

FINANCIAL SERVICES AND MARKETS BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Financial Services and Markets Bill as brought from the House of Commons on 8 December 2022 (HL Bill 80).

- These Explanatory Notes have been prepared by HM Treasury in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

- 1 The Financial Services and Markets Bill makes important updates to the UK's regulatory framework for financial services.
- 2 The Bill implements the outcomes of the Future Regulatory Framework (FRF) Review. The Bill therefore revokes retained EU law relating to financial services and enables HM Treasury and the financial services regulators to replace it with legislation designed specifically for UK markets, in a way that builds on the UK's existing approach to financial services regulation.
- 3 The Bill also enhances the UK's existing regulatory regime by updating the objectives of the financial services regulators to ensure a greater focus on long-term growth and international competitiveness.
- 4 The Bill also seeks to secure and enhance the UK's position as an open and global financial hub by providing for the implementation of mutual recognition agreements (MRAs) with the UK's global partners, and for the UK to recognise equivalent Simple, Transparent and Standardised (STS) securitisations issued by entities outside of the UK.
- 5 The Bill brings stablecoins, a type of cryptoasset, into the scope of regulation when used as a form of payment, paving their way for use in the UK as a recognised form of payment. It also enables technological innovation in financial services by allowing financial market infrastructure (FMI) firms to explore new technologies in temporary pilot schemes and reduces the risk of an incident at a third-party provider which has a systemic impact on the UK financial services sector.
- 6 The Bill maintains the UK's position as a competitive marketplace with robust regulatory standards by reforming the UK's wholesale capital markets regime; giving the Bank of England new tools to mitigate the risks of failure of critical financial institutions; enhancing the UK's insolvency arrangements for insurers to help authorities to better manage insurers in financial distress; and creating a senior managers and certification regime for a number of types of systemically important firms, similar to the existing regime for bank, insurers and other financial services firms.
- 7 Finally, the Bill introduces measures that support financial inclusion by ensuring people across the UK can continue to access cash with ease; enabling credit unions to offer more products; introducing a regulatory gateway designed to improve the quality of financial promotions; and enhancing protection for victims of authorised push payment scams.

Policy background

Revocation of retained EU law

Comprehensive FSMA model for financial services

- 8 The current model of financial services regulation was introduced by the Financial Services and Markets Act 2000 (FSMA 2000). The FSMA model delegates the setting of regulatory standards to the independent financial services regulators, the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA), that work within an overall policy framework set by government and Parliament.
- 9 During the UK's membership of the European Union (EU), and particularly following the global financial crisis, the majority of new financial services regulation was developed and delivered at an EU level. When the UK left the EU, the body of EU legislation that applied directly in the UK at the point of exit was transferred onto the UK statute book by the European Union (Withdrawal) Act 2018 (EUWA 2018). This is known as retained EU law.
- 10 HM Treasury undertook a significant programme of secondary legislation to ensure that the body of retained EU law relating to financial services would operate effectively following the UK's withdrawal from the EU, using powers in EUWA 2018 to make the necessary amendments to address any deficiencies arising as a result of exit at the end of the transition period.
- 11 This approach provided stability and continuity in the immediate period after EU exit, but it was never intended to provide the optimal, long-term approach for UK regulation of financial services. It has led to a complicated patchwork of regulatory requirements across domestic primary and secondary legislation, retained EU law, and regulator rulebooks. And it means that the regulators are restricted in how they can pursue their statutory objectives through their rules, as they are not able to make changes to rules that are set out directly in retained EU law, except in very limited cases.
- 12 Financial services regulations need to be updated regularly to take account of new products and markets, and emerging risks and opportunities. The FSMA model supports this by delegating the setting of regulatory requirements to the regulators, working within an overall policy framework set by government and Parliament.
- 13 The government considers that the FSMA model remains the most appropriate way to regulate financial services in the UK.
- 14 That means that a large number of detailed regulatory requirements which currently sit in retained EU law should, under a FSMA approach, generally be in the regulators' rules.
- 15 The government's overall policy objective is to establish a comprehensive FSMA model for financial services regulation. That means applying the FSMA model to areas currently covered by retained EU law, so that the government and Parliament establish the framework and objectives for the regulators, and the regulators design the detailed rules that apply to firms.
- 16 The government published two consultations, in [October 2020](#) and [November 2021](#), outlining the aim of establishing a comprehensive FSMA model. Respondents demonstrated overwhelming support for the establishment of a comprehensive model of regulation based on FSMA 2000, agreeing that the FSMA model is world-leading.

Revocation of retained EU law

- 17 Delivering a comprehensive FSMA model of regulation requires the revocation of retained EU law relating to financial services.
- 18 The Bill will revoke the following types of retained EU law, which are all captured by Schedule 1 to the Bill:
 - a. All direct principal EU legislation, such as Regulations;
 - b. Secondary legislation made under primary legislation, such as instruments made to implement EU obligations under the European Communities Act 1972, and instruments made under the European Union Withdrawal Act 2018 which addressed deficiencies in EU law;
 - c. All EU tertiary legislation, such as Delegated Regulations, Commission Decisions, and Implementing Acts; and
 - d. Some parts of primary legislation;
- 19 The revocation of retained EU law will not extend to Acts of Parliament, except to the parts which are listed in Schedule 1, which are necessary to remove as they will not function effectively when retained EU law is revoked.
- 20 Where revoked legislation amends domestic legislation, including primary legislation, (for example, where a statutory instrument made under section 2(2) of the European Communities Act 1972 amends FSMA 2000), the amendments to that other legislation will remain in force despite the revocation. This is necessary in order to ensure that domestic legislation continues to function effectively.
- 21 Retained EU law is a broad category and includes some domestic legislation like the Regulated Activities Order. Some of these domestic instruments which contain elements of retained EU law are an essential part of the FSMA model of regulation that needs to be maintained. Therefore, HM Treasury will have the means to exclude instruments which are not intended to be revoked.
- 22 Retained EU law which is already part of the regulators' rulebooks will not be revoked through the Bill, because these rules can be updated by the regulators themselves according to their normal processes established in FSMA 2000.
- 23 The Bill will commence the revocation of retained EU law in a way which facilitates a smooth transition to a comprehensive FSMA model. This means that where the government feels that it is necessary, the government does not expect to commence the revocation of individual parts of the Schedule unless the regulators have drafted and consulted on rules that are ready to be enforced, where it is appropriate that these provisions are replaced.

Associated powers

- 24 The Bill introduces a number of provisions to allow retained EU law to be replaced in a way that creates a comprehensive FSMA model of regulation.

Restating parts of retained EU law to create a comprehensive FSMA model

- 25 Under the FSMA model, Parliament through legislation sets the overall approach to financial services regulation including the regulators' objectives. Parliament also establishes the parameters within which HM Treasury sets the 'regulatory perimeter' through secondary legislation, specifying which financial activities should be regulated.

- 26 There are some elements of retained EU law that carry out similar functions, and will need to be maintained under a comprehensive FSMA model. The Bill gives HM Treasury the ability to “restate” any part of retained EU law into either primary or secondary domestic legislation, with any necessary or desirable modifications.
- 27 Examples of provisions which HM Treasury expects to restate in part include:
- a. Key definitions that make up elements of the financial services regulatory framework and therefore what activities are being regulated. For example, definitions of different types of financial market infrastructure. This will ensure that the government continues to be responsible for determining what activities are regulated.
 - b. Existing powers for the regulators to supervise and enforce their rules effectively, and processes concerning authorisation or other forms of registration or notification.
 - c. The ability for HM Treasury to assess whether other jurisdictions have regulatory requirements equivalent to those in the UK, and to give effect to those findings. This is consistent with the government’s responsibility for deference arrangements.

Regulator rule-making

- 28 To establish a comprehensive FSMA model, the regulators need to have the appropriate powers to make rules when retained EU law is revoked. In many instances, FSMA 2000 already provides the necessary powers, or will do so through the Designated Activities Regime (DAR) which is introduced by clause 8 of the Bill. There are also additional general rule-making powers for the Bank of England and the FCA, which are covered in the “New Regulatory Powers” section of these Notes.
- 29 In other instances, the regulators do not have sufficient regulatory rule-making powers to replace the rules that are currently in retained EU law. The restatement power will allow HM Treasury to address this by enabling the:
- a. Restatement into domestic legislation of any existing regulator rule-making powers that are set out in retained EU law;
 - b. Modification of existing regulator rule-making powers; and
 - c. Creation of new regulator rule-making powers in areas which are currently covered by retained EU law.
- 30 There are appropriate limitations to this restatement power. For example, the power has not been designed to create entirely new general rule-making powers, such as those in sections 137A and 137G of FSMA 2000.

Modifying retained EU law

- 31 The government expects that it will take a number of years to complete the process of revoking retained EU law. Therefore, it is likely that some elements or specific provisions within retained EU law will become ineffective or out-of-date before the revocation is commenced.
- 32 During this transitional period before revocation has fully taken effect, the regulators will be restricted in how they are able to pursue their statutory objectives. For example, a regulator may consider that disclosure requirements should be enhanced to protect consumers against an emerging risk. If the relevant requirements are set out in retained EU law whose revocation has not yet been commenced, however, they may be unable to give effect to this.

- 33 The Bill therefore provides HM Treasury with a power to make targeted modifications to retained EU law during this transitional period.
- 34 The Bill will enable HM Treasury to make modifications in relation to the following purposes:
- a. Protecting and enhancing the stability and integrity of the UK financial system;
 - b. Promoting the safety and soundness of financial services firms;
 - c. Promoting the effective functioning of financial markets;
 - d. Promoting effective competition in the interests of consumers;
 - e. Facilitating the international competitiveness of the economy of the United Kingdom and its growth in the medium to long term;
 - f. Protecting consumers and insurance policy holders, or those who may become policy holders;
 - g. Providing for effective rule-making, enforcement, investigation, and supervision;
 - h. Providing for the effective arrangements in relation to resolution;
 - i. Protecting public funds;
 - j. Implementing international standards and practices;
 - k. Providing for efficient and effective regulatory, enforcement, investigatory and supervisory arrangements;
 - l. Removing provisions that are yet to be commenced or changing the timing of their commencement.
- 35 These purposes closely relate to the regulators' statutory objectives and, as described above, while retained EU law remains in force, the regulators will be constrained in how they further these objectives.
- 36 In addition, the power to amend retained EU law may also be used for technical purposes, such as making retained EU law clearer.
- 37 An example of where modification might be necessary is to enable provision to ensure the regulators have the right enforcement and supervisory powers in relation to restated law (including fee-raising and information-sharing powers) and the necessary statutory immunities.
- 38 The Bill also gives HM Treasury the power to make modifications to retained EU law when restating it. The purposes for which HM Treasury may modify retained EU when restating it are the same as those set out in paragraph 27. HM Treasury will have the ability to modify any element of retained EU law that has been restated in future. This will ensure that the legislation can remain up-to-date in light of developments in financial markets.

Effective regulator rule-making

- 39 As set out above, the government envisages that many of the provisions in retained EU law will be replaced by the regulators in their rulebooks, rather than in legislation.
- 40 When retained EU law is revoked, the regulators will need to replace the regulatory requirements contained in that retained EU law with the appropriate rules, reflecting their objectives. The government expects this to take a number of years and will be a significant programme of work for the financial services regulators.

- 41 The Bill makes a small number of technical changes to ensure that the regulators are able to replace retained EU law effectively, and to generally improve the effectiveness and agility of regulator rule-making

Targeted regulator exemption from complying with certain accountability requirements

- 42 When deciding what rules to make, the regulators will need to follow their usual process for making rules – including considering how to further their objectives, having regard to the regulatory principles, and any additional “have regards” set by HM Treasury. The regulators are also required to consult publicly on rule changes, and to conduct a cost benefit analysis, unless an exemption applies.
- 43 The Bill introduces some exemptions from the statutory consultation requirements imposed by FSMA in relation to the FCA, the PRA, and the Bank of England, and by the Financial Services (Banking Reform) Act 2013 in relation to the Payment Systems Regulator (PSR). This will give the regulators discretion as to whether to consult, and enable them to take a proportionate approach to consultation when creating rules tailored to the UK to replace EU-derived regulation or EU-derived rules which are already in their rulebooks.
- 44 The Bill introduces an exemption from the regulators’ statutory requirements to consult and conduct cost benefit analysis where the regulator is deleting, without replacing, rules in their rulebooks which contain a retained EU obligation. This will allow the regulators to quickly remove unnecessary rules which they were required to make in order to fulfill EU obligations where the regulator determines that those rules should not be replaced.
- 45 The Bill also enables HM Treasury to specify in regulations parts of retained EU law where the regulators are exempt from the same requirements, in circumstances where the regulators are: restating retained EU law revoked through this Bill in their rulebooks without material changes; replacing revoked retained EU law with material changes but the only material effect is to reduce a regulatory burden; or amending their own rules that currently contain retained EU law obligations to make material changes but the only material effect is to reduce a regulatory burden. Where changes also have other material effects, which may include impacts on the regulators’ objectives, for example on market integrity, competition, or consumer protection, it is appropriate to require the regulators to consult, to allow affected parties to participate in a consultation. Therefore, the exemption does not apply where this is the case.
- 46 This exemption will allow the regulators to more easily replicate in their rules important provisions currently in retained EU law which HM Treasury and the regulators agree work well for the UK and are already familiar to stakeholders. It will also allow the regulators to more easily remove unnecessary regulatory burdens inherited from the EU, and focus time and resource on the areas where reform will unlock the greatest benefits.
- 47 When making or amending rules in accordance with the provisions of clause 6 on the basis that they reduce regulatory burden, the FCA, the PRA and the PSR are required to publish a statement alongside the final rules which explains how any changes are compatible with their duties (for example, their duties in relation to statutory objectives). In relation to the Bank of England, the statement must explain how any changes are compatible with the Bank’s financial stability objective under section s2A of the Bank of England Act 1998.

Modifying and disapplying rules

- 48 Under Section 138A of FSMA 2000, the FCA and the PRA are able to disapply or modify their rules for individual firms, with the consent of the firm, or at its request, where compliance with the unmodified rules is unduly burdensome or unworkable for a firm.

- 49 The current process to enable the modification and disapplication of rules is an important tool in regulator rule-making, as it enables rules to be properly calibrated to the firms to which they apply. Retained EU law also contains a number of different provisions that also allow for disapplication or modification of rules for individual firms. Not all of these regimes would currently be possible under FSMA 2000.
- 50 Therefore, this Bill introduces a power for HM Treasury to introduce different modification and disapplication regimes, as well as appropriate procedural requirements surrounding these regimes. This is intended to sit alongside the existing provisions in FSMA 2000, which will continue to apply.

Pre-commencement consultation

- 51 The Bill changes the objectives and other matters that the regulators are required to consider when consulting and making rules, such as “have regards” and obligations. The Bill therefore includes a provision which makes it clear that these requirements can be met by consultations made before commencement, to ensure appropriate use of resources and avoid delay to necessary reforms.

Permanent enhancements to FSMA 2000

- 52 The Bill will also make enhancements to the FSMA 2000 framework, to ensure that important public policy priorities can continue to be appropriately factored into financial services regulation.
- 53 While the UK was a member of the EU, and a significant amount of legislation was negotiated in Brussels, the government could ensure that such issues were considered, and EU institutions would also consider these issues. Under the FSMA model, the regulators must act as they consider appropriate to advance their statutory objectives – limiting the extent to which any wider public policy issues, not covered by their statutory objectives, can be considered.

Power to require the regulators to “have regard” to specified matters

- 54 The Bill gives HM Treasury the power to require the regulators to “have regard” to things specified by HM Treasury when they are making rules, and to explain how this has influenced their rules.
- 55 The regulators must continue to act in a way that furthers their objectives, and must have regard to these additional matters insofar as that is compatible with their objectives, and their existing rule-making powers.
- 56 The purpose of this power is to enable the government to ensure that more specific public policy priorities can be reflected in regulator rule-making, where it considers that appropriate

Power to obligate the regulators to make rules in specified areas

- 57 The Bill also enables HM Treasury to place obligations on the regulators to make rules in relation to specific areas of regulation. For example, in the Financial Services Act 2021, HM Treasury required that the FCA make rules applying to FCA-regulated investment firms which imposed a variety of prudential requirements, including requirements relating to types and amounts of capital and liquid assets such firms must hold to manage risk.
- 58 In making rules to comply with any obligations, the regulators must continue to act in a way that furthers their objectives and must comply with these obligations insofar as that is compatible with their objectives, and their existing rule-making powers.

Transitional amendments

Amendments to the Markets in Financial Instruments Regulation (MiFIR) and the European Market Infrastructure Regulation (EMIR)

Wholesale capital markets regulation

- 59 Wholesale capital markets regulations govern the buying, selling and organised trading of financial instruments, such as shares, bonds and derivatives, between professional investors and companies.
- 60 Wholesale capital markets are where a range of firms and investors from across the financial services sector come together to raise short- and long-term finance to grow. This includes, but is not limited to, market infrastructure providers and exchanges, data providers and investment firms, such as investment banks and asset managers.
- 61 Many of the rules that directly govern the buying, selling and organised trading of transferable financial instruments are set out in the Markets in Financial Instruments Regulation (MiFIR). MiFIR is one of two pieces of EU legislation (the other being the second Markets in Financial Instruments Directive (MiFID II)) which together underpin what is referred to as the MiFID II framework. As part of the onshoring process, the MiFID II framework was amended to address deficiencies arising as a result of the UK's withdrawal from the EU and the end of the Transition Period.
- 62 The UK played a significant role in designing the MiFID II framework, and the government believes that the resilience and effectiveness of the UK's capital markets has been significantly strengthened by the post-crisis reforms that it implemented. Although the regime is working well in many areas, the EU approach to regulation - where the same rules apply across member states in order to facilitate a single market in financial services - means that MiFID II framework requirements are not calibrated solely for UK markets. In some areas, it has not delivered its intended benefits, has led to duplication and excessive administrative burdens for firms, or has stifled innovation. Following the UK's exit from the EU, in July 2021, the government launched the Wholesale Markets Review (WMR) consultation with the aim of creating a simpler and less prescriptive regime that meets the needs of UK markets while maintaining high regulatory standards.
- 63 The Bill delivers the priority measures identified through the WMR consultation and aims to improve competitiveness and increase the flexibility of wholesale markets regulation by making nine sets of changes to the MiFID II framework.

1. Removing the Share Trading Obligation (STO)

- 64 Shares can be traded over-the-counter (OTC), where contracts are traded directly between two parties, or on a trading venue. Trading venues help to ensure fair and orderly trading as they communicate price information for the instruments that are available to trade on the venue. This helps investors to make well informed decisions and increases market transparency.
- 65 The MiFID II framework includes two types of trading venues where shares can be traded: regulated markets (RMs) and multilateral trading facilities (MTFs). Both are multilateral systems where multiple third-party buying and selling interests in financial instruments interact in accordance with non-discretionary rules.
- 66 The onshored Share Trading Obligation (STO) requires firms to trade shares admitted to trading on a UK RM, MTF, systematic internaliser or an overseas venue assessed as

equivalent. It had been implemented by the EU with the aim of increasing transparency in share trading, however there is no evidence that it has achieved this. In fact, evidence suggests that it can prevent firms from accessing the most liquid markets and therefore achieving the best price for investors.

- 67 In December 2020, the FCA announced that it would use its Temporary Transitional Power (TTP) under Part 7 of FSMA 2000 (Amendment) (EU Exit) Regulations 2019 to give a transitional direction modifying the STO. This allows firms to continue trading shares on EU trading venues or systematic internalisers from the end of the implementation period in the absence of an equivalence determination. This approach has allowed firms operating in the UK to continue to access the most liquid markets and get the best outcomes for themselves and their clients when trading European Economic Area (EEA) shares (regardless of the currency they are seeking to trade in).
- 68 The Bill removes the STO so that firms can trade shares on any trading venue in the UK or overseas with any counterparty or on an OTC basis. This is intended to ensure that investors can get the best price for their trade.

2. Replacing the pre-trade transparency waiver regime and removing the Double Volume Cap

- 69 The MiFID II framework requires trading venues and systematic internalisers to publish details about bids and offers before a trade has been completed. This is known as pre-trade transparency. Pre-trade transparency helps ensure an efficient price discovery process, but in some instances, it can impair liquidity. For example, market participants can use pre-trade information to increase their prices or create a shortage of shares, which can result in false indications of liquidity. This can have a negative impact on price formation.
- 70 To mitigate this, MiFIR includes four pre-trade transparency waivers for equity and equity-like instruments, which firms can use to avoid publishing offered, executable quotes before a trade has been completed. These are:
- a. the reference price (RP) waiver, which can be used where a trading venue matches orders for an equity instrument based on the midpoint between current bid and offer prices¹ of the trading venue where that instrument was first admitted to trading or the most relevant market in terms of liquidity²;
 - b. the negotiated trade (NT) waiver, for transactions that are negotiated bilaterally but are reported on venues;
 - c. the large in scale (LIS) waiver, for orders considered large-in-scale against normal market size; and
 - d. the order management facilities waiver, for orders held in an order management facility of a trading venue pending disclosure.
- 71 MiFIR also introduced a mechanism to limit the amount of trading that happens under the reference price and negotiated trade waivers: the Double Volume Cap (DVC).
- 72 The Bill revokes the existing system of waivers from pre-trade transparency requirements and instead gives the FCA new rule-making powers to determine under which circumstances waivers are available and any conditions that are to be attached to their use. This will allow

1 The midpoint is the price midway between the lowest price at which any participant on the market is willing to sell and the highest price at which any participant on the market is willing to buy.

2 The FCA has the power under Article 4(6)(b) to make technical standards to specify the most relevant market in terms of liquidity. Pre-Brexit, the Commission exercised this power in Article 4 of Commission Delegated Regulation (EU) 2017/587.

the FCA to make evidence-based decisions about the circumstances in which waivers should apply.

- 73 As part of this change, the Bill removes the DVC from the MiFID II framework.
- 74 Research on the impact of trading without pre-trade transparency on the integrity and efficiency of markets suggests that the relationship between price formation and execution costs is complex and variable. It also shows that banning trading happening without pre-trade transparency can result in volumes moving into hybrid, trading mechanisms that do not operate under full transparency. When this happens, it is unlikely that volumes will return to transparent public markets. Furthermore, evidence shows that the use of so-called dark pools can reduce the transaction costs of large institutional orders. Removing the DVC will therefore give firms greater choice over where they trade to get the best prices for investors.
- 75 The FCA will be required to monitor UK markets in order to continue its own research into assessing the impacts of trading with no pre-trade transparency. The FCA can only intervene to limit the availability of a waiver if it considers that market integrity is impacted and must only do so having first consulted with HM Treasury. When considering intervention, the FCA must consider evidence from across the globe as to the impact of trading without pre-trade transparency.

3. Changing the definition of a systematic internaliser

- 76 Systematic internalisers are investment firms that deal on their own account (i.e., use their own capital) when executing clients' orders outside of a trading venue on a "organised, frequent, systematic and substantial basis". Because they use proprietary capital rather than that of clients or counterparties, they are considered a counterparty of the trade and therefore take on risk.
- 77 The scope of the systematic internaliser regime was originally determined on a qualitative basis. Its objective was to ensure that OTC trading in the form of systematic internalisation of order flows by investment firms could contribute to price formation. Internalisation of orders occurs when a firm executes a trade for a client using inventory the firm already has as opposed to going outside of the firm to another firm or a trading venue. The systematic internaliser regime ensured that these 'internalised' transactions were made transparent to the market. In 2018 the definition was amended, and a number of quantitative thresholds were introduced. The thresholds are calculated at different levels for each asset class and investment firms are expected to perform calculations for each financial instrument they deal in on a quarterly basis, covering the previous 6-month period, to determine if they are a systematic internaliser. The intention behind moving to a quantitative based regime was to ensure consistency across all EU member states. It has instead resulted in a very burdensome regime and to avoid the calculations, which are costly, many firms simply opt into the regime and comply with the obligations of being a systematic internaliser.
- 78 The Bill therefore reverts to a qualitative definition of systematic internaliser and gives the FCA the power to specify how the new definition should be interpreted. This will ensure that the regime is flexible, better able to account for market evolutions, and that it achieves its aim of increasing transparency and price formation, while removing unnecessary burdens on firms.

4. Removing restrictions on midpoint crossing for trades

- 79 The tick size regime sets minimum increments ("ticks") by which prices for equity and equity-like instruments can change and limits the ability of trading venues and systematic internalisers to cross at the midpoint (i.e., halfway between the buying and selling prices).

- 80 A harmonised tick size regime was introduced under the MiFID II framework to reduce the ever-decreasing increments in price seen on different trading venues. Prior to the introduction of the tick size regime under the MiFID II framework venues competed against each other with smaller and smaller price spreads to the detriment of the price formation process.
- 81 The tick size regime was originally limited to trading venues but was extended to systematic internalisers in 2020 in an attempt to create a fair balance between systematic internalisers and trading venues. It currently prohibits systematic internalisers from crossing orders at the midpoint except for orders that are large in scale (LIS)³
- 82 The government supports the tick size regime but believes that the extension of the regime to systematic internalisers does not account for the difference between systematic internalisers and trading venues, as systematic internalisers take on counterparty risk. Therefore, limiting systematic internalisers' ability to cross at the midpoint does not benefit price formation and can in some cases limit firms' ability to offer the best prices to their clients.
- 83 The Bill removes the restriction on midpoint crossing for systematic internalisers for all trades. As midpoint crossing can offer price improvements for investors, this will allow systematic internalisers to achieve the best outcome for their clients.

5. Aligning the Derivatives Trading Obligation with the EMIR Clearing Obligation

- 84 The Derivatives Trading Obligation (DTO) requires financial counterparties and some non-financial counterparties (counterparties being entities which take up opposite sides in a financial transaction) to trade certain classes of derivatives on UK authorised trading venues, or overseas trading venues that have been recognised as equivalent.
- 85 The Clearing Obligation (CO) requires certain OTC derivative contracts (as defined in the European Market Infrastructure Regulation (EMIR)) to be cleared by an authorised central counterparty.
- 86 The scope of the counterparties which are subject to the CO and DTO were intended to be aligned. In 2019 EMIR was amended to alter the counterparties in scope of the CO, but the DTO was not updated to reflect that change. This has created unintentional misalignment which has led to uncertainty and complications for firms because the scope of counterparties subject to the DTO references the definition in EMIR. To mitigate this, the FCA has been using a transitional relief to address the issue.
- 87 The Bill formally realigns the counterparties (including financial, non-financial and analogous third country entities) in scope of the DTO with those in scope of the CO in EMIR.
- 88 To ensure that misalignment is not an issue in the future, the scope of the DTO explicitly, and accurately, cross-references EMIR, so that a counterparty is within scope of the DTO if it is subject to CO (or, in the case of non-financial counterparties, if it is subject to the CO in respect of derivative contracts pertaining to the same asset classes).

6. Exempting for post-trade risk reduction services from the DTO

- 89 Post-trade risk reduction services are types of trades that are made to reduce risks in derivatives portfolios without changing the market risk of those portfolios.

³ The FCA calculates and publishes thresholds for large in scale trades.

- 90 For example, portfolio compression is where counterparties simplify derivative portfolios by terminating derivative contracts and replacing them with other derivative contract(s) of equivalent value to reduce exposure and lower costs.
- 91 Currently, transactions resulting from portfolio compression are exempt from complying with the DTO; the best execution requirement (which obliges firms carrying out investment business to obtain the best possible deal for their clients); transparency obligations; and a requirement in the FCA's Market Conduct sourcebook about the operation of multilateral systems. Although the last requirements are unrelated to the DTO, they are also contained in Article 31 of MiFIR.
- 92 Exempting more post-trade risk reduction services from the DTO, and the other obligations that portfolio compression trades are currently exempt from, could encourage their use and help reduce systemic risk. Doing so should not negatively impact price formation, because these trades are non-price forming. The Bill therefore expands the exemptions that currently apply to portfolio compression to other risk reduction services. To ensure that the right services are covered by the exemption, the Bill gives the FCA a new rule-making power to specify which post-trade risk reduction services can benefit from the exemptions listed above as well as the conditions attached to their use.
- 93 The Bill also gives the Bank of England (the Bank) a similar rule-making power, so that the same types of services can, if appropriate, be exempted from the CO as well. The Bank will be able to specify the post-trade risk reduction services that are to benefit from an exemption from the CO. The Bank and the FCA will be required to consult each other before making changes to their respective exemptions. This change aims to incentivise the uptake of post-trade risk reduction services and is intended to support market stability.

7. Giving the FCA a permanent power to modify or suspend the DTO

- 94 In December 2020, the FCA announced that it would use its TTP to modify the DTO. The FCA used the TTP to allow UK firms, EU firms using the UK's temporary permissions regime and branches of overseas firms in the UK to use EU venues when trading with an EU client who does not have access to a venue that both the UK and EU have granted equivalence to. This has limited disruption for market participants and prevented liquidity fragmentation that would have arisen from conflicting UK and EU DTOs after the end of the transition period.
- 95 The Bill gives the FCA a new, permanent power to modify or suspend the DTO, subject to HM Treasury approval, to prevent or mitigate disruption to markets. This power will allow the FCA to make changes to the DTO in respect of which counterparties it is imposed upon; which derivatives come within its scope; and the venues on which transactions must be concluded by counterparties in scope of the DTO.

8. Simplifying the transparency regime for fixed income and derivatives

- 96 The MiFID II framework includes several requirements for trading venues and systematic internalisers to provide information about pricing and volume before a trade would be completed (this is known as pre-trade transparency) and publicly disclose certain details about executed trades (this is known as post-trade transparency). These requirements apply to bonds, structured finance products, emission allowances and derivatives. An EU-wide transparency regime for fixed income and derivatives markets was only introduced in 2018 and was modelled on the transparency regime for equity markets that existed pre-2018.
- 97 Although it was amended to accommodate for the specific characteristics of non-equity markets, the way that it is calibrated does not go far enough in accounting for fundamental

differences between equity and fixed income and derivatives markets, and the different instruments that make up the latter. This has resulted in a number of bespoke illiquid instruments (where transparency does not always aid price formation and is therefore unnecessarily burdensome) falling within scope of the regime, while some liquid and standardised contracts (where more transparency would aid price formation) are not subject to transparency requirements.

- 98 The current regime also includes a number of exemptions from post-trade transparency requirements which have made the regime overly complex and costly and resulted in it being difficult for the market to view actual traded prices.
- 99 The Bill aims to reduce the complexity of the current regime and ensure that the right instruments fall within scope by delegating responsibility for calibrating the scope and firm-facing transparency requirements to the FCA.
- 100 To achieve this, the Bill removes the current regime which is set out in primary legislation and gives the FCA new rule-making powers to:
 - a. develop a qualitative and quantitative assessment to ensure that the right instruments are in scope of the pre- and post-trade fixed income and derivatives transparency regimes;
 - b. specify the circumstances where pre-trade transparency requirements should apply, and what those requirements are; and
 - c. develop a post-trade transparency regime.

9. Simplifying the position limits regime

- 101 Commodity derivatives are derivatives whose value is derived from the price of an underlying commodity (for example, crude oil or metals).
- 102 The MiFID II framework position limits regime restricts the maximum size of a net position that a person can hold in a commodity derivative contract that is traded on a trading venue, or in economically equivalent OTC contracts. Position limits were introduced with the objective of protecting against market volatility and preventing market abuse. They were intended to align with the G20's 2011 commitment to give market regulators effective intervention powers to mitigate against market abuse in commodity derivatives markets.
- 103 MiFID II also requires trading venues to establish and operate their own position management controls (for example, to monitor positions and require a person to terminate or reduce a position, if necessary, to ensure that markets function with integrity).
- 104 Although the government supports the objective of position limits and remains signed up to the G20 commitment to promote fair and effective commodities markets, it is the government's position that the scope of the current regime is disproportionate, duplicative, overly complicated, and unnecessarily prevents the build-up of liquidity.
- 105 To simplify the regime and ensure that position limits apply to the correct contracts, the Bill revokes the requirement for the FCA to apply position limits to all commodity derivative contracts that are traded on a trading venue and economically equivalent OTC contracts, and transfers responsibility for setting position limits from the FCA to trading venues.
- 106 To ensure that appropriate regulatory oversight is maintained, the Bill grants the FCA a power to develop a framework to outline how trading venues should apply position limits and position management controls. This will provide guidance on factors that venues should take account of when setting limits and granting exemptions, for example, under

which conditions they should review the case for position limits in particular contracts. It also gives the FCA the ability to require trading venues to set position limits on contracts which pose a clear threat to market integrity, and the ability to intervene directly, where absolutely necessary.

- 107 This approach is similar to the regime that was in place prior to the introduction of strict position limits in MiFID II. These changes will ensure a return to a model under which position limits are set more flexibly, as venues will have full visibility of all market positions and can respond accordingly. This is intended to enable liquidity to develop in these contracts, as well as making it easier for non-financial firms to find counterparties to accept the other side of hedging trades and therefore manage commercial risk. The changes will also ensure that protections which are necessary to protect market integrity can be kept in place, and that there will be a consistent approach to position limits governance across trading venues.

Amendments to the EU Securitisation Regulation 2017

- 108 Securitisation is the process of pooling various financial exposures (such as mortgages, car loans, or other consumer loans) to create a financial instrument that can be marketed to investors. These financial instruments are ‘tranching’, to reflect the fact that they carry different levels of risk and return to suit the appetite of different investors. This process allows lenders (such as banks) to transfer the risks of loans or other assets to other banks or investors (such as insurance firms or asset managers). This process can help free up lenders’ balance sheets to allow for further lending to the economy.
- 109 The key entities typically involved in securitisations are an originator and/or sponsor, a securitisation special purpose entity (‘SSPE’), and investors. The originator is responsible for creating or acquiring the exposures (for example, loans or receivables) to be securitised. The sponsor typically establishes and manages a securitisation programme by purchasing exposures from another entity (for example, an original lender) and transferring them to the SSPE.⁴ The SSPE purchases the exposures, packages them up, and issues securities in the market for investors to invest in. These securities are backed by payments generated by the underlying exposures.

Simple, Transparent and Standardised (STS) Securitisations

- 110 Under the UK Securitisation Regulation, certain securitisations can be designated as Simple, Transparent and Standardised (STS). Such STS securitisations are designed to make it easier for investors to understand and assess the risks of a securitisation investment by excluding more complex features. The UK STS framework is in line with international standards for Simple, Transparent, and Comparable (STC) securitisation, set by the Basel Committee on Banking Supervision (BCBS) and International Organization of Securities Commissions (IOSCO).
- 111 Some firms who invest in securitisations (in particular banks, building societies, investment firms and insurance firms) are subject to prudential regulation. Prudential regulation seeks to ensure that financial institutions have adequate financial resources and risk management processes so they can continue to provide vital services to the real economy throughout economic and financial cycles. Banks, building societies, and PRA-designated investment firms are subject to prudential requirements in the Capital Requirements Regulation and relevant PRA rules (‘CRR firms’), and some insurance firms are subject to prudential requirements under the Solvency II regime (‘Solvency II firms’). These two regimes require

⁴ Sponsors are more commonly involved in certain short-term securitisations called Asset-Backed Commercial Paper (ABCP). The securities issued by an ABCP securitisation have an original maturity of one year or less.

firms to hold capital against their exposures, including exposures to securitisations, dependent on the risk attached to them.

- 112 CRR firms and Solvency II firms who invest in STS securitisations can benefit from preferential capital treatment for these investments, compared to investing in non-STS securitisations. Preferential treatment means they can be eligible for lower capital requirements compared to other securitisations, reflecting their adherence to simple, transparent, and standardised criteria.
- 113 In order for a securitisation to be designated as STS, the UK Securitisation Regulation currently requires the originator and sponsor of an STS securitisation to be established in the UK.⁵ In addition, securitisations designated as STS under the EU Securitisation Regulation (with the originator and sponsor in the EU) before 31 December 2024 are also recognised as STS in the UK for the lifetime of the securitisation. This approach was adopted as part of the process of addressing deficiencies in retained EU law, to ensure that legislation continued to operate effectively at the point at which the UK left the EU.
- 114 Under the UK Securitisation Regulation, securitisations with originators and sponsors established outside the UK (or the EU until 31 December 2024) cannot be designated as STS. As a result, CRR firms and Solvency II firms cannot get preferential capital treatment for investing in those securitisations originated overseas, even if this is appropriate to reflect their adherence to STS criteria. This limits the availability of STS securitisations for UK investors, which can have a negative impact on their liquidity and on the STS securitisation market as a whole.

Equivalence framework for STS securitisations

- 115 Article 46 of the UK Securitisation Regulation placed an obligation on HM Treasury to review the functioning of the Regulation. As part of that review, HM Treasury was required to assess whether, in the area of STS securitisations, an equivalence regime could be introduced for overseas originators, sponsors and SSPEs. Industry respondents to HM Treasury's [call for evidence](#), as part of the review process, were supportive of the creation of such a regime to provide more choice for UK investors.
- 116 As a result, the Bill aims to increase choice for UK investors in the market for STS securitisations, by allowing for STS equivalent non-UK securitisations to be recognised in the UK, with appropriate safeguards, provided they are originated in a jurisdiction that has an equivalent framework for STS securitisations to the UK. Therefore, the Bill creates a framework under which HM Treasury can designate other jurisdictions as having an STS securitisation framework equivalent to that of the UK.

New regulatory powers

Designated activities regime

The FSMA model and the Regulated Activities Order

- 117 FSMA 2000 splits responsibilities for financial services policy and regulation across Parliament, HM Treasury, and the regulators as follows:
- a. Parliament, through primary legislation, sets the overall approach and institutional architecture for financial services regulation, including the regulators' objectives;

⁵ This applies to non-ABCP securitisations. For ABCP STS securitisations, only the sponsor is required to be established in the UK, because they are the key entity on the sell-side of an ABCP securitisation.

- b. Parliament establishes the parameters within which HM Treasury sets the ‘regulatory perimeter’ through secondary legislation, specifying which financial activities should be regulated and the circumstances in which regulation should apply;
 - c. The regulators have the statutory responsibility for setting the direct regulatory provisions that apply to firms which carry out regulated activities, using the powers given to them by FSMA 2000, and following the processes established by it;
 - d. Parliament, through FSMA 2000, sets the statutory objectives for the regulators, with requirements set in legislation to ensure appropriate accountability to Parliament, HM Treasury, and the general public.
- 118 FSMA 2000 also establishes a framework whereby any person (whether an individual or firm) can only carry out a regulated activity if that person is authorised by the appropriate regulator (i.e. is an “authorised person”) or is exempt (exemptions as specified in FSMA 2000). Under this framework, HM Treasury determines which activities are regulated activities, by specifying activities to be regulated in FSMA 2000 (Regulated Activities) Order 2001 (RAO). Regulated activities include many of the kinds of activities which are carried out exclusively by banks, insurers, and investments firms, and involve providing financial services to the public, such as accepting deposits or offering investment services.
- 119 Firms wishing to carry out a regulated activity must apply to the appropriate regulator for authorisation to do so, and the regulator must assess applications in line with the requirements established in FSMA 2000, which can include considerations of suitability and business models.
- 120 FSMA 2000 gives the PRA and the FCA general rule-making powers, which allow them to make rules which apply to authorised persons, for the purpose of advancing one or more of their statutory objectives. The regulators are required to maintain arrangements for supervising authorised persons, and also have powers to monitor and enforce compliance with the rules.
- 121 Many activities which are currently regulated directly in retained EU law are already regulated activities under FSMA 2000. When retained EU law is revoked, these ‘regulated activities’ will continue to be regulated, in line with the existing FSMA model described above.

The regulation of financial markets

- 122 Financial markets represent the intersection between financial services firms and the wider economy. Engaging with these markets can include activities like listing a company’s shares on an exchange, entering into a derivative contract, or engaging in market activities such as short selling. These activities are carried out by a wide range of persons, many of whom are not typically considered to be financial services firms, and who are not authorised by the regulators.
- 123 As an example, a large number and wide range of businesses across the economy enter into derivatives contracts. They are often used by businesses to manage the risk of price fluctuations. These businesses can be complex financial services firms or non-financial businesses operating in the real economy. For example, a car manufacturer may enter into metal derivative contracts as a way of protecting itself against a rise in the price of the metals that it needs to purchase at a later date.
- 124 Many activities related to financial markets came to be subject to EU law as a response to the global financial crisis. These activities need to continue to be subject to rules when retained EU law has been revoked. Bringing these activities inside the current framework

for regulated activities through the RAO would not be appropriate, as it would require all businesses and individuals engaging in those activities to become authorised persons, and to be supervised as if they are offering financial services directly in the way described above. This would be a disproportionate burden on those firms.

- 125 Therefore, this Bill enhances the financial services regulatory framework in FSMA 2000 by ensuring that activities relating to financial markets can continue to be regulated in a manner which is suited to these kinds of activities.

The Designated Activities Regime

- 126 The Bill creates the Designated Activities Regime (DAR) to allow activities related to financial markets to be regulated within a framework which is compatible with a comprehensive FSMA model.

127 The Bill:

- a. Establishes a framework within FSMA 2000 which sets the overall structure and powers for regulation and applies the relevant regulatory objectives and principles.
- b. Sets a prohibition against carrying out ‘designated’ activities, or stipulates that they must take place in accordance with the relevant rules;
- c. Provides a power for HM Treasury to designate activities relating to financial markets, exchanges, instruments, products, or investments, in secondary legislation, so that relevant activities can be brought inside this framework. This is modelled on the RAO but this power will also enable HM Treasury to set some requirements directly, and to indicate where the activities must be performed in line with rules made by the FCA;
- d. Provides a rule-making power for the FCA, which will enable them to make rules in relation to designated activities within the accountability and objectives framework for financial services regulators set by Parliament.

Designation of activities

- 128 The DAR will enable HM Treasury to designate activities related to financial markets exchanges, instruments, products, or investments, in order to bring them into regulation. Where an activity has been designated, anyone conducting that activity will be required to follow the rules for that activity, unless they are exempt.

- 129 Initially, the government expects most designated activities to be activities which are currently regulated through retained EU law. This is an ongoing power similar to the power to bring activities in the RAO, and so the Bill enables HM Treasury to designate any activity that relates, or is connected to, financial markets or exchanges of the United Kingdom, or to financial instruments, financial products, or financial investments issued or, or sold, to persons in the United Kingdom (which can include cryptoassets).

- 130 When designating an activity, HM Treasury will be able to make regulations relating to the performance of that activity, including prohibiting the activity in its entirety, or setting direct requirements.

- 131 As part of these regulations, HM Treasury will have the ability to stipulate where the FCA may make rules relating to the performance of a designated activity. Where the FCA is empowered to make rules, the FCA can make rules relating to the designated activity, or to specified matters relating to the designated activity, and not the wider unrelated activities of those carrying out the designated activity. When making rules relating to a designated

activity the FCA will be required to do so within a wider overall policy framework set by government and Parliament.

- 132 This differs from the rule-making powers over authorised persons in section 9A of FSMA 2000, which enables the FCA and the PRA to make any rules over authorised persons, including in relation to activity which is not a regulated activity, provided that they consider this necessary or expedient to advance their objectives.
- 133 When making designated activity regulations, HM Treasury will also have the power to set the appropriate monitoring and enforcement framework to allow for the effective regulation of each activity. This will include the ability to confer monitoring and enforcement powers on the FCA for each designated activity, including the power to require the supply of information. HM Treasury may make such provision for enforcement by applying the existing provisions of FSMA 2000 (with or without modifications), including any existing criminal offences within FSMA 2000. This includes the ability to widen the scope of such offences.

Financial market infrastructure: general rules and requirements

Financial market infrastructure

- 134 In financial markets, there are various processes that need to be performed to complete each transaction. These processes are performed by several different types of entity, many of which are collectively referred to as financial market infrastructure (FMI).
- 135 Each type of FMI performs a vital function in supporting financial markets. This ranges from collecting data on financial transactions, to performing unique services to enable firms active in financial markets to meet their regulatory obligations.
- 136 These entities are regulated in a way that reflects these unique functions, recognising the significant impact that their failure or malfunction could have on the financial markets that they support. Many of the regulatory frameworks for FMI currently sit, in whole or in part, in retained EU law.

FMI and regulator rule-making

- 137 In order to establish a comprehensive FSMA model, the regulators need the appropriate powers to make rules when retained EU law is revoked. That includes the ability to make rules for FMI and the appropriate powers to supervise and oversee them.
- 138 The Bill therefore introduces a general rule-making power for the Bank of England (the Bank) in relation to two types of FMI, central counterparties (CCPs) and central securities depositories (CSDs), so that it can take on primary responsibility for setting regulatory requirements for these entities.
- 139 The Bill also gives the FCA general rule-making powers over another two types of FMI, Data Reporting Services Providers (DRSPs) and Recognised Investment Exchanges (RIEs).

Regulation of CCPs and CSDs by the Bank of England

- 140 Firms use CCPs to reduce certain risks that arise when entering into financial transactions with other parties, such as derivative transactions or buying and selling securities. CCPs sit between the buyers and sellers of financial contracts, providing assurance that the obligations under those contracts will be fulfilled. Instead of holding the contract with each other, the buyer and seller each hold their side of the contract with the CCP instead. The process of transacting through a CCP is known as “clearing”.

141 CSDs hold financial instruments (securities), such as shares, and play a key role at the center of financial markets by enabling securities to be issued (through creating the record of a security on their ledgers), settled (by updating their records to reflect the transfer of securities between market counterparties) and maintained (performing administrative tasks relating to securities, such as the processing of dividend payments).

Bank of England rule-making powers

142 At present, the Bank has limited powers to set direct regulatory requirements on these firms as these requirements sit in retained EU law. The most relevant pieces of retained EU law in this area are the European Market Infrastructure Regulation (EMIR) and the Central Securities Depositories Regulation (CSDR). These regulations implemented international standards within EU law and set out a comprehensive regime for these entities.

143 The Bill introduces a general rule-making power for the Bank over CCPs and CSDs so that it can take on primary responsibility for setting regulatory requirements for these entities. This sits alongside an adjusted set of statutory objectives and principles to ensure that the Bank considers the appropriate public policy objectives when exercising this power. The Bill updates the framework that sits around the power in order to strengthen the Bank's accountability to Parliament, its relationship with HM Treasury and its engagement with stakeholders. The Bill also provides the Bank with a power to impose requirements on individual CCPs and CSDs (which is similar to the FCA's and the PRA's ability to impose requirements on the firms they regulate under sections 55L and 55M of FSMA 2000).

144 The Bill also establishes the concept of a "systemic third country CCP". It enables the Bank to establish whether an overseas CCP is a systemic third country CCP, in accordance with the criteria of general application that HM Treasury has set out in secondary legislation, as well as any detailed provisions that the Bank sets out in a statement of policy which specify further how the HM Treasury criteria will be applied. HM Treasury intends for the criteria it sets out in secondary legislation on what constitutes a systemic third country CCP to be high-level and not more detailed or prescriptive than the current framework set out in Article 25(2a) of UK EMIR. The Bank will then be able to set out more detailed considerations in a statement of policy as it does now. This could include, where appropriate, more detailed quantitative or qualitative criteria. This would allow the Bank to continue to operate its tiering framework as set out in its policy statement of 30 June 2022.

145 Where the Bank has determined a firm to be a systemic third country CCP, the Bill then provides the Bank with the power to apply its domestic rulebook, in part or entirely, to these firms. These powers allow for the Bank to maintain the effect of the existing framework where certain CCPs headquartered outside the UK may be subject to UK rules if they are deemed systemically important.

146 The Bill also allows for HM Treasury to grant the Bank further powers to apply domestic rules to non-systemic overseas CCPs and CSDs, should it deem it necessary in the future.

Regulation of FMI by the Financial Conduct Authority

Data Reporting Service Providers

147 Data Reporting Services Providers (DRSPs) are a type of FMI. They are commercial entities that allow investment firms to fulfil their regulatory reporting obligations. There are three types of DRSPs:

- a. Approved publication arrangements (APAs): APAs publish trade reports on behalf of investment firms, which are required to publish information, such as price and size of

executed trades they perform, so that market participants can use such information to make informed investment decisions. They are required to publish this information as near to “real time” as possible. If a trade occurs on a trading venue, then the information is automatically made public. If a trade happens off-exchange, then an investment firm must disclose the trading information themselves or use an APA to do so.

- b. Approved Reporting Mechanisms (ARMs): ARMs report details about transactions to the FCA on behalf of investment firms, for market surveillance purposes. This information is not made public.
 - c. Consolidated tape providers (CTPs): CTPs collate trading data for financial instruments from a variety of sources, including APAs and trading venues, and consolidate them into a continuous electronic live data stream. This data stream provides price and volume information for each financial instrument. This data can help market participants to make informed investment decisions.
- 148 Many of the rules that govern DRSPs are set out in the Data Reporting Services Regulations 2017 (DRSRs), which were introduced to transpose parts of the second Markets in Financial Instruments Directive (MiFID II), an EU Directive, into UK law. The DRSRs include rules that apply directly to the DRSPs themselves, including those relating to authorisation and operating requirements (for example how DRSPs collect and disseminate data, and the need for effective governance procedures). The DRSRs also establish the FCA’s supervision and enforcement powers in relation to DRSPs. As part of the onshoring process, the DRSRs were amended to address deficiencies arising as a result of the UK’s withdrawal from the EU and the end of the transition period.
- 149 DRSPs currently sit outside of the core FSMA 2000 authorisation regime and the FCA does not have any rule-making powers over them, except for some limited powers in respect of technical standards, which are not sufficient to replace the rules currently in retained EU law.
- 150 The Bill therefore gives the FCA a general rule-making power in relation to DRSPs to enable the FCA to replace the provisions in retained EU law relating to the regulation of DRSPs, and to ensure that the FCA has an effective way of upholding and enhancing standards in the future. This will allow the FCA to act as the market evolves, including through the trading of new types of asset classes and trading that uses new forms of technology.
- 151 The rule-making power will also help ensure that the FCA has the necessary tools to facilitate the development of a consolidated tape.

Recognised Investment Exchanges

- 152 A Recognised Investment Exchange (RIE) is a multilateral system which brings together multiple third-party buying and selling interests in financial instruments in accordance with non-discretionary rules. They are managed and/or operated by a market operator.
- 153 RIEs are one of three types of trading venue. The other types are multilateral trading facilities (MTFs) and organised trading facilities (OTFs)
- a. MTFs: Like RIEs, MTFs are multilateral systems which bring together multiple third-party buying and selling interests in financial instruments via a system with non-discretionary rules. Whereas RIEs are managed and/or operated by a market operator, MTFs can be operated by an investment firm or a market operator.
 - b. OTFs: OTFs are also multilateral systems that facilitate the bringing together of multiple third-party buying and selling interests and can also be operated by an

investment firm or market operator. Unlike RIEs and MTFs, the execution of orders on an OTF is carried out on a 'discretionary basis', where the market operator takes an active role in managing trades.

- 154 RIEs currently sit outside of the core FSMA 2000 authorisation regime and the FCA has limited rule-making powers over them because, prior to EU exit, the regulations relating to them were largely set at EU level through the Markets in Financial Instruments Regulation (MiFIR). MiFIR is one of two pieces of EU legislation (the other being MiFID II) which together underpin what is sometimes referred to as the MiFID II framework. As outlined above, as part of the onshoring process, the MiFID II framework was amended to address deficiencies arising as a result of the UK's withdrawal from the EU and the end of the Transition Period.
- 155 The lack of wider rule-making powers over RIEs is a problem because as part of the Future Regulatory Framework (FRF) Review the government intends, as a general approach and over time, to revoke the direct regulatory requirements in EU-derived regulation that apply to firms to enable the appropriate regulator to set their own rules. This is to ensure that the regime is proportionate and flexible. Without these proposed new powers, it will not be possible for the FCA to adequately replace the regulatory requirements that relate to these entities.
- 156 This Bill therefore gives the FCA a general rule-making power over RIEs to enable the FCA to:
- a. replace the provisions in retained EU law relating to the regulation of RIEs; and
 - b. ensure that the FCA has an effective way of upholding and enhancing standards in the future.
- 157 This is important to future-proof the regime and mitigate risks as the market evolves, including as the market continues to incorporate the trading of new types of asset classes and embrace new forms of technology.

Financial market infrastructure: regulatory sandboxes

- 158 The Bill enables HM Treasury to set up one or more Financial Market Infrastructure (FMI) sandboxes, which will enable participating firms to test and adopt new technologies and practices. An FMI sandbox will do this by enabling participating firms to be subject to temporary modifications to legislation, where that legislation does not currently accommodate such activities or is ambiguous as to whether or not it can be accommodated. HM Treasury will also be able to make permanent changes to legislation, via statutory instrument (subject to the affirmative procedure where primary legislation is being changed), on the basis of what is learned in each FMI sandbox, having first reported back to Parliament.
- 159 FMI play a crucial role at the center of financial markets, providing the platforms, networks and processes that facilitate the trading, clearing, settling, reporting and administration of securities transactions. A number of FMI are considered systemically important, meaning their failure could lead to financial instability and/or disrupt the effective functioning of the market, with subsequent negative impacts on the real economy (for example, if a transaction fails to settle in time, this can add cost and inconvenience to both financial and real economy participants). It is therefore crucial that there is a robust, regulatory framework that ensures risks are properly managed, but that is also able to be flexible in the face of technological change.
- 160 At the same time, it is important that FMI can innovate and adopt new technologies or practices, which could enable both FMI and the firms which use them to reduce their

operating costs and perform in new and more efficient ways. It could also improve the resilience of FMI, to the benefit of financial stability. Effective competition and innovation can enable more agile companies to better meet customer needs and challenge incumbents by providing improved services.

- 161 A particular example of a new technology is Distributed Ledger Technology (DLT), which is a form of database technology that digitally records transactions across multiple ledgers at the same time. The data on these ledgers is replicated simultaneously or in rapid succession, shared and synchronised to achieve a form of decentralised consensus across the network. The ledger is an immutable record of all the transactions that have taken place within the network previously and is therefore capable of providing a high degree of certainty in transactional data, which is a key legal requirement of FMI.
- 162 Technology, such as DLT, could potentially provide greater efficiency, transparency and overall resilience in the performance of FMI. It could fundamentally change the role of intermediaries operating within the securities trading, clearing, and settlement cycle, for instance, particularly if activities currently performed by separate FMI can all be performed on the same ledger.
- 163 This may not always have desirable policy outcomes, given that intermediaries provide useful checks and balances that protect investors, maintain regulatory compliance and preserve the resilience of FMI. The benefits and suitability of DLT in financial markets has not yet been proven, particularly when compared to more conventional IT systems. The role of FMI will need to evolve with new technology, like DLT, to safeguard the benefits of the current system, while also ensuring that the potential benefits of innovation are captured.
- 164 It is not always clear what legislative changes will most effectively support FMI in their safe use of new and developing technologies or practices. In 2021, HM Treasury conducted a [Call for Evidence](#) to examine the application of DLT to FMI. A key issue identified in responses to the Call for Evidence was that the UK legislative framework is not designed to support the use of DLT in FMI, and that an evaluation of the legislative framework would be needed to enable the use of DLT and to realise its potential benefits while ensuring regulatory objectives around their safety and robustness are met. While responses identified many areas of legislation that may need changing in future, it is not fully clear what legislative and regulatory changes are needed and how these should be made. Responses to the Call for Evidence identified a need to experiment with the use of DLT in markets, so that HM Treasury, regulators, and industry can better understand the impacts of emerging technologies, like DLT, to ensure that regulatory objectives are met, and in particular to understand what changes should be made to the FMI legislative framework to support the effective and safe adoption of DLT.
- 165 The use of sandboxes was highlighted as a key method of doing this. The term “sandbox” has been applied in different ways, both in and outside of financial services. Broadly, it is a term used to refer to a safe space in which to experiment and learn, and in some circumstances test new technology. In 2016, the FCA launched its “Regulatory sandbox”, which allows businesses to test new technologies and products in financial markets, in a controlled manner and with close regulatory oversight, within existing legislative frameworks. In addition to helping firms navigate the authorisations process, the FCA provides firms in the sandbox with informal steers to help them understand the potential regulatory implications of their business model.
- 166 After the Call for Evidence, the government committed in April 2021 that HM Treasury in conjunction with the Bank of England (the Bank) and the FCA would develop an FMI sandbox to allow technology to be trialed by FMI. These measures are intended to allow FMI to test whether and how they can use new technology or new practices to perform

specific activities and to test its compatibility within the existing legislative framework in an effective, efficient, and safe way.

- 167 The Bill provides HM Treasury with powers to set up an FMI sandbox for the purposes of testing the carrying on of FMI activities with new technology or practices. FMI entities (i.e., the type of entity allowed to participate in an FMI sandbox) include, for example, existing recognised CSDs, and operators of multilateral trading facilities (MTFs), though it could include other categories of FMI in future. The scope of the FMI sandbox powers is intended to be sufficiently flexible to enable different FMI sandboxes to be established in future to test different technologies and practices for different entities and activities.
- 168 HM Treasury will be able to temporarily disapply or modify relevant legislation relating to the regulation of FMI (defined as ‘relevant enactments’ in the Bill) and to allow FMI entities to innovate, within the scope of the activities they have been authorised to carry out, in an FMI sandbox. The full list of legislation in scope, which can be amended, is included on the face of the Bill in clause 17(3), and includes retained EU law before it is revoked. This includes:
- a. elements of retained EU law, such as the UK Central Securities Depositories Regulation 2014 (CSDR), the Markets Abuse Regulation 2016 (MAR) and the UK Markets in Financial Instruments Regulation 2014 (UK MiFIR);
 - b. legislation implementing UK law, such as the Settlement Finality Regulations 1999 (SFRs); and
 - c. other UK legislation, such as the FSMA 2000 and the Uncertificated Securities Regulations 2001 (USRs).
- 169 HM Treasury will have the ability to add to the legislation in scope of the FMI sandbox using secondary legislation. HM Treasury intends to consult industry on the proposed temporary modifications to legislation which would be tested in the FMI sandbox. FMI entities will be required to apply to the regulators in order to participate in the FMI sandbox, and a limited number of FMI entities would be selected to participate. An FMI sandbox will be created by a statutory instrument, and a full impact assessment will be provided as and when that occurs. It is intended that each statutory instrument will set out:
- a. The relevant legislation to be modified or disapplied.
 - b. The activities that FMI are permitted to undertake in an individual FMI sandbox. For example, HM Treasury may choose to include securities issuance, settlement and maintenance in scope of an FMI sandbox, activities currently performed by CSDs. Temporary modifications to legislation could enable participants of an FMI sandbox to perform these activities using DLT. HM Treasury could also allow certain activities that are currently performed by separate FMI to be combined into one entity within an FMI sandbox. For instance, an FMI sandbox could potentially allow a trading venue to perform securities issuance, settlement and maintenance (in addition to trading), while under current legislation these activities may only be performed by a CSD.
 - c. Requirements and restrictions for participants in an FMI sandbox. This could include the types of securities that FMI participants will be allowed to issue/trade/settle, and in what quantities.
 - d. The role of the regulators in running an FMI sandbox and what enforcement powers they will have.

- e. The duration of an FMI sandbox. The powers enable HM Treasury to set the desired timeline in secondary legislation. HM Treasury will have the power to terminate an FMI sandbox sooner at its discretion and ensure there is a smooth transition for participating firms between being subject to the temporary modifications to relevant enactments within an FMI sandbox and provisions adopted permanently outside an FMI sandbox in general legislation.
 - f. What processes participants in an FMI sandbox will have to put in place to either wind-down its activities by the end of a sandbox or what process they will need to put in place to continue their activities outside an FMI sandbox on a permanent basis, to the extent that they are authorised to do so.
- 170 Aside from where legislation has been modified or disapplied to accommodate new technology and new practices, participants in an FMI sandbox would otherwise be required to comply with all other existing, relevant legislation and regulator rules that apply to the activity they are undertaking.
- 171 For each FMI sandbox, the regulators will provide information and assistance to enable HM Treasury to produce a report assessing whether technology and practices tested in the sandbox had been successful. The performance of an FMI sandbox will be reported to Parliament and, if deemed successful, HM Treasury may make permanent legislative changes in general law, via statutory instrument subject to the affirmative procedure, to enable FMI to use that new technology or new practices outside of an FMI sandbox. HM Treasury may consider whether further consultation is needed with industry when making legislation permanent. It is possible that permanent legislative changes may be broader or vary from the modified legislation within an FMI sandbox, subject to the technology or practices being tested and assessed as intended.
- 172 HM Treasury will be able to ensure that transitional arrangements are in place which would allow successful FMI participants, with appropriate authorisation, to transition from an FMI sandbox to providing the same or similar authorised services outside of the FMI sandbox as part of the permanent FMI regulatory framework under general law. This will provide continuity and will prevent the risk that FMI participants would need to stop providing services until permanent legislative changes are made. HM Treasury and the regulators will be able to put in place arrangements to ensure the successful wind-down of a participant, where that participant does not intend to or will not be permitted to operate outside an FMI sandbox.
- 173 The success of any FMI sandbox will be contingent on a high level of cooperation between the regulators, in large part because an FMI sandbox could entail FMI entities regulated by one regulator engaging in activities that are regulated by another regulator. For example, operators of MTFs proposing to use DLT for settlement, are currently supervised by the FCA but the performance of CSD-type settlement activities within an FMI sandbox are currently supervised by the Bank. Critical to the success of the FMI Sandbox will be ensuring that there is neither duplication nor gaps in the legal and regulatory oversight of FMI entities.
- 174 The government's approach to establishing FMI sandboxes is intended to strike a balance between providing a sufficiently flexible, yet secure, environment to identify how emerging technologies (such as DLT) and new practices can operate within a particular framework of legislation. It will enable permanent changes to legislation to be made where appropriate. This measure will also ensure an appropriate level of Parliamentary scrutiny is maintained.

Powers in relation to critical third parties

- 175 Regulated financial services firms and financial market infrastructures are increasingly outsourcing important services to third parties outside the financial services regulatory perimeter. For example, many firms are frequently using a small number of third parties to provide cloud services. Cloud services are digital platforms infrastructure that are hosted by a third party that firms use to support their own business. Where many firms use the same third party to support services that are important to the economy, failure of this ‘critical’ third party could result in significant negative impacts on the functioning of the financial services sector – for example, by disrupting the ability of businesses and individuals to make payments or withdraw funds. The Bank, the PRA and the FCA have powers that are designed to allow them to mitigate serious risks to the financial services sector, but these powers are largely restricted to regulated financial services firms. The regulators can impose requirements on regulated financial services firms designed to limit their risk of failure or disruption, and improve resilience. However, the regulators have no equivalent powers in relation to critical third parties.
- 176 The Bank, the PRA and the FCA can impose *indirect* obligations on third parties, by requiring firms to incorporate resilience requirements in contracts with these entities. But the nature of the relationship between firms and critical third parties mean indirect contractual obligations are often difficult to enforce, as a small number of critical providers are dominant in the market, so firms may find it difficult to influence these providers, or to find an alternative provider that is more resilient. The Bank and the PRA can also impose *direct* requirements on third parties, but these are insufficient because they only relate to third parties to payment systems.

Designating critical third parties

- 177 The Bill addresses the issue by enabling HM Treasury to designate certain third parties as ‘critical’ and giving the Bank, PRA and FCA the ability to directly oversee critical services provided to regulated firms and financial market infrastructures by designated critical third parties. This will allow the regulators to intervene to raise the resilience of these services and reduce the risk of systemic disruption in the finance sector.
- 178 The Bill will enable HM Treasury to designate third parties as critical on the basis of the following criteria:
- a. the materiality of the services which a third party provides to firms; and
 - b. the number and type of firms which use a third party.

- 179 HM Treasury will have to consult the Bank, the PRA or the FCA before designating a critical third party. In practice, designation will generally follow a recommendation from the regulators. Before designating critical third parties, HM Treasury must take representations from potential critical third parties and may consult others with an interest. Designation will itself be made by secondary legislation as the list of critical third parties will change over time.

Oversight by the financial services regulators

- 180 The Bill will give the Bank, the PRA and the FCA powers to make rules, gather information, and take limited enforcement actions in respect of the services that critical third parties provide to regulated finance firms and financial market infrastructures. All three of the Bank, PRA and FCA will be granted these powers because critical third are relevant to each of their objectives. To ensure alignment, the regulators will be required to consult one another before issuing rules, gathering information or taking enforcement action. The Bank, the PRA and the FCA will shortly publish a Discussion Paper setting out how they would

exercise these new oversight powers in practice, and how they would make recommendations to HM Treasury on potential critical third parties.

- 181 The rule-making powers granted to the Bank, the PRA and the FCA will enable them to introduce resilience standards and resilience testing for the services critical third parties provide to regulated finance firms and financial market infrastructure. Resilience standards will enable minimum levels of resilience to be set, and resilience testing will allow the regulators to evaluate whether resilience standards are met in practice. The information-gathering powers granted to the Bank, the PRA and the FCA will enable them to request documents and appoint an independent third party to provide a view on services critical third parties provide to regulated finance firms, as well as to undertake investigations of potential contraventions.
- 182 The enforcement powers granted to the Bank, the PRA and the FCA under the Bill will enable them to take action if rules or information-gathering requests are not complied with. The Bill provides for a range of enforcement actions appropriate to the nature of this new regime. This will include the ability to direct a critical third party to remediate failings or publish a statement noting the critical third party has failed to comply with requests. As an ultimate sanction, the Bank, the PRA and the FCA will have the disciplinary power to prevent a critical third party from providing new or current services to the financial services sector, or set conditions on the provision of those services, where such action will not harm the UK's financial stability or any of the regulators' objectives.

Regulatory gateway for approving financial promotions

- 183 A financial promotion is a communication that contains an invitation or inducement to engage in a financial product or service. Such communications can take a wide variety of forms, including advertisements placed through print, broadcast or online media; marketing brochures; direct mail; or use of social media. Financial promotions are often consumers' first contact with an investment opportunity and so can have a significant influence over the financial decisions they make.
- 184 The financial promotions regulatory regime in the UK seeks to ensure that consumers are provided with clear and accurate information that enables them to make appropriate decisions for their individual circumstances. Under the current regime, financial promotions communicated by unauthorised firms (i.e., firms that are not authorised to carry out a regulated activity by the FCA or the PRA) must be approved by firms that are authorised by the FCA or the PRA, unless the promotion is otherwise subject to an exemption.
- 185 Authorised firms have a responsibility to ensure that any financial promotions they approve are compliant with relevant FCA rules, helping to protect consumers from potentially harmful promotions.
- 186 Currently, any authorised firm can approve any financial promotion of an unauthorised firm and there is no specific suitability test or assessment that the authorised firm has to meet in order to do so. This gives rise to three risks:
- a. An authorised firm can approve the financial promotion of another firm operating in an area in which the authorised firm has no specific expertise;
 - b. Some authorised firms may approve the financial promotions of unauthorised firms without undertaking sufficient due diligence around the firm or the promotion; and
 - c. It acts as an obstacle to the FCA in exercising appropriate regulatory oversight of those firms that are approving the financial promotions of unauthorised firms. For example, firms are not currently required to notify the FCA when they are approving

the financial promotions of unauthorised firms. The FCA therefore often only finds out about financial promotions that do not meet its rules via complaints or reports. This means that the FCA often only becomes aware of the potential for harm after it has occurred.

- 187 These risks can result in significant harm to consumers, including investor loss, re-direction of investment away from more appropriate products, and a loss of consumer confidence in the financial services sector.
- 188 To address this, the Bill establishes a regulatory “gateway”, which authorised firms must pass through before being able to approve the financial promotions of unauthorised firms. Any authorised firm wishing to approve the financial promotions of unauthorised firms will first need to obtain the permission of the FCA. The FCA will also be able to place limitations on the types of promotions authorised firms will be able to approve, for example, restricting firms to approving financial promotions in their field of expertise.
- 189 The regulatory gateway aims to improve the quality of financial promotions communicated by unauthorised firms, by allowing only those authorised firms that the FCA assesses as suitable and with sufficient expertise to approve the promotions of unauthorised firms. It will also give the FCA greater oversight of the approval of financial promotions and reduce the number of authorised firms that are able to undertake such approvals.

Digital settlement assets

- 190 Cryptoassets are a digital representation of value or contractual rights that can be transferred, stored or traded electronically, which may (though do not necessarily) utilise cryptography or distributed ledger technology. No internationally agreed definition, taxonomy or classification currently exists.
- 191 In January 2021, HM Treasury launched a consultation and [call for evidence](#) on the UK’s regulatory approach to cryptoassets. This sought views on how the government and regulators can ensure that the UK’s regulatory framework is equipped to harness the benefits of new technologies, supporting innovation and competition, whilst mitigating risks to consumers, market integrity and financial stability.
- 192 This consultation proposed a staged and proportionate approach to regulation, which is sensitive to risks posed and responsive to new developments in the market. In particular, it highlighted that certain forms of cryptoassets, known as “stablecoins” had the potential to develop into a widespread means of payment, and potentially deliver improvements for payment transactions.
- 193 HM Treasury’s response to the [consultation](#), published in April 2022, outlined the government’s intention to bring stablecoins, where used as a means of payment, into the regulatory perimeter.

Stablecoins

- 194 Stablecoins are a form of cryptoasset which aim to maintain a stable value relative to other assets. Design features vary, including how the stablecoin is backed or stabilised (for example, with financial assets or using an algorithm to increase or decrease the supply as needed to maintain a stable price).
- 195 Stablecoins which reference their value in relation to fiat currencies can be seen as more akin to traditional payment instruments, than other types of cryptoassets such as those used primarily as a means of investment (for example, Bitcoin). Depending on the specific way that they are designed, stablecoins may already be subject to UK financial services regulation, though many currently are not in scope.

196 This Bill brings activities facilitating the use of certain stablecoins, where used as a means of payment, into the UK regulatory perimeter primarily by amending the existing electronic-money and payment system regulatory frameworks. Through this approach, the government has sought to reflect the [Financial Stability Board's recommendations](#) on the regulation, supervision and oversight of global stablecoin arrangements, and the CPMI-IOSCO consultation report on the application of the Principles for Financial Market Infrastructures to stablecoin arrangements, and will leave room to update the regulatory framework as international standards are developed.

197 Separately, the government intends to launch a consultation on its regulatory approach to wider cryptoassets beyond stablecoins used for payments, including those primarily used as a means of investment (such as Bitcoin) later in 2022.

Electronic money and payments legislation

198 Electronic money is, broadly, monetary value as represented by a claim on the issuer which is: stored electronically, including magnetically; issued on receipt of funds; and used for the purposes of making payment transactions. Although stablecoins have similar characteristics to electronic money, they often, due to their characteristics, fall outside of scope of the payments regulatory regime. This is out of step with the government's stated objective of ensuring that activities that involve the same risk have the same regulatory outcome.

199 Electronic money is currently regulated by the FCA under the Electronic Money Regulations 2011 (EMR 2011), which includes authorisation and supervision of the business of electronic money institutions. There are other forms of payment services regulated under the Payments Services Regulations 2017 (PSR 2017), such as money remittance. Together, this legislation provides powers to the FCA to regulate and supervise firms engaged in relevant payment activities. The FCA regulates payment and electronic money institutions, and is responsible both for conduct and prudential regulation of these institutions.

200 The Banking Act 2009 and Financial Services (Banking Reform) Act 2013 (FSBRA 2013) provide the Bank of England (the Bank) with power and responsibility for regulation of systemically important payment systems and service providers to those payment systems, and the Payment Systems Regulator (PSR) with power and responsibility for the economic regulation of payment systems, respectively. In the case of the Banking Act 2009, the Bank regulates and supervises systemic payment systems following a recognition decision made by HM Treasury. Similarly, in the case of the FSBRA 2013, the PSR regulates payment systems following a designation process made by HM Treasury.

Bringing digital settlement assets into the regulatory perimeter

201 This Bill gives HM Treasury a power to bring digital settlement assets used for payments into the UK regulatory perimeter. It introduces a definition of "digital settlement asset", a new concept which has not been previously defined in legislation. Given the nascent nature of the cryptoasset market, the Bill gives HM Treasury a power to amend this definition in the event that there are changes in the features, underlying technology or usage of these assets, so that the regulation can continue to have effect as intended.

202 As mentioned above, the government's staged and proportionate approach will begin by focusing on stablecoins which reference their value from fiat currency (such as Pound Sterling), where used as a means of payment, because the government believes that such tokens share characteristics with existing forms of electronic money. This will ensure that fiat-linked stablecoins, where used for payments, are subject to the same requirements and protections as other similar payment methods.

203 A feature of the current design of the UK payments and electronic money legislation is a degree of regulatory overlap between the authorities, where responsibilities are distributed across the regulators and they set requirements and oversee firms pursuant to their differing statutory objectives. By extending the existing frameworks to cover fiat-referenced stablecoins used as a means of payment, further regulatory overlaps will apply between the Bank of England and the FCA for a small number of systemic firms. The Bill therefore puts in place a regime that allows for the clear identification of the applicable regulatory requirements (for example, in relation to prudential rules) where a payment system using digital settlement assets or digital settlement asset service provider is recognised as being systemic by HM Treasury.

204 Specifically, the Bill will:

- a. Provide the power for HM Treasury to establish an FCA authorisation and supervision regime, drawing broadly on existing electronic money and payments regulation, to mitigate conduct, prudential and market integrity risks for issuers of, and payment service providers using, stablecoins.
- b. Enable HM Treasury to recognise the operators of systemic payment systems and systemic service providers using digital settlement assets for regulation by the Bank, subject to meeting relevant thresholds and following HM Treasury's publication of a recognition order. This will enable the Bank to regulate and supervise systemically important stablecoin payment systems and related service providers to mitigate financial stability risk.
- c. Enable the PSR to regulate payment systems using digital settlement assets, following HM Treasury's publication of a designation order, to address issues relating to competition innovation, user interests and access.
- d. Enable HM Treasury to apply the Financial Markets Infrastructure Special Administration Regime (FMI SAR), which is a bespoke administration regime for recognised payment and settlement systems and recognised service providers, to stablecoin firms that have been recognised by HM Treasury, with appropriate modifications. This will ensure appropriate tools are in place to mitigate the risks to financial stability associated with a systemic stablecoin firm's failure.
- e. Amend or disapply existing FCA or PRA rules in areas relating to financial stability to avoid relevant systemic stablecoin firms being subject to conflicting requirements. HM Treasury intends to establish this mechanism through secondary legislation.

Implementation of mutual recognition agreements

205 Outside of the EU, the UK is able to negotiate its own international trade agreements, including Mutual Recognition Agreements (MRAs) related to financial services. These MRAs are intended to provide recognition of rules and practices in other jurisdictions to allow both the UK and its MRA partners to defer to each other in respect of the regulation and supervision of both UK and overseas firms undertaking cross border financial services activity. MRAs therefore offer a practical way to promote openness and mutual market access between jurisdictions, supported by regulatory and supervisory cooperation. The UK is in the process of negotiating a financial services MRA with Switzerland. The UK hopes, in the future, to enter into MRAs with other jurisdictions.

206 The UK has a dualist legal system. This means that a treaty ratified by the government does not alter the laws of the State unless and until it is incorporated into domestic law by legislation. As a consequence, international agreements, such as MRAs, must be

implemented in domestic law in order to ensure that the UK can meet its international obligations under such agreements. Not all obligations within an MRA will require a change to domestic law, but it is a convention in the UK that an international treaty is not ratified until it has been fully implemented.

- 207 The Bill provides for HM Treasury to make changes to domestic legislation necessary to ensure that MRAs can be fully implemented, using secondary legislation subject to the affirmative procedure. This includes the ability to grant any additional powers to the financial services regulators that are required to give effect to MRAs. It is intended that this provision will be used to implement the MRA on financial services which is currently being negotiated with Switzerland, and any future financial services MRAs.
- 208 Currently in financial services regulation, market access between the UK and other jurisdictions is generally delivered through the UK's equivalence framework for financial services, which is operated by HM Treasury as set out in more detail in the [guidance document](#) for the UK's Equivalence Framework for Financial Services, published on 9 November 2020. The equivalence framework provides mechanisms for HM Treasury to determine that, in specific areas of regulation, another jurisdiction's regulatory and supervisory framework are equivalent to the UK's. This serves to facilitate cross-border financial services activity in relation to that equivalent jurisdiction by permitting market access and reducing regulatory frictions or costs to firms. These mechanisms are primarily found in retained EU law (by virtue of the European Union (Withdrawal) Act 2018) and were previously operated by the European Commission. The MRAs negotiated by the government may in some cases go further than, or function differently to, these existing equivalence mechanisms. The power that the Bill provides to HM Treasury to implement MRAs therefore includes the power to modify the application of existing equivalence mechanisms or create new mechanisms to reflect what has been agreed in the relevant MRA.
- 209 It may also be appropriate to adjust the powers and functions of the financial services regulators set out primarily in FSMA 2000 in order to ensure that they are equipped to give effect to MRAs, including ensuring that they have appropriate rule-making powers. The regulators must continue to act in a way that furthers their statutory objectives.
- 210 The MRAs are intended to be "living agreements" such that the scope may evolve or expand over time in accordance with the desire of the parties. This could include amending or expanding their scope to take account of new developments in financial services sectors and possible future legislative changes. Taking account of this possibility, the Bill allows for the implementation of any amendments to or extension of the scope of MRAs as and when the UK and its MRA partners agree to such changes.
- 211 As with most international treaties, any MRAs for financial services made in the future will be subject to parliamentary scrutiny before ratification, as set out in the Constitutional Reform and Governance Act 2010 (CRaG). As part of the process, the government will set out in the explanatory memorandum accompanying any MRA how it intends to implement its terms in domestic law. Only once an MRA has both been scrutinised by Parliament pursuant to the CRaG process and all necessary domestic implementation has been completed will an MRA be ratified and enter into force.

New objectives and regulatory principles

- 212 Having left the EU, the government wants to ensure that the framework of objectives and principles that guide the regulators' actions, particularly given their additional rule-making responsibilities, continues to set the right strategic considerations.

- 213 As set out in the strategy document published alongside the Chancellor's Mansion House speech in July 2021, the UK will continue to remain a global leader in promoting high international standards. Alongside this commitment, the government's intention is to ensure that the financial services sector is delivering for businesses and consumers across the UK.
- 214 The government considers that the regulators' current objectives are each important in helping to deliver these outcomes. Robust regulatory standards encouraged by these objectives are the cornerstone of the UK market's attractiveness, and the stability and soundness of the UK's market remains an important priority for the government.
- 215 The government therefore considers that the regulators' existing objectives set broadly the right strategic considerations and wants to maintain the regulators' focus on these objectives.

