

Bank of England

Prudential Regulation Authority

Draft Statement of Policy – Dealing with insurers in financial difficulties

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February 2023

Draft for consultation



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Contents

Contents	1
1. Introduction	2
2. PRA consent to the making of a write-down application	3
3. The PRA's consent to write-down manager appointment and statement of suitability	6

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1. Introduction

1. The purpose of this Statement of Policy is to set out the approach and expectations of the Prudential Regulation Authority (PRA) in relation to consent and related processes under section 377C and 377G of the Financial Services and Markets Act 2000 (FSMA). Those provisions apply where certain parties apply to court for a write-down of an insurer's liabilities pursuant to section 377A of FSMA.
2. Chapter 2 concerns the giving of consent by the PRA (under section 377C of FSMA) to an application to court for a write-down order under section 377A of FSMA.
3. Chapter 3 concerns the giving of consent by the PRA to an application for the appointment of a person as write-down manager under section 377G of FSMA. Chapter 3 also concerns the provision of associated statements of suitability by the PRA.

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2. PRA consent to the making of a write-down application

4. A write-down order may be made by the court under section 377A of FSMA upon application by:

- a. HM Treasury (HMT);
- b. the PRA;
- c. the insurer;
- d. a shareholder of the insurer; or
- e. a policyholder or other creditor (including a contingent or prospective creditor) of the insurer.¹

5. Except where the applicant is HMT or the PRA, the applicant must obtain the consent of the PRA before making an application to court for a write-down order.²

6. The PRA's consent must be:

- a. in writing; and
- b. filed with the court with the relevant application.³

7. The PRA is also required to consult the Financial Conduct Authority (FCA) before giving or refusing such consent.⁴

8. In deciding whether to consent to the making of a write-down application, the PRA will consider all relevant factors, including those set out below, in the context of its statutory objectives. While the PRA's consent is required for most applications to proceed, the giving of such consent does not mean that a write-down order will ultimately be made. It is for the court to decide whether, and on what terms, to make a write-down order by reference to the test in section 377A(2) of FSMA.

¹ Section 377C(1) of FSMA.

² Section 377C(3) of FSMA.

³ Section 377C(4) of FSMA.

⁴ Section 377C(5)(b) of FSMA.

9. The PRA expects intending applicants to prepare a write-down plan (usually in conjunction with a nominee write-down manager). The write-down plan should set out the proposed terms of the write-down order. The PRA will consider the position of the firm and the write-down plan from the perspective of its statutory objectives. In particular, the PRA will consider the impact on policyholders, having regard to:

- a. the scale of the write-down compared to a potential insolvency counterfactual;
- b. the extent to which policyholders could be eligible for protection under the Financial Services Compensation Scheme (FSCS);
- c. the potential impact of the write-down on the FSCS compared to a potential insolvency counterfactual;
- d. the impact of not allowing a write-down on continuity and availability of cover;
- e. whether the firm has sufficiently assessed the adequacy, availability, and timeliness of other approaches to securing a solvent run-off or orderly exit, before seeking a write-down order;
- f. the location of the firm's head office and operations and the jurisdiction of its insured persons and risks, and the associated risk of the write-down order not being enforceable or other insolvency or restructuring proceedings being commenced; and
- g. other relevant factors, including tax implications for policyholders, the firm, and other affected parties.

10. Given the impact of a write-down order on policyholders, the FSCS and other affected persons, and ultimately the safety and soundness of PRA-authorized persons, the PRA will also consider:

- a. the likelihood and timing of a future write-up (which is a full or partial reversal of a write-down order),⁵ with interest;⁶ and
- b. whether the firm is in a position, in good time before the coming into effect of the write-down order, to agree and execute any documents and processes needed to give effect to the arrangements contemplated by Chapter 5A of the Policyholder Protection Part of the PRA Rulebook.

⁵ Under section 377I of FSMA.

⁶ Under paragraph 11 of Schedule 19B to FSMA.

11. The PRA will also consult the FCA, as required under section 377C(5)(b) of FSMA. While the PRA will liaise directly with the FCA for this purpose, firms should discuss their proposed application for a write-down order with the FCA.

12. The PRA anticipates that write-down plans will broadly respect the creditor hierarchy in order to 'lead to a better outcome for the insurer's policyholders and other creditors (taken as a whole) than not making the order.'⁷ The PRA also recognises that while liabilities secured by floating charges are not excluded liabilities,⁸ and may therefore be written-down, this is intended to 'avoid creating an inappropriate and unintended priority for inward reinsurance creditors, who are often granted a floating charge but contractually subordinated to rank alongside direct policyholders (who have a statutory priority)'.⁹ Accordingly, liabilities secured by floating charges which are not subordinated in this way would generally be expected to be written down only after lower-ranking liabilities, in accordance with the creditor hierarchy.

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⁷ Section 377A(2)(b) of FSMA.

