

Chapter 8

Waiver and modification of rules



8.1 Application and purpose

8.1.1 **R** [deleted]

8.1.1-A **R** This chapter applies to every:

- (1) *firm* or *person* who is subject to *FCA rules* that wishes to apply for, consent to, or has been given a modification of or waiver of the *FCA's rules*;
- (2) *person*, as respects a particular *AUT*, *ACS* or *ICVC*, who wishes to apply for, consent to, or has been given a modification of or waiver of the *rules* in *COLL*.

8.1.1A **G** This chapter is relevant to an applicant for a *Part 4A permission*, as if that applicant were a *firm*. Where the chapter refers to appropriate supervisory contact, the applicant should read this as being the usual supervisory contact at the *appropriate regulator*. Further, this chapter is relevant to a *person* who is subject to rules made by the *appropriate regulator* and where the chapter refers to a *firm*, this includes that person.

8.1.2 **G** A *recognised body* should see **REC 3.3** for information on *waivers of rules* in *REC* under section 294 of the *Act*.

8.1.3 **G** This chapter is not relevant to the functions of the *FCA* acting in its capacity as the *competent authority* for the purposes of Part VI of the *Act* (Official Listing).

Purpose

8.1.4 **G** This chapter explains how the regime for the *waiver of rules* works.



8.2 Introduction

Waivers under section 138A of the Act

- 8.2.1 **G** Under section 138A of the Act (Modification or waiver of rules), the *appropriate regulator* may, on the application or with the consent of a *firm*, direct that its *rules*:
 - (1) are not to apply to the *firm*; or
 - (2) are to apply to the *firm* with such modifications as may be specified.

- 8.2.1A **G** ■ SUP 8.2.1 G does not apply to:
 - (1) *rules* made by either regulator under section 137O of the Act;
 - (2) *rules* made by the FCA under sections 247 or 248 of the Act.

- 8.2.2 **G** The directions referred to in ■ SUP 8.2.1 G (1) and ■ SUP 8.2.1 G (2) are collectively referred to in the *Handbook* as *waivers*.

Waivers of rules in COLL

- 8.2.3 **G** Sections 250 and 261L of the Act and regulation 7 of the *OEIC Regulations* allow the FCA to *waive* the application of certain *rules* in COLL to:
 - (1) a *person*, as respects a particular *AUT*, *ACS* or *ICVC*, on the application or with the consent of that *person*; and
 - (2) an *AUT*, *ACS* or *ICVC* on the application or with the consent of the *manager* and *trustee* (in the case of an *AUT*), the *authorised contractual scheme manager* and *depository* (in the case of an *ACS*) or the *ICVC* and its *depository* (in the case of an *ICVC*).

- 8.2.4 **G** Those *persons* to whom sections 250 and 261L and regulation 7 of the *OEIC Regulations* are relevant, but who are not *firms*, should follow SUP 8 as if they were *firms*.

- 8.2.5 **G** Sections 250 and 261L of the Act and regulation 7 of the *OEIC Regulations* work by giving effect to section 138A of the Act in respect of *waivers* given under section 250(2) and (3), section 261L(2) and (3) and regulation 7(1) and (2) of the *OEIC Regulations*.

Rules which can be waived

8.2.6 **G** [deleted]

8.2.7 **G** [deleted]

8.2.8 **G** [deleted]



8.3 Applying for a waiver

Conditions for giving a waiver

- 8.3.1** G Under section 138A(4) of the *Act*, the *appropriate regulator* may not give a *waiver* unless it is satisfied that:
- (1) compliance by the *firm* with the *rules*, or with the *rules* as unmodified, would be unduly burdensome, or would not achieve the purpose for which the *rules* were made; and
 - (2) the *waiver* would not adversely affect the advancement of, in the case of the *PRA*, any of its objectives and, in the case of the *FCA*, any of its operational objectives.

- 8.3.1A** G Even if the conditions in section 138A(4) of the *Act* are satisfied, the *appropriate regulator* will consider other relevant factors before giving a *waiver*, such as whether the *waiver* would be compatible with European law, including relevant EC Directives.

Publication of waivers

- 8.3.2** G The *appropriate regulator* is required by section 138B of the *Act* to publish a *waiver* unless it is satisfied that it is inappropriate or unnecessary to do so (see ■ SUP 8.6).

- 8.3.2A** G The *FCA* must consult the *PRA* before publishing or deciding not to publish a *waiver* which relates to:
- (1) a *PRA-authorised person*; or
 - (2) an *authorised person* who has as a member of its *immediate group* a *PRA-authorised person*;

unless the *waiver* relates to rules made by the *FCA* under sections 247 or 248 of the *Act*.

