STATUTORY INSTRUMENTS

# 2011 No. 99

# The Electronic Money Regulations 2011

## PART 3

## PRUDENTIAL SUPERVISION AND PASSPORTING

*Safeguarding*

**Safeguarding requirements**

**20.**—(1) Electronic money institutions must safeguard funds that have been received in exchange for electronic money that has been issued (referred to in this regulation and regulations 21 and 22 as "relevant funds").

(2) Relevant funds must be safeguarded in accordance with either regulation 21 or regulation 22.

(3) Where—

(a) only a proportion of the funds that have been received are to be used for the execution of a payment transaction (with the remainder being used for non-payment services); and

(b) the precise portion attributable to the execution of the payment transaction is variable or unknown in advance,

the relevant funds are such amount as may be reasonably estimated, on the basis of historical data and to the satisfaction of the Authority, to be representative of the portion attributable to the execution of the payment transaction.

(4) Funds received in the form of payment by payment instrument need not be safeguarded until they—

(a) are credited to the electronic money institution's payment account; or

(b) are otherwise made available to the electronic money institution,

provided that such funds must be safeguarded by the end of five business days after the date on which the electronic money has been issued.

(5) In paragraphs (1) to (4) and in regulations 21 to 24 references to an electronic money institution include references to a credit union.

(6) Regulation 19 of the Payment Services Regulations 2009 applies in relation to funds received by electronic money institutions and credit unions for the execution of payment transactions that are not related to the issuance of electronic money with the following modifications—

(a) references to an "authorised payment institution" are to be treated as references to an authorised electronic money institution;

(b) references to a "small payment institution" are to be treated as references to—

(i) a small electronic money institution; and

(ii) a credit union; and

(c) references to a "payment transaction" are to be treated as references to a payment transaction that is not related to the issuance of electronic money.

**Safeguarding option 1**

**21.**—(1) An electronic money institution must keep relevant funds segregated from any other funds that it holds.

(2) Where the institution continues to hold the relevant funds at the end of the business day following the day on which they were received it must—

(a) place them in a separate account that it holds with an authorised credit institution; or

(b) invest the relevant funds in secure, liquid, low-risk assets ("relevant assets") and place those assets in a separate account with an authorised custodian.

(3) An account in which relevant funds or relevant assets are placed under paragraph (2) must—

(a) be designated in such a way as to show that it is an account which is held for the purpose of safeguarding relevant funds or relevant assets in accordance with this regulation; and

(b) be used only for holding those funds or assets.

(4) No person other than the electronic money institution may have any interest in or right over the relevant funds or the relevant assets placed in an account in accordance with paragraph (2)(a) or (b) except as provided by this regulation.

(5) The institution must keep a record of—

(a) any relevant funds segregated in accordance with paragraph (1);

(b) any relevant funds placed in an account in accordance with paragraph (2)(a); and

(c) any relevant assets placed in an account in accordance with paragraph (2)(b).

(6) For the purposes of this regulation—

(a) assets are both "secure" and "low risk" if they are—

(i) asset items falling into one of the categories set out in Table 1 of point 14 of Annex 1 to Directive 2006/49/EC(**1**) for which the specific risk capital charge is no higher than 1.6% but excluding other qualifying items as defined in point 15 of that Annex; or

(ii) units in an undertaking for collective investment in transferable securities which invests solely in the assets mentioned in paragraph (i); and

(b) assets are "liquid" if they are approved as such by the Authority.

(7) In this regulation—

"authorised credit institution" means a person authorised for the purposes of the 2000 Act to accept deposits or otherwise authorised as a credit institution in accordance with Article 6 of the banking consolidation directive other than a person in the same group as the electronic money institution;

"authorised custodian" means a person authorised for the purposes of the 2000 Act to safeguard and administer investments or authorised as an investment firm under Article 5 of Directive 2004/39/EC of 12th April 2004 on markets in financial instruments(**2**) which holds those investments under regulatory standards at least equivalent to those set out under Article 13 of that directive.

(**1**) OJ No 177, 30.6.2006, p.201.
(**2**) OJ No L 145, 30.4.2004, p.1.

