

Proposed extended asset retention requirement for firms under the British Steel Pension Scheme consumer redress scheme

Consultation Paper

CP22/22**

November 2022

How to respond

We are asking for comments on this Consultation Paper (CP) by **23 December 2022**.

You can send them to us using the form on our [website](#)

Or in writing to:

Prudential & Redress Policy
Financial Conduct Authority
12 Endeavour Square
London E20 1JN

Email:

cp22-22@fca.org.uk



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1 Summary

- 1.1** In April 2022, we published Policy Statement [PS22/4](#) which introduced a temporary asset retention requirement for certain firms under the proposed British Steel Pension Scheme (BSPS) consumer redress scheme. We introduced the temporary rules on an emergency basis, without consultation, in light of the risk that firms may seek to dispose of assets ahead of the proposed consumer redress scheme being introduced.
- 1.2** The rules require certain personal adviser firms that gave BSPS members advice on transferring out to retain assets to help ensure they have sufficient funds to meet redress liabilities if they provided unsuitable advice to scheme members. The temporary rules apply from 27 April 2022 to 31 January 2023.
- 1.3** The temporary rules followed our [consultation](#) (CP22/6) published on 31 March 2022 on a proposed consumer redress scheme for BSPS members who received advice to transfer out of the scheme between 26 May 2016 and 29 March 2018.
- 1.4** In PS22/4 we explained that, if we decided to implement a consumer redress scheme, we might consult on extending the asset retention measures until firms had resolved all cases under the scheme and paid redress.
- 1.5** Following our consultation CP22/6, we have now [made the rules](#) (PS22/14) that implement a consumer redress scheme ('the scheme') under s.404 of the Financial Services and Markets Act 2000 (FSMA). These rules apply to firms that advised former members of the BSPS to transfer out. The scheme will start on 28 February 2023. Accordingly, we have now decided to consult on a proposed extension of the temporary asset retention requirement. This extension would continue to apply until firms have resolved all relevant BSPS cases that are subject to the rules of the BSPS consumer redress scheme ('scheme cases') and other relevant cases outside the scheme ('non-scheme cases'). Non-scheme cases include specific complaints that have been referred to the Financial Ombudsman Service and cases involving a past business review, which would have otherwise been in the scheme.
- 1.6** We expect the proposed extension to the asset retention measures to reduce the number of relevant firms that become insolvent. It is also likely to increase the availability of assets of firms that do become insolvent. This makes it more likely that these firms will be able to meet their liabilities or, if necessary, have an orderly wind down, so reducing some of the impact on both consumers and Financial Services Compensation Scheme (FSCS) levy payers.

Why we are consulting

- 1.7** We introduced the temporary asset retention rules in April because we were concerned that firms which might be subject to the proposed consumer redress scheme might try to avoid their liabilities to BSPS members by disposing of their assets.

- 1.8** We have now made the final rules for the BSPS consumer redress scheme. So we are consulting on extending the temporary asset retention rules. This extension would ensure that the rules continue to apply until firms have resolved all the scheme cases that they are responsible for, plus other relevant cases outside the scheme. Other relevant cases include complaints that have been referred to the Financial Ombudsman Service and cases that are subject to a past business review that would have otherwise been in the scheme. This will help ensure good outcomes for customers of firms that were advised to transfer out of BSPS between 26 May 2016 and 29 March 2018, and fair outcomes for the wider industry.
- 1.9** This proposed intervention will help reinforce our goal – as set out in our three-year Strategy – to ensure that firms conduct their businesses in a proper and responsible way. It will also help to ensure that, when things go wrong, consumers have access to appropriate redress and that more consumers secure redress from the firm that owes them money, rather than the liabilities falling to the FSCS.

Who this applies to

- 1.10** These proposals affect:
- Firms that provided BSPS members with advice to transfer during the period of 26 May 2016 to 29 March 2018 and their insurers. This will include firms that are subject to the BSPS consumer redress scheme, plus firms whose BSPS complaints have been referred to the Financial Ombudsman Service or are subject to a past business review (which are not in scope of the consumer redress scheme, but otherwise would have been).
- 1.11** Other groups may also be interested in this Consultation Paper, including:
- industry groups and trade bodies
 - individual consumers, particularly BSPS members who transferred their pension, and their representatives
 - consumer groups

What we want to change

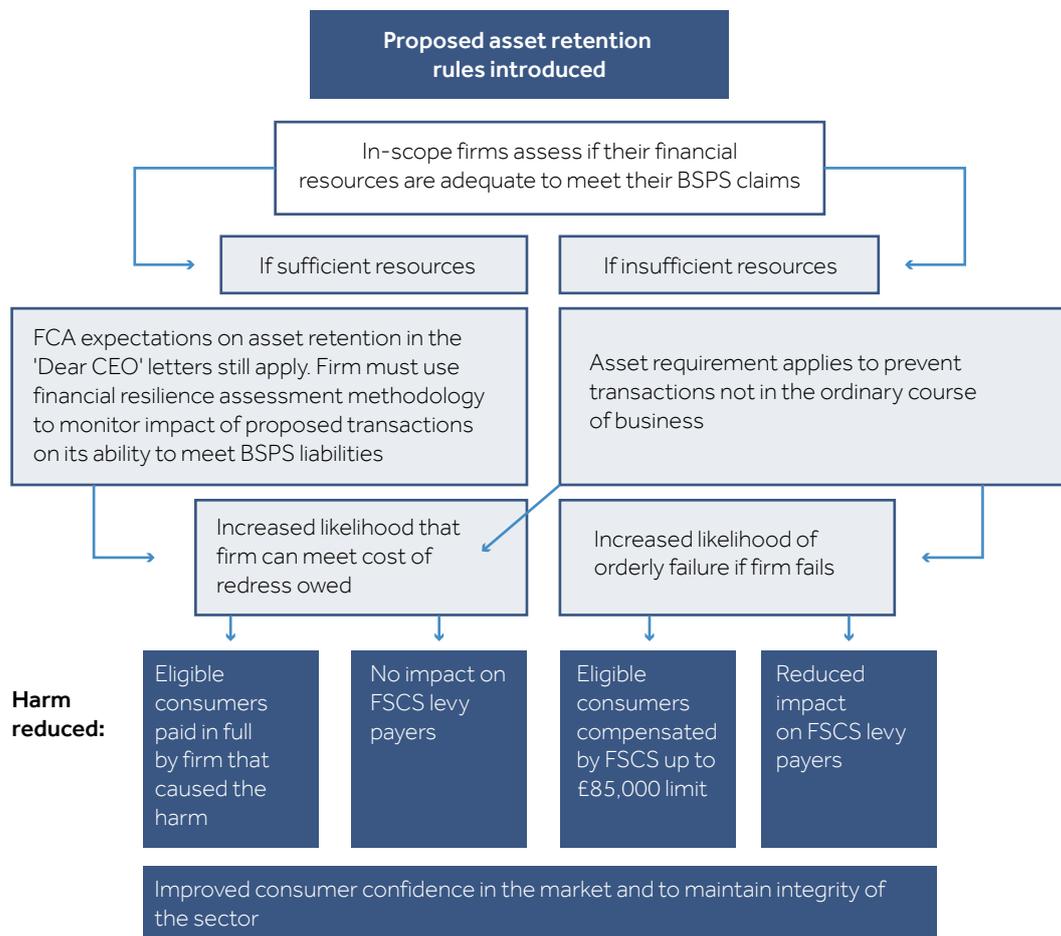
- 1.12** Our proposed rules extend the asset retention rules beyond the time when the current temporary rules expire on 31 January 2023. The proposed extended rules will apply from 11:59pm on 31 January 2023 and require certain firms who provided transfer advice to BSPS members during the relevant period to preserve their ability to pay their customers' relevant claims. The rules will apply to a firm until it has resolved all scheme cases that it is responsible for under the rules of the BSPS consumer redress scheme, or other relevant cases.

- 1.13** The proposed asset retention rules would require in-scope firms to assess whether they are likely to meet their contingent BSPS redress liabilities on an ongoing basis. They would have to complete a prescribed Financial Resilience Assessment (FRA), and firms that have not already done so will have to report the outcome to us. The proposed FRA methodology is based on a combination of firm-specific inputs and assumptions based on market-wide data.
- 1.14** Where the FRA suggests that a firm may not have sufficient assets to meet estimated contingent BSPS liabilities, the asset restriction rules would prevent it from undertaking transactions that are not 'in the ordinary course of business'. Firms under the asset restriction rules would be able to continue carrying on their ordinary business but be unable to carry out other transactions that might reduce the assets that they have to meet potential redress liabilities.
- 1.15** Firms that assess and have notified us that they have sufficient assets to meet estimated contingent BSPS liabilities would not be affected by the proposed extended asset restriction rules, or associated rules about notifications or consent for transactions, unless their circumstances change.

Outcomes we are seeking

- 1.16** We want to increase the likelihood that firms hold sufficient resources to enable them to meet the cost of BSPS redress due to their customers. This will help ensure that the firms that create BSPS liabilities meet the cost of those liabilities, rather than those liabilities falling to the FSCS and industry levy payers that were not responsible for the harm caused. Additionally, where the firm responsible meets the cost of redress itself, the customer who suffered financial loss because of the firm's conduct will be paid in full and not just up to the current compensation limit of £85,000 for FSCS claims.
- 1.17** We know that some firms will still become insolvent despite our proposed intervention. We want to increase the likelihood of an orderly failure for these firms and to increase the available resources for the firm's creditors – potentially including the FSCS. This may increase the amount that the FSCS is able to recover from the estate of the failed firm, assuming the FSCS declares it in default, and will help to reduce the costs to FSCS levy payers.
- 1.18** Ultimately this proposed intervention helps to protect consumers and to maintain the integrity of the financial services sector.
- 1.19** The following causal chain illustrates the effect of our proposed rules in reducing harm.

Figure 1: Causal chain setting out how we expect the proposed extended asset retention rules to reduce harm



Measuring success

1.20 Through these proposed rules, we want to ensure that firms pay their redress liabilities as far as possible and do not seek to avoid responsibility. We would expect a lower proportion of BSPS firms to fail as a result of these proposed rules. We will monitor the number of BSPS firms that fail following the commencement of the BSPS consumer redress scheme. We will also monitor notifications to ensure that the number of firms reporting that the asset restriction applies is in line with our expectations.

Next steps

1.21 The consultation will close on 23 December 2022. If we decide to implement rules to extend the asset retention requirement, we expect to publish a policy statement in January 2023, before the temporary asset retention rules expire on 31 January 2023.

1.22 The temporary rules (ie as confirmed in PS22/4) continue to apply while we consult on the proposed extension of those rules. Accordingly, firms should continue to comply with those rules up to 31 January 2023.

2 The wider context

2.1 In this chapter, we set out the wider context of the proposals. We describe why we are concerned that firms may seek to avoid their BSPS redress liabilities, the relevance to our objectives and the wider effects of the consultation, including equality and diversity implications.

The harm we are trying to reduce

- 2.2** We have introduced a consumer redress scheme for consumers who were advised to transfer out of BSPS. We have done this because we are concerned about the widespread harm caused to a large number of consumers due to advice given by financial advisors between May 2016 and March 2018. We consider there may have been a widespread failure to provide suitable advice to BSPS members between these dates. We have found that around 8,100 consumers were advised by around 350 firms to transfer their BSPS pension benefits over this period, and we estimate around 46% of these transactions represented bad advice. As a result of this, around 1,100 in-scope consumers are expected to be owed redress through the consumer redress scheme of around £49 million.
- 2.3** We want to ensure that the firms that are responsible for causing this harm meet the cost of putting it right by paying redress to their customers where it is due. This will help avoid liabilities falling to the FSCS, where the costs are met by levy paying firms which were not responsible for the harm, and would ultimately be likely to lead to higher costs for consumers.
- 2.4** This is why we introduced the temporary asset retention rules in April 2022. We introduced these temporary rules on an emergency basis, without consultation, given the risk that firms may seek to dispose of assets before we introduced the proposed consumer redress scheme. That intervention followed 'Dear CEO' letters we published in December 2021 and March 2022 where we explained that we expected to consult on a consumer redress scheme and set out our expectations on adequate financial resources and the retention of assets.
- 2.5** Now that we have confirmed the rules for the consumer redress scheme, we propose to extend the temporary asset retention rules that we introduced in April 2022. This will help reduce the real risk that firms under the BSPS consumer redress scheme take steps to dispose of their assets to avoid having to meet the cost of any redress due to their customers.
- 2.6** We have seen evidence of this risk materialising in the past, with firms trying to protect their interests at the expense of their customers and the wider industry. For example, in February 2022, we announced that we had stopped AJH Financial Services Limited, a firm that advised on transfers from BSPS, disposing of assets without our permission. We were concerned that this firm did not have sufficient financial resources to pay potential redress claims and appeared to have paid out dividends rather than retaining assets. Additionally, in August 2021, an insolvency practitioner appointed to handle the potential liquidation of A.W. Dallas Financial Services Limited confirmed that the firm was to be placed into creditors' voluntary liquidation after we

had opposed the potential sale of the business to a firm with common directors. The insolvency practitioner explained that the FCA did not consider it appropriate for the directors to continue to benefit from customers that were potentially mis-advised on BSPS by A.W. Dallas, and whose redress liabilities would likely be left to the FSCS.

2.7 This intervention is also about the increasing costs falling to the FSCS. Total levy costs have increased from between £200 and £300 million between 2011/12 and 2014/15 to £717 million in 2021/22. In particular, the FSCS has seen increasing numbers of claims for pension products, which last year represented 86% of compensation costs for investment claims. These increasing costs have fallen to FSCS levy payers to meet. This has resulted in dissatisfaction that other businesses – that may not be linked to the activities creating these FSCS costs – are required to meet costs due to the misconduct of the firms that have failed. We are currently taking action to bring down the cost of liabilities falling to the FSCS and to ensure that, wherever possible, the firm that causes redress liabilities meets their cost.

2.8 The National Audit Office (NAO) noted the prevalence of claims liabilities falling to the FSCS in its March 2022 [Investigation into the British Steel Pension Scheme](#). The NAO noted '22% of complaints made to the Financial Ombudsman have so far been passed to the Financial Services Compensation Scheme (FSCS) due to firms being unable to pay compensation and entering liquidation.' The NAO also noted that some losses were not covered in full by the FSCS due to the FSCS's compensation limit.

How it links to our objectives

Consumer protection

2.9 The BSPS redress scheme will advance our objective to secure an appropriate degree of protection for consumers by helping consumers who received unsuitable advice and suffered harm receive redress. The proposed extended asset retention measures would increase the likelihood that firms can meet their BSPS liabilities and reduce the likelihood of firms failing in a disorderly way. This should reduce the number of consumers who need to make a claim to the FSCS to get redress, where the FSCS's compensation limit (currently £85,000) would apply.

2.10 Reducing the number of claims referred to the FSCS may mean that lower costs are passed down to consumers. By reducing the opportunity for firms to avoid their liabilities by relying on the FSCS to pick up the cost of their misconduct, we expect to improve firm governance and conduct – to the benefit of consumers generally.

Market integrity

2.11 The proposed measures help make sure the financial services market works well through improved financial resilience of firms and reduces the risk that firms who have caused consumer harm seek to avoid their liabilities. Where firms still fail, the measures are intended to reduce the impact on FSCS levy payers by helping to make sure the firms fail in an orderly way.

Wider effects of this consultation

- 2.12** This consultation and the proposed extended asset retention rules directly affect firms that advised their customers to transfer out of BSPS between 26 May 2016 to 29 March 2018. The proposals may also indirectly affect other connected parties, including the affected firms' professional indemnity insurance providers and parties that the affected firm transact with.
- 2.13** We expect the proposals to ultimately have a positive impact on consumers, who may benefit from a higher amount of redress paid by the firm that is responsible for their loss, and FSCS levy payers, who may be required to meet a lower level of compensation costs than would have otherwise been the case.

Equality and diversity considerations

- 2.14** We have considered the equality and diversity issues that may arise from the proposals in this Consultation Paper. Overall, we do not consider that the proposals materially impact any of the groups with protected characteristics under the Equality Act 2010.
- 2.15** We believe our approach will not disadvantage or inadvertently discriminate against any person or group of people on the basis of their protected characteristics. The proposed extended asset retention requirement would help ensure that the BSPS redress scheme will positively affect consumers with the protected characteristics of 'age', 'sex', and 'disability', as well as those in vulnerable circumstances such as consumers with low levels of financial resilience, by increasing the likelihood that those groups receive redress from their advising firm and/or that the firm fails in an orderly way.
- 2.16** We will continue to consider the equality and diversity implications of the proposals during the consultation period and will revisit them when making the final rules. In the meantime, we welcome your input to this consultation on this.

3 The temporary asset retention rules

- 3.1** In this chapter we revisit the temporary asset retention rules which we introduced in April 2022. Full details of the temporary rules were set out in PS22/4.

Emergency rules

- 3.2** We introduced the temporary asset retention rules using general rule-making powers in section 137A of FSMA. We considered that an emergency rule change, without consultation, was necessary to manage the highly likely risk that some firms would take steps to dissipate assets if the rules were preceded by a consultation. Under section 138L of FSMA, we are not required to publish a public consultation if we consider the delay this involves will be prejudicial to the interests of consumers.
- 3.3** We added the rules to the Consumer Redress Schemes sourcebook (CONRED) and they apply from 27 April 2022 to 31 January 2023.

