ERNST & YOUNG

Ernst & Young LLP
1 More London Place
London SE1 2AF

Tel: 020 7951 2000
Fax: 020 7951 1345
www.ey.com/uk

Banking reform consultation responses
Banking Reform Team
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

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Email: robin.heath@uk.ey.com

By post and e-mail: banking.reform@hm-treasury.gov.uk

Dear Banking Reform Team

Financial stability and depositor protection: special resolution regime

INTRODUCTION

Ernst & Young LLP welcomes the opportunity to review and comment on the joint consultation paper entitled *Financial stability and depositor protection: special resolution regime* ("the Consultation Paper").

Our interest

Ernst & Young is one of the largest global professional services organisations. We provide a wide range of audit, accounting, tax, corporate finance and other business advisory services. All of our UK activities are supervised by the Institute of Chartered Accountants in England & Wales, with further supervision over certain parts of our business by the Financial Reporting Council, the Financial Services Authority ("FSA") and other regulators.

Our interests in the Consultation Paper are twofold:

- Our client base is diverse representing most sectors and industries, including banking. As business advisers, particularly in the areas of auditing, advisory and restructuring, we have seen the wide-ranging effects of the recent "credit crunch" on most sectors and industries including those effects which form the subject matter of the Consultation Paper.

- We are a large business in the UK with over 9,500 partners and employees. Not only do all of our people have a personal interest in the specific issue of depositor protection but, as individuals and as a business, we are dependent on a fully functioning banking system in the UK.

We have a number of overall observations to make on the Consultation Paper that we outline below before commenting on its specific questions.

INVESTOR IN PEOPLE

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OVERALL OBSERVATIONS

Speed of proposed reforms

We are generally supportive of the principles behind the proposals. However, they have the potential to create many complex and far-reaching consequences. It is therefore crucially important for the details of the proposals, which are not covered in this Consultation Paper, to be developed through full and proper consultation before being implemented into law. This will help gain stakeholder confidence and result in better legislation. We have serious concerns that the bill timetable is too fast given these complexities and that it may be better to extend or otherwise temporarily modify the Banking (Special Provisions) Act 2008. This would give Parliament and all other stakeholders a proper opportunity to consider the new proposals to make sure we get it right.

In view of this, it was disappointing that the consultation period for this Consultation Paper spans little more than seven weeks particularly over the summer vacation when better regulation principles recommend a consultation period of at least 12 weeks.

In a similar vein, and if indeed the Authorities intend to keep the option of partial transfers open, we believe there should be a full consultation for the code of practice in this area. This is discussed in more detail below.

Full cost benefit analysis needed

There is no Regulatory Impact Assessment attached to the Consultation Paper. As we say above, the proposals are numerous, complex and far reaching with potential costs and benefits for all stakeholders.

As the Authorities' policy development in this area moves forward a full cost/benefit analysis of the different options is essential. We would therefore encourage development of a detailed regulatory impact assessment for public consultation as soon as possible. In this respect, we believe that the Authorities need to work closely with the banking industry to identify the likely costs of the various options both in terms of the reforms themselves and also the costs of the particular SRR options available based on practical hypothetical scenarios.

SRR should be a last resort option

The potential consequences on the market and on depositors of all kinds of entering into an SRR are significant. For these reasons, it is vital that the SRR is seen as an option of last resort when all other reasonable options to deal with the failed bank have been explored.

RESPONSE TO SPECIFIC QUESTIONS

Our answers to the specific questions are set out in the Appendix.

OTHER COMMENTS

Chapter 3: SRR tools

In relation to paragraphs 3.52 and 3.53, absent a common cross-sector data format, the systems challenges which may arise in trying to effect a partial transfer quickly and effectively should not be underestimated.

CONCLUSION

We are grateful to the Authorities for publishing the Consultation Paper. We hope that you have found our comments helpful. If you would find it useful, relevant members of our firm are available to discuss any of the points we have raised.

We wish you every success with the rest of the consultation process and encourage you to publish all non-confidential responses to the Consultation Paper in early course. We look forward to reading the results.

For the avoidance of doubt, none of the comments set out in this letter are intended to be confidential.

