

Chapter 8

Financial promotion and related activities

8.34 The business test

- 8.34.1** **G** *Persons who may be carrying on the activity of advising on investments or making arrangements with a view to transactions in investments will only require authorisation or exemption if they are carrying on those activities by way of business. This is the effect of section 22(1) of the Act. Under section 419 of the Act, the Treasury has the power, by order, to require activities which would otherwise be treated as carried on by way of business to be treated as not carried on by way of business and vice versa. The Treasury has used this power to restrict the business test when applied to regulated activities such as advising on investments or making arrangements with a view to transactions in investments to situations where a person is carrying on the business of engaging in those activities. This is the effect of article 3 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (as amended).*
- 8.34.2** **G** *In the FCA's view, for a person to be carrying on the business of advising on investments or making arrangements with a view to transactions in investments, he will usually need to be carrying on those activities with a degree of regularity. The person will also usually need to be carrying on the activities for commercial purposes. That is to say, he will normally be expecting to gain a direct or indirect financial benefit of some kind. Activities carried on out of friendship or for altruistic purposes will not normally amount to a business. However, in the FCA's view, it is:*
- (1) not necessary that a person be seeking to profit from carrying on activities; for example a company set up by a number of other companies operating in a particular area to provide research may simply charge to recover its costs but may still be regarded as carrying on its activities as a business; and*
 - (2) not necessarily the case that services provided free of charge will not amount to a business; for example, much investment advice is provided free of charge to investors but in the course of a business funded by commission payments; services (particularly advice, information or links) available on a website may also be free of charge to users of the site but be part of a business funded by advertising fees or sponsorship; and free newspapers may well represent a business for similar reasons.*
- 8.34.3** **G** *The 'by way of business' test for insurance distribution activities is distinguished from the standard test for 'investment business' in article 3 of the Business Order. The business test for persons carrying on insurance distribution activities is in article 3(4) of the Business Order. See ■ PERG 5.4 (The business test).*