schedule 2 at present, only loans secured on land are specified as the kind of matter which may be specified as an investment.) The amendments would also allow the Treasury to specify contracts for hire of goods as investments.

116. New section 22(1A) is required to enable the Treasury to specify being a credit reference agency or providing credit information services (both subject to regulation under the Consumer Credit Act 1974) within the scope of FSMA regulation. As these activities cannot be said to be an activity which relates to an “investment”, section 22(1) would not allow this activity to be specified as a regulated activity. New section 22(1A) avoids the need to specify an “investment”.

Effect

117. The effect of the amendments is to expand the powers of the Treasury to specify activities as regulated activities.

Parliamentary scrutiny

118. The Treasury, having considered the comments of the DPRRC in its memorandum to the Joint Committee, consider that it is appropriate that the procedure for orders under section 22 (regulated activities) which expand the scope of regulation to be subject to the draft affirmative procedure unless the order needs to be made on an urgent basis, in which case it appropriate that an order made under section 22 should be approved within 28 days of being laid (taking no account of periods during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days). The Treasury agree that the use of the 28 day procedure should be reserved for cases of urgency, for example, where it is necessary for consumer protection or financial stability that a particular activity becomes subject to regulation without delay. The Treasury do not consider that the existence of the precedent for use of the 28 day procedure in all cases provided by the Financial Services Act 1986 can appropriately be relied upon. Clause 7 of the Bill therefore amends paragraph 26 of Schedule 2 to provide that the orders made under section 22(1) or the new section 22(1A) (discussed above) are subject to the draft affirmative procedure except in cases of urgency. Orders
under section 22 which do not expand the scope of regulation will continue to be subject to the negative procedure. This acknowledges the points made by the DPRRC in their memorandum to the Joint Committee.

**Clause 8 (Designation of activities requiring prudential regulation by PRA)**

119. Clause 8 inserts new sections 22A and 22B. This should be read with new section 2D.

120. **Power: to specify by order the regulated activities that are PRA-regulated activities, and to specify additional objectives for the PRA**

121. **Body: Treasury**

122. **Parliamentary scrutiny: draft affirmative procedure, or in urgent cases, approval within 28 days of being laid (see further detail below)**

123. New section 22A provides that the Treasury may specify by order the regulated activities which are to be PRA-regulated activities.

124. The order may provide for exceptions; confer powers on the Treasury, the FCA or the PRA; authorise the making of rules or other instruments by the PRA or the FCA for purposes of, or connected with, any provision made by or under new section 22A; make provision in respect of any information or document which in the opinion of the Treasury, the FCA or the PRA, is relevant for purposes of, or connected with, any such provision; and make such consequential, transitional, or supplemental provision as the Treasury consider appropriate (including amendment of primary and delegated legislation).

125. The Government have announced (in *A new approach to financial regulation: building a stronger system* (Cm8012) that it proposes to exercise the power conferred by section 22A to provide that the following will be PRA-authorised activities – accepting deposits, effecting and carrying out contracts of insurance and, in limited circumstances, dealing in investments as principal. A draft of an order under section 22A has been published by the Treasury as part of its response to the report of the Joint Committee to assist Parliamentary consideration of the Bill. This is available on the Treasury’s website (www.treasury.gov.uk). Copies of the draft Order can also be made available by the Treasury to the DPRRC if that would assist the Committee.

126. **Under new section 9O(2)(c) of the Bank of England Act 1998 (inserted by clause 3), the FPC may provide the Treasury with recommendations as to how the power under section 22A is to be exercised. Thus if the FPC considered that a particular activity should be prudentially regulated by the PRA (rather than the FCA) it could provide a recommendation to that effect to the Treasury.**
New section 2D (inserted by clause 5) provides that an order under section 22A which extends the regulated activities which are PRA-regulated activities, can specify an additional objective for the PRA in relation to the additional PRA-regulated activities. Such provision may not be made in the first order to be made under section 22A. This reflects the fact that, as outlined above, the Government has announced what regulated activities it proposes to specify as PRA-regulated activities under the first order to be made under section 22A. The Bill provides for appropriate objectives for the PRA in relation to these activities. The Treasury therefore considers that it would be inappropriate for the Treasury to be able to provide for additional objectives when it makes the first order under section 22A.

**Reasons for taking the power**

FSMA does not define “regulated activity”, but leaves the scope of activities that are within the meaning of “regulated activity” to be specified by order made by the Treasury under section 22 of FSMA. As the scope of activities that are regulated is specified by order (rather than in primary legislation), it is not possible for the Bill to set out in primary legislation which of those activities are to be PRA-regulated activities. The Bill therefore follows the approach taken in section 22 of FSMA, by providing for an order-making power in the new section 22A.

Whilst the Government has announced what regulated activities will be subject to prudential regulation by the PRA on the commencement of the new regulatory regime (see above), it is possible that it will be appropriate to change the scope of the PRA’s regulatory remit in the future, either by providing that additional regulated activities are to be subject to prudential regulation by the PRA or by providing that some PRA-regulated activities are to cease to be prudentially regulated by the PRA. This power therefore provides flexibility as to the scope of the PRA’s remit to accommodate the changing needs of the regulatory regime.

Wide ancillary powers are provided for in section 22A(2). This is appropriate to ensure that any order under section 22A may cater for a wide range of appropriate scenarios. For example, the Government has announced that, in relation to individual firms which deal in investments as principal and which meet certain criteria set out in rules made by the regulators, the PRA may designate the activity of dealing in investments as principal as a PRA-regulated activity. Under the draft Order prepared by the Treasury, the PRA will be required to publish and maintain a statement of policy as to how it will exercise its powers and affected firms will be given the opportunity to make representations to the PRA before such a power is exercised. The powers conferred by new section 22A(2) (especially paragraph (b)) provide the necessary vires for this approach.

The power to amend legislation for the purpose of making consequential, transitional or supplemental provision (new section 22A(2)(e) read with section 22A(3)) is appropriate so as to allow related amendments to be made in connection with an order under new section 22A. For example,
where a regulated activity becomes a PRA-regulated activity it may be appropriate to make modifications for new Part 4A of FSMA in relation to the treatment of outstanding applications made to the FCA for permission to carry on that activity.

132. The Treasury have recognised that the prudential regulation of insurance firms requires a different approach to the prudential regulation of banks. The Treasury have therefore provided the PRA with a specific objective in relation to regulation of the activity of effecting or carrying on contracts of insurance (new section 2C). This is in addition to its general objective. Similarly, the Treasury have concluded that in the event that PRA is given responsibility for prudentially regulating other activities, it may be appropriate to provide the PRA with further additional objectives reflecting the specific requirements of prudentially regulating those activities. New section 2D therefore establishes that the Treasury may provide such additional objectives by Order, and subsection (2) makes clear that the PRA must act compatibly with both the general objective and any such additional objective. Any additional objective will have equal status to the general objective.

133. As outlined above, the Treasury may not exercise the power under new section 2D to provide for an additional objective for the PRA when they make the first order under new section 22A.

Effect

134. Orders under new section 22A will determine the scope of regulation by the PRA and the persons whom the PRA will regulate. For example, the Government has announced its intention to designate accepting deposits and effecting and carrying out contracts of insurance as PRA-regulated activities.

135. Orders under new section 22A may also, by virtue of new section 2D (inserted by clause 5), specify an additional objective. If so, the PRA would so far as is reasonably possible have to act in a way act in a way which is compatible with its general objective and the specified objective and which the PRA considers the most appropriate for the purpose of meeting those objectives.

Parliamentary scrutiny

136. The Treasury consider it appropriate that the procedure for orders under new section 22A should reflect that for orders made under section 22 (regulated activities). In light of the DPRRC’s comments on the draft Bill, the Treasury have amended the Bill to provide that the first order made under new section 22A or any subsequent order which extends the scope of PRA-regulation are subject to the draft affirmative procedure unless the order needs to be made on an urgent basis. Only in such urgent cases, may such orders be made under the 28 day procedure. Other orders under new section 22A are subject to the negative procedure. This acknowledges the points made by the DPRRC in their memorandum to the Joint Committee.
137. This approach reflects the amended approach outlined above to orders under section 22.

Clause 9 (Permission to carry on regulated activities)

138. Clause 9 inserts new sections 55A to 55Z2. These provisions relate to applications for permission to carry on regulated activities, the variation of permission and the imposition of requirements.

New section 55C (power to amend Schedule 6)

139. **Power**: To amend the threshold conditions set out in Schedule 6 by altering, adding or repealing provisions or substituting the Schedule

140. **Body**: Treasury

141. **Parliamentary scrutiny**: draft affirmative procedure

142. New section 55C enables the Treasury to amend the threshold conditions set out in Schedule 6 to FSMA including by adding to the conditions, repealing conditions or substituting Schedule 6 as a whole.

143. This power should be considered with paragraph 5 of Schedule 21 which requires the Treasury, prior to the commencement of clause 9, to make an order which makes provision as to which of the threshold conditions are to relate to the discharge by each regulator of its functions

Reasons for taking the power

144. Under new section 55B(3), in exercising their functions under Part 4A of FSMA both the FCA and PRA must ensure that the person concerned will satisfy and continue to satisfy the relevant threshold conditions set out in Schedule 6 to FSMA for which the regulator has responsibility. In addition, the own-initiative powers of the FCA and PRA under section 55J (own-initiative variation power) and sections 55L and 55M (own-initiative requirement power) are exercisable by both regulators where it appears to the regulator that a person is failing or likely to fail to satisfy any of the threshold conditions. The threshold conditions are therefore vitally important for the operation by each of the FCA and the PRA of the operation of the regulatory regime.

145. The Treasury have concluded that the PRA and FCA should each have its own set of threshold conditions, reflecting the fact that the PRA will be principally regulating the prudential aspects of the firm, whereas the FCA will be regulating its conduct. This is a change from the approach set out in the draft Bill, under which there was a single set of threshold conditions (brought forward unchanged from FSMA), with provisions for the regulators to make arrangements between themselves to assess different elements of the
conditions. Having considered the report of the Joint Committee, the Treasury have concluded that it would be clearer (for the regulators and for regulated firms) to provide for separate sets of conditions in legislation, rather than leaving it to arrangements arrived at by the regulators themselves.

146. However, the Joint Committee has also recommended that the Treasury should consult before making any such substantive changes in this area. Responding to this, the Treasury consider that, building on the existing power in paragraph 9 of Schedule 6 (power to vary, remove or add to the threshold conditions), it is appropriate to take a general power to amend the threshold conditions set out in Schedule 6, including a power to specify different threshold conditions for the FCA and PRA. Paragraph 5 of Schedule 21 operates to ensure that, prior to the commencement of clause 9, the Treasury will put in place an order which specifies separate threshold conditions for the FCA and PRA.

147. The power in new section 55C could also be used to provide for more detailed threshold conditions as compared to the relatively short threshold conditions set out in Schedule 6. The power could also be used to specify different threshold conditions in relation to different regulated activities.

148. This power should be considered with the new power in new section 137M for the FCA and PRA to make rules (referred to as the regulator’s threshold condition code) for the purpose of supplementing any of the condition specified in relation to that regulator in Schedule 6. This will allow the regulators themselves to provide further detail and supplementary material as to how they consider the threshold conditions in Schedule 6 operating. This will provide greater clarity both for the regulator itself and regulated firms and those seeking to become regulated.

149. Under section 55B, the “threshold conditions” are defined as the conditions set out in Schedule 6 taken together with any relevant threshold condition code. This will ensure that the threshold condition codes made by the regulator may be relied upon by the regulator when taking action by reference to the threshold conditions.

150. The codes will be made under the same conditions, and subject to the same safeguards as other rules.

Effect

151. An order will amend, add to, repeal or substitute the threshold conditions set out in Schedule 6. Paragraph 5 of Schedule 21 operates to require the Treasury, prior to the commencement of clause 9, to make an order which makes provision as to which of the threshold conditions are to relate to the discharge by each regulator of its functions.

152. The Treasury have indicated that they propose to publish for public consultation a draft of an order under new section 55C during the course of Parliamentary consideration of the Bill.
Parliamentary scrutiny

153. Given the fundamental importance of the threshold conditions to the operation of the regulatory regime, and the importance of the division between the PRA and FCA of responsibility for the threshold conditions, this power is subject to the draft affirmative procedure (see section 429 as amended by clause 46). The Treasury do not consider that it is likely that emergency provision would need to be made under new section 55C and so have not provided for the 28 day procedure to apply in cases of urgency. The Treasury note that orders under paragraph 9 of Schedule 6, which is a similarly broad power to amend the threshold conditions, is subject to the negative procedure. The Treasury do not consider that this would be an appropriate procedure for the new section 55C power.

154. Threshold condition codes made under section 137M are not subject to Parliamentary procedure.

New section 55Q (exercise of own-initiative powers at request of overseas regulator)

155. Power: To prescribe categories overseas regulators at whose request the FCA and PRA may exercise their own-initiative powers

156. Body: Treasury

157. Parliamentary scrutiny: negative procedure

Reasons for taking the power

158. This power enables the Treasury to make detailed provision as to how the regulators should exercise their own-initiative powers at the requests of overseas regulator. It also allows the Treasury to adjust these provisions to cater for changes in circumstances (for example changes in EU law).

159. This power is not a new power. It mirrors the existing power under section 47 FSMA (which will be repealed by the Bill). The power under section 47 FSMA has been exercised (see the Financial Services and Markets Act 2000 (Own-initiative Power) (Overseas Regulators) Regulations 2001 S.I. 2001/2639).

Effect

160. New section 55Q(1) enables the Treasury to specify categories of overseas regulator at whose request the FCA or PRA may exercise their own-initiative powers under Part 4A (see sections 55J, 55L and 55M). Section 55Q(4) provides that the FCA or PRA must, when requested to exercise its own-initiative power by an overseas regulator of a kind prescribed by the Treasury, consider whether it is necessary to comply with the request in order to comply with an EU obligation.
Parliamentary scrutiny

161. The powers under new section 55Q are subject to the negative procedure. The Treasury consider that this is appropriate given the technical nature of the provision which is likely to be made under new section 55Q. It also reflects the procedure for the existing power under section 47 FSMA.

New section 55R (persons connected with applicant)

162. Power: To prescribe circumstances in which the FCA or PRA must consult the home state regulator of an EEA firm which is connected to a person who is the subject of proposed action under Part 4A.

163. Body: Treasury

164. Parliamentary scrutiny: negative procedure

165. This clause enables the Treasury to specify the circumstances in which the FCA or PRA, when dealing with an application for Part 4A permission or determining whether to vary or cancel permission, impose or vary a requirement or to give consent under Part 4A, to consult the home state regulator of an EEA firm which is connected with the person who is the subject of the proposed action or decision.

Reasons for taking the power

166. There is a substantial amount of relevant EU law on this point. Different provision is made in relation to different sectors resulting in a complicated set of provisions as to when consultation is required under the current regulatory regime (see section 49(2), (2A) and (4)). Changes to EU law in the future may result in additional provision being needed in this area.

