

SCHEDULES

SCHEDULE 7

Section 29

APPLICATION OF PROVISIONS OF FSMA 2000 TO BANK OF ENGLAND ETC

This is the Schedule 17A to be inserted in FSMA 2000 after Schedule 17—

“SCHEDULE 17A

Section 285A

FURTHER PROVISION IN RELATION TO EXERCISE OF PART 18 FUNCTIONS BY BANK OF ENGLAND

PART 1

CO-OPERATION BETWEEN APPROPRIATE REGULATORS

Memorandum of understanding between appropriate regulators and PRA

- 1 (1) The appropriate regulators must prepare and maintain a memorandum describing how they intend to work together in exercising their functions in relation to persons who are recognised bodies.
- (2) The memorandum must in particular make provision about—
 - (a) the need for each party when exercising a function in relation to any person (“A”) who is a recognised body, or any member of A's group, to have regard to the exercise (or possible exercise) of any function by the other party in relation to A or any member of A's group;
 - (b) the role of each party in cases where they are both exercising functions in relation to the same persons;
 - (c) the obtaining and disclosure of information;
 - (d) the co-ordination by the parties of the exercise of their powers to appoint competent persons under Part 11 (information gathering and investigations) to conduct investigations on their behalf.
- (3) In this paragraph any reference to a function is to any function whether conferred by or under any provision of this Part of this Act or any other provision of this Act or otherwise.
- 2 (1) The appropriate regulators and the PRA must prepare and maintain a memorandum describing how they intend to work together in exercising their functions in relation to persons who are recognised bodies and who—
 - (a) are PRA-authorised persons; or
 - (b) are members of a group of which a member is a PRA-authorised person.
- (2) The memorandum must in particular make provision about—

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- (a) the need for each party when exercising a function in relation to any person (“A”) who is a recognised body, or any member of A's group, to have regard to the exercise (or possible exercise) of any function by the other party in relation to A or any member of A's group;
 - (b) the role of each party in cases where they are both exercising functions in relation to the same persons;
 - (c) the obtaining and disclosure of information;
 - (d) the co-ordination by the parties of the exercise of their powers to appoint competent persons under Part 11 (information gathering and investigations) to conduct investigations on their behalf.
- (3) In this paragraph any reference to a function is to any function whether conferred by or under any provision of this Part of this Act or any other provision of this Act or otherwise.
- 3 The parties to a memorandum under paragraph 1 or 2 must review the memorandum at least once in each calendar year.
- 4 The parties to a memorandum under paragraph 1 or 2 must give the Treasury a copy of the memorandum and any revised memorandum.
- 5 The Treasury must lay before Parliament a copy of any document received by them under paragraph 4.
- 6 The parties to a memorandum under paragraph 1 or 2 must ensure that the memorandum as currently in force is published in the way appearing to them to be best calculated to bring it to the attention of the public.

Notification by FCA of action in relation to recognised clearing houses

- 7 The FCA must notify the Bank of England of any direction given by it under section 128 to a recognised clearing house (market abuse: suspension of investigations).
- 8 The FCA must notify the Bank of England of any requirement imposed by it under section 313A on a recognised clearing house (power to require suspension or removal of financial instruments from trading).

PART 2

APPLICATION OF PROVISIONS OF THIS ACT IN RELATION TO BANK OF ENGLAND

Introduction

- 9 (1) The provisions of this Act mentioned in this Part of this Schedule are to apply in relation to the Bank of England in accordance with the provision made by this Part of this Schedule.
- (2) In any case where sub-paragraph (1) applies—
- (a) any reference in this Act to the FCA or the PRA which is contained in, or relates to, any of those provisions (however expressed) is to be read as a reference to the Bank; and
 - (b) this Act has effect with any other necessary modifications.

