

The DFSA Sourcebook



Regulatory Policy and Process

(RPP Sourcebook)

(FEBRUARY 2017 EDITION)

| | | |
|----------|---|-----------|
| 1 | INTRODUCTION | 5 |
| 1-1 | PURPOSE | 5 |
| 1-2 | STATUS | 6 |
| 1-3 | UPDATING THE RPP | 6 |
| 1-4 | DEFINED TERMS | 6 |
| 1-5 | DFSA'S REGULATORY MANDATE | 7 |
| 1-6 | DFSA'S OBJECTIVES AND GUIDING PRINCIPLES | 7 |
| 1-7 | DFSA'S REGULATORY STRUCTURE | 8 |
| 2 | AUTHORISATION - BECOMING REGULATED | 10 |
| 2-1 | DFSA'S APPROACH TO AUTHORISATION | 10 |
| 2-2 | ASSESSING THE FITNESS AND PROPRIETY OF AUTHORISED PERSONS | 10 |
| 2-3 | ASSESSING THE FITNESS AND PROPRIETY OF AUTHORISED INDIVIDUALS, PRINCIPAL REPRESENTATIVES AND KEY INDIVIDUALS | 12 |
| 2-4 | WAIVERS DURING AUTHORISATION..... | 19 |
| 2-5 | START-UP ENTITIES IN THE DIFC..... | 20 |
| 2-6 | APPLICATION FOR A RETAIL ENDORSEMENT | 23 |
| 2-7 | APPLICATION FOR AN ISLAMIC ENDORSEMENT | 24 |
| 2-8 | APPLICATION FOR AN ENDORSEMENT TO OPERATE A MULTILATERAL TRADING FACILITY OR ACT AS A TRADE REPOSITORY | 25 |
| 2-9 | APPLICATION TO BE A REPRESENTATIVE OFFICE | 25 |
| 2-10 | REGISTERING AS A DNFBP | 25 |
| 2-11 | APPLICATION TO BE A REGISTERED AUDITOR | 26 |
| 2-12 | APPLICATION TO BE AN AUDIT PRINCIPAL..... | 26 |
| 3 | SUPERVISION - BEING REGULATED | 28 |
| 3-1 | DFSA'S APPROACH TO SUPERVISION | 28 |
| 3-2 | SUPERVISION OF AUTHORISED FIRMS | 32 |
| 3-3 | SUPERVISION OF REPRESENTATIVE OFFICES | 42 |
| 3-4 | SUPERVISION OF DNFBPS..... | 42 |
| 3-5 | SUPERVISION OF REGISTERED AUDITORS..... | 43 |
| 3-6 | SUPERVISION OF AUTHORISED MARKET INSTITUTIONS | 43 |
| 3-7 | BUSINESS TRANSFER SCHEMES..... | 45 |
| 4 | SUPERVISORY AND ENFORCEMENT POWERS | 50 |
| 4-1 | INTRODUCTION | 50 |
| 4-2 | POWER TO REQUEST INFORMATION AND DOCUMENTS..... | 51 |
| 4-3 | POWER TO ACCESS PREMISES | 51 |
| 4-4 | POWER TO REQUIRE A REPORT..... | 51 |
| 4-5 | POWER TO RESTRICT AN AUTHORISED PERSON'S BUSINESS OR PROPERTY..... | 52 |
| 4-6 | POWER TO IMPOSE CONDITIONS AND RESTRICTIONS ON AN AUTHORISED PERSON'S LICENCE OR ENDORSEMENT | 53 |
| 4-7 | POWER TO WITHDRAW AN AUTHORISATION OR ENDORSEMENT IN RESPECT OF ONE OR MORE FINANCIAL SERVICES OR A LICENCE | 54 |
| 4-8 | POWER TO IMPOSE CONDITIONS AND RESTRICTIONS ON THE STATUS OF AN AUTHORISED INDIVIDUAL OR KEY INDIVIDUAL | 55 |
| 4-9 | POWER TO RESTRICT, SUSPEND AND WITHDRAW THE STATUS OF AN AUTHORISED INDIVIDUAL OR KEY INDIVIDUAL | 55 |
| 4-10 | POWER TO RESTRICT INDIVIDUALS..... | 56 |
| 4-11 | POWERS RELATING TO THE REGISTRATION OF A REGISTERED AUDITOR OR AUDIT PRINCIPAL | 57 |

| | |
|--|------------|
| 4-12 MISCELLANEOUS POWERS | 57 |
| 5 ENFORCEMENT | 61 |
| 5-1 THE DFSA'S APPROACH TO ENFORCEMENT | 61 |
| 5-2 ENFORCEMENT FRAMEWORK | 62 |
| 5-3 ASSESSMENT OF COMPLAINTS AND REFERRALS..... | 63 |
| 5-4 COMMENCEMENT OF INVESTIGATIONS..... | 65 |
| 5-5 INFORMATION GATHERING | 66 |
| 5-6 REMEDIES..... | 73 |
| 5-7 APPOINTMENT OF MANAGERS | 74 |
| 5-8 FINES..... | 75 |
| 5-9 CENSURES..... | 76 |
| 5-10 INJUNCTIONS AND ORDERS..... | 76 |
| 5-11 CIVIL PROCEEDINGS | 77 |
| 5-12 THE COMPULSORY WINDING UP OF A REGULATED ENTITY..... | 78 |
| 5-13 MARKETS LAW - ORDERS IN THE INTERESTS OF THE DIFC | 79 |
| 5-14 INTERVENTION POWER..... | 80 |
| 5-15 SETTLEMENT GUIDANCE | 80 |
| 5-16 COSTS | 84 |
| 5-17 PUBLICITY..... | 85 |
| 5-18 MAINTENANCE OF REGISTERS..... | 87 |
| 5-19 CONCLUSION OF AN INVESTIGATION | 88 |
| 6 PENALTY GUIDANCE..... | 90 |
| 6-1 DFSA'S APPROACH TO IMPOSING A PENALTY..... | 90 |
| 6-2 DECIDING TO TAKE ACTION | 90 |
| 6-3 FINANCIAL PENALTY OR PUBLIC CENSURE | 91 |
| 6-4 DETERMINING THE APPROPRIATE LEVEL OF FINANCIAL PENALTY | 93 |
| 6-5 FINANCIAL PENALTIES IMPOSED ON A FIRM..... | 94 |
| 6-6 FINANCIAL PENALTIES IMPOSED ON AN INDIVIDUAL..... | 98 |
| 6-7 SERIOUS FINANCIAL HARDSHIP | 102 |
| 6-8 DISCOUNT FOR EARLY SETTLEMENT | 103 |
| 7 DECISION MAKING | 104 |
| 7-1 INTRODUCTION | 104 |
| 7-2 WHO CAN EXERCISE A DFSA POWER?..... | 104 |
| 7-3 DFSA'S GENERAL APPROACH TO DECISION MAKING..... | 105 |
| 7-4 OPERATIONAL DECISIONS | 106 |
| 7-5 SCHEDULE 3 DECISIONS..... | 107 |
| 7-6 BESPOKE DECISIONS..... | 108 |
| 7-7 THE DECISION MAKING COMMITTEE..... | 109 |
| 7-8 THE FINANCIAL MARKETS TRIBUNAL..... | 109 |
| 8 CONFIDENTIAL REGULATORY INFORMATION | 111 |
| 8-1 INTRODUCTION | 111 |
| 8-2 GUIDING PRINCIPLES..... | 111 |
| 8-3 RELEVANT LEGISLATION..... | 112 |
| 8-4 INFORMATION UNDER MEMORANDA OF UNDERSTANDING | 120 |
| 8-5 DISCLOSURE TO A COURT | 121 |
| 8-6 INTERNAL PROCEDURES..... | 122 |
| 9 WAIVERS AND MODIFICATIONS | 123 |
| 9-1 INTRODUCTION | 123 |

| | | |
|-----------|---|------------|
| 9-2 | DFSA'S POWER TO ISSUE RELIEF | 123 |
| 9-3 | MAKING AN APPLICATION | 123 |
| 9-4 | CONSIDERING AN APPLICATION | 124 |
| 9-5 | PUBLICATION OF WAIVERS AND MODIFICATIONS | 125 |
| 9-6 | WITHDRAWAL OR VARIATION OF WAIVERS AND MODIFICATIONS | 126 |
| 9-7 | ENFORCEMENT OF WAIVERS AND MODIFICATIONS | 126 |
| 9-8 | EXPIRY AND EXTENSION OF CURRENT WAIVERS AND MODIFICATIONS | 126 |
| 10 | PERMISSIBLE COMPANY AND TRADING NAMES FOR ENTITIES ESTABLISHED IN THE DIFC | 127 |
| 10-1 | INTRODUCTION | 127 |
| 10-2 | PURPOSE AND SCOPE OF THE DFSA'S NAMING POLICY | 127 |
| 10-3 | GUIDING PRINCIPLES | 128 |
| 10-4 | RELEVANT LAWS AND REGULATIONS | 128 |
| 10-5 | THE GENERAL POLICY ON USE OF THE WORDS "BANK", "INSURANCE" AND "TRUST" | 129 |
| 10-6 | EXCEPTIONS TO THE GENERAL POLICY | 130 |
| 10-7 | OTHER MATTERS | 131 |
| 10-8 | USING THE PROHIBITION POWER | 132 |
| 10-9 | UNREGULATED ENTITIES | 133 |

1 INTRODUCTION

1-1 PURPOSE

1-1-1 The purpose of the Regulatory Policy and Process (RPP) Sourcebook is to provide readers with an understanding of how the Dubai Financial Services Authority (DFSA) functions and operates and what we expect from the regulated community.

1-1-2 The RPP contains:

- (a) statements of DFSA's regulatory policy;
- (b) descriptions of the regulatory processes that we follow when exercising our statutory powers;
- (c) information as to DFSA's risk based approach to authorisation, supervision and enforcement; and
- (d) information on matters which the DFSA may assess when considering using specific discretionary powers. For example, this would include those matters which the DFSA may take into consideration when making an assessment of whether an Authorised Person or Authorised Individual is fit and proper.

1-1-3 RPP is therefore relevant to a Person who is:

- (a) seeking to be authorised or registered by the DFSA;
- (b) already subject to applicable laws, Rules and policies administered by the DFSA such as Authorised Persons (i.e. Authorised Firms or Authorised Market Institutions), DNFBPs, Registered Auditors, Audit Principals, Authorised Individuals, Key Individuals, Principal Representatives and any other Persons subject to the DFSA's regulatory oversight; and
- (c) otherwise subject to the jurisdiction of the DFSA such as by reason of the DFSA's authority under a delegated power.

1-1-4 RPP also concerns Persons who have made or intend to make:

- (a) an Offer of Securities; or
- (b) a Financial Promotion;

in or from the DIFC.

1-1-5 The types of Person mentioned above to whom RPP is relevant are not intended to be exhaustive and such Persons are generally referred to in this Sourcebook as a "firm" unless the context provides otherwise.

