CLIFFORD

CHANCE

Briefing note

March 2013

Financial Services Act 2012 and its impact on lending transactions

From 1 April 2013, a new financial regulation framework will be operative in the UK. The Financial Services Authority (FSA) is being replaced by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), the Bank of England is to have overall responsibility for financial stability and a new Financial Policy Committee (FPC) of the Bank of England is being created. However, the Financial Services Act 2012 does more than just give effect to these regulatory reforms. In this briefing we provide an overview of the new framework and summarise some of the other main areas of change that are most relevant to those involved in lending transactions, including the resolution powers under the Banking Act 2009.

1. Overview

The Financial Services Act 2012 implements significant changes to the UK financial regulation framework by amending the relevant provisions of the Financial Services and Markets Act 2000 (**FSMA**). In addition, the 2012 Act will:

- restructure and broaden the law relating to market manipulation and misleading statements and impressions;
- extend the scope of the special resolution regime under the Banking Act 2009;
- create a new category of regulated activity in relation to benchmarks (e.g. LIBOR) and credit ratings;
- change the regime for the approval, supervision and discipline of sponsors under FSMA; and
- allow the regulation of consumer credit to be transferred to the FCA.

2. Who's who in the new financial regulation framework

- The **Prudential Regulation Authority (PRA)** is a subsidiary of the Bank of England. It will be responsible for the prudential regulation of deposit takers, insurers and major investment firms.
- The **Financial Conduct Authority (FCA)** will be responsible for conduct regulation and also for the prudential regulation of non-PRA firms (i.e. smaller investment firms, exchanges and other financial services providers). It will replace the FSA as the

Timeline

1 April 2013:

- New UK financial regulation framework comprising Bank of England (including FPC), PRA and FCA
- Market manipulation laws restructured and broadened
- Changes to approval, supervision and discipline of sponsors under FSMA

Summer 2013(?):

- Resolution powers under Banking Act extended to certain UK investment firms, certain group companies of UK banks and UK investment firms, and UK clearing houses

Timing not yet clear:

- Regulation of certain activities in relation to benchmarks (e.g. LIBOR) and credit ratings
- Transfer of consumer credit regulation to the FCA (expected to be effective April 2014?)

authority responsible for the official list under Part 6 of FSMA.

- The **Financial Policy Committee (FPC)** will be primarily responsible for assisting the Bank of England in achieving its financial stability objective and will be given powers of recommendation and direction (to the FCA or the PRA) to address systemic risk.
- The **Bank of England** will have overall responsibility for financial stability. The Bank will also be the appropriate regulator for recognised clearing houses and will have the power to direct a UK clearing house in certain circumstances.

