

Chapter 8

Waiver and modification of rules

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*; 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.