Consultation on amendments relating to Part 7 of FSMA 2000: summary of responses

April 2008

HM TREASURY

HM TREASURY

Consultation on amendments relating to Part 7 of FSMA 2000: summary of responses

April 2008

HM Treasury contacts

This document can be found in full on our website at:

hm-treasury.gov.uk

If you require this information in another language, format or have general enquiries about HM Treasury and its work, contact:

Correspondence and Enquiry Unit
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

Tel: 020 7270 4558
Fax: 020 7270 4861
E-mail: public.enquiries@hm-treasury.gov.uk

Printed on 100% recycled paper.
When you have finished with it please recycle it again.

ISBN 978-1-84532-543-7

PU547

CONTENTS

CONSULTATION ON AMENDMENTS TO PART 7 FSMA

INTRODUCTION

1.1 On 3 November 2006 the Treasury published a consultation paper on proposed amendments relating to Part 7 ('Control of Business Transfers') of the Financial Services and Markets Act 2000 ("FSMA"). The consultation period ran for twelve weeks until 26 January 2007.

1.2 Transfers of insurance business from one insurer to another, in whole or in part, are authorised under Part 7 through a process of court approval. Other than for several tightly defined exclusions, transfers of UK insurance business within the European Economic Area must be conducted under Part 7. (Transfers of banking business may also be conducted under Part 7. The changes discussed in this document are being pursued in the context of insurance business transfers, and mostly have relevance only to such transfers[1].)

1.3 In order to facilitate transfers, the Court has a wide discretion under Part 7 to order the transfer of property and liabilities relating to a proposed transfer scheme. However, in response to suggestions that there is a degree of uncertainty in certain respects regarding the extent of the powers of the Court, the Treasury proposed several clarificatory amendments to aid the effective operation of the legislation.

1.4 These amendments are intended to put beyond doubt the ability of the Court to transfer property and override contractual provisions that might otherwise have the effect of voiding or altering any contract subject to the transfer, either at the point of transfer or before that.

1.5 This is an issue that has been raised in the particular context of reinsurance contracts taken out on the risks being transferred, though it has wider application. Concomitant to the clarificatory amendments is a further amendment to provide that all affected reinsurers have the right to be notified of a proposed transfer, to help ensure they are in a position to exercise existing rights under Part 7 for those who consider they would be adversely affected by a transfer to make representations to the court.

1.6 A final amendment covered by the consultation amends the scope of section 323 of FSMA, in the context of the application of Part 7 to insurance business written at Lloyd's of London. The present wording includes business written by a "former underwriting member". However the definition of that expression is limited to certain former members. The amendment changes the position so that all former members are able to transfer their business under Part 7 (and not just those, as is presently the case because of the wording of section 323, who resigned on or after 24 December 1996). The effect would be to permit all insurance business, whenever written at Lloyd's, to be the subject of an insurance business transfer scheme.

1.7 The consultation document (including draft regulations and a partial impact assessment) was published on the Treasury's website and made available in hardcopy. The document was sent to a broad constituency of stakeholders. Around 120 responses were received, from a variety of interested organisations and individuals including:

[1] That said, the changes to section 112 discussed in Chapter 2 clarifying the powers of the court to order the transfer of property and override contractual provisions to facilitate transfers apply equally, in principle, to transfers of banking business being conducted under Part 7

insurance and reinsurance companies, policyholders, law firms, trade bodies, the Financial Services Authority, and former members of Lloyd's.

1.8 We are grateful for all the responses received. A list of consultation respondents is at Annex A. This document summarises the views expressed, including drafting comments made about the regulations, and sets out the Treasury's response and, where applicable, revised regulations.

1.9 Not all responses were organised around the questions posed in the consultation document, and views were not expressed on all questions by all respondents. In particular, a number of replies focussed either on the clarificatory amendments, or those concerning the proposal to alter the scope of section 323 to widen the reference to former underwriting members of Lloyd's. Many of the more substantive responses included detailed drafting comments on the regulations.

1.10 The summaries below do not, in consequence, lend themselves to simple statistical analysis in terms of numbers for or against the proposals. Rather, they are intended to bring out the main themes raised by respondents relevant to the questions and the relative strength of support for the proposals.

1.11 The changes will be effected through secondary legislation subject to negative resolution. The amended statutory instruments (SIs) are included in full at Annexes B-E.

1.12 The Treasury intends to lay three of the SIs before Parliament as soon as possible following the period of one month from the publication date of this document (9 April 2008). The Treasury would intend them to come into force 21 days later from laying. The other SI (the Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's)(Amendment) Order 2008), which relies on the amendment to section 323 before it can be made, would be made when that amendment to section 323 comes into force. The Treasury would intend it to come into force 21 days after it is made.

1.13 Questions or comments about this document and/or the revised SIs should be addressed to:

David Beardsworth
Financial Stability & Risk Team
HM Treasury
1 Horse Guards Road
London SW1A 2HQ

Tel: 0207 270 4427
E-mail: David.Beardsworth@hm-treasury.x.gsi.gov.uk

2 Responses to the Consultation Questions - Reinsurance and Other Contracts

2.1 The consultation document invited views on several specific questions. This chapter summarises the responses, and the Treasury's reaction to those responses, to the three questions about proposed amendments to clarify the powers of the Court under Part 7 in relation to the transfer of reinsurance and other contracts. It also covers the associated question about notification of reinsurers whose reinsurance contracts are subject to transfer under a Part 7 transfer of insurance business. (The following chapter covers responses to the question about the amendments concerning former underwriting members of the Lloyd's insurance market.) The questions are set out below:

> Q1. Do you agree that Part 7 should be amended to put it beyond all doubt that reinsurance (and other related contracts) are always transferable under a Court order, should the Court deem it appropriate in the circumstances of each case?

> Q2. Do you agree that changes should be made to part 7 of FSMA to put it beyond all doubt that the Court can, if it deems it appropriate, override contractual provisions that purport to modify or annul related contracts that would otherwise be subject to transfer under an insurance business transfer scheme?

> Q3. Do you agree that changes should be made to part 7 of FSMA to put it beyond all doubt that the Court can, if it deems it appropriate, override contractual provisions that purport to modify or annul that contract upon a preparatory step towards a transfer (eg such as the application to the Court) being taken?

