

# **Temporary asset retention requirement for certain firms subject to the proposed British Steel Pension Scheme consumer redress scheme**

**Policy Statement**

PS22/4

April 2022

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# 1 Summary

- 1.1** We are introducing temporary asset retention rules which apply to certain firms who provided transfer advice to British Steel Pension Scheme (BSPS) members. The rules require firms to retain assets to help ensure they have sufficient funds to meet redress liabilities if they provided unsuitable advice. This will help make sure the firms responsible for redress liabilities meet the cost of those liabilities, rather than the costs falling to other Financial Services Compensation Scheme (FSCS) levy payers, and ultimately being passed on to consumers.
- 1.2** On 22 December 2021, we published a [Dear CEO letter](#) issued to firms who gave pension transfer advice to BSPS members. The letter explained that we expected to consult at the end of March 2022 on a consumer redress scheme and set out our expectations on adequate financial resources and retention of assets.
- 1.3** On 31 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. Many members of BSPS transferred out of it after being given unsuitable advice and have suffered financial loss as a result. We have reviewed files from a sample of the firms who recommended transfers out of BSPS, and our view is that this unsuitable advice was widespread. Our evidence suggests that in 46% of cases we reviewed, the recommendation to transfer was unsuitable. This is significantly higher than we have found in our other reviews of defined benefit (DB) transfer advice.
- 1.4** We intend to publish a policy statement, including (if appropriate) any final rules for the redress scheme, by the autumn or winter of 2022.
- 1.5** Despite the expectations set out in our Dear CEO letter, we continue to have serious concerns that firms which may be subject to the proposed consumer redress scheme may take steps to avoid their liabilities to BSPS members by dissipating their assets.
- 1.6** We have therefore introduced temporary asset retention measures to prevent firms that may be subject to the consumer redress scheme from dissipating their assets to avoid the cost of redress liabilities that may arise if the consumer redress scheme is introduced. The rules confirm the expectations we previously set out in our Dear CEO letter and create a framework to help our supervision of the relevant firms.
- 1.7** The rules do not apply to certain categories of firms, such as firms that provided advice to fewer than 5 BSPS members, or firms that are already subject to comparable measures that prevent asset dissipation. Out-of-scope firms should continue to refer to the expectations in the Dear CEO letter.

## Who this affects

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**1.8** This will affect:

- firms that provided BSPS members with advice to transfer during the period of 26 May 2016 to 29 March 2018 and their insurers

Other groups may also be interested in this Policy Statement, including:

- industry groups/trade bodies
- individual consumers, particularly BSPS members who transferred their pension, and their representatives
- consumer groups

## Our rule making powers

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**1.9** We are using general rule-making powers in section 137A of the Financial Services and Markets Act 2000 (FSMA) to introduce the temporary asset retention measures. We consider that an emergency rule change, without consultation, is necessary to mitigate, in our view, the highly likely risk that some firms will 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.

**1.10** We are satisfied that this test is met in this case, given our serious concerns over some firms dissipating their assets to avoid BSPS liabilities, and the resulting consumer harm. So, we are making rules set out in Appendix 1 in reliance on section 138L. We have, as required, consulted with the Prudential Regulation Authority (PRA).

**1.11** Our rules ensure firms are less likely to fail and more likely to meet their BSPS liabilities, and if they fail, they are more likely to do so in an orderly manner.

**1.12** The emergency rules are intended to increase the likelihood that consumers will receive full compensation for any losses that they may have suffered directly from firms. The rules are also intended to reduce the unpaid redress liabilities from failed firms that fall to FSCS and are picked up by those firms remaining in the market which contribute to FSCS levies.

**1.13** We have limited the scope of our rules by excluding certain categories of firm completely, so that these measures are proportionate and appropriately targeted. Also, where firms are required to complete the 'Financial Resilience Assessment' (FRA), and they confirm they are likely to be able to meet their contingent BSPS redress liabilities, the 'Asset Restriction Rules' will not generally apply. The FRA is explained in more detail in paragraphs 2.8 to 2.26, and the 'Asset Restriction Rules' are explained in paragraphs 2.27 to 2.36.

## How it links to our objectives

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### Consumer protection

- 1.14** The proposed redress scheme will advance our objective to secure an appropriate degree of protection for consumers by making sure consumers who received unsuitable advice and suffered harm receive redress. The asset retention measures increase the likelihood that firms can meet their BSPS liabilities and reduce the likelihood of firms failing in a disorderly way, whether or not the proposed scheme is implemented. This should reduce the number of consumers who have to make a claim to the FSCS in order to obtain redress.
- 1.15** 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

- 1.16** The measures help make sure the market works well through improved financial resilience of firms and reduce the risk that firms who have caused consumer harm 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.