Rules

- 10 (1) The following provisions of Part 9A of this Act are to apply in relation to rules made by the Bank under any provision made by or under this Act—
- (a) section 137T (general supplementary powers);
 - (b) sections 138A and 138B (modification or waiver of rules), but with the omission of subsection (4)(b) of section 138A and subsection (4) of section 138B;
 - (c) section 138C (evidential provisions);
 - (d) section 138D (actions for damages), but with the omission of subsection (2);
 - (e) section 138E (limits on effect of contravening rules);
 - (f) section 138F (notification of rules);
 - (g) section 138G (rule-making instruments);
 - (h) section 138H (verification of rules);
 - (i) section 138J (consultation), but with the omission of subsections (1)(a), (2)(c) and (5)(b); and
 - (j) section 138L (consultation: general exemptions), but with the omission of subsections (1) and (3).
- (2) Any reference in any of those provisions to an authorised person is to be read as a reference to a recognised clearing house.
- (3) Section 138J(2)(d) has effect in relation to rules proposed to be made by the Bank as if the reference to the compatibility of the proposed rules with the provisions mentioned in section 138J(2)(d) were a reference to their compatibility with the Bank's financial stability objective.
- (4) Section 138L(2) has effect as if for paragraphs (a) and (b) there were substituted “be prejudicial to financial stability”.

Information gathering and investigations

- 11 (1) The powers conferred by section 165(1) and (3) (power to require information) are exercisable by the Bank or (as the case may be) its officers to impose requirements on—
- (a) a recognised clearing house;
 - (b) a person who for the purposes of section 165 is connected with a recognised clearing house.
- (2) The information or documents that the Bank may require to be provided or produced are limited to—
- (a) information or documents reasonably required in connection with the exercise by the Bank of functions conferred on it by or under this Part of this Act;
 - (b) information or documents reasonably required in connection with the exercise by the Bank of any of its other functions in pursuance of its financial stability objective; and
 - (c) information or documents which the Bank reasonably considers may enable or assist the FCA in discharging functions conferred on the FCA by or under this Act.

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- (3) In consequence of the provision made by sub-paragraph (2), section 165(4) is not to apply in relation to section 165(1) and (3) as applied by this paragraph.
- 12 The power conferred by section 166 (reports by skilled person) is exercisable by the Bank as if references in that section to an authorised person were to a recognised clearing house.
- 13 (1) The powers conferred by section 167 (appointment of persons to carry out general investigations) are exercisable by the Bank as if references in that section to an authorised person were to any recognised clearing house other than an overseas clearing house.
- (2) In addition to the powers conferred by section 171, a person conducting an investigation under section 167 as a result of this paragraph is to have the powers conferred by sections 172 and 173 (and for this purpose the references in those sections to an investigator are to be read accordingly).
- 14 (1) The power conferred by section 168(5) (appointment of persons to carry out investigations in particular cases) is exercisable by the Bank.
- (2) That power is exercisable if it appears to the Bank that there are circumstances suggesting that—
- (a) a clearing house may be guilty of an offence under section 398(1) or an offence under prescribed regulations relating to money laundering;
 - (b) a clearing house may have contravened a rule made by the Bank under this Part of this Act;
 - (c) a clearing house may have contravened the recognition requirements;
 - (d) a clearing house may have contravened any qualifying EU provision that is specified, or of a description specified, for the purposes of this sub-paragraph by the Treasury by order;
 - (e) a clearing house may have breached the general prohibition.
- (3) In addition to the powers conferred by section 171, a person conducting an investigation under section 168(5) as a result of this paragraph is to have the powers conferred by sections 172 and 173 (and for this purpose the references in those sections to an investigator are to be read accordingly).
- 15 An overseas regulator may, in accordance with section 169, request the Bank to exercise the power conferred by section 165 (as applied by paragraph 11 of this Schedule).
- 16 The power to give information under section 176(1) (entry of premises under warrant) is exercisable by the Bank, or an investigator appointed by the Bank, as if the reference to the second set of conditions were omitted.

Powers in relation to parent undertakings

- 17 (1) The following provisions of Part 12A of this Act are to apply in relation to the Bank—
- (a) section 192C (power to direct qualifying parent undertaking);
 - (b) section 192D (requirements that may be imposed);
 - (c) section 192E (direction: procedure);
 - (d) section 192G (references to Tribunal);
 - (e) section 192H (statement of policy);

