

# **BANKING ACT 2009**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 3: Bank Administration Procedure**

##### **Introduction**

##### *Section 136: Overview*

317. This section outlines the main features of the bank administration procedure which is based largely (with modifications where required) on the existing administration provisions of the Insolvency Act 1986 as amended by the Enterprise Act 2002.
318. Where part of a failing bank's business, assets or liabilities are transferred to either a bridge bank or a private sector purchaser the residual part of the bank may be left as an insolvent entity. In such circumstances, an application may be made to the court by the Bank of England for a Bank Administration Order. The bank administration procedure is designed to apply to an insolvent residual company to ensure that any essential services and facilities that cannot be immediately transferred to a bridge bank or private sector purchaser continue to be provided for a period of time.
319. Once the primary objective has been achieved, the procedure would continue in a similar way to an ordinary administration although to keep down costs, maximise returns to creditors and provide for a variety of outcomes, some of the existing powers of a liquidator have been built in to the procedure.

##### *Section 137: Objectives*

320. The bank administrator has specific statutory objectives. First, either to provide support to the bridge bank or private sector purchaser. Once such support is no longer required, the objective is to achieve either of the two principle aims of an ordinary administration - either to rescue the company as a going concern or to achieve a better result for creditors than in an immediate liquidation.
321. *Subsection (2)* provides that, while objective 1 has priority, there are some elements of an ordinary administration that may be begun immediately where they do not conflict with the primary objective, and subsection (2) therefore obliges a bank administrator to pursue both of the objectives in parallel.

##### *Section 138: Objective 1: supporting private sector purchaser or bridge bank*

322. As outlined above, the primary objective of the bank administration procedure is to provide services and facilities where a partial transfer to either a private sector purchaser or a bridge bank has been effected. *Subsection (2)* provides that this obligation also includes acting as a transferor or transferee in relation to any subsequent or reverse property transfers between the residual company and the bridge bank or the private sector purchaser.

323. In the event of a partial transfer to a private sector purchaser, *subsection (3)* requires that in trying to achieve objective 1 a bank administrator should act in accordance with the terms of any service agreement drawn up between the residual company and the commercial purchaser, and the court will act as the arbiter in the event of any dispute or uncertainty.
324. Under *subsection (4)*, where a partial transfer is effected to a bridge bank, the bank administrator is required to work with the Bank of England to effect appropriate service arrangements. To protect the interests of creditors, the bank administrator should ensure that, as far as reasonably practicable in light of his duty to pursue objective 1, payments for any services provided to the bridge bank are made at a fair market value.
325. *Subsection (5)* provides that where the bank administrator requires the prior agreement of the Bank of England to take certain actions, the Bank of England may only block actions which would be adverse to the continuing provision of services of facilities to a bridge bank.

### ***Section 139: Objective 1: duration***

326. Once the Bank of England informs the bank administrator, by way of an “Objective 1 Achievement Notice”, that the continued provision of services and facilities to the bridge bank or commercial purchaser is no longer required (or that such support was never required – see *subsection (3)*) the administration should continue in much the same way as an ordinary administration.
327. *Subsection (2)* provides that, where the bank administrator is of the opinion that objective 1 has been achieved or is no longer applicable, the administrator may seek directions from the court as to how to proceed. The court may give the Bank directions to consider whether to give the bank liquidator a notice that objective 1 no longer applies.

### ***Section 140: Objective 2: “normal” administration***

328. Objective 2 of the bank administration procedure is based on the existing provisions of paragraphs 3(1)(a) and 3(1)(b) of Schedule B1 to the Insolvency Act 1986.
329. In keeping with those provisions, *subsection (2)* obliges a bank administrator to seek to rescue the residual bank as a going concern unless he or she considers that this not a viable outcome or a better result would be achieved for the bank’s creditors by following some other courses of action.
330. To ensure that the bank administrator does not realise any assets that may be essential to achieving objective 1, *subsection (3)(a)* provides that only assets specified by agreement between the administrator and the Bank of England may be sold. Once objective 1 has been achieved, this is no longer applicable and the administrator will be free to deal with the assets of the bank to facilitate a rescue as a going concern and/ or to realise those assets for the benefit of the bank’s creditors.