## What we are changing

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- 1.17** We are introducing temporary asset retention requirements for certain firms who provided transfer advice to BSPS members to preserve their ability to pay their customers' claims where appropriate.
- 1.18** The rules require in-scope firms to assess whether they are likely to meet the contingent BSPS redress liabilities on an ongoing basis. They have to complete a prescribed FRA, and report the outcome to us. The FRA methodology is based on a combination of firm-specific inputs and assumptions based on market-wide data.
- 1.19** 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'. Firms subject to the asset restriction rules can continue carrying on their ordinary business but will be unable to carry out other transactions that might reduce the assets that they have to meet potential redress liabilities.
- 1.20** Firms that assess that they have sufficient assets to meet estimated contingent BSPS liabilities and notify us accordingly will not be affected by the asset restriction rules or associated rules about notifications/consent for transactions, unless their circumstances change.

- 1.21** These measures apply from 12.01am on 27 April 2022 and on a temporary basis up to 31 January 2023. If we decide to implement a consumer redress scheme, we may consult on extending these measures until firms have resolved all cases under the scheme and paid redress (including cases referred to the Financial Ombudsman Service).
- 1.22** These rules have been introduced on an emergency basis, without public consultation.

## Outcome we are seeking

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- 1.23** We expect the asset retention measures to reduce the number of firms under the proposed BSPS redress scheme that become insolvent and increase the availability of assets of firms that do become insolvent. This increases the prospect of an orderly wind down and helps mitigate the impact on consumers and FSCS levy payers.

## Equality and diversity considerations

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- 1.24** Overall, 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 asset retention requirements will help ensure that the proposed 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.

## Next steps

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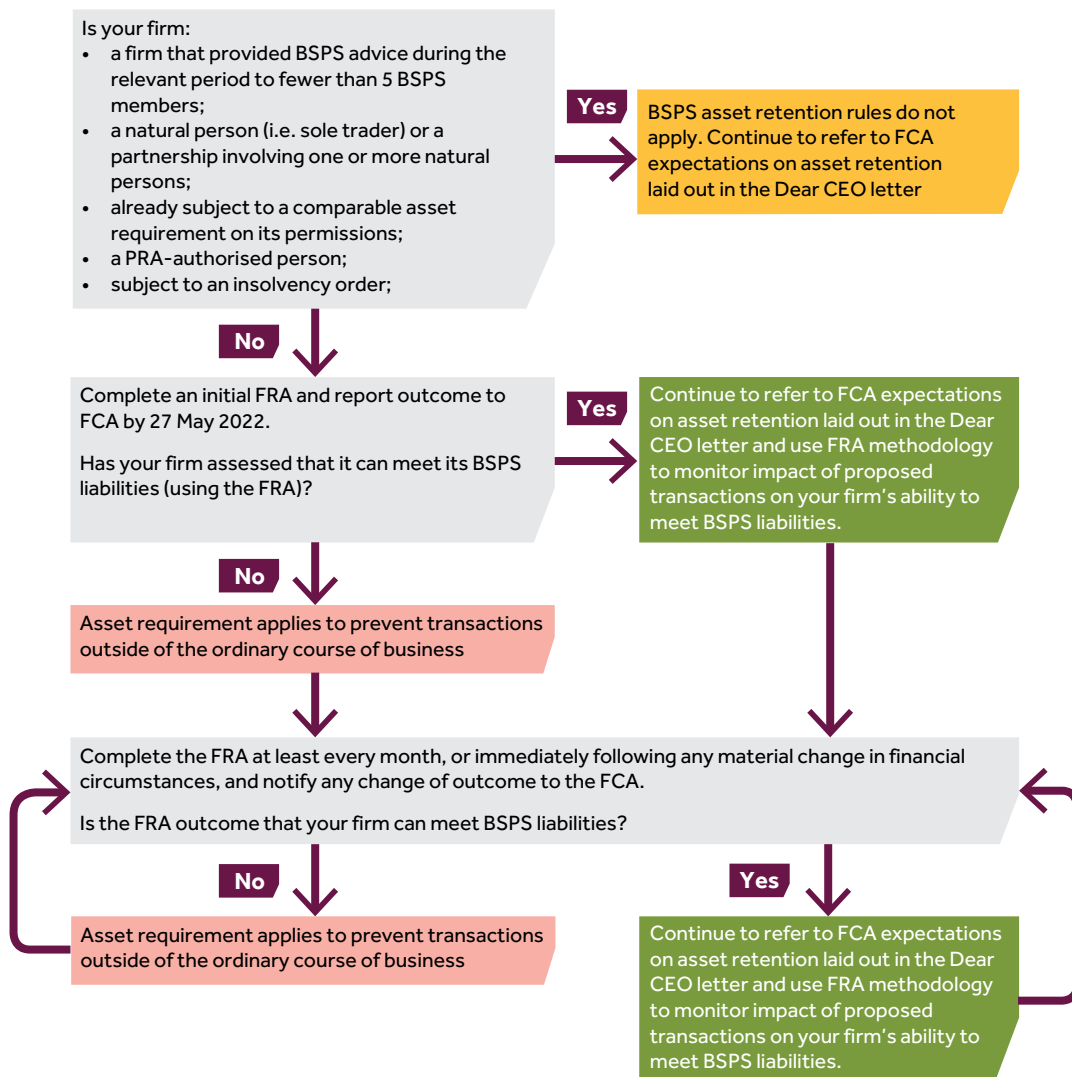
- 1.25** The asset retention measures take effect at 12.01am on 27 April 2022 and will continue until 31 January 2023. This gives firms at least one day to prepare for the introduction of the rules. Our intention is to give firms enough time to digest these rules, while maximising the benefits for consumers and the market by bringing in these rules quickly. If a firm sought to dissipate its assets prior to the rules coming into force, we would look very closely at whether that action was in breach of the core regulatory obligations that apply to firms (as described in our Dear CEO Letter).
- 1.26** Any firm who provided advice to BSPS members resulting in members transferring out of the scheme between 26 May 2016 and 29 March 2018 (or who was responsible for an appointed representative that provided such advice) should take immediate action to decide whether they are in scope of these rules.
- 1.27** In scope firms must notify us of the outcome of their initial assessment by 27 May 2022, certified by the firm's compliance officer or, if that is not possible, another appropriate senior manager. We are making a system available for submission of these notifications, and firms can also send their submission to [BSPSredress@fca.org.uk](mailto:BSPSredress@fca.org.uk).
- 1.28** Firms must update their FRA at least monthly, and immediately following a material change to the firm's financial circumstances. If the assessment outcome changes, the firm must submit an updated attestation.

