

## Chapter 3

# The FCA's duties and powers

## 3.2 The FCA's power to make a direction

- 3.2.1** **G** Section 328 of the *Act* (Directions in relation to the general prohibition) gives the *FCA* power to make a direction that the exemption under section 327 of the *Act* (see **■ PROF 2.1.3 G**) does not apply to the extent specified in the direction. Section 328 allows the *FCA* to make a direction in relation to different classes of *person* or different descriptions of *regulated activity*. Section 325(3) of the *Act* requires the *FCA* to keep under review the desirability of exercising its powers under Part XX of the *Act* (Provision of Financial Services by Members of the Professions), including its direction powers under section 328 of the *Act*.
- 3.2.2** **G** If the *FCA* gives a direction in relation to specified classes of *person*, then any *person* within those classes may be in contravention of the *general prohibition* unless:
- (1) it ceases to carry on *regulated activities*; or
  - (2) it is an *authorised person*; or
  - (3) it is an *exempt person*.
- 3.2.3** **G** A direction might also cover classes of *persons* who are *members* of different *designated professional bodies*.
- 3.2.4** **G** Were the *FCA* to give a direction in relation to a description of *regulated activity* (for example, *dealing in investments as agent*), then that activity could no longer be carried on within the terms of the exemption.
- 3.2.5** **G**
- (1) The *FCA* may exercise its direction powers under section 328(6) of the *Act* in two situations, as set out in (2) and (3).
  - (2) First, the *FCA* may exercise its direction power under section 328(6)(a) of the *Act* if it is satisfied that it is desirable in order to protect the interests of *clients*. In considering whether it is satisfied, the *FCA* is required by section 328(7) of the *Act* to have regard, among other things, to the effectiveness of any arrangements made by a *designated professional body*:
    - (a) for securing compliance with *rules* made under section 332(1) of the *Act* (see **■ PROF 4.1.1 G**);

- (b) for dealing with complaints against its *members* in relation to the carrying on by them of *exempt regulated activities* (see ■ PROF 4.1.4 G (2)(d));
- (c) in order to offer redress to *clients* who suffer, or claim to have suffered, loss as a result of misconduct by its *members* in their carrying on of *exempt regulated activities* (see ■ PROF 4.1.4 G (2)(d)); and
- (d) for cooperating with the *FCA* under section 325(4) of the *Act* (see ■ PROF 3.1.2 G).

(3) Second, the *FCA* may exercise its direction power under section 328(6)(b) of the *Act* if it is satisfied that it is necessary to do so in order to comply with an obligation imposed by the *IDD*. For example, the *FCA* might wish to do so if it was not receiving from a *designated professional body* the information it needs to maintain the *Financial Services Register* (see PROF 7.1).

**3.2.6**

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Section 330 of the *Act* (Consultation) sets out procedures which the *FCA* must follow if it wishes to make a direction under section 328(6)(a) or (b). Except as specifically provided in section 330:

- (1) the *FCA* must consult publicly on its proposed direction;
- (2) the *FCA* must have regard to any representations made in response to the consultation; and
- (3) if the *FCA* then gives the proposed direction, it must publish an account of the representations made and its response to them.

**3.2.7**

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The directions the *FCA* has made under section 328 (6)(a) are set out in ■ PROF 3 Annex 1 G. Directions made by the *FCA* under section 328(6)(b) of the *Act* are listed in ■ PROF 3 Annex 2 G (The *FCA*'s duties and powers).