1-2 STATUS

1-2-1 The information in RPP is issued under Article 116(2) of the Regulatory Law 2004 (the Regulatory Law). RPP is for information purposes only and forms one of the DFSA's Sourcebook modules. RPP contains policy and process information which is indicative and non-binding.

1-2-2 RPP is not an exhaustive source of the DFSA's policy on the exercise of its statutory powers and discretions. To the extent that it sets out how the DFSA may act in certain circumstances, the information in RPP does not bind the DFSA and nor does it necessarily create a legitimate expectation for Persons who might reasonably seek to rely upon it. RPP should not be relied upon as a safe harbour by any Person.

1-2-3 Anyone reading RPP should also refer to the:

- (a) DIFC laws, including DFSA administered laws ("Laws");
- (b) DFSA Rulebook ("Rules"); and
- (c) other parts of the DFSA Sourcebook ("Sourcebook");

that may have an impact on them.

1-2-4 The Laws and Rules set out the precise scope and effect of any particular provision referred to in RPP. If you have any doubt about a legal or other provision or your responsibilities under the Law, Rules or other relevant requirements, you should seek appropriate legal advice.

1-2-5 The Sourcebook comprises a number of modules such as the Prudential Returns (PRU) module and the Application, Forms and Notices (AFN) module.

1-3 UPDATING THE RPP

1-3-1 We shall take reasonable steps to review the RPP to ensure that it remains current. We shall also make amendments where there are changes in our policy or processes in light of our regulatory experience and to reflect legal and market developments in the DIFC or in the relevant standards and practices set by international regulatory bodies. This may result in new chapters being added or existing chapters being amended or merged or deleted, as is necessary.

1-4 DEFINED TERMS

1-4-1 In order to be consistent and accurate when referring to terms that have specific meaning elsewhere, defined terms are identified throughout RPP by the capitalisation of the initial letter of a word or each word of a phrase and are defined in the Glossary module (GLO) of the DFSA's Rulebook. Unless the context otherwise requires, where capitalisation of the initial letter is not used, an expression has its natural meaning.

1-5 DFSA'S REGULATORY MANDATE

1-5-1 The DFSA is the independent regulator of financial and ancillary services conducted in or from the Dubai International Financial Centre (DIFC), a purpose-built financial free-zone in Dubai.

1-5-2 The DFSA's regulatory oversight includes asset management, banking and credit services, securities, collective investment funds, custody and trust services, commodities futures trading, Islamic finance, insurance, an international equities and derivatives exchange and an international commodities derivatives exchange.

1-5-3 The DFSA's mandate is to ensure that the DIFC is one of the best regulated international financial centres in the world, a centre based on principles of integrity, transparency and efficiency.

1-5-4 The international standards adopted and applied by the DFSA in the DIFC are those set by leading international organisations such as, BCBS (Basel Committee on Banking Supervision), IAIS (International Association of Insurance Supervisors), IOSCO (International Organization of Securities Commissions) and FATF (Financial Action Task Force).

1-6 DFSA'S OBJECTIVES AND GUIDING PRINCIPLES

1-6-1 In discharging its regulatory mandate, the DFSA has a statutory obligation under Article 8(3) of the Regulatory Law to pursue the following objectives:

- (a) to foster and maintain fairness, transparency and efficiency in the financial services industry (namely, the financial services and related activities carried on) in the DIFC;
- (b) to foster and maintain confidence in the financial services industry in the DIFC;
- (c) to foster and maintain the financial stability of the financial services industry in the DIFC, including the reduction of systemic risk;
- (d) to prevent, detect and restrain conduct that causes or may cause damage to the reputation of the DIFC or the financial services industry in the DIFC, through appropriate means, including the imposition of sanctions;
- (e) to protect direct and indirect users and prospective users of the financial services industry in the DIFC;
- (f) to promote public understanding of the regulation of the financial services industry in the DIFC; and
- (g) to pursue any other objectives as the Ruler of Dubai may from time to time set under DIFC Law.

1-6-2 In exercising its powers and performing its functions, the DFSA has regard to the following guiding principles as set out in Article 8(4) of the Regulatory Law, being the desirability of:

- (a) pursuing the objectives of the DIFC as set out under Dubai Law in so far as it is appropriate and proper for the DFSA to do so;

- (b) fostering the development of the DIFC as an internationally respected financial centre;
- (c) co-operating with and providing assistance to regulatory authorities in the United Arab Emirates and other jurisdictions;
- (d) minimising the adverse effects of the activities of the DFSA on competition in the financial services industry;
- (e) using its resources in the most efficient way;
- (f) ensuring the cost of regulation is proportionate to its benefit;
- (g) exercising its powers and performing its functions in a transparent manner; and
- (h) complying with relevant generally accepted principles of good governance.

1-7 DFSA'S REGULATORY STRUCTURE

1-7-1 The DFSA is structured into a number of divisions and departments. For the purpose of this Sourcebook, the most relevant are as follows:

Supervision

- (a) The Supervision Division authorises firms and individuals to conduct Financial Services in or from the DIFC. This Division also registers DNFBPs and Registered Auditors (see Chapter 2).
- (b) This Division also conducts supervisory oversight on all Authorised Firms, DNFBPs and Registered Auditors, including by conducting risk assessments. The scope and frequency of such assessments are dictated by the nature of the firm's activities and its perceived risks. From time to time, Supervision carries out thematic reviews inspired by topical events which have both local and international relevance (see Chapter 3).

Markets

- (c) The Markets Division licenses and supervises Authorised Market Institutions in the DIFC (see Chapters 2 and 3).
- (d) The Division also recognises those financial markets that operate an exchange or clearing house outside the DIFC without having a physical presence in the DIFC but make their services available to Persons in the DIFC. Trading and Clearing members of an Authorised Market Institution who operate in a jurisdiction other than the DIFC and do not have a physical presence in the DIFC are also recognised by the Division.
- (e) The Division is also responsible for regulating Offers of Securities in or from the DIFC, and supervises Reporting Entities by monitoring their on-going market disclosures and compliance with Rules.

Enforcement

- (f) The primary function of the Enforcement Division is to prevent, detect and restrain conduct that causes or may cause damage to the reputation of the DIFC or the financial services industry in the DIFC. Consequently, the Enforcement Division is responsible for:
 - (i) liaising and co-operating with international regulatory and enforcement agencies under relevant multilateral memoranda of understanding or bilateral arrangements in relation to investigation and enforcement matters;
 - (ii) conducting investigations commenced under Article 78 of the Regulatory Law in respect of contraventions of DFSA administered Laws and Rules; and
 - (iii) the taking of enforcement action in circumstances where contraventions of DFSA administered Laws and Rules pose an unacceptable risk to the DIFC.
- (g) The DFSA has a range of remedies to enforce the legislation that we administer (see Chapters 4 and 5).

Policy and Strategy Division

- (h) The Policy and Strategy Division is responsible for the DFSA's policy framework, including its maintenance and development, as well as providing advice on the intent of the policy framework to Divisions of the DFSA.
- (i) The Division also oversees the DFSA's risk framework and its approach to strategic planning.

Legal Department

- (j) The Legal Department provides advice and legal opinions on matters affecting the DFSA. This includes advising the operational divisions on the supervision and enforcement of the Laws and Rules administered by the DFSA and on the application of legislation and associated jurisdiction issues. It is also responsible for drafting and maintaining the DIFC Laws and Rules administered by the DFSA and for consulting with the Dubai Government and the DIFC Authority on DIFC, Dubai and Federal legislation.
- (k) The Department also provides litigation management and advice for the DFSA on matters which are, or could be, before the DIFC Courts or the Financial Markets Tribunal.
- (l) The General Counsel is responsible for managing and supervising the Legal Department, advising the DFSA Board and its committees, investigating complaints against the DFSA and overseeing the DFSA's ethics programme.

2 AUTHORISATION - BECOMING REGULATED

2-1 DFSA'S APPROACH TO AUTHORISATION

Introduction

2-1-1 This chapter outlines the DFSA's approach to assessing an applicant or registrant to become:

- (a) an Authorised Person, that is, an Authorised Market Institution or an Authorised Firm (an Authorised Firm includes a Representative Office);
- (b) an Authorised Individual;
- (c) a Principal Representative;
- (d) a Key Individual;
- (e) a DNFBP;
- (f) a Registered Auditor; or
- (g) an Audit Principal.

2-1-2 Prior to submitting an application to the DFSA, the relevant applicant should contact the DFSA Enquiries Team on +971 (0)4 362 1500 or using the [General Enquiries form](#) on our website. In preparing an application, this chapter should be read in conjunction with the forms and notes in the [AFN Sourcebook](#), and relevant Laws and Rules.

2-1-3 In assessing whether a relevant applicant is and remains fit and proper, the DFSA may also consider the degree to which an applicant is ready, willing and able to conduct the relevant activities in accordance with the Laws and Rules and other legislation applicable in the DIFC.

2-1-4 An applicant must not provide information to the DFSA which is false, misleading or deceptive, or conceal information where the concealment of such information is likely to mislead or deceive the DFSA (see Article 66 of the Regulatory Law).

2-1-5 If an applicant becomes aware of a material change in circumstances that is reasonably likely to be relevant to an application which is under consideration by the DFSA, then it must inform the DFSA of the change, in writing, without delay (see Article 46 of the Regulatory Law).

2-2 ASSESSING THE FITNESS AND PROPRIETY OF AUTHORISED PERSONS

Introduction

2-2-1 This section sets out matters which the DFSA takes into consideration when assessing the fitness and propriety of an Authorised Person (including applicants). There are some matters in this section which apply to all Authorised Persons and some which are specific to either an Authorised Firm or an Authorised Market Institution, so this chapter should be read in conjunction with those requirements relating to Authorised Firms (see

chapter 7 of the GEN module) and Authorised Market Institutions (see chapters 2 and 9 of the AMI module).

2-2-2 The DFSA may have regard to all relevant matters, whether arising in the DIFC or elsewhere. The DFSA may determine the materiality of any information for the purposes of considering whether an Authorised Person has demonstrated, or continues to demonstrate, that it is fit and proper.

2-2-3 The DFSA may request or require any information which it considers relevant to its consideration of an application by an Authorised Person.

2-2-4 In considering any specific matters, the DFSA may request reviews by an appropriately skilled third party on any aspect of the Authorised Person's proposed or actual activities or the environment in which the applicant predominantly operates. The DFSA will normally agree to the scope of any reviews performed. Such reviews will ordinarily be at the applicant's sole expense.