Yours sincerely

Robin Heath
Managing Partner, Regulatory & Public Policy

APPENDIX

RESPONSE TO SPECIFIC QUESTIONS

Chapter 2: SRR objectives, role and governance

2.1 Do you agree with the SRR objectives, as set out in draft clause 4?

Yes. We believe that the objective of financial stability is particularly important. As we explain below, the potential effects to the banking system of entering into an SRR are significant and wide-ranging. Accordingly, we believe that the SRR should only ever be entered into and continue where it is necessary to protect financial stability.

We are aware that understandably some stakeholders are suggesting there should be an additional objective of maximising franchise value. Without an objective hierarchy, which we believe would be undesirable, it would be challenging for the Authorities to balance the objective of maximising franchise value with the other draft Objectives particularly Objectives 1 and 2. As an alternative to including a maximising franchise value objective, there could be a greater onus on the Authorities to demonstrate a positive cost-benefit ratio to the whole banking system in pursuing the SRR objectives, for there to be transparency and for there to be appropriate compensation arrangements.

We also believe that the inclusion of Objective 5 adds little because the Authorities will be obliged to have regard to the Human Rights Act 1998 in any event.

2.2 Do you agree with the role of the FSA in determining the conditions for entering the SRR?

Yes.

2.3 Do you agree with the conditions for entering the SRR as set out in draft clause 7?

Yes. In our view, the drafting could make it clearer that both conditions must be satisfied before entering an SRR.

2.4 Do you agree with the role of the Bank of England in operating the SRR in the public interest as set out in draft clause 8?

Yes.

2.5 Do you agree with the roles of the Treasury as set out in draft clauses 8(4), 8(5), 9 and 10?

Yes. However, we have concerns whether the Bank of England could realistically achieve the objectives set out in draft clause 9(6) if the Treasury had refused consent under draft clauses 9(1) or 9(3).

2.6 Do you agree that the SRR objectives should be supplemented by a code of practice?

Yes. It will provide greater clarity of thought and purpose as well as bringing a necessary element of transparency and flexibility.

2.7 Do you agree with the proposed areas to be covered in a code of practice?

Yes, in principle. However, the areas to be covered are very broad particularly the requirement for guidance on how to achieve the resolution objectives (draft clause 5(2)(a)). As such the code will have to be extremely well drafted if it is to provide meaningful guidance.

Chapter 3: SRR tools - stabilisation powers and compensation

3.1 What are your views on the breadth of the property transfer powers in clauses 14 to 23? Are there particular powers that are lacking?

Whilst we understand the need for the powers set out in draft clauses 14 to 23, the draft clauses themselves and their description set out in Appendix A could be much clearer.

For example, draft clause 17 appears to contain a list of possible additional provisions that may be included in a property transfer instrument. However, the draft clause does not explain that this is its purpose. We also believe that draft clause 17 is not an exhaustive list and that additional categories of provision may be needed. Arguably though draft clause 21 captures any provisions which are not mentioned specifically in draft clause 17.

Draft clause 19 is also extremely difficult to follow; particularly draft clauses 19(2), (3) and (4). Aside from the drafting we have concerns that this may give the Authorities an inequitable right to "cherry-pick" agreements for the bridge bank or partial transfer. This is a particular issue in relation to netting and set-off arrangements as we explain in more detail below.

3.2 What are your views on the nature of these powers?

The powers are wide-ranging and onerous. There will need to be clear codes of practice or rules for the Authorities on how to exercise these powers including an obligation to use reasonable endeavours to maximise as far as reasonably possible the return for shareholders when exiting the SRR.

3.3 Do you consider that a company limited by shares, with the Bank of England as the sole or controlling shareholder, would be the most appropriate governance structure?

Yes, although it could give rise to consolidation problems.

3.4 Do you agree that the lifespan of a bridge bank should be limited? What do you think is an appropriate length of time?

Yes, the life of a bridge bank should be limited in some way. Although we can see that for reasons of public accountability a fixed amount of time would be more attractive, we believe that there are better options. We say this because the downward pressure on potential sale price would likely increase as the bridge bank approaches its expiry date.

A preferable option would be to ensure that the Authorities have a responsibility to find a commercial solution as quickly as is reasonably possible and that the bridge bank lasts: (i) for as long as it takes to find a private sector solution; or (ii) until the Authorities decide that no private sector solution is available in which case the assets of the bridge bank would presumably be returned to the residual company.

