



# Financial Services and Markets Act 2000

## 2000 CHAPTER 8

### [<sup>F1</sup>PART 9A

#### RULES AND GUIDANCE

### [<sup>F1</sup>CHAPTER 2

#### RULES: MODIFICATION, WAIVER, CONTRAVENTION AND PROCEDURAL PROVISIONS

##### Textual Amendments

- F1** Pt. 9A substituted for ss. 138-164 (24.1.2013 for specified purposes, 1.4.2013 in so far as not already in force) by [Financial Services Act 2012 \(c. 21\)](#), ss. **24(1)**, 122(3) (with [Sch. 20](#)); [S.I. 2013/113](#), art. 2(1)(c), [Sch. Pt. 3](#); [S.I. 2013/423](#), art. 3, [Sch.](#)

#### *Modification or waiver of rules*

#### **138A Modification or waiver of rules**

- (1) Either regulator may, on the application or with the consent of a person who is subject to rules made by that regulator, direct that all or any of those rules—
- (a) are not to apply to that person, or
  - (b) are to apply to that person with such modifications as may be specified in the direction.
- (2) Subsection (1) does not apply to—
- [ rules made by either regulator under section 64A (rules of conduct);]
- <sup>F2</sup>(za)
- (a) rules made by either regulator under section 137O (threshold condition code);

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- (b) rules made by the FCA under section 247 (trust scheme rules) [<sup>F3</sup>, section 248 (scheme particulars rules), section 261I (contractual scheme rules) or section 261J (contractual scheme particulars rules)].
- (3) An application must be made in such manner as the regulator may direct.
- (4) A regulator may not give a direction unless it is satisfied that—
- (a) compliance by the person 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
  - (b) the direction would not adversely affect the advancement of any of the regulator's objectives.
- (5) In subsection (4)(b) “objectives”, in relation to the FCA, means operational objectives.
- (6) A direction may be given subject to conditions.
- (7) The regulator may—
- (a) revoke a direction, or
  - (b) vary it on the application, or with the consent, of the person to whom it relates.
- (8) “Direction” means a direction under this section.

#### Textual Amendments

- F2** S. 138A(2)(za) inserted (25.7.2014) by [Financial Services \(Banking Reform\) Act 2013 \(c. 33\)](#), s. 148(5), [Sch. 3 para. 8](#); S.I. 2014/1819, art. 2(4)(b)
- F3** Words in s. 138A(2)(b) substituted (6.6.2013) by [The Collective Investment in Transferable Securities \(Contractual Scheme\) Regulations 2013 \(S.I. 2013/1388\)](#), regs. 1, [3\(4\)](#) (with reg. 24)

#### Modifications etc. (not altering text)

- C1** S. 138A applied by S.I. 2008/2674, art. 29(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 149\(b\)\(aa\)\(ii\)](#)
- C2** S. 138A modified by S.I. 2002/1775, reg. 3(2)(a) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 77\(4\)\(b\)](#)
- C3** S. 138A applied by S.I. 2009/3226, art. 20(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 182\(a\)\(aa\)\(ii\)](#)
- C4** S. 138A applied (with modifications) by S.I. 2008/432, art. 15(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 136\(d\)\(aa\)\(ii\)](#)
- C5** S. 138A applied by S.I. 2008/2644, art. 27(2) (as substituted) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 147\(b\)\(aa\)\(ii\)](#)
- C6** S. 138A applied by S.I. 2008/2666, art. 18(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 148\(b\)\(aa\)\(ii\)](#)
- C7** S. 138A applied by S.I. 2008/2546, art. 37(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 146\(c\)\(aa\)\(ii\)](#)