Background to the proposed section 112 amendments

2.2 Part 7 does not refer specifically to how reinsurance contracts are to be dealt with in the context of a transfer of insurance business. The consultation questions above were posed in the context of section 112(2) FSMA, which currently includes the following formulation:

> "**An order…may –**
>
> **a) transfer property or liabilities whether or not the authorised person concerned** [ie the insurer transferring its business] **otherwise has the capacity to effect the transfer in question;**"

2.3 Consistently with the policy intention behind Part 7, practitioners have in general taken the view that reinsurance contracts are eligible for transfer under this provision. There are several cases in which the Court has approved such transfers. These were unopposed first-instance decisions however, and some concerns have been raised about how the full extent of the Court's powers should or might be interpreted, eg with regard to the transferability of a reinsurance contract which is subject to express consent from the reinsurer. Lack of certainty also extends potentially to the ability to

provide for the transfer of other contracts, eg accompanying infrastructure assets such as policy administration or IT contracts.

2.4 The consultation proposals added several new subsections to section 112. New subsections (2A) and (2B) were to make clear, for the avoidance of any doubt, that the power of the court to make an order under section 112 is to be taken as always having included the power to transfer, for example, contracts which include provisions prohibiting their transfer or contracts in relation to which there is a query as to their transferability in the absence of consent of a counterparty.

2.5 New subsections (2C) and (2D) were to make clear, again for the avoidance of any doubt, that rights or interests specified in the new subsections (to terminate, modify, acquire or claim an interest or right, or to treat an interest or right as terminated or modified) arising as the result of something done or likely to be done by or under Part 7 will only be enforceable, if at all, after the transfer and on the terms provided in the court's order.

Responses from consultees

2.6 In this section we set out a synthesis of the responses from consultees. The Treasury's responses follow in the next section. The proposed amendments to section 112 attracted comment about general policy towards transfers involving reinsurance under Part 7 and its current effect, as well as the drafting and impact of the proposed amendments. In some cases, respondents prefaced their comments on the proposals with more general observations about the operation of insurance business transfers.

2.7 Generally, Part 7 is seen as a beneficial regime that promotes economies and efficiencies through facilitating transfers and restructuring. The benefits of enhanced legal certainty through the court procedure were noted, though it was also suggested by one respondent that an alternative administrative procedure might provide a less costly option in some circumstances.

Interests of reinsurers

2.8 However, the potential impact on reinsurers of Part 7 transfers was an issue that attracted some substantive comment. Six respondents addressed this issue in detail. In developing relationships with clients, and entering into reinsurance agreements with them, reinsurers have regard to a number of factors, including the company's underwriting strategy, market position and reputation, and the quality of its personnel and management and claims systems. Where reinsurance covers a highly specialised class of business, the skills of the company (and by extension, under a transfer, those of the transferee) will be highly relevant.

2.9 Contracts entered into may be the subject of extensive negotiation. Reinsurers' own diversification strategies and capital requirements will play key roles in determining what business to accept. Over time, reinsurance relationships may develop into multiple reinsurance agreements under which each party assumes and cedes risk, and which include offset provisions that operate to reduce the credit risk of one party to the other.

2.10 Enforced transfer of reinsurance contracts to a different insurer therefore has the potential to have a significant impact on the reinsurer, eg in terms of increased costs through aggregation or credit risks. To quote from one response, "Reinsurance contacts should not in general be seen as fungible financial instruments that conveniently can be transferred from one bearer to another". Other factors that could have a material impact on the reinsurer include the rating of the transferee – which might be lower than

the transferor - and its internal controls. A transfer might also lead to a higher claims ratio than expected, if, for example, the transferee had poorer claims handling than the transferor.

2.11 There was thus some unease expressed at the principle of possible judicial override of contractual provisions negotiated in good faith for the protection of the reinsurer in such circumstances. One respondent questioned whether section 112 as presently enacted did permit the court to vary the terms of reinsurance contracts, and suggested that reinsurers wishing to maintain their protections might insist, in future, that their reinsurance is subject to foreign law and jurisdiction, thereby increasing uncertainty. Respondents who commented specifically on this issue were united in the view that the court's powers should be used with caution. The general view was that reinsurers should receive the benefit of the same protections as other affected parties, eg policyholders.

2.12 Several suggestions to provide safeguards for reinsurers were made. These ranged from preserving the right of reinsurers to terminate their contracts in the event of a change in the identity of their insurer to measures that would build more assurances into the transfer process. The latter included requiring the transferor to present a report to the court listing any difference in credit quality with the transferee, establishing minimum capital thresholds and minimum solvency margins, and setting other obligations such as giving undertakings to the court not to reduce capital for a certain period, to ensure transferees met certain standards.

Clarifying the Court's powers – section 112

2.13 Respondents who commented on the amendments to section 112 were in favour, in principle, of clarifying the court's powers. Support was expressed in terms of the desirability of increasing clarity during the process of a transfer application and for helping to remove any doubt as to the effect of a transfer after the event in the face of any legal challenge to a transfer. The possible impact, through amending Part 7, of casting doubt on previous transfers was not thought significant.

2.14 Against the background of that general support, questions were raised about the overall effect of the amendments and their drafting. A fundamental concern expressed by several respondents was the importance of ensuring that any amendments did not run the risk of undermining the purposive and dynamic approach to section 112 that the courts have adopted previously. Care was needed in granting the courts any specific powers in relation to the transferability of contracts, to ensure they did not, in practice, have the effect of narrowing the overall discretion of the courts, eg in relation to ancillary areas that are also a necessary part of a scheme (such as the modification of contractual provisions). Another respondent, in the particular context of transfers of reinsurance contracts, commented that the amendments should not create a statutory presumption that such contracts should always be transferred. The contrary view was also expressed.

2.15 Other comments on the proposed amendments to section 112 centred on the drafting. Several respondents felt that the provisions were not easy to follow. Consideration of use of alternative language, or other models in statute which deal with similar issues, were two suggestions. In addition, detailed comments about the drafting of the amendments as proposed were made. These are summarised below:

- The new provisions should be made without prejudice to the generality of section 112.

- The wording in new subsections 112(2C) and (2D) is wide: it should be revisited to clarify that it applies only to the enforceability of pre-existing contractual termination or modification rights triggered by a scheme and not to new or varied policy or contractual rights or obligations created under the terms of the scheme itself.

- The amendments might not cover steps towards transfer short of termination such as changes to interest rates in loan agreements, triggering of pre-emption rights, or where consent to a transfer is specifically required (though this is implicit in the first amendment).

- The words "or likely to be done" in new subsection 112(2C) are not sufficiently clear and might give rise to disputes. This wording would be difficult to apply in some circumstances, giving rise to doubt about whether certain triggers for rights, eg where a party ceases or threatens to cease business, are caught by the new enforcement provisions. A more concrete threshold would be helpful.

- There is no mechanism in the new sections to reinstate contractual provisions that have been suspended, in the eventuality that a transfer scheme does not go ahead.

