

Chapter 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:
 - the advice was given to a *consumer* during the relevant period;
 - the advice was to transfer the *consumer's* BSPS pension benefits;
 - the advice was subject to the suitability requirements; and
 - the *consumer* subsequently transferred their BSPS pension benefits;
- (4) 'BSPS claims' means potential liability that a *firm* may incur for BSPS advice, determined 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 the document 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) (a) 'scheme case' is a case that meets the conditions in ■ CONRED 4.2.2R, as modified by ■ CONRED 4.2.3R;
(b) for the purposes of (a), ■ CONRED 4.2.2R(5) must be read as follows:

(5) the *consumer* had not, prior to the scheme effective date, accepted an offer of redress from the *firm* or other *person* that was:

- (a) calculated in accordance with the applicable *rules* and *guidance*; and
- (b) in full and final settlement of all potential claims arising out of the advice in (1).

(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.

3.1.1A

G The effect of ■ CONRED 3.1.1R(6A) is that a *firm* which has settled a potential case prior to the *consumer redress scheme* may only cease to count the case towards the Financial Resilience Assessment in ■ CONRED 3.2 if the settlement amount has been calculated in accordance with the applicable *rules* and *guidance*. The *FCA* reminds all *firms* that they are required to calculate any offer of redress in accordance with applicable regulatory requirements.

Purpose

3.1.2

G The provisions in this chapter are 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. 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-authorized 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*;

- 3.1.5 **G** (4) a *firm* that has provided BSPS advice to a total of fewer than 3 members of the BSPS; or
- (5) a *firm* that is subject to an asset *requirement* that has comparable effect to ■ CONRED 3.3.
- (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

G

■ CONRED 3 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 number of cases calculated in accordance with ■ CONRED 3.2.4AR;
 - (i) [deleted]
 - (ii) [deleted]
 - (c) L is the likelihood that the *firm's* BSPS advice was unsuitable, which a *firm* must estimate at 46%;
 - (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

3.2.4A **R**

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.

- (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:
 - one of the following conditions is met:
 - 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;
 - 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
 - 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;
 - 6 months have expired since the date of the letter in (i); and
 - 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 ■ CONRED 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 11% of the mean cash equivalent transfer value for BSPS advice (excluding any advice given to BSPS members falling within ■ 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:
 - the relevant insurance policy does not exclude BSPS advice from the scope of coverage; and
 - 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 a *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 requirements

3.2.7

R

- (1) A *firm* must (save in the circumstances in (1A)) have notified 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), (4) or (7) 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

3.2.8

G

- (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.
- (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).
- (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 *BSPS* 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 *BSPS* 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 *BSPS* 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 3.3.8R 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).