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- C8** S. 138A(1) modified by S.I. 2009/814, art. 9(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 167(b)(ii)**
- C9** S. 138A(1)(6)(7) excluded by S.I. 2006/3221, reg. 8(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 118(h)(iii)** (with Sch. 2 para. 119)
- C10** Ss. 138A(3)-(7) modified by S.I. 2001/1228, reg. 7(3)(4) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 41(4)**
- C11** Ss. 138A(3)-(7) applied (with modifications) by S.R. 2004/335, reg. 7(3)(4) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 87(4)**
- C12** S. 138A(4) restricted by S.I. 2009/3226, art. 20(3) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 182(a)(aa)(iii)**
- C13** S. 138A(4) restricted by S.I. 2008/432, art. 15(3) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 136(d)(aa)(iii)**
- C14** S. 138A(4) restricted by S.I. 2008/2666, art. 18(3) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 148(b)(aa)(iii)**
- C15** S. 138A(4) restricted by S.I. 2008/2546, art. 37(3) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 146(c)(aa)(iii)**
- C16** S. 138A(4) excluded by S.I. 2006/3221, reg. 8(2) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 118(h)(iii)** (with Sch. 2 para. 119)
- C17** S. 138A(4) restricted by S.I. 2008/2644, art. 27(3) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 147(b)(aa)(ii)**
- C18** S. 138A(4) modified by S.I. 2009/814, art. 9(3)-(5) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 167(b)(iii)(iv)**
- C19** S. 138A(4) restricted by S.I. 2008/2674, art. 29(3) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 149(b)(aa)(iii)**

### **138B Publication of directions under section 138A**

- (1) Subject to subsection (2), a direction must be published by the regulator concerned in the way appearing to the regulator to be best calculated for bringing it to the attention of—
- (a) persons likely to be affected by it, and
  - (b) persons who are, in the opinion of the regulator, likely to make an application for a similar direction.
- (2) Subsection (1) does not apply if the regulator is satisfied that it is inappropriate or unnecessary to publish the direction.
- (3) In deciding whether it is satisfied as mentioned in subsection (2), the regulator must—
- (a) consider whether the publication of the direction would be detrimental to the stability of the UK financial system,

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- (b) take into account whether the direction relates to a rule contravention of which is actionable in accordance with section 138D,
  - (c) consider whether publication of the direction would prejudice, to an unreasonable degree, the commercial interests of the person concerned or any other member of the person's immediate group, and
  - (d) consider whether its publication would be contrary to an international obligation of the United Kingdom.
- (4) The FCA must consult the PRA before publishing or deciding not to publish a direction which relates to—
- (a) a PRA-authorised person, or
  - (b) an authorised person who has as a member of its immediate group a PRA-authorised person.
- (5) For the purposes of paragraphs (c) and (d) of subsection (3), the regulator must consider whether it would be possible to publish the direction without either of the consequences mentioned in those paragraphs by publishing it without disclosing the identity of the person concerned.
- (6) “Direction” means a direction under section 138A.

**Modifications etc. (not altering text)**

- C20** S. 138B modified (20.2.2013) by [The Financial Services Act 2012 \(Transitional Provisions\) \(Rules and Miscellaneous Provisions\) Order 2013 \(S.I. 2013/161\)](#), arts. 1(1), **9(3)(4)**
- C21** S. 138B applied (with modifications) by S.R. 2004/335, reg. 7(3)(4) (as amended (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 87(4)**)

*Contravention of rules*

**138C Evidential provisions**

- (1) If a particular rule made by either regulator so provides, contravention of the rule does not give rise to any of the consequences provided for by other provisions of this Act.
- (2) A rule made by a regulator which so provides must also provide—
- (a) that contravention may be relied on as tending to establish contravention of such other rule made by that regulator as may be specified, or
  - (b) that compliance may be relied on as tending to establish compliance with such other rule made by that regulator as may be specified.
- (3) A rule may include the provision mentioned in subsection (1) only if the regulator making the rule considers that it is appropriate for it also to include the provision required by subsection (2).
- (4) In this section “rule” does not include a rule made under—
- (a) section 137O (threshold condition code);
  - (b) section 192J (provision of information by parent undertakings).

