Draft Order laid before Parliament under sections 47(5) and 48(6) of the Banking Act 2009, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2014 No.

FINANCIAL SERVICES AND MARKETS

The Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2014

Made - - - -	*2014*
Coming into force - -	*1st August 2014*

The Treasury, in exercise of the powers conferred on them by sections 47, 48 and 259(1) of the Banking Act 2009(**1**), make the following Order.

In accordance with sections 47(5) and 48(6) of that Act, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

PART 1

General

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2014.

(2) This Order comes into force on 1st August 2014.

(3) In this Order—

"the Act" means the Banking Act 2009;

"the Bank" means the Bank of England;

"continuity powers" means the powers conferred by section 64(2) of the Act (including that subsection as applied by section 65(2) of the Act);

"market contracts" has the meaning given by section 155(1)(d) of the Companies Act 1989(**2**);

(**1**) 2009 c.1; section 89B, which applies sections 47 and 48 of the Act to recognised central counterparties,was inserted by the Financial Services Act 2012 (c.21), section 102(1) and (6). Section 89B was amended by S.I. 2013/504.

(**2**) 1989 c.40; section 155(1) was substituted by S.I. 2013/504.

"title transfer financial collateral arrangement" has the meaning given by regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003(**3**).

(4) Expressions used in this Order and in the Insolvency Act 1986(**4**) have the same meaning as in that Act.

(5) References in this Order to netting arrangements include—

(a) arrangements which provide for netting (within the meaning given by regulation 2 of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999(**5**); and

(b) arrangements which include a close-out netting provision (within the meaning given by regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003).

(6) In this Order, all references to a provision in Part 1 of the Act are references to that provision as applied to recognised central counterparties by section 89B of the Act.

Application of this Order

2.—(1) Articles 3 to 12 of this Order apply in the following cases.

(2) Case 1 is where a partial property transfer has been made by the Bank in accordance with section 11(2) or 12(2) of the Act.

(3) Case 2 is where—

(a) the Bank has made a property transfer instrument in accordance with section 11(2) or 12(2) of the Act (whether or not that instrument is a partial property transfer); and

(b) a property transfer instrument under section 42, 42A(**6**), 43 or 44 of the Act has been made by the Bank which is a partial property transfer.

(4) Case 3 is where—

(a) the Bank has made a share transfer instrument in accordance with section 13(2) of the Act, and

(b) a property transfer instrument has been made by the Bank under section 45(**7**) or 46(**8**) of the Act which is a partial property transfer.

(5) For the purposes of this Order, a property transfer instrument which purports to transfer all of the property, rights or liabilities of a recognised central counterparty shall be treated as having done so effectively (and so shall not be treated as a partial property transfer), notwithstanding the possibility that any of the property, rights or liabilities are foreign and may not have been effectively transferred by the property transfer instrument by virtue of steps taken under section 39 of the Act.

(**3**) S.I. 2003/3226.
(**4**) 1986 c.45.
(**5**) S.I. 1999/2979.
(**6**) Section 42A was inserted by the Financial Services Act 2012, section 97(1) and (5).
(**7**) Subsection (8) was amended by the Financial Services Act 2012, Schedule 17, paragraphs 1 and 24. Subsection (5A) will be inserted when the Financial Services Act 2012, section 98(1),(4) is commenced.
(**8**) Subsection (1) was amended by the Financial Services Act 2012, section 97(1) and (7)(a). Subsection (3A) was inserted by the Financial Services Act 2012, section 97(1) and (7)(b). Subsection (7) was amended by the Financial Services Act 2012, Schedule 17, paragraphs 1 and 25. Subsection (5A) will be inserted when the Financial Services Act 2012, section 98(1) and (5) is commenced.

PART 2

Restrictions on partial property transfers

Protected rights and liabilities

3.—(1) A partial property transfer to which this Order applies may not provide for the transfer of some, but not all, of the protected rights and liabilities between a particular person ("P") and a recognised central counterparty.

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

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

(4) This paragraph applies where—

(a) the recognised central counterparty has established a separate default fund for a particular class or classes of financial instruments in accordance with Article 42(4) of the EMIR Regulation; and

(b) the rights and liabilities—

(i) are recorded in the accounts of the recognised central counterparty as positions in the class or classes financial instruments referred to in sub-paragraph (a) or as assets held to cover those positions; or

(ii) arise out of the clearing members' contributions to the separate default fund referred to in sub-paragraph (a).

(5) This paragraph applies where—

(a) the recognised central counterparty has established a single default fund in accordance with Article 42 of the EMIR regulation; and

(b) the rights and liabilities—

(i) are recorded in the accounts of the recognised central counterparty; or

(ii) arise out of the clearing members' contributions to the single default fund referred to in sub-paragraph (a).

(6) For the purposes of paragraph (1), a property transfer instrument which purports to transfer all of the protected rights and liabilities between P and a recognised central counterparty shall be treated as having done so effectively (and so not give rise to a contravention of paragraph (1)), notwithstanding the possibility that any of the protected rights or liabilities are foreign property and may not have effectively been transferred by the property transfer instrument or by virtue of steps taken under section 39 of the Act.

(7) In this article—

(a) "clearing member" has the meaning given by Article 2(14) of the EMIR Regulation;

(b) "EMIR Regulation" means Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories(**9**).

(**9**) OJ No L 201, 27.7.2012, p1.

EU law

4. A partial property transfer to which this Order applies may not transfer property, rights or liabilities or include provision under the continuity powers to the extent that to do so would contravene EU law.