New economic growth and international competitiveness secondary objectives

- 216 The government recognises that the financial services sector is not just an industry in its own right but an engine of growth for the wider economy. As the regulators take on responsibility for setting detailed rules in areas currently covered by retained EU law, the government considers that it is right that the regulators' objectives reflect the need to support the medium to long-term growth and competitiveness of the UK economy, including the financial services sector.
- 217 The Bill introduces a new secondary objective for the FCA and the PRA to provide greater focus on medium to long-term growth and international competitiveness. The government wants to ensure that giving the regulators a legal basis for advancing medium to long-term growth and international competitiveness does not detract from their existing objectives of: ensuring that UK firms remain safe and sound; that the UK's markets function well; that there is healthy competition in the interests of consumers, and, that consumers and users of financial services receive an appropriate degree of protection.
- 218 The Bill enables the FCA and the PRA to act only in a way which facilitates growth and international competitiveness in the medium to long-term. The government does not want the PRA and the FCA to act in a way which benefits short-term competitiveness at the cost of long-term growth.
- 219 The government is committed to maintaining high regulatory standards in the UK so the new objectives provide for the regulators to facilitate medium to long-term growth and competitiveness subject to aligning with relevant international standards.
- 220 Financial Services regulation is a reserved matter. As such, the new objectives for the PRA and the FCA are designed to advance the medium to long-term growth and competitiveness of the entire UK economy, including the devolved nations and English regions.
- 221 No changes are made to the statutory objectives of the PSR, which is an economic regulator with specific and differing objectives to the financial services authorities.

New regulatory principle that the regulators must have regard to the UK net zero emissions target

- 222 The government wants to further strengthen the UK's regulatory regime relating to climate. Therefore, alongside the new secondary objectives, the government proposes to embed consideration of the UK's climate target across the full breadth of the regulators' general functions and put this on a statutory basis. The government consulted on strengthening the

UK's regulatory regime relating to climate in its November 2021 consultation on the FRF Review and received significant support from respondents.

- 223 The regulatory principles set out in FSMA 2000 aim to promote regulatory good practice across the range of the regulators' policymaking. The November 2021 consultation proposed amending the regulators' existing sustainable growth regulatory principle to incorporate the UK's statutory climate target. Following feedback to the consultation, and given that the FCA and the PRA will have new secondary objectives to facilitate international competitiveness and growth in the medium to long-term, the Bill will remove the existing sustainable growth principle for the FCA and the PRA from the regulatory framework to avoid unnecessary duplication.
- 224 The Bill will therefore introduce a new regulatory principle for the FCA and the PRA, requiring the regulators, when discharging their general functions to have regard to the need to contribute towards achieving compliance with section 1 of the Climate Change Act 2008. This net zero regulatory principle seeks to cement the government's long-term commitment to transform the economy in line with its Net Zero Strategy and vision to make the UK a net zero financial centre by ensuring the regulators must have regard to these considerations when discharging their functions.
- 225 The PSR has a similar set of regulatory principles to the FCA and the PRA (including sustainable growth). As the PSR's objectives are not changing, the PSR's existing sustainable growth principle will be maintained, and the climate change target will be incorporated into its sustainable growth principle. This will be done in a way that ensures that the achievement of the net zero target should be understood as being only one element of the sustainable growth principle.

Exercise of Bank of England regulatory powers

Objectives and principles

- 226 The additional regulatory powers that the Bank of England is being granted in this Bill over CCPs and CSDs are set out elsewhere in these Notes. Alongside this expansion of the Bank's responsibilities and powers, the Bill puts in place a framework to ensure that the Bank is set the right overall public policy objectives and is fully accountable and transparent in pursuing them.
- 227 The Bank's function as regulator and supervisor of CCPs and CSDs is currently subject to its Financial Stability Objective as set out in section 2A of the Bank of England Act 1998, which is as follows:
- 2A Financial Stability Objective*
- (1) *An objective of the Bank shall be to protect and enhance the stability of the financial system of the United Kingdom (the "Financial Stability Objective").*
- (2) *In pursuing the Financial Stability Objective the Bank shall aim to work with other relevant bodies (including HM Treasury and the Financial Conduct Authority).*
- 228 This financial stability objective will remain the sole primary objective for the Bank in its regulation of CCPs and CSDs. The Bill specifies that when the Bank acts to advance this objective, it should also have regard to:
- a. The effects generally that its regulation of CCPs and CSDs will or may have on the financial stability of countries or territories (other than the UK) where CCPs and CSDs are established or provide services.

These Explanatory Notes relate to the Financial Services and Markets Bill as brought from the House of Commons on 8 December 2022 (HL Bill 80)

- b. Regulating CCPs and CSDs in a manner that is not determined by whether the users of their services are located in the UK or elsewhere.
- 229 The Bill also introduces a secondary objective for the Bank so that as it advances its primary objective for financial stability it must, so far as is reasonably possible, facilitate innovation in the clearing and settlement services provided by the CCPs and CSDs it regulates with a view to improving the quality, efficiency and economy of the services they provide.
- 230 The Bill also introduces regulatory principles for the Bank, similar to those set out in FSMA 2000 for the PRA and the FCA. This includes a sustainable growth principle incorporating the government's commitment to achieving net zero emissions by 2050. The Bill also introduces a new regulatory principle for the Bank to have regard to the desirability of facilitating fair and reasonable access to services provided by CCPs and CSDs.

Internal decision-making processes

- 231 Currently, the Bank largely undertakes its decision-making for its regulation of CCPs and CSDs through its FMI Board. This is an internal, non-statutory executive committee constituted by the Governor of the Bank of England to exercise the Bank's powers in relation to the FMI it regulates. It is chaired by the Deputy Governor for Financial Stability and includes senior Bank executives, as well as three external members. The Governor has reserved limited decisions to himself; the Governor can also be consulted on important decisions that would otherwise fall within the Board's remit (and resolve to take such decisions himself). The Board can also delegate matters to Bank officials if it deems it appropriate to do so.
- 232 The Bill places the Bank's decision-making processes for CCPs and CSDs onto a statutory footing by creating a new FMI Committee. The intention of this is to increase transparency and accountability around the Bank's internal decision-making processes as it exercises its new rule-making power for CCPs and CSDs. The constitution of this Committee will be left largely to the Bank's judgment; but the Bill specifies that there should be at least three independent members on the Committee, and that the Committee should be chaired by either the Governor or a Deputy Governor of the Bank. The Bill allows the FMI Committee to, as it sees fit, arrange for any of its functions to be carried out by the Governor or after consultation with the Governor. It also continues to provide for matters to be delegated within the Bank where appropriate, with the exception of its rule-making functions.
- 233 The Bill leaves the Committee's procedures largely to the judgment of the Bank. The Bank will be required to publish a statement on a number of matters relating to the Committee. This includes its membership, arrangements for meetings, voting and decision taking procedures, arrangements for any decisions to be taken by, or in consultation with, the Governor and arrangements for matters to be delegated within the Bank.

Accountability of regulators

Regulator engagement with HM Treasury, external stakeholders, and Parliament

Regulators' relationship with HM Treasury

- 234 As the regulators will receive new responsibilities following the revocation of retained EU law, it is important that the mechanisms underpinning the regulators' relationship with HM Treasury are strengthened. This will ensure there continues to be appropriate democratic input into, and public oversight of, the regulators' activities.

- 235 There are already many provisions in the UK's domestic framework for HM Treasury to hold the regulators to account. HM Treasury ministers have overall responsibility for the UK's financial services regulatory framework and the continued effective operation of the financial services regulators as part of that framework.
- 236 Existing domestic legislation already provides for a number of formal accountability mechanisms between the regulators and HM Treasury in specific circumstances, including:
- a. HM Treasury appoints the Chair and Chief Executive of the FCA, as well as members of the FCA board and Prudential Regulation Committee (the governing committee of the PRA).
 - b. The Governor and Deputy Governors of the Bank of England are appointed by the Crown. HM Treasury is responsible for advising the Prime Minister who makes a recommendation to the Crown.
 - c. HM Treasury may appoint an independent person to conduct a review of the economy, efficiency and effectiveness of the FCA's use of resources.
 - d. HM Treasury may direct the PRA or the FCA to carry out investigations into specific events if that is in the public interest (under section 77 of the Financial Services Act 2012).
 - e. HM Treasury may direct the PRA or the FCA to take action, or refrain from taking action, in relation to specified matters in order to ensure that the UK meets its international obligations.
- 237 In addition, FSMA 2000 provides HM Treasury with the ability to make recommendations to the regulators through open 'recommendations letters' on issues related to matters of economic policy which the regulators should take into account when exercising their general duties. The most recent recommendations for both the PRA and the FCA were issued on 23 March 2021 and supplemented by a further update issued on 7 April 2022.
- 238 When the UK was a member of the EU, the government, through ministerial engagement in the European Council and via MEPs in the European Parliament, had a formal role in the EU system of regulatory policymaking. Following the revocation of retained EU law, the regulators will have greater responsibility to set the regulatory requirements which apply to firms in areas previously covered by retained EU law.
- 239 The government considers that the existing mechanisms governing the regulators' relationship with HM Treasury are effective. The government considers that the greater responsibility being given to the regulators should be balanced with effective policy input from, and appropriate accountability to, government. The government consulted in November 2021 on proposals to strengthen the engagement mechanisms between HM Treasury and the regulators. These proposals were broadly supported by respondents.
- 240 The Bill also creates analogous provisions to the above in relation to the PSR, where these do not exist already, namely the ability for HM Treasury to send letters of recommendation. The approach set out here will also apply to the Bank of England in its regulation of CCPs and CSDs.

Requirement of the regulators to respond to HM treasury recommendations

- 241 The Bill introduces a requirement for the regulators to respond annually to the recommendations made by HM Treasury in the recommendation letters under existing provisions in FSMA 2000. The regulator's response should outline the action the regulator has taken or intends to take, or the reasons the regulator has not taken and does not intend

to take action on the basis of the recommendations. The response will be laid before Parliament by HM Treasury. This is intended to increase HM Treasury's and wider stakeholders' ability to understand how the regulators have taken into account the recommendations. An analogous provision is made for the PSR, inserted into FSBRA 2013.

- 242 In future, to ensure that it is clear which recommendations are in force, and so need to be included in the response, HM Treasury will make clear in its recommendations letters whether the recommendations replace previous recommendations or are in addition to them

Regulators' review of their rules

- 243 It is important to review policy interventions after implementation to ensure they remain appropriate and have had the desired effect. This can range from monitoring to wider evaluation of the impact of a rule after a certain period.
- 244 There is currently no formal requirement for the regulators to conduct reviews of their existing rules. The Bill will introduce a requirement for the regulators to keep their rules under review. The government expects this would cover all approaches to assessing the effect of rules, from monitoring to wider evaluation.
- 245 This requirement to keep rules under review is intended to provide for more effective regulation by ensuring there is a legislative duty for the regulators to review their rules. In addition, more systematic reviews should improve regulation, as potentially outdated rules will be removed or revised more consistently.
- 246 Alongside this requirement, the Bill requires the regulators to publish a statement of policy for how they conduct rule reviews. The requirement for the regulators to publish a statement of policy is to provide clarity and transparency for stakeholders on how and when rules are reviewed. This should allow stakeholders to be confident that reviews are happening in a consistent manner, increasing confidence in regulation.
- 247 The government expects that the statements of policy would cover at least the following aspects of review:
- a. The different methods of reviews regulators may conduct, including any differences in purpose and scope between them.
 - b. The process for determining the methods of review to be applied.
 - c. The process for determining the timing of different methods of review.

Power of HM Treasury to require a rule review by the regulator

- 248 There is currently no formal mechanism for HM Treasury, or anyone else, to require the regulators to conduct reviews of their existing rules. This power is intended to provide for more effective regulation by ensuring there is such a mechanism for the regulator to review its rules where HM Treasury considers it is in the public interest.
- 249 In general, HM Treasury expects that it may be in the public interest to exercise the power to direct the regulator to review its rules where:
- a. significant developments in the relevant markets give rise to the possibility that the current rules may no longer be appropriate; or
 - b. substantial evidence gives rise to the possibility that the rules are not achieving their purpose, considering:

- i. in relation to the FCA, its explanation of how the rules were compatible with its strategic objective and advanced one or more of its operational objectives when the rules were made;
 - ii. in relation to the PRA, its explanation of how the rules advanced one or more of its objectives when the rules were made;
 - iii. in relation to the PSR, its explanation of how the requirements advanced one or more of its payment systems objectives;
 - iv. in relation to the Bank as it exercises its FMI functions, its explanation of how the rules advanced its Financial Stability Objective when the rules were made.
- 250 HM Treasury is required to consult the regulator before directing a review under this clause. Matters to be consulted on may include:
- a. the regulator's current plans for review
 - b. the quality of the evidence on which a direction is being considered
 - c. the timing of a review; and
 - d. whether an independent reviewer is necessary.
- 251 There may be situations where it would not be appropriate for the regulator itself to conduct the review. In such a situation, HM Treasury would expect to include in its direction that the regulator should appoint an independent reviewer.

Power for HM Treasury to direct the regulator to report on performance

- 252 FSMA 2000 and the Financial Services (Banking Reform) Act 2013 establish multiple ways for the regulators to report on their performance to support scrutiny and accountability. These include a requirement for the regulators to report annually, setting out, amongst other things, how they have advanced and acted compatibly with their objectives and had regard to the regulatory principles. Within their annual reports, HM Treasury may also direct the FCA and the PRA to include 'such other matters' as HM Treasury considers appropriate.
- 253 In addition, on a voluntary basis, the FCA annually publishes 'operating service metrics.' These are metrics relating to how the FCA carries out routine customer service functions, including authorisations, timeliness of responses to stakeholders, and regulatory permissions requests. In April 2022 the FCA published a comprehensive set of Outcomes and Metrics which it will use to measure and publicly report on its performance. The PRA also annually publishes data on its performance of authorisation processes.
- 254 On 1 December 2022, the government published an [exchange of letters](#) setting out its commitment to ensuring the UK has world-leading levels of regulatory operational effectiveness. In response, the regulators have committed to publishing more detailed performance data in relation to authorisation processes on a quarterly basis in future. Given the regulators' new responsibilities following the repeal of retained EU law, and the introduction of new growth and competitiveness objectives for the FCA and the PRA, the government considers that there is an increased need for the regulators to publish further information about their performance, to support their scrutiny by Parliament and government and engagement with stakeholders.
- 255 The Bill introduces a power of direction for HM Treasury to direct the regulator to publish a report on such matters, at specific intervals, as the Treasury considers necessary to support scrutiny of their performance in discharging their general functions. This will enable HM

Treasury to direct the regulators to publish additional information to support the review and scrutiny of their discharge of their general functions. This includes how the regulators have acted compatibly with and advanced their objectives, and had regard to the regulatory principles, as well as wider operational effectiveness. HM Treasury will be required to lay any direction in Parliament, to notify it of the use of the power.

- 256 HM Treasury expects that this power will only be used in exceptional circumstances, in cases where existing forms of engagement have been exhausted. It provides a backstop to ensure that the regulators can be directed to provide further information on their performance where required while respecting their operational independence and expertise. This will support their accountability to Parliament and the public.
- 257 HM Treasury will only be able to exercise the power where it has determined that:
- a. publication of the information is necessary for scrutiny of the regulator's discharge of its functions; and
 - b. that any information already published is insufficient for effective scrutiny.
- 258 HM Treasury will not be able to issue a direction that would require publication of the relevant information more than once a quarter. Given the requirement for information to relate to the discharge of the regulator's functions, HM Treasury expects that directions will only relate to matters within the regulator's remit.
- 259 HM Treasury will be required to consult the regulator before exercising this power. This will allow for HM Treasury and the regulator to consider factors such as whether the information can reasonably be collected, recorded, and published by the regulator, ahead of the direction being issued. HM Treasury will also be required to have regard to the desirability of minimising adverse effects on the regulators' other functions when exercising the power.
- 260 This power cannot be used to require the regulator to publish information that is confidential for the purposes of Part 23 of FSMA 2000 in relation to the FCA and the PRA, section 91(2) of FSBRA in relation to the PSR and Part 23 of FSMA 2000 as it applies in relation to the Bank of England.
- 261 The regulator will be required to publish the report. However, there is an exemption from publishing information where doing so would be against the public interest in the regulator's opinion.
- 262 This power will apply to the FCA, the PRA, the PSR, and the Bank of England in its regulation of certain financial market infrastructure.

Mechanism to require the regulators to notify HM Treasury of actions affecting deference decisions

- 263 Deference, as it is applied to financial services, is a process endorsed by the Group of Twenty (G20) where jurisdictions defer to each other when it is justified by the quality of their respective regulatory, supervisory and enforcement regimes.⁶ Deference provides for preferential treatment for market participants conducting cross border activity; however, the form of preferential treatment varies across deference provisions. For example, some provisions allow overseas firms to export financial services into the UK, and others remove duplicative requirements on cross-border business. Within the UK's system, equivalence, which is an autonomous form of deference, is assessed on an outcomes basis, and (where

⁶ September 6, 2013 St Petersburg Summit G20 Leaders' Declaration.

applicable) in compliance with internationally agreed standards. These assessments generally focus on whether the overseas jurisdiction's regulatory, supervisory and enforcement framework provides an equivalent outcome to the corresponding UK legal framework.

- 264 Deference serves to facilitate cross border financial services activity by permitting market access and reducing regulatory frictions/costs to firms. Deference is, therefore, an important policy tool for promoting the UK as a global financial centre. The government is responsible for managing, granting, and (where relevant) agreeing deference arrangements with overseas jurisdictions. This includes nearly all of the EU equivalence decisions for overseas jurisdictions that were incorporated into UK law at the end of the implementation period.⁷ The government also intends to agree deference arrangements as part of Mutual Recognition Agreements with our overseas partners. In fulfilling this function, the government will monitor these arrangements and keep them under review such that it would be aware if the relevant regulatory and supervisory frameworks are no longer equivalent.
- 265 As noted earlier, once the UK moves to a comprehensive FSMA model of regulation, the UK's financial services regulators will set the direct regulatory requirements which apply to firms in their rulebooks. This will have a bearing on HM Treasury's responsibilities in managing the UK's deference framework. For example, if new firm facing rules made by the regulators mean that overseas jurisdictions may no longer be regarded as equivalent on an outcomes basis, HM Treasury may launch a review of the relevant existing deference decision and ultimately revoke that decision.
- 266 Sections 144C(3) and (4) of FSMA 2000 require the PRA to consider and consult HM Treasury on the impact on relevant equivalence decisions when making rules relating to the Capital Requirements Regulation (CRR) or CRR Basel standards. Sections 143G (3) and (4) of FSMA 2000, contain a similar requirement for the FCA when making rules relating to the prudential regulation of investment firms regulated by the FCA. However, beyond considering the impact on deference when making rules in these areas, there is no statutory requirement for the regulators to consider the impact of their rule changes on the remainder of HM Treasury's deference framework nor to consult HM Treasury on these impacts. The provisions of this mechanism are intended to improve the quality of information available to regulators when exercising their regulatory powers.
- 267 The Bill places a statutory requirement on the PRA and the FCA to consider, when setting rules or supervisory policies and practices, the effect of their proposed action on notified deference decisions (HM Treasury will notify certain deference decisions to the PRA and the FCA as relevant to this requirement). Only actions where there is a duty to carry out a public consultation will trigger this requirement. If, following that consideration, the PRA or the FCA consider that there is a material risk that their actions are incompatible with a notified deference decision, then the PRA or the FCA must consult HM Treasury prior to their public consultation.
- 268 This mechanism will also apply to the Bank of England in relation to its regulation of CCPs and CSDs. This will ensure consistency with the changes taken forward in the Bill regarding the Bank of England's regulation of FMI following the FRF Review.

⁷ The Government did not onshore equivalence decisions for Central Counterparties (CCPs) that the EU made under Article 25 of the European Market Infrastructure Regulation (EMIR - EU Regulation 648/2012).

Mechanism to require the regulators to notify HM Treasury on actions affecting international trade obligations

- 269 Following the UK's withdrawal from the EU, the UK has assumed responsibility for its own trade policy. This includes negotiating and entering into new international trade agreements and ensuring the compatibility of domestic policies and rules with our obligations in international trade agreements. Previously, the EU was responsible for managing any claims made by trading partners under trade agreement dispute settlement mechanisms. The UK government is now responsible for managing dispute settlement with trading partners and must therefore ensure that it has appropriate visibility over the regulators' setting of domestic financial services policies and rules to fulfil this duty.
- 270 As noted earlier, moving to a comprehensive FSMA model of regulation will give the regulators significant new rule-making responsibilities. These rule-making responsibilities interact with obligations in the UK's trade agreements in a number of ways, such as the need to ensure that regulatory rules and supervisory policy are not discriminatory and that they are consulted upon and published in a transparent manner. As the extent of the regulators' rule-making responsibilities expands, the number of interactions with the UK's international trade agreements is also likely to increase.
- 271 Currently, HM Treasury and the regulators work together closely to ensure that the rules and supervisory policy overseen by the regulators are compliant with obligations in the proposed trade agreements when they come into force. This mechanism seeks to ensure that, in the years following the conclusion of each international trade agreement, regulatory rules and supervisory policy/practice remain consistent with the UK's obligations arising from those agreements.
- 272 The Bill introduces a statutory requirement to require the regulators to consider, when setting rules or supervisory policies and practices, the effect of their proposed action on international trade obligations. The regulators need only consider those international trade obligations which relate to financial services and markets. Where the regulators see a material risk of incompatibility between their action and international trade obligations, they must notify HM Treasury. Where there is a duty to consult in relation to the action, the regulator must notify HM Treasury prior to their public consultation.
- 273 This mechanism is intended to sit alongside existing HM Treasury powers in Section 410 of FSMA 2000, that allows HM Treasury to direct the FCA, the PRA and the Bank in exercising certain functions to take action (or refrain from taking action) in order to ensure that the UK meets its international obligations. While this power will remain the means by which HM Treasury could ultimately ensure UK compliance with its obligations in trade agreements, this mechanism seeks to ensure earlier, proactive consideration by the regulators of how their actions interact with the UK's international trade obligations.
- 274 This mechanism will also apply to the Bank of England in relation to its regulation of CCPs and CSDs. This is to be consistent with the scope of the wider FRF Review changes taken forward in the Bill regarding the regulation of FMI by the Bank.
- 275 A separate analogous mechanism will also apply to the PSR by amendment to the Financial Services (Banking Reform) Act 2013 (see clause 8 of Schedule 7).

Engagement with stakeholders

- 276 It is vital that there are opportunities for consumers, relevant stakeholders and firms to engage with and scrutinise the development of regulatory proposals.

- 277 Engagement with stakeholders is embedded in the regulators' policymaking process through the application of statutory requirements and public law principles. The PRA and the FCA are subject to statutory requirements in FSMA 2000 which, in general, require them to consult with the public on draft rules. These PRA and FCA consultations are generally open for three months, though this can change depending on the issue. The PSR's consultation obligations are largely derived from those of the FCA.
- 278 As part of these consultation requirements, the regulators must explain why making the proposed rules advances, and is compatible with, their objectives as set by Parliament in legislation. The regulators must also explain how the proposals are compatible with their obligation to have regard to the regulatory principles. They must also produce a cost-benefit analysis (CBA) of the draft rules unless an exemption applies
- 279 The government considers that this statutory general requirement for the regulators to consult on proposals remains fit for purpose and the key mechanism for stakeholder engagement.
- 280 In addition to the duty to consult publicly on proposals, the FCA has a general duty to "make and maintain effective arrangements for consulting practitioners and consumers." The PRA has a similar general duty to "make and maintain effective arrangements for consulting PRA-authorized persons or, where appropriate, persons appearing to the PRA to represent the interests of such persons", on the extent to which the PRA's general policies and practices are consistent with its general duties. The PSR has a similar general duty to "make and maintain effective arrangements for consulting relevant persons" on the extent to which its general policies and practices are consistent with its general duties, and how its payment systems objectives may best be achieved. As part of these duties, the regulators are required to maintain stakeholder panels.
- 281 The regulators have regular meetings and discussions with the stakeholder panels, in which most major policy and regulatory proposals are presented for comment at an early stage. The panels' contributions to policy development as part of this process are confidential to ensure both the regulator and panel members can share ideas and feedback openly. This confidentiality allows the regulators to engage the panels when policy is in the early stages of development ahead of public consultation. The panels publish an annual report on their work and their views on the regulators' work.
- 282 Greater rule-making responsibilities will increase the opportunities for the regulators to consult the panels from the outset of policy and regulatory development in more policy areas, which was not possible to the same extent while the UK was a member of the EU. The government and the regulators consider this will strengthen the panels' important ability to provide stakeholder input into the development of policy and regulation.
- 283 The government's November 2021 consultation proposed a number of measures that seek to ensure that there is appropriate transparency of regulators' operations for stakeholders to be confident in them; and that there is appropriate systematisation of important practices relating to the regulators' statutory panels, the production of CBA, and the regulators' review of rules. Respondents to the November 2021 consultation were broadly supportive of these proposals. These measures will apply to the PRA, the FCA and the PSR.

Strengthening the role of statutory panels

Placing the Listing Authority Advisory Panel and the PRA Practitioner Panel's insurance sub-committee on a statutory footing

- 284 The Bill will put the FCA's Listing Authority Advisory Panel and the PRA Practitioner Panel's insurance sub-committee on a statutory footing. This is intended to ensure

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consistency across all panels and seeks to provide confidence for stakeholders that the currently voluntary practices of operating these panels will endure. The Bill also seeks to clarify that the minimum requirements for the regulators in relation to both of these panels will be the same as for other statutory panels, including the appointment of a chair and the appointment of members.

Requirement for regulators to publish information on their engagement with stakeholder panels

285 The Bill will introduce a new statutory requirement for the regulators to publish clear and consistent public communication on how they have engaged with the panels across all of the regulators' work. This seeks to increase transparency of the regulators' operations, improving the ability of Parliament to scrutinise them, and of stakeholders to comment on them.

286 The statutory requirement will require the regulators:

- a. to provide information in their annual reports on their engagement with panels over the reporting period
- b. to provide, as part of public consultation, information on any engagement with panels before the consultation.

287 The form and detail of the information provided will be for the regulators (working with the panels as appropriate) to decide. This seeks to ensure the regulators can find the appropriate balance between transparency and the confidentiality crucial to ensure an open exchange of views as part of the policymaking process, which is fundamental to the panels' role as a 'critical friend'.

Requirement for regulators to publish a statement of policy on the processes they use to appoint members to their stakeholder panels

288 Ensuring the right membership of the panels is crucial to their success in providing challenge, a range of expertise, and differing perspectives to the regulator. Panels that have members from diverse backgrounds, with wide-ranging expertise and a variety of different perspectives will be better placed to ensure the regulators receive the most comprehensive appraisal of their policy. In order to ensure that the membership of panels represents the full diversity of stakeholders, both amongst practitioners and amongst consumers, there should be a clear and transparent process for appointing members.

289 The FCA has recognised the importance of improving diversity in the membership of the panels and is already undertaking a review to identify ways to improve diversity so the composition of the panels appropriately reflects the range of practitioners and stakeholders in financial services. The government welcomes the work the regulators are doing to move recruitment of panel membership in this direction and expects the regulators will take this opportunity to commit to open and fair recruitment practices to ensure a diverse range of qualified candidates are appointed to panels.

290 Building on this work, and to improve transparency, the Bill will introduce a requirement for the regulators to each maintain statements on their processes for appointing members to panels. The regulators will need to consult HM Treasury on the statement before it is published. This measure seeks to increase transparency of regulator operations which will improve the ability of Parliament to scrutinise them, and of stakeholders to comment on them.

291 The government also recognises that consultation respondents raised concerns regarding the composition of panel membership. These included suggestions that there may be a bias towards large firms and established sectors, and suggestions that there may be a lack of representation of some groups; for example, vulnerable consumers.

292 As part of their ongoing work to improve the diversity of panels, the regulators should also continue to consider the diversity of the sectoral composition of membership. In the context of emerging technologies, changing business models, and evolving consumer choices (for example, the transition towards digital payments), it is particularly important that a representative balance of stakeholder types and views are included.

Regulators' cost-benefit analysis process

Requirement for the regulators to publish a statement of policy for their approach to cost-benefit analysis (CBA)

293 The Bill seeks to provide transparency of the regulators' CBA processes going forward and support robust regulatory policymaking by introducing a requirement for the regulators to publish a statement of policy detailing their approach to CBA. A clear and publicly available description of the regulators' CBA processes will provide further assurance to stakeholders that the regulators are seeking to understand the effect of their regulatory policymaking. This will also support stakeholders in considering effectively whether the regulators' CBA assessments are accurate.

Requirement for the regulators to establish CBA panels

294 In response to the October 2020 FRF Review consultation, several respondents expressed support for enhanced external challenge as a way to improve the quality of the regulators' CBA. The regulators' existing panels can be, and are, asked for early, qualitative comment on the policy aims and CBA.

295 The Bill requires the PRA and the FCA to establish new statutory panels dedicated to supporting the development of the regulators' CBAs. The PRA's CBA panel will also be used by the Bank of England (for CCP and CSD supervision) and the FCA's CBA panel will be used by the PSR. The creation of the CBA Panel seeks to improve the overall quality of rule-making by improving the CBA underpinning it. The government also considers that it can increase stakeholders' confidence that there is regular, independent input into the regulators' CBA.

296 The CBA panels are intended to support the regulators' development of CBAs. Each regulator must seek the CBA panel's input as part of the development of CBA before they publish a CBA as part of a public consultation. The government recognises there may be instances where it is disproportionate for a regulator to consult with the CBA Panel before it publishes a consultation. The regulators will be required to publish a CBA framework, which will specify, amongst other things, when the CBA Panel does not need to be consulted before publication of an individual consultation.

297 This measure also seeks to ensure that the CBA panels can periodically review the regulators' CBA methodology and processes by examining a collection of past CBAs following implementation of rule change. This seeks to enable the CBA panels to provide recommendations for how the regulators can improve their overall methodology and approach to CBA. Where appropriate, these recommendations may form the basis for updating the regulators' statement of policy on their approach to CBA.

Appointment of external persons to statutory panels

298 The Bill introduces a requirement for the FCA, PRA and PSR, when appointing persons to their statutory panels, to ensure all members are external to the FCA, the PRA, the PSR, the Bank of England, or the Treasury. The legislation describes 'external' as those who do not receive remuneration from the regulators or HM Treasury.

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- 299 This requirement is intended to maintain the practice that the regulators' statutory panels are comprised entirely of external members, which is crucial to each panel's success in providing challenge, expertise, differing perspectives and fulfilling their role as a 'critical friend' to the regulator.
- 300 This requirement will be applied to all the existing regulator statutory panels and new panels created or placed on a statutory footing by the FSM Bill, save for where HM Treasury provides exemptions via regulations.
- 301 In some cases, while remaining external, it is appropriate for panel members to receive remuneration. For example, to ensure that the panels continue to attract a diverse range of experts, it may be appropriate for panel members to receive remunerations for their work on the panel or other ad hoc work on specific projects. Therefore, the Bill provides for HM Treasury to make regulations specifying exemptions to this condition, where appropriate.
- 302 This requirement does not disqualify someone who is serving on a statutory panel from receiving expenses.
- 303 This requirement is intended to maintain the general practice that the regulators' statutory panels are comprised entirely of external members, which is crucial to each panel's success in providing challenge, expertise, differing perspectives and fulfilling their role as a 'critical friend' to the regulator.
- 304 This requirement will be applied to all the existing regulator statutory panels and new panels created or placed on a statutory footing by the FSM Bill, save for where HM Treasury provides exemptions via regulations.
- 305 The FCA statutory panels in scope of this requirement will be: the FCA's Practitioner Panel, the Smaller Business Practitioner Panel, the Markets Practitioner Panel, the Consumer Panel, the Listing Authority Advisory Panel and the Cost Benefit Analysis Panel.
- 306 The PRA statutory panels in scope will be: the PRA Practitioner Panel, the Insurance Practitioner Panel, and the Cost Benefit Analysis Panel.
- 307 The PSR statutory panel in scope will be the Payment Systems Regulator Panel.
- 308 The Bank of England (the Bank) does not maintain statutory panels for the exercise of its FMI functions, so this requirement does not apply to them.

Publication of consultation respondents

- 309 This measure applies to the FCA, PRA, PSR, and the Bank in its regulation of certain financial market infrastructures.
- 310 The scope of this measure is limited to the financial services regulators, reflecting the existing specific requirements in FSMA 2000 and the Financial Services (Banking Reform) Act 2013 in relation to how they must conduct consultations.
- 311 The Bill introduces a new statutory requirement for the regulators to include a list of respondents to their public consultations as part of their response to the consultation. This requirement is intended to enhance transparency around who responded to the consultation, and whose views the regulators have taken into account when making new rules. This is expected to enable more effective scrutiny of the regulators' operations.
- 312 Respondents will be required to opt-in to having their name published. This maintains the ability for individual respondents to respond confidentially if they wish to, so as not to deter potential respondents.

Accountability to Parliament

Engagement with Parliamentary Committees

- 313 Revoking retained EU law in order to move to a comprehensive FSMA model of regulation, where the independent regulators set the direct regulatory requirements which apply to firms in their rulebooks, will give the regulators significant new rule-making responsibilities.
- 314 Given these new responsibilities, it is important that the mechanisms by which Parliament holds the regulators to account are strengthened. This will ensure there continues to be appropriate democratic input into, and oversight of, the regulators' activities.
- 315 As Parliament sets the regulators' objectives and gives them the powers to pursue those objectives, Parliament has a unique and special role in relation to the scrutiny and oversight of the financial services regulators.
- 316 The system of Parliamentary select committees is particularly important in financial services policy and in relation to the scrutiny of the work of the regulators. Relevant select committees, and the Treasury Select Committee (TSC) in particular, provide scrutiny of financial services policy in the following ways:
- a. **Select committee inquiries:** Committees choose their own subjects of inquiry and decide the duration and approach that will be used for each inquiry. The committees have the power to send for "persons, papers and records" which they decide will be relevant, as per the House of Commons Standing Order No. 152. Other committees, such as the former House of Lords EU Financial Affairs Sub Committee and the House of Commons European Scrutiny Committee, have also played a key role in scrutinising financial services policy.
 - b. **Regular hearings to scrutinise the work of the financial services regulators:** the TSC routinely examines the regulators' approaches to policy and administration.
 - c. **Pre-commencement hearings:** Parliament, through the TSC, conducts pre-commencement hearings following the appointment of the Chair and Chief Executive of the FCA and the Chief Executive of the PRA.
- 317 There are also long-established scrutiny arrangements in place for Parliament to hold Ministers of the Crown accountable for the work of HM Treasury and the UK's financial services regulators. These arrangements include:
- a. Government ministers regularly responding to oral and written questions in both Houses of Parliament.
 - b. Government policy being scrutinised through a range of Parliamentary debates.
 - c. Legislation is debated and scrutinised according to the procedures for primary and secondary legislation.
 - d. Both Houses of Parliament being kept informed of policy and regulatory initiatives through the making of ministerial statements and by the laying of important documents before Parliament, including the annual reports of the financial services regulators.
- 318 The FRF Review proposed two measures building on these existing arrangements that seek to ensure that Parliament has the appropriate tools to conduct scrutiny of regulators' rule-making and other functions in the manner that Parliament sees fit. The requirements introduced by the Bill are set out below. The measures will apply to the FCA, the PRA and

the PSR, as well as the Bank in its regulation of central counterparties and central securities depositories.

Requirement for the regulators to notify the relevant select committee when they publish a consultation

- 319 The Bill requires the regulators to notify the relevant select committee when they publish a consultation. The measure aims to ensure that the relevant select committees have access to the information needed to best scrutinise the work of the regulators. This is intended to support more effective accountability and scrutiny of the regulators by Parliament.
- 320 The obligation to notify the relevant select committee will apply when the regulators consult publicly on proposed rules (or, in the case of the PSR, generally applicable requirements that they impose on regulated entities); when the regulators publish proposals about how they exercise any of their general regulatory functions; or if the regulators publish proposals under a duty imposed by legislation.
- 321 This measure includes a requirement for the regulator to draw the relevant select committee's attention to the section of its consultation dealing with how the proposals advance its objectives. The regulator will also need to draw attention to the section of their consultation which deals with how they have had regard to their regulatory principles and any other relevant considerations that the regulators must have regard to, including in the recommendation letters from HM Treasury.

Requirement for the regulators to respond to Parliament

- 322 The regulators will be required to respond in writing to formal responses to relevant consultations from Parliamentary committees. This will formalise an approach that is currently taken informally and seeks to ensure that there are clear expectations for how the regulators must respond to any representations from Parliamentary committees. The measure has been designed to support more effective accountability and scrutiny of the regulators by Parliament.
- 323 The government considers that such an approach is appropriate due to the unique circumstances of the financial services regulators' wide remits, and their position as independent public bodies which are accountable to Parliament. Parliament therefore plays a unique role, alongside government, setting the policy framework within which the regulators operate.

Relationship of the Bank of England with HM Treasury, Parliament and external stakeholders

- 324 Currently, the Bank is subject to several mechanisms which promote accountability and transparency in its regulation of CCPs and CSDs. These include notifying HM Treasury if it makes, alters or revokes any rules, and undertaking consultation and cost-benefit analysis prior to introducing any changes. The current mechanisms are appropriate for the Bank's limited existing rule-making powers.
- 325 The Bill introduces a range of measures designed to strengthen the Bank's relationship with HM Treasury, accountability to Parliament and stakeholder engagement to ensure these aspects are appropriate for the new general rule-making power. These mechanisms are very similar to the measures being introduced in the Bill for the PRA and the FCA, and in many cases the Bill simply applies those measures directly to the Bank.
- 326 There are two measures in the Bill which are slightly different to those the Bill introduces for the PRA and the FCA. Firstly, the Bill introduces the ability for HM Treasury to make

recommendations to the Bank about matters to which it should have regard when advancing its objectives and principles for its new rule-making power. The Bill sets out that HM Treasury must do so at least once every Parliament, publish the recommendations, and lay them before Parliament. This measure aligns the Bank with the existing ability for HM Treasury to make recommendations to the PRA and the FCA. The Bill also applies the new requirement for the PRA and the FCA to respond to recommendations made by HM Treasury to the Bank.

327 Secondly, the Bill introduces a requirement for the Bank to report annually on the efforts it has made to engage with industry stakeholders aside from those that it directly regulates (i.e. the CCPs and CSDs themselves) and to give a summary of that engagement. This measure is intended to increase transparency around the Bank's engagement with the wider market such as the firms who use CCP and CSD services. The Bill does not specify exactly how the Bank should conduct this engagement, the exact stakeholders it should engage with or the frequency of the engagement, leaving these aspects to the Bank's judgment.

Financial Ombudsman Service, FCA and FSCS co-operation on wider implications issues

328 The FCA is the conduct regulator for the financial services sector. A key part of its role is to set rules that financial services firms must adhere to. It is responsible for the conduct of around 51,000 financial services firms, the prudential regulator for 49,000, and sets specific standards for 18,000 in the UK.

329 The Financial Ombudsman Service is an alternative dispute resolution service for financial services complainants such as consumers and smaller businesses which have a complaint about a financial services firm or claims management company – it is provided free to complainants at the point of use. Its statutory purpose is to provide for the resolution of disputes quickly and with minimum formality by an independent person.

330 The Financial Services Compensation Scheme (FSCS) exists to provide protection for eligible customers of financial services firms authorised by the FCA. It protects consumers that incur financial losses when authorised firms are unable, or likely to be unable, to pay claims against them.

331 Whilst the FCA, the Financial Ombudsman Service and the FSCS have distinct roles, the work of each organisation will often be relevant to, or have implications for, the other. Given this, the FCA and the Financial Ombudsman Service are subject to a statutory requirement to take such steps as they consider appropriate to co-operate with each other in the exercise of their functions. The FCA and the Financial Ombudsman Service are required by statute to maintain a memorandum of understanding (MoU) describing how they intend to comply with this requirement to cooperate. The FSCS and the FCA are also subject to a statutory requirement to cooperate with each other and maintain an MoU describing how they do so.

332 In some cases, issues being considered by the Financial Ombudsman Service, the FCA or the FSCS will have significant implications for the other, and/or for the wider financial services sector. For example, if the Financial Ombudsman Service receives complaints from a large number of consumers in relation to potential wide-spread misconduct (e.g. mis-selling) this may have implications for the FCA's regulation or supervision of those financial services firms, or may lead to claims for FSCS compensation in the event that firms fail. The FCA, the Financial Ombudsman Service and the FSCS may need to cooperate to determine the optimal way of delivering redress to the affected consumers. Similarly, the development of new regulatory rules by the FCA could have implications for the number and nature of

complaints brought to the Financial Ombudsman Service, for example if they impose significant new requirements on firms. When issues with wider implications emerge, it is beneficial for the organisations to work together to ensure timely, collaborative discussions to determine the most appropriate approach to managing such issues.

- 333 To promote effective cooperation on wider implications issues, the FCA, the Financial Ombudsman Service and the FSCS (together with the Money and Pensions Service and the Pensions Regulator) voluntarily operate a [Wider Implications Framework](#), which was formally launched in January 2022. This framework provides a transparent structure for collaboration between these organisations, and ensures appropriate information is shared with stakeholders through the publication of minutes of meetings, an annual report and a central log of the issues identified. The [Terms of Reference](#) for the Wider Implications Framework are published on the Financial Ombudsman Service’s website.
- 334 The Bill will make it a statutory requirement for the FCA, the Financial Ombudsman Service and the FSCS to cooperate on issues with wider implications, to ensure that these existing arrangements will endure over time. Requiring the FCA, the Financial Ombudsman Service and the FSCS to maintain arrangements to cooperate in respect of these issues seeks to ensure increased coordination on wider implications issues to support better outcomes for financial services firms and consumers.
- 335 In addition, the Bill requires the FCA, the Financial Ombudsman Service and the FSCS to publish a statement of policy setting out how they will comply with this duty to cooperate on wider implications issues. It also requires them to put in place arrangements for stakeholders to provide representations on their compliance with the duty, and requires the publication of an annual report on compliance with the duty including any representations received from stakeholders.

Chair of the Payment Systems Regulator as member of FCA Board

- 336 The FCA is the conduct regulator for financial services in the UK. The FCA Board is the governing body of the FCA. The composition of the FCA Board is set out in FSMA 2000 and consists of:
- a. A chair appointed by HM Treasury (the FCA Chair);
 - b. A chief executive appointed by HM Treasury;
 - c. The Bank’s Deputy Governor for prudential regulation;
 - d. Two members jointly appointed by the Secretary of State and HM Treasury;
 - e. At least one other member appointed by HM Treasury.
- 337 The PSR is the economic regulator for payment systems in the UK. It is an independent subsidiary of the FCA, and the FCA is responsible for appointing the chair of the PSR Board (the PSR Chair), with the approval of HM Treasury.
- 338 From the establishment of the PSR in 2014 until May 2022, the same individual was appointed to the offices of FCA Chair and PSR Chair. As a result, the PSR Chair was effectively a member of the FCA Board, without being expressly referred to in the legislation as a member of that board.
- 339 Following the resignation of the previous FCA Chair, HM Treasury decoupled the FCA Chair and PSR Chair roles to have them performed by separate individuals.
- 340 Continued effective cooperation between the FCA and the PSR is important given that the PSR’s powers apply to users of payment systems, many of which are firms regulated by the

FCA. In addition, the FCA is responsible for the regulation of payment services. The PSR is also subject to a statutory duty to coordinate the exercise of its functions with the FCA. Given these respective roles, duties and the link between the UK payments sector and the wider financial services sector, the government considers it is important that the PSR Chair continues to be represented on the FCA Board, now that the PSR Chair and FCA Chair are held by separate individuals.

- 341 The Bill will ensure the PSR Chair is included in the FCA Board as an ex-officio member, by providing a statutory basis for the PSR Chair to join the FCA Board.
- 342 In addition, the Bill will ensure the existing FSMA 2000 provisions which apply to the Bank's Deputy Governor for prudential regulation will also apply to the PSR Chair. This includes providing for the FCA to pay them expenses and prohibiting them from taking part in Board discussions on the FCA's exercise of its powers in relation to a particular firm or person.

Access to cash

- 343 Access to cash remains important to the daily lives of many people across the UK. In its [Financial Lives 2020 survey](#), the FCA found that there are an estimated 5.4 million adults (10%) who report as reliant on cash to a very great or great extent in their day-to-day lives. Meanwhile the use of alternatives, such as cards and digital payments, is not yet a realistic option in some situations or for many people who still rely on notes and coins.
- 344 The use of cash by individuals and businesses is enabled through access to suitable cash withdrawal and deposit facilities. Examples of these may include, but are not limited to, a cash withdrawal from an ATM or cash machine, cashback, or an over-the-counter cash withdrawal or deposit at a bank branch or Post Office. Therefore, the government wants to ensure that the provision of cash access facilities continues to provide appropriate coverage across the UK to meet the cash needs of consumers and businesses.
- 345 To date, the market has provided sufficient cash access to support people's use of cash. Over the past decade the UK has witnessed a decline in the use of cash towards card and other digital payment methods. This has made it relatively more expensive for firms to maintain the existing infrastructure needed for current levels of access to cash to continue. In response, firms have consolidated their cash facilities in recent years.
- 346 Whilst the [current level of access to cash coverage](#) across the UK is extensive, the government considers the decline in cash usage and the number of cash facilities to pose risks to the future provision of access to cash.
- 347 At present, there is no existing substantive legislative framework relating to minimum or reasonable levels of access to cash, and no single authority has overall responsibility for overseeing the maintenance of a well-functioning UK cash system for the benefit of customers. Furthermore, no regulator currently has express powers to ensure that a cash withdrawal or deposit facility is in place to support access to cash.
- 348 At Budget 2020, the government committed to introduce a legislative framework to protect access to cash for those who need it. The government issued a [Call for Evidence](#) in October 2020 on the key considerations associated with cash access, including deposit and withdrawal facilities, cash acceptance, and regulatory oversight of the cash system. On 1st July 2021, the government published its [response to the Call for Evidence](#) alongside a [consultation](#) which sought views on legislative proposals to protect access to cash.
- 349 On 19 May 2022, the government published a [summary of responses to the consultation](#) confirming its approach to legislating. This set out the government's intention to establish

the Financial Conduct Authority (FCA) as the lead regulator for retail cash access and provide it with appropriate powers for ensuring that specified firms, i.e. banks and building societies as designated by HM Treasury, continue to ensure the reasonable provision of deposit and withdrawal facilities across the UK. The FCA's powers will allow it to address cash access issues at both a national and local level.

- 350 Since the government's consultation, significant steps have been taken by industry to improve coordinated efforts by firms to meet cash access needs. In December 2021, the financial services sector announced that it had developed a voluntary industry model for the provision of cash access facilities, including initiatives to provide shared services. Under the model, an industry coordination body assesses the cash needs of local communities with a view to ensuring appropriate cash services are in place. In light of these developments, and the significant role that such coordination arrangements may play in the future of cash provision, the summary of responses to the consultation also set out the government's intention to also enable HM Treasury to designate the operators of such arrangements for FCA oversight.

Cash access services

- 351 The Bill intends to protect access to cash by ensuring the reasonable provision of cash withdrawal and deposit facilities.
- 352 The Bill appoints the FCA as the lead regulator for access to cash. HM Treasury will be empowered to designate firms to be subject to FCA oversight for the purpose of ensuring the reasonable provision of cash access (i.e., cash withdrawal and deposit) services across the UK, or parts of the UK. HM Treasury will consider the following factors for designation decisions: a firm's geographic coverage; distribution of customers; and market share. On the basis of these criteria HM Treasury expects the firms it will designate will be larger banks and building societies. HM Treasury will also be empowered to designate operators of cash coordination arrangements for FCA oversight.
- 353 The FCA will be granted monitoring, supervision and enforcement powers to regulate the provision of cash facilities by designated banks and building societies. These powers will also apply to any designated operators of cash coordination arrangements. Organisations that are involved in the provision of cash facilities but are not designated by HM Treasury will be subject to FCA powers relating to obtaining information only.
- 354 The FCA's powers will equip it with the ability to address cash access at both a national and local level. The Bill provides the FCA with the ability to impose requirements (including both rules and directions) on one or multiple designated banks and building societies, or designated operators of cash coordination arrangements, to require them to take such action as needed to ensure that there is reasonable provision of cash access services; this is in order to support the ongoing use of cash. The Bill enables the FCA to take account of the impact on persons, even where there is no relationship between the designated firm and the person. By way of example, it does not make FCA activity dependent upon whether a designated firm has customers residing in any given area, in recognition of factors such as that customers may access cash as they travel or change provider. The actions that the FCA requires firms to take may include refraining from the closure of a cash access service where there is no suitable alternative.
- 355 The Bill requires HM Treasury to prepare a policy statement on cash access services, and enables HM Treasury to structure its policy statement on the basis of baselines for

withdrawal and deposit facilities, rural and urban areas, and for different types of current account such as those for personal and non-personal customers. The FCA will be required to have regard to the policy statement in carrying out its functions. The Bill will also allow the FCA to take other matters that it thinks appropriate into account. This could include, for example: the type of service, and associated factors such as hours of availability; where the services should be provided; and cost, both in terms of provision and charges to end users.

Wholesale cash distribution

- 356 To support continued access to cash, a sustainable and resilient wholesale cash system is needed. This is the UK's infrastructure, including a system of cash centres, that is integral to the sorting, storing and distribution of coins and notes.
- 357 The wholesale cash industry purchases banknotes from the Bank of England (the Bank) and coins from the Mint at face value. Wholesale Cash in Transit (CiT) providers then move cash from where it has been printed or minted to cash centres for distribution. Cash centres then receive, store and prepare cash for circulation to the public.
- 358 The wholesale cash network is split across a number of cash centre operators. The decline in the transactional use of cash has put pressure on the business models of the wholesale cash network. While some operators have rationalised their cash centre estates and closed cash centres, utilisation of cash centres nevertheless remains low in some parts of the UK and there is little ability to reduce the fixed costs associated with running cash centres on an individual basis.
- 359 None of the current operators within the wholesale cash industry are currently considered to be systemic, as others are able to step in, in the event of a failure of one of the networks. The government expects the industry will transition to a smaller overall network in the coming years. This transition could be through rationalisation of the existing networks, or consolidation of the number of networks and operators. If this restructuring happens in a disorderly way it could pose a potentially significant risk to the wholesale cash infrastructure's effectiveness and sustainability, and consequently its ability to supply cash as and when required to the retail network across the UK. These risks need to be managed and it is the government's view that it is not possible to do that through voluntary arrangements alone.

Ensuring an effective, resilient and sustainable wholesale cash infrastructure

- 360 HM Treasury's principal policy aim is to support access to cash through ensuring that the wholesale cash infrastructure is effective, resilient, and sustainable in the long-term. In this respect sustainability means viability of the system over time. Furthermore, this policy also seeks to ensure that risks to financial stability and/or confidence in the UK financial system that would arise through the creation of a systemic entity in the event of a failure or wider disruption in the wholesale cash network are effectively managed. The government has also designed the regime so that it can accommodate commercial solutions to the challenges faced by the industry, as these emerge over time, whilst protecting the effectiveness, resilience, and sustainability of the wholesale cash distribution system.
- 361 The Bill provides the Bank with the powers to oversee the wholesale cash industry. There are two levels to the regime. Firstly, the Bank will be enabled to regulate the market activities of the wholesale cash industry (the market oversight regime) to ensure it remains effective, resilient and sustainable. Secondly, the Bank will have the ability to prudentially regulate a systemic entity in the market, should one form in the future (the prudential regime). HM Treasury, after consultation with the Bank and the industry, would designate entities as within scope of either or both parts of the regime. HM Treasury will also have a

similar power to un-designate entities if required. HM Treasury may only recognise an entity as having systemic significance, and therefore being in scope of the prudential regime, if they are satisfied that a deficiency or disruption to their wholesale cash distribution activities would threaten the stability of or confidence in the UK financial system.

- 362 For the market oversight regime, all entities which provide wholesale cash activities or provide financial support in relation to these activities, could be brought under the regime. HM Treasury will also have the power to designate a service provider to the industry under the regime, if required.
- 363 Under the market oversight regime, the Bank will be given the power to require the provision of information. This is for the purpose of allowing the Bank to form an aggregate picture of the overall health of the industry and identify emerging risks. The Bank would also have the power to give directions to designated firms. This would be to require or prohibit taking of actions or to set standards firms must meet. There would also be powers given to the Bank to enable them to publish principles and codes of practice industry must follow. The Bank would also be given powers of inspection, powers to enforce the regime, and would be enabled to levy fees for the operation of the scheme and to levy penalties for non-compliance. For the fees, these must relate to a scale of fees approved by HM Treasury and Parliament. Industry will be consulted on the development of this fee scale.
- 364 In relation to prudential regulation, the Bank would exercise the same powers used in the market oversight regime, but towards the objective of managing risks to financial stability, and to maintain confidence in the UK financial system. The failure of a systemic entity could threaten the stability or confidence in the financial system through a loss or severe reduction of access to cash as a means of payment for consumers as well as a potential loss of confidence in cash as a payment method. Therefore, the Bank would have the power to mitigate such a failure by applying an appropriate Special Administrative Regime (SAR) to the entity in the event of its failure or impending failure.
- 365 Given the nature of governance and financial support for wholly owned state entities, there is a power for HM Treasury to either not apply or apply with modifications any of the regulatory and enforcement provisions in relation to companies wholly owned by the Crown. Wholly owned state entities would also not be in scope of the prudential regime.
- 366 The Bank will publish a statement on its regulatory approach before exercising its powers. This will set out how the Bank intends to use its powers. The Bank will consult with industry on the development of its regulatory approach and this statement.

Performance of functions relating to financial market infrastructure

- 367 As noted earlier, CCPs and CSDs provide critically important functions which underpin the safe and effective functioning of global financial markets. These critically important functions mean that disruption at, or failure of, any of these entities could threaten the financial stability of the UK or cause significant disruption to the wider UK economy and to consumers. As such, encouraging effective governance and incentivising good behaviour within these entities supports the effective functioning of UK markets, and protects consumers and the economy.
- 368 The existing regulatory regime for CCPs and CSDs makes very limited provision for the oversight of individual conduct within these firms, as most supervisory and enforcement powers are focused on the entity itself. The Bill addresses this by introducing a senior

managers and certification regime (SM&CR) which can be applied to CCPs and CSDs. The key features of the SM&CR for CCPs and CSDs are similar to the existing SM&CR for banks, insurers and other authorised persons, which is set out in Part 5 of FSMA 2000.

- 369 The Bill also provides HM Treasury with a power to apply the regime to two other systemically important types of firms that promote market integrity, should the government determine that is appropriate following consultation with industry. These are Credit Rating Agencies (CRAs) and Recognised Investment Exchanges (RIEs). CRAs perform an integral role within global financial markets by providing judgments on the creditworthiness of a wide variety of financial instruments. RIEs are marketplaces where equities, commodities, derivatives and other financial instruments are traded. The core function of an exchange is to ensure fair and orderly trading and the efficient dissemination of price information for any securities trading on that exchange. By providing that the regime can be applied to CRAs and RIEs, the Bill aims to deliver greater regulatory consistency across the financial services sector.
- 370 CCPs and CSDs are regulated by the Bank, whilst RIEs and CRAs are regulated by the FCA. The Bank or the FCA (as appropriate) will make rules that will apply to these entities within the SM&CR.
- 371 The government will be able to decide when to apply the regime to any one of the entities within scope of the regime. The Bill will also allow the government to tailor the regime to each type of firm. For example, CRAs are subject to a stand-alone regulatory regime separate to the Part 18 of FSMA 2000 regime for CCPs, CSDs and RIEs and the regime will need to account for those differences.
- 372 The Bill provides supervisory, disciplinary and other powers for the Bank and the FCA, including the power to impose financial penalties, to take action against misconduct, and to make prohibition orders. The Bill includes further provisions to ensure that the SM&CR can be introduced as intended, and the relevant regulators (Bank or FCA) can regulate and supervise these entities effectively.

Proposed Senior Managers & Certification Regime

- 373 The key features of the SM&CR are similar to the existing SM&CR for banks, insurers and other authorised persons, which is set out in Part 5 of FSMA 2000. Upon HM Treasury applying the regime to a particular type of firm, the relevant regulator will be granted new powers to implement, supervise and enforce the following:
- a. **A Senior Managers Regime.** This gives the regulators the power to determine whether individuals who perform roles that pose a potential risk to the firm or to business or other interests in the UK have the appropriate competence, expertise and personal characteristics (such as integrity) to carry out their roles.
 - b. **A Certification Regime.** This requires firms to certify as fit and proper any employee (including contractors and secondees) who performs a “specified function” that could cause significant harm to the entity or its consumers.
 - c. **Conduct rules.** These apply to all employees (including contractors and secondees), and set minimum, high-level requirements regarding the conduct of individuals at these systemically important entities.
- 374 The Bank and the FCA will have the power to impose penalties where an individual performs a senior management function without approval, and the individual knew, or could reasonably be expected to have known, that they were doing so without approval. The Bank and the FCA would also have the power to take action against an individual for misconduct.

- 375 As a complement to the SM&CR, the Bank and the FCA will have the power to make prohibition orders, analogous to the existing powers that the FCA and the PRA have to make prohibition orders under Part 5 of FSMA 2000. If it appears to the Bank or the FCA that an individual is not a fit and proper person to perform a function in relation to an activity carried out by a type of firm that they regulate and which is within scope of this SM&CR, they will be able to make an order prohibiting that individual from performing any function in a particular firm, type of firm or any firm covered by the new SM&CR. The Bank and the FCA can also, where appropriate, make provision under this section preventing an individual from performing regulated activities at an authorised person, exempt person, or person to whom the general prohibition does not apply as a result of Part 20 of FSMA 2000. This will allow, for example, the Bank to issue a prohibition order that prevents an individual not only from performing functions in respect of activities carried out by a CCP, CSD, RIE or CRA, but also within any other type of entity subject to the SM&CR in Part 5 of FSMA 2000.
- 376 The Bill will make it a criminal offence for an individual to perform a function in breach of a prohibition order. Other criminal offences that already apply to individuals in these firms under existing legislation would also be extended to encompass the SM&CR. For example, individuals would be guilty of an offence if they knowingly or recklessly provide false or misleading information to the regulator in relation to the regime.

Senior Managers Regime

- 377 The Bill sets out a senior managers regime for these entities, which will, in essence, be very similar to the regime that already applies to banks, insurers and other authorised persons. It will place obligations on firms as well as the people who carry out senior management functions. The firm must ensure that senior management functions are only carried out by people who have been approved by the relevant regulator, and individuals have an obligation not to perform senior management functions without approval.
- 378 The Bill also provides powers for the Bank and the FCA to make rules and directions relating to a number of elements of the regime, including:
- a. specifying which functions are to be considered “designated senior management functions”, and therefore require approval;
 - b. the form in which applicants may be required to submit and verify information; and
 - c. defining the types of characteristics, qualifications and competencies that the entity must consider before making an application.

Certification Regime

- 379 The Certification Regime applies to employees performing “specified functions”, meaning those who are not carrying out senior management functions, but whose roles have been deemed capable of causing significant harm to the firm or its consumers. The Bill provides that firms must take reasonable care to ensure that specified functions are only performed by a person if they have a valid certificate issued by the regulated firm. The purpose of the certificate is to confirm that the person is considered to be a “fit and proper” person to carry out the function.
- 380 The Bill provides power for the Bank and the FCA to define specific functions within the entity for which a person must be certified by the entity to be “fit and proper” to perform the role. The types of roles that fall in scope of the Certification Regime would be determined by the relevant regulator, following public consultation.

Conduct Rules

- 381 Conduct Rules set minimum, high-level expectations regarding the conduct of individuals and provide a framework against which firms and regulators can form judgements about an individual's behaviour and actions.
- 382 The Bill provides powers for the Bank and the FCA to make conduct rules which apply to all employees of the entity, as well as to require firms to ensure that all employees understand how those rules apply in relation to them. Conduct rules would be determined by the regulators following public consultation.

Central counterparties in financial difficulties

- 383 Central counterparties (CCPs) are institutions that sit between the buyers and sellers of financial contracts, providing assurance that the obligations under those contracts will be fulfilled. This reduces risks to the financial system associated with counterparty default. The process of transacting through a CCP is known as "clearing". Firms can access CCPs' clearing services either by becoming a "clearing member" of a CCP, or a client of a clearing member. Clearing members are typically large international institutions, such as banks, who can then offer clearing services to individual clients. Clients tend to be medium and large sized financial and non-financial firms.
- 384 Following the global financial crisis starting in 2007, the "clearing obligation" was introduced to increase the use of CCPs for clearing and reduce the overall counterparty risk in the market. Firms subject to the clearing obligation are legally required to access clearing services for certain transactions. Since the introduction of this requirement, the volume of clearing at CCPs, both in the UK and abroad, has increased significantly. UK CCPs have consistently shown resilience during times of market stress but, due to the systemic nature of CCPs and the interconnectivity and increased volume of trades cleared through them, the government considers that it is important to ensure that the UK has a robust regime to manage the failure of a CCP in the event that it did occur, in a way that minimises risks to the wider financial system, the economy, and public funds.
- 385 The UK's existing resolution regime for CCPs was introduced in 2014. It provides the Bank with a limited set of powers which allow it to transfer the property or ownership of a CCP. After the use of these powers, the Bank remains reliant on the powers available under the CCP's own rulebook to allocate losses and ensure the continued operation of the CCP.
- 386 CCPs have various resources, tools and plans in place to help mitigate against the risk of a clearing member defaulting. In order to clear through a CCP, clearing members must provide collateral to cover their transactions, known as initial margin (IM), which the CCP will use to meet payment obligations to the other side of the contract in the event that a clearing member defaults. How much IM a clearing member is required to provide is calculated based on a number of factors, including the riskiness of the clearing member's portfolio.
- 387 All clearing members are also required to contribute to a further mutualised pool of financial resources, known as the default fund. In the event that a defaulting clearing member's initial margin is insufficient to cover the loss resulting from their default, then the default fund is used to absorb the loss. The defaulter's own contribution is exposed first, followed by part of the CCP's own capital (known as "skin in the game"), and then default fund contributions from other clearing members are used.
- 388 In 2017 the Financial Stability Board (FSB) published guidance for recovery and resolution of CCPs. The FSB is an international body that promotes international financial stability and

works towards developing strong regulatory, supervisory and other financial sector policies. The guidance sets out the tools and powers that should be provided to resolution authorities. As the UK's current regime was introduced in 2014, it is not aligned with the FSB's most recent guidance. The Bill will therefore bring the UK in line with the most recent FSB guidance, which seeks to ensure that resolution authorities have the appropriate flexibility needed to resolve a CCP in the most effective way.

Failure of a CCP

- 389 UK CCPs must calibrate their IM and default fund requirements such that they are large enough to cover the losses resulting from the default of two of their largest clearing members. If a default loss exceeds this amount, the CCP has recourse to a number of tools and powers in its rulebook, which sets out the contractual agreements the CCP has with its clearing members, to mitigate against the loss. If a CCP began to experience a deterioration in its financial situation as a result of clearing member default, the CCP would use these tools to stop it from failing. These are known as "recovery actions". If the CCP is unable to cover the loss using these recovery actions, it may have to close the clearing service and allocate outstanding losses to clearing members.
- 390 The continuity of critical clearing services may also be threatened as a result of the CCP experiencing a loss which arises not as a result of a clearing member default (e.g. as a result of a cyber-attack). This is known as a "non-default loss".
- 391 The closure of a CCP's critical clearing services, either because of a default loss or non-default loss scenario, would constitute the failure of a CCP. Typically, when a financial institution fails, it would be subject to normal or modified insolvency proceedings. In the case of CCPs, due to their systemic importance, this approach would be likely to have a significant negative impact on financial stability, disrupting the provision of critical clearing and settlement functions to the economy, and having severe knock-on effects on other market participants. The failure of a CCP could cause considerable disruption to the markets it serves, with these markets potentially needing to close, which could expose market participants to significant losses. The scale of the losses and impact on financial markets could be similar to that of a financial system-wide crisis, or even cause such a crisis. The failure of a CCP could therefore undermine the stability of the entire financial system.
- 392 Given this, the use of normal or modified insolvency procedures are generally not considered appropriate for managing the failure of a CCP, and alternative arrangements are needed.

Resolution

- 393 A resolution regime exists for circumstances where a CCP's recovery actions are either not successful or are deemed unlikely to be successful, or where continued recovery actions are considered inappropriate (for example, where continuing with those actions could itself have significant adverse impacts on financial markets). It provides a resolution authority with legal powers to intervene in advance of the CCP entering into insolvency, either to restore it to health or to manage its failure in an orderly way.
- 394 The objectives of the existing CCP resolution regime include:
- a. Maintaining the critical clearing services of a CCP
 - b. Protecting public confidence in the UK's financial system
 - c. Avoiding interference with property rights
 - d. Limiting contagion to wider markets, and more broadly, protecting financial stability
 - e. Protecting public funds.

395 A resolution regime requires a resolution authority which is responsible for planning for and executing a resolution. This resolution authority creates ‘resolution plans’ which consider the scenarios in which a market participant may fail, and set out the preferred strategy and powers and tools that the resolution authority will use in resolution. The UK’s resolution authority is the Bank of England (the Bank), which is also the authority responsible for protecting and enhancing the resilience of the UK financial system. The Resolution Directorate at the Bank which would oversee any CCP resolution is organisationally distinct from the part of the Bank responsible for the ongoing regulation and supervision of CCPs (which has oversight of CCP recovery). The FRF Review measures within this Bill which look to reform the Bank’s role as CCP regulator will not apply to the Bank in its capacity as resolution authority.

Expanding the UK regime

396 The expanded resolution regime implemented by the Bill will seek to provide the Bank, as the UK resolution authority, with the necessary powers to stabilise a CCP, so that it can continue to provide its critical clearing services, preventing contagion spreading across the financial system; whilst ensuring CCPs and clearing members bear the losses arising from the failure, thereby protecting public funds.

397 The Bill provides the Bank of England with the following powers, to successfully perform a resolution:

- a. **Removal of material impediments to resolvability.** This power would enable the Bank to require a CCP to make changes to remove potential barriers to its resolvability identified by the Bank;
- b. **Conditions and timing for entry into resolution and engagement between authorities.** The Bill will set the conditions that must be assessed before a CCP can be placed into resolution. This includes the power to enable the Bank to place a CCP into resolution before the CCP’s own recovery measures have been exhausted, on the condition that continued recovery actions by the CCP would likely ‘compromise financial stability’. The Bank will be required to consult HM Treasury on whether this new resolution condition is met;
- c. **Lockdown or deferral on the payment of dividends, buybacks or variable remuneration.** This power would enable the Bank to temporarily restrict or prohibit any remuneration of equity for CCP shareholders or variable remuneration for the CCP’s senior staff in severe circumstances, including if there is a rapid deterioration in the financial situation of the CCP, and it was therefore at risk of failing. It would be available as an early intervention measure, but also after the CCP has entered resolution to ensure that all resources are directed to compensation payments and replenishing public funds where these have been used as a last resort, should either be necessary;
- d. **Power to suspend termination rights.** This power would give the Bank the ability to temporarily stop any right to early termination of participation by a clearing member that arises as a result of a CCP being placed in resolution. This would help stabilise the clearing services offered by the CCP and ensure that the Bank has access to the largest possible pool of resources for loss absorbency, thereby limiting risks to public funds;
- e. **Power to take control of the CCP.** This power would enable the Bank to take control of a CCP without having to rely on its existing property or share transfer powers. This would allow the Bank to enforce the CCP’s rulebook more easily to stabilise the CCP

and ensure continuity of the critical clearing service in resolution without the legal and operational risk of conducting a property or ownership transfer;

- f. **Power to remove and replace directors.** This would provide the Bank with the power to direct a CCP to remove or replace directors and senior managers and appoint temporary managers in severe circumstances, as the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) are already able to do for other types of financial services firms. Pre-resolution, it would only be used subject to a number of conditions, including if there was a rapid deterioration in the financial situation of the CCP and it was at risk of failing, or if there was a regulatory infringement by the directors or senior managers at the CCP;
- g. **Power to return the CCP to a matched book.** The Bank will have the power to return a failing CCP to a 'matched book' to ensure that it does not continue to be exposed to losses generated by the positions of the defaulting clearing member(s)⁸. The Bank would have the flexibility to perform a full or partial termination of contracts, depending on the scenario and the potential wider impacts on financial stability. To provide clearing members and end users with greater certainty of how these powers would work in practice, the Bank will be required to set out how it intends to use these powers in the event of a CCP failure;
- h. **Power to perform variation margin gains haircutting (VMGH).** This gives the Bank the ability to reduce (potentially to zero) the payments that a CCP would otherwise be required to make to clearing members whose positions have gained value. It will allow the Bank to go beyond what is permitted by the CCP's own rulebook when doing this. This tool would only be available for use where the CCP's losses are caused by clearing member default;
- i. **Further powers to generate additional loss absorbing capacity and replenish a CCP's resources.** The Bank will be given powers to write down unsecured liabilities (which can only be used in the case of non-default scenarios) and a statutory cash call power which enables the Bank to collect contributions from clearing members (in the case of both default loss and non-default loss scenarios). The Bank will be able to allocate losses and replenish a CCP's resources through the mechanism that it judges least disruptive. There will be safeguards to stop the Bank writing down certain liabilities (e.g. initial margin) when using its write-down power. To enable clearing members to be aware of the level of resources that they might have to pay under the cash call power, the Bill will confer powers on HM Treasury to cap an individual clearing member's contribution. The government currently envisage this cap to be at two times an individual member's prefunded contribution to the default fund in a default-loss scenario, and three times in a non-default loss scenario;
- j. **Power to delay enforcement of a clearing member's obligation in resolution.** The Bill will confer a power on HM Treasury to make regulations enabling the Bank to delay enforcement of a clearing member's obligations in resolution should such enforcement during the resolution of a CCP present a risk to financial stability. It is expected that the Bank would have the ability to enforce outstanding obligations resulting from a delay in enforcement at any time up to 18 months after the resolution, if at the relevant time the reasons for refraining from their enforcement no longer exist. If the Bank does not enforce an outstanding obligation within this 18-month period, the obligation will lapse at the end of it;

⁸ A matched book ensures that the CCP has a buyer and seller for every trade that they are a part of.

- k. The Bill also provides for a “**no creditor worse off**” (NCWO) safeguard. This safeguard ensures that creditors of the CCP have the right to compensation should they be worse off in resolution than they would have been in the absence of resolution action had the CCP entered insolvency.

398 As part of their prefunded resources, UK CCPs are already required to hold a ring-fenced tranche of their own capital often referred to as “skin in the game” (SITG). HM Treasury intends for the Bank to be able to require CCPs to hold a second tranche of SITG sitting after the prefunded default fund, which would mean CCPs holding a greater amount of their own capital for loss absorption. The new powers granted to the Bank and HM Treasury under this Bill could be used to introduce such a requirement.

399 Together, the proposed powers and tools are intended to provide the Bank with a set of options to resolve a CCP in the most effective way, limiting risks to financial stability and public funds.

Insurers in financial difficulties

400 A company is insolvent when it can no longer meet its financial obligations to those parties to whom it owes money (known as its ‘creditors’).⁹ When a company is insolvent, or in danger of becoming insolvent, the law sets out the procedures available for managing the company’s affairs with a view to rescuing the company or, if the company ceases to trade, establishing how the company’s assets will be realised and divided between its creditors. These procedures, and the rules surrounding their use, can broadly be referred to as a jurisdiction’s insolvency arrangements.

401 The UK’s insolvency arrangements for insurers are a modified version of the UK’s standard corporate insolvency arrangements, augmented in some places with bespoke provisions. This framework is primarily contained in the Insolvency Act 1986, FSMA 2000, and associated secondary legislation.

402 Insurer insolvency is rare, with only 11 UK insurers having become insolvent since the year 2000.¹⁰ When it does occur, it can be detrimental both for individual policyholders (who may rely on life insurance policies for a primary source of income), and for businesses left unable to operate without insurance cover. As such, robust insolvency arrangements that promote good outcomes for policyholders and other creditors are essential. While the current arrangements have generally been effective, some elements have become outdated as related international standards have developed. This creates shortcomings that could increase the risk of adverse outcomes for policyholders and other creditors when an insurer becomes insolvent.

403 The Bill makes a series of targeted amendments to the existing arrangements, in order to clarify certain elements, and to expand the protections available to an insurer and its policyholders where an insurer is undergoing insolvency or write-down procedures. The government [consulted](#) on these amendments in 2021, and published a [response](#) in April 2022. These amendments cover three broad areas.

Section 377 of the Financial Services and Markets Act 2000

404 Section 377 of FSMA 2000 currently provides a power for the court to reduce the value of one or more of the contracts of an insurer which has been ‘proved to be unable to pay its

⁹ For insurers, the large majority of these creditors will typically be the insurer’s policyholders.

¹⁰ Over this time period 27 insurers operating in the UK have become insolvent, but in only 11 of these cases was the Financial Services Authority (until 2013) or Prudential Regulation Authority (since 2013) the home-state regulator.

debts,' as an alternative to making a winding-up order (which would place the insurer into liquidation). This reduction is referred to as a 'write-down' of liabilities. The power in FSMA 2000 has never been used, and is only described at a high level in legislation.¹¹ As such, significant uncertainties around its application exist, and may limit its usability, even where it could provide a better outcome for the creditors and policyholders of an insurer in financial distress; for example, by ensuring continuity of cover. The Bill clarifies aspects of this power, including:

- a. The liabilities in scope. Broadly, all unsecured liabilities will be in scope, including liabilities to policyholders. The Bill creates a number of exemptions, including debts to employees and pension schemes, and sums owed in respect of financial contracts.
- b. The parties eligible to apply to the court for use of the power; and
- c. The test the court must apply when considering such applications.

405 The Bill also makes the power available when an insurer is, or is likely to become, unable to pay its debts, rather than solely in the event that it is proved unable to pay its debts.¹²

406 The Bill will introduce a new position of 'write-down manager', an officer of the court tasked with monitoring a court-ordered write down. In practice, we expect the write-down manager will help design the write-down order. Unlike an insolvency practitioner, a write-down manager would not be 'in possession' of an insurer, as managers will retain control of the firm. The write-down manager will be empowered to make recommendations to the insurer's directors, and there is provision for the write-down manager to apply to the court for orders and directions. The role of write-down manager continues until a write-down is terminated or the insurer is wound-up.

407 The Bill also makes provision for the rules relating to the Financial Services Compensation Scheme (FSCS) to require the FSCS to make payments in relation to protected policyholders whose payments are reduced under a write-down.¹³ Currently, while protected policyholders would be eligible for FSCS compensation in the event that their insurer became insolvent, they would not be eligible for FSCS compensation in the event of a write-down under section 377 of FSMA 2000. This mismatch in available protection creates a situation in which protected policyholders may be better off if their insurer fails (given that FSCS protection would apply) than if the court orders a write-down under section 377 of FSMA 2000 to avoid that failure (whereby FSCS protection would not currently apply). The government's intent is to align the protection available following a write-down with the protection available in insolvency, to better protect policyholders. As the FSCS operates within rules set by the Prudential Regulation Authority (PRA), in its [Rulebook](#), the Bill will establish a legislative framework to ensure the PRA is able to make rules facilitating the protection described above.

408 The Bill also empowers the court to (partially or fully) reverse a write-down if an insurer's financial position improves, and it is deemed able to pay a greater proportion of its debts. This would result in the value of the insurer's liabilities being increased.

11 An attempt to use the power was made in 1978 in the matter of *re Capital Annuities Ltd* [1978] 3 All ER 704. It was eventually determined that the company in question was not insolvent, and so the power was not used.

12 This test matches the established test for entry into administration, as set out in section 11, Schedule B1 to the Insolvency Act 1986.

13 Protected policyholders are policyholders who would currently be eligible for FSCS compensation if their insurer became insolvent and was declared in default by the FSCS.

409 The Bill additionally sets out that written-down liabilities (and the potential for a future reversal of the write-down) will be disregarded for the purposes of section 123 of the Insolvency Act 1986 (to ensure that an insurer cannot be deemed ‘unable to pay its debts’ on the basis of liabilities which have been written-down), and for the purposes of Art. 11 of the Solvency 2 Regulation (*Recognition of contingent liabilities*) and purposes of the PRA’s prudential rules governing insurers. This is to ensure that written-down liabilities are treated as extinguished for these purposes, for so long as the write-down is in force. Without this, an insurer could still meet the statutory test for insolvency following its liabilities being written-down or have the potential for a future reversal of the write-down reflected on its balance sheet as a contingent liability, contrary to the intended effect of the write-down which is to restore an insurer’s balance sheet. The Bill gives HM Treasury a power to amend the provisions for which purposes written-down liabilities are disregarded (through statutory instrument under the draft affirmative procedure) (Paragraph 9(3) of new Schedule 19B to FSMA 2000). This power allows HM Treasury to keep the list of provisions in paragraph 9(2) of that Schedule up-to-date, ensuring HM Treasury can address potential future changes in prudential rules and insolvency legislation.

410 In addition, the Bill introduces a statutory moratorium on certain types of legal action taken against an insurer which is undergoing a write-down. While the moratorium is in place, creditors will not be able to take legal action to recover their debts or to enforce security.¹⁴ In this way, the new moratorium has similarities to the moratorium which currently applies while a firm is in administration. The Bill sets out that certain processes, including any actions taken by the PRA or Financial Conduct Authority (FCA), actions to enforce financial awards made by the Financial Ombudsman Service (FOS), and employment tribunals, will be exempt from the effect of the moratorium. Certain arrangements in financial contracts are also excluded from the moratorium to protect parties’ risk management practices. The Bill gives HM Treasury a power to alter these exclusions by regulation made by statutory instrument under the draft affirmative procedure (Paragraph 3(4) of Schedule 19B to FSMA 2000). Other types of legal action against the firm or its assets will still be available with the permission of the court. The Bill also introduces certain restrictions on an insurer subject to a write-down disposing of its assets without consent from the PRA.

Contractual Termination Rights

411 Insurers will typically hold both supply contracts (contracts to supply the firm with goods or services), and financial contracts, such as bank loans. Both types of contracts can include ‘ipso facto’ clauses, which allow counterparties to terminate the contract if the insurer enters insolvency, restructuring or similar proceedings, or otherwise comes under financial distress, even if the insurer continues to meet its obligations to that counterparty (such as making payments on time).¹⁵ Entry into the write-down process (or other procedures that are likely to be under consideration around the same time, such as administration or winding-up) may thus allow a firm’s suppliers and financial counterparties to terminate contracts. Early termination of supply contracts could disrupt the ongoing viability of a struggling insurer, hindering attempts to avoid a disorderly failure. Early termination of

¹⁴ Secured creditors are creditors with claims backed by some form of collateral. Secured creditors have a right, in certain circumstances, to ‘enforce’ their security, generally by taking possession of certain assets or by appointing administrators in respect of the company.