- 1.29** Where applicable, firms must comply with the 'Asset Restriction Rules' from 12.01am on 27 April 2022.
- 1.30** We will review the asset retention measures to correspond with the conclusion of the BSPS redress scheme consultation later in 2022 and launch a consultation on these measures around the same time, if appropriate.

## 2 The asset retention measures

2.1 We have designed these measures to apply to firms in a proportionate and targeted way. The rules apply 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 define as 26 May 2016 to 29 March 2018 (inclusive of both dates). Figure 1 shows how our asset retention measures apply to firms.

**Figure 1: Application of BSPS asset retention measures to firms that provided 'BSPS advice' between 26 May 2016 and 29 March 2018**





## Excluded firms

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**2.2** We have limited the scope of our rules by excluding certain types of firms where they are less likely to contribute to the consumer harm we are seeking to avoid, or because the rules are inappropriate due to the legal structure or status of the firm.

**2.3** The type of firms excluded are:

- Firms that provided BSPS transfer advice to fewer than 5 consumers. Such firms are exposed to relatively lower levels of potential liabilities and have been excluded to ensure the intervention remains proportionate.
- 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 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.

**2.4** We are reiterating in Handbook guidance that these excluded firms should continue to follow the expectations we set out in our Dear CEO letter dated 31 March 2022 by maintaining adequate resources to meet BPS claims. Their senior management are personally accountable for meeting the standards of the regulatory system.

### **Example of an excluded firm:**

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

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

**Firm A is not in scope of the Financial Resilience Assessment or the Asset Restriction, but should continue to refer to the expectations set out in the FCA's recent Dear CEO letters.**

## Firms with appointed representatives and other similar scenarios

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- 2.5** An appointed representative is a firm or person who carries on regulated activity on behalf, and under the responsibility, of an authorised firm (the principal). Some BSPS advice in the relevant period was provided by appointed representatives.
- 2.6** As the principal accepts responsibility for the activities of the appointed representative, our prudential rules generally require a principal to hold capital against risks relating to the activities of the appointed representative (see eg IPRU-INV 13.14.8R). For the purposes of these rules, principals must also treat BSPS advice given by their appointed representatives, for which they are responsible, as their own.
- 2.7** 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 have resulted in the firm assuming liability for the provision of BSPS advice by the original transferor), the firm must comply with these rules as if it provided the advice itself.