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- (f) section 192I (statement of policy: procedure);
 - (g) section 192J (rules requiring provision of information);
 - (h) sections 192K to 192N (enforcement).
- (2) For the purposes of those provisions section 192B (meaning of “qualifying parent undertaking”) is to apply as if the reference in subsection (1) to a qualifying authorised person or recognised UK investment exchange were a reference to a recognised clearing house other than an overseas clearing house.
- (3) Section 192C has effect as if—
- (a) the general condition in subsection (2) were that the Bank considers that it is desirable to give the direction for the purpose of the effective regulation of one or more recognised clearing houses in the group of the qualifying parent undertaking,
 - (b) subsections (3) and (4) were omitted, and
 - (c) the reference in subsection (5)(a) to authorised persons or recognised investment exchanges were a reference to recognised clearing houses.
- (4) Section 192E has effect as if the reference in subsection (1) to an authorised person or recognised investment exchange were a reference to a recognised clearing house.
- (5) Section 192I has effect as if the reference in subsection (1)(a) to the other regulator and the Bank were a reference to the FCA and the PRA.
- (6) Before the Bank gives a notice under section 192E(1) or (8)(b)—
- (a) if the notice relates to the parent undertaking of an authorised person or recognised investment exchange, the Bank must consult the FCA, and
 - (b) if the notice relates to the parent undertaking of a PRA-authorised person, the Bank must also consult the PRA.

Auditors

- 18 (1) Section 342 (information given by auditor to a regulator) applies in relation to a relevant auditor as if—
- (a) the references in that section to a recognised investment exchange were to a recognised clearing house,
 - (b) in the case of an auditor of a recognised clearing house which is also an authorised person or recognised investment exchange, the references to a regulator included the Bank, and
 - (c) in the case of an auditor of a recognised clearing house not falling within paragraph (b), the references to a regulator were to the Bank.
- (2) A “relevant auditor” is a person who is, or has been, an auditor of a recognised clearing house appointed under or as a result of a statutory provision.
- 19 (1) Section 343 (information given by auditor: person with close links) applies in relation to a relevant auditor as if—
- (a) the references in that section to a recognised investment exchange were to a recognised clearing house,
 - (b) in the case of an auditor of a recognised clearing house which is an authorised person or which is a recognised investment exchange, the references to a regulator included the Bank, and

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- (c) in the case of an auditor of a recognised clearing house not falling within paragraph (b), the references to a regulator were to the Bank.
- (2) A “relevant auditor” is a person who—
 - (a) is, or has been, an auditor of a recognised clearing house appointed under or as a result of a statutory provision, and
 - (b) is, or has been, an auditor of a person who has close links with the recognised clearing house.
- 20 Section 344 (duty of auditor resigning to give notice) applies to an auditor to whom section 342 applies (whether by virtue of paragraph 18 or otherwise) as if—
 - (a) the references in that section to a recognised investment exchange were to a recognised clearing house,
 - (b) in the case of an auditor of a recognised clearing house which is neither an authorised person nor a recognised investment exchange, the reference in the definition of “the appropriate regulator” to the FCA were a reference to the Bank,
 - (c) in the case of an auditor of a recognised clearing house which is a PRA-authorized person, the reference in the definition of “the appropriate regulator” to the PRA were a reference to the PRA and the Bank, and
 - (d) in the case, not falling within paragraph (c), of an auditor of a recognised clearing house which is an authorised person or which is a recognised investment exchange, the reference in the definition of “the appropriate regulator” to the FCA were a reference to the FCA and the Bank.
- 21 Sections 345A to 345E apply to auditors to whom section 342 applies only by virtue of paragraph 18 as if—
 - (a) the references in those sections to an auditor or actuary to whom section 342 applies were to an auditor to whom section 342 applies by virtue of paragraph 18,
 - (b) the references in those sections to a PRA-authorized person were to a recognised clearing house,
 - (c) in a case where the Bank disqualifies a person from being an auditor of a recognised clearing house that is also a recognised investment exchange, section 345A(5)(a) required the Bank to notify the FCA, and
 - (d) the references in sections 345D and 345E to a regulator included the Bank.

Public record and disclosure of information

- 22 Section 347 (record of authorised persons, recognised investment exchanges, etc), so far as it relates to recognised investment exchanges, applies in relation to the Bank as if references in that section to a recognised investment exchange were to a recognised clearing house.
- 23 Sections 348 to 350 and 353 (disclosure of information) apply in relation to information received by the Bank for the purposes of, or in the discharge of, any of its functions relating to recognised clearing houses.