The temporary asset retention measures

- 3.4** The temporary rules applied to firms that provided 'BSPS advice' (ie advice to a consumer to transfer their BSPS pension benefit, which the consumer followed, where suitability requirements applied to the advice given), subject to various exclusions. The advice must have been given during the relevant period which we defined as 26 May 2016 to 29 March 2018 (inclusive of both dates).
- 3.5** Certain exclusions applied. These included firms that provided BSPS advice during the relevant period to fewer than 5 BSPS members, for natural persons, for partnerships involving one or more natural persons and for PRA authorised persons.
- 3.6** In-scope firms were required to complete a basic assessment of the adequacy of their financial resources to assess if they can meet their BSPS claims (the 'Financial Resilience Assessment' or 'FRA'). The FRA is a calculation that considers the firm's regulatory capital, the number of relevant BSPS claims the firm could be liable for, the likelihood of any BSPS advice being unsuitable, and the estimated average liability for BSPS claims (reflecting any professional indemnity insurance in place). Some of these inputs were firm-specific, others prescribed assumptions based on market-wide data.
- 3.7** Firms were required to notify us of the outcome of their assessment by 27 May 2022. Firms were then required to update their FRA at least monthly, and immediately if the terms or availability of their professional indemnity insurance change or there is any other change in circumstances that could materially reduce their ability to meet BSPS claims. If a firm updates its FRA and the previously-notified outcome has changed, it is required to re-notify us.

- 3.8** If a firm assesses that it can meet its BSPS liabilities under the FRA and notifies us accordingly, it will not be affected by the asset restriction rules. This applies on the condition it monitors the impact of transactions on its regulatory capital position and makes sure that its transactions do not cause it to fail the FRA. However, other regulatory obligations and the expectations set out in our December 2021 and March 2022 'Dear CEO' letters on maintaining adequate resources continue to apply.
- 3.9** If a firm has assessed that it cannot meet its BSPS liabilities using the FRA, or assesses that a proposed transaction would cause it to not be able to meet its BSPS liabilities, the firm must consider whether any transaction it wants to carry out is permitted by the asset restriction rules. Until a firm has carried out the assessment, it must also comply with the asset restriction rules
- 3.10** Where they apply, the asset restriction rules prevent a firm from undertaking transactions that are not 'in the ordinary course of business'. We made temporary rules and guidance about what amounts to the 'ordinary course of business'. Where a firm believes that certain higher-risk transactions are 'in the ordinary course of business', it must have notified us in advance or have obtained our prior consent.

Outcome since the temporary asset retention rules were introduced

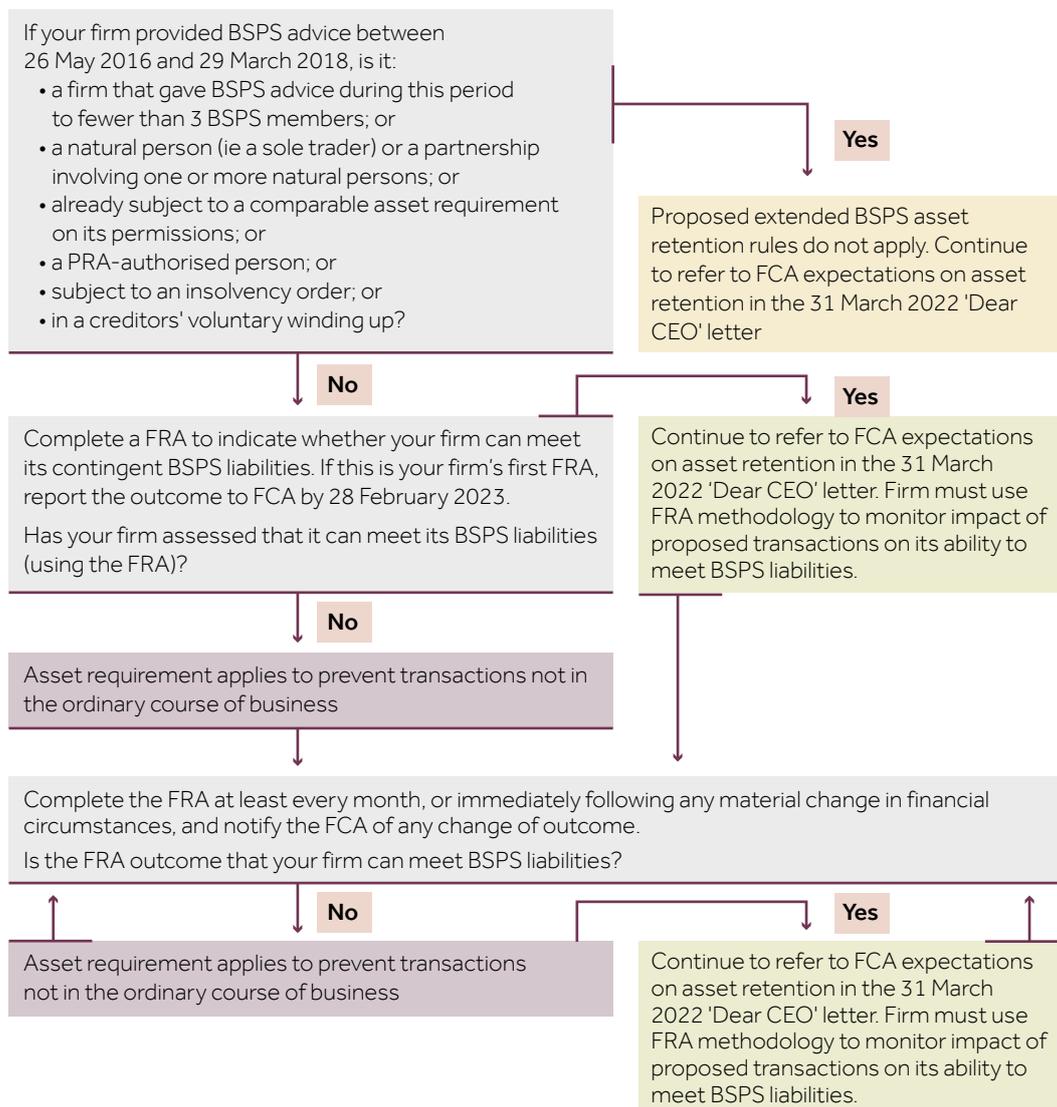
- 3.11** As explained in our [update](#) published in August 2022, the temporary asset retention rules that we introduced in April 2022 applied to 101 in-scope firms which provided pension transfer advice to former BSPS members. Of these 101 firms, 26 firms confirmed that they had assessed that they could not meet their BSPS liabilities based on the outcome of the FRA. Accordingly, the temporary asset restriction rules applied to these 26 firms and they were not permitted to undertake transactions that were not 'in the ordinary course of business'.
- 3.12** Overall, the temporary rules were well received by stakeholders, with firms understanding the reason for the measures we had taken. Wider stakeholders also supported the objective of ensuring that firms that may be liable for BSPS redress must hold sufficient capital to meet those liabilities. Stakeholders considered the impact of the rules on the affected firms and the FCA itself was proportionate.

4 The scope and duration of the proposed extended asset retention rules

4.1 In the next 3 chapters we describe the proposed extended rules that would apply from 11:59pm on 31 January 2023. While the proposed extended asset retention rules will be similar to the current temporary rules, and will have a similar impact on the firms that are subject to the proposed rules, we have made some changes. These changes reflect that we have now confirmed the consumer redress scheme and have also been updated in light of our experience of the operation of the temporary rules. This chapter explains how the proposed asset retention rules work as a whole. Annex 2 provides additional technical information about the changes we propose to make to the text published in PS22/4.

4.2 Figure 2 gives an overview of the proposed extended asset retention rules, summarised in this section.

Figure 2: Application of BSPS asset retention measures



Duration of extended rules

- 4.3** We propose that the asset retention requirement will no longer cease on 31 January 2023, and that the amended rules will come into effect at 11:59pm on 31 January 2023.
- 4.4** The extended rules will apply to an in-scope firm (see next section) until all its BSPS cases (ie complaints or potential complaints) are resolved. A case is resolved when it no longer counts towards 'N' (number of relevant cases) or 'CL' (total confirmed liabilities) in the FRA that is described in the next chapter.
- 4.5** This means that, once a firm has resolved all its BSPS cases that are subject to the consumer redress scheme rules, plus other relevant non-scheme cases (see paragraph 4.7) it will no longer be affected by the proposed extended asset retention rules.

Q1: Do you have any comments on the duration of the proposed extended rules?

In-scope and excluded firms

- 4.6** We propose that the extended rules will continue to apply to firms that provided 'BSPS advice' during the relevant period which we defined as 26 May 2016 to 29 March 2018 (inclusive of both dates). By 'BSPS advice' we mean advice to a consumer to transfer their BSPS pension benefits, which the consumer followed, where suitability requirements applied to the advice given.
- 4.7** The proposed rules would apply to firms that were responsible for advice given during the relevant period for:
- Scheme cases: Instances of BSPS advice that are subject to the rules of the BSPS consumer redress scheme.
 - Non-scheme cases: Instances of BSPS advice that would be in scope of the rules of the BSPS consumer redress scheme if they were not excluded under CONRED 4.2.2R(6) or CONRED 4.2.2R(7). These include certain complaints that have been referred to the Financial Ombudsman Service and cases that are subject to a past business review, that would have otherwise been in the scheme.
- 4.8** The temporary rules contained several exclusions for firms we considered less likely to contribute to the harm we are seeking to avoid, or because the rules were considered inappropriate due to the firm's legal structure or status. We propose to apply the same exclusions for the extended rules, but with a change to the threshold for the number of cases the firm advised on. The updated exclusions are:
- Firms that provided BSPS transfer advice to fewer than 3 consumers. Such firms are exposed to relatively lower levels of potential liabilities and have been excluded to ensure the intervention remains proportionate. This is a change from the previous exclusion for firms which provided advice to fewer than 5 consumers. We propose to reduce the threshold to ensure that more firms which could give rise to redress liabilities and may seek to dispose of assets are subject to the proposed rules. We consider that it is important that firms that arranged a relatively low number of BSPS transfers (ie 3 or more) should be subject to the proposed extended asset

retention rules because of the potentially high cost of redress that may be due to customers of these firms, which firms will only hold limited resources to meet. The change also ensures that a larger number of firms can prepare for the consumer redress scheme, now that we have confirmed the final rules for the scheme.

- PRA-authorized firms. The FCA is not responsible for the financial resilience of these firms.
- Firms that are natural persons (ie sole traders) or unlimited partnerships involving one or more natural persons. As there is no clear legal division between the personal and business assets of such firms, we do not consider it appropriate to impose an asset restriction on these firms.
- Firms that are subject to an insolvency order. These rules are designed to reduce the risk that firms fail, and to maximise the availability of their assets if they fail, but are not intended to prevent distribution of the assets of firms that do fail.
- Firms subject to a Creditors' Voluntary Liquidation. This is a change from the temporary rules, because of the similarities between that process and other insolvency processes.
- Firms subject to comparable asset retention requirements on their permissions through our direct and individual intervention. Where these requirements already exist, it is not necessary to replicate their effect through legally binding rules.

Example of an excluded firm:

Firm A advised 6 BSPS members in the relevant period. But Firm A only recommended that 2 BSPS members transfer: 4 were advised against transferring. All advice was subject to suitability requirements, and all consumers subsequently transferred.

The firm only provided 2 instances of 'BSPS advice' to BSPS members – the 4 'insistent clients' who transferred against the firm's recommendations do not count as 'BSPS advice'.

Our proposed extended rules would not apply to firms that advised on fewer than 3 BSPS transactions.

Accordingly, firm A would not be in scope of the proposed Financial Resilience Assessment or the asset restriction but should continue to refer to the expectations set out in the FCA's December 2021 and March 2022 'Dear CEO' letters.

Firms with appointed representatives and other similar scenarios

4.9

An appointed representative is a firm or person who carries on regulated activity on behalf of an authorised firm (the 'principal'), who has responsibility for them. Some BSPS advice in the relevant period was provided by appointed representatives.

- 4.10** As the principal accepts responsibility for the activities of the appointed representative, our prudential rules generally require a principal to hold capital against risks involving the activities of the appointed representative (see eg IPRU-INV 13.14.8R). For the purposes of the proposed extended rules, principals would also treat BSPS advice given by their appointed representatives, for which they are responsible, as their own.
- 4.11** Similarly, if a firm has assumed liability for BSPS advice by another person for some other reason (eg where there has been a sale or other transfer of a client book to the firm and the terms of that sale or transfer mean the firm assumes liability for the provision of BSPS advice by the original transferor), the firm would need to comply with the proposed extended rules as if it provided the advice itself.

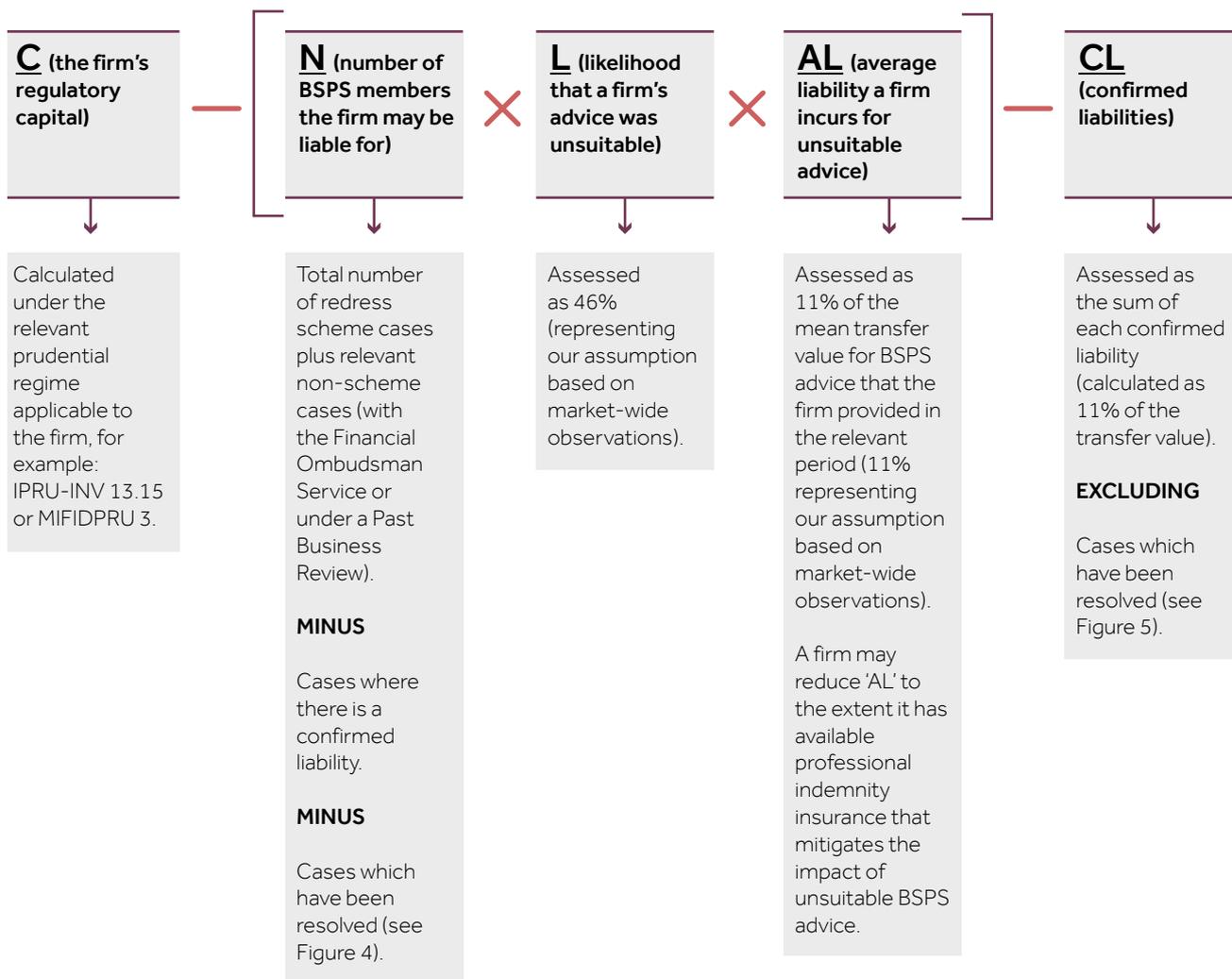
Q2: Do you have any comments on the types of firm that are in scope of the proposed extended rules?

5 The proposed Financial Resilience Assessment

- 5.1** As with the temporary rules, we propose that in-scope firms must complete a basic 'financial resilience assessment' (FRA) of the adequacy of their financial resources to assess if they can meet their BSPS claims. The assessment will also inform our risk-based supervision of these firms so our approach continues to be proportionate and targeted. We are proposing to make several changes to the FRA we set out in PS22/4.
- 5.2** The FRA is a calculation that considers the firm's regulatory capital, the number of relevant BSPS claims the firm could be liable for, the likelihood of any BSPS advice being unsuitable and the estimated average liability for BSPS claims (reflecting any professional indemnity insurance in place). Some of these inputs are firm-specific, others prescribe assumptions based on market-wide data. We also propose to include an additional element for 'confirmed liabilities', which will apply once firms have assessed the suitability of their advice and causation (ie whether the advice caused the transfer and, if it did, whether the transfer caused any loss to the consumer).
- 5.3** In practice, the financial impact of unsuitable BSPS advice on a firm may be higher or lower than the methodology indicates. This could be, for example, because a firm may have given more, or less, unsuitable advice than the methodology assumes, or underlying markets may have performed differently in particular cases. However, the assessment methodology is intended as a simple risk indicator.
- 5.4** The outcome of the assessment decides whether the asset restriction described in Chapter 6 applies to a firm's transactions.
- 5.5** As illustrated at Figure 3, the FRA methodology is as follows:

$$C - (N \times L \times AL) - CL$$

Figure 3: Proposed Financial Resilience Assessment calculation



Calculating 'C' - Regulatory capital

5.6 'C' represents a firm's regulatory capital, calculated under the relevant prudential regime that applies to it. For example, a personal investment firm subject to IPRU-INV 13 must use its capital resources calculated under IPRU-INV 13.15R, and a MIFIDPRU investment firm must use its own funds calculated under MIFIDPRU 3. Firms will already be familiar with these concepts and are already required to regularly report their regulatory capital position to us.

