BUTTERWORTHS

SECURITIES & FINANCIAL SERVICES LAW HANDBOOK

RECESSION SPECIAL 2009 SUPPLEMENT

Edited by
DEBORAH SABALOT
FELICITY MAHER
Consultant Editor
WILLIAM BLAIR

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In his testimony to the Treasury Select Committee on the banking crisis, Mervyn King, Governor of the Bank of England said "We will never get rid of financial crises—a bank is inherently a dangerous institution that will generate crises from time to time—but what we ought to be really concerned about is that the impact of these crises and their frequency is not diminishing over time. We get used to the idea that aeroplane crashes are less frequent and that we make passenger transport more safe over time. In the financial sector it seems to be the other way round, and that is why we cannot, I think, just put the issue to one side and say practical people who understand the world know there is nothing you can do about it. That is a counsel of despair, and we cannot afford a counsel of despair given the damage that has been wreaked on the rest of the economy by the problems in the financial sector."

When the tenth edition of Butterworths Securities and Financial Services Law Handbook went to press in early 2009 we were able to include the text of the Banking Act 2009 but since that time a number of additional statutory instruments and other instruments made under the Act (including instruments made by the Bank of England under its powers under section 11(2) and 12(2) of the Banking Act 2009) have come into effect as Parliament and the regulators have moved to make the financial sector safer and to deal with the aftermath of the credit crunch and the failure of a number of UK financial institutions.

Due to the cross-over between material in the Butterworths Securities and Financial Services Law Handbook and Butterworths Banking Law Handbook it was decided to bring out a common supplement to cover the most recent orders and instruments affecting the special resolution regimes in relation to Bradford & Bingley plc, Heritable Bank plc, Kaupthing Singer & Friedlander and, most recently, the Dunfermline Building Society.

This Supplement provides an up-to-date and readily portable text of the Banking Act 2009 and its associated secondary legislation as well as relevant European legislative materials in force on 1 August 2009. However, later changes have been included wherever possible.

The Supplement is divided into six Parts, within which material is reproduced chronologically—

- Part I: Banking Act 2009
- Part II: Other Acts
- Part III: Statutory Instruments under the Banking Act 2009
- Part IV: Other Statutory Instruments
- Part V: EU materials
- Part VI: Other Materials

This Supplement follows the standard Butterworths Handbooks style, with amendments made by new legislation incorporated into the text of existing legislation. The notes which follow a provision detail the changes that have been made to the text and list any prospective amendments. In relation to the statutory material, the following points should be noted—

- Material in italics is prospectively repealed/revoked or substituted. The notes provide a detailed explanation of such prospective amendments.
- Material within square brackets is the subject of one or more insertions or substitutions of text. Again, the notes provide full details.
- Modifications of provisions are set out in full in the notes where relevant. In some cases, where modifications or extensions of scope have been made (for example, in

relation to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001), this is noted as a cross-reference to the note at the beginning of that Part or section, etc.

- Where an Act or Statutory Instrument is amending only, it is not (generally) included in full, although the notes will provide a summary of the changes. The amendments made by such legislation are fully incorporated into the relevant provisions where they are within the scope of this work.

The main texts of Butterworths Securities and Financial Services Law Handbook and Butterworths Banking Law Handbook are regularly updated online.

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August 2009

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[12 February 2009]

NOTES

General Note: On 8 July 2009 HM Treasury issued a consultation paper, Reforming Financial Markets which includes a number of proposals to amend the primary legislation including the Banking Act 2009 including formalising and strengthening the arrangements for institutional cooperation by the creation of the Council for Financial Stability, strengthening the governance arrangements and statutory framework of the Financial Services Authority (FSA) by amending the Financial Services and Markets Act 2000, enhancing the FSA's powers to include a power to suspend individuals or firms for misconduct; and a power to penalise individuals who perform a controlled function without FSA approval, expanding the role of the Financial Services Compensation Scheme (FSCS) to allow it to act as the single point of contact in the UK for deposit-guarantee schemes in other Member States, to act as the UK agent for compensation schemes in other countries (including third countries) when they have to pay compensation to UK customers of financial services firms and to act as paying agent in other cases when arrangements are put in place to make payments to UK customers of financial services firms as well as taking steps to ensure that the regulators have the power to ensure that competitive markets work for consumers through financial capability and money guidance, strengthening the FSA's consumer capability and ensuring swift and effective redress including updating the regulators' existing backstop powers to deliver collective redress and introducing some form of collective action through which consumers can enforce their rights to redress in the event of a firm's default. The closing date for this consultation paper is 30 September 2009.

PART 1
SPECIAL RESOLUTION REGIME

Introduction

1 Overview

(1) The purpose of the special resolution regime for banks is to address the situation where all or part of the business of a bank has encountered, or is likely to encounter, financial difficulties.

(2) The special resolution regime consists of—
(a) the three stabilisation options,
(b) the bank insolvency procedure (provided by Part 2), and
(c) the bank administration procedure (provided by Part 3).

(3) The three "stabilisation options" are—
(a) transfer to a private sector purchaser (section 11),
(b) transfer to a bridge bank (section 12), and
(c) transfer to temporary public ownership (section 13).

(4) Each of the three stabilisation options is achieved through the exercise of one or more of the "stabilisation powers", which are—
(a) the share transfer powers (sections 15, 16, 26 to 31 and 85), and
(b) the property transfer powers (sections 33 and 42 to 46).

(5) Each of the following has a role in the operation of the special resolution regime—
(a) the Bank of England,
(b) the Treasury, and
(c) the Financial Services Authority.

(6) The Table describes the provisions of this Part.

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[1]

NOTES
Commencement: 17 February 2009 (in so far as conferring or relating to any power to make subordinate legislation or codes of practice); 21 February 2009 (otherwise).

2 Interpretation: "bank"

(1) In this Part "bank" means a UK institution which has permission under Part 4 of the Financial Services and Markets Act 2000 to carry on the regulated activity of accepting deposits (within the meaning of section 22 of that Act, taken with Schedule 2 and any order under section 22).

(2) But "bank" does not include—
(a) a building society (within the meaning of section 119 of the Building Societies Act 1986),
(b) a credit union within the meaning of section 31 of the Credit Unions Act 1979, or
(c) any other class of institution excluded by an order made by the Treasury.

(3) In subsection (1) "UK institution" means an institution which is incorporated in, or formed under the law of any part of, the United Kingdom.