167. To avoid having complicated provisions on the face of the Bill which would need to be amended on a regular basis to accommodate changes to EU law, the Treasury propose to take a power to set out in regulations when consultation is required.

Effect

168. The regulations set out when the FCA or PRA must consult a regulator in another EEA state.

Parliamentary scrutiny

169. The Treasury consider that it appropriate that regulations made under section 55R are subject to the negative procedure. This reflects the technical nature of the provision which is likely to be made under this power.
Clause 10 and Schedule 4 (Passporting: exercise of EEA rights and Treaty rights)

170. Clause 10 introduces Schedule 4 which makes various amendments to the provisions of FSMA relating to the exercise of rights under the single market directives listed in Schedule 3 to FSMA and under other European legislation as specified in Schedule 4 to FSMA (“passporting rights”). Paragraphs 2(3), 3(3) and 15(3) of Schedule 4 amend various provisions in Schedule 4 to FSMA to enable the Treasury to prescribe cases in which the FCA is to provide to the PRA copies of notices received in connection with passporting rights.

171. **Power: to prescribe cases in which the FCA is to provide to the PRA copies of notices received in connection with passporting rights**

172. **Body: Treasury**

173. **Parliamentary scrutiny: negative procedure**

174. These provisions enable the Treasury to prescribe cases in which the FCA is to provide to the PRA copies of notices received in connection with passporting rights. (Section 417 provides that “prescribed” means where not otherwise defined, prescribed in regulations made by the Treasury.)

175. Section 34 and Schedule 3 provide that EEA firms which are authorised by their home state regulator in accordance with the relevant single market directive (see paragraph 1 of Schedule 3) may establish a branch or provide services in the UK without requiring permission under Part 4A; this is known as “passporting”. Section 35 and Schedule 4 make similar provision in relation to EEA persons where there is no such right under a single market directive but the law of their home state affords equivalent protection, or where there is EU law providing for coordination or harmonisation of Member States’ laws and administrative procedures in relation to the activity in question.

176. Exercise of the passporting rights to establish a branch or provide services in the UK generally requires notices to be given to the “appropriate UK regulator”, either by an overseas regulator or by the firm or person intending to exercise the passporting rights. The United Kingdom will specify which of the PRA and FCA is the appropriate regulator to receive these notices in relation to each of the single market directives listed in paragraph 1 of Schedule 3 to FSMA by the provision of notice to the European Commission. The PRA must pass all notices it receives in relation to the exercise of passporting rights to the FCA; the FCA must pass copies of such notices it receives to the PRA in prescribed circumstances. The circumstances to be prescribed will, for example, relate to the activities described in the order under section 22A. The intention is that the FCA will supervise all incoming EEA firms. The PRA will have to supervise incoming EEA firms which are PRA-authorised persons or intend to undertake PRA-regulated activities.
Reasons for taking the power

177. Which of the FCA and the PRA is the “appropriate UK regulator” in practice will be determined by the scope of the activities that each regulates. FSMA does not define “regulated activity”, but leaves the scope of activities that are within the meaning of “regulated activity” to be specified by order made by the Treasury under section 22 of FSMA. The Bill follows this approach in determining which regulated activities are to be PRA-regulated activities, providing for an order-making power in the new section 22A which is inserted by clause 8. Because the scope of the PRA’s regulatory remit is to be determined by order under new section 22A, and because notification is yet to be given to the European Commission of the single market directives under which each regulator will receive passporting notices, it is not possible to specify on the face of the Bill the cases in which the FCA will receive a passporting notice but the PRA will also need to be notified. A power has therefore been taken to prescribe the cases in question. The taking of a power will also provide for flexibility in the future should the scope of the PRA’s regulatory remit change, or further European directives in this area are made.

Effect

178. The regulation-making power will be used to prescribe the cases in which, where the FCA receives a passporting notice in relation to a non-UK firm, it will have to provide a copy of the notice to the PRA. The amendments to Schedule 3 to FSMA made by paragraphs 2 and 3 of Schedule 4 to the Bill provide that where the PRA receives a copy of a notice from the FCA, it will have to prepare to supervise the firm or person in question.

Parliamentary scrutiny

179. The Treasury consider that it is appropriate that regulations under these provisions should be subject to the negative procedure. The power to prescribe cases in which the FCA must provide a copy of a notice to the PRA relates to an administrative arrangement and is not a matter for which the approval of Parliament should be required; any change to the regulatory remit of the PRA itself can only be done by order under new section 22A, which does require Parliamentary approval of the order where the regulatory scope (or primary legislation) is amended.

Clauses 12 and 13 and Schedule 5 (approval for particular arrangements)

180. Clause 12 and Schedule 5 (introduced by clause 13) make amendments to FSMA which relate to persons who perform functions specified as “controlled functions” in rules by the FCA or PRA under an arrangement entered into by an authorised person. Such persons require the approval of the regulator to perform these functions and are referred to in FSMA as “approved persons”.

181. Clause 12 does not affect the conditions set out in section 59 of FSMA that must be satisfied before the regulator may specify in rules that a function
as a controlled function. Thus no amendments are being made to the scope of the delegated power. However further detail of the amendments being made to the existing power is outlined below.

182. The amendments made by clause 13 specify the basis on which each of the FCA and PRA may specify controlled functions under section 59 FSMA. In broad terms, in relation to PRA-authorised persons, the PRA may specify a function as a controlled function if satisfied that the function is a “significant-influence function” within the meaning of new section 59(7B). The FCA may specify, in relation to PRA-authorised persons, a function as a controlled function if it is either a significant-influence function or a customer-dealing function within the meaning of new section 59(7A). However under section 59A the FCA is required to keep under review the exercise of its power to specify significant-influence functions as controlled functions and exercise it in a way which will minimise the likelihood that a person will require approval from both the PRA and FCA in respect of a significant influence function.

183. Paragraph 14 of Schedule 5 also amends section 66 of FSMA (disciplinary powers)

184. **Power: to specify qualifying EU provision in relation which, if an approved person has been knowingly concerned in a contravention by the relevant authorised person of, the approved person is guilty of misconduct**

185. **Body: Treasury**

186. **Parliamentary scrutiny: negative procedure**

187. This provision enables the Treasury to specify by order qualifying EU provision (as defined by new section 425C), or descriptions qualifying EU provisions, which may be relevant in determining whether an approved person has been guilty of misconduct.

188. Note that a number of provisions in the draft Bill contain similar powers, including new section 204A inserted by paragraph 4 of Schedule 9\(^\text{11}\). The reasons for taking such powers are identical to the reasons set out below. In light of this these powers are not discussed separately in this memorandum.

**Reasons for taking the power**

189. As indicated above, an increasing volume of EU legislation is being adopted by way of directly applicable regulations. For example, a number of EU Directives (including Directive 2004/39/EC on markets in financial instruments and Directive 2009/65/EC relating to undertakings for collective investment in transferable securities) confer powers on the Commission to make regulatory technical standards or implementing technical standards.

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\(^{11}\) These other powers appear in provision made by paragraph 11 of Schedule 8, paragraphs 13, 15 and 17 of Schedule 9, paragraph 8 of Schedule 12 and paragraph 5 of Schedule 18.
Such measures could be adopted by way of directly applicable regulations. In addition, a number of current proposals for European legislation take the form of regulations (including the proposed Capital Requirements Regulation\textsuperscript{12} and the proposed European Market Infrastructure Regulation).

190. While the UK is not required (or permitted) to implement such regulations into UK law, the UK is required to provide for adequate means of enforcement of such regulations. Thus it is appropriate to provide for the disciplinary powers of the FCA and PRA in relation to approved persons to be exercisable in relation to contravention of such EU measures.

191. As it is expected that the volume of such EU measures is likely to increase, the Treasury propose to take a power to specify by order the EU provisions which are relevant in this area. This will ensure that there is a clear list of measures which are relevant for this purpose; avoid a potentially long and detailed list on the face of FSMA itself; and make it easier to keep the list of relevant EU measures up to date.

192. The power can be used to specify qualifying EU provisions by name or by way of description.

Effect

193. The order making power will be used to specify qualifying EU provisions which are relevant in determining whether an approved person is guilty of misconduct and so amenable to disciplinary measures by the FCA or PRA.

Parliamentary scrutiny

194. The Treasury consider that it is appropriate that orders under this provision should be subject to the negative procedure. This reflects the technical nature of the power.

Clauses 16 and 17 (Listing rules: disciplinary powers in relation to sponsors and primary information providers)

195. Power: to make further provision in listing rules regarding arrangements in relation to sponsors (see the amendment to section 88(3) of the FSMA which is made by clause 16(2)(a)) and to make provision in Part 6 rules concerning the use of primary information providers (new section 89P inserted by clause 17(1))

196. Body: FCA

197. Parliamentary scrutiny: none

\textsuperscript{12} Published by the Commission on 20 July 2011:
Reasons for making further provision in relation to rules which can be made under Part 6 of the FSMA

198. Part 6 of the FSMA (official listing) sets out the regime under which the “competent authority” is responsible for: (a) maintaining the official list of securities admitted to trading on a regulated market in the UK (the “Official List”); (b) regulating the admission of securities to the Official List; and (c) monitoring compliance with requirements imposed on issuers of securities (and other relevant persons) by or under the Part or by directly applicable European measures. Currently, the FSA is the “competent authority” and is known in this context as the UK Listing Authority (“UKLA”) but, in future, these functions are to be performed by the FCA (see the amendments made to FSMA by clause 14 of the Bill).

199. Section 88(1) of the FSMA enables the FSA (and in future the FCA) to make listing rules requiring issuers of listed securities to make arrangements with “sponsors” for certain purposes. A “sponsor” is a person who is approved for the purposes of the rules and whose role, in broad terms, is to advise an issuer on the listing and disclosure requirements imposed by or under Part 6. The amendments made by clause 16(2)(a) expand the list of matters (referred to in section 88(3)) which may be included in listing rules made under section 88(1). In particular, the amendments make clear that the rules may provide for limitations or other restrictions to be imposed on the services to which a person’s approval as a sponsor relates and provide for the approval of a person as a sponsor to be suspended on the application of a sponsor. For example, the FCA may choose to limit the types of transaction for which a person may provide services as sponsor.

200. Clause 17 inserts new section 89P into the FSMA, subsection (1) of which provides that Part 6 rules may require issuers of financial instruments to use primary information providers for the purpose of giving information of a specified description to a market of a specified description. A “primary information provider” is defined in subsection (2) as a person approved by the FCA for the purposes of section 89P. Subsection (4) specifies that Part 6 rules made by virtue of subsection (1) may provide for the FCA to maintain a list of providers, impose requirements on a provider in relation to the giving of information or information of a specified description, and covers other matters. Subsections (5) to (9) make similar provision to that made by section 88 (as amended by clause 16(2)) in relation to sponsors.

201. Before making changes to listing or other rules made under Part 6 the FCA is required to follow the procedures provided for under the new Part 9A of the FSMA (inserted by clause 22 discussed below) including the requirement to consult on any proposed draft rules (see new section 138I (consultation by the FCA)) unless the FCA considers that any delay in complying with the consultation requirements would be prejudicial to the interests of consumers (new section 138L(1) (consultation: general exemptions)).

Effect
202. The general effect of these amendments is to expand the provision which may be made in rules made by the FCA under Part 6 to include further provision about the arrangements in relation to a person’s approval as a sponsor and to include requirements regarding the arrangements for the use by listed issuers of primary information providers.

**Parliamentary scrutiny**

203. The Treasury consider that it appropriate that rules made under this power be subject to the safeguards built into the general rule making power in section 137I except where it is necessary or expedient to make rules without complying with the consultation requirements where the FCA considers it necessary to protect the interests of consumers (in this case, in particular, the interests of investors and issuers) (see the definition of “consumer” for the purposes of the FCA’s “consumer protection” operational objective and the following part of the definition of “regulated financial services” (new section 1H(2)(h) and (i)).

**Clause 22 (rules and guidance)**

204. Clause 22 replaces Part 10 of FSMA with a new Part 9A. Part 9A confers powers on the FCA and the PRA to set regulatory requirements for persons regulated under FSMA, through the making of rules. It also gives the FCA the power to issue guidance on the operation of FSMA and of any rules made by the FCA, on its functions and on any other matters on which the FCA thinks it desirable to give information or advice.

205. In addition, Part 9A confers on the Treasury a number of legislative powers.

206. Part 9A is a largely a restatement of Part 10, with modifications reflecting the replacement of the FSA by the FCA and PRA. Therefore, only those provisions set out in clause 22 which confer new powers are discussed below; no comments are given in respect of delegated powers which replicate those currently available in FSMA to the FSA or the Treasury.

207. Annex 1 contains a table setting out the derivation of the rule-making powers in the Bill, noting any changes from the current rule-making power to that proposed.

**New section 137C (FCA general rules: product intervention)**

208. Power: to ensure that the FCA’s power to make general rules includes power to make rules that prohibit or restrict authorised persons from exposing consumers to an economic interest in specified products by prohibiting or restricting the making of “specified agreements” that might have such an effect. The FCA may attach specific provisions to such rules as to the effect of contravention of such rules including that agreements entered into in breach
of rules made under this provision are rendered automatically void and unenforceable against a consumer

209. Body: the FCA

210. Parliamentary scrutiny: none

Reasons for taking the power

211. This power is intended to assist the FCA to be a proactive regulator, with the ability to take action to prevent consumer detriment where appropriate. The power is intended to give the FCA a clear mandate and the flexibility to intervene where it is concerned that a particular product or product feature could cause detriment, thereby better enabling the FCA to achieve its consumer protection objective. The power is therefore intended to give the FCA a wide range of options for addressing concerns about particular products, including the ability to provide that products meet certain requirements and the ability to prohibit the distribution of products to the public as a whole or to specified classes of customer.

212. The ability to make more detailed and specific provision as to the effect of contravention of rules in this area will also enable the FCA to provide a broader and more effective range of remedies for those who have been adversely affected by contravention of product banning powers.

Effect

213. The FCA will be able to make rules to help prevent consumer detriment that would otherwise be caused by exposure to certain products. Product intervention rules under this power can prohibit authorised persons from exposing consumers to an economic interest in certain products if the FCA considers this to be necessary or expedient for the purpose of advancing the consumer protection or competition objectives.

214. The things that the FCA can specify as prohibited in its product intervention rules include: entering into specified agreements with any person or specified person; entering into specified agreements with any person or specified person unless requirements specified in the rules have been satisfied; doing anything else that might result in (a) the entering into of specified agreements by persons or specified persons or (b) the holding by them of a beneficial or other kind of economic interest in a specified agreement; or doing anything else unless certain requirements in the rules are met. The FCA should be able to specify a class of consumer who should not be exposed to a particular product, or should only be exposed to it if certain requirements are met. The power is intended to capture all kinds of exposure, including providing, selling, arranging and advising. It should be able to make rules in relation to all kinds of products, including where there is no direct agreement between a retail consumer and a provider. This reflects the fact that a product could take any form, ranging from a straightforward agreement between provider and retail consumer to exposure to a product through a
complex product chain. It would also be possible to have a product that is structured such that the consumer enters into a deed of trust through which he is exposed to the toxic product. In this situation, there may be a deed of trust or an arrangement but no “specified agreement”. The focus of the new power is therefore on protecting the consumer from exposure to an economic interest in a product which the FCA considers is likely to cause detriment.

