Chapter 8

Waiver and modification of rules
8.1 Application and purpose

8.1.1 [deleted]

8.1.1-A 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 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 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 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 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 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 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 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 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 depositary (in the case of an ACS) or the ICVC and its depositary (in the case of an ICVC).

8.2.4 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 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.
**SUP 8 : Waiver and modification of rules**

**Section 8.2 : Introduction**

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8.3 Applying for a waiver

Conditions for giving a waiver

8.3.1 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 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 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 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 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).

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Section 8.3: Applying for a waiver of rules

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8.3.3A G (1) The appropriate regulator’s preferred method of submission for waiver applications is by e-mail.

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

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

8.3.13 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.
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

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 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 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 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 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 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 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 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 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 In making waiver applications under section 250 of the Act or regulation 7 of the OISC 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 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 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 If, after taking into account the matters in § SUP 8.6.3 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 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 The principal means of publication of waiver information will be the appropriate regulator's website.
8.7 Varying waivers

8.7.1 **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 **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 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 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 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 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 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 - Forms/sup/SUP_8_ann_2D_w_form_20181001.pdf