- New subsection 112(2D) provides that suspended entitlements are enforceable after the transfer only to the extent that the Court order provides that they are. An alternative approach, turning this round so that entitlements are enforceable following a transfer unless the order provides that they are not, might be simpler and easier and would highlight those rights being lost.

- The intention regarding provisions under non-transferring contracts is not clear. A transferor may be party to contracts which are to be retained, but which nevertheless contain provisions having one or more of the effects referred to in new subsection 112 (2C). Contracts not transferred by a scheme might be caught by that subsection and rendered unenforceable.

Overseas recognition

2.16 Three respondents referred to recognition of transfers in overseas jurisdictions, though this was not addressed in the consultation. This was seen as an important and difficult issue, and one that represented substantive costs in a transfer (eg in terms of establishing the governing law of reinsurance treaties and the enforceability of a court order against reinsurers in other jurisdictions). The amendments would help, but it was also recognised that, ultimately, this was a matter of local law. It was suggested that using language of universal succession by the transferee to the transferor might help. Exploring the possibility of reaching agreements with the legislature or regulators in key financial services jurisdictions was also mooted.

Amendment of policy terms

2.17 Clarification that the court can amend policy terms under section 112 was suggested by two respondents. They felt the ability to do so is important, eg for long-term insurance business where the costs of the management of unit linked business or with-profits business on original terms may become disadvantageous to policyholders as the book matures. Case law supports that the court can approve modifications to existing policy or other contractual terms in agreements but explicit confirmation would provide greater clarity.

Treasury response

2.18 The Treasury has considered carefully and at length all the points raised. It is worth restating that the amendments to section 112 are for clarificatory purposes, and are not indicative of any change in policy towards the conduct of transfers under Part 7. The effective operation of these provisions, in a way which fairly balances the interests of all those affected, is the guiding principle behind the proposals.

2.19 Any wider review of the operation of transfers under Part 7 – such as revisiting policy towards the power of the court, providing for alternative models for authorising transfers, or considering provisions that might aid recognition in other jurisdictions – is outside the scope of this consultation. Our overall approach therefore is to work with the specific amendments proposed, taking account of consultees' responses and dealing with the issues raised.

2.20 In doing so, whilst we acknowledge that several respondents have found the drafting difficult to follow, we consider that maintaining the existing thrust and style of the drafting of Part 7 (rather than, as was suggested, adopting a different language) represents the best option going forward given practitioners' familiarity with it. In addition, a fundamental change in drafting style might raise different legal issues, requiring wider and more time-consuming consideration.

2.21 Turning to specifics, regarding the position of reinsurers, the Treasury recognises and accepts that they have legitimate interests in the identity of transferees. The enforced transfer of reinsurance agreements has the potential to have a material impact on the reinsurer. The issue, therefore, is ensuring that those interests and their impact are recognised and considered fairly within the Part 7 process along with those of all others affected.

2.22 Establishing a statutory presumption that reinsurance contracts should not be within the courts' discretion to transfer would put reinsurers on a different footing to other stakeholders in a proposed transfer who may also have legitimate reasons for objecting to a transfer, and would alter significantly the conduct of transfers. It would also undermine the basic principle behind authorisation of transfers under Part 7: namely, that it is for the court to determine whether and on what terms to approve a proposed transfer, taking into account all relevant factors.

2.23 The Treasury considers, therefore, that the approach outlined in the consultation document remains the correct one. The court should have the power to order the transfer of reinsurance contracts taken out on the risks being transferred where it considers it appropriate in all the circumstances to approve such a scheme and Part 7 should be clear about the full extent of the court's discretion to order the transfer of property and liabilities. But this is not to say that other measures which would help to ensure that the interests of reinsurers are given due consideration should not be considered.

2.24 The Treasury has discussed this point with the Financial Services Authority (FSA). Because of the technical nature of this issue and the different circumstances that apply to individual cases, we consider that such considerations are best addressed through evidence to the court. The FSA provides a report to the court in all Part 7 insurance business transfer schemes to assist in the court's evaluation of the proposed schemes. In considering a scheme, the FSA is concerned with whether the proposal is fair to the generality of policyholders and consistent with the FSA's statutory objectives

under section 2 FSMA. As part of its evaluation the FSA considers the effect of the scheme on reinsurance arrangements.

2.25 The FSA plans to consult in due course on proposals to update the guidance in its Handbook (SUP 18) to reflect the changes made by these legislative amendments together with changes made previously to implement the Reinsurance Directive. The responses to this consultation will be considered when formulating the guidance. The FSA's consultation will give respondents a further opportunity to provide input into operation of the Part 7 transfer process and the principles and procedures governing the FSA report to the court.

2.26 The Treasury considers that these changes, together with strengthened arrangements for notifying affected reinsurers about proposed transfers (see paragraphs 2.30 to 2.49 below) and the present working of Part 7 provide effective safeguards for reinsurers, whilst preserving the proper discretion of the court under part 7 to order the transfer of property and liabilities in connection with a scheme.

2.27 With regard to the detail of the amendments to section 112 concerned with clarification of the extent of that discretion, the issues raised by consultees set out in paragraph 2.15 above are dealt with below:

- *the amendments should be made without prejudice to the generality of section 112.* The Treasury agrees that it is important not to narrow inadvertently the existing powers of the Court. Our policy remains that Part 7 should be able to deal with the wide range of situations that come before the courts. Provisions to this effect have been added.

- *the new provisions (now in new section 112A) should apply to pre-existing rights or obligations only, i.e. not rights created by the scheme.* The Treasury thinks the drafting of the new section makes it clear it is about pre-existing rights or obligations. If however, a right or obligation created by a scheme could fall within the wording then it would be possible to provide for its future enforceability in the court order.

- *The new provisions might not cover steps towards transfer short of termination.* The Treasury has added explicit reference to property whose transfer would otherwise require consent being transferable on the basis there is no such requirement. The new section 112A (consultation draft section 112(2C)) clearly includes many more rights and obligations than just termination of a right or obligation. New section 112A(1) refers to modification, acquisition and claiming of rights and interests. Those words could include rights such as a right of pre-emption and a right to accelerate payment or increase interest rates.

- *The words "or likely to de done" are not sufficiently clear.* The Treasury intends to keep this formulation as the provision which prevents enforcement of the rights falling within new section 112A is intended to be broad. To make a more restricted provision would run the risk that the effect of the new provision could be drafted around which would render the policy of the provision nugatory.

- *There is no mechanism to reinstate entitlements falling within new section 112A (consultation draft subsections 112(2C) and (2D)).* The Treasury does not think it is right or necessary to include a mechanism for reinstatement of an entitlement falling within new section 112A. New section 112A only applies to

entitlements arising in consequence of anything done or likely to be done by or under Part 7. It would not eg prevent termination of a contract for a reason not related to the transfer, such as non-payment.