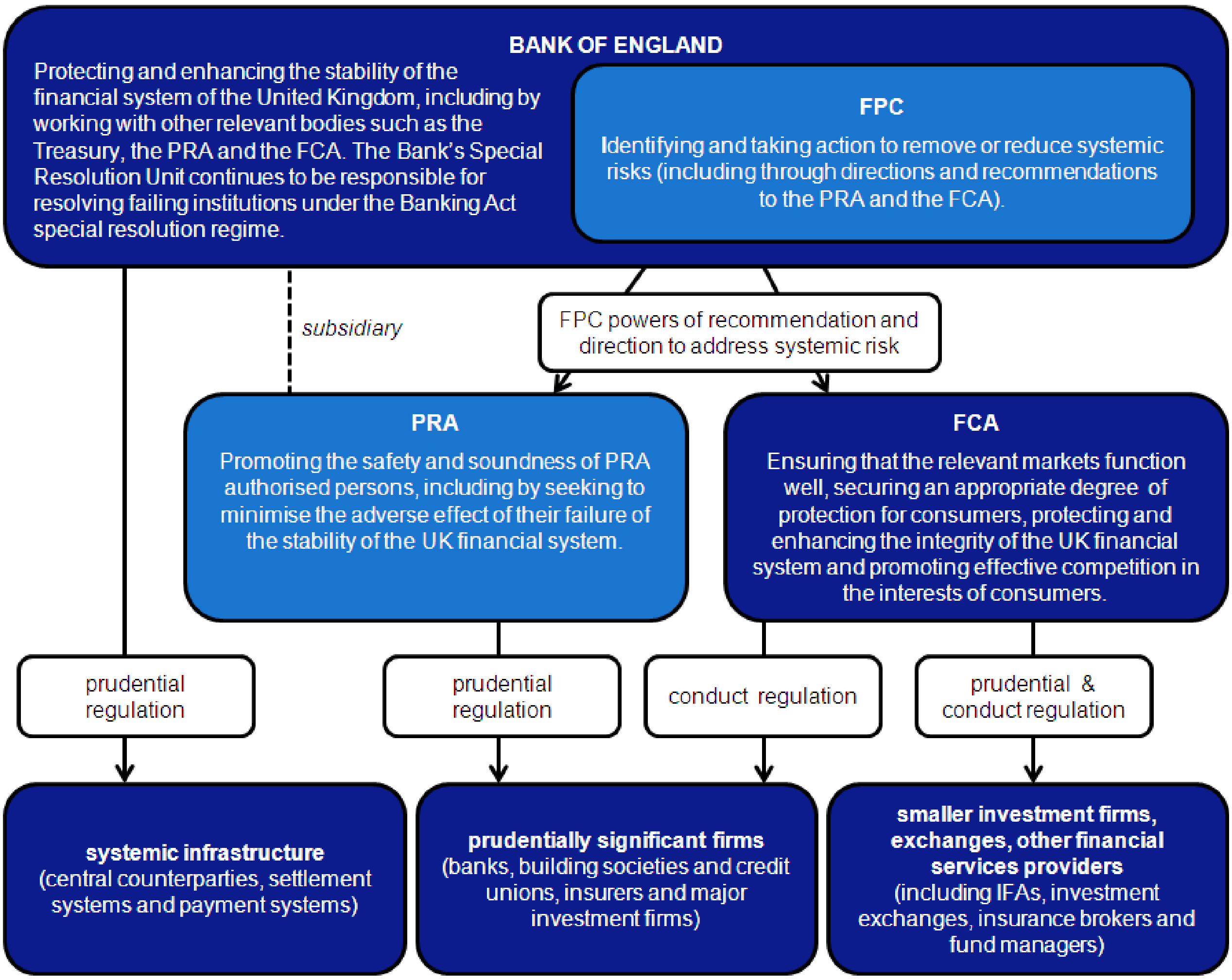
3. Misleading statements and impressions offences

The 2012 Act will restructure and broaden the ambit of the law relating to market manipulation and misleading statements and impressions.

The existing offence, for misleading statements and practices, under section 397 of FSMA is being repealed and replaced by three separate offences:

- misleading statements (section 89 of the 2012 Act);
- misleading impressions (section

Roles of the bodies in the new regulatory architecture



This is a modified version of the diagram on page 10 of HM Treasury consultation "A new approach to financial regulation: building a stronger system", February 2011

90 of the 2012 Act); and

- misleading statements etc in relation to benchmarks (section 91 of the 2012 Act).

Together, the new misleading statements and misleading impressions offences largely cover the same ground as the existing single offence under section 397 of FSMA. However, the misleading impressions offence will be slightly broader than its predecessor in that it includes misleading impressions made recklessly in addition to those made intentionally.

The new offence for misleading statements etc in relation to benchmarks is being introduced in response to the final report of the Wheatley Review of LIBOR, which recommended that the criminal law should be amended to cover manipulation of LIBOR. The new offence is not expected to result in amendments to loan documentation generally or change any definition of LIBOR in particular. Separately as part of further implementation of the recommendations of the Wheatley Review of LIBOR, the definition of LIBOR is the subject of a Loan Market Association consultation.

4. Changes to the Banking Act 2009

The 2012 Act will also be making changes to the Banking Act 2009. For our purposes, the extension of the special resolution regime (**SRR**) is of note. Under the current SRR, actions may be taken by the Treasury and the Bank of England to address a situation where a UK bank or building society has, or is likely to encounter, financial difficulties. In these cases, the Treasury and the Bank of England have wide powers to implement stabilisation measures under the Banking Act (including share transfers and property transfers). The 2012 Act will extend the SRR to certain UK investment firms, UK clearing houses and certain group companies of UK banks and UK investment firms (each a **banking group company**). Accordingly, this may mean that more companies within a UK bank's group may be affected by the SRR and any provisions of documentation which address Banking Act risk (such as any representation, event of default and even legal opinions) will need to be extended to include such additional entities. Note, however, that the prohibition is not yet clear as there is scope for exemptions to be introduced prior to implementation. So, it is possible that the applicability to banking group companies may be more limited than it appears at present. Since implementation dates for the majority of the changes to the Banking Act 2009 have not yet been provided (although we understand, from HM Treasury, that summer 2013 is a possibility), for the moment it is a case of "watch this space."

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