**Safeguarding option 2**

**22.**—(1) An electronic money institution must ensure that—

(a) any relevant funds are covered by—

(i) an insurance policy with an authorised insurer;

(ii) a guarantee from an authorised insurer; or

(iii) a guarantee from an authorised credit institution; and

(b) the proceeds of any such insurance policy or guarantee are payable upon an insolvency event into a separate account held by the electronic money institution which must—

(i) be designated in such a way as to show that it is an account which is held for the purpose of safeguarding relevant funds in accordance with this regulation; and

(ii) be used only for holding such proceeds.

(2) No person other than the electronic money institution may have any interest or right over the proceeds placed in an account in accordance with paragraph (1)(b) except as provided by this regulation.

(3) In this regulation—

"authorised credit institution" has the same meaning as in regulation 21;

"authorised insurer" means a person authorised for the purposes of the 2000 Act to effect and carry out a contract of general insurance as principal or otherwise authorised in accordance with Article 6 of the First Council Directive 73/239/EEC of 24th July 1973 on the business of direct insurance other than life insurance(**3**), other than a person in the same group as the electronic money institution;

"insolvency event" means any of the following procedures in relation to an electronic money institution—

(a) the making of a winding-up order;

(b) the passing of a resolution for voluntary winding-up;

(c) the entry of the institution into administration;

(d) the appointment of a receiver or manager of the institution's property;

(e) the approval of a proposed voluntary arrangement (being a composition in satisfaction of debts or a scheme of arrangement);

(f) the making of a bankruptcy order;

(g) in Scotland, the award of sequestration;

(h) the making of any deed of arrangement for the benefit of creditors or, in Scotland, the execution of a trust deed for creditors;

(i) the conclusion of any composition contract with creditors;

(j) the making of an insolvency administration order or, in Scotland, the execution of a trust deed for creditors;

(k) the conclusion of any composition contract with creditors; or

(l) the making of an insolvency administration order or, in Scotland, sequestration, in respect of the estate of a deceased person.

(**3**) OJ No L 228, 16.8.1973, p.3.

**Power of the Authority to exclude assets**

**23.** In exceptional circumstances the Authority may determine that an asset that would otherwise be secure and low-risk for the purposes of paragraph (2) of regulation 21 by virtue of paragraph (6) of that regulation is not such an asset provided that—

(a) the determination is based on an evaluation of the risks associated with the asset, including any risk arising from the security, maturity or value of the asset; and

(b) there is adequate justification for the determination.

**Insolvency events**

**24.**—(1) Subject to paragraph (2), where there is an insolvency event—

(a) the claims of electronic money holders are to be paid from the asset pool in priority to all other creditors; and

(b) until all the claims of electronic money holders have been paid, no right of set-off or security right may be exercised in respect of the asset pool except to the extent that the right of set-off relates to fees and expenses in relation to operating an account held in accordance with regulation 21(2)(a) or (b) or 22(1)(b).

(2) The claims referred to in paragraph (1)(a) shall not be subject to the priority of expenses of an insolvency proceeding except in respect of the costs of distributing the asset pool.

(3) An electronic money institution must maintain organisational arrangements sufficient to minimise the risk of the loss or diminution of relevant funds or relevant assets through fraud, misuse, negligence or poor administration.

(4) In this regulation—

"asset pool" means—

(a) any relevant funds segregated in accordance with regulation 21(1);

(b) any relevant funds held in an account accordance with regulation 21(2)(a);

(c) any relevant assets held in an account in accordance with regulation 21(2)(b);

(d) any proceeds of an insurance policy or guarantee held in an account in accordance with regulation 22(1)(b);

"insolvency event" has the same meaning as in regulation 22;

"insolvency proceeding" means—

(a) winding-up, administration, receivership, bankruptcy or, in Scotland, sequestration;

(b) a voluntary arrangement, deed of arrangement or trust deed for the benefit of creditors; or

(c) the administration of the insolvent estate of a deceased person;

"security right" means—

(a) security for a debt owed by an electronic money institution and includes any charge, lien, mortgage or other security over the asset pool or any part of the asset pool; and

(b) any charge arising in respect of the expenses of a voluntary arrangement.

**Accounting and statutory audit**

**25.**—(1) An electronic money institution which carries on activities other than the issuance of electronic money and the provision of payment services, must provide to the Authority separate accounting information in respect of its issuance of electronic money and provision of payment services.