5.7 The proposed extended rules also specify that:

- where a firm has made a provision on its balance sheet for liabilities connected to unsuitable advice on scheme cases (plus other relevant non-scheme cases, see paragraph 4.7) which reduces its regulatory capital, then
- it may disregard the provision when calculating its regulatory capital for the purposes of the proposed extended asset retention rules.

5.8 This addresses the scenario where a firm makes a provision on its balance sheet to cover anticipated losses caused by unsuitable BSPS advice. A provision is presented as a liability on the balance sheet and so reduces the amount of a firm's regulatory capital.

Provisioning in this way could result in 'double counting' of potential BSPS liabilities when a firm performs the FRA. So we are allowing a firm to disregard a provision that it has which meets the relevant conditions. A firm may only disregard a provision to the extent it covers liabilities connected to unsuitable advice on relevant BSPS cases. It cannot disregard other provisions, eg liabilities for unsuitable advice that are not related to BSPS.

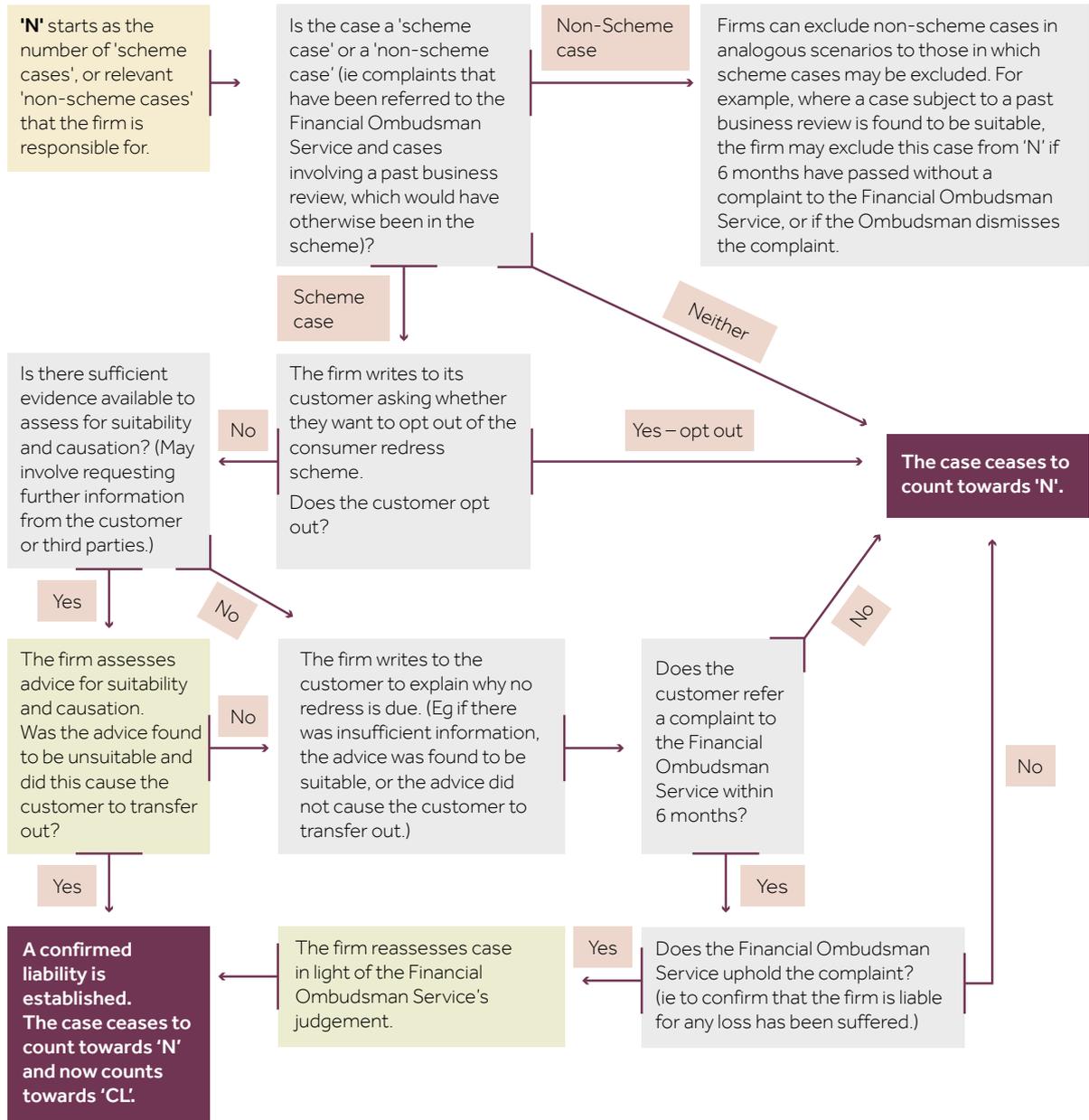
Calculating 'N' - Number of relevant cases

- 5.9** 'N' represents the total number of relevant cases that could give rise to a redress liability. We propose significant changes to this element of the calculation. Now that we have made the redress scheme rules, we propose for this number to be dynamic, so that as firms resolve cases under the redress scheme, 'N' will fall until it eventually reaches zero.
- 5.10** 'N' starts out as the total number of a firm's cases that are subject to the BSPS redress scheme (scheme cases), plus relevant cases which have been excluded from the redress scheme (non-scheme cases). Non-scheme cases are cases excluded either because they are already the subject of a Financial Ombudsman Service complaint, or because there has been a skilled person appointed to carry out a past business review which has resulted in the customer being told they can go to the Financial Ombudsman Service. We consider that it is appropriate to include these non-scheme cases in the FRA because they pose similar risks to scheme cases.
- 5.11** If a firm is unsure whether a case should be included in 'N', for example, because it has not yet assessed whether all its cases are scheme cases or other relevant non-scheme cases, then it must include the case in 'N'.
- 5.12** As cases progress, there will be more certainty about whether there is a potential liability or not. If a firm (or the Financial Ombudsman Service or a skilled person) decides that the advice was unsuitable and caused the customer to transfer, we propose that the case will cease to count towards 'N' but count instead towards its confirmed liabilities ('CL'). We explain how to calculate 'CL' in the next section.
- 5.13** If there is a sufficient degree of certainty that a case will not create a liability (eg because the advice provided was confirmed to be suitable, or the consumer has failed to respond to requests for information that the firm needs), we propose that the case should also cease to count towards 'N' and will fall out of the FRA entirely. However, we do not consider that there will be a sufficient degree of certainty until the Financial Ombudsman Service has finished assessing any complaint, or 6 months have expired without a complaint being referred to it. So we propose that such a case will continue to count towards 'N' until either the Financial Ombudsman Service has finished assessing any complaint by the consumer, or 6 months have expired without a complaint since the firm notified the consumer of its decision to exclude their case from the scheme.
- 5.14** Non-scheme cases are not required to be resolved under the rules of the consumer redress scheme but should still be treated as potential complaints against the firm. We will permit firms to exclude non-scheme cases in analogous scenarios to those in which scheme cases may be excluded. For example, where a case has been excluded from the redress scheme because the firm appointed a skilled person to carry out a past business review and the firm has told the consumer that the advice was suitable,

it may exclude this case from 'N' if 6 months have passed without a complaint to the Financial Ombudsman Service, or if the Ombudsman dismisses the complaint.

5.15 Figure 4 explains how we expect 'N' to change over time, including as scheme cases progress through the different stages of the redress scheme. This illustration is intended to cover the main scenarios that may arise but is not exhaustive; please refer to the draft CONRED 3.2.4AR in Appendix 1 for more detail.

Figure 4: Calculation of 'N'



Calculating 'L' - Likelihood

- 5.16** 'L' represents the likelihood that a firm's advice was unsuitable, which firms must assess at 46%. We have based this assumption on our market-wide observations from our review of sample files, which we explained in Chapter 3 of CP22/6 and also Chapter 3 of PS22/14. We are not proposing any changes to the 'L' element of the calculation.

Calculating 'AL' - Average liability

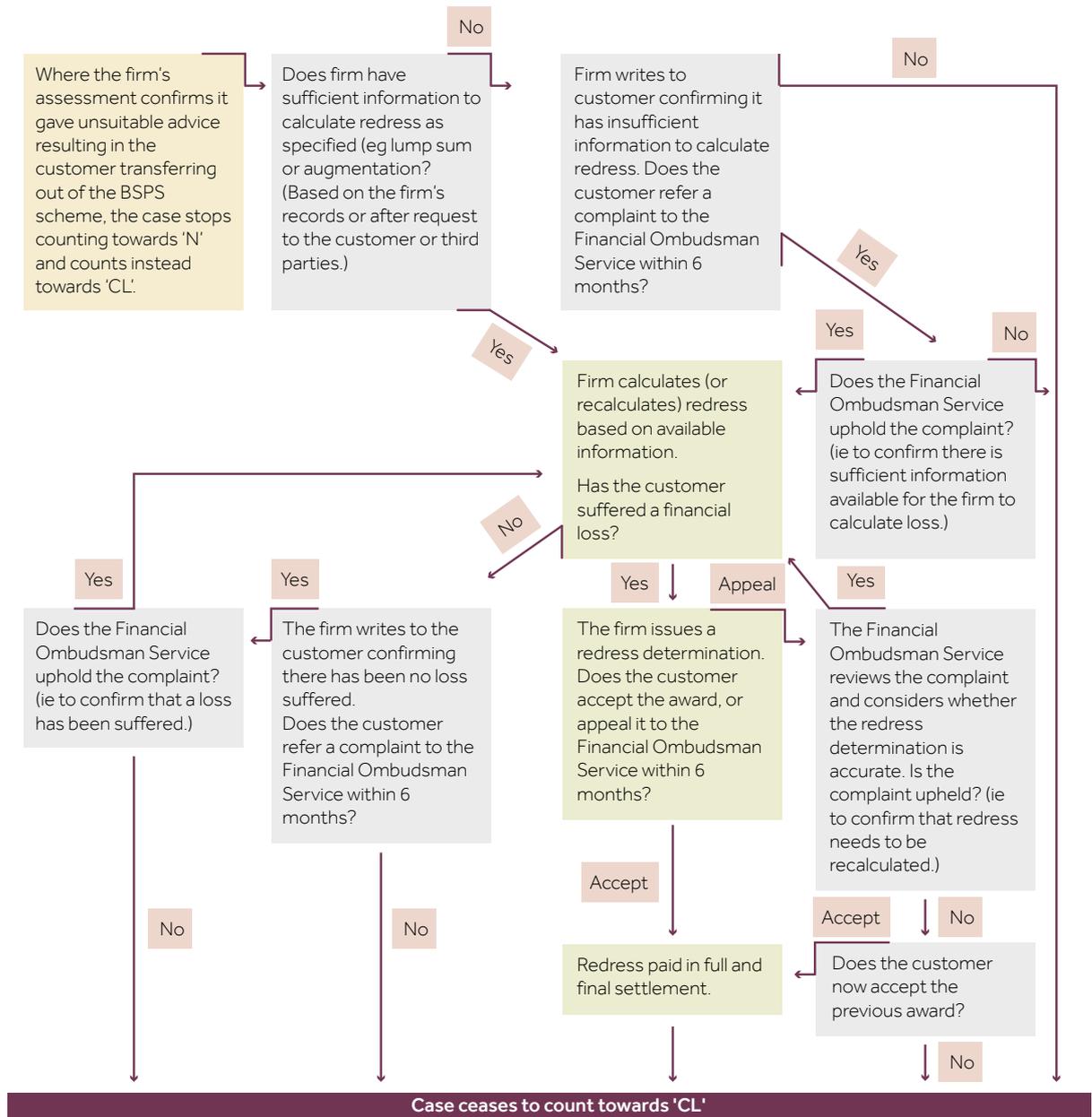
- 5.17** 'AL' represents the average liability that a firm incurs for unsuitable advice. In PS22/4, we required firms to assess this figure as 16% of the mean transfer value for BSPS advice that they provided in the relevant period. We based this assumption on a survey of advice firms, which provided a sample of 132 cases where the firm themselves or the Financial Ombudsman Service had found the advice to be unsuitable. FSCS data at the time implied a larger liability figure for average financial loss (at around 22% of the average transfer value).
- 5.18** We have received reports that, in some cases, changes in market conditions are resulting in lower average figures for redress than we previously saw. We do not have significant amounts of data about the quantum of redress being paid out by firms since the recent changes in market conditions, and we do not expect to have a sufficient level of data to draw conclusions until firms begin calculating and paying out redress under the scheme. We also know there is a possibility that further changes in market conditions may yet result in further material increases or decreases to the figures for average financial loss.
- 5.19** We have therefore considered the most recent data for BSPS in relation to claims decisions made by FSCS. This suggests that the average financial loss has fallen from 22% to approximately 16% of the average transfer value. The number of unsuitable cases that did not result in financial loss has increased from an immaterial level (6%) to 32% of cases. As a result, we are proposing to reduce the assumption for 'AL' from 16% to 11% (based on 16% multiplied by 1-32%) to reflect the falls seen from FSCS data.
- 5.20** We will keep this assumption under review in light of changing market conditions and may consider further changes if appropriate.
- 5.21** A firm may reduce AL to the extent it has available professional indemnity insurance that mitigates the impact of unsuitable BSPS advice, discussed at paragraph 5.29.

Calculating 'CL' - Confirmed liability

- 5.22** 'CL' represents the total confirmed liabilities that a firm has for relevant BSPS advice. Where a firm's assessment confirms that it has provided unsuitable advice which caused the consumer to transfer out of the BSPS scheme, the case will cease to count towards 'N' and count instead towards 'CL' until the case has been resolved (eg in payment of redress to the consumer in full and final settlement).

- 5.23** As with 'AL', we are proposing to allow a firm to reduce 'CL' to the extent it has available professional indemnity insurance that mitigates the impact of unsuitable BSPS advice.
- 5.24** Where there is a confirmed liability, we propose to use the same notional loss figure (11%) as for 'AL' (as per paragraph 5.19). We consider it appropriate to still use the notional loss figure, as opposed to actual loss figures that the firm may have calculated, to keep the calculation simple and supervisable. It is also appropriate because of the risk that that any loss figure the firm proposes may not be accepted by the consumer.
- 5.25** We propose for 'CL' to be a dynamic number in the same way as 'N' is, so that, as firms resolve cases under the redress scheme, 'CL' will eventually reach zero. A case will cease to count towards 'CL' once the firm pays any redress owed to the consumer in full and final settlement.
- 5.26** It is also possible that, while a firm may have provided unsuitable advice which caused the consumer to transfer out, no redress becomes payable (eg because the redress calculation results in a no-loss determination, or the consumer does not respond to requests from the firm). As above, we consider that such cases should cease to count towards 'CL' once either 6 months have expired without a complaint to the Financial Ombudsman Service, or the Financial Ombudsman Service has determined any complaint.
- 5.27** As with 'N', we will allow firms to exclude relevant non-scheme cases in analogous scenarios to those in which scheme cases may be excluded.
- 5.28** Figure 5 explains how we expect 'CL' to change over time, including as firms progress through the different stages of the redress scheme. This illustration is intended to cover the main scenarios that may arise but is not exhaustive; please refer to the draft CONRED 3.2.6AR in Appendix 1 for more detail.

Figure 5: When do cases cease to count towards 'CL'?



Availability of professional indemnity insurance

- 5.29** A firm may have taken out professional indemnity insurance that reduces the financial impact of it having provided unsuitable BSPS advice. As with the temporary rules, we propose to allow firms to reduce AL, and also CL, to reflect this.
- 5.30** If a firm's professional indemnity insurance policy excludes BSPS advice, or excludes liabilities that result from a consumer redress scheme, then a firm cannot rely on it to reduce AL or CL.
- 5.31** Otherwise, the reduction of AL or CL must not exceed the maximum amount of coverage that a firm may reasonably expect from its insurance, considering any exclusions or conditions, such as excesses. If there is more than one exclusion or condition, a firm would need to consider how these interact.

- 5.32** It is possible that the terms of a firm's professional indemnity insurance may change on renewal, or a policy may lapse or be terminated. In these circumstances, a firm would need to immediately recalculate the value of AL and CL and may need to notify us if this affects the conclusion of its FRA.

Example of firm which holds professional indemnity insurance (PII), where the assessment shows it can meet its BSPS liabilities:

Firm B provided 'BSPS advice' to 35 BSPS members.

5 cases have already been assessed by the firm to be suitable, and 6 months have expired since consumers were notified of this without any complaints to the Financial Ombudsman Service. These cases can therefore be disregarded for the purposes of the firm's FRA.

2 of Firm B's 30 remaining cases have already been found to be confirmed liabilities.

The firm's average (mean) transfer value for the 28 clients who do not have confirmed liabilities is £350,000.

The transfer value for the two clients with confirmed liabilities are £200,000 and £300,00 (total £500,000).

The firm has a PII policy that covers BSPS advice, with an excess of £10,000 for each and every claim. There are no other relevant PII exclusions or limits for the firm to consider. The firm has regulatory capital of £250,000. 2 of Firm B's 30 cases have already been found to be confirmed liabilities.

Disregarding PII, the outcome of the Financial Resilience Assessment would be as follows:

$$C - (N \times L \times AL) - CL =$$

$$£250,000 - (28 \times 0.46 \times (£350,000 \times 0.11)) - (£500,000 \times 0.11)$$

$$£250,000 - (28 \times 0.46 \times £38,500) - (£55,000)$$

$$£250,000 - £495,880 - £55,000 = -£300,880$$

However, the firm can reduce AL and CL to reflect the impact of its Professional Indemnity Insurance. The firm can reduce AL from £38,500 to the £10,000 excess, which represents its remaining exposure after accounting for the PII. And the firm can reduce CL by reducing the value of its confirmed liability to £10,000 for each case.