- *Reversing the way that section 112(2D) worked so that it would make entitlements affected enforceable unless the court order provided for them not to be enforceable.* The Treasury thinks it is preferable not to make this change since it could create uncertainty when the policy here is to bring greater certainty. It will be open for the parties to argue that an entitlement within the scope of section 112A is to be enforceable and for the court to make provision to such effect.

- *The effect of section 112(2D) in relation to non-transferring contracts eg of reinsurance is not clear.* The Treasury agrees that it should be made clear how the new section 112A(2) (consultation draft section 112(2D)) deals with contracts which include eg events of default triggered by a transfer, yet are not themselves to be transferred by the scheme. The Treasury has clarified that the new section 112A has effect also in relation to a contract that is not to be transferred yet includes an entitlement of the type referred to. This is because if that were not so such a provision in a contract could in an extreme case prevent a Part 7 scheme going ahead altogether which would be against the general policy of Part 7.

2.28 We do not propose to make further amendments relating to the power of the court to amend policy terms. Section 112 already gives the court the express power to reduce benefits in a transfer on such terms as it thinks fit. We consider that its wider discretion covers other circumstances in which amendments may be necessary. Examining this issue in more detail would widen this consultation exercise beyond its intended scope.

2.29 The revised instrument amending section 112 is at Annex B.

2.30 The fourth question posed in the consultation document sought views on the proposal to extend formal notification requirements to reinsurers:

> Q4. Do you agree that the parties to a transfer scheme should be required to notify all those reinsurers whose reinsurance contracts would be subject to transfer under a Part 7 transfer of insurance business (subject to the Court's power to waive such a requirement at its discretion)?

Background to proposed notification amendments

2.31 As provided for in section 110(b) FSMA, anyone who alleges they would be adversely affected by a transfer scheme may be heard by the court. In order to exercise this right, affected persons clearly need to be aware that a transfer is proposed and a hearing is taking place. Pre-transfer notification provisions are set out in the Financial Services and Markets Act 2000 (Control of Business Transfers)(Requirements on Applicants) Regulations 2001 (SI 2001/3625). At present, notice must be published in the Gazette and two national newspapers. For insurance business transfer schemes, direct notification must be sent to policyholders.

2.32 The proposed amendments extend the requirement for direct notification to reinsurers through amendments to regulations 3 and 4 of SI 2001/3625. The effect is to oblige a person applying to the court for sanction of an insurance business scheme

under Part 7 to give direct notice of the application to a reinsurer any of whose contracts of reinsurance are proposed to be transferred as part of the scheme.

2.33 The court may not determine an application if these requirements have not been met, though it has the power to disapply them.

Responses from consultees

2.34 A clear majority of opinion was in favour of the proposals. It was felt that the effect of the current provisions, including other elements of the process under Part 7 such as the expert's report to the court, is to give the greatest focus of attention to the interests of policyholders in a transfer. The power of the court to modify contracts freely entered into between the parties is something to be exercised with caution. It is in the interests of smooth and successful transfers that all those with legitimate objections have the chance to make their views known to the court.

2.35 Overseas reinsurers in particular are less likely to be aware of a proposed transfer through the existing publicity requirements and so will benefit from direct notification. No consultees felt it was necessary to extend the notification provisions to other parties to a transfer. In complex schemes, for example, there may be many third parties with little or no interest in the identity of their counterparty. The extra expense of notifying them could not be justified. On one view, though, it was cautioned that the new obligation should not prejudice the informal notification of counterparties of other material contracts as a factor the court has discretion to take into account in sanctioning a scheme.

2.36 Several respondents commented that notification of reinsurers merely reflects best practice. But, as one also commented, putting it on a statutory footing will have the "very important merit" of emphasising to applicant transferors and their advisers the importance of considering resinsurers' legitimate concerns in the development of a transfer scheme, in the same way that policyholders' interests are addressed. It was felt by some that the expert's report to the court might be amplified in relation to reinsurance.

2.37 Objections to the proposal were expressed in practical terms, though questions were raised about the need for the changes. The relevant part of the FSA's Handbook (SUP 18) concerned with notification under these provisions does refer to reinsurers where it states that it may also be appropriate [in addition to policyholders] to give notice to others affected. The risk of costs from an abortive transfer through failure to notify reinsurers makes it prudent to do so in any event.

2.38 Even some of those in favour commented that identification of all reinsurers affected by a transfer scheme is not always easy, or even possible. For example, there could be inability of or failure by a counterparty to respond to requests for information to identify reinsurers in respect of past years' liabilities, particularly where the reinsurers are overseas. For long term and complex businesses, it might be disproportionately onerous to identify and notify all individual reinsurers involved over a significant period of time. Business may have been placed on a pool basis. Some reinsurers may have very small shares of the risk at high levels.

2.39 The position of retrocessionaires (ie those with whom a reinsurer may have reinsured its own risk) was also touched upon by two respondents. Although not in contractual relations with the applicant transferor, retrocessionaires can be adversely affected. An applicant transferor will not know to whom its reinsurers may have ceded

risk making individual notification of them impossible. Retrocessionaires might build in their own termination clauses, possibly triggered by the reinsurer being notified of a proposed transfer, placing the reinsurer in a potentially difficult position if the reinsurance is transferred despite its objections.

2.40 A further issue identified by one respondent was that, especially in an intermediated insurance market such as London, direct notification might be contrary to the wording of reinsurance contracts in question. The brokers who arrange reinsurance for clients are commonly entrusted by those clients to retain the administrative details of the contract, in return for which the contracts might contain an "intermediary clause" stipulating that all communication between cedant and reinsurers should be carried out via the broker. Therefore, flexibility is required where reinsurance is placed via brokers.

Treasury response

2.41 The material impact on reinsurers that a transfer might have is one of the main issues highlighted in consultation responses. There is no doubt that reinsurers, alongside policyholders, are amongst those most likely to be affected under an insurance business transfer scheme.

2.42 Having the chance to make objections to the court is a fundamental safeguard in the Part 7 process. It stands as a corollary to the ability of the court to override contractual constraints and helps inform observance of its duty to sanction transfers only if appropriate in all circumstances of the case.

2.43 This makes it all the more important to ensure that objections from key stakeholders can be heard and given fair consideration. Putting the notification process for reinsurers on a statutory footing will strengthen the arrangements for bringing this about, and – as pointed out – will help ensure that their interests are given due weight in the design of transfer schemes well before the court process is underway.

2.44 The Treasury recognises that the amendments formalise what in many cases is simply good practice. However, the balance of opinion in consultation responses, which the Treasury shares, is that they are justified for the reasons stated above and for signalling to the court and other participants in the court process such as the independent expert the significance of reinsurers' legitimate concerns.