215. Consumer has the meaning in the consumer protection objective in new section 1C. However, it is envisaged that the powers will generally be exercised for the protection of retail consumers.

216. The rules may provide for contravention of a product intervention rule to have particular consequences. Thus the rules can provide for agreements or obligations to be unenforceable, provide for the recovery or money or other property paid or transferred and provide for the payment of compensation for any loss sustained. The rules should make it easier for consumers to obtain appropriate redress. New section 138D(2) provides that a contravention of a rule by the FCA is actionable at the suit of a private person, unless FCA rules provide to the contrary (pursuant to section 138D(3)).

Parliamentary scrutiny

217. The Treasury consider that it is appropriate that rules made under this power be subject to the safeguards built into the general rule making power in section 137A except where it is necessary or expedient to make rules quickly, in which case temporary rules can be made (see below).

New section 137D (Orders under section 137C(1)(b))

218. Power: to extend the product intervention rule making power in section 137C

219. Body: Treasury

220. Parliamentary scrutiny: draft affirmative procedure or, in urgent cases approval within 28 days of being laid (see further detail below)

221. This clause enables the Treasury to extend the application of section 137C to allow the FCA to make product intervention rules where it considers it is necessary or expedient for the purpose of advancing its integrity objective.

Reasons for taking the power

222. The power is intended to support the FCA’s work in promoting better outcomes for retail customers of financial services, and is therefore justified for the FCA’s consumer protection and competition objectives. In particular, there are historical examples of where a product sold to retail customers, for example precipice bonds and single premium payment protection insurance (PPI), has caused significant consumer detriment, and where earlier, direct...
regulatory intervention in relation to the product, either in the form of an outright ban or product restrictions could have prevented detriment.

223. It is not clear at this point that such a power is needed for integrity purposes. However, there may be instances in the future where such a power would be appropriate, for example where a crisis may necessitate action for integrity (including financial stability) purposes. It is therefore important to have the power to extend the power to the FCA’s market integrity objective.

Effect

224. The exercise of this power would extend the FCA’s rule making power so that it can make rules that it considers are necessary or expedient for the purposes of advancing its integrity objective.

225. New section 9O(2)(d) of the Bank of England Act 1998 inserted by clause 3 provides that the FPC may give the Treasury advice about the exercise of this order making power.

Parliamentary scrutiny

226. The Treasury consider that it appropriate that an order made under section 137C(1)(b) be subject to approval by both Houses. Product intervention rules have the potential to restrict the economic activities of firms. Expanding the product intervention rules to enable action for integrity purposes would have the potential to restrict freedom of wholesale activities to a significant degree. Therefore it is appropriate for there to be parliamentary scrutiny in both Houses. This has to be balanced with the need to be able to expand this power quickly, if this is necessary to help prevent a financial crisis or to meet the FCA’s other objective. In light of this, the Treasury propose that, in urgent cases, it should be possible for the Treasury to make an Order under section 137C(1)(b) without prior approval but that the Order should cease to have effect if the Order is not approved by each House within 28 days of the order being made (no account being taken of any time during which Parliament is dissolved, prorogued or adjourned for more than four days). In non-urgent cases, the ordinary affirmative procedure would apply. This acknowledges the points made by the DPRRC in their memorandum to the Joint Committee.

New section 138K(6) (Consultation: mutual societies)

227. Power: to specify by order a description of a body which is a cooperative or mutual undertaking and which is established or operates in accordance with the laws of an EEA state

228. Body: Treasury

229. Parliamentary scrutiny: negative procedure
230. This clause enables the Treasury to specify by order a description of a body which is a cooperative or mutual undertaking and which is established or operates in accordance with the laws of an EEA state; the power is relevant to the definition of “EEA mutual society” in the context of the duty on the PRA and the FCA, when proposing and making rules, to prepare a statement setting out the impact of the rules on authorised persons who are mutual societies as compared with the impact of the rules on authorised persons who are not.

**Reasons for taking the power**

231. The PRA and the FCA are under a duty (under section 138L) to consider the impact of their proposed rules, and rules as made, on mutual societies. However, a mutual society that is established outside the United Kingdom (but which provides services or establishes branches in the UK) might not fall the definition of “EEA mutual society” in new section 138K(6)(a) and 138K(6)(b). If so, it would not be covered by the duty under new section 138L. This could place that society or category of society at a disadvantage, which could potentially breach EU law. The power in new section 138K(6) has been taken to provide for flexibility in the future, to prevent this problem. The same approach was taken in the definition of “EEA mutual society” in section 3(12) of the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007.

**Effect**

232. When proposing rules, the PRA and FCA must consider whether the impact of the proposed rule would be significantly different on authorised persons who are mutual societies (new section 138K). They must also prepare and publish alongside the draft rule a statement setting out their opinion in this regard. An order under new section 138K allows the Treasury to require the FCA and the PRA to specify additional categories of firm to be included in the definition of “EEA mutual society”. The effect of this is that the PRA and FCA must consider these additional categories of mutual society when proposing rules, and must include them in its statement setting out the particular effects on mutual societies.

**Parliamentary scrutiny**

233. The Treasury consider that it is appropriate for an order made under new section 138K(6) to be subject to the negative procedure. Although the effect of the order would be to increase the scope of the duties described above, the order would not amend the text of FSMA. The changes effected by the order would be of a technical nature, and, possibly, necessary to ensure the compliance of FSMA with European Community law. The Treasury do not consider it necessary that an order under new section 138K(6) should be subject to the affirmative procedure. Comparable orders made under section 3(12) of the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 are subject to the negative procedure.
New section 138M (Consultation: exemptions for temporary product intervention rules)

234. Power: this allows the FCA to make product intervention rules without complying with the usual procedural requirements for rule making if it considers it is necessary or expedient to advance the FCA’s consumer protection or competition objectives (extendable by order by the Treasury to the FCA’s integrity objective)

235. Body: FCA

236. Parliamentary scrutiny: none

Reasons for taking the power

237. This is to enable the FCA to take decisive and timely action to tackle problems before they give rise to significant consumer detriment.

238. The obligation in new section 138I and new section 138K to publish a draft of the proposed rules, accompanied by a cost benefit analysis, a statement of the impact of the proposed rules on mutual societies and the other information required under new section 138K is a significant obligation which is likely to take at least six months and in some cases over a year. New section 138L(1) provides that new sections 138I and 138K do not apply in relation to rules made by the FCA if the FCA considers that the delay involved in complying with them would be prejudicial to the interests of consumers. However, the Treasury consider that the application of new section 138L may be insufficient in limited instances in relation to product intervention. The new power therefore gives the FCA the flexibility to intervene earlier, and a clear mandate to intervene earlier, before there is clear evidence of widespread detriment on which to justify an intervention.

239. The Treasury is particularly concerned about cases where the FCA think that a product or product feature might lead to consumer detriment if not immediately prohibited or restricted but do not have clear evidence that this would be the case. In such circumstances, the test in new 138L would not be met. This would leave the FCA having to consult on the proposal to make rules and conduct a full cost benefit analysis of the proposal. This is likely to take at least 6 months, during which time the product will be in circulation.

240. The inability to act quickly and decisively where the FCA thinks that consumer detriment might be caused by a delay in making rules gives rise to a number of problems. These problems are we think specific to rules of this kind. Once a product (or product feature) has gained traction, more firms enter the market for that product and increasing numbers of consumers are affected. It is also more costly for firms and for the regulator to deal with problems after detriment has crystallised, through provision of redress. It is also particularly difficult to analyse the costs and benefits of prohibiting or imposing restrictions on a product (especially where it is not already in circulation), so it is important that, where the FCA considers it appropriate to
impose permanent product intervention rules, it has sufficient time to prepare a credible analysis (during the 12 months in which the temporary rules are in place). Therefore, without the temporary rule-making provisions, it is unlikely that the FCA will be able to take action quickly enough to prevent “toxic” products or product features from gaining traction in the market and causing harm to consumers.

241. The Treasury therefore consider that, in relation to this limited class of rules, it is appropriate to allow the FCA to make product intervention rules without prior consultation, a cost benefit analysis and an analysis of the implications for mutual societies but that where the FCA does so, the rules should be in place for a limited period only. Should the FCA wish to maintain such rules in place on a permanent basis, the FCA should comply in full with the requirements set out in new sections 138I and 138K.

242. A period of 12 months has been selected as the maximum duration for the temporary rules on the basis that this should be adequate time to enable the FCA to consider whether permanent rules are appropriate and to carry out further analysis of the proposed permanent rules and to consult on them. It will be open to the FCA to revoke the temporary rules within the 12 month period (for example, where it has made permanent rules which supersede the temporary rules).

243. The FCA may not make temporary product intervention rules which are substantially the same as temporary product intervention rules which it has previously made within 1 year of the date on which the previous rules ceased to have effect. This will ensure that temporary product intervention rules are not maintained for a prolonged period. If the FCA considers that it is appropriate for product intervention rules to be in place for more than a 12 month period, it must make product intervention rules under its general rule making power, complying in full with the requirements of new sections 138I and 138K.

244. To provide greater clarity and transparency as to how the power to make temporary product intervention rules will be exercised by the FCA, section 138N requires the FCA to prepare and issue a statement of its policy with respect to the making of temporary product intervention rules. The FCA will be required to publish such statements in draft and bring them to the attention of the public under 138O. This provision requires the FCA to have regard to any representations made to it before issuing the statement. It must account for any significant differences between the draft version on which the FCA consulted and the final version.

Effect

245. Product intervention rules can be made without prior public consultation, where the FCA considers it is necessary or expedient to advance a relevant objective. Any rules made pursuant to this provision are temporary and must cease to have effect within 12 months of the day on which they come
into force. The FCA may not make further temporary rules which are substantially the same as temporary rules which have lapsed within one year.

**Parliamentary scrutiny**

246. None.

*New section 141A (power to make consequential amendments of references to rules etc.)*

247. *Power:* this power enables the Treasury to amend primary or subordinate legislation that contains a reference to rules of either regulator (or to guidance of the FCA) for the purpose of keeping such references up-to-date into the future. It will be exercised where it appears to the Treasury that references to the regulators’ rules need to be amended in consequence of the exercise by the regulators of their powers to make, alter or revoke rules or guidance.

248. *Body:* the Treasury

249. *Parliamentary scrutiny:* negative procedure

**Reasons for taking the power**

250. Section 429(8) of FSMA will operate and the negative resolution procedure will apply. Although this is a Henry VIII power, it is a limited power. It does permit the amendment of legislation whenever passed or made but this is necessary to enable the Treasury to keep the statute book up-to-date. This is not an unrestricted power for the Treasury to amend references in legislation to handbooks etc. It is an ongoing power needed as a result of how the new regulatory regime will operate. The clause does not refer to Handbook, Rulebook or Sourcebook but instead refers to more generally to rules and guidance. The intention is to capture handbooks or rulebooks, whatever they are called, provided of course that they amount to rules or guidance.

251. It is not possible to predict what replace all of the references to the FSA’s handbook across the statute book. This power will facilitate the constant updating of references to the new regulators’ handbooks across the statute book.

**Effect**

252. This will enable the Government to ensure the accuracy of UK legislation where it makes reference to the regulators’ rules and guidance.

253. The FSA regularly amends its rulebook and there is currently no system in place for ensuring that changes to the rules are picked up and reflected in domestic legislation. It seems to us that the new regulators will also amend their rulebooks. In future it may be necessary to replace references
to one regulator’s handbook etc with references to a different handbook (of the same regulator or of the other regulator).

**Clause 25 (Powers of regulators in relation to parent undertakings)**

254. Clause 25 inserts new sections 192A to 192N into FSMA. Part 12A confers powers on the FCA and PRA in relation to “qualifying parent undertakings” (as defined in new section 192B) of “qualifying authorised persons” (as defined in new section 192A) and recognised investment exchanges. The powers are the power of direction provided for in new section 192C and the power to make rules requiring such parent undertakings to provide information or produce documents under new section 192J.

**New section 192A (meaning of “qualifying authorised person”)**

255. **Power:** To add to or restrict the descriptions of authorised person specified in subsection (3) who can be “qualifying authorised persons” for the purposes of the powers conferred by Part 12A; to provide that the requirement in section 192A(3) (that the authorised person be a PRA-authorised person or an investment firm) is not to have effect

256. **Body:** Treasury

257. **Parliamentary scrutiny:** draft affirmative procedure except in cases of urgency where the order must be approved within 28 days of making (see detail below)

258. This clause enables the Treasury to modify the category of authorised persons who are “qualifying authorised persons” for the purposes of the powers conferred under Part 12A in relation to parent undertakings.

**Reasons for taking the power**

259. Part 12A enables the FCA or PRA to give a direction to a parent undertaking of a qualifying authorised person or a recognised investment exchange or to make rules on certain matters which apply to such parent undertakings if certain conditions are satisfied. These are new powers which are not currently provided for in FSMA. These sections are also applied to the Bank in relation to parent undertakings of recognised clearing houses (as defined by section 285 of FSMA (exemption for recognised investment exchanges and clearing houses)) (see paragraph 17 of new Schedule 17A to FSMA inserted by Schedule 7 to the Bill).

260. Section 192A defines “qualifying authorised person” for these purposes as meaning an authorised person who is a body corporate incorporated in any part of the United Kingdom and who is either a PRA-authorised person or an investment firm (within the meaning of section 424A FSMA). The Treasury consider that this provides for the powers under new Part 12A to be limited to an appropriate class of parent undertaking. The Treasury consider that the power of direction should only be exercisable in
connection with an authorised person who requires a sophisticated level of prudential regulation (and so is prudentially regulated by the PRA) or is an investment firm.

261. However, it is possible that changes in the future may mean that the definition of “qualifying authorised person” needs to be adjusted in the future. Changes to the scope of PRA responsibility (by virtue of an order under new section 22A, considered above) may mean that the operation of section 192A(3) is no longer appropriate. As the new powers conferred by Part 12A are exercised by the regulators, it may also become apparent that the powers should be available in relation to a wider class of authorised persons or that the powers are unnecessary in relation to certain classes of qualifying authorised persons. It is also possible that authorised persons may adjust their group structure for the purpose of evading the application of the powers under Part 12A.