3.5 Do you think that the extension of a bridge bank's lifetime should be subject to certain conditions? If so, what?

We refer you to our response to Question 3.4 above.

3.6 Do you think that partial transfers increase the chances of the successful operation and sale of a bridge bank and the chances of a private sector purchase?

Yes, in certain circumstances. The interconnectedness of banking and finance arrangements, including netting agreements, is extremely complex. Partial transfers will therefore be a challenging exercise. However, from a purely insolvency perspective, a partial transfer could lead to a better price for the assets transferred to the bridge bank than might have been achievable had the assets remained in the failed bank. It would allow "good" business or assets to be grouped together which would allow a realisation of franchise value which would not otherwise be possible where these "good" assets are tainted by impaired ones. It may also increase the chances of a private sector purchase.

We are aware of serious concerns among the banks about the effects of partial transfers on their financing arrangements which have the potential to create significant uncertainty in the financial sector. Certainty is essential because without it financial institutions may struggle to obtain clean legal opinions on their netting arrangements. This may in turn adversely affect their regulatory capital requirements which will likely decrease liquidity in the banking sector.

In any event, the risk of partial transfers has the potential to increase the costs of interbank lending which will increase the costs of borrowing for both business and consumers.

The proposal to oblige the residual company to continue to provide services to a bridge bank will need to be covered in the event of a partial transfer. It could cause further deterioration in the value of the residual company unless there is suitable costs cover and compensation.

3.7 Do you agree that guidelines, setting out when partial transfers might be used, should be provided in the code of practice?

Yes, subject to our comments in response to Question 3.6 above. If the Authorities proceed with partial transfers as an option, we believe this to be essential. In any event, there would need to be a full public consultation on the code of practice so as to promote stakeholder confidence in it.

3.8 Would these guidelines provide reassurances about how the Authorities might use partial transfers?

Potentially yes. We would have to see the draft guidelines to be able to comment in detail. It also assumes that the guidelines are public and transparent.

3.9 Do you agree with the situations in which it is proposed that the partial transfer powers could be exercised?

Yes, provided that the Authorities only exercise the powers after having considered the matter fully and having reasonably concluded that a partial transfer is the best option in terms of returning value to the residual company.

Finally, there may be situations other than those proposed and the powers need to take account of this.

3.10 What is the appropriate level of flexibility for the situations in which these powers can be used?

We understand that, in view of the objective to promote financial stability, the Authorities would wish to have these powers. Any powers in this situation would have to be handled extremely carefully and in an ideal world, we believe that such transfers ought to be arranged on commercial terms between the bridge bank and the residual company and not in the way proposed.

That said, a code of practice to be used on a "comply or explain" basis would strike the right balance between flexibility and restrictiveness in the circumstances provided that the code is policed properly, the Bank of England is accountable for its compliance with it and there is an equitable mechanism for compensating those parties who suffer loss as a result of the partial transfer.

3.11 Do you think the Bank of England should have the flexibility to make subsequent transfers between a bridge bank and a residual company?

Yes but such flexibility would need to be exercised carefully and responsibly by the Bank of England so as not to damage the residual company even further. It would have to be commercially justifiable with the potential to return value to the residual company.

3.12 Do you think the Bank of England should have the power to make subsequent transfers using the stabilisation powers?

Please see our response to Questions 3.10 and 3.11 above.

3.13 Do you agree with the restrictions the Authorities propose for subsequent transfers (that they should only occur between a bridge bank and a residual company and not involve moving liabilities from the bridge bank to the residual company)? Should there be additional restrictions?

Yes, save that the Bank of England's powers should cease once the bridge bank has expired, the Bank of England should remain accountable at all times for the exercise of these powers and there should be an equitable mechanism for compensating those parties who suffer loss as a result of the partial transfer.

3.14 Do you think that the bank resolution fund is an appropriate means for compensating creditors left in the residual company?

Yes, in principle. However, we would need to see the detail of any proposals to provide more meaningful comments.