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### 138D Actions for damages

- (1) A rule made by the PRA may provide that contravention of the rule is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.
- (2) A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.
- (3) If rules made by the FCA so provide, subsection (2) does not apply to a contravention of a specified provision of the rules.
- (4) In prescribed cases, a contravention of a rule which by virtue of subsection (1) or (2) would be actionable at the suit of a private person is actionable at the suit of a person who is not a private person, subject to the defences and other incidents applying to actions for breach of statutory duty.
- (5) In subsections (1), (2) and (3) “rule” does not include—
  - <sup>F4</sup>(za) [ rules under section 64A (rules of conduct);]
  - (a) Part 6 rules;
  - (b) rules under section 137O (threshold condition code);
  - (c) rules under section 192J (provision of information by parent undertakings);
  - (d) a rule requiring an authorised person to have or maintain financial resources.
- (6) “Private person” has such meaning as may be prescribed.

#### Textual Amendments

**F4** S. 138D(5)(za) inserted (25.7.2014) by [Financial Services \(Banking Reform\) Act 2013 \(c. 33\)](#), s. 148(5), [Sch. 3 para. 9](#); S.I. 2014/1819, art. 2(4)(b)

#### Modifications etc. (not altering text)

**C22** S. 138D applied by S.R. 2004/335, reg. 25(6) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 87\(6\)](#)

**C23** S. 138D modified by S.I. 2002/1775, reg. 3(2)(a) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), [Sch. 2 para. 77\(4\)\(b\)](#)

### 138E Limits on effect of contravening rules

- (1) A person is not guilty of an offence by reason of a contravention of a rule made by either regulator.
- (2) No such contravention makes any transaction void or unenforceable.
- (3) Subsection (2) does not apply in relation to—
  - (a) rules made by the FCA under section 137C, or
  - (b) product intervention rules made by the FCA under section 137D.

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### Procedural provisions

#### 138F Notification of rules

[ If either regulator makes, alters or revokes any rules, that regulator must without delay<sup>F5</sup> (1)] give written notice—

- (a) to the Treasury, and
- (b) to the Bank of England.

[ Subsection (1)(b) does not apply to rules made under or by virtue of section 137FB,<sup>F6</sup>(2) 333Q or 333R.]

#### Textual Amendments

- F5** S. 138F(1): s. 138F renumbered as s. 138F(1) (3.3.2015) by [Pension Schemes Act 2015 \(c. 8\), s. 89\(1\)\(a\), Sch. 3 para. 7\(2\)](#) (with s. 87)
- F6** S. 138F(2) inserted (3.3.2015) by [Pension Schemes Act 2015 \(c. 8\), s. 89\(1\)\(a\), Sch. 3 para. 7\(3\)](#) (with s. 87)

#### 138G Rule-making instruments

- (1) Any power conferred on either regulator to make rules is exercisable in writing.
- (2) An instrument by which rules are made by either regulator (“a rule-making instrument”) must specify the provision under which the rules are made.
- (3) To the extent that a rule-making instrument does not comply with subsection (2), it is void.
- (4) A rule-making instrument must be published by the regulator making the rule in the way appearing to that regulator to be best calculated to bring it to the attention of the public.
- (5) The regulator making the rule may charge a reasonable fee for providing a person with a copy of a rule-making instrument.
- (6) A person is not to be taken to have contravened any rule made by a regulator if the person shows that at the time of the alleged contravention the rule-making instrument concerned had not been made available in accordance with this section.

#### 138H Verification of rules

- (1) The production of a printed copy of a rule-making instrument purporting to be made by a regulator—
  - (a) on which is endorsed a certificate signed by a member of staff of that regulator who is authorised by the regulator for that purpose, and
  - (b) which contains the required statements,
 is evidence (or in Scotland sufficient evidence) of the facts stated in the certificate.
- (2) The required statements are—
  - (a) that the instrument was made by the FCA or the PRA (as the case may be),
  - (b) that the copy is a true copy of the instrument, and

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- (c) that on a specified date the instrument was made available to the public in accordance with section 138G(4).
- (3) A certificate purporting to be signed as mentioned in subsection (1) is to be taken to have been properly signed unless the contrary is shown.
- (4) A person who wishes in any legal proceedings to rely on a rule-making instrument may require the regulator that made the rule to endorse a copy of the instrument with a certificate of the kind mentioned in subsection (1).