2.45 Regarding retrocessionaires, the position is not changed by these amendments. Their contractual relationship is with the reinsurer, not the transferor, and they remain outside the scope of the formal notification requirements. Reinsurers would of course need to consider the terms of their contracts with retrocessionaires in the face of possible termination rights on the part of the latter should transfers, or notification of transfers, take place.

2.46 The Treasury therefore intends to implement the requirement to notify reinsurers. That said, from the comments received, we accept that further amendments to the proposals are needed to reflect the practicalities of notification in certain circumstances.

2.47 Before outlining those changes, it is worth restating that, as proposed, the court has the discretion to waive the notification requirements for reinsurers as it has for policyholders. So where the nature, time period, or complexity of the chain of business is such that direct notification of all reinsurers would be impossible or

disproportionately expensive, for example, the transferor will be able to apply to the court to dispense with the obligation.

2.48 With regard to the further amendments required, adopting the drafting suggestion by one respondent to reflect transfers of only part of the benefit of a reinsurance contract, the words "in whole or part" have been added to amended regulation 3 of SI 2001/3625. Two other sub-clauses have been added to allow for notification of a person (or persons) authorised to act on behalf of a reinsurer (or reinsurers). The Treasury considers that these changes will cater for circumstances identified by respondents where business has been placed through intermediaries or on a pool basis.

2.49 The revised instrument amending SI 2001/3625 is at Annex C.

3 Responses to the Consultation Questions - Former Underwriting Members of Lloyd's

3.1 The final topic addressed in the consultation document concerned an issue relating to transfers of business by certain former underwriting members of Lloyd's of London. This section summarises consultation responses to the question posed:

> Q5. Do you agree that an amendment to FSMA should be made to allow all former Lloyd's Names to participate in a transfer of insurance business?

Background to the proposed section 323 and related amendments

3.2 Section 323 FSMA grants authority to the Treasury to apply the transfer provisions of Part 7 to members of Lloyd's and to "former underwriting members " of Lloyd's as defined in FSMA: that is, "a person ceasing to be an underwriting member of the Society on, or at any time after, 24 December 1996". As explained in the consultation document, the reason for this definition is to ensure that underwriting members of Lloyd's (or "Names") whose resignation took effect prior to 24 December 1996 are not regulated under FSMA in the same way as other insurance undertakings and current underwriting members of Lloyd's. This distinction is not relevant to the application of Part 7 of FSMA to insurance business written at Lloyd's.

3.3 However, because the extent of the application of the Part 7 transfer provisions to former members of Lloyd's is determined by the scope of section 323, this makes it impossible for any member who ceased underwriting prior to 24 December 1996 to transfer their insurance business. There is no good reason why insurance business written by some former underwriting members should be capable of transfer, whilst that of others cannot. As noted in the consultation document, the date of a Name's resignation should not be a determining factor.

3.4 The proposed amendments therefore bring former underwriting members who resigned before 24 December 1996 within the scope of section 323 and, by order made under that section, the transfer provisions of Part 7. Equivalent amendments are necessary to the Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001 ("the Lloyd's Order", SI 2001/3626). The latter amendments also included clarification that a scheme can transfer business written on different syndicates and in different years of account of syndicates.

3.5 These changes correct what seems in principle an anomalous position. However, they do have a specific and practical consequence potentially in relation to Equitas (the run-off reinsurer that was set up in 1996 to take on the 1992 and prior years non-life liabilities of Names).

3.6 One scenario under which the business of former members might be transferred, and which would not be possible in the absence of the proposed changes, would be the transfer of the whole chain of Equitas' business. This particular scenario could manifest itself in a number of different legal models. As noted in the consultation document, though, Equitas announced in October 2006 its intention to complete a deal with a subsidiary of the US group Berkshire Hathaway, ultimately involving the transfer of its business.

Responses from consultees

3.7 These proposals attracted two main blocks of opinion. Many former Names welcomed the changes in terms of allowing for the possibility of a transfer of their

business. In numerical terms, the overwhelming weight of opinion in responses is in favour of the proposed changes.

Change to definition of former Names

3.8 Around 70 individuals focussed on this issue, giving the proposals their support, as did several associations representing Names or ex-Names. A few respondents gave support in principle but raised questions about the prior legal background to any transfer, for example in relation to the extent and nature of the residual liability of former Names. Opinion was also generally in favour amongst those who commented more substantively on the other amendments subject to the consultation.

3.9 In terms of the drafting of the amendments, it was suggested that, where the business to be transferred includes the business of any person who has ceased to be an underwriting member of Lloyd's and the business has been delegated either to a run-off manager or to a reinsurer to close, that manager or reinsurer should be entitled to act on behalf of the members concerned, as an alternative to applying to the Council of Lloyd's to appoint a person for the purpose (as required by the Lloyd's Order).

3.10 One respondent felt that the proposals were based on misconceptions of the legal position and liabilities of former Names, and might not provide for the possibility of finality, through a transfer, for them (which he supported). Another similarly thought there were prior questions about whether there is any residual liability residing in Names who ceased to underwrite some years ago and were not party to the run-off and reinsurance arrangements, or whether or not all such liability has been transferred to reinsured Names.

Interests of policyholders

3.11 Representing the main block of opinion against the proposals, six respondents expressed strong reservations in principle about the changes. All were North American-based policyholders or law firms representing their views. Many of the points made were common to the replies. Concerns centre around the fact that these respondents feel that their interests, as holders of long-tail liability insurance policies at Lloyd's, are at risk of being compromised should a transfer take place.

3.12 Behind this view lies the unlimited liability of Names and the "chain of security", including the Lloyd's Central Fund and Lloyd's American Trust funds, backing policies at Lloyd's. According to respondents it was a significant factor in the original decisions of these policyholders to choose policies with Lloyd's, and continues to stand behind policies reinsured by Equitas. Whilst it was recognised by some that the transaction could be beneficial to policyholders, a transfer by Equitas of the whole chain of its business would remove that extra layer of security. The possibility that the transferee entity could in turn seek to terminate the runoff of long-tail claim liabilities under pre-1993 Lloyd's policies by proposing a scheme of arrangement could be of further potential detriment to policyholders.

3.13 A transfer of the kind envisaged by Equitas could not happen without the proposed amendments. Against the background of that fact, it was felt that the consultation document had paid insufficient attention to the interests of policyholders and the possible impact on them of the transfer, compared to those of other stakeholders such as Names and Lloyd's. These respondents felt the commercial interests of Equitas were referred to but not those of policyholders.