Background and history

2-2-5 In respect of the background and history of an Authorised Person, the DFSA may have regard to any matters including, but not limited to, the following:

- (a) any matter affecting the propriety of the Authorised Person's conduct, whether or not such conduct may have resulted in the commission of a criminal offence or the contravention of the law or the institution of legal or disciplinary proceedings of whatever nature;
- (b) whether an Authorised Person has ever been the subject of disciplinary procedures by a government body or agency or any self-regulatory organisation or other professional body;
- (c) a contravention of any provision of financial services legislation or of rules, regulations, statements of principle or codes of practice made under it or made by a recognised self-regulatory organisation, Financial Services Regulator or regulated exchange or clearing house;
- (d) whether an Authorised Person has been refused, or had a restriction placed on, the right to carry on a trade, business or profession requiring a licence, registration or other permission;
- (e) an adverse finding or an agreed settlement in a civil action by any court or tribunal of competent jurisdiction resulting in an award against or payment by an Authorised Person in excess of \$10,000 or awards that total more than \$10,000;
- (f) whether an Authorised Person has been censured, disciplined, publicly criticised or the subject of a court order at the instigation of any regulatory authority, or any officially appointed inquiry, or any other Financial Services Regulator; and
- (g) whether an Authorised Person has been open and truthful in all its dealings with the DFSA.

Locations of offices

2-2-6 An Authorised Person should be able to satisfy the DFSA that it is in compliance with chapter 6 of the GEN module. In particular, section 6.5 of GEN requires that if an Authorised Person is a Body Corporate, or a Partnership, constituted under the laws of the DIFC it should maintain its head office and registered office within the boundaries of the DIFC. The 'head office' of an Authorised Person is defined as the principal place where it carries on both the day-to-day management and control of its business and also the activities for which it is authorised by the DFSA. An Authorised Person operating in the DIFC through a branch must have a place of business in the DIFC that is the principal place where it carries on the activities for which it is authorised by the DFSA and the address in the DIFC to which communications and notices may be sent.

Close Links

2-2-7 GEN section 6.6 concerns Close Links. The DFSA should be satisfied that the existence of Close Links do not prevent the effective supervision of the Authorised Person by the DFSA.

Legal status of Authorised Firms

2-2-8 The DFSA will only consider an application for authorisation where the legal status of the proposed entity meets the requirements set out in section 7.2 of the GEN module or chapter 5 of the AMI module. In the case of non-DIFC firms other than companies limited by shares, the DFSA will consider whether the legal form is appropriate for the activities proposed.

2-2-9 In respect of Effecting Contracts of Insurance or Carrying Out Contracts of Insurance, an Authorised Firm has to be a Body Corporate in accordance with GEN Rule 7.2.2(2).

2-2-10 In respect of Accepting Deposits or seeking to Accept Deposits, an Authorised Firm has to be a Body Corporate or Partnership in accordance with GEN Rule 7.2.2(3).

2-2-11 In respect of Acting as the Trustee of a Fund or Managing a Collective Investment Fund, an Authorised Firm has to be a Body Corporate in accordance with GEN Rule 7.2.2(4).

Ownership and Group

2-2-12 In respect of the ownership and Group structure of an Authorised Person, the DFSA may have regard to:

- (a) the Authorised Person's position within its Group, including any other relationships that may exist between the Authorised Person's affiliates, Controllers, Associates or other Persons that may be considered a Close Link (see paragraph 2-2-13 for considerations relating to Controllers and paragraph 2-2-7 for considerations relating to Close Links);
- (b) the financial strength of the Group and its implications for the Authorised Person;
- (c) whether the Group has a structure which makes it possible to:
 - (i) exercise effective supervision;

- (ii) exchange information among regulators who supervise Group members; and
- (iii) determine the allocation of responsibility among the relevant regulators;
- (d) any information provided by other regulators or third parties in relation to the Authorised Person or any entity within its Group; and
- (e) whether the Authorised Person or its Group is subject to any adverse effect or considerations arising from a country or countries of incorporation, establishment and operations of any member of its Group. In considering such matters, the DFSA may also have regard to the type and level of regulatory oversight in the relevant country or countries of the Group members, the regulatory infrastructure and adherence to internationally held conventions and standards that the DFSA may have adopted in its Rules.

Controllers

2-2-13 In respect of the Controllers of an Authorised Person, the DFSA may, taking into account the nature, scale and complexity of the firm's business and organisation, have regard to:

- (a) the background, history and principal activities of the Authorised Person's Controllers, including that of the Controller's Directors, Partners or other officers associated with the Authorised Person, and the degree of influence that they are, or may be, able to exert over the Authorised Person and/or its activities;
- (b) where the Controller will exert significant management influence over the Authorised Person, the reputation and experience of the Controller or any individual within the Controller;
- (c) the financial strength of a Controller and its implications for the Authorised Person's ability to ensure the sound and prudent management of its affairs, in particular where such a Controller agrees to contribute any funds or other financial support such as a guarantee or a debt subordination agreement in favour of the Authorised Person; and
- (d) whether the Authorised Person is subject to any adverse effect or considerations arising from the country or countries of incorporation, establishment or operations of a Controller. In considering such matters, the DFSA may have regard to, among other things, the type and level of regulatory oversight which the Controller is subject to in the relevant country or countries and the regulatory infrastructure and adherence to internationally held conventions and standards that the DFSA may have adopted in its Rules.

2-2-14 Where the DFSA has any concerns relating to the fitness and propriety of an applicant for a licence stemming from a Controller of such a person, the DFSA may consider imposing licence conditions designed to address such concerns. For example, the DFSA may impose, in the case of a start-up, a licence condition that there should be shareholder agreement to resort to an effective shareholder dispute resolution mechanism.

Resources, Systems and Controls

2-2-15 The DFSA will have regard to whether the Authorised Person has sufficient resources, including the appropriate systems and controls (including those set out in chapter 5 of the GEN module and AMI Rules 5.5.4 and 5.5.5), such as:

- (a) the Authorised Person's financial resources and whether it complies, or will comply, with any applicable financial Rules, and whether the Authorised Person appears in a position to be able to continue to comply with such Rules;
- (b) the extent to which the Authorised Person is or may be able to secure additional capital in a form acceptable to the DFSA where this appears likely to be necessary at any stage in the future;
- (c) the availability of sufficient competent human resources to conduct and manage the Authorised Person's affairs, in addition to the availability of sufficient Authorised Individuals or Key Individuals, as applicable, to conduct and manage the Authorised Person's Financial Services;
- (d) whether the Authorised Person has sufficient and appropriate systems and procedures in order to support, monitor and manage its affairs, resources and regulatory obligations in a sound and prudent manner;
- (e) whether the Authorised Person has appropriate anti-money laundering procedures and systems designed to ensure full compliance with applicable money laundering and counter terrorism legislation, and relevant UN Security Council sanctions and resolutions, including arrangements to ensure that all relevant staff are aware of their obligations;
- (f) the impact of other members of the Authorised Person's Group on the adequacy of the Authorised Person's resources and, in particular, though not exclusively, the extent to which the Authorised Person is or may be subject to consolidated prudential supervision by the DFSA or another Financial Services Regulator;
- (g) whether the Authorised Person is able to provide sufficient evidence about the source of funds available to it, to the satisfaction of the DFSA. This is particularly relevant in the case of a start-up entity; and
- (h) the matters specified in paragraph 2-2-12(c).

Authorised Firms - Collective suitability of individuals or other persons connected to the Authorised Firm

2-2-16 Notwithstanding that individuals performing Licensed Functions are required to be Authorised Individuals and that an Authorised Firm is required to appoint certain Authorised Individuals to certain functions as stated in chapter 7 of the GEN module, the DFSA will also consider:

- (a) the collective suitability of all of the Authorised Firm's staff taken together, and whether there is a sufficient range of individuals with appropriate knowledge, skills and experience to understand, operate and manage the Authorised Firm's affairs in a sound and prudent manner;

- (b) the composition of the Governing Body of the Authorised Firm. The factors that would be taken into account by the DFSA in this context include, depending on the nature, scale and complexity of the firm's business and its organisational structure, whether:
- (i) the Governing Body has a sufficient number of members with relevant knowledge, skills and expertise among them to provide effective leadership, direction and oversight of the Authorised Firm's business. For this purpose, the members of the Governing Body should be able to demonstrate that they have, and would continue to maintain, including through training, necessary skills, knowledge and understanding of the firm's business to be able to fulfil their roles;
 - (ii) the individual members of the Governing Body have the commitment necessary to fulfil their roles, demonstrated, for example, by a sufficient allocation of time to the affairs of the firm and reasonable limits on the number of memberships held by them in other Boards of Directors or similar positions. In particular, the DFSA will consider whether the membership in other Boards of Directors or similar positions held by individual members of the Governing Body has the potential to conflict with the interests of the Authorised Firm and its customers and stakeholders; and
 - (iii) there is a sufficient number of independent members on the Governing Body. The DFSA will consider a member of the Governing Body to be "Independent" if he is found, on reasonable grounds by the Governing Body, to be independent in character and judgement and able to make decisions in a manner that is consistent with the best interests of the Authorised Firm;
- (c) the position of the Authorised Firm in any Group to which it belongs;
- (d) the individual or collective suitability of any Person or Persons connected with the Authorised Firm;
- (e) the extent to which the Authorised Firm has robust human resources policies designed to ensure high standards of conduct and integrity in the conduct of its activities;
- (f) whether the Authorised Firm has appointed auditors, actuaries and advisers with sufficient experience and understanding in relation to the nature of the Authorised Firm's activities; and
- (g) whether the remuneration structure and strategy adopted by the Authorised Firm is consistent with the requirements in GEN Rule 5.3.31(1).

Authorised Market Institutions – Other Considerations

2-2-17 In determining whether an Authorised Market Institution has satisfied its Licensing Requirements set out in chapter 5 of the AMI module and chapter 5 of the GEN module, the DFSA will consider:

- (a) its arrangements, policies and resources for fulfilling its obligations under the Licensing Requirements prescribed in AMI Rule 4.2.1;

- (b) its arrangements for managing conflicts and potential conflicts between its commercial interest and applicable regulatory requirements in section 5.4 of the AMI module;
- (c) the extent to which its constitution and organisation provide for effective governance;
- (d) the arrangements made to ensure that the Governing Body has effective oversight of its Regulatory Functions;
- (e) the fitness and propriety of its Key Individuals and the access the Key Individuals have to the Governing Body;
- (f) the size and composition of the Governing Body including:
 - (i) the number of independent members on the Governing Body;
 - (ii) the number of members of the Governing Body who represent Members of the Authorised Market Institution or other persons and the types of persons whom they represent; and
 - (iii) the number and responsibilities of any members of the Governing Body with executive roles within the Authorised Market Institution.
- (g) the structure and organisation of its Governing Body, including any distribution of responsibilities among its members and committees;
- (h) the integrity, relevant knowledge, skills and expertise of the members of the Governing Body to provide effective leadership, direction and oversight of the Authorised Market Institution's business. For this purpose, such individuals should be able to demonstrate that they have, and would continue to maintain, including through training, necessary skills, knowledge and understanding of the Authorised Market Institution's business to be able to fulfil their roles;
- (i) the commitment necessary by the members of the Governing Body to fulfil their roles effectively, demonstrated, for example, by a sufficient allocation of time to the affairs of the Authorised Market Institution and reasonable limits on the number of memberships held by them in other Boards of Directors or similar positions. In particular, the DFSA will consider whether the membership in other Boards of Directors or similar positions held by individual members of the Governing Body has the potential to conflict with the interests of the Authorised Market Institution and its stakeholders;
- (j) the integrity, qualifications and competence of its Key Individuals;
- (k) its arrangements for ensuring that it employs individuals who are honest and demonstrate integrity;
- (l) the independence of its regulatory and listings departments from its commercial departments; and
- (m) whether the remuneration structure and strategy adopted by the Authorised Market Institution is consistent with the requirements in GEN Rule 5.3.31(1).