Form and method of application

- 8.3.3** D A firm wishing to apply for a *waiver* must complete the application form in ■ SUP 8 Annex 2 D and submit it in the way set out in ■ SUP 15.7.4 R to ■ SUP 15.7.9 G (Form and method of notification).

- (1) [deleted]

- (2) [deleted]
- (3) [deleted]
- (4) [Deleted]
- (5) [Deleted]
- (6) [Deleted]
- (7) [Deleted]
 - (a) [Deleted]
 - (b) [Deleted]

- 8.3.3A** G (1) The *PRA's* preferred method of submission for *waiver* applications is by e-mail. The *FCA's* preferred method of submission for *waiver* applications is through online submission via the *FCA's* website at www.fca.org.uk.
- (2) The form is available on the *appropriate regulator's* website.

8.3.4 G Before sending in a *waiver* application, a *firm* may find it helpful to discuss the application with its appropriate supervisory contact. However, the *firm* should still ensure that all relevant information is included in the application.

8.3.4A G *Firms* or *persons* other than *PRA-authorised persons* should send applications for *waivers* or applications for variations of *waivers* to the *FCA*.

- 8.3.4B** G *PRA-authorised persons* should send applications for *waivers* or applications for variations of *waivers* to:
- (1) the *FCA* in respect of *rules* in the *FCA Handbook* applicable to that *PRA-authorised person*; and
 - (2) the *PRA* in respect of *rules* in the *PRA Handbook*.

Procedure on receipt of an application

8.3.5 G The *appropriate regulator* will acknowledge an application promptly and if necessary will seek further information from the *firm*. The time taken to determine an application will depend on the issues it raises. A *firm* should make it clear in the application if it needs a decision within a specific time.

8.3.5A G The *appropriate regulator* will treat a *firm's* application for a *waiver* as withdrawn if it does not hear from the *firm* within 20 *business days* of sending a communication which requests or requires a response from the *firm*. The *appropriate regulator* will not do this if the *firm* has made it clear

to the *appropriate regulator* in some other way that it intends to pursue the application.

8.3.6 **G** In some cases, the *appropriate regulator* may give a modification of a *rule* rather than direct that the *rule* is not to apply. The *appropriate regulator* may also impose conditions on a *waiver*, for example additional reporting requirements. A *waiver* may be given for a specified period of time only, after which time it will cease to apply. A *firm* wishing to extend the duration of a *waiver* should follow the procedure in ■ SUP 8.3.3 D. A *waiver* will not apply retrospectively.

8.3.7 **G** If the *appropriate regulator* decides not to give a *waiver*, it will give reasons for the decision.

8.3.8 **G** A *firm* may withdraw its application at any time up to the giving of the *waiver*. In doing so, a *firm* should give the *appropriate regulator* its reasons for withdrawing the application.

8.3.9 **G** If the *appropriate regulator* believes that a particular *waiver* given to a *firm* may have relevance to other *firms*, it may publish general details about the possible availability of the *waiver*. For example, IPRU(INV) 3-80(10)G explains that a *firm* that wishes to use its own internal model to calculate its position risk requirement (PRR) will need to apply for a *waiver* of the relevant *rules*.

Giving a waiver with consent rather than on an application

8.3.10 **G** Under section 138A(1) of the *Act* the *appropriate regulator* may give a *waiver* with the consent of a *firm*. This power may be used by the *appropriate regulator* in exceptional circumstances where the *appropriate regulator* considers that a *waiver* should apply to a number of *firms* (for example, where a *rule* unmodified may not meet the particular circumstances of a particular category of *firm*). In such cases the *appropriate regulator* will inform the *firms* concerned that the *waiver* is available, either by contacting *firms* individually or by publishing details of the availability of the *waiver* on the *appropriate regulator's* website provided that the *FCA* must comply with ■ SUP 8.3.2A G. The *firms* concerned will not have to make a formal application but will have to give their written consent for the *waiver* to apply.

Waiver of an evidential provision

8.3.11 **G** An application for a *waiver* of an *evidential provision* will normally be granted only if a breach of the underlying binding *rule* is actionable under section 138D of the *Act*. Individual *guidance* would normally be a more appropriate response (see ■ SUP 9 (Individual Guidance)) if there is no right of action.

8.3.12 **G** An application for a *waiver* of the presumption of compliance created by an *evidential provision* would not normally be granted.

8.3.13 **G** For an application for a *waiver* of the presumption of contravention of a binding *rule*, which is actionable under section 138D of the *Act*, the *appropriate regulator* would normally wish to be satisfied that the evidential *rule* is itself unduly burdensome or does not achieve the purpose of the *rule*.

8.3.13A **G** In accordance with section 138C(4) of the *Act*, in **■ SUP 8.3.11 G** to **■ SUP 8.3.13 G**, a reference to a *rule* does not include a *rule* made under:

- (1) section 137O of the *Act*; or
- (2) section 192J of the *Act*.