¹⁵ The Insolvency (Protection of Essential Supplies) Order 2015 (SI 2015/989) created a statutory override of ‘ipso facto’ clauses pertaining to certain insolvency procedures (although, these provisions only applied to supplies of utilities and IT goods). The Corporate Insolvency and Governance Act 2020 (CIGA) extended these protections to cover all types of supplies. Supplies to insurers (among other categories of financial services firms) were explicitly excluded under CIGA, meaning that insurers are still vulnerable to the termination of certain supply contracts.

financial contracts could suddenly expose an insurer to significant risks, leading to further financial deterioration. In both cases, these termination rights could increase the risk of adverse outcomes for an insurer's policyholders and other creditors.

- 412 The Bill will introduce a new 'moratorium' which will temporarily prevent suppliers and some financial contract counterparties from using this type of termination clause, while an insurer is undergoing certain insolvency or write-down procedures. The moratorium will apply during administration, during a write-down process under the new provisions replacing section 377 of FSMA 2000 (for an initial six-month period, with the possibility of extensions by the court), and while there is an outstanding petition for winding-up in relation to the insurer (but not once a winding-up order is granted by the court). In the write-down context, the moratorium will not prevent counterparties terminating for non-performance (e.g., where the insurer fails to make payments or meet any of its other obligations under the contract). The scope of the write-down is also designed to ensure that financial counterparties are generally not written-down at all, and suppliers are not written-down in respect of ongoing supplies, ensuring that parties 'locked-in' by the moratorium are generally able to expect payment and ongoing performance from the firm. The Bill will also empower the court to grant exemptions from the effect of the moratorium where it would otherwise be likely to cause hardship for affected parties.
- 413 The moratorium will apply by default to all supply contracts and most financial contracts; certain arrangements in financial contracts will be excluded to protect parties' risk management practices. In particular, the moratorium will not affect 'protected arrangements' as defined in section 48P Banking Act 2009. In individual cases, the court will be able to narrow the scope of the moratorium, to remove contracts from its scope where the court is satisfied that not doing so will cause hardship, or where to do so will lead to a better outcome for creditors (or, where relevant, promote the purpose of administration). The Bill also gives HM Treasury a power to alter the scope of the moratorium by regulation made by statutory instrument under the draft affirmative procedure (Paragraph 12 of Schedule 19C to FSMA 2000). This will allow the government to update the scope of the moratorium as needed, in response to market practice and any corresponding developments in insolvency law.

Policyholder Surrender Rights

- 414 Certain life insurance policies include an investment element and accrue cash value over time. These policies typically include 'surrender' clauses allowing policyholders to terminate their contract early in return for a proportion of its cash value. Examples include unit-linked policies and with-profits policies, which are economically similar to managed funds. Unit linked insurance policies offer both insurance coverage and investment exposure (usually to equities, bonds or an index), allowing policyholders to make regular premium payments which build up additional units. In effect, these products act as a savings/investment vehicle for policyholders. With-profit policies serve a similar purpose, but rather than policyholders buying units representing specific underlying assets (or asset classes/indexes), policyholders share in the overall profits and losses of a firm's with-profits fund. This allows the insurer to 'smooth' investment returns to with-profits policyholders.
- 415 In both cases (unit-linked and with-profits), the policies have a surrender value which policyholders are generally able to convert to cash at will, or switch between different funds in order to reduce investment exposure. When a life insurer is known to be in financial distress, policyholders may choose to surrender their contracts over concern that they will lose value, creating a situation similar in motivation and effect to a 'run' on a bank. Widespread policy surrenders could make it more difficult to estimate an insurer's liabilities or force an insurer to rapidly sell assets in order to meet demands for payment.

This could exacerbate an insurer's financial difficulties, potentially leading to worse outcomes for its policyholders and other creditors.

- 416 The Bill will introduce a temporary moratorium on life insurance policyholder surrender and switching rights, which will apply in the same circumstance as the moratorium on contractual termination rights described above. The stay will last for an initial 6-month period, with the possibility of extension if granted by the court (or the period the insurer is in administration or a winding up petition has been presented but not withdrawn or determined). The stay will prevent life insurance policyholders from surrendering their policies, although small withdrawals (or 'partial surrenders'), of up to 5% of the value of the policy in any 12-month period, will still be allowed. The Bill also provides HM Treasury with a power to amend this percentage limit through statutory instrument under the draft affirmative procedure (Paragraph 12 of new Schedule 19C to FSMA 2000). As with the moratorium described above, the Bill will make available hardship exemptions where the stay would otherwise be likely to cause hardship to policyholders. Such hardship exemptions can be granted by certain parties, including the write-down manager (as well as by the court), making the process less expensive and more rapid, whilst protecting the firm from widespread surrenders.

Miscellaneous

Disciplinary action against formerly authorised persons

- 417 Firms performing regulated financial services activities in the UK must generally be authorised by the FCA, or where relevant, the PRA. A firm must apply to obtain authorisation and once authorised, must comply with the relevant rules and requirements set out by the regulators.
- 418 The FCA and the PRA have a broad range of powers to supervise firms and enforce rules and regulatory requirements. For example, they can carry out investigations, and where a firm fails to adhere to a requirement or rule, the FCA and the PRA have the ability to take disciplinary action against the firm. These disciplinary actions include the publication of a statement detailing the misconduct ('public censure') or the issuing of fines.
- 419 Except in some specific circumstances, the FCA and the PRA are unable to take disciplinary action against firms which are no longer authorised, if they committed misconduct whilst they were authorised.
- 420 The Bill will allow the FCA and the PRA to take action against firms that are no longer authorised (provided they become unauthorised on or after the introduction of this Bill), for misconduct while they were authorised. This will enable the regulators to appoint a person to carry out an investigation into potential misconduct, issue a public censure, issue a financial penalty, and require the payment of compensation to victims of misconduct. This will ensure that any firms committing misconduct are held to account, and that they cannot escape appropriate disciplinary action by applying to cancel their authorisation before their misconduct is identified by the regulators.

Financial Services Compensation Scheme

- 421 The Financial Services Compensation Scheme ('FSCS') is the scheme for compensating persons, such as consumers, in cases where authorised financial services firms are unable, or likely to be unable, to satisfy claims. The FSCS is administered by the 'FSCS manager', a body corporate established under FSMA 2000.

- 422 The Office for National Statistics ('ONS') is responsible for compiling the National Accounts – core accounts for the UK economy as a whole that describe production, income, consumption, accumulation and wealth across different parts of the economy. In order to provide accurate National Accounts, the ONS classifies the entities making up the UK's economy by reference to certain sectors and subsectors.
- 423 The FSCS manager was classified by the ONS in 2020 as a 'supervisory authority' and part of the 'public financial auxiliaries' subsector within the broader 'public financial corporations' sector which means it is not part of central government nor an Arm's Length Body (ALB) of HM Treasury. This decision was based on its view that the FSCS manager carries out supervisory actions with regard to paying compensation and is able to freely take decisions to ensure it has sufficient resources.
- 424 The decision has the following implications:
- a. the FSCS manager's new status as a 'public financial auxiliary' for ONS purposes means that it is now treated by the ONS in a similar way to the PRA and the FCA; and
 - b. given the FSCS manager is no longer regarded as an ALB of HM Treasury, its accounts will no longer be consolidated within HM Treasury accounts.
- 425 The Bill will make two changes to the legislative framework as set out in FSMA 2000 to ensure that it properly reflects the FSCS manager's new status.
- 426 Firstly, the Bill will remove the requirement that the FSCS manager has an accounting officer. Retaining the accounting officer requirement for the FSCS manager would not be appropriate given the level of independence of bodies classified as public financial auxiliaries. Requirements in FSMA 2000 that the FSCS manager must ensure efficiency and effectiveness in the discharge of its functions and minimise public expenditure attributable to financial assistance will be retained to ensure that Parliament's interests, including the FSCS manager's use of public funds, continue to be protected.
- 427 Second, the Bill will remove HM Treasury's power to require certain information from the FSCS Manager in connection with accounts. Since the FSCS manager accounts are no longer consolidated within HM Treasury accounts, the information sharing requirement is unnecessary.

Unauthorised Co-ownership alternative investment funds (AIFs)

- 428 Since March 2020, the government has been conducting a review of the UK's funds regime to identify options to make the UK a more attractive location to set up funds and to support a wider range of more efficient investments that are better suited to investor needs. This review encompasses the fund structures available in the UK, their legal form, their regulation and their taxation.
- 429 In January 2021, the government sought stakeholder views on the wider components of the review by publishing [Review of the UK funds regime: A call for input](#) ("Call for Input"). The *Call for Input* set out the objectives and scope of the review and requested feedback on which reforms should be taken forward and how they should be prioritised.
- 430 Prior to the launch of the *Call for Input*, the asset management sector had made representations to the government pointing out that there is a gap in the range of fund structures offered by the UK for which FCA authorisation is not required. Stakeholders argued that there is demand for a flexible, tax-efficient, unauthorised fund structure that can invest in asset classes other than stocks and bonds ("alternative asset classes"), aimed only at professional investors. These funds cannot currently be set up in the UK. The government sought views on this potential gap as part of its *Call for Input*.

- 431 A significant proportion of the respondents to the *Call for Input* on these areas called for the creation of a new fund structure: the unauthorised contractual scheme. The unauthorised contractual scheme was proposed to be a contractual scheme, as per section 235A of FSMA 2000, that is: unauthorised, unlisted, closed-ended¹⁶, only available to professional investors, unconstrained in terms of investment approach, tax transparent for income¹⁷, and has tradeable units.
- 432 In February 2022, the government published [Review of the UK funds regime: a call for input - Summary of responses](#) (“*Summary of Responses*”). This publication summarised the responses the government received following the *Call for Input*, set out the government’s response to respondents’ feedback, and the next steps the government proposed to take to ensure that the UK funds regime review delivers on its objectives. In the *Summary of Responses*, the government committed to further explore options for the introduction of the unauthorised contractual scheme.
- 433 At present, the rights and liabilities of participants under sections 261M to 261O and section 261P(1) and (2) of FSMA 2000 only applies to a contractual scheme, that is structured as a co-ownership scheme and which benefits from an authorisation order (typically abbreviated to CoACS). As a result, if a new investment vehicle that is similar to the unauthorised contractual scheme was introduced in statute, it would not benefit from the same provisions in relation to the contracts in the scheme, statutory rights and limitation and segregation of liability as a CoACS does. The absence of these provisions means that if an unauthorised contractual scheme was introduced in statute it is unlikely to be commercially viable and may present inappropriate risk to participants.
- 434 The Bill provides HM Treasury with a power to essentially apply relevant rights and liabilities that a CoACS would already benefit from, to the proposed unauthorised contractual scheme in order to ensure its commercial viability (in the event that such an investment vehicle were to be introduced).
- 435 Before making the unauthorised contractual scheme available in the UK, the government must ensure that it is subject to the appropriate legal, regulatory and tax treatment. That work continues, however it is clear that this scheme will not be a commercially viable product without having the appropriate rights and liabilities in place, especially for participants. Therefore, the government is legislating for this power now to ensure that – should it decide to proceed with this fund structure in the future – it can do so successfully.

Control over authorised persons

- 436 Where a person (“controller”) decides to acquire control of a UK authorised firm (defined as taking an ownership stake of 10% or more), the proposed controller will need to seek approval from the relevant regulator before the interest is acquired. This is done by the means of giving notice in line with section 178 of FSMA 2000. The regulators will then make a decision about whether to approve or reject the change in control based on a number of criteria:

16 An “open-ended fund” is one in which the participants have a right to redeem or sell their interest in the fund at a price related to the net value of the assets held by the fund. In contrast, a “closed-ended fund” is broadly any fund that is not open-ended. Closed-ended funds have a fixed number of units or shares that may be issued subject to company law or other constraints in the fund’s constitution. Once issued, unitholders or shareholders are not entitled to have their units or shares redeemed on demand and the units or shares are usually only traded in the secondary market or redeemed on the winding up of the fund.

17 Tax transparency means that the fund’s income is treated as arising directly to investors for UK tax purposes.

- a. The reputation of the section 178 notice-giver;
 - b. The reputation and experience of any person who will direct the business;
 - c. The overall financial soundness of the section 178 notice-giver;
 - d. Whether the UK financial services firm will be able to comply with its prudential requirements (including the threshold conditions – the minimum requirements for the financial services firm to be authorised and stay authorised - in relation to its regulated activities);
 - e. Whether, if the UK financial services firm is to become part of a group as a result of the acquisition, that group has a structure which makes it possible to exercise effective supervision, exchange information among regulators and determine the allocation of responsibly among regulators.
 - f. Whether there are reasonable grounds to suspect that the new controller is connected with money laundering or terrorist financing or that the risk of this activity could increase.
- 437 In making an assessment, the appropriate regulator must disregard the economic needs of the market.
- 438 Currently, the PRA and the FCA can approve or reject an application for a change in control, and they can also impose conditions, but only where they would otherwise reject the application. This limit to the scenarios where the regulators can impose conditions was introduced through the EU Acquisitions Directive (2007/44/AC).
- 439 There are some situations where the evidence may not reach the “reasonable grounds” threshold needed to reject a decision, but the relevant regulator still has significant concerns. For example, an investigation may be ongoing while the change-in-control process is taking place and may conclude in due course in a finding that adversely impacts the reputation of the new controller. This situation may therefore warrant a condition on a change-in-control.
- 440 The Bill will provide for the regulators to apply conditions to new controllers where they have concerns which affect their ability to advance the regulators’ objectives, rather than in the narrower set of existing circumstances.

Liability of payment service providers for fraudulent transactions

- 441 The value and volume of “authorised push payment” (APP) scams has increased significantly in recent years. An APP scam occurs when someone is tricked into making a payment to a fraudster under false pretences, for example, where someone is deceived into authorising a payment to a person for something they believe at the time is a legitimate purchase.
- 442 APP scams are different to unauthorised payment fraud, where money is taken from someone’s account without their knowledge or consent. Victims of unauthorised payment fraud are protected by legislation, with statutory requirements on payment service providers (for instance, a payer’s bank) to reimburse victims for the losses they incur under such circumstances.
- 443 Although no statutory reimbursement requirement exists for APP scams, some payment service providers have made voluntary commitments to reimburse APP scam victims in certain circumstances, including by signing up to a voluntary contingent reimbursement model code that sets a framework for how liability should be apportioned when a scam

occurs. The varying approaches to reimbursement by payment service providers have led to inconsistent levels of protection for APP scam victims, based on which payment service provider they use, and how the payment service provider interprets any voluntary commitments to a customer when an APP scam occurs.

- 444 The Payment Systems Regulator (PSR) regulates designated payment systems and their participants (including banks and other payment service providers). In 2021, the PSR published a [Call for Views](#), and subsequent [Consultation](#), on APP scams. In these documents, the PSR proposed options to address the problem, including requiring participants in the Faster Payments Service to reimburse APP scam victims. The vast majority of APP scams occur over the Faster Payments Service, as it is the principal payment system which payers use to make instant credit transfers.
- 445 The PSR has stated that there is at present a legislative barrier in the Payment Services Regulations 2017 preventing it from using its regulatory powers to implement mandatory reimbursement. Specifically, regulation 90(1) of the Payment Services Regulations 2017 provides that where a payment service provider (for example, a bank) has executed a payment in accordance with the unique identifier (for example, the sort code and account number) provided by the payer, then the payment is deemed to have been correctly executed, and so the payment service provider cannot be liable for defective execution.
- 446 In November 2021, the Economic Secretary to HM Treasury made a [statement](#) that the government would legislate to address any barriers to regulatory action on this matter. In May 2022, the government published a [policy statement](#) setting out further detail on this policy approach.
- 447 This Bill amends the Payment Services Regulations to clarify that nothing in regulation 90 affects the liability of a payment service provider where the PSR has exercised its regulatory powers in relation to APP scams. This will enable the PSR to use its regulatory powers (whether in relation to payment system operators, payment service providers, or in combination), to require mandatory reimbursement by payment service providers in cases of APP scams.
- 448 The Bill also places a duty on the PSR to take regulatory action on APP scam reimbursement by participants in the Faster Payments Service, by requiring the regulator to consult on a draft regulatory requirement, and impose a regulatory requirement, within two and six months respectively of the legislation coming into force.

Cryptoassets

- 449 The government's view is that cryptoasset technologies could have a profound impact across the financial services sector. At present most cryptoasset activities in the UK are not subject to comprehensive financial services regulation. This gives rise to a range of risks, including to consumers, market integrity and potentially to financial stability. It may also prevent UK firms and consumers from realising the possible benefits of cryptoasset technologies, including new products and services.
- 450 The government has proposed a staged approach to regulation, which is sensitive to risks posed and responsive to new developments in the market. HM Treasury's response to its [consultation](#), published in April 2022, outlined the government's intention to bring stablecoins, where used as a means of payment, into the regulatory perimeter. Alongside, the government confirmed that the market has developed sufficiently to move ahead with regulating a broader set of cryptoasset activities.

451 Clause 65, alongside new section 71K(7) of FSMA 2000 as inserted by clause 8 of this Bill, clarifies that HM Treasury has the necessary powers to regulate a range of cryptoasset activities, particularly those relating to the trading and investment of cryptoasset tokens.

452 In due course and ahead of using these powers, HM Treasury will consult on an approach which enables firms to innovate, while maintaining financial stability and clear regulatory standards so that people can use new technologies both reliably and safely.

Cryptoassets: amendments to the Financial Services and Markets Act (FSMA) 2000

453 Clause 65 ensures that cryptoassets are within scope of sections 21 and 22 of FSMA 2000 relating to regulated activities, and inserts a definition of “cryptoassets” which may be amended by HM Treasury.

454 The changes complement section 71K(7) of FSMA 2000, as inserted by clause 8 of this Bill, which clarifies that cryptoassets are within scope of the designated activities regime. It also complements changes introduced by clause 21 and clause 22 and Schedule 6 of this Bill to enable the regulation of cryptoassets used for payments, including so-called stablecoins (amongst any other digital assets used for payments, where these are within scope of the new concept of “digital settlement asset”).

455 The combined effect of clauses 8 and 65 is to ensure that cryptoassets may be regulated within the framework established by FSMA 2000 (as extended by this Bill).

456 This will ensure that HM Treasury is equipped to respond to developments in cryptoassets more quickly, and deliver regulation in an agile, risk-based way consistent with our approach to the broader financial services sector. For instance, HM Treasury’s ability to amend the definition of “cryptoasset” by regulation allows HM Treasury to respond quickly to developments in the technology that underlies these cryptoassets.

457 Given the fast-moving nature of the sector it is vital that the government has the flexibility to introduce regulation in an agile way using secondary legislation. This is an existing feature of the FSMA framework, in which HM Treasury sets the regulatory perimeter through secondary legislation.

458 This clause will also ensure that HM Treasury and the regulators can update the cryptoasset regulation as international standards are developed. For example, the government’s proposals will take account of the Financial Stability Board’s consultative proposals for the [Regulation, Supervision and Oversight of Crypto-Asset Activities and Markets](#) published in October 2022.

Clarifying the scope of the Financial Promotions Order (FPO)

459 Clause 65(2) amends the definition of “investment” contained in section 21(14) of FSMA. The existing definition is “investment” includes any asset, right or interest.’ Clause 65(2) ensures that this includes where an asset, right or interest is, or comprises or represents, a cryptoasset.

Clarifying the scope of the Regulated Activities Order (RAO)

460 Under the FSMA framework, HM Treasury determines which activities are regulated activities, by specifying activities to be regulated in the RAO.

461 Clause 65(3) amends the definition of “investment” contained in section 22(4) of FSMA 2000 to clarify that this includes where an asset, right or interest is, or comprises or represents, a cryptoasset.

Bank of England Levy

Background to the CRD scheme

- 462 The Cash Ratio Deposit (CRD) scheme funds the Bank of England's (the Bank's) monetary policy and financial stability functions. Under the scheme, deposit-taking institutions (i.e., banks and building societies) with eligible liabilities above a minimum threshold are required to place non-interest bearing deposits at the Bank. The Bank invests these deposits into interest bearing assets (currently only UK gilts), with the income generated used to fund the Bank's monetary policy and financial stability operations.
- 463 The Bank's expenditure on policy functions, as currently funded by the CRD scheme, includes Monetary Analysis and the Monetary Policy Committee (MPC), Markets and Banking, Research and statistics, Financial Stability Strategy and Risk, Resolution, International policy, the elements of FMI supervision not funded by the FMI levy and elements of PRA activity not funded by the PRA levy.
- 464 The CRD scheme does not fund the following functions of the Bank:
- a. its remunerated activities - including its banking services, services to HM Treasury (such as the management of the note issue and the Exchange Equalisation Account) and lending operations for the Bank's own account,
 - b. its operations acting as the PRA, which are funded by the PRA levy, and
 - c. its FMI supervision, which is funded by the FMI levy.
- 465 The CRD scheme runs in five-year cycles. The scheme was last calibrated in 2018 to deliver for the 2018-23 period a fixed income target of £169 million per annum. In 2018, an indexation-based approach was introduced to make the CRD scheme responsive to changes in gilt yields and to provide a smoother income profile. In effect, this means that when gilt yields decrease, participants are required to increase their deposits at the Bank, so that the Bank can invest in more gilts, in an attempt to meet the income target. As of June 2021, the overall size of the cash ratio deposits were £12.1 billion. The largest 20 institutions accounted for 83% of the total deposits, eight of which each contributed more than £200 million in deposits under the scheme.

Rationale for replacing the CRD scheme

- 466 The CRD scheme has resulted in cash ratio deposit sizes significantly higher than originally forecast and a lack of predictability for CRD payers as the required cash ratio deposit sizes change in line with gilt yields, which have been lower than anticipated since the 2018 review. This has resulted in the CRD scheme not being able to generate its target income from the investment of deposits and therefore failing to fully fund the Bank's policy functions. The shortfall to date has been funded from the Bank's capital and reserves.
- 467 Since the introduction of the indexation approach, gilt yields have persistently fallen below the Bank's downside scenario. The CRD scheme in its current form has resulted in significant volatility in cash ratio deposit sizes and a lack of predictability for CRD payers as their required contribution changes in line with gilt yields, which have been lower than anticipated since CRD was last reviewed in 2018.
- 468 Consistent with global trends, the market expects the low returns on UK gilts to persist. If CRD is unchanged and low UK gilt yields were to persist, then the CRD scheme's income would continue to not meet the costs of the Bank's policy functions and the Bank would have to continue to fund the income shortfall through its own capital and reserves. This would inhibit the Bank from discharging its functions in pursuit of its statutory objectives in

respect of monetary policy and financial stability. For the eligible institutions within the CRD scheme, keeping the CRD scheme in its current form would mean that the CRD balances would remain elevated and volatile, resulting in an ongoing lack of predictability for those institutions. Recalibration of the current CRD scheme would require either leaving the Bank exposed to under-recovery of costs in low yield conditions, or making the CRD scheme more volatile and imposing additional uncertainty and cost on CRD payers.

- 469 In 2021, HM Treasury ran a public consultation on the CRD scheme and proposals for an alternative funding arrangement. This confirmed that stakeholders are overall supportive of the proposal to replace the CRD scheme with a new Bank of England levy.

Bank of England levy

- 470 The Bill will repeal the provisions in the Bank of England Act 1998 that provide for the CRD scheme and replace these with a new levy on eligible financial institutions. Replacing the CRD scheme with a levy is intended to ensure that the Bank receives income in line with its forecast policy expenditure and conserve its current capital position. In line with the intention of the existing CRD scheme, the levy will cover the costs of the Bank's monetary policy and financial stability functions. It is also intended to give payers greater certainty over the size of their annual contribution as, unlike the CRD scheme, the levy will not change in line with gilt yields. The overall objective of financial institutions funding the Bank's policy functions will not change, however the method by which this happens will.
- 471 Under the new levy, the Bank will determine the total policy levy annually to match expected expenditure on policy functions. The Bank's policy costs to be recovered through the levy will be approved by the Bank's Court of Directors as part of the annual budget setting processes. This will be discussed with HM Treasury as part of the existing arrangements for engagement on the Bank's annual budgets and financial performance as agreed in the Memorandum of Understanding on the Financial Relationship between HM Treasury and the Bank. Each year, before applying the levy, the Bank will notify industry on its plans for the levy. Financial gains or losses from policy operations – for example in relation to profits or losses from trading activities or counterparty losses – would not be covered by the scheme.
- 472 In line with the existing CRD scheme, the levy will apply to eligible institutions, which are defined as deposit-takers whose eligible liabilities are above a defined threshold. It is intended that secondary legislation will provide that the Bank will allocate the expenditure total across the eligible firms, for each institution and proportionate to their eligible liability base. This will allow each firm's contribution to be proportional to their exposure to liquidity risk. It is proposed that the levy would apply to all eligible firms with eligible liabilities of at least £600 million.
- 473 HM Treasury will be able to set out how the Bank calculates the levy and allocates the charge to eligible institutions in secondary legislation, subject to the affirmative procedure. The intention is for the policy costs payable by an eligible institution to be proportional to an eligible institution's liability base above a threshold.
- 474 As happens with other cost recovery schemes, a mechanism would exist for adjusting subsequent years' levies to take account of under or overspends, following the finalisation of accounts. The Bank would publish a detailed breakdown of its costs for the year, deviations from budget and income from the levy in its annual report and accounts and/or the annual notification.
- 475 The government will continue to monitor the effectiveness of the funding model used to meet the Bank's policy costs and will conduct a further formal review within at least five

years of secondary legislation being introduced and publish a report in respect of that review. As part of HM Treasury's five-yearly review of the levy, consideration of the Bank's approach to levying policy costs, including its approach to setting the annual aggregate costs will be included.

Credit unions

- 476 Credit unions are small financial co-operatives owned by their members. Most credit unions in Great Britain have less than £5m in assets. The largest credit union has around £210m in assets and 55,000 members.
- 477 In Great Britain, credit unions are governed under the Credit Unions Act 1979 (the 1979 Act). The 1979 Act is restrictive in that it sets out the purpose of a credit union and specifies the products and services that credit unions can provide. It lists four "objects"¹⁸ which sets out their purpose. These are:
- a. The promotion of thrift among the members of the society by the accumulation of their savings;
 - b. The creation of sources of credit for the benefit of the members of the society at a fair and reasonable rate of interest;
 - c. The use and control of the members' savings for their mutual benefit; and
 - d. The training and education of the members in the wise use of money and in the management of their financial affairs.
- 478 In addition to this, credit unions have a set of rules, agreed by members, which set out their relationship with members and their governance structures. For example, credit unions set out their mandatory objects, as well as broader restrictions around topics such as membership, minimum shareholding requirements, or if the credit union should allow corporate members.
- 479 The current content of the 1979 Act has meant that credit unions primarily offer savings accounts and loans to their members, with some offering a slightly wider range of products and services such as mortgages. In the [2020 Budget](#), the Chancellor committed to bringing "forward legislation to allow credit unions to offer a wider range of products and services to their members, supporting their vital role in financial inclusion."
- 480 The Association of British Credit Unions Limited (ABCUL) ran a sector-wide consultation in 2019 named "[Vision 2025](#)". The consultation highlighted that credit unions were interested in offering other products and services beyond those allowed under the 1979 Act. There was strong interest from credit unions in being able to offer car finance (70%) and insurance distribution (49%).
- 481 The Bill gives credit unions in Great Britain the ability to offer hire purchase and conditional sale agreements to their members, for example as a form of car finance agreement.
- 482 Hire purchase agreements and conditional sale agreements have different structures but are similar in that members of the credit union will be able to choose a product and pay a deposit to a credit union. The credit union will then buy and own the asset while the member uses it and makes payments to the credit union until it is paid off. The member will typically repay the credit union the value of the item plus interest in instalments or periodic payments. The agreements usually include the condition that the goods do not belong to the

¹⁸ "Objects" is an antiquated term for "objectives"

- member until they have paid the final instalment and the credit union may be able to repossess the goods if the member falls behind with payments.
- 483 Specifically, a conditional sale agreement is an agreement where a credit union purchases a good on behalf of a member and the member then pays the credit union in instalments as agreed for the product until it is paid off. The credit union retains ownership of the good, but the member uses it during the period of repayment.
- 484 Hire purchase agreements are agreements where the credit union purchases the good on behalf of the member, and the member makes periodic payments on the good until it is owned by the member, often based on compliance with payments and full repayment.
- 485 Hire purchase agreements and conditional sale agreements will be subject to credit unions obtaining permission from the appropriate regulator in the same way as other providers, and secure approval from their members. The Bill will cap the interest a credit union can charge on the outstanding balance due under these finance agreements at 3% interest per month but gives the government the power to raise this cap to provide flexibility for credit unions. This interest rate is in line with what credit unions can charge for loans and mirrors the power HM Treasury already has for setting the interest rate cap for loans in the 1979 Act. Additionally, the Bill allows credit unions to offer these agreements to corporate members. This is subject to this being set out in a credit union's rules, which requires member agreement at a general meeting. The legislation also requires that no more than 10% of the total outstanding balances due to be repaid under these agreements can be owed by corporate members. The Bill will also ensure that the 10% limit can be amended via statutory instrument.
- 486 The Bill will enable credit unions to offer insurance distribution services to their members. This means, subject to receiving permission from the appropriate regulator to carry out any regulated activities, a credit union will be able to help its members take out insurance policies with partner insurance firms and charge the partner insurance firm for their services.
- 487 The Bill will give HM Treasury the power to add further services to the 1979 Act in the future via secondary legislation, subject to the affirmative procedure, i.e., the approval of both Houses of Parliament. HM Treasury will be required to consult with relevant stakeholders before exercising this power. Given that the 1979 Act is prescriptive, as described above, this power provides HM Treasury with greater flexibility to support the credit union model to adapt more quickly to changing demands in product offerings, remain competitive as a sector, and continue to serve their members effectively, while still maintaining the lighter-touch regulatory benefits of the prescriptive regime by ensuring there is still scrutiny over which products and services may be offered.
- 488 The Bill introduces two additional changes to the 1979 Act, following engagement with the Financial Conduct Authority and the Prudential Regulatory Authority. Firstly, it introduces a legislative requirement for credit unions to submit annual returns to the Financial Conduct Authority, and adopt year of account provisions in the [Co-operative and Community Benefit Societies Act 2014](#) to specify the accounting period, to reinforce good governance practices in credit unions and bring credit unions in line with other societies registered under the Co-operative and Community Benefit Societies Act 2014. Credit unions in Great Britain are currently required to submit a copy of their audited accounts to the FCA in accordance with the FCA's rules, rather than under legislation.
- 489 Secondly, the legislation also clarifies the ability of credit unions to lend to/borrow from other credit unions, even when there is no membership link, to provide legal certainty over

this activity. Credit unions are already able to undertake this lending and borrowing, and the legislation previously made explicit reference to temporarily borrowing from another credit union under the [original drafting of section 10 of the 1979 Act](#). This new amendment provides further legislative clarity over this practice.

490 The Bill will also ensure that the new legislative changes do not retrospectively apply to the practices of lending to and borrowing from other credit unions, or to submitting annual accounts to the FCA, and adopting year of account provisions before the Bill comes into force.

Reinsurance for acts of terrorism

491 In some instances, HM Treasury intervenes in the (re)insurance market to support the provision of insurance for certain systemic risks. This is when the risks would not otherwise be covered by the market because the potential financial losses are deemed too great by commercial (re)insurers. In cases of terrorism, HM Treasury has agreements with reinsurers under which it offers an unlimited guarantee (in the form of an unlimited loan) should they exhaust their funds in the event of pay-outs pursuant to a terrorist attack.

492 Under the Reinsurance (Acts of Terrorism) Act 1993 (“the 1993 Act”), HM Treasury has Parliamentary approval to pay out funds in line with these agreements. This enables the widespread provision of terrorism insurance in Great Britain. The 1993 Act was introduced when, following a number of terrorist attacks in Great Britain, (re)insurers withdrew from the terrorism (re)insurance markets. The 1993 Act enables the government to act as the reinsurer of last resort for reinsurance companies offering terrorism cover.

493 In accordance with its current practice, the Office for National Statistics (“ONS”) is likely to classify a company that enjoys the benefit of a guarantee under the 1993 Act as a public sector body. Such classifications are likely to be retrospective to the date that the company started to enjoy the benefit of a guarantee under the 1993 Act.

494 The consequences of a company being classified as a public sector body include a requirement that its accounts are consolidated into its sponsor department’s departmental accounts (as required by the Government Resources and Accounts Act 2000), and it becomes subject to necessary and appropriate controls, standards and processes expected of a public sector (which may include central government) body, in line with government policy and the expectations of Parliament on the use of funds on the public account. This could include, for example, Managing Public Money (“MPM”) guidance.

495 In order to secure compliance with the requirements associated with classification as a public sector body, sponsor government departments generally put in place Framework Documents with entities subject to this classification. Framework Documents are not legally enforceable. HM Treasury therefore needs to ensure that any entity classified as a public body that benefits from an arrangement under the 1993 Act, will comply with necessary controls so that money on the public accounts is managed appropriately.

496 This provision in the Bill will amend the 1993 Act to give HM Treasury the power to issue directions to any public sector body which benefits from an arrangement under the 1993 Act. The provision also provides HM Treasury with the ability to issue a direction to the group undertakings (within the meaning of section 1161 of the Companies Act 2006) of public sector bodies which benefit from an arrangement under the 1993 Act. HM Treasury may issue a direction if it considers it necessary for the purpose of ensuring compliance with any requirements associated with classification as a public sector body. Directions may include provision about compliance with relevant requirements relating to auditing, accounting, budgeting, arm’s length bodies or public sector bodies. There is also a specific

power to direct such bodies to appoint an accounting officer. This will enable HM Treasury to ensure that any public sector body that benefits from a guarantee has sufficient oversight of its requirements as a public sector body.

Requirements

497 The Bill will ensure that any public sector bodies that benefit from an arrangement under the 1993 Act can be obliged to comply with any requirements associated with their public sector classification and/or to appoint an accounting officer. The requirements may include matters relating to:

- a. Auditing - for example, MPM which sets out the main principles for the management of resources in UK public sector organisations.
- b. Accounting - for example, Government Financial Reporting Manual (FReM) standards, which are the public sector accounting standards.
- c. Budgeting - for example, MPM and the Consolidated Budgeting Guidance, which is the budgeting framework that applies for expenditure control.
- d. Arm's length bodies – for example, MPM.
- e. Public sector bodies - for example, MPM and public sector pay guidance.

Banking Act 2009: miscellaneous amendments

498 The Banking Act 2009 provides for a special resolution regime (SRR), providing the Bank of England, the PRA, the FCA and HM Treasury with tools to protect financial stability by effectively resolving banks, building societies, investment firms, banking group companies and central counterparties that are failing, while protecting depositors, client assets, taxpayers and the wider economy.

499 Since its introduction, the Act has undergone further amendment to keep up with international developments and maintain its usability. Most notably during the implementation of two EU directives (the original Bank Recovery and Resolution Directive in 2014 and the update to the Bank Recovery and Resolution Directive in 2019) and the onshoring process by which EU financial services legislation was preserved in the UK statute book and amended to ensure that it worked in a UK-only context.

500 The government is committed to maintaining the workability of the legislation and has identified five minor but necessary technical amendments across the Act.

501 The Bill will make a technical correction in relation to a requirement on the Bank of England, when directing firms to issue eligible liabilities (equity and debt that can be bailed-in during a resolution), to consult the FCA and the PRA as well as to have regard to:

- a. The wider UK financial services market;
- b. the impact on the institution in question;
- c. and the UK's financial stability.

This correction also establishes explicitly a similar requirement on the Bank when it is directing institutions with regard to altering maturity profiles of these eligible liabilities. This represents a reversion to the approach established in the original Act which was inadvertently removed during the transposition of the update to the Bank Recovery and Resolution Directive in 2020.

502 The Bill also makes two further corrections which clarify the existing legislation by deleting extraneous text and correcting a cross reference between two sections of the Act.

- 503 Additionally, this provision clarifies the application of the power to recognise a payment system as systemic, for the purposes of engaging the Bank’s regulatory powers under Part 5 of the Banking Act 2009. The clarification ensures that a payment system can be recognised before it has commenced operating within the UK.
- 504 Finally, clause 71 also includes an amendment specifying that the Bank’s existing immunity from damages will extend to new functions conferred by or under this Bill.

Legal background

Revocation of retained EU law

- 505 The European Union (Withdrawal) Act 2018 (EUWA 2018) repealed the European Communities Act 1972 (ECA 1972) and preserved the existing body of directly applicable EU law, so that it continues to apply. It also preserved UK laws relating to EU membership, such as legislation implementing EU Directives.
- 506 This body of law is referred to as “retained EU law”, as defined by EUWA 2018.
- 507 Broadly speaking, EU law falls into the following categories:
- a. Direct EU legislation, such as an EU regulation or a Delegated Regulation, which applied directly to the UK as a result of the ECA 1972; this is incorporated into UK law through section 3 of EUWA 2018.
 - b. EU obligations, principally those imposed by EU Directives, which were, in part, incorporated into UK law through the powers in section 2(2) of the ECA 1972; this is incorporated into UK law as “EU-derived domestic legislation” in section 2 of the EUWA 2018.
 - c. Rights, powers, liabilities, obligations, restrictions, remedies and procedures which stem from retained EU law, and which are saved by section 4 of EUWA 2018.
- 508 HM Treasury undertook an extensive programme of secondary legislation in order to address deficiencies in retained EU law in financial services under the powers in section 8 of EUWA 2018. Where retained EU law continues to exist, it restricts the ability of the regulators to make rules, even where they already have the power to do so.
- 509 This Bill revokes most types of retained EU law in financial services so that the model of regulation established in FSMA 2000 can be applied across all areas of financial services regulation.
- 510 It does this by creating the concept of “EU-derived legislation”. This concept captures all Direct EU legislation and all EU obligations related to financial services.
- 511 The Bill also sets aside any rights, powers and liabilities in financial services captured by section 4 of EUWA 2018, which exist as a result of EU-derived legislation.
- 512 EU-derived legislation as defined in this Bill, and retained EU law as defined in sections 2, 3, and 4 of EUWA 2018, are not exactly the same, meaning that this Bill does not revoke all retained EU law in financial services. In particular, this Bill does not generally repeal retained EU law where it has been incorporated into primary legislation. It does not revoke non-legislative provisions such as the regulators rulebooks, where they implemented EU obligations.

- 513 The Bill also revokes some legislation which is not retained EU law. This is because EU-derived legislation also captures associated regulations made under EUWA 2018, and regulations made under this Bill which amend retained EU law. When retained EU law in financial services is revoked, these regulations will no longer be needed.

Parts 9C and 9D of FSMA 2000

- 514 The Financial Services Act 2021 inserted Parts 9C and 9D into FSMA 2000. Both these parts enable the PRA and the FCA to make rules for firms which has previously been subject to retained EU law, and are relevant to the approach taken in this Bill.
- 515 Both Parts 9C and 9D of FSMA 2000 establish “accountability arrangements” for the relevant regulators which govern the making of these prudential rules for some firms. In particular, sections 144C and 143G of FSMA 2000 require the PRA and the FCA to “have regard” to certain matters when making rules. Sections 143C and 143D of FSMA 2000 require the FCA to make certain rules in relation to investment firms. Clauses 27, 28 and 29 of this Bill insert new powers in FSMA 2000 which provide for HM Treasury to make similar arrangements for other policy areas.
- 516 Finally, section 144E(3) of FSMA 2000 creates a number of exemptions from the requirement to consult and conduct cost benefit analysis where the PRA makes rules which are materially similar to those in the capital requirements regulation (“the CRR”). Clause 6 of this Bill applies a similar approach to other parts of retained EU law where the regulators make rules which are materially similar, or revoke rules without replacing them.

Transitional amendments

Amendments to the Markets in Financial Instruments Regulation (MiFIR) and the European Market Infrastructure Regulation (EMIR)

Wholesale capital markets regulation

- 517 UK capital markets are regulated under the framework that the UK inherited from the EU: the MiFID II framework (with ‘MiFID’ standing for ‘Markets in Financial Instruments Directive’). The MiFID II framework has been, where necessary, brought into UK law and amended to address deficiencies resulting from the UK’s withdrawal from the EU.
- 518 The cornerstone of the MiFID II framework is an EU Directive known as MiFID II.¹⁹ Being an EU Directive, MiFID II required transposition into national law across EU states. Responsibility for transposition into UK law was essentially divided between HM Treasury and the FCA: the FCA made changes to its Handbook (for example, to introduce new rules on the categorisation of clients of regulated entities), and HM Treasury dealt with the changes that had to be made to UK legislation (for example, it updated the Regulated Activities Order²⁰ to include new regulated activities). Although MiFID II itself was not brought into UK law, those UK-issued rules and legislation which were used to transpose it still reflect the content of that Directive.
- 519 The other central piece of legislation in the MiFID II framework is MiFIR. Being an EU Regulation, MiFIR applies directly across EU states. MiFIR is one of the parts of the framework that was brought into UK law; this means there is now a UK version of MiFIR, which is currently treated much like UK primary legislation. In its UK version, MiFIR applies to investment firms, credit institutions and market operators with a registered or

¹⁹ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.

²⁰ Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544).

head office in the UK.²¹ In this UK version, the FCA inherited functions that had belonged to the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA) under the EU version.

- 520 A number of MiFID II and MiFIR provisions had required supplementing via delegated acts or technical standards (including regulatory technical standards (RTS)). Like MiFIR, the resulting Commission Delegated Regulations were brought into UK law but, differently from MiFIR, they are treated much like, respectively, UK subordinate legislation and regulators' rules.
- 521 Changes to the regulation of wholesale financial markets will involve amendment of the UK version of MiFIR. Because of the interplay between rules and legislation making up the MiFID II framework, most of these changes will also involve amendment of UK-issued law transposing MiFID II (especially the MiFI Regulations²²), FCA and PRA rules, and the UK versions of Commission Delegated Regulations. Many of these additional amendments will be effected other than through the Bill: for example, changes to certain Commission Delegated Regulations will be effected by the FCA through powers the FCA already has.

Equity markets

- 522 The predecessor of MiFID II, which was known as the Markets in Financial Instruments Directive (MiFID), was in force across the EU from 2007 to 2018 (the date from which the majority of the MiFID II framework's requirements began to apply). MiFID provided for, among others, transparency requirements; this included, for example, how EU states should require investment firms to report on transactions, and rules for admission of financial products to trading.
- 523 MiFID II, which replaced MiFID, also covered, among other key areas, the regulation of trading venues, with requirements being imposed on both market operators²³ and investment firms operating trading venues; those requirements concerned, for example, best execution, and the suspension and removal of financial instruments from trading. The FCA's transposition of MiFID II involved the publishing of policy statements²⁴ introducing instruments to turn MiFID II requirements into FCA rules.
- 524 In addition to MiFID II requirements brought into UK law and rules, MiFIR (which was directly applicable EU law and the other fundamental component of the MiFID II framework) contains several provisions for the regulation of trading venues, including in respect of transparency. A notable characteristic of the retained version of MiFIR in UK law is its interplay with the regulatory treatment of trading venues under FSMA 2000. Article 2(1)(13A) MiFIR introduces the definition of 'UK regulated market', which brings together the MiFID II concept of 'regulated market' with FSMA 2000's 'recognised investment exchanges' (RIEs)²⁵. RIEs (and therefore some MiFIR 'regulated markets') are exempt from the FSMA 2000 general prohibition in respect of any regulated activity which they carry on as part of the exchange's business as an investment exchange.

21 This is subject to important caveats in respect of non-UK firms with permission to carry on business in the UK.

22 Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (SI 2017/701).

23 This is the person (including a legal person) who manages and/or operates the business of a regulated market and may be the regulated market itself.

24 Policy Statement 17/5 (which covered mainly markets and organisational requirements) and Policy Statement 17/14 (which covered conduct issues, including research, inducements, client categorisation, best execution, the appropriateness test, taping, client assets and perimeter guidance).

25 These are investment exchanges which have been recognised by the FCA under Part 18 of FSMA 2000.

Share Trading Obligation (STO)

- 525 One of the regulatory changes introduced by the MiFID II framework to the regulatory regime established by MiFID was the introduction of a new requirement known as the Share Trading Obligation (STO), which sits at Article 23 MiFIR. Under the STO, no investment firm may execute a trade in shares admitted to trading on a UK RM, or traded on a UK trading venue, unless that trade takes place on a UK RM, MTF, or systematic internaliser, or an equivalent third-country trading venue.
- 526 Under Part 7 (regulations 197 – 205) of the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019,²⁶ each of the FCA, PRA and Bank of England has a power (the Temporary Transitional Power, or TTP) to make transitional directions to waive or modify obligations imposed on persons where the nature of the obligation has been altered by the exercise of section 8 of EUWA 2018. In December [2020 the FCA exercised its TTP power to modify the requirements imposed on investment firms by the STO](#): its transitional direction provided that investment firms could trade in shares subject to the STO on or through EU trading venues and systematic internalisers.
- 527 The Bill permanently removes the STO.

Pre-trade transparency waiver regime

- 528 Articles 3 to 7 MiFIR concern transparency obligations in respect of trading in a wide range of equity and equity-like instruments, comprising shares, depositary receipts, ETFs, certificates and other similar financial instruments. Each of Articles 3 to 7 relates to obligations on market operators and investment firms operating a trading venue²⁷. Of those Articles, the following concern transparency obligations imposed on those persons in a pre-trade context:
- a. Article 3 (*Pre-trade transparency requirements for trading venues in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments*). Market operators and investment firms operating a trading venue must make public current bid and offer prices and the depth of trading interests at those prices.
 - b. Article 4 (*Waivers for equity instruments*). The FCA has the power to waive the obligation above in respect of certain types of orders or financial instruments. Article 4(1) MiFIR specifies a number of situations in which the FCA may waive the pre-trade transparency requirements in Article 3(1). These waivers include the Reference price (RP) and the Negotiated trade (NT) waivers. Article 4(5) enables the FCA to withdraw waivers if it considers that the way in which they are being used is inconsistent with the original purpose of the waiver or is circumventing the requirements of Article 4.
 - c. Article 5 (*Volume cap mechanism*). Article 5 introduces what is commonly known as the Double Volume Cap (DVC). The DVC imposes two quantitative constraints on the use of the RP and NT waivers in the trading of equity instruments on trading venues:
 - i. that trading on a single venue using those waivers be limited to 4% of the trading of that instrument on all trading venues across the ‘relevant area’²⁸; and
 - ii. that trading on all venues using those waivers be limited to 8% of the trading of that instrument on all trading venues across the relevant area.

26 SI 2019/632.

27 I.e., a UK regulated market, a UK MTF or a UK OTF (Article 2(1)(16A) MiFIR, read with 2(1)(62)).

28 This is the UK and any countries or regions specified by the FCA in a direction.

529 Temporarily, further to Article 5(3A) MiFIR, the requirement at Article 5(2) and (3) for the FCA to suspend use of the RP and NT waivers in the event the 4% and 8% caps are exceeded does not apply; instead the FCA has the discretion to suspend use of the RP or NT waivers for an initial period of six months to ensure that the use of the waivers does not harm price formation (Article 5(3B)).

530 In respect of the waivers regime generally, the Bill confers on the FCA the discretion to decide what the waivers should be and the conditions or limitations that should attach to them. In respect, specifically, of the DVC, the Bill removes that mechanism and replaces it with an obligation on the FCA to monitor the level of 'dark' trading and a power to limit it where there is evidence that it is undermining the efficiency of the price formation process.

Systematic internalisers

531 A systematic internaliser is an investment firm which, on an organised, frequent, systematic and substantial basis, deals on own account when executing client orders outside of an RM, MTF or an OTF, without operating a multilateral system.²⁹

532 Under MiFIR, systematic internalisers are subject to bespoke pre-trade transparency requirements and, alongside other investment firms, to post-trade disclosure requirements. Before a trade takes place, systematic internalisers must make public the prices they are prepared to buy and/or sell an equity instrument at (see Article 14(1); for the corresponding obligation in respect of non-equities, see Article 18(1)). After a trade has taken place, systematic internalisers (like other investment firms) must make public the price and volume of certain transactions completed (see Article 20(1) for transactions in equities and Article 21(1) for transactions in non-equities). Commission Delegated Regulation (EU) 2017/587³⁰, made under MiFIR, sets out the detail of the pre- and post- trade transparency requirements for trading venues and investment firms (including systematic internalisers).

Definition of a systematic internaliser

533 The definition of systematic internaliser brings together a number of concepts and calculations. In particular, a systematic internaliser will:

- a. be an "investment firm": this is a person whose regular occupation or business is the provision of one or more investment services to third parties or the performance of one or more investment activities on a professional basis;³¹
- b. be "dealing on own account": this means that the investment firm (that is, the systematic internaliser) executes trades by trading against the investment firm's own proprietary capital. Because the systematic internaliser uses its proprietary capital, it is legally considered to be a counterparty of the trade, and to take on risk from that trade; and
- c. operate on an "organised, frequent, systematic and substantial basis": this concept is aimed at excluding from the definition investment firms who, though otherwise operating as systematic internalisers, only do so on an occasional, ad hoc and irregular basis.

29 Article 2(1)(12)(a) MiFIR.

30 Commission Delegated Regulation (EU) 2017/587 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser.

31 Article 2(1A)(1) MiFIR.

534 There are two notable features of the definition of systematic internaliser which concern the “organised, frequent, systematic and substantial basis” limb of the definition:

- a. First, determining whether an investment firm is acting as a systematic internaliser involves looking at each relevant instrument. This is a result of the way in which Article 2(1)(12A) MiFIR provides what this basis is: “[F]requent and systematic” is measured by reference to each financial instrument the firm deals on, and “substantial” is measured by reference to each specific financial instrument the firm deals on.³²
- b. Second, the way to determine what constitutes organised, frequent, systematic and substantial trading in respect of each such instrument is via a combination of quarterly calculations and quantitative thresholds specified in an onshored Commission Delegated Regulation (this Delegated Regulation is often referred to as MiFID Org Regulation).³³

535 The Bill removes the inherent requirement on firms to carry out complex calculations by substituting Article 2(1)(12) to (12A) MiFIR with a new definition of systematic internaliser. This definition retains the “organised, frequent, systematic and substantial basis” criterion but removes the role of calculations, in the MiFID Org Regulation or elsewhere, in determining the meaning of this basis, instead empowering the FCA to make this determination via rules.

Execution of trades at the midpoint

536 ‘Tick sizes’ set minimum increments (‘ticks’) by which prices for equities can change; in other words, they represent the smallest permitted price fluctuation for any particular equity. ‘Tick size regimes’ restrict so-called ‘midpoint’ trading. Midpoint trading is where a buyer and seller of a security are matched at a price that is half-way between (i.e. at the ‘midpoint’ of), for example, their respective offers to buy and sell.³⁴ In other words, tick size regimes prohibit or constrain trades happening where the price agreed is set at a fraction of the minimum increment (i.e. at a fraction of the tick size).

537 The current UK tick size regime was introduced by the MiFID II Directive. It provides trading venues (regulated markets, MTFs and OTFs) with an exemption permitting midpoint trading that would otherwise involve a price movement below the tick size where the order is ‘Large In Scale’ (LIS). Whether an order is LIS is determined in accordance with Article 7 of Commission Delegated Regulation 2017/587.

538 Article 63 of the Investment Firms Regulation³⁵ inserted Article 17a into MiFIR, which provided that systematic internalisers must comply with the tick size regime as well, although giving them the benefit of a similar exemption for midpoint trading on orders that are LIS. Bar this exemption, the prices at which systematic internalisers quote, offer improvements and ultimately enter into transactions must be in multiples of the stipulated tick size.

32 Article 2(1)(12A)(b) MiFIR.

33 Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

34 In the context of trades made with an systematic internaliser, the mid-point would be between the buy and sell quotes of that systematic internaliser.

35 Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014.

539 The Bill provides for systematic internalisers to be able to trade in equities with their clients at the midpoint in all circumstances, rather than only for orders that are LIS.

Fixed income and derivatives markets

540 The Derivatives Trading Obligation (or DTO) is set out in Article 28 MiFIR. There are three fundamental components to the DTO:

- a. *the counterparties on whom the DTO is imposed.* The DTO applies to all ‘financial counterparties’ (FCs) and to a subset of ‘non-financial counterparties’ (NFCs). The terms ‘financial counterparty’ and ‘non-financial counterparty’ are taken from another retained EU Regulation, the European Market Infrastructure Regulation or EMIR.³⁶
- b. *the derivatives coming under the scope of the DTO.* These are the derivatives within a class that the FCA has declared to be subject to the DTO and listed in a public register.
- c. *the venues on which transactions must be concluded by the counterparties under the DTO.* The counterparties on whom the DTO is imposed must trade the derivatives coming under the scope of the DTO on a UK authorised trading venue, or overseas trading venue that benefits from an equivalence decision.

Alignment with the EMIR clearing obligation

541 EMIR imposes a number of requirements on counterparties to derivative contracts, central counterparties and trade repositories³⁷. What EMIR seeks to tackle is essentially the risk that OTC derivatives (as defined in EMIR³⁸) pose to market stability and increased transparency in the OTC market. One of the key elements of EMIR, aimed at increasing the number of OTC derivatives that are cleared through CCPs³⁹, is the Clearing Obligation (CO). The CO is set out at Article 4 EMIR. Like the DTO, the CO applies to (at least some) FCs, NFCs and analogous third-country entities. Where the CO applies, the entities in question must clear the trade through a CCP.

542 The way in which MiFIR frames the scope of the DTO draws heavily on EMIR; indeed, the scope of the DTO and CO were originally aligned. In 2019, EMIR was amended by an EU Regulation commonly referred to as ‘EMIR Refit’.⁴⁰ The amendments to EMIR made by EMIR Refit include changes to the scope of the counterparties subject to the CO, namely, the introduction of an exemption from the CO for small FCs, and the modification of the mechanism for determining the obligations of NFCs that are subject to the CO because they exceed certain thresholds. EMIR Refit did not make corresponding changes to Article 28 MiFIR, and so the respective scopes of the CO and DTO stopped being aligned.

36 Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories. A financial counterparty (FC) is a regulated financial services firm falling within one of the seven categories specified in Article 2(8) EMIR; a non-financial counterparty (NFC) is an entity established in the UK that is not a financial counterparty or a CCP (see Article 2(9) EMIR).

37 ‘Trade repository’ is defined at Article 2(2) EMIR as a legal person that centrally collects and maintains the records of derivatives. Trade repositories are regulated under EMIR to manage data in a transparent and confidential manner.

38 OTC derivatives are derivatives the execution of which does not take place on a regulated market.

39 A CCP is a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer. This process is the ‘clearing’ to which the CO refers.

40 Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

- 543 The Bill realigns the scopes of the CO and DTO by amending the DTO so that it only applies to relevant FCs and to relevant NFCs, being those FCs and NFCs that are subject to the CO.
- 544 In the interest of the realignment between the CO and the DTO, the Bill also amends EMIR to introduce an exemption to the CO mirroring the exemption to the DTO. The Bill gives the Bank of England a rule-making power to determine which post-trade risk reduction services should benefit from the new exemption to the CO, which power will be analogous to the FCA's power to determine the application of the exemption from the DTO; in exercising its respective power, each regulator will be required to consult with the other.

Exemptions for post-trade risk reduction services

- 545 Article 31 MiFIR concerns a post-trade service used in derivatives markets known as 'portfolio compression', which MiFIR defines as a risk reduction service in which two or more counterparties wholly or partially terminate some or all of the derivatives submitted by those counterparties for inclusion in the portfolio compression and replace the terminated derivatives with another derivative whose combined notional value is less than the combined notional value of the terminated derivatives. Article 31(1) MiFIR exempts those carrying out portfolio compression from certain requirements, and in particular it exempts the trades that occur as part of portfolio compression from the DTO.
- 546 The Bill makes the exemption from the DTO available to other post-trade risk-reduction services which can perform a similar function by empowering the FCA to set the appropriate scope of the exemption, which would no longer be linked to portfolio compression, and the appropriate conditions that should attach to its use.

FCA power to modify or suspend the DTO

- 547 The FCA has used the TTP to make a transitional direction modifying the DTO to, in short, allow certain counterparties to use EU venues when trading with an EU client who does not have access to a venue that both the UK and EU have granted equivalence to. The Bill empowers the FCA to suspend or modify the DTO outside the limited purpose and time limit constraints of the TTP. The Bill allows the FCA to direct that the DTO is modified including in respect of any of its three fundamental components, and subject to conditions; the FCA will be able to direct, for example, that, for a certain period, certain persons to whom the DTO would normally apply are not bound by the DTO provided they meet certain conditions laid out in the direction.

Transparency regime for fixed income and derivatives

- 548 Articles 8 to 11 MiFIR⁴¹ concern transparency obligations in respect of trading in a wide range of fixed income and derivatives instruments, including covered bonds,⁴² exchange traded notes (ETNs),⁴³ exchange traded commodities (ETCs)⁴⁴ and emission allowances. Each of Articles 8 to 11 relates to obligations on market operators and investment firms operating a trading venue. In overview:

41 I.e. Chapter 2 MiFIR ("Transparency for non-equity instruments").

42 Bonds, generally issued by banks and other regulated credit institutions, which are backed by a pool of assets.

43 Securities issued by an institution which are traded on a stock exchange and which invest in underlying securities or assets.

44 Investments which are traded on a stock exchange and themselves invest in commodities or follow commodity indices.

- a. Article 8 (*Pre-trade transparency requirements for trading venues in respect of bonds, structured finance products,⁴⁵ emission allowances and derivatives*). Market operators and investment firms operating a trading venue must, on a continuous basis during normal trading hours, make public current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems.
- b. Article 9 (*Waivers for non-equity instruments*). The FCA has the power to waive the obligation above in respect of certain types of orders or financial instruments, for example, orders that are ‘large in scale’ compared with normal market size (this is sometimes referred to as the ‘LIS Waiver’), or financial instruments for which there is not a liquid market. The FCA is empowered, further to Article 9(5)(e) MiFIR, to make or amend technical standards to specify the financial instruments or the classes of financial instruments for which there is not a liquid market where pre-trade disclosure (as required by Article 8(1)) may be waived (under Article 9(1)); [Commission Delegated Regulation \(EU\) 2017/583](#), an onshored Delegated Regulation amended by the FCA, fulfils this role.⁴⁶ Likewise, the same Delegated Regulation provides the methodology for specifying whether there is a liquid market; the FCA then performs the calculations to determine whether a ‘liquid market’ exists, on the basis of information it must collect daily from, in particular, trading venues and APAs.
- c. Article 10 (*Post-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives*). Market operators and investment firms operating a trading venue must, as close to real time as possible (and in any case within five minutes after the execution of the relevant transaction), make public the price, volume and time of the transactions executed on the trading venues they operate. MiFIR empowers the FCA to specify the details of the transactions that must be made available for each class of financial instrument, which details are currently provided by Commission Delegated Regulation (EU) 2017/583.
- d. Article 11 (*Authorisation of deferred publication*). The FCA has the power to authorise deferred compliance with the obligation above on the basis of the size or type of the transaction, e.g. where transactions are large in scale compared with the normal market size for a given non-equity (this is sometimes referred to as the ‘LIS Deferral’); similarly to the pre-trade transparency regime, there is also a deferral available in respect of fixed income and derivative instruments, or classes of fixed income and derivative instruments, for which there is not a liquid market. FCA authorisation of the proposed arrangements for deferred publication must be obtained in advance, and those arrangements must be clearly disclosed to market participants and the public. The conditions for authorising market operators and investment firms operating a trading venue to provide for deferred publication are specified by the FCA itself further to Article 11(4)(c) MiFIR, and are currently provided by Commission Delegated Regulation (EU) 2017/583. Under Article 11(3) MiFIR, the FCA may do a number of things in conjunction with giving authorisation, including allowing for the omission of the publication of the volume of an individual transaction during an extended time period of deferral of four weeks.

45 ‘Structured finance products’ are defined in Article 2(1)(28) MiFIR as “*securities created to securitise and transfer credit risk associated with a pool of financial assets entitling the security holder to receive regular payments that depend on the cash flow from the underlying assets*”. Put simply, they are a form of tradeable investment that derives its value from underlying contractual debt; e.g. mortgage-backed securities.

46 Including to specify what a liquid market is for purposes of deferred publication in respect of post-trade disclosure obligations.

549 Articles 18, 19 and 21 MiFIR similarly concern transparency obligations in respect of trading in fixed income and derivative instruments, but rather than applying to market operators and investment firms operating a trading venue, these apply to systematic internalisers and, in respect of Article 21, investment firms trading over the counter. In overview:

- a. Article 18 (*Obligation for systematic internalisers to make public firm quotes in respect of bonds, structured finance products, emission allowances and derivatives*). When providing a quote to a client at that client's request in respect of a non-equity which is traded on a trading venue (ToTV), systematic internalisers must, in a manner which is easily accessible and on a reasonable commercial basis, also make public firm quotes in respect of that instrument. Systematic internalisers must, in addition, undertake to enter into transactions under the published conditions with any other client to whom the quote is made available. There are waivers available which similarly hinge on specifications provided by the FCA under the UK version of Commission Delegated Regulation (EU) 2017/583.
- b. Article 19 (*Monitoring by the competent authority*). The FCA has a monitoring duty in respect of the application of Article 18, and HM Treasury have the power to specify certain elements of the same article, e.g. what constitutes a 'reasonable commercial basis'.
- c. Article 21 (*Post-trade disclosure by investment firms, including systematic internalisers, in respect of bonds, structured finance products, emission allowances and derivatives*). Investment firms (including systematic internalisers) trading away from a trading venue must, on concluding transactions, make public the volume and price of those transactions and the time at which they were concluded via an APA. The FCA has the power to allow investment firms to defer publication of such transaction details or may request the publication of limited details of a transaction or details of several transactions in an aggregated form, or a combination thereof, on similar terms to those provided by transactions caught by Article 11. Like Article 10, Article 21 concerns transactions in fixed income and derivative instruments which are traded on a trading venue.

550 The Bill allows for the simplification of both pre- and post-trade transparency requirements by empowering the FCA to provide for the nature, scope and detail of those requirements in rules, including, if desired, with recourse to the 'liquid market' and 'ToTV' concepts. In respect of pre-trade requirements, the FCA will be able to, for example, determine, or set out a mechanism to determine, which trading systems used by venues, and which fixed income and derivative instruments, would be in scope, and in which circumstances waivers would be available. Similarly, in respect of post-trade requirements, the FCA will be able to, for example, determine, or set out a mechanism to determine, which fixed income and derivative instruments would be in scope and in which circumstances deferrals would be available.

551 In the case of pre-trade transparency requirements on trading venues, and of post-trade transparency requirements, the FCA's rule-making powers are coupled with an obligation on the FCA to use those powers.

Commodity derivatives

552 Article 2(1)(30) MiFIR provides the legal definition of "commodity derivative", which definition the FCA adopts in its Handbook, and which is also used in the RAO.

553 In addition to providing the definition of "commodity derivative", MiFIR also contains important FCA powers in respect of the setting of position limits which are reflected in

Commission Delegated Regulation (EU) 2017/591. The regulation of commodity derivatives as such is not provided for in detail in the UK version of MiFIR, which reflects the EU's MiFID II framework approach to commodity derivatives. Beyond MiFIR, and the relevant RTS which have been brought into UK law, financial regulation of commodity derivatives exists in UK law and regulation under, among others:

- a. Part 3 of the MiFI Regulations, which concerns key parts of the UK's onshored regime for commodity derivatives, namely, position limits⁴⁷ and position management controls⁴⁸; and
- b. rules and directions relating to position limits, position management and position reporting at [chapter 10 of the FCA's Market Conduct sourcebook \(FCA MAR\)](#), which rules and directions implement Articles 57 and 58 of MiFID II.

Position limits regime

554 MiFID II provided that, in order to prevent market abuse, and to support orderly pricing and settlement conditions (including the prevention of market distorting positions), competent authorities should be empowered to establish position limits, with Article 57 of that Directive stipulating that those competent authorities must set and apply position limits. Today, the obligation on the FCA to establish position limits sits in Part 3 of the MiFI Regulations and catches both venue-traded commodity derivative contracts and economically equivalent over the counter contracts. Note that regulation 19(1) generally requires the FCA to establish position limits using Commission Delegated Regulation (EU) 2017/591 (as amended by the FCA during the onshoring process), which details the methodology for the calculation of position limits on commodity derivatives.

555 Other than position limits, the regulation of commodity derivatives in the UK also involves the application of position management controls. FCA MAR 10.3.3, which, in short, applies to firms operating MTFs or OTFs, imposes requirements in respect of position management controls, the details of which firms must provide to the FCA. Paragraph 7BA of the Schedule to the Recognition Requirements Regulations sets out requirements for position management controls for investment exchanges operating trading venues which are (or wish to be) recognised by the FCA under section 290 of FSMA 2000. These requirements, which substantially mirror the FCA MAR 10.3.3 requirements, cover e.g. the monitoring of open interest positions and the power to require persons to terminate or reduce positions.

556 The Bill removes the universal requirement, under Part 3 of the MiFI Regulations, for position limits to be imposed in respect of commodity derivatives, and transfers the principal responsibility for the setting of position limits (and exemptions from those position limits) from the FCA to trading venue operators, while empowering the FCA to develop a framework to support and constrain operators in both setting and applying position limits. The FCA will also retain an exceptional power to impose position limits, or restrict positions, itself. In respect of position management controls, the Bill gives the FCA the flexibility to require venues to set and apply position management controls as the FCA considers appropriate.

Amendments to the EU Securitisation Regulation 2017

557 Regulation (EU) 2017/2402 ('the EU Securitisation Regulation'), laid down a general framework for securitisation and created a specific framework for designating certain

47 A position limit is a pre-set level of ownership established by exchanges or regulators that limits the number of shares or derivative contracts that a trader, or any affiliated group of traders and investors, may own.

48 In short, these are the means by which trading venues ensure compliance with position limits.

securitisations as STS. It applied in the UK and EU from 1 January 2019. The EU Securitisation Regulation was accompanied by the Securitisation Regulations 2018 SI 2018/1288 ('the 2018 Regulations'), which amended UK law to ensure that the EU Securitisation Regulation was fully effective and enforceable in the UK.

558 The Securitisation (Amendment) (EU Exit) Regulations 2019, SI 2019/660 ('the Securitisation Exit SI') addressed deficiencies in the EU Securitisation Regulation and the 2018 Regulations that arose from the withdrawal of the UK from the EU. These changes, which took effect at the end of the EU Exit transition period, were made to ensure that the securitisation framework continued to operate effectively after the UK left the EU. This legislative approach, which was taken across government, is known in financial services as 'onshoring'. Amendments to the onshoring arrangements for securitisation (extending the duration of the transitional arrangements for EU STS securitisations) were made by the Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2022, SI 2022/1080 and the Financial Services (Miscellaneous Amendments) Regulations 2022, SI 2022/1223. The onshored EU Securitisation Regulation is referred to as the UK Securitisation Regulation.

559 The UK Securitisation Regulation aims to strengthen the legislative framework for securitisations and revive high-quality securitisation markets after the Global Financial Crisis. It seeks to do this in two ways:

560 First, it sets out provisions in relation to all securitisations which are within its scope, consolidating and adding to the rules that previously applied to particular types of regulated entities. These provisions include requirements for SSPEs, investors' due diligence, risk retention and transparency obligations, credit-granting standards, and a ban on re-securitisation, as well as a supervisory and enforcement framework for these requirements.

561 Secondly, it sets out a regulatory, supervisory, and enforcement framework for STS securitisations. The framework for STS securitisations is designed to make it easier for investors to understand and assess the risks of a securitisation investment.

562 Through this Bill, the UK Securitisation Regulation is being amended to add new Chapter 4A, which creates the regime for STS equivalent non-UK securitisations.

New regulatory powers

Designated activities regime

Replacement of revoked Retained EU law

563 Clause 1 of the Bill revokes the retained EU law relating to financial services listed in Schedule 1. When that retained EU law is revoked, which will take place over several years, where appropriate the activities previously regulated in retained EU law can be designated by HM Treasury under the new designated activities regime in new Part 5A of FSMA, inserted by clause 8 of this Bill. HM Treasury will be able to provide, by way of regulations, for an activity to be a designated activity under this new regime. These "designated activity regulations" will be made under new section 71K of FSMA 2000. Under new section 71N(2) of FSMA 2000 the designated activity regulations will also be able to provide for the FCA to make rules in relation to designated activities or in relation to specified matters relating to designated activities.

Powers of the FCA under FSMA 2000

- 564 Section 1B of FSMA 2000 requires the FCA to comply with a number of requirements when discharging its “general functions” under FSMA 2000. This includes acting in a way that is compatible with its strategic objectives and advancing one or more of its operational objectives. The FCA must also have regard to the regulatory principles in section 3B of FSMA 2000. The FCA’s general functions, specified in subsection (6) include the making of rules. Section 22 of FSMA 2000 provides for HM Treasury to specify in regulations activities where the person conducting them requires to be authorised by the FCA.
- 565 Schedule 2 to FSMA 2000 sets out a non-exclusive list of examples of activities which require authorisation, which are set out in more detail in the Financial Services and Markets Act 2000 (Regulated Activities) Order S.I. 2001/544 (“the Regulated Activities Order”). There are many pieces of retained EU law which set the rules for a kind of activity, product, or conduct which are not FSMA 2000 regulated activities, and which apply to a broader range of entities than persons. As a result, the general rule-making powers of the FCA in relation to authorised persons under FSMA 2000 do not currently apply. When those areas of retained EU law are revoked under clause 1 of the Bill, the FCA would not, therefore, have a power to make rules in relation to those activities, in the absence of the provisions of the Bill. FSMA 2000 also provides the FCA with a range of information-gathering and enforcement powers, again linked to the FCA’s general functions (see for example, Parts 11 and 14 of FSMA 2000).
- 566 Where these powers are currently available for matters contained in retained EU law, this is sometimes enabled through statutory instruments specific to the particular matter, and sometimes through the Financial Services and Markets Act 2000 (Qualifying EU Provisions) Order 2013⁴⁹(QUEPO). The QUEPO applies provisions of FSMA 2000 to retained EU law files listed within it. When an area of regulated activity becomes subject to designated activity regulations the corresponding retained EU law will be revoked, through commencing the revocation of clause 1 of the Bill in relation to the specific pieces of retained EU law, and the powers applied under the QUEPO no longer apply. The FCA would not, therefore, have access to those powers in relation to matters designated by HM Treasury under the new Part 5A of FSMA 2000, without the provisions for HM Treasury to enable powers of information-gathering and enforcement under the Bill.

Financial Market Infrastructure: general rules and requirements

Regulation of FMI by the Bank of England

The existing statutory framework for the Bank’s regulation of CCPs and CSDs

- 567 The Bank was incorporated by Royal Charter in 1694. As a chartered corporation, it is an entirely statutory entity, with its powers determined by reference to the 1694 Charter, subsequent Charters and various pieces of primary and secondary legislation. In particular, the Bank of England Act 1946 brought the Bank of England’s capital stock into public ownership and made provision concerning the relationship between the Bank, HM Treasury and other banks, and the Bank of England Act 1998 (as amended over time, in particular by the Banking Act 2009, Financial Services Act 2012 and the Bank of England and Financial Services Act 2016) makes more detailed provision about the constitution, regulation, financial arrangements and functions of the Bank. Section 2A of the Bank of England Act 1998 contains the Bank’s Financial Stability Objective, which applies to the Bank in its regulation of CCPs and CSDs, as in its other responsibilities. This objective

49 SI 2013/419

requires the Bank to protect and enhance the stability of the financial system of the United Kingdom.

- 568 Part 18 of FSMA 2000 establishes a recognition regime for certain types of financial market infrastructure, including CCPs and CSDs that are established in the UK. The recognition regime for CCPs and CSDs is operated by the Bank, and recognised firms are subject to supervision by the Bank. Firms that are recognised are exempt from the general prohibition in FSMA 2000 in respect of the regulated activities they carry out, and hence are exempt from the requirement to obtain permission to carry on regulated activities under Part 4A of that Act.
- 569 The requirements of the recognition regime are set out in Part 18 of FSMA 2000 and supplemented by Schedule 17A to that Act which applies various provisions to the FCA and the PRA to the Bank when performing functions under Part 18. In particular, Part 18 and Schedule 17A give the Bank limited powers to make rules which apply to CCPs and CSDs, at section 166(9) (applied by paragraph 12 Sch 17A), section 286(4F) and section 293. Paragraph 10 of Schedule 17A applies a number of provisions in Part 9A of FSMA 2000 to rules made by the Bank, including the requirement to notify rules to HM Treasury and to publish them, and to consult before making rules.
- 570 Paragraph 33 of Schedule 17A requires the Bank to make a report to HM Treasury at least once a year, based on the requirements for the PRA's report under Schedule 1ZB to FSMA 2000.

Current regulation of CCPs and CSDs

- 571 The key regulatory requirements for CCPs in the UK are currently contained in the following instruments:
- a. Titles III and IV of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("EMIR"), which forms part of retained EU law and therefore continues to apply in the United Kingdom as amended by regulations made under the European Union (Withdrawal) Act 2018;
 - b. Part 18 of and Schedule 17A to FSMA 2000;
 - c. secondary legislation made in order to implement EMIR and under Part 18 of FSMA 2000;
 - d. technical standards made under EMIR.
- 572 The key regulatory requirements for CSDs in the UK are currently contained in the following instruments:
- a. Titles III and IV of Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 in improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (the "CSDR"), which forms part of retained EU law and therefore continues to apply in the United Kingdom as amended by regulations made under the European Union (Withdrawal) Act 2018;
 - b. Part 18 of and Schedule 17A to FSMA 2000;
 - c. secondary legislation implementing the CSDR;
 - d. technical standards made under the CSDR.

Regulation of FMIs by the Financial Conduct Authority

Data Reporting Service Providers

- 573 Data Reporting Service Providers (DRSPs) are currently regulated through:
- a. the Data Reporting Services Regulations 2017 (S.I. No 2017/699) (DRSRs)
 - b. chapter 9 of the FCA's [Market Conduct sourcebook](#) (MAR 9), relating to data reporting services
 - c. the UK version of the Markets in Financial Instruments Regulation (UK MiFIR)
 - d. Regulation 2017/565; and
 - e. onshored technical standards such as Commission Delegated Regulation 2017/571.
- 574 DRSPs are not authorised persons under FSMA 2000.
- 575 The DRSRs impose a prohibition on the provision of data reporting services in the course of business unless that person is authorised to do so under the DRSRs or is verified by the FCA. The FCA has the power to authorise a person to carry out data reporting services only where the applicant satisfies certain conditions as set out in regulation 10 of the DRSRs. The FCA may provide verification only where an applicant fulfils the requirements set out at regulation 8 of the DRSRs.
- 576 Operational requirements on DRSPs arise under the DRSRs and retained EU law, namely Regulation 2017/571 and Regulation 2017/565. Information requirements are set out across the DRSRs and UK MiFIR and vary depending on the type of DRSP.
- 577 Whilst the FCA does not have any rule-making powers over DRSPs (except for the limited power in respect of technical standards), it does have a significant role in the regulation of DRSPs. The function of the FCA in respect of DRSPs is set out at regulation 17 of the DRSRs. In exercising its function, the FCA must cooperate with other persons with a regulatory role under the DRSR including, in certain situations, the Bank of England (see regulation 19 of the DRSRs).
- 578 Under regulation 18, the FCA must maintain arrangements to monitor and enforce the provisions of the DRSRs. They may also give guidance, as it considers appropriate, and may direct DRSPs as to how information should be provided to them.
- 579 Where the FCA considers that a DRSP has contravened its requirements under the DRSRs, it may:
- a. impose restrictions on that entity (regulation 22),
 - b. publish a statement to that effect (regulation 23), and/or
 - c. impose financial penalties (regulation 24).
- 580 The DRSRs create the offences of:
- a. misleading the FCA (regulation 29); and
 - b. breaching the prohibition on providing a data reporting service, without authorisation or an exemption (regulation 30).
- 581 A person found guilty of an offence under the DRSR would be liable:
- a. on summary conviction

- i. in England and Wales, to a fine; or
 - ii. in Scotland or Northern Ireland, to a fine not exceeding the statutory maximum; or
- b. on conviction on indictment, to a fine.

Recognised Investment Exchanges

582 The legislation and rules which currently regulate Recognised Investment Exchanges (RIEs) include:

- a. Part 18 of FSMA 2000 (Recognised Investment Exchanges, Clearing Houses and Central Securities Depositories) Regulation;
- b. secondary legislation, including FSMA 2000 (Recognition Requirements for Investment Exchanges, Clearing Houses and Central Securities Depositories) Regulations 2001 (S.I. No. 2001/995) (the recognition requirements regulations);
- c. Part 7 of the the Companies Act 1989 (Financial Markets and Insolvency);
- d. UK MiFIR;
- e. the FCA's [specialist sourcebook relating to RIEs](#) (REC); and
- f. technical standards, such as Commission Delegated Regulation 2017/587, Commission Delegated Regulation 2017/583, Commission Delegated Regulation 2017/584, Commission Delegated Regulation 2017/588.

583 Section 285(2) of FSMA 2000 provides that an RIE is exempt from the general prohibition in respect of any regulated activity carried on as part of the exchange's business as an investment exchange, or which is 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. RIEs are outside of the FCA's "authorisation regime" and therefore not within scope of the FCA's general rule-making power under section 137A of FSMA 2000.

584 The FCA has the power to grant a 'recognition order' under section 290 of FSMA 2000 only where the applicant satisfies the recognition requirements. These recognition requirements include requirements contained in any retained direct EU legislation stemming from any EU regulation originally made under MiFID, from any EU regulation originally made under MiFIR, and any subordinate legislation made under MiFIR. The FCA's position on what is accepted in satisfaction of these requirements is set out at REC2 of the FCA Handbook. Regulation 11 of the recognition requirements regulations confers power on the FCA to make rules for the purpose of these regulations, although to date this has not been used.

585 Sections 293 to 300 of FSMA 2000 include provisions regarding the supervision of RIEs and other recognised bodies. These include notification and information requirements. Under section 296, the FCA has limited powers to direct an RIE which has failed, or is likely to fail, to satisfy the recognition requirements, or has failed any other obligation imposed on it under FSMA 2000. In doing so, the FCA must comply with the procedure under section 298. The FCA has limited powers under s. 294 to waive or modify certain rules regarding notification under FSMA 2000.