We have two other points to make:

- The proposed compensation measures need to acknowledge that there is a potential for inequality for creditors in a partial transfer situation. Creditors taken with the assets transferred to the bridge bank may be repaid in full whereas the creditors left in the residual company may receive even less than they would have received had the failed bank remained whole. This needs to be taken into account when calculating any compensation due and we presume that it will be covered by the compensation arrangements discussed in paragraphs 3.128-3.148 of the Consultation Paper.
- We do not understand why the residual company should have only a "contingent" economic interest in the net proceeds of the resolution[1]. The residual company will always have an economic interest in the proceeds of sale. We accept that the net proceeds may be zero but this does not mean that the interest is a contingent one.

3.15 Do you agree that an explicit safeguard to protect set-off and netting arrangements is required?

Yes. Certainty is essential as regards regulatory capital. If banks are unable to obtain clean legal opinions in relation to some of their netting arrangements, there is a significant risk that the banks will have to gross up their regulatory capital. This, of itself, could cause financial instability.

3.16 Do you agree with the risks of adopting a complete master netting arrangement safeguard?

Yes. The risk of banks finding ways around the legislation will always be a risk because the market has always been innovative. If the Authorities create uncertainty for netting arrangements, a likely work-around would be to structure the arrangements through other jurisdictions and choices of law.

3.17 Should the qualifying financial contracts approach be adopted, what do you think should be defined as qualifying financial contracts?

The qualifying financial contracts approach has its merits but it would become out-of-date quickly and would not be able to keep up with the pace of change. All definitions have potential downsides. In our view, the clearest way could be to adopt a product approach including products such as swaps, forwards, options, futures or repo.

It would be vital to ensure any such product list was kept up-to-date and in line with innovation in financial services otherwise it could cause significant damage to the UK market as a result.

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[1] See paragraph 3.64 of the Consultation Paper.

3.18 Can you suggest any alternative options for how the safeguard might be framed in a sufficiently wide but workable way?

This is a complex and continuous evolving market and therefore there will be no definitive test. The wider the approach, the more uncertainty will be created. We repeat our comments to Question 3.6 above which explain the possible effects of uncertainty in this regard.

3.19 Do you agree that an explicit safeguard to protect structured finance arrangements is required?

Yes, conceptually we believe there should be safeguards. The Authorities would have to be able to take the whole structure across to a bridge bank to give certainty to those buying into the structured finance arrangement at the outset so they could continue to rely on their credit assessments which assumed that the structure finance arrangement had all its component parts and could not be disassembled.

That said, in practice, it would be very difficult to take structured finance arrangements across to the bridge bank in a partial transfer situation because hedging arrangements and/or credit protection integral to the structure will probably form part of the derivatives book of the bank. This in turn would be caught by master netting agreements with counterparties.

Again, legal certainty is required here. If it is not dealt with properly, the structured finance market as a whole could be damaged. Separation of assets and liabilities from these arrangements would cause open investment positions and create significant financial uncertainty.

3.20 Do you have any suggestions for how the safeguard might be framed in a sufficiently wide but workable way?

We refer to our response to Question 3.19 above.

3.21 Do you agree that a safeguard to protect all security interests could make a partial transfer practically difficult?

Yes.

3.22 Which security interests should not be covered by this safeguard?

It is unclear why the Authorities would wish to exclude certain security interests from the safeguard. We are uncomfortable with the principle of excluding security interests because exclusions would, again, potentially create uncertainty in the banking system.

The Authorities specifically mention floating charges. We do not believe this to be an issue because we are not aware of floating charges generally being given by banks. If the aim of the Authorities is to exclude floating charges now to stop them becoming more prevalent as an innovative market response to banking reforms then we can understand this aim in principle. However, we believe that such a response would be unlikely.

If the Authorities believe that a regulatory response is necessary, our preferred approach would be for a regulator like the FSA to prohibit financial institutions from entering into those security interests which were seen as undesirable in the context of these reforms. The FSA would then follow up through inspections to check that banks had not entered into them[2]. We would need to see the types of security interests that the Authorities are proposing to exclude before we can comment further.

3.23 Do you consider that where part of a failing bank's business is transferred to a bridge bank, a special bank administration procedure may be required to deal with the residual company?

Yes.

3.24 Do you think that this special bank administration procedure should be confined to the residual company where a partial transfer is effected to a bridge bank or should it also apply, with any necessary modifications, where a partial transfer is effected to a private sector institution?