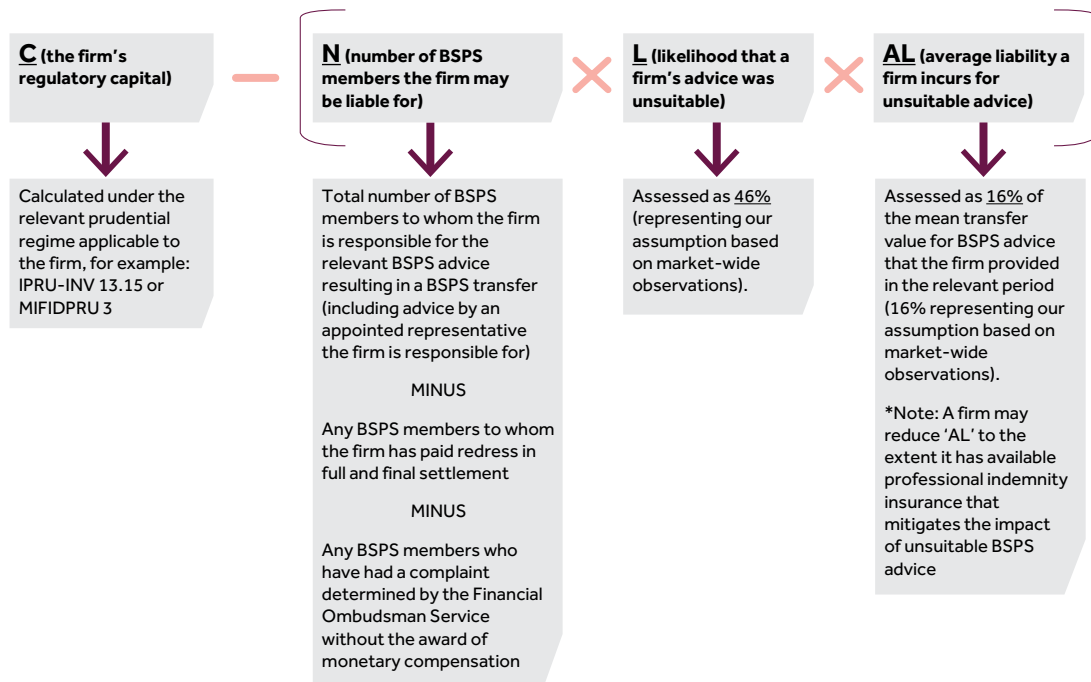
## Financial Resilience Assessment

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- 2.8** In-scope firms must 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'), and to inform our risk-based supervision of these firms so our approach continues to be proportionate and targeted.
- 2.9** 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.
- 2.10** In practice, the financial impact of unsuitable BSPS advice on a firm may be higher or lower than the 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 assessment methodology is intended as a simple risk indicator.
- 2.11** The outcome of the assessment decides whether the asset restriction described in paragraphs 2.27 to 2.36 applies to a firm's transactions.
- 2.12** The FRA methodology is as follows:

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

**Figure 2 Financial Resilience Assessment calculation:**



**2.13** '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 13.15, 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.

**2.14** 'N' represents the number of relevant BSPS members. This is calculated as the total number of BSPS members that received 'BSPS advice' which the firm is responsible for, less any BSPS members to whom the firm has paid redress in full and final settlement, and any BSPS members who have had a complaint determined by the Financial Ombudsman Service without the award of monetary compensation. We are excluding these 2 categories because further claims about these members are unlikely to materialise.

**2.15** 'L' represents the likelihood that a firm's advice was unsuitable which firms must assess as 46%. We have based this assumption on market-wide observations.

**2.16** 'AL' represents the average liability that a firm incurs for unsuitable advice which firms must assess as 16% of the mean transfer value for BSPS advice that they provided in the relevant period. Again, we have based this assumption on market-wide observations. But a firm may reduce AL to the extent it has available professional indemnity insurance that mitigates the impact of unsuitable BSPS advice, discussed below.

## Availability of professional indemnity insurance

- 2.17** A firm may have taken out professional indemnity insurance that mitigates the financial impact of it having provided unsuitable BSPS advice. We are allowing firms to reduce AL to reflect this mitigation.
- 2.18** 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.
- 2.19** Otherwise, the reduction of AL must not exceed the maximum amount of coverage that a firm may reasonably expect from its insurance, considering any exclusions or conditions (eg relating to excesses). If there is more than one exclusion or condition, a firm must consider how these interact.
- 2.20** We note the possibility that the terms of a firm's professional indemnity insurance may change upon renewal, or a policy may lapse or be terminated. In these circumstances, a firm must immediately recalculate the value of AL, and may need to notify us if this affects the conclusion of its FRA.

### Example of firm which holds PII insurance, where assessment shows it can meet its BSPS liabilities:

Firm B provided 'BSPS advice' to 30 BSPS members. The firm's average (mean) transfer value for the 30 clients was £350,000. 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.

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

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

$$£250,000 - (30 \times 0.46 \times (£350,000 \times 0.16))$$

$$£250,000 - (30 \times 0.46 \times £56,000)$$

$$£250,000 - £772,800 = -£522,800$$

However the firm can reduce AL to reflect the impact of its Professional Indemnity Insurance. The firm can reduce AL from £56,000 to the £10,000 excess, which represents its remaining exposure after accounting for the PII.

Using the revised figure for AL,

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

$$£250,000 - (30 \times 0.46 \times 10,000) =$$

$$£250,000 - £138,000 = £112,000$$

**Firm B passes the FRA and should notify the FCA accordingly, explaining how it has factored PII into its calculation. 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 the firm’s ability to meet BSPS liabilities, and continue to refer to expectations in the FCA’s 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 notification to us

- 2.21** We expect that firms will generally be able to carry out their initial FRA quickly using information previously requested and submitted to us.
- 2.22** Firms must notify us of the outcome of their assessment by 27 May 2022, certified by the firm’s compliance officer or, if that is not possible, another appropriate senior manager. We are making a system available for submission of these notifications, but firms can also send their submission to [BSPSredress@fca.org.uk](mailto:BSPSredress@fca.org.uk). If a firm proposes to rely upon professional indemnity insurance in its calculation, it must provide supporting information.
- 2.23** Firms must also 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.
- 2.24** If a firm updates its FRA and the outcome previously notified to us has changed, it must re-notify us.
- 2.25** 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 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.

- 2.26** If a **firm has assessed that it cannot meet its BPS liabilities** using the FRA, or assesses that a proposed transaction would cause it to not be able to meet its BPS 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.