(2) Such accounting information must be subject, where relevant, to an auditor's report prepared by the institution's statutory auditors or an audit firm (within the meaning of Directive 2006/43/EC of the European Parliament and of the Council of 17th May 2006 on statutory audits of annual accounts and consolidated accounts(**4**)).

(3) A statutory auditor or audit firm ("the auditor") must, in any of the circumstances referred to in paragraph (4), communicate to the Authority information on, or its opinion on, matters—

(a) of which it has become aware in its capacity as an auditor of an electronic money institution or of a person with close links to an electronic money institution; and

(b) which relate to the electronic money issued and payment services provided by that institution.

(4) The circumstances are that—

(a) the auditor reasonably believes that—

(i) there is or has been, or may be or may have been, a contravention of any requirement imposed on the electronic money institution by or under these Regulations; and

(ii) the contravention may be of material significance to the Authority in determining whether to exercise, in relation to that institution, any functions conferred on the Authority by these Regulations;

(b) the auditor reasonably believes that the information on, or the auditor's opinion on, those matters may be of material significance to the Authority in determining whether the institution meets or will continue to meet—

(i) in the case of an authorised electronic money institution, the conditions set out in regulation 6(4) to (8) or the requirement in regulation 19(1) to maintain own funds; or

(ii) in the case of a small electronic money institution, the conditions set out in regulation 13(6) to (10) or the requirement in regulation 19(2) to maintain own funds;

(c) the auditor reasonably believes that the institution is not, may not be or may cease to be, a going concern;

(d) the auditor is precluded from stating in the auditor's report that the annual accounts have been properly prepared in accordance with the Companies Act 2006;

(e) the auditor is precluded from stating in the auditor's report, where applicable, that the annual accounts give a true and fair view of the matters referred to in section 495 of the Companies Act 2006 (auditor's report on company's annual accounts) including as that section is applied and modified by regulation 39 of the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008(**5**) ("the LLP Regulations"); or

(f) the auditor is required to state in the auditor's report in relation to the person concerned any of the facts referred to in subsection (2), (3) or (5) of section 498(**6**) of the Companies Act 2006 (duties of auditor) or, in the case of limited liability partnerships, subsection (2), (3) or (4) of section 498 as applied and modified by regulation 40 of the LLP Regulations.

(5) In this regulation a person has close links with an authorised electronic money institution ("A") if that person is—

(a) a parent undertaking of A;

(b) a subsidiary undertaking of A;

(c) a parent undertaking of a subsidiary undertaking of A; or

(**4**) OJ No L 157, 9.6.2006, p.87.
(**5**) S.I. 2008/1911.
(**6**) Section 498(5) was substituted by S.I. 2008/393.

(d) a subsidiary undertaking of a parent undertaking of A.

**Outsourcing**

**26.**—(1) An authorised electronic money institution must notify the Authority of its intention to enter into a contract with another person under which that person will carry out any operational function relating to the issuance, distribution or redemption of electronic money or the provision of payment services ("outsourcing").

(2) Where the institution intends to outsource any important operational function, all of the following conditions must be met—

(a) the outsourcing is not undertaken in such a way as to impair—

(i) the quality of the institution's internal control; or

(ii) the ability of the Authority to monitor the authorised electronic money institution's compliance with these Regulations or the Payment Services Regulations 2009;

(b) the outsourcing does not result in any delegation by the senior management of the institution of responsibility for complying with the requirements imposed by or under these Regulations or the Payment Services Regulations 2009;

(c) the relationship and obligations of the institution towards its electronic money holders under these Regulations or the Payment Services Regulations 2009 is not substantially altered;

(d) compliance with the conditions which the institution must observe in order to become an authorised electronic money institution and remain so is not adversely affected; and

(e) none of the conditions of the institution's authorisation requires removal or variation.

(3) For the purposes of paragraph (2), an operational function is important if a defect or failure in its performance would materially impair—

(a) compliance by the institution with these Regulations or the Payment Services Regulations 2009 and any requirement of its authorisation under these Regulations;

(b) the financial performance of the institution; or

(c) the soundness or continuity of the institution's electronic money issuance or provision of payment services.

**Record keeping**

**27.**—(1) Electronic money institutions must maintain relevant records and keep them for at least five years from the date on which the record was created.

(2) For the purposes of paragraph (1), records are relevant where they relate to the institution's compliance with this Part and, in particular, would enable the Authority to supervise effectively such compliance.