We agree that a special bank administration procedure should generally only be needed where there is a partial transfer to a bridge bank.

If the partial transfer is to facilitate a pre-agreed partial private sector solution, time will be needed to transfer assets to the purchaser. In this regard, the objectives and powers in the special bank administration procedure would be helpful. We therefore believe there should be flexibility to use the special bank administration procedure where it is needed.

Additionally, the Authorities may also want to consider how to secure continued access to the banking system for the bank in administration such that it can remain connected to payment systems and can continue to receive other critical banking services. This is likely to work better under a special bank administration procedure.

3.25 Do you agree that the special bank administration procedure should have specific objectives?

Yes, to provide transparency and confidence for stakeholders in the procedure. They would help to identify whether special bank administration is the most appropriate option in the circumstances or whether other options such as liquidation are more suitable. Specific objectives would also provide protection and certainty for the special bank administrator.

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[2] See our response to Question 3.1 in our letter dated 15 September 2008 in response to the Authorities' consultation paper entitled "*Financial stability and depositor protection: further consultation*".

3.26 Do you agree with the objectives and their priorities as proposed above? In particular, do you agree that the objective of supporting the bridge bank should take priority?

Yes, provided that the objective is always the protection and enhancement of financial stability.

3.27 Should the grounds for commencing or applying for special bank administration be linked to the partial transfer of assets and liabilities to a bridge bank?

Yes.

3.28 Should any other grounds be included in the legislation?

None of which we are aware.

3.29 Should the special bank administration procedure be commenced by an order of the court or initiated automatically by the direct appointment of a special bank administrator by the Bank of England?

We believe that the procedure should be commenced by an order of the court because this would give more transparency and independent scrutiny to the process which will lead to increased stakeholder confidence. This need not slow down the administration in any material way.

3.30 Should the special bank administrator be an officer of the court, or in the interest of promoting the objectives of the SRR should he or she be subject to overall direction by the Bank of England, with the court ruling on any disputes arising in the resolution?

Consistent with our response to Question 3.29 above, we believe that the special bank administrator should be an officer of the court. It is worth noting that in this situation, the FSA would continue to regulate the bank with the administrator in post.

3.31 Are the moratorium provisions outlined above sufficient for the purposes of a special bank administration procedure? If not, what additional measures would be required?

In principle they look sufficient.

3.32 Do you think that the existing powers of an administrator would be sufficient for the purposes of special bank administration?

We believe that the administrator could find additional powers useful. We refer you to our response to Question 3.33 below.

3.33 Should the special bank administrator be given any additional powers, including some or all of the powers of a liquidator outlined above? If so, what extra powers do you consider would be appropriate?

We agree that powers to disclaim and to initiate timely action in relation to alleged fraudulent or wrongful trading would also be useful.

3.34 Do you agree that the Bank of England should have a key role to play in the special bank administration procedure to facilitate the successful resolution of a bridge bank and to assist in the winding up of the residual company in the interests of its creditors generally?

Yes.

3.35 Should the Bank of England rather than an initial meeting of creditors be responsible for considering and agreeing to, with or without modification, the special bank administrator's proposals?

Yes, provided that alongside there are suitable arrangements in place for creditors to be kept informed, for the Bank to be accountable to them and for there to be a proper system of compensation in the event of loss. This would be consistent with other special resolution regimes.

3.36 Should the Bank of England rather than creditors fulfil the functions of a creditors' committee?

This is a possibility provided that the Bank of England continues to keep creditors informed.

3.37 Should the rights of creditors to challenge the conduct of the procedure be subject to restrictions to ensure that the principal objectives are not jeopardised?

Whilst it is important that the administration be allowed to work without undue interference, the interests of creditors continue to be important and need to be protected. Instead of restrictions on the ability for creditors or other affected parties to make legal challenges generally, guidance for judges and the exercise of their discretion in these circumstances would be a more appropriate response.

3.38 Do you agree that there should not be any substantial change to the ordinary statutory order of priority of creditors in the special bank administration procedure?

Yes, assuming that eligible depositors will have already been repaid with the FSCS standing as a creditor in their place.