## **Process**

### ***Section 141: Bank Administration Order***

331. To ensure compatibility with human rights legislation, a bank administration may commence only by an order of the court and the making of such an order will be subject to the satisfaction of notice requirements to be specified in secondary legislation.
332. *Subsections (2) and (3)* ensure that only a qualified insolvency practitioner, who is willing to accept the position, may be appointed as a bank administrator.

**Section 142: Application**

333. Entry into bank administration is by virtue of an application to court. *Subsection (3)* provides that notice of the application must be given in accordance with the rules made under section 411 of the Insolvency Act 1986.

**Section 143: Grounds for applying**

334. Only the Bank of England, as the authority responsible for administering the SRR, will be able to apply to the court for a bank administration order.
335. An application may be made only where a partial transfer has been effected by virtue of *subsection (3)*, where the residual banking company is left as an insolvent entity; that is, it is unable, or is likely to become unable, to pay its debts.
336. By the application of paragraphs 44(1)(a) and 44(5) of Schedule B1 to the Insolvency Act 1986 in section 145, as in an ordinary administration, on the making of the application an interim moratorium will take effect so that creditors will not be able to enforce their security over the residual company's property and no legal proceedings may be taken against the company (except with the leave of the court).

**Section 144: Grounds for making**

337. The court may grant the Bank's application, adjourn it or dismiss it.

**Section 145: General powers, duties and effect**

338. This section is based largely on existing insolvency law and practice, with Table 1 drawing on the existing administration provisions of Schedule B1 to the Insolvency Act 1986.<sup>1</sup>
339. A bank administrator will have powers and duties similar to those of an ordinary administrator, but modifications have been made where necessary to ensure that the unique statutory objectives of the bank administration procedure can be achieved. Many of these modifications also reflect the supervisory role that the Bank of England will have in the initial stages of the procedure in place of a creditors' committee up until the point that the primary objective has been achieved.
340. The provisions of Schedule B1 to the Insolvency Act 1986 relating to a meeting of creditors and the functions of a creditors' committee will not apply until an Objective 1 Achievement Notice has been served. Once an Objective 1 Achievement Notice has been issued by the Bank of England, the procedure will continue in much the same way as an ordinary administration; a meeting of creditors should be called to consider the administrator's proposals for the progression of the administration and at this stage the creditors will be able, among other resolutions, to form a creditors' committee. The need for the bank administrator to obtain the consent of the Bank of England to take certain actions will therefore also lapse at this point.
341. Other relevant provisions of the Insolvency Act 1986 are also applied by Table 2 and these largely mirror provisions also applied to the bank insolvency procedure by section 103. It should be noted that section 145(4)(f) provides that where Insolvency Act provisions have been applied with modifications to both Part 2 and Part 3 of the Banking Act, the modifications in section 103 in Part 2 should be read across to the applied provisions in Part 3, with references to bank administration rather than to bank insolvency.
342. Some of the powers that only a liquidator currently has have been applied to the bank administration procedure to create a flexible, stand-alone, procedure to maximise returns to creditors. The Bank Administrator is therefore given powers to disclaim

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<sup>1</sup> Inserted by the Enterprise Act 2002.

onerous property (see the entry in table 2 for section 178, (and related sections 179 to 182)), subject to requiring consent from the Bank of England to do so until objective 1 has been achieved, and to bring action before the court in respect of fraudulent or wrongful trading (see table 2 entries for sections 213 and 214 of the Insolvency Act 1986).

343. Through the application, with modifications, of section 135 of the Insolvency Act 1986, the court will be able to appoint a provisional bank administrator in the period between the submission of an application for a bank administration order and the court hearing for the making of that order. The powers of a provisional bank administrator will be determined by the court but will be limited to functions required to achieve objective 1 as set out in section 138.
344. Once an Objective 1 Achievement Notice has been issued by the Bank of England, the bank administrator will be able to pay dividends, where possible, to unsecured creditors without requiring permission from the court to do so.

#### ***Section 146: Status of bank administrator***

345. A bank administration can only be commenced by an order of the court and this section specifies that as in an ordinary administration (see paragraph 4 of Schedule B1 to the Insolvency Act 1986) the bank administrator is an officer of the court.