586 UK MiFIR provides the framework for exchanges and markets in the UK, and imposes a number of information requirements on market operators and investment firms that operate trading venues. Almost all of the relevant articles of MiFID II and UK MiFIR are subject to further specification under level 2 measures (regulatory technical standards (RTS); Implementing Technical Standards (ITS); and delegated acts).

Financial market infrastructure: regulatory sandboxes

- 587 Financial services are currently tightly structured and highly intermediated with a number of participating FMIs being governed by different regulatory and legal frameworks. For example, a form of FMI is a CSD. It is regulated by the Bank of England (the Bank) and its main regulatory framework is principally based on the Central Securities Depositories Regulation 2014 (CSDR), Uncertificated Securities Regulations 2001 (USRs), and Settlement Finality Regulations 1999 (SFRs). A second form of FMI is a multilateral trading facility (MTF). It is operated by an investment firm or a recognised investment exchange (RIE). The operation of MTFs by RIEs or investment firms is supervised by the FCA, and the main regulatory framework includes (without limitation) the UK MIFIR, FSMA 2000, related secondary legislation, technical standards and rules.
- 588 FMI legislation is intended to be ‘technology neutral’. Inevitably, FMI legislation is based on and in some cases heavily tailored to the technology of the day. This potentially creates obstacles for FMI using new technology where the legislative requirements are heavily based on how existing technology works. What is unclear is whether emerging technology, such as distributed ledger technology (DLT), can always be accommodated within this existing FMI legislative framework or whether there will be legal ambiguity and a risk of inconsistencies as to whether the legislation is compatible with a particular emerging technology. An FMI sandbox is an opportunity to review the existing legislative framework in a technologically neutral way, that allows for the appropriate regulatory outcomes to be achieved.
- 589 For example, provisions in CSDR may prevent FMI from undertaking certain activities and practices when using emerging technology such DLT. HM Treasury’s Call for Evidence to examine the application of DLT to FMI identified that operators of multilateral trading facilities (MTFs) could look to use their own DLT arrangements to settle tokenised securities traded on their market. A key obstacle to this was identified by industry in CSDR Article 3(2), which requires transferable securities traded on a UK trading venue to be “recorded in book entry form in a CSD or third-country CSD”. This means that an operator of an MTF is prevented from being able to use its own settlement arrangements to settle transactions on its market.
- 590 The CSDR includes other definitions and obligations that are based on how current FMI IT legacy systems function, which may raise questions about their application to DLT arrangements. For example, DLT coordinates the simultaneous updating of records held by multiple ‘nodes’ in a decentralised network- in this context, doubts have been raised around the compatibility of this with CSDR definitions and requirements in relation to ‘securities accounts’ or ‘book entry form’, which reflect the settlement of securities transactions being reflected by double or multiple book entry keeping on securities accounts at CSDs. Modifications to legislation may therefore provide clarity within CSDR around accommodating the functioning of DLT, in a way that meets the same regulatory outcomes but in a different way.
- 591 Another example is the Companies Act 2006 (CA 2006), which is the main piece of legislation that governs UK company law. It seeks to modify, consolidate, and simplify company laws which, among other things, protect shareholder rights and simplifies certain formalities and administrative burdens imposed on UK companies.
- 592 There is provision in the CA 2006 that certain formalities are complied with in the recording and registration of shares and access to shareholder information in a prescribed way that is intended to protect shareholders and creditors. The CA 2006 defines “company records” and specifies the form in which they are to be available for public inspection and how they are disseminated.

- 593 The operation of technology, such as DLT, is not necessarily incompatible with the overall obligations identified above in the CA 2006, though there is a greater risk that DLT is incompatible with the existing means and mechanisms of delivering these obligations. Temporary modifications to the CA 2006 for the duration of a FMI sandbox may ensure that key provisions, such as shareholder and creditors rights and overall company transparency are preserved, as intended by the legislation, but in a way that ensures that emerging technologies, such as DLT, operate in a way that is compatible with the legislation.
- 594 A further example is the USRs, which are intended to allow for title in securities to be transferred without the need for a written instrument – in what is described as “dematerialised” form. It has been highlighted by industry that the USRs are not drafted in such a way that contemplates DLT. The regulations are premised on the operation of centralised registers that are maintained by an operator using a “Relevant System” – colloquially described as providing the “golden record” – which maintains control over the maintenance and verification of records. This approach differs from how DLT is used. It is premised on a de-centralised operating system, with a number of the transactional functions, currently performed by system operators, being performed automatically within the architecture of the DLT framework concerned.
- 595 The examples given above are not intended to provide a legal commentary on the application of UK law with regard to DLT systems. Rather they are cited because they have been flagged as potential obstacles by industry (and as legislation that may need to be modified within the context of an FMI sandbox relating to DLT). Absent any express amendments to legislation, such as those outlined above, it is possible that this form of technology could be interpreted as compatible with parts of existing legislation, but possibly in a way that strains the existing language and therefore risks causing ambiguity, particularly as different types of technology, with different characteristics, emerge and are applied to the legislation over time. As noted, in some other cases, the introduction of new technology and practices, may be clearly incompatible with existing legislation and therefore unambiguously in need of modification if the new technologies and practices are to be integrated into the operations of FMI.

Variation from the affirmative SI procedure

- 596 The Bill enables HM Treasury and the regulators to modify relevant enactments (including primary legislation, secondary legislation, and technical standards and rules) by applying the negative statutory instrument procedure, in place of the more standard affirmative procedure. The approach, in the context of these clauses, is reasonable because the modifications are temporary in nature and will be available to a limited number of entities that have been approved by the regulators to participate in a particular FMI sandbox. Limitations may be placed on the amount and values of instruments permitted for an FMI activity in an FMI sandbox. FMI entities will be carefully monitored by the regulators for the duration of the FMI Sandbox and the regulators will be permitted to suspend or terminate an FMI entity for breaching the terms of an FMI sandbox or the legislative requirements. If this occurs, the general law, as it exists outside of an FMI sandbox, would then apply once more.
- 597 The negative statutory instrument procedure will be limited to the modification of legislation that appears as a relevant enactment on face of the Bill at clause 17(3). Any additions to this list of legislation are intended to be approved by affirmative statutory instrument procedure.
- 598 A report will be made to Parliament outlining the performance of an FMI Sandbox, in advance of any proposed permanent changes to legislation which will be subject to the

affirmative statutory instrument procedure where primary legislation is amended, otherwise the negative procedure will apply. This is intended to ensure that Parliament is afforded an appropriate level of scrutiny.

- 599 It is possible that certain enabling legislation will fall to the rule-making powers of regulators, where the powers within the proposed future regulatory framework are to be implemented. As a result, in future the functioning of the FMI Sandbox may evolve with the regulators, rather than HM Treasury, being responsible for making the majority of legislative changes to be tested in a FMI sandbox

Powers in relation to critical third parties

- 600 The Bank, the PRA and the FCA's indirect power over third parties results from their direct powers over the firms they authorise and regulate under the Banking Act 2009 (for the Bank) and FSMA 2000 (for the PRA and the FCA). Under section 180-191 of the Banking Act 2009, the Bank has the power to establish principles, codes of practice and requirements for operators of recognised payments systems. Under section 137A of FSMA 2000, the FCA has the power to 'make such rules applying to authorised persons' with respect to their carrying out any activities, regardless of whether these are regulated or not. The PRA has a similar power under section S137G of FSMA 2000 in respect of PRA-authorized persons.
- 601 The Bank, the PRA and the FCA have used these powers to attempt to mitigate risks from third parties. In 2021, for example, the Bank, the PRA and the FCA introduced new rules on [operational resilience](#). In addition, the PRA introduced modern expectations on [outsourcing and third party risk management](#).
- 602 In comparison to their powers over authorised entities, the Bank, the PRA and the FCA have very limited direct powers over unrelated third party service providers to authorised firms.
- 603 The Bank can have direct regulatory power over a service provider to a recognised payments system but only if HM Treasury has specified that service provider in an order made under S206A of the Banking Act 2009. HM Treasury has to date specified only one such service provider.
- 604 The PRA has power under section 165A of FSMA 2000 to obtain information or documents from certain third parties, including service providers to PRA- and FCA-authorized firms, where the information or documents are relevant to the stability of the UK financial system or reasonably required by the Bank in connection with the exercise of its functions in pursuit of its financial stability objective. Exercise of the section 165A power is subject to significant procedural safeguards.

Regulatory gateway for financial promotions

- 605 Presently, section 21 of FSMA 2000 provides that a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity or to engage in claims management activity (referred to as a 'financial promotion'), unless they are an authorised firm, the communication is approved by an authorised firm, or there is an applicable exemption under the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (FPO). An authorised firm is primarily a person that has permission from the FCA or the PRA to carry-on one or more regulated activities, in accordance with section 31 of FSMA 2000 (referred to as "Part 4A permission"). Engaging in investment activity is defined in section 21(8) of FSMA 2000 as relating to either a controlled activity or a controlled investment, which are further defined in Schedule 1 to FPO. The exemptions to the restriction in section 21 of FSMA 2000 are also set out in the FPO.

606 Under section 25 of FSMA 2000 it is a criminal offence for an unauthorised firm to communicate a financial promotion in breach of section 21 of FSMA 2000. Firms that commit such an offence can be liable to a fine and/or up to two years' imprisonment. In addition, agreements entered into as a result of a financial promotion that contravenes section 21(1) of FSMA 2000 are, among other things, unenforceable against any customer (section 30 of FSMA 2000).

607 The Bill inserts section 21(2A) of FSMA 2000 which provides that an authorised firm can only approve a financial promotion within the scope of a permission granted by the FCA or within an exemption. The Bill provides HM Treasury with a power to specify the relevant exemptions from the requirement for FCA permission to approve promotions. The Bill also inserts section 55NA of FSMA 2000 which provides the FCA with powers to grant permission and to vary or cancel that permission, either on the application of the authorised firm or on the FCA's own initiative. The FCA's powers are exercisable primarily by reference to its operational objectives.

Digital settlement assets

608 As noted in the policy background to these Notes, the current legislation applicable to the UK payments regime is contained in various pieces of existing legislation.

609 A new category of "digital settlement asset", which includes stablecoins and other cryptoassets which meet the definition, will be created to bring all such instruments within the regulatory reach of the existing payment and electronic money landscape. Initially, digital settlement assets will be defined (in clause 22(2) of this Bill and new section 182(4A) of the Banking Act 2009, which will be inserted by Schedule 6 to this Bill) as a digital representation of value or rights, whether or not cryptographically secured, that –

- a. can be used for the settlement of payment obligations,
- b. can be transferred, stored or traded electronically, and
- c. uses technology supporting the recording or storage of data (which may include distributed ledger technology).

The Banking Act 2009

610 The Bill will expand Part 5 of the Banking Act 2009. This Part of that Act provides for the Bank's oversight and supervisory powers once a payment system is "recognised" by HM Treasury upon fulfilling the designation criteria set in section 185 of the Act. In recognising a payment system using digital settlement assets or a digital settlement asset service provider, HM Treasury will consider whether an entity is likely to threaten the stability of, or confidence in the UK financial system; or have serious consequences for business or other interests throughout the UK, and if so, they will be considered for recognition. There are currently nine payment systems recognised by HM Treasury, all of whom are within the Bank's supervision. Once recognised, the Bank will have oversight of the operators of digital settlement asset recognised payment systems and will be able to, for example, issue principles (under section 188 of the Banking Act 2009) and codes of practice (under section 189 of that Act), give directions (under section 191 of that Act), take enforcement action against recognised payment systems or service providers using digital settlement asset and expect compliance with information requests.

611 Through the expansion of Part 5 of the Banking Act 2009, recognised payment systems and service providers using digital settlement assets may also be subject to the same sanctions and criminal offences that existing payment systems will be subject to in the event of a compliance failure. For example, if the Bank thinks that a compliance failure threatens the

stability of, or confidence in, the UK financial system, or has serious consequences for business or other interests throughout the UK, it may give that operator of the digital settlement asset payment system a “closure order” such that all payment activities or specified activities to cease. A person in breach of a closure order is guilty of an offence, liable on summary conviction, to a fine not exceeding the statutory maximum, or on conviction on indictment, to a fine. Under section 200, the Bank may also issue a management disqualification against a person holding an office or position for making management decisions for a recognised digital settlement asset payment system or service provider. A person who breaches a disqualification order is guilty of an offence under section 200(3) punishable by a fine, on summary conviction, to a fine not exceeding the statutory maximum, or on conviction on indictment.

Financial Services (Banking Reform) Act 2013

- 612 The Bill expands the application of FSBRA 2013 so that its regulatory regime includes those systems using digital settlement assets in a similar manner to current payment system designation orders under section 43(1) of FSBRA 2013. Once a payment system has been designated as a regulated system by HM Treasury, the PSR will have regulatory powers over participants in that system to ensure that relevant stablecoin-based payment systems are subject to appropriate economic and competition regulation.
- 613 Thereafter the PSR will have powers over digital settlement assets to issue directions (under section 54 of FSBRA 2013), system rules (under section 55), conduct investigations into regulatory failures (sections 83-93) and have enforcement powers to maintain competition scrutiny. As in the application of offences and sanction under the Banking Act 2009, the same would be the case for the application of FSBRA 2013 criminal offences to digital settlement asset payment systems. For example, under regulation 83 of FSBRA 2013, the Payment Systems Regulator may appoint an “officer” to conduct investigations on a regulated payment in furtherance of its payment systems objectives. In connection with that investigation, digital settlement assets will risk committing criminal offences under the Act and they will be liable to a term of imprisonment, or fine, or both.

Special Administration Regimes

- 614 The Bill gives HM Treasury powers to amend insolvency and administration procedures as they apply to the operators of recognised (under Part 5 of the Banking Act 2009) payment systems and recognised service providers that use digital settlement. This will allow HM Treasury to amend existing Special Administration Regimes (SARs) by way of secondary legislation, as they apply to such firms, to prepare for their possible failure. SARs provide for bespoke insolvency provision where the general administration process is not considered to be in the public interest. The Financial Market Infrastructure (FMI) SAR (provided for in Part 6 of FSBRA 2013 imposes an objective on administrators to ensure that a failed payment system in scope of the regime continues to be maintained and operated as an efficient and effective system, effectively prioritising this ahead of the interests of its creditors. Initially, HM Treasury intends to develop and bring forward a statutory instrument to amend the FMI SAR to ensure it can effectively be applied to digital settlement.

Implementation of mutual recognition agreements

- 615 The relevant legal background is explained in the policy background section of these Notes.

New objectives and regulatory principles

FCA and PRA objectives and regulatory principles

- 616 The statutory framework for the Financial Conduct Authority (FCA) is set out in Chapter 1 of Part 1A of, and Schedule 1ZA to, FSMA 2000. This Part sets out the FCA's general functions which consist of making rules, making technical standards in certain circumstances, issuing codes and guidance and determining its general policy and principles by reference to which it performs particular functions under FSMA 2000. Part 1A also sets out the FCA's strategic objective, three operational objectives and the regulatory principles which the FCA must advance and have regard to, respectively, when discharging its general functions.
- 617 The statutory framework for the Prudential Regulation Authority (PRA) is set out in Chapter 2 of Part 1A of, and Schedule 1ZB to, FSMA 2000. This Part sets out the PRA's general functions which consist of making rules, making technical standards in certain circumstances, issuing codes and determining the general policy and principles by reference to which it performs certain functions under FSMA 2000. Part 1B also sets out the PRA's general objective, insurance objective and secondary competition objective together with the regulatory principles which the PRA must promote and have regard to, respectively, when discharging its general functions.
- 618 When discharging its general functions, the FCA must, so far as is reasonably possible act in a way which is compatible with its strategic objective and advances its three operational objectives. The three operational objectives are detailed in sections 1C, 1D and 1E of FSMA 2000. The FCA's operational objectives are concerned with consumer protection, protecting the integrity of the UK financial system and promoting effective competition. The FCA's strategic objective is to ensure that relevant markets function well.
- 619 The Bill inserts into FSMA 2000 a new secondary objective for the FCA which requires it, so far as is reasonably possible, when discharging its general functions in a way that advances its objectives, to act in a way which advances the international competitiveness of the economy of the United Kingdom and its growth in the medium to long term.
- 620 When discharging its general functions the PRA must, so far as is reasonably possible, act in a way which advances its general objective. The PRA has a general objective, an insurance objective and a secondary competition objective.
- 621 The PRA's general objective is to promote the safety and soundness of PRA-authorized persons. The insurance objective is to contribute, so far as is reasonably possible, to the securing of an appropriate degree of protection for those who are or may become policyholders. This applies where the PRA is discharging its general functions so far as relating to a PRA-regulated activity relating to the effecting or carrying out of contracts of insurance. The secondary competition objective requires the PRA, when discharging its general functions in a way that advances its objectives must, so far as is reasonably possible, act in a way which facilitates effective competition in the markets for services provided by PRA-authorized persons in carrying on regulated activities.
- 622 The Bill inserts an additional secondary objective in FSMA 2000 for the PRA which requires it, when discharging its general functions in a way that advances its objectives, to act in a way which facilitates the international competitiveness of the economy of the United Kingdom in the medium to long term.
- 623 The statutory principle in section 3B(1)(c) of FSMA 2000 requires the regulators to have regard to the desirability of sustainable growth in the economy of the United Kingdom in the medium or long term ("the sustainable growth principle").

- 624 The Bill removes the existing sustainable growth principle and introduces a new regulatory principle which refers explicitly to the need for the regulators to contribute towards achieving a net zero emissions target (by reference to section 1 of the Climate Change Act 2008) when discharging their general functions.
- 625 The Bill makes consequential amendments to Part 9C of FSMA to take account of the amended statutory principle.
- 626 The statutory framework for the Payment Systems Regulator is set out in Part 5 of FSBRA 2013. This Part establishes the PSR as the authority responsible for exercising functions in relation to payment systems; makes provision in relation to designating payment systems as a regulated payment system; and contains provisions about the general duties of the PSR, its regulatory and competition functions. Part 5 includes the ability of the PSR to make directions, which is the PSR's principal regulatory tool, and encompasses the regulatory principles and objectives which underpin the creation of the authority.
- 627 The statutory principle in section 53(c) of FSBRA 2013 requires the PSR to have regard to the desirability of sustainable growth in the economy of the United Kingdom in the medium or long term ("the sustainable growth principle").
- 628 The Bill amends the PSR's sustainable growth principle so that it refers explicitly to the need for the PSR to have regard to the desirability of acting in a way that is consistent with contributing towards achieving the net zero emissions target (by reference to section 1 of the Climate Change Act 2008) when discharging its general functions.

Regulator engagement with HM Treasury, external stakeholders, and Parliament

Regulators' relationship with HM Treasury

- 629 Section 1JA of FSMA 2000 provides that HM Treasury may make recommendations, by notice in writing, to the FCA about aspects of economic policy of His Majesty's government to which the FCA should have regard when considering certain matters. These are, how to act in a way which is compatible with its strategic objective, how to advance one or more of its operational objectives, the application of its regulatory principles and the importance of taking action to minimise the extent to which it is possible for a business to be used for a purpose connected with financial crime (in section 1B(5)(b) of FSMA 2000).
- 630 Section 30B of the Bank of England Act 1998 provides that HM Treasury may make recommendations, by notice in writing, to the Prudential Regulation Committee ("PRC") about aspects of economic policy of His Majesty's Government to which the PRC should have regard to when considering how to advance the PRA's objectives and when considering the application of the regulatory principles in section 3B of FSMA 2000.
- 631 HM Treasury is required to make recommendations to the FCA and the PRA at least once in each Parliament.
- 632 The Bill inserts a new provision in FSMA 2000 that requires the FCA and the PRA to respond to each recommendation made by HM Treasury in writing before the end of 12 months beginning with the date the notice containing the recommendation was given. The new provision places an ongoing requirement, to be exercised every 12 months, on the FCA and the PRA to update HM Treasury on its responses to the recommendations.
- 633 The FCA's rule-making powers are set out in Parts 5, 6, 8A, 9A, 9B, 9C, 12A, 15, 15A, 16, 17, 17A, 20, 22 of, and Schedules 1ZA and 1A to, FSMA 2000. This includes the power to make

'general rules' in section 137A. In addition, the FCA has rule-making powers under the Payment Services Regulations 2017⁵⁰ and the Electronic Money Regulations 2011⁵¹.

- 634 The PRA's rule-making powers are set out in Parts 5, 9A, 9B, 9D, 11, 12A, 12B, 15A, 19 of, and Schedule 1ZB to, FSMA 2000.
- 635 The Bill inserts in FSMA 2000 a general duty on the FCA and the PRA to keep their rules under review and to issue and maintain a statement of policy setting out how the FCA and the PRA will review their rules. The new provision gives HM Treasury the power to direct the FCA and the PRA to carry out a review of rules that the FCA or the PRA have made where HM Treasury believes it is in the public interest to do so. Where HM Treasury has directed the FCA or the PRA to undertake a review of certain rules, the new provision also requires the FCA and the PRA to make a written report to HM Treasury detailing the findings of its review. HM Treasury must then publish this report and lay it before Parliament.
- 636 Sections 144C(3) and (4) of the FSMA requires the PRA to consider and consult HM Treasury on the impact on relevant equivalence decisions when making rules relating to the Capital Requirements Regulation (CRR) or CRR Basel standards. Sections 143G (3) and (4) of FSMA, contain a similar requirement for the FCA when making rules relating to the prudential regulation of investment firms regulated by the FCA.
- 637 The Bill inserts section 409A in FSMA 2000 to specify the circumstances in which the regulators must consult with HM Treasury in relation to the effect of certain actions on deference decisions.
- 638 The Bill inserts section 409B in FSMA 2000 to specify the circumstances in which the regulators must notify HM Treasury in relation to compatibility of certain actions with international trade obligations.
- 639 Section 138L of FSMA 2000 sets out general exemptions to the regulator's duty to consult the public. These (and any other exemption from a duty to consult) are relevant to determining whether and when the regulators must consult / notify HM Treasury under Sections 409A and 409B. This is because the obligation to consult/notify HM Treasury will only apply where the regulators are under a duty to consult in respect of the action that they propose to take.
- 640 Section 138M of FSMA 2000 sets out an exemption to the FCA's duty to consult the public in relation to temporary product intervention rules. The application of section 138M to sections 409A and 409B has been modified by the Bill. The modified section 138M is relevant to determining whether and when the regulators must consult/ notify HM Treasury under sections 409A and 409B.
- 641 Section 410 of FSMA 2000 allows HM Treasury to direct the FCA, the PRA and the Bank of England in exercising certain functions to take action (or refrain from taking action) in order to ensure that the UK meets its international obligations. Obligations arising from international trade agreements fall within this section. Section 410 of FSMA 2000 does not apply to the PSR.
- 642 Section 9S of the Bank of England Act 1998 requires the Financial Policy Committee to prepare an explanation of how the use of powers in section 9H (directions to the FCA or the PRA requiring macro-prudential measures) and section 9Q (recommendations to the FCA

50 S.I. 2017/752

51 S. I. 2011/99

and the PRA) is compatible with duties under section 9F (other general duties). Section 9F sets out that the Financial Policy Committee must have regard to the international obligations of the UK. Sections 409A and 409B of FSMA 2000 accordingly omit overlaps with the provisions in the Bank of England Act.

- 643 Part 2 of Schedule 17A to FSMA 2000 applies certain provisions of FSMA 2000 in relation to the Bank of England. By amendments under clause 47, sections 409A and 409B FSMA 2000 are applied with modification to the Bank in exercise of its FMI functions.
- 644 FSBRA 2013 establishes the PSR as the authority responsible for exercising functions in relation to payment systems. Schedule 7 amends FSBRA 2013 to include a new section 107A on international trade obligations. This works analogously to section 409B to specify the circumstances in which the PSR must notify HM Treasury in relation to compatibility of their actions with international trade obligations. Unlike the other regulators, the PSR does not have a rule-making function, and instead imposes generally applicable requirements. Accordingly, new section 107A applies to proposals to impose generally applicable requirements, or changes to the PSR's general policies and practices).

Power for HM Treasury to direct the regulator to report on performance

- 645 Paragraph 11(1) of Schedule 1ZA to FSMA 2000 requires the FCA to make a report to HM Treasury annually. Paragraph 11(1) of Schedule 1ZA details the information which the FCA must include in the annual report. Paragraph 11(1)(j) of Schedule 1ZA provides a power for HM Treasury to specify information which the FCA must include in the annual report.
- 646 Paragraph 19(1) of Schedule 1ZB to FSMA 2000 requires the PRA to make a report to the Chancellor annually. Paragraphs 19(1) and 19(1A) of Schedule 1ZA detail the information which the PRA must include in the annual report. Paragraph 19(1)(g) of Schedule 1ZB provides a power for HM Treasury to specify information which the PRA must include in the annual report.
- 647 Paragraph 33 of Schedule 17A to FSMA 2000 applies paragraph 19 of Schedule 1ZB to FSMA 2000 to the Bank of England when acting as a regulator for CCPs and CSDs.
- 648 Paragraph 7(1) of Schedule 4 to FSBRA requires the PSR to make a report to the FCA annually. Paragraph 7(2) of Schedule 4 details the information which must be included in the annual report.
- 649 The Bill provides a new power to HM Treasury, in addition its power to direct the FCA, PRA and the Bank in its function as a regulator for CCPs and CSDs to include specified information in their annual reports. The new power, in paragraph 11A of Schedule 1ZA, paragraph 21A of Schedule 1ZB to FSMA 2000 and paragraph 7A of Schedule 4 to FSBRA permits HM Treasury to direct the FCA, PRA, Bank and PSR to report on such matters as specified by HM Treasury where the information is reasonably necessary for the purpose of reviewing and scrutinising the discharge of the regulators' functions and only where other information available is not sufficient.
- 650 The new provisions for each of the regulators state that a direction by HM Treasury may not require the publication of information that is confidential information for the purposes of Part 23 of FSMA. "Confidential information" is defined in section 348(2) of FSMA 2000 and section 91(2) of FSBRA.

Engagement with stakeholders

- 651 Part 1A of FSMA 2000 details the statutory panels which the FCA must establish and maintain. The FCA Practitioner Panel represents the interests of practitioners, the Smaller

Business Practitioner Panel represents the interests of eligible practitioners, the Markets Practitioner Panel represents the interests of practitioners who are likely to be affected by the exercise of the FCA of its functions relating to markets and the Consumer Panel represents the interests of consumers.

- 652 The FCA is required to consult the statutory panels and consider representations that are made by the panels. Where appropriate, the FCA must publish the representations it receives from the panels.
- 653 The FCA appoints the members of the statutory panels. HM Treasury's approval is required for the appointment and dismissal of the chair of the statutory panels. The Bill inserts a new provision in FSMA 2000 that requires the FCA to prepare and publish a statement of policy detailing the process adopted for making appointments and the matters considered in determining who is appointed.
- 654 The Bill also inserts a provision in FSMA 2000 that requires the FCA to establish and maintain a panel called the Listing Authority Advisory Panel to represent the interests of practitioners who are likely to be affected by the exercise by the FCA of its functions relating to the listing, issue or trading of products on recognised investment exchanges and other markets the operation of which is regulated by the FCA.
- 655 Section 2L of FSMA 2000 places a duty on the PRA to make and maintain effective arrangements for consulting PRA-authorized persons or persons appearing to the PRA to represent the interests of such persons. This includes a requirement to make and maintain the PRA Practitioner Panel (see section 2M of FSMA 2000).
- 656 The PRA is required to consider representations that are made by the PRA Practitioner Panel. Where appropriate, the FCA must publish the representations it receives from the panel.
- 657 The PRA appoints members of its statutory panel. HM Treasury's approval is required for the appointment and dismissal of the chair. The Bill inserts in FSMA 2000 a provision that requires the PRA to prepare and publish a statement of policy detailing the process adopted for making appointments and the matters considered in determining who is appointed.
- 658 The Bill also inserts a new provision in FSMA 2000 that requires the PRA to establish and maintain a panel called the Insurance Practitioner Panel to represent the interests of practitioners involved in the carrying on of the activity of effecting or carrying out contracts of insurance.
- 659 The Bill inserts a new provision in Schedules 1ZA and 1ZB to FSMA 2000 that requires the FCA and the PRA to notify the chair of the Treasury Select Committee of the House of Commons that the consultation has been issued.
- 660 Where the FCA or the PRA issue a public consultation and a Committee of the House of Commons or the House of Lords or a joint Committee of both Houses has provided to the FCA or the PRA representations in response to the consultation, the new provision in Schedules 1ZA and 1ZB require the FCA and the PRA to respond in writing to the representations.
- 661 Paragraph 11 of Schedule 1ZA to FSMA 2000 requires the FCA to make a report to HM Treasury at least once a year on a number of matters including the discharge of its functions, the extent to which it has acted compatibly with its strategic objective and the extent to which its operational objectives have been advanced. The existing requirement in relation to the FCA's operational objective will also capture the FCA's new secondary competitiveness and growth objective. The Bill inserts a new provision in Schedule 1ZA to

FSMA 2000 that requires the FCA to include in its annual report any engagement it has had with the statutory panels of the FCA, the PRA or the PSR.

- 662 Paragraph 19 of Schedule 1ZB to FSMA 2000 requires the PRA to make a report to the Chancellor of the Exchequer at least once a year on a number of matters including the discharge of its functions, the extent to which, in the PRA's opinion, it has advanced its objectives. The existing provision in paragraph 19 in relation to the PRA's objectives will also capture the PRA's new competitiveness and growth objective. The Bill inserts a new provision in Schedule 1ZB to FSMA 2000 that requires the PRA to include in its annual report any engagement it has had with the statutory panels of the PRA, the FCA or the PSR.
- 663 The Bill inserts new provisions in FSMA 2000 that require the FCA and the PRA to each publish a CBA statement of policy which applies when the regulator is proposing to make new rules or amend existing rules. The statement of policy will make reference to the methodology of the CBA, the application of existing exemptions to carry out a cost benefit analysis, how the regulator considers section 138I(8) of FSMA 2000 (whether the costs and benefits can be reasonably estimated), how any representations made by stakeholders at the consultation stage are considered and the criteria for when the regulator does not need to consult with the cost benefit analysis panel in relation to the development of cost benefit analysis.
- 664 Section 138J(2)(a) of FSMA 2000 requires the PRA to undertake and publish a CBA alongside a draft of any proposed rules. "Cost benefit analysis" is defined in section 138J(7) of FSMA 2000.
- 665 The Bill inserts a new provision in FSMA 2000 that requires the PRA to establish and maintain a statutory panel which is dedicated to supporting the development of the PRA's cost benefit analyses for the purposes of section 138J.
- 666 Section 138I(2)(a) of FSMA 2000 requires the FCA to undertake and publish a CBA alongside a draft of any proposed rules. "Cost benefit analysis" is defined in subsection (7).
- 667 The Bill inserts a provision in FSMA 2000 that requires the FCA to establish and maintain a statutory panel to provide advice in relation to cost benefit analyses for the purpose of section 138I of FSMA 2000.
- 668 Section 103 of FSBRA 2013 sets out the PSR's general duty to make and maintain effective arrangements for consulting relevant persons on the extent to which its general policies and practices are consistent with its general duties under section 49, and how its payment systems objectives may best be achieved. Section 103(3) confirms that these arrangements must include the establishment and maintenance of one or more panels of persons to represent the interests of relevant persons.
- 669 The PSR appoints the members of the statutory panel. HM Treasury's approval is required for the appointment and dismissal of the chair of the statutory panel. The Bill inserts a new provision in FSBRA 2013 that requires the PSR to prepare and publish a statement of policy detailing the process adopted for making appointments and the matters considered in determining who is appointed.
- 670 Section 104 of FSBRA 2013 states that before imposing a generally applicable requirement, the PSR must publish a draft of the proposed requirement, accompanied by a cost benefit analysis (defined in subsection (7)).
- 671 The Bill inserts a provision in FSBRA 2013 requiring the PSR to consult the FCA's Cost Benefit Analysis Panel about the preparation of CBAs under section 104. It also places requirements on the FCA Cost Benefit Analysis Panel in relation to the PSR's duties in

connection with CBAs. It also requires the PSR to publish a statement of policy in relation to the preparation of CBAs for the purposes of section 104 FSBRA 2013.

Appointment of external persons to statutory panels

672 Section 1M of FSMA 2000 requires the FCA to make and maintain effective arrangements for consulting practitioners and consumers on the extent to which its general policies and practices are consistent with its general duties. In order to satisfy this requirement, the FCA has the following statutory panels:

- a. The FCA Practitioner Panel (set out in section 1N of FSMA);
- b. The Smaller Business Practitioner Panel (set out in section 1O of FSMA);
- c. The Markets Practitioner Panel (set out in section 1P of FSMA);
- d. The Consumer Panel (set out in section 1Q of FSMA);
- e. The Listing Authority Advisory Panel (new section 1QA of FSMA, inserted by clause 39 of the Bill); and
- f. FCA Cost Benefit Analysis Panel (new section 138IA of FSMA, inserted by clause 41(2) of the Bill).

673 The members of the panels listed above are appointed by the FCA. The Bill introduces a provision (new section 1MA of FSMA) which means that persons who receive remuneration from the FCA, PRA, the Bank, PSR or HM Treasury are disqualified from being appointed as a member of a statutory panel. This will capture anyone who is completing work for the regulators or HM Treasury but will not capture those who only receive expenses.

674 “Remuneration” is not defined in this new section because the default position in other legislation is that a reference to “remuneration” does not include expenses – see for example, paragraph 7 of Schedule 1 to the Advanced Research and Invention Agency Act 2022.

675 The Bill provides HM Treasury with a power to make regulations to exempt a panel generally or in relation to such descriptions of persons or cases as the regulations may specify. These regulations will be subject to the negative procedure.

676 Section 2L of FSMA 2000 requires the PRA to make and maintain effective arrangements for consulting PRA-authorized persons, or persons who represent the interest of such persons, on the extent to which its general policies and practices are consistent with its general duties. In order to satisfy this requirement, the PRA has the following statutory panels:

- a. The PRA Practitioner Panel (set out in section 2M of FSMA);
- b. The Insurance Practitioner Panel (new section 2MA of FSMA inserted by clause 40 of this Bill); and
- c. PRA Cost Benefit Analysis Panel (new section 138JA of FSMA inserted by clause 41(3) of this Bill).

677 The members of the panels listed above are appointed by the PRA. The Bill introduces a provision (new section 2LA of FSMA) which means that persons who receive remuneration from the FCA, PRA, the Bank, PSR or HM Treasury are disqualified from being appointed as a member of a statutory panel. This will capture anyone who is completing work for the regulators or HM Treasury but will not capture those who only receive expenses.

- 678 “Remuneration” is not defined in this new section because the default position in other legislation is that a reference to “remuneration” does not include expenses – see for example, paragraph 7 of Schedule 1 to the Advanced Research and Invention Agency Act 2022.
- 679 The Bill provides HM Treasury with a power to make regulations to exempt a panel generally or in relation to such descriptions of persons or cases as the regulations may specify. These regulations will be subject to the negative procedure.
- 680 Section 103(1) of FSBRA 2013 requires the PSR to make and maintain effective arrangements for consulting relevant persons on certain specified areas.
- 681 Section 103(3) of FSBRA requires the PSR to establish and maintain one or more panels to represent the interests of relevant persons. In order to satisfy this requirement, the PSR has established the Payment Systems Regulator Panel.
- 682 The members of the Payment Systems Regulator Panel are appointed by the PSR. The Bill introduces a new provision in section 103 which means that persons who receive remuneration from the FCA, PRA, the Bank, PSR or HM Treasury are disqualified from being appointed as a member of a statutory panel. This will capture anyone who is completing work for the regulators or HM Treasury but will not capture those who only receive expenses.
- 683 “Remuneration” is not defined in this clause because the default position in other legislation is that a reference to “remuneration” does not include expenses – see for example, paragraph 7 of Schedule 1 to the Advanced Research and Invention Agency Act 2022.
- 684 The Bill provides HM Treasury with a power to make regulations to exempt a panel generally or in relation to such descriptions of persons or cases as the regulations may specify. These regulations will be subject to the negative procedure.

Publication of consultation respondents

- 685 Section 138I(1)(b) of FSMA 2000 requires the FCA to, before making any rules, and after consulting the PRA, consult publicly on the proposed rules. Section 138I(2) of FSMA 2000 sets out what must accompany the consultation. Section 138I(4) of FSMA 2000 requires the FCA to publish an account of the representations that have been made to it in response to the consultation and its response to these representations.
- 686 The Bill inserts new provisions into section 138I of FSMA 2000 that require the FCA to publish the names of respondents to a consultation published under section 138I(1)(b) as part of its response in accordance with section 138I(4). This requirement only applies where a respondent has explicitly provided their consent to the FCA that their response can be published.
- 687 Section 138J(1)(b) of FSMA 2000 requires the PRA, before making any rules, and after consulting the FCA, to consult publicly on the proposed rules. Section 138J(2) of FSMA 2000 sets out what must accompany the consultation. Section 138J(4) of FSMA 2000 requires the PRA to publish an account of the representations that have been made to it in response to the consultation and its response to these representations.
- 688 The Bill inserts a new provision into section 138J of FSMA 2000 that requires the PRA to publish the names of respondents to a consultation published under section 138J(1)(b) as part of its response in accordance with section 138J(4). This requirement only applies where a respondent has explicitly provided their consent to the PRA that their response can be published.

- 689 Paragraph 10(1)(i) of Schedule 17A to FSMA 2000 applies section 138J of FSMA 2000 and the provision inserted by the Bill to the Bank of England in respect of its functions in relation to CCPs and CSDs.
- 690 The Bill inserts a new paragraph into Schedule 17A to FSMA 2000 (paragraph 10A) which applies section 138J of FSMA 2000 and the provision inserted by the Bill to the Bank of England in relation to rules made by the Bank of England under section 312M of FSMA 2000.
- 691 Section 104(2)(b) of FSBRA 2013 requires the PSR to, before imposing generally applicable requirements, and after consulting the Bank of England, the FCA and the PRA, consult publicly on the proposed rules. Section 104(3) of FSBRA 2013 sets out what must accompany the consultation. Section 104(5) of FSBRA requires the PSR to publish an account of the representations that have been made to it in response to the consultation and its response to these representations.
- 692 The Bill inserts a new provision into section 104 of FSBRA 2013 that requires the PSR to publish the names of respondents to a consultation published under section 104(2)(b) as part of its response in accordance with section 104(5). This requirement only applies where a respondent has explicitly provided their consent to the PSR that their response can be published.

Accountability to Parliament

- 693 The Bill inserts a new provision in Schedules 1ZA and 1ZB to FSMA 2000 that requires the FCA and the PRA to notify the chair of the Treasury Select Committee of the House of Commons that the consultation has been issued. For the PSR, an equivalent amendment is made via a new provision in Schedule 4 to the Financial Services (Banking Reform) Act 2013 (FSBRA 2013).
- 694 Where the FCA or the PRA issue a public consultation and a Committee of the House of Commons or the House of Lords or a joint Committee of both Houses has provided to the FCA or the PRA representations in response to the consultation, the new provision in Schedules 1ZA and 1ZB requires the FCA and the PRA to respond in writing to the representations. For the PSR, an equivalent obligation to respond to Parliament is created in the new provision of Schedule 4 to FSBRA 2013.

Financial Ombudsman Service, FCA and FSCS co-operation on wider implications issues

- 695 The Financial Ombudsman Service is set up under Part 16 and Schedule 17 to FSMA 2000 and referred to in that legislation as “the ombudsman scheme”. The ombudsman scheme's statutory purpose is to provide for the resolution of certain disputes “quickly and with minimum formality by an independent person” (section 225(1) of FSMA 2000) based on what is, in the ombudsman’s opinion, fair and reasonable in all the circumstances of the case. The Financial Ombudsman Service is administered by the Financial Ombudsman Service Limited, a company limited by guarantee, which is the “body corporate” established by the Financial Services Authority (now the FCA) under paragraph 2(1) of Schedule 17 to FSMA 2000 (as originally enacted). Financial Ombudsman Service Limited is the “scheme operator” for the purposes of FSMA 2000 (see section 225(2) FSMA 2000).
- 696 The Financial Ombudsman Service is operationally independent from the FCA, but the FCA has a duty to make the rules which govern the Financial Ombudsman Service’s operation (including matters such as the scope of the Financial Ombudsman Service’s jurisdiction and the eligibility of complainants). These rules are in the FCA’s [Dispute Resolution: Complaints Sourcebook](#) (DISP).

- 697 The FSCS is a scheme set up under Part 15 of FSMA 2000 to provide for the payment of compensation, up to certain limits, to eligible customers of financial services firms that are unable, or likely to be unable, to pay claims against them. Technically, the FSCS consists of the rules establishing the “compensation scheme” that have been made by the FCA and the Prudential Regulation Authority (PRA) under Part 15 of FSMA 2000. “FSCS” is also used as an abbreviation for the Financial Services Compensation Scheme Ltd, the company limited by guarantee which administers the compensation scheme and which is defined as the “scheme manager” in FSMA 2000 (see section 212(1) of FSMA 2000).
- 698 Like the Financial Ombudsman Service, the FSCS is operationally independent from the FCA, but the FCA and the PRA are responsible under section 212(2) FSMA 2000 for ensuring that the scheme manager is at all times capable of exercising its functions under parts 15 and 15A of FSMA 2000. The FCA’s rules governing the FSCS are in its [Compensation Sourcebook](#) (COMP).
- 699 Paragraph 3A of Schedule 17 to FSMA 2000 (Relationship with FCA) requires the Financial Ombudsman Service and the FCA to “take such steps as [they] consider appropriate to cooperate with each other in the exercise of their functions” and requires them to prepare (and publish) a memorandum describing how they intend to comply with that obligation.
- 700 The FCA and the Financial Ombudsman Service have a Memorandum of Understanding in place which was entered into in December 2015 to comply with their duty under paragraph 3A of Schedule 17 of FSMA 2000. This document provides “a framework for the FCA and the Financial Ombudsman Service Limited to cooperate and communicate constructively to carry out their independent roles and separate functions” (paragraph 2). This “is particularly important where the FCA is taking supervisory or regulatory action and, at the same time, the Financial Ombudsman Service Limited’s ombudsman scheme is receiving a significant number of cases concerning the same issue” (paragraph 4). Paragraph 14(d) of the memorandum requires the Financial Ombudsman Service and FCA to “consult one another at an early stage on any issues that might have significant implications for the other organization”, and paragraph 14(e) requires them to “share (for comment) at an early stage, draft documents (such as consultation papers and briefings) that affect the other’s functions.”.
- 701 Section 232A of FSMA 2000 provides that the Financial Ombudsman Service must disclose to FCA any information which “would or might be of assistance to the FCA in advancing one or more of FCA’s operational objectives”. In addition to this obligation, the memorandum makes further provision about voluntary information sharing between the Financial Ombudsman Service and FCA, and provides that the Financial Ombudsman Service and FCA may each disclose information to the other for the purpose of assisting either party in discharging their functions.
- 702 The FSCS and the FCA are subject to an equivalent duty to take appropriate steps to cooperate with each other and to prepare, maintain and publish a memorandum describing how they intend to do so, under section 217A of FSMA 2000 (Co-operation). Accordingly, the FCA and the FSCS also have a Memorandum of Understanding in place, which provides at paragraph 19 that the FCA “will seek advice from the FSCS in relation to domestic or international policy making initiatives that might have a material effect on the FSCS’s ability to administer those schemes effectively now or in the future”. This memorandum also states that: the FCA and FSCS “undertake to share information to allow them to fulfil their respective responsibilities” (paragraph 11); the FSCS “will keep the FCA informed in relation to issues concerning the interpretation of rules, the eligibility of claims, and its contingency and scenario planning, where appropriate” (paragraph 12); the FCA

“agrees to keep the FSCS informed of any regulatory or market developments that may affect the planning or operation of the FSCS - both in general terms and in relation to the likelihood of a specific firm failing” (paragraph 13); and the FSCS “will keep the FCA informed on the effectiveness of the rules for the compensation scheme”.

- 703 The Financial Ombudsman Service and the FSCS are not subject to a bilateral duty of cooperation akin to the duties in paragraph 3A of Schedule 17 to, and section 217A of, FSMA 2000.

Chair of the Payment Systems Regulator as member of FCA Board

- 704 The PSR is a body corporate which was established by the FCA under Part 5 of the Financial Services (Banking Reform) Act 2013 (FSBRA 2013), to exercise regulatory functions in relation to payment systems. Under paragraph 2(2)(a) of Schedule 4 to FSBRA 2013, the FCA is responsible for appointing a member to chair the board of the PSR (the PSR Chair), with the approval of HM Treasury.
- 705 The “governing body” of the FCA (the FCA Board) is formed in accordance with paragraph 2 of Schedule 1ZA to FSMA 2000. Under paragraph 2(2)(a), HM Treasury is responsible for appointing a chair to that board (the FCA Chair). Under paragraph 2(3), certain members of the FCA Board are non-executive members.
- 706 Until 1 May 2022, the same individual was appointed to the offices of FCA Chair and PSR Chair. Therefore, the PSR Chair was effectively a member of the FCA Board. However, the PSR Chair is no longer the same person as the FCA Chair, and the PSR Chair is not currently listed as a member of the FCA Board in paragraph 2(2) of Schedule 1ZA to FSMA 2000.
- 707 The Bill adds the PSR Chair to that list, so that the PSR Chair will become a member of the FCA Board in their own right. It also amends paragraph 2(3) to specify that the PSR Chair is to be a non-executive member.
- 708 The Bill also ensures that the following provisions in Schedule 1ZA FSMA 2000 will be extended to apply to the PSR Chair as member of the FCA Board:
- a. Paragraph 3(6), which provides that an employee of the PRA cannot be an “appointed member” of the FCA Board.
 - b. Paragraph 3(7), which allows the FCA to pay expenses to the Bank’s Deputy Governor for prudential regulation for service as a member of the FCA Board.
 - c. Paragraph 6, which prohibits the Bank’s Deputy Governor for prudential regulation from taking part in discussions about the exercise of the FCA’s powers in relation to particular persons.

Access to cash

Cash access services

- 709 The Bill inserts new Part 8B, titled “Cash Access Services”, into FSMA 2000. Part 8B applies to credit institutions which are authorised under Part 4A. The FCA therefore already regulates the carrying on of regulated activities by these credit institutions. In September 2020, the FCA issued guidance setting out considerations that these firms should take into account when planning the closure of a branch or ATM, or conversion of a free-to-use ATM to pay-to-use. This guidance was underpinned by Principles 6 and 7 of the FCA’s “Principles for Business.”

- 710 The new Part 8B of FSMA 2000 provides the FCA with a bespoke rule making and directions power to further advance the aim of protecting access to cash for UK customers, through seeking to ensure the continued reasonable provision of cash withdrawal and deposit facilities.

Wholesale cash distribution

- 711 There currently exists no statutory regime relating to the wholesale cash distribution network and the Bank has no statutory powers of oversight. The Bill establishes a new statutory oversight regime of wholesale cash distribution. In particular, it confers on the Bank a formal role of oversight over the wholesale cash distribution network.

Performance of functions relating to financial market infrastructure

- 712 The key features of the senior managers and certification regime (SM&CR) introduced by the Bill for relevant recognised bodies will be similar to those of the existing SM&CR for banks, insurers and other authorised persons, which is set out in Part 5 of FSMA 2000.
- 713 The existing SM&CR replaced the Approved Persons Regime (APR) between March 2016 and December 2019. The APR, which was introduced in 2001 and was set out in sections 59 to 71 of FSMA 2000, required the pre-approval by a regulator of certain individuals within financial institutions before they could carry out one or more activities. The global financial crisis in 2007-08 and the Libor scandal in 2012 exposed the shortcomings of the APR, and made clear that there was a need for more effective regulation of the conduct of individuals working in the financial services industry.
- 714 This was achieved by amending FSMA 2000 to augment the APR with the SM&CR for certain types of financial institutions. The SM&CR was introduced with the aim of reducing harm to consumers and strengthening market integrity by changing behaviours and culture within firms. The Financial Services (Banking Reform) Act 2013 created two regimes within sections 59 to 71 of FSMA 2000. The new SM&CR would apply to 'relevant authorised persons' (i.e., banks, building societies, credit unions and PRA-regulated investment firms), and the APR would continue to apply to all other authorised persons. SM&CR was subsequently extended to all authorised persons. As a result of the amendments to sections 59 to 71 of FSMA 2000, the existing SM&CR can be viewed as an enhanced version of the APR.
- 715 The SM&CR set out in Part 5 of FSMA 2000 has five key elements: the Senior Managers Regime (sections 59 to 63ZE and 71 of FSMA 2000); the Certification Regime (sections 63E and 63F of FSMA 2000); conduct rules for individuals (sections 64A to 64C of FSMA 2000); disciplinary powers (sections 56 to 58, 63A to 63D and 66 to 71 of FSMA 2000); and criminal offences (sections 56(4) and 398 of FSMA 2000).
- 716 Whilst the new regime implemented by the Bill will be broadly similar to the SM&CR set out in Part 5, it will sit separately to the existing regime, and will be set out in Part 18 of FSMA 2000.
- 717 In order to implement the regime, the Bank and the FCA would rely on both their general rule-making powers as well as bespoke rule-making powers and duties. This Bill introduces a new general rule-making power for the Bank over CCPs and CSDs which will be inserted as section 300F of FSMA 2000 (see clause 9), and a new general rule-making power for the FCA over RIEs and data reporting service providers (DRSPs) which will be inserted as section 300H of FSMA 2000 (see clause 11). Regulation 3 of The Credit Rating Agencies

(Amendment etc.) (EU Exit) Regulations 2019⁵² grants the FCA an existing general rule-making power over CRAs.

- 718 The UK's regulatory regime for CCPs, CSDs and RIEs is outlined in Part 18 of FSMA 2000. Amongst other provisions, Part 18 of FSMA 2000 grants an exemption for the purposes of the general prohibition (which provides that no person may carry on a regulated activity in the UK unless they are authorised or exempt), under which RIEs, CCPs and CSDs that have been recognised by the regulator are able to carry on a regulated activity in the UK without being authorised under FSMA 2000. It also provides for the recognition and supervisory powers of the relevant regulators – the FCA in respect of RIEs and the Bank in respect of CCPs and CSDs. As with other areas of financial services, the regulation and supervision of UK CCP, CSDs and RIEs has also been heavily influenced by the UK's membership of the EU. The core EU legislation relating to each of these bodies is set out below.
- 719 The European Market Infrastructure Regulation (EMIR)⁵³ is the core EU legislation relating to CCPs. It came into effect on 16 August 2012, and lays down rules on OTC derivatives, central counterparties, and trade repositories. Following the end of the Transition Period, the EU Regulation forms part of retained EU law, by operation of the European Union (Withdrawal) Act 2018 (EUWA 2018) and as amended by regulations made under section 8 of EUWA 2018, which ensure that EMIR continues to function appropriately and effectively in the UK. The EU Regulation as amended and forming part of retained EU law is referred to as UK EMIR.
- 720 The Central Securities Depositories Regulation (CSDR)⁵⁴ is the core EU legislation relating to CSDs, and it came into effect on 17 September 2014. The aim of CSDR is to harmonise certain aspects of the settlement cycle and settlement discipline and to provide a set of common requirements for CSDs operating securities settlement systems across the EU. Following the end of the Transition Period, the EU Regulation forms part of retained EU law, by operation of EUWA 2018, and as amended by regulations made under section 8 of EUWA 2018, which ensure that CSDR continues to function appropriately and effectively in the UK. The EU Regulation as amended and forming part of retained EU law is referred to as UK CSDR.
- 721 The Markets in Financial Instruments Directive (MiFID II)⁵⁵ and the Markets in Financial Instruments Regulation (MiFIR)⁵⁶ form the MiFID II framework, which is the core EU legislation relating to RIEs. The MiFID II framework came into effect on 3 January 2018. The framework strengthens investor protection and improves the functioning of financial markets, making them more efficient, resilient and transparent. Following the end of the Transition Period, the MiFID II framework forms part of retained EU law, by operation of EUWA 2018. The EU MiFID II framework was transposed and implemented in the UK by a combination of FCA and PRA Handbook rules, HM Treasury legislation (such as the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018), and directly

52 SI 2019/266

53 Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories

54 Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012

55 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

56 Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012

applicable EU regulations, which delivered the necessary amendments to ensure that the framework was implemented and continues to function appropriately and effectively following the end of the Transition Period. MiFID II and MiFIR as amended and forming part of retained EU law are referred to together as the UK MiFID II framework.

- 722 The Credit Rating Agencies Regulation (the EU CRAR)⁵⁷ is the core EU legislation relating to CRAs and credit ratings. It was developed to address issues relating to CRAs that became apparent in the financial crisis of 2007/08. The EU CRAR was subsequently amended by Regulation (EU) 513/2011 (OJ L 145/30) (EU CRA II Regulation) and Regulation (EU) 462/2013 (OJ L 146/1) (EU CRA III Regulation). The EU Regulation now forms part of retained EU law, by operation of EUWA 2018. The Credit Rating Agencies (Amendment, etc.) (EU Exit) Regulations 2019⁵⁸ delivered the necessary amendments to ensure that the EU Regulation continues to function appropriately and effectively following the end of the Transition Period. The EU Regulation as amended and forming part of retained EU law is referred to as the UK CRAR.
- 723 As set out in the FRF Review consultation, it is proposed that, as a general approach, the direct regulatory requirements that apply to firms in retained EU law be revoked, so that, for the most part, the regulators can determine them in their rulebooks. There are also a number of provisions in retained EU law which do not set direct regulatory requirements on firms. These may be amended and/or retained in domestic legislation. The core EU legislation mentioned above will therefore be revoked, with most firm-facing requirements replaced by regulators' rules, and other requirements retained and restated in legislation.

Central counterparties in financial difficulties

- 724 As explained above, the UK has an existing recovery and resolution regime for central counterparties (CCPs), which came into force in 2014. This regime comprises Part 1 of the Banking Act 2009, as modified and extended to CCPs by section 102 of the Financial Services Act 2012, and secondary legislation made under the Banking Act 2009.
- 725 Section 102 of the Financial Services Act 2012 inserted sections 89B to 89G into Part 1 of the Banking Act 2009, with section 89B setting out the modifications of Part 1 in its application to CCPs.
- 726 Part 1 of the Banking Act 2009 has since been amended by the Bank Recovery and Resolution Order 2014, the Bank Recovery and Resolution Order 2016, and the Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2020. None of these amendments affected the regime as it applies to CCPs, and section 89B(1ZA) disregards amendments made by these enactments for the purposes of the CCP regime.
- 727 The existing resolution regime for CCPs is therefore based on the text of Part 1 of the Banking Act 2009, as amended in accordance with any amendments not disregarded under section 89B, as modified under section 89B⁵⁹.

⁵⁷ Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies

⁵⁸ SI 2019/266

⁵⁹ Minor amendments have been made under the Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018/1394.

Miscellaneous

Disciplinary action against formerly authorised persons

- 728 Under section 168(3) and (5) of FSMA 2000, the FCA and the PRA may appoint one or more competent persons to conduct an investigation on their behalf. Section 168(1) to (2) sets out the circumstances in which a regulator can exercise its power under section 168(3). Section 168(4) specifies the circumstances in which a regulator can exercise its power under section 168(5). The powers in section 168 can be used against a range of persons, including authorised persons under FSMA 2000.
- 729 Part 14 of FSMA 2000 gives the FCA and the PRA certain disciplinary powers. In particular, if a regulator considers that an authorised person has contravened a relevant requirement, it may publish a statement to that effect under section 205, or impose a financial penalty, under section 206(1) of FSMA 2000. By virtue of section 404C of FSMA 2000, these powers can also be used against formerly authorised persons to enforce rules made under section 404.
- 730 Under section 384(5), the FCA or the PRA can require an authorised person to pay profits unlawfully accrued or an amount for the loss the person caused if the regulator is satisfied that the conditions set out in subsection (1) are met.
- 731 The powers described above cannot be used against formerly authorised persons (except in the circumstances set out in section 404C). “Authorised person” under section 31 of FSMA 2000 means a person with a current permission to carry on one or more regulated activities in the UK.

Financial Services Compensation Scheme

- 732 Part 15 of FSMA 2000 makes provision in connection with the FSCS. The FSCS is administered by the FSCS manager established under section 212 of FSMA 2000. The FCA and the PRA are responsible for appointing and removing the FSCS manager’s chairperson, chief executive and directors. The appointment and the removal of the chairperson and chief executive require HM Treasury’s approval.
- 733 Section 212(3)(aa) of FSMA 2000 requires the chief executive to be the accounting officer of the FSCS manager. This requirement reflects the principle that the permanent heads of ALBs are usually appointed as the accounting officers for those bodies.
- 734 Under section 218B of FSMA 2000, HM Treasury can require the FSCS manager to provide information reasonably required in connection with HM Treasury’s duties under the Government Resources and Accounts Act 2000.

Unauthorised Co-ownership AIFs

- 735 The concept and definition of a “contractual scheme” is set out at section 235A of FSMA 2000. Contractual schemes are a form of collective investment scheme as per section 235A(2) and section 235A(5) of FSMA 2000. They can be established as a co-ownership scheme (section 235A(2) to (4) of FSMA 2000), or as a partnership scheme (section 235A(5) to (7) of FSMA 2000). If the contractual scheme is established as a co-ownership scheme it is not prevented from being established as an umbrella structure⁶⁰ (section 235(4) of FSMA 2000).
- 736 A contractual scheme can apply to the FCA for authorisation, per sections 261C to 261D of FSMA 2000, and therefore become an authorised contractual scheme, by virtue of an

⁶⁰ An “umbrella fund” is a collective investment scheme that exists as a single legal entity, but has several distinct sub-funds which, in effect, are traded as individual investment funds.

authorisation order under section 261D(1) of FSMA 2000. If it is structured as a co-ownership scheme, it will therefore be a CoACS.

737 Sections 261M to 261P of FSMA 2000 sets out the rights and liabilities of participants in CoACS. These provisions afford CoACS with the following:

- a. section 261M of FSMA 2000 makes provision about the contracts in the scheme;
- b. section 261N of FSMA 2000 limits an investor's rights and liabilities - to which they are entitled or subject under, or in connection with, contracts in the scheme - to the period that they are a participant;
- c. section 261O of FSMA 2000 limits an investor's liability for debts incurred under, or in connection with, contracts which the operator is authorised to enter on their behalf; and
- d. section 261P of FSMA 2000 provides for the segregation of liabilities of participants in sub-funds, where a co-ownership scheme is constituted as an umbrella fund.

738 These provisions (sections 261M to 261P of FSMA 2000) do not apply to a co-ownership scheme that does not benefit from an authorisation order and therefore would not apply to a new investment vehicle, like the unauthorised contractual scheme, that is structured as an unauthorised co-ownership AIF with a corresponding tax treatment, if such a vehicle was introduced into statute.

739 The power taken in this measure enables HM Treasury to essentially apply, as relevant, the effects of sections 261M to 261O and section 261P(1) and (2) of FSMA 2000 to a contractual scheme, that is a co-ownership scheme, but which does not benefit from an authorisation order (noting that of section 261P of FSMA 2000, only section 261P(1) and (2) of FSMA 2000 would be relevant for the unauthorised contractual scheme in any event). Any such scheme would likely be an alternative investment fund ("AIF"), as per section 417(1) of FSMA 2000 and so the power is scoped to only apply to AIFs (hence the term, "unauthorised co-ownership AIF" within the measure). The likely exercise of this power will therefore be to make provision that corresponds or is similar to sections 261M to 261O and section 261P(1) and (2) of FSMA 2000, for a new investment vehicle that benefits from a corresponding tax treatment and is structured as an unauthorised co-ownership AIF. This is in the event that such a vehicle was introduced into statute, like the unauthorised contractual scheme.

740 Separately, this measure also amends section 261E of FSMA 2000, to clarify that section 261E of FSMA 2000 is relevant for the purposes of authorised contractual schemes with regards to section 261D(1)(a) of FSMA 2000, reflecting the title of the section.

Control over authorised persons

741 The change in control regime is contained in Part 12 of FSMA 2000. This sets out the full process for all applications for a change in control.

742 Section 187 which sets out the circumstances where conditions can be imposed:

(2) The appropriate regulator may only impose conditions where—

(a) if it did not impose those conditions, it would propose to object to the acquisition, or

(b) it is required to do so by a direction under section 187A(3)(b) or section 187B(3)

743 The Bill will add an additional limb to this section to enable the regulators to impose conditions where it is appropriate to do so in order to advance any of that regulator's objectives.

Cryptoassets

- 744 Clause 65 amends FSMA 2000. It amends the definitions of “investment” for the purposes of section 21 of FSMA 2000, which allows HM Treasury to prohibit unauthorised persons from issuing financial promotions, and section 22 of FSMA 2000, which allows HM Treasury to make provision as to the classes of regulated activity and types of investment that are regulated under FSMA. In doing so, it ensures that HM Treasury’s powers under sections 21 and 22 of FSMA 2000 can be used to regulate cryptoassets.
- 745 Clause 65(4)(a) inserts a new definition of “cryptoasset” to section 417 of FSMA 2000. Per clauses 65(4)(b) and 65(5), HM Treasury may amend this definition by SI subject to the affirmative Parliamentary procedure.

Bank of England levy

- 746 The Cash Ratio Deposit scheme is provided for by section 6 of, and Schedule 2 to, the Bank of England Act 1998. Certain aspects of the scheme, such as the value bands and the ratio applicable to each value band used for calculating how much a financial institution must deposit, are set out in secondary legislation made under paragraphs 2 and 5 of Schedule 2 to the Bank of England Act 1998. The Bill will repeal all these provisions and, in its place, make provision for a levy to be imposed.

Liability of payment service providers for fraudulent transactions

The Financial Services (Banking Reform) Act 2013

- 747 FSBRA 2013 specifically Part 5, as supplemented by Schedule 4, established the PSR, and specifies the entities it regulates (namely designated payment systems and their participants), provides for the PSR’s objectives and powers in relation to those regulated entities, and how those powers are to be exercised.
- 748 Under section 43 of FSBRA 2013, HM Treasury may by order designate a payment system and its participants for regulation by the PSR, provided certain criteria (in section 44 of that Act) are met.
- 749 The PSR’s objectives, in summary, include: to promote effective competition in the markets for payment systems and services - between operators, payment service providers (PSPs) and infrastructure providers (the “competition objective”; section 50 of FSBRA 2013); to promote the development of and innovation in payment systems, in particular the infrastructure used to operate those systems (the “innovation objective”; section 51 of FSBRA 2013) and to ensure that payment systems are operated and developed in a way that considers and promotes the interests of all the businesses and consumers that use them (the “service-user objective”; section 52 of FSBRA 2013).
- 750 In order to achieve these objectives, the PSR may give direction to regulated participants (section 54 of FSBRA 2013), and/or require payment system rule changes (section 55 of FSBRA 2013).

The Payment Services Regulations 2017

- 751 The Payment Services Regulations 2017 are the main domestic legislation governing payment services in the UK, establishing the rights and obligations of payment service users (including payers and payees) and PSPs - including banks and certain other authorised entities - in relation to payment services. The Payment Services Regulations implemented the requirements of the Second Payment Services Directive and were made under powers in section 2(2) of the European Communities Act 1972. The Payment Services Regulations were amended by the Electronic Money, Payment Services and Payment Systems (Amendment

and Transitional Provisions) (EU Exit) Regulations 2018 (2018/1201) using powers under the European Union (Withdrawal) Act 2018 to fix deficiencies arising as a result of the UK's exit from the European Union.

- 752 Regulation 90(1) of the Payment Services Regulations provides that where a payment order is executed in accordance with the “unique identifier” (defined in regulation 2 of the Payment Services Regulations) provided by the payment service user, the payment order is deemed to have been correctly executed by each PSP involved in executing the payment order, and the PSP is not obliged to provide reimbursement.
- 753 The Financial Conduct Authority (FCA) remains the competent authority for the purposes of monitoring and enforcing regulation 90.

Credit unions

- 754 The relevant legal background is explained in the policy background section of these Notes.

Reinsurance for acts of terrorism

- 755 The relevant legal background is explained in the policy background section of these Notes.

Banking Act 2009: miscellaneous amendments

- 756 Section 7A(1) of the Banking Act 2009 requires the Bank of England, where it is considering the imposition of a requirement under certain direction-making powers in section 3A of that Act, to consult the PRA and the FCA, and to have regard to certain potential impacts of those directions. When section 3A was amended in December 2020 to implement an update of the EU Bank Recovery and Resolution Directive, the cross-reference made to section 3A in section 7A(1) was not updated to reflect that amendment. This provision updates that cross-reference in section 7A(1). This restores the obligation for the Bank of England to consult other regulators (and have regard to specific impacts) in relation to the amended parts of section 3A.
- 757 Section 83ZD of the Banking Act 2009 allows the Bank of England to appoint persons to conduct an investigation where there are circumstances suggesting that a person may have failed to comply with any requirement imposed by the Bank of England under Part 1 of the Banking Act. An exception to this is where the requirement is imposed by the Bank in relation to regulatory sanctions. This provision corrects the cross-reference to the provision related to regulatory sanctions.
- 758 Section 89H of the Banking Act 2009 provides for the recognition by the Bank of England of resolution actions undertaken in a country or territory outside the United Kingdom. This provision provides for the removal of certain words used in subsection (7) which have no legal effect and may reduce clarity of the recognition process.
- 759 Part 5 of the Banking Act 2009 provides the Bank of England with regulatory powers over payment systems that may pose financial stability risks to the UK. For those powers to be engaged, the payment system must be recognised by HM Treasury as suitable for such regulation, under section 182 of that Act.
- 760 Section 244 of the Banking Act 2009 provides that the Bank, its directors, officers, employees and agents are immune from liability in damages for anything done or not done in the exercise of its functions, as described in that section.

Territorial extent and application

761 Clause 77 sets out the territorial extent of the Bill. That is, the jurisdictions in the UK of which the Bill forms part of the law; application applies to where the Bill has practical effect.

762 Financial services is a reserved matter in the UK. The Bill extends and applies to England, Wales, Scotland and Northern Ireland, with two exceptions. Clause 69 (credit unions) and clause 70 (reinsurance for acts of terrorism) extend to England, Wales and Scotland only.

763 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

Commentary on provisions of Bill

Part 1: Regulatory Framework

Chapter 1: Revocation of retained EU law

Clause 1: Revocation of retained EU law relating to financial services and markets

- 765 Subsection (1) revokes the retained EU law relating to financial services referred to in Schedule 1.
- 766 This has the effect of revoking most types of retained EU law entirely, subject to commencement.
- 767 Subsection (2) sets out the contents of Schedule 1.
- 768 EUWA 2018 saves as part of UK law directly effective rights that existed through section 2(1) of ECA where those rights have been recognised by a domestic or EU court before then. It also saves rights derived from Directives that have been recognised by the courts prior to the end of the transition period. Subsection (3) disapplies those rights, along with any other powers, liabilities, obligations, restrictions, remedies and procedures which may have been preserved by EUWA 2018 in any of the instruments in Schedule 1. To the extent to which the government considers it desirable to save those rights, they can be saved through the savings provisions in clause 76(2)(c).
- 769 Subsection (4) clarifies that, where a piece of retained EU law is revoked, any amendments that that piece of retained EU law makes will continue to apply. For example, if an instrument referred to in Schedule 1 makes an amendment to FSMA 2000, then FSMA 2000 will remain unchanged, and unaltered by the revocation of the instrument which amended it.
- 770 Subsection (5) enables HM Treasury to exclude subordinate legislation from Part 5 of the Schedule, meaning that it would not be revoked by Part 5.
- 771 Subsection (6) is self-explanatory.

Clause 2: Transitional amendments

- 772 This clause inserts Schedule 2, which makes transitional amendments to parts of Schedule 1 before it is revoked.
- 773 Subsection (2) establishes the concept of a “transitional period”. Each piece of legislation captured by Schedule 1 has its own transitional period, which lasts from the commencement of this clause to the point at which the revocation of that instrument is commenced.
- 774 Subsection (3) is self-explanatory.

Clause 3: Power to make further transitional amendments

- 775 This clause creates a power for HM Treasury to modify retained EU law captured by Schedule 1 during the transitional period. It can only be modified for the reasons set out in subsection (2).
- 776 Many of the ‘reasons’ in subsection (2) are similar to the objectives of the FCA, the PRA, the financial stability objective of the Bank of England, and the special resolution objectives in section 4 of the Banking Act 2009. This clause should be read in its own right, and is in no way bound by the way that these objectives are interpreted by the regulators.
- 777 Subsection (3) is self-explanatory.

These Explanatory Notes relate to the Financial Services and Markets Bill as brought from the House of Commons on 8 December 2022 (HL Bill 80)

- 778 Subsection (4) enables HM Treasury to create powers, including new regulator rule-making powers, as part of modifying retained EU law for or in connection to one of the purposes in subsection (4). Subsection (4)(a) governs the creation of new powers; and subsection (4)(b) governs modification of existing regulator rule-making powers or powers to make other instruments. An important point is that this subsection is not limited to rule-making. The Payments Systems Regulator (PSR), for example, makes directions and not rules, and a direction is an example of an “other instrument” that is captured by this clause. Clause 7 defines “regulator” as the PRA, the FCA, the Bank of England, or the PSR.
- 779 Subsection (5) clarifies that when exercising the power under clause 76(2)(c), HM Treasury can restate legislation for the purpose of making the law clearer or more accessible.
- 780 Subsection (6) require HM Treasury to consult the PRA, the FCA, and PSR, and the Bank of England when exercising this power. The effect of subsection (7) is that HM Treasury must consult the PRA and the FCA in all instances, and the Bank of England and the PSR only where HM Treasury considers it appropriate to do so.
- 781 Subsection (8)(b) provides that the power in this clause cannot be used to amend technical standards, which are a subset of EU tertiary legislation. Responsibility for these instruments was transferred to the financial services regulators using powers in EUWA 2018, and the regulators already have the ability to amend or revoke them. Subsection (8)(b) also prohibits the use of the power over new technical standards instruments made by the regulators.
- 782 Subsections (9) and (10) govern the Parliamentary procedure to be applied when the power in this clause is exercised. Regulations under this clause can be made through the negative procedure where they modify either EU tertiary legislation, or subordinate legislation which was originally made under negative procedure. Otherwise, the affirmative procedure must be used.

Clause 4: Power to restate and modify saved legislation

- 783 This clause clarifies the power in subsection (5) of clause 78, which is the power to make transitional and saving provision when making regulations to commence parts of this Bill. Subsection (1) provides that, when revoking retained EU law captured by Schedule 1, HM Treasury may exercise the power to make saving provision in order to restate parts of retained EU law into domestic primary or secondary legislation (referred to as “restatement regulations”). Subsection (1)(a) enables HM Treasury to amend existing primary and secondary legislation and subsection (1)(b) enables HM Treasury to create new secondary legislation through restatement regulations.
- 784 Subsection (2) enables HM Treasury to modify the restated retained EU law in the restatement regulations. HM Treasury can modify legislation either to make the law clearer or more accessible, or for any of the purposes in clause 3(2). That means that when modifying retained EU law, either directly as per clause 3 or when restating it into domestic legislation as per clause 4, it can be modified for the same set of purposes.
- 785 Subsection (3) provides that restatement regulations should not be treated as retained EU law, to the extent to which they would otherwise be.
- 786 Subsection (4) provides that HM Treasury can continue to modify restatement regulations for the purpose of making the law clearer or more accessible or for any of the same set of purposes in clause 3(2).
- 787 Subsection (5) clarifies that HM Treasury can create powers for the regulators or HM Treasury, or modify existing powers in FSMA 2000, in the same way as through clause 3(4).

- 788 Subsection (6) clarifies that restatement regulations can be used to restate an entire piece of legislation not captured by Schedule 1, or part of one.
- 789 Subsection (7) applies the same restriction to restating technical standards and other EU tertiary legislation as in clause 3(8).
- 790 Subsections (8) and (9) govern the Parliamentary procedure to be applied when this power is exercised. Regulations under this clause can be made through the negative procedure where they amend either EU tertiary legislation, subordinate legislation which was originally made under negative procedure, or where legislation is restated without modification for a purpose in clause 3(2). Otherwise, the affirmative procedure must be used. The affirmative procedure must be used in all instances where restatement regulations amend primary legislation.

Clause 5: Power to replace references in EU directives

- 791 Subsection (1) provides that HM Treasury can modify legislation in order to remove references to EU directives. While directives were implemented in UK law, there are many existing references to EU directives in legislation. Where HM Treasury exercises this power, there is no requirement that it replaces the removed reference with a new reference.
- 792 Subsection (2) provides that this power is only exercisable if HM Treasury considers it necessary or desirable for the purpose of making the law clearer or more accessible, or for any of the purposes in clause 3(2).
- 793 Subsections (3) and (4) govern the Parliamentary procedure to be applied when this power is exercised. Where the power is exercised to amend primary legislation, the affirmative procedure must be used. Otherwise, the negative procedure can be used.

Clause 6: Restatement in rules: exemption from consultation requirements

- 794 Under clause 6 the regulators are exempt from certain requirements when making, amending or revoking rules in relation to retained EU law.
- 795 Subsection (1) provides that a relevant requirement does not apply to the making of rules by the regulator where the proposed rules make excluded provision in relation to the retained EU law specified in Schedule 1 and which has been specified by HM Treasury in regulations.
- 796 “Relevant requirement” is defined in subsection (3) and means specified statutory requirements that apply to the regulators when make rules, such as carrying out a public consultation.
- 797 “Excluded provision” is defined in subsection (2B) and means, in the opinion of the regulator, that the rules reproduce the relevant retained EU law in Schedule 1 without material changes, or the changes are material but their effect is to reduce a regulatory burden.
- 798 Subsection (2) provides that a relevant requirement does not apply to rules made by the regulator if the rules make ‘excluded changes’ to existing rules that contain a retained EU obligation and which are specified by HM Treasury in regulations.
- 799 “Excluded changes” is defined in subsection (2C) and means changes to existing rules that, in the opinion of the regulator, reduce a regulatory burden and have no other effects that are material.
- 800 Subsection (2A) provides that a relevant requirement does not apply to the revocation of rules by a regulator if the rules make provision containing a retained EU obligation and, the rules that are being revoked are not being replaced.

- 801 Subsection (2B) sets out a definition of “excluded provision” for the purposes of subsection (1).
- 802 Subsection (2C) sets out a definition of “excluded changes” for the purposes of subsection (2).
- 803 Subsection (2D) sets out a non-exhaustive list of matters that fall within the term “regulatory burden”.
- 804 Subsection (2E) provides that a relevant requirement does not apply to an incidental, supplemental, consequential or transitional provision made in connection with rules that are made, amended or revoked as described in subsections (1), (2) or (2A).
- 805 Subsection (3) sets out the meaning of ‘relevant requirement’ for the FCA, the PRA, the Bank of England, and the PSR.
- 806 Subsection (4) requires the regulator to publish a statement when making, or revoking rules that are subject to this exemption. The statement must list the provisions of legislation that have been restated by the rules, the retained EU obligations that have been changed by the rules, or the retained EU obligations that have been removed by the rules, as relevant.
- 807 Subsection (4A), applies where new rules or changes to existing rules make material changes but their effect is to reduce a regulatory burden. In these circumstances, the subsection requires the regulators to explain in the statement why it believes that the proposed rules are compatible with, in particular, their statutory objectives.
- 808 Subsections (5) and (6) are self-explanatory.
- 809 Subsection (7) sets out the meaning of ‘rules’ referred to in this clause in relation to the FCA, the PRA, the Bank of England and the PSR.

Clause 7: Interpretation of Chapter

- 810 This clause governs the interpretation of Chapter 1 of the Bill.
- 811 Subsection (1) defines several terms which are used in the preceding clauses and Schedule 1.
- 812 Subsection (2) clarifies that, for the purposes of Chapter 1 of the Bill, references to legislation do not include references to rules made by the regulators. Otherwise, regulator rules would be revoked through Part 5 of Schedule 1.
- 813 Subsections (3) and (4) are self-explanatory.

Chapter 2: New regulatory powers

Designated activities regime

Clause 8: Designated activities

- 814 This clause inserts new Part 5A into FSMA 2000.

New section 71K: Designated activities

- 815 This new section of FSMA 2000 allows HM Treasury to specify an activity as a designated activity through secondary legislation.
- 816 Subsections (1) and (2) empower HM Treasury to make designated activities regulations. These regulations enable HM Treasury to specify an activity as a “designated activity”, bringing it into the regulation of new Part 5A of FSMA 2000.

817 Subsection (3) stipulates that HM Treasury can only specify an activity is a designated activity if that activity is related or connected to either, the financial markets or exchanges of the United Kingdom, or to financial instruments, financial products or financial investments that are (or are proposed to be) issued or sold to, or by, persons in the United Kingdom.

818 Subsection (4) is self-explanatory.

819 Subsection (5) refers to Schedule 6B which is inserted into FSMA 2000 by clause 8(9) of, and Schedule 3 to, this Bill, which contains an illustrative, but non-exhaustive list of examples of the types of activity which HM Treasury intends to specify as designated activities. This is similar to Schedule 2 to FSMA 2000 which relates to regulated activities. Schedule 6B itself is inserted by subsection (9) of clause 8.

820 Subsection (6) clarifies that the contents of Schedule 6B in no way limits HM Treasury's power to designate activities under this section.

821 Subsection (7) clarifies that financial instruments, financial products and financial investments can include cryptoassets for the purpose of this clause.

New section 71L: Restrictions on carrying out designated activities

822 Subsection (1) prohibits any person from carrying on a designated activity, to the extent to which it is prohibited by HM Treasury through designated activities regulations.

823 Subsection (2) stipulates that any person carrying out a designated activity, which is not prohibited under subsection (1), must do so in line with designated activities regulations made by HM Treasury, and designated activity rules made by the FCA.

824 Subsection (3) is self-explanatory.

New section 71M: Designated activity regulations: general

825 This section provide that designated activity regulations can make provision about the carrying on of delegated activities.

826 Subsection (2) gives examples of what could be included in designated activity regulations. This includes the ability to state in which circumstances the restrictions on carrying out a designated activity imposed by section 71L are to apply to a person carrying out the activity outside the United Kingdom. Subsection 2(b) enables HM Treasury to make designated activity regulations supplementing or connected to any FCA rules in relation to designated activities.

827 Subsection (3) allows HM Treasury to make exemptions through designated activity regulations, for example to exclude a certain type of firm from the requirement to follow designated activities rules and designated activities regulations. It also gives HM Treasury the ability to confer powers both on itself and on the FCA through designated activity regulations.

New section 71N: Designated activity: rules

828 This section governs the making of designated activity rules by the FCA.

829 Subsection (1) enables the FCA to make rules relating to any and all designated activities which are designated through designated activity regulations.

