

Annex 1 Guidance on granting a waiver

1. Introduction

Purpose

1. This document provides guidance for those making decisions about when we will grant a waiver of our regulatory arrangements – that is, of our rules and regulations. While we are under no obligation to grant a waiver, this guidance sets out the circumstances in which we will consider doing so.
2. This document should be read in the context of our decision-making framework. It is a living document and will be reviewed and updated as appropriate. It reflects our approach to our regulatory role, and any departure must be capable of justification on the individual facts of the case.

What is a waiver?

3. When an individual or firm regulated by us, or affected by our rules or regulations, ask us to agree that they do not have to comply with that rule or regulation.

Types of matters that may be suitable for a waiver

4. Many of our rules and regulations may be waived in if they meet the criteria in this guidance. However, we cannot waive rules or regulations:
 - a. that impose obligations required by statute, or other legislation such as EU Directives or Regulations
 - b. unless our regulatory arrangements (including this policy) give us the power to do so.

Case study one: a refusal to waive the requirement to have a HOFA

5. The Head of Finance and Administration (HOFA) of a small licensed body we regulate leaves the firm. The firm asks us for a waiver of the requirement to replace the HOFA on the basis that they do not have a suitable candidate, and the volume of client account transactions is small. In this case, even if the factual circumstances led us to believe that a waiver was appropriate, we do not have the power to grant a waiver because the requirement derives from statute (in this case paragraph 13 of Schedule 11 to the Legal Services Act 2007, which states that our rules must state that a licensed body must, always, have a Head of Finance and Administration fulfilling this role).

2. Criteria for granting a waiver

6. Before granting an application for a waiver we will need to be satisfied that, in the applicant's specific circumstances, a waiver is compatible with the regulatory objectives in section 1 of the Legal Services Act 2007, which are:

- protecting and promoting the public interest;
 - supporting the constitutional principle of the rule of law
 - improving access to justice
 - protecting and promoting the interests of consumers
 - promoting competition in the provision of legal services
 - encouraging an independent, strong, diverse and effective legal profession
 - increasing public understanding of the citizen's legal rights and duties
 - promoting and maintaining adherence to the professional principles.
7. The waiver sought may, in the particular circumstances, advance some of the regulatory objectives but have an adverse impact on others. For example, a waiver of some of our current practising restrictions may promote access to legal services by enabling services to be provided by a new business in a novel way, but arguably give the applicant a competitive advantage by removing restrictions that are generally applied.
 8. We expect applicants, insofar as they are able to do so, to identify the impact of the waiver, with reference to the regulatory objectives. These details are requested in the waiver application form.
 9. We will then consider any competing objectives and reach a decision that best serves our public interest purpose: namely providing consumers with appropriate protection and supporting the rule of law and administration of justice.
 10. We may grant a waiver to resolve a regulatory conflict between our rules and regulations and those of another body that regulates the applicant, or to avoid unnecessary duplication of regulatory requirements.

Case study two: a waiver of the SRA's requirement to have compliance officers

11. We regulate a firm, which is a partnership made up of four corporate partners, all of whom we also regulate.
12. Our rules require all authorised bodies to have their own compliance officers (Compliance Officer for Legal Practice (COLP) and Compliance Officer for Finance and Administration (COFA)). The former must report to us any serious breach of our rules or regulations in relation to the management and delivery of legal services. The latter's duties relate primarily to compliance with our rules regarding holding client money.
13. The corporate partners ask us for a waiver of the requirement to have their own, separate COLPs and COFAs. We grant the waiver on the basis that the requirement to have a COLP and COFA in these circumstances would serve no purpose as the corporate partners are not themselves providing legal services in their own right – only through the partnership, which has its own COLP and COFA. Therefore, the compliance officers would have no duties to fulfil and the granting of a waiver would have no adverse effect on the public interest.