3.14 One comment was that the Treasury appeared motivated to make these changes to terminate the contingent liability of Lloyd's under its pre-1993 non-life policies. It followed that a number of assumptions and representations made in the consultation document required scrutiny. This group of respondents felt references in the document

to the proposed deal between Equitas and Berkshire Hathaway were insufficiently clear about the "direct links" between that deal and the amendments being proposed. They felt there were good reasons for treating pre-1996 former Names differently, as after that time Names may be organised through the admission of corporate capital to the marketplace on a limited liability basis. A limited liability corporation is backed up only by the security of its own assets. Schemes of arrangement are not open to old Names.

3.15 Opinion amongst this group of respondents was therefore against proceeding with the amendments. But in the event that they were to be implemented, it was suggested that specific safeguards should be introduced. These included measures to be taken by the Treasury to analyse the reinsurance contract underpinning the Equitas transaction, ensuring that the required assets are sufficient and available to pay claims; compensation for loss of the ability to sue Names; disclosure to policyholders of reserves established to satisfy transferred obligations; safeguards imposed on all funds to be transferred to guarantee they are maintained for the sole purpose of settling claims; and written public warranties to be secured from Equitas and the transferee entity that they have no present intention to reorganise the new vehicle into a scheme of arrangement.

Treasury response

3.16 The responses to the question relating to allowing for transfers by all former members of Lloyd's attracted a lot of comment. Though there were dissenters, a large body of opinion – the great majority – was in favour of the proposed amendments.

3.17 Notwithstanding the comments of concerned policyholders, which are addressed below, the Treasury continues to believe that date of resignation should not be a determinant of whether former underwriting members should be able to transfer their business. Differentiation in section 323 FSMA of former members who resigned before 24 December 1996 is not justified by any good reason.

3.18 We therefore consider that the changes are justified and should proceed. The changes are to remove an unintended consequence of the definition of former underwriting members, so to allow for the possibility of transfers by all former Names of any insurance business whenever written at Lloyd's. They do not seek to guide or determine the nature of any possible transfer involving former Names. Still less should they be seen as endorsement by the Treasury of any proposed scheme, which is a commercial matter for the parties concerned.

3.19 Clearly, and as was recognised explicitly in the consultation document, the proposed deal between Equitas and the Berkshire Hathaway group could not proceed as planned to its final stage of a transfer without the changes being made. But it is wholly incorrect to conclude from that state of affairs that the changes are being made for no other reason.

3.20 The Treasury is not in a position to comment on whether the terms of any transfer would compromise the interests of those affected, including policyholders. This is properly a matter for the relevant regulators and the court which must decide whether and on what terms to approve a transfer.

3.21 We recognise that the policyholders who have commented in opposition to the changes are expressing their genuine concerns about the possible consequences, for them, of a transfer. The whole process of court approval under Part 7 is intended and

designed to ensure that such concerns are given fair consideration. It provides real and effective safeguards:

- under the wording of section 111(3) FSMA the court must consider that in all the circumstances of the case it is appropriate to sanction the scheme;

- the courts have regularly stated that they must be satisfied that the scheme is fair overall to policyholders before it can be sanctioned;

- there are robust publicity and notification provisions to help ensure those affected are informed of transfers;

- those who allege they are adversely affected by the scheme can be heard in front of the court;

- there must be a report on the scheme from an independent expert;

- for all Part 7 insurance business transfers, the FSA considers the risks of the proposed scheme to its regulatory objectives, which include protecting consumers and maintaining market confidence, and is entitled to be heard by the court.

- there must be a solvency certificate about the transferee and other certificates for transfers, and

- the court has the power under an order to make provisions for the interests of any person who objects to the scheme.

3.22 We therefore consider that the process for approval of transfers already contains the elements necessary to address the concerns expressed by policyholders. It should be added that it would not be appropriate, or indeed possible, for the Treasury to seek to influence the terms of a particular transfer through the addition of further conditions, such as those suggested by respondents. The terms of a scheme are a commercial matter for the participants, their approval subject to the regulatory and judicial constraints and processes applied under Part 7.

3.23 Some further observations may be appropriate in the context of the wider concerns expressed. The consultation document rightly focussed on the terms of the legislative changes being proposed, and their impact in terms of allowing all former Names to transfer their business. The fact of the changes – despite their significance for the proposed deal between Equitas and the Berkshire Hathaway group – does not in itself mean that a particular scheme will take place and be approved. The consultation document was not and could not be an analysis and assessment of the impact on stakeholders and relative merits of any scheme that might be possible as a result of the changes.

3.24 With regard to the suggestion that the reference in section 323 to the date of resignation of a Name does, in fact, have significance for the application of Part 7 because of the change in the Lloyd's market from reliance on individual names to corporate capital providers, the Treasury does not consider this is relevant to the application of Part 7 to business written in the Lloyd's market. Therefore, it should not affect making the amendments. The chain of security at Lloyd's is not confined to Names with unlimited liability.

3.25 The Treasury continue to take the view that to remove the restriction in section 323 would be to remove an unjustified restriction on the ability to transfer insurance

business. As noted earlier in this document, removing the restriction does not by any means mean that any particular scheme will be approved by the court.

3.26 The instruments making the changes to section 323 FSMA and the Lloyd's Order are at Annexes D and E respectively.

A List of respondents

Mr Justice David Richards (on behalf of the Judges of the Chancery Division of the High Court)

The City of London Law Society

Financial Services Working Party sub-committee of the Company Law Committee of the Law Society

Slaughter & May

Herbert Smith

Norton Rose

Clifford Chance

Bingham McCutchen

Martin Moore QC

Covington & Burling

Kendall Freeman

Lloyd's of London

Equitas

The Equitas Trust

The Association of British Insurers (ABI)

The Actuarial Profession

International Underwriting Association (IUA)

Munich Re

ACE Overseas General

Liberty Syndicates

Association of Run-off Companies (ARC)