⁸ Section 377B(1)(d) of FSMA treats 'an amount secured on property of any kind, other than an amount secured by a charge which, as created, was a floating charge' as an excluded liability (the term 'floating charge' is then defined in section 377B(2) of FSMA).

⁹ Paragraph 3.21 of HM Treasury, 'Amendments to the Insolvency Arrangements for Insurers: Response to Consultation' (April 2022):

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1066045/Government_Response_Amendments_to_the_Insolvency_Arrangements_for_Insurers_April.pdf.

3. The PRA's consent to write-down manager appointment and statement of suitability

13. The effect of section 377A(3)(a) of FSMA is that a write-down order cannot take effect until the appointment of a write-down manager takes effect under section 377G of FSMA.

14. The write-down manager is appointed by court order¹⁰ either at the same time as making a write-down order or at a later date.¹¹ Multiple persons may be appointed to the role (acting jointly or separately).¹²

15. Upon appointment, the write-down manager is an officer of the court¹³ and is subject to any directions the court may give at the time of appointment¹⁴ or subsequently.¹⁵ The write-down manager does not act as an agent or representative of the PRA. Moreover, the firm remains in control of the conduct of its business throughout, and is ultimately responsible for compliance with the write-down order and the implementation of the write-down plan.

16. The process under section 377C of FSMA applies to an application for the appointment of a write-down manager,¹⁶ meaning that (as above):

- a. The PRA's consent is required before making such an application;
- b. such consent must be:
 - i. in writing; and
 - ii. filed with the court with the relevant application; and
- c. the PRA is required to consult the FCA before giving or refusing such consent.

17. In addition, the court may only appoint a person as write-down manager if:

¹⁰ Section 377G(1) of FSMA.

¹¹ Section 377G(2)(a) of FSMA.

¹² Section 377G(6) of FSMA.

¹³ Paragraph 2 of Schedule 19A to FSMA.

¹⁴ Section 377G(2)(c) of FSMA.

¹⁵ Paragraphs 6 or 7(4) of Schedule 19A to FSMA.

¹⁶ Section 377G(4) of FSMA, which applies section 377C of FSMA (subject to certain modifications, which are not relevant for present purposes).

- a. the PRA has provided the court with a statement that the person is suitably qualified; and
- b. the person has provided the court with a statement that they consent to the appointment.¹⁷

18. In deciding whether to consent to the making of an application for the appointment of a person as write-down manager (and in providing the associated statement of suitability), the PRA will consider all relevant factors, including those set out below, in the context of its statutory objectives. As with write-down orders, the decision whether to appoint a person as write-down manager is for the court. The provision of consent (and a statement of suitability) by the PRA does not mean that a given candidate will ultimately be appointed by the court as write-down manager.

19. The PRA expects the firm to propose a candidate for appointment as write-down manager.

20. The PRA expects the proposed write-down manager to:

- a. be independent – any direct or indirect interest or connection they have or have had in the insurer should not prejudice their status;
- b. work for an employer that is independent – any direct or indirect interest or connections they have or have had in the insurer should not prejudice their status;
- c. have relevant knowledge, both practical and theoretical, and experience of the types of insurance business transacted by the insurer;
- d. be a licensed insolvency practitioner, a suitably qualified insurance professional or an actuary, as may be appropriate to the firm and the write-down plan contemplated;
- e. have appropriate professional indemnity insurance (or similar arrangements) in place;
- f. provide the PRA with sufficient detail to enable it to make the statement required under section 377G(5)(a) of FSMA;
- g. be willing and ready to provide the statement required under section 377G(5)(b) of FSMA; and

¹⁷ Section 377G(5) of FSMA.

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- h. have the appropriate time and capacity to undertake the work required in connection with:
- i. the development of the write-down plan;
 - ii. the application to court for a write-down order;
 - iii. the monitoring of the insurer's affairs¹⁸ and any other functions anticipated in connection with the implementation of the write-down plan; and
 - iv. the provision of regular reports to the PRA and the FCA.¹⁹

21. The principles set out in PRA Supervisory Statement (SS) 7/14 – 'Reports by skilled persons',²⁰ also apply to the PRA's consideration of whether to consent to an application for the appointment of a person as write-down manager (and the associated statement of suitability).

22. If an appropriate candidate is not identified by the insurer, the PRA may put forward a member of its own staff for appointment as write-down manager. In such a case, the PRA would still be required to consent to the application and provide a statement of suitability, though not all of the factors set out in paragraph 20 would be relevant.

¹⁸ Pursuant to paragraph 3 of Schedule 19A to FSMA.

¹⁹ Paragraph 3(4) of Schedule 19A to FSMA.

²⁰ SS7/14 – 'Reports by skilled persons', June 2014: <https://www.bankofengland.co.uk/prudential-regulation/publication/2014/reports-by-skilled-persons-ss>.