Using the revised figure for AL:

$$C - (N \times L \times AL) - CL =$$

$$£250,000 - (28 \times 0.46 \times £10,000) - (2 \times £10,000) =$$

$$£250,000 - £128,800 - £20,000 = £101,200$$

Firm B passes the FRA. The firm is not generally subject to the asset restriction and does not generally need to ensure that its transactions are in the 'ordinary course of business'. But any transaction that causes the firm to fail the FRA would be subject to the asset restriction.

The firm should use the FRA methodology to monitor the impact of proposed transactions on its ability to meet BSPS liabilities and continue to refer to expectations in the FCA's December 2021 and March 2022 'Dear CEO' letters. The firm must also update the FRA calculations immediately if the terms of its PII coverage change or if the policy lapses or is terminated.

Frequency of assessment and notifications to us

- 5.33** The temporary rules require firms to update the FRA at least monthly, and immediately if the terms or availability of their professional indemnity insurance change or there is any other change in circumstances that could materially reduce their ability to meet BSPS claims.
- 5.34** Under the proposed extended rules, these requirements will remain. If a firm updates its FRA and the outcome previously notified to us has changed, it would need to re-notify us. The firm's compliance officer would need to certify the notification or, if that is not possible, another appropriate senior manager would need to do so.
- 5.35** Firms that arranged 3 or 4 BSPS transactions, and which would therefore be subject to the asset retention rules for the first time in light of the change proposed at paragraph 4.8, would be required to report the outcome of their first FRA to the FCA by 28 February 2023. This is 4 weeks from the proposed commencement of the rules at 11.59pm on 31 January 2023.
- 5.36** The notification requirement will continue until the firm has resolved all its cases under the consumer redress scheme (as explained at paragraph 4.4). Once a firm has resolved all cases relevant to the FRA (ie once N and CL are both zero) it must notify the FCA of this outcome. The firm would then no longer be subject to the proposed asset retention rules.
- 5.37** If a **firm assesses that it can meet its BSPS liabilities** under the FRA and notifies us accordingly, it will not be affected by the proposed extended asset restriction rules (explained in the next chapter), as long as it monitors the impact of transactions on its regulatory capital position and makes sure that its transactions do not cause it to fail the FRA. However, other regulatory obligations and the expectations set out in our March 2022 'Dear CEO' letter on maintaining adequate resources continue to apply. For example, if a firm expects to have higher redress liabilities than the FRA methodology indicates (eg because the firm believes it has given a higher proportion of unsuitable BSPS advice than the 46% assumed by the methodology), we would expect it to make sure it can meet these liabilities.
- 5.38** If a **firm assesses that it cannot meet its BSPS liabilities** using the FRA, or assesses that a proposed transaction would cause it to not be able to meet its BSPS liabilities, the firm must consider whether any transaction it wants to carry out is permitted by the proposed extended asset restriction rules. Until a firm has carried out the assessment, it would need to comply with the extended asset restriction rules.

Example of a firm where assessment shows it cannot meet its BSPS liabilities:

Firm C provided 'BSPS advice' to 15 BSPS members. The firm's average transfer value for the 15 clients was £350,000. The firm's professional indemnity insurance policy excludes cover for BSPS advice. The firm has regulatory capital of £60,000. No liabilities are yet confirmed liabilities or otherwise eligible for exclusion.

The outcome of the firm's Financial Resilience Assessment would be as follows:

$$£60,000 - (15 \times 0.46 \times (£350,000 \times 0.11)) =$$

$$£60,000 - £265,650 = -£205,650$$

Firm C fails the FRA. Firm C is subject to the asset restriction in full and can only dispose of or deal with its assets 'in the ordinary course of business'. Certain transactions must be notified to the FCA in advance or may require prior FCA consent.

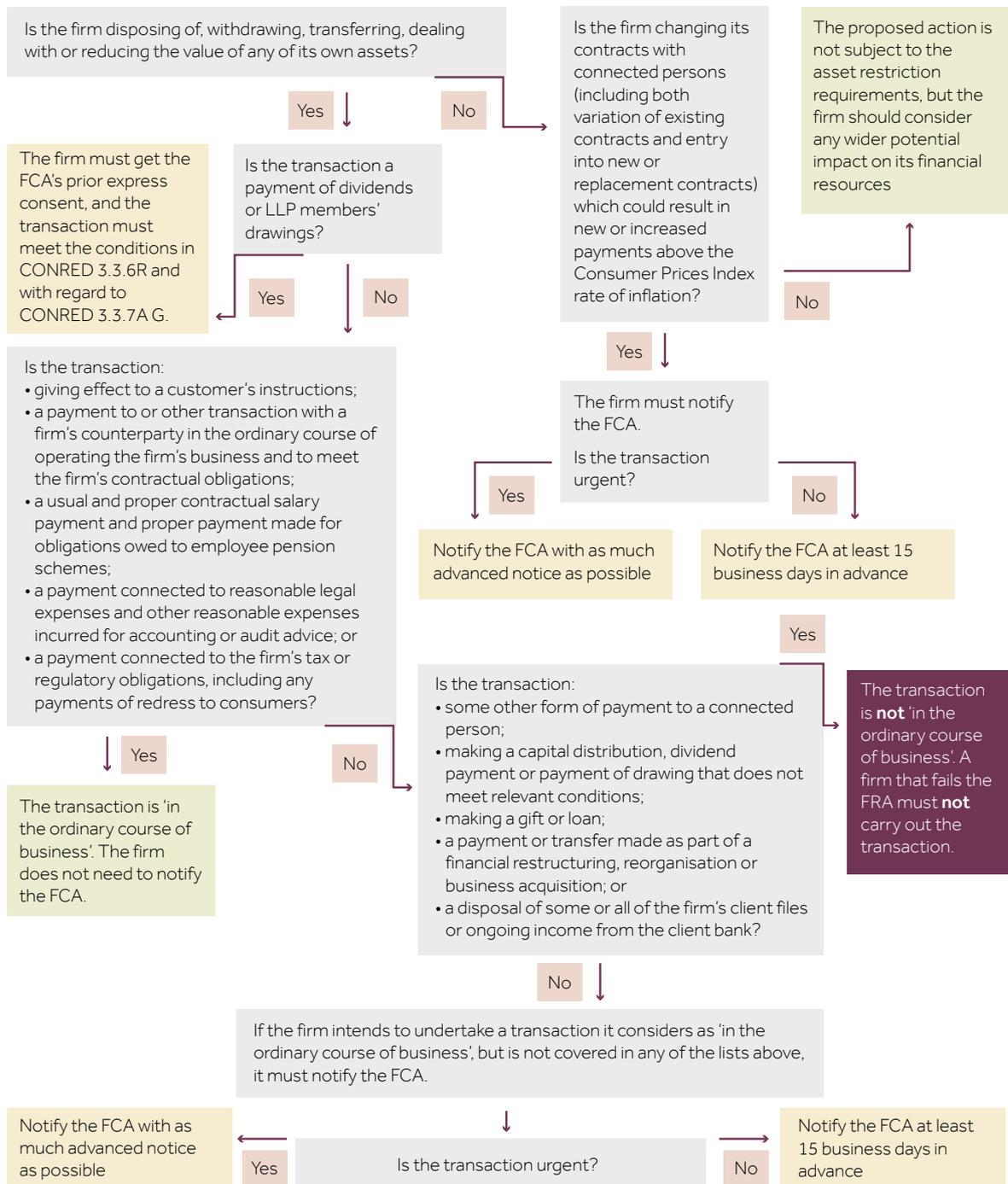
5.39 Annex 3 provides a full worked example of the FRA, illustrating how the outcome of the assessment may change over time, under both the original temporary asset retention rules and the proposed extended asset retention rules.

Q3: Do you have any comments on the proposed Financial Resilience Assessment and the notification process?

6 The proposed extended asset restriction rules

- 6.1** We do not propose to make any changes to the text of the asset restriction rules published in PS22/4, except to insert some additional clarificatory guidance in CONRED 3.3.7AG as explained in Annex 2.
- 6.2** We propose that, where they apply, the extended asset restriction rules will prevent a firm from undertaking transactions that are not 'in the ordinary course of business'.
- 6.3** Where a firm believes that certain higher-risk transactions are 'in the ordinary course of business', it must have notified us in advance or have got our prior consent. Figure 6 shows how the proposed asset restriction rules work.

Figure 6: Proposed Extended Asset Restriction Rules – transactions in the ‘ordinary course of business’



Transactions in the ordinary course of business

6.4 As with the temporary rules, the proposed extended rules would mean that firms may treat the following transactions as occurring in the ordinary course of business:

- transactions giving effect to instructions from customers
- payments to or other transactions with a firm's counterparties in the ordinary course of operating the firm's business and to meet the firm's contractual obligations

- usual and proper contractual salary payments and proper payments made for obligations owed to employee pension schemes
- payments connected to reasonable legal expenses and other reasonable expenses incurred for getting accounting or audit advice
- payments connected to the firm's tax or regulatory obligations, including any payments of redress to consumers

6.5 This would mean that a firm may carry out any of these transactions, whatever the outcome of its FRA.

6.6 This proposed list is not comprehensive. If a firm intended to undertake a transaction that it considers is in the ordinary course of business but is not on this list, it would be required to notify us at least 15 business days in advance. If the situation was urgent, the firm must instead give as much advance notice as possible. This is to give us time to consider the proposed transaction.

6.7 In addition, if a firm proposed to enter into new or amended contracts with a connected person (as defined) which may result in new or increased payments above the Consumer Prices Index rate of inflation, the firm would be required to notify us. This is to prevent the firm avoiding the objectives of the asset restriction.

6.8 Notifications would need to be made to BSPSredress@fca.org.uk and must contain the following:

- an explanation of the transaction or contract change
- an explanation of the quantifiable impact on the firm's FRA
- an explanation of why the firm considers that the transaction or contract change occurs in the ordinary course of business
- reference to any comparable historic payments or contract changes which support the firm's view that this occurs in the ordinary course of business
- in the case of a notification on an urgent basis, explanation of the nature of the urgency and why it has not been possible to comply with the normal 15-business day notification requirement

Payment of dividends and LLP members' drawings

6.9 Some firms may use dividends or limited liability partnership (LLP) members' drawings as a way of remunerating natural persons for services to the firm, in a way that is similar to an ordinary salary. As under the temporary rules, we do not intend to prohibit this practice under the extended rules, as long as it happens in the ordinary course of business.

6.10 However, there is a high risk that dividends or LLP members' drawings may be used in other scenarios in a way that disposes of assets. So we propose that we continue to require firms to get our consent before paying out any dividends or LLP members' drawing. Firms would need to provide specified information as part of any application, to show that the transaction is in the ordinary course of business and is otherwise lawful.

6.11 In the extended rules, we propose to introduce guidance which provides further direction about the specified information which firms are required to provide, and expectations when considering the impact of the proposed dividend on threshold conditions.

Transactions not in the ordinary course of business

6.12 We propose that firms must not treat any of the following transactions as occurring in the ordinary course of business:

- payments to any connected person, except where these fall in the list of permitted transactions in paragraph 6.4 or under the 'Payment of dividends and LLP members' drawings' section
- making any capital distributions, dividend payments or payment of drawings, unless permitted under the 'Payment of dividends and LLP members' drawings' section
- making any gift or loan
- any payments or transfers made as part of any financial restructuring, reorganisation or business acquisition
- disposing of some or all of the firm's client files or ongoing income from the client bank

6.13 This would mean that if the proposed extended asset restriction rules apply to a firm, it may not carry out any of these transactions.

Q4: Do you have any comments on the proposed extended asset restriction rules?

Q5: Do you have any general comments about the overall proposals for the extended asset retention rules set out in this consultation paper?

Annex 1

Questions in this paper

- Q1:** Do you have any comments on the duration of the proposed extended rules?
- Q2:** Do you have any comments on the types of firm that are in scope of the proposed extended rules?
- Q3:** Do you have any comments on the proposed Financial Resilience Assessment and the notification process?
- Q4:** Do you have any comments on the proposed extended asset restriction rules?
- Q5:** Do you have any general comments about the overall proposals for the extended asset retention rules set out in this consultation paper?
- Q6:** Do you have any comments on our cost benefit analysis?

Annex 2

Summary of changes since PS22/4

1. In this Annex we provide additional technical information about the changes we propose to make to the Handbook text published in PS22/4. This includes changes that have been described elsewhere in this consultation paper and any further material amendments or clarifications to CONRED 3 that we are proposing.
2. This information is provided as a guide for firms who are already familiar with the main body of proposals under consultation, to help them understand where we are proposing to make changes.
3. References to CONRED provisions relate to the proposed extended rules in Appendix 1.

Main CONRED rule or guidance reference	Purpose of Amendment	Explanation
3.1.4R(3A)	To exclude firms that are subject to a Creditors' Voluntary Liquidation from the scope of the rules	In light of the similarities between a Creditors' Voluntary Liquidation process and processes that come under the definition of an Insolvency Order, we have added firms subject to a Creditors' Voluntary Liquidation to the types of firm that are excluded from the asset retention rules.
3.1.4R(4)	To exclude firms which provided BSPS advice to fewer than 3 individuals	We propose to reduce the threshold for the number of BSPS transactions that an in-scope firm needed to arrange from 5 to 3, to ensure that a greater number of firms are subject to the rules, which may be at risk of seeking to dissipate assets.
3.1.7AR	Clarification for firms that advised one BSPS member on transferring multiple pension benefits	We propose to clarify that such a firm must treat this as one instance of BSPS advice when calculating 'N', and aggregate the values when calculating 'AL'.
3.1.8G and 3.2.7R(8)	Duration of application	We propose that the asset retention rules will no longer cease on 31 January 2023. The rules will apply until all relevant cases are resolved. A case is resolved when it no longer counts towards "N" (number of relevant cases) or "CL" (total confirmed liabilities) in the Financial Resilience Assessment.
3.2	Adjustments to the FRA	We are proposing various adjustments to the FRA, in particular adjustments to the calculation for 'N' and a new element 'CL'. We explain these changes in Chapter 5 of this consultation paper.
3.2.3R (2) and 3.2.4G (3) to (4)	Clarification for treatment of provisions for BSPS liabilities	We are proposing to clarify that where a firm has made a provision for unsuitable BSPS advice on its balance sheet, it may disregard the provision when calculating its regulatory capital, as explained in paragraph 5.7 of this consultation paper.

Main CONRED rule or guidance reference	Purpose of Amendment	Explanation
3.2.7R (1A)	Notification requirements – firms that arranged 3 or 4 transfers	A firm that arranged 3 or 4 BSPS transactions, and which would therefore be subject to the asset retention rules for the first time, would be required to report the outcome of its first FRA to the FCA by 28 February 2023 – 4 weeks from the proposed commencement of the rules from 11:59pm on 31 January 2023.
3.2.7R (7)	Notification requirements – final notification	A firm must promptly notify the FCA once the 'N' and 'CL' elements of the FRA are both zero. The notification must be made to the email address: BSPSredress@fca.org.uk .
3.3.7AG	Explanation regarding consent for payment of dividends and LLP members' drawings	Guidance which provides further direction about the specified information which firms are required to provide, and expectations for consideration of the impact of the proposed dividend on threshold conditions.

Annex 3

Worked example of changes to a Financial Resilience Assessment over time

1. In this Annex we have provided a worked example of the completion of a Financial Resilience Assessment (FRA) and how the outcome could change over time, including under both the temporary asset retention rules and the proposed extended asset retention rules.
2. The example is based on a fictitious firm, 'Firm D', where the following circumstances apply:
 - Firm D provided advice to 10 BPS members during the relevant period, 26 May 2016 to 29 March 2018.
 - The firm's average (mean) transfer value for the 10 clients was £200,000.
 - The firm does not hold any valid professional indemnity insurance that would cover BPS liabilities.

1) May 2022: Initial FRA completed under the temporary asset retention rules

Following publication of PS22/4, in-scope BPS firms were required to submit the outcome of an initial FRA by 27 May 2022.

FRA calculation

Under the temporary asset retention rules, firms are required to perform the following calculation:

$$C - (N \times L \times AL) =$$

Under the temporary rules, L (likelihood) was assessed at 46% and AL (average liability) was assessed at 16% of the mean transfer value of BPS advice that the firm provided.

As at May 2022, Firm D holds regulatory capital of £120,000.

Accordingly, Firm D perform the following calculation:

$$£120,000 - (10 \times 0.46 \times (£200,000 \times 0.16))$$

$$£120,000 - (10 \times 0.46 \times £32,000)$$

$$£120,000 - £147,200 = - £27,200$$

Outcome of FRA calculation

This calculation means that Firm D failed the FRA and was required to notify the FCA of this outcome. Firm D was therefore subject to the asset restriction and could only dispose of or deal with assets in 'the ordinary course of business'. Certain transactions had to be notified to the FCA in advance or might require prior FCA consent.

2) June 2022 to January 2023: Ongoing FRA assessments under the temporary asset retention rules

After notifying the FCA of the outcome of its initial FRA in May 2022, Firm D continued to update its FRA assessment on a monthly basis, as required by the temporary asset retention rules.

However, the outcome of the assessment does not change over the remainder of 2022 and into 2023. Accordingly, the asset restriction continues to apply.

3) January 2023: Introduction of extended asset retention rules

Following consultation, the FCA confirms in January 2023 that the asset retention rules will be extended from 11:59pm on 31 January 2023, so that they continue to apply until firms have resolved all the scheme cases that they are responsible for, plus other relevant cases outside the scheme (non-scheme cases).