Waiver of a two-way evidential provision

8.3.14 **G** In the case of an application for a *waiver* of a *two-way evidential provision* relating to an actionable binding *rule*, the policy in **■ SUP 8.3.12 G** would apply to the presumption of compliance and the policy in **■ SUP 8.3.13 G** would apply to the presumption of contravention. In other words, any modification is likely to be in relation to the second presumption only.



8.4 Reliance on waivers

Application of waived rules

8.4.1

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If the *appropriate regulator* gives a *firm* a *waiver*, then the relevant *rule* no longer applies to the *firm*. But:

- (1) if a *waiver* directs that a *rule* is to apply to a *firm* with modifications, then contravention of the modified *rule* could lead to *appropriate regulator* enforcement action and (if applicable) a right of action under section 138D of the *Act* (Actions for damages); and
- (2) if a *waiver* is given subject to a condition, it will not apply to activities conducted in breach of the condition, and those activities, if in breach of the original *rule*, could lead to *appropriate regulator* enforcement action or such a right of action.

The effect of rule changes on waivers

8.4.2

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Substantive changes to the *rules* (this would not include simple editorial changes) in the *Handbook* may affect existing *waivers*, changing their practical effect and creating a need for a change to the original *waiver*. The *appropriate regulator* will consult on proposed *rule* changes. A *firm* should note proposed *rule* changes and discuss the impact on a *waiver* with its appropriate supervisory contact.



8.5 Notification of altered circumstances relating to waivers

- 8.5.1 **R** A *firm* which has applied for or has been granted a *waiver* must notify the *appropriate regulator* immediately if it becomes aware of any matter which could affect the continuing relevance or appropriateness of the application or the *waiver*.

- 8.5.2 **G** *Firms* are also referred to **■** SUP 15.6 (Inaccurate, false or misleading information). This requires, in **■** SUP 15.6.4 R, a *firm* to notify the *appropriate regulator* if false, misleading, incomplete or inaccurate information has been provided. This would apply in relation to information provided in an application for a *waiver*.



8.6 Publication of waivers

Requirement to publish

8.6.1 **G** The *appropriate regulator* is required by sections 138B(1) and (2) of the *Act* to publish a *waiver* unless it is satisfied that it is inappropriate or unnecessary to do so. If the *appropriate regulator* publishes a *waiver*, it will not publish details of why a *waiver* was required or any of the supporting information given in a *waiver* application.

8.6.1A **G** The *FCA* must consult the *PRA* before publishing or deciding not to publish a *waiver* which relates to:

- (1) a *PRA-authorised person*; or
- (2) an *authorised person* who has as a member of its immediate *group* a *PRA-authorised person*;

unless the *waiver* relates to *rules* made by the *FCA* under sections 247 or 248 of the *Act*.

Matters for consideration

8.6.2 **G** When considering whether it is satisfied under section 138B(2), the *appropriate regulator* is required by section 138B(3) of the *Act*:

- (1) to take into account whether the *waiver* relates to a *rule* contravention of which is actionable under section 138D of the *Act* (Actions for damages); Schedule 5 identifies such *rules*;
- (2) to consider whether its publication would prejudice, to an unreasonable degree, the commercial interests of the *firm* concerned, or any other member of its *immediate group*;
- (3) to consider whether its publication would be contrary to an international obligation of the *United Kingdom* (for example, the confidentiality obligations in the *Single Market Directives*); and
- (4) to consider whether the publication of the *waiver* would be detrimental to the stability of the *UK financial system*.

8.6.3 **G** *Waivers* can affect the legal rights of third parties, including *consumers*. In the *appropriate regulator's* view it is important that the fact and effect of such *waivers* should be transparent. So the fact that a *waiver* relates to a

rule that is actionable under section 138D of the Act (see ■ SUP 8.6.2 G (1)) will tend to argue in favour of publication.

8.6.4 **G** In making *waiver* applications under section 250 of the Act or regulation 7 of the *OEIC Regulations*, ■ SUP 8.6.2 G (2) should be read in application to *rules* in *COLL* as if the word "commercial" were omitted.

8.6.5 **G** In considering whether commercial interests would be prejudiced to an unreasonable degree (see ■ SUP 8.6.2 G (2)), the *appropriate regulator* will weigh the prejudice to *firms'* commercial interests against the interests of *consumers*, markets and other third parties in disclosure. In doing so the *appropriate regulator* will consider factors such as the extent to which publication of the *waiver* would involve the premature release of proprietary information to commercial rivals, for example relating to a product innovation, or reveal information which could reasonably be regarded as the *firm's* own intellectual property. In line with section 138B(5) of the Act, the *appropriate regulator* will also consider whether prejudice to a *firm's* commercial interests could be avoided or mitigated by publication of the *waiver* without disclosing the identity of the *firm*.