**Example of firm where assessment shows it cannot meet its BPS liabilities:**

Firm C provided 'BPS advice' to 15 BPS members. The firm's average transfer value for the 15 clients was £350,000. The firm's PII Policy excludes cover for BPS advice. The firm has regulatory capital of £60,000.

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

$$£60,000 - (15 \times 0.46 \times (£350,000 \times 0.16)) =$$

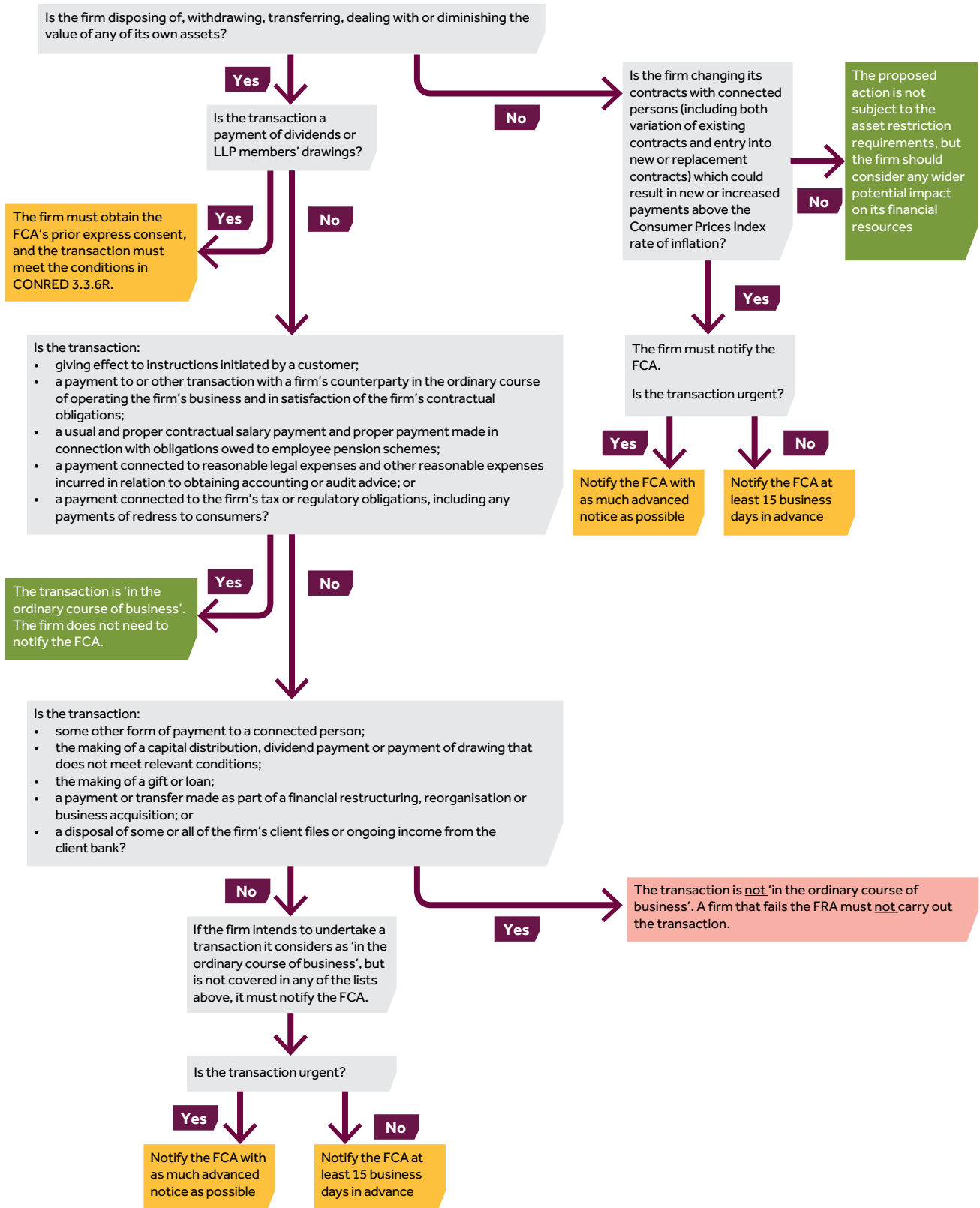
$$£60,000 - £386,400 = -£326,400$$

**Firm C fails the FRA and must notify the FCA of this. 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 FCA in advance or may require prior FCA consent.**

## Asset Restriction Rules

- 2.27** Where they apply, the Asset Restriction Rules prevent a firm from undertaking transactions that are not 'in the ordinary course of business'. We have made 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. Figure 3 shows how the Asset Restriction Rules work.

Figure 3: Asset Restriction Rules – transactions in the 'ordinary course of business'



## Transactions in the ordinary course of business

**2.28** Firms may treat the following transactions as occurring in the ordinary course of business:

- transactions giving effect to instructions initiated by customers
- payments to or other transactions with a firm's counterparties in the ordinary course of operating the firm's business and in satisfaction of the firm's contractual obligations
- usual and proper contractual salary payments and proper payments made in connection with obligations owed to employee pension schemes
- payments connected to reasonable legal expenses and other reasonable expenses incurred in relation to obtaining accounting or audit advice
- payments connected to the firm's tax or regulatory obligations, including any payments of redress to consumers

**2.29** This means that a firm may carry out any of these transactions, whatever the outcome of its FRA.

**2.30** This list is not exhaustive. However, if a firm intends to undertake a transaction that it considers is in the ordinary course of business but is not on this list, it must notify us at least 15 business days in advance. If the situation is urgent, the firm must instead give as much advanced notice as possible. This is intended to give us time to consider the proposed transaction.