2-2-18 The DFSA will consider a Director to be “independent” if the Director is found, on the reasonable determination by the Governing Body, to:

- (a) be independent in character and judgement; and
- (b) have no relationships or circumstances which are likely to affect or could appear to affect the Director’s judgement in a manner other than in the best interests of the Authorised Market Institution.

2-2-19 In forming a determination the Governing Body should consider the length of time the Director has served as a member of the Governing Body and whether the relevant Director:

- (a) has been an employee of the Authorised Market Institution or group within the last five years;
- (b) has or has had, within the last three years, a material business relationship with the Authorised Market Institution, either directly or as a Partner, shareholder, Director or senior employee of a body that has such a relationship with the Authorised Market Institution;
- (c) receives or has received, in the last three years, additional remuneration or payments from the Authorised Market Institution apart from a Director’s fee, participates in the Authorised Market Institution’s share option, or a performance-related pay scheme, or is a member of the Authorised Market Institution’s pension scheme;
- (d) is or has been a Director, Partner or Employee of a firm which is the Authorised Market Institution’s auditor;
- (e) has close family ties with any of the Authorised Market Institution’s advisors, Directors or senior employees;
- (f) holds cross directorships or has significant links with other Directors through involvement in other bodies; or
- (g) represents a significant shareholder.

2-3 ASSESSING THE FITNESS AND PROPRIETY OF AUTHORISED INDIVIDUALS, PRINCIPAL REPRESENTATIVES AND KEY INDIVIDUALS

Introduction

2-3-1 This section sets out the matters which the DFSA takes into consideration when assessing the fitness and propriety of:

- (a) in the case of an Authorised Firm, an Authorised Individual or Principal Representative under section 7.6 of the GEN module and section 4.2 of the REP module, respectively; and
- (b) in the case of an Authorised Market Institution, a Key Individual under section 3.3 and chapter 5 of the AMI module.

2-3-2 In order to assess the fitness and propriety of a proposed Authorised Individual, Key Individual or Principal Representative, the DFSA may request an interview with the proposed individual.

2-3-3 In respect of Authorised Individuals, Article 53(2) of the Regulatory Law provides that applications for Authorised Individual status in respect of Licensed Function roles must be made by both the individual seeking to be authorised and the Authorised Firm for which that individual is to perform services. Under Article 56 of the Regulatory Law, the DFSA may reject an application for Authorised Individual status or extension to such status or grant Authorised Individual status or extension to such status with or without conditions and restrictions.

2-3-4 AMI Rule 3.3.1(1) requires applications for Key Individual to be made by both the individual seeking to be authorised and the Authorised Market Institution for which that individual is to perform a Key Individual function. In assessing whether an individual meets the fitness and propriety criteria to be able to perform the role of a Key Individual, the DFSA takes into account the considerations noted in paragraphs 2-3-5 to 2-3-7 below.

Integrity

2-3-5 In determining whether an individual has satisfied the DFSA as to his integrity, the DFSA may have regard to matters including, but not limited to, the following:

- (a) the propriety of an individual's conduct whether or not such conduct may have resulted in the commission of a criminal offence, the contravention of a law or the institution of legal or disciplinary proceedings of whatever nature;
- (b) a conviction or finding of guilt in respect of any offence, other than a minor road traffic offence, by any court of competent jurisdiction;
- (c) whether the individual has ever been the subject of disciplinary proceedings by a government body or agency or any recognised self-regulatory organisation or other professional body;
- (d) a contravention of any provision of financial services legislation or of rules, regulations, statements of principle or codes of practice made under or by a recognised self-regulatory organisation, Authorised Market Institution, regulated exchange or regulated clearing house or Financial Services Regulator;
- (e) a refusal or restriction of the right to carry on a trade, business or profession requiring a licence, registration or other authority;
- (f) a dismissal or a request to resign from any office or employment;
- (g) whether an individual has been or is currently the subject of or has been concerned with the management of a Body Corporate which has been or is currently the subject of an investigation into an allegation of misconduct or malpractice;
- (h) an adverse finding in a civil proceeding by any court of competent jurisdiction of fraud, misfeasance or other misconduct, whether in connection with the formation or management of a corporation or otherwise;

- (i) an adverse finding or an agreed settlement in a civil action by any court or tribunal of competent jurisdiction resulting in an award against the individual in excess of \$10,000 or awards that total more than \$10,000;
- (j) an order of disqualification as a director or to act in the management or conduct of the affairs of a corporation by a court of competent jurisdiction or regulator;
- (k) whether the individual has been a director, or concerned in the management of, a body corporate which has gone into liquidation or administration whilst that person was connected with that body corporate or within one year of such a connection;
- (l) whether the individual has been a partner or concerned in the management of a partnership where one or more partners have been made bankrupt whilst that person was connected with that partnership or within a year of such a connection;
- (m) whether the individual has been the subject of a complaint in connection with a financial service, which relates to his integrity, competence or financial soundness;
- (n) whether the individual has been censured, disciplined, publicly criticised by, or has been the subject of a court order at the instigation of, the DFSA, or any officially appointed inquiry, or Financial Services Regulator; and
- (o) whether the individual has been candid and truthful in all his dealings with the DFSA.

Competence and capability

2-3-6 In determining the competence and capability of an individual to perform the role of an Authorised Individual, Principal Representative or Key Individual, the DFSA may have regard to any factors, whether in the U.A.E. or elsewhere, including whether an individual is capable of performing functions which he has to perform within the Authorised Firm or Authorised Market Institution which employs or intends to employ him. A relevant factor may also include evidence of appropriate qualifications, including, for example, the bespoke examination offered by the Chartered Institute for Securities and Investment in respect of DIFC Laws and Rules.

Financial soundness

2-3-7 In determining the financial soundness of an individual, the DFSA may have regard to any factors including, but not limited to, the following:

- (a) whether an individual is able to meet his debts as they fall due; and
- (b) whether an individual has been adjudged bankrupt, had a receiver or an administrator appointed, had a bankruptcy petition served on him, had his estate sequestrated, entered into a deed of arrangement (or any contract in relation to a failure to pay due debts) in favour of his creditors or, within the last 10 years, has failed to satisfy a judgement debt under a court order, whether in the U.A.E. or elsewhere.

2-4 WAIVERS DURING AUTHORISATION

2-4-1 An applicant for authorisation may request a waiver or modification whilst its application for authorisation is being processed. In some circumstances, the applicant may need to work with the DFSA in developing the waiver and may not be required to use the

formal application process. However, the written consent to the waiver by the Authorised Person will then be required once the applicant is authorised.

2-4-2 For further details on the DFSA's approach to waivers and modifications please see Chapter 9 of this Sourcebook.

2-5 START-UP ENTITIES IN THE DIFC

What are "Start up Entities"?

2-5-1 Start up entities are, either:

- (a) new financial services businesses; or
- (b) existing financial services businesses which have never been subject to financial services regulation, for whatever reason.

2-5-2 This section is designed to serve as a guide to assist start up entities that are interested in applying for authorisation by the DFSA to conduct Financial Services in or from the DIFC. This section sets out the information required to support an application and indicates the criteria that the DFSA may apply in the authorisation process. Start ups, as with any other applicants, will be required to satisfy all relevant aspects of the DFSA's rules and authorisation process prior to being granted a licence.

Entities seeking authorisation as Banks

2-5-3 An entity seeking authorisation to be a Bank, and to carry on its activities in or from the DIFC, will be either:

- (a) a branch of an existing bank; or
- (b) a subsidiary of an existing bank (wholly or partially owned); or
- (c) a start-up entity.

2-5-4 Where the applicant falls into categories (a) and (b) above, the DFSA will pay particular attention to the soundness of the existing bank of which the proposed DIFC entity is a part. It is our expectation that the existing bank will be a source of strength¹ for the DIFC entity. The DFSA will also pay particular attention to the supervisory relationships it has, or will need to establish, with the supervisor(s) of the existing bank, whichever jurisdiction(s) that is based in. Being able to exchange supervisory information with other relevant supervisors is a cornerstone of the DFSA's regulatory approach.

2-5-5 Where the applicant falls into category (c) above, and so is a start-up entity, the DFSA will, clearly, not be able to place reliance on existing banking entities or the strength of a larger group. The credibility and financial soundness of the proposed shareholders of the start-up Bank will, therefore, be a key consideration for the DFSA, as it is these proposed shareholders that the DFSA would need to look to, to provide support to the Bank, should it encounter difficulties.

¹ The 'source of strength' doctrine is a well-established and understood concept in banking regulation. It is an expectation that the parent company of a regulated bank will be a source of financial strength and support to that regulated bank should it experience distress.

2-5-6 The DFSA will have a greater degree of comfort with proposed shareholders who are themselves regulated financial institutions or who have a track record of investing in financial institutions and of providing support to those institutions, if and when such support has been needed. Similarly, if proposed shareholders demonstrably have the financial means to provide further support to the start-up Bank, then this will allow the DFSA to take greater comfort.

2-5-7 Applicants who wish to establish a start-up Bank in the DIFC should consider carefully the implications of the absence of a central bank in the DIFC. For example, the DFSA would expect applicants to address how this fact would affect their:

- (a) business plan, including any impact on current or prospective credit ratings;
- (b) adequacy of capital and capital management plan;
- (c) plans for liquidity management; and
- (d) ability to deal with stressed situations, including a resolution plan.

2-5-8 In formulating this policy the DFSA recognises that it is not practical to provide information on the application of the policy to every possible scenario. Therefore, interested parties are invited to contact the DFSA if they have questions about the application of the policy to their particular circumstances.

The DFSA's Risk-Based Approach to Start Up Entities: Broad Risk Categories

2-5-9 Any consideration of an application for authorisation received by the DFSA is likely to involve an assessment of the risks posed to the objectives of the DFSA by the proposed activities of the applicant. Whilst the broad categories of risks for all applicants will be the same, the nature of those risks within start up entities will be unique, as start ups do not have a regulatory track record upon which the DFSA may place reliance. In the case of a new business, even where senior management has substantial experience and relevant competence in the business sector, this does not necessarily imply an ability to create and sustain an adequate management control environment and compliance culture, particularly when faced with all the other issues of establishing a new business.