8.6.6 **G** The *appropriate regulator* may consider publication unnecessary where, for example, the *waiver* relates to a minor matter that does not affect any third party and is unlikely to be of relevance or interest to other *firms*.

Firm's objection to publication

8.6.7 **G** If, after taking into account the matters in ■ SUP 8.3.3 D to ■ SUP 8.6.6 G, a *firm* believes there are good grounds for the *appropriate regulator* either to withhold publication or to publish the *waiver* without disclosing the identity of the *firm*, it should make this clear in its application. If the *appropriate regulator* proposes to publish a *waiver* against the wishes of the *firm*, the *appropriate regulator* will give the *firm* the opportunity to withdraw its application before the *waiver* is given.

Withholding publication for a limited period

8.6.8 **G** A decision to withhold a *waiver* or identity of a *firm* from publication may be for a limited period only, usually as long as the duration of the relevant grounds for non-publication. If the *appropriate regulator* proposes to publish information about a *waiver* that had previously been withheld, it will first give the *firm* an opportunity to make representations.

Means of publication

8.6.9 **G** The principal means of publication of *waiver* information will be the *appropriate regulator's* website.



8.7 Varying waivers

- 8.7.1** **G** Once the *appropriate regulator* has given a *waiver*, it may vary it with the *firm's* consent, or on the *firm's* application. If a *firm* wishes the *appropriate regulator* to vary a *waiver*, it should follow the procedures in ■ SUP 8.3.3 D, giving reasons for the application. In a case where a *waiver* has been given to a number of *firms* (see ■ SUP 8.3.10 G), if the *appropriate regulator* wishes to vary such *waivers* with the consent of those *firms*, it will follow the procedures in ■ SUP 8.3.10 G.
- 8.7.2** **G** If the *waiver* that has been varied has previously been published, the *appropriate regulator* will publish the variation unless it is satisfied that it is inappropriate or unnecessary to do so, having regard to any representation made by the *firm*.

8.8 Revoking waivers

- 8.8.1** **G** The *appropriate regulator* may revoke a *waiver* at any time. In deciding whether to revoke a *waiver*, the *appropriate regulator* will consider whether the conditions in section 138A(4) of the Act are no longer satisfied (see **■ SUP 8.3.1 G**), and whether the *waiver* is otherwise no longer appropriate.
- 8.8.2** **G** If the *appropriate regulator* proposes to revoke a *waiver*, or revokes a *waiver* with immediate effect, it will:
- (1) give the *firm* written notice either of its proposal, or of its action, giving reasons;
 - (2) state in the notice a reasonable period (usually 28 days) within which the *firm* can make representations about the proposal or action; if a *firm* wants to make oral representations, it should inform the *appropriate regulator* as quickly as possible, specify who will make the representations and which matters will be covered; the *appropriate regulator* will inform the *firm* of the time and place for hearing the representations and may request a written summary;
 - (3) after considering any representations, in the case of a proposed revocation, give the *firm* written confirmation of its decision to revoke the *waiver* or not; or, in the case of a revocation that has already taken effect, either confirm the revocation or seek the *firm's* consent to a new *waiver*.
- 8.8.3** **G** If the *waiver* that has been revoked has previously been published, the *appropriate regulator* will publish the revocation unless it is satisfied that it is inappropriate or unnecessary to do so, having regard to any representations made by the *firm*.



8.9 Decision making

- 8.9.1** **G** The *waivers* regime is overseen by a staff committee. Its responsibility is to ensure that the giving of *waivers* is in accordance with the requirements of the *Act*, of the *guidance* in ■ SUP 8 and of other relevant *guidance*. Decisions on individual applications are made under arrangements designed to result in rapid, responsive and well-informed decision making. The arrangements include arrangements for collective decision making to set general policies, and, as necessary, determine cases for applications with substantially common characteristics (for example, *waivers* in relation to the same *rule* or related *rules* or by *firms* in a similar position). It also includes arrangements for decision making by individuals within established precedents and policies.
- 8.9.2** **G** If the *appropriate regulator*, in the course of carrying on supplementary supervision of a *financial conglomerate*, is considering exercising its powers under section 138A of the *Act* (Modification or waiver of rules), regulation 4 of the *Financial Groups Directive Regulations* contains special provisions. The *appropriate regulator* must, in broad terms, do two things. Where required by those regulations, it must obtain the consent of the relevant competent authorities of the group. And, where required by those Regulations, it must consult those competent authorities.

Application form for a waiver or modification of rules

This annex consists only of one or more forms. Forms are to be found through the following address:

Waiver Application form - SUP_8_ann_2D_w_form_20190930.pdf