#### ***Section 147: Administrator's proposals***

346. *Subsections (1) to (4)* provide that, prior to the achievement of objective 1, a bank administrator must agree with the Bank of England a statement of proposals for achieving the objectives of the bank administration and (under *subsection (5)*) any matters of disagreement on the content of that statement may be referred to the court. As in an ordinary administration, under *subsection (7)*, those proposals may subsequently be revised.
347. *Subsection (8)* provides that, except for the differences specified in this section, the proposals should generally be dealt with in the same way as in an ordinary administration and copies of the document must therefore also be circulated to creditors and members of the company and a copy filed at Companies House. *Subsection (6)* stipulates that the FSA should also be sent a copy of the proposals.
348. Once objective 1 has been achieved, as for a normal administration, the bank administrator will then produce a statement of proposals for the achievement of objective 2 of the bank administration which should be circulated to creditors for their consideration at a meeting of creditors and filed at Companies House in the usual way.

#### ***Section 148: Sharing information***

349. Where a partial transfer is effected to a bridge bank, this section provides for the sharing of information between the bank administrator, the Bank of England and also the bridge bank.
350. *Subsection (2)* requires the Bank of England to provide the bank administrator with details of the financial situation of both the residual bank and the bridge bank. This provision ensures that the Bank of England's acquired knowledge in effecting a partial transfer is supplied to the bank administrator so that he or she can produce an appropriate statement of proposals to the Bank of England.
351. Given the linkages between a bridge bank and the residual company, and because the resolution of the bridge bank will impact on the timing and amount of any distribution to creditors of the failed bank, *subsection (3)* obliges the bridge bank to supply information to the bank administrator.

*These notes refer to the Banking Act 2009 (c.1)  
which received Royal Assent on 12 February 2009*

352. *Subsection (4)* similarly obliges a bank administrator to provide information to the Bank of England and the bridge bank on the financial position of the residual company.
353. *Subsections (5) and (6)* require the Treasury to specify by secondary legislation what sort of information and class of record will be relevant in a particular case. The regulations are subject to the negative procedure.

## **Multiple Transfers**

### ***Section 149: General application of this Part***

354. This section enables special provisions to be made, where necessary, in cases involving multiple property transfers from a residual bank or a bridge bank.
355. In such circumstances, the Treasury may make regulations modifying the application of the bank administration procedure. Those regulations would be subject to the affirmative procedure, or in the first instance the 28 day procedure, as provided by section 259.

### ***Section 150: Bridge bank to private purchaser***

356. Where a partial transfer to a bridge bank is effected and part or all of the bridge bank's business is subsequently acquired by a private sector purchaser, the continued provision of services and facilities from the residual company to the commercial purchaser may still be essential to ensure a successful resolution. In those circumstances, this section continues to bind a bank administrator to achieving objective 1.

### ***Section 151: Property transfer from a bridge bank***

357. This section applies where a property transfer instrument has been exercised to transfer property to a bridge bank and following that the Bank makes or proposes to make a further (onward) property transfer instrument from the original bridge bank.
358. *Subsection (2)* has the effect that both the original residual bank and the bridge bank, which will itself be a residual bank following the onward transfer, may be put into the bank administration procedure and ensure the continued provision of necessary services and/or facilities to the transferee.

### ***Section 152: Property transfer from temporary public sector ownership***

359. This section applies in the case where the Treasury brings a bank (or bank's holding company) into temporary public ownership and later makes an onwards property transfer order from that entity.
360. *Subsection (2)* provides that the bank administration procedure can be applied to the residual bank left in temporary public ownership following the transfer under the property transfer order.
361. Under *subsection (3)* the Treasury may make regulations modifying the application of the bank administration procedure. The regulations are subject to the affirmative procedure, or in the first instance the 28 day procedure, as provided by section 259.

## **Termination**

### ***Section 153: Successful rescue***

362. This section provides a way to terminate a bank administration where objective 1 has been achieved and the bank has also, in the opinion of the bank administrator, been rescued as a going concern.