262. The power in section 192A(4) gives the Treasury the flexibility to adjust the scope of the Part 12A powers to address these possibilities. In particular the Treasury may add or restrict the description of authorised person in subsection (3). Section 192A(4)(b) gives the Treasury the option to provide that subsection (3) has no effect. The effect of this would be that all authorised persons who satisfy the condition in subsection (2) (body corporate incorporated in the United Kingdom) would be “qualifying authorised persons”.

Effect

263. Orders under section 192A(4) may amend section 192A(3) to add to or restrict the description of authorised person specified by subsection (3) or provide that it is not to have effect.

Parliamentary scrutiny

264. The Treasury consider that it is appropriate that an order made under section 192A(4) should generally be subject to the draft affirmative procedure. This is appropriate given that the order will be amending primary legislation.

265. However, there may be cases where the scope of the power of direction under section 192A needs to be modified on an urgent basis. For example, if it becomes apparent that it is necessary for the appropriate regulator to be able to exercise the power of direction to reduce a significant threat to financial stability or to avoid imminent detriment to consumers, it may be appropriate to exercise the power in section 192A on an urgent basis. In light of this possibility, the Treasury propose that in cases of urgency it should be possible for the Treasury to make an order under section 192A without prior Parliamentary approval. In such cases, the order should lapse 28 days later unless it has been approved by both Houses. (In calculating the 28 days, no account is to be taken of any periods of dissolution, prorogation or adjournments of more than 4 days.) The Treasury consider that this approach strikes the appropriate balance between the need for appropriate Parliamentary
scrutiny and the need to be able to react effectively and quickly in a crisis. It also acknowledges the points made by the DPRRC in their memorandum to the Joint Committee

**New section 192B(4) (meaning of “qualifying parent undertaking”)**

266. *Power: Prescription of kinds of financial institution in relation to whom the Part 12A powers are exercisable*

267. *Body: Treasury*

268. *Parliamentary scrutiny: negative procedure*

269. This clause enables the Treasury to prescribe kinds of financial institution which are potentially subject to the Part 12A powers.

**Reasons for taking the power**

270. The powers under Part 12A may be exercisable by the FCA or PRA in relation to parent undertakings of qualifying authorised persons (as defined by section 192A) or (in the case of the FCA) recognised investment exchanges which meet the three conditions set out in section 192B(2) to (4). Condition C in section 192B(4) is that the parent undertaking is a financial institution of a kind prescribed by the Treasury.

271. The Treasury consider that, at least at this stage, the Part 12A powers should only be exercisable in relation to parent undertakings which are financial institutions. Those parent undertakings which carry on a business which is not primarily based on the provision of financial services or the management and ownership of other persons who provide financial services, should not be the subject of the power of direction. However, the Treasury consider that referring to “financial institution” without more might give rise to a certain level of ambiguity as to what institutions in a group which contains a qualifying authorised person are subject to the power of direction. A more precise definition of which “financial institutions” are subject to the power is likely to be complicated and technical. Any definition is also likely to require updating to reflect changing market practice (including market practice intended to evade the application of the Part 12A powers).

272. The Treasury therefore consider that it is appropriate to take a power to prescribe in secondary legislation what kind of financial institutions are subject to the Part 12A powers. This will ensure that the scope of the Part 12A powers is clearly delineated and provide for the flexibility to respond to changes in circumstances.

**Effect**

273. An order made under section 192B(4) may prescribe kinds of financial institutions which are subject to Part 12A powers (where the other conditions set out in the operative provisions of Part 12A are satisfied).
Parliamentary scrutiny

274. The Treasury consider that it is appropriate that an order made under section 192B(4) is subject to the negative procedure. This is a power to specify more precisely what class of parent undertaking is subject to the Part 12A powers.

New section 192B(6) (power to amend section 192B)

275. Power: To remove the requirement that a parent undertaking must be a “financial institution” for the purposes of the Part 12A powers.

276. Body: Treasury

277. Parliamentary scrutiny: draft affirmative procedure

278. This clause enables the Treasury to remove the requirement that the parent undertaking must be a financial institution before the Part 12A powers are applicable.

Reasons for taking the power

279. The Part 12A powers are new powers which are not currently provided for in FSMA. The Treasury consider that it is currently appropriate to limit these new powers so that they are exercisable only in relation to those parent undertakings which are financial institutions. Thus, for example, the power of direction should not be exercisable in relation to a parent undertaking whose primary business is to manufacture goods or to provide services unconnected to financial services. However the Treasury consider that it may be possible in the future that a wider range of parent undertaking should be brought within the scope of the Part 12A powers. The experience by the regulators of the use of these new powers may suggest that the limitation to financial institutions is inappropriate (either because it significantly reduces the effectiveness of regulation in other cases or otherwise). It is also possible that market participants may adjust the manner in which groups containing authorised persons are structured for the purpose of evading the application of the Part 12A powers.

280. To cater for this possibility, section 192B(6) enables the Treasury to remove the requirement that the parent undertaking be a financial institution. It would be open to the Treasury, under section 192B(6), to prescribe a different class of parent undertaking.

281. Should the Treasury consider it appropriate to provide that parent undertakings which are not “institutions” (in other words, not body corporate) are within the scope of the power of direction, it would be necessary to modify section 192B(2) (which requires the parent undertaking to be a body corporate). Section 192B(6)(b) provides for an order under section 192B(6)(a) to make connected amendments to section 192B(2).
Effect

282. The effect of an order under section 192B(6) would be to provide that Condition C in section 192B(4) is that the parent undertaking is of a kind prescribed by the Treasury. It would no longer be a requirement that the parent undertaking be a financial institution.

Parliamentary scrutiny

283. The Treasury consider that it is appropriate that an order made under section 192B(6) be subject to the draft affirmative procedure. This is appropriate given the fact that any such order would be amending primary legislation.

Clause 26 (Exemption for recognised investment exchanges and recognised clearing houses)

284. Power: to make orders amending the scope of the second limb of the exemption from the general prohibition for recognised investment exchanges and recognised clearing houses (see, respectively new subsections (2)(b) and (3)(b) of section 285 of FSMA inserted by clause 26(2) and (3))

285. Body: The Treasury

286. Parliamentary Scrutiny: draft affirmative procedure

Reasons for taking the power

287. Part 18 of FSMA sets out the regime for the regulation of recognised investment exchanges and recognised clearing houses (together “recognised bodies”). An entity designated as a recognised body is exempt from the general prohibition set out in section 19 (the general prohibition) in respect of regulated activities carried on for certain purposes (see section 285(2) and (3) (exemption for recognised investment exchanges and clearing houses)).

288. Clause 26(2) amends the exemption for recognised investment exchanges (section 285(2)(b)). This change means that, going forward, recognised investment exchanges will not have an exemption in relation to any regulated activities carried on “for the purposes of, or in connection with, the provision of clearing services” by the relevant exchange. Rather, in addition to the general exemption in relation to regulated activities carried on as part of a person’s business as an exchange, recognised investment exchanges will also have exemption from the general prohibition in relation to any regulated activity carried on “for the purposes of, or in connection with, the provision by the exchange of services designed to facilitate the provision of clearing services by another person”. The exemption for recognised clearing houses is also clarified (clause 26(3)) to make clear that such bodies have exemption in relation to any regulated activities carried on in offering any services designed to facilitate the provision of clearing services by another person.
289. In broad terms the amendment to the scope of the exemption for recognised investment exchanges is a forerunner to the coming into force of the European regulation on derivative transactions, central counterparties and trade repositories, commonly known as the European Markets Infrastructure Regulation (“EMIR”), which will require those entities offering central counterparty clearing services (for certain purposes) to be subject to the requirements established under that regulation. As such it would not be appropriate, going forward, for recognised investment exchanges to be permitted to offer clearing services pursuant to their status as recognised investment exchanges. However, the Treasury consider it appropriate that recognised investment exchanges should continue to be able to offer services to their clients which facilitate the provision of clearing services by another person, for example transaction administration services which may involve the carrying on of regulated activities. As such the current scope of the exemption has been amended.

290. It is possible that, as a result of further European measures or changes to domestic arrangements, it may be appropriate to further change the scope of the second limb of the exemption for each kind of recognised body. As such clause 26(4) inserts a new subsection (4) into section 285 which confers a new power which provides important flexibility for the Treasury to change the scope of the second limb of each of the exemptions from time to time.

Effect

291. The power may be exercised by the Treasury to change, by order, the scope of the second limb of the exemption from the general prohibition for recognised investment exchanges and recognised clearing houses, for example, by extending, narrowing or re-defining that limb of the exemption. The power cannot be exercised to amend the first limb of each of the exemptions (as specified in section 285(2)(a) and (3)(a)).

Parliamentary scrutiny

292. The Treasury consider it appropriate that an order amending the scope of the exemption be subject to the draft affirmative procedure in order that Parliament has opportunity to scrutinise the measure in draft, particularly as it would amend primary legislation and potentially impact upon the regulatory status of one or more types of recognised bodies. For example, if the scope of the exemption referred to in section 285(2)(b) were to be narrowed then, in order to continue to provide services and, in the course of so doing, carry on regulated activities, which were otherwise provided pursuant to that exemption, the recognised investment exchanges concerned may need to seek and obtain authorisation under Part 4A of the FSMA in order to continue to offer those services (and, as such, would be subject to two regulatory regimes-the regime applying to recognised bodies and the regime applying to

13 The draft regulation is available at the following web address: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0484:FIN:EN:PDF.
authorised persons). As such it is important that Parliament can consider the order in draft.

**Clause 28 (Recognition requirements: power of FCA and Bank to make rules)**

293. *Power: to make regulations conferring on the Bank of England and/or the FCA the power to make rules concerning recognised bodies*

294. *Body: The Treasury*

295. *Parliamentary scrutiny: negative procedure*

**Reasons for amending the power**

296. Under the current arrangements referred to at paragraph 285 above, the FSA has responsibility under Part 18 for the consideration of applications for recognition of a person as a recognised investment exchange or recognised clearing house (as the case may be) and for regulating recognised bodies under that Part. However, under the new arrangements the Bank of England is to assume the FSA’s role as the regulator of recognised clearing houses and the FCA is to assume the FSA’s role as the regulator of recognised investment exchanges (see clause 27).

297. Section 286 (qualification for recognition) confers on the Treasury a power to make regulations setting out the requirements which must be satisfied in order for a clearing house or an investment exchange to be specified as a recognised body.

298. Clause 28 inserts a new subsection (4F) into section 286 to enable the Treasury to confer on the Bank of England and/or the FCA (as the case may be) the power to make rules for the purposes specified in the regulations.

**Effect**

299. The effect of the amendment is to provide the Treasury with the flexibility to confer, should they consider it appropriate, on the Bank of England (in relation to recognised clearing houses) and the FCA (in relation to recognised investment exchanges) the power to make rules on matters specified in the regulations.

300. For example, the current regulations\(^{14}\) require recognised bodies to have “sufficient” financial resources (see paragraph 16 of the Schedule to the regulations). Views may vary as to what constitutes “sufficient” resources therefore it may be helpful for the relevant regulator to be able to specify in

\(^{14}\) The regulations currently in force are the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001 (S.I. 2001/995) (as amended).
rules precisely what constitute “sufficient” resources for the purposes of the recognition requirements.

301. In terms of the provision which may be made in rules, the Treasury have the flexibility to state the precise scope of the power (for example, the Treasury could confine any power to make rules to only to certain requirements).

302. Paragraph 10 of the new Schedule 17A to the FSMA (Schedule 7 to the Bill) applies certain of the provisions relating to the PRA’s rule-making function to the Bank of England should it exercise any rule-making power conferred by the regulations, for example, the requirement to consult before making rules (new section 138J). No additional provision is needed in the case of the FCA - the normal rule-making provisions would apply (see the new Part 9A inserted by clause 22).

Parliamentary scrutiny

303. Regulations made under section 286 are subject to the negative procedure. This is considered appropriate, notwithstanding the extension of the provision which may be made in such regulations, as any rule-making power must relate to a matter which is referred to in the regulations (provision for which may already be made under the regulations) and is therefore narrowly confined. In addition, as noted above, the Bank of England and the FCA must undertake a public consultation exercise before making rules in exercise of a power conferred on either regulator under the regulations (save in exceptional circumstances). This ensures that those persons who may be affected by an exercise of the rule-making power have the opportunity to make representations to the relevant regulator.

Clause 30 (new section 312E(2)(c) and (3)(c) (power to specify functions under EU provisions) and various provisions in new Schedule 17A to the FSMA (inserted by Schedule 7 to the Bill)

304. Power: To specify functions under or as a result of a qualifying EU provision (as defined in new subsection 425C) in connection with which the Bank or the FCA (as the case may be) may take disciplinary action. Paragraphs 14(2)(d), 24(2)(c), 28(c) and 32(2)(b) of new Schedule 17A (inserted by Schedule 7 to the Bill) also confer similar powers in relation to the circumstances in which, respectively, the Bank may: appoint persons to carry out investigations (using the power conferred by section 168(5) of FSMA), apply to the court for an injunction (using the power conferred by section 380 as applied), take action under section 398 in relation to circumstances in which the Bank has been misled; and charge fees

305. Body: Treasury

306. Parliamentary Scrutiny: negative procedure

Reasons for taking the powers
307. The discussion above concerning the powers conferred by paragraph 20 of Schedule 1ZA, new section 1L and the amendment to section 66 of FSMA (see the discussion in relation to clauses 12 and 13) is relevant to these powers and is not repeated here.

308. However, it is noted that it is important that the Treasury can ensure that the Bank and FCA (as the case may be) have the powers available to enable them to take action in relation to a recognised body which has breached, or is suspected of having breached, a requirement imposed by a qualifying EU provision (for example, should it be so specified, a requirement under EMIR). As such the powers confer on the Treasury the ability to make clear the circumstances in which recognised bodies may be subject to an exercise of these powers.

**Effect**

309. The powers to make orders under new section 312E can be exercised to specify qualifying EU provisions in relation to which the Bank and the FCA may take disciplinary action in relation to recognised clearing houses and recognised investment exchanges (as the case may be). It is to be noted that similar powers also appear in paragraphs 14(2)(d), 24(2)(c), 28(c) and 32(2)(b) of new Schedule 17A (inserted by Schedule 7 to the Bill) which enable the Treasury to specify qualifying EU provisions in relation to the circumstances in which the Bank may exercise certain of its powers under the FSMA (as applied by new Schedule 17A to that Act).

**Parliamentary Scrutiny**

310. The Treasury consider it appropriate that orders under these provisions should be subject to the negative procedure. This reflects the technical nature of these powers.

**Clause 34 and Schedule 9 (discipline and enforcement)**

311. Clause 34 introduces Schedule 9 which makes various amendments to the provisions of FSMA relating to discipline and enforcement.