#### **Modifications etc. (not altering text)**

- C24** S. 138H modified (20.2.2013) by [The Financial Services Act 2012 \(Transitional Provisions\) \(Rules and Miscellaneous Provisions\) Order 2013 \(S.I. 2013/161\)](#), arts. 1(1), **3(6)**
- C25** S. 138H excluded by S.I. 2002/1501, art. 12(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 76(c)(i)**
- C26** S. 138H modified (26.7.2013 for specified purposes, 1.4.2014 in so far as not already in force) by [The Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) \(No. 2\) Order 2013 \(S.I. 2013/1881\)](#), arts. 1(2)(6), **64(4)**

### **138I Consultation by the FCA**

- (1) Before making any rules, the FCA must—
  - (a) consult the PRA, and
  - (b) after doing so, publish a draft of the proposed rules in the way appearing to the FCA to be best calculated to bring them to the attention of the public.
- (2) The draft must be accompanied by—
  - (a) a cost benefit analysis,
  - (b) an explanation of the purpose of the proposed rules,
  - (c) any statement prepared under section 138K(2),
  - (d) an explanation of the FCA's reasons for believing that making the proposed rules is compatible with its duties under section 1B(1) and (5)(a), and
  - (e) notice that representations about the proposals may be made to the FCA within a specified time.
- (3) Before making the proposed rules, the FCA must have regard to any representations made to it in accordance with subsection (2)(e).
- (4) If the FCA makes the proposed rules, it must publish an account, in general terms, of—
  - (a) the representations made to it in accordance with subsection (2)(e), and
  - (b) its response to them.
- (5) If the rules differ from the draft published under subsection (1)(b) in a way which is, in the opinion of the FCA, significant the FCA must publish—
  - (a) details of the difference (in addition to complying with subsection (4)) together with a cost benefit analysis, and
  - (b) any statement prepared under section 138K(4).
- (6) The requirements to carry out a cost benefit analysis under this section do not apply in relation to rules made under—

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- (a) section 136(2);  
[ section 137FB;]
  - <sup>F7</sup>(aa) (b) subsection (1) of section 213 as a result of subsection (4) of that section;
  - (c) section 234;  
[ section 333Q;
  - <sup>F8</sup>(ca) (cb) section 333R;]
  - (d) paragraph 23 of Schedule 1ZA;
  - (e) paragraph 12 of Schedule 1A.
- (7) “Cost benefit analysis” means—
- (a) an analysis of the costs together with an analysis of the benefits that will arise—
    - (i) if the proposed rules are made, or
    - (ii) if subsection (5) applies, from the rules that have been made, and
  - (b) subject to subsection (8), an estimate of those costs and of those benefits.
- (8) If, in the opinion of the FCA—
- (a) the costs or benefits referred to in subsection (7) cannot reasonably be estimated, or
  - (b) it is not reasonably practicable to produce an estimate,
- the cost benefit analysis need not estimate them, but must include a statement of the FCA’s opinion and an explanation of it.
- (9) The FCA may charge a reasonable fee for providing a person with a copy of a draft published under subsection (1)(b).
- (10) Subsection (1)(a) does not apply to<sup>F9</sup>—
- (a) rules made by the FCA under section 137FB, 333Q or 333R, or
  - (b) rules made by the FCA in relation to recognised investment exchanges under Part 18.
- (11) This section is subject to section 138L.

#### Textual Amendments

- F7** S. 138I(6)(aa) inserted (3.3.2015) by [Pension Schemes Act 2015 \(c. 8\)](#), s. 89(1)(a), **Sch. 3 para. 8(a)** (with s. 87, **Sch. 3 para. 18(1)**)
- F8** S. 138I(6)(ca)(cb) inserted (3.3.2015) by [Pension Schemes Act 2015 \(c. 8\)](#), s. 89(1)(a), **Sch. 3 para. 8(b)** (with s. 87)
- F9** S. 138I(10)(a) and word inserted (3.3.2015) by [Pension Schemes Act 2015 \(c. 8\)](#), s. 89(1)(a), **Sch. 3 para. 8(c)** (with s. 87)