***Section 154: Winding-up or voluntary arrangement***

363. This provision allows for the dissolution of the residual banking company where the objectives of the bank administration procedure have been achieved and the bank's affairs have been fully wound up.
364. Alternatively, where it would be in the best interests of creditors, the bank administrator may make proposals to creditors for a company voluntary arrangement under Part 1 of the Insolvency Act 1986. These provisions mirror some of the current exit routes from an ordinary administration.
365. As the bank administrator is given some additional powers usually only available to a liquidator (see the note to section 145), it is not necessary to provide for conversion to a creditors' voluntary liquidation to effect a distribution to unsecured creditors.

**Miscellaneous**

***Section 155: Disqualification of directors***

366. As with the bank insolvency procedure (see the note to section 121) and normal administration proceedings, the provisions of the Company Directors Disqualification Act 1986 are applied to the bank administration procedure.

***Section 156: Application of other law***

367. This section provides for future amendments to insolvency legislation (including administration) to be applied, with any required modifications, to the bank administration procedure; and provides a power (to be exercised by the Secretary of State and the Treasury) to amend other existing insolvency provisions (including administration) as a consequence of the introduction of the bank administration procedure. Any such amendments may be effected by secondary legislation subject to the affirmative procedure, or in the first instance the 28 day procedure, as provided by section 259.

***Section 157: Other processes***

368. The Financial Services and Markets Act 2000 gives the Financial Services Authority powers to present an administration application to the court, or file a winding-up petition, against a bank. Given the Bank of England's role as the authority responsible for the SRR, the FSA will only be able to make such an application or file such a petition against a residual bank where appropriate notice has been given to the Bank of England. The Bank of England will also be entitled to appear at any consequent court hearing and make representations.

***Section 158: Building Societies***

369. This gives the Treasury a power to apply the bank administration procedure to building societies (with any necessary modifications) by secondary legislation subject to the affirmative procedure, or in the first instance the 28 day procedure, as provided by section 259.

***Section 159: Credit Unions***

370. This gives the Treasury a power to apply the bank administration procedure to credit unions (with any necessary modifications) by secondary legislation subject to the affirmative procedure.

***Section 160: Rules***

371. This section amends section 411 of the Insolvency Act 1986 to allow secondary legislation to be made to make the bank administration procedure work in practice. The

first set of Rules will be consulted on with an appropriate panel of experts rather than the Insolvency Rules Committee.

### ***Section 161: Fees***

372. Section 414 of the Insolvency Act 1986, which deals with the setting of fees to apply to insolvency proceedings, is amended to ensure that those provisions apply to the bank administration procedure.

### ***Section 162: Evidence***

373. Section 433 of the Insolvency Act 1986, which deals with the admissibility of statements of affairs as evidence is applied to the bank administration procedure.

### ***Section 163: Partnerships***

374. This allows the Lord Chancellor, with the agreement of the Secretary of State and Lord Chief Justice, to modify the provisions of the bank administration procedure for banks that are partnerships rather than limited companies. This reflects existing powers under section 420 of the Insolvency Act 1986.

### ***Section 164: Scottish partnerships***

375. This gives the Secretary of State the power to modify the bank administration procedure in its application to Scottish Partnerships.

### ***Section 165: Co-operation between courts***

376. Section 426 of the Insolvency Act 1986, which provides for co-operation between certain insolvency courts in different jurisdictions, is amended to ensure that these provisions apply to the bank administration procedure.

### ***Section 166: Interpretation: general***

377. Due to the size and complexity of the UK's banks and the nature of the partial transfer tool, *subsection (1)* provides that only the higher courts may make a Bank Administration Order and that they will supervise the process.
378. *Subsection (3)* defines "inability to pay debts" and applies existing definitions from sections 367(4) and (5) of the Financial Services and Markets Act 2000 (as applied by *subsection 4(a)*) and section 123 of the Insolvency Act 1986 (as applied by *subsection (4)(b)*).
379. *Subsections (4) to (5)* provide that the expressions used generally throughout this part of the Act and also in insolvency and company legislation have the same meaning.

### ***Section 167: Northern Ireland***

380. This section makes specific provisions in the application of the bank administration procedure to banks registered in Northern Ireland.

### ***Section 168: Consequential provisions***

381. The Treasury may, by secondary legislation, make any consequential provisions required to legislation required as a result of the creation of the bank administration procedure.