2-5-10 In the case of an existing, but previously unregulated business, any existing control environment and compliance culture may not have been subject to external independent regulatory scrutiny and the additional regulatory reporting requirements which apply to an authorised firm.

2-5-11 The broad categories of risk and some of the unique elements of those risk categories that apply to start up entities include financial risk, governance risk, business/operational risk and compliance risk.

2-5-12 The DFSA will consider each application for a start-up separately and determine accordingly if further tailored regulatory requirements, in addition to the DFSA's existing requirements, may be necessary. Tailored requirements could include – but not be limited to – capital, liquidity, credit or investment limits.

Financial Risk

2-5-13 All applicants are required to demonstrate a sound initial capital base and funding and to meet the relevant prudential requirements of the DFSA rulebook, on an on-going basis. This may include holding sufficient capital to cover expenses on a zero revenue basis. Inevitably, start up entities face greater financial risks as they seek to establish and grow a new business.

2-5-14 In addition to the risks associated with the financial viability of the start up entity, particular attention may be given to the clarity and the verifiable source of the initial capital funding. Start up entities may be required to disclose the source of their funds and the history of those funds for at least the previous 12 months.

Governance Risk

2-5-15 All applicants are required to demonstrate robust governance arrangements together with the fitness and integrity of all controllers, directors and senior management. The DFSA is aware that management control, in smaller start ups especially, may lie with one or two dominant individuals who may also be amongst the owners of the firm. In such circumstances, the DFSA would expect the key business and control functions (i.e. risk management, compliance and internal audit) to be subject to appropriate oversight arrangements which reflect the size and complexity of the business. Applicants can assist the DFSA by describing in detail the ownership structure, high level controls and clear reporting lines which demonstrate an adequate segregation of duties.

2-5-16 The DFSA may request details of the background, history and ownership of the start up entity and, where applicable, its Group. Similar details relating to the background, history and other interests of the directors of the start up entity may also be required. Where it considers it necessary to do so, the DFSA may undertake independent background checks on such material. A higher degree of due diligence will apply to individuals involved in start up entities and there would be an expectation that the entity itself will have conducted detailed background checks, which may then be verified by the DFSA.

Business/Operational Risk

2-5-17 All applicants are required to establish appropriate systems and controls to demonstrate that the affairs of the firm are managed and controlled effectively. The nature of the systems and controls may depend on the nature, size and complexity of the business. Start up entities may wish to consider which additional systems and controls may be appropriate in the initial period of operation following launch, such as increased risk or compliance monitoring. Due to the unproven track record of start up entities, the DFSA may, for example, impose restrictions on the business activities of the entity or a greater degree and intensity of supervision until such a track record is established.

Compliance Risk

2-5-18 The Senior Executive Officer within all Authorised Firms is expected to take full responsibility for ensuring compliance with the DFSA rules by establishing a strong compliance culture which is fully embedded within the organisation. A start up entity will be required to appoint a UAE resident Compliance Officer and Money Laundering Reporting Officer (MLRO) with the requisite skills and relevant experience in compliance and anti-money laundering duties. The individuals fulfilling these roles within start up entities may be expected to demonstrate to the DFSA their competence to perform the proposed role and

adequate knowledge of the relevant sections of the DFSA rulebook and, in the case of the MLRO, the wider anti-money laundering legislation and related provisions.

Main Information Requirements

2-5-19 The main information requirements are the same for all applicants, including start ups, and each application will be assessed on its own merits. It may help if start up applicants consider the risk categories set out above and how they will address the particular risks raised by their start up proposition.

2-5-20 A key document will be the regulatory business plan submitted in support of the application. It will facilitate the application process if applicants cover the following areas within this submission:

- (a) An introduction and background;
- (b) Strategy and rationale for establishing in the DIFC;
- (c) Organisational structure;
- (d) Management structure;
- (e) Proposed resources;
- (f) High level controls;
- (g) Risk management;
- (h) Operational controls;
- (i) Systems overview; and
- (j) Financial projections.

2-5-21 Start up applicants may find it useful to include diagrams illustrating corporate structures, and, where applicable, group relationships, governance arrangements, organisational design, clear reporting lines, business process flows and systems environments.

2-5-22 Comprehensively addressing these areas and detailing how the key risks will be identified, monitored and controlled may significantly assist the DFSA in determining applications from start up entities.

2-6 APPLICATION FOR A RETAIL ENDORSEMENT

2-6-1 GEN 2.2.8 provides that an applicant intending to carry on a Financial Service with a Retail Client requires an endorsement on its Licence. GEN Rule 7.3.1 sets out the requirements that must be met for the grant of such an endorsement.

2-6-2 When assessing an application for a Retail Endorsement, the DFSA may consider, among other things, the following:

- (a) the adequacy of an applicant's systems and controls for carrying on Financial Services with a Retail Client;

- (b) whether the applicant is able to demonstrate that its systems and controls (including policies and procedures) adequately provide for, among other things, compliance with the requirements specifically dealing with Retail Clients in the COB module, in particular:
- (i) marketing materials intended for Retail Clients;
 - (ii) the content requirements for Client Agreements for Retail Clients;
 - (iii) the suitability assessment for recommending a financial product for a Retail Client;
 - (iv) the disclosure of fees and commissions, and any inducements, to a Retail Client; and
 - (v) the segregation of Client Money and/or Client Investments, where relevant;
- (c) whether the applicant has adequate systems and controls to ensure, on an on-going basis, that its Employees remain competent and capable to perform the functions which are assigned to them, including any additional factors that may be relevant if their functions involve interfacing with Retail Clients; and
- (d) the adequacy of the applicant's Complaints handling policies and procedures. An applicant's policies and procedures must provide for fair, consistent and prompt handling of complaints. In addition to the matters set out in Chapter 9 of the GEN module, the policies and procedures should explicitly deal with how the applicant ensures that:
- (i) Employees dealing with Complaints have adequate training and competencies to handle Complaints, as well as impartiality and sufficient authority (see GEN Rules 5.3.19, 9.2.7 and 9.2.8);
 - (ii) a Retail Client is made aware of the firm's Complaints handling policies and procedures before obtaining its services (see COB Rule A2.1.2(1)(h)); and
 - (iii) the applicant's Complaints handling policies and procedures are freely available to any Retail Client upon request (see GEN Rule 9.2.11).

2-7 APPLICATION FOR AN ISLAMIC ENDORSEMENT

2-7-1 Under Article 9 of the Law Regulating Islamic Financial Business 2004, in order to conduct Islamic Financial Business, an Authorised Person must have an endorsed Licence authorising it to conduct business either as an Islamic Financial Institution or as an Islamic Window. Conducting Islamic Financial Business means carrying on one or more Financial Services in accordance with Shari'a.

2-7-2 An Authorised Person who is granted an endorsement to operate an Islamic Window may conduct some of its Financial Service activities in a conventional manner while conducting its Islamic Financial Business through the Islamic Window.

2-7-3 The DFSA may grant an Islamic Endorsement only if it is satisfied that the applicant has demonstrated that it has the systems and controls in place to undertake Islamic Financial Business. In deliberating over the granting of an Islamic Endorsement, the DFSA

may consider, among other things, those matters set out in the [IFR module](#) of the DFSA's Rulebook.

2-8 APPLICATION FOR AN ENDORSEMENT TO OPERATE A MULTILATERAL TRADING FACILITY OR ACT AS A TRADE REPOSITORY

2-8-1 An applicant seeking to obtain an endorsement on its Licence to operate a Multilateral Trading Facility or to act as a Trade Repository will need to comply with the applicable requirements, including those set out in the GEN and AMI modules.

2-8-2 An applicant seeking to obtain an endorsement on its Licence to operate a Multilateral Trading Facility has to be an Authorised Market Institution which is Licensed to Operate an Exchange, or an applicant for such a Licence (see AMI Rule 2.3.1). In order to obtain such an endorsement, an applicant needs to demonstrate to the DFSA that it can meet the requirements in AMI Rule 4.2.1(3). Under that Rule, all the Licensing Requirements applicable with respect to operating an Exchange apply with respect to the operation of a Multilateral Trading Facility as if such a facility is an Exchange.

2-8-3 An applicant seeking to obtain an endorsement on its Licence to act as a Trade Repository must be an Authorised Firm or an Authorised Market Institution, or an applicant for such a Licence (see GEN Rule 2.2.13(1)). Such an applicant needs to demonstrate to the DFSA its ability to meet the requirements set out in App 5 of the GEN module (see GEN Rule 7.3.2 and AMI Rule 2.3.2).

2-9 APPLICATION TO BE A REPRESENTATIVE OFFICE

2-9-1 An applicant seeking to become a Representative Office will need to comply with requirements including those set out in the REP module and take note of any applicable matters set out in section 2-2 of the RPP.

2-9-2 In assessing an application for a Representative Office, the DFSA is likely to assess matters including whether:

- (a) the proposed activities to be undertaken by the applicant are consistent with the Financial Service activity of Operating a Representative Office as described in section 2.26 of the GEN module; and
- (b) the applicant is incorporated and regulated by a Financial Services Regulator in a jurisdiction other than the DIFC.

2-9-3 Further general information in relation to the DFSA's Representative Office regime can be found in a Question and Answer document at:

<http://www.dfsa.ae/Pages/DFSALibrary/DFSAPublications/Publications.aspx>

2-10 REGISTERING AS A DNFBP

2-10-1 Chapter 15 of the AML module sets out the registration requirements for a DNFBP. A DNFBP must register with the DFSA by way of a notification by completing and submitting the [DNFBP1 form](#) in the AFN module of the DFSA Sourcebook.

2-10-2 At the time of registration the DFSA expects a DNFBP to be in full compliance with its obligations set out in the AML module of the DFSA Rulebook.

2-11 APPLICATION TO BE A REGISTERED AUDITOR

2-11-1 An applicant seeking to become a Registered Auditor will need to comply with requirements including those set out in the [AUD module](#) and Part 8 of the Regulatory Law.

2-11-2 A Person is not permitted to provide audit services to an Authorised Firm or an Authorised Market Institution which is a Domestic Firm, a Public Listed Company or a Domestic Fund, unless that Person is a Registered Auditor. A Person intending to provide audit services to an Authorised Firm or an Authorised Market Institution (which is a Domestic Firm), a Public Listed Company or a Domestic Fund, must apply to the DFSA for registration in accordance with the AUD module.

2-11-3 An applicant for registration as a Registered Auditor should be able to demonstrate to the DFSA's satisfaction that it:

- (a) is fit and proper;
- (b) has professional indemnity insurance as required in section 4.3 of the AUD module;
- (c) has adequate systems, procedures and controls to ensure due compliance with:
 - (i) the International Standards on Auditing;
 - (ii) the International Standards on Quality Control; and
 - (ii) the Code of Ethics for Professional Accountants;
- (d) has clear and comprehensive policies and procedures relating to compliance with all applicable legal requirements, including those in the Regulatory Law, AUD, AML and other relevant modules of the Rulebook, when providing audit services to a Domestic Firm, Public Listed Company or Domestic Fund;
- (e) has adequate means to implement those policies and procedures and monitor that they are operating effectively and as intended;
- (f) is controlled by a majority of individuals who hold Recognised Professional Qualifications; and
- (g) has identified at least one or more appropriate individuals, who will be appointed by it to undertake the responsibilities of an Audit Principal; and
- (h) has complied with any other requirement as specified by the DFSA.