830 Subsection (2) states that subsection (1) only applies to the extent to which this is provided for in HM Treasury's designated activities regulations.

831 Subsection (3) gives the FCA the ability to suspend designated activity rules for any length of time it considers appropriate.

- 832 Subsection (4) allows the FCA to modify or waive designated activity rules where the FCA considers it appropriate.
- 833 Subsection (5) states that the FCA can only suspend, modify or waive designated activity rules under subsections 3 or 4 under circumstances specified by HM Treasury in secondary legislation.
- 834 Subsection (6) requires the FCA to consult with the PRA before suspending any rules.
- 835 Subsection (7) states that the FCA must bring any suspension of designated activity rules under subsection (3) to the attention of those impacted by the relevant rules.
- 836 Subsection (8) states that the reference to “authorised persons” in section 138T(a) of FSMA 2000 should also be read as relating to persons subject to designated activities rules. This has the effect of meaning that the FCA’s designated activities rules can make different provision for different types of persons, activities, or investment. Section 138T(b) and Section 138(c) apply automatically to designated activities rules, as they apply to all regulator rule-making under FSMA 2000, including designated activities rules.

New section 71O: Designated activities: directions

- 837 Subsection (1) gives the FCA a power of direction in relation to designated activities. As supplemented by subsection (3), this power enables the FCA to require a person carrying on a designated activity to take, or refrain from taking, an action specified by the FCA.
- 838 Subsection (2) states that HM Treasury has the power to state, in secondary legislation, when the FCA is able to exercise its power of direction under subsection (1). Subsection (10) expands on this by enabling HM Treasury to set conditions which the FCA must meet when exercising a power of direction. Under subsection (11) this can include, but is not limited to, a requirement to consult the PRA before imposing or varying a requirement under subsection (1) relating to a PRA-authorised person.
- 839 Subsection (4) states that any action required by the FCA’s power of direction under this clause need not be in relation to a designated activity itself.
- 840 Subsections (5) to (12) are self-explanatory.

New section 71P: Designated activities: liability

- 841 This section sets out that designated activities regulations can make regulations concerning liability and compensation.
- 842 Subsection (2) states that a contravention of a designated activity rule or regulation does not make a person guilty of an offence, or make transactions void or unenforceable, or give rise to action for breach of statutory duty, unless designated activity regulations explicitly state otherwise.
- 843 Subsection (3) gives examples of how HM Treasury may use its power under subsection (1).
- 844 Subsection (3)(d) clarifies that HM Treasury may make such regulations for the purpose of subsection (1) by applying, and if needed modifying, existing provisions of FSMA 2000.

New section 71Q: Designated activities: enforcement

- 845 This section enables designated activities regulations to make regulations concerning enforcement of designated activities regulations and rules. This will allow HM Treasury to create an enforcement framework for each designated activity.

- 846 Subsection (2) gives a non-exhaustive list of examples of the types of enforcement provision which can be made through designated activities regulations, such as monetary penalties or powers of censure.
- 847 Subsection (3) states HM Treasury may create such enforcement frameworks for designated activities by applying existing provisions of FSMA 2000, with or without amendments. For example, instead of creating a new investigation power for the FCA, designated activities regulations could apply the relevant parts of FSMA 2000 which govern the FCA's current information gathering powers.
- 848 This subsection also enables designated activities regulations to apply, with or without amendments provisions in FSMA 2000 which create criminal offences.
- 849 Subsection (4) clarifies that HM Treasury's power to apply provisions in FSMA 2000 under this section includes the power to amend, or repeal such provisions.

New section 71R: Designated activities and rules: connected amendments

- 850 This section creates a new power, for the purpose of modifying primary legislation in order to make modifications which are appropriate, taking account of designated activities regulations and rules.
- 851 Subsection (1) gives HM Treasury the power to amend primary legislation including FSMA 2000, if it considers appropriate to do so for the purposes of, or in connection with, designated activity regulations or rules.
- 852 Subsection (2) clarifies that HM Treasury's power under subsection (1) to amend primary legislation in particular extends to revoking or varying any requirement under FSMA 2000 which extends to a designated activity.
- 853 Subsection (3) further clarifies that HM Treasury's power to amend FSMA 2000 under subsection (1) allows HM Treasury to modify any criminal offence in FSMA 2000 which relates to a designated activity. Modification in this case includes widening the scope of the criminal offence.
- 854 Subsection (4) is self-explanatory.

Section 71S: Designated activity regulations: Parliamentary control

- 855 Subsections (1) and (2) provide that regulations made under new section 71K are subject to the affirmative procedure where they provide for an activity of a specified description to be a designated activity.
- 856 Subsections (3) to (7) provide that where, in the opinion of HM Treasury, it is, by reason of urgency, necessary to make the regulations without a draft being laid before and approved by parliament, the regulations must be laid after being made and cease to have effect at the end of the period of 28 days beginning with the day on which the regulations are made unless approved by parliament.

Clause 8: Designated activities: continued

- 857 Subsection (3) onwards makes a number of changes to FSMA 2000, which are needed as a result of inserting Part 5A.
- 858 Subsection (4) amends section 3E of FSMA 2000. Section 3E of FSMA 2000 provides for a memorandum of understanding between the PRA and the FCA regarding their functions under FSMA 2000. Subsection (4) amends section 3E to include directions made by the FCA under section 71O within the ambit of the memorandum of understanding.

- 859 Subsection (5) amends section 3I of FSMA 2000. Where the FCA proposes to make rules in relation to persons who are also regulated by the PRA, section 3I of FSMA 2000 gives the PRA power to direct the FCA not to make those rules in specified circumstances. Subsection 5 includes rules proposed to be made by the FCA under Part 5A of FSMA 2000 within the PRA's powers under section 3I.
- 860 Subsection (6) excludes designated activity rules from section 138D of FSMA 2000 (action for damages).
- 861 Subsection (7) amends section 417 to insert a definition of 'designated activity' into FSMA 2000.
- 862 Alongside the new section 71S, subsection (8) establishes the Parliamentary procedure which governs statutory instruments made under new Part 5A of FSMA 2000. The affirmative procedure is used where HM Treasury 'designates' a new activity (subject to the urgency exception described above), and where HM Treasury amends primary legislation.
- 863 Subsection (9) inserts new Schedule 6B, which is Schedule 3 to this Bill, into FSMA 2000.

Financial market infrastructure: general rules and requirements

Clause 9: Rules relating to central counterparties and central securities depositories

- 864 This clause inserts new sections 300F and 300G into FSMA 2000, which will create a general rule-making power for the Bank over recognised central counterparties, recognised CSDs, third country central counterparties and third country CSDs. The terms "recognised central counterparty", "recognised CSD", "third country central counterparty" and "third country CSD" have the meaning provided for in section 285 of FSMA 2000. This clause will enable the Bank to set rules for these firms that it judges are necessary or expedient to advance its Financial Stability Objective.
- 865 New section 300G places restrictions on how this general rule-making power will apply to third country CCPs and CSDs. It ensures that the Bank can only apply "corresponding" rules to these firms. This means that the Bank can only apply rules which have already been applied to the relevant domestic firm (for example, in the case of third country CCPs, this would be recognised CCPs). The Bank would be able to apply all corresponding rules to the third country CCP or CSD or only such rules as it considers appropriate.
- 866 Subsection (3) of new section 300G allows the Bank to modify the rules to ensure that they can be applied effectively to overseas firms, reflecting their different circumstances. This is intended to account for the fact that domestic rules may have been drafted with the specific legal or operational circumstances of UK CCPs in mind. For example, rules may make reference to UK-law concepts or definitions, or they may be tailored to fit the corporate structure of UK firms. As such, the Bank may need to modify the rules to ensure they operate effectively for overseas firms.
- 867 New section 300G also makes different provision for "systemic third country CCPs" compared to other CCPs and CSDs. "Systemic third country CCPs" are third country CCPs the Bank has determined are systemically important, or are likely to become systemically important, to the financial stability of the United Kingdom. When making this determination, the Bank must have regard to criteria of general application set out by HM Treasury through secondary legislation. It must also have regard to any statement of policy issued by the Bank which provide further specification of the criteria set out by HM Treasury.

- 868 Where a third country CCP is a systemic third country CCP, the Bank will automatically be able to apply rules to that firm which correspond to those for recognised CCPs. For other CCPs and CSDs, the Bank may only apply its rules to third country firms if HM Treasury makes regulations authorising it to do so (new section 300G (1)(b)). When making these regulations, HM Treasury, under subsections (4) and (5) of the new 300G, would be able to limit which firms any such Bank power would apply to, and to impose further conditions or limitations on how any power could be used. These restrictions do not apply to the Bank's power to apply corresponding rules to systemic third country CCPs.
- 869 New section 300G(14) allows HM Treasury to make regulations applying other provisions of FSMA 2000 with modifications to third country CCPs and third country CSDs. These are the overseas firms that the Bank will be able to apply its rules to, subject to the limitations set out in s.300G. This power is needed in order to ensure that provisions of FSMA 2000 - for example, regarding enforcement - apply to these firms, as is appropriate in light of the rules that the Bank is able to make. Schedule 17A already makes some provision for application of provisions in FSMA 2000.
- 870 Subsection (5) of clause 9 amends the Bank's power at section 293 of FSMA 2000 to make rules requiring recognised bodies to notify it of specified events, or provide it with specified information. This amendment will enable the Bank to make rules under section 293 concerning third country central counterparties.

Clause 10: Central counterparties and central securities depositories: other requirements

- 871 This clause inserts a new paragraph 9B into Schedule 17A to FSMA 2000. This new paragraph provides for a power for the Bank to be able to impose requirements on a recognised central counterparty, recognised CSD and systemic third-country CCP; these are described as "relevant bodies" in this clause. There are two key means by which a requirement can be imposed. First, paragraph 9B(1) to (5) provide that the Bank can impose a requirement of its own initiative, either if it is desirable to do so for its objective 'to protect and enhance the stability of the financial system of the United Kingdom' (the Financial Stability Objective), or if the relevant body has failed, or is likely to fail, to satisfy recognition requirements or an obligation under FSMA 2000. This power is based on the FCA's "own-initiative power" in section 55L(3) of FSMA 2000, and the PRA's equivalent power in section 55M. Second, paragraph 9B(7) provides that the Bank can impose a requirement on the application of the relevant body itself. This is based on the FCA's power to impose a voluntary requirement on authorised persons in section 55L(5) of FSMA 2000 and the PRA's equivalent power in section 55M.
- 872 Paragraph 9B(6) provides that the Bank's "own-initiative" power cannot be used to restrict or prohibit discretionary payments to employees or shareholders of a recognised central counterparty. Paragraph 13 of Schedule 11 to this Bill gives the power to impose such a restriction or prohibition in certain circumstances.
- 873 Paragraph 9B(9) provides that relevant provisions of Part 4A apply to requirements imposed by the Bank under this new provision, as they apply to requirements imposed by the FCA under section 55L, with appropriate modifications provided for in sub-paragraph (10).

Clause 11: Rules relating to investment exchanges and other data reporting service providers

- 874 This clause inserts new section 300H into FSMA 2000. This new section gives the Financial Conduct Authority (FCA) general rule-making powers with regard to Recognised Investment Exchanges (RIEs) and Data Reporting Service Providers (DRSPs).
- 875 Subsection (1) explains that FSMA 2000 will be amended to establish this power.
- 876 Subsection (2) inserts a new section (300H) into FSMA 2000 to confer the new rule-making powers on the FCA.
- 877 New subsection 300H(1) of FSMA 2000 limit the FCA's ability to make rules applying to RIEs and DRSPs to circumstances where the FCA considers that doing so is necessary or expedient to advance one or more of its operational objectives. These objectives are set out in FSMA 2000 (see section 1B(3)).
- 878 New subsection 300H(2) defines relevant activity for the purposes of 300G.
- 879 New subsection 300H(3) provides indicative examples of the sort of requirements the FCA could impose using this power.
- 880 New subsection 300H(4) stipulates that the FCA may not use this power to change, amend or revoke any retained direct EU law for RIEs or DRSPs with the exception of parts of retained direct EU law which take the form of FCA rules.
- 881 New subsection 300H(5) sets out the definitions applicable to this power. It also sets out that this power is only applicable to UK authorised RIEs, not overseas investment exchanges as defined in section 313(1) FSMA 2000.
- 882 Subsection (3) gives the FCA the power to appoint a skilled person to collect and update information in relation to RIEs, if it considers that an RIE has contravened a requirement in rules made by the FCA.
- 883 Subsection (4) enables the FCA to appoint investigators if they believe an authorised RIE might have breached the rules made using this power.
- 884 Subsection (5) gives the appropriate regulator the power to publish a statement when it considers that a DRSP or RIE has contravened a relevant requirement.
- 885 Subsection (6) makes consequential amendments to Chapter 3A of Part 18 of FSMA 2000. This ensures that the various disciplinary measures in that chapter also apply to DRSPs in respect of breaches of rules made under the FCA's general rule-making power.

Clause 12: Treasury directions to Bank of England: restrictions

- 886 Section 4 of the Bank of England Act 1946 contains provisions for HM Treasury to be able to give directions to the Bank where it considers it necessary in the public interest to do so. This clause amends that section, so that it no longer applies to the Bank's functions in relation to recognised central counterparties, recognised CSDs, third country central counterparties or third country CSDs. Instead, the Bank will be subject to the transparency and accountability requirements set out elsewhere in these Notes.

Financial market infrastructure: piloting powers

Clause 13: Testing of FMI technologies or practices

- 887 This clause provides for the temporary disapplication and modification of legislation to allow FMI to innovate with certain technology and new practices in the activities they

perform in a controlled environment. This will ensure that any modification or disapplication of legislation is fit for purpose before any permanent changes are enacted in general law.

- 888 Subsection (1) provides HM Treasury with a power to make provision in regulations to allow for the creation of one or more iterations of an FMI sandbox. This is intended to test, for a limited period, the efficiency or effectiveness of engaging in FMI activity in a particular way, as permitted by the regulations in accordance with Subsection (2) to (11). It also provides an opportunity to assess if any relevant enactments may need amending permanently in general law and, if so, in what form.
- 889 Subsection (2) provides that carrying on FMI activity in a particular way is intended to include the use of developing technology or the adoption of new and different practices. For example, in a particular part of the trading, clearing, and settlement cycle.
- 890 Subsection (3) provides that regulations allowing for the FMI activities permitted within this clause will be referred to as an FMI sandbox.
- 891 Subsection (4)(a) and (b) provide that the creation of an FMI sandbox will consist of a regulatory framework that will specify or otherwise make provision for the type of FMI activities, FMI entities and “other persons” that can participate in a particular iteration of the FMI sandbox. “Other persons” shall include, for example, persons either connected with or otherwise peripherally engaged with an FMI entity’s FMI activities in a particular iteration of an FMI sandbox arrangement. One such example being “users” of an FMI entity’s services within an FMI sandbox. This is because if changes are made to requirements for FMI entities, it may also be desirable or necessary to make changes to requirements for their related users.
- 892 Subsection (4)(c) provides expressly that an FMI sandbox is not intended to operate indefinitely. An FMI sandbox can be determined by reference to a particular date, time frame or some other trigger in connection with its cessation.
- 893 Clause 76 contains a general power that allows for a regulation to impose different requirements on different persons. This would be helpful in the above respect, particularly as it relates to different types of participants operating within or engaging with an FMI sandbox.
- 894 Subsection (5) makes provision for regulations to confer functional powers on the regulators in connection with the creation and operation of an FMI sandbox. For example, the provision could confer on the regulators a functional, rule-making power in connection with winding-down an FMI sandbox. This would include provision for regulations conferring discretionary powers on regulators under clause 16(1). It would not extend to conferring functional powers on regulators that are legislative in nature because these operational powers would fall to HM Treasury. In this respect, HM Treasury could exercise a general power to make regulations under clause 76 of the Bill to ensure a smooth transition between the temporarily modified legislation in an FMI sandbox and those provisions that are adopted in general law.
- 895 Subsection (6)(a) and (b) allow for a framework of legislation to be temporarily disappplied or modified, from the list of relevant enactments, for the purpose of testing the compatibility of FMI activities against this within an FMI sandbox. Subsection (6)(b) allows for new provisions to be added to support new practices or technologies that are not covered by existing legislation. For example: in the context of DLT, new provisions may be required for so-called smart contracts, which automate the execution of certain activities when certain pre-conditions are met. New provisions may be required to address new risks,

such as around cyber security. Subsection (6)(c) allows for the application of legislation that would otherwise not apply to a particular FMI entity and other persons (such as “users”), were it not permitted to engage in a particular activity within an FMI sandbox. For example, an FMI sandbox could allow a trading venue to perform securities issuance, settlement and maintenance (in addition to trading). Under current legislation, these activities are performed only by a CSD and not a trading venue. This clause would also enable further relevant enactments to be temporarily disapplied, modified or applied during an FMI sandbox so that any new and unforeseen legislative obstacles or risks identified during an FMI sandbox could be assessed in a timely manner. This subsection also makes clear that any disapplication, modification or alternative application of legislation within an FMI sandbox is non-textual and not intended to amend, repeal or revoke legislation, subject to it being implemented permanently by HM Treasury under clause 15.

- 896 Subsection (7) makes provision in regulation that would allow a regulator to exercise powers under Subsection (6) if a relevant enactment contains rules or standards instruments made by regulators. For example, the regulator may want certain formalities connected with its rule making powers, such as a duty to consult in a relevant enactment such as FSMA 2000 to not apply when making or modifying rules or technical standards for purposes of an FMI sandbox. This clause is intended to supplement and not undermine either powers that may be conferred on regulators in subsections (5) or (6) when read together with clause 16(1) or otherwise the operation of their powers in general law.
- 897 Subsection (8) refers to Schedule 1 which serves as an indication of how an FMI sandbox might be structured and operate.
- 898 Subsection (9) makes provision for more than one iteration of an FMI sandbox to operate at any one time which may be different, similar or the same to an existing or previous FMI sandbox either in terms of function or effect.
- 899 Subsection (10) provides that regulations made under this section are subject to the negative statutory instrument procedure.
- 900 Subsection (11)(a) defines FMI entities that are eligible to apply and participate in an FMI sandbox and makes provision to amend the list of FMI entities to beyond what is listed. Subsections (11)(b) and (11)(c) are self-explanatory.

Clause 14: Reports on FMI sandboxes

- 901 Subsections (1) to (7) of this clause specify the reporting obligations on HM Treasury when it exercises its regulatory powers under clause 14. This includes an obligation to prepare and publish a report on an iteration of an FMI sandbox to be laid before Parliament. The subsection specifies the information the report must contain by the agreed deadline. Subsection (5), imposes an express obligation on HM Treasury to engage with the relevant regulator when preparing a report and imposes an obligation on the regulator to provide HM Treasury with information it may require in preparing its report.

Clause 15: Permanent implementation of arrangements tested under an FMI sandbox

- 902 Subsections (1) to (6) of this clause make provision for HM Treasury to exercise its regulatory powers and roll out into general law those legislative provisions which have been subject to temporary modification and disapplication within an FMI sandbox and Parliamentary scrutiny. These legislative provisions would therefore apply to entities that either did not participate or were ineligible to participate in an FMI Sandbox, such as overseas operators of FMI entities, subject to the entities being authorised by the appropriate regulator.

- 903 Subsections (1) and (2) provides that the exercise of this power will be subject to the due consideration of the “efficiency or effectiveness” of an FMI sandbox arrangement, as provided for in the reporting procedure in clause 14 and can take place either at the conclusion of an FMI sandbox or while it remains operational. The intention is that this power is broad enough to include provisions in relevant enactments that may not have been included in the initial legislative framework of an FMI sandbox but are nonetheless included in making permanent changes in general law to ensure the legislation operates as intended. For example, where it may not be possible or practicable to test a particular activity in the FMI sandbox, but where changes to general law may be required to facilitate the FMI activities.
- 904 Subsection (3) makes express provision for a determination to be made as to the efficiency or effectiveness of an FMI before the expiry of an FMI sandbox. If an FMI sandbox is terminated early, it would be possible to revoke the temporary modifications before the termination date and, subject to Parliamentary scrutiny, approve the amendments into general law. This is intended to provide legislative continuity and avoid legislative gaps between the termination and the permanent implementation of FMI sandbox arrangements and would operate in conjunction with HM Treasury’s power to engage general transitional provisions within the Bill.
- 905 HM Treasury’s powers under subsections (4), (5) and (6) make provision to amend repeal or revoke a relevant enactment, subject to the affirmative statutory instrument procedure if it concerns primary legislation or retained direct principal EU legislation. Otherwise, the negative statutory instrument procedure will apply.

Clause 16: Regulations

- 906 Subsection (1) allows HM Treasury to confer a discretionary power on an appropriate regulator or another specified person to do anything under or for the purposes of the regulations made under clauses 13 to 15. This includes a power for an appropriate regulator to make, disapply or modify rules or technical standards in connection with an FMI sandbox. For example, where HM Treasury has made changes to remove obstacles from primary legislation, it may be necessary for the regulators to also make consequential changes to the related technical standards and rules. Prior to conferring such a power, HM Treasury must consult with the appropriate regulators or such other persons it considers appropriate.

Clause 17: Interpretation

- 907 Subsection (2) defines “appropriate regulator” as either the FCA or the Bank of England acting either independently or jointly in the operation and oversight of an FMI sandbox.
- 908 Subsection (3) defines a relevant enactment for the purpose of the provisions and sections 16(6) and (7) provides HM Treasury with a power to amend the list of relevant enactment by way of the affirmative statutory instrument procedure.
- 909 Subsection (4) provides the meanings for “FMI activities”, “FMI participant”, “FMI sandbox” and “FMI sandbox arrangements”.
- 910 Subsection (5) provides that “FMI entities” defined for the purpose of clause 13(11) have the same meaning as in Part 18 of FSMA 2000.

Powers in relation to critical third parties

Clause 18: Critical third parties: designation and powers

- 911 This clause inserts new sections 312L to 312W into FSMA 2000. These new sections enable the FCA, the PRA and the Bank of England to oversee the services provided by critical third parties to the UK’s financial services sector.

These Explanatory Notes relate to the Financial Services and Markets Bill as brought from the House of Commons on 8 December 2022 (HL Bill 80)

- 912 **New section 312L** grants HM Treasury the power to designate a third party to an authorised person, relevant service provider or FMI entity (“regulated firms”) as a critical third party (CTP) (subsection (1)). HM Treasury can only designate an entity as a CTP if failure or disruption to the CTP’s services would pose a financial stability or confidence risk to the UK (subsection (2)).
- 913 Subsection (3) sets out criteria which HM Treasury must have regard to in designating a CTP. These are the materiality of the services provided to regulated firms in the context of the UK’s financial stability; and the number of regulated firms to which services are provided by a given entity.
- 914 Subsection (4) obliges HM Treasury, before designating a CTP, to consult the relevant regulators (and anyone else HM Treasury considers appropriate); to give the proposed CTP a notice in writing which sets out a period in which that potential CTP can make representations to HM Treasury; and to have regard to any representations received from that entity.
- 915 Subsection (5) prevents the Bank of England from being designated as a CTP.
- 916 Subsection (6) sets out that the relevant regulators for the CTP regime are the FCA, the PRA and the Bank of England, while subsections (7) and (8) provide definitions.
- 917 **New section 312M** grants the FCA, the PRA and the Bank of England a power to make rules over the services that CTPs provide to regulated firms to advance the relevant regulator’s objectives.
- 918 Subsection (2) clarifies the regulators’ objectives for this purpose.
- 919 Subsection (3) applies and adapts the existing FSMA 2000 provisions containing the regulators’ rule-making powers over authorised persons for the CTP regime.
- 920 **New section 312N** grants the FCA, the PRA and the Bank of England a power to direct a CTP to do (or not do) something for the purpose of advancing a regulator’s objectives. This could include setting conditions or restrictions on the CTP’s provision of services.
- 921 Subsection (2) sets out procedural requirements for a direction.
- 922 Subsections (3) to (6) provide that a CTP (including its officers and staff) be immune from damages where it is acting in accordance with a Direction from the Bank, the PRA or the FCA which has been given for the purpose of resolving or reducing a threat to the stability of the UK financial system (unless the CTP is acting in bad faith or contrary to section 6(1) of the Human Rights Act 1998). In such a case, the direction must set out that immunity applies.
- 923 Subsections (7) to (9) are self-explanatory.
- 924 **New section 312O** sets out further procedural matters for a direction under 312N.
- 925 Subsection (1) provides that the relevant regulator must give written notice to a critical third party.
- 926 Subsection (2) enables the relevant regulator to specify when the direction takes effect (which could be immediately or on a specific date). Alternatively, if the regulator specifies no date in the notice, then the notice takes effect when the matter to which the notice relates is no longer open to review.
- 927 Subsection (3) requires no further explanation.

- 928 Subsection (4) sets out the matters a notice must contain.
- 929 Subsection (5) enables the relevant regulator to extend the period of notice it provides for a critical third party to make representations.
- 930 Subsection (6) provides that the relevant regulator must give written notice to the critical third party if, after considering its representations, it still wishes to proceed with a direction (or wishes to continue the effect of a notice which has already been given).
- 931 Subsection (7) provides that the relevant regulator must give written notice if, after considering a critical third party's representations, it decides not to proceed with the proposed direction; decides to give a different direction; or to revoke a direction which is already in force.
- 932 Subsection (8) ensures that the critical third party is notified of its right to refer the matter to the Tribunal.
- 933 Subsection (9) ensures that if the relevant regulator, after taking representations, gives a different direction, the new notice must comply with the same rules (in subsection (4)) as the original notice.
- 934 Subsection (10) applies existing rules as to whether a matter can be referred to the Tribunal.
- 935 **New section 312P** grants the FCA, the PRA and the Bank of England powers to require information from a CTP, to commission a report by a skilled person and to investigate potential contraventions.
- 936 Subsection (1) applies the existing FSMA 2000 information-gathering and investigation provisions to CTPs.
- 937 Subsection (2) adapts the language in those provisions to the CTP regime.
- 938 Subsection (3) enables the regulators to delegate the power to request information to their members of staff.
- 939 Subsection (4) makes clear that information can only be requested if it is reasonably required in relation to the regulators' functions under the CTP regime.
- 940 Subsection (5) enables the regulators to obtain a skilled person's report in respect of a CTP or a person connected to a CTP (that is, a member of the CTP's group, a controller of the CTP, or an officer or employee of these).
- 941 Subsection (6) enables the regulators to obtain a skilled person's report in respect of a CTP in cases where a regulator suspects a breach of their rules to have occurred.
- 942 Subsection (7) restricts the regulators' power of investigation to those cases where it appears that a CTP may have contravened a requirement.
- 943 Subsections (8) and (9) enable the regulators to require, where necessary or expedient for an investigation, persons with relevant information to appear for an interview and provide information.
- 944 Subsection (10) provides definitions.
- 945 **New section 312Q** expressly empowers the FCA, the PRA and the Bank of England to publicly censure a CTP which has contravened a requirement under the CTP regime.
- 946 **New section 312R** sets out disciplinary measures available to the regulators under the CTP regime.

- 947 Subsection (1) provides that the disciplinary measures in the section are available if the FCA, the PRA or the Bank of England consider that a CTP has contravened a requirement imposed under the CTP regime.
- 948 Disciplinary measures are given effect by the publication of a notice (subsection (2)), which can prohibit the CTP and specified regulated firms from entering into arrangements for the services specified in the notice or, if such arrangements already exist, prohibit the CTP from continuing to provide (and specified regulated firms from continuing to receive from the CTP) the specified services.
- 949 Subsection (3) ensures that disciplinary measures can be tailored to the contravention and are appropriately proportionate.
- 950 The regulators may only exercise the disciplinary powers if they are satisfied that it is appropriate in the circumstances to take action against the CTP; that the action will not threaten the UK's financial stability or confidence in the UK finance system; and that it is desirable to exercise the power in order to advance one or more of the regulators' objectives (subsection (4)).
- 951 Subsection (5) sets out that notices can be varied or withdrawn, including on application by the CTP concerned.
- 952 Subsection (6) requires no further explanation.
- 953 Where a notice contains a measure from subsection (2), the regulators must publish the notice in a way that best brings it to the attention of those affected by it (subsection (7)).
- 954 Subsection (8) brings a breach of these disciplinary measures into the existing offences framework of FSMA 2000.
- 955 Subsection (9) requires no further explanation.
- 956 **New section 312S** sets the notice and other procedural requirements for a statement under section 312Q or a notice under section 312R and grants the CTP the right to appeal to the Tribunal.
- 957 **New section 312T** obliges the FCA, the PRA and the Bank of England to publish a statement of policy setting out how they will use the disciplinary powers in the CTP regime (subsection (1)). Subsections (2) to (4) are self-explanatory.
- 958 **New section 312U** obliges the FCA, the PRA and the Bank of England to coordinate their functions under the CTP regime (subsection (1)), to the extent that doing so does not create a disproportionate burden (subsection (3)).
- 959 It obliges them to seek information from each other as needed (subsection (2)) and to consult each other before exercising any of the powers in the CTP regime (subsection (4)).
- 960 **New section 312V** requires the FCA, the PRA and the Bank of England to produce and keep up-to-date a memorandum of understanding (MoU) relating to the exercise of functions in the CTP regime and how they will comply with their duty to coordinate in new section 312Q (subsection (1)).
- 961 Subsections (2) to (6) require no further explanation.
- 962 The regulators do not need to include in the MoU any aspect of their coordination under new section 312Q which would be against the public interest to publish, or which is technical or operational and so does not affect the public (subsection (7)).

963 **New section 312W** disapplies certain sections of FSMA 2000 (which have already been re-cast above) for the purposes of the CTP regime.

Clause 19: Critical third parties: related amendments

- 964 This clause amends FSMA 2000 to accommodate the new framework for CTPs as inserted by clause 18.
- 965 Subsection (2) inserts a definition of a critical third party into FSMA 2000 for the purpose of the amendments the Bill makes to Schedule 17A.
- 966 Subsection (3) ensures that existing provisions in FSMA 2000 about injunctions function properly for the CTP regime.
- 967 Subsection (4) applies existing publication requirements in FSMA 2000 to warning notices issued under new sections 312Q and 312R.
- 968 Subsection (5) applies existing provision in FSMA 2000 about warning notices and decision notices to the power of censure and the disciplinary powers in the CTP regime.
- 969 Subsection (6) establishes the Parliamentary procedure for an order of HM Treasury designating a service provider as a CTP.
- 970 Subsection (7) is self-explanatory.
- 971 Subsections (8) and (9) apply the legislative framework around rules made by the FCA and the PRA to rules made by the Bank of England under the new section 312M.
- 972 Subsection (10) applies the restrictions on disclosure of confidential information to information received by the Bank of England in connection with the exercise of its functions under the CTP regime.
- 973 Subsection (11) clarifies that the Bank of England may also apply to the court for an injunction in connection with a contravention or likely contravention of a requirement under the CTP regime.
- 974 Subsection (12) applies existing provisions in FSMA 2000 on restitution orders to the CTP regime.
- 975 Subsection (13) applies existing provisions in relation to notices under FSMA 2000 to the power of censure and disciplinary measures in the CTP regime.
- 976 Subsection (14) makes it an offence (as it already is with the PRA and the FCA) to knowingly or recklessly give the Bank of England information which is false or misleading in connection with a requirement imposed by the Bank of England in relation to CTPs.
- 977 Subsection (15) applies existing record-keeping provisions in FSMA 2000 to the CTP regime.
- 978 Subsection (16) applies existing provisions in FSMA 2000 about the Bank of England's annual report to the CTP regime.
- 979 Subsection (17) incorporates the changes in Part 5 of Schedule 2 into this provision.

Regulatory gateway for financial promotions

Clause 20: Financial promotion

- 980 This section amends FSMA 2000 to establish the regulatory gateway, which authorised firms must pass through before being able to approve the financial promotions of unauthorised firms. Any authorised firm wishing to approve the financial promotions of

unauthorised firms will first need to obtain permission to do so from the FCA or otherwise do so within the scope of an exemption to the regulatory gateway.

- 981 Subsection (1) is self-explanatory.
- 982 Subsection (2) relates to the insertion of the new subsection 2A into section 21 of FSMA 2000. This removes a general permission that allows authorised firms to approve the content of financial promotions. By this new subsection, an authorised firm can only approve a financial promotion if it is either permitted to do so having gone through the regulatory gateway under the new section 55NA of FSMA 2000, or an applicable exemption applies under the new section 55NB of FSMA 2000.
- 983 Subsection (3) sets out the substance of the new financial promotion regulatory gateway and inserts the new section 55NA and the new section 55NB into FSMA 2000.
- 984 Subsection (3) (inserting section 55NA(1) of FSMA 2000) imposes a new requirement on all authorised firms to have permission from the FCA under the regulatory gateway before approving financial promotions, unless exempt from this requirement.
- 985 Subsection (3) (inserting section 55NA(2) of FSMA 2000) provides that authorised firms that approve financial promotions for the purpose of section 21 of FSMA 2000, without FCA permission under the regulatory gateway, will be doing so in breach of a requirement imposed by the FCA under FSMA 2000.
- 986 Subsection (3) (inserting section 55NA(3) of FSMA 2000) provides that both an authorised firm, or an applicant for authorisation, may apply for and be granted permission under the regulatory gateway.
- 987 Subsection (3) (inserting section 55NA(4) to (6) of FSMA 2000) details the FCA's powers to grant, vary or cancel a permission to approve financial promotions under the regulatory gateway. The FCA is able to grant the firm permission in line with the terms sought in its application, but it can also make the permission subject to other, potentially narrower, terms if it considers that appropriate. The FCA is also able to vary or cancel an existing permission, either on its own initiative or following an application made by the firm that was granted the permission. Where a permission is either granted or varied, the FCA must set out the terms on which it has been granted or varied.
- 988 Subsection (3) (inserting section 55NA(7) of FSMA 2000) provides that the FCA may refuse an application for a new regulatory gateway permission, or a variation or cancellation of an existing permission, if the FCA believes that such a decision would advance one or more of its operational objectives of consumer protection, integrity and competition under section 1B(3) of FSMA 2000.
- 989 Subsection (3) (inserting section 55NA(8) of FSMA 2000) details the grounds on which the FCA may vary or cancel an authorised firm's existing permission, on its own initiative. These arise if it appears to the FCA that the firm has not approved any promotions of unauthorised firms in at least 12 months or if doing so would advance one or more of its operational objectives.
- 990 Subsection (3) (inserting section 55NA(9)(a) of FSMA 2000) imposes a requirement on the FCA to consult the PRA before granting, varying or cancelling a permission under the gateway given to a firm that is, or will be, a PRA-authorised firm or to a firm that is part of a group that includes a PRA-authorised firm.
- 991 Subsection (3) (inserting section 55NA(9)(b) to (10) of FSMA 2000) requires the FCA to consult the Gibraltar regulator before granting, varying or cancelling a permission given to

a Gibraltar-based firm. The exception is if the FCA varies or cancels a gateway permission on its own initiative, in which case the FCA must only inform the Gibraltar regulator of its decision.

- 992 Subsection (3) (inserting section 55NA(11) of FSMA 2000) provides that the requirement for authorised firms to obtain FCA permission under the regulatory gateway will not apply if an exemption under the new section 55NB applies.
- 993 Subsection (3) (inserting section 55NA(12) of FSMA 2000) provides that, where appropriate, the FCA is able to draw on other powers in FSMA 2000 to impose further requirements on an authorised firm's ability to approve a financial promotion, beyond what is provided for in the new section 55NA(1) of FSMA 2000. It also clarifies that, where any additional requirement is inconsistent with the new section 55NA(1) of FSMA 2000, then that requirement would be of no effect.
- 994 Subsection (3) (inserting section 55NB(1) to (3) of FSMA 2000) confers a power on HM Treasury to create exemptions to the regulatory gateway in respect of certain firms, activities, circumstances and under certain conditions.
- 995 Subsection (4) is self-explanatory.
- 996 Subsection (5) confirms that the amendments under this section and Schedule 5 apply to firms authorised either before or after they come into force and that it does not affect financial promotions that were approved before this measure comes into force.

Digital settlement assets

Clause 21: Digital settlement assets

- 997 This clause introduces Schedule 6 which provides for the regulation of payment systems using digital settlement assets, digital settlement asset service providers and service providers to digital settlement asset systems by way of extending Part 5 of the Banking Act 2009 and Part 5 of FSBRA 2013 with additional provision for addressing occurrences of regulatory overlap in that context.

Clause 22: Digital settlement assets: power to make regulations

- 998 Subsection (3)(a) to (i) gives HM Treasury the power to make regulations to regulate payments that include digital settlement assets.
- 999 Subsections (3)(a) to (e) clarifies the nature of legislative provisions that HM Treasury may enact in pursuance of that aim. Subsection (3)(b) provides that the power includes the power to apply, and amend, existing legislation on insolvency arrangements (including administration, restructuring and similar procedures – as provided for in (1)(c) to apply appropriately for digital settlement assets used in payments. Subsection (3)(c) confers powers on HM Treasury to legislate, which will be relevant when amending primary legislation to include regulation making powers with respect to digital settlement assets. These are intended to bring digital settlement assets within the existing legislative perimeter of payments and electronic money regime, address regulatory overlaps and amend the application of existing SARs to cater for digital settlement asset features and operations.
- 1000 Subsection (4) allows HM Treasury to make provision for creating offences punishable on summary conviction with respect to digital settlement assets. This could include expanding existing criminal offences that apply to existing authorised payment institutions and authorised electronic money institutions under the EMR 2011 and PSR 2017 to apply to digital settlement assets.

1001 Subsection (5) clarifies that the power to make such regulations includes the power to modify legislation (which under clause subsection (13) includes the power to amend, repeal or revoke existing legislation). For instance, this could be relevant where HM Treasury needs to amend existing legislation, such as the EMR 2011, to apply to digital settlement assets.

1002 Subsections (7) and (9) to (12) sets out the procedure in which such legislation may be made and confirms that such regulations made under these provisions will be subject to the affirmative procedure or if urgent, that the “made affirmative” procedure be used. This procedure could be relevant if HM Treasury needs to react urgently to developments within the cryptoasset market. Subsection (8) imposes the requirement on HM Treasury to consult with the regulators before laying draft regulations under this power.

Mutual recognition

Clause 23: Implementation of mutual recognition agreements

1003 Subsection (1) allows HM Treasury to make, by regulations, any such provision as it considers appropriate for the purpose of, or in connection with, implementing MRAs to which the UK is or is expected to become a party.

1004 Subsections (2) and (3) clarify the meaning of “mutual recognition agreement”. This would include a full-fledged MRA which covers all financial services sectors, as well as more bespoke MRAs which cover only specific financial services or markets sectors or activities. It would also include mutual recognition provisions on financial services contained within other international agreements such as free trade agreements. As per subsection (5), it would also extend to any future amendments or modifications to existing MRAs. The definition would not include any parts of international agreements which are not related to mutual recognition in the field of financial services or markets.

1005 Subsections (4) and (6) provide further clarification as to the provision which may be made by regulations under subsection (1). This includes conferring powers on HM Treasury or the financial services regulators and imposing duties on those regulators. Duties may only be imposed where considered appropriate by HM Treasury. The appropriateness of such duties will be considered, where relevant, in the context of the relevant regulator’s obligations in FSMA 2000 with respect to the advancement of its statutory objectives. Such regulations may modify (including amending repealing or revoking, as per subsection (11)) primary and subordinate legislation, as well as retained EU law. This will enable HM Treasury to give domestic effect to the recognition accorded under an MRA. For example, if an MRA provides for recognition of an MRA partner country’s framework in relation to a sector or activity not covered by an existing equivalence regime, the power could be used to create a new domestic recognition regime or to amend the scope of existing regimes to allow for such recognition.

1006 HM Treasury may also impose duties on the regulators, including a duty to make rules. HM Treasury is required to consult the relevant regulator before doing so, pursuant to subsection (7). Subsections (8) and (9) further provide that if HM Treasury imposes a duty on a regulator to make rules, this may (among other things) specify matters that the rules must cover and specify a period within which the rules must be made. This ensures that HM Treasury can delegate aspects of implementation of MRAs to regulators where appropriate, but that it may not specify the precise form or content of the regulators’ rules.

1007 Subsection (10) applies the affirmative procedure to regulations made under subsection (1).

Chapter 3: Accountability of regulators

FCA and PRA objectives and regulatory principles

Clause 24: Economic competitiveness and growth objective

- 1008 This clause adds new secondary objectives for the PRA and the FCA in relation to growth and international competitiveness.
- 1009 Subsection (2) inserts a new subsection (4A) into FSMA 2000 which requires the FCA to, so far as is reasonably possible, advance the competitiveness and growth objective when discharging its general functions.
- 1010 Subsection (3) inserts a new section (1EB) into FSMA 2000 which sets out what the competitiveness and growth objective is. The facilitation of the objective by the FCA is subject to the FCA aligning with relevant international standards.
- 1011 Subsection (4a) changes the title in section 2H of FSMA 2000 to account for the new secondary objective.
- 1012 Subsection (4b) substitutes the existing subsection (1) of section 2H of FSMA 2000 to add a requirement for the PRA to, so far as is reasonably possible, advance the competitiveness and growth objective when discharging its general functions.
- 1013 Subsection (4b) inserts a new section (1B) into FSMA 2000 which sets out what the competitiveness and growth objective is. The facilitation of the objective by the PRA is subject to the PRA aligning with relevant international standards.

Clause 25: Regulatory principles: net zero emissions target

- 1014 This clause embeds the UK's net zero target into the regulatory principles for the PRA and the FCA.

Clause 26: sections 24 and 25: consequential amendments

- 1015 This clause sets out minor and consequential amendments to section 143G of FSMA 2000.
- 1016 Subsection (2) amends section 143G of FSMA 2000 to make consequential amendments to provisions which are redundant following the introduction of the amended sustainable growth principle.
- 1017 Subsection (3) amends paragraph 11 of Schedule 1ZA to FSMA 2000 and requires the FCA to report annually on how it has advanced its growth and international competitiveness objective through its annual report.
- 1018 Subsection (4) amends paragraph 20 of Schedule 1ZB to FSMA 2000 and requires the PRA to report annually on how it has advanced its growth and international competitiveness objective through its annual report.

FCA and PRA powers to make rules etc

Clause 27: Review of rules

- 1019 This clause amends FSMA 2000 to introduce requirements relating to the review of rules made by the regulators.
- 1020 New section 3RA(1) introduces a requirement for the regulators to keep generally under review any rules made by the regulator, with subsection (2) exempting rules made for the purpose of complying with directions or recommendations from the Financial Policy

Committee. If the relevant direction or recommendation is withdrawn, the rules made to comply with the direction or recommendation will no longer fall under the exemption in subsection (2).

1021 New section 3RB requires each regulator to prepare and publish statements of policy on how they will carry out their obligations under new section 3RA. Subsection (3) requires publication to be in a way appearing to the regulator to be best designed to bring it to the attention of the public.

1022 New section 3RC provides HM Treasury with the power to direct the regulators to review specified rules.

1023 Subsection 3RC(1)(a) requires that the rules have been in force for at least 12 months. 3RC(1)(b) sets out that HM Treasury must consider it to be in the public interest that the rules are reviewed. Subsection (1)(c) clarifies that HM Treasury can only direct the regulator to carry out a review if, in the opinion of HM Treasury, the regulator is not already carrying out, or planning to carry out, an effective review of the rules in question.

1024 Subsection (2) clarifies that the scope of the power is those rules which fall under the regulators general duty to review rules in new section 3RA(1).

1025 Subsection (3) requires HM Treasury to consult the regulator before giving a direction under the power.

1026 Subsection (4) specifies that HM Treasury must have regard to the desirability of minimising any adverse effect that the carrying out of the review may have on the regulator. Subsection (5) sets out what a direction may include. Subsection (6) sets out what may be included in the scope and conduct of a review. Subsection (7) sets out the requirement for HM Treasury to lay the direction before Parliament and publish it before giving a direction. Subsection (8) disapplies subsection (7) where HM Treasury considers that publication would not be in the public interest. Subsection (9) allows a direction to be varied or revoked by a further direction.

1027 New section 3RD requires reports to be made by the regulator on reviews under new section 3RC. Section 3RD(1) states that section 3RD applies where HM Treasury has given a direction to a regulator under section 3RC(1). Subsection (2) sets out the matters that must be contained in the regulator's report.

1028 Subsection (3) requires HM Treasury to lay a copy of the report before Parliament and publish it. Subsection (4) provides a public interest exemption to subsection (3).

1029 Schedule 7 inserts into FSBRA 2013 corresponding provisions for the PSR.

Clause 28: Treasury power in relation to rules

1030 This clause inserts new section 3RE into FSMA 2000.

New section 3RE

1031 Subsection (1) of new section 3RE creates a power for HM Treasury to require a regulator to use one of their rule-making powers to make rules. HM Treasury can require a regulator to use any of the rule-making powers in or under FSMA 2000, but it does not apply to any regulator powers outside FSMA 2000 unless the relevant Parts of FSMA 2000 have been applied.

1032 Subsection (2)(a) of new section 3RE enables HM Treasury to specify matters that the rules must cover. Subsection (2)(b) of the new section enables HM Treasury to set a time limit within which the relevant regulator must make the rules necessary to fulfil the requirement set by HM Treasury.

1033 Subsection (3) limits the power to the matters covered by subsection 2(a) – i.e. the requirement that the regulator make rules covering specified matters. Subsection 3(a) states that the power cannot be used to require a regulator to structure their rules in a particular way or to include certain content. And subsection 3(b) states that the power cannot be used to achieve a particular outcome.

1034 Subsection (4) of new section 3RE clarifies that, if no time period within which rules must be made is specified by HM Treasury under subsection (2)(b), the relevant regulator is required to make the rules as soon as is practicable.

Clause 29: Matters to consider when making rules

1035 This clause inserts new Section 138EA into FSMA 2000.

1036 Within this, subsection (1) of new Section 138EA states that this section applies to all regulator rule-making empowerments within FSMA 2000, meaning that it is applicable whenever a regulator proposes to make rules in or under the Act. It therefore has the same scope as new Section 3RE, as inserted by clause 28.

1037 138EA(2) and (3) provide HM Treasury with a power to specify matters that the regulators must have regard to when making rules in a particular area. HM Treasury is able to specify different matters that must be considered when rules are made in different areas.

1038 138EA(4) enables HM Treasury to limit the matters which must be considered such that it can apply to only a subset of regulator rule-making, including by references to the power exercised by the regulator, the persons to whom the rules apply, or the activities or subject matter concerned.

1039 138EA(5) provides an exemption to the consideration of matters specified by HM Treasury where rules are made in order to comply or act in accordance with a direction or recommendation made by the Financial Policy Committee of the Bank of England.

1040 138EA(6) is self-explanatory.

1041 Subsection (3) of this clause inserts a number of provisions into section 138I of FSMA 2000.

1042 Subsection (3)(a) inserts new subsection 138I(2)(ba) which places a requirement on the FCA to include within a consultation an explanation of the how the consideration of matters specified by HM Treasury using the power in 138EA has affected the draft rules proposed in their consultation.

1043 Subsection (3)(b) inserts new subsection 138I(8A) which exempts the FCA from complying with the requirement in new subsection 138I(2)(ba) if compliance would cause an undue delay which would be damaging to consumer interests or if the proposed rules make changes to pre-existing rules that are non-material in the opinion of the FCA. The new subsection 138I(8B) is self-explanatory.

1044 Subsection 4 inserts a number of provisions into 138J of FSMA 2000.

1045 Subsection (4)(a) inserts new subsection 138J(2)(ba). This has the same effect on the PRA's consultation requirement as new subsection 138I(2)(ba) has on the FCA's consultation requirements.

1046 Subsection (4)(b) inserts new subsection 138J(8A). This exempts the PRA from complying with the requirement in new subsection 138J(2)(ba) if compliance would cause an undue delay. The conditions that this exemption is subject to in 138J(8A)(a)(i) and 138J(8A)(a)(ii) are based on the PRA's statutory objectives. The new subsection 138J(8A)(b) exempts the PRA from the requirement in new subsection 138J(2)(ba) if the proposed rules make

changes to pre-existing rules that are non-material in the opinion of the PRA. The new subsection 138J(8B) is self-explanatory.

1047 Subsection (5) inserts new section 138EA into section 429 of FSMA 2000 which provides that SIs made under this power are subject to the affirmative Parliamentary procedure.

Clause 30: Effect of rules etc on deference decisions

1048 This clause amends FSMA 2000 by inserting a new section 409A, requiring the FCA and the PRA to consider the effect of a relevant action on notified HM Treasury deference decisions and consult HM Treasury if it considers there to be a material risk that the action would be incompatible with a notified deference decision.

1049 Subsection (1) outlines that this mechanism will apply only in scenarios where the FCA and the PRA propose to take a “relevant action”.

1050 Subsection (2) requires the PRA or the FCA to consider the effect of the relevant action on notified deference decisions. If the PRA or the FCA considers there is a material risk that the action would be incompatible with a notified decision, it must consult HM Treasury about the likely effect of the action on the decision.

1051 Subsection (3) limits the requirements in subsection (2) to situations where the PRA or the FCA proposes to take a relevant action, and a duty to consult publicly applies in respect of the action. Subsection (6) provides that a “duty to consult” (publicly) for the purposes of subsection (3) means i) a duty imposed by sections 138I or 138J FSMA 2000 to publish draft rules, or ii) any other duty to publish the proposal to take the action- examples of (ii) include duties under common law, or a statutory requirement under Article 42(3) of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (Retained EU Legislation). If there is no duty to consult as defined in subsection (6), which includes circumstances where the FCA or the PRA are relying on an exemption from the duty to consult, the test in subsection (3) is not satisfied. Examples of such exemptions applicable to the regulator include section 138L FSMA 2000 (Consultation: general exemptions) and Article 42(4) of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (Retained EU Legislation). Note that the treatment of the exemption in section 138M(1) of FSMA 2000 (consultation: exemptions for temporary product intervention rules) has been modified for the purposes of new section 409A.

1052 Subsection (4) defines what constitutes a “relevant action” under this clause. These are if the PRA or the FCA proposes to make rules under FSMA 2000 or any other enactment, or make changes to its general policies and practices relating to their respective supervisory remits.

1053 Subsection (5) defines key concepts for the purposes of the requirement outlined in subsection (2).

1054 Subsection (6) defines the “duty to consult” test set out in subsection (3).

1055 Subsection (7) states that section 138M(1), which is the FCA’s exemption relating to temporary product intervention rules, should be ignored for the purposes of assessing whether there is a “duty to consult” for the purposes of subsection (6). Subsection (7) should be read alongside subsections (9)(a) and (10) which introduce a narrower exception from the requirement in subsection (2) in relation to product intervention rules for the purposes of new section 409A.

- 1056 Subsection (8) requires the PRA or the FCA, when fulfilling the consultation requirement outlined in subsection (2), to consult HM Treasury prior to consulting publicly.
- 1057 Subsection (9) creates certain exceptions to the requirement in subsection (2). The requirement in subsection (2) does not apply when there is an existing duplicative requirement elsewhere in FSMA 2000. Subsection (9) further exempts the regulator from the requirement where the proposed action has been undertaken to comply with a direction given by the Financial Policy Committee of the Bank of England or to act in accordance with a recommendation made by the same committee.
- 1058 Subsection (10) provides the condition for subsection (9)(a) to apply, and covers situations where the FCA considers that delay involved in complying with the requirement in subsection (2) would be prejudicial to advancing a) the consumer protection objective or b) if an order under section 137D(1)(b) of FSMA 2000 is in force, the integrity objective.

Clause 31: Effect of rules etc on international trade obligations

- 1059 This clause amends FSMA 2000 by inserting a new section 409B, requiring the FCA and the PRA to notify HM Treasury of a relevant action if they consider there to be material risk that the action would be incompatible with the UK's international trade obligations.
- 1060 Subsection (1) outlines that this mechanism will apply only in scenarios where the FCA or the PRA propose to take a "relevant action" and considers there to be a material risk that the action would be incompatible with an international trade obligation. Under subsection (12), the only international trade obligations which the regulator must consider for the purposes of this section are the UK's obligations relating to financial services or markets under free trade agreements or the 1994 Marrakesh Agreement which established the World Trade Organisation.
- 1061 Subsection (2) requires the regulator to give HM Treasury written notice of the proposed action before taking it (see separately the requirement under subsections (10) and (11)).
- 1062 Subsection (3) limits the notification requirement in subsection (2) to situations where the regulator proposes to take a relevant action, and a duty to consult publicly applies in respect of the action.
- 1063 Subsection (4) defines what constitutes a "relevant action" under this clause. These are if the PRA or the FCA propose to make rules under FSMA 2000 or any other enactment, or make changes to its general policies and practices relating to their respective supervisory remits.
- 1064 Subsection (5) provides that a "duty to consult" (publicly) for the purposes of subsection (3) means i) a duty imposed by sections 138I or 138J FSMA 2000 to publish draft rules, or ii) any other duty to publish the proposal to take the action. Examples of (ii) include duties under common law, or a statutory requirement under Article 42(3) of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (Retained EU Legislation). If there is no duty to consult as defined in subsection (5), including where the FCA or the PRA are relying on an exemption from the duty to consult, the test in subsection (3) is not satisfied. Examples of such exemptions applicable to the regulator include section 138L FSMA 2000 (Consultation: general exemptions) and Article 42(4) of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (Retained EU Legislation). Note that the treatment of the exemption in section 138M(1) of FSMA 2000 (consultation: exemptions for temporary product intervention rules) has been modified for the purposes of new section 409B.

1065 Subsection (6) states that section 138M(1), which is the FCA's exemption relating to temporary product intervention rules, should be ignored for the purposes of assessing whether there is a "duty to consult" for the purposes of subsection (5). Subsection (6) should be read alongside subsections (8)(a) and (9) which introduce a narrower exception from the requirement in subsection (2) in relation to product intervention rules.

1066 Subsection (7) requires the regulator to give the written notice under subsection (2) prior to consulting publicly in respect of the relevant action.

1067 Subsection (8) also exempts the regulator from the requirement in subsection (2) where the proposed action has been undertaken to comply with a direction given by the Financial Policy Committee of the Bank of England or to act in accordance with a recommendation made by the same committee.

1068 Subsection (9) provides the condition for subsection (8)(a) to apply, and covers situations where the regulator considers that delay involved in complying with the requirement in subsection (2) would be prejudicial to advancing a) the consumer protection objective or b) if an order under section 137D(1)(b) of FSMA 2000 is in force, the integrity objective.

1069 Subsection (10) provides that subsection (11) applies in circumstances where a notification is not made under subsection (2) prior to a relevant action being taken, either because there is no duty to consult publicly in respect of that action or because the exception relating to product intervention rules under subsection (8)(a) applies.

1070 Subsection (11) provides that in those circumstances, the regulator must give written notice to HM Treasury as soon as reasonably possible after taking a relevant action if it appears that there is a material risk that the action is incompatible with an "international trade obligation".

Clause 32: Power to disapply or modify rules

1071 This clause inserts new section 138BA into FSMA 2000. This Section of FSMA 2000 enables the PRA and the FCA to identify parts of their rules which can be waived or disapplied upon application or consent.

1072 Within this, subsection (1) of new section 138BA states that new section 138BA only applies to rules made by a regulator if, or to the extent that, HM Treasury provides for it to apply in regulations.

1073 138BA(2) states that, where provided for in subsection 1, a regulator can grant a permission to a person who is subject to their rules, on their application or with their consent.

1074 138BA (2)(a) and (b) specify what a permission granted by the relevant regulator can enable. The regulator is able to disapply the rules entirely or to continue to apply the rules but with modifications specified in the permission.

1075 138BA (3) states that the PRA and the FCA cannot grant in relation to rules made under these listed sections of FSMA 2000.

1076 138BA (4)(a) states that the relevant regulator may grant an authorised person permission to disapply or modify the rules subject to conditions. The regulator will set these conditions.

1077 138BA(4)(b) makes provision for the regulators to revoke or vary permission under new section 138BA.

1078 138BA(5) enables HM Treasury to set procedural requirements in relation to the granting of a permission in regulations under subsection (1). 138BA(6) is a list of possible provision about procedural matters that may be made under subsection (5). This list is indicative and provision under subsection (5) may include provision about other matters.

1079 138BA(7) places an obligation on HM Treasury to consult the relevant regulator prior to making regulations under subsection (1).

1080 Subsection (3) of this clause inserts new section 138BA into section 429 of FSMA 2000 which provides that SIs made under this power are subject to the affirmative Parliamentary procedure.

FCA and PRA engagement

Clause 33: Responses of recommendations of the Treasury

1081 This clause amends section 1JA of FSMA 2000 and section 30B of the Bank of England Act 1998, respectively, to require annual responses from the FCA and the Prudential Regulation Committee to HM Treasury recommendations.

1082 Section 33(2) inserts subsection (2A) into section 1JA of FSMA 2000 which requires the FCA and the Prudential Regulation Committee to respond to the recommendations explaining the action that the relevant regulator has taken or intends to take in accordance with the recommendation, or the reasons why the relevant regulator has not acted or does not intend to act in accordance with the recommendation.

1083 Section 33(2) inserts subsection (2B) and (2C) into section 1JA of FSMA 2000 to make this requirement annual.

1084 Section 33(2) also inserts subsection (2D) into section 1JA of FSMA 2000 to remove the requirement where HM Treasury has notified the FCA in writing that an update (or further update) is not required.

1085 Section 33(2) inserts subsection (2E) into section 1JA of FSMA 2000 to allow the FCA to withhold information where its publication would be against the public interest.

1086 Section 33(4) does the same for the Prudential Regulation Committee as section 33(2) does for the FCA.

1087 Schedule 7 to this Bill inserts corresponding provisions into FSBRA 2013 in relation to the PSR.

Clause 34: Public consultation requirements

1088 This clause requires the FCA and the PRA to provide information in their public consultations on any engagement they have had with the statutory stakeholder panels established for the FCA, the PRA and the PSR prior to that consultation. Reference to public consultations include non-statutory consultations.

Clause 35: Engagement with statutory panels

1089 This clause will require the FCA and the PRA to publish information in their annual reports on how they have engaged with the statutory stakeholder panels established for the FCA, the PRA and the PSR.

1090 The clause also requires the FCA and the PRA to provide information in their public consultations on any engagement they have had with these statutory panels prior to that consultation. Reference to public consultations include non-statutory consultations.

1091 Equivalent provision is made for the PSR in relation to its engagement with its statutory panel in Schedule 7 to this Bill. This amends the existing requirements of the PSR in relation to its annual report in Schedule 4 to FSBRA 2013, and inserts a new section 104A into FSBRA 2013.

Clause 36: Engagement with Parliamentary Committees

- 1092 This clause sets out that the FCA and the PRA must notify the Treasury Select Committee when they publish a consultation on any matter and that they must respond to any Parliamentary Committee that has responded to a consultation published by the regulators.
- 1093 Subsection (2) amends Part 4 of Schedule 1ZA to FSMA 2000. Subsection (2) inserts paragraph 28 into Part 4 and sets out the requirement for the FCA to notify the Treasury Select Committee when it publishes a consultation.
- 1094 Subsection (2) also inserts paragraph 29 into Part 4 of Schedule 1ZA to FSMA 2000 which sets out the requirement that the FCA must respond to any Parliamentary Committee that has responded to a consultation published by the regulators. The qualification in new paragraph 29(5) that the FCA does not need to supply any information that they consider is against the public interest operates only as a qualification of the new statutory duty itself. It does not purport to speak for any wider purpose (and therefore does not purport to limit the inherent jurisdiction of Parliament to require the production of papers or to summon witnesses).
- 1095 Subsection (3) inserts paragraph 36 into Part 4 of Schedule 1ZB to FSMA 2000 and sets out the requirement for the PRA to notify HM Treasury Select Committee when it publishes a consultation. The qualification in new paragraph 36(5) that the PRA does not need to supply any information that they consider is against the public interest operates only as a qualification of the new statutory duty itself. It does not purport to speak for any wider purpose (and therefore does not purport to limit the inherent jurisdiction of Parliament to require the production of papers or to summon witnesses).
- 1096 Subsection (3) also inserts paragraph 37 into Part 4 of Schedule 1ZB to FSMA 2000 which sets out the requirement that the PRA must respond to any Parliamentary Committee that has responded to a consultation published by the regulators.

Clause 37: Reporting requirements

- 1097 This clause inserts new paragraph 11A into Schedule 1ZA of FSMA 2000, which provides HM Treasury with a power to direct the FCA to publish a report containing information about matters specified by HM Treasury.
- 1098 Subsection (2) of this clause inserts new paragraph 11A(1) which enables HM Treasury to direct the FCA to publish information, subject to conditions.
- 1099 Paragraph 11A(2) sets the conditions under which HM Treasury can direct the FCA, relating to the necessity of information for scrutiny of the regulator and the availability of existing information.
- 1100 Paragraph 11A(3) requires the FCA to publish a report in line with the direction. Paragraph 11A(4) exempts information from this publication that it would be against the public interest to publish.
- 1101 Paragraph 11A(5) places conditions on the provision of information in a direction, in that a direction cannot require the FCA to report more than once a quarter, nor to publish information that is confidential for the purposes of Part 23 of FSMA 2000.
- 1102 Paragraphs 11A(6) and 11A(7) are self-explanatory.
- 1103 Paragraph 11A(8) is self-explanatory.
- 1104 Paragraph 11A(9) allows HM Treasury to vary or revoke directions under the power.

1105 Sub-section (3) inserts paragraph 21A into Schedule 1ZB to FSMA 2000 which sets out the same power to direct the regulator to publish a report containing information about matters specified by HM Treasury, but in relation to the PRA.

Cooperation of FCA, PRA and others

Clause 38: Duty to co-operate and consult in exercising functions

1106 This clause introduces a statutory requirement for the FCA, the Financial Ombudsman Service and the FSCS to cooperate on issues which have significant implications for each other or the wider financial services market.

1107 Subsection 3 requires the FCA, the Financial Ombudsman Service and the FSCS to publish a statement explaining how they will comply with the duty.

1108 Subsection 6a requires the FCA, the Financial Ombudsman Service and the FSCS to publish an annual report on their compliance with the duty. This report must also describe representations the authorities have received from stakeholders on their compliance with the duty to cooperate on wider implications issues (subsection 7).

FCA and PRA panels and policy statements

Clause 39: Listing Authority Advisory Panel

1109 The clause will place the Listing Authority Advisory Panel on an equal footing with the regulators' current statutory panels.

Clause 40: Insurance Practitioner Panel

1110 The clause will place the PRA Practitioner Panel's Insurance Sub-committee on an equal footing with the regulators' current statutory panels.

Clause 41: Cost Benefit Analysis Panels

1111 This clause will require the FCA and the PRA to establish and maintain a new statutory panel each ("the CBA Panel") which is dedicated to supporting the development of the regulators' CBA. The regulators should consult their CBA Panel before publication of consultations on rules, except for circumstances where there is an exemption. The CBA Panels will also be able to review the regulators' CBA methodology and processes by examining published CBAs. The CBA Panels will be on equal footing with the existing statutory panels and those panels which will be placed on a statutory footing.

Clause 42: Statement of policy on cost benefit analyses

1112 This clause will create a new statutory requirement for the regulators to each publish a statement of policy on their approach to Cost Benefit Analyses. This statement will set out when a CBA is conducted and what a CBA consists of.

Clause 43: Statement of policy on panel appointments

1113 This clause will create a requirement for the regulators and publish statements of policy which set out their processes for appointing members to their statutory panels. Prior to publishing their respective statements of policy, the regulators will be required to consult HM Treasury and have regard to any representations HM Treasury make in response.

Clause 44: Composition of panels

1114 This clause inserts new sections after section 1M of FSMA 2000 (FCA's general duty to consult), after section 2L of FSMA 2000 (PRA's general duty to consult), and after section 103(5) of FSBRA 2013 (regulator's general duty to consult) to require the FCA, the PRA, and

These Explanatory Notes relate to the Financial Services and Markets Bill as brought from the House of Commons on 8 December 2022 (HL Bill 80)

the PSR, when appointing persons to their statutory panels, to ensure all members are external to the FCA, the PRA, the PSR, the Bank of England, and HM Treasury.

1115 Subsection (2) inserts section 1MA into FSMA 2000 (composition of panels) which sets out that a person who receives remuneration from the FCA, the PRA, the PSR, the Bank of England, or HM Treasury is disqualified from being appointed as a member of a panel established under any of sections 1N to 1QA or 138IA of FSMA for the FCA. Section 1MA(2), as inserted by subsection (2) of this clause, sets out that section 1MA(1) does not apply in respect of a panel if regulations made by HM Treasury provide for it not to apply to that panel. Section 1MA(3), as inserted by subsection (2) of this clause, sets out that regulations made by HM Treasury using the power in sections 1MA(2) may include provision in respect of a panel generally, or in relation to descriptions of persons or cases, but that such regulations may not be exercised so as to specify these persons by name.

1116 Subsections (3) to (6) of clause 46 make sections 1N (FCA Practitioner Panel), 1O (Smaller Business Practitioner Panel), 1P (Markets Practitioner Panel), and 1Q (Consumer Panel) of FSMA 2000 subject to section 1MA of FSMA 2000 as inserted by this clause.

1117 Subsection (7) of this clause inserts section 2LA (PRA's general duty to consult) into FSMA 2000 which replicates, with appropriate amendments, the wording of section 1MA of FSMA 2000 for the PRA.

1118 Subsection (8) of this clause makes section 2M (the PRA Practitioner Panel) of FSMA 2000 subject to section 2LA of FSMA 2000. Subsection (9) of this clause inserts sections (5A) to (5C) into section 103 of FSBRA 2013 which replicate, with appropriate amendments, the wording of section 1MA of FSMA for the PSR.

Bank of England regulatory powers

Clause 45: Exercise of FMI regulatory powers

1119 This clause inserts new sections 30D to 30I into the Bank of England Act 1998. They make new provision concerning the Bank's exercise of its regulatory powers as follows.

1120 Section 30D sets out the statutory objectives for the Bank to follow in the exercise of its FMI functions (which are defined in section 30D(3)). FMI functions, as defined, will include the Bank's role in implementing a new Senior Manager & Certification Regime for CCPs and CSDs as well its powers over critical third parties when relevant powers in that regime are exercised in relation to a critical third party who provides services to CCPs and CSDs. Subsection (1) maintains the Bank's Financial Stability Objective as its primary objective, and further provides that when advancing this objective the Bank should have regard to:

- a. The regulatory principles set out in section 30E;
- b. The effect that the Bank's regulation will or may have on the financial stability of other countries or territories in which CCPs and CSDs are established or provide services; and
- c. The desirability of regulating CCPs and CSDs in a way that is not determined by whether the users of their services are located in the UK or elsewhere.

1121 Subsection (2) provides for a new secondary objective for the Bank when exercising its FMI functions, which is to be advanced as far as reasonably possible alongside the Financial Stability Objective. This is to facilitate innovation in the services provided by central counterparties and CSDs, with a view to improving the quality, efficiency and economy of those services.

- 1122 Section 30E sets out the regulatory principles to which the Bank must have regard when exercising its FMI functions. These are based on the existing principles from section 3B FSMA 2000 which apply to the FCA and the PRA. This includes a requirement to have regard to the desirability of sustainable growth, including in a way which is consistent with the UK's net zero emissions target. The clause also includes an additional principle requiring the Bank to have regard to the desirability of facilitating fair and reasonable access to services provided by CCPs and CSDs.
- 1123 Section 30F creates a committee of the Bank called the 'Financial Market Infrastructure Committee' (FMI Committee). It sets out the requirements regarding the membership of this Committee. The Committee must be chaired by either the Governor or a Deputy Governor of the Bank, and it must have at least three independent members.
- 1124 Section 30G provides for the functions of the FMI Committee. It will be responsible for exercising the Bank's FMI functions (which are its regulatory functions in relation to CCPs and CSDs, including setting policy approaches and making rules, and are defined in section 30D). Subsection (1)(b) provides that the Bank's Court of Directors can confer other functions on the Committee. Subsections (3) and (4) provide that the functions of the Committee can be delegated, for example to Bank officials, where it considers this appropriate, except for its function of making rules or technical standards. Subsection (2) provides that the Committee can provide for certain of its functions to be exercised by the Governor, instead of by the Committee, or that the Committee is only able to exercise a particular function after consulting with the Governor of the Bank.
- 1125 Section 30H requires the Bank to publish certain information on the new Committee, including roles and membership, meeting and decision-making procedures and arrangements for the exercise of any functions outside of the Committee.
- 1126 Section 30I provides that HM Treasury may make recommendations on aspects of the government's economic policy which the Bank should have regard to when advancing its objectives and applying the regulatory principles in relation to its FMI functions. HM Treasury is required to do so at least once every Parliament, and to publish and lay before Parliament its recommendations. The FMI Committee must respond in writing within a year to note what action it has taken, or intends to take, in response to these recommendations (or, if it does not intend to take action in response, its reasons for this). The Committee must then provide an updated response every year unless HM Treasury has informed the Bank that no update is required.

Clause 46: Bank of England: rule-making powers

- 1127 This clause amends FSMA 2000 to introduce requirements relating to the review of rules made by the Bank in relation to CCPs and CSDs. New section 300I introduces a requirement for the Bank to keep generally under review any rules made by the Bank under FSMA 2000. Subsection (2) exempts rules made for the purpose of complying with a recommendation from the Financial Policy Committee.
- 1128 New section 300J requires the Bank to prepare and publish a statement of policy on how they will carry out their obligations under new section 300I. Subsection (3) requires publication to be in a way appearing to the Bank to be best designed to bring it to the attention of the public.
- 1129 New section 300K provides HM Treasury with the power to direct the Bank to review specified rules when this is in the public interest.
- 1130 Subsection 300K(1)(a) sets out that the rules must have been in place for at least 12 months. Subsection (1)(b) sets out that HM Treasury must consider it to be in the public interest that

the rules are reviewed. Subsection (1)(c) clarifies that HM Treasury can only direct so if, in the opinion of HM Treasury, the Bank is not already carrying out, or planning to carry out, an effective review of the rules in question.

1131 Subsection (2) clarifies that the scope of the power is those rules which fall under the Bank's general duty to review rules in new section 300I.

1132 Subsection (3) requires HM Treasury to consult the Bank before giving a direction under the power.

1133 Subsection (4) requires HM Treasury to consider the effect of any direction under the power on the exercise of the Bank's other functions. Subsections (5) and (6) clarify various matters that may be included in a direction issued under this section. Subsection (7) requires HM Treasury to lay any direction under the power in Parliament and publish it. Subsection (8) provides a public interest exemption to subsection (6).

1134 Subsection (9) allows for HM Treasury directions under the power to be varied or revoked by further directions.

1135 New section 300L requires reports to be made by the Bank on reviews under new section 300K. Subsection (2) defines the matters that must be contained in the Bank's report.

1136 Subsection (3) requires HM Treasury to lay the report before Parliament and publish it. Subsection (4) provides a public interest exemption to subsection (3).

1137 The clause also inserts a new section 300M into FSMA 2000. Subsection (1) of new section 300M creates a power for HM Treasury to require the Bank to use its rule-making power under FSMA 2000 to make rules in relation to a specified activity or description of person.

1138 Subsection (2)(a) of new section 300M enables HM Treasury to list elements that the Bank must include within the rules. Subsection (2)(b) enables HM Treasury to set a time limit within which the Bank must make the rules necessary to fulfil the requirement set by HM Treasury.

1139 Subsection (3) limits the power to the matters covered by subsection (2)(a), i.e. the requirement that the Bank make rules covering specified matters. Subsection (3)(a) states that the power cannot be used to require the Bank to structure their rules in a particular way or to include certain content. And subsection (3)(b) states that the power cannot be used to achieve a particular outcome.

Clause 47: Application of FSMA 2000 to FMI functions

1140 This clause makes several amendments to Part 18 and Schedule 17A to FSMA 2000 to ensure that they function in a way which is appropriate for the Bank's new regulatory framework and its new general rule-making power. For example, subsection (8) applies section 166A of FSMA 2000 to the Bank, which allows for the appointment of a skilled person to investigate a potential breach of a requirement to collect and keep up to date information.

1141 The clause also amends Schedule 17A to make provision in relation to the Bank which aligns with measures being introduced for the PRA and the FCA as follows:

- a. It applies new section 1RB, which will be inserted into FSMA 2000 by clause 34 of this Bill, to the Bank. This will require the Bank to include in its public consultations information about the statutory panels of the FCA, the PRA and Payment Systems Regulator that it has engaged with in relation to the subject matter of the consultation.
- b. It applies new section 138BA, which will be inserted into FSMA 2000 by clause 32 of the Bill, to the Bank. This will provide for the Bank to be able to disapply or modify rules in individual cases.

- c. It applies new section 138EA, which will be inserted into FSMA 2000 by clause 29 of this Bill, to the Bank. This confers power on HM Treasury to set out in regulations matters which the Bank must consider when making rules.
- d. It applies new section 138JA(2), (3), (4), (9) and (10) and section 138JB, which will be inserted into FSMA 2000 by clause 42 and as a result of which the Bank will be required to consult the PRA Cost-Benefit Advisory Panel (which is established by section 138JA), and to publish a statement of policy for its cost-benefit analyses.
- e. It applies section 141A of FSMA 2000, and new section 141B, which will be inserted into FSMA 2000 by clause 61, to the Bank. This will enable HM Treasury to make amendments to legislation which are consequential on Bank rules and references to Bank rules.
- f. It applies new sections 409A and 409B, which will be inserted into FSMA 2000 by clauses 30 and 31, as a result of which the Bank will be required to notify HM Treasury if it intends to take any action that could be incompatible with either a deference decision or an international trade obligation.
- g. It introduces a new requirement to paragraph 33 (a) of the Schedule for the Bank to set out in its Annual Report the efforts it has made to engage with interested stakeholders other than CCPs and CSDs, and the results of that engagement.
- h. It applies new paragraph 21A of Schedule 1ZB to FSMA 2000 (which will be inserted into that Act by clause 38), and which will provide HM Treasury with a power to direct the Bank to publish a report containing information about matters specified by HM Treasury.
- i. It applies new paragraphs 36 and 37 of Schedule 1ZB to FSMA 2000 (which will be inserted into that Act by clause 36), and which will require the Bank to notify the Chair of HM Treasury Select Committee when issuing a consultation, publishing draft rules or other proposals, and to provide a written response when a Parliamentary committee makes representations in response to a consultation. The qualification in new paragraph 36(5) that the Bank does not need to supply any information that they consider is against the public interest operates only as a qualification of the new statutory duty itself. It does not purport to speak for any wider purpose (and therefore does not purport to limit the inherent jurisdiction of Parliament to require the production of papers or to summon witnesses).

Payment Systems Regulator's powers

Clause 48: Payment Systems Regulator

1142 This clause introduces Schedule 7 which makes amendments to FSBRA 2013.

Clause 49: Chair of the Payment Systems Regulator as member of the FCA Board

1143 This clause amends FSMA 2000 to make the chair of the PSR board (the PSR Chair) an ex-officio member of the FCA Board.

1144 Subsection 4 provides for the PSR Chair to be a non-executive member of the governing body of the FCA (the FCA Board).

1145 Subsection 5 ensures that the same provisions applying in relation to the Bank of England's Deputy Governor for prudential regulation apply to the PSR Chair. This includes prohibiting an employee of the PSR being appointed as a member of the FCA Board and allowing for the FCA to pay expenses to the PSR Chair in respect to their service as a member of the FCA Board.

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1146 Subsection 6 ensures that the validity of any act of the FCA is not affected by vacancy or defects in the appointment of the PSR Chair to the FCA Board.

1147 Subsection 7 prohibits the PSR Chair, from taking part in discussions or decisions relating to the exercise of the FCA's function in relation to a particular person, unless the PSR Chair is also the chair of the FCA Board.

Consultation on rules

Clause 50: Consultation on rules

1148 Section 138I(1)(b) of FSMA 2000 requires the FCA to, before making any rules, and after consulting the PRA, consult publicly on the proposed rules. Section 138I(2) of FSMA 2000 sets out what must accompany the consultation. Section 138I(4) of FSMA 2000 requires the FCA to publish an account of the representations that have been made to it in response to the consultation and its response to these representations.

1149 The Bill inserts new provisions into section 138I of FSMA 2000 that require the FCA to publish the names of respondents to a consultation published under section 138I(1)(b) as part of its response in accordance with section 138I(4). This requirement only applies where a respondent has explicitly provided their consent to the FCA that their response can be published.

1150 Section 138J(1)(b) of FSMA 2000 requires the PRA to, before making any rules, and after consulting the FCA, consult publicly on the proposed rules. Section 138J(2) of FSMA 2000 sets out what must accompany the consultation. Section 138J(4) of FSMA 2000 requires the PRA to publish an account of the representations that have been made to it in response to the consultation and its response to these representations.

1151 The Bill inserts a new provision into section 138J of FSMA 2000 that requires the PRA to publish the names of respondents to a consultation published under section 138J(1)(b) as part of its response in accordance with section 138J(4). This requirement only applies where a respondent has explicitly provided their consent to the PRA that their response can be published.

1152 Paragraph 10(1)(i) of Schedule 17A to FSMA 2000 applies section 138J of FSMA 2000 and the provision inserted by the Bill to the Bank of England in respect of its functions in relation to CCPs and CSDs.

1153 The Bill inserts a new paragraph into Schedule 17A to FSMA 2000 (paragraph 10A) which applies section 138J of FSMA 2000 and the provision inserted by the Bill to the Bank of England in relation to rules made by the Bank of England under section 312M of FSMA 2000.

1154 Section 104(2)(b) of FSBRA 2013 requires the PSR to, before imposing generally applicable requirements, and after consulting the Bank of England, the FCA and the PRA, consult publicly on the proposed rules. Section 104(3) of FSBRA 2013 sets out what must accompany the consultation. Section 104(5) of FSBRA requires the PSR to publish an account of the representations that have been made to it in response to the consultation and its response to these representations.

1155 The Bill inserts a new provision into section 104 of FSBRA 2013 that requires the PSR to publish the names of respondents to a consultation published under section 104(2)(b) as part of its response in accordance with section 104(5). This requirement only applies where a respondent has explicitly provided their consent to the PSR that their response can be published.

Part 2: Access to Cash

Clause 51: Cash access services

1156 This clause inserts Schedule 8, which inserts new Part 8B into FSMA 2000.

Clause 52: Wholesale cash distribution

1157 This clause inserts Schedule 9, which inserts new Part 5A into the Banking Act 2009 and makes amendments to Part 6 of the Financial Services (Banking Reform) Act 2013.