Whether the FCA will ultimately proceed to make the extended asset retention rules as consulted on will depend on the outcome of this consultation and will be subject to a decision to be made by the FCA Board at the appropriate time.

4) February 2023: Updated FRA under the new extended asset retention rules

Firm D is required to complete an updated FRA calculation under the new extended asset retention rules.

FRA calculation

The revised calculation is:

$$C - (N \times L \times AL) - CL$$

Under the extended asset retention rules, L (likelihood) is still assessed at 46% but AL (average liability) should now be assessed at 11% of the mean transfer value of BSPS advice that the firm provided.

At this stage, Firm D has not assessed any of the 10 BSPS cases that it is responsible for, so there are no confirmed liabilities which count towards 'CL'.

As at February 2023, Firm D holds regulatory capital of £125,000.

Accordingly, Firm D perform the following calculation:

$$£125,000 - (10 \times 0.46 \times (£200,000 \times 0.11))$$

$$£125,000 - (10 \times 0.46 \times £22,000)$$

$$£125,000 - £101,200 = £23,800$$

Outcome of FRA calculation

Therefore, Firm D passes the FRA. As this is a change to the outcome previously notified to the FCA in May 2022, Firm D must notify the FCA of the outcome of the revised assessment.

This means that the asset restriction that has been in place since May 2022 is lifted. Therefore, Firm D is not generally subject to the asset restriction and does not generally need to ensure that its transactions are in the 'ordinary course of business'. But any transaction that causes the firm to fail the FRA would be subject to the asset restriction.

Firm D should use the FRA methodology to monitor the impact of proposed transactions on its ability to meet BSPS liabilities and continue to refer to expectations in the FCA's December 2021 and March 2022 'Dear CEO' letters.

5) March 2023: Commencement of the BSPS consumer redress scheme

As confirmed in PS22/14, the BSPS consumer redress scheme will commence on 28 February 2023.

Accordingly, in March 2023, Firm D contacts the 10 consumers it provided BSPS advice to during the relevant period, to ask whether they wish to opt out of the consumer redress scheme.

Firm D notes that all 10 cases represent 'scheme cases', and the firm is not responsible for any 'non-scheme cases'.

Firm D starts to assess the 10 cases to confirm whether the advice was suitable in accordance with the rules of the consumer redress scheme.

As required by the extended asset retention rules, Firm D continues to update its FRA assessment on a monthly basis.

6) June 2023: Completion of initial assessments

By June 2023, 1 consumer has chosen to opt out of the consumer redress scheme. Therefore, this case no longer needs to be accounted for in Firm D's FRA.

Firm D has completed its initial assessments of the 9 remaining cases that it is responsible for.

Of the remaining 9 cases, Firm D assesses that in 5 cases the advice was unsuitable and caused the consumer to transfer out, whilst in 4 cases the advice was suitable. The firm writes to the 4 consumers to confirm that their cases are not eligible for redress.

FRA calculation

Accordingly, Firm D updates its FRA assessment. It is now required to account for 5 cases as confirmed liabilities. The 4 cases it has rejected still count towards 'N' as it is not yet clear whether the consumers will appeal the decision to the Financial Ombudsman Service.

Firm D now needs to consider the 5 confirmed liabilities and the 4 other cases separately. The transfer value for the 5 confirmed liabilities is a total of £900,000. The average transfer value for the remaining 4 cases is £215,000.

As at June 2023, Firm D holds regulatory capital of £130,000.

Accordingly, Firm D perform the following calculation:

$$C - (N \times L \times AL) - CL =$$

$$£130,000 - (4 \times 0.46 \times (£215,000 \times 0.11)) - (£900,000 \times 0.11)$$

$$£130,000 - (4 \times 0.46 \times £23,650) - (£99,000)$$

$$£130,000 - £43,516 - £99,000 = -£12,516$$

Outcome of FRA calculation

This calculation means that Firm D fails the FRA. As this is a change to the outcome previously notified to the FCA in February 2023, Firm D must notify the FCA of the outcome of the revised assessment.

Firm D will therefore be subject to the asset restriction and can only dispose of or deal with assets in 'the ordinary course of business'. Certain transactions have to be notified to the FCA in advance or may require prior FCA consent.

7) August 2023: Payment of redress

In August 2023, Firm D calculates the redress that is due to its 5 customers where the advice was found to be unsuitable.

Firm D makes offers of compensation to the 5 customers. All 5 customers accept the redress in full and final settlement. Firm D completes payment to the 5 customers.

FRA calculation

At the end of August, Firm D updates its FRA calculation.

As 5 customers have accepted redress in full and final settlement, the cases are no longer treated as confirmed liabilities and are no longer accounted for in the FRA calculation.

However, as 6 months has not yet passed in relation to the 4 cases it rejected in June 2023 (and the individuals may still make a complaint in relation to those decisions), those cases still count towards 'N'.

As at August 2023, after paying redress due to its customers, Firm D holds regulatory capital of £50,000.

Accordingly, Firm D performs the following calculation:

$$C - (N \times L \times AL) - CL =$$

$$£50,000 - (4 \times 0.46 \times (£215,000 \times 0.11)) - 0$$

$$£50,000 - (4 \times 0.46 \times £23,650)$$

$$£50,000 - £43,516 = £6,484$$

Outcome of FRA calculation

Therefore, Firm D passes the FRA. As this is a change to the outcome previously notified to the FCA in June 2023, Firm D must notify the FCA of the outcome of the revised assessment.

This means that the asset restriction that has been in place since June 2023 is lifted. Therefore, Firm D is not generally subject to the asset restriction and does not generally need to ensure that its transactions are in the 'ordinary course of business'. But any transaction that causes the firm to fail the FRA would be subject to the asset restriction.

Firm D should use the FRA methodology to monitor the impact of proposed transactions on its ability to meet BSPS liabilities and continue to refer to expectations in the FCA's December 2021 and March 2022 'Dear CEO' letters.

8) December 2023: End of 6-month Financial Ombudsman Service appeal window

By December 2023, none of the 4 consumers that Firm D wrote to in June 2023 have appealed the decision.

Accordingly, Firm D can exclude these 4 cases from the FRA assessment.

As there are no outstanding cases which count towards 'N' or 'CL', the firm is no longer subject to the extended asset retention rules.

Firm D notifies the FCA of this position, confirming that it has resolved all cases relevant to the FRA.

Annex 4

Cost benefit analysis

Introduction

1. This Annex sets out our assessment of the costs and benefits of the proposed extension to the asset retention rules.
2. FSMA, as amended by the Financial Services Act 2012, requires us to publish a cost benefit analysis (CBA) of our proposed rules. Specifically, section 138I requires us to publish a CBA of proposed rules, defined as 'an analysis of the costs, together with an analysis of the benefits that will arise if the proposed rules are made'.
3. This analysis presents estimates of the significant impacts of our proposal. We provide monetary values for the impacts where we believe it is reasonably practicable to do so. For others, we provide estimates of outcomes in other dimensions. Our proposals are based on carefully weighing up these multiple dimensions and reaching a judgement about the appropriate level of consumer protection, taking into account all the other impacts we foresee.
4. When we introduced the temporary asset retention rules in April 2022, we used emergency rule making powers, which did not require us to publish a full cost benefit analysis. This analysis sets out the costs and benefits associated to the proposed extension of the temporary rules beyond 31 January 2023.

Background

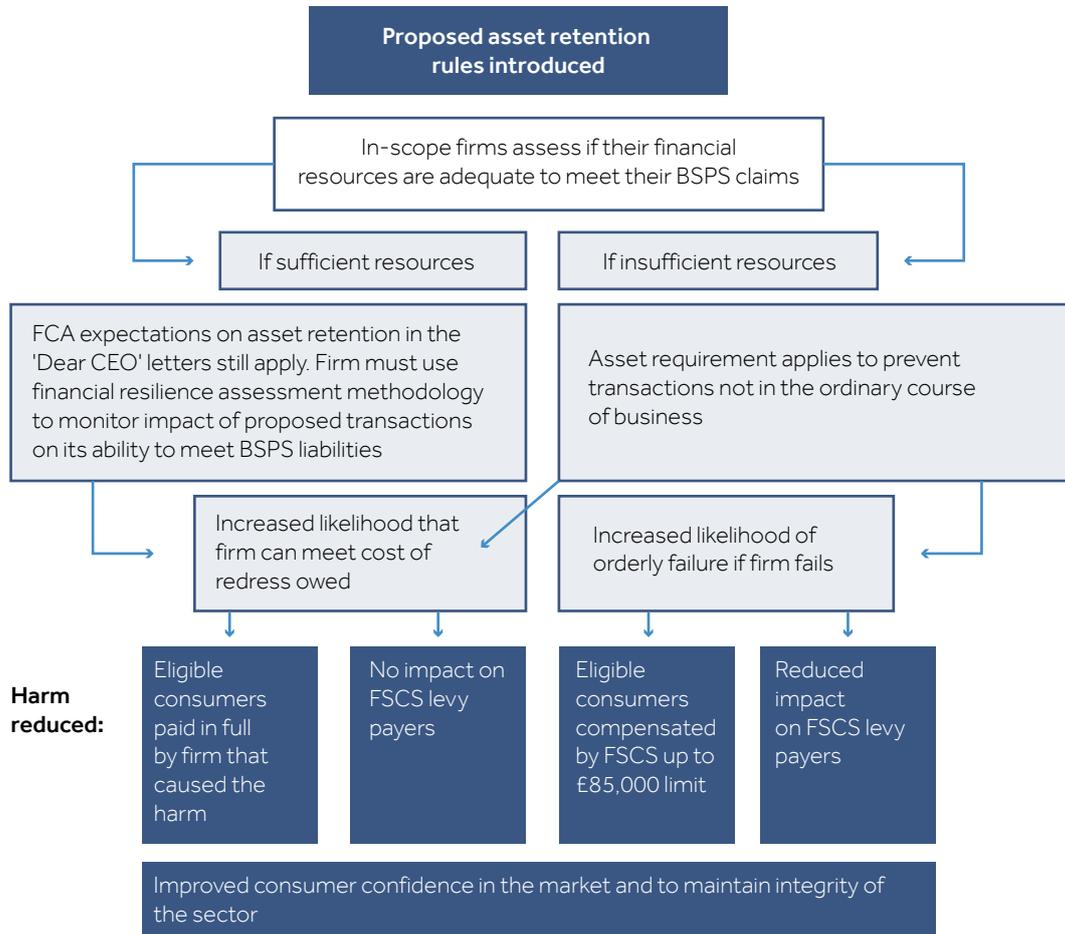
5. In March 2022, we consulted on a proposed consumer redress scheme for certain members of BSPS who received advice to transfer out of the scheme between 26 May 2016 and 29 March 2018. Following this, we introduced the temporary asset retention rules in April 2022 to prevent firms that may be subject to the consumer redress scheme from dissipating assets to avoid the cost of redress liabilities that may arise if the consumer redress scheme was introduced.
6. Now that it has been confirmed that the consumer redress scheme will commence on 28 February 2023, we consider it appropriate to consult on a proposed extension to the temporary asset retention rules, so that the rules continue to apply until firms that are subject to the consumer redress scheme (along with firms that are responsible for cases that have been referred to the Financial Ombudsman Service or are subject to a past business review and are outside the scope of the consumer redress scheme) resolve all of the potential complaints that they are responsible for. This will ensure that we continue to mitigate the risk that firms that gave potentially negligent advice in relation to BSPS seek to avoid the cost of redress liabilities.

Problem and rationale for intervention

- 7.** As explained at paragraph 2.5 of our consultation paper, we consider there is a risk that firms could seek to dissipate assets to avoid meeting the cost of redress that they may be liable for under the consumer redress scheme.
- 8.** Examples of actions that firms may seek to take include:

 - taking assets out of the business and transferring them to related entities
 - payment of excessive dividends to directors
 - gifts or loans to related entities
 - payments or transfers made as part of a financial restructuring, reorganisation or business acquisition
 - disposal of the firm's client files or ongoing income from the client bank
- 9.** The consequence of such actions could be that the firm has insufficient funds to meet the cost of redress due to its customers. This could mean that customers are not paid redress – in full or at all – by the firm that caused the harm that they have suffered. Whilst the FSCS may be able to step in and declare the firm 'in default', it would only be able to pay compensation up to the relevant compensation limit (£85,000 for firms declared in default since 1 April 2019) and those costs will ultimately be met by 'innocent' firms which contribute to the FSCS levy. Those levy paying firms may then pass the cost on to their customers.
- 10.** Accordingly, through this intervention, we want to increase the likelihood that firms that are responsible for BSPS redress liabilities meet the cost of those liabilities, avoiding the costs falling to other firms unconnected from the original advice through the FSCS levy. In some cases, firms may still fail notwithstanding this proposed intervention. However, we expect that the intervention will decrease the risk of a disorderly winding up of the firm and may help to increase the funds available to the firm's creditors, potentially including the FSCS. Ultimately this will help to improve consumer confidence in the markets and maintain the integrity of the financial system.
- 11.** Our proposed rules will apply from 11:59pm on 31 January 2023 and will require certain firms (as explained at paragraphs 4.6 to 4.8 of the consultation paper), which advised on BSPS transfers during the period 26 May 2016 to 29 March 2018, to complete a Financial Resilience Assessment (FRA) to provide an indication of whether they are likely to meet the contingent BSPS redress liabilities on an ongoing basis. Certain exclusions apply to ensure that the intervention is proportionate and focuses on the firms that are at greater risk of giving rise to the risk we are seeking to mitigate. Where the FRA suggests that a firm may not have sufficient assets to meet estimated contingent BSPS liabilities, the asset restriction rules prevent it from undertaking transactions that are not 'in the ordinary course of business'.
- 12.** Figure 7 illustrates how the proposed extended asset retention rules will reduce harms identified.

Figure 7: Causal chain setting out how we expect the extended asset retention rules to reduce harm



Estimation approach

13. Our cost and benefit estimates are derived from our modelling of the outcomes of the proposed FRA process which estimates the liabilities which firms may accrue under the consumer redress scheme and compares this with the estimated capital they have available to meet those contingent liabilities. Our approach is to estimate the incremental costs and benefits arising from the intervention, by comparing outcomes under the:

- **Counterfactual:** In the absence of the proposed intervention, there would be asset dissipation, and capital of firms who fail the FRA would be diluted. Under our base case we assume capital dilution would be the mid-point between actual reported capital and the regulatory minimum. Under the alternative 'full dissipation' scenario, we assume that capital for all firms who fail the FRA would be diluted to the regulatory minimum. We have modelled these two scenarios because of the uncertainty about the extent to which firms would seek to dissipate assets.
- **Intervention:** For firms who fail the FRA, no capital dilution is permitted, and capital is retained at the current reported level.

14. In estimating the costs and benefits of the proposed intervention, we have applied the following assumptions:

- 46% of BSPS advice given over the relevant period was unsuitable. This is based on our market-wide observations from our review of sample files, which was explained in Chapter 3 of PS22/14. This is consistent with the suitability rate accounted for in the CBA included in PS22/14.
- The average financial loss suffered by consumers who are owed BSPS redress represents 16% of their BSPS transfer value. As explained at paragraph 5.19, this is based on the most recent data provided by the FSCS in relation to claims decisions made by FSCS and is consistent with how average loss was accounted for in the CBA included in PS22/14.
- Where a case is unsuitable, 32% of calculations show that no financial loss has been suffered. As explained at paragraph 5.19, this is based on the most recent data provided by the FSCS in relation to claims decisions made by FSCS and is consistent with how no-loss cases were accounted for in the CBA included in PS22/14.
- Due to the uncertainty about the availability of professional indemnity insurance (PII), no PII has been accounted for. This is consistent with how PII was accounted for in the CBA included in PS22/14.
- As explained at paragraph 22, our base case scenario assumes that, without the asset retention rules, firms would dissipate some available assets from their business. This has been calculated based on the mid-point between the full available capital and the regulatory minimum requirement. Our full dissipation scenario assumes that firms would dissipate all available assets, except for their regulatory minimum requirement.
- We have assumed that claims processed by the FSCS will cost £1,450 per claim (an FSCS management cost).

15. When calculating the cost to firms in relation to completing FRA calculations and reporting the outcome to the FCA, we have assumed:

- All 139 in-scope firms would be required to complete a monthly FRA calculation for a period of 12-months. We would expect most firms to have resolved their BSPS cases within that period so would no longer incur costs. We have assumed that the monthly assessment will take a compliance officer (or equivalent) 1 hour to complete the assessment, at an estimated hourly rate of £50. Therefore, the total cost is estimated to be £600 per firm.
- All 37 firms that are expected to fail the FRA (ie indicating that they are not in a position to meet the contingent BSPS liabilities), and 38 of the firms that were not subject to the temporary asset retention rules, will be required to notify the FCA of the outcome of the FRA assessment 1 time (in reality, not all firms would be required to submit a notification, whilst some firms would need to submit more than 1). We have estimated that each notification will involve a compliance officer (or equivalent) spending 5 hours to prepare the submission, at an estimated hourly rate of £50, and a senior manager taking 1 hour to approve the submission, at an estimated hourly rate of £100. Therefore, the total cost per firms is estimated to be £350.

Data

16. The model we have used to calculate the costs and benefits of the proposed intervention is consistent with the model used to calculate the costs and benefits of the consumer redress scheme, including use of common underlying data and common assumptions. At paragraph 21 of Annex 1 of PS22/14, we set out the data sources we have used when modelling the costs and benefits.