3.39 Should any special provisions relating to statutory set-off be introduced within a special bank administration procedure?

Unless special provisions are introduced in one form or another, there is a risk of treating banking customers differently so that eligible depositors under the FSCS receive repayments gross whereas ineligible depositors (or those depositors who had more than the FSCS limit deposited) will be subject to the usual rules of set off. The Authorities therefore need to consider the impact of this potential inequality.

3.40 Do you agree that the procedure should only be terminated where the Bank of England provides consent?

Yes.

3.41 Do you think that provisions should be made for a variety of ways to bring the procedure to a close, including conversion to ordinary insolvency procedures?

Yes.

3.42 Do you agree that temporary public ownership should be subject to similar public interest tests as the Banking (Special Provisions) Act 2008?

Yes.

3.43 Do you agree that the Authorities should have the power to put in place a bank resolution fund for a bridge bank and temporary public sector ownership?

Yes, in principle. However, we would need to understand the details of this proposal before commenting further.

3.44 Do you agree that the bank resolution fund should be mandatory in the case of the bridge bank tool, but optional in the case of temporary public ownership?

We can see the logic behind the proposed distinction. It would be preferable for the sake of transparency to use a bank resolution fund in all cases even if the balance to be returned to the residual company or to its shareholders in the case of temporary public ownership may never rise above zero.

3.45 Do you agree that the bank resolution fund should comprise only the net proceeds of resolution (that is, less the costs of resolution)?

Yes, in principle. However, we would need to understand the details of this proposal before commenting further.

3.46 Do you agree with the mechanisms for compensation and appointing an independent valuer in the circumstances set out above?

Yes. The Treasury could also consider forming a panel of approved valuers to help avoid allegations of impartiality on appointment.

3.47 Do you agree with the proposals to confer specific powers on an independent valuer, and the nature of the powers described above and provided for in draft clause 28?

They seem sensible in principle. In respect of draft clause 30(1), we believe that the valuer would always need specific instructions. Accordingly, we recommend replacing the word "may" with "shall".

The powers to obtain information and explanations referred to in draft clause 28 are important but widely drafted. It is important to understand what level of compulsion the valuer will have at his/her disposal. If this is not dealt with specifically under draft clause 28, we recommend that the order covers this.

3.48 Do you agree with the principles of valuation set out in draft clause 30?

Yes in principle. However, we would point out that those set out in draft clause 30 are broad. This could be seen as allowing the Treasury, through the Valuation Principles, to influence the outcome of the valuation significantly.

3.49 Do you agree that the Treasury should have power to provide for the reconsideration of the independent valuer's determination and appeals from the valuer to a court or tribunal?

Yes, although the Consultation Paper does not make a case why only the Treasury should have this option.

Rather than an ability to refer the matter to Court, the Authorities could consider adjudication as an alternative. For example, the valuer's decision could be referred to a review board of three other valuers taken from the Treasury panel who would adjudicate by a majority. The party challenging the decision would have the ability to make representations to the panel on why they are challenging the opinion. Having the matter automatically referred to a court or tribunal could be very expensive and time consuming.

Having said this, we foresee that a potential area of challenge of the valuer's decision is on the interpretation or application of the instructions or Valuation Principles given to the valuer by the Treasury. However, there appears to be no specific right or ability to challenge these instructions other than by challenging the valuer's decision.

3.50 Do you agree that alternative compensation arrangements are needed for a private sector purchaser tool, that would not involve an independent valuer?

If using a private sector purchaser tool, we believe that there are many situations where the involvement of an independent valuer would be merited. A judicial review has the potential to be very expensive with multiple parties potentially seeking to introduce their own independent valuations. For this reason, the Authorities may want to give consideration to using expert determination instead of, or as part of, any judicial review.

3.51 Should any of the costs described above not be covered by the FSCS, under the Authorities proposals? Please explain why.

We agree with the Authorities' analysis set out in paragraphs 3.149 to 3.154 of the Consultation Paper.

3.52 Are there any additional costs of resolution which could be borne by the FSCS?

None of which we are aware.

Chapter 4: SRR tools – bank insolvency procedure

4.1 Do you agree with the provisions for entry into the bank insolvency procedure, as set out in draft clauses 38-41, 60 and 62?