Association of Lloyd's Members

High Premium Group

Resolution plc

Royal & Sun Alliance

Aviva

Ungaretti & Harris

K&L Gates

The Zidell Companies

Olin Corporation

Teckcominco

Lloyd's Names Association

Exlloydsnames.com

The Restitution Initiative Ltd

RTY E&E Ltd

Stephen Merrett

Mitchells Roberton

Garth Fryett QC

Roger Crouch

Alan Wesley

Harvey L Meares

Dr A E L Davis

Brian E Graves

Carole Tyce

Dr A J Burn

T R Hewett

David Coleridge

M J Smedley

Alan Brooke Turner

W A Horncastle

W A P Manser

Lady Marion Dodds

Stanislaus Jewson

R D Jackson

Mary E Nash

D C Willis

S A Roston

H V Bruce

Richard Law

M R Flook

Richard Lloyd

James F Pawsey

Clive Moy

Costas Kleanthous

V Avril J Wotherspoon

Derek Salter

Patrick J Agnew

Joylon Kay

The Rt Hon Lord Blaker

James Bertram

Charles Hindson

C O Lawrence

Philip Colfox

William James

Michael Moore

Robin Gilkes

Roger Cunliffe

Dr David E E Dale

Richard Brooks

Mike Hannan

June Mackrell

Sarah R Barrett

Mrs J M Gresty

Julia L Smart

Diana Bremner

P A Lawrence

B R S Powley

C J York

D J Blackwell

Leonard Ratcliffe

M D Bracknell

T O Seymour

Peter Byrd

B L Clay

Lewis Deyong

R W Bosshard

P L Butler

Mrs Norah Douglas

Delia Drummond

John Abel

R H Y Mills

P A Lousada

Michael Holman

A G J Rimmel

Ken Adams

M L Newman

Christchurch ex-names

Charles van der Lande

Jack O'Hara

Gordon Black

K J Leonard

Dr D B James

Richard A P Sheehan

Edward Lyndon-Stanford

Francis E S Hayes

R Pannier

M D Sinclair

Harry Purchase

John R Rix

B AMENDMENTS TO PART 7 REGULATIONS 2008

STATUTORY INSTRUMENTS

2008 No. XXX

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Amendments to Part 7) Regulations 2008

Made - - - -	*2008*
Laid before Parliament	*2008*
Coming into force - -	*2008*

The Treasury, in exercise of the powers conferred on them by sections 117(b) and 428(3) of the Financial Services and Markets Act 2000(1) make the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Financial Services and Markets Act 2000 (Amendments to Part 7) Regulations 2008 and come into force on [2008].

Amendments to Part 7 of the Financial Services and Markets Act 2000

2.—(1) After subsection (2) of section 112 of the Financial Services and Markets Act 2000 (effect of order sanctioning business transfer scheme) insert—

"(2A) Subsection (2)(a) is to be taken to include power to make provision in an order—

(a) for the transfer of property or liabilities which would not otherwise be capable of being transferred or assigned;

(b) for a transfer of property or liabilities to take effect as if there were—

(i) no such requirement to obtain a person's consent or concurrence, and

(ii) no such contravention, liability or interference with any interest or right,

as there would otherwise be (in the case of a transfer apart from this section) by reason of any provision falling within subsection (2B).

(2B) A provision falls within this subsection to the extent that it has effect (whether under an enactment or agreement or otherwise) in relation to the terms on which the authorised person concerned is entitled to the property or subject to the liabilities in question.

(2C) Nothing in subsection (2A) or (2B) is to be read as limiting the scope of subsection (1)."

(2) In subsection (9) of that section after "subsection (2)," insert "(2A),".

(3) After section 112 insert—

(1) 2000 c.8.

"**112A Rights to terminate etc.**

(1) Subsection (2) applies where (apart from that subsection) a person would be entitled, in consequence of anything done or likely to be done by or under this Part in connection with an insurance business transfer scheme or a banking business transfer scheme—

(a) to terminate, modify, acquire or claim an interest or right; or

(b) to treat an interest or right as terminated or modified.

(2) The entitlement—

(a) is not enforceable in relation to that interest or right until after an order has been made under section 112(1) in relation to the scheme; and

(b) is then enforceable in relation to that interest or right only insofar as the order contains provision to that effect.

(3) Nothing in subsection (1) or (2) is to be read as limiting the scope of section 112(1).".

Name

Date Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend Part 7 of the Financial Services and Markets Act 2000 ("the Act") which deals with schemes for the transfer of insurance and banking business.

Section 112 of the Act is amended by the insertion of new subsections (2A) to (2C) and a consequential amendment of subsection (9).

Subsections (2A) and (2B) make clear for the avoidance of doubt that the power of the court to make an order under section 112 is to be taken as always having included the power to transfer, for example, contracts which include provisions prohibiting their transfer or contracts in relation to which there is a query as to their transferability in the absence of consent of a counterparty or contracts where there is a contravention, liability or interference with a right or interest which arises as a result of the transfer.

New section 112A is inserted. The new section makes clear, again for the avoidance of doubt, that the specified entitlements arising as a result of something done or likely to be done by or under Part 7 of the Act will only be enforceable after the order under section 112(1) has been made and only insofar as the court makes provision to that effect in that order. These circumstances might be relevant, for example, in relation to the transfer of reinsurance contracts, if such transfer were sanctioned by the court, which are connected to insurance contracts being transferred under an insurance business transfer scheme. Section 112A(1) could be relevant, for example, where a counterparty of a bank or insurer has a right to terminate an agreement with the bank or insurer which is exercisable as a result of the bank or insurer stating its intention to pursue a banking or insurance business transfer scheme.

A full regulatory impact assessment has been produced for this instrument and is available from the Financial Stability and Risk Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ and is on the HM Treasury's web-site at www.hm-treasury.gov.uk.

C CONTROL OF BUSINESS TRANSFERS (REQUIREMENTS ON APPLICANTS) (AMENDMENT) REGULATIONS 2008

STATUTORY INSTRUMENTS

2008 No.

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Control of Business Transfers)(Requirements on Applicants)(Amendment) Regulations 2008

Made - - - -	*2008*
Laid before Parliament	*2008*
Coming into force - -	*2008*

The Treasury, in exercise of the powers conferred on them by sections 108 and 428(3) of the Financial Services and Markets Act 2000([1]), make the following Regulations:

Citation and commencement

3. These Regulations may be cited as the Financial Services and Markets Act 2000 (Control of Business Transfers)(Requirements on Applicants)(Amendment) Regulations 2008 and come into force on [2008].

Amendment to the 2001 Regulations

4. The Financial Services and Markets Act 2000 (Control of Business Transfers)(Requirements on Applicants) Regulations 2001([2]) are amended as follows—

(a) at the end of regulation 3(2)(a)(iv) omit "and";

(b) at the end of regulation 3(2)(b) add—

"; and

(c) sent—

(i) to every reinsurer of the authorised person concerned (within the meaning of section 105(2) of the Act) any of whose contracts of reinsurance (in whole or part) are to be transferred by the scheme; or

(ii) in a case where such a contract has been placed with or through a person authorised to act on behalf of the reinsurer, then to that person; or

(iii) in a case where such a contract has been placed with more than one reinsurer, then to the person or persons authorised to act on behalf of those reinsurers or groups of reinsurers.";

(c) in regulation 4(2) for "and (b)" substitute ", (b) and (c)".

([1]) 2000 c. 8.

