

Chapter 3

British Steel Pension Scheme Financial Resilience Requirements

3.3 Asset restriction

Purpose

- 3.3.1G
- (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
- 3.3.2G

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
- 3.3.3R

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:
- CONRED 3/2

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- (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.

- (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

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- (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

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- (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*.

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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.

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- (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

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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;

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- (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.

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

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- (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.

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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

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- (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.

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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.

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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).