2-12 APPLICATION TO BE AN AUDIT PRINCIPAL

2-12-1 An Audit Principal is an individual responsible for managing the conduct of audit work undertaken by the Registered Auditor or signing audit reports, or any other reports as may be required under the Rules, on behalf of the Registered Auditor.

2-12-2 A Registered Auditor is not permitted to allow any individual to undertake any of the responsibilities of an Audit Principal unless that individual is registered by the DFSA as an Audit Principal for that Registered Auditor.

2-12-3 An individual applying for registration as an Audit Principal should be able to demonstrate to the DFSA's satisfaction that he:

- (a) holds a Recognised Professional Qualification;
- (b) is a member of good standing of a Recognised Professional Body;
- (c) has at least five years of relevant post qualification audit experience in the past seven years, including at least one year of experience in a managerial role supervising and finalising audits; and
- (d) is fit and proper to conduct audit work.

3 SUPERVISION - BEING REGULATED

3-1 DFSA'S APPROACH TO SUPERVISION

Introduction

3-1-1 Chapter 3 focuses on the DFSA's risk-based approach to supervision and the on-going relationship between the DFSA and an Authorised Person, DNFBP or a Registered Auditor (collectively referred to as firms in this Chapter unless otherwise stated).

3-1-2 Section 3-1 outlines the DFSA's general approach to risk based supervision; the remaining sections (3-2 to 3-6) provide additional information in relation to the DFSA's approach to the supervision of particular types of firms.

3-1-3 The appropriate use of the DFSA's supervisory powers plays an important part in ensuring that the DFSA achieves its statutory objectives and has regard to its guiding principles which are set out in chapter 1.

Supervision philosophy

3-1-4 The DFSA has adopted a risk-based approach to the regulation and supervision of all regulated firms in order to concentrate its resources on the mitigation of risks to its objectives. The DFSA will work with a regulated entity to identify, assess, mitigate and control these risks where appropriate.

3-1-5 The DFSA's supervisory risk-based approach involves:

- (a) the DFSA's continuous risk management cycle, which utilises macro-prudential data, risk assessments and a risk matrix to form risk-based classifications of firms, as set out in paragraphs 3-1-8 to 3-1-24;
- (b) where applicable, developing a strong relationship with a firm and its senior management, as set out in paragraphs 3-1-25 to 3-1-31;
- (c) firms making notifications to the DFSA, including as set out in paragraphs 3-1-32 and 3-1-33;
- (d) using appropriate supervisory tools; and

where applicable, considering any lead or consolidated supervision which a firm or its Group may be subject to in other jurisdictions, taking into account the DFSA's relationship with other regulators, set out in paragraphs 3-1-34 and 3-1-35;

3-1-6 The DFSA's risk-based approach to the supervision of a firm may vary depending upon the size, scale, nature and circumstances of each individual firm and the specific risks it poses to the DFSA's objectives.

3-1-7 The DFSA is concerned with a firm's behaviour that affects both its overall financial condition and its interaction with individual customers and market counterparties. We do not aim to prevent all failures. A 'zero failure' regime would place an excessive regulatory burden on firms. Instead, we aim to reduce the probability of excessive

risk taking or inappropriate conduct through increased intensity of supervision where it is both appropriate and likely to be effective.

Risk management cycle

3-1-8 The DFSA has adopted a continuous risk management cycle. This comprises the identification, assessment, prioritisation, monitoring and mitigation of risks.

3-1-9 Our risk management cycle starts with a macro-prudential view of the DIFC as a whole. We produce a comprehensive set of quarterly data which highlight demographics of all types of regulated entities. This data set provides an overview of the risk profile of regulated entities, including the aggregate financial position.

3-1-10 Based on the analysis of this data set, we might increase assessment activity with respect to certain entities, or use thematic reviews to target certain products, services or practices across a set of firms.

3-1-11 Our Board of Directors use these data, amongst other factors, to set organisational risk tolerances which are used to prioritise risks.

Risk Matrix - Impact and Probability Ratings

3-1-12 The impact rating is an assessment of the potential adverse consequences that could follow from the failure of, or significant misconduct by, a firm. The potential adverse consequences include not only the direct financial impact on such firm's customers and stakeholders, but also the potential for damage to the reputation and objectives of the DFSA.

3-1-13 We do not have a single proxy for the impact rating. We consider a variety of factors such as:

- (a) the amount of firm revenue generated by activity in or from the Centre;
- (b) the number of employees in the DIFC;
- (c) the potential scale of damage to the firm's customers based on the firm's level of activity in or from the DIFC;
- (d) whether the firm holds deposits or any other form of client money;
- (e) the potential for an individual firm or entity's failure or misconduct to directly damage other firms or entities; and
- (f) the potential damage of failure or significant misconduct on the reputation and objectives of the DFSA.

3-1-14 The probability rating covers four broad risk groups:

- (a) Corporate Governance, Strategy and Business Model Risks;
- (b) Financial and Operational Risks;

- (c) Conduct of Business Risks to Clients and Markets; and
- (d) Anti-Money Laundering, Counter Terrorist Financing and Financial Crime.

3-1-15 Within these risk groups are risk elements which the DFSA may review, according to the type of firm, to identify risks that could inhibit the achievement of our objectives.

3-1-16 A risk matrix is then used to identify, assess and further prioritise risks using these impact and probability ratings, resulting in a risk based classification of a firm.

Risk-based classification of firms

3-1-17 Risk assessments allow the DFSA to allocate its resources in such a way that its supervisory tools are targeted towards those firms and activities which pose a higher risk to the DFSA's objectives.

3-1-18 The DFSA has in place intra-departmental challenges and measures to check that our supervisory activities are proportionate to a firm's risk-based classification.

3-1-19 We will generally only allocate a Relationship Manager to a firm with a higher level of resultant risk from the combined assessment of impact and probability risk ratings. This means that a significant number of firms will not have a dedicated Relationship Manager, but will be supervised by a team – the Thematic Supervision Team (TST).

3-1-20 Firms supervised by the TST will be subject to onsite and thematic surveillance reviews, however, the review cycle will differ from those firms supervised by dedicated relationship managers. In addition to risk assessments, the TST will use high-level management meetings and self-certifications as considered necessary.

3-1-21 Thematic reviews will cover a sample of all relevant firms. Such reviews may be conducted at any time.

3-1-22 Whilst the DFSA may discuss certain information with a firm, in particular the specific risks that lead it to assign an overall risk classification to the firm and any necessary remedial actions, it will not usually disclose the final risk classification.

Risk mitigation

3-1-23 Whenever appropriate, the DFSA may inform the firm of the steps it needs to take in relation to specific risks. The DFSA then expects the firm to demonstrate that it has taken appropriate steps to mitigate the risks it poses to the DFSA's objectives.

3-1-24 Where necessary, risk mitigation programmes may be developed with a firm in order to mitigate or remove identified areas of risk.

DFSA's relationship with firms

3-1-25 In order to meet its objectives, the DFSA requires an open, transparent and co-operative relationship between itself and each firm. The DFSA expects to establish and maintain an on-going dialogue with the firm's senior management in order to develop and

sustain a thorough understanding of the firm's business, systems and controls and, through this relationship, to be aware of all areas of risk to the DFSA's objectives.

3-1-26 The DFSA seeks to maintain an up-to-date knowledge of a firm's business. However, a firm is also required to keep the DFSA informed of significant events, or anything related to the firm of which the DFSA would reasonably expect to be notified, including as set out in paragraphs 3-1-32 and 3-1-33.

3-1-27 The nature and intensity of the DFSA's relationship with a firm will depend first on the extent of risk a firm poses, but after that will also depend on a number of factors. The DFSA's level of supervision will be proportionate to the risks which the firm poses to the DFSA's objectives and will emphasise the responsibilities of the firm's senior management in identifying, assessing, mitigating and controlling its risks. The greater the impact and probability of the firm's perceived risks, the more intensive the supervisory relationship may be.

3-1-28 For those Firms who have a dedicated Relationship Manager, their Relationship Managers will be the Firms' main point of contact with the DFSA. This includes any notifications, changes or queries.

3-1-29 For those Firms without a dedicated Relationship Manager, who will be supervised by the TST, a "Supervised Firm Contact Form" (Contact Form), is available only to Firms on the DFSA website and provides a mechanism to securely and efficiently communicate with us.

<http://www.dfsa.ae/Pages/ContactUs/SupervisedFirmContactForm.aspx>

3-1-30 This Contact Form can be used for any questions or queries you have of us and for the lodgement of any required forms (except EPRS returns). The Contact Form also allows for the attachment of any related supporting documents. Once received, all enquiries will be acknowledged and an appropriate DFSA staff member will be allocated to each enquiry. The DFSA has put in place service standards to ensure that all enquiries are responded to in a timely manner.

3-1-31 In addition, we have also published, on our website, a set of [Frequently Asked Questions](#) (FAQs). These FAQs include the most commonly asked questions from our regulated entities ranging from general "Where can I find ... ?" queries to more specific supervisory processes or reporting requirement queries. We will update the FAQs on a regular basis and we encourage all regulated entities to visit and revisit this resource frequently.

Notifications to the DFSA

3-1-32 Section 11.10 of the GEN module sets out Rules on specified events, changes or circumstances that require notification to the DFSA by an Authorised Person (other than a Representative Office). The list of notifications outlined in section 11.10 is not exhaustive and other areas of the Rulebook may also specify additional notification requirements.

3-1-33 An Authorised Firm and Authorised Market Institution are required to comply with the high level principles in GEN Rule 4.2.10 and AMI Rule 9.2.1 respectively. These Rules require an Authorised Person to deal with the DFSA in an open and co-operative manner

and keep the DFSA promptly informed of significant events or anything else relating to such person of which the DFSA would reasonably expect to be notified.

Co-operation with other regulators

3-1-34 The DFSA views co-operation with other regulators as an important component of its supervisory activities. Effective co-operation arrangements with other regulators will provide for prompt exchange of information in relation to supervision, investigation and enforcement matters. Usually, co-operation arrangements will be in the form of memoranda of understanding or other arrangements. The information exchange may enhance, for example, the DFSA's understanding of the operations of an Authorised Firm's Group and the effect on the firm.

3-1-35 The DFSA may exercise its powers for the purposes of assisting other regulators or agencies (see Article 39 of the Regulatory Law). The DFSA may also delegate functions and powers to representatives of other regulators or agencies (see Article 40 of the Regulatory Law).

3-2 SUPERVISION OF AUTHORISED FIRMS

Introduction

3-2-1 Section 3-2 provides additional information in relation to DFSA's approach to the supervision of an Authorised Firm. Where relevant, some of these requirements may apply to a Representative Office.