Part 3: Performance of functions relating to financial market infrastructure

Clause 53: Recognised bodies: senior managers and certification

1158 This clause inserts Schedule 10, which inserts new Chapter 2A into Part 18 of FSMA 2000.

Part 4: Central counterparties in financial difficulties

Clause 54: Central counterparties in financial difficulties

1159 This clause inserts Schedule 11, which makes provision for a special resolution regime for central counterparties (CCPs) where all or part of the business has encountered or is likely to encounter financial difficulties.

Part 5: Insurers in financial difficulties

Clause 55: Insurers in financial difficulty

1160 Subsection (1) introduces the concept of a “write-down order” and cross-references Schedule 12, which sets out related amendments to FSMA 2000.

1161 Subsection (2) cross-references Schedule 13, which introduces restrictions on the enforcement of contracts against an insurer subject to a write-down order or certain insolvency proceedings.

Part 6: Miscellaneous

Amendments to FSMA 2000

Clause 56: Application of provisions to regulatory functions under this Act

1162 This clause amends sections 1A and 2AB of FSMA 2000 so that those responsibilities given to the FCA and the PRA in this Bill, or could be given to them in the future as a result of regulations made under this Bill, are treated as functions of the respective regulator.

1163 Subsection (2) provides that functions under this Bill, or regulations made under it, are functions of the FCA.

1164 Subsection (3) provides that functions under this Bill, or regulations made under it, are functions of the PRA.

Clause 57: Formerly authorised persons

1165 This clause amends FSMA 2000 to ensure that the regulators can use their existing powers in sections 168, 205, and 206 and 384 of FSMA 2000 in relation to formerly authorised persons.

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1166 Subsection (2) amends section 404C of FSMA 2000 to ensure that it is consistent with new section 415AA.

1167 Subsection (3) inserts new section 415AA into FSMA 2000, which provides that a power in section 168, 205, 206 or 384 of FSMA 2000 may be exercised in relation to persons who were at any time authorised persons (in addition to persons who are authorised persons at the time when the power is exercised). Section 415AA(2) provides that references to “authorised person” in sections 168, 205, 206 to 209 and 384 are to be read as including a person who is no longer authorised.

1168 Subsection (4) provides that the amendments made by this section have effect only in relation to persons who cease to be authorised persons on or after the day on which this Bill is introduced.

Clause 58: Control over authorised persons

1169 This clause inserts an additional scenario where the regulators can impose conditions on a new controller into section 187(2) of Part 12 of FSMA 2000. This additional scenario is where it is desirable to do so in order to advance that regulator’s objectives, subject to the obligation to disregard the economic needs of the market.

Clause 59: Financial services compensation scheme

1170 This clause amends section 212(3)(aa) and repeals section 218B of FSMA 2000 as set out in subsections (2) and (3) to remove the requirement that the chief executive should be the accounting officer of the FSCS manager and remove HM Treasury’s power to require information from the FSCS manager respectively.

1171 Subsection (4) repeals section 15 of FSBRA 2013, which inserted section 218B of FSMA 2000.

Clause 60: Unauthorised co-ownership AIFs

1172 This section amends FSMA 2000 to establish the delegated power for HM Treasury and to clarify that section 261E of FSMA 2000 is relevant for the purposes of authorised contractual schemes with regards to section 261D(1)(a) of FSMA 2000.

1173 Subsection (1) is self-explanatory.

1174 Subsection (2)(a) (inserting section 261E(A1) of FSMA 2000) clarifies that section 261E is relevant for the purposes of section 261D(1)(a) of FSMA 2000.

1175 Subsection (2)(b) is self-explanatory.

1176 Subsection (3) inserts the new Chapter 3B – Unauthorised co-ownership AIFs, along with the new section 261Z6 of FSMA 2000.

1177 Subsection (3) (inserting section 261Z6(1) of FSMA 2000) delegates a power to HM Treasury to apply the effect, as relevant, of sections 261M to 261O and section 261P(1) and (2) of FSMA 2000, to unauthorised co-ownership AIFs.

1178 Subsection (3) (inserting section 261Z6(2) of FSMA 2000) makes clear that the delegated power allows for provision about unauthorised contractual AIFs in general, or those of a specified description.

1179 Subsection (3) (inserting section 261Z6(3) of FSMA 2000) sets out the definition of an unauthorised co-ownership AIF, for the purposes of this section.

Clause 61: Power to amend enactments in consequence of rules

1180 This clause inserts new section 141B into FSMA 2000.

1181 Within this, subsection (1) of new section 141B enables HM Treasury to amend legislation as a consequence of rules made by a regulator.

1182 Subsection 141B(2) is self-explanatory.

1183 Subsection (3) omits section 144F of FSMA 2000, which enables HM Treasury to amend an enactment as a consequence of CRR rules made by the PRA. New section 141B will enable HM Treasury to amend enactments as a consequence of CRR rules, in addition to other regulator rules, and so section 144F is no longer required.

1184 Subsection (4)(a) inserts new section 141B into section 429(4) of FSMA 2000 which provides that regulations made under this power are subject to the affirmative Parliamentary procedure. And as 144F has been repealed, subsection (4)(b) provides for the deletion of section 144F from Section 429(4) of FSMA 2000.

Clause 62: Ambulatory references

1185 This clause enables the PRA, the FCA, and HM Treasury to make “ambulatory” references to domestic legislation and regulator rules respectively. This means that such references would not need to be updated if the rules or legislation they refer to change over time.

1186 Subsection (2) amends section 137T of FSMA 2000. When the PRA and the FCA make rules, this section enables them to make provisions that a reference to legislation is ambulatory. This means that it would refer to the current version of the legislation rather than the legislation at the point at which the rule is made.

1187 Subsection (3) fulfils a similar function for regulations made under FSMA 2000. This means that where HM Treasury makes secondary legislation, that legislation can refer to the current version of the rules, rather than the rules at the point at which the legislation is made. Subsection 3(b) clarifies that this includes rules made by the Bank of England.

Clause 63: Power to amend or repeal certain provisions of FSMA 2000

1188 This clause enables HM Treasury to amend or repeal the parts of 9C and 9D of FSMA 2000 which established the requirements for the FCA to make certain rules in relation to investment firms, and for the PRA and the FCA to have regard to certain matters. This is required as HM Treasury could exercise the powers in clauses 28 and 29 in a way that would require these Parts of FSMA 2000 to be repealed or amended in order to remain effective.

1189 Subsection (1) provides a power for HM Treasury to amend or repeal provisions the relevant parts of Parts 9C and 9D of FMSA 2000. Subsection (2) enables HM Treasury to make consequential changes to the rest of these Parts of FSMA 2000 as a result of exercising this power.

1190 Subsection (3) is self-explanatory.

Clause 64: Power under FSMA 2000 to make transitional provisions

1191 This clause amends section 427 of FSMA 2000, which makes provision about transitional arrangements that can be provided for by the Government in relation to FSMA 2000. These amendments update references to “the Authority” (which referred to the Financial Services Authority) to refer to the FCA and the PRA.

1192 Subsection (3) inserts paragraph 31B into Schedule 17A to FSMA 2000, which ensures that references to “a regulator” in section 427 of FSMA 2000 are read as including the Bank of England.

Clause 65: Cryptoassets

1193 This clause amends FSMA 2000 to clarify that HM Treasury can use its existing powers in sections 21 and 22 of FSMA 2000 to regulate cryptoassets.

1194 Subsection (2) amends the definition of “investment” contained in section 21(14) of FSMA 2000. The existing definition is “investment” includes any asset, right or interest.’ This amendment ensures that this includes where an asset, right or interest is, or comprises or represents, a cryptoasset.

1195 Subsection (3) amends the definition of “investment” contained in section 22(4) of FSMA 2000. The existing definition is “investment” includes any asset, right or interest.’ This amendment ensures that this includes where an asset, right or interest is, or comprises or represents, a cryptoasset.

1196 Subsection (4)(a) inserts a new definition of “cryptoasset” to section 417 of FSMA 2000, to apply across FSMA 2000. This defines cryptoassets as any cryptographically secured digital representation of value or contractual rights that can be transferred, stored or traded electronically, and that uses technology supporting the recording or storage of data (which may include distributed ledger technology).

1197 Subsection (4)(b) gives HM Treasury the power to amend by regulation the definition of cryptoassets in subsection (4)(a) above.

1198 Subsection (5) amends section 429(2) of FSMA 2000 to include the new amendment power in subsection (4)(b) above. As a result, any regulation made by HM Treasury pursuant to the power in subsection (4)(b) above is subject to the affirmative parliamentary procedure.

Bank of England levy

Clause 66: Bank of England levy

1199 This clause amends the Bank of England Act 1998 to repeal the Cash Ratio Deposit (CRD) scheme and to introduce new provisions for the Bank to impose a charge on financial institutions in connection with the pursuit of its financial stability and monetary policy objectives.

1200 Subsection (2) omits section 6 (Cash ratio deposits) of, and Schedule 2 to, the Bank of England Act 1998. Together these omissions repeal the CRD scheme. Subsections (3) and (4) insert the new section 6A and Schedule 2ZA into the Bank of England Act 1998, establishing the Bank of England levy, which will replace it.

1201 Paragraph 1 of Schedule 2ZA will give a new power to the Bank to impose a charge on eligible institutions, known as the Bank of England levy. The remainder of the Schedule makes provision for how this power may be exercised.

1202 The charge may be levied on ‘eligible institutions’, which is defined by paragraph 2 broadly as UK deposit-taking institutions (banks and building societies) authorised under FSMA 2000. HM Treasury will have the power to amend this definition by regulations.

1203 Paragraph 4 requires the Bank to: 1) determine which of its policy functions it intends to fund (in whole or in part) using the levy; and, 2) determine the amount it reasonably considers it requires in connection with the funding of those functions, for each levy year

(which is defined as a period of 12 months in paragraph 3). Here the Bank's policy functions refers to functions exercised by the Bank in pursuit of its monetary policy and financial stability objectives. The Bank will also be required to publish these determinations.

1204 Paragraph 5 provides that the amount of the levy that an individual eligible institution is liable to pay must be determined by the Bank in accordance with regulations made by HM Treasury. These regulations will set out how the levy is to be calculated and it is intended that they will be reviewed at least every five years. The provision also gives HM Treasury the power to confer discretion on the Bank to determine certain specified matters. Paragraph 6 sets out the process by which the Bank will notify individual eligible institutions of the amount of levy they must pay each levy year.

1205 Paragraphs 7 and 8 set out what will happen if a levy is not paid and how the Bank may seek to recover unpaid amounts.

1206 Paragraph 9 gives the Bank powers to request information which it needs in order to operate the levy scheme.

1207 Paragraph 10 sets out the provisions concerning the making of secondary legislation. In making regulations under Schedule 2ZA, HM Treasury must consult the Bank and any others who appear to HM Treasury to represent those likely to be affected by the regulations. It must also have regard to the financial needs of the Bank. The provision also sets out the parliamentary procedure required for exercising the regulation making powers.

Clause 67: Bank of England levy: consequential amendments

1208 This clause makes a number of consequential amendments to the Bank of England Act 1998 which are needed as a result of the amendments in clause 66.

Other miscellaneous provisions

Clause 68: Liability of payment service providers for fraudulent transactions

1209 Subsections (1), (2), (3)(a) and (4) of this clause set out that the Payment Systems Regulator must prepare and publish a draft relevant requirement; describe the nature of that requirement; how the Payment Systems Regulator should consult, and the timescales within which it must do so. The effect of this section is to place a standalone duty on the PSR that it must prepare and publish a draft of a relevant requirement for reimbursement in such "qualifying cases" of payment orders as the Regulator considers should be eligible for reimbursement (subsections (1) and (3)(a)). Such qualifying cases are where "the case relates to a payment order executed over the Faster Payments Scheme" and "the payment order was executed subsequent to fraud or dishonesty" (subsection (2)). This would cover APP scams. Such a requirement must be published within 2 months of the provision being commenced (subsection (4)).

1210 Subsections (5) to (7) require the Payment Systems Regulator to subsequently impose such a requirement, having regard for any representations received as part of the consultation, and the timescales within which it must do so. The PSR must consult on the published requirement and then give effect to it subject to any consultation responses (subsections (3)(b), (5) and (6)). This process must be completed within 6 months of the provision being commenced. The provision does not amend the FSBRA 2013 framework, but requires the PSR to take a set of specified actions within that framework.

1211 Subsection 8 makes clear that publication and consultation requirements in subsections (1) and (3) as well as under section 104(2) of the Financial Services (Banking Reform) Act 2013

in the application of that section to a relevant requirement can be satisfied by action taken before the coming into force of this provision.

1212 Subsection (9) clarifies that the Payment Systems Regulator is able to subsequently vary (that is, amend) or revoke any requirement made under this section, and to impose further requirements relating to the reimbursement of fraudulent payments.

1213 Subsection 10 defines specific terms used in subsections (1) to (9).

1214 Subsection 11 amends regulation 90 of the Payment Services Regulations 2017, such that it does not affect the liability of a payment service provider under a relevant requirement in a case where the payment order is executed subsequent to fraud or dishonesty. Relevant requirements include the provisions in FSBRA 2013 and regulation 125 of the Payment Services Regulations 2017 that may be used by the PSR in relation to APP scams.

Clause 69: Credit unions

1215 This clause inserts Schedule 14, which amends the Credit Unions Act 1979.

Clause 70: Reinsurance for acts of terrorism

1216 This clause inserts new sections 2A and 2B into the Reinsurance (Acts of Terrorism) Act 1993 (the 1993 Act) after section 2.

1217 Section 2A gives HM Treasury the power to issue directions to any public sector body, as classified by the Office for National Statistics (ONS), which benefits from an arrangement under the Act.

1218 Section 2A(1) is self-explanatory.

1219 Subsection (2) defines the category of “relevant persons” who may be subject to directions made by HM Treasury under these powers. A “relevant person” is defined in subsection (2)(a) as a person who has (i) entered into arrangements with HM Treasury under the 1993 Act (whether before or after the passing of the 1993 Act), such as an unlimited guarantee, and (ii) who has also been classified to the public sector by the ONS (whether before or after the passing of the 1993 Act). Subsection (2)(b) also includes in the definition any group undertaking of a person falling within subsection (2)(a).

1220 Subsection (3) gives HM Treasury the power to direct a “relevant person” to appoint an accounting officer.

1221 Subsection (4) allows HM Treasury to issue directions if it considers it necessary for the purpose of ensuring compliance with any requirements associated with the public sector classification of a person falling within subsection (2)(a). The following subsection (5) sets out certain matters to which such requirements may relate.

1222 Subsection (6) imposes a requirement on HM Treasury to consult with a “relevant person” before giving a direction to that person.

1223 Subsection (7) sets out the requirements for HM Treasury to issue a notice alongside any direction which includes the reasons for giving the direction and states when the direction takes effect.

1224 Subsections (8) to (12) are self-explanatory.

1225 Section 2B sets out how section 2A may be enforced by HM Treasury.

Clause 71: Banking Act 2009: miscellaneous amendments

1226 This clause makes minor technical amendments to the Banking Act 2009.

1227 Subsections (2) to (4) are explained in the legal background of these Notes.

1228 Subsection (5) amends the definition of “payment system” for the purposes of Part 5 of the Banking Act 2009 to clarify that it clearly includes firms before they have commenced operation.

1229 Subsection (6) provides that the Bank’s immunity from liability for damages in s.244 of the Banking Act 2009 applies to functions conferred under, or as a result of regulations made under, this Bill.

Part 7: General

Clause 72: Interpretation

1230 This clause explains key terms for the purposes of this Bill.

Clause 73: Pre-commencement consultation

1231 Subsections (1) and (2) explain that any duty to consult that applies to or is connected with, or arises as a consequence of a provision modified or made by, the Bill can be fulfilled if undertaken before the commencement date, as well as on or after. obligation to consult introduced by the Bill. That includes, for example, the obligation for the FCA and the PRA to consult their cost-benefit analysis panels.

1232 Subsection (3) specifies duties to consult in other primary legislation to which subsection (1) applies.

1233 Subsection (4) defines the term “commencement date” for the purpose of this section.

Clause 74: Financial provision

1234 This clause is self-explanatory.

Clause 75: Power to make consequential provision

1235 This clause gives HM Treasury power to make regulations making provisions consequential on provisions of the Bill. Regulations making consequential amendments are subject to the negative procedure, except where they amend primary legislation. In that case, the regulations are to be subject to the affirmative procedure.

Clause 76: Regulations

1236 This clause specifies that regulations made under this Bill are exercisable by statutory instrument. Subsection (2)(a) enables HM Treasury to make regulations that include ambulatory references rules or other instruments.

1237 Subsections (3) and (4) defines the “affirmative” and “negative” scrutiny procedures that apply to the making of regulations under the Bill.

1238 Subsections (5), (6) and (7) are self-explanatory.

Clause 77: Extent

1239 This clause sets out the territorial extent of the Bill.

Clause 78: Commencement

1240 This clause sets out that the provisions of the Bill, other than those listed in subsections (1) and (2), will commence on the day appointed by HM Treasury by regulations.

1241 Subsection (1) lists provisions which will commence on Royal Assent and subsection (2) lists provisions which will commence two months after Royal Assent.

1242 Subsections (3) to (7) are self-explanatory.

Clause 79: Short title

1243 This clause provides that the Act may be cited as the Financial Services and Markets Act 2022.

Schedule 1: EU financial services legislation

1244 Schedule 1 governs the retained EU law related to financial services which is revoked by clause 1(1).

Part 1 – Retained direct principal EU legislation

1245 Part 1 of the Schedule captures retained direct principal EU legislation. This means EU Regulations which were made directly under the powers to make legislation granted to EU institutions in the various Treaties which establish the EU. This list is not exhaustive, but it contains all the EU Regulations which are generally followed. It is possible that there are some EU Regulations which have been superseded which are not listed here.

Part 2 – Subordinate legislation made under primary legislation

1246 Part 2 of the Schedule captures subordinate legislation made under primary legislation. That means domestic secondary legislation which was made either entirely or in part, for the purposes of implementing EU Directives or other obligations, or for related purposes.

1247 This list is broadly composed of three types of SI:

- a. SIs made under section 2(2) of the European Communities Act (ECA) 1972. These SIs were generally made under the ECA in order to implement EU obligations when the UK was part of the EU. It was common for EU Directives to be implemented in this way, and many EU Regulations also required use of the powers in the ECA in order to be properly incorporated into UK law.
- b. SIs made partly under the ECA. While some SIs in this Schedule may look as if they are made under entirely domestic legislation according to their titles, such as FSMA 2000, HM Treasury has included them in this list as they exercised the powers in the ECA in addition to domestic powers.
- c. SIs made under EUWA 2018. These SIs were made in order to address deficiencies in retained EU law when the UK left the EU. While these SIs do not directly implement EU obligations, they will no longer function effectively when retained EU law is revoked, and they are included in this Schedule. There is also one SI made under the EU (Withdrawal) Agreement Act 2020, which is included for the same reason.

Part 3 – EU tertiary legislation

1248 Part 3 of the Schedule captures EU tertiary legislation. This means instruments which are made under other EU instruments, rather than under EU Treaties. Examples include Delegated Regulations, Implementing Acts, and EU Decisions. Rather than list this category directly in the Schedule, the Schedule captures tertiary legislation under:

- a. EU Regulations related to financial services as captured by Part 1 of the Schedule; and
- b. EU Directives related to financial services, which are listed in the Schedule itself. While EU Directives no longer apply to the UK, they sometimes created powers for the EU commission to create EU tertiary legislation which does continue to apply.

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- c. Any legislation made under the secondary legislation in Part 2 of the Schedule, as these SIs will be revoked;
- d. Any Technical Standards made under Chapter 2A of Part 9A of FSMA 2000, which will also be revoked.

Part 4 – Primary legislation

1249 Part 4 of the Schedule contains primary legislation. This repeals Part 9D of FSMA 2000, which relates to rules which are defined in relation to the EU Capital Requirements Regulation; and Chapter 2A of Part 9B of FSMA 2000, which governs Technical Standards, which are a form of EU tertiary legislation for which responsibility has already been transferred to the Regulators, and so when they are repealed this Chapter of FSMA 2000 will no longer be needed.

Part 5 – Other retained EU law

1250 Part 5 acts as a “sweep up” provision by revoking all EU-derived legislation relating to financial services which is not directly listed in the Schedule (except primary legislation). While the government has attempted to identify all relevant retained EU law in financial services, this has not always been possible. This is due to the length of time that the UK was in the EU, the fact that many EU laws have been updated frequently or superseded over time, and finally because some EU obligations were implemented entirely through domestic instruments. This approach is also necessary to capture instruments which will be made during the transitional period before retained EU law is revoked.

1251 Therefore Part 5 revokes all EU-derived legislation in financial services which is not listed or otherwise captured by Parts 1, 2, and 3 of the Schedule.

1252 This part is governed by the definition of EU-derived legislation and how this can be determined to “relate” to financial services, which is also set out in Part 5 of the Schedule. Essentially, this means that clause 1(1) of the Bill revokes all the legislation which is listed directly in the Schedule, but also any unlisted EU-derived legislation related to financial services.

1253 As a result, Part 5 revokes:

- a. Any unlisted EU regulations relating to financial services;
- b. Any unlisted EU tertiary legislation relating to financial services;
- c. Any unlisted UK secondary legislation which implemented an EU Directive or other obligation related to financial services.
- d. Secondary legislation made under clause 3 of this Bill, which gives HM Treasury a power to amend retained EU law;
- e. Any unlisted or not yet made SIs made under EUWA 2018 relating to financial services.

1254 The revocation of unlisted EU-derived legislation does not capture any domestic primary legislation.

1255 In order to ensure that Part 5 does not revoke important provisions which may, in part, implement EU obligations, and to avoid unintended consequences, clause 1(6) provides HM Treasury with a power to exclude subordinate legislation from this “sweep up” provision, meaning that they would not be revoked by clause 1(1) of the Bill. The Regulated Activities Order is an example of an instrument which HM Treasury may wish to exclude from Part 5

of the Schedule in such a way, as it is an important part of the functioning of the domestic FSMA 2000 framework, and there are already sufficient existing powers to update it. Clause 1(6) is therefore included in order to avoid the unnecessary complexity of revoking and restating such instruments, and any others.

Schedule 2: Transitional amendments

Part 1 – Amendments to the Markets in Financial Instruments Regulation

Paragraph 2: Transparency requirements for equities and equity-like instruments

1256 This paragraph of the Schedule amends Article 3 of the Markets in Financial Instruments Regulation (MiFIR), which sets out what information trading venues need to make public in respect of trading interests in certain equity and equity-like instruments. It transfers to Article 3 a power, previously contained in Article 4 of MiFIR, for the FCA to make RTS to specify the detail of pre-trade transparency requirements and their calibration for different types of trading system. It specifies that when developing the RTS the FCA must take into account the different types of trading systems that may be used by trading venues.

Paragraph 3: Waivers for equity and equity-like instruments

1257 This paragraph of the Schedule substitutes Article 4 MiFIR to allow the FCA to make rules to provide for the waiver of the pre-trade transparency requirements that are set out in Article 3 of MiFIR. For context, Article 3(1) MiFIR requires market operators and investment firms operating a trading venue to make public certain information about a trade in equity and equity-like instruments on a continuous basis, that is, before shares, depositary receipts, exchange traded funds, certificates and other similar financial instruments are traded on a trading venue.

1258 Paragraph 2 of the new Article 4 limits the FCA's ability to waive pre-trade transparency requirements for equity and equity-like instruments traded on a venue to circumstances where the FCA considers that doing so is necessary or expedient to advance one or more of its operational objectives. These objectives are set out in FSMA 2000 (see section 1B(3)).

1259 Paragraph 3 enables the FCA to apply conditions on market operators and investment firms operating trading venues when they are using a waiver.

1260 Paragraph 4 requires the FCA to monitor the impact of any rules it makes when using this power.

1261 Paragraph 5 gives the FCA the power to withdraw the use of waivers for specific market operators and investment firms operating a trading venue if it believes that a trading venue is mis-using a waiver (for example, if it is using them to avoid requirements imposed by the rules).

Paragraph 4: Suspension of waivers

1262 Paragraph 4 introduces a new Article 4a into MiFIR to give the FCA the power to suspend, or partially suspend the use of a waiver if it considers that price formation is being unduly harmed by its use.

1263 Paragraph 2 of Article 4a specifies that the FCA can only suspend a waiver using the power outlined in paragraph 1 for six months at a time but can renew the suspension for further periods of up to six months if it considers that reinstating the waiver would unduly harm price formation.

1264 Paragraph 3 limits the FCA’s ability to suspend a waiver using the powers outlined in paragraph 1 to instances where the FCA considers that the intervention is necessary to advance the FCA’s integrity objective under section 1D of FSMA 2000.

1265 Paragraph 4 prescribes the factors to which the FCA must have regard when considering the suspension or renewal of a suspension of a waiver.

1266 Paragraph 5 requires that the FCA consult HM Treasury before directing that a waiver is suspended.

1267 Paragraph 6 exempts the FCA from that consultation requirement if the FCA considers that it is under time pressure and urgent action is needed to protect the price formation process or the interests of consumers.

Paragraph 5: Double Volume Cap

1268 This paragraph of the Schedule removes the double volume cap (DVC), which was a mechanism that was introduced to limit the amount of trading that could happen using the ‘reference price waiver’ and ‘negotiated trade waiver’ (waivers provided by the Article 4 MiFIR prior to its substitution by paragraph 3).

Paragraph 6: Amendment to the obligation for systematic internalisers to make public firm quotes

1269 This paragraph of the Schedule makes consequential amendments to Article 14 of MiFIR (which concerns the obligation for systematic internalisers to make public firm quotes on equity and equity-like instruments) to remove references to Article 5 MiFIR (Article 5 MiFIR contains the DVC, which is being removed by paragraph 5 of the Schedule).

1270 This paragraph 6 also introduces a provision describing the transitional period referenced in Article 14. This replaces an equivalent provision previously contained in Article 5 MiFIR.

Paragraph 7: Transparency requirements for fixed income instruments and derivatives etc

1271 This paragraph of the Schedule substitutes Articles 8 to 11 (Pre-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives; Waivers for non-equity instruments; Post-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives; and, Authorisation of deferred publication) of MiFIR.

1272 Paragraph 1 of new Article 8 requires the FCA to make rules imposing pre-trade transparency requirements on trading venues where the FCA determines that relevant non-equity instruments should attract such requirements. The purpose of imposing requirements must be to aid price formation and to allow for the fair evaluation of financial assets.

1273 Paragraph 2 of Article 8 limits the rule-making power outlined in paragraph (1) to circumstances where the FCA considers its use is necessary or expedient for advancing at least one of the FCA’s operational objectives as set out in section 1B(3) of FSMA 2000.

1274 Paragraph 3 of Article 8 also requires the FCA to consider the impact on market liquidity when setting pre-trade transparency requirements for fixed income and derivatives trading using the power outlined in paragraph 1. This is to avoid the efficient functioning of markets being negatively impacted through reduced liquidity.

- 1275 Paragraph 4 of Article 8 provides examples of the sorts of requirements the FCA could impose using this power.
- 1276 Paragraph 5 of Article 8 clarifies that when making rules using the power in paragraph 1 the FCA can set different requirements for different types of trading systems and instruments. For example, the FCA could limit pre-trade transparency requirements to systems that already operate based on broad transparency, such as order books in respect of derivative transactions.
- 1277 Paragraph 6 of Article 8 makes provision about the instruments and persons that are in scope of this power.
- 1278 Paragraph 1 of new Article 9 gives the FCA the power to include provision for waivers in respect of the pre-trade transparency requirements it imposes through rule-making power in Article 8.
- 1279 Paragraph 2 of Article 9 gives the FCA the power to decide what, if any, conditions should be applied to any waiver.
- 1280 Paragraph 3 of Article 9 gives the FCA the ability to withdraw a waiver from a relevant person if they are using it in a way that deviates from its original purpose or to avoid complying with regulation. The FCA must give the relevant person a notice to withdraw the waiver.
- 1281 Paragraph 4 of Article 9 gives the FCA the power to suspend requirements in pre-trade transparency rules for an instrument or class of instruments. The power is exercisable by notice.
- 1282 Paragraph 5 of Article 9 obliges the FCA to include specific information in such notices and imposes requirements about the manner of their publication.
- 1283 Paragraph 6 of Article 9 limits the FCA's power to suspend pre-trade requirements to instances where it considers that it is necessary to do so to advance its integrity objective, as set out in section 1D of FSMA 2000.
- 1284 Paragraph 7 of Article 9 specifies that when suspending pre-trade transparency requirements, the FCA should also have regard to its consumer protection objective and competition objective, as set out in sections 1C and 1E of FSMA 2000 respectively.
- 1285 Paragraph 1 of new Article 10 requires the FCA to make rules imposing post-trade transparency requirements on trading venues where the FCA determines that relevant non-equity instruments should attract such requirements. The purpose of imposing requirements must be to aid price formation and to allow for the fair evaluation of financial assets.
- 1286 Paragraph 2 of Article 10 limits the rule-making power for post-trade transparency, outlined in paragraph (1) to circumstances where the FCA considers its use is necessary or expedient for advancing at least one of the FCA's operational objectives as set out in section 1B(3) of FSMA 2000.
- 1287 Paragraph 3 of Article 10 requires the FCA to consider the impact on market liquidity, when setting post-trade requirements using the power outlined in paragraph 1. This is to avoid the efficient functioning of markets being negatively impacted through reduced liquidity.
- 1288 Paragraph 4 of Article 10 provides examples of the sorts of requirements the FCA could impose using this power.

1289 Paragraph 5 of Article 10 clarifies that when making post-trade transparency requirements using the rule-making power in paragraph 1 the FCA can set different requirements for different types of trading systems and instruments.

1290 Paragraph 6 of Article 10 makes provision about the instruments and persons that are in scope of this power.

1291 Paragraph 1 of new Article 11 gives the FCA the power to include provision for deferrals in respect of post-trade transparency requirements it imposes through the rule-making power in Article 10.

1292 Paragraph 2 of Article 11 gives the FCA the power to suspend requirements in post-trade transparency rules for an instrument or class of instruments. The power is exercisable by notice.

1293 Paragraph 3 of Article 11 obliges the FCA to include certain things in such notices and imposes requirements about the manner of their publication.

1294 Paragraph 4 of Article 11 limits the FCA's power to suspend post-trade requirements to instances where it considers that it is necessary to do so to advance its integrity objective, as set out in section 1D of FSMA 2000.

1295 Paragraph 5 of Article 11 specifies that when suspending post-trade transparency requirements, the FCA should also have regard to its consumer protection objective and competition objective, as set out in sections 1C and 1E of FSMA 2000 respectively.

Paragraph 8: Systematic Internalisers (definition)

1296 This paragraph of the Schedule amends the definition of a systematic internaliser in Article 2(1) MiFIR.

1297 It retains the current high-level component of the definition of a systematic internaliser in MiFIR (an investment firm which, on an organised, frequent, systematic and substantial basis, deals on own account when executing client orders outside of a UK regulated market, a UK multilateral trading facility (MTF) or a UK organised trading facility (OTF)), and the ability for investment firms to opt in to be a systematic internaliser. It removes the need for investment firms to undertake complex calculations to determine if they are operating on an organised, frequent, systematic and substantial basis and instead gives the FCA the power to make rules to determine the meaning of organised, frequent, systematic and substantial. This determination can be entirely qualitative, if the FCA sees fit.

Paragraph 9: Systematic Internalisers (midpoint crossing)

1298 This paragraph of the Schedule removes the reference to 'large in scale' in Article 17a of MiFIR, which currently restricts systematic internalisers from crossing at the midpoint within the best bid and offer to trades that are 'large in scale'. Removing the reference to 'large in scale' will allow systematic internalisers to execute client orders at the midpoint within the best bid and offer for all trades.

Paragraphs 10 to 12: Systematic internalisers (pre-trade transparency requirements for fixed income instruments and derivatives etc)

1299 Paragraphs 10 and 11 of the Schedule substitute Articles 18 and 21 (Obligation for systematic internalisers to make public firm quotes in respect of bonds, structured finance products, emission allowances and derivatives; Post-trade disclosure by investment firms, including systematic internalisers, in respect of bonds, structured finance products, emission allowances and derivatives) of MiFIR, and introduce two new articles. Further to this, paragraph 12 of the Schedule makes a consequential amendment to Article 22.

- 1300 Paragraph 1 of new Article 18 gives the FCA a power to make rules imposing pre-trade transparency requirements on systematic internalisers where the FCA determines relevant non-equity instruments should attract such requirements. The purpose of imposing requirements must be to aid price formation and allow for the fair evaluation of financial assets.
- 1301 Paragraph 2 of Article 18 limits this rule-making power to circumstances where the FCA considers its use is necessary or expedient for advancing at least one of the FCA's operational objectives as set out in section 1B(3) of FSMA 2000.
- 1302 Paragraph 3 of Article 18 requires the FCA to consider the impact on market liquidity when using the power to set pre-trade transparency requirements on systematic internalisers. This is to avoid the efficient functioning of markets being negatively impacted through reduced liquidity.
- 1303 Paragraph 4 of Article 18 provides examples of the sorts of requirements the FCA could impose using this power.
- 1304 Paragraph 5 of Article 18 provides that when making rules to set pre-trade transparency requirements for systematic internalisers, the FCA can set provisions for quotes issued by systematic internalisers to be updated or withdrawn.
- 1305 Paragraph 6 of Article 18 makes provision about the instruments that are in scope of this power.
- 1306 Paragraph 1 of Article 18a gives the FCA the power to make provision for waivers of any of the pre-trade transparency requirements it imposes using the rule-making power in Article 18.
- 1307 Paragraph 2 of Article 18a gives the FCA the power to decide what, if any, conditions should be applied to any waiver.
- 1308 Paragraph 3 of Article 18a gives the FCA the ability to withdraw a waiver from a systematic internaliser if the systematic internaliser is using it in a way that deviates from its original purpose or to avoid complying with regulation. The FCA must give the relevant systematic internaliser a notice to withdraw the waiver.
- 1309 Paragraph 4 of Article 18a gives the FCA the ability to suspend pre-trade transparency requirements for an instrument or class of instruments. The power is exercisable by notice.
- 1310 Paragraph 5 of Article 18a obliges the FCA to include certain things in such notices and also imposes requirements about the manner of their publication.
- 1311 Paragraph 6 of Article 18a limits the FCA's power to suspend pre-trade transparency requirements to instances where it considers that it is necessary to do so to advance its integrity objective, as set out in section 1D of FSMA 2000.
- 1312 Paragraph 7 of Article 18a specifies that when suspending pre-trade transparency requirements, the FCA should also have regard to its consumer protection objective and competition objective, as set out in sections 1C and 1E of FSMA 2000 respectively.
- 1313 Article 18b is inserted to complement the amendment to the 'systematic internaliser' definition in paragraph 8 of the Schedule. It requires investment firms who meet the definition of 'systematic internaliser' to notify the FCA, and the FCA to keep a list of all systematic internalisers for which it has received notification.
- 1314 Paragraph 1 of new Article 21 requires the FCA to make rules imposing post-trade transparency requirements on investment firms, including systematic internalisers, where

the FCA determines that relevant non-equity instruments should attract such requirements. The purpose of imposing requirements must be to aid price formation and allow for the fair evaluation of financial assets.

- 1315 Paragraph 2 of Article 21 limits the rule-making power outlined in paragraph (1) to circumstances where its use is either necessary, or expedient, in advancing at least one of the FCA's operational objectives as set out in section 1B(3) of FSMA 2000.
- 1316 Paragraph 3 of Article 21 requires the FCA to consider the impact on market liquidity when setting post-trade transparency requirements for investment firms, including systematic internalisers, using the power conferred by paragraph 1. This is to avoid the efficient functioning of markets being negatively impacted through reduced liquidity.
- 1317 Paragraph 4 of Article 21 provides examples of the sorts of requirements the FCA could impose in relation to transparency using this power.
- 1318 Paragraph 5 of Article 21 clarifies that when making rules about post-trade transparency requirements for investment firms, including systematic internalisers, using the powers in paragraph 1 the FCA can prescribe who should report a trade, when both parties to the trade are subject to post-trade transparency requirements.
- 1319 Paragraph 6 of Article 21 explains that the FCA can grant deferrals for investment firms, including systematic internalisers, who are subject to the post-trade transparency requirements that the FCA imposes through the rule-making power in paragraph 1.
- 1320 Paragraph 7 of Article 21 states that the FCA can impose any conditions it deems appropriate when granting a deferral.
- 1321 Paragraph 8 of Article 21 gives the FCA the ability to suspend any transparency requirement the FCA imposes using the rule-making power in paragraph 1 for an instrument or class of instruments. The power is exercisable by notice.
- 1322 Paragraph 9 of Article 21 obliges the FCA to include certain things in such notices and imposes requirements about the manner of their publication.
- 1323 Paragraph 10 of Article 21 limits the FCA's power to suspend post-trade requirements for systematic internalisers and investment firms to instances where it considers that it is necessary to do so to advance its integrity objective, as set out in section 1D of FSMA 2000.
- 1324 Paragraph 11 of Article 21 provides that when suspending post-trade transparency requirements for investment firms, including systematic internalisers, the FCA must also have regard to its consumer protection objective and competition objective, as set out in sections 1C and 1E of FSMA 2000 respectively.
- 1325 Paragraph 12 of Article 21 makes provision about the instruments and persons that are in scope of the FCA's rule-making power.

Paragraphs 13 and 14: Share Trading Obligation

- 1326 Paragraph 13 of the Schedule amends Article 23 MiFIR. Subparagraph (2) of this paragraph removes the requirement (known as the Share Trading Obligation or STO) for investment firms to ensure that the trades they undertake in shares admitted to trading on a venue take place on a UK regulated market, UK MTF, UK systematic internaliser, or an overseas trading venue assessed as equivalent.
- 1327 Subparagraph (3) changes the title of Article 23 MiFIR to reflect the removal of the STO. The only remaining requirement in Article 23 is the requirement for investment firms that operate an internal matching system which executes client orders in shares, depositary

receipts, ETFs, certificates and other similar financial instruments on a multilateral basis to ensure that they have permission to operate as an MTF.

1328 Paragraph 14 of the Schedule removes a reference to Article 23 in Article 1 of MiFIR which is no longer needed as a result of the removal of the STO.

Paragraphs 15 and 16: Realigning the scope of the derivatives trading obligation

1329 Paragraphs 15 and 16 of the Schedule alter the scope of the type of counterparties that are subject to the derivatives trading obligation (DTO), set out at Article 28 of MiFIR, in order to align it with the scope of counterparties subject to the Clearing Obligation (CO), which is contained in EMIR.

1330 Paragraph 15 amends Article 1(3) MiFIR to bring the overall application of the relevant Part of MiFIR, as regards financial counterparties and non-financial counterparties, into line with those expressed to be within scope of the DTO further to the changes made to Article 28 by paragraph 16, as described below.

1331 Paragraph 16 of the Schedule amends Article 28 MiFIR to specify that the financial and non-financial counterparties in scope of the DTO are those subject to the CO in EMIR.

1332 To ensure consistency with the CO, paragraph 16 also stipulates that intragroup transactions and transactions that are covered by temporary exemptions from the CO (which apply to transactions that reduce investment risks directly relating to the financial solvency of pension scheme arrangements) are out of scope of the DTO.

Paragraph 17: Suspension or modification of the DTO

1333 Paragraph 17 of the Schedule introduces a new Article 28a into MiFIR. Paragraph 1 of Article 28a MiFIR gives the FCA the power to suspend or modify the DTO if the FCA considers it necessary to prevent or mitigate disruption to financial markets and advances one or more of the FCA's operational objectives.

1334 Paragraph 2 outlines specific ways in which the DTO may be suspended or modified. It specifies that changes can be made in respect of either the persons, derivatives, or classes of derivatives to which the obligation applies, or to the trading venues on which the transactions must be concluded. It also gives the FCA the ability to make the suspension conditional on any criteria, as it deems appropriate.

1335 Paragraph 3 requires the FCA to have regard to its new competitiveness and growth objective in section 1EB of FSMA 2000 when using the power.

1336 Paragraph 4 explains that the FCA must consult with the Bank of England and the PRA if the suspension or modification could have an impact within the PRA's remit (for example, if the change would apply to a person which is authorised by the PRA or if it would impact the discharge of the PRA's functions).

1337 Paragraph 5 specifies that the FCA must obtain consent from HM Treasury before issuing a direction. Once the FCA has submitted a proposed direction to HM Treasury, HM Treasury must provide a written response within four weeks (and HM Treasury are deemed to consent to the issuing of the direction if no response is provided within that period).

1338 Paragraph 6 outlines that when giving a direction to modify the DTO, the FCA must also prepare a statement which explains the rationale behind issuing the direction, and any relevant guidance.

1339 Paragraph 7 requires the FCA to publish this direction and statement, and paragraph 8 requires HM Treasury to lay a copy of the direction and the statement before Parliament.

1340 Paragraph 9 outlines that if the FCA wish for a direction to have effect for longer than 6 months, it must publish a statement explaining why the criteria for the use of the direction are still being fulfilled. This statement is to be published as soon as reasonably practicable after each 6-month period (which starts on the day the direction is given).

1341 Paragraph 10 clarifies that the FCA may publish the statement in whatever way it thinks will best bring it to the attention of the public.

1342 Paragraph 11 clarifies that the FCA can vary a suspension or modification by issuing a new direction. Paragraph 12 specifies that the variation of a direction is not to be treated as the giving of a new direction in respect of the requirement to publish a statement after every 6-month period (as outlined above). It also explains that certain requirements applying to the issuing of an initial direction (such as the obligation to publish guidance in connection with the direction) do not apply to a direction which merely revokes a previous direction.

1343 Paragraph 13 stipulates that the issuance of an FCA direction to modify or suspend the DTO does not fall within scope of requirements in the Financial Services Act 2012 which concern the investigation of complaints against regulators in relation to the exercise of certain functions. Complaints relating to the exercise of this power of direction would not therefore need to be dealt with through the complaints scheme established under the relevant provisions of the 2012 Act.

Paragraph 18: DTO exemptions for risk reduction services

1344 Paragraph 18 of the Schedule substitutes Article 31 MiFIR. Paragraph 1 of the new Article 31 gives the FCA a rule-making power to disapply certain obligations in relation to either the transactions carried out as part of a risk reduction service, or persons meeting certain criteria who participate in the risk reduction services.

1345 Paragraph 2 limits the FCA's use of this rule-making power to circumstances where the FCA considers its use is necessary or expedient for advancing at least one of the FCA's operational objectives, as outlined in section 1B(3) FSMA 2000.

1346 Paragraph 3 establishes the criteria which risk reduction services must satisfy in order to be eligible for the exemption. Namely, to be capable of benefiting from the exemption, services must be post-trade services and must only produce trades which are non-price forming (i.e. that do not contribute to the price discovery process).

1347 Paragraph 4 specifies that when exercising this power, the FCA has the discretion to:

- a. Specify which risk reduction services are to be eligible for the exemptions with reference to any factors or criteria which it deems to be suitable (within the parameters of paragraph 3); and
- b. Impose any conditions on, or exceptions to, the use of the exemption that the FCA deems appropriate. It is through this provision that the FCA will be able to apply the conditions which were previously applied to the narrower exemption for portfolio compression, should it wish to.

1348 Paragraph (5) requires the FCA to consult with the Bank of England before using this power to make rules.

1349 Paragraph (6) specifies which requirements the FCA can exempt risk reduction services from under this rule-making power. These are:

- a. The best execution obligation, which obliges firms carrying out investment business to obtain the best possible deal for clients;

- b. A requirement in the FCA's Market Conduct sourcebook relating to the operation of a multilateral system from an establishment in the United Kingdom.
- c. The DTO.

Paragraphs 19 to 27: Consequential amendments in MiFIR

1350 These paragraphs of the Schedule set out minor and consequential amendments to MiFIR further to the changes detailed above.

Part 2 – Amendments to the European Market Infrastructure Regulation

Paragraphs 28 to 30: CO exemptions for risk reduction services

1351 Paragraph 28 of the Schedule introduces the changes to EMIR made by paragraphs 29 and 30.

1352 Paragraph 29 of the Schedule inserts Article 6b in EMIR.

1353 Paragraph 1 of Article 6b gives the Bank of England the power to disapply the clearing obligation, set out in Article 4 of EMIR, from transactions which stem from a post-trade risk reduction service. Post-trade risk reduction services consist of technical trades that reduce the risk of positions that market participants have entered into.

1354 Paragraph 2 limits the Bank's use of this rule-making power to circumstances where the Bank considers its use is necessary or expedient for advancing the Bank's key objective of financial stability under section 2A of the Bank of England Act 1998.

1355 Paragraph 3 establishes the criteria which risk reduction services must satisfy in order to be eligible for the exemption. Namely, it explains that the services must be post-trade, and must only produce trades which are non-price forming (i.e. which do not contribute to the price discovery process).

1356 Paragraph 4 specifies that when exercising this power, the Bank has the discretion to:

- a. Specify which risk reduction services are to be eligible for the exemptions with reference to any factors or criteria which it deems to be suitable (within the parameters of paragraph (3)); and
- b. Impose any conditions on, or exceptions to, the disapplication of the CO that the Bank deems appropriate.

1357 Paragraph 5 clarifies what counts as a risk reduction service for the purposes of this Article (i.e. that it must be a service provided by two or more counterparties for the purpose of reducing non-market risk in derivatives portfolios, such as portfolio compression).

1358 Paragraph 30 of the Schedule introduces Article 84c into EMIR, which provides how provisions of Part 9A of FSMA 2000 concerning rule-making will apply in relation to Article 6b.

Part 3 – Amendments to the EU Securitisation Regulation 2017

Paragraphs 31 and 32: Amendments to the UK Securitisation Regulation

1359 Paragraph 31 sets out that the UK Securitisation Regulation will be amended by this Schedule.

1360 Paragraph 32 amends definitions in Article 2 of the UK Securitisation Regulation to add a definition of 'STS equivalent non-UK securitisation'. It also revokes the definition of 'third

country', because this term is being replaced with references to 'country or territory outside of the United Kingdom' throughout the Regulation.

Paragraph 33: Designation of countries or territories in relation to STS equivalent non-UK securitisations

- 1361 Paragraph 33 inserts new article 28A into the UK Securitisation Regulation.
- 1362 Paragraph 1 of new Article 28A confers on HM Treasury a power to make regulations designating a country or territory in relation to specified descriptions of securitisations ('STS equivalent non-UK securitisations.')
- 1363 Paragraph 2 of new article 28A allows HM Treasury to do so only if it is satisfied that the law and practice of the country or territory in relation to such securitisations has equivalent effect to the UK Securitisation Regulation and the 2018 Regulations as they relate to UK STS securitisations ('applicable UK law', as defined by paragraph 3).
- 1364 Paragraph 4 of new article 28A says that, in making such regulations, HM Treasury must have regard to whether the FCA and, where relevant, the PRA, have established effective cooperation arrangements with the competent authorities of the country or territory being designated, as well as any other matter it considers relevant.
- 1365 Paragraph 5 sets out that HM Treasury may request a report in writing from the FCA on the law and practice of a country or territory in relation to specified securitisations. This can be requested when HM Treasury is considering whether to make, vary or revoke its designation of a country or territory.
- 1366 Paragraph 6 specifies what the FCA must do when HM Treasury requests such a report.
- 1367 Paragraph 7 sets out that the regulations made by HM Treasury may specify matters that must be considered by an institutional investor carrying out due diligence under Article 5(3) of the UK Securitisation Regulation, prior to holding a position in an STS equivalent non-UK securitisation.
- 1368 Paragraphs 8, 9 and 10 set out the requirements for regulations made by HM Treasury under new Article 28A.

Paragraphs 34 to 43: Minor and consequential amendments

- 1369 Paragraphs 34 to 43 make minor and consequential amendments including:
- a. Replacing reference to 'third country' with reference to 'country or territory outside the United Kingdom' in the UK Securitisation Regulation and the Securitisation Regulations 2018 (S.I. 2018/1288);
 - b. Revoking the requirement for HM Treasury to review the UK Securitisation Regulation in relation to whether an equivalence regime should be introduced in the area of STS securitisations, because this review has been completed and new Article 28A inserts such a regime; and
 - c. To ensure STS equivalent non-UK securitisations receive the same prudential treatment as UK STS securitisations in the CRR and Solvency II.

Part 4 – Amendments to the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017

- 1370 Paragraph 44 of the Schedule introduces the changes to the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 made by paragraphs 45 to 50.

These Explanatory Notes relate to the Financial Services and Markets Bill as brought from the House of Commons on 8 December 2022 (HL Bill 80)

Paragraph 45: Position limits for commodity derivatives

- 1371 Paragraph 45 of the Schedule introduces regulation 15A to the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (MiFI Regulations).
- 1372 Paragraph (1) of regulation 15A gives the FCA a rule-making power to require the operators of trading venues to set and enforce position limits and position management controls in respect of specific commodity derivative contracts, as well as classes of commodity derivatives. This will allow the FCA to establish a framework which will govern these regimes.
- 1373 Paragraph (2) limits the ability of the FCA to exercise this rule-making power to instances where the FCA considers that doing so is necessary or expedient for advancing at least one of its operational objectives, as outlined in section 1B(3) of FSMA 2000.
- 1374 Paragraph (3) explains that the FCA must have regard to its competitiveness and growth objective in section 1EB of FSMA 2000 when making rules under paragraph (1).
- 1375 Paragraph (4) clarifies that the FCA can use its rule-making power to set out specific matters that trading venues need to consider when establishing position limits and management controls.
- 1376 Paragraph (5) notes that the FCA can specify by rules certain circumstances when there will be exemptions from position limits and position management controls established under the framework set out in rules made under paragraph (1).
- 1377 Paragraph (6) clarifies the meaning of ‘position management controls’ which are covered by this rule-making power. It does so by giving a high-level, inexhaustive, list of arrangements which are encompassed by ‘position management controls’. This list includes monitoring the exposure of persons holding commodity derivative contracts, as well as requiring information from them about the size of the positions they have entered into.
- 1378 Paragraphs (7) through to (10) outline the way in which various elements of the wider existing legislative framework apply to the rule-making power conferred by this regulation

Paragraph 46: FCA power to establish position limits

- 1379 Subparagraphs (2) and (3) of paragraph 46 to the Schedule amend regulation 16 to remove the obligation for the FCA to establish position limits on commodity derivative contracts traded on a trading venue and economically equivalent over-the-counter (OTC) contracts. As amended, regulation 16 gives the FCA the ability to set position limits on contracts that are in scope of the rules developed under regulation 15A (the FCA’s rule-making power over trading venues).
- 1380 Subparagraph (4) introduces changes to regulation 16 to limit the FCA’s ability to use this power to circumstances where the FCA considers that doing so is necessary to advance at least one of its operational objectives (as outlined in 1B(3) of FSMA 2000). Subparagraph (4) also provides that position limits which the FCA sets directly take precedence over position limits imposed by venues (even if this is as a result of the FCA requiring the venue to impose such limits through the use of its rule-making power). This effectively creates an emergency power through which the FCA can intervene in the market to impose position limits directly, in instances where the limits imposed by venues in accordance with the FCA’s broader framework are insufficient to uphold its objectives.
- 1381 Subparagraph (5) removes various requirements which are no longer necessary as a result of the FCA no longer being obliged to impose limits on commodity derivative contracts.

Paragraph 47: FCA power to require information on commodity derivatives

1382 Paragraph 47 updates the FCA's power to require information regarding commodity derivatives contracts in order to take account of amendments introduced by paragraphs 45 and 46 of the Schedule.

1383 Subparagraphs (2) to (4) of this paragraph to the Schedule remove references to 'over-the-counter' contracts. They specify that the FCA can require information, notably, about contracts which belong to a class in respect of which the FCA is considering making rules and imposing requirements further to regulation 15A.

Paragraph 48: FCA power to intervene in setting position limits

1384 Paragraph 48 updates the FCA's power to intervene in respect of position in commodity derivatives to account for the changes made to other parts of the position limits regime.

1385 To achieve this, subparagraph (2) of this paragraph to the Schedule updates the criteria under which the FCA can intervene directly, by limiting its use of this power to situations where the FCA considers intervention is necessary for advancing at least one of its operational objectives.

1386 Subparagraph (3) clarifies that the FCA may intervene and set restrictions on positions in commodity derivatives, even when doing so means imposing a more stringent requirement than those which are being imposed by trading venues in accordance with the FCA's overarching framework governing the setting of position limits.

1387 Subparagraph (4) removes 'economically equivalent over the counter contracts' from the scope of the power.

Paragraphs 49: Interpretation

1388 Paragraph 49 to the Schedule makes updates to relevant definitions in regulation 29 of the MiFI Regulations. It:

- a. clarifies that the market operators which are subject to the FCA's rule-making power in respect of position limits and position management controls are the same market operators as defined more generally in MiFIR;
- b. reiterates the meaning of "relevant person" provided by regulation 15A(10).

Paragraph 50: Consequential revocations

1389 This paragraph of the Schedule sets revocations of related legislation to be made in consequence of the changes to the MiFI Regulations described above.

Part 5 – Amendments relating to critical third parties

Paragraphs 51 to 71: Consequential amendments relating to critical third parties

1390 Because electronic money institutions (EMIs) as well as authorised payment institutions, small payment institutions and registered account information services providers can be designated as critical third parties (CTPs) and thus subject to the new Part of FSMA 2000, this Schedule makes consequential changes to the Electronic Money Regulations 2011 and the Payment Services Regulations 2017 to accommodate the new CTP regulatory regime.

Schedule 3: New Schedule 6B to FSMA 2000

1391 This Schedule is to be inserted as Schedule 6B into FSMA 2000.

1392 This Schedule gives an illustrative and non-exhaustive list of examples of the types of activities which HM Treasury may designate using the powers conferred on it by new section 71K.

Schedule 4: FMI sandboxes

1393 Paragraphs (1) to (9) of the Schedule are intended to be illustrative as to the operational structure of an FMI sandbox and the powers that may be conferred by regulation on the regulators in its operation and oversight.

Paragraph 1 – Participation

1394 Subparagraph (1) to (4) outlines the type of eligibility criteria and procedure that may be applied for a particular iteration of an FMI Sandbox.

1395 Subparagraph (5) suggests that FMI participants notify other persons likely to engage either directly or indirectly in its FMI activities. For example, this would ensure that the market users of an FMI participant which is participating in an FMI sandbox, do not inadvertently end up participating in an FMI Sandbox without any warning or consent.

Paragraph 2 – Technology

1396 Testing the efficiency or effectiveness of technology is an example of how the FMI sandbox may be employed.

Paragraph 3 – Practices

1397 Testing the efficiency or effectiveness of new or different practices is an example of how the FMI sandbox may be employed.

Paragraph 4 – Financial Instruments

1398 An iteration of an FMI sandbox could specify the type of activity; the type and form of financial instruments; and any limitations imposed on an FMI participant as part of its participation in the FMI sandbox.

Paragraph 5 – Settlement of Payments

1399 An iteration of an FMI Sandbox could specify how transactions are to be settled and the form in which the settlement takes place.

Paragraph 6 – Requirements

1400 Sub-paragraph (1): The legislative framework of an FMI sandbox would allow the regulations to impose requirements on persons participating in an FMI sandbox and other persons engaged in connection with or otherwise not participating directly in an FMI sandbox.

1401 Sub-paragraph (2): The regulations could confer a power on the regulator to make its rules and technical standards applicable for the purposes of an FMI sandbox arrangement.

Paragraph 7 – Co-operation

1402 This paragraph is self-explanatory.

Paragraph 8 – Transparency and reporting

1403 Sub-paragraphs (1) to (3) are indicative of the reporting and accountability provisions that could be adopted to ensure that an appropriate level of information is provided for the duration of an FMI sandbox, particularly as it relates to the reporting obligation, as provided for in clause 14.

Paragraph 9 – Enforcement

1404 Sub-paragraphs (1) to (3) are indicative of an enforcement regime that could be in place during the operation of an FMI sandbox. Provision could be made to allow regulators to draw on their existing enforcement powers and tailor them in accordance with a particular iteration of an FMI sandbox, to include, suspending or terminating a person’s participation within an FMI Sandbox and the imposition of civil penalties.

Schedule 5: Financial promotion: related amendments

1405 Paragraph (1) is self-explanatory.

1406 Paragraph (2) refers to section 1H of FSMA 2000. The amendment expands the definition of “regulated financial services” to now include services provided by authorised firms communicating, or approving communications by others, of “inducements” to engage in investment activity. Inclusion of the term “inducement” provides that the FCA’s operational objectives are applied to the full range of financial promotion activity and specifically as it relates to the new section 55NA(7) and (8)(b) of FSMA 2000.

1407 Paragraph (3) refers to section 25 of FSMA 2000. The change amends the reasonable grounds for a defence relating to a contravention of the general restriction on financial promotions under section 21 of FSMA 2000, to accommodate the new subsection 2A. This change means that in proceedings for an offence under section 25 of FSMA 2000, it is a defence for the accused to show that they believed on reasonable grounds that the communication had been approved by an authorised firm who had been granted permission under the regulatory gateway or was otherwise exempt.

1408 Paragraph (4) refers to section 55A of FSMA 2000, which relates to an application for permission to carry on one or more regulated activities. This amendment clarifies that an application for permission under the regulatory gateway is distinct and separate from this.

1409 Paragraph (5) refers to section 55O of FSMA 2000, which relates to the imposition of a requirement where control is acquired over a UK authorised firm with a Part 4A permission and there are no grounds for the FCA to exercise its own initiative power. The amendments take account of the regulatory gateway regime for these purposes.

1410 Paragraph (6) refers to section 55R of FSMA 2000. This amendment expands the remit within which the regulator can consider persons connected with a firm applying for a permission. When considering a new application under the regulatory gateway, or a variation or cancellation of an existing gateway permission, the regulator may consider persons connected with that firm where it is relevant.

1411 Paragraph (7) refers to section 55U of FSMA 2000, which relates to applications under Part 4A to carry on regulated activities. This amendment sets out that where an application is made for permission in respect of the regulatory gateway, or for variation of an existing permission, a statement must be included of the permission or variation sought.

1412 Paragraph (8) refers to section 55V of FSMA 2000. The amendment expands the requirement on the regulator to provide written notice when it grants an application for permission under the regulatory gateway, or for the variation or cancellation of such a permission.

1413 Paragraph (9) refers to section 55X of FSMA 2000, specifying when the regulator must give warning and decision notices to applicants. The amendment expands the obligation on the regulator to give the applicant a warning notice when it proposes to grant or vary a permission under the regulatory gateway, subject to other terms the regulator considers appropriate (which may be narrower than the application sought). In addition, if the

regulator makes a decision to grant or vary a permission so that it is subject to other such terms, the regulator must give the applicant a decision notice.

1414 Paragraph (10) refers to section 55Y of FSMA 2000, which relates to the procedures the regulator must follow when exercising its own-initiative power. The amendments provide that when the regulator exercises its own-initiative power to vary, or proposes to vary, a gateway permission, it must follow the pre-existing procedure under section 55Y of FSMA 2000. This includes a requirement that if the FCA varies, or proposes to vary, a permission under the regulatory gateway with immediate effect, it must give the firm written notice.

1415 Paragraph (11) refers to section 55Z of FSMA 2000, which relates to the procedure for cancelling a permission. The amendments expand the remit of this procedure to take into account the regulatory gateway regime.

1416 Paragraph (12) refers to section 55Z3 of FSMA 2000, which relates to an applicant's right to refer a regulator's decision or exercise of its own-initiative variation or requirement power, to the Upper Tribunal. The amendment allows a firm to refer the FCA's exercise of its own-initiative power to vary or cancel a permission under the regulatory gateway to the Upper Tribunal.

1417 Paragraph (13) refers to section 395 of FSMA 2000, which relates to the FCA's and the PRA's procedures. The amendment means that within these pre-existing procedures, the definition of a "supervisory notice" is expanded. It now includes the written notice that the FCA must provide under the new section 55Y(4A) of FSMA 2000, which applies if the FCA varies, or proposes to vary, a permission under the regulatory gateway with immediate effect.

Schedule 6: Digital settlement assets

Part 1 – Amendments to the Banking Act 2009

1418 Schedule 6 extends the application of the existing scope of Part 5 of the Banking Act 2009 to include payment systems using digital settlement assets and digital settlement asset service providers. Therefore, consequential amendments are made to accommodate the differences between systems using digital settlement assets and more traditional payments systems (those which are currently regulated). This necessitates the inclusion of new clauses covering those who are service providers connected to a digital settlement asset payment system. For example—

- a. Paragraph 4(4) of the Schedule introduces a definition of "digital settlement assets" as a new section 182(4A) of the Banking Act 2009, which includes a right to or interest in a digital settlement asset.
- b. Paragraph 4(5) of the Schedule adds a new section 182(5A) of the Banking Act 2009, intended to capture firms that provide one or more services in relation to a payment system chain. These could be those that safeguard, or safeguard and administer (such as wallets), stablecoin creators or issuers, exchange providers. Those who set rules are defined as "digital settlement asset service providers". This reflects the way in which stablecoin functions can be distributed across multiple entities. The same paragraph adds a new section 182(5B) which defines what "digital settlement asset exchange providers" are.
- c. Paragraph 4(5) adds a new section 182(5C) of the Banking Act 2009 allowing HM Treasury to amend the definitions in the new sections 182(4A) and 182(5A), via affirmative procedure, as necessary for HM Treasury to remain agile and responsive to market developments and safeguard against risks for consumer protection and

financial stability purposes. Without such futureproofing, there is the risk of current definitions quickly becoming outdated and the measure would not capture entities intended for regulation.

1419 Paragraph 9 adds a new section 184A of the Banking Act 2009 enabling HM Treasury to issue recognition orders in respect of payments systems using digital settlement assets as is currently the case for traditional payment systems as well as a new section 185A at paragraph 10 which sets out the recognition criteria for such digital settlement assets service providers mirroring sections 184 and 185 for the power and criteria to make designation orders for traditional payment systems. Paragraph 17(b) adds a new section 190A which allows the Bank to direct systemic digital settlement assets to establish service provider rules mirroring its powers under section 190 as it can direct so for system rules.

1420 Paragraph 20 adds a new section 192A where the Bank may give direction to the FCA to refrain from certain action with respect to recognised digital settlement asset payment systems and recognised digital settlement asset service providers. This seeks to address the situation where an existing firm regulated by the FCA under either the EMR 2011 and the PSR 2017 is recognised as systemic – such that it is also regulated by the Bank in relation to financial stability risks under Part 5 of the Banking Act 2009.

1421 Paragraph 32(b) inserts a new section 203C which requires that the Bank issue a policy statement with respect to its overall policy approach with regard to its oversight of recognised digital settlement asset payment systems and recognised digital settlement asset service providers under Part 5 of the Banking Act 2009. This will ensure the means and mechanics of the new regime are sufficiently communicated to those operating within the market through a coordinated approach between the regulators, in this case the FCA who the Bank is required to consult with.

1422 Paragraph 37 amends section 206A to insert new subsections 206A(2A), 206(2B) and 206(3A) which confer powers on the Treasury to make order(s) applying any sections under Part 5 of the Banking Act 2009 to those service providers who provide services to DSA service providers. This is intended to capture other service providers in relation to recognised DSA service providers or those who may themselves potentially become systemic but could not be recognised as systemic by HMT for systemic regulation in their own right.

1423 Paragraph 38 inserts a new section 206AA to acknowledge the difference between the normal payments chain and the digital settlement asset payments chain. In doing so, it seeks to capture service providers connected with a recognised payment system using digital settlement assets.

Part 2 – Amendments to FSBRA 2013

1424 This clause extends the application of the existing scope of Part 5 of FSBRA 2013 to include payment systems using digital settlement assets and digital settlement asset service providers. Paragraph 41(2) inserts a new section 41(2A) amending the reference to funds to include digital settlement assets and then defines digital settlement asset, mirroring the Banking Act 2009 definition. This is so that the regulatory oversight for regulated payment systems which HM Treasury controls via designation orders, will be brought within scope of the PSR power as set out above.

1425 Paragraph 42(3) inserts a new section 42(5A) defining payment service providers mirroring the definition under the new section 182(5A) of the Banking Act 2009.

1426 Paragraph 43 amends section 98(5)(c) with respect to amending the FCA's duty to ensure a co-ordinated exercise of functions so that such duties are extended with respect to its

functions under the EMR 2011 and its functions in regulating credit institutions with Part 4A permissions and authorised Payment institutions that it regulates under PSR 2017.

1427 Paragraph 44 inserts definitions of “digital settlement asset” and “digital settlement asset exchange provider” to section 110 of FSBRA 2013. The latter cross-references back to the definition of “digital settlement asset exchange provider” in section 182(5B) of the Banking Act 2009. This ensures that, should the definition in the Banking Act 2009 be amended, the amendment will automatically flow through to FSBRA 2013.

Schedule 7: Accountability of the Payment Systems Regulator

1428 Paragraph 2 of the Schedule inserts new subsection (11A) in section 39 of FSBRA 2013 for the accountability of the Payment Systems Regulator (PSR) and in section 39(12) substitutes 107A for 107.

Paragraph 3: Regulatory principles of the PSR

1429 Paragraph 3 amends paragraph (c) of section 53 of FSBRA 2013 to embed the UK’s net zero target into the regulatory principles of the PSR, by confirming that the sustainable growth principle to which the PSR must have regard includes consistency with contributing towards achieving compliance with the UK net zero emissions target

Paragraph 4: Recommendations by HM Treasury

1430 Paragraph 4 inserts new section 102A which enables HM Treasury to make recommendations to the PSR about aspects of government economic policy to which the regulator should have regard, similar to section 1JA of FSMA 2000. The PSR must respond to those recommendations, in a corresponding set of provisions to clause 33.

Paragraphs 5 to 7: Corresponding provisions

1431 Paragraphs 5 and 6 insert into FSBRA 2013 corresponding provision for the PSR as clause 29 of this Bill. Specifically, paragraph 5 inserts section 102B (Matters to consider when imposing generally applicable requirements) before section 103 (regulator’s general duty to consult). Paragraph 6(a) substitutes “Part” for “section” in 104(1), in the words before paragraph (a). Paragraph 6(b) inserts paragraph (ba) “an explanation of the ways in which having regard to specified matters under section 102B(2) has affected the proposed requirement” after 104(3)(b). Paragraph 6(c) inserts new subsections (12A) and (12B) after subsection (12). New subsection (12A) removes the requirement to provide the explanation referred to in subsection (3)(ba) in relation to any requirement if the requirement changes an existing requirement and the changes consist of, or include changes which, in the Payment Systems Regulator (PSR’s) opinion, are not material. New subsection (12B) provides that where an explanation is not provided by virtue of subsection (12A), the draft of the requirement must be accompanied by a statement of the PSR’s opinion.

1432 Paragraph 7 inserts into FSBRA 2013 corresponding provision for the PSR as clauses 34, 27 and 28. Adjustments are made to reflect that the PSR operates by imposing generally applicable requirements, such as general directions, and is not a rule-making authority. References to the Financial Policy Committee (“FPC”) are also omitted as the FPC has no power of direction in relation to the PSR.

Paragraph 8: International trade obligations for the PSR

1433 Paragraph 8 inserts a new section 107A into FSBRA 2013, requiring the PSR to notify HM Treasury of a relevant action if it considers there to be material risk that the action would be

incompatible with the UK's international trade obligations. This is a corresponding provision to clause 31, adjusted to refer to the PSR.

1434 Subsections (6), (8) and (9) of clause 31 are not relevant to the PSR, so have no corresponding provision in this new section.

Paragraphs 9 to 11: Ancillary adjustments to FSBRA 2013

1435 Paragraph 9 inserts into section 110(1) of FSBRA 2013 a definition of a generally applicable requirement, which has the meaning given by section 104(1) of FSBRA 2013.

1436 Paragraph 10(b) inserts into section 143(2), after paragraph (b), a new subsection (ba) matters to consider when imposing generally applicable requirements and (bb) power to require imposition of generally applicable requirements, which ensure that the statutory instruments HM Treasury is permitted to make in relation to the accountability of the PSR require affirmative procedure.

1437 Paragraph 11 inserts into Schedule 4 of FSBRA 2013 a requirement that the PSR must include in its annual report any engagement with its statutory panel, in a corresponding provision to clause 35.

Paragraph 12: Engagement with Parliamentary Committees for the PSR

1438 Paragraph 12 amends Schedule 4 to FSBRA 2013, inserting new paragraph 14A into the Schedule to establish the requirement for the PSR to notify the Treasury Select Committee when it publishes a consultation.

1439 Paragraph 12 also inserts new paragraph 14B into Schedule 4 to FSBRA 2013, which sets out the requirement that the PSR must reply to the chair of any Parliamentary Committee that has responded to a consultation published by the PSR. The qualification in new paragraph 14B(5) that the PSR does not need to supply any information that they consider is against the public interest operates only as a qualification of the new statutory duty itself. It does not purport to speak for any wider purpose (and therefore does not purport to limit the inherent jurisdiction of Parliament to require the production of papers or to summon witnesses).

Schedule 8: Cash access services

Part 1 – New Part 8B of FSMA 2000

1440 Part 1 of this Schedule inserts a new Part 8B titled “Cash Access Services” into FSMA 2000.

Section 131M: Overview

1441 This section provides a summary of the new Part 8B of FSMA 2000, which creates legislation to protect access to cash.

1442 It explains that Part 8B requires HM Treasury to publish a cash access policy statement (see section 131P), permits HM Treasury to designate legal persons that are involved in the provision of cash deposit and withdrawal services (which are defined in section 131N subsection (3)), and provides the Financial Conduct Authority (FCA) with powers over those persons designated by HM Treasury.

Section 131N: Cash access services and coordination arrangements

1443 This section defines the use of the terms “cash”, “cash access service”, “cash access coordination arrangements” and related terms for the purposes of this Part.

1444 Subsection (2) defines “cash” as banknotes and coins.

These Explanatory Notes relate to the Financial Services and Markets Bill as brought from the House of Commons on 8 December 2022 (HL Bill 80)

1445 Subsection (3) defines “cash access service” as a service which enables cash to be placed on a relevant current account (as defined in section 131O) or which enables cash to be withdrawn from a relevant current account. Examples may include, but are not limited to, a cash withdrawal from an ATM or cash machine, cashback, or an over-the-counter cash withdrawal or deposit at a bank branch or Post Office.

1446 Subsection (4) defines “cash access coordination arrangements” as arrangements which are designed to coordinate the provision of cash access services by multiple providers, but which do not directly provide these services to any person. The core functions of such coordination arrangements may include monitoring cash access, assessing whether cash provision meets community needs (for example, in response to a closure or request from a local community), and commissioning the provision of solutions where required.

1447 Subsection (5) defines terms in relation to “cash access coordination arrangements”. A reference to an “operator” of such arrangements means any person with responsibility for managing or operating such arrangements. A reference to the operation of such arrangements includes their management. Subsection (6) uses the same definition of ‘relevant current account’ as that contained under section 131O.

Section 131O: Current accounts and relevant current account providers

1448 This section defines “current account”, “relevant current account”, and “relevant current account provider” for the purposes of this Part. These definitions are used in other parts of the legislation, for example, to specify the types of accounts that are within scope of the definition of cash access services (see section 131N) under this Part and the type of firm that HM Treasury may designate (see 131R).

1449 Subsection (2) describes the type of account that is intended to be within scope of this Part. It defines “current account” as an account by means of which one or more named persons are able to place cash, withdraw cash, and execute and receive “payment transactions” to and from third parties including execution of credit transfers. This is to cover the types of account by which customers facilitate their day-to-day transactions in cash. Subsection (3) defines “payment transaction” as an act initiated by the payer or payee, or on behalf of the payer, of placing, transferring or withdrawing funds.

1450 Subsections (4) and (5) define a “relevant current account provider” and “relevant current account”. “Relevant current accounts” are current accounts provided by legal persons in reliance on a Part 4A permission under FSMA 2000. “Relevant current account providers” are the legal persons that provide such accounts, subject to the exemptions in subsection (5). These are banks and building societies, and are the entities potentially in scope of new Part 8B (subject to the designation process set out in section 131R). Subsection (5) lists persons that are not “relevant current account providers” for the purposes of this Part. These are credit unions (as defined in the Credit Unions Act 1979 or Credit Unions (Northern Ireland) Order 1985); societies that are registered under Friendly Societies Act 1974 or incorporated under the Friendly Societies Act 1992.

1451 Subsection (6) permits HM Treasury to amend the definitions of this Part and any other related provisions of this Part.

Cash access policy statement

Section 131P: Cash access policy statement

1452 This section requires HM Treasury to set out a policy statement and describes the contents and process relating to such a policy statement. This enables HM Treasury to set out its policy with regards to access to cash withdrawal and deposit services, which the FCA must

have regard to when exercising its functions to protect access to cash (see subsection 131U(2)).

1453 Subsection (1) provides that HM Treasury must prepare a cash access policy statement.

1454 Subsection (2) defines a policy statement as a statement of the government's policies for cash access services in the United Kingdom, or a part of the United Kingdom.

1455 Subsection (3) provides that the policy statement may state policies in relation to cash deposit and withdrawal services, services provided in relation to current accounts of different descriptions (for example personal and business current accounts) and services provided in urban and rural areas, among other things.

1456 Subsection (4) provides that when preparing a policy statement under this section HM Treasury must consult the FCA and have regard to any report provided to it by the FCA (see section 131Q).

1457 Subsections (5) and (6) provide that HM Treasury must publish a cash access policy statement in a manner that it thinks fit, and must keep the statement under review and may prepare a revised statement.

Section 131Q: Provision of reports to assist HM Treasury

1458 This section requires the FCA to provide reports to HM Treasury under this Part, if requested to do so by HM Treasury. This is to provide HM Treasury with the necessary data on cash provision in the UK required to support HM Treasury's roles under the legislation, preparing the policy statement (section 131P) and designating persons (section 131R).

1459 Subsection (1) provides that the FCA, when requested by HM Treasury, must provide a report to HM Treasury.

1460 Subsection (2) sets out that HM Treasury may only request a report under this section for a report it reasonably requires in connection with the preparation of a policy statement (section 131P) or a decision on whether or not to designate a person for the purposes of this Part (section 131R).

1461 Subsection (3) determines the process for HM Treasury to make a request for a report. It states that a request must be made in writing and allows HM Treasury to require the FCA to send a report within a reasonable period of time as may be specified in the request.

1462 Subsection (4) determines that the FCA is not prevented or restricted from sharing information with HM Treasury for the purposes of providing reports to HM Treasury under this Part by section 348 of FSMA 2000 (restrictions on disclosure of confidential information), or regulations made under section 349, notably the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001. As per subsection (5), the disapplication of section 348 and regulations made under 349 in subsection (4) does not apply in relation to information provided to the FCA by a regulatory authority outside the United Kingdom.

Designation

Section 131R: Designation

1463 This section permits HM Treasury to designate persons for the purposes of this Part and specifies the procedure which HM Treasury must follow to designate a person. It provides HM Treasury with the ability to bring banks, building societies and operators of cash coordination arrangements within scope of the FCA's functions relating to access to cash described below.

1464 Subsection (1) allows HM Treasury to designate a legal person if the person is a relevant current account provider (i.e. a bank or building society - see section 131O), or the operator of cash access coordination arrangements (see subsection 131N subsection (5)) if at least one of the participants in those arrangements is a designated relevant current account provider.

1465 Subsections (2) to (5) set out the procedure relating to designation under this Part. Subsection (2) states that a person is designated by giving the person a designation notice, and subsection (3) states that a designation notice must specify whether the person is designated for the whole of the United Kingdom, Great Britain only, or Northern Ireland only. Subsection (4) states that a designation notice to the operator of cash access coordination arrangements must specify the arrangements in as much detail as is reasonably practicable. Subsection (5) provides that before HM Treasury can give a designation notice to a person it must consult the FCA, notify the person, and consider any representations made.

1466 Subsection (6) provides that a designated person must comply with rules made by the FCA (see section 131V) and any directions given by the FCA (see section 131W).

Section 131S: Designation criteria

1467 This section sets out the purpose and criteria that HM Treasury must have regard to when designating a person.

1468 Subsection (1) provides that HM Treasury may only designate a person if it is satisfied that this is likely to further the FCA's purpose of seeking to ensure reasonable provision of cash access services (see section 131U).

1469 Subsection (2) sets out criteria that HM Treasury must have regard to when considering whether to designate a relevant current account provider. These are:

- a. the distribution of cash access services operated by the provider in the United Kingdom, Great Britain or Northern Ireland (as the case may be);
- b. the distribution in the United Kingdom, Great Britain or Northern Ireland (as the case may be) of persons holding current accounts provided by the provider;
- c. the provider's share of the current account market in the United Kingdom, Great Britain or Northern Ireland (as the case may be);
- d. the total value of the deposits held in current accounts provided by the provider in the United Kingdom, Great Britain or Northern Ireland (as the case may be).

1470 Subsection (3) makes clear that where a relevant current account provider is part of a group which includes other relevant current account providers, for example where there may be multiple banks within a banking group, references to "provider" are to be read as both the relevant current account provider HM Treasury is considering whether to designate and each of the other relevant current account providers that are part of the group. This allows HM Treasury, when considering whether to designate a person, to take into account the other relevant current account providers that are part of the group in accordance with the criteria in subsection (2).

1471 Subsection (4) provides that for the purposes of subsection (3) a "group" means the definition applied under section 421 of FSMA 2000, with the omission of subsection (1)(g) of that section as this relates to friendly societies, which are excluded from the definition of relevant current account providers under this Part.

Section 131T: Cancellation or variation of a designation notice

1472 This section permits HM Treasury to cancel or vary a designation notice given to a person. If HM Treasury varies a notice given to a person so that person is designated for a new or different part of the United Kingdom from the previous notice, sections 131R (3) and (5) and 131S apply. This means that:

- a. the varied document must specify for which part of the United Kingdom the person is designated (section 131R subsection (3));
- b. HM Treasury must consult the FCA, notify the person and consider any representations made (section 131R subsection (5));
- c. the purpose, criteria and related provisions set out in section 131S apply.

Supervision of designated persons

Section 131U: Purpose for which FCA must exercise functions under this Part

1473 This section sets out the purpose for which the FCA must exercise its functions in order to protect access to cash under this Part, and the considerations that the FCA must have regard to in relation to achieving this purpose.

1474 Subsection (1) provides that the FCA must exercise its functions under this Part for the purpose of seeking to ensure reasonable provision of cash access services in the United Kingdom or a part of the United Kingdom.

1475 Subsection (2) provides that for the purposes of this Part the FCA may determine what is meant by “reasonable provision” of cash withdrawal and deposit services, while requiring the FCA to have regard to the HM Treasury cash access policy statement currently in effect and any other matters that the FCA thinks appropriate.