#### Modifications etc. (not altering text)

- C27** S. 138I excluded (20.2.2013) by [The Financial Services Act 2012 \(Transitional Provisions\) \(Rules and Miscellaneous Provisions\) Order 2013 \(S.I. 2013/161\)](#), arts. 1(1), **8(2)**
- C28** S. 138I excluded by S.I. 2004/454, art. 12(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 89(b)**



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- C29** S. 138I excluded by S.I. 2006/3259, reg. 4 (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\), Sch. 2 para. 120\(b\)\(ii\)](#)
- C30** S. 138I excluded (2.4.2013) by [The Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) Order 2013 \(S.I. 2013/655\), arts. 1, 9\(2\)](#)
- C31** Ss. 138I-138L applied (with modifications) (22.7.2013) by [The Alternative Investment Fund Managers \(Amendment\) Regulations 2013 \(S.I. 2013/1797\), regs. 1\(2\), 6\(3\)-\(7\) \(with reg. 6\(2\)\) \(as amended \(31.12.2020\) by S.I. 2019/328, regs. 1\(3\), 19\(1\) \(which is itself amended by S.I. 2019/325, reg. 58\); 2020 c. 1, Sch. 5 para. 1\(1\)\)](#)
- C32** S. 138I applied (with modifications) (26.7.2013) by [The Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) \(No.2\) Order 2013 \(S.I. 2013/1881\), arts. 1\(4\), 61\(5\) \(with art. 61\(6\)\(7\)\)](#)
- C33** S. 138I excluded (1.4.2015) by [The Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) Order 2015 \(S.I. 2015/369\), arts. 1, 6\(2\)\(b\)](#)
- C34** S. 138I excluded (6.4.2015) by [The Bank of England Act 1998 \(Macro-prudential Measures\) Order 2015 \(S.I. 2015/909\), arts. 1, 4\(2\)\(a\) \(with art. 4\(1\)\)](#)
- C35** S. 138I(1)(b)(2)(e)(3) applied by S.I. 2008/346, reg. 42(4)(4A) (as substituted (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\), Sch. 2 para. 134\(d\)](#))
- C36** S. 138I(2)(a) excluded (26.7.2013) by [The Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) \(No.2\) Order 2013 \(S.I. 2013/1881\), arts. 1\(4\), 61\(3\) \(with art. 61\(6\)\)](#)
- C37** S. 138I(2)(d) excluded (1.4.2013) by [The Financial Services Act 2012 \(Mutual Societies\) Order 2013 \(S.I. 2013/496\), art. 1\(1\), Sch. 1 para. 6\(2\), \(3\)\(a\) \(with Sch. 12\)](#)

## 138J Consultation by the PRA

- (1) Before making any rules, the PRA must—
  - (a) consult the FCA, and
  - (b) after doing so, publish a draft of the proposed rules in the way appearing to the PRA to be best calculated to bring them to the attention of the public.
- (2) The draft must be accompanied by—
  - (a) a cost benefit analysis,
  - (b) an explanation of the purpose of the proposed rules,
  - (c) any statement prepared under section 138K(2),
  - (d) an explanation of the PRA's reasons for believing that making the proposed rules is compatible with its duties under—
    - (i) section 2B(1) or, as the case requires, section 2C(1) or 2D(3), and
    - (ii) section 2H, and
  - (e) notice that representations about the proposals may be made to the PRA within a specified time.
- (3) Before making the proposed rules, the PRA must have regard to any representations made to it in accordance with subsection (2)(e).
- (4) If the PRA makes the proposed rules, it must publish an account, in general terms, of—
  - (a) the representations made to it in accordance with subsection (2)(e), and
  - (b) its response to them.
- (5) If the rules differ from the draft published under subsection (1)(b) in a way which is, in the opinion of the PRA, significant the PRA must publish—