3-2-2 In supervising an Authorised Firm, the DFSA expects an Authorised Firm to comply with a number of high level principles in relation to its activities.

3-2-3 An Authorised Firm, other than a Representative Office, must comply with the twelve principles set out in section 4.2 of the GEN module. In brief, these are:

- (a) Principle 1 – Integrity;
- (b) Principle 2 – Due skill, care and diligence;
- (c) Principle 3 – Management, systems and controls;
- (d) Principle 4 – Resources;
- (e) Principle 5 – Market Conduct;
- (f) Principle 6 – Information and Interests;
- (g) Principle 7 – Conflicts of Interest;
- (h) Principle 8 – Suitability;
- (i) Principle 9 – Customer assets and money;
- (j) Principle 10 – Relations with regulators;

- (k) Principle 11 – Compliance with high standards of corporate governance; and
- (l) Principle 12 – Remuneration practices.

3-2-4 A Representative Office must comply with the four principles set out in section 3.2 of the REP module. In brief, these are:

- (a) Principle 1 – Integrity;
- (b) Principle 2 – Due skill, care and diligence;
- (c) Principle 3 – Resources; and
- (d) Principle 4 – Relations with regulators

Group supervision

3-2-5 When the DFSA licenses an Authorised Firm, it takes into consideration the relationship with any wider Group to which the firm may belong or with other Persons closely linked to it. The DFSA may also take into account lead or consolidated supervision to which an Authorised Firm or its Group may be subject in another jurisdiction.

3-2-6 An Authorised Firm is expected to provide information as required or reasonably requested under legislation applicable in the DIFC relating to the Authorised Firm and, where applicable, its consolidated or lead regulatory arrangements. This information may include prudential information, reports on systems and controls relating to an Authorised Firm's Group, internal and external audit reports, details of disciplinary proceedings or any matters which may have financial consequences, reputational impact or pose any significant risk to the DIFC or to the Authorised Firm and the group-wide corporate governance practices and policies and the remuneration structure and strategies adopted. This information may initially be taken into account as part of DFSA's fit and proper test as set out in section 2-2 and may subsequently be utilised in the supervision of the Authorised Firm. Further Rules and Guidance with regard to obtaining information from an Authorised Firm's lead regulator are set out in GEN Rule 11.1.5.

3-2-7 The DFSA has an interest in the relationship of an Authorised Firm with other regulators, particularly in order to determine the level of reliance the DFSA may place on a regulator in another jurisdiction concerning any lead supervision arrangements. Depending on the legal structure of an Authorised Firm and the relationship of the DFSA with the regulator in question, the DFSA may place appropriate reliance on the supervision undertaken by this regulator.

Domestic firm's group with DIFC head office

3-2-8 The DFSA will usually be the lead and consolidated regulator of any Group headed by a Domestic Firm. Members of the Group, that is any of the Authorised Firm's Subsidiaries or branches, will be either subject to DFSA's exclusive supervision or, where members of the Group are located in a jurisdiction outside the DIFC, generally subject to lead or consolidated supervision by the DFSA in co-operation with another regulator.

Subsidiary of a non-DIFC firm

3-2-9 The DFSA will routinely be the lead regulator for the purpose of prudential supervision of an Authorised Firm which is a DIFC incorporated Subsidiary of a non-DIFC firm.

3-2-10 Where the Authorised Firm is a Subsidiary of a regulated non-DIFC parent company, the DFSA may have regard to any consolidated prudential supervision arrangements to which the Subsidiary is subject and will liaise with other regulators as necessary to ensure that these are adequately carried out, taking into account the Subsidiary's activities. The DFSA may place appropriate reliance on the Subsidiary's consolidated regulator in another jurisdiction if it is satisfied that it meets appropriate regulatory criteria and standards.

3-2-11 An Authorised Firm carrying on Financial Services as a Subsidiary of an unregulated non-DIFC parent company may be subject to the DFSA's consolidated prudential supervision, taking into account the parent's activities.

Branch of a non-DIFC firm

3-2-12 An Authorised Firm carrying on Financial Services through a branch will be subject to supervision by both the DFSA and the regulator in its head office jurisdiction.

3-2-13 The DFSA will have regard to any lead or consolidated prudential supervision arrangements to which a branch is subject. The DFSA may place appropriate reliance on a Branch's lead regulator in another jurisdiction and, where appropriate, its consolidated prudential regulator if it is satisfied that it meets appropriate regulatory criteria and standards. Where an Authorised Firm is subject to lead regulation arrangements with a foreign regulator, the DFSA will usually not seek to impose consolidated prudential supervision on the Authorised Firm's Group.

3-2-14 During the authorisation process the DFSA will take into account the nature and scope of the regulation and supervision to which the applicant is subject in its head office jurisdiction. Notwithstanding that an Authorised Firm may be subject to lead or consolidated regulatory arrangements, the DFSA requires it to remain fit and proper in respect of its Group and Controllers. Certain changes or events will require notification to, or prior approval from, the DFSA.

3-2-15 The DFSA will determine the level of regulatory and supervisory oversight which is subsequently required for a specific Branch. As part of DFSA's risk assessment process, during the authorisation process the DFSA undertakes a two-tier approach to the risks to its objectives posed by the Branch, thereby taking into account the characteristics of the applicant and its head office. The first part of this assessment includes a judgement on the degree of home country supervision and considers the strength of support, both financial and managerial, which the head office is capable of providing to the Branch, taking into account the Branch's activities and the adequacy of, among other things, the corporate governance framework and practices and remuneration structure and strategies adopted at the head office. The second part of the assessment considers the risk and control mechanisms within the Branch itself.

3-2-16 As a result of the assessment, the DFSA may consider granting a waiver or modification notice in respect of specific prudential or other regulatory requirements relating to a Branch.

Periodic returns for Authorised Firms

3-2-17 An Authorised Firm is required to submit periodic returns. In addition, an Authorised Firm may be required to submit copies of its Group's annual interim and audited accounts. The DFSA may also require an Authorised Firm to provide copies of Group returns which are sent to any other regulator.

3-2-18 Collecting this data in a timely and accurate manner is imperative to our risk management cycle, which is the primary reason we have automatic fees for late financial reports.

On-going risk analysis

3-2-19 The DFSA conducts an on-going analysis of risks relating to each Authorised Firm, although the information required may vary from firm to firm. Authorised Firms with a higher risk classification may be subject to closer regulatory attention and would typically be subject to supervisory reviews specifically designed to address particular causes of risk.

3-2-20 All Authorised Firms will be subject to an individual on-site risk assessment, except where more than one Authorised Firm belongs to the same Group, in which case the DFSA may decide to carry out a Group risk assessment.

3-2-21 The risk assessment process is ongoing. The DFSA will, on a continuous basis, review notifications and reporting of information, maintain an ongoing dialogue with senior management and make appropriate visits to the Authorised Firm, so that the DFSA has current information on key risk areas of the Authorised Firm.

3-2-22 There are also a number of trigger events which may affect the frequency of a risk assessment and the Authorised Firm's overall risk classification. Examples include:

- (a) a notification from a non-DIFC regulator or other authority of an issue concerning the Authorised Firm or its Group;
- (b) a material change in an Authorised Firm's business and new business activities;
- (c) a change in the Authorised Firm's Controllers;
- (d) an Authorised Firm's development of high risk products or business lines;
- (e) an Authorised Firm's development of business areas with characteristics such as unusual profitability;
- (f) an Authorised Firm's appointment of new personnel in key business areas;
- (g) an Authorised Firm's acquisition of new or revised information systems or new technology;

- (h) a rapid growth in specific areas of activity of an Authorised Firm which is not matched by appropriate systems and controls to manage such growth;
- (i) an Authorised Firm's corporate restructuring, merger or acquisitions;
- (j) an Authorised Firm's expansion or acquisition of non-DIFC operations including the impact of changes in related economic and regulatory environments; or
- (k) the DFSA's response to industry-wide concerns or themes.

Review of risk management systems

3-2-23 Under GEN Rule 5.3.4, an Authorised Firm must ensure that its risk management systems provide the Authorised Firm with the means to identify, assess, mitigate and control its risks. In addition to undertaking its own assessment of the Authorised Firm, the DFSA may review the results of the Authorised Firm's internal risk assessment and determine the extent to which each of the Authorised Firm's risks impacts on DFSA's objectives, the likelihood of the risk occurring and then will consider the controls and mitigation programmes the firm has in place.

Desk based reviews

3-2-24 The DFSA may undertake desk based reviews in order to review compliance with legislation applicable in the DIFC. They assist the DFSA's understanding of an Authorised Firm's operations. For example, monitoring its financial position and detecting emerging problems or concerns to be explored in greater detail through prudential meetings, examinations, or otherwise. A desk based review may involve analysing information provided by the firm through periodic returns, internal management information, published financial information or specially requested information.

On-site visits

3-2-25 On-site visits provide the DFSA with an overview of the Authorised Firm's operations and enable it to form a first-hand view of the personnel, systems and controls and compliance culture within the Authorised Firm as well as identifying and evaluating the risks to the DFSA's objectives, taking into account any mitigation by the Authorised Firm. They enable the DFSA to test the soundness of the Authorised Firm's systems and controls and the extent to which the DFSA can continue to rely on them and the Authorised Firm's senior management to prevent or mitigate risks to the DFSA's objectives. On-site visits will also assist the DFSA to assess the extent of supervision and the use of other supervisory tools required to address certain key risk areas.

3-2-26 There are various types of on-site visits by the DFSA to an Authorised Firm which differ in their objective and frequency:

- (a) Periodic visits are undertaken at frequencies determined by the DFSA and focus on the main risk areas within an Authorised Firm as well as providing the DFSA with a thorough understanding of the Authorised Firm, its business and any major changes that have taken place within the Authorised Firm since a previous visit or risk assessment and their probable effects;

- (b) Theme visits are designed to address a current or topical risk or issue either within a particular type of Authorised Firm or the market place in general. They tend to be short in duration and are focused in their approach. Examples of theme visits are anti-money laundering, client assets and conflict management;
- (c) Follow-up visits are often required to assess the implementation of any action that may have been agreed as part of a risk mitigation programme or to satisfy the DFSA that the Authorised Firm has taken appropriate action arising from a previous visit or communication;
- (d) Special visits are unique to a particular Authorised Firm and are generally scheduled following a particular event or notification from an Authorised Firm. They are generally short, focused visits usually targeted to a particular area of an Authorised Firm. These visits allow the DFSA to review certain high risk areas of an Authorised Firm's business in isolation. Occasionally, special visits may be unannounced. These assist in keeping firms alert to the need to maintain a continuously high quality of compliance; and
- (e) The DFSA may, from time to time, hold high level meetings with an Authorised Firm's senior management. Such meetings enable the DFSA to assess issues including any prudential concerns arising from desk based reviews or elsewhere.