Insolvency

- 24 (1) The following provisions of Part 24 of this Act are to apply in relation to the Bank—
 - (a) section 356 (powers to participate in proceedings: company voluntary arrangements);

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- (b) section 358 (powers to participate in proceedings: trust deeds for creditors in Scotland);
 - (c) section 359 (administration order);
 - (d) section 362 (powers to participate in administration proceedings);
 - (e) section 362A (consent to appointment of administrator);
 - (f) section 363 (powers to participate in proceedings: receivership);
 - (g) section 365 (powers to participate in proceedings: voluntary winding-up);
 - (h) section 367 (winding-up petitions);
 - (i) section 371 (powers to participate in proceedings: winding-up).
- (2) Those provisions are to apply as if any reference to an authorised person or recognised investment exchange were a reference to a recognised clearing house.
- 25 In the case of any regulated activity which is carried on for the purposes of, or in connection with, the provision of clearing services, the reference to the FCA in section 375(1) is to be read as including a reference to the Bank.

Injunctions and restitution

- 26 (1) The power to make an application under section 380(1), (2) or (3) (injunctions) is exercisable by the Bank.
- (2) For the purposes of the application, any reference in that section to a relevant requirement is to—
- (a) a requirement that is imposed by or under any provision of this Part of this Act that relates to a recognised clearing house;
 - (b) a requirement that is imposed under any other provision of this Act by the Bank;
 - (c) a requirement that is imposed by any qualifying EU provision that is specified, or of a description specified, for the purposes of this subparagraph by the Treasury by order; or
 - (d) a requirement that is imposed by this Act and whose contravention constitutes an offence that the Bank has power to prosecute under this Act (see section 401, as applied by paragraph 31).
- 27 (1) The power to make an application under section 382(1) (restitution order) is exercisable by the Bank.
- (2) For the purposes of the application, any reference in that section to a relevant requirement is to be read in accordance with paragraph 26(2) of this Schedule.
- 28 (1) The power conferred by section 384(5) (power of FCA to require restitution order) is exercisable by the Bank.
- (2) That power is exercisable if the Bank is satisfied that a recognised clearing house has contravened a relevant requirement, or been knowingly concerned in the contravention of a relevant requirement, and—
- (a) that profits have accrued to the recognised clearing house as a result of the contravention; or
 - (b) that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.
- (3) For the purposes of that power, “relevant requirement” is to be read in accordance with paragraph 26(2) of this Schedule.

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- (4) Where this paragraph applies, section 384(5) and (6) are to have effect as if—
- (a) any reference to the person concerned were a reference to the recognised clearing house; and
 - (b) any reference to subsection (1) were a reference to sub-paragraph (2) of this paragraph.

Notices

- 29 The provisions of Part 26 of this Act (notices) apply in relation to a warning or decision notice given by the Bank under section 192L, 312G or 312H as they apply in relation to such a notice given by the FCA under that section.

Offences

- 30 Section 398 (misleading the FCA: residual cases) applies to information given to the Bank in purported compliance with—
- (a) a requirement that is imposed by or under any provision of Part 18 of this Act that relates to a recognised clearing house;
 - (b) a requirement that is imposed under any other provision of this Act by the Bank; or
 - (c) a requirement that is imposed by any qualifying EU provision specified, or of a description specified, for the purposes of this paragraph by the Treasury by order.
- 31 (1) Section 401 (proceedings for an offence) applies to the Bank as if for the purposes of subsections (2)(a) and (3)(a) of that section the Bank were an appropriate regulator in respect of each of the following offences—
- (a) an offence under section 177(3) where the investigation is being, or is likely to be, conducted on behalf of the Bank;
 - (b) an offence under section 177(4) where the requirement is imposed by the Bank;
 - (c) an offence under section 177(6) where the warrant is issued as a result of information on oath given by the Bank or a person appointed by it to conduct an investigation on its behalf;
 - (d) an offence under section 398(1) where the information was given to the Bank.
- (2) Section 401(3B) has effect subject to the provision made by this paragraph (so that the FCA is not the appropriate regulator for the purposes of subsections (2)(a) and (3)(a) in respect of the above offences).

Records

- 32 Paragraph 17 of Schedule 1ZB (records) applies in relation to the recording of decisions made by the Bank in the exercise of its functions relating to recognised clearing houses.

