Chapter 8

Waiver and modification of rules
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 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 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 8.3.3 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 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.