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- (a) details of the difference (in addition to complying with subsection (4)) together with a cost benefit analysis, and
  - (b) any statement prepared under section 138K(4).
- (6) The requirements to carry out a cost benefit analysis under this section do not apply in relation to rules made under—
- (a) section 136(2);
  - (b) subsection (1) of section 213 as a result of subsection (4) of that section;
  - (c) section 234;
  - (d) paragraph 31 of Schedule 1ZB;
  - (e) paragraph 12 of Schedule 1A.
- (7) “Cost benefit analysis” means—
- (a) an analysis of the costs together with an analysis of the benefits that will arise—
    - (i) if the proposed rules are made, or
    - (ii) if subsection (5) applies, from the rules that have been made, and
  - (b) subject to subsection (8), an estimate of those costs and of those benefits.
- (8) If, in the opinion of the PRA—
- (a) the costs or benefits referred to in subsection (7) cannot reasonably be estimated, or
  - (b) it is not reasonably practicable to produce an estimate,
- the cost benefit analysis need not estimate them, but must include a statement of the PRA’s opinion and an explanation of it.
- (9) The PRA may charge a reasonable fee for providing a person with a copy of a draft published under subsection (1)(b).
- (10) This section is subject to section 138L.

#### **Modifications etc. (not altering text)**

- C31** Ss. 138I-138L applied (with modifications) (22.7.2013) by [The Alternative Investment Fund Managers \(Amendment\) Regulations 2013 \(S.I. 2013/1797\)](#), regs. 1(2), **6(3)-(7)** (with reg. 6(2)) (as amended (31.12.2020) by [S.I. 2019/328](#), regs. 1(3), **19(1)** (which is itself amended by [S.I. 2019/325](#), reg. **58**); 2020 c. 1, [Sch. 5 para. 1\(1\)](#))
- C38** S. 138J applied (with modifications) (26.7.2013) by [The Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) \(No.2\) Order 2013 \(S.I. 2013/1881\)](#), arts. 1(4), **62(4)(5)**
- C39** S. 138J excluded (6.4.2015) by [The Bank of England Act 1998 \(Macro-prudential Measures\) Order 2015 \(S.I. 2015/909\)](#), arts. 1, **4(2)(b)** (with art. 4(1))
- C40** Ss. 138J, 138K excluded (6.4.2015) by [The Bank of England Act 1998 \(Macro-prudential Measures\) \(No.2\) Order 2015 \(S.I. 2015/905\)](#), arts. 1(2), **5(2)(a)** (with art. 5(1))
- C41** S. 138J(2)(a) excluded (1.4.2013) by [The Bank of England Act 1998 \(Macro-prudential Measures\) Order 2013 \(S.I. 2013/644\)](#), arts. 1(1), **3(2)**
- C42** S. 138J(2)(a) excluded (26.7.2013) by [The Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) \(No.2\) Order 2013 \(S.I. 2013/1881\)](#), arts. 1(4), **62(2)**
- C43** S. 138J(5)(a) restricted (25.3.2013) by [The Financial Services Act 2012 \(Transitional Provisions\) \(Miscellaneous Provisions\) Order 2013 \(S.I. 2013/442\)](#), arts. 1(2), **70(3)**

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### **138K Consultation: mutual societies**

- (1) Subsection (2) applies where a regulator proposes to make a rule (“the proposed rule”) which would apply both to—
  - (a) authorised persons which are mutual societies, and
  - (b) other authorised persons.
- (2) The regulator must prepare a statement setting out—
  - (a) its opinion whether or not the impact of the proposed rule on persons within subsection (1)(a) will be significantly different from its impact on persons within subsection (1)(b), and
  - (b) if so, details of the difference.
- (3) Subsection (4) applies where a regulator makes a rule which—
  - (a) applies both to—
    - (i) authorised persons which are mutual societies, and
    - (ii) other authorised persons, and
  - (b) differs from the draft of the proposed rule published under section 138I(1)(b) or section 138J(1)(b) (as the case may be).
- (4) The regulator must prepare a statement setting out—
  - (a) its opinion whether or not the impact of the rule is significantly different from the impact of the proposed rule on—
    - (i) the persons within subsection (3)(a)(i), and
    - (ii) those persons as compared with persons within subsection (3)(a)(ii), and
  - (b) if so, details of the difference.
- (5) A “mutual society” is—
  - (a) a building society within the meaning of the Building Societies Act 1986;
  - (b) a friendly society within the meaning of the Friendly Societies Act 1992;
  - (c) a registered society within the meaning of [<sup>F10</sup>the Co-operative and Community Benefit Societies Act 2014];
  - (d) an EEA mutual society.
- (6) An “EEA mutual society” is—
  - (a) a body which is a European Cooperative Society for the purposes of Council Regulation (EC) No 1435/2003 (statute for a European Cooperative Society);
  - (b) a body which is established as a cooperative under the law of an EEA state as mentioned in that Regulation;
  - (c) a body which is a cooperative or mutual undertaking of such description as the Treasury specify by order and which is established or operates in accordance with the laws of an EEA state.