**2.31** In addition, if a firm proposes 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 must notify us. This is intended to prevent avoidance of the objectives of the asset restriction.

**2.32** Notifications must be made to [BSPSredress@fca.org.uk](mailto: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

**2.33** We recognise that some firms may use dividends or limited liability partnership (LLP) members' drawings as a way of remunerating natural persons for services they provide to the firm, in a way that is similar to an ordinary salary. We do not intend to prohibit this practice, as long as it occurs in the ordinary course of business.

**2.34** However, given the high risk that dividends or LLP members' drawings may be used in other scenarios in a way that dissipates assets, we are requiring firms to get our consent before paying out any dividends or LLP members' drawing. Firms must provide specified information as part of any application, to show that the transaction is in the ordinary course of business and is otherwise lawful.



## Transactions not in the ordinary course of business

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**2.35** 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 2.28 or under the 'Payment of dividends and LLP members' drawings' section
- the making of any capital distributions, dividend payments or payment of drawings, unless permitted under the 'Payment of dividends and LLP members' drawings' section
- the making of any gift or loan
- any payments or transfers made as part of any financial restructuring, reorganisation or business acquisition
- disposal of some or all of the firm's client files or ongoing income from the client bank

**2.36** This means that if the Asset Restriction Rules apply to a firm, the firm may not carry out any of these transactions.

## 3 Costs and benefits

- 3.1** We are introducing emergency rules, made without the prior consultation or detailed cost benefit analysis that we are normally required to carry out. While every effort has been made to make sure these temporary rules achieve their intended effect in a clear and targeted way, we have provided an email address – [BSPSredress@fca.org.uk](mailto:BSPSredress@fca.org.uk) – which can be used to raise any questions or highlight any unintended consequences. If we decide to consult on an extension of the asset retention requirements later in the year, we will publish a more detailed cost benefit analysis at that stage.
- 3.2** To help stakeholders understand the impact of this intervention, we have provided a high-level illustration of the likely costs and benefits below, although these have not been quantified.
- 3.3** The costs will include:
- Cost to firms of understanding the requirements and providing information to us.
  - For firms subject to the asset restriction, there may be an opportunity cost because of restricting firms' ability to invest their capital.
  - Costs associated with the delay in undertaking planned and legitimate financial transactions while completing the calculation.
  - Reputational impact on firms which are subject to the asset restriction. This may be an issue for firms whose BSPS exposure is below the assumed levels for the calculations.
  - Cost to us responding to enquiries, reviewing firm submissions, and chasing outstanding information. We have aimed to minimise this by targeting our intervention at the highest risk firms.
- 3.4** The benefits will include:
- The asset restriction retention requirements will increase the likelihood that firms in scope are able to meet some or all of the cost of redress under the proposed scheme, as more resource would be available to meet these liabilities. So, it would be expected that the introduction of the asset retention requirements would mean a lower proportion of firms ultimately fail. This will ultimately reduce the cost of liabilities which would otherwise fall to FSCS.
  - Even if the asset retention requirements do not prevent a firm from failing, they may increase the likelihood of an orderly failure of the firm (to the extent that an insolvency will be inherently disorderly). This would be because the asset restriction should help to preserve the amount of capital held by the firm. Even if a firm is ultimately found to be unable to meet its liabilities, the availability of those assets should decrease the burden on FSCS and make the estate more attractive to an insolvency practitioner.
- 3.5** We recognise there are costs associated with this intervention. But we consider the benefits – although not quantified – are important to make sure we urgently take appropriate steps to maximise the prospect that firms which create redress liabilities meet the cost of those redress liabilities. This will help minimise the impact on FSCS levy payers which protects consumers who ultimately absorb the increased levy cost, BSPS claimants who would have their redress limited to the FSCS cap of £85,000, and the FSCS itself.

- 3.6** Furthermore. If we did not make this intervention, the FCA would still need to take action against individual firms in certain instances, for example, where we have concerns that the firm may seek to dissipate assets. Such firm-by-firm action would still involve costs to the FCA and the firms concerned. However, in this instance, we consider that this intervention, covering a number of firms, will be more effective than a firm-by-firm approach.

# Annex 1

## Compatibility statement

### Compliance with legal requirements

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1. This Annex records the FCA's compliance with a number of legal requirements applicable when the FCA makes rules, including an explanation of the FCA's reasons for concluding that our rules are compatible with certain requirements under the Financial Services and Markets Act 2000 (FSMA).
2. When making rules, the FCA is required 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 must also consider whether 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 measures 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 Her 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 measures.
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

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7. The rules described in this statement are primarily intended to advance the FCA's operational objective of consumer protection. They are also relevant to the FCA's market integrity objective.