3. In what circumstances will a waiver not be granted?

14. A waiver will not be granted if it would undermine our public interest purpose as set out above.
15. If the applicant's circumstances are common to others in the market, it is unlikely that a waiver will be appropriate unless it is evident that the underlying provision itself needs review in accordance with developing our policy in this area.
16. Further, we will not grant a waiver if there is another way for the applicant to achieve their objective and which is reasonable to pursue or if we are unable grant a waiver as the requirement in one imposed by statute.

Case study three: a waiver of the SRA Indemnity Insurance Rules (SIIR)

17. A Scottish firm of solicitors wants to open a branch office in England at which dual-qualified solicitors will be based. That English office is required, under the SIIR, to have its own policy of indemnity insurance that meets our requirements. The firm wants a waiver because the English office is covered by the firm's Scottish Master Policy, which includes "foreign work/foreign advice extension" cover for practice conducted outside the jurisdiction of Scotland. However, the master policy does not comply with the SIIR, because the insurers under the Scottish Master Policy are not participating insurers, the master policy is not a "policy" (as no separate policies are issued to individual firms), nor is its qualifying insurance written on our minimum terms and conditions.
18. Although the Scottish Master Policy does differ in some respects to that required by our rules, the key scope is broadly the same. The firm does conveyancing work and we are satisfied the firm carried out conveyancing work and we are satisfied the insurance level provides adequate cover for clients in both England and Wales. We therefore grant the waiver of the SIIR, as doing so meets the regulatory objectives of protecting and promoting consumer interests. It also promotes competition in the provision of legal services.

Case study four: a refusal to grant a waiver of the SIIR

19. A firm of solicitors wants to open an office in England. They apply for a waiver of the obligation to have a separate policy of indemnity insurance on the basis that the type of work they will do is "low risk" and the premiums they have been quoted are unaffordable. We refuse the waiver as the purpose of the present requirement to have insurance in place is to provide a clear and consistent level of protection for consumers of legal services provided by firms authorised by us.

4. Publication of waivers

20. We will generally publish on our website a summary of all waiver decisions we make, including a summary of the application; the waiver granted and the reasons for granting it (or not), together with any conditions. We will not publish the detail of the supporting information provided in any waiver application.
21. In deciding whether to publish, we will consider all of the circumstances including:

- whether the waiver decision impacts on the rights of consumers or third parties and if so, the extent of this
- the extent that the waiver decision may be of interest or relevance to other firms
- whether publication would adversely affect the commercial interests of the firm concerned, for example, the release of proprietary information that might benefit the applicant's rivals, for example, relating to a product innovation
- whether publication would breach any confidentiality obligations

22. We will balance any reasons for not publishing, for example, the firms' commercial interests against transparency and the interests of consumers, markets and other third parties.

23. If a firm consider that there are good grounds for us either to withhold publication or to publish the waiver without disclosing the identity of the firm or avoiding certain key details, it should make this clear in its application. If we propose then to still to publish a waiver, we will give the firm appropriate notice of our intention to publish.

24. We may decide that any prejudice to a firm's commercial interests could be mitigated by limited publication of the waiver decision, for example, without disclosing the identity of the firm. Alternatively, we may decide to withhold publication of a waiver or certain details of it for a limited period, for example, to protect commercially sensitive information. If we propose to publish information about a waiver that had previously been withheld, we will first give the firm an opportunity to comment on what is published and when.

25. We will make decision on the length of publication on a case-by-case basis. This reflects our expectations of the range waiver applications that we might receive and therefore transparency requirements.

5. Checklist for decision maker

- What is the applicant seeking?
Is it a waiver of our rules and regulations?
- Can we grant a waiver?
Do we have the power to waive the particular rule? Does the rule or regulation to which the application relates reflect a legislative requirement?

Is such a waiver necessary for the applicant to achieve their objective?
- On balance, would the waiver promote or be compatible with the regulatory objectives?
- Overall, is the waiver in the public interest?
- Should the decision be published to ensure fairness for other firms or individuals who face similar circumstances?