Draft Regulations laid before Parliament under section 235(2) of the Banking Act 2009, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2011 No.

FINANCIAL SERVICES AND MARKETS

The Investment Bank Special Administration Regulations 2011

Made - - - - ***

Coming into force in accordance with regulation 1

The Treasury make the following Regulations in exercise of the powers conferred by sections 233, 234 and 259(1) of the Banking Act 2009(**1**) (the power in section 233 having not yet lapsed under section 235(4)).

Before laying these Regulations before Parliament in draft, the Treasury consulted in accordance with section 235(3) of that Act.

A draft of these Regulations has been laid before and approved by resolution of each House of Parliament in accordance with section 235(2) of that Act.

Citation and commencement

1. These Regulations may be cited as the Investment Bank Special Administration Regulations 2011 and shall come into force on the day after the day on which they are made.

Interpretation

2.—(1) In these Regulations, except where the context otherwise requires—

"the Act" means the Banking Act 2009;

"administrator" has the meaning set out in regulation 4;

"Authorities" means the Bank of England, the Treasury and the FSA;

"business day" has the meaning set out in section 251 of the Insolvency Act;

"client" means a person for whom the investment bank has undertaken to receive or hold client assets (whether or not on trust and whether or not that undertaking has been complied with);

"contributory" has the meaning set out in section 79 of the Insolvency Act(**2**);

"court" means—

(**1**) 2009 c. 1.
(**2**) Section 79 was amended by S.I. 2009/1941.

(a) in England and Wales, the High Court,

(b) in Scotland, the Court of Session, and

(c) in Northern Ireland, the High Court;

"deposit-taking bank" means an investment bank to which the definition set out either in section 2 or in section 91 of the Act applies;

"the Disqualification Act" means the Company Directors Disqualification Act 1986(**3**);

"enactment" includes—

(a) an enactment comprised in or in an instrument made under an Act of the Scottish Parliament;

(b) Acts and Measures of the National Assembly for Wales and instruments made such an Act or Measure;

(c) Northern Ireland legislation;

and any EU Instrument (as defined in Part 2 of Schedule 1 of the European Communities Act 1972(**4**));

"fair" is to be construed in accordance with section 93(8) of the Act;

"FSA" means the Financial Services Authority;

"FSCS" means the scheme manager of the Financial Services Compensation Scheme (established under Part 15 of FSMA);

"FSMA" means the Financial Services and Markets Act 2000(**5**);

"the Insolvency Act" means the Insolvency Act 1986(**6**);

"insolvency rules" means rules made under section 411 of the Insolvency Act as applied and modified by regulation 15;

"market charge" means a charge to which Part 7 of the Companies Act 1989(**7**) applies as a result of the operation of section 173 of that Act(**8**);

"market contract" means a contract to which Part 7 of the Companies Act 1989 applies as a result of the operation of section 155 of that Act(**9**);

"market infrastructure body" means a recognised clearing house, recognised investment exchange, recognised overseas clearing house or recognised overseas investment exchange in relation to which the investment bank is a counterparty in a market contract or to a market charge or is a member or participant;

"Objective 1", "Objective 2" and "Objective 3" have the meanings set out in regulation 10;

"prescribed" means prescribed by insolvency rules;

"recognised clearing house" has the meaning set out in section 285 of FSMA;

"recognised investment exchange" has the meaning set out in section 285 of FSMA;

"recognised overseas clearing house" means an overseas person in respect of whom the FSA has made a recognition order under section 292 of FSMA(**10**) declaring them to be a recognised clearing house;

(**3**) 1986 c. 46.
(**4**) 1972 c. 68; Schedule 1 was amended by the European Union (Amendment) Act 2008 (c.7), section 3(3), Schedule, Part 1.
(**5**) 2000 c. 8.
(**6**) 1986 c. 45.
(**7**) 1989 c. 40.
(**8**) Section 173 was amended by S.I. 1991/880 and by S.I. 1992/1315.
(**9**) Section 155 was amended by S.I. 1991/880, S.I. 1998/1748 and by S.I. 2009/853.
(**10**) Section 292 was amended by S.I. 2006/2975.

"recognised overseas investment exchange" means an overseas person in respect of whom the FSA has made a recognition order under section 292 of FSMA declaring them to be a recognised investment exchange;

"Schedule B1" means Schedule B1 to the Insolvency Act(**11**);

"Schedule B1 administration" means the administration procedure set out in Schedule B1;

"securities" means financial instruments as defined in regulation 3 of the Financial Collateral Arrangements (No.2) Regulations 2003(**12**);

"security interest" means any legal or equitable interest or any other right in security (other than a title transfer financial collateral arrangement) created or otherwise arising by way of security including—

(a) a pledge,

(b) a mortgage,

(c) a fixed charge,

(d) a charge created as a floating charge, or

(e) a lien;

"special administration" has the meaning set out in regulation 3;

"special administration (bank insolvency)" has the meaning set out in paragraph 1 of Schedule 1;

"special administration (bank administration)" has the meaning set out in paragraph 1 of Schedule 2;

"special administration objectives" has the meaning set out in regulation 10;

"special administration order" has the meaning set out in regulation 4;

"statement of proposals" means the statement of proposals drawn up by the administrator in accordance with—

(a) paragraph 49 of Schedule B1 (as applied by regulation 15);

(b) where the FSA has given a direction, regulation 17; or

(c) in relation to Schedule 2, paragraph 7 of that schedule; and

"title transfer financial collateral arrangement" has the meaning set out in regulation 3 of the Financial Collateral Arrangements (No.2) Regulations 2003.