Population of impacted firms

17. We are aware of around 350 firms which advised consumers to transfer out of BSPS (and where the transfer was effected) between 26 May 2016 and 29 March 2018 and are in-scope of the consumer redress scheme. Our cost benefit analysis included in our policy statement confirming the final rules for the scheme PS22/14 stated that we estimate that the population of adviser firms was responsible for arranging BSPS transfers to around 8,100 consumers. Around 1,100 of these consumers may be entitled to redress of around £49 million under the consumer redress scheme. In addition, our proposed asset retention rules will apply to firms which are responsible for BSPS cases that are being reviewed by the Financial Ombudsman Service, or are subject to past business reviews, which are outside the scope of the consumer redress scheme.
18. As explained at paragraph 4.8 of our consultation paper, we propose to exclude certain firms from the asset retention rules, to ensure that the intervention remains proportionate and targets appropriate firms. These exclusions include firms that provided BSPS transfer advice to fewer than 3 consumers, PRA-authorized firms, firms that are natural persons (or partnerships involving one or more natural persons), firms that are subject to an insolvency order or a Company Voluntary Liquidation and firms that are already subject to an asset requirement. We have estimated that of the around 352 firms that advised on BSPS, around 213 firms will be subject to these proposed exclusions, and that we expect around 139 firms will be subject to the proposed rules.
19. These 139 firms will be required to complete an FRA to indicate whether they are able to meet the cost of the BSPS liabilities that may arise. To calculate the costs and benefits of the intervention we consider the impact of the FRA on expected firm failure. We compare the outcome under the intervention where the asset retention rules are in place relative to the outcome under the counterfactual where the rules are absent, and capital dilution is expected. We estimate that of the 139 firms in-scope:
- 37 firms will fail the FRA even where the rules are in place, owing to insufficient financial resources to meet their contingent BSPS redress liabilities.
 - 52 firms will fail the FRA under the base case (79 firm under the alternative counterfactual scenario) because of insufficient financial resources.
20. The costs and benefits of the intervention are estimated by comparing the outcomes under the intervention where the asset restriction rules are in place relative to the counterfactual where the rules are absent.

Summary of costs and benefits

21. Table 1 summarises the estimated costs of our proposed extended asset retention rules (costs are broadly similar under both the base case scenario and the alternative full dissipation scenario).

Table 1 – Summary of costs

Description of cost	Cost
Cost to in-scope firms of completing monthly Financial Resilience Assessment calculation and reporting outcome to the FCA	£0.1 million
Familiarisation costs associated with affected firms reading the requirements of the rules proposed in this consultation paper and carrying out a legal review of the proposals	£0.2 million
Training costs	£0.1 million
Other costs (including business change or IT costs)	£0.3 million
TOTAL	£0.8 million

Note: Values are rounded to the nearest £100,000.

22. Table 2 summarises the estimated benefits of our proposed extended asset retention rules. Benefits have been calculated under two scenarios:

- **Base case scenario:** Whereby, without the asset retention rules, firms would dissipate some available assets from their business. This has been calculated based on the mid-point between the full available capital and the regulatory minimum requirement.
- **Full dissipation scenario:** Whereby firms would dissipate all available assets, except for their regulatory minimum requirement.

Table 2 – Summary of benefits (Relative to the counterfactual)

Description of benefit	Financial benefit – base case scenario	Financial benefit – full dissipation scenario
Number of additional solvent firms	15	42
Number of additional customers receiving full redress	84	245
Consumer: Increase in the value of consumer redress paid	£1.4 million	£3.8 million
FSCS Savings: Management costs	£0.1 million	£0.4 million
FSCS Savings: Compensation costs	£3.1 million	£8.8 million
FCA: Business as usual costs	£0.0 million	£0.0 million
TOTAL	£4.6 million	£13.0 million

Note: Values are rounded to the nearest £100,000.

23. Accordingly, we estimate that the cost of this intervention to be £0.8 million, compared with estimated benefits of £4.6 million (and potentially as high as £13.0 million, if firms were to seek to dissipate all available assets).

Costs

24. The costs arising from the intervention will include the cost to firms associated with complying with the rules, and FCA's own costs associated to supervising firms subject to the rules. We have estimated that the cost to be incurred by impacted firms will include:
- Cost to in-scope firms of completing monthly Financial Resilience Assessment calculation and reporting outcome to the FCA: We have estimated this cost to be around £0.1 million. See paragraph 14 for detail of the assumptions applied when estimating this cost.
 - Familiarisation and legal review costs: We draw on standardised assumptions to estimate these for all of the estimated 139 firms in scope of our proposal, comprising an estimated 3 large firms, 10 medium-sized firms and 126 small firms. Taking into account the length of this consultation paper and the legal instrument, we estimate these costs to be around £0.2 million.
 - Training: Using our standardised assumptions, we estimate training costs of £0.1 million.
 - Other costs: Including business change and IT costs. Using our standardised assumptions, we estimate these costs to be around £0.3 million.
25. We consider the cost to FCA of overseeing the asset retention process is minimal and represents a 'business-as-usual' supervision cost, so has not been quantified.
26. There may also be additional costs to firms such as an opportunity cost of capital which is retained as a result of the intervention, and the consequences in terms of capital constraints of not having access to it. However, we would already expect firms to ensure that they have sufficient resources to meet redress liabilities. There may also be a reputational cost to firms that are impacted by the proposed asset retention requirement, but we would expect firms to prioritise the payment of redress in any event. These opportunity and reputational costs may be more material for firms which are subject to an asset restriction but where it transpires that their BSPS liabilities are not as significant than as indicated by the standard FRA calculation (although the FRA does allow firms to account for confirmed liabilities once eligibility of a case has been assessed). We are not able to quantify these costs.

Benefits

27. The main benefit of this proposed intervention, which requires firms at risk of failing the FRA to retain capital, is the increased likelihood that these firms will be able to meet their redress liabilities under the proposed consumer redress scheme. Furthermore, even if the asset restriction does not prevent a firm from failing, it may increase the likelihood of an orderly failure of the firm. This will reduce the cost of liabilities which would otherwise fall to the FSCS.

- 28.** We estimate that 37 firms which could otherwise fail, potentially leaving no assets to pay a portion of the liabilities, will retain approximately £4.6 million worth of capital as a result of the proposed asset retention rules which can go towards redress payments (this could be as high as £33.9 million if firms withdrew all available capital from their businesses). This would increase the prospect of an orderly wind down by increasing the amount that can be recovered from the failed firms.
- 29.** As a result of the proposed intervention, we estimate that 15 firms would remain solvent (that may have otherwise failed), meaning approximately 84 consumers will receive redress in full from the firm that caused the harm. Due to the compensation limit cap at FSCS this will mean around £1.4 million more redress is paid out to consumers (or £3.8 million under the full dissipation scenario), and savings to the FSCS compensation levy of around £3.1 million (or £8.8 million under the full dissipation scenario). As FSCS will need to process fewer compensation claims, it will also save approximately £0.1 million in FSCS management expenses (or £0.4 million under the full dissipation scenario).

Conclusion

- 30.** We consider that the main benefits of the intervention are the £3.2 million estimated FSCS cost saving, as a consequence of fewer firms falling to the FSCS resulting in a reduction of the compensation costs and management expenses that would fall to FSCS levy payers, and the £1.4 million benefit to consumers as a result of being paid redress by the firm that is responsible for their BPS advice, and by avoiding redress being capped at FSCS's compensation limit. The total benefits are greater than the estimated £0.8 million cost to firms of familiarising themselves and complying with the proposed rules. Under our 'full dissipation' scenario, the benefit could be as high as £13.0 million.

Q6: Do you have any comments on our cost benefit analysis?

Annex 5

Compatibility statement

Compliance with legal requirements

1. This Annex records the FCA's compliance with a number of legal requirements applicable to the proposals in this consultation, including an explanation of the FCA's reasons for concluding that our proposals in this consultation are compatible with certain requirements under the Financial Services and Markets Act 2000 (FSMA).
2. When consulting on new rules, the FCA is required by section 138I(2)(d) FSMA to include an explanation of why it believes making the proposed rules is (a) compatible with its general duty, under s. 1B(1) FSMA, so far as reasonably possible, to act in a way which is compatible with its strategic objective and advances one or more of its operational objectives, and (b) its general duty under s. 1B(5)(a) FSMA to have regard to the regulatory principles in s. 3B FSMA. The FCA is also required by s. 138K(2) FSMA to state its opinion on whether the proposed rules will have a significantly different impact on mutual societies as opposed to other authorised persons.
3. This Annex also sets out the FCA's view of how the proposed rules are compatible with the duty on the FCA to discharge its general functions (which include rule-making) in a way which promotes effective competition in the interests of consumers (s. 1B(4)). This duty applies in so far as promoting competition is compatible with advancing the FCA's consumer protection and/or integrity objectives.
4. In addition, this Annex explains how we have considered the recommendations made by the Treasury under s. 1JA FSMA about aspects of the economic policy of His Majesty's Government to which we should have regard in connection with our general duties.
5. This Annex includes our assessment of the equality and diversity implications of these proposals.
6. Under the Legislative and Regulatory Reform Act 2006 (LRRRA) the FCA is subject to requirements to have regard to a number of high-level 'Principles' in the exercise of some of our regulatory functions and to have regard to a 'Regulators' Code' when determining general policies and principles and giving general guidance (but not when exercising other legislative functions like making rules). This Annex sets out how we have complied with requirements under the LRRRA.

The FCA's objectives and regulatory principles: Compatibility statement

7. The proposals set out in this consultation are primarily intended to advance the FCA's operational objective of consumer protection. They are also relevant to the FCA's market integrity objective.
8. Our consumer protection objective is to secure an appropriate degree of protection for consumers. In considering this, we are required to have regard to the matters listed in FSMA s.1C(2)(a)-(h). The proposed extended asset retention measures would increase the likelihood that firms can meet their BSPS liabilities and reduce the likelihood of firms failing in a disorderly way. This should reduce the number of consumers who need to make a claim to the FSCS in order to obtain redress, where FSCS's compensation limit (currently £85,000) would apply. Reducing the number of claims referred to the FSCS may mean that lower costs are passed down to consumers. By reducing the opportunity for firms to avoid their liabilities by relying on the FSCS to pick up the cost of their misconduct, we expect to improve firm governance and conduct – to the benefit of consumers generally.
9. We consider these proposals are compatible with the FCA's strategic objective of ensuring that the relevant markets function well through improved financial resilience of firms and by reducing the risk that firms who have caused consumer harm seek to avoid their liabilities. Where firms still fail, the measures are intended to mitigate the impact on FSCS levy payers by helping to make sure they fail in an orderly way. For the purposes of the FCA's strategic objective, "relevant markets" are defined by s. 1F FSMA.
10. In preparing the proposals set out in this consultation, the FCA has had regard to the regulatory principles set out in s. 3B FSMA. This is set out in the following sections.

The need to use our resources in the most efficient and economic way

11. We consider that our proposals will ensure that we use our resources in the most efficient and economic way. In particular, by introducing an asset retention requirement that applies to a population of firms it may avoid the FCA needing to take action against individual firms (eg through a Voluntary Application for Imposition of Requirement or Own Initiative Requirement).

The principle that a burden or restriction should be proportionate to the benefits

12. In Annex 4 we have set out our analysis of the costs and benefits of our proposals for consultation. Overall, we believe that our proposals are a proportionate response to the harm that we have found.

The desirability of sustainable growth in the economy of the United Kingdom in the medium or long term

13. Our proposals support the desirability of sustainable growth in the economy by increasing the prospect that consumers that are due redress in relation to BSPS liabilities are paid the redress by the firm that is responsible for the liability, and without the redress being limited by the compensation limit that is applicable to claims dealt with by the FSCS. This will help maintain consumer confidence in the UK markets.

Furthermore, the proposals aim to reduce calls on the FSCS, which will reduce the costs that will fall to industry levy payers which fund the FSCS.

The general principle that consumers should take responsibility for their decisions

14. We have considered this principle and do not believe our proposals undermine it.

The responsibilities of senior management

15. We have had regard to this principle and do not believe that our proposals undermine it. In particular, relevant senior management will need to ensure that firms comply with our proposed rules having regard to their responsibilities under the Senior Managers and Certification Regime. In addition, an individual approved to perform the compliance oversight function for the firm or, if that is not possible, an individual approved to perform another appropriate senior management function within the firm, may be required to approve notifications required under the proposed rules.

The desirability of recognising differences in the nature of, and objectives of, businesses carried on by different persons including mutual societies and other kinds of business organisation

16. We have had regard to this principle and do not believe that our proposals undermine it.

The desirability of publishing information relating to persons subject to requirements imposed under FSMA, or requiring them to publish information

17. We have had regard to this principle and do not believe that our proposals undermine it.

The principle that we should exercise of our functions as transparently as possible

18. We will continue to engage with stakeholders throughout the consultation process before making final rules. We have had regard to this principle and do not believe that our proposals undermine it.
19. In formulating these proposals, the FCA has had regard to the importance of taking action intended to minimise the extent to which it is possible for a business carried on (i) by an authorised person or a recognised investment exchange; or (ii) in contravention of the general prohibition, to be used for a purpose connected with financial crime (as required by s. 1B(5)(b) FSMA). We do not consider this relevant in relation to our proposals.

Expected effect on mutual societies

20. The FCA does not expect the proposals in this paper to have a significantly different impact on mutual societies than other authorised persons subject to our proposals or present them with any more or less of a burden than other authorised persons subject to our proposals.

Compatibility with the duty to promote effective competition in the interests of consumers

21. In preparing the proposals as set out in this consultation, we have had regard to the FCA's duty to promote effective competition in the interests of consumers.
22. In recent years, increasing claims against failed firms have focused attention on the compensation framework within which FSCS operates and have led to increasing dissatisfaction amongst industry levy payers that fund the compensation costs. Once costs have fallen to FSCS it means that the 'polluter' is no longer paying for the harm they have caused.
23. Excessive FSCS compensation liabilities are a burden on firms – and therefore an extra cost to consumers who are likely to ultimately be required to meet these costs. They are also potentially a barrier to competition by, for example, discouraging new entrants with innovative product offerings from entering the market.
24. We want to ensure that the FSCS framework helps to maintain confidence in the financial services markets and encourages consumers to do business with firms, whilst not creating conditions which unduly impact competition or create barriers to entry or exit.
25. We believe that ensuring FSCS is only there as a 'last resort', and that wherever possible redress is paid directly by the 'polluter', will promote effective competition in the interests of consumers.

Equality and diversity

26. We are required under the Equality Act 2010 in exercising our functions to 'have due regard' to the need to eliminate discrimination, harassment, victimisation, and any other conduct prohibited by or under the Act, advance equality of opportunity between persons who share a relevant protected characteristic and those who do not, to and foster good relations between people who share a protected characteristic and those who do not.
27. As part of this, we ensure the equality and diversity implications of any new policy proposals are considered. The outcome of our consideration in relation to these matters in this case is stated in paragraph 2.14 to 2.16 of the Consultation Paper.

Legislative and Regulatory Reform Act 2006 (LRR)

28. We have had regard to the principles in the LRR for the parts of the proposals that consist of general policies, principles or guidance. We consider that our proposals are transparent and proportionate as set out above. We are consulting on a consumer redress scheme having taken into account feedback from stakeholders during pre-consultation engagements. Our proposals would apply in a consistent manner to all firms who gave advice to transfer out of the BPS and is only targeted at the BPS specifically where we have seen widespread harm.

29. We have had regard to the Regulators' Code for the parts of the proposals that consist of general policies, principles or guidance and consider that the proposals are proportionate to the harm suffered by some consumers or risks to our statutory objectives identified.

HM Treasury recommendations about economic policy

30. We have considered the most recent recommendations from HM Treasury under s. 1JA FSMA. Our proposals are consistent with these recommendations as they aim to improve outcomes for consumers who transferred out of the BSPS and reduce the impact of FSCS levies on firms, which supports the government's economic policy objective.

Annex 6

Abbreviations in this document

Abbreviation	Description
AL	The 'average liability' element of the Financial Resilience Assessment calculation
BSPS	British Steel Pension Scheme
C	The 'regulatory capital' element of the Financial Resilience Assessment calculation
CEO	Chief executive officer
CL	The 'confirmed liabilities' element of the Financial Resilience Assessment calculation
CP22/6	'Consumer redress scheme for unsuitable advice to transfer out of the British Steel Pension Scheme' consultation paper, published in March 2022
DB	Defined Benefit
'Dear CEO' letters	Letters sent to firms who gave pension transfer advice to BSPS members dated 22 December 2021 and 31 March 2022
FCA	Financial Conduct Authority
FRA	Financial Resilience Assessment
FSCS	Financial Services Compensation Scheme
FSMA	Financial Services and Markets Act 2000
IPRU-INV	Interim Prudential sourcebook for Investment Businesses
L	The 'liability' element of the Financial Resilience Assessment calculation
LLP	Limited Liability Partnership
LRRA	Legislative and Regulatory Reform Act 2006
MIFIDPRU	Prudential sourcebook for Markets in Financial Instruments Directive Investment Firms
N	The 'number of relevant cases' element of the Financial Resilience Assessment calculation
NAO	National Audit Office

Abbreviation	Description
Non-scheme case	Instances of BSPS advice that would be in scope of the rules of the BSPS consumer redress scheme if not excluded under CONRED 4.2.2R(6) or CONRED 4.2.2R(7).
PII	Professional indemnity insurance
PRA	Prudential Regulation Authority
PS22/4	'Temporary asset retention requirement for certain firms subject to the proposed British Steel Pension Scheme consumer redress scheme' policy statement, published in April 2022
PS22/14	'Consumer redress scheme for unsuitable advice to transfer out of the British Steel Pension Scheme' policy statement, published in November 2022
Scheme case	Instances of BSPS advice that are subject to the rules of the BSPS consumer redress scheme

We make all responses to formal consultation available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure.

Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

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Appendix 1

Draft Handbook text

**BRITISH STEEL PENSION SCHEME (FINANCIAL RESILIENCE) (No 2)
INSTRUMENT 2023**

Powers exercised

- A. The Financial Conduct Authority (“the FCA”) makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 137A (The FCA’s general rules);
 - (2) section 137T (General supplementary powers); and
 - (3) section 139A (Power of the FCA to give guidance).
- B. The rule-making provisions listed above are specified for the purposes of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on [*date*].

Amendments to the Handbook

- D. The Consumer Redress Schemes sourcebook (CONRED) is amended in accordance with the Annex to this instrument.

Notes

- E. In this instrument, the “notes” (indicated by “**Note:**” or “*Editor’s note:*”) are included for the convenience of readers but do not form part of the legislative text.

Citation

- F. This instrument may be cited as the British Steel Pension Scheme (Financial Resilience) (No 2) Instrument 2023.

By order of the Board
[*date*]

Annex

Consumer Redress Schemes sourcebook (CONRED)

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

3 British Steel Pension Scheme Financial Resilience Requirements

3.1 Interpretation and application

Interpretation

3.1.1 R In this chapter, the following definitions apply:

- (1) ‘asset restriction’ means the restriction in *CONRED* 3.3.3R;
- (2) ‘BSPS’ means the Old British Steel Pension Scheme (known during the relevant period as the British Steel Pension Scheme) that entered a Pension Protection Fund assessment period on 29 March 2018;
- (3) ‘BSPS advice’ means advice in relation to which all of the following conditions are met:
 - (a) the advice was given to a *consumer* during the relevant period;
 - (b) the advice was to transfer the *consumer’s* BSPS pension benefits;
 - (c) the advice was subject to the suitability requirements; and
 - (d) the *consumer* subsequently transferred their BSPS pension benefits;
- (4) ‘BSPS claims’ means potential liability that a *firm* may incur for BSPS advice, determined ~~as the product of $N \times L \times AL$ (as defined in accordance with *CONRED* 3.2.2R)~~ in accordance with *CONRED* 3.2.2R(1);
- (4A) ‘BSPS DBAAT’ means the British Steel Pension Scheme Defined Benefit Advice Assessment Tool in the form of an Excel spreadsheet at *CONRED* 4 Annex 20R;
- (4B) ‘causation question’ is whether the *firm’s* failure to comply with the suitability requirements is the effective cause of the *consumer’s* loss;
- (4C) ‘FCA DBAAT’ means the FCA Defined Benefit Advice Assessment Tool.

[Editor's note: the FCA DBAAT is available at <https://www.fca.org.uk/firms/defined-benefit-pension-transfers>]

- (5) 'financial resilience assessment' has the meaning in *CONRED* 3.2.2R(3);
- (6) 'relevant period' means 26 May 2016 to 29 March 2018 (inclusive of both dates);
- (6A) 'scheme case' is a case that meets the conditions in *CONRED* 4.2.2R, as modified by *CONRED* 4.2.3R;
- (6B) 'non-scheme case' is a case that would be a scheme case if it were not for the condition in:
 - (a) *CONRED* 4.2.2R(6); or
 - (b) *CONRED* 4.2.2R(7);
- (7) 'suitability requirements' are the requirements in *COBS* 9.2.1R(1) and the common law duty in contract or tort to exercise reasonable skill and care in advising the *consumer* on *pension transfers*; and
- (8) 'unsuitable BSPS advice' is BSPS advice that does not comply with the suitability requirements that were in force during the relevant period.

Purpose

- 3.1.2 G The provisions in this chapter are ~~ultimately~~ intended to secure the payment of redress to *consumers* by ensuring that a *firm* does not inappropriately dissipate assets that could otherwise be used to fund redress payments. ~~However, they do not relate directly to a *consumer redress scheme* and are~~ This chapter is not made using the power in section 404 of the Act. However, it is intended to complement the *consumer redress scheme* in *CONRED* 4.

Scope of application

- 3.1.3 R *CONRED* 3 applies to any *firm* (including a *TP firm*) that provided BSPS advice in the relevant period, except in the cases specified in *CONRED* 3.1.4R.
- 3.1.4 R *CONRED* 3 does not apply to any of the following:
- (1) a *PRA-authorised person*;
 - (2) a *firm* that is a natural person or a *partnership* involving one or more natural persons;
 - (3) a *firm* that is subject to an *insolvency order*;

- (3A) a firm that is in a creditors' voluntary winding up under Chapter IV of Part IV of the Insolvency Act 1986;
- (4) a firm that has provided BSPS advice to a total of fewer than 53 members of the BSPS; or
- (5) a firm that is subject to an asset requirement that has comparable effect to CONRED 3.3.
- 3.1.5 G (1) CONRED 3.1.4R disapplies the requirements in CONRED 3 for certain categories of firm where the FCA has concluded that:
- (a) due to the legal structure or status of the firms concerned, the requirements would be inappropriate, disproportionate or unnecessary; or
- (b) the relevant firms pose a lower relative risk of harm in relation to potential BSPS redress payments.
- (2) However, the FCA reiterates the expectations set out in its Dear CEO Letter dated 31 March 2022 for these firms. To ensure that they have adequate financial resources, out-of-scope firms should continue to retain assets so that they can meet costs arising in connection with any BSPS redress. A copy of the FCA's Dear CEO Letter is available here:
<https://www.fca.org.uk/publication/correspondence/british-steel-pension-scheme-consultation-redress-scheme.pdf>
- (3) The FCA reminds SMF managers at out-of-scope firms that they are personally accountable for breach of the conduct rules in COCON. For example, Senior Manager Conduct Rule 2 requires an SMF manager to take reasonable steps to ensure that the business of the firm for which they are responsible complies with the relevant requirements and standards of the regulatory system. SMF managers should take account of the expectations in the FCA's Dear CEO Letter when complying with their regulatory obligations.
- 3.1.6 R For the purposes of this chapter, when determining whether it has provided BSPS advice, a firm must treat both of the following as having been provided by the firm:
- (1) any BSPS advice given by an appointed representative for which the firm has responsibility as principal; and
- (2) any BSPS advice given by another person for which the firm is liable (including any BSPS advice that gives rise to a contingent liability on the part of the firm).
- 3.1.7 G Under CONRED 3.1.6R(2), a firm will be treated as having provided BSPS advice if the firm has assumed liability for potentially unsuitable

advice given by another *person* in relation to transfers of interests in the BSPS. This could arise, for example, where there has been a sale or other transfer of a client book to the *firm* and the terms of that sale or transfer have resulted in the *firm* assuming liability for the provision of BSPS advice by the original transferor.

- 3.1.7A** **R** Where a *firm* has advised one BSPS member on transferring multiple BSPS pension benefits (for example, pension benefits deriving from different periods of service), it must:
- (1) treat this as one instance of BSPS advice when calculating ‘N’ in accordance with CONRED 3.2.4AR; and
 - (2) aggregate the cash equivalent transfer values for that member when calculating ‘AL’ in accordance with CONRED 3.2.5R.

Duration of application

- 3.1.8** **RG** CONRED 3 applies until the end of 31 January 2023. has no end date. However, as a *firm* deals with potential redress cases (normally under CONRED 4), the cases will cease to count towards ‘N’ or ‘CL’ under the Financial Resilience Assessment in CONRED 3.2. Once ‘N’ and ‘CL’ are zero and a *firm* has notified the FCA accordingly, the obligations in CONRED 3 cease to be of any continuing relevance to the *firm*.

3.2 Financial resilience assessment

Purpose

- 3.2.1** **G**
- (1) The purpose of CONRED 3.2 is to require *firms* to undertake a basic assessment of the adequacy of their financial resources to meet potential liability arising from unsuitable BSPS advice, and to facilitate the FCA’s supervision of these *firms*.
 - (2) The outcome of the financial resilience assessment determines whether the asset restriction in CONRED 3.3 applies to transactions undertaken by a *firm*.
 - (3) The assessment methodology outlined below is based on aggregate data that the FCA has collected during its supervision of *firms* that provided BSPS advice and relates to settled claims.
 - (4) The financial impact on a *firm* of having given unsuitable BSPS advice may be higher or lower than this methodology indicates, because (for example) a *firm* may have given more or less unsuitable advice than the methodology assumes or underlying markets may have performed differently in particular cases. However, the methodology is intended to provide the *firm* and the FCA with an estimate of the *firm*’s BSPS redress liabilities and the resulting impact on its financial resilience.

- (5) The *FCA* expects *firms* to have adequate financial resources to be able to provide redress. Further guidance on assessing adequate financial resources is contained in FG20/1. Nothing in this chapter relieves a *firm* of the obligation to have adequate financial resources as required by *Principle 4* and the *threshold conditions*.
- (6) For example, if a *firm* expects to have higher redress liabilities than the methodology in this section indicates (e.g. because the *firm* has reason to believe that it has given unsuitable advice in a higher proportion of instances of BSPS advice than the 46% assumed by the *FCA*'s methodology), the *FCA* would expect the *firm* to ensure that it can meet these liabilities. This would include refraining from undertaking the transactions described in *CONRED 3.3.8R*.

- 3.2.2 R (1) A *firm* must assess its ability to meet BSPS claims for the relevant period using the following methodology:

$$C - (N \times L \times AL) - CL$$

where:

- (a) C is the *firm*'s regulatory capital calculated in accordance with *CONRED 3.2.3R*;
- (b) N is the ~~total number of BSPS members to whom the *firm* gave BSPS advice, less:~~ number of cases calculated in accordance with *CONRED 3.2.4AR*;
- (i) ~~the number of BSPS members to whom the *firm* has paid redress in full and final settlement; and [deleted]~~
- (ii) ~~the number of BSPS members who have made a complaint to the Ombudsman, and the Ombudsman has determined the complaint without making a money award in favour of the BSPS member under *DISP 3.7.1R*; [deleted]~~
- (c) L is the likelihood that the *firm*'s BSPS advice was unsuitable, which a *firm* must estimate at 46%; ~~and~~
- (d) AL is the average liability that a *firm* incurs for unsuitable BSPS advice, which must be calculated in accordance with *CONRED 3.2.5R*; ~~and~~
- (e) CL is the confirmed liabilities that a *firm* has, calculated in accordance with *CONRED 3.2.6AR*.
- (2) Where the result of the calculation in (1):

- (a) is a positive value, the *firm* may conclude for the purposes of this chapter that it is able to meet BSPS claims in full; and
 - (b) is a negative value or is zero, the *firm* must conclude for the purposes of this chapter that it is not able to meet BSPS claims in full.
- (3) For the purposes of this chapter, the result of the calculation in (1) is known as the ‘financial resilience assessment’.

Regulatory capital

- 3.2.3 R (1) A *firm*’s regulatory capital must be calculated in accordance with the prudential requirements applicable to it.
- (2) If a *firm* has made a provision on its balance sheet for liabilities connected to unsuitable advice on scheme cases that has reduced its regulatory capital, it may disregard the provision when calculating its regulatory capital for the purposes of this chapter.
- 3.2.4 G (1) A *personal investment firm*’s regulatory capital is its capital resources calculated in accordance with *IPRU-INV* 13.15.
- (2) A *MIFIDPRU investment firm*’s regulatory capital is its own funds calculated in accordance with *MIFIDPRU* 3.
- (3) *CONRED* 3.2.3R(2) addresses the scenario where a *firm* makes a provision on its balance sheet to cover anticipated losses arising from unsuitable BSPS advice. The *FCA* encourages *firms* to consider making provision for redress liabilities on their balance sheets, in accordance with the relevant accounting standards.
- (4) When making a provision leads to a reduction of a *firm*’s regulatory capital, this could result in ‘double counting’ of potential BSPS liabilities when a *firm* performs the financial resilience assessment. As a result, the *FCA* is allowing a *firm* to disregard a provision that it has made which meets the relevant conditions. A *firm* may only disregard a provision to the extent it covers liabilities connected to unsuitable advice on scheme cases. Other provisions (for example, for liabilities for unsuitable advice that are not related to BSPS) must not be disregarded. A provision may also only be disregarded when it has led to a reduction of a *firm*’s regulatory capital.
- 3.2.4A R (1) N is the total number of scheme cases and non-scheme cases, less any cases falling within (2) or (3).
- (2) A *firm* may exclude the following scheme cases from N:

- (a) a case where the *firm* has sent the *consumer* the redress determination in *CONRED* 4 Annex 3R (Redress determination: confirmation of consumer opt-out) in accordance with the requirements in *CONRED* 4;
- (b) a case where:
- (i) one of the following conditions is met:
- (A) the *firm* has sent the *consumer* the redress determination letter in *CONRED* 4 Annex 6R (Redress determination: further information not provided) in accordance with the requirements in *CONRED* 4;
- (B) the *firm* has sent the *consumer* the redress determination letter in *CONRED* 4 Annex 8R (Redress determination: unsuitable advice, no causation) in accordance with the requirements in *CONRED* 4; or
- (C) the *firm* has sent the *consumer* the redress determination letter in *CONRED* 4 Annex 9R (Redress determination: suitable advice) in accordance with the requirements in *CONRED* 4;
- (ii) 6 months have expired since the date of the letter in (i); and
- (iii) a *complaint* relating to the letter in (i) has not been made to the *Ombudsman*;
- (c) a case where a *complaint* has been made to the *Ombudsman* relating to the letter in 3.2.4AR(2)(b)(i), and the *Ombudsman* has dismissed the complaint; or
- (d) a case where the *firm*, the *Ombudsman* or a *skilled person* has concluded that the advice provided to the *consumer* did not comply with the suitability requirements and has answered ‘yes’ to the causation question in the BSPS DBAAT or FCA DBAAT.
- (3) A *firm* may exclude a non-scheme case in scenarios analogous to those in (2).
- (4) If a *firm* is unsure whether a case falls within any of the exclusions in *CONRED* 3.2.4AR (2) or (3), it must include the case in N.
- 3.2.4B G (1) N is intended to be a dynamic number that reflects the total number of cases that could give rise to a redress liability. As a *firm*

makes progress in resolving cases, we expect this number to fall as cases are either recognised as ‘confirmed liabilities’ (‘CL’) or resolved in a way that confirms there is no liability.

- (2) CONRED 3.2.4AR(2) explains when a *firm* may cease counting a scheme case towards ‘N’. It works by referring to stages of the consumer redress scheme in CONRED 4, and certain letters required to be sent under the scheme.
- (3) Non-scheme cases are cases which are not required to be resolved through the consumer redress scheme, but which pose similar risks. As these cases are not required to be resolved in accordance with the prescriptive rules in CONRED 4, we are permitting a *firm* to exclude non-scheme cases in analogous scenarios to those in CONRED 3.2.4AR(2). For example, where a case has been excluded from the redress scheme because the *firm* appointed a *skilled person* to carry out a past business review and the *firm* has communicated to the *consumer* that the advice was suitable, a *firm* may exclude this case from ‘N’ if 6 months have expired without a complaint to the *Ombudsman*, or if the *Ombudsman* dismisses the complaint.

Average liability for unsuitable BSPS advice

- 3.2.5 R (1) A *firm* must calculate AL as ~~16%~~ 11% of the mean cash equivalent transfer value for BSPS advice (excluding any advice given to BSPS members falling within ~~CONRED 3.2.2R(1)(b)(i) or (ii)~~ CONRED 3.2.4AR (2) or (3)) that the *firm* provided in the relevant period, subject to (2).
- (2) A *firm* may reduce the value of AL to reflect the impact of professional indemnity insurance if both of the following conditions are met:
- (a) the relevant insurance policy does not exclude BSPS advice from the scope of coverage; and
- (b) the relevant insurance policy does not exclude from the scope of coverage any liability that results from a *consumer redress scheme*.
- (3) Any reduction in the value of AL that a *firm* applies under (2) must not exceed the maximum level of coverage in respect of BSPS advice that the *firm* could reasonably expect to rely upon under the policy, taking into account any policy exclusions or conditions.
- (4) Where a *firm* has reduced the value of AL to reflect the impact of professional indemnity insurance, it must immediately recalculate the value of AL and update the outcome of the calculation in CONRED 3.2.2R if:

- (a) there is a subsequent change in the terms of that insurance that affects its scope or coverage; or
- (b) the insurance policy lapses or is otherwise terminated.
- 3.2.6 G (1) The purpose of *CONRED* 3.2.5R(2) is to recognise that a *firm* may hold professional indemnity insurance that covers the risk of unsuitable BSPS advice, which can mitigate the impact on the *firm's* financial resources.
- (2) A *firm* must not apply a reduction in relation to professional indemnity insurance if the conditions in *CONRED* 3.2.5R(2) are not met.
- (3) When considering the impact of professional indemnity insurance on the *firm's* potential liability for BSPS advice, a *firm* must take into account any exclusions or conditions (for example, excesses) under the relevant policy. The *firm* should also consider how these might interact, such as where 2 or more claims may be treated as a single claim for the purposes of the excess or the limit of indemnity.
- (4) If a *firm* has relied upon professional indemnity insurance to cover some of its potential liability for BSPS advice in accordance with *CONRED* 3.2.5R(2), it is possible that the terms of that insurance may subsequently change. Alternatively, the relevant insurance policy may lapse or may be terminated. In such circumstances, the *firm* must immediately recalculate the value of AL under *CONRED* 3.2.5R(1) and update the calculation in *CONRED* 3.2.2R. If the updated calculation indicates that the *firm* is unable to meet all claims for BSPS advice for the purposes of this chapter, the *firm* must immediately notify the *FCA* under *CONRED* 3.2.7R.
- 3.2.6A R (1) CL must be calculated in accordance with this rule.
- (2) A *firm* has a confirmed liability where the *firm*, Ombudsman or skilled person has concluded that the advice provided to a consumer did not comply with the suitability requirements and has answered 'yes' to the causation question in the BSPS DBAAT or FCA DBAAT.
- (3) A *firm* may cease to treat a scheme case as a confirmed liability in the following scenarios:
- (a) the *firm* has paid redress to the consumer in full and final settlement; or
- (b) (i) one of the following applies:
- (A) the *firm* has sent the consumer the redress determination letter in *CONRED* 4 Annex

12R (Redress determination: Redress calculation – information not provided) in accordance with the requirements in CONRED 4;

(B) the firm has calculated the amount of redress owed to the consumer in accordance with CONRED 4.4.2R, decided that no redress is owed, and has sent the consumer the redress determination letter in CONRED 4 Annex 13R (Redress determination: Result of redress calculation) in accordance with the requirements in CONRED 4; or

(C) the firm has sent the consumer the redress determination letter in CONRED 4 Annex 17R (Redress Determination: payment acceptance not provided) in accordance with the requirements in CONRED 4;

(ii) 6 months have expired since the date of the letter in (i); and

(iii) a complaint relating to the letter in (i) has not been made to the Ombudsman; or

(c) a case where a complaint has been made to the Ombudsman relating to the letter in CONRED 3.2.6AR(3)(b)(i), and the Ombudsman has dismissed the complaint.