#### **Textual Amendments**

**F10** Words in s. 138K(5)(c) substituted (1.8.2014) by [Co-operative and Community Benefit Societies Act 2014 \(c. 14\)](#), s. 154, [Sch. 4 para. 69](#) (with [Sch. 5](#))

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#### **Modifications etc. (not altering text)**

- C31** Ss. 138I-138L applied (with modifications) (22.7.2013) by [The Alternative Investment Fund Managers \(Amendment\) Regulations 2013 \(S.I. 2013/1797\)](#), regs. 1(2), **6(3)-(7)** (with reg. 6(2)) (as amended (31.12.2020) by [S.I. 2019/328](#), regs. 1(3), **19(1)** (which is itself amended by [S.I. 2019/325](#), **reg. 58**); 2020 c. 1, **Sch. 5 para. 1(1)**)
- C40** Ss. 138J, 138K excluded (6.4.2015) by [The Bank of England Act 1998 \(Macro-prudential Measures\) \(No.2\) Order 2015 \(S.I. 2015/905\)](#), arts. 1(2), **5(2)(a)** (with art. 5(1))
- C44** S. 138K excluded (20.2.2013) by [The Financial Services Act 2012 \(Transitional Provisions\) \(Rules and Miscellaneous Provisions\) Order 2013 \(S.I. 2013/161\)](#), arts. 1(1), **8(2)**
- C45** S. 138K excluded (6.4.2015) by [The Bank of England Act 1998 \(Macro-prudential Measures\) Order 2015 \(S.I. 2015/909\)](#), arts. 1, **4(2)** (with art. 4(1))

### **138L Consultation: general exemptions**

- (1) Sections 138I(1)(b) and (2) to (5) and 138K do not apply in relation to rules made by the FCA if the FCA considers that the delay involved in complying with them would be prejudicial to the interests of consumers, as defined in section 425A.
- (2) Sections 138J(1)(b) and (2) to (5) and 138K do not apply in relation to rules made by the PRA if the PRA considers that the delay involved in complying with them would—
  - (a) be prejudicial to the safety and soundness of PRA-authorised persons, or
  - (b) in a case where section 2C applies, be prejudicial to securing the appropriate degree of protection for policyholders.
- (3) The provisions listed in subsection (4) do not apply if the regulator concerned considers that, making the appropriate comparison—
  - (a) there will be no increase in costs, or
  - (b) there will be an increase in costs but that increase will be of minimal significance.
- (4) Those provisions are—
  - (a) subsections (2)(a) and (5)(a) of section 138I;
  - (b) subsections (2)(a) and (5)(a) of section 138J.
- (5) The “appropriate comparison” means—
  - (a) in relation to section 138I(2)(a) or 138J(2)(a), a comparison between the overall position if the rules are made and the overall position if the rules are not made;
  - (b) in relation to section 138I(5)(a) or 138J(5)(a), a comparison between the overall position after the making of the rules and the overall position before they were made.