**New section 204A (meaning of “relevant requirement” and “appropriate regulator”)**

312. Power: To specify qualifying EU provisions; To which of the FCA and the PRA (or both) is the “appropriate regulator” for the purposes of taking disciplinary action under Part 14 of FSMA (disciplinary measures) in relation to the qualifying EU provision specified (the other provisions are noted in the footnote)

313. Body: Treasury

314. Parliamentary scrutiny: negative procedure
Reasons for taking the power

315. The FSA has powers to take disciplinary action in relation to breaches of requirements imposed by or under the FSMA or by any directly applicable Community regulation made under the markets in financial instruments directive (for example, see section 205 (public censure)).

316. Under the new regime, the FCA, the PRA and the Bank (as the case may be) will have available powers to take disciplinary and other action in relation to firms authorised under the new Part 4A (inserted by clause 8 of the Bill), approved persons and recognised bodies where such persons have contravened, or are suspected of having contravened, a requirement imposed by or under FSMA. However, it is also appropriate to ensure that the regulators can take action in relation to relevant EU requirements.

317. The reasons for taking the power in new section 204A(2)(b) to specify what qualifying EU provisions (as defined by new section 425C) are relevant for these purposes are identical to those outlined in relation to the power contained in section 66 of FSMA (as amended by Schedule 5) and are not repeated here.

318. It is important to ensure that the new regulators are able to monitor compliance with, and to enforce, such requirements. Therefore, new section 204A(3)(c) (and various other provisions referred to in the footnote) confers on the Treasury the power to specify which of the FCA and the PRA (or both) is the appropriate regulator in relation to a breach of a qualifying EU provision.

319. Accordingly, this power provides flexibility to the Treasury to allocate responsibilities between the regulators for monitoring compliance, and for enforcing relevant EU requirements.

Effect

320. This provision enables the Treasury to designate either or both of the regulators as the “appropriate regulator” for the purposes of taking disciplinary action under Part 14 of FSMA in relation to the contravention of a qualifying EU provision specified in an order by the Treasury.

Parliamentary scrutiny

321. The Treasury consider it appropriate that an order designating the appropriate regulator for these purposes be subject to the negative procedure as any order making provision for the effect of EU law and allocating responsibilities for it between the regulators will be technical and uncontroversial in nature.

Clause 35 and Schedule 10 (Financial Services Compensation Scheme)
322. Clause 35 introduces Schedule 10 which makes various amendments to the provisions of Part 15 of FSMA relating to the Financial Services Compensation Scheme (FSCS). Paragraph 3 of Schedule 10 amends section 213 FSMA (the compensation scheme).

323. **Power: to prescribe the cases in which each of the FCA and PRA will make rules under section 213(1)**

324. **Body: Treasury**

325. **Parliamentary scrutiny: draft affirmative procedure**

326. These provisions require the Treasury to prescribe what FSCS rules the FCA may or may not be responsible for and what FSCS rules the PRA may or may not be responsible for.

**Reasons for taking the power**

327. At present the FSA makes rules covering all the different products/business the FSCS is responsible for (deposit taking, insurance policies, insurance broking (for business on or after 14 January 2005), investment business and mortgage advice and arranging (for business on or after 31 October 2004). On commencement of this clause, the appropriate regulator will make FSCS rules for each of the products/business set out above.

328. As the scope of activities prudentially regulated by each of the FCA and the PRA will not be provided for on the face of the Bill (the scope of the activities that each regulator regulates will be specified by orders made by the Treasury under sections 22 and 22A of FSMA) it follows that it is not appropriate for section 213 to specify which regulator is responsible for making FSCS rules. The Treasury consider that responsibility of the FCA and PRA for aspects of the FSCS should reflect the responsibility of the FCA and PRA for the prudential regulation of regulated activities.

**Effect**

329. The order making power will be used to prescribe which FSCS rules the FCA may or may not be responsible for and which FSCS rules the PRA may or may not be responsible for.

**Parliamentary scrutiny**

330. The Treasury consider that given the significance of an order made as a result of this power it is appropriate that regulations under these provisions should be subject to the affirmative procedure.

**Clause 37 (Lloyd’s)**

331. Clause 37 amends Part 19 of FSMA which relates to Lloyd’s.
New section 315 (the Society: regulated activities)

332. New section 315 does not confer a new delegated power but it modifies an existing delegated power. It is therefore discussed below.

333. Section 315 FSMA currently provides that the Society of Lloyd’s is an authorised person and disapplies any requirement under FSMA that relates to its registered office (see for example paragraph 2 of Schedule 6 to FSMA which provides that the registered office of an authorised person must be in the United Kingdom).

334. Given that the scope of regulatory responsibilities of the FCA and PRA will be specified in secondary legislation (under new section 22A), it is not felt appropriate to provide on the face of FSMA whether the Society is a PRA-authorised person (although, in accordance with the Government’s announcement as to the scope of the PRA’s regulatory remit, it is expected that the Society will indeed by a PRA-authorised person). In light of this, the Treasury propose to provide in secondary legislation (the order made under new section 22A) whether the activities carried on by the Society are PRA-regulated activities. (As noted above, the Treasury have published a draft of the order under section 22A to assist with Parliamentary consideration of the Bill.) The conferral of permission to carry on PRA-regulated activities will be addressed by transitional provisions made under the Bill.

335. As FSMA will no longer provide on its face that the Society is an authorised person, the Treasury consider that it not appropriate for provision as to how the regulatory regime is to apply to the Society to be included in FSMA. Clause 37 therefore amends section 315 to provide that any order made under section 22 FSMA (regulated activities) may make provision as to the application to the Society of requirements of FSMA relating the registered office.

336. The procedure for orders under section 22 FSMA is set out in paragraph 26 of Schedule 2 to FSMA as amended by the Bill (see above).

Clause 38 and Schedule 12 (information, investigations, disclosure etc.)

337. Clause 38 introduces Schedule 12 which makes various amendments to FSMA in relation to information, investigations and disclosure. Schedule 12 does not confer any additional delegated powers. However it does make a substantive amendment to an existing power. This is explored below.

Paragraph 4 of Schedule 12 (amendment to Treasury power to extend scope of PRA’s information gathering powers)

338. Section 165A enables the FSA to require certain persons who are not authorised persons to provide information or produce documents. The power is exercisable in relation to information and documents that the FSA considers are or might be relevant to the stability of one or more aspects of the UK
financial system. The classes of person to whom the power applies are set out in section 165A(2)(a) to (e). Section 165A(2)(d) enables the Treasury to specify additional persons or descriptions of persons in respect of whom the power is exercisable. Under section 165C, the Treasury may only make such an order if the Treasury consider that a serious threat to UK financial stability is posed (or is likely to be posed) by: (a) the activities themselves or the way in which they are carried on; or (b) any failure to carry on those activities. Any such orders are subject to the draft affirmative procedure or, in cases of urgency, the 28 day procedure.

339. Paragraph 4 of Schedule 12 substitutes section 165C to provide for the power in section 165A(2)(d) to be exercisable on a new ground – to implement a recommendation which the FPC has made to the Treasury. Under new section 9O(4) of the Bank of England Act 1998, the FPC may only make such a recommendation if it considers that the exercise by the Treasury of the power in section 165A(2)(d) in the manner proposed is desirable for the purposes of the FPC’s functions. This approach is considered appropriate as the FPC will not itself be able to obtain information. It will obtain information that it needs for the discharge of its functions from the PRA and FCA (including, where appropriate, by virtue of the power of direction exercisable by the Bank under section 9V of the Bank of England Act 1998). Thus where the FPC needs information from unauthorised persons (for example, for the purposes of advising the Treasury under section 9O(2)(b) as to whether the Treasury should make an order under section 22 to expand the scope of FSMA regulation), and the PRA cannot obtain such information under section 165A or by other means, and the FPC considers that the information is desirable for the exercise of its functions, the Treasury should be able to make an order under section 165A.

340. The Treasury will not be obliged to make such an order on the receipt of a recommendation from the Treasury. The Treasury would only make such an order where it considered, in light of the recommendation from the FPC and other matters, that it is appropriate to do so.

341. Orders under section 165A will continue to be subject to the affirmative procedure.

Clause 39 and Schedule 13 (Auditors and actuaries)

342. Clause 39 and Schedule 13 amend the provisions in Part 24 of FSMA which relate to auditors and actuaries. FSMA, as amended, will enable both the FCA and the PRA to make rules imposing duties on actuaries and auditors, in place of the FSA’s existing power. FSMA as amended will also provide for the Treasury to make regulations prescribing circumstances in which an auditor (or actuary in certain cases) must provide information to the FCA, the PRA or the Bank, in place of the FSA. Schedule 13 gives the FCA powers to impose disciplinary sanctions for breach of these requirements. It also provides, in new section 345A, for the PRA (and the Bank by virtue of the application of this section by paragraph 21 of Schedule 17A to FSMA inserted by Schedule 7 to the Bill) to have parallel powers to impose disciplinary
sanctions if the Treasury provides by order for the relevant provisions in section 345A to have effect.

343. Power: to provide that relevant provisions in section 345A have effect, conferring disciplinary powers on the PRA and the Bank

344. Body: Treasury

345. Parliamentary scrutiny: negative procedure

**Reasons for taking the power**

346. The FSA’s experience suggests that the disciplinary powers conferred by FMSA as amended by Schedule 13 to the Bill will be needed by the FCA, for example in relation to rules made in relation to client assets. However, it is less likely that the PRA will make rules imposing duties on auditors or actuaries, or that it would need powers to enforce regulations requiring information to be provided to the PRA. New section 345A therefore provides the flexibility for disciplinary powers to be conferred on the PRA if necessary in the future. Disciplinary powers can also be conferred on the Bank on the same basis in relation to auditors of recognised clearing houses by virtue of an exercise of the order-making power in relation to section 345A as applied by paragraph 21 of new Schedule 17A (see Schedule 7 to the Bill).

347. That flexibility might similarly have been achieved by making provision for the PRA and/or Bank in terms identical to section 345 (as amended), and only bring that provision, or relevant subsections, into force by commencement order as and when needed. However, the Treasury do not consider it would be appropriate to achieve flexibility through non-commencement of provisions passed by Parliament and enacted.

**Effect**

348. The order making power will be used to confer some or all of the disciplinary powers exercisable by the FCA on the PRA and/or Bank.

**Parliamentary scrutiny**

349. The Treasury consider that it is appropriate that an order providing for the relevant provisions within new section 345A to have effect should subject to the negative procedure. An order under section 345A will not amend primary legislation; it will merely provide for the legislation passed by Parliament to have effect. As explained above, this is akin to a commencement provision which would normally not be subject to Parliamentary scrutiny.

**Clause 40 (provisions about consumer protection)**

350. Clause 40 inserts new a new Part 16A. This part makes provision in relation to consumer protection.
New section 234C (power to designate consumer bodies)

351. Power: To designate bodies which may make a complaint to the FCA under this provision

352. Body: Treasury

353. Parliamentary scrutiny: negative procedure.

354. Section 234C enables consumer bodies which have been designated by the Treasury to make a complaint to the FCA that a feature, or combination of features, of a market in the UK for financial services is or appears to be significantly damaging the interests of consumers. Under new section 234E, the FCA must, within 90 days, provide a response.

355. This mechanism, which is commonly referred to as a “super-complaint” is based on the mechanism in section 11 of the Enterprise Act 2002 under which designated consumer bodies can make a complaint to the Office of Fair Trading.

Reason for taking the power

356. The power to designate consumer bodies which may make a complaint under section 234C ensures that the Treasury can keep the range of consumer bodies that may make such a complaint up to date. It means that if a new body emerges with the appropriate expertise to make such a complaint the Treasury can, without enacting further primary legislation, confer the “super-complaint” power on them. Similarly, if an existing designated consumer body ceases operation, it can be removed from the provision without further primary legislation.

357. Under new section 234C(3)(b), the Treasury must publish criteria which will be applied by them in determining whether to make or revoke a designation.

Effect

358. The effect of being designated is that the consumer body may make a super-complaint under new section 234C.

Parliamentary scrutiny

359. The Treasury consider that given the technical nature and limited scope of the power, the negative procedure is appropriate. This reflects the procedure for the similar power under section 11 of the Enterprise Act 2002.

New section 234E and 234F (responses by the FCA to complaints and references under Part 16A)
360. **Power**: To amend the period within which the FCA must under new section 234E respond to a complaint or reference made under Part 16A or to inform the relevant person (in the case of a reference by a regulated person under new section 234D) that the duty to respond under new section 234E does not apply.

361. **Body**: Treasury

362. **Parliamentary scrutiny**: negative procedure

363. This clause enables the Treasury to amend the period (currently 90 days) within which the FCA must respond to any complaint or reference made to it under Part 16A or, in the case of references made under new section 234D by regulated person, inform the person that the duty to respond does not apply.

**Reasons for taking the power**

364. The power under Part 16A for consumer bodies, the Financial Ombudsman Scheme or regulated persons to make complaints or references to the FCA have been modelled in part on section 11 of the Enterprise Act 2002 (super-complaints to the OFT). Under the Enterprise Act, the OFT has 90 days to respond to a complaint. This in turn reflects the Government’s own undertaking as to the timescale in which it will respond to any recommendations made to it by the OFT. However, should experience in the exercise of this mechanism suggest that the period is inappropriate (either too long or too short), this power gives the Treasury the ability to modify the period.

**Effect**

365. To amend the period within which the FCA must respond to a complaint or reference under Part 16A. The Treasury may specify a shorter or longer period.

**Parliamentary scrutiny**

366. Given the limited nature of the power conferred by new sections 234E and 234F) the Treasury consider that the negative procedure is appropriate.

**New section 234H (power of FCA to make request to Office of Fair Trading)**

367. **Power**: To amend the period within which the OFT must respond to the request from the FCA

368. **Body**: Treasury

369. **Parliamentary scrutiny**: negative procedure
This clause enables the Treasury to amend the period (currently 90 days) within which the OFT must respond to any request made to it by the FCA under new section 234H.

**Reasons for taking the power**

The reasons for this power are similar to the reasons outlined above in relation to the powers in new section 234E and 234F (time limit for the FCA to respond to complaints and references made to it) and are not repeated here.

**Effect**

To amend the period within which the OFT must respond to a request made to it by the FCA under new section 234H. The Treasury may specify a shorter or longer period.

**Parliamentary scrutiny**

Given the limited nature of the power conferred by section 234H the Treasury consider that the negative procedure is appropriate.

**PART 3: MUTUAL SOCIETIES**

**Clause 47 (Mutual societies: power to transfer functions)**

Clause 47 gives the Treasury the power to make an order amending the legislation relating to mutual societies listed in that clause for the purpose of conferring functions on the FCA, the PRA and, in respect of the Northern Irish legislation listed, the registrar of companies or the Registrar of Community Interest Companies. Clause 48 provides that an order under clause 47 may include various provisions, including consequential amendments, the transfer of rights and liabilities, and the application of the objectives of the FCA and the PRA to functions transferred to them by the order.