1476 Subsection (3) and (4) supports the FCA’s ability to use its powers to address issues with access to cash at a local level. It provides that in making a determination of reasonable provision the FCA must have regard to any impacts of local deficiencies in the provision of cash access services that it considers to be significant, to the extent that it is aware of them. Subsection (4) defines a local deficiency as circumstance which, the FCA believes, limits the ability of persons in any local area in the United Kingdom to withdraw or place cash from or on a relevant current account.

1477 Subsections (5) and (6) provide that in determining whether there are local deficiencies, and their impacts, the FCA must have regard to the cash access policy statement currently in effect and any other such matters it thinks appropriate. Subsection (6) lists what these other matters may include (but are not limited to), such as the number of persons likely to be affected, their characteristics, and the likely impact upon them.

Section 131V: FCA rules

1478 This section gives the FCA powers to make rules that apply to designated persons as the FCA thinks is necessary or expedient in order to achieve the purpose set out in section 131U. The process for the FCA to make rules in relation to this Part reflects the process under the existing FSMA 2000 regime with appropriate modifications to ensure it functions effectively.

1479 Subsection (2) explains that rules made by the FCA under this section only apply to a designated person in relation to the part of the United Kingdom for which they are designated.

1480 Subsection (3) applies 137T (general supplementary powers for rules made by a regulator) FSMA 2000 to any rules made by the FCA under this section. This subsection sets out that references to “authorised persons, activity, or investment” in section 137T means designated persons (as defined section 131R) and their activities. Section 137T as it is applied to section 131V supplements the rule-making power, for instance permitting the FCA to make rules that make different provision for different cases and in respect of different descriptions of designated persons.

1481 Subsection (4) applies section 138A (modification or waiver of rules) FSMA 2000 to any rules made by the FCA under this section, except subsection (4)(b) of that section. Section 138A as it is applied to 131V has the effect of allowing the FCA to modify how rules made under section 131V apply to particular designated persons (or disapply them entirely).

1482 Subsection (5) applies section 138I (consultation by FCA before making rules) FSMA 2000 to any rules made by the FCA under this section. Section 138I as it is applied to 131V requires the FCA to consult and publish a draft of proposed rules before such rules may take effect, and to accompany any draft rules with explanation of the FCA’s reasons for believing the proposed rules are compatible with the FCA’s purpose to seek to ensure the reasonable provision of cash access services, as set out in section 131U.

Section 131W: Power to direct designated persons

1483 This section gives the FCA powers to give a direction under this section to a designated person.

1484 Subsection (1) provides that the FCA may only give a direction if it thinks the direction is desirable for the purpose mentioned in section 131U.

1485 Subsection (2) explains that a direction given by the FCA under this section only applies to a designated person in relation to the part of the United Kingdom that they are designated.

1486 Subsection (3) explains that a direction may include requiring a person to take specified action, refrain from taking a specified action, or to review - or take remedial action in respect of - past conduct.

1487 Subsection (4) allows the FCA to issue a new direction following the expiration of an existing direction.

1488 Subsection (5) permits the FCA to revoke a direction by written notice, and states that a direction ceases to be in force if the recipient is no longer a designated person.

Section 131X: Direction: procedure

1489 This section sets out the procedure by which the FCA can give a direction for the purposes of this Part.

1490 Subsection (1) requires the FCA to give written notice to the designated person to whom the direction is or will be given. A direction given by the FCA may take effect immediately, on a date specified by the FCA, or when the matter to which the notice relates is no longer open to review in accordance with section 391(8) of FSMA 2000 (see section 131X subsections (2) and (11)). Subsection (3) provides that a direction may only take effect immediately or on a specified date if the FCA thinks this is necessary.

1491 Subsection (4) sets out the details that the FCA must include in a written notice. These are: details of the direction; the FCA’s reasons for the direction and when it takes effect; information that the designated person may make representations to the FCA within a specified period in the notice and of the designated person’s right to refer to the Tribunal.

1492 Subsection (5) permits the FCA to extend the period specified in the notice for designated persons to make representations to the FCA.

1493 Subsection (6) requires the FCA to give written notice to a designated person if, having considered any representations, it decides to give the direction proposed or not revoke an existing direction. The notice must inform the person of their right to refer to the Tribunal (as stated in subsection (8)).

1494 Subsection (7) requires the FCA to give written notice to a designated person if, having considered any representations, it decides to not give the direction proposed, give a different direction (in which case this must comply with the requirements in subsection (4) as stated in subsection (9)), or revoke a direction.

1495 If a notice informs the designated person of their right to refer to the Tribunal it must give an indication of the procedure (as per subsection 10).

Section 131Y: Information gathering and investigations

1496 This section gives the FCA powers to obtain information and documents reasonably required by the FCA in connection with the exercise of functions under this Part, and the ability to investigate designated persons for the purposes of this Part. Such powers are intended to give the FCA the ability to collect information to inform reports to assist HM Treasury in preparing a policy statement and designating persons (see section 131Q), and to carry out their own functions under this Part 8B.

1497 This is achieved by applying Part 11 (information gathering and investigations) FSMA 2000 (see subsection (1)) with the exceptions of sections of 165A to 165C; 169; and 169A (see subsection (2)). These exceptions relate to powers of the Prudential Regulation Authority (165A to 165C) and assistance to overseas regulators (169 and 169A), which are not relevant to this Part 8B regime.

1498 Subsection (3) applies the provisions in Part 11 of FSMA 2000 to persons who are designated under this Part (relevant current account providers and operators of cash coordination arrangements, as per section 131R). All sections of Part 11, including powers relation to both information gathering and investigations, are applied to such designated persons, except those listed in subsection (2).

1499 Subsection (4) applies provisions in Part 11 that relate to information gathering only (i.e. not investigations) to persons who are not designated under this Part but may have relevant information to support the FCA in exercising its functions under this Part (see subsection 5).

1500 Subsection (5) lists the non-designated persons that are in scope of the FCA's information gathering powers specified in subsection (4). The persons are:

- a. relevant current account providers who are not a designated person;
- b. operators of a cash access coordination arrangements who are not a designated person;
- c. operators of, or infrastructure providers in relation to, a payment system, who are not designated;
- d. any other person who provides cash access services and is not a designated person; and
- e. any other person who provides a relevant service to a person mentioned in paragraph (a), (b), (c) or (d) and is not a designated person.

1501 Subsections (6) and (7) define terms used in subsection (5). Any references to a “payment system”, an “operator” and “infrastructure provider” in relation to a payment system, have the same meanings as in Part 5 of the Financial Services (Banking Reform) Act 2013 (see section 110 of that Act). Any references to a “relevant service” in subsection 5(e) is a service provided in connection with the provision of cash access services.

1502 Subsection (8) clarifies that, for the purposes of its application to this Part 8B, any reference in Part 11 to “either regulator” is to the FCA only.

Section 131Z: Disciplinary Measures

1503 This section gives powers to enforce requirements imposed by or under this Part on designated persons. This is achieved by applying Part 14 of FSMA 2000 (disciplinary measures) as if reference to “authorised persons” includes a person who is designated for the purposes of this Part. This allows the FCA to issue public statements or impose financial penalties in response to contraventions of requirements such as rules or directions. Subsection (b) omits section 206A of FSMA 2000 which relates to suspending permission to carry on regulated activities.

Section 131Z1: Costs of supervision

1504 The FCA is to be able to collect fees in order to cover the costs of supervision, for example costs associated with day to day supervision, or with appointing an investigator. This section restricts the FCA’s ability to collect such fees in relation to functions under this Part to designated relevant current account providers (i.e. designated banks and building societies).

Section 131Z2: Exclusion and modification of general duties

1505 This section requires that, when exercising its functions under this Part, the FCA must, so far as is reasonably possible, act in a way which is compatible with its strategic objective and advances its access to cash purpose (section 131U) in place of its operational objectives. The FCA’s competition duty (subsection 1B(4) of FSMA 2000) and economic competitiveness and growth objective (subsection 1B(4A) are also disappplied in relation to this Part.

1506 Subsection (2) ensures that the FCA’s regulatory principles (in section 3B of FSMA 2000) are appropriately modified, by including a reference to the FCA’s purpose in relation to access to cash (section 131U) in paragraph (g) which relates to the publication of information as a means of contributing to the advancement of the FCA’s objectives.

1507 Subsection (3) ensures that the existing decision-making procedure in section 395 of FSMA 2000 applies appropriately for a direction made under section 131W.

Part 2 – Consequential amendments to FSMA 2000

1508 Part 2 of this Schedule makes consequential amendments to FSMA 2000 as a result of the introduction of Part 8B.

- a. Paragraph 2 introduces amendments to FSMA 2000.
- b. Paragraph 3 amends subsection (4) of section 3D of FSMA 2000, to enable the FCA to coordinate with the Prudential Regulation Authority (PRA) regarding the FCA’s functions under this part.
- c. Paragraph 4 amends subsection 55H(4) to allow the FCA to refuse an application to vary a permission under Part 4A if it appears to the FCA that it is desirable to do so in order to advance the FCA’s purpose under this Part.
- d. Paragraph 5 amends subsection 55L(6) to allow the FCA to refuse an application to impose, vary or cancel a requirement in relation to a Part 4A permission if it appears

to the FCA that it is desirable to do so in order to advance the FCA's purpose under this Part.

- e. Paragraph 6 amends section 55T as a consequence of the amendments in paragraphs 4 and 5.
- f. Paragraph 7 amends section 232A so that the ombudsman scheme operator's duty to provide information to FCA applies in relation to information relevant to this Part.
- g. Paragraph 8 amends subsection 395 in order to enable the application of the existing process for decision making with regards to directions issued under section 131W.
- h. Paragraph 9 amends subsection 429(2) to apply the affirmative procedure applies to regulations made under 131O.

Schedule 9: Wholesale cash distribution

Part 1 – New Part 5A of the Banking Act 2009

1509 Part 1 of this Schedule inserts a new Part 5A into the Banking Act 2009.

Section 206C: Overview and purpose

1510 This section summarises the purpose of this Part. This Part permits the Bank to oversee certain persons involved in wholesale cash distribution (as defined in section 206E) (see subsection (1)).

1511 The Bank must exercise its powers under this Part for the purpose of managing risks to the effectiveness, resilience, and sustainability of wholesale cash distribution throughout the United Kingdom, or throughout any part of the United Kingdom (see subsection (2)).

Section 206D: Policy statement

1512 This section sets out the policy statement requirements. Subsection (1) provides that the Bank must prepare a statement of its policy with respect to the exercise of its powers under this Part, and must from time to time review the statement, and may prepare a revised statement.

1513 Subsection (2) provides that when preparing a statement under this section the Bank must consult such persons as appear to the Bank to be representative of persons likely to be affected by the statement.

1514 Subsection (3) provides that after preparing a statement under this section the Bank must provide the statement to HM Treasury and publish the statement. Subsection (4) provides that HM Treasury must lay a copy of each statement received before Parliament.

1515 Subsection (5) provides that no power conferred on the Bank by this Part may be exercised before a statement under this section has been published.

Section 206E: Interpretation: "wholesale cash distribution"

1516 This section defines the use of the terms "wholesale cash distribution" and "wholesale cash distribution activities". In this Part, "wholesale cash distribution" means arrangements by which cash is made available for retail cash distribution and removed from circulation, and "wholesale cash distribution activities" are activities intended to facilitate or control wholesale cash distribution and include (but are not limited to) purchasing cash from issuing authorities or the Mint; storing cash; transporting cash; undertaking authentication processes; and returning cash to issuing authorities or the Mint (see subsection (1)).

Section 206F: Interpretation: other terms

1517 This section defines other terms used in this Part. In particular, “FCA” means the Financial Conduct Authority; “Part 4A permission” has the meaning given by section 55A of FSMA 2000; “PRA” means the Prudential Regulation Authority; “the UK financial system” has the meaning given by section 1I of FSMA 2000.

Recognised persons

Section 206G: Wholesale cash oversight orders

1518 This section sets out how and when HM Treasury may specify a person as a recognised person and the information that must be recorded in a wholesale cash oversight order. HM Treasury may, by a wholesale cash oversight order, specify a person as a recognised person for the purposes of this Part (see subsection (1)) if the person performs a relevant function in relation to a wholesale cash distribution activity and is recognised as having market significance in accordance with section 206H (see subsection (2)). A “relevant function” is defined in subsection (3).

1519 Subsection (4) provides that a wholesale cash oversight order must specify in as much detail as is reasonably practicable each wholesale cash distribution activity in relation to which the specified person performs a relevant function and each relevant function the person performs.

1520 Subsection (5) provides that HM Treasury is not permitted to make a wholesale cash oversight order in respect of an issuing authority or the Mint. Authorised banks that are issuing authorities may be subject to an order in respect of their activities that are not in their capacity as an issuing authority.

Section 206H: “Market significance” and “systemic significance”

1521 This section explains the relevance of “market significance” and “systemic significance” in the context of wholesale cash oversight orders.

1522 Subsection (1) provides that a wholesale cash order must specify whether the person in respect of whom the order is made is recognised as having market significance only, or as also having systemic significance.

1523 Subsection (2) provides that HM Treasury may recognise a person as having market significance only if satisfied that any significant deficiency in, or disruption to, the performance of the person’s relevant functions in relation to wholesale cash distribution activities would be likely to undermine the effectiveness, resilience, or sustainability of wholesale cash distribution throughout the United Kingdom, or throughout any part of the United Kingdom.

1524 Subsection (3) provides that HM Treasury may recognise a person as having systemic significance only if satisfied that any significant deficiency in, or disruption to, the performance of the person’s relevant functions in relation to wholesale cash distribution activities would be likely (in addition to the consequences mentioned above) to threaten the stability of, or confidence in, the UK financial system, or to have serious consequences for business or other interests throughout the United Kingdom or any part of the United Kingdom.

1525 Subsection (4) provides that where a person is part of a group, HM Treasury may have regard to functions performed by other members of the group when determining the matters mentioned in subsection (2) or (3). In this subsection “group” has the meaning given by section 421 of the Financial Services and Markets Act 2000 (see subsection (5)).

1526 Subsection (6) provides that HM Treasury may not recognise a person as having systemic significance if the person is a company wholly owned by the Crown.

Section 206I: Procedure

1527 This section sets out the procedure for the making of a wholesale cash oversight order. In particular, HM Treasury must first consult the Bank, notify the person, and consider any representations made (see subsection (1)).

1528 Subsection (2) provides that HM Treasury must, in addition to the requirements in subsection (1), consult the FCA before making a wholesale cash oversight order in respect of a person who has, or has applied for, Part 4A permission. Where the person has, or has applied for, Part 4A permission for the carrying on of a PRA-regulated activity, HM Treasury must also consult the PRA. Where the person is a participant in a regulated payment system (as defined in subsection (3)), HM Treasury must also consult the Payment Systems Regulator. In carrying out the consultation in accordance with subsection (2) HM Treasury must consider any representations made before making the wholesale cash oversight order.

1529 Subsection (4) provides that in considering whether to make the wholesale cash oversight order, HM Treasury may rely on information provided by the Bank, the FCA, the Payment Systems Regulator or the PRA.

Section 206J: Amendment or revocation of a wholesale cash oversight order

1530 Subsection (1) provides that HM Treasury may amend or revoke a wholesale cash oversight order.

1531 Subsection (2) provides that HM Treasury must revoke a wholesale cash oversight order if it is no longer satisfied that the person specified in the order performs a relevant function in relation to a wholesale cash distribution activity and has market significance.

1532 If HM Treasury is satisfied that the person continues to have market significance but is no longer satisfied that the person has systemic significance, then HM Treasury must amend the order so that it no longer specifies that the person is recognised as having systemic significance (see subsections (3) and (4)).

1533 Subsection (4) provides that subject to subsections (2) to (3), HM Treasury must consider any request by a person specified in a wholesale cash oversight order for the amendment or revocation of the order.

1534 Subsection (5) provides that the procedure as set out in section 206I applies to the amendment or revocation of a wholesale cash oversight order as it applies to the making of the order.

Regulation

Section 206K: Principles

1535 Subsection (1) gives the Bank the power to publish principles to which recognised persons must have regard in performing relevant functions in relation to wholesale cash distribution activities.

1536 Principles of general application may be published. Alternatively, subsection (2) provides that different principles may be published in relation to different wholesale cash distribution activities; different relevant functions; persons recognised as having market significance only and persons recognised as also having systemic significance.

1537 Subsection (3) provides that prior to publishing such principles, the Bank must consult such persons as appear to the Bank to be representative of persons likely to be affected by the principles and obtain the approval of HM Treasury.

These Explanatory Notes relate to the Financial Services and Markets Bill as brought from the House of Commons on 8 December 2022 (HL Bill 80)

Section 206L: Code of Practice

1538 This section gives the Bank the power to publish codes of practice about the performance by recognised persons of relevant functions in relation to wholesale cash distribution activities (see subsection (1)). Codes of practice are intended to set out binding requirements, whereas principles (made under section 206K) are intended to provide high-level over-arching guidance.

1539 Codes of general application may be published. Alternatively, subsection (2) provides that different codes of practice may be published in relation to different wholesale cash distribution activities; different relevant functions; and persons recognised as having market significance only and persons recognised as also having systemic significance.

1540 Subsection (3) provides that before publishing a code of practice, the Bank must consult such persons as appear to the Bank to be representative of persons likely to be affected by the code.

Section 206M: Directions

1541 This section gives the Bank power to give directions in writing to a recognised person (see subsection (1)). This may include requiring or prohibiting the taking of specified action in relation to the performance of a specified relevant function in relation to a specified wholesale cash distribution activity. It may also include setting standards to be met in the performance of a specified relevant function in relation to a specified wholesale cash distribution activity (see subsection (2)).

1542 Subsections (3) and (4) provide that if the Bank gives a direction to a recognised person for the purpose of resolving or reducing a threat to the stability of the UK financial system, the recognised person (including the recognised person's officers and staff) has immunity from liability in damages in respect of action or inaction in accordance with the direction.

1543 Subsection (5) sets out that a direction given to a recognised person for the purpose of resolving or reducing a threat to the stability of the UK financial system must include a statement that it is given for that purpose and inform the recognised person of the effect of immunity from liability in damages in respect of action or inaction in accordance with the direction.

1544 Subsection (6) provides that HM Treasury may confer, by regulations, immunity on any person from liability in damages in respect of action or inaction taken by a person in accordance with the direction of the Bank, including a direction to a recognised person for the purpose of resolving or reducing a threat to the stability of the UK financial system. Subsection (7) sets out the procedure for making an order under subsection (6).

1545 Immunity from liability conferred under this section does not extend to action or inaction taken in bad faith or in contravention of section 6(1) of the Human Rights Act 1998.

Section 206N: Role of the FCA, the PRA and the Payment Systems Regulator

1546 This section sets out the role of the FCA, the PRA and the Payment Systems Regulator. Under subsection (1), the Bank of England is required to have regard to any action which the FCA, the PRA or the Payment Systems Regulator has already taken or could take when exercising its powers.

1547 Under subsection (2), as part of the requirement at subsection (1), the Bank of England is required to consult FCA before taking action in respect of a person who is regulated or has applied to be regulated. There is also a requirement to consult the PRA where it is in respect to a person who has applied for Part 4A Permission to carry out PRA regulated activity. Where the Payment Systems Regulator is involved, there is also a requirement for the Bank of England to consult the regulator before taking action in respect to a participant in a regulated payment system.

1548 Subsection (3) provides the source for definition for “participant” and “regulated payment system” for the purposes of subsection (2)(c) ascribing to them the same meaning as that contained at section 110 of the Financial Services (Banking Reform) Act 2013.

1549 Subsection (4) stops the Bank of England from taking action in respect to a person described under subsection (2) if the FCA, the PRA or the Payment Systems Regulator has given notice to the Bank of England that they are considering taking action. The exception to this requirement not to take action is whereby the FCA, the PRA or the Payments Systems Regulator have consented or withdrawn the notice.

Enforcement

Section 206O: Inspection

1550 This section gives the Bank the power to appoint one or more persons to inspect the performance by a recognised person of a relevant function in relation to a wholesale cash distribution activity (see subsection (1)). This power allows the Bank to appoint an inspector to check that codes of practice, principles, or directions are being complied with, or that the performance by a recognised person of a relevant function is being carried out in a satisfactory manner.

1551 Subsection (2) requires a recognised person who performs a relevant function in relation to a wholesale cash distribution activity to co-operate with an inspector and grant the inspector access, on request and at any reasonable time, to premises on or from which any part of the function is performed, and otherwise co-operate with an inspector.

Section 206P: Inspection: warrant

1552 This section provides that an inspector may apply for a warrant entitling the inspector or a constable to enter premises if there is performed on the premises any part of a relevant function in relation to a wholesale cash distribution activity. The application for a warrant is to be made to a justice of the peace (or in Scotland, to a justice of the peace or a sheriff; in Northern Ireland, to a lay magistrate), who can issue the warrant only if one or more of the conditions set out in subsections (2), (3), (4) and (5) are fulfilled:

- a. Condition 1: The Bank has issued a notice under Information section 206Z3 and the requirement has not been complied with, and it is reasonable to believe that relevant documents or information are on the premises.
- b. Condition 2: An information requirement has been imposed under section 206Z3, there is reason to suspect that it would not be complied with or that the documents or information would be destroyed or tampered with.
- c. Condition 3: An inspector appointed under section 206O gave reasonable notice of a wish to enter the premises and was refused entry to those premises.
- d. Condition 4: A person occupying or managing the premises has failed to co-operate with an inspector.

1553 Subsection (6) sets out that a warrant issued in accordance with this section will permit an inspector or a constable to enter the premises, to search and take possession of information or documents, take copies, and permit a constable to use reasonable force.

1554 Subsection (7) applies to warrants issued in accordance with this section, sections 15(5) to (8) and 16 of the Police and Criminal Evidence Act 1984 which provide that a warrant may authorise persons to accompany the constable executing it and permit that person to have the same powers as the constable in relation to the warrant. Subsections (8) and (9) make

similar provision about the application to warrants issued in accordance with this section in Scotland and Northern Ireland.

Section 206Q: Independent report

1555 Subsection (1) enables the Bank to require a recognised person who performs a relevant function in relation to a wholesale cash distribution activity to appoint an expert to provide a report on the performance of the function.

1556 Subsection (2) specifies that the Bank may only impose this requirement where the Bank thinks that the person is not having sufficient regard to the principles published by the Bank under section 206K; the person is failing to comply with a code of practice under section 206L; or the report is likely for any other reason to assist the Bank in the performance of its functions under this Part.

1557 Subsection (3) enables the Bank to impose requirements about the nature of the expert to be appointed, the content of the expert's report, how the report is subsequently treated (including whether or not it is to be disclosed or published); and the timeframe within which the report must be produced.

Section 206R: Compliance failure

1558 This section defines the use of the term "compliance failure" throughout this Part. A compliance failure is taken to mean the failure by a recognised person to comply with a code of practice (section 206L), with a direction made by the Bank (section 206M), or with a requirement to ensure compliance with regard to producing an independent report (section 206Q).

Section 206S: Publication

1559 This section gives the Bank the power to publish details of a compliance failure by a recognised person and gives the Bank the power to publish details of a sanction imposed under sections 206T to 206V.

Section 206T: Penalty

1560 In the event of a compliance failure, subsection (1) gives the Bank the power to impose on a recognised person a financial penalty.

1561 Subsection (2) provides that the financial penalty is to be paid to the Bank and is enforceable as a debt.

1562 Subsections (3) and (4) specify that the Bank must prepare and publish on its website a statement of principles which it will apply in determining whether to impose a penalty, and the quantum of the penalty, for compliance failures under this Part. The Bank must send a copy of the statement to HM Treasury, review the statement from time to time and revise the statement, if necessary. In considering financial penalties for compliance failures under this Part, the Bank must apply the statement in force when the failure occurred.

Section 206U: Closure

1563 This section enables the Bank to give a closure order to a person recognised for the purposes of this Part as having systemic significance only.

1564 Subsection (1) provides that the Bank may make a closure order only if it is satisfied that a compliance failure threatens the stability of, or confidence in, the UK financial system, or has serious consequences for business or other interests throughout the United Kingdom.

1565 Subsection (2) gives the Bank the power to specify that a recognised person must cease operation for a specified time, until further notice, or permanently.

1566 Subsection (3) provides that before giving a closure order to a recognised person, the Bank must have regard to the public interest in the continued performance by the person of relevant functions (whether or not specified) in relation to wholesale cash distribution activities (whether or not specified).

1567 Subsection (4) makes it an offence for a recognised person to fail to comply with a closure order. A fine may be imposed on a person found guilty of contravening an order issued under this section (see subsection (5)).

Section 206V: Management disqualification

1568 This section enables the Bank to make an order to disqualify a specified person from holding an office or position involving responsibility for taking decisions about the management of a recognised person for either a specified period, until further notice, or permanently (see subsection (1)).

1569 Under subsection (2) it is an offence for a person to breach a prohibition issued in accordance with subsection (1). A fine may be imposed on a person found guilty of contravening an order issued under this section (see subsection (3)).

Section 206W: Warning

1570 This section requires the Bank to give a warning notice of its intention to impose a sanction and allow 21 days for the person to whom the notice relates to make representations, which the Bank must consider before it may impose a sanction under this Part. The Bank must issue a decision notice stating whether or not it intends to impose the sanction.

1571 In certain circumstances the Bank has power, under subsection (3), to give a closure order under section 206U or to make an order under section 206V without giving a warning notice. The Bank may make such orders if, for instance, the recognised person is committing a compliance failure of such a serious nature that it poses an imminent threat to the stability of the UK financial system.

Clause 206X: Appeal

1572 This section provides for appeals against the Bank's decision to impose a sanction under this Part. Where the Bank notifies a person under section 206W(1) that it intends to impose a sanction, the person may appeal to the Upper Tribunal (see subsection (1)). Where the Bank imposes a sanction on a person without notice in reliance on section 206W(3), the person may appeal to the Upper Tribunal (see subsection (2)). The Bank may not impose a sanction while an appeal under this section could be brought or is pending (see subsection (3)).

Clause 206Y: Injunctions

1573 This section provides for injunctions in favour of the Bank.

1574 If, on the application of the Bank, the court is satisfied that there is a reasonable likelihood that there will be a compliance failure, or that there has been a compliance failure and there is a reasonable likelihood that it will continue or be repeated, the court may make an order restraining the conduct constituting the failure (see subsection (1)).

1575 If, on the application of the Bank, the court is satisfied that there has been a compliance failure by a recognised person, and that there are steps which could be taken for remedying the failure, the court may make an order requiring the recognised person, and any other person who appears to have been knowingly concerned in the failure, to take such steps as the court may direct to remedy it (see subsection (2)).

1576 If, on the application of the Bank, the court is satisfied that there may have been a compliance failure by a recognised person, or that any other person may have been

knowingly concerned in a compliance failure, the court may make an order restraining the person from dealing with any assets which it is satisfied the person is reasonably likely to deal with (see subsection (3)).

1577 Subsection (4) provides that in England and Wales and Northern Ireland the jurisdiction conferred by this section is exercisable by the High Court and in Scotland by the Court of Session.

1578 1459 Subsection (5) explains how provisions in this section are to be interpreted in Scotland.

Miscellaneous

Clause 206Z: Fees

1579 This section enables the Bank to require a recognised person to pay fees (see subsection (1)) but only in accordance with a scale of fees set by HM Treasury in regulations (see subsection (2)). Subsection (4) specifies that the requirement to pay fees may be enforced by the Bank as a debt.

Clause 206Z1: Records

1580 This section provides that the Bank must maintain satisfactory arrangements for recording decisions made in the exercise of functions under this Part and the safe keeping of those records which it considers ought to be preserved (see subsection (1)).

Clause 206Z2: Annual report

1581 This section provides that the Bank must, at least once a year, make a report to HM Treasury on the discharge of its functions under this Part and such other matters as HM Treasury may from time to time direct (see subsection (1)). Subsection (1) does not require the inclusion in the report of any information the publication of which would, in the opinion of the Bank, be against the public interest (see subsection (3)).

1582 A report on the discharge of the Bank's functions under this Part must, in particular, include the Bank's opinion as to the extent to which risks to the effectiveness, resilience and sustainability of wholesale cash distribution throughout the United Kingdom, or throughout any part of the United Kingdom, have been managed, and the extent to which, in relation to the exercise of functions in relation to persons recognised as having systemic significance, risks to the stability of the UK financial system have been managed (see subsection (2)).

1583 HM Treasury must lay before Parliament a copy of each report received under this section (see subsection (4)).

Clause 206Z3: Requirement to provide information

1584 This section provides that the Bank may by notice in writing require a person to provide information which the Bank thinks will help HM Treasury in determining whether to make a wholesale cash oversight order (section 206G) or which the Bank otherwise requires in connection with its functions under this Part (see subsection (1)). The Bank may also by notice in writing require a person who performs a relevant function in relation to wholesale cash distribution activity to provide information which the Bank requires in connection with the exercise of its functions (whether under this Part or otherwise) in pursuance of the purpose mentioned in section 206C(2), or the Bank's financial stability objective. A notice under subsection (1) or (2) may require the person to notify the Bank if events of a specified kind occur (see subsection (3)). A notice under subsection (1) or (2) may require information to be provided in a specified form or manner at a specified time in respect of a specified period (see subsection (4)).

1585 Under subsection (5) it is an offence for a person to fail without reasonable excuse to comply with a requirement under this section or knowingly or recklessly to give false information in pursuance of this section. Under subsection (6)(a), a fine may be imposed on a person found guilty of contravening a notice issued under this section.

Clause 206Z4: Disclosure of information

1586 This section permits the Bank to disclose information obtained by virtue of section 206Z3 to HM Treasury, the FCA, the PRA, and The Royal Mint (see subsection (1)). Subsection (1) overrides a contractual or other requirement to keep information in confidence and is without prejudice to any other power to disclose information (see subsection (2)).

1587 HM Treasury may by regulations permit the disclosure by the Bank of specified information obtained by virtue of section 206Z3 to specified persons and permit the publication of specified information and make provision about the manner and extent of publication (see subsection (3)).

Clause 206Z5: Saving for informal oversight

1588 This section clarifies that nothing in Part 5A prevents the Bank of England either from having dealings with persons who are not recognised persons for the purposes of the Part or from having dealings with recognised persons other than through the provisions of the Part.

Clause 206Z6: Power to disapply regulation and enforcement provisions

1589 This section permits HM Treasury by regulations to provide for any of sections 206K to 206Z4 not to apply, or to apply with modifications, in relation to recognised persons that are companies wholly owned by the Crown (see subsection (1)). For the purposes of this section, a company is wholly owned by the Crown if, and only if, every member of the company is a Minister of the Crown, government department or company wholly owned by the Crown, or a person acting on behalf of a Minister of the Crown, government department or company wholly owned by the Crown (see subsection (5)).

1590 Before making regulations under this section HM Treasury must consult the Bank.

1591 Subsection (4) makes provision about the procedure for regulations made under subsection (1).

1592 Section 206Z6 allows HM Treasury to, by regulations, provide for a company wholly owned by the Crown to be a person recognised as having market significance. Currently there is only one company that is both wholly owned by the Crown and operating in the wholesale cash distribution market. Existing oversight arrangements over this company are envisaged to be sufficient to safeguard against any risks that may arise should the company become systemic. HM Treasury intends for wholly Crown-owned entities to be within scope of market oversight designation only, but with a power for HM Treasury to disapply some or all of the powers under the regime for Crown-owned entities at the point of designation, if deemed appropriate.

Part 2 – Amendments to Part 6 of the Financial Services (Banking Reform) Act 2013

1593 Part 2 of this Schedule makes amendments to Part 6 of the Financial Services (Banking Reform) Act 2013. These amendments extend the special administration regime for operators of certain infrastructure systems to also include persons recognised for the purposes of Part 5A of the Banking Act 2009. This ensures that a special administration regime (SAR) applies to entities designated as having systemic significance.

1594 Paragraph 2 provides that Part 6 of the Financial Services (Banking Reform) Act 2013 (to provide for special administration arrangements to apply to certain persons) is amended as follows.

These Explanatory Notes relate to the Financial Services and Markets Bill as brought from the House of Commons on 8 December 2022 (HL Bill 80)

- 1595 Paragraph 3 amends section 111 (financial market infrastructure administration) to refer to a new term “financial market and cash infrastructure” for the purposes of Part 6.
- 1596 Paragraph 4 provides that section 112 (interpretation: infrastructure companies) is amended to include persons recognised under Part 5A as having systemic significance within the definition of an “infrastructure company”.
- 1597 Paragraph 5 amends section 113 (interpretation: other expressions) to include within the definition of “the relevant system” in relation to an infrastructure company falling within section (2)(ba) “*any system used by the company to facilitate or control wholesale cash distribution*”.
- 1598 Paragraph 6 amends section 115 (objective of FMI administration) to provide that where an FMI administrator is appointed in relation to a company that is a person recognised for the purposes of Part 5A of the Banking Act 2009, the objective of the FMI administration is (a) to ensure that the functions performed by the person in relation to wholesale cash distribution are and continue to be performed efficiently and effectively, and (b) to ensure by one or both of the specified means that it becomes unnecessary for the FMI administration order to remain in force for that purpose or those purposes.
- 1599 Paragraph 7 amends section 119 (continuity of supply). The definition of “supply” is amended to include, in the case of an infrastructure company that is a person recognised for the purposes of Part 5A of the Banking Act 2009, goods and equipment used by the person in connection with wholesale cash distribution activities.
- 1600 Paragraph 8 amends section 120(8) (power to direct FMI administrator) to state that the section does not limit the powers conferred on the Bank by section 206M(directions) of the Banking Act 2009 in relation to a person recognised as having systemic significance for wholesale cash distribution.
- 1601 Paragraph 9 amends section 127(1) (interpretation of Part) to state that the terms “wholesale cash distribution” and “wholesale cash distribution activities” have the meanings given by section 113.

Part 3 – Consequential amendments

- 1602 Part 3 of this Schedule makes consequential amendments to the Banking Act 2009 which are needed as a result of the amendments in Part 1 of this Schedule.
- 1603 Paragraph 10 introduces amendments to Banking Act 2009.
- 1604 Paragraph 11 amends the table contained at section 259(3) of the Banking Act 2009 by adding four new rows and three columns in a table with the heading (Part 5A-Wholesale cash distribution) to continue the table after 206A (services forming part of recognised payment systems). This table sets out the procedures as follows: in the first row under the heading, where the Bank of England issues directions: immunity under section 206M this should be done following the negative resolution procedure. In the second row, section 206Z for fees should follow the negative resolution procedure. In the third row which is for information powers, the negative resolution is followed and where section 206Z6 which is the power to disapply regulation and enforcement provisions, the draft affirmative resolution is followed.
- 1605 Paragraph 12 makes some changes to the index of defined terms to be found under section 261 of the Banking Act 2009. The row where “FCA” appears under the expression column, section 206F is added after 183 to include it in the index of defined terms which should read “3, 93, 166, 183 & 206F”. In the entry for “Payment Systems Regulator” in the second

column section 206F is added after so that it reads “183 & 206F). At (c), in the row for the PRA in the second column “206F” is also added to read “183 & 206F). This table sets out expressions defined in the Banking Act 2009 for general purposes.

1606 Paragraph 13 introduces amendments to the Financial Services Act 2012.

1607 Paragraph 14(1) amends section 85 at subsection (3)(a) of the Financial Services Markets Act 2012 which deals with relevant functions of the Bank of England in relation to the complaints scheme by making wholesale cash distribution a relevant function.

1608 Paragraph 14(3)(a) adds wholesale cash distribution functions of publishing principles under section (206K) or codes of practice under section 206L as legislative functions in section 85(7) of Banking Act 2009. Paragraph 14(3)(c) makes preparing a statement of principles by the Bank of England under section 206T(3) a legislative function.

1609 Paragraph 15(1) introduces amendments to section 110 of the Banking Act 2009 which deals with payments to HM Treasury of penalties received by the Bank of England. Paragraph 15(2) amends section 110(2)(b) to add penalties received under new Part 5A section 206T.

1610 Paragraph 15(3) adds sections 206S to 206V and 206Y to the enforcement powers of the Bank of England for the purposes of section 110(7).

1611 Paragraph 16 deals with amendments necessary in the Financial Services (Banking Reform) Act 2013. The new Part 5A (wholesale cash distribution) is added to ensure coordinated exercise of functions in section 98.

Schedule 10: Performance of functions relating to financial market infrastructure

Part 1 – New Chapter 2A of Part 18 of FSMA 2000

1612 Paragraph 1 inserts a new “Chapter 2A: Performance of Functions of Recognised Bodies” into Part 18 of FSMA 2000, comprising new sections 309A to 309Z8 of FSMA 2000, and making provision for a Senior Managers & Certification Regime for recognised central counterparties (CCPs), recognised investment exchanges (RIEs) and recognised central security depositories (CSDs), and a power to apply the regime to credit rating agencies (CRAs).

1613 Section 309A enables HM Treasury to make regulations which, in effect, apply the new Chapter 2A to CCPs, CSDs or RIEs designating them as a “relevant recognised body” for the purpose of the regime. This section provides that, if HM Treasury wishes to apply the regime to RIEs, it must consult the Financial Conduct Authority (“FCA”), and that if it wishes to apply the regime to recognised CCPs or recognised CSDs, it must consult the Bank of England (“the Bank”). HM Treasury is also required to consult anyone who is likely to be affected by the application of this Chapter to a particular type of recognised body, for example the firms themselves. Section 309A (4) clarifies that where the “relevant recognised body” is an RIE, the appropriate regulator for the purpose of this Chapter is the FCA, and that for CCPs and CSDs it is the Bank.

1614 Section 309B provides that, if the appropriate regulator considers that an individual is not a fit and proper person to perform functions which relate to any activity (regulated or unregulated) carried on by a relevant recognised body it regulates, it can make a “Part 18 prohibition order”. A Part 18 prohibition order is an order which prohibits an individual from performing a particular function, any function within a particular category, or any function. Sections 309B (3) and (4) clarifies the types of activities and persons that a

prohibition order may relate to. The regulators have the power to make a range of prohibition orders, depending on the circumstances of each case and the range of activities which the relevant individual would not be considered fit to undertake. They can also make provision prohibiting the individual from performing functions in relation to a regulated activity (or regulated activities) carried out by a person who is authorised or exempt under FSMA 2000, or a person to whom, as a result of Part 20 of FSMA 2000, the general prohibition does not apply in relation to a regulated activity. This would allow, for example, the Bank to issue a prohibition order that prevented an individual not only from performing functions in respect of activities carried out by a CCP, CSD, RIE or CRA, but also functions in respect of regulated activities (or activities that would otherwise be regulated) within any other type of entity subject to the SM&CR in Part 5 of FSMA 2000.

1615 Section 309C sets out the procedure for making Part 18 prohibition orders. The appropriate regulator may be required to consult another regulator ahead of making a prohibition order in circumstances prescribed by HM Treasury through secondary legislation. If the appropriate regulator proposes to make a Part 18 prohibition order it must also give the individual to whom the prohibition order would apply a warning notice, which sets out the terms of the prohibition order. A warning notice is a notice issued by the appropriate regulator, in accordance with section 387 of FSMA 2000. If the regulator decides to make a Part 18 prohibition order, section 309C provides for a decision notice to be given to the individual to whom the prohibition order applies. A decision notice is a notice issued by the appropriate regulator, in accordance with section 388 of FSMA 2000. The decision notice must name the individual and, similarly to the warning notice, set out the terms of the Part 18 prohibition order. An individual subject to a Part 18 prohibition order has the right to refer the matter to the Tax and Chancery Chamber of the Upper Tribunal (“the Tribunal”).

1616 Section 309D enables the appropriate regulator to vary or revoke a prohibition order if an individual named in the order applies for it to be revoked or varied. In circumstances prescribed by HM Treasury through secondary legislation, the appropriate regulator may be required to consult another regulator ahead of varying or revoking a prohibition order. Subsections (4) and (5) are self-explanatory.

1617 Section 309E provides that an individual is guilty of an offence, if they perform, or agree to perform, a function in breach of a Part 18 prohibition order, issued under section 309B. If convicted, an individual is liable to a fine. The fine could be potentially unlimited in England and Wales, while it should not exceed £5,000 in Scotland and Northern Ireland. There is a defence under subsection (3) for a person who can show that they took all reasonable precautions and exercised all due diligence to avoid committing the offence.

1618 Section 309F (1) provides that persons falling within section 309B (4) must take reasonable care to ensure that their functions are not performed by a person in breach of a Part 18 prohibition order. If a private person suffers a loss because a person falling within section 309B (4) has acted in breach of this duty, subsection (2) provides that they may bring an action for damages against them. Subsections (3) and (4) confer powers on HM Treasury, by regulations, to define a “private person” and to specify circumstances in which this section applies to a person other than a private person.

1619 Section 309G (1) requires relevant recognised bodies to take reasonable care not to allow persons, natural or corporate, to perform certain functions – described in these provisions as “designated senior management functions” - without the approval of the appropriate regulator. Subsection (2) provides that this duty applies where functions are performed under an arrangement entered into by the body itself (e.g., a contract of employment), or where they are performed under an arrangement entered into by its contractor. Subsection

(3) provides that the functions which are “designated senior management functions” requiring approval are to be specified by the appropriate regulator’s rules. The regulator is able to specify a function as a “designated senior management” function if it falls within the description in subsections (4) to (6), which can be summarised as follows:

- a. The function will require the person performing it to be responsible for managing one or more aspects of the body’s affairs (including, for example, taking decisions, or participating in the taking of decisions, about how one or more aspects of a relevant recognised body’s affairs should be carried on); and
- b. Those aspects involve, or might involve, a risk of serious consequence for the relevant recognised body itself, or for business or other interests in the United Kingdom.

1620 Section 309H grants the appropriate regulator the power to make transitional provisions when making rules under section 309G (3). Subsection (2) enables HM Treasury to make any incidental, consequential, transitional, supplemental or saving provision it considers appropriate through secondary legislation, in connection with the regulators’ ability to make rules under section 309G (3).

1621 Section 309I requires an application for approval to be submitted to the appropriate regulator by the relevant recognised body concerned or, in the case of new firms awaiting recognition, a prospective recognised body, and must include a statement of the aspects of the applicant’s affairs that the person will be responsible for managing (known as a “statement of responsibilities”). The application must be made in the manner required by the appropriate regulator and must contain any information that the appropriate regulator may reasonably require. After the application is made, the appropriate regulator can require the applicant to request any additional information it needs to assess the application.

1622 Section 309J provides for the vetting of candidates by a relevant recognised body before it submits an application for approval to perform a designated senior management function. Section 309J (1) requires the relevant recognised body to be satisfied that a candidate is fit and proper to perform the functions in question before it is able to submit an application. Subsection (2) sets out matters that a recognised body must have regard to, among other things, when vetting candidates. These are whether the person has obtained specified qualifications, has undergone, or is undergoing specified training, possesses a specified competence, or has specified personal characteristics. These matters are all to be specified in rules made by the appropriate regulator. Subsection (4) provides that HM Treasury will specify in regulations the circumstances in which regulators are required to consult each other, ahead of making rules.

1623 Section 309K sets out the basis on which the relevant regulator is to assess the suitability of a candidate for approval. Subsection (1) requires the relevant regulator to be satisfied that a candidate is fit and proper to perform the functions in question before it is able to give its approval, or that this condition will be met if the application is granted subject to conditions. Subsection (3) sets out that the appropriate regulator may choose to grant a time-limited approval, or an approval subject to specific conditions, if it considers it desirable to do so in order to advance, in the case of the FCA, any of its operational objectives, and, in the case of the Bank, its Financial Stability Objective. Subsection (5) provides that HM Treasury can make regulations imposing consultation requirements on the appropriate regulator to be complied with ahead of granting an application.

1624 Section 309L requires the appropriate regulator to grant an approval within three months of receiving an application, or, if later, within the period within which a prospective recognised body’s application for recognition is to be determined. The three-month period

is paused if the regulator requires the applicant to provide it with further information after the application is submitted. Subsection (5) provides that an applicant may withdraw an application by giving written notice to the appropriate regulator, but only with the consent of the person in relation to whom the application is being made (and the person by whom that person is retained, if not the applicant).

- 1625 Section 309M sets out the procedure for notifying interested parties of a regulator's actual or proposed decision in relation to an application. If it proposes to refuse the application, or grant it for a time limited period or subject to conditions, it must give a warning notice to the interested parties. A warning notice is a notice issued by the appropriate regulator, in accordance with section 387 of FSMA 2000. This must be followed by a decision notice if it subsequently decides to refuse the application or grant it for a time limited period or subject to conditions. A decision notice is a notice issued by the appropriate regulator, in accordance with section 388 of FSMA 2000. Subsection (4) provides for an appeal to the Tribunal if an application is refused or granted for a limited time or subject to conditions.
- 1626 Section 309N requires the relevant recognised body to notify the appropriate regulator, and submit a revised statement of responsibilities, each time there is a change within the area of responsibility of a senior manager who has been approved by the appropriate regulator, which is worthy of notification to the regulator. A statement of responsibilities is a statement of the aspects of the relevant recognised body's affairs that the senior manager is responsible for managing. The appropriate regulator has the power to make rules specifying when a change in a senior manager's responsibilities is to be considered worthy of notification to the regulator (subsection 3), and to direct the form in which the relevant recognised body may be required to submit and verify information, when informing the regulator of such a change (subsection 4).
- 1627 Section 309O gives the appropriate regulator the power to withdraw the approval granted for the purposes of section 309G where it no longer considers that the person is a fit and proper person to carry out the functions for which they had been approved. It also requires the relevant recognised body to review senior managers' fitness for approval at intervals specified by the appropriate regulator in its rules, and to notify the regulator if it considers there are grounds for withdrawal of approval.
- 1628 Section 309P sets out the procedure for withdrawing approval of a senior manager. Before making a decision to withdraw an approval given under section 309G, the appropriate regulator must comply with any consultation requirements that are prescribed in regulations made by HM Treasury and issue a warning notice to the interested parties, including the person in relation to whom the approval was given. This must be followed by a decision notice if the proposed decision is made. Subsection (3) provides for a right of appeal to the Tribunal.
- 1629 Section 309Q sets out that, if the appropriate regulator has granted a conditional or time-limited approval, the relevant recognised body to which the approval applies may request the appropriate regulator to vary or remove the condition or time limit, or impose a new condition. Subsections (3) and (4) set out that the appropriate regulator must decide whether to grant the application or give a warning notice within three months (or such other period prescribed by HM Treasury regulations). Subsections (5) and (6) provide that the appropriate regulator can refuse an application if it is desirable to do so in order to advance, for the FCA any of its operational objectives, and for the Bank its Financial Stability Objective.
- 1630 Section 309R provides that the appropriate regulator may choose to vary an approval on its own initiative if it considers it desirable to do so in order to advance a relevant objective, as

defined in subsection (2). The approval may be varied by imposing, varying or removing a condition, limiting the period for approval, or varying or removing a time limit. Subsections (5) to (14) provide for the procedure to be followed when the appropriate regulator proposes to or decides to vary an application.

- 1631 Section 309S requires the appropriate regulator to issue a statement of its policy on the circumstances in which it will give a time-limited or conditional approval, and on the variation of an approval under sections 309Q and 309R. The statement of policy is required to be published in draft, which must specify a period within which members of the public may make representations. These must be considered by the appropriate regulator before the proposed statement is issued. The appropriate regulator is required to publish the statement, along with a summary of the representations received and any significant changes made since the statement was published in draft, in the best way to bring them to the attention of the public.
- 1632 Under section 309T, if a private person suffers a loss because a relevant recognised body has acted in breach of the duty under section 309G (1) (failing to take care to prevent a person carrying out certain functions without approval), they may bring an action for damages against the relevant recognised body. Subsections (2) and (3) confer powers on HM Treasury, by regulations, to define a “private person” and to specify circumstances in which this section applies to a person other than a private person.
- 1633 Section 309U provides that the appropriate regulator can impose a penalty, of such amount as the regulator considers appropriate, if a person has performed a designated senior management function without approval, and the person knows, or ought to have known, that they were doing so.
- 1634 Section 309V sets out the procedure for imposing penalties and is self-explanatory.
- 1635 Section 309W requires the appropriate regulator to issue a statement of its policy on the circumstances in which it will impose penalties under section 309U and the basis on which the level of penalties will be determined. The policy set out in the statement must cover the matters set out in subsection (2) to (4). Subsection (5) is self-explanatory. Subsection (6) requires the appropriate regulator to have regard to the statement in force at the time when the person performed a senior manager function without approval.
- 1636 Section 309X sets out the procedure for issuing a statement of policy under section 309W. Subsections (1) and (2) require the regulator to publish a draft of the statement of policy before it is issued, together with a notice stating that representations about the proposal may be made to the appropriate regulator within a specified period. The appropriate regulator is then required to publish the statement when it is issued, along with a summary of the representations received and any significant changes made since it was published in draft, in the best way to bring them to the attention of the public.
- 1637 Section 309Y establishes a certification regime for specified functions which are not subject to the senior managers’ approval regime in sections 309G to 309X. It requires relevant recognised bodies to take reasonable care not to allow employees, including contractors and secondees, to perform certain functions without having a valid certificate issued by the relevant recognised body. The functions requiring certification will be specified by the appropriate regulator’s rules. The regulator is only able to specify functions for this purpose if they are a “significant harm function” which is not a designated senior management function (as defined in s309G). Subsection (5) provides that a “significant harm function” is:
- a. a function which will require the person performing it to be involved in one or more aspects of the relevant recognised body’s affairs; and

- b. those aspects involve, or might involve, a risk of serious harm for the relevant recognised body itself, or for any of its users, or persons who have relevant rights or interests in its services. “Relevant rights or interests” are described in subsection (7).

1638 Section 309Z (1) provides that a relevant recognised body must not issue a certificate to a person in relation to a function specified under section 309Y unless it is satisfied that a person is fit and proper to perform that function. Subsection (2) sets out the matters that a relevant recognised body must have regard to, among other things, when assessing the suitability of someone to perform a function specified under section 309Y. These are whether the person has obtained a specified qualification, has undergone or is undergoing specified training, possesses a specified competence, or has specified personal characteristics (with all these matters being specified in rules made by the appropriate regulator). Subsection (4) provides that the certificate issued under this section must state that the body is satisfied that the individual is fit and proper to perform the function, and set out the aspects of the body’s affairs which the certified individual is involved in when performing the function to which the certificate relates. The certificate has a validity of twelve months. Where the relevant recognised body decides not to issue a certificate, subsection (6) requires it to give the person a notice in writing stating the reason for the decision, and next steps. Subsection (7) requires the relevant recognised body to keep a record of all employees who have a valid certificate.

1639 Section 309Z1 provides that the appropriate regulator may make rules about the conduct of approved senior managers, employees and directors of relevant recognised bodies. These rules are often referred to as “conduct rules”. Rules under this section may include provision requiring a relevant recognised body to notify its employees of the conduct rules that apply to them, and to take the necessary steps to ensure that all employees understand the rules that apply in relation to them. They may also include provision requiring a relevant recognised body to notify the appropriate regulator if the body decides to take disciplinary action in relation to a person.

1640 Section 309Z2 gives the appropriate regulator a power to take disciplinary action for misconduct. Action can be taken if it appears to the appropriate regulator that the person is guilty of misconduct, and the appropriate regulator is satisfied that it is appropriate to take action against the person. Subsection (2) sets out what the appropriate regulator may do when it decides to take action under this section. The actions that a regulator may take are: publishing a statement of the person’s misconduct, imposing a monetary penalty or imposing a suspension, condition or limitation on an approval given under section 309G. Subsection (3) limits the length of a suspension, condition or limitation. Subsection (4) allows the appropriate regulator to withdraw or vary any such existing suspension, condition or limitation. Subsection (5) provides that action taken under this section must be within 6 years of the regulator finding out about the misconduct.

1641 Section 309Z3 sets out circumstances in which a person is guilty of misconduct for the purposes of section 309Z2.

1642 Section 309Z4 sets out the procedure to be followed when a regulator proposes to take disciplinary action under section 309Z2. Subsections (1) to (5) require a warning notice to be issued and detail what it must include. If the regulator subsequently decides to take action, it must issue a decision notice under subsection (6). Subsections (7) to (10) detail what must be stated in the decision notice in different circumstances. Subsection (11) provides for a right of appeal to the Tribunal against a decision to take disciplinary action. Subsection (12) requires the appropriate regulator to send a copy of the statement of a person’s misconduct to the person concerned, as well as anyone who was given a copy of the decision notice.

1643 Section 309Z5 requires the appropriate regulator to issue a statement of its policy on the circumstances in which it will impose penalties, suspensions, conditions or limitations under section 309Z2 and the basis on which the level of these sanctions will be determined for different types of misconduct. The policy set out in the statement must provide for the regulator to take into account the factors which are set out in subsection (2). Subsection (4) requires the appropriate regulator to have regard to any statement in force at the time of the misconduct when exercising, or deciding whether to exercise, its power under this section 309Z2.

1644 Section 309Z6 sets out the procedure for issuing a statement of policy under section 309Z5. Subsection (1) requires the appropriate regulator to publish the statement of policy in draft, with a notice stating that representations about the proposal may be made to the appropriate regulator. The appropriate regulator is required to consider representations before issuing the statement, and then to publish the statement, along with a summary of the representations made in accordance with subsection (2) and a description of significant changes since the statement was published in draft, in the best way to bring them to the attention of the public.

1645 Section 309Z7 defines a number of the terms used in this Chapter of the Act.

1646 Section 309Z8 grants HM Treasury the power to provide by regulations for the regime set out in this Chapter, or any part of it, to apply to registered credit rating agencies (CRAs), or to certain categories of CRA. Subsection (2) provides that the appropriate regulator, in relation to CRAs, must be the FCA. Subsection (3) provides that regulations made under this section can modify legislation.

Part 2 – Related amendments

1647 Part 2 of the Schedule makes amendments to FSMA 2000 in consequence of the provision being made in Part 1 of this Schedule.

Schedule 11: Central counterparties

Part 1 – Introductory

1648 Paragraph 1 sets out the main features of the special resolution regime for central counterparties (CCPs). The regime is intended to address a situation where all or part of the business of a CCP has encountered, or is likely to encounter, financial difficulties.

1649 This paragraph sets out the eight stabilisation options, and the three stabilisation powers which may be exercised to achieve the stabilisation options.

1650 The Bank and HM Treasury have significant roles in the operation of the special resolution regime, with more limited roles for the PRA and the FCA.

Part 2 – Pre-resolution powers of the Bank of England

Removal of impediments to the exercise of stabilisation powers etc.

1651 Paragraph 2 provides the powers the Bank will have to direct a CCP to take measures which address impediments to the effective exercise of the stabilisation powers. It is envisaged that these powers would be available for the Bank to use when performing its day-to-day functions of CCP supervisor and resolution authority, should such measures be necessary.

1652 Paragraph 2(2) outlines a non-exhaustive list of the powers the Bank could take to direct a CCP if required.

1653 Paragraph 2(3) outlines that, where a CCP is a subsidiary, the Bank may direct the parent company of the CCP to establish a financial holding company to facilitate the exercise of stabilisation powers, or to ensure the powers do not have an adverse effect on other entities in the group.

1654 Paragraph 2(4) outlines that the Bank must consult the relevant authorities and consider the impact on the CCP or entity in question, the financial markets and the financial stability of the UK before giving directions.

1655 Paragraph 2(6) outlines the form directions can or must take if being issued by the Bank.

1656 Paragraph 2(7) clarifies that nothing in this section limits the powers of the Bank under section 296A of, or paragraph 9B of Schedule 17A to, FSMA 2000.

Safeguards relating to directions under paragraph 2

1657 Paragraph 3 outlines the various safeguards relating to any directions given under paragraph 2, noting (but not limited to) the rights of the CCP to make representations and requirements for the Bank, including a requirement for the Bank to accompany any direction with a notice stating its reasons for exercising the power.

Part 3 – Resolution plans

1658 Paragraph 4(1) outlines that HM Treasury may, by regulations, make provisions for the purpose of ensuring that the Bank creates and maintains a resolution plan for each CCP under its jurisdiction. Examples of provisions that could be created by these regulations are provided in paragraph 4(2), whilst paragraph 4(3) outlines that regulations may also provide for exemptions

Part 4 – Removal of directors and senior managers

Removal of directors and senior managers

1659 Paragraph 5 outlines the Bank's power to require the CCP to remove directors and senior managers if the conditions in paragraphs 7(1) and (2) are met. It is envisaged that this power would be used in instances where the Bank has not yet exercised the stabilisation powers.

Temporary manager

1660 Paragraph 6 outlines that the Bank may appoint a person or more than one person to act as a temporary manager of the CCP, either replacing or working with the directors of a CCP, and that the temporary manager will have the functions specified in paragraph 9. Paragraph 6(7) outlines the powers of instruction the Bank could utilise if the temporary manager is being appointed to work with the directors.

1661 Sub-paragraphs (4) to (6) outline the functions and powers of the temporary manager that may be specified under paragraph 9.

Paragraphs 5 and 6: conditions

1662 Paragraph 7 outlines the conditions that would have to be met for the powers in paragraph 5 and 6 to be exercised. Namely, that there is a significant deterioration in the financial situation of a CCP, a serious infringement by the CCP of a relevant requirement or its rules, or if director of a CCP meets the conditions in paragraph 7(5). Paragraph 7(6) defines a relevant requirement as one imposed by or under FSMA 2000, the European Market Infrastructure Regulation (EMIR), as onshored in UK law, or another enactment specified in regulations made by HM Treasury.

1663 Paragraph 7(2) clarifies that the conditions are met if it's not reasonably likely that a measure taken by the Bank under its powers in section 296 or 296A of FSMA 2000 or paragraph 13 of this Schedule would reverse a financial deterioration or bring an infringement to an end.

Temporary manager: further provisions in relation to the appointment

1664 Paragraph 8(1) clarifies that the Bank must be satisfied the temporary manager has the relevant experience and qualifications necessary to perform the role and has no conflicts of interest.

1665 Sub-paragraphs (2) to (4) outline that the Bank may not appoint a temporary manager for longer than a year, may vary the terms of the appointment (and remove the temporary manager) at any point, and clarifies the limitations of what the temporary manager will be liable for.

Temporary manager: instrument of appointment

1666 Paragraph 9 clarifies that the power to appoint a temporary manager must be exercised by an instrument of appointment, which must be published if the conditions specified in sub-paragraph (7) are met.

1667 Sub-paragraphs (2), (5) and (6) outline the details and provisions that the instrument of appointment must or may contain, whilst sub-paragraphs (3) and (4) outline the requirements the Bank may place on the temporary manager.

Right to refer matters to the Tribunal

1668 Paragraph 10 outlines the rights of a CCP, director, or senior manager (or former director or senior manager) who is aggrieved by the exercise of powers within paragraphs 5 or 6 to refer the matter to the Tribunal.

Removal of directors and senior managers and appointment of temporary manager: procedure

1669 Paragraph 11(1) outlines that the powers to remove directors or appoint a temporary manager may take effect immediately, or at a specified date.

1670 Sub-paragraphs (2) and (3) specify that the Bank must give written notice to the CCP, and in some cases the directors and senior managers to whom the requirement relates when exercising the powers mentioned in paragraphs 5 or 6, or in cases where representations have been made and the Bank does or does not change their approach in light of this.

Removal of directors and senior managers and appointment of temporary manager: notice requirements

1671 Paragraph 12 outlines requirements for the contents of any written notice which is provided under paragraph 11.

Temporary restriction on remuneration

1672 Paragraph 13 describes the powers the Bank will have to direct a CCP to restrict or prohibit discretionary payments to specific employees or shareholders of a CCP for a specified time. These include equity remuneration, dividend payments, share buy-backs, bonuses and severance payments, where these payments are not obligations imposed under a contract. The Bank can only exercise this power when it has not yet exercised any stabilisation powers.

1673 Sub-paragraphs (2) to (4) outline the conditions that must be met for this power to be exercised.

1674 Sub-paragraphs (5) to (8) require that the Bank must publish a statement of policy, and that no directions may be under this section before the statement of policy has been published.

1675 Sub-paragraph (9) outlines that the specified time for use of this power must not exceed 5 years, and sub-paragraph (10) clarifies that a direction must be given in writing and can be varied or revoked.

Restriction on remuneration: review and revocation

1676 Paragraph 14 applies where a direction has been given under paragraph 13 in relation to a CCP, noting that the Bank must review whether the requirements are still met for the power to be exercised every 3 months, and revoke the direction immediately if they are not.

1677 The direction also ceases to have effect if a stabilisation power is exercised.

Part 5 – Special resolution action

Special resolution objectives

1678 Paragraph 15 sets out the five special resolution objectives, which the Bank must have regard to in using (or considering using) the stabilisation powers.

1679 With no order of priority these objectives are:

- a. To protect and enhance the stability of the financial system of the UK (by preventing contagion and maintaining market discipline);
- b. To protect and enhance public confidence in the stability of the financial system of the UK;
- c. To maintain the continuity of clearing services;
- d. To protect public funds;
- e. To avoid interfering with property rights in contravention of a Convention right (the meaning of which is in the Human Rights Act 1998).

Code of Practice

1680 Paragraph 16 specifies that HM Treasury must issue a code of practice about the use of stabilisation powers, which the Bank must have regard to.

1681 Paragraph 16(2) outlines what the code may provide guidance on. This includes, amongst other things, how the special resolution objectives should be interpreted, how decisions over which stabilisation powers to exercise are expected to be made, and compensation arrangements including the methodology for calculating how much compensation may be owed to persons left financially worse off where stabilisation options are exercised.

1682 Paragraph 16 also clarifies that HM Treasury must consult the Bank, the FCA and the PRA before issuing the code, and must lay a copy before Parliament as soon as reasonably practicable after issuing it.

General conditions

1683 Paragraph 17 outlines the conditions that must be met for a stabilisation power to be exercised.

1684 There are four conditions which are not in order of priority:

- a. Condition 1: The CCP is failing or likely to fail (within the meaning given in sub-paragraph (6));
- b. Condition 2: It is not reasonably likely that (ignoring the stabilisation powers) action will be taken which means the CCP is not likely to fail, or actions undertaken by the CCP to prevent failure might have an adverse impact the stability of the financial system of the UK;
- c. Condition 3: The exercise of the power is necessary having regard to the public interest, in the advancement of one or more of the special resolution objectives;
- d. Condition 4: One of more of the special resolution objectives would not be met to the same extent by the winding up of the CCP.

1685 Paragraph 17(10) clarifies that the Bank must consult the FCA and Treasury (and in some cases the PRA) before determining if conditions 2, 3 and 4 are met.

Effect on other group members

1686 Paragraph 18 outlines that, if the CCP is a member of a group, the Bank must have regard to the need to minimise the effect of the power on other undertakings of the same group, and the effect of the power on the financial stability of third countries.

Specific conditions: financial assistance cases

1687 Paragraph 19 sets out the conditions that must be met before the Bank exercises the stabilisation powers outlined in paragraphs 27, 29 and 30, where HM Treasury has notified the Bank that they have provided financial assistance in respect of a CCP, for the purpose of resolving or reducing a serious threat to the stability of the financial system of the UK.

Resolution liaison panel

1688 Paragraph 20 sets out the arrangements HM Treasury must make for a panel to advise HM Treasury about the effect of the special resolution regime for CCPs on the financial services industry and financial markets. In particular it clarifies what the panel may advise on and the membership of the panel.

Restrictions on use of certain resolution powers

1689 Paragraph 21 outlines restrictions on certain resolution powers; specifically, for the first stabilisation option (private sector purchaser), where the Bank may only exercise resolution powers in relation to a residual CCP; and the third stabilisation option (transfer of ownership), where the Bank may only exercise resolution powers where the transferee is the Bank, a company owned the Bank or HM Treasury, or a nominee of HM Treasury.

Pre-resolution valuation

1690 Paragraph 22 sets out that before the bank exercises any stabilisation power, it must ensure that the assets and liabilities of a CCP are valued by an independent valuer (unless urgency dictates that the Bank must carry out a provisional valuation instead).

1691 Sub-paragraph (4) provides that the Bank may carry out a provisional valuation if urgency dictates it is necessary.

1692 Sub-paragraph (5) clarifies what a person conducting a valuation is obligated to consider, and sub-paragraphs (7) and (8) set out the products that a valuation must or may be accompanied by, though if a provisional valuation is being carried out the Bank need only comply with sub-paragraph (7) as far as it is reasonable to do so in the circumstances (sub-paragraph (9)).

1693 Sub-paragraph (10) outlines that HM Treasury may by regulations specify the methodology for a valuation.

Replacement of Bank's provision valuation

1694 Paragraph 23 provides that if the Bank has carried out a provisional valuation under paragraph 22(4), the Bank must arrange for a full valuation to be carried out by an independent valuer as soon as is reasonably practicable, for the purposes outlined in sub-paragraph (2).

1695 The valuation under paragraph 23 must adhere to the same requirements as in paragraph 22(5) and (7)).

Independent valuer: valuation under paragraph 22 or 23

1696 Paragraph 24 provides that the Bank must appoint a person to act as an independent valuer for the purposes outlined under paragraph 22 and 23. Sub-paragraph (2) explains that the Bank may require the CCP to reimburse the Bank for costs it incurs in relation to the valuer.

1697 Sub-paragraph (3) notes that an independent valuer must satisfy certain requirements in order to be appointed, whilst sub-paragraphs (4), (5) and (6) provide for the duration in which a valuer may hold office, the grounds on which a valuer may be removed from office, and the actions the Bank must take upon the death, resignation or removal from office of an independent valuer respectively.

Independent valuer: supplemental

1698 Paragraph 25 outlines that the independent valuer may do anything necessary or desirable for the purposes of their valuation (sub-paragraph (1)), including appointing staff (sub-paragraph (4)), and HM Treasury may make regulations to confer specific functions on valuers or make provisions for procedure to be followed, as outlined in sub-paragraphs (2), (3), and (5).

1699 Sub-paragraph (6) notes that independent valuers and their staff are not civil servants, nor servants or agents of the crown, and sub-paragraph (7) notes that records of an independent valuer are public records (for the purposes of the Public Records Act 1958).

Consequences of a replacement valuation

1700 Paragraph 26 provides that, where an independent valuation produces a higher valuation of the net asset value of the CCP than a provisional valuation, the Bank may modify and liability of the CCP which has been reduced, deferred or cancelled by a write-down instrument, to reinstate that liability. They may also instruct a bridge CCP to pay additional considerations to the persons outlined in sub-paragraph (1)(b). This is subject to certain conditions, outlined in sub-paragraph (2).

Private sector purchaser

1701 Paragraph 27 sets out the first stabilisation option (private sector purchaser), which allows the Bank to sell all or part of the business of a CCP to a commercial purchaser.

1702 Sub-paragraph (2) provides that this transfer may be effected through either a transfer of the CCP's shares and other securities, or some or all of its property, rights and liabilities. Both types of transfer are executed by instruments made by the Bank (a share transfer instrument or a property transfer instrument).

Private sector purchaser: marketing

1703 Paragraph 28 sets out that if utilising the private sector purchaser option, the Bank must make arrangements for marketing any parts of the businesses sold through the share

transfer or property transfer instruments (unless this would undermine one or more of the special resolution objectives (sub-paragraphs (4) and (5)).

1704 Arrangements are subject to certain criteria, outlined in sub-paragraphs (2) and (3).

Bridge central counterparty

1705 Paragraph 29 sets out the second stabilisation option (bridge central counterparty). It allows the Bank to transfer all or part of the business of a CCP to a company which is a) wholly or partially owned by the Bank, is b) controlled by the Bank, and is c) created for the purposes of receiving a transfer by virtue of this paragraph. The option is designed to facilitate a temporary arrangement in order to maintain access to critical clearing services, with the view to eventually selling the CCP or its business. The Bank can make one or more property or share transfer instrument(s) for this purpose.

1706 Sub-paragraphs (4) and (5) set out the provisions that must be included in the code of practice referred to in paragraph 16, and the situations in which the Bank must take necessary steps to wind up the bridge CCP.

1707 Sub-paragraphs (9) and (10) set out circumstances pertaining to an “onward bridge central counterparty”, whereby the business of a CCP first transferred by a property transfer instrument is later transferred to another company wholly owned by the Bank.

Transfer of ownership

1708 Paragraph 30 sets out that third stabilisation option is to transfer ownership of the CCP to any person, for which the Bank may make one or more share transfer instruments. It is designed to allow the Bank to transfer the ownership of the CCP to a person other than a commercial purchaser or into a Bank-owned bridge company.

Tear-up power

1709 Paragraph 31 sets out the fourth stabilisation option (to make one or more tear-up instruments for the purpose of ensuring the CCP has a matched book). This would involve the Bank terminating all or part of any contracts held by the CCP with its clearing members, allowing the Bank to rebalance the CCP’s finances.

1710 Sub-paragraph (4) sets out that the Bank must either a) require a CCP to make a commercially reasonable payment to a clearing member who is a party to a contract being terminated, or b) require the clearing member who is a party to the contract to make a commercially reasonable payment to the CCP. Sub-paragraph (5) requires the Bank to publish a statement of policy within 12 months of the power coming into force as to how it determines what a commercially reasonable payment is.

1711 Sub-paragraph (8) defines a matched book.

Cash call power

1712 Paragraph 32 out the fifth stabilisation option (to make one or more cash-call instruments). This power allows the Bank to require clearing members of the CCP to pay a specified amount in cash to the CCP, in order to absorb losses and recapitalise the CCP.

1713 Sub-paragraph (3) states that HM Treasury may make regulations to determine the maximum cash amount that clearing members can be required to contribute, and specify circumstances in which the Bank may require a CCP to use specified funds of specified clearing members. It is the government’s intention in the near-term to use this power to set specific maximum cash limits, specifically two times a clearing member’s default fund contribution (for default losses) and three times a clearing member’s default fund contribution (for non-default losses).

1714 This power will not apply to certain clearing members, as clarified in sub-paragraph (4).

Power to reduce variation margin payments

1715 Paragraph 33 sets out the sixth stabilisation option (power to cancel or reduce variation margin payments). This power allows the Bank to cancel or reduce a variation margin payment (as defined in sub-paragraph (5)) that a CCP would have otherwise paid to a clearing member.

1716 Sub-paragraph (3) specifies that this power can only be used to recover losses incurred as a result of a clearing member defaulting and will not apply to the clearing members outlined in sub-paragraph (4).

Write-down power

1717 Paragraph 34 outlines the seventh stabilisation option (to make one or more write-down instruments). This power allows the Bank to cancel, modify or change the form of an unsecured liability which is owed by the CCP.

1718 Sub-paragraph (3) specifies that this power can only be used to recover losses incurred as a result of anything other than a clearing member defaulting. This power may also not be exercised for a number of liabilities, outlined in sub-paragraph (4), and HM Treasury will have power to make regulations to add to/amend this list of excluded liabilities.

Powers in relation to securities

1719 Paragraph 35 sets out the interaction of the write-down power with securities, and provides that a write-down instrument may cancel, transfer, dilute, modify or convert any securities (as defined in sub-paragraph (2)).

1720 Sub-paragraph (3) further outlines what a write-down instrument may provide for, including provision with respect to rights attaching to securities issued by the CCP and providing for the listing of securities issued by the CCP to be discontinued or suspended. Further details are provided in sub-paragraphs (5), (6) and (7).

1721 Sub-paragraph (8) clarifies the interaction with FSMA 2000, whilst sub-paragraph (9) clarifies that any provision made under this paragraph is in addition to any powers in paragraph 34.

Report on provisions in write-down instrument

1722 Paragraph 36 applies to a relevant provision in a write-down instrument as referred to in para 34(2), and provides that the Bank must report to the Chancellor stating reasons why that provision has been made in the case of the liabilities concerned and the reasons for any deviation from normal certain specified insolvency treatment principles. The Chancellor must lay a copy of this report before Parliament.

Priority between creditors

1723 Paragraph 37 permits HM Treasury to make regulations to specify matters to which the Bank must have regard in making a write-down instrument to ensure that the treatment of liabilities in a write down instrument align to an appropriate degree with how liabilities should be treated under insolvency proceedings. This will ensure the effective use of the write down power in paragraph 34. The power corresponds with the provisions in paragraph 36 where the Bank has taken action that deviate from normal insolvency treatment principles.

Power to take control

1724 Paragraph 38 outlines the eighth stabilisation option (to make one or more instruments of control). An instrument of control allows for any voting rights of shareholders or members and specified powers of directors and senior managers of the CCP to be transferred to the Bank for a specified time. The power will thus enable the Bank to assume control of a failing CCP quickly in order to stabilise it and restore it to viability.

Shadow directors etc

1725 Paragraph 39 applies where the Bank has used one or more stabilisation options mentioned in paragraph 1(3) unless the CCP has ceased to be subject to the exercise of any stabilisation power mentioned in paragraph 1(4), and clarifies that relevant persons (e.g. the Bank, someone working for or acting for the Bank, or a temporary manager appointed under paragraph 6) are not to be treated as a shadow director of a CCP, or a director or someone who discharges managerial responsibilities for the purposes of the relevant enactments.

Interpretation: “securities”

1726 Paragraph 40 defines “securities” for the purpose of this Schedule and in particular the use of share transfer instruments, as per paragraph 41.

Share transfer instrument

1727 Paragraph 41 defines a “share transfer instrument”. It is an instrument which provides for securities issued by a CCP to be transferred, or makes other provision for the transfer of securities issued by a CCP. This enables the operation of stabilisation options involving a transfer of shares set out at paragraphs 27, 29 and 30.

Effect

1728 Paragraph 42 outlines that a ‘transfer’ (a transfer provided for by a share transfer instrument) takes effect despite any restrictions arising from contracts or legislation (sub-paragraph (3)), and can take effect free from any trust, liability or other encumbrance (sub-paragraph (5)). It can also extinguish any rights to acquire securities arising from shares, stock or debentures (sub-paragraph (6)).

Continuity

1729 Paragraph 43 states that when a share transfer instrument is made, provision can be made to ensure the continuity of arrangements operating in respect of a CCP.

1730 Sub-paragraph (1) enables the share transfer instrument to include provision that the transferee can be treated as the same person as the transferor for any purpose connected with the transfer.

1731 Sub-paragraph (2) enables the share transfer instrument to include provision that agreements made or other things done by or in relation to a transferor are treated as made or done by or in relation to the transferee. This provision would enable for example, the transferred CCP to continue to benefit from arrangements entered into by the transferors, notwithstanding any rights triggered on the transfer.

1732 Sub-paragraph (3) allows for transitional provision about things transferred to be continued. This can include continuation of legal proceedings by or in relation to the transferee. Sub-paragraph (4) allows for the modification of references to the transferor in instruments or documents. Sub-paragraph (5) allows for provision of information to be required or permitted between the transferor and the transferee of a share transfer instrument or order.

Conversion and delisting

1733 Paragraph 44 outlines that a share transfer instrument may provide for securities (as previously defined), to be converted from one form or class to another (sub-paragraph (1)) – and may also provide for the listing of securities to be discontinued or suspended (sub-paragraph (2)). Sub-paragraph (3) explains that where the listing of securities is suspended by a share transfer instrument, those securities are to be treated as still being listed for specific purposes.

Directors and senior managers

1734 Paragraph 45 outlines that a share transfer instrument may be used to remove, appoint, and amend the service contract of a director or senior manager of a CCP.

1735 Sub-paragraph (2) clarifies that this also applies to directors or senior managers of any undertaking which is a CCP group company, in respect of a specified CCP. Sub-paragraph (4) explains that any appointments are to be on terms and conditions agreed with the Bank, whilst sub-paragraph (3) defines ‘relevant CCP group company’.

Ancillary instruments: production, registration, etc

1736 Paragraph 46 makes various provisions for share transfer instruments to take effect irrespective of the lack of completion of formalities. It provides that the transfer has effect irrespective of production, delivery, transfer or other dealing with an instrument and irrespective of registration.

Incidental provision

1737 Paragraph 47 outlines that a share transfer instrument may include incidental, consequential or transitional provision (e.g., provision for different purposes, cases or circumstances).

Procedure: instruments

1738 Paragraph 48 outlines the procedure that the Bank must follow in making a share transfer instrument. It describes the persons that the Bank must send a copy of the share transfer instrument to (sub-paragraph (1)), and where the Bank must publish a copy (sub-paragraph (2)). HM Treasury must also lay a copy before Parliament (sub-paragraph (3)).

Supplemental instruments

1739 Paragraph 49 outlines that where the Bank has made a share transfer instrument, they may also make one or more supplemental share transfer instruments (sub-paragraph (2)). This can provide for the transfer of securities which were issued by the CCP before the original instrument, and have not been transferred by the original instrument (or another supplementary instrument), or makes provisions of the kind that a share instrument may make under paragraph 41, sub-paragraph (1)(b)).

1740 The general and specific conditions (paragraphs 17 and 19) do not apply to a supplemental instrument. Sub-paragraph (5) outlines who the Bank must consult before making a supplemental share instrument, and sub-paragraph (7) outlines that paragraph 48 also applies for a supplemental share instrument.

Onward transfer

1741 Where the Bank has made a share transfer instrument, it may then make onward share transfer instruments.

1742 These may provide for two things: first, for the transfer of securities meeting the description specified in paragraph 50(3)(a); and, second, for any provision in relation to the relevant securities.

1743 Paragraph 50(4) stipulates that the transferee may not be the transferor under the original order, and the Bank may not make an onward share transfer unless the transferee falls into the conditions outlined in paragraph 50(5).

1744 The general and specific conditions (paragraph 17 and 19) do not apply to an onwards transfer. Paragraph 50(7) provides that the Bank must consult the FCA, and the PRA if the CCP is authorised by the PRA.

1745 Paragraph 48 applies where the Bank has made an onward share transfer instrument.

Reverse share transfer

1746 Where the Bank has made a share transfer instrument, it may make reverse share transfer instruments.

1747 A reverse share transfer instrument may transfer securities back to original transferors (e.g. the holders of the shares and other securities before Bank intervention). Where there has been an onward share transfer, the order may transfer securities back from that onward transferee. The three conditions defining a reverse share transfer instrument are outlined in paragraph 51(4).

1748 Sub-paragraphs 51(5) and (6) outline the conditions that must be met for a reverse share transfer instrument to be used (e.g. the onward transferee must be the Bank, a company owned by the Bank or HM Treasury, or a nominee of HM Treasury, or must be made with written consent of the onward transferee).

1749 The general and specific conditions (paragraph 17 and 19) do not apply to reverse share transfers. Paragraph 51(8) provides that the Bank must consult the FCA, and the PRA if the CCP is authorised by the PRA.