#### **Modifications etc. (not altering text)**

- C31** Ss. 138I-138L applied (with modifications) (22.7.2013) by [The Alternative Investment Fund Managers \(Amendment\) Regulations 2013 \(S.I. 2013/1797\)](#), regs. 1(2), **6(3)-(7)** (with reg. 6(2)) (as amended (31.12.2020) by [S.I. 2019/328](#), regs. 1(3), **19(1)** (which is itself amended by [S.I. 2019/325](#), **reg. 58**); 2020 c. 1, **Sch. 5 para. 1(1)**)
- C46** S. 138L(1)(2) modified by [S.I. 2008/2666](#), art. 19(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 148(c)(i)**

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- C47** S. 138L(1)(2) modified by S.I. 2009/3226, art. 21(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 182(b)(i)**
- C48** S. 138L(1)(2) modified by S.I. 2008/2674, art. 30(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 149(c)(i)**
- C49** S. 138L(1)(2) modified by S.I. 2008/2546, art. 38(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 146(d)(i)**
- C50** S. 138L(1)(2) modified by S.I. 2008/2644, art. 28(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 147(c)(i)**
- C51** S. 138L(1)(2) modified by S.I. 2008/432, art. 16(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 136(e)(aa)(i)**
- C52** S. 138L(1)(2) modified by S.I. 2009/814, art. 10(1) (as amended) (1.4.2013) by [The Financial Services Act 2012 \(Consequential Amendments and Transitional Provisions\) Order 2013 \(S.I. 2013/472\)](#), **Sch. 2 para. 167(c)(i)**

### **138M Consultation: exemptions for temporary product intervention rules**

- (1) Sections 138I(1)(b) and (2) to (5) and 138K do not apply in relation to product intervention rules made by the FCA if it considers that it is necessary or expedient not to comply with them for the purpose of advancing—
  - (a) the consumer protection objective or the competition objective, or
  - (b) if an order under section 137D(1)(b) is in force, the integrity objective.
- (2) Any rules made as a result of subsection (1) (“temporary product intervention rules”) are to cease to have effect at the end of the period specified in the rules.
- (3) The longest period that may be specified is the period of 12 months beginning with the day on which the rules come into force.
- (4) Nothing in subsection (2) prevents the FCA from revoking temporary product intervention rules before the end of the period mentioned there.
- (5) If the FCA has made temporary product intervention rules (“the initial rules”), it may not make further temporary product intervention rules containing the same, or substantially the same, provision as that contained in the initial rules until the prohibited period has ended.
- (6) “The prohibited period” means the period of 12 months beginning with the day on which the period mentioned in subsection (2) ends (whether or not the initial rules have been revoked before the end of the period mentioned there).

### **138N Temporary product intervention rules: statement of policy**

- (1) The FCA must prepare and issue a statement of its policy with respect to the making of temporary product intervention rules.
- (2) The FCA may at any time alter or replace a statement issued under this section.
- (3) If a statement issued under this section is altered or replaced, the FCA must issue the altered or replacement statement.

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- (4) The FCA must, without delay, give the Treasury a copy of any statement which it publishes under this section.
- (5) A statement issued under this section must be published by the FCA in the way appearing to the FCA to be best calculated to bring it to the attention of the public.
- (6) The FCA may charge a reasonable fee for providing a person with a copy of the statement.

### **138O Statement of policy under section 138N: procedure**

- (1) Before issuing a statement under section 138N, the FCA must publish a draft of the proposed statement in the way appearing to the FCA to be best calculated to bring it to the attention of the public.
- (2) The draft must be accompanied by notice that representations about the proposal may be made to the FCA within a specified time.
- (3) Before issuing the proposed statement, the FCA must have regard to any representations made to it in accordance with subsection (2).
- (4) If the FCA issues the proposed statement it must publish an account, in general terms, of—
  - (a) the representations made to it in accordance with subsection (2), and
  - (b) its response to them.
- (5) If the statement differs from the draft published under subsection (1) in a way which is, in the opinion of the FCA, significant, the FCA must (in addition to complying with subsection (4)) publish details of the difference.
- (6) The FCA may charge a reasonable fee for providing a person with a copy of a draft published under subsection (1).
- (7) This section also applies to a proposal to alter or replace a statement.]

**Status:**

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**Changes to legislation:**

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