([2]) S.I. 2001/3625, amended by S.I. 2004/3379 and 2007/3255.

Name

Date Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Financial Services and Markets Act 2000 (Control of Business Transfers)(Requirements on Applicants) Regulations 2001 (S.I. 2001/3625). The effect of the amendments is to oblige a person applying to court for an order sanctioning an insurance business transfer under section 107 of the Financial Services and Markets Act 2000 to give notice of the application to a reinsurer (or a person acting on its behalf) any of whose contracts of reinsurance are proposed to be transferred as part of the insurance business transfer scheme.

A full regulatory impact assessment has been produced for this instrument which is available from the Financial Stability and Risk Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ. It is also available on the HM Treasury web-site at www.hm-treasury.gov.uk.

D AMENDMENT OF SECTION 323 REGULATIONS 2008

STATUTORY INSTRUMENTS

2008 No.

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Amendment of section 323) Regulations 2008

Made - - - -	*2008*
Laid before Parliament	*2008*
Coming into force - -	*2008*

The Treasury are a government department designated([1]) for the purposes of section 2(2) of the European Communities Act 1972([2]) in relation to transfers of insurance contracts other than contracts of life assurance from one insurance undertaking to another and matters relating to the transfer of contracts of life assurance from one insurance undertaking to another and to anything supplemental or incidental to those matters.

In exercise of the powers conferred on them by section 2(2) of the European Communities Act 1972, the Treasury make the following Regulations:

Citation and commencement

5. These Regulations may be cited as the Financial Services and Markets Act 2000 (Amendment of section 323) Regulations 2008 and come into force on [2008].

Amendment to section 323

6. In section 323 of the Financial Services and Markets Act 2000 (transfer schemes), for the words from "members" (where it first occurs) to the end substitute—

> "underwriting members of the Society or by one or more persons who have ceased to be such a member (whether before, on or after 24th December 1996)".

Name

Date — Two of the Lords Commissioners of Her Majesty's Treasury

([1]) S.I. 1997/2781.

([2]) 1972 c. 68. The enabling powers of section 2(2) of this Act were extended by virtue of the amendment of section 1(2) by section 1 of the European Economic Area Act 1993 (c.51). Council Directive 73/239/EEC applies in the EEA by virtue of the Annex IX of the EEA Agreement signed at Oporto on 2nd May 1992 together with the Protocol adjusting that Agreement signed at Brussels on 17th March 1993. Directive 2002/83 of the European Parliament and the Council applies in the EEA by virtue of the EEA Joint Committee Decision No 60/2004 of 26th August 2004 (O.J. L.277, 26.8.2004, p.172).

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend section 323 of the Financial Services and Markets Act 2000 ("the Act"). Section 323 enables the application by order of Part 7 of the Act, which provides for insurance and banking transfer schemes, in relation to the insurance business of underwriting members and former underwriting members of the Society of Lloyd's.

Section 323 of the Act as it stands prior to this amendment uses the existing definition of former underwriting member set out in section 324 of the Act. That definition does not apply to former underwriting members who ceased to be underwriting members before 24th December 1996. This amendment enables an order under section 323 to apply to all insurance business whenever written in the Lloyd's Market.

The Regulations are made using the power in section 2(2) of the European Communities Act 1972. This matter arises out of and relates to the European Community obligation on Member States to authorise insurance undertakings, in particular, to transfer all or part of their portfolio of contracts to an accepting office within the Community under Article 12(2) of Council Directive 1992/49/EEC (known as "the third non-life insurance directive") and Article 14 of European Parliament and Council Directive 2002/83/EC (known as "the consolidated life insurance directive").

A full regulatory impact assessment has been produced for this instrument and is available from the Financial Stability and Risk Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ. It is also on the HM Treasury web-site at www.hm-treasury.gov.uk.

E CONTROL OF TRANSFERS OF BUSINESS DONE AT LLOYD'S (AMENDMENT) ORDER 2008

STATUTORY INSTRUMENTS

2008 No.

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) (Amendment) Order 2008

Made - - - -	*2008*
Laid before Parliament	*2008*
Coming into force - -	*2008*

The Treasury, in exercise of the powers conferred on them by sections 323 and 428(3) of the Financial Services and Markets Act 2000([1]), make the following Order:

Citation and commencement

7. This Order may be cited as the Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) (Amendment) Order 2008 and comes into force on [2008].

Amendment of the Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001

8.—(1) The Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001([2]) is amended as follows.

(2) In article 2, omit the definition of "former underwriting member".

(3) In article 3—

(a) for "107 to 114" substitute "107 to 114A";

(b) for "members of the Society or former underwriting members" substitute—

"underwriting members of the Society or by one or more persons who have ceased to be such a member (whether before, on or after 24 December 1996)".

(4) In article 4—

(a) for paragraph (b) substitute—

"(b) that the Council of Lloyd's has—

(i) by resolution authorised one person to act, or

(ii) certified that one person has authority to act,

in connection with the transfer for the members concerned, as transferor;";

([1]) 2000 c. 8; section 323 was amended by the Financial Services and Markets Act 2000 (Amendments of section 323) Regulations 2008, S.I. 2008/

([2]) S.I. 2001/3626.

(b) for paragraph (c) substitute—

"(c) that a copy of the resolution or the certificate has been give to the Authority.".

(5) In article 5(1)(b)—

(a) after "the person authorised" insert ", or the person certified to have authority,";

(b) for "paragraph (a)" substitute "paragraph (b)".

(6) After article 5(2) add—

"(3) A transfer scheme carried out by virtue of this Order may transfer to an establishment of the transferee business written on different syndicates and in different years of account of syndicates.".

Name

Date Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Order)

The Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001 (S.I. 2001/3626) applies to the Lloyd's market Part 7 of the Financial Services and Markets Act 2000.

Part 7 provides for insurance business transfer schemes. This Order amends the 2001 Order so that the provisions of Part 7, that were applied by that Order to members and to some former members of Lloyd's, apply to all insurance business whenever written in the Lloyd's market.

In article 2(4) article 4(b) of the Order is substituted to insert an alternative provision to the requirement of the Council of Lloyd's to pass a resolution authorising a person to act in connection with a transfer, by allowing the Council of Lloyd's in addition, where relevant, to certify that a person has authority to act in relation to a transfer.

Article 2(5) makes an amendment consequential on the change made to article 4(b) and also corrects an error in a cross-reference in the original Order.

The amendment in article 2(6) makes clear that a transfer scheme can include the insurance business written on different syndicates and of different years of account of syndicates.

A full regulatory impact assessment has been produced for this instrument which is available from the Financial Stability and Risk Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ. It is also available on the HM Treasury web-site at www.hm-treasury.gov.uk.

ISBN 978-1-84532-453-7