(4) A firm may cease to treat a non-scheme case as a confirmed liability in scenarios analogous to those in (3).

(5) If a firm is unsure whether a case falls within any of the exclusions in CONRED 3.2.6AR (3) or (4), it must include the case in CL.

(6) A firm must quantify each confirmed liability as 11% of the mean cash equivalent transfer value for that case.

(7) CL is the aggregate amount of all confirmed liabilities.

(8) A firm may reduce the value of CL to reflect the impact of professional indemnity insurance where the conditions in CONRED 3.2.5R(2) to (4) are met (and applying the conditions and obligations in CONRED 3.2.5R(2) to (4) as if references to AL were to CL).

Notification ~~requirement~~ requirements

- 3.2.7 R (1) A *firm* must (save in the circumstances in (1A)) notify the *FCA* of the outcome of the financial resilience assessment in *CONRED* 3.2.2R before the end of 27 May 2022.
- (1A) A *firm* that has only provided BSPS advice to a total of 3 or 4 members of the BSPS must notify the *FCA* of the outcome of the financial resilience assessment in *CONRED* 3.2.2R before the end of 28 February 2023.
- (2) If a *firm* has relied on professional indemnity insurance to reduce the value of its potential liability for BSPS advice in accordance with *CONRED* 3.2.5R(2), the notification in (1) must contain:
- (a) a statement of the value of the reduction that the *firm* has applied in connection with the professional indemnity insurance; and
 - (b) an explanation of why the *firm* has concluded that the potential liability is covered by professional indemnity insurance.
- (3) A *firm* must update its financial resilience assessment referred to in (1) or (1A):
- (a) immediately following any change in the *firm*'s circumstances that could materially reduce its ability to meet BSPS claims; and
 - (b) in any case, at least once a *month*.
- (4) A *firm* must immediately notify the *FCA* if the *firm* has updated its financial resilience assessment and the outcome previously notified to the *FCA* has changed.
- (5) Any notification made under (1), (1A) or (4) must:
- (a) be submitted as follows:
 - (i) where an electronic system has been made available by the *FCA* for the purposes of the notification, the notification must be submitted using that electronic system; and
 - (ii) in any other case, the notification must be submitted by email to the *FCA* at BSPSredress@fca.org.uk; and
 - (b) be approved and signed by an individual approved to perform the *compliance oversight function* for the *firm* or, if that is not possible, by an individual approved to perform

another appropriate *senior management function* within the *firm*.

- (6) For the purposes of (5)(b), a notification is to be treated as signed where any of the following apply:
- (a) it contains an image of a ‘wet ink’ signature applied by the appropriate individual;
 - (b) it contains an electronic signature applied by the appropriate individual; or
 - (c) it contains a typed name applied by, or with the express consent of, the appropriate individual.
- (7) A firm must promptly notify the FCA once ‘N’ and ‘CL’, as calculated under CONRED 3.2.4AR and CONRED 3.2.6AR, are both zero. The notification must be made to the email address BSPSredress@fca.org.uk.
- (8) This rule ceases to apply to a firm once ‘N’ and ‘CL’, as calculated under CONRED 3.2.4AR and CONRED 3.2.6AR, are both zero and the firm has notified under (7).

- 3.2.8 G (1) The notification requirements in CONRED 3.2.7R are intended to facilitate the FCA’s supervision of relevant *firms*.
- (2) While some inputs into the methodology in CONRED 3.2.2R are static assumptions, the FCA expects other inputs (e.g. a *firm*’s calculation of its regulatory capital) to change over time. The FCA therefore requires *firms* to notify it if the outcome of their financial resilience assessment changes - i.e. if a *firm* previously calculated that it was able to meet BPS redress liabilities, but now calculates that it cannot do so or vice versa.
- (3) A *firm* must update the outcome of the calculation under CONRED 3.2.2R immediately following any change in the *firm*’s circumstances that might materially reduce its ability to meet BPS claims. In any case, a *firm* must also ensure that it has updated the outcome of the calculation at least once a *month* to ensure ongoing monitoring of its position.
- (4) A *firm* is not required to notify the FCA if, following an update to its financial resilience assessment, the outcome previously notified to the FCA has not changed. However, *firms* are reminded of their separate obligations under Principle 11 to inform the FCA of anything of which the FCA would reasonably expect notice. Therefore, if a *firm* has already notified the FCA that it does not have sufficient regulatory capital to meet BPS claims under CONRED 3.2.2R but there is a further substantial deterioration in the *firm*’s financial position, the *firm* should update the FCA. The

FCA may also engage with *firms* directly to discuss their financial resilience assessments and their broader financial situation as part of the *FCA*'s ongoing supervision work.

- (5) Each notification submitted under *CONRED* 3.2.7R must be signed by a *person* who holds an appropriate *senior management function* within the *firm*. The *FCA* would generally expect that this would be the individual approved to perform the *compliance oversight function*, but if that is not possible, this may be a holder of a different *senior management function*.

3.3 Asset restriction

Purpose

- 3.3.1 G (1) The purpose of *CONRED* 3.3 (Asset restriction) is to maximise a *firm's* ability to meet redress liabilities to *consumers*, by limiting its ability to dissipate assets before it has assessed and paid any redress it owes.
- (2) The asset restriction is designed only to interfere with a *firm's* ability to transact in its assets to the extent necessary to protect *consumers* who may be owed redress. The asset restriction therefore permits any transaction, as long as a *firm* calculates, using the methodology in *CONRED* 3.2, that it will continue to be able to meet its redress liabilities immediately after the transaction.
- (3) If a *firm* calculates, using the methodology in *CONRED* 3.2, that it will not be able to meet its redress liabilities, then the asset restriction prevents the *firm* from carrying out any transaction unless the transaction is in the ordinary course of business.
- (4) The *FCA* has made *rules* and *guidance* about what the ordinary course of business means. The *FCA* expects that these will generally be sufficient to allow a *firm* to interpret the asset restriction. On occasion, however, a *firm* may feel the need to seek individual *guidance* from the *FCA*. Further information on seeking individual *guidance* is contained in *SUP* 9. Requests for individual *guidance* on the asset restriction may be directed to BSPSredress@fca.org.uk.
- (5) Where a *firm* wishes to make a transaction that is in the ordinary course of business but is not listed in *CONRED* 3.3.5R, the *firm* must first notify the *FCA* in accordance with *CONRED* 3.3.10R.

Responsibilities of SMF managers

- 3.3.2 G The *FCA* reminds *SMF managers* that they are personally accountable for breach of the conduct rules in *COCON*. For example, Senior Manager Conduct Rule 2 requires an *SMF manager* to take reasonable steps to ensure that the business of the *firm* for which they are responsible

complies with the relevant requirements and standards of the *regulatory system*.

The asset restriction

- 3.3.3 R A *firm* must not in any way dispose of, withdraw, transfer, deal with or diminish the value of any of its own assets (whether in the *United Kingdom* or elsewhere), unless:
- (1) the relevant transaction occurs in the ordinary course of business of the *firm*; or
 - (2) the *firm* satisfies all of the following conditions:
 - (a) the *firm* has previously notified the *FCA* under *CONRED* 3.2.7R that it is able to meet claims for unsuitable BSPS advice under its financial resilience assessment under *CONRED* 3.2.2R;
 - (b) since the notification in (a) was submitted, the *firm* has not subsequently notified the *FCA* under *CONRED* 3.2.7R that it is not able to meet claims for unsuitable BSPS advice under its financial resilience assessment under *CONRED* 3.2.2R; and
 - (c) the *firm* has calculated, in accordance with *CONRED* 3.2.2R, that it will continue to be able to meet claims for unsuitable BSPS advice immediately after the relevant transaction.
- 3.3.4 G (1) *CONRED* 3.3.3R contains a restriction (the ‘asset restriction’) that prevents a *firm* from undertaking transactions that could have the effect of dissipating the value of the *firm’s* assets, except to the extent that an exception in *CONRED* 3.3.3R(1) or (2) applies.
- (2) Under *CONRED* 3.3.3R(1), the asset restriction does not apply to a transaction that a *firm* undertakes in the ordinary course of business. *CONRED* 3.3.5R contains a non-exhaustive list of transactions that a *firm* may treat as being undertaken in the ordinary course of business for these purposes. ~~*CONRED* 3.3.6R~~ *CONRED* 3.3.8R contains a list of transactions that a *firm* must not treat as being undertaken in the ordinary course of business.
- (3) Under *CONRED* 3.3.3R(2), the asset restriction does not apply to any other transaction undertaken by a *firm* that:
- (a) has notified the *FCA* that it has calculated (using the methodology in *CONRED* 3.2.2R) that it can meet its BSPS redress liabilities; and
 - (b) has calculated (using the methodology in *CONRED* 3.2.2R) that it will continue to be able to meet its BSPS

redress liabilities immediately after the relevant transaction occurs.

- (4) In summary, the overall effect of the provisions outlined in (1) to (3) is therefore as follows:
- (a) a *firm* that has calculated under *CONRED* 3.2.2R that it has sufficient regulatory capital to meet its BSPS redress liabilities and has notified the *FCA* that this is the case is not subject to the asset restriction at all, provided that the *firm* will continue to hold sufficient regulatory capital after any proposed transaction occurs; and
 - (b) a *firm* that has calculated under *CONRED* 3.2.2R that it does not hold sufficient capital to meet its BSPS redress liabilities is subject to the asset restriction. However, the *firm* may continue to undertake transactions that are in the ordinary course of its business.

Transactions in the ordinary course of business

- 3.3.5 R (1) The following is a non-exhaustive list of transactions that a *firm* may treat as occurring in the ordinary course of business for the purposes of *CONRED* 3.3.3R(1):
- (a) transactions giving effect to instructions initiated by customers;
 - (b) payments to or other transactions with the *firm's* counterparties in the ordinary course of operating the *firm's* business and in satisfaction of the *firm's* contractual obligations;
 - (c) usual and proper contractual salary payments and proper payments made in connection with obligations owed to employee pension schemes;
 - (d) payment of dividends or drawings that have been approved by the *FCA* in accordance with *CONRED* 3.3.6R;
 - (e) payments connected to reasonable legal expenses and other reasonable expenses incurred in relation to obtaining accounting or audit advice; and
 - (f) payments connected to the *firm's* tax or regulatory obligations, including any payments of redress to *consumers*.
- (2) Where a *firm* intends to undertake a transaction that the *firm* considers is in the ordinary course of business, but which is not a

type of transaction listed in (1), the *firm* must notify the *FCA* in advance under *CONRED* 3.3.10R.

Payment of dividends and LLP members' drawings

- 3.3.6 R (1) A *firm* may treat a dividend as being paid in the ordinary course of business for the purposes of *CONRED* 3.3.3R(1) if the *firm* has obtained prior express consent from the *FCA*.
- (2) To obtain the consent in (1), a *firm* must:
- (a) notify the *FCA* by email to BSPSredress@fca.org.uk, including the following information:
- (i) the value of the proposed dividend(s);
 - (ii) the date on which the *firm* intends to pay the proposed dividend(s);
 - (iii) the recipients of the proposed dividend(s);
 - (iv) a clear statement of the quantified effect of the payment of the proposed dividend(s) on the *firm*'s regulatory capital position;
 - (v) a copy of the *firm*'s latest management accounts; and
 - (vi) an express confirmation that the payment of the proposed dividend(s) is lawful under applicable company or partnership law and insolvency law; and
- (b) as part of the notification in (1), demonstrate both of the following to the reasonable satisfaction of the *FCA*:
- (i) the dividend(s) will be paid in connection with services provided for or on behalf of the *firm* by a natural person; and
 - (ii) the timing of the proposed payment and the value of the dividend(s) are consistent with the historical pattern of the payment of dividends for equivalent purposes over the immediately preceding 12 *months*.
- (3) For the purposes of this *rule*, a reference to a 'dividend' includes drawings paid to a member of a *limited liability partnership*.
- 3.3.7 G The purpose of *CONRED* 3.3.6R is to permit a *firm* that is subject to the asset restriction to pay dividends or drawings to individual shareholders or members where those individuals perform services for the *firm* and

have historically been paid through similar dividends or drawings and prior *FCA* consent to the dividends or drawings has been obtained. Any dividends or drawings paid must be consistent in terms of both their value and their timing with previous dividends or drawings paid by the *firm* for that purpose. The *firm* must also confirm to the *FCA* that the payment of the dividend or drawings would be lawful, having regard to any relevant restrictions that may apply in areas such as company law or insolvency law. A *firm* may wish to obtain professional advice to confirm its analysis before giving the required confirmation.

- 3.3.7A G (1) As part of the notification in CONRED 3.3.6R, a firm is required to include a clear statement of the quantified effect of the payment of the proposed dividend(s) on the firm's regulatory capital position. A firm should provide this information by:
- (a) providing financial forecasts which show the expected change in the firm's regulatory capital over time; and
- (b) explaining the impact of proposed dividend payments on these financial forecasts.
- (2) When quantifying a proposed dividend payment, we expect a firm to consider its regulatory obligations under the threshold conditions and the principles. Dividend payments which allow a firm to increase its regulatory capital over time, and which support the firm in passing the financial resilience assessment in CONRED 3.2.2R over a reasonable time horizon, would support compliance with these obligations.

Transactions not in the ordinary course of business

- 3.3.8 R The following transactions must not be regarded as occurring in the ordinary course of business:
- (1) payments to any *connected person*, except to the extent that they fall within a category of transaction listed in *CONRED 3.3.5R*;
- (2) the making of any capital distributions, dividend payments or payment of drawings, except to the extent expressly permitted by the *FCA* under *CONRED 3.3.5R(1)(d)* and *CONRED 3.3.6R*;
- (3) the making of any gift or loan;
- (4) any payments or transfers made as part of any financial restructuring or reorganisation of the *firm's* business (whether share or asset based) or the acquisition by the *firm* of part or all of another business; and
- (5) the disposal to another *person* of some or all of the *firm's* client files or ongoing income from the client bank.

- 3.3.9 G The effect of *CONRED* 3.3.3R is that a *firm* that has not notified the *FCA* that it is able to meet all BSPS claims under its financial resilience assessment under *CONRED* 3.2.2R must not undertake any of the types of transactions listed in *CONRED* 3.3.8R.

Prior notification of other transactions in the ordinary course of business

- 3.3.10 R (1) Except where (2) applies, a *firm* that has not assessed that it is able to meet all BSPS claims under its financial resilience assessment under *CONRED* 3.2.2R must notify the *FCA* at least 15 *business days* in advance of:

- (a) undertaking any transaction that the *firm* considers is in the ordinary course of business, but which is not listed in *CONRED* 3.3.5R; or
- (b) any change to its contracts with *connected persons* (including both variation of existing contracts and entry into new or replacement contracts) which could result in new or increased payments above the de minimis threshold specified in *CONRED* 3.3.12R.

- (2) If a *firm* needs to undertake a transaction that falls within (1)(a) in an urgent situation, the *firm* must still notify the *FCA* in advance by giving as much notice as possible, but the 15-*business day* period in (1) does not apply.

- 3.3.11 G The *FCA* expects that a *firm* would make a notification of the type specified in *CONRED* 3.3.10R(2) only in genuinely urgent cases and where it has not been possible to identify the need for the relevant transaction sufficiently in advance. In such cases, the *firm* must still give the *FCA* as much notice as possible.

- 3.3.12 R (1) The de minimis threshold in *CONRED* 3.3.10R is a percentage amount equal to the latest Consumer Price Index annual rate published by the Office for National Statistics at the time at which the change in contract is proposed to occur.

- (2) In calculating whether the de minimis threshold has been exceeded, a *firm* must aggregate all connected payments.

- 3.3.13 G For the purposes of *CONRED* 3.3.12R(2), payments may be connected because they are made to the same *person*, or because they are made to separate *persons* who are connected by virtue of being *close relatives*, or through an agent-principal relationship or through a relationship of control.

- 3.3.14 R The notification in *CONRED* 3.3.10R must:

- (1) be made to BSPSredress@fca.org.uk; and

- (2) contain the following information:
- (a) an explanation of the transaction or contract change;
 - (b) an explanation of the quantifiable impact on the *firm's* financial resilience assessment under *CONRED 3.2.2R*;
 - (c) an explanation of why the *firm* considers that the transaction or contract change occurs in the ordinary course of business and is therefore permitted;
 - (d) reference to any comparable historic payments or contract changes which support the *firm's* view that this occurs in the ordinary course of business; and
 - (e) in the case of a notification on an urgent basis under *CONRED 3.3.10R(2)*, an explanation of the nature of the urgency and why it has not been possible to comply with the normal 15-*business day* notification requirement in *CONRED 3.3.10R(1)*.

