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*Dear Paul*

## **MANAGING WAIVERS IN THE TRANSITION TO NEWCOB**

Last October, in Consultation Papers 06/19 and 06/20, we set out our plans to replace the existing FSA conduct of business sourcebook (COB) with an entirely new sourcebook (NEWCOB). This will come into force on 1 November 2007. In CP 06/19 we noted, at page 166, that on the transition to NEWCOB all existing waivers of COB rules would expire, and that we would be contacting those firms who would be affected to establish their future plans.

The purpose of this letter is to inform you of how we intend to handle this work, and to ask for your help in communicating this to your members. Before doing so, it might be helpful to set out the background to this issue.

### Background

Section 148 of FSMA gives the FSA the power to waive or modify the application to particular firms of various categories of its rules, subject to certain conditions being met. But when such a rule is subsequently deleted from the FSA Handbook, any existing waiver or modification of that rule automatically ceases. The transition to NEWCOB will therefore bring about the end of all existing COB waivers, and those firms affected may wish to consider whether they wish to apply for a waiver of one or more of the new rules. In doing so, they will need to take account of three factors:

1. NEWCOB is drafted at a generally higher level than COB. In some areas, existing rules will not be carried forward into NEWCOB, thus removing the need for a waiver.
2. NEWCOB contains many rules which implement parts of MiFID or of other EU Directives. The FSA cannot waive or modify these rules insofar as they apply to firms doing business which falls within the scope of these Directives, because that would put the UK in breach of its obligation to implement EU law. Of course, that does not mean we can never waive a rule which is derived from a Directive. We may do this in areas

where we have applied Directive rules to firms doing business outside the scope of that Directive eg where we have applied MiFID rules to non-MiFID firms.

3. NEWCOB is similar in scope to COB, but there is no direct read-across between individual rules. In order to be granted, any application for a waiver must meet the statutory requirements set out in s.148 of FSMA. It does not follow that just because a firm met these tests when it originally applied for a waiver of a particular COB rule, that it would necessarily meet them if it applied for a waiver of a NEWCOB rule.

#### Waivers of NEWCOB rules

Decisions on whether and when to apply for waivers of NEWCOB rules are matters for individual firms. We wish to give firms plenty of time in which to consider this issue before the new rules come into force, because we want to avoid receiving a rush of applications as we approach 1 November. In the light of this, we have decided that we will accept and begin to consider applications for NEWCOB waivers as soon as we make and publish the final NEWCOB rules. As noted in CP 06/19, we expect this to be in the second quarter of this year. We have also now written to all of the firms which our central records show hold current waivers of the COB rules, to draw their attention to this fact.

#### Other existing COB waivers

The remaining group of COB waivers shown on our records are a diverse collection of waivers and modifications applying to different firms, which have been sought and granted for different reasons. In these cases we have now written to the firms involved reminding them of the effect that the introduction of NEWCOB will have on their waiver, and of the need to consider what to do next – see copy letter attached. In order to help with our internal work planning, we have asked those firms who think they may wish to replace their waiver with a waiver of a NEWCOB rule to let us know by 1 June. I should stress that we are not asking for, nor can we consider, formal waiver applications at this stage – this will not be possible until the final rules are made later this year. Nor would the fact that a firm does not currently think that it wishes to apply for a NEWCOB waiver application prevent its reconsidering and submitting such an application later this year.

#### Conclusion

As I have mentioned, the primary responsibility of considering whether to apply for any waiver rests with firms themselves. So far as NEWCOB in particular is concerned, we have set out the issues described above in CP 06/19. So whilst we are writing directly to those firms which we know have a waiver of the existing COB rules, this is merely a reminder of the need for them to consider this matter. But there are two groups of firms who we cannot contact directly, and so you may wish to consider including some reference to waivers in any communications you send to your members about their preparations for the introduction of NEWCOB. First of all, we have no central records for waivers that were granted before April 2004 and which might still be in force. If any firms have waivers of the COB rules granted before that date, and are still relying on these, then they will need to consider whether they wish to apply for a new waiver. Secondly, it is possible that firms who do not have waivers of the current COB rules will nevertheless wish to apply for waivers of NEWCOB rules. If

so, and if they are seeking a waiver that would come into force at the same time as the new rules, then they would need to apply in good time before 1 November.

A handwritten signature in black ink, appearing to read "Yours Mike" with a flourish at the end.

Michael Folger  
Director, Wholesale and Prudential Policy