1750 Paragraph 48 applies where the Bank has made a reverse share transfer instrument.

Bridge central counterparties: share transfers

1751 Where the Bank has made a property transfer instrument to effect the bridge CCP option, it may make bridge CCP share transfer instruments.

1752 These instruments provide for securities issued by the bridge CCP to be transferred and for other provision to be made in relation to the securities of the bridge CCP. Thus the Bank of England may transfer the securities of a bridge CCP.

1753 The general and specific conditions (paragraph 17 and 19) do not apply to transfers under paragraph 52. Paragraph 52(5) provides that the Bank must consult the FCA, and the PRA if the CCP is authorised by the PRA.

1754 Paragraph 48 applies where the Bank has made a transfer under paragraph 52.

Bridge central counterparties: reverse share transfers

1755 Where the Bank has made a bridge CCP share transfer instrument, it may make one or more bridge CCP reverse share transfer instruments, as long as the transferee under the original instrument fulfils the criteria outlined in paragraph 53(4).

1756 A bridge CCP reverse share transfer instrument provides for securities to be transferred back to the transferor under the original instrument, as outlined in paragraph 53(3).

1757 The general and specific conditions (paragraph 17 and 19) do not apply to transfers made under paragraph 53. Paragraph 53(6) provides that the Bank must consult the FCA, and the PRA if the CCP is authorised by the PRA.

1758 Paragraph 48 applies where the Bank has made instrument under paragraph 53.

Property transfer instruments

1759 Paragraph 54 provides that property transfer instruments may be made by the Bank of England to effect a transfer of a CCP's property, rights or liabilities. It describes the provision that a property transfer instrument may make. The instrument may transfer some or all of the property, rights or liabilities of a specified CCP. The instrument may relate to specified combinations of the specified CCP's property, rights or liabilities.

Effect

1760 Paragraph 55 sets out that a transfer of property, rights or liabilities is effected through a property transfer instrument (paragraph 54). Sub-paragraphs (3) and (4) make provision for the transfer to take effect regardless of any legislative or contractual restriction, including requirements for consent (or any other restrictions which might render property not transferable).

Transferable property

1761 Paragraph 56 makes provision for a property transfer instrument to transfer any property, rights or liabilities. Such property, rights and liabilities are expressed to include those acquired or arising between the making of the instrument and the transfer date, and any rights and liabilities arising on or after the transfer date in respect of matters occurring before that date. Sub-paragraphs (c) and (d) provide that foreign property may be transferred. Sub-paragraph (e) provides that rights and liabilities under enactments may be the subject of a transfer.

Continuity

1762 Paragraph 57 states that, when a property transfer instrument is made, provision can be made to ensure the continuity of arrangements operating in respect of a CCP.

1763 Sub-paragraph (1) enables the property transfer instrument to include provision that the transferee can be treated as the same person as the transferor for any purpose connected with the transfer and for the transfer to be treated as a succession.

1764 Sub-paragraph (2) enables the property transfer instrument to include provision that agreements made or other things done by or in relation to a transferor are treated as made or done by or in relation to the transferee. This provision would enable, for example, the CCP to continue to benefit from arrangements entered into by the transferor, notwithstanding any rights triggered on the transfer.

1765 Sub-paragraph (3) provides that anything related to things that have been transferred under the instrument, which are already in the process of being done by or to the transferor immediately before the transfer can be continued in relation to the transferee. This can include continuation of legal proceedings by or in relation to the transferee.

1766 Sub-paragraph (4) allows for provision to be included in a property transfer instrument about continuity of employment.

1767 Sub-paragraph (5) allows for the modification of references to the transferor in instruments or document.

1768 Sub-paragraph (6) provides that in so far as rights and liabilities in respect of anything transferred are enforceable after a transfer date, a property transfer instrument can apportion them as between the transferor and the transferee.

1769 Sub-paragraph (7) provides that the transferor and the transferee may, by agreement, modify a provision of the instrument. Such a modification must achieve a result that could have been achieved by the instrument, and may not transfer (or arrange the transfer of) property rights or liabilities.

1770 Sub-paragraph (8) allows for provision of information and assistance to be required or permitted between the transferor and the transferee under a property transfer instrument.

Directors and senior managers

1771 Paragraph 58 allows the Bank, through a property transfer instrument, to take various actions with regard to directors and senior managers of CCPs or relevant CCP group company in respect of a CCP, including appointment and removal, termination and variation of service contracts.

1772 Sub-paragraph (4) clarifies that appointments are to be made on terms and conditions agreed by the Bank, whilst sub-paragraph (3) defines 'relevant CCP group company'.

Recognised central counterparty rules

1773 Paragraph 59 states that a property transfer instrument made by the Bank may also include provision regarding the consequences of a transfer for the rules of a CCP. Sub-paragraph (2) provides that an instrument may modify or amend the rules of a CCP (or the part of the CCP that either has or has not been transferred).

Recognised central counterparty membership

1774 Paragraph 60 outlines that a property transfer instrument may make provision about the consequences of a transfer for membership of a CCP. Namely, an instrument may make provision which modifies the terms on which a person is a clearing member of a CCP, and where there has been a partial transfer provide for a person to remain a member of the transferor whilst also becoming a member of the transferee.

Licenses

1775 Paragraph 61 makes provision in relation to licenses. Sub-paragraph (1) provides that a licence in respect of property transferred by property instrument shall continue to have effect notwithstanding the transfer. Sub-paragraph (2) provides that the Bank may disapply sub-paragraph (1), so that a licence may be discontinued. Sub-paragraph (3) specifies that where a licence imposes rights or obligations, a property transfer instrument may apportion responsibility for exercise or compliances between the transferor and transferee.

Foreign property

1776 Paragraph 62 describes how a property transfer instrument may make provision for the transfer of property situated outside the United Kingdom and rights and liabilities governed by foreign law.

1777 Sub-paragraph (3) states that both the transferor and the transferee must take any necessary steps to ensure that the transfer is effective as a matter of foreign law.

1778 Sub-paragraph (4) makes provision for what the transferor must do in the period before a transfer is fully effective as a matter of foreign law. For this period, the transferor must act on behalf of the transferee by holding any property or right for its benefit or discharging any liability on its behalf. This is unless the Bank determines that it will not be possible for the transfer of property to be effective under the jurisdiction it occurs in (subsection (5)).

1779 Sub-paragraph (7) outlines that the transferor must meet any expenses of the transferee in complying with this provision.

1780 Sub-paragraphs (8) and (9) relate to obligations imposed by the operation of this paragraph. Such obligations are enforceable as contracts and the Bank of England may give directions in relation to those obligations, with which the transferor must comply.

Incidental provision

1781 Paragraph 63 provides for a property transfer instrument to include incidental, consequential or transitional provision. Such provision may be made generally or for a specified purpose or purposes.

Procedure

1782 Paragraph 64 outlines the procedural requirements for a property transfer instrument. It requires the Bank of England to send a copy of a property transfer instrument, as soon as reasonably practicable, to the affected CCP, HM Treasury, the FCA, the PRA (if the CCP is a PRA-authorised person) and any other persons specified in the code of practice.

1783 The Bank of England must also publish the property transfer instrument in line with the provisions of sub-paragraph (2). HM Treasury is also required to lay a copy of the transfer instrument before Parliament (sub-paragraph (3)).

Property transfer instrument: delisting

1784 Paragraph 65 explains that a property transfer instrument may provide for the listing of securities to be discontinued or suspended. Where they are suspended, the securities are to be treated for the purposes of the relevant provisions in FSMA 2000 (outlined in sub-paragraph (2)) as still being listed.

Transfer of property subsequent to resolution instrument

1785 Paragraph 66 states that, where the Bank has made a resolution instrument, the Bank may make one or more property transfer instruments in respect of property, rights or liabilities of the CCP.

1786 Sub-paragraph (3) notes that paragraph 17 does not apply to a property transfer instrument under sub-paragraph (2), whilst sub-paragraph (4) notes that the Bank must consult the FCA, HM Treasury, and the PRA if the CCP is a PRA-authorised person.

Supplemental instruments

1787 Paragraph 67 states that, where the Bank of England has made a property transfer instrument in accordance with either the private sector purchaser or the bridge CCP options, it may make additional supplemental property transfer instruments. These may, among others, provide for two things: first, for property, rights and liabilities to be transferred from the original transferor; and, second, for anything that a property transfer instrument may otherwise provide for.

1788 Sub-paragraph (4) provides that the general and specific conditions (paragraph 17 and 19, respectively) do not apply to supplemental transfers.

1789 Sub-paragraph (5) provides that the Bank of England must consult the FCA, HM Treasury, and, if the CCP is a PRA-authorised person) the PRA, before making the instrument.

1790 Making a supplementary property transfer instrument will not prejudice the possibility of making a new instrument under paragraph 27 or 29.

1791 The procedure outlined under paragraph 64 will also apply if a supplemental property transfer instrument is made.

Private sector purchaser: reverse property transfer

- 1792 Paragraph 68 sets out that, where the Bank of England has made a property transfer instrument in accordance with the private sector purchaser option it may make reverse property transfer instruments.
- 1793 A reverse property transfer instrument may transfer property, rights or liabilities of a private sector purchaser back to the original transferor, or make other provision in connection with the transfer of property, rights or liabilities that are, could be, or could have been transferred.
- 1794 Sub-paragraph (4) provides that the Bank must obtain the written consent of the original transferee before making a private sector reverse property transfer instrument.
- 1795 Sub-paragraph (5) provides that the general and specific conditions (paragraph 17 and 19, respectively) do not apply to instruments made under paragraph 68.
- 1796 Sub-paragraph (6) provides that the Bank of England must consult the FCA, HM Treasury, and (if the CCP is a PRA-authorized person) the PRA, before making the instrument.
- 1797 The procedure outlined under paragraph 64 will also apply if a transfer instrument is made under this paragraph.

Onward transfer

- 1798 Paragraph 69 sets out that, where the Bank has made a property transfer instrument in respect of a bridge CCP, the Bank may make one or more onward property transfer instruments. This provides that property rights or liabilities of the bridge CCP may be transferred, or the Bank make other provision in connection with the transfer of property, rights or liabilities of the bridge CCP. This applies to property, rights and liabilities of the bridge CCP whether or not they were transferred under the original instrument.
- 1799 Sub-paragraph (5) provides that the onward property transfer may not transfer property, rights, or liabilities to the original transferor.
- 1800 Sub-paragraph (6) provides that the general and specific conditions (paragraph 17 and 19, respectively) do not apply to an instrument made under paragraph 69.
- 1801 Sub-paragraph (7) provides that the Bank of England must consult the FCA, HM Treasury, and (if the CCP is a PRA-authorized person) the PRA, before making the instrument.
- 1802 The procedure outlined under paragraph 64 will also apply if an instrument is made under this paragraph.

Bridge central counterparties: reverse property transfer

- 1803 Paragraph 70 sets out that, where the Bank has made a property transfer instrument providing for the transfer of property, rights or liabilities to a bridge CCP, they may make one or more bridge CCP reverse property transfer instruments. If the Bank makes an onward property transfer instruments under paragraph 69, they may make one or more reverse property transfer instruments in respect of property rights or liabilities of the onward transferee.
- 1804 The Bank may not make a bridge CCP reverse property transfer instrument unless the conditions in sub-paragraph (5) are met.
- 1805 Sub-paragraph (6) provides that the general and specific conditions (paragraph 17 and 19, respectively) do not apply to instruments made under paragraph 70.

1806 Sub-paragraph (7) provides that the Bank of England must consult the FCA, HM Treasury, and (if the CCP is a PRA-authorised person) the PRA, before making the instrument.

1807 The procedure outlined under paragraph 64 will also apply if an instrument is made under this paragraph.

Transfer of ownership: property transfer

1808 Paragraph 71 sets out that, where the Bank has made a share transfer instrument in respect of paragraph 30 (transfer of ownership) or paragraph 27, the Bank may make one or more property transfer instruments. A property transfer instrument is defined in sub-paragraph (3), and sub-paragraph (4) notes that the Bank may not make a property transfer instrument under this paragraph unless the original instrument transferred securities to the Bank, a company wholly owned by the Bank or HM Treasury, or a nominee of HM Treasury.

1809 Sub-paragraph (5) provides that the general and specific conditions (paragraph 17 and 19, respectively) do not apply to a property instrument made under paragraph 71.

1810 Sub-paragraph (6) provides that the Bank of England must consult the FCA, and (if the CCP is a PRA-authorised person) the PRA, before making the instrument.

1811 The procedure outlined under paragraph 64 will also apply if an instrument is made under this paragraph.

Transfer of ownership: reverse property transfer

1812 Paragraph 72 sets out that, where the Bank has made a property transfer instrument in accordance with paragraph 71, the Bank may make one or more reverse property transfer instruments in respect of the property rights and liabilities of the transferee under the original instrument. The reverse property transfer instrument is defined in sub-paragraph (3).

1813 Sub-paragraph (4) outlines the conditions that must be met for a reverse property transfer instrument to be used (e.g the transferee under the original instrument is the Bank, a company owned by the Bank or HM Treasury, or a nominee of HM Treasury, or must be made with written consent of the onward transferee).

1814 Sub-paragraph (5) provides that the general and specific conditions (section 17 and 19, respectively) do not apply to a property instrument made under paragraph 72.

1815 Sub-paragraph (6) provides that the Bank of England must consult the FCA, and (if the CCP is a PRA-authorised person) the PRA, before making the instrument.

1816 The procedure outlined under 64 will also apply if an instrument is made under this paragraph.

Bridge central counterparty: supplemental property transfer powers

1817 Paragraph 73 applies where the Bank has made a share transfer instrument providing for the transfer of securities by a CCP to a bridge central counterparty. Sub-paragraph (2) outlines that the Bank may make one or more property transfer instruments in relation to the CCP.

1818 Sub-paragraph (3) defines a bridge central counterparty supplemental property transfer instrument.

1819 Sub-paragraph (4) provides that the general and specific conditions (paragraphs 17 and 19 respectively) do not apply to bridge central counterparty supplemental property transfer instruments.

1820 Sub-paragraph (5) provides that the Bank of England must consult the FCA, and (if the CCP is a PRA-authorized person) the PRA, before making the instrument.

1821 Sub-paragraph (6) provides that the possibility of making a bridge central counterparty supplemental property transfer instrument is without prejudice to the possibility of making a property transfer instrument in accordance with paragraph 29(3).

1822 The procedure outlined under 64 will also apply if an instrument is made under this paragraph.

Bridge central counterparty: supplemental reverse property transfer powers

1823 Paragraph 74 sets out that, where the Bank has made a bridge central counterparty supplemental property transfer in accordance with paragraph 73, the Bank may make one or more reverse property transfer instruments in respect of the property rights and liabilities of the transferee under the original instrument. The reverse property transfer instrument is defined in sub-paragraph (3).

1824 Sub-paragraph (5) sets out the conditions that must be met for a reverse property transfer instrument to be used.

1825 Sub-paragraph (4) provides that the general and specific conditions (paragraphs 17 and 19 respectively) do not apply to a bridge central counterparty supplemental reverse property transfer instrument.

1826 Sub-paragraph (6) provides that the Bank of England must consult the FCA, and (if the CCP is a PRA-authorized person) the PRA, before making the instrument.

1827 The procedure outlined under 64 will also apply if an instrument is made under this paragraph.

Restriction of partial transfers

1828 Paragraph 75 sets out a power for HM Treasury to make regulations enabling restrictions to be placed on the making of partial transfers through the property transfer powers by HM Treasury. A partial transfer is the transfer of some, but not all, of a CCP's property, rights or liabilities (as defined in sub-paragraph (1)). The regulations that may be laid by HM Treasury are outlined in sub-paragraph (2).

Power to protect certain interests

1829 Paragraph 76 sets out a power to enable certain private law rights to be protected when the property transfer powers are exercised to effect a partial transfer. A partial transfer is the transfer of some, but not all, of a CCP's property, rights or liabilities (as defined in sub-paragraph (1) of paragraph 75).

1830 Sub-paragraph (1) broadly defines the certain interests ("protected arrangements") for which the power may provide protection. This provision reflects the extremely broad range of relevant interests which exist in this field. The interests which the exercise of the power is intended to cover may include, for example, security interests and set-off and netting arrangements.

1831 Under the power, such interests may be protected in the ways set out in sub-paragraph (2), as supplemented by sub-paragraph (3).

1832 Sub-paragraph (4) allows for regulations to include provision for determining which arrangements are to be considered protected arrangements (with 'arrangements' being defined in sub-paragraph (5)).

Creation of liabilities

1833 Paragraph 77 explains that a property transfer instrument may include provision for the creation of liabilities.

Regulation for safeguarding certain financial arrangements

1834 Paragraph 78 sets out that HM Treasury may make regulations in cases where write down instruments may interact with or affect protected arrangements (sub-paragraph (3)). Regulations under this paragraph can restrict the making of instruments, impose conditions on a write-down instrument, require write-down instruments to included specific provisions, provide for a write-down instrument to be void, and specify principles that the Bank must have regard to when making a write-down instrument.

1835 Regulations can apply to protected arrangements generally, or in specified circumstances or as a specified kind (sub-paragraph 4).

1836 Regulations made by HM Treasury may include provision for determining what is, or is not to be, treated as a protected arrangement.

Resolution instruments: effect and supplementary matters

1837 Paragraph 79 outlines the powers of, and requirements imposed on, resolution instruments (which must be made in writing). A resolution instrument enables the Bank to exercise all stabilisation options other than those that require use of a share or property transfer instrument.

1838 Sub-paragraph (3) outlines that resolution instruments cease to have effect in relation to CCPs on one of the following occurring; the date specified in the instrument is reached (though the Bank may amend this in consultation with HM Treasury, as set out in sub-paragraphs (4) and (5)), a share transfer or property transfer instrument is made in relation the CCP, or any of the resolution conditions cease to have effect in relation to the CCP.

1839 Sub-paragraph (6) outlines that provision made in a resolution instrument will take effect regardless of any restriction arising from contracts or legislation in another way, and sub-paragraph (7) set out that it may provide for anything that is affected by the instrument to be continued that was in the process of being done immediately before the instrument takes effect (including legal proceedings).

1840 Sub-paragraphs (8) to (10) specify that a resolution instrument can modify references in an instrument or document, require or permit any person to provide information and assistance to the Bank or another person, and include incidental, consequential, or circumstantial provision. Sub-paragraph (11) states that an instrument ceasing to have effect does not affect the validity of anything previously done in accordance with it.

Write-down instruments: supplementary

1841 Paragraph 80 makes provision for instruments that allow the Bank to exercise its power to write-down unsecured liabilities.

Resolution instruments: procedure

1842 Paragraph 81 outlines the procedural requirements for resolution instruments.

1843 The Bank must, as soon as is reasonably practicable after making a resolution instrument in respect of a CCP, send a copy of the instrument to the organisations listed in sub-paragraph (1).

1844 The Bank must also follow the instructions in sub-paragraph (2), regarding publishing a copy of the resolution instrument. HM Treasury must also lay a copy of the resolution instrument before Parliament.

Supplemental resolution instruments

1845 Paragraph 82 applies where the Bank has made a resolution instrument. The Bank may make additional resolution instruments, designated by the Bank as supplemental resolution instruments.

1846 Sub-paragraph (3) provides that paragraphs 17 and 79(3)(c) do not apply to a supplemental resolution instrument.

1847 Sub-paragraph (4) provides that the Bank of England must consult the FCA, and (if the CCP is a PRA-authorized person) the PRA, before making the instrument.

1848 Sub-paragraph (5) clarifies that the possibility of making a supplemental resolution instruments is done without prejudice to the possibility of making new instruments in accordance with the paragraphs outlined.

Directors and senior managers

1849 Paragraph 83 allows the Bank, through a resolution instrument, to take various actions with regard to directors and senior managers of CCPs or relevant CCP group companies in respect of a CCP, including appointment and removal, termination and variation of service contracts.

1850 Sub-paragraph (4) clarifies that appointments are to be made on terms and conditions agreed by the Bank.

Termination rights etc

1851 Paragraph 84 sets out certain provisions in relation to default event provisions of the two types set out in the paragraph. Sub-paragraph (6) allows for default event provisions (e.g. termination rights) not to be triggered in relation to the exercise of a resolution measure (as defined in sub-paragraph (1)) and the occurrence of any event directly linked to the application of such a measure.

Deferment

1852 Paragraph 85 outlines that HM Treasury may make provisions through regulations for the suspension or waiver of provisions that are made under a resolution instrument. This would enable the Bank to defer enforcement of obligations imposed on a clearing member of a CCP through its exercise of its resolution powers.

1853 Sub-paragraph (2) provides examples of provisions that may be made under this section.

Recovery of expenses

1854 Paragraph 86 provides that the Bank may direct a CCP to pay the Bank a fee to cover expenses reasonably incurred by the Bank in making a resolution, share transfer, or property transfer instrument.

1855 Sub-paragraph (2) provides that HM Treasury may also exercise a similar power to recover its own reasonable expenses.

Compensation scheme

1856 Paragraph 87 outlines that HM Treasury may, by making regulations, make provision for protecting the financial interests of persons in connection with the making of a relevant

instrument. The regulations may provide for a scheme which may, for example, determine whether compensation is required, pay compensation, and under which specified relevant persons become entitled to the proceeds of the disposal of things transferred under a share transfer/property transfer instrument.

1857 Sub-paragraph (3) ensures HM Treasury must have regard to the desirability of ensuring a person is not worse off under a relevant instrument than they would have been if the CCP had entered insolvency immediately before the relevant instrument was made and all the relevant rules of the CCP had been applied in the period leading up to insolvency.

1858 Sub-paragraph (6) notes that regulations may provide for compensation either by HM Treasury or any other specified person.

Instruments: notification of members and creditors

1859 Paragraph 88 sets out that, where the Bank has applied one or more stabilisation options, the Bank must send a copy of any share/property transfer or resolution instrument to the shareholders (or members, where the CCP is an unincorporated association) and creditors of the CCP known to the Bank. This is unless securities issued by the CCP have been admitted to trading on a regulated market.

General continuity obligation: property transfers

1860 Under paragraph 89, a residual CCP and each group company (as defined in sub-paragraph (1)) must provide such services and facilities as are required to enable a transferee to operate the transferred business (or part of it) effectively. This duty may be enforced as a contract (sub-paragraph (4)), continues even if the residual CCP or group company enter insolvency (sub-paragraph (5)), and is not limited to the provision of services or facilities directly to a transferee (sub-paragraph (8)).

1861 The Bank may also (with HM Treasury consent) specify activities that are required of the residual CCP or group company (sub-paragraph (9)), with further detail in sub-paragraph (10)).

1862 Sub-paragraph (6) provides that the residual CCP or group company has a right to reasonable consideration, with extra detail provided in (sub-paragraph (7)).

Special continuity obligations: property transfers

1863 Paragraph 90 provides that the Bank may modify, cancel or impose rights and obligations between a transferee, the residual CCP and a group company or third-party (sub-paragraph (2)).

1864 Sub-paragraph (3) provides that the Bank shall aim, so far as is reasonably practicable, to preserve or include provision for reasonable consideration and terms.

1865 Powers in this section may only be exercised if the conditions under sub-paragraph (4) are met. Sub-paragraph (5) ensures that obligations imposed under sub-paragraph (2)(d) or (e) continue to apply despite the residual CCP or group company entering insolvency.

Continuity obligations: onward property transfers

1866 Paragraph 91 provides for the Bank or HM Treasury to extend the general continuity obligation of paragraph 89 or special continuity obligations of paragraph 90 in the circumstances of an onward transfer of property, rights or liabilities (so, for example, continuity obligations could be owed to the onward transferee).

1867 Sub-paragraph (3) provides that onward obligations may be imposed on the persons listed, whilst sub-paragraph (4) clarifies that these obligations may be imposed in addition to, or replacing, initial obligations.

1868 The power under this section is exercisable by giving a notice both to each person on whom a continuity obligation is to be imposed, and the person who is expected to benefit from it. The Bank may exercise the power only with the consent of HM Treasury.

General continuity obligation: share transfers

1869 Paragraph 92 makes provision for services to be provided in respect of a CCP transferred by share transfer from former group companies through means of a general obligation.

1870 Sub-paragraph (3) provides that each former group company (as defined in sub-paragraph (1)) must provide such services and facilities as required to enable the transferred CCP to operate effectively. This duty may be enforced as a contract (sub-paragraph (4)), continues even if the residual CCP or former group company enters insolvency (sub-paragraph (5)), and is not limited to the provision of services or facilities directly to the transferred CCP (sub-paragraph (8)).

1871 The Bank may also (with Treasury consent) specify activities that are required of the residual CCP or former group company (sub-paragraph (9)), with further detail in sub-paragraph (10).

1872 Sub-paragraph (6) provides that the residual CCP or former group company has a right to reasonable consideration, with extra detail provided in (sub-paragraph (7)).

Special continuity obligations: share transfers

1873 Paragraph 93 provides that the Bank, through a share transfer instrument, may modify or cancel a contract or other arrangement between the transferred CCP and a group company or third-party, or otherwise confer and impose rights and obligations upon those entities in respect of a share transfer (sub-paragraph (2)).

1874 Sub-paragraph (3) provides that the Bank shall aim, so far as is reasonably practicable, to preserve or include provision for reasonable consideration and terms expected in arm's length arrangements.

1875 Powers in this section may only be exercised if the conditions under sub-paragraph (4) are met. Sub-paragraph (5) ensures that obligations imposed under sub-paragraph (2)(b) or (c) continue to apply despite the transferred CCP or former group company entering insolvency.

Continuity obligations: onward share transfers

1876 Paragraph 94 provides for the Bank to extend the general continuity obligation of paragraph 92 or special continuity obligations of paragraph 93 in the circumstances of an onward transfer of securities.

1877 Sub-paragraph (3) outlines who the Bank may impose obligations on. Sub-paragraph (4) provides that onward obligations may be in addition to, or replace, initial obligations.

1878 The power under this paragraph is exercisable by giving a notice both to each person on whom a continuity obligation is to be imposed, and the person who is expected to benefit from it. The Bank may exercise the power only with the consent of HM Treasury.

Continuity obligations: consideration and terms

1879 Paragraph 95 provides HM Treasury with a power to make regulations to specify matters which are to be or not to be considered in determining what amounts to reasonable consideration for the purposes of general continuity obligations, and what provisions to include in accordance with paragraphs 90(3)(b) and 93(3)(b).

1880 Sub-paragraph (2) also provides that the Bank may give guarantees or indemnities in respect of the services or facilities that are providing in pursuance of a continuity obligation.

Continuity obligations: termination

1881 Paragraph 96 provides that the Bank may by notice terminate a general continuity obligation.

Suspension of obligations

1882 Paragraph 97 provides that the Bank may suspend obligations to make a payment or delivery under a contract, if one of the parties is a CCP for which the Bank is exercising a stabilisation power.

1883 Sub-paragraph (2) provides that a suspension does not apply to payments of eligible claims or payments or deliveries to excluded persons.

1884 This power must be exercised through a share transfer instrument, property transfer instrument, resolution instrument or third-country instrument (sub-paragraph 5)), and sub-paragraphs (3) and (4) outline when the suspension may begin and end, and clarify the extent of the suspension and when payment or delivery under a contract will be due in certain circumstances.

1885 Sub-paragraph (6) outlines that the Bank must have regard to the impact of a suspension on the functioning on financial markets.

Restriction of security interests

1886 Paragraph 98 provides that, when exercising a stabilisation power in respect of a CCP, the Bank may suspend the rights of a secured creditor in order to enforce any security interest the creditor has in relation to any CCP assets. This power must be exercised through a share transfer, property transfer, resolution instrument, or third-country instrument.

1887 Sub-paragraph (2) outlines when this suspension must begin and end.

1888 Sub-paragraph (3) sets out a situation in which the Bank may not exercise this power.

1889 Sub-paragraph (6) outlines that the Bank must have regard to the impact of a suspension on the functioning on financial markets.

Suspension of termination rights

1890 Paragraph 99 provides that the Bank may suspend the termination right of any party to a qualifying contract, providing that the obligations under the contract are still being met by the CCP in question, or the conditions in sub-paragraph (3) are met.

1891 Sub-paragraph (4) sets out that the Bank must have regard to the impact of this on the functioning of financial markets, and sub-paragraph (5) sets out that the power must be exercised by way of provision within the instruments listed.

1892 Sub-paragraphs (7), (8) and (9) outline when a person may, or may not exercise their termination right.

Suspension: general provision

1893 Paragraph 100 provides definitions for 'business day' and 'excluded person' for the purposes of paragraph 97 to 99.

Stay on terminating membership

1894 Paragraph 101 provides that, where the Bank has made a resolution instrument, a member of the CCP may not terminate their membership during the period that the resolution instrument is in force.

1895 Sub-paragraph (4) clarifies that a resolution instrument in relation to a CCP may provide for this power not to apply in relation to member of the CCP, or only apply to extent that is specified by the Bank, if the Bank considers that would advance one or more special resolution objectives (sub-paragraph (5)).

Restriction on remuneration

1896 Paragraph 102 provides that the Bank may, for a specified period, restrict or prohibit discretionary payments to specified employees or shareholders of a CCP, where a share transfer, property transfer or resolution instrument has been exercised. This is similar to the power set out in paragraph 13 and enables the Bank to impose a restriction on discretionary payments in instances when it has exercised a stabilisation option. The period of any restriction may not exceed 5 years.

1897 This power must be exercised by way of provision in a share transfer, property transfer or resolution instrument.

Pensions

1898 Paragraph 103 provides that a share transfer or property transfer instrument may make provision about the consequences of a transfer for a pension scheme, and make provision about the property rights and liabilities of any pension scheme of the CCP. A provision in reliance of this section must have the consent of HM Treasury.

1899 An instrument may modify or apportion rights or liabilities, and property of, or accrued rights in one pension scheme to another. It may also amend the terms of a pension scheme.

Disputes

1900 Paragraph 104 provides that a share transfer, property transfer, or resolution instrument or a third-country instrument may include provision for disputes to be determined in a specified manner. In particular, provision may confer jurisdiction on a court or tribunal, or confer discretion on a specified person.

Tax

1901 Paragraph 105 enables HM Treasury to make regulations including provision in relation to tax in connection with the fiscal consequences of the exercise of a stabilisation power.

1902 Sub-paragraph (2) sets out the taxes in relation to which provision may be made.

1903 Sub-paragraphs (3) and (4) set out what the regulations may apply to, and the effects which the regulations may have.

1904 Sub-paragraph (5) outlines that HM Treasury may make provision for the fiscal consequences of a stabilisation power in respect of things done three months before the exercising of the stabilisation powers, or on or after that date.

1905 Sub-paragraph (6) defines ‘stabilisation power’ under the section in relation to a number of other paragraphs.

1906 Sub-paragraph (7) allows HM Treasury to change the taxes listed in sub-paragraph (2) by regulations.

Stay or sist of legal proceedings

1907 Paragraph 106 provides that where the Bank has exercised a stabilisation power in relation to a CCP or CCP group company, and that CCP or CCP group company is a party to legal proceedings before the court in the UK, the Bank may apply to that court for a stay of proceedings where the Bank reasonably considers it necessary for the effective application of the stabilisation powers.

Insolvency proceedings

1908 Paragraph 107 provides that, if a stabilisation power has been exercised in respect of the CCP, or the conditions in paragraph 17 have been met, insolvency proceedings may not be commenced in relation to the CCP without the consent of the Bank. Sub-paragraph (3) defines “commencement of insolvency proceedings”.

Recognition of transferee company

1909 Paragraph 108 provides that the Bank may provide for a company to which the business of a CCP is transferred (as under paragraph 29 (3)) to be treated as a CCP for the purposes of FSMA 2000.

1910 This provision may have effect for a period specified in the instrument, or until an event described in the instrument occurs. This power may only be exercised with the consent of HM Treasury, and by way of provision in a property transfer instrument (or supplemental instrument).

International obligation notice: general

1911 Paragraph 109 provides that the Bank may not exercise a stabilisation power in respect of a CCP if HM Treasury notifies the Bank that the exercise would be likely to contravene an international obligation of the UK.

1912 This notice must be in writing, and may be withdrawn (generally, partially or conditionally) (sub-paragraph (2)), and the Bank must then consider other exercises of pursuing the resolution objectives and avoiding Treasury objections (sub-paragraph (3)). HM Treasury may disapply sub-paragraph (3) and may revoke a notice.

International obligation notice: bridge central counterparty

1913 Paragraph 110 provides that where a bank transferred all or part of a CCP’s business to a bridge CCP, the Bank must comply with any notice of HM Treasury to take, or not to take action ensuring compliance by the UK with its international obligations.

1914 This notice may include timing requirements, must be in writing, and may be withdrawn (generally, partially or conditionally).

Public funds: general

1915 Paragraph 111 makes provision about the role of HM Treasury with regard to public funds when the stabilisation powers are being exercised. It provides that the Bank of England may not exercise a stabilisation power without HM Treasury’s consent if the exercise would be likely to have implications for public funds.

1916 Sub-paragraph (3) provides HM Treasury with the power to specify considerations that should or should not be taken into account in determining whether action has implications for public funds.

1917 Sub-paragraph (4) requires the Bank to consider another exercise of the stabilisation powers if HM Treasury has refused consent. In doing so the Bank must pursue the special resolution regime objectives and avoid the objections that HM Treasury first made.

1918 Sub-paragraph (5) allows HM Treasury, by notice, to disapply the requirement to consider alternative actions (as set out in sub-paragraph (4)). Any such notice may be revoked.

Public funds: bridge central counterparty

1919 Paragraph 112 makes provision about the role of HM Treasury with regard to public funds when a CCP has been fully or partially placed into a bridge institution.

1920 Sub-paragraph (2) states that the Bank of England may not take any action in respect of the bridge CCP without HM Treasury's consent if the action would be likely to have implications for public funds.

1921 Sub-paragraph (3) applies paragraph 111(2) and (3) for the purposes of this paragraph.

Private sector purchaser: report

1922 Paragraph 113 provides that, where the Bank has sold all or part of a CCP's business to a private sector purchaser, the Bank must report to the Chancellor of the Exchequer about the exercise of the power to make share and property transfer instruments under paragraph 27(2).

1923 Sub-paragraph (4) provides that the first report be made as soon as is reasonably practicable after the end of one year, and the report must comply with any requirements specified by HM Treasury (sub-paragraph (3)).

Bridge central counterparty: report

1924 Paragraph 114 sets out requirements for the Bank to report to the Chancellor of the Exchequer on the activities of a bridge CCP.

1925 Sub-paragraphs (2) and (3) requires the first report to be made as soon as is reasonably practicable after the end of one year and each subsequent year.

1926 Sub-paragraph (4) requires the Chancellor of the Exchequer to lay a copy of the reports mentioned in sub-paragraphs (2) and (3) before Parliament.

1927 Sub-paragraph (5) requires the Bank of England to comply with any request of HM Treasury for a report dealing with specified matters in relation to the bridge CCP. The request may include the content or timing (sub-paragraph (6)).

Resolution instruments: report

1928 Paragraph 115 provides that, where the Bank makes one or more resolution instruments in respect of a CCP, the Bank must at HM Treasury's request report to the Chancellor of the Exchequer about the exercise of the power. Sub-paragraph (3) states that the report must comply with any requirements specified by HM Treasury.

1929 Sub-paragraph (4) requires the Chancellor of the Exchequer to lay a copy of each report before Parliament.

Transfer of ownership: report

1930 Paragraph 116 provides that, where the Bank makes one or more share transfer instruments in respect of a CCP under paragraph 30 sub-paragraph (2) (transfer of ownership), the Bank must report to the Chancellor of the Exchequer about the exercise of the power.

1931 Sub-paragraph (4) provides that the first report be made as soon as is reasonably practicable after the end of one year, and the report must comply with any requirements specified by HM Treasury (sub-paragraph (3)).

Sale to commercial purchaser, transfer to bridge central counterparty and transfer of ownership: conditions for group companies

- 1932 Paragraph 117 lays out the conditions that must be met if the Bank is to exercise a stabilisation power in respect of a CCP group company in accordance with paragraph 27 sub-paragraph (2) (private sector purchaser), paragraph 29 sub-paragraph (3) (bridge CCP) or paragraph 30 sub-paragraph (2) (transfer of ownership).
- 1933 Sub-paragraph (2) sets out that the Bank must be satisfied the general conditions for exercising a stabilisation power are met in respect of a CCP in the same group, and the Bank is satisfied that exercise of the power is necessary (sub-paragraph (3)).
- 1934 Sub-paragraph (4) sets out that in a financial assistance case, HM Treasury must first recommend a stabilisation power be used and the Bank must be of the opinion that the exercise of the power is appropriate.
- 1935 Sub-paragraph (5) sets out that the CCP group company must be an undertaking incorporated in or formed under the law of the UK.
- 1936 Sub-paragraph (6) sets out that the Bank must consult HM Treasury, the FCA, and (if the CCP is a PRA-authorized person) the PRA.
- 1937 Sub-paragraph (7) sets out that the Bank must have regard to the need to minimise the effect of the power on other undertakings in the same group, whilst sub-paragraph (8) defines “financial assistance case”.

Paragraph 117: Supplemental

- 1938 Paragraph 118 provides that where the Bank exercise a stabilisation power in respect of a CCP group company in reliance on paragraph 117, the provisions apply as if the CCP group company were a CCP (with some exceptions, outlined in sub-paragraph (2)).

Part 6 – Information, investigation and enforcement

Information

- 1939 Paragraph 119 outlines the powers available to the Bank for acquiring information and documents reasonably required in connection with the exercise of functions conferred on the Bank by or under the Schedule.
- 1940 Sub-paragraphs (2) to (6) outline that the Bank, or an officer authorised by the Bank, may require a CCP or group company to provide specified information or documents, and may determine the form and reasonable timeline for producing the documents.
- 1941 Sub-paragraph (7) outlines that the Bank may also impose these requirements on a person connected to the CCP.

Reports by skilled persons

- 1942 Paragraph 120 provides that, where the Bank has required a person (defined in sub-paragraph (2)) to provide information in accordance with paragraph 119, the Bank may produce a notice to a person to provide a report or appoint a person to provide a report.
- 1943 The person appointed must have the skills necessary to make a report. If an appointment is made by the person concerned, the appointee must be nominated or approved the Bank.
- 1944 Sub-paragraph (7) outlines that the appointed person must be given all assistance they reasonably require by the person concerned (as defined in sub-paragraph (2)).

1945 Sub-paragraph (8) outlines that the assistance requirement (sub-paragraph (7) is enforceable by an injunction (except in Scotland, where an order for specific performance applies), and sub-paragraph (9) notes that the CCP may be required to pay the Bank a fee to cover expenses incurred by the Bank in relation to the appointment.

Appointment of persons to carry out general investigations

1946 Paragraph 121(2) outlines the three things the Bank may appoint one or more competent persons to conduct an investigation into: the nature, conduct, or state of a CCP's business, a particular aspect of that business, or the ownership or control of a CCP.

1947 Sub-paragraph (3) provides that, with written notice, a person may investigate the business of a person who is, or has been at a relevant time, a member of a group of which the CCP under investigation is part.

Appointment of persons to carry out investigations in particular cases

1948 Paragraph 122 provides that, if the Bank thinks that a person may have failed to comply with any relevant requirement (meaning a requirement imposed by the Bank by or under the Schedule, the Bank may appoint a competent person to conduct an investigation on its behalf.

Investigations etc in support of foreign resolution authorities

1949 Paragraph 123 provides for the Bank to exercise the power conferred in paragraph 119 or appoint one or more competent persons to investigate any matter, in relation to a request from a foreign resolution authority.

1950 Sub-paragraph (3) stipulates an applicable request by a foreign resolution authority as one in connection with the exercise by that authority of functions in relation to third-country resolution action (within the meaning of paragraph 145 of this Schedule).

1951 Sub-paragraph (4) explains that an investigator appointed under this paragraph has the same powers as an investigator appointed under paragraph 122.

Investigations: general

1952 Paragraph 124 provides that, if the Bank appoints one or more investigators to conduct an investigation on its behalf (under paragraph 121 or paragraph 122), the person under investigation must be notified by the Bank. The notice must state the reason for the appointment and specify the provisions under which (and as a result of which) the investigator has been appointed.

1953 Sub-paragraphs (4) and (5) provide that the investigator may be a member of staff at the Bank, and must make a report of the investigation to the Bank.

1954 Sub-paragraphs (6) and (7) outline the ways in which the Bank may direct the investigation, and sub-paragraph (8) provides that the person under investigation must be notified of a significant change in scope.

1955 If the appointment was made under paragraph 122, the Bank does not need to notify the person under investigation if they believe it will result in the investigation being frustrated.

Powers of persons appointed under paragraph 121

1956 Paragraph 125 provides that, if a person is appointed under paragraph 121 to conduct an investigation, the investigator may require the person under investigation (or any connected person) to answer questions in person, or provide required information, or produce documents at a specified time or place. The investigator can only impose such

requirements at a specified time and place, as long as the investigator reasonably considers the information relevant for the purposes of the investigation.

Powers of persons appointed as a result of paragraph 122

1957 Paragraph 126 provides that, if an investigator was appointed under paragraph 122, they have the powers conferred under paragraph 125, and may also require the person under investigation to give all assistance they can reasonably give. If they see it as necessary or expedient, the investigator may also require a person who is neither under investigation, or connected with the investigation, to answer questions at a specified time and place, or provide information that is required for the purposes of the investigation.

Admissibility of statements made to the investigators

1958 Paragraph 127 provides that a statement made to an investigator appointed under paragraph 122 by a person that complies with an information requirement is admissible in evidence in any proceedings (subject to the general law on admissibility of evidence).

1959 Sub-paragraphs (2) and (3) stipulate that, in criminal proceedings in which a person is charged with an offence other than an offence listed in sub-paragraph (3) (which relate generally to making false or misleading statements or failing to comply with information requirements imposed by an investigator), no evidence relating to the statement may be adduced and no question relating to it may be asked, by or on behalf of the prosecution or the Bank.

Information and document: supplemental provision

1960 Paragraph 128 provides that, where a person has been required to produce a document but it is in the possession of a third person, the Bank may impose that requirement on the third person.

1961 A person to whom the document is produced may take copies or extracts of the document, and require any relevant person to provide an explanation of the document.

1962 An investigator or the Bank may require the person to state, if they fail to produce a document, where they believe the document to be, and lawyers may be required if necessary to furnish the name and address of a client.

1963 A document so produced may be retained for so long as the person to whom it is produced considers it necessary to retain, and if there are reasonable grounds for believing that it may be required in connection with to legal proceedings it may be retained until they are concluded.

1964 Information which comes under and is subject to an obligation of confidence may be exempt from a requirement to disclose, unless one or more of the conditions outlined under sub-paragraph (7) apply.

1965 Sub-paragraph (8) clarifies that if a person claims a lien on a document, its production under this part will not affect the lien, whilst sub-paragraph (9) provides definitions.

Protected items

1966 Paragraph 129 outlines that a person may not be required under this Schedule to produce, disclose or permit the inspection of protected items, as defined by sub-paragraphs (2), (3), and (4) (broadly meaning legally privileged communications and material).

Entry of premises under warrant

1967 Paragraph 130 provides that a justice of the peace may issue a warrant if there are reasonable grounds to believe that the conditions in sub-paragraph (2), (3) and (4) are met, based on information on oath that is given by, or on behalf of, the Secretary of State, the Bank or an investigator.

1968 Sub-paragraph (5) outlines the various actions a warrant under this section authorises a constable to perform. Sub-paragraphs (6), (7) and (8) clarify that that a warrant may authorise any constable, or person authorised by and under the supervision of a constable.

Retention of documents obtained under paragraph 130

1969 Paragraph 131 provides that any document of which possession is taken under warrant (paragraph 130) may be retained so long as it is necessary to retain it in the circumstances.

1970 Sub-paragraphs (2), (3), (4), and (5) outline the legal proceedings for any person claiming to be the owner of a document appealing for its return.

Offences etc

1971 Paragraph 132 sets out the criminal offences which apply in relation to investigations. Paragraphs (1) and (2) provide that if a person fails to comply with requirements imposed under an investigation without reasonable excuse, that person can be dealt with as if they were in contempt of court. Sub-paragraphs (4), (5) and (6) set out other offences relating to the falsification, concealment or destruction of documents by a person who knows that an investigation is being or is likely to be conducted, the provision of false or misleading information in response to a requirement imposed under this Schedule, and the intentional obstruction of the exercise of rights conferred by a warrant under paragraph 130. Sub-paragraph (7) sets out the penalties for these offences.

Prosecution of offences under paragraph 132

1972 Paragraph 133 provides that proceedings for an offence under paragraph 132 may be instituted only by the Bank or with the consent of the Director of Public Prosecutions (in England and Wales) or the Director of Public Prosecutions for Northern Ireland. Sub-paragraphs (2) and (3) note provide that the Bank must comply with any conditions or restrictions imposed by HM Treasury.

Offences under paragraph 132 by bodies corporate etc

1973 Paragraph 134 outlines how the offences in paragraph 132 relate to bodies corporate. Sub-paragraph (1) outlines that both bodies corporate and officers may be subject to proceedings and punished accordingly if sub-paragraphs (a) and (b) apply. Sub-paragraph (3) makes similar provision in respect of partnerships and partners. In a case where a body corporate is managed by its members, sub-paragraph (1) applies as if that member were a director of the body (as per sub-paragraph (2)).

1974 Sub-paragraph (6) provides for offences committed by an unincorporated association.

Injunctions: prevent failure to comply with relevant requirement

1975 Paragraph 135 provides that the court may make an order restraining (or in Scotland an interdict prohibiting) a contravention by a person that the court is satisfied is reasonably likely to contravene a relevant requirement (as defined in paragraph 122). Sub-paragraph (2) clarifies how this is exercised within England and Wales.

Regulatory sanctions

1976 Paragraph 136 outlines the actions (regulatory sanctions) the Bank may take if they consider that a person has failed to comply with a relevant requirement (as defined in paragraph 122). Sub-paragraphs (1), (2), (3) and (4) outline the actions the Bank may take and their duration, including censures, fiscal penalties, directions and disqualifications, and that those penalties must be paid to the Bank (and can be enforced by the Bank as a debt).

Determination of sanctions

1977 Paragraph 137 outlines the circumstances the Bank must take into account when determining the type of sanction or level of any penalty to be imposed under paragraph 136.

Procedure: warning notice

1978 Paragraph 138 outlines that the Bank must give a person a warning notice if imposing a sanction under paragraph 136 and sets out the content the warning notice must include.

1979 Sub-paragraphs (2) and (3) outline how section 387 of FSMA 2000 applies to warning notices given under this paragraph.

Procedure: decision notice

1980 Paragraph 139 outlines that if the Bank decides to impose a sanction on a person under paragraph 136, it must (without delay) give that person a decision notice. Sub-paragraphs (2), (3), (4) and (5) outline what a decision notice must specify in different contexts.

1981 Sub-paragraphs (6) and (7) outline how section 388 of FSMA 2000 applies to decision notices given under this paragraph.

Procedure: general

1982 Paragraph 140 outlines how the procedure set out in certain sections in FSMA 2000 apply to a warning notice given under paragraph 138, or a decision notice given under paragraph 139.

Appeals

1983 Paragraph 141 outlines that a person may appeal to the Upper Tribunal in respect of a sanction imposed on them by the Bank under paragraph 136.

Injunctions: failure to comply with certain paragraph 136 sanctions

1984 Paragraph 142 outlines actions the court may take if it is broadly satisfied that there has been, or will be, or may have been a compliance failure (as defined in sub-paragraph (4)) in respect of certain sanctions imposed under paragraph 136 (sub-paragraphs (1), (2) and (3)). These actions include (among others) orders restraining the conduct constituting a failure to comply, or requiring a person to take such steps as directed by the court to remedy a failure to comply.

1985 Sub-paragraph (5) sets out the courts within England and Wales which have jurisdiction in respect of the matters in this paragraph.

Publication

1986 Paragraph 143 provides that, in the case of a warning notice given under paragraph 138, neither the Bank nor the person to whom the notice is given or copied may publish the notice, though the Bank may publish such information as it considers appropriate after consulting the persons to whom it is given or copied (sub-paragraph (1)).

1987 Sub-paragraph (2) provides that a person given a decision notice under paragraph 139 may not publish the notice or any details unless the Bank has published the notice or those details.

1988 Sub-paragraphs (3) and (4) outline the content that must sit within, and accompany, a notice of discontinuance.

1989 Sub-paragraph (5) sets out that the Bank may publish information regarding a decision notice. Under sub-paragraph (6), where the Bank has published information relating to a decision notice, the Bank must publish updated information (comprising the status and outcome of the appeal) if the matter to which the decision notice relates is appealed to the Upper Tribunal. The Bank must also publish details of any sanction where the Bank gives a final notice (sub-paragraph (7)) and if the circumstances in sub-paragraph (8) apply in relation to information to which a decision notice or a final notice relates, such information must be published anonymously (further details on this are in sub-paragraph (9)).

1990 Any published information must remain for five years on the Bank's website, unless this contradicts data protection legislation (sub-paragraph (10)).

Co-operation

1991 Paragraph 144 outlines that if imposing sanctions under paragraph 136, the Bank must take steps as it considers appropriate to co-operate with the organisations, authorities and persons in sub-paragraphs (a) and (b).

Part 7 – Third-country resolution actions

1992 Paragraph 145 applies where the Bank is notified of third-country resolution action, in respect of a third-country central counterparty. With the approval of HM Treasury (sub-paragraph (3)), the Bank must make an instrument which either recognises the action, or refuses to recognise the action, or recognises part all or part of the action but not the remainder (sub-paragraph (2)).

1993 Recognition of the action may be refused if the Bank and HM Treasury are satisfied that the conditions in sub-paragraph (4) are met, and recognition of third-country resolution actions is without prejudice to normal insolvency proceedings (sub-paragraph (5)).

1994 Paragraph 146 applies where an instrument under paragraph 145 recognises all or part of the third-country resolution action. The third-country resolution actions produce the same legal effect in any part of the UK as it would have produced had it been made under the law of the relevant part of the UK. The Bank may, to support or give full effect to a third-country resolution action, exercise one or more stabilisation options in relation to the third-country central counterparty (sub-paragraph (3)).

1995 Sub-paragraph (4) provides further detail on which instruments these provisions may sit within, and that the wider Schedule applies to any power exercised under sub-paragraph (3), pending the modifications made in sub-paragraphs (6) and (7).

1996 Paragraph 147 applies (with some modifications) certain other paragraphs within the Schedule to a third-country instrument.

Part 8 – General

Information

1997 Paragraph 148 permits the Bank of England to disclose information relating to the financial stability of the individual financial institutions or aspects of the financial system of the

United Kingdom. It may disclose information to HM Treasury, the FCA, the Financial Services Compensation Scheme, the Payment Systems Regulator, and authorities in jurisdictions outside the United Kingdom exercising similar functions to those of HM Treasury and the financial authorities. The provision overrides other confidentiality requirements and is without prejudice to any other power to disclose information.

Restrictions on disclosure of confidential information

1998 Paragraph 149 outlines how certain sections in FSMA 2000 relating to the disclosure of confidential information apply to this Schedule, and notes modifications.

1999 This will enable the Bank of England to share relevant information that it may have received in relation to its financial stability functions, for example from an institution administered under the special resolution regime.

Remedies on judicial review

2000 Paragraph 150 outlines the effect that a decision from a judicial review concerning the decision of the Bank to exercise stabilisation powers may have on a “relevant provision” or “relevant transfer” (as defined in sub-paragraphs (2)(b) and (c)).

2001 Sub-paragraph (3) clarifies that the power of the court to award damages (subject to the immunity provided under section 244 of the Banking Act 2009) is not affected by sub-paragraph (1).

Giving of notices, documents etc under this Schedule

2002 Paragraph 151 notes that regulations made under section 414 of FSMA 2000, and subsection (4) of that section, apply in relation to any notice, direction or document required to be given under this Schedule.

Financial assistance

2003 Paragraph 152 provides a definition of “financial assistance” and allows HM Treasury to make regulations to further define financial assistance for the purposes of the Bill.

Modifications to the law

2004 Paragraph 153 enables HM Treasury to modify the law in order to allow powers made under the Schedule to be used effectively, having regard to the special resolution objectives. This includes regulations with retrospective effect (sub-paragraph (3)), though HM Treasury must note it is in the public interest to avoid this.

2005 Sub-paragraph (6) outlines that regulations under this paragraph are subject to the affirmative procedure, or if HM Treasury deems it necessary for the regulations to come into force without delay, the made affirmative procedure.

Interpretation

2006 Paragraph 154 provides a number of definitions relevant to this Schedule.

Recognised central counterparty

2007 Paragraph 155 defines a “recognised central counterparty” for the purpose of this Schedule. Sub-paragraph (2) notes that a recognised central counterparty does not include a recognised clearing house which is also a bank, building society, credit union or investment firm. Sub-paragraph (3) notes that a recognised central counterparty does not cease to have that status for the purposes of this Schedule if its recognition under FSMA 2000 is revoked.

Interpretation: CCP group company, etc

2008 Paragraph 156 defines “CCP group company”, and gives HM Treasury the power to make regulations to further define a CCP group company.

Part 9 – HM Treasury support for CCPs

Consolidated fund

2009 Paragraph 157 provides for any expenditure incurred by HM Treasury in connection with the exercise of the powers in this Schedule, by HM Treasury or Secretary of State (with the consent of HM Treasury) in connection with the giving of financial assistance to or in respect of CCPs or in connection with the provision of financial assistance by HM Treasury to the Bank of England to be paid from money provided by Parliament. Financial assistance includes giving guarantees or indemnities.

National loans fund

2010 Paragraph 158 allows HM Treasury to draw money from the National Loans Fund for the purpose of making a loan to or in respect of a CCP, when the loan is required urgently to protect the stability of the financial systems of the United Kingdom.

Part 10 – Consequential etc provision

2011 Paragraphs 159 to 164 make consequential amendments to a number of enactments to ensure these apply correctly to Schedule 11.

2012 Paragraph 165 allows HM Treasury to make regulations to provide for provisions in of certain listed enactments to apply for the purposes of Schedule 11, with or without modifications.

Schedule 12: Write-down orders

Part 1 – Write-down orders: main provisions

2013 Paragraph 1 of Schedule 12 amends Part 24 of FSMA 2000. It amends section 360 of FSMA 2000 to require that a person may not be appointed as administrator of an insurer in relation to which a write-down order under new section 377A of FSMA 2000 is in effect without the consent of the Prudential Regulation Authority (PRA). It also omits section 377 of FSMA 2000 and inserts sections 377A to 377J. The effects of each of the new sections inserted into FSMA 2000 are detailed below. Nothing inserted by these provisions affects the requirement for an insurer to comply with its broader obligations as an authorised person once a write-down order is made.

2014 Section 377A provides more detail on write-down orders. In particular, the section explains what a write-down order is, sets out the test which the court must consider when deciding whether to make a write-down order, makes provision about when a write-down order takes and ceases to have effect (cross-referencing section 377H) and provides that a write-down order cannot be made in respect of an insurer in administration or in liquidation.

2015 Section 377B sets out the liabilities which cannot be written-down under a write-down order.

2016 Section 377C sets out the parties able to apply to the court to make a write-down order. It also sets out, in particular, the consent which certain applicants must obtain before making an application.

- 2017 Section 377D gives the FCA and the PRA the right to be heard at court hearings relating to a write-down order and to receive documents related to those hearings.
- 2018 Section 377E sets out the court's powers once an application for a write-down order has been received.
- 2019 Section 377F requires an insurer subject to a write-down order to notify "affected persons" (the meaning of which will be specified in Rules made by the PRA) and the FCA and the PRA as soon as possible after the order is made. The broader regulatory obligations on an insurer as an authorised person may require additional notifications separate from this legislative requirement.
- 2020 Section 377G sets out the court's powers to appoint an eligible person or persons to act as a 'manager of a write-down order' (the manager). The section includes provision that the court can only appoint a person as a manager if the PRA provides a statement confirming they are suitably qualified (for example if they are an actuary, a licensed insolvency practitioner, or a suitably qualified insurance professional). The majority of the procedural provisions in sections 337C and 377D apply in relation to a manager, as they apply in relation to a write-down order.
- 2021 Section 377H provides that a write-down order ceases to have effect on the date specified in the order or on the date a "termination event" occurs (the latter only if the termination event is earlier than the date specified or no date is specified). Termination events include the making of a winding up order against the insurer and the insurer entering administration, among others set out in the section.
- 2022 Section 377I sets out how the court can revoke or vary a write-down order, including broadening or narrowing the scope of the order. When deciding whether to revoke or vary a write-down order, the court must apply the same test it applies when deciding whether to make an order. Subject to certain differences, the procedural provisions relating to the making of a write-down order and the appointment of a manager under sections 377C to 377G also apply to termination or variation of a write-down.
- 2023 Section 377J is self-explanatory.

Part 2 – The manager of a write-down order

New Schedule 19A

- 2024 Paragraph 2 of Schedule 12 inserts a new Schedule 19A to FSMA 2000, which makes further provision about the manager. The effect of the provisions included in Schedule 19A are detailed below.
- 2025 Paragraph 1 of the new Schedule 19A sets out that the Schedule only applies where the court has: (i) made a write-down order in relation to an insurer; and (ii) appointed a manager. Paragraph 1 also makes provision in relation to the application of the Schedule where one or multiple persons are appointed as the manager.
- 2026 Paragraph 2 is self-explanatory.
- 2027 Paragraph 3 provides that a manager must monitor the insurer's affairs to consider whether the write-down order remains reasonably likely to lead to a better outcome for policyholders and creditors (taken as a whole) than if the write-down order were not in effect. Paragraph 3 also provides that the manager must consider whether the insurer could take or refrain from taking certain actions so that the write-down order would remain, or once again become, reasonably likely to lead to a better outcome for policyholders and creditors (taken as a whole), and provides that the manager can make relevant

recommendations to the insurer. Paragraph 3 also sets out that the manager must produce a report if directed to do so by the FCA or the PRA.

2028 Paragraph 4 sets out that the manager must apply to the court for such orders as the manager thinks likely to achieve the best outcome for the insurer's policyholders and other creditors (taken as a whole) if they form the view that it would be in the interests of the insurer's policyholders and creditors (taken as a whole) for the order to be varied or revoked.

2029 Paragraph 5 empowers the manager to require the provision of information and assistance (as reasonably required to undertake its functions) by the people listed in sub-paragraph (2), and requires that the information be provided as soon as practicable; subparagraph (4) provides that the manager can enforce the provision of information through an application for an injunction/specific performance.

2030 Paragraph 6 is self-explanatory.

2031 Paragraph 7 provides that the actions, omissions or decisions of a manager can be challenged through an application to the court by the parties listed and sets out the court's powers when a challenge to the manager is brought.

Part 3 – Further provision about write-down orders

New Schedule 19B

2032 Paragraph 3 of Schedule 12 inserts a new Schedule 19B into FSMA 2000, which provides for:

- a. restrictions on the enforcement against an insurer (including the enforcement of security over the insurer's property) (Part 1);
- b. restrictions on the insurer's dealing with assets, paying variable remuneration and making of distributions to shareholders (Part 2);
- c. the treatment of an insurer's liabilities in certain circumstances (Part 3); and
- d. the interest payable in respect of liabilities reduced under a write-down order (Part 4).

2033 The effects of the provisions included in Schedule 19B are described in further detail below.

Part 1 of new Schedule 19B: Restrictions on enforcement

2034 Paragraph 1 sets out when the restrictions on enforcement provided for by Paragraph 2 have effect. These restrictions apply initially (on an interim basis) from when an application for a write-down order is put to the court until a write-down order is made or the application is withdrawn or dismissed. Paragraph 1 provides that the restrictions subsequently apply (on a permanent basis) from the date a write-down order is made for a default period of 6 months (beginning with the day on which the order takes effect) and any such further period as the court may order (which cannot be more than six months per order). These restrictions cease to apply if the court orders so, or if the write-down order ceases to have effect in accordance with section 377H of FSMA 2000. The court may extend or terminate the restrictions only on an application by the persons set out in Paragraph 1(4).

2035 Paragraph 2 sets out the restrictions on enforcement which take effect for such periods as provided for under Paragraph 1. The restrictions prevent an insurer's creditors from taking steps, without the permission of the court, to, for example, enforce security over the insurer's property. Paragraph 2 empowers the court to impose conditions on any consent it gives for an act of enforcement to be taken which would otherwise be prohibited under the paragraph.

2036 Paragraph 3 sets out exceptions to the restrictions imposed by Paragraph 2. This Paragraph provides HM Treasury with a power to amend certain of the exceptions through statutory instrument under the draft affirmative procedure.

Part 2 of new Schedule 19B: Dealing with assets etc

2037 This Part is intended to prevent inappropriate value extraction from an insurer subject to a write-down order under new section 377A of FSMA 2000.

2038 Paragraphs 4 to 7 are self-explanatory.

Part 3 of new Schedule 19B: Treatment of written-down liabilities for certain purposes

2039 Paragraph 8 sets out that Part 3 of Schedule 19B applies to liabilities of an insurer when the value of a liability has been reduced by or under a write-down order.

2040 Paragraph 9 sets out that written-down liabilities (and the potential for a future reversal of the write-down) will be disregarded for the purposes of section 123 Insolvency Act 1986 or Article 103 of the Insolvency (Northern Ireland) Order 1989 (to ensure that an insurer cannot be deemed 'unable to pay its debts' on the basis of liabilities which have been written-down); the PRA's prudential rules governing insurers; and Solvency II. This is to ensure that written-down liabilities are treated as extinguished for these purposes, for so long as the write-down is in force. Without this, an insurer could still meet the statutory test for insolvency following its liabilities being written-down or have the potential for a future reversal of the write-down reflected on its balance sheet as a contingent liability, contrary to the intended effect of the write-down which is to restore an insurer's balance sheet. Paragraph 9(3) gives HM Treasury a power to amend the purposes for which written-down liabilities are disregarded through statutory instrument under the draft affirmative procedure.

2041 Paragraph 10 concerns pay-as-paid clauses. These clauses stipulate that a reinsurer must only pay out the amount the original insurer (cedant) actually pays to underlying policyholders. Paragraph 10 overrides "pay-as-paid" clauses held between an insurer under write-down and its reinsurers, meaning reinsurers will remain liable for the full amount due, even if the court has reduced the value of the liability owed by the cedant insurer to the underlying policyholder. This prevents the value of outwards reinsurance contracts held by an insurer under write-down from decreasing and providing undue financial benefits to a reinsurer.

Part 4 of new Schedule 19B: Interest

2042 Paragraph 11 sets out the interest payable in respect of liabilities reduced under a write-down order.

Part 4 – Write-down orders: financial services compensation scheme

2043 Paragraph 4 of Schedule 12 is self-explanatory.

2044 Paragraph 5 of Schedule 12 inserts a new section 217ZA and section 217ZB into FSMA 2000. Section 217ZA provides that the rules underpinning the Financial Services Compensation Scheme (FSCS) must require the FSCS to provide financial assistance to protected policyholders whose entitlements reduce in value following a write-down order under section 377A. Subsection 5 of section 217ZA sets out that the financial assistance provided by the FSCS under this section must not be used for any purpose other than enabling

payments to be made to protected policyholders and will not appear as an asset on the insurer's balance sheet. Section 217ZB provides for the FSCS to have the right to recover the financial assistance provided to an insurer. The right of recovery must not be taken into account in assessing an insurer's liabilities for the purposes of a relevant insolvency provision, as set out in paragraph 9 of Schedule 19B. This right of recovery must not be exercised against a policyholder.

2045 Paragraph 6 of Schedule 12 amends section 219 of FSMA 2000, setting out that the FSCS can obtain information from an insurer who has been given financial assistance under section 217ZA.

2046 Paragraph 7 of Schedule 12 inserts section 220A of FSMA 2000, allowing an FSCS- authorised person to inspect documents held by a write-down manager, for the purpose of assisting the FSCS to discharge its functions under sections 217ZA and 217ZB.

Part 5 – Consequential amendments

2047 Paragraph 8 of Schedule 12 is self-explanatory.

2048 Paragraph 9 of Schedule 12 amends section 348 of FSMA 2000 to make the write-down manager a “primary recipient”, which means certain provisions restricting the disclosure of confidential information in FSMA 2000 have effect in relation to the write-down manager.

2049 Paragraph 10 of Schedule 12 amends section 429 (2B) of FSMA 2000 to require that any regulations made by HM Treasury pursuant to the power in paragraph 3(4) or paragraph 9(3) of Schedule 19B be approved by Parliament.

2050 Paragraph 11 of Schedule 12 amends Schedule 1ZB to FSMA 2000 to ensure a member of staff of the PRA acting as a write-down manager is exempt from liability in damages for anything they do or omit to do in so acting.

2051 Paragraph 12 of Schedule 12 amends Part 1 of Schedule 1 of the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 to ensure that a write-down manager appointed under section 377G can obtain confidential information where this information relates to the write-down manager's functions concerning the write-down order.

Schedule 13: Insurers in financial difficulties: enforcement of contracts

Part 1 – New Schedule 19C TO FSMA 2000

2052 Paragraph 1 of Schedule 13 inserts new provisions into Part 24 of FSMA 2000 and a new Schedule 19C into FSMA 2000. Sub-paragraph 2 inserting the new section 377K into FSMA 2000 is self-explanatory. The effect of the provisions of the new Schedule inserted by sub-paragraph 3 are detailed below.

New Schedule 19C

Part 1 of new Schedule 19C: introductory

2053 Paragraph 1 is self-explanatory.

2054 Paragraph 2 explains for the purpose of Schedule 19C when an insurer is in financial difficulties (i.e., when Part 1 of Schedule 19B has effect in relation to the insurer, or where it is in administration or subject to a winding-up petition).

Part 2 of new Schedule 19C: policyholder surrender rights

2055 Paragraph 3 prevents policyholders exercising “surrender rights”, or the ability to cancel a life insurance contract in exchange for its cash value, beyond a defined limit (‘the surrender limit’) while an insurer is in “financial difficulties” as defined in Paragraph 2.

2056 Paragraph 4 provides that restrictions on policyholder surrender rights extend to a policyholder’s right to switch between funds in accordance with the terms of a relevant contract of insurance (“switching rights”).

2057 Paragraph 5 provides for consent to be given, by the court and certain other parties, to the surrender of an amount beyond the surrender limit. These parties may give consent if they are satisfied that not providing consent would cause hardship to the policyholder.

Part 3 of new Schedule 19C: termination of relevant contracts

2058 Paragraph 6 explains that contracts for goods and services, financial contracts (the meaning of which is defined further in sub-paragraphs (2) to (3)), and reinsurance contracts are “relevant contracts” potentially subject to the restriction on termination created by Paragraph 7.

2059 Paragraph 7 prevents relevant contracts, to which the insurer is a counterparty, terminating or being terminated by reason of the insurer being in “financial difficulties” as defined in Paragraph 2.

2060 Paragraph 8 provides for consent to be given, by the court and certain other parties, to the termination of contracts. These parties may give consent if satisfied that not providing consent would cause the counterparty hardship.

Part 4 of new Schedule 19C: exclusions and disapplication of this Schedule

2061 Paragraph 9 is self-explanatory.

2062 Paragraph 10 provides that the court may, by order, disapply or modify any of the provisions imposed by this Schedule in relation to one or more of an insurer’s contracts.

2063 Paragraph 11 specifies the applicants who may apply to the court to disapply the provisions imposed by this Schedule as provided for by Paragraph 10 and the procedural requirements that must be followed before an application can be made to the court.

Part 5 of new Schedule 19C: powers to amend this Schedule

2064 Paragraph 12 provides a power for HM Treasury to amend certain provisions in new Schedule 19C.

Part 2 – Consequential amendments

2065 Paragraph 2 amends section 429 (2B) of FSMA 2000 to require that any regulations made by HM Treasury pursuant to the power in paragraph 12 of the new Schedule 19C must be approved by Parliament.

Schedule 14: Credit unions

2066 This Schedule amends the Credit Unions Act 1979.

2067 Section 1 (3ZZA) introduces a new, optional object for credit unions. This is the section which allows credit unions to offer the new services specified in section 1ZA, should they choose to adopt this new object into their rules and subject to any relevant regulatory permissions.

- 2068 Section 1ZA outlines the services that fall under the optional object and the new powers HM Treasury has in relation to this new object. The services are hire purchase agreements, conditional sale agreements, and insurance distribution services. It also sets out that HM Treasury may specify future regulations relating to these objects.
- 2069 Section 1ZB grants HM Treasury powers to make regulations to amend section 1ZA relating to the new, optional object and the processes HM Treasury must go through to make the regulations. HM Treasury may add new activities to the optional object in future, and any amendments to the rest of the Credit Unions Act 1979 as needed, to support the new products or services. Before HM Treasury can add any further products or services under the new object, it must consult with people it deems appropriate, and it must secure approval for the additions from both Houses of Parliament.
- 2070 The amendments to section 2(3) specify that a society must be registered as a credit union provided it has, wholly or substantially, the mandatory objects, regardless of whether it takes on the new, optional object 3ZZA.
- 2071 Section 7 (5A) places restrictions in certain circumstances on members' ability to withdraw shares held when they have taken out secured hire purchase agreements and/or conditional sale agreements with the credit union.
- 2072 Section 9A is amended to allow credit unions to charge for services ancillary to entering into a conditional sale agreement or hire purchase agreement.
- 2073 Section 11 clarifies that credit unions may offer loans to other credit unions, regardless of whether they have a membership link with the lending credit union. The lending must be repaid in six months or less. These loans are subject to the same interest rate cap as all other loans made by credit unions. This does not affect existing loans between credit unions.
- 2074 Section 11E details further provisions as to how credit unions may offer hire purchase agreements or conditional sale agreements. It specifies that credit unions may offer these services to their members if they have adopted the optional object into their rules. They may offer these products to corporate members provided that their rules allow them to enter into these agreements with corporate members, and provided that the aggregate, outstanding balances of the agreements with corporate members are no more than 10% of the aggregate outstanding balances of these contracts provided to members. This is to ensure that credit unions primarily remain focused on serving their retail members as mutual organisations. The 10% rate may be amended by HM Treasury.
- 2075 This section also specifies that credit unions must include in the terms of an agreement whether the borrower may withdraw any of their shares during the repayment period. Finally, it also outlines that these agreements are subject to a 3% interest rate cap, the same as credit union loans, and that HM Treasury may amend this rate.
- 2076 Section 11F details provisions for treating hire purchase agreements or conditional sale agreements as secured agreements.
- 2077 Section 11G introduces the terms under which a credit union may offer insurance distribution services to members and specifies that it may charge a fee as deemed appropriate for providing the service. This section also specifies that a credit union must have adopted the new object 3ZZA in its rules to carry out insurance distribution.
- 2078 Section 12(3) is amended to allow credit unions to hold an interest in land for the purposes of securing hire purchase agreements or conditional sale agreements.

2079 Subsection (5) of section 23A is omitted as it is instead moved into the “interpretation” section.

2080 The amendment to section 29 is self-explanatory.

2081 Section 31 is amended to provide definitions for the new financial activities included in the new, optional object 3ZZA. It also includes the definition of “enactment” which was removed from section 23A. Subsection (4) of this section requires credit unions to submit annual returns to the Financial Conduct Authority and requires credit unions to be subject to the year of account provisions in the Co-operative and Community Benefit Societies Act 2014.

2082 Schedule 1(9) is amended to require credit unions to outline the mode and circumstances in which loans to other credit unions, alongside loans to members, are made and repaid in their rules.

2083 A transitional provision is made to ensure that amendments to section 11 and Schedule 1(9) do not apply retrospectively to any loans credit unions may have made to another credit union before Royal Assent of this Bill.

2084 A transitional provision is included to ensure that a credit union’s current year-end remains intact, and that the provisions for year of account do not apply retrospectively to previous years of account.

Commencement

2085 Clause 78 sets out that the provisions of the Bill, other than those listed in subsections (1) and (2), will commence on the day appointed by HM Treasury by regulations. Subsections (1) lists provisions which will commence on Royal Assent and subsection (2) lists provisions which will commence two months after Royal Assent.

Financial implications of the Bill

2086 The expected financial costs and benefits of the Bill are set out in the accompanying Impact Assessment.

2087 As detailed in the Impact Assessment, provisions relating to the reform of wholesale capital markets, amendments to credit unions legislation, and changes to the insurer insolvency regime will involve some familiarisation costs for businesses. In addition, the increase in debt issuance costs for insurers due to changes to the insurer insolvency regime will result in further costs.

2088 The other measures in this Bill do not directly impact UK businesses but will enable a series of changes which require further action from the government (in the form of secondary legislation) or the financial services regulators (in the form of regulatory rules), which may ultimately result in costs for businesses.

2089 The final impacts will be dependent upon subsequent decisions by the government and the regulators.

Parliamentary approval for financial costs or for charges imposed

2090 A money resolution was passed by the House of Commons on 7 September 2022, which continues to apply, and covers:

- a. any expenditure incurred by HM Treasury by virtue of the Bill;
- b. any increase in sums payable by virtue of any other Act where the increase is attributable to the Bill; and
- c. loans from the National Loans Fund (for example, for the purpose of making a loan to or in respect of a central counterparty when the loan is required urgently to protect the stability of the financial system of the United Kingdom).

2091 A ways and means resolution was passed by the House of Commons on 7 September 2022, which continues to apply, and covers:

- a. the charging of fees (for example, the Bank of England imposing a charge on financial institutions in connection with the pursuit of its financial stability and monetary policy objectives);
- b. payments into the National Loans Fund (for example, sums received by HM Treasury in respect of loans drawn from the National Loans Fund and issued to central counterparties); and
- c. payments into the consolidated fund (for example, penalties received by the Financial Conduct Authority and the Bank of England under Part 3 of the Bill relating to the performance of activities relating to financial market infrastructure).

Compatibility with the European Convention on Human Rights

2092 The government considers that the Financial Services and Markets Bill is compatible with the European Convention on Human Rights (ECHR). Accordingly, Baroness Penn, Parliamentary Secretary in HM Treasury, has made a statement under section 19(1)(a) of the Human Rights Act 1998 to this effect.

2093 A separate memorandum on human rights issues has been prepared for the Joint Committee on Human Rights and can be accessed on the Committee's website.

Statement on environmental principles

2094 The government considers that the Financial Services and Markets Bill contains provision which, if enacted, would be environmental law; and that the Bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law.

2095 Accordingly, Baroness Penn, Parliamentary Secretary in HM Treasury, has made a statement under section 20(2)(a) and (3) of the Environment Act 2021 to this effect.

Related documents

2096 The following documents are relevant to the Bill and can be read at the stated locations:

- A new chapter for financial services: <https://www.gov.uk/government/publications/a-new-chapter-for-financial-services>
- Future Regulatory Framework (FRF) Review: Proposals for Reform (2021): <https://www.gov.uk/government/consultations/future-regulatory-framework-frf-review-proposals-for-reform>
- Future Regulatory Framework (FRF) Review Consultation (2020): <https://www.gov.uk/government/consultations/future-regulatory-framework-frf-review-consultation>
- Wholesale Markets Review Consultation: <https://www.gov.uk/government/consultations/uk-wholesale-markets-review-a-consultation>
- Review of the Securitisation Regulation: Call for Evidence: <https://www.gov.uk/government/consultations/securitisation-regulation-call-for-evidence>
- Critical third parties to the finance sector: policy statement: <https://www.gov.uk/government/publications/critical-third-parties-to-the-finance-sector-policy-statement>
- Regulatory Framework for Approval of Financial Promotions: <https://www.gov.uk/government/consultations/regulatory-framework-for-approval-of-financial-promotions>
- UK regulatory approach to cryptoassets and stablecoins: Consultation and call for Evidence: <https://www.gov.uk/government/consultations/uk-regulatory-approach-to-cryptoassets-and-stablecoins-consultation-and-call-for-evidence>
- Access to Cash Consultation: <https://www.gov.uk/government/consultations/access-to-cash-consultation>
- Protecting UK wholesale cash infrastructure: policy statement: <https://www.gov.uk/government/publications/protecting-uk-wholesale-cash-infrastructure>
- Senior Managers & Certification Regime (SM&CR) for Financial Market Infrastructures (FMIs) Consultation: <https://www.gov.uk/government/consultations/senior-managers-certification-regime-smcr-for-financial-market-infrastructures-fmis-consultation>
- Expanded Resolution Regime for Central Counterparties (CCP) Consultation: <https://www.gov.uk/government/consultations/expanded-resolution-regime-for-central-counterparties-ccp-consultation>
- Amendments to the Insolvency Arrangements for Insurers Consultation: <https://www.gov.uk/government/consultations/amendments-to-the-insolvency-arrangements-for-insurers-consultation>

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- Review of the Cash Ratio Deposit Scheme Consultation:
<https://www.gov.uk/government/consultations/review-of-the-cash-ratio-deposit-scheme-consultation>
- Government approach to authorised push payment scam reimbursement: policy statement: <https://www.gov.uk/government/publications/government-approach-to-authorised-push-payment-scam-reimbursement>
- HM Treasury's review of Pool Reinsurance Company Limited 2020-2022:
<https://www.gov.uk/government/publications/hm-treasurys-review-of-pool-reinsurance-company-limited-2020-2022>

Annex A – Territorial extent and application in the United Kingdom

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Regulatory framework: removal of retained EU law Clauses 1 – 7	Yes	Yes	No	Yes	No	Yes	No
Regulatory framework: new regulatory powers Clauses 8 – 23	Yes	Yes	No	Yes	No	Yes	No
Regulatory framework: accountability of regulators Clauses 24 – 50	Yes	Yes	No	Yes	No	Yes	No
Access to cash Clauses 47 – 52	Yes	Yes	No	Yes	No	Yes	No
Performance of functions relating to financial market infrastructure Clause 53	Yes	Yes	No	Yes	No	Yes	No
Central counterparties in financial difficulties Clause 54	Yes	Yes	No	Yes	No	Yes	No
Insurers in financial difficulties Clause 55	Yes	Yes	No	Yes	No	Yes	No
Miscellaneous Miscellaneous Clauses 56 – 68 & 71	Yes	Yes	No	Yes	No	Yes	No
Credit unions Clause 69	Yes	Yes	No	Yes	No	No	No
Reinsurance for acts of terrorism Clause 70	Yes	Yes	No	Yes	No	No	No
General Clauses 72 – 79	Yes	Yes	No	Yes	No	Yes	No

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Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Schedules 1 – 13	Yes	Yes	No	Yes	No	Yes	No
Schedule 14 (Credit unions)	Yes	Yes	No	Yes	No	No	No

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FINANCIAL SERVICES AND MARKETS BILL

EXPLANATORY NOTES

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