(2) In the definition of "security interest", in sub-paragraph (c), in its application to Scotland, "fixed charge" means a fixed security within the meaning given by section 47(1) of the Bankruptcy and Diligence etc. (Scotland) Act 2007(**13**).

(3) References in these Regulations to a regulated activity must be read with—

(a) section 22 of FSMA (classes of regulated activity and categories of investment);

(b) any relevant order under that section; and

(c) Schedule 2 to that Act (regulated activities).

(4) For the purposes of a reference in these Regulations to inability to pay debts—

(a) an investment bank that is in default on an obligation to pay a sum due and payable under an agreement is to be treated as unable to pay its debts; and

(b) section 123 of the Insolvency Act (inability to pay debts) also applies,

(**11**) Relevant amendments to Schedule B1 were made by S.I. 2003/2096, S.I. 2005/879, S.I. 2007/2974, S.I. 2008/948, S.I. 2008/1897, S.I. 2009/1941 and S.I. 2010/18.
(**12**) S.I. 2003/3226.
(**13**) 2007 asp 3.

and for the purposes of sub-paragraph (a), "agreement" means an agreement the making or performance of which constitutes or is part of a regulated activity carried on by the investment bank.

(5) Expressions used in these Regulations and in the Insolvency Act have the same meaning as in that Act, and the provision made by paragraphs 100 and 101 of Schedule B1 (as applied by regulation 15) in respect of the effect of the references in that Schedule also apply in respect of the same references where used in these Regulations.

(6) Expressions used in these Regulations and in the Companies Act 2006(**14**) have the same meaning as in that Act.

(7) Regulation 26 applies with respect to the application of these Regulations to Northern Ireland.

Overview

3.—(1) These Regulations provide for a procedure to be known as investment bank special administration ("special administration").

(2) The main features of special administration are that—

(a) an investment bank enters the procedure by court order;

(b) the order appoints an administrator;

(c) the administrator is to pursue the special administration objectives in accordance with the statement of proposals approved by the meeting of creditors and clients and, in certain circumstances, the FSA; and

(d) in other respects the procedure is the same as for Schedule B1 administration under the Insolvency Act, subject to specific modifications, and the inclusion of certain liquidation provisions of the Insolvency Act.

(3) Where the investment bank is a deposit-taking bank with eligible depositors (within the meaning of section 93(3) of the Act)—

(a) regulations 4 to 8 do not apply; and

(b) in addition to the insolvency procedures established under Parts 2 and 3 of the Act, the Bank of England or, as the case may be, the FSA, may apply for an order to put the bank into—

(c) special administration (bank insolvency) as set out in Schedule 1 (as applied by regulation 9); or

(d) special administration (bank administration) as set out in Schedule 2 (as applied by regulation 9).

(4) Where the investment bank is a deposit-taking bank but has no eligible depositors, the investment bank must not be put into special administration (bank insolvency); instead the investment bank may be put into either—

(a) special administration (bank administration), (in which case regulations 4 to 8 do not apply); or

(b) special administration.

Special administration order

4.—(1) An investment bank special administration order ("special administration order") is an order appointing a person as the investment bank administrator ("administrator") of an investment bank.

(**14**) 2006 c.46.

(2) A person is eligible for appointment as administrator under a special administration order if qualified to act as an insolvency practitioner.

(3) An appointment may be made only if the person has consented to act.

(4) For the purpose of these Regulations—

(a) an investment bank is "in special administration" while the appointment of the administrator has effect;

(b) an investment bank "enters special administration" when the appointment of the administrator takes effect;

(c) an investment bank ceases to be in special administration when the appointment of the administrator ceases to have effect in accordance with these Regulations; and

(d) an investment bank does not cease to be in special administration merely because an administrator vacates office (by reason of resignation, death or otherwise) or is removed from office.

Application

5.—(1) An application to the court for a special administration order may be made to the court by—

(a) the investment bank;

(b) the directors of the investment bank;

(c) one or more creditors of the investment bank;

(d) the designated officer for a magistrates' court in the exercise of the power conferred by section 87A of the Magistrates' Courts Act 1980(**15**) (fines imposed on companies);

(e) (subject to paragraph (7)), a contributory of the investment bank;

(f) a combination of persons listed in sub-paragraphs (a) to (e);

(g) the Secretary of State; or

(h) the FSA.

(2) Where an application is made by a person other than the FSA, the FSA is entitled to be heard at—

(a) the hearing of the application for special administration; and

(b) any other hearing of the court in relation to the investment bank under these Regulations.

(3) An application must nominate a person to be appointed as the administrator.

(4) As soon as is reasonably practicable after making the application, the applicant shall notify—

(a) a person who gave notice to the FSA in accordance with Condition 1 of regulation 8; and

(b) such other persons as may be prescribed.

(5) An application may not be withdrawn without the permission of the court.

(6) In sub-paragraph (1)(c), "creditor" includes a contingent creditor and a prospective creditor.

(7) A contributory ("C") is not entitled to make an application for special administration unless either—

(a) the number of members is reduced below 2; or

(**15**) 1980 c. 43; section 87A was inserted by the Criminal Justice Act 1988 (c. 33), section 62(1) and amended by the Enterprise Act 2002 (c. 40), section 248(3), Schedule 17, paragraph 2, the Courts Act 2003 (c. 39), section 109(1), Schedule 8, paragraph 224(1), (2), (3), Schedule 10, and the Tribunals, Courts and Enforcement Act 2007 (c. 15), section 62(3), Schedule 13, paragraphs 45, 53(1), (2), (3), (4).