*Power: to amend mutuals legislation to confer functions on the regulators*

*Body: Treasury*

*Parliamentary scrutiny: draft affirmative procedure*

**Reasons for taking the power**

Part 21 of FSMA provided powers to transfer functions relating to mutual societies to the FSA. These powers were exercised in 2001 and the FSA exercises various functions under the mutuals legislation listed in clause 47. These functions are not subject to the FSA’s objectives in section 2 of FSMA (see paragraph 2 of Schedule 2 to the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, S.I. 2001/2617).
376. The powers in Part 21 of FSMA only permitted the transfer of functions to the FSA and are effectively spent. The Bill therefore replaces these powers with the powers in clauses 47 and 48 to enable the FSA’s functions under the legislation governing mutual societies and listed in clause 47(2) to be conferred on the FCA and the PRA. The listed legislation includes legislation governing mutual societies in Northern Ireland; clause 47 also provides that order may confer functions under that legislation of the registrar of credit unions for Northern Ireland and of a Northern Ireland department to be conferred on the FCA, the PRA and the court.

377. The Treasury intend to publish a draft of an order under clause 47 on introduction of the Bill to Parliament.

Effect

378. The order making power will be used to transfer functions under mutuals legislation, and make associated provision.

Parliamentary scrutiny

379. The Treasury consider that it is appropriate that orders under these provisions should be subject to the draft affirmative procedure because they will amend primary legislation.

PART 4: COLLABORATION BETWEEN TREASURY AND BANK OF ENGLAND, FCA OR PRA

380. This Part deals with the relationship between the Treasury, the Bank of England, the FCA and the PRA in relation to the management of a crisis (including imposing an obligation on the Bank of England to notify the Treasury of a material risk that public funds may need to be provided in connection with financial institutions) and relations with international organisations (including the operation of the European Supervisory Authorities).

Clause 63 (interpretation of Part 4)

381. Power: to provide by order that a specified activity or transaction, or class of activity or transaction, is to be or not to be treated as financial assistance

382. Body: Treasury

383. Parliamentary scrutiny: negative procedure

Reasons for taking the power
384. Clause 54 requires the Bank to notify the Treasury when the Bank considers that there is a material risk of the Treasury or Secretary of State regarding it as appropriate to provide financial assistance in respect of a financial institution.

385. Clause 63(3) provides a non-exhaustive definition of “financial assistance” for these purposes.

386. “Financial assistance” is a concept that is difficult to define. The assistance itself can take a wide range of forms (loan, indemnity, guarantee). In addition, whether a transaction is a normal or commercial transaction or “assistance” will often be difficult to ascertain. For example, the purchase of shares on commercial terms where there is a competitive market for those shares may not be “assistance”. But the purchase of shares where there is no market for those shares may well be “assistance”. The power in clause 63(3) enables the Treasury to provide clarity in such cases by providing that an activity or transaction, or class of activity or transaction, is or is not to be treated as financial assistance.

387. The power also enables the Treasury to “future proof” the Bill. It is not clear what forms of financial assistance might be provided in the future or in what circumstances. It is possible that financial assistance provided in the future should be a relevant consideration in determining whether the Bank’s duty to notify should apply. This power enables the Treasury to provide that certain assistance is not to be treated as financial assistance for the purposes of the public funds notification requirement in clause 54.

388. The power is similar to that in section 257 Banking Act 2009.

Effect

389. The effect of an order under clause 63(3) is that the activity or transaction specified by the Treasury in the order is (or is not, as the case may be) to be regarded as financial assistance for the purposes of Part 4 of the Bill.

Parliamentary scrutiny

390. The Treasury consider that it appropriate that an order made under clause 63 be subject to the negative procedure. This power is being taken to enable the Treasury to clarify what is to be considered financial assistance for this purpose and as a precaution against changing circumstances. It is also possible that this power may need to be exercised on an urgent basis (for example, to clarify the status of a transaction in time of market uncertainty). It is not considered that it should be necessary for Parliament to approve a draft of such an order before it is made.

PART 5: INQUIRIES AND INVESTIGATIONS
391. Part 5 makes provision for the Treasury to appoint a person to carry out an independent inquiry about a matter relating to the regulation of financial services or markets or for the regulators themselves to carry out an investigation.

**Clause 71 (Interpretation of section 70)**

392. *Power: to provide by order that a specified activity or transaction, or class of activity or transaction, is to be or not to be treated as financial assistance*

393. *Body: Treasury*

394. *Parliamentary scrutiny: negative procedure*

395. Clause 71(5) enables the Treasury to make an order providing whether specified activities or transactions are to be treated as financial assistance.

**Reasons for taking the power**

396. Clause 70 sets out the circumstances in which the PRA is to be subject to a duty to investigate and report on possible regulatory failure. Those circumstances include the incurring of relevant public expenditure in relation to a PRA-authorised person where the expenditure might not have been incurred but for a regulatory failure (clause 70(1)). Clause 71(3) defines “relevant public expenditure” as including the giving of financial assistance.

397. Clause 71(4) provides a non-exhaustive definition of “financial assistance” for these purposes.

398. The reasons for taking the power in clause 71(5) to allow the Treasury to make further provision as to what is, and is not, to be regarded as financial assistance for these purposes are similar to those outlined above in relation to the power in clause 63(4) and so are not repeated here.

**Effect**

399. The effect of an order under clause 71(5) is that the activity or transaction specified by the Treasury in the order is (or is not, as the case may be) to be regarded as financial assistance for the purposes of clause 71.

**Parliamentary scrutiny**

400. The Treasury consider that it appropriate that an order made under clause 71 be subject to the negative procedure, for the reasons set out above in connection with the similar power in clause 63.

**PART 7: AMENDMENTS OF BANKING ACT 2009**
401. Part 7 of the Bill makes amendments to certain parts of the Banking Act 2009. The DPRRC considered the Banking Bill in the 2008-2009 session and produced two reports concerning provisions of the Bill (the first and second reports of that session).

402. Clauses 84 to 86 make amendments to Part 1 of the Act (special resolution regime) which confers on the Bank and the Treasury powers to resolve failing banks (as defined in section 2 of the Act); clause 87 (state aid) makes an amendment to Part 3 of the Act (bank administration regime) to enable the Treasury to give directions to a bank administrator for the purposes of assisting the UK in obtaining the approval of the European Commission for any State aid provided in connection with a resolution. Clauses 88 and 89 make amendments to Part 5 of the Act (inter-bank payment systems) and clause 90 introduces Schedule 17 to the Bill which makes amendments to various Parts of that Act.

**Clause 84 (private sector purchasers)**

403. **Power:** to make reverse transfer instruments or orders in respect of property, rights or liabilities or securities which have been transferred to a commercial purchaser

404. **Body:** The Bank of England (in the case of reverse transfer instruments); the Treasury (in the case of reverse transfer orders)

405. **Parliamentary scrutiny:** none (in the case of instruments made by the Bank of England); negative procedure (in the case of orders made by the Treasury)

**Reasons for taking the powers**


407. However, in summary, Part 1 of the Banking Act confers on the Bank and the Treasury powers to resolve failing banks (defined in section 2 of the Act) in the event that the FSA has determined that the general conditions are met (which are specified in section 7) and the Bank or the Treasury have determined that specific conditions in sections 8 or 9 of the Act (as the case may be) are met.

408. The Bank has the power to transfer the securities or some or all of the property, rights and liabilities (“business”) of a failing bank to a commercial purchaser (section 11) or some or all of the business to a bridge bank wholly owned and controlled by the Bank (section 12). The Treasury have the powers to transfer the securities of a failing bank into temporary public ownership.
(section 13) or, as a last resort, the power to transfer the securities of a bank’s holding company into temporary public ownership (section 82).

409. Following transfer to a bridge bank, or transfer into temporary public ownership, the Bank and the Treasury (as the case may be) have the powers to effect “supplemental” and “onward” transfers. For example, in the case of Dunfermline Building Society (the only institution to date to have been resolved using powers under the Act) the Bank transferred part of Dunfermline’s business to a bridge bank and then later transferred the business from the bridge bank to a commercial purchaser (Nationwide) using the power conferred by section 43 (onward transfer).

410. In addition, the Bank and the Treasury have “reverse transfer” powers, for example, to enable business to be transferred from a bridge bank back to the failing bank (sections 29, 31, 44 and 46). However, under the current arrangements, the reverse transfer powers are not available in cases where securities or business have been transferred to a commercial purchaser (see, for example, the limitations specified in section 44(3)).

411. The Government considers that it would be useful to allow property to be transferred back from a commercial purchaser, provided that the purchaser consents. This power might be used, for example, to remedy the situation where property is inadvertently transferred contrary to the commercial agreement of the parties involved in the resolution. Therefore, clause 84 makes a number of amendments to Part 1 of the Act to extend the availability of the reverse transfer powers to cases where a transfer (or onward transfer) has been made to a commercial purchaser.

Effect

412. The clause makes certain amendments (including the insertion of new sections 26A and 42A into the Banking Act) to extend the range of circumstances in which reverse transfers may be effected so as to enable securities or business to be transferred from a transferee to the transferor (e.g. from a commercial purchaser to the failed bank where a transfer has been effected under section 11, or from a commercial purchaser to a bridge bank where an onward transfer has been effected under section 43).

413. The extension of the reverse transfer powers is considered appropriate in order to give the resolution authorities maximum flexibility, for example, to correct the situation in which business is erroneously transferred to a purchaser. However, crucially, before effecting a reverse transfer from a commercial purchaser, the relevant authority is required to have first obtained the written consent of the purchaser (see, for example, new section 26A(4)). This ensures that the availability of the reverse transfer powers does not undermine the confidence prospective acquires of the securities or business of a failing bank have in the operation of the special resolution regime. In addition, the arrangements for compensation have been extended (see subsection (9) of clause 84) to ensure the Treasury have the power to make compensation arrangements in relation to such transfers.
Parliamentary scrutiny

414. As for the other transfer powers available to the Bank under Part 1 of the Banking Act 2009, instruments made under the Bank’s new reverse property transfer powers are not subject to Parliamentary scrutiny. However, the Treasury must be consulted before the Bank makes a reverse transfer instrument (see, for example, section 26A(6)) and the Bank must provide a copy of the instrument to the Treasury which is required to lay a copy in Parliament (reverse transfer instruments are treated as any other transfer instrument (see new section 26A(5) and section 24 of the Act)).

415. In the case of reverse transfer orders, these are subject to the negative procedure (as in the case of other types of share or property transfer order). This is considered appropriate for the reasons given in paragraphs 74ff of the memorandum on the Banking Bill- in particular, for reasons of speed and certainty.

Clause 88 (Inter-bank payment systems)

416. Power: to confer immunity from liability in damages on any person in respect of action or inaction in accordance with a direction given by the Bank of England under section 191 of the Banking Act 2009

417. Body: Treasury

418. Parliamentary Scrutiny: negative procedure

Reasons for taking the power

419. Section 191 of the Banking Act 2009 confers a power on the Bank to give directions to the operator of a recognised inter-bank payment system (a system specified by the Treasury as a specified system by way of an order made under section 184 (recognition order)). It also confers a power on the Treasury to confer immunity from liability on damages in respect of action or inaction in accordance with the direction by order (made under the negative resolution procedure).

420. Clause 88 restates section 191 in an amended form so that immunity from liability in damages is conferred automatically on operators of recognised inter-bank payment systems (and their officers and staff) when the Bank gives a direction for the purposes of resolving or reducing a threat to the stability of the UK financial system. Subsection (5) also enables the Treasury to confer on any person immunity from liability in damages by order in relation to action or inaction in accordance with a direction. This power could be used to confer on an operator immunity from liability in damages where the direction is given for some purpose other than that of resolving or reducing a threat to the stability of the UK financial system or, where a direction is given in such a case, to confer immunity on a person other than an operator (for
example, a person who provides services to a recognised inter-bank payment system).

**Effect**

421. The overall effect of clause 88 is, therefore, not to change an existing delegated power but to remove the need to make an order to confer immunity in a certain circumstance (i.e. to resolve or reduce a threat to financial stability) in which it is vital that the Bank can act quickly and nothing impedes the speed with which the operator can comply with the direction.

**Parliamentary scrutiny**

422. The Treasury consider it appropriate that an order under section 191 can be made using the negative procedure in order to ensure that immunity can be conferred with immediate effect. This is particularly important in cases of urgency when it may be appropriate to confer immunity on, for example, persons who provide infrastructure services to recognised inter-bank payment systems, in order to ensure that there is no unnecessary delay between the time at which a direction is issued by the Bank to resolve or reduce a serious threat to financial stability and the taking of action in accordance with the direction. As such the Treasury consider it appropriate that an order made under this section is subject to the negative procedure.

**Clause 90 and paragraph 55(4) of Schedule 17 to the Bill (amendments of the Banking Act 2009 relating to the new regulators - the amendment to section 232 of that Act)**

423. Power: to amend the definition of “investment activity” in subsection (5B) of section 232 of the Banking Act 2009 (definitions for the purposes of the investment bank insolvency regulations made under section 233 of the Act)

424. Body: Treasury

425. Parliamentary Scrutiny: negative procedure

**Reasons for taking the power**

426. Section 233 of the Banking Act 2009 (insolvency regulations) confers on the Treasury a power to make regulations modifying the law of insolvency in its application to investment banks. This power was exercised in 2011 to make the Investment Bank Special Administration Regulations 2001 (S.I. 2011/245). Section 232 (definition) sets out the definition of “investment bank” for the purposes of sections 233 to 236. In summary, an institution will fall within this definition if (i) it is an institution that has a regulatory permission under the FSMA to carry on the regulated activity of, among others, safeguarding and administering investments or dealing in investments as principal; (ii) it is an institution which holds client assets; and (iii) it is incorporated in, or formed under the law of, any part of, the UK. “Assets” is defined in subsection (5A) (inserted by S.I. 2011/239) to include money but
excludes anything the institution holds for the purposes of carrying on an insurance mediation activity unless the activity (i) arises in the course of carrying on “investment activity”; or (ii) the institution has elected to comply with rules that would apply in relation to it if the activity were not an insurance mediation activity. “Investment activity” is defined in subsection (5B) to mean “anything that falls within the definition of “investment services and activities” in section 417(1) of the FSMA or anything that is “designated investment business” within the meaning of the FSA’s Handbook.

427. The Treasury consider it undesirable to rely on a definition specified in the rulebook of the relevant regulator which may be omitted or change from time to time and therefore wish to take a power to specify by order the definition of “investment activity”.

Effect

428. This power enables the Treasury to specify by order the definition of “investment activity”; it may be appropriate to amend this definition from time to time and therefore further orders could be made under this section to expand or narrow the definition.

Parliamentary procedure

429. Paragraph 57 of Schedule 17 to the Bill amends section 235 (regulations procedure) to specify that an order made under the new section 232(7) is subject to the negative procedure. The Treasury consider this procedure to be appropriate bearing in mind the technical and uncontroversial nature of any amendment to the definition of “investment activity” in section 232.