Annual report

- 33 Paragraph 19 of Schedule 1ZB (annual report by PRA) applies in relation to the Bank, but—

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- (a) as if for paragraphs (a) to (f) of sub-paragraph (1) there were substituted—
 - “(a) the discharge of its functions relating to recognised clearing houses,
 - (b) the extent to which, in its opinion, in discharging those functions its financial stability objective has been met,”
- and
- (b) as if sub-paragraph (3) were omitted.

PART 3

WINDING UP, ADMINISTRATION OR INSOLVENCY OF UK CLEARING HOUSES

Notice to Bank of England of preliminary steps

- 34
- (1) An application for an administration order in respect of a UK clearing house may not be determined unless the conditions below are satisfied.
 - (2) A petition for a winding up order in respect of a UK clearing house may not be determined unless the conditions below are satisfied.
 - (3) A resolution for voluntary winding up of a UK clearing house may not be made unless the conditions below are satisfied.
 - (4) An administrator of a UK clearing house may not be appointed unless the conditions below are satisfied.
 - (5) Condition 1 is that the Bank of England has been notified—
 - (a) by the applicant for an administration order, that the application has been made,
 - (b) by the petitioner for a winding up order, that the petition has been presented,
 - (c) by the UK clearing house, that a resolution for voluntary winding up may be made, or
 - (d) by the person proposing to appoint an administrator, of the proposed appointment.
 - (6) Condition 2 is that a copy of the notice complying with Condition 1 has been filed (in Scotland, lodged) with the court (and made available for public inspection by the court).
 - (7) Condition 3 is that—
 - (a) the period of 2 weeks, beginning with the day on which the notice is received, has ended, or
 - (b) the Bank of England has informed the person who gave the notice that—
 - (i) it has no objection to the order, resolution or appointment being made, and
 - (ii) it does not intend to exercise a stabilisation power under Part 1 of the Banking Act 2009.
 - (8) Arranging for the giving of notice in order to satisfy Condition 1 can be a step with a view to minimising the potential loss to a UK clearing house's creditors for the purpose of section 214 of the Insolvency Act 1986 (wrongful trading).

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- (9) In this paragraph “the court” means—
- (a) in England and Wales, the High Court,
 - (b) in Scotland, the Court of Session, and
 - (c) in Northern Ireland, the High Court.

Power to give directions to insolvency practitioner

- 35 (1) This paragraph applies where a person has been appointed to act as an insolvency practitioner (within the meaning of section 388 of the Insolvency Act 1986 or Article 3 of the Insolvency (Northern Ireland) Order 1989) in relation to a company which is, or has been, a UK clearing house.
- (2) The Bank of England may give directions to the person if satisfied that it is desirable to give the directions, having regard to the public interest in—
- (a) protecting and enhancing the stability of the UK financial system,
 - (b) protecting and enhancing public confidence in the stability of the UK financial system, and
 - (c) maintaining the continuity of central counterparty clearing services.
- (3) Before giving directions the Bank of England must consult—
- (a) the Treasury,
 - (b) (if the clearing house is a PRA-authorised person) the PRA, and
 - (c) the FCA.
- (4) Directions are enforceable, on an application by the Bank of England, by an injunction or, in Scotland, by an order for specific performance under section 45 of the Court of Session Act 1988.
- (5) A person is not liable for damages in respect of action or inaction in accordance with directions.
- (6) The immunity does not extend to action or inaction—
- (a) in bad faith, or
 - (b) in contravention of section 6(1) of the Human Rights Act 1998.

PART 4

FEES

- 36 (1) The Bank of England may, in connection with the discharge of any of its qualifying functions, require recognised clearing houses to pay fees to the Bank.
- (2) The “qualifying functions” of the Bank are—
- (a) its functions under or as a result of this Part of this Act, and
 - (b) its functions under or as a result of a qualifying EU provision that is specified, or of a description specified, for the purposes of this subparagraph by the Treasury by order.
- (3) The power of the Bank to set fees includes power to set fees for the purpose of meeting expenses incurred by it or the FCA—
- (a) in preparation for the exercise of functions by the Bank under this Part of this Act, or

- (b) for the purpose of facilitating the exercise by the Bank of those functions or otherwise in connection with their exercise by it.
 - (4) It is irrelevant when the expenses were incurred (and, in particular, it is irrelevant if expenses were incurred by the FCA at a time when it was known as the Financial Services Authority).
- 37 Any fee which is owed to the Bank under paragraph 36 may be recovered as a debt due to the Bank.”