Yes. It is also important to note that under draft clause 41 the bank insolvency is deemed to begin on the date on which the application or petition was presented rather than the date of the

making of the order. Therefore it may be necessary to include provisions to protect transactions occurring in the two week window after the application or petition but before the granting of the order. In a compulsory liquidation, where there is usually a time gap between presentation of the petition and making of the order, transactions occurring between petition and order are void unless the court orders otherwise.

If similar restrictions were to apply in the bank insolvency procedure they could severely curtail the operation of the bank in the post-petition/application period. It is not clear whether it is envisaged that transactions which occurred in this period will also be void or whether they would always be valid, perhaps provided that they were entered into during the normal course of business.

All of the draft clauses address the powers from a high level. We will need to see the draft detailed rules which will be required to underpin the draft clauses and recommend that these rules are subject to proper consultation in due course.

4.2 Do you agree with the provisions for the appointment and objectives of the bank liquidator, as set out in draft clauses 37, 42, 46 and 47?

Yes.

4.3 Do you agree with the provisions for the powers and responsibilities of the bank liquidator, as set out in draft clauses 47, 48, 61, 63 and 66?

Yes.

4.4 Do you agree with the provisions for the liquidation committee, as set out in draft clauses 44 and 45?

Yes although draft clause 44(3)(a) seems potentially very onerous.

4.5 Do you agree with the provisions for the end of the bank insolvency procedure, as set out in draft clauses 50-58?

Yes, subject to two comments:

- We believe that the terms of draft clause 52(1)(a) have the potential to be problematic if the members of the liquidation committee are no longer representatives of the Authorities which is possible pursuant to draft clause 44(6). For example, as currently drafted, the liquidation committee does not have to consult the FSA or Bank of England if it wants to make an application to remove the liquidator under draft clause 52. However, we assume that regulators will still have an interest in the bank's run down and therefore will want to be able to veto the removal if necessary.
- One would also expect these clauses to deal with a situation where the liquidator dies in office.

Chapter 5: building societies and other issues of scope

5.1 Do you agree that the objectives, roles of the Authorities and governance of the SRR should not differ for building societies and banks?

Yes. We would need to see detailed proposals before being able to comment further.

5.2 Do you agree that the Authorities should have powers to disapply statutory requirements including the principal purpose and lending and funding limits, for the residual element of a building society following a partial transfer?

Yes, subject to our comments in response to Question 5.1 above.

5.3 Do you agree that there should be a special building society administration procedure for building societies in the event that part of a building society's business is transferred to a bridge bank?

Yes, subject to our comments in response to Question 5.1 above.

5.4 Would temporary public ownership be a useful tool for resolving a failing building society in some circumstances?

Yes, subject to our comments in response to Question 5.1 above.

5.5 How would this tool best be implemented in the case of a building society, given the lack of applicability of share transfer powers?

This is not straightforward. Potentially this tool could be implemented by allowing the Bank of England appointing a new board for the building society or replacing particular board members. Additionally the Bank of England could have powers to require the board to be directly accountable to it. In any event, there would have to be suspension of members' voting rights.

We would need to see detailed proposals before being able to comment further.

5.6 Should a set of principles be established to determine how compensation is distributed between members of building societies? If so, what would be the most appropriate fair and equitable principles?

Yes, in principle provided that a building society does not already have a mechanism for such distributions in which case the building society's own terms should continue to apply.

Presumably a set of principles would determine how compensation would be distributed between member on the basis of a combination of size of deposit/mortgage and the length of time held. If a set of common principles is developed, those building societies who do not have their own terms for distribution may want to consider reflecting the principles in their own terms of membership so that there is transparency and so building society depositors know what to expect.

We would need to see the detailed proposals to be able to comment further.

5.7 What are the risks in creating a pre-determined set of principles for distributing compensation?

It seems to us that significant risks will be minimised if any pre-determined principles are (i) subject to full consultation; (ii) clearly set out; and (iii) are brought to the attention of depositors before entering into transactions with a building society.

5.8 Should the former members have a say in how compensation is distributed?

Provided that there is a pre-existing mechanism adopted by the building society or a pre-determined set of principles for distributing compensation which are transparent to members, an additional say for members seems unnecessary.