## Consumer protection

8. The asset retention measures increase the likelihood that firms are able to meet their British Steel Pension Scheme (BSPS) liabilities and reduce the likelihood of firms failing in a disorderly way, whether or not the proposed redress scheme is implemented.
9. Reducing the number of claims referred to the Financial Services Compensation Scheme (FSCS), may ultimately mean that fewer costs are passed down to consumers. And by reducing the opportunity for the firms to avoid their liabilities by relying on 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

10. The measures help ensure the market works well by improving firms' financial resilience and reducing the risk that firms responsible for consumer harm avoid their liabilities, with the costs falling to FSCS levy payers. Where firms still fail the rules are intended to minimise the amount that will need to be paid by FSCS thereby reducing the exposure of FSCS levy payers.
11. We consider these measures are compatible with our strategic objective of ensuring that the relevant markets function well because in the context of the proposed BSPS redress scheme, dealing with unsuitable advice on defined benefit transfers, we are reducing the risk of firms defaulting on their liabilities. For the purposes of our strategic objective, 'relevant markets' are defined by s. 1F FSMA.
12. In preparing these measures, the FCA has had regard to the regulatory principles set out in s. 3B FSMA.

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

13. We have considered this principle as part of our measures to address the harm suffered by consumers who are less likely to obtain full redress if firms are allowed to avoid their BSPS liabilities. The asset retention measures, and in particular the 'Financial Resilience Assessment', help us identify the firms most at risk of not meeting their BSPS liabilities, and concentrate our supervision resources in the most effective and economic way.
14. Making these rules is a more effective and efficient way of addressing harm than taking a case-by-case approach with individual firms, which can be expensive, resource intensive and time consuming.

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

15. We believe the mechanism of our rules ensure a proportionate and targeted approach, by excluding appropriate categories of firms from the asset retention rules, and only applying the asset restriction to firms which cannot demonstrate they are likely to meet their BSPS liabilities.
16. We do not consider that less restrictive measures would adequately mitigate the risks to consumers we are seeking to address and provide an appropriate degree of protection for consumers. So we consider our measures are proportionate.

### ***The responsibilities of senior management***

17. Reliance on FSCS may create perverse incentives for firms, as they can avoid the liabilities resulting from their misconduct. Our rules reduce this reliance therefore encourages better firm governance and conduct by senior management, benefiting consumers.

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

18. Our measures support the desirability of sustainable growth in the economy by ensuring consumers who have suffered a financial loss are able to receive redress, and minimising costs that are passed to other FSCS levy payers and, ultimately, consumers. We want to see more firms able to meet their own redress liabilities and fewer costs mutualised across the industry. We believe this will result in more sustainable economic growth in the longer term.

### ***The general principle that consumers should take responsibility for their decisions***

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

### ***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***

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

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

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

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

22. Emergency rules are, by their nature, made without prior consultation or full cost benefit analysis, and so do not undergo the usual process of testing draft rules and receiving feedback from the public before they are made. While every effort has been made to make sure these temporary rules achieve their intended effect in a clear and targeted way, we have provided an email address [BSPSredress@fca.org.uk](mailto:BSPSredress@fca.org.uk) which can be used to raise any questions or highlight any unintended consequences.
23. In formulating these measures, we have 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).

## **Expected effect on mutual societies**

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24. The FCA does not expect these measures to have a significantly different impact on mutual societies than other authorised persons subject to these measures, or present them with any more or less of a burden than other authorised persons subject to these measures.

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

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25. In preparing these measures, we have had regard to the FCA's duty to promote effective competition in the interests of consumers.
26. 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.
27. Once costs have fallen to FSCS it means that the 'polluter' is no longer paying for the harm they have caused.
28. 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.
29. 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 impacts competition or creates barriers to entry or exit. 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

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30. 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.
31. As part of this, we ensure the equality and diversity implications of any new policy measures are considered. Overall, we believe our approach does not disadvantage or inadvertently discriminate against any person or group of people based on their protected characteristics. The asset restriction will help ensure that the proposed scheme will positively impact 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.

## Legislative and Regulatory Reform Act 2006 (LRR)

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32. We have had regard to the principles in the LRR for the parts of the measures that consist of general policies, principles or guidance. We consider that our measures are transparent and proportionate as set out above. We are using our emergency powers

under s138L to implement the measures set out in this document because we believe our immediate intervention is necessary to prevent any firms taking action to avoid BSPS liabilities ahead of the proposed redress scheme coming into force.

- 33.** Emergency rules are, by their nature, made without prior consultation or full cost benefit analysis, and so do not undergo the usual process of testing draft rules and receiving feedback from the public before they are made. While every effort has been made to make sure these temporary rules achieve their intended effect in a clear and targeted way, we have provided an email address [BSPSredress@fca.org.uk](mailto:BSPSredress@fca.org.uk) which can be used to raise any questions or highlight any unintended consequences.
- 34.** We have had regard to the Regulators' Code for the parts of the measures that consist of general policies, principles or guidance and consider that the measures are proportionate to the harm suffered by some consumers or risks to our statutory objectives identified.

