

Chapter 16

Disapplication orders against members of the professions

16.1 The FCA's general approach to making disapplication orders

- 16.1.1** The *FCA's* power under section 329 of the *Act* to make an order disapplying an exemption from the *general prohibition* in relation to a *person* who is a *member* of the professions on the grounds that the *member* is not a fit and proper person to conduct *exempt regulated activities*, and to maintain a public record of disapplication orders, will assist the *FCA* in pursuing its *statutory objectives*.
- 16.1.2** The *FCA* may make a range of disapplication orders depending on the particular circumstances of each case, including the range of *exempt regulated activities* undertaken and the particular *exempt regulated activities* to which the *person's* lack of fitness and propriety in that context is relevant.
- 16.1.3** The *FCA* recognises that a decision to make a disapplication order may have serious consequences for a *member* in relation not only to the conduct by the member of *exempt regulated activities*, but also in relation to the other business carried on by the *member*. When it decides whether to exercise its power to make a disapplication order, the *FCA* will consider all relevant circumstances including whether other action, in particular the making of a *prohibition order* (see chapter 9 of this guide), would be more appropriate. In general, the *FCA* is likely to exercise its powers to make an order disapplying an exemption where it considers that a *member* of a profession presents such a risk to the *FCA's statutory objectives* that it is appropriate to prevent the *member* from carrying out the *exempt regulated activities*. The *FCA* will also have regard to any disciplinary action taken, or to be taken, against the *person* by the relevant *designated professional body*.

16.2 Disapplication orders

- 16.2.1** When the *FCA* has concerns about the fitness and propriety of a *member* to carry out *exempt regulated activities*, it will consider all the relevant circumstances of the case, including whether those concerns arise from the fitness and propriety of specific individuals engaged to perform the *exempt regulated activities* carried out by the *member* or whether its concerns arise from wider concerns about the *member* itself.
- 16.2.2** In most cases, where the *FCA* is concerned about the fitness and propriety of a specific individual, it may be more appropriate for the *FCA* to consider whether to make an order prohibiting the individual from performing functions in relation to *exempt regulated activities* rather than a disapplication order in relation to the *member* concerned. The criteria which the *FCA* will apply when determining whether to make a prohibition order against an individual who is not regulated by the *FCA* are set out in paragraphs ■ 9.5.1 to ■ 9.5.2 of this guide (*prohibition orders* against other individuals). In addition to the factors referred to in these paragraphs, the *FCA* may also take into consideration any disciplinary action that has been, or will be taken against the individual concerned by the relevant *designated professional body*, where that disciplinary action reflects on the fitness and propriety of the individual concerned to perform *exempt regulated activities*.
- 16.2.3** The *FCA* will also take into account the potentially more serious consequences that a disapplication of an exemption will have for the *member* concerned compared with the consequences of a prohibition of a particular individual engaged in *exempt regulated activities*. However, the *FCA* may consider it appropriate in some cases to disapply an exemption where it decides that the *member* concerned is not fit and proper to carry out *exempt regulated activities* in accordance with section 327 of the *Act* (Exemption from the general prohibition).
- 16.2.4** As an alternative to making an order to disapply an exemption, the *FCA* may consider issuing a private warning. A private warning may be appropriate where the *FCA* has concerns in relation to a *member's* fitness and propriety but feels that its concerns in relation to the conduct of *exempt regulated activities* can be more appropriately addressed by a private warning than by a disapplication of the *member's* exemption.
- 16.2.5** When it decides whether to exercise its power to disapply an exemption from the *general prohibition* in relation to a *member*, the *FCA* will take into account all relevant circumstances which may include, but are not limited to, the following factors:

- (1) Disciplinary or other action taken by the relevant *designated professional body*, where that action relates to the fitness and propriety of the *member* concerned: where the *FCA* considers that its concerns in relation to the fitness and propriety of the *member* concerned may be, or have been adequately addressed by disciplinary or other action taken by the relevant *designated professional body* it may consider not making a disapplication order in addition to such action; however, where the *FCA* considers that its concerns, and in particular, any risks presented to the *member's clients* in respect of its *exempt regulated activities*, are not adequately addressed by that action, the *FCA* will consider making a disapplication order;
- (2) The significance of the risk which the *member* presents to its *clients*: if the *FCA* is satisfied that there is a significant risk to *clients* and *consumers* it may consider making a disapplication order;
- (3) The extent of the *member's* compliance with *rules* made by the *FCA* under section 332(1) of the *Act* (Rules in relation to whom the general prohibition does not apply) or by the relevant *designated professional body* under section 332(3) of the *Act*;

16.2.6 Where the *FCA* is considering whether to exercise its power to make a disapplication order in relation to a *member*, it will liaise closely with the relevant *designated professional body*.

16.2.7 Where the *FCA* is considering making a disapplication order against a *member* as a result of a breach of *rules* made by the *FCA* under section 323(1) of the *Act*, it will take into account any proposed application by the *member* concerned for *authorisation* under the *Act*. The *FCA* may refrain from making a disapplication order pending its consideration of the application for *authorisation*.



16.3 Applications under section 329(3) for variation or revocation of disapplication orders

16.3.1

When considering whether to grant or refuse an application under section 329(3) of the *Act* to vary or revoke a disapplication order, the *FCA* will take into account all the relevant circumstances. These may include, but are not limited to:

- (1) any steps taken by the *person* to rectify the circumstances which gave rise to the original order;
- (2) whether the *person* has ceased to present the risk to *clients* and *consumers* or to the *FCA's statutory objectives* which gave rise to the original order;
- (3) the circumstances giving rise to the original order and any additional information which, had it been known by the *FCA*, would have been relevant to the decision to make the order;
- (4) the amount of time which has elapsed since the order was made.

16.3.2

The *FCA* will not generally grant an application to vary a disapplication order unless it is satisfied that the proposed variation will not result in the *person* presenting the same degree of risk to *clients* or *consumers* that originally gave rise to the order to disapply the exemption. Similarly, the *FCA* will not revoke a disapplication order unless and until it is satisfied that the *person* concerned is fit and proper to carry out *exempt regulated activities* generally or those specific *exempt regulated activities* in relation to which the exemption has been disapplied.

16.4 The effect of a disapplication order

- 16.4.1** When the *FCA* has made a disapplication order, the *member* against which it has been made may not perform the *exempt regulated activities* to which the order relates. If the member contravenes the order, there will be a breach of the *general prohibition* that may be prosecuted under section 23 of the *Act* (see ■ chapter 12).
- 16.4.2** A disapplication order in relation to *exempt regulated activities* made against a *member* will be relevant should that *member* subsequently apply for *authorisation* under the *Act*. Whether or not such an application for *authorisation* is successful will depend on many factors, including the *FCA*'s grounds for making the disapplication order. For example, if the order for disapplication of the exemption was made on the grounds of a breach of *rules* made under section 332(1) of the *Act*, the *FCA* may accept an application for *authorisation* notwithstanding the disapplication order. If, however, the order was made on grounds of a breach of the rules of a *designated professional body* resulting in a significant risk to *clients* in relation to the provision of *exempt regulated activities*, it is unlikely that an application for approval made by the *member* would be accepted by the *FCA* before the revocation of the disapplication order.