PART 8: MISCELLANEOUS

Clause 91 (power to make further provision about regulation of consumer credit)

430. The Bill enables the regulation of consumer credit to be transferred from the OFT to the FCA by expanding the scope of activities that may be regulated under FSMA (see in particular clause 6 of the Bill).

431. This power set out in clause 91 is being taken to effect the transfer of consumer credit regulation from the Office of Fair Trading (OFT) to the Financial Conduct Authority (FCA). The Treasury recognise that this is a significant and rather unusual power but take the view that the power is an appropriate one to take, and that it contains necessary safeguards on its use.

432. The FCA will have stronger powers and greater resources than the OFT to police the consumer credit market and tackle detrimental practices. For example, the FCA will be able to make rules on which are binding on regulated firms and to ban specific products or product features that cause harm. Unlike the OFT, the FCA will be also have powers to impose unlimited
fines and require firms to pay redress to consumers who have been adversely affected by their actions. It is intended that the transfer will deliver stronger protections for consumers in relation to consumer credit and ancillary credit services such as debt collections and debt management.

433. Following a consultation on the transfer of regulation in January 2012, the Government committed itself to retaining the important rights and protections set out in the current legal framework. This is to ensure that (a) consumers don’t lose out as a result of the transfer (by having fewer rights and protections available to them); and (b) disruption to consumer credit licence holders is minimised.

434. This commitment shapes the way in which the new regulatory regime is provided for in the Bill. Where possible, protections for consumers provided for by the Consumer Credit Act 1974 (CCA) will be replicated in rules made by the FCA under section 137A of the Financial Services and Markets Act 2000 (FSMA) (as inserted by clause 22 of the Bill), and the relevant sections of the CCA will be repealed. This approach is in line with the intention to move to a more flexible, rules-based regime that can respond more quickly to market changes than the current statutory regime.

435. However, it will not be possible for the FCA to replicate all the CCA protections set out in the CCA, as some of the provisions of the CCA go beyond the FCA’s rule making power (see section 137A of FSMA as inserted by clause 22 of the Bill). For example, the FCA cannot generally make rules which confer rights directly on consumers (see for example the approach taken in sections 66A-73 of the CCA), or which affect the private law rights of parties to a contract (see for example the effect of sections 82-84 of the CCA) some of whom are not (and will not) be authorised under FSMA. Therefore, certain provisions of the CCA will be retained in the new regime, and will remain in force following the transfer of regulation. This approach also benefits those who provide credit and related services such as debt advice, who are familiar with the CCA, and do not want the provisions to be rewritten in new unfamiliar language. Therefore, it is intended that certain provisions of the CCA (e.g. section 75 which provides for the joint liability of creditors for misrepresentation or breaches by suppliers) are likely to be retained following the transfer, as may those provisions that confer rights or places obligations directly on the consumer (e.g. sections 66A to 73 of the CCA).

436. To ensure that the retained provisions of the CCA continue to operate effectively once regulation has been transferred to the FCA, a number of changes will be needed to be made to the CCA and FSMA. Changes will be needed in particular to reflect the fact that responsibility for regulating consumer credit has transferred to the FCA, and to ensure that the FCA, and local trading standards bodies (see paragraph 35 below) can effectively enforce the remaining CCA provisions.

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15 If this were to happen, the relevant case law would also fall away.
437. In broad terms it will be necessary to:

(a) replace references in the CCA to the “OFT” with “FCA”;

(b) apply features of FSMA – such as the FCA’s objectives\(^{16}\), statutory immunity\(^{17}\), and fee-raising powers\(^ {18}\) – to the FCA’s new functions under the CCA; and

(c) enable the FCA to use FSMA supervision and enforcement powers – that would normally be used in relation to breaches of FCA rules – in relation to breaches of retained provisions of the CCA.

438. The legislative mechanisms for providing for this regime are considered below.

439. Power: To make further provision about the regulation of consumer credit

440. Body: Treasury

441. Parliamentary scrutiny: draft affirmative procedure

**Reasons for taking the power**

442. Clause 6 of the Bill enables the responsibility for the regulation of consumer credit to be transferred from the OFT to the FCA. It is intended that all activities currently subject to regulation under the CCA will become regulated activities under FSMA.

443. As set out above, the Government’s intention is that the new regulatory regime for consumer credit will retain the main consumer rights and protections set out in the CCA either by way of keeping the relevant provision of the CCA in place or by the FCA making rules that have a similar effect. This approach will minimise the additional burdens on business which arise from the transfer of regulation from the OFT to the FCA.

444. Clause 91 confers a broad power to make further provision about the regulation of consumer credit. It is intended to be used as part of a package of measures to provide for the transfer of responsibility for the regulation of consumer credit from the OFT to the FCA. The other parts of this package of measures include:

(a) **Use of section 22 of FSMA (as amended by clause 6 of the Bill)** – Section 22 provides for activities to be regulated activities for the purpose of FSMA.

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\(^{16}\) See new sections 1B to 1C FSMA.

\(^{17}\) See paragraph 22 of new Schedule 1ZA to FSMA.

\(^{18}\) See paragraphs 20 and 21 of new Schedule 1ZA to FSMA.
This provision may be used to specify that activities in relation to credit are to be regulated activities for the purposes of FSMA.

(b) Use of paragraph 25 of Schedule 2 to FSMA – This provision states that an order under section 22(1) or (1A) FSMA may make such consequential, transitional or supplemental provision as the Treasury consider appropriate for purposes of, or connected with, any relevant provision. In particular it may be used:

- in consequence of activities in relation to credit becoming regulated activities, repeal licensing and “regulatory”19 provisions of CCA at the time of the transfer of regulatory responsibilities20 at the time of the transfer of regulatory responsibilities;
- to make consequential and supplemental amendments to CCA provisions that are retained; and
- to make transitional provisions in relation to the transfer of regulation in so far as they relate to processes e.g. licences, on-going disciplinary action.

445. Clause 91 enables the Treasury to make the necessary changes to the CCA and FSMA by order. The Treasury are taking a power to make these changes as the detail of what is required will depend on the detailed design of the new FCA regime.

446. The Treasury and the Department for Business, Innovation and Skills (BIS) are currently working, together with the FSA and OFT, to design a model of FCA regulation that does more to protect consumers, but also reflects the particular characteristics of the consumer credit market and remains proportionate. In addition, the Government has convened a forum of key industry and consumer stakeholders to advise on this design process. This involves looking at the diversity of firms and activities currently regulated by the OFT under the CCA, and considering what regulatory approach is appropriate for the different segments of the market depending on the level of risk to consumers and the costs to business. The work also involves identifying which consumer rights and protections in the CCA will be replicated in FCA rules, and which will provisions of the CCA will need to be retained.

447. Following Royal Assent, the Treasury will formally consult on the secondary legislation which will affect the transfer alongside an impact assessment on the proposals. This is expected to take place in early 2012. The consultation is likely to be accompanied by a high-level consultation on

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19 Such as OFT powers to impose penalties, charge licensees for costs of regulation, and obtain information. The FCA have equivalent powers in FSMA to do these things.
20 To achieve this, the section 22 power would used in conjunction with the power in paragraph 25 of Schedule 2 to FSMA to make consequential or supplemental provision in connection with an amendment to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) (the RAO). The RAO (made further to sections 22(1) and (5), 426 and 428(3) of, and paragraph 25 of Schedule 2 to FSMA) sets out those activities that are regulated activities for the purposes of FSMA.
the FCA’s approach to regulating consumer credit, which will be followed by a more detailed consultation on new FCA rules later in 2013.

**Effect**

448. Turning to the substance of clause 91, subsection (1) makes it clear that the power can only be used in circumstances where the Treasury have made an order under section 22 of FSMA after the passing of the Bill which has the effect that an activity (a “transferred activity”) ceases to be an activity for which a licence under section 21 of the CCA is required or would have been required but for a relevant exemption and becomes a regulated activity for the purposes of FSMA. The power can therefore only be used where the Treasury have provided for an activity related to consumer credit to be subject to FCA regulation as opposed to OFT regulation.

449. Once the Treasury have made such an order, subsection (2) enables it to make an order under this clause to do any of the things set out in paragraphs (a) to (h).

450. Paragraph (a) enables OFT functions under any provision of the CCA to be transferred to the FCA. This could be used to ensure that all or some of the general functions of the OFT set out in section 1 of the CCA could be transferred to the FCA. For example, this provision could be used to provide for the FCA to be given the duty to monitor, supervise and enforce compliance with the CCA provisions that are retained in the new regime (and secondary legislation made under them) and other pieces of legislation related to consumer credit\(^\text{21}\). The FCA may also need to be given powers to cover Part XI CCA (Enforcement of the Act) (to the extent that they’re not covered by Part XI FSMA (Information Gathering and Investigations)).

451. Paragraph (b) enables provisions of FSMA which relate to the powers or duties of the FCA in relation to breaches of requirements imposed by or under FSMA (for example, section 205 (public censure) and section 206 (financial penalties) to apply in relation to contraventions of retained provisions of the CCA. This provision is designed to ensure that the FCA is able to use its enforcement powers (as set out in FSMA) to deal with the breach of a requirement imposed by or under a specified provision of the CCA. This means that the enforcement powers under FSMA can be applied to contraventions of provisions of the CCA. Paragraph (b) makes provision for the Treasury to modify those FSMA enforcement powers that are applied to CCA provisions to ensure that they are appropriate and proportionate in the consumer credit context, and align, as far as possible, with the sanctions available for other breaches of requirements under FSMA.

\(^{21}\) Part 8 of the Enterprise Act 2002 gives enforcement bodies (including the OFT) powers to obtain court orders against businesses which do not comply with their legal obligations to consumers. The OFT also has power to prosecute criminal offences under the Consumer Protection from Unfair Trading Regulations 2008 (S.I. 2008/1277). The OFT also has power to review the operation of the Store Cards Market Investigation Order 2006 and the Home Credit Market Investigation Order 2007 which imposes obligations on home credit lenders to maintain certain advertisements on an approved website.
The application of the enforcement powers in FSMA to breaches of retained provisions of the CCA will (subject to provision made under paragraph (d), discussed below) supplement enforcement provisions set out in the CCA including in certain cases criminal sanctions. This may be appropriate where there is evidence that an existing criminal sanction provides an effective deterrent to misconduct, or where a criminal sanction is deemed appropriate given the nature of the regulatory breach – particularly given that consumer credit, unlike other financial services, often involves distress purchases and dealing with vulnerable consumers in financial difficulties.

The Treasury take the view that there is no inherent difficulty in maintaining both criminal and civil means of enforcement for the same prohibition and that both means of enforcement are already available in FSMA to a limited degree. For example, the deliberate or reckless failure by an authorised person to comply with a requirement imposed under Part 11 of FSMA could be enforced both under sections 205 or 206 FSMA or be the subject of a prosecution under section 177(4).

Similarly, the Treasury note that the market abuse regime in FSMA is enforced by civil means whilst insider dealing (which overlaps considerably with the market abuse regime) has criminal sanction. The Treasury also note that the possibility of a requirement being enforced by both civil and criminal means also underpins the Regulatory Enforcement and Sanctions Act 2008.

In taking this power the Treasury is mindful of the need to ensure that there is no risk of unfairness to consumer credit businesses subject to the new regime, and the need to ensure that there is no inappropriate “double jeopardy” i.e. circumstances where a consumer credit business that has breached a provision of the CCA is unfairly sanctioned twice (once under the FSMA regime, and again under the CCA regime).

To minimise the risk of unfairness or inappropriate “double jeopardy”, subsection (2) includes the following certain safeguards:

(a) paragraph (b) makes it clear that this provision cannot be used to make generic provision relevant to all CCA requirements. Rather, the Treasury will be required to specify which particular provisions of the CCA are relevant to any order made further this clause; and

(b) to ensure that stakeholders are clear about how the FCA’s disciplinary and enforcement powers will be exercised in the consumer credit context, and what sanctions are available to it to deal with a breach of a specified provision of the CCA, an order made under this clause may require the FCA to issue a statement of policy in relation to the exercise of powers conferred on it by virtue of paragraph (b) (see paragraph (c));

(c) where the existence of both regulatory and criminal sanctions is inappropriate, paragraph (d) enables the Treasury to provide by order that the
failure to abide with a provision of the CCA specified in the order no longer constitutes a criminal offence; and

(d) paragraph (d) enables the Treasury to provide that a person may not be convicted of an offence under the CCA in relation to an act or omission which has already been the subject of regulatory sanction. This reflects the approach taken in section 41(b) of the Regulatory Enforcement and Sanctions Act 2008 (person may not be convicted of an offence in relation to an act or omission which has resulted in a monetary penalty).

457. It is clear that the FSA already has experience of dealing with different enforcement powers arising out of substantially the same facts. The FSA’s Enforcement Guide (EG): (http://fsahandbook.info/FSA/html/handbook/EG/link/PDF) sets out its policy in the situation where market misconduct may involve a breach of the criminal law as well as market abuse as defined in section 118 of FSMA. Paragraphs 12.7 to 12.10 of EG are particularly relevant here:

"When the FSA decides whether to commence criminal proceedings rather than impose a sanction for market abuse in relation to that misconduct, it will apply the basic principles set out in the Code for Crown Prosecutors...It is the FSA’s policy not to impose a sanction for market abuse where a person is being prosecuted for market misconduct or has been finally convicted or acquitted of market misconduct (following the exhaustion of all appeal processes) in a criminal prosecution arising from substantially the same allegations. Similarly, it is the FSA’s policy not to commence a prosecution for market misconduct where the FSA has brought or is seeking to bring disciplinary proceedings for market abuse arising from substantially the same allegations".

458. In exercising the power the Treasury is likely to require the FCA to maintain and publish a statement of policy on this point (along similar lines to section 210 FSMA). The Treasury consider that the FCA may combine this statement of policy with its “general” statement of policy on its enforcement functions under section 210 FSMA. The Treasury note that the issuance of guidance is also the approach taken to this issue under the Regulatory Enforcement and Sanctions Act (see sections 63 and 64).

459. Paragraph (d) is discussed above.

460. Paragraph (e) provides for the functions of the Secretary of State in relation to the CCA to be transferred to the Treasury. This provision may be used to transfer power to make secondary legislation from the Secretary of State to the Treasury. For example, the provision could be used to ensure that Treasury Ministers can make regulations specifying the types of transactions that are exempted from the provision that a linked transaction has no effect until the principle agreement is made (section 19 CCA). It is appropriate to transfer these powers as Treasury Ministers are responsible for FSMA and for the FCA.
461. The Treasury take the view that it is appropriate to provide for a specific power for the transfer of functions of the Secretary of State under the CCA to the Treasury, rather than to rely upon the general powers conferred by the Ministers of the Crown Act 1975, and avoid adding another order to the package of measures that is needed to support an effective transfer. Providing for the transfer of functions under new clause 4, rather than the Ministers of the Crown Act 1975 avoids the fragmentation of the legislation needed to support the transfer of regulation of credit from the OFT to the FCA. The Treasury are also mindful of the fact that the Secretary of State functions set out in section 2 of the CCA cannot be simply transferred to the Treasury. As part of the transfer, some wording will need to be repealed. For example, section 2(2) and (3) CCA provides for the Secretary of State to give directions to the OFT. The Treasury will not have a generally applicable power of direction to the FCA and it is unlikely to be appropriate to transfer the power of direction in section 2 of the CCA to the Treasury.

