THRESHOLD CONDITIONS (BANKING ACT 2009) INSTRUMENT 2009

Powers exercised

A. The Financial Services Authority makes this instrument in the exercise of the power in section 157(1) (Guidance) of the Financial Services and Markets Act 2000.

Commencement

B. This instrument comes into force on 6 September 2009.

Amendments to the Handbook

C. The Threshold Conditions (COND) are amended in accordance with the Annex to this Instrument.

Citation

D. This instrument may be cited as the Threshold Conditions (Banking Act 2009) Instrument 2009.

By order of the Board
23 July 2009

Annex

Amendments to the Threshold Conditions (COND)

In this Annex, underlining indicates new text and striking through indicates deleted text unless otherwise stated.

1.1.1 G *COND* applies to every *firm*, except that:

…

(3) *threshold conditions* 3, 4 and 5 do not apply to a *Swiss General Insurance Company*; ~~and~~

(4) *COND* 2.6 (Additional conditions) is only relevant to *non-EEA insurers*; and

(5) *COND* 3.1 is only relevant to *firms* falling within the scope of the Banking Act 2009 (see *COND* 3.1.1G).

…

After COND 2 insert the following new chapter. The text is not underlined.

3 Banking Act 2009

3.1 Assessing Condition 2 under section 7(3) of the Banking Act 2009

Introduction

3.1.1 G The Banking Act 2009 (the Banking Act) introduces new powers for HM Treasury, the Bank of England and the *FSA* to deal with failing banks. The powers, which are set out in Parts 1 to 3 of that Act, can be used to deal with UK incorporated *firms* with a *Part IV permission* to carry on the *regulated activity* of *accepting deposits*, other than *credit unions* and any other class of institution specified in secondary legislation. In relation to *building societies*, the main tools in the Act are applied with modifications. In this section the term “bank” is used to refer to those *firms* that are potentially subject to the powers in Parts 1 to 3 of the Banking Act. The powers are defined in the Banking Act, and referred to in this section as the “stabilisation powers”. The Banking Act contains powers to enable HM Treasury to extend the application of the stabilisation powers to *credit unions* by secondary legislation.

3.1.2 G Section 7 of the Banking Act sets out the two conditions that must be met before a stabilisation power can be exercised in respect of a bank:

(1) Condition 1 is that the bank is failing, or is likely to fail, to satisfy the *threshold conditions*.

(2) Condition 2 is that, having regard to timing and other relevant circumstances, it is not reasonably likely that (ignoring the stabilisation powers) action will be taken by or in respect of the bank that will enable it to satisfy the *threshold conditions*.

3.1.3 G The Banking Act provides that the *FSA* is to treat Conditions 1 and 2 as met if satisfied that they would be met but for financial assistance provided by either HM Treasury or the Bank of England (disregarding ordinary market assistance offered by the Bank on its usual terms).

Assessing Condition 1

3.1.4 G The matters the *FSA* will take into account in assessing whether a bank is failing or is likely to fail to satisfy the *threshold conditions* are described in *COND* 2.1 to *COND* 2.5. The options available to the *FSA* in the case of a breach of the *threshold conditions* are outlined in Chapter 8 of the *Enforcement Guide* and *SUP* 7.2. These tools are available to the *FSA* at any time, and so may be used before or in conjunction with the stabilisation tools provided by the Banking Act.

Assessing Condition 2

3.1.5 G The Banking Act provides that in considering the test in Condition 2, the *FSA* should ignore the stabilisation powers. The purpose of this limitation is to make clear that in making its assessment, the *FSA* is not considering whether the stabilisation powers could successfully resolve the situation, but is considering whether alternative measures might provide for this instead.