## Treasury recommendations about economic policy

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- 35.** We have considered the most recent recommendations from the Treasury under s. 1JA FSMA, including the supplementary recommendations made in April 2022. Our measures are consistent with these recommendations as they aim to improve outcomes for consumers who transferred out of BSPS.



## Annex 2

### Abbreviations used in this paper

| Abbreviation    | Description  |
|-----------------|--|
| <b>BSPS</b>     | British Steel Pension Scheme   |
| <b>CEO</b>      | chief executive officer  |
| <b>DB</b>       | defined benefit  |
| <b>FCA</b>      | Financial Conduct Authority  |
| <b>FRA</b>      | Financial Resilience Assessment  |
| <b>FSCS</b>     | Financial Services Compensation Scheme   |
| <b>FSMA</b>     | Financial Services and Markets Act 2000  |
| <b>IPRU-INV</b> | Interim Prudential sourcebook for Investment Businesses                                  |
| <b>LLP</b>      | limited liability partnership  |
| <b>LRRA</b>     | Legislative and Regulatory Reform Act 2006   |
| <b>MIFIDPRU</b> | Prudential sourcebook for Markets in Financial Instruments Directive<br>Investment Firms |
| <b>PRA</b>      | Prudential Regulation Authority  |

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# Appendix 1

## Made rules (legal instrument)

**BRITISH STEEL PENSION SCHEME (FINANCIAL RESILIENCE) INSTRUMENT  
2022**

**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);
  - (3) section 138L(1) (Consultation: general exemptions); and
  - (4) 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 at 12:01am on 27 April 2022.

**Amendments to the Handbook**

- D. The Glossary of definitions is amended in accordance with Annex A to this instrument.
- E. The Consumer Redress Schemes sourcebook (CONRED) is amended in accordance with Annex B to this instrument.

**Citation**

- F. This instrument may be cited as the British Steel Pension Scheme (Financial Resilience) Instrument 2022.

By order of the Board  
22 April 2022

## Annex A

## Amendments to the Glossary of definitions

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

Amend the following definitions as shown.

*connected person* ...

(6) (in CONRED 3):

- (a) a member of the same *group* as the *firm*;
- (b) a *controller*, shareholder or member of the *firm*;
- (c) a *director*, other *officer* or *employee* of the *firm*, or of any member of the same *group* as the *firm*;
- (d) a *close relative* of a *person* falling within sub-paragraph (b) or (c);
- (e) an agent acting on behalf of a *person* falling within paragraphs (a) to (d); or
- (f) any other *person* ('A') in relation to whom the following conditions are met:
  - (i) the *firm* (or another *person* falling within sub-paragraphs (a) to (e)) has provided, has agreed to provide or is proposing to provide, a financial benefit to A; and
  - (ii) A either:
    - (1) is a *person* who has been directly involved in, or has been responsible for, BPS advice which has been provided by (or is treated as having been provided by) the *firm* for the purposes of CONRED 3; or
    - (2) is controlled by a *person* who falls within (1).

## Annex B

### Consumer Redress Schemes sourcebook (CONRED)

Insert the following new chapter, CONRED 3 (British Steel Pension Scheme Financial Resilience Requirements), after CONRED 2 (Arch cru Consumer Redress Scheme). The text is not underlined.

### **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);
- (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);
- (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 BPS 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 not made using the power in section 404 of the *Act*.

#### Scope of application

- 3.1.3 R *CONRED 3* applies to any *firm* (including a *TP firm*) that provided BPS 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*;
- (4) a *firm* that has provided BPS advice to a total of fewer than 5 members of the BPS; 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 BPS 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 BPS 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.

#### Duration of application

- 3.1.8 R *CONRED* 3 applies until the end of 31 January 2023.

### 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:

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

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:
  - (i) the number of BSPS members to whom the *firm* has paid redress in full and final settlement; and
  - (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*;



- (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.
- (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 BPS 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 BPS 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 A *firm*'s regulatory capital must be calculated in accordance with the prudential requirements applicable to it.
- 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.

#### Average liability for unsuitable BPS advice

- 3.2.5 R (1) A *firm* must calculate AL as 16% of the mean cash equivalent transfer value for BPS advice (excluding any advice given to BPS members falling within *CONRED* 3.2.2R(1)(b)(i) or (ii)) 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 BPS 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 BPS 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 BPS 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 BPS 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 BPS 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 BPS advice for the purposes of this chapter, the *firm* must immediately notify the *FCA* under *CONRED* 3.2.7R.

#### Notification requirement

- 3.2.7 R
- (1) A *firm* must notify the *FCA* of the outcome of the financial resilience assessment in *CONRED* 3.2.2R before the end of 27 May 2022.
  - (2) If a *firm* has relied on professional indemnity insurance to reduce the value of its potential liability for BPS 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):
  - (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) 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](mailto: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.

- 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](mailto: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 BPS 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 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 BPS redress liabilities; and
- (b) has calculated (using the methodology in *CONRED* 3.2.2R) that it will continue to be able to meet its BPS 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 BPS 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 BPS 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](mailto: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.

#### 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](mailto: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).