Secured liabilities

5.—(1) Paragraph (2) applies where an arrangement has been entered into under which one party owes a liability to the other and that liability is secured against property or rights; and it is immaterial that—

(a) the liability is secured against all or substantially all of the property or rights of a person;

(b) the liability is secured against specified property or rights; or

(c) the property or rights against which the liability is secured are not owned by the person who owes the liability.

(2) A partial property transfer to which this Order applies may not—

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

(b) transfer the benefit of the security unless the liability which is secured is also transferred;

(c) transfer the liability unless the benefit of the security is also transferred;

(d) include provision under the continuity powers which terminates or modifies the arrangement if the effect of that provision is to provide that the liability is no longer secured against the property or rights.

(3) For the purposes of paragraph (2), a property transfer instrument which purports to transfer any property, rights or liabilities shall be treated as having done so effectively (and so not give rise to a contravention of paragraph (2)), notwithstanding the possibility that any of the property, rights or liabilities are foreign property and may not have been effectively transferred by the property transfer instrument or by virtue of steps taken under section 39 of the Act.

(4) Paragraph (2) does not apply if the arrangement has been entered into by the recognised central counterparty in contravention of any requirement set out in regulations made pursuant to section 286(1) of the Financial Services and Markets Act 2000(**10**) or any rules made pursuant to section 286(4F) of that Act(**11**).

Market contracts

6.—(1) Subject to paragraph (2), a partial property transfer to which this Order applies may not transfer property, rights or liabilities or include provision under the continuity powers to the extent that to do so would render unenforceable a market contract.

(2) The restriction in paragraph (1) does not apply to the extent that it would contradict any provision in a relevant property transfer instrument which applies subsection (6) or (7) of section 38 of the Act.

(3) In this Article, "relevant property transfer instrument" means any instrument made for the purposes of effecting a partial property transfer to which this Order applies.

(**10**) 2000 c.8; section 286(1) was amended by the Financial Services Act 2012, Schedule 8, paragraphs 1, 2(1) and 2(2).
(**11**) Subsection (4F) was inserted by the Financial Services Act 2012, section 30.

Trusts

7. A partial property transfer to which this Order applies which makes provision under section 34(7)(a) of the Act(**12**) may remove or alter the terms of the trust (howsoever arising) only to the extent necessary or expedient for the purpose of transferring from the recognised central counterparty to the transferee—

(a) the legal or beneficial interest of the recognised central counterparty in the property held on trust;

(b) any powers, rights or obligations of the recognised central counterparty in respect of the property held on trust.

Additional restrictions on reverse transfers

8.—(1) This article applies to a partial property transfer to which this Order applies which is made by the Bank under section 44(**13**) or 46(**14**) of the Act.

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

(a) any property, rights or liabilities which were not transferred under the original instrument; or

(b) any liability which was not, at the time immediately before the original instrument was made, a liability owed by the recognised central counterparty.

(3) Paragraph (2) does not apply to—

(a) a transfer of property, rights or liabilities which have accrued, become or ceased to become payable, changed or lapsed as a result of the application of a default event provision which applies by virtue of the original instrument;

(b) a transfer of property, rights or liabilities to which consent has been given by the transferee, the transferor and any other person whose consent for the transfer would be required were the transfer not being effected by a property transfer instrument;

(c) a transfer of a claim for damages or an award of damages against the recognised central counterparty which was in existence immediately before the original instrument was made;

(d) a transfer to an undertaking which has not entered insolvency; or

(e) a transfer under article 12(6).

(4) In this article—

(a) "original instrument" has the meaning given by section 44 or 46 of the Act; and

(b) the reference to insolvency includes a reference to—

(**12**) Subsection (7) will be amended when the Financial Services Act 2012, section 98(1),(2) is commenced.

(**13**) The section heading will be amended when the Financial Services (Banking Reform)Act 2013 (c. 33), Schedule 2, paragraphs (1) and 16(h) are commenced. Subsection (2) will be amended when the Financial Services (Banking Reform) Act 2013, Schedule 2, paragraphs 1 and 16(a) are commenced. Subsection (3) was amended by the Financial Services Act 2012, section 97(1),(6)(a) and will be further amended when the the Financial Services (Banking Reform) Act 2013, Schedule 2, paragraphs1 and 16(b) are commenced. Subsection (4) will be amended when the Financial Services (Banking Reform) Act 2013, Schedule 2, paragraphs1 and 16(c) are commenced. Subsection (4A) was was inserted by the Financial Services Act 2012, section 97(1), (6)(b) and will be amended when the Financial Services (Banking Reform) Act 2013, Schedule 2, paragraphs 1 and 16(d) are commenced. Subsections (5) and (7) will be amended when the Financial Services (Banking Reform) Act 2013, Schedule 2, paragraphs 1 and 16(e), (g) are commenced. Subsection (6) was amended by the Financial Services Act 2012, Schedule 17, paragraphs 1 and 23 and will be amended when the Financial Services (Banking Reform) Act 2013, Schedule 2, paragraphs (1) and 16(f) are commenced.

(**14**) Subsection (1) was amended by the Financial Services Act 2012, section 97(1), (7)(a). Subsection (3A) was inserted by the Financial Services Act 2012, section 97(1), (7)(b). Subsection (5A) will be inserted when the Financial Services Act 2012, section 98(1), (5) is commenced. Subsection (7) was amended by the Financial Services Act 2012, Schedule 17, paragraphs 1 and 25.