462. Paragraph (f) provides for functions of the Secretary of State under CCA to be exercised concurrently with Treasury.

463. Paragraph (g) enables local weights and measures authorities to institute proceedings in England and Wales for a “relevant offence” (as defined in subsection (3)). Local weights and measures authorities, colloquially known as Trading Standards bodies, currently enforce the CCA within Great Britain (see section 161 of the CCA). The provision will enable the Treasury to provide for Trading Standards to prosecute certain credit related offences under FSMA in England and Wales (in particular, breach of the general prohibition in section 19 FSMA) without obtaining the consent of the Director of Public Prosecutions. This may be appropriate to ensure that the specialist Illegal Money Lending Teams run by Trading Standards, which currently to rely on the CCA offence of providing credit without a licence, will be able to continue to operate following the transfer.

464. Paragraph (h) is designed to ensure that references to the FCA’s functions in certain specified enactments, are taken to include reference to its functions resulting from any order made under this clause. For example section 460 of the Companies Act 2006 prohibits the disclosure of information obtained under compulsory powers. The prohibition in section 460 does not apply to for the purpose of enabling or assisting the Financial Services Authority to exercise its functions under FSMA (see section 461(4)(g)). Paragraph (h) could be used to ensure that this reference to the FCA’s functions under FSMA is taken to include reference to its functions resulting from any order made under this clause.

465. Subsection (4) provides for the Treasury to exclude the application of any provision of the CCA in relation to a transferred activity, and repeal any provision of the CCA which relates to a transferred activity. The Treasury may only make such an order:

(a) at the same time, or after an order under section 22 of FSMA after the passing of the Bill which has the effect that an activity (a “transferred
activity”) ceases to be an activity for which a licence under section 21 of the CCA is required or would have been required but for a relevant exemption; and

(b) if they consider it desirable to do so having regard to the FCA’s operational objectives (as defined in new section 1B(3) of FSMA).

466. Subsection (4) is designed to ensure that on or after the making of an order under this clause, it is possible to repeal or to constrain the application of any provision of the CCA which continues in force, in so far as that provision relates to an activity which is subject to regulation under FSMA. This is designed to “future proof” the regime. In the new regime it is envisaged that certain sections of the CCA will be retained (and modified to ensure that they “fit” with the FSMA regime). However, it may become apparent that it is no longer desirable, having regard to the FCA’s operational objectives, to continue the retained provisions of the CCA in force. The protections provided by such provisions may become unnecessary or inappropriate or they may be superseded by alternative protections provided by the FCA. Subsection (4) enables the Treasury to repeal or limit the application of the retained provisions of the CCA.

467. The “triggers” set out in paragraph 37 above, are designed to ensure that the provision can only be used in relation to the transfer, and bearing in mind the FCA’s operational objectives. This will require the Treasury to have regard to consumer protection, the integrity of the UK financial system, and competition when considering whether or not to repeal any provision of the CCA at or following the transfer. The intention is that protections for consumers in the CCA should not be repealed until there is an equivalent substitute under the FSMA regime or it is clear that the protection is no longer needed.

468. The power in subsection (4) will ensure that all aspects of the regulatory regime for consumer credit can be kept under review and, if appropriate, adjusted – regardless of whether the regulation is contained in the CCA or in FCA rules. The power is however limited to repealing provisions of the CCA or excluding the application of provisions of the CCA. (This may be appropriate where the provision remains appropriate for certain credit activities, but not others.) It cannot be used to make change substantively the way in which the provision of the CCA applies.

469. Subsection (5) provides for the Treasury to be able to (a) make any such consequential provision it considers appropriate and, (b) amend any enactment, including provision of, or made under, the Bill.

470. Subsection (6) provides that the clause does not affect the powers conferred by clause 98 to make consequential amendments to other enactments in consequence of provision made by order under the Bill or the powers conferred by Schedule 21 to make transitional provisions in connection with the transfer of functions from the OFT to the FCA.
Parliamentary scrutiny

471. Given the significance and wide ranging nature of the power, and the impact on providers of consumer credit, the Treasury consider that the order making power should only be exercisable if a draft of the order has been approved by each House. The Treasury does not envisage the need to make such an order on an urgent basis and so does not consider it appropriate to provide for the use of the 28 day affirmative procedure in urgent cases.

472. As noted above, the Treasury has announced its intention to consult publicly on the first order to be made under this clause.

Clause 93 (Evidencing and transfer of title to securities without written instrument)

473. Power: to make regulations concerning the transfer of title to securities without a written instrument and, in particular, for the regulation of the persons responsible for the operation of any procedures for the electronic transfer of title

474. Body: Treasury and the Secretary of State (jointly or concurrently)

475. Parliamentary scrutiny: draft affirmative procedure (section 784(3) and section 1290 of the Companies Act 2006)

Reasons for amending the power

476. Chapter 2 of the Companies Act 2006 confers on the Treasury and the Secretary of State the power to make regulations (jointly or concurrently) enabling title to securities (defined in section 783 of the Act (scope of this Chapter)) to be evidenced and transferred without a written instrument. Sections 785 to 788 of the Companies Act 2006 specify the provision which may be made in regulations made under the Chapter 2 of that Act. The current regulations (the Uncertificated Securities Regulations 2001 (S.I. 2001/3755) (the “Regulations”)) enable the electronic transfer of title to securities using approved systems (“relevant systems”) and provide for the regulation of the operators of relevant systems. Clause 93 amends section 785 to extend the provision which may be made in such regulations.

Effect

477. Section 788(d) of the Companies Act 2006 specifies that the authority making the regulations may delegate to any person willing and able to discharge them any functions of the authority under the regulations. Under the existing arrangements, the Treasury have delegated all of their functions under

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22 The Regulations were made by the Treasury under section 207 of the Companies Act 1989 and now have effect as if made under the Companies Act 2006 by virtue of section 1297 of that Act (continuity of the law).

23 The only such system in the UK is CREST which is operated by Euroclear UK and Ireland.
Part 2 of the Regulations (regarding the approval and regulation of operators of relevant systems) to the FSA save for those functions specified in regulation 12 (international obligations).

478. Under the new regulatory regime, the Bank of England is to assume responsibility for the regulation of settlement systems. Therefore section 785 is amended by clause 93 of the Bill to make clear that regulations made under Chapter 2 may confer functions on any person (including a person other than the authority making the regulations).

479. In addition, the amendments make clear that authority making the regulations may confer on any person the power to give guidance, issue codes of practice or make rules for the purposes of any provision made by the regulations. This is considered appropriate in order to ensure that the authority making the regulations can confer on the Bank of England the same suite of powers (as appropriate) as those which are, or will be, made available to the Bank in relation to the other types of infrastructure provider which it regulates (or will regulate) (payment systems\(^{24}\) and clearing houses\(^{25}\)). For example, the Treasury may consider it appropriate to confer on the Bank a power to make rules concerning the operation of settlement systems, in order to enable the Bank to make rules on the systems and controls and record keeping arrangements which are appropriate to ensure the orderly operation of the relevant systems in pursuance of its financial stability objective specified in section 2A of the Bank of England Act 1998.

480. In addition, section 785 is amended to enable the authority making the regulations to confer on any person immunity from liability in damages. This is considered appropriate to enable provision to be made, for example, to exempt a person from liability in damages for action or inaction in accordance with a regulatory requirement imposed for the purposes of addressing a threat to the stability of the financial systems of the UK, and aligns with the arrangements under Part 5 of the Banking Act (see section 191 as amended by clause 88(3) of the Bill).

Parliamentary scrutiny

481. Regulations made under Chapter 2 of the Companies Act 2006 are subject to the affirmative resolution procedure (section 784(3) of the Companies Act 2006). This is considered appropriate as the regulations enable title to securities to be evidenced and transferred without a written instrument, a process which is vital to the efficient functioning of the capital markets. In addition, the regulations establish the regime for the regulation of the operation of relevant systems, which impacts on the operators of those systems but is vital for the purposes of ensuring the orderly operation of such systems.

\(^{24}\) Under Part 5 of the Banking Act 2009.

\(^{25}\) Under Part 18 of FSMA as amended by the Bill (see clauses 26 to 32).
PART 9: GENERAL

482. This Part deals with matters such as interpretation, consequential and transitional provision, extent and commencement.

**Clause 99 (power to make further consequential amendments etc)**

483. **Power: To make consequential amendments**

484. **Body: Treasury or Secretary of State**

485. **Parliamentary scrutiny: draft affirmative if the order amends or repeals primary legislation, otherwise negative (see clause 96(1) and (2)(c))**

486. This clause enables the Treasury or the Secretary of State to make an order amending any enactment passed or made before the passing of the Bill, and any enactment passed or made on or before the last day of the Session in which the Bill is passed.

**Reasons for taking the power**

487. The power is needed to enable amendments to both primary and secondary legislation consequential to the provisions made in or under the Bill. Schedule 18 to the Bill makes amendments to primary legislation consequential on the Bill; however, further amendments to primary legislation may be needed in consequence of provisions made under the Bill and to give effect to implementation of the Bill. Secondary legislation can be amended under the powers under which it was originally made; however, the power in this clause will ensure that consequential amendments can be made where the powers under which the secondary legislation to be amended would not otherwise extend to the making of the amendment.

**Effect**

488. Orders made under clause 99 will give assist in giving effect to the Bill and its implementation.

**Parliamentary scrutiny**

489. The Treasury consider it appropriate that an order under clause 98 should be subject to the draft affirmative procedure where it amends or repeals primary legislation, and that the negative procedure is appropriate in other cases.

**Clause 100 (transitional provisions and savings)**

490. **Power: To make transitional, transitory or saving provision by order**

491. **Body: Treasury**
492. *Parliamentary scrutiny: negative procedure*

493. This clause enables the Treasury by order to make such provision as they consider necessary or expedient for transitory, transitional or saving purposes in connection with the commencement of any provision made by or under the Bill.

**Reasons for taking the power**

494. The power is needed to facilitate the transition between the current arrangements and the new regulatory regime introduced by the Bill.

**Effect**

495. Orders under clause 100 will make transitional arrangements to facilitate implementation of the Bill, and saving provision where appropriate to preserve the effect of legislation which is otherwise repealed.

**Parliamentary scrutiny**

496. The Treasury does not consider it necessary that transitional and saving provisions should require the approval of each House in draft; it is appropriate that orders under this provision should be subject to the negative procedure.
Annex 1

Table of rule-making powers

The rule-making powers in Chapters 1 and 2 of Part 9A of FSMA, which are inserted by clause 22 of the Bill, are largely a restatement of the rule-making powers currently set out in Chapter 1 of Part 10 of FSMA, which Part 9A replaces. There are some minor modifications. The table below shows the derivation of the rule-making powers set out in the Bill, noting any changes from the current rule-making power to that proposed. The table does not note consequential amendments, for example where rule-making powers currently exercised by the FSA are conferred on the FCA or the PRA (or, where relevant, both), or where reference to (the PRA’S) general objective or (the FCA’S) operational objectives replaces reference to (the FSA’S) regulatory objectives. The table also does not note additional procedural requirements for the regulators to consult or notify each other.

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<td>This is a new power and is discussed in the main body of the Delegated Powers Memorandum</td>
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<td>Financial promotion rules: directions given by FCA</td>
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<td>Section 137Q creates a new power for the FCA to direct an authorised person to withdraw, or refrain from making, a communication or an approval of a communication (that is, the communication of an invitation or inducement to engage in investment activity or to participate in a collective investment scheme). Further detail is given in the Explanatory Notes.</td>
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<td>In deciding whether it is satisfied that it is inappropriate or unnecessary to publish a direction (that is, a direction that</td>
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</table>
any or all of the rules made by that regulatory are not to apply to that person, or are to apply with specified modifications), the regulator must also consider whether publication of the direction would be detrimental to the stability of the UK financial system.

<table>
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</table>
| When proposing draft rules, and when making rules which are significantly different from the draft, the regulators must (as the FSA must) carry out and publish a cost benefit analysis. Whereas the current definition of “cost benefit analysis” in section 155(10) is “an estimate of the costs together with an analysis of the benefits”, sections 138I(7) and 138J(7) define a “cost benefit analysis as “an analysis of the costs together with an analysis of the benefits... and an estimate of those costs and of those benefits”; sections 138I(8) and 138J(8) provide that if, in the regulator’s opinion, the costs or benefits cannot reasonably be estimated or it is not reasonably practicable to produce an estimate (for example, if it...
would be disproportionately expensive to produce accurate figures, or if figures would be so imprecise as to be meaningless for the purposes of consultation), an estimate need not be provided; but in this case, the regulator must explain why it is of that opinion.

(Section 138L(4) replicates section 155(8) and provides that the regulator need not prepare and publish a cost benefit if it is of the view that there will be, or a minimal, increase in costs)

| Consultation: mutual societies | 138K | Section 138K imposes new requirements on the regulators when propose draft rules and when they make rules. Where a regulator proposes a rule which would apply to authorised persons which are mutual societies and to other authorised persons, it must state whether the impact of the rule on these two categories of authorised persons will be different and give details of the difference. Similarly, where a regulator makes a rule which applies both to authorised persons which are mutual societies and to other authorised persons, and which differs significantly from the draft rule, it must state whether the impact of the rule is significantly different from the impact of the proposed rule on authorised persons which are mutual societies, and on those persons as compared with other authorised persons; the regulator must also give details of the difference. |
| Consultation: general exemptions | 138L 155 | Section 138L(1) replicates section 155(7) and provides that the public consultation requirements do not apply in |
relation to rules made by the FCA if the FCA considers that the delay involved in complying with them would prejudice the interests of consumers; the Bill applies the definition of consumers in section 425A.

Section 138L(2) makes parallel provision in respect of rules made by the PRA if the PRA considers that the delay would prejudicial to the safety and soundness of PRA-authorised persons, or (where the insurance objective in section 2C is engaged) to securing the appropriate degree of protection for policy holders.

| Consultation: exemptions for temporary product intervention rules | 138M | Section 138M permits the FCA to dispense with the public consultation requirements in relation to product intervention rules if it considers it necessary or expedient to advance its consumer protection objective (section 1C) or (if an order under section 137C(1)(b) is in force) its integrity objective (section 1D). But such rules may only remain in force for a maximum of twelve months. |
| Temporary product intervention rules: statement of policy | 138N and 138O | Section 138N imposes a duty on the FCA to prepare and publish a statement of its policy with respect to the making of temporary product intervention rules (that is, product intervention rules made under section 138M).

Section 138O prescribes the procedure that the FCA must follow in proposing and making a statement of policy. |