Draft Order laid before Parliament under sections 47(5), 48(6) and 48P(8) of the Banking Act 2009, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2014 No. ****

BANKS AND BANKING

The Banking Act 2009 (Restriction of Special Bail-in Provision, etc.) Order 2014

Made - - - -	***
Coming into force - -	*1st January 2015*

The Treasury, in exercise of the powers conferred by sections 47(2) and (4), 48(2), (3) and (4), 48P(3), (5) and (6) and 259(1) of the Banking Act 2009(**1**), makes the following Order:

A draft of this Order has been laid before and approved by a resolution of each House of Parliament in accordance with 47(5), 48(6) and 48P(8) of the Banking Act 2009.

Citation and commencement

1.—(1) This Order may be cited as the Banking Act 2009 (Restriction of Special Bail-in Provision, etc.) Order 2014.

(2) This Order comes into force on 1st January 2015.

Interpretation

2.—(1) In this Order—

"the Act" means the Banking Act 2009;

"the Bank" means the Bank of England;

"banking institution" means—

(a) a bank(**2**);

(b) an investment firm(**3**);

(c) a banking group company;

(**1**) 2009 (c.1); section 48P was inserted by the Financial Services (Banking Reform) Act 2013 (c.33), Schedule 2, paragraph 4.
(**2**) Defined in section 2 of the Act.
(**3**) Defined in section 258A of the Act. Section 258A was inserted by the Financial Services Act 2012 (c.21), section 101.

"eligible liabilities" has the meaning given in Article 2.1(71) of directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms(**4**);

"netting arrangements" has the meaning given in section 48P(2) of the Act;

"relevant banking institution" has the meaning given in article 3(2);

"set-off arrangements" has the meaning given in section 48P(2) of the Act;

"title transfer collateral arrangements" has the meaning given in section 48P(2) of the Act;

"transferable securities" has the meaning given in Article 4.1(44) of Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments(**5**), but does not include securities (within the meaning of section 14 of the Act(**6**)) issued by the relevant banking institution.

(2) References to sections of the Act include, as the context requires, those sections as applied by section 89A of the Act (application to investment firms)(**7**).

Application, etc.

3.—(1) This Order applies to an instrument which makes special bail-in provision.

(2) In this Order "relevant banking institution" means, in relation to an instrument to which this Order applies, the banking institution in respect of which special bail-in provision is made by the instrument.

Set-off and netting

4.—(1) An instrument to which this Order applies may not make special bail-in provision in respect of a protected liability (subject to paragraph (6)).

(2) In this article a "protected liability" is an eligible liability which is not within paragraph (3), and meets the following conditions—

(a) condition 1 is that the liability is owed by the relevant banking institution to a particular person ("the person");

(b) condition 2 is that the liability is a liability which either the person or the relevant banking institution is entitled to set-off or net under particular set-off arrangements, netting arrangements or title transfer collateral arrangements into which the person has entered with the relevant banking institution ("the relevant arrangements");

(c) condition 3 is that—

(i) where the liability relates to a derivative, financial contract or qualifying master agreement (see article 5), it has not been converted into a net debt, claim or obligation, whether in accordance with the relevant arrangements or through the making of special bail-in provision or otherwise;

(ii) where the liability relates to any other type of contract, it has neither been converted nor treated as if it had been converted into a net debt, claim or obligation, whether in accordance with the relevant arrangements or through the making of special bail-in provision or otherwise.

(3) The following liabilities are not protected liabilities—

(**4**) OJ L 190, 12.6.2014, p.190.
(**5**) OJ L 173, 12.6.2014, p.349.
(**6**) Amended by SI 2013/3115.
(**7**) Section 89A was inserted by the Financial Services Act 2012 (c.21), section 101(1), (5).

(a) liabilities in relation to an unsecured debt instrument which is a transferable security issued by that banking institution, and for these purposes a "debt instrument" is any instrument falling within article 77 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(**8**);

(b) liabilities in relation to a capital instrument issued by that banking institution;

(c) liabilities owed in relation to subordinated debt;

(d) unsecured liabilities in relation to any instrument or contract which—

(i) at the date on which it was issued or made, had a maturity period of 12 months or more, and

(ii) is not a derivative, financial contract or qualifying master agreement;

(e) unsecured liabilities owed to another member of the same group as the relevant banking institution which are not owed in relation to derivatives, financial contracts or qualifying master agreements;

(f) liabilities which relate to a claim for damages or an award of damages or a claim under an indemnity.

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

(a) it does not matter whether—

(i) the arrangements which permit the person or the banking institution to set-off or net the liability also permit the person or the banking institution to set-off or net rights and liabilities with another person,

(ii) the right of the person or the banking institution to set-off or net is exercisable only on the occurrence of a particular event;

(b) a liability is treated as if it is converted into a net debt, claim or obligation if the amount due in relation to the liability is reduced by reference to any sums which the debtor would be able to set off against the liability in the event that the debtor decided to exercise set-off or netting rights.

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

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

(a) the net debt, claim or obligation that would be due under the set-off arrangements, netting arrangements or title transfer collateral arrangements at the time the special bail-in provision providing for this is made, or

(b) an estimate of that net debt, claim or obligation.

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

5.—(1) In this Order "derivative" means a derivative as defined in Article 2(5) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4th July 2012 on OTC derivatives, central counterparties and trade repositories(**9**).

(2) In this Order "financial contract" means any or any combination of the following (other than a derivative)—

(**8**) SI 2001/544. Article 77 was amended by SI 2010/86; 2011/133.
(**9**) OJ L 201, 27.7.2012, p.1.