Timing

3.1.6 G In assessing Condition 2, the *FSA* will consider the timeframe during which any actions taken by or in relation to the bank are likely to be available and to have effect. In the view of the *FSA*, the purpose of the reference to timing in Condition 2 is to require the *FSA* to consider whether a return to full compliance is likely to occur within a reasonable period of time. The following is a non-exhaustive list of factors the *FSA* may consider:

(1) the extent of any loss, or risk of loss, or other adverse effect on *consumers*. The more serious the loss or potential loss or other adverse effect, the more likely it is that the *FSA* will consider that remedial action will be needed urgently;

(2) the seriousness of any suspected breach of the requirements of the *Act* or the *rules* and the steps that need to be taken to correct that breach;

(3) the risk that the bank's conduct or business presents to the *financial system* and to confidence in that system;

(4) the likelihood that remedial action that could be taken by or in relation to the bank will take effect before *consumers* or market confidence suffers significant detriment.

3.1.7 G If the *FSA* is satisfied that the breach of *threshold conditions* is likely to be temporary and to be rectified within a reasonable time, the *FSA* is unlikely to conclude that Condition 2 has been met.

Other relevant circumstances

3.1.8 G In general the *FSA* will be concerned to determine whether any remedial action that could be taken by or in relation to the bank will be effective. This will include an assessment of both how likely it is that the action will be taken, and if it is, the impact it will have on the bank's compliance with the *threshold conditions*. Circumstances that the *FSA* may take into account include but are not limited to:

(1) where the *FSA's* concerns relate to adequacy of liquidity:

(a) the availability of market funding to banks generally and any specific circumstances of the bank that may impact on its ability to access the market on terms which are generally available;

(b) whether the bank's current funding structure is adequate and viable; whether the primary sources of funding continue to be available, given current market sentiment, and whether they would still be viable if market sentiment was to change;

(c) the maturity profile of the bank's existing funding and the availability of funding from the market to replace maturing funding as the need arises;

(d) whether liquidity problems call into question adequacy of capital;

(e) the bank's credit rating and the likelihood and impact of any potential downgrade;

(f) the availability and terms of liquidity support from group companies, existing funders and central banks;

(2) where the *FSA's* concerns relate to capital:

(a) the availability of capital from the market for banks in general and any specific circumstances of the bank that may impact on its ability to access the market on terms which are generally available;

(b) potential sources of capital and the nature of and terms on which capital may be obtained;

(c) the success of any recent attempts by the bank to raise capital on the open market;

(d) the willingness of existing significant institutional investors to provide or assist in a strategic solution to the bank;

(3) where the *FSA's* concerns relate to the adequacy of non-financial resources or suitability, the *FSA* will take into account the factors identified in *COND* 2.4 and 2.5, and other *Handbook* provisions referred to in those chapters. In assessing Condition 2, the circumstances of each case are likely to be different, but the *FSA* will be concerned to establish the likelihood of achieving a return to full compliance with the *threshold conditions*, and the timescale in which a return to compliance will be effected;

(4) the prospects of the bank securing a material and relevant transaction with a third party, for example a sale of the bank itself or of all or part of its business. In relation to any transaction, the *FSA* will have regard to factors including but not limited to:

(a) the status of any ongoing negotiations;

(b) the level of interest expressed and the credibility of potential counterparties;

(c) practical constraints related to the bank itself, for example, management engagement, availability of relevant information and severability of infrastructure;

(d) the sources, availability and firmness of financing for any transaction;

(e) the need for shareholder approval, merger clearances or other consents;

(f) the suitability of the counterparty and the stability of the relevant parties following completion of any transaction.

3.1.9 G When assessing whether the bank will return to compliance with *threshold condition* 4 (adequate resources) the *FSA* will also assess the reasons behind the likely or actual failure of compliance. Serious failures of management, systems or internal controls may in themselves call into question the adequacy of the bank's non-financial resources (*threshold condition* 4) or suitability (*threshold condition* 5). Therefore, in assessing whether a bank is reasonably likely to satisfy the *threshold conditions* in the future, the *FSA* will be concerned to ensure that any such failures have been adequately addressed.