Periodic Communications

3-2-27 The DFSA is committed to open and transparent communication with Authorised Firms. From time to time, the DFSA may issue letters to Senior Executive Officers or equivalent persons across the DIFC (commonly referred to as 'Dear SEO Letters'). Frequently, these letters will be issued as a means of communicating findings arising from completed thematic visits. However, they may also be issued in response to other major events or changes. For example, such a letter may include an update from relevant United Nations Security Council Sanctions or Resolutions or the Financial Action Task Force, in relation to the prevention of money laundering and combating the financing of terrorism.

3-2-28 In addition to the Senior Executive Officer letters, the DFSA may issue alerts and warnings in response to particular matters of concern. An example of this could be in relation to matters concerning fraudulent activity that the DFSA has become aware of.

3-2-29 The DFSA holds outreach sessions from time to time, to interact with firms operating in the DIFC. These sessions are held to discuss regulatory matters in an open manner.

3-2-30 From time to time, the DFSA may consider a particular item of communication to an Authorised Firm to be of key regulatory importance. For this reason, the DFSA may consider it necessary to issue such communications directly to a senior member of staff at the Board level of the DIFC entity copied (where appropriate) to the group's home state regulator. For entities established as a Branch in the DIFC, these communications will likely be delivered to the Chairman of the Board at the DIFC Branch entity's head or Parent office. For DIFC incorporated entities, communications will likely be delivered directly to the Chairman of the firm's Board or head office. These communications may include, for example, the results of DFSA's risk assessment visits where a risk mitigation plan has been sent that contains significant matters of concern to DFSA's objectives.

External auditor reports, statements and tripartite meetings

3-2-31 The DFSA requires an Authorised Firm's registered external auditor to co-operate with the DFSA in a number of ways, including the submission of specific audit reports and statements. As part of an audit, the DFSA would expect an auditor to review any relevant correspondence between the DFSA and the Authorised Firm. Further, tripartite meetings between the Authorised Firm's senior management, the auditor, and the DFSA may be requested at the DFSA's initiative. Finally, an auditor is required to disclose to the DFSA those matters outlined in Article 104(3) of the Regulatory Law.

Requiring information and documents

3-2-32 Apart from reports such as regular prudential returns, the DFSA may from time to time also request from an Authorised Firm additional supplementary information and documents, including non-financial information such as an Authorised Firm's internal policies on particular areas of risk and compliance.

Requirements relating to Change in Control

3-2-33 Article 64 of the Regulatory Law and section 11.8 of the GEN module set out the DFSA's requirements governing Controllers of Authorised Firms.

DFSA approval

3-2-34 A Person who proposes to become a Controller of a Domestic Firm or an existing Controller who proposes to increase the level of control which that Person has in a Domestic Firm beyond the threshold of 30% or 50% is required to obtain the DFSA's prior approval before doing so. The DFSA's assessment of a proposed acquisition or increase in control of a Domestic Firm is a review of such a firm's continued fitness and propriety and ability to conduct business soundly and prudently. Accordingly, the DFSA takes into account the considerations specified in paragraph 2-2-13 relating to Controllers when making such an assessment.

3-2-35 Under GEN Rule 11.8.5(1), a Person who proposes either to acquire or increase the level of control in a Domestic Firm must lodge with the DFSA an application for approval in the appropriate form in AFN. The DFSA may approve of, object to or impose conditions relating to the proposed acquisition or the proposed increase in the level of control of the Authorised Firm. If the information in the application form lodged with the DFSA is incomplete or unclear, the DFSA may in writing request further clarification or information. The DFSA may do so at any time during the processing of such an application. The period of 90 days within which the DFSA will make a decision will not commence until such clarification or additional information is provided to the satisfaction of the DFSA. The DFSA may, in its absolute discretion, agree to a shorter period for processing an application where an applicant requests for such a period, provided all the information required is available to the DFSA.

3-2-36 Where the DFSA proposes to object to or impose conditions relating to a proposed acquisition of or increase in the level of control in a Domestic Firm, the DFSA will first notify the applicant in writing of its proposal to do so and its reasons. The DFSA will take into account any representations made by an applicant before making its final decision.

3-2-37 The DFSA may consider whether a Person has become an unacceptable Controller as a result of any notification given by an Authorised Firm under Rule 11.8.11(2) or as a result of its own supervisory work. The considerations which the DFSA will take into account in assessing whether a Person is an acceptable Controller are those set out in paragraph 3-2-34 above.

Application for a Change of Scope of Licence

3-2-38 Where an Authorised Firm applies to change the scope of its Licence, it should provide the following information:

- (a) a revised business plan as appropriate, describing the basis of, and rationale for, the proposed change;
- (b) details of the extent to which existing documentation, procedures, systems and controls will be amended to take into account any additional activities, and how the Authorised Firm will be able to comply with any additional regulatory requirements; and
- (c) descriptions of the Authorised Firm's senior management responsibilities (GEN chapter 5) where these have changed from those previously disclosed, including any up-dated staff organisation charts and internal and external reporting lines.
- (d) details of any transitional arrangements where the Authorised Firm is reducing its activities and where it has existing customers who may be affected by the cessation of a Financial Service;
- (e) the appropriate financial reporting statement where the variation may result in a change to the Authorised Firm's prudential category or the application of additional or different financial rules. If a capital increase is required in order to demonstrate compliance with additional financial rules but such capital is not paid up or available at the time of application, proposed or forecast figures may be used;
- (f) details of the effect of the proposed variation on the Authorised Individuals including, where applicable, submitting any application forms for individuals to perform additional or new Licensed Functions, or to remove existing Licensed Functions; and
- (g) revised pro forma financial statements.

3-2-39 An Insurer which wishes to vary its Licence to remove the Financial Service of Effecting Contracts of Insurance or to reduce the classes of insurance should refer to the run-off provisions in PIN chapter 9.

3-2-40 In considering whether an Authorised Firm is fit and proper with respect to a change in the scope of its Licence, the DFSA may take into account those matters in Chapter 2 of the RPP Sourcebook, which provides Guidance on fitness and propriety for Authorised Firms.

3-2-41 When considering a change to the scope of a Licence, the DFSA may also consider one or more of the matters outlined in paragraphs 3-2-51 to 3-2-56 below relating to the withdrawal of a Licence.

Notification to the DFSA relating to a Major Acquisition

3-2-42 GEN Rule 11.10.8 provides that an Authorised Firm which makes or proposes to make a Major Acquisition as defined must comply with either GEN Rule 11.10.9 or 11.10.10, depending on whether it is a Domestic Firm.

3-2-43 An Authorised Firm should provide to the DFSA information that would enable the DFSA to consider factors noted in GEN Rule 11.10.9(3). Although the DFSA does not prescribe the form in which such information is to be provided to the DFSA, Authorised Firms should consider any relevant industry and international practices when providing information to the DFSA for similar purposes.

3-2-44 The 45 day notice period referred to in GEN Rule 11.10.9(1) commences to run from the first business day after the date on which the DFSA receives the notification. However, if any critical information that the DFSA requires in order to assess the notification has not been provided to the DFSA at the time of the notification, the relevant notice period for considering that notification will only commence to run after the Authorised Firm has provided to the DFSA that information upon a request made by the DFSA under its powers in GEN Rule 11.10.11(1).

3-2-45 Upon the request of an Authorised Firm, the DFSA may, at its sole discretion, agree to consider a notification within a shorter period than the 45 days referred to above. The onus is on an Authorised Firm which wishes to obtain a DFSA decision under this Rule within a shorter period to make a request to that effect to the DFSA and provide all the information that the DFSA requires to enable the DFSA to process the notification within a shorter timeframe.

3-2-46 The DFSA may exercise its powers under this provision to object to a proposed Major Acquisition or impose any conditions relating to a Major Acquisition. In these cases a Person affected by such a decision may refer the decision to the Financial Markets Tribunal for review. Provisions on the referral to the Financial Markets Tribunal are in GEN Rule 11.10.12.

3-2-47 Where the DFSA receives a notification under GEN Rule 11.10.10(1)(b), it will to the extent necessary, liaise with the home regulator in taking any appropriate action relating to the proposed Major Acquisition.

Outsourcing

3-2-48 An Authorised Person must comply with those requirements in GEN Rules 5.3.21 and 5.3.22 when outsourcing functions or activities. In relation to Funds, there are additional outsourcing and delegation requirements applicable for Fund Managers and Trustees in section 8.12 of the CIR module.

3-2-49 The DFSA requires an Authorised Person to notify it of any material outsourcing arrangements. In the case of an Authorised Market Institution, any material outsourcing arrangements require the DFSA's prior approval under AMI Rule 5.5.3(1). An outsourcing arrangement would be considered to be material if it is a service of such importance that weakness or failure of the service would cast serious doubt on the Authorised Firm's continuing ability to remain fit and proper or comply with applicable Laws and Rules.

3-2-50 The outsourcing of functions or activities does not absolve management or Governing Body of responsibility and accountability for ensuring proper administration and execution of these functions or activities.

Application for a Withdrawal of Licence

3-2-51 In considering requests under GEN Rule 11.4.1, an Authorised Firm will need to satisfy the DFSA that it has made appropriate arrangements with respect to its existing customers, including the receipt of any customers' consent where required and, in particular:

- (a) whether there may be a long period in which the business will be run-off or transferred;
- (b) whether deposits must be returned to customers;
- (c) whether money and other assets belonging to customers must be returned to them; and,
- (d) whether there is any other matter which the DFSA would reasonably expect to be resolved before granting a request for the withdrawal of a Licence.

3-2-52 In determining a request for the withdrawal of a Licence, the DFSA may require additional procedures or information as appropriate including evidence that the Authorised Firm has ceased to carry on Financial Services.

3-2-53 An Authorised Firm should submit detailed plans where there may be an extensive period of wind-down. It may not be appropriate for an Authorised Firm to immediately request a withdrawal of its Licence in all circumstances, although it may wish to consider reducing the scope of its Licence during this period. Authorised Firms should discuss these arrangements with the DFSA.

3-2-54 The DFSA may refuse a request for the withdrawal of a Licence where it appears that customers may be exposed to adverse effect.

3-2-55 The DFSA may also refuse a request for the withdrawal of a Licence where:

- (a) the Authorised Firm has failed to settle its debts to the DFSA; or
- (b) it is in the interests of a current or pending investigation by the DFSA, or by another regulatory body or Financial Services Regulator.

3-2-56 Some other matters which an Authorised Firm should be mindful of in relation to the withdrawal of its Licence include:

- (a) Under Article 63 of the Regulatory Law where the DFSA grants a request for the withdrawal of a Licence, the DFSA may continue to exercise any power under the Regulatory Law or Rules in relation to an Authorised Firm, Authorised Individual or any other officer, employee or agent of the Authorised Firm for three years from the date on which the DFSA becomes aware of the act or omission that gives rise to the right to exercise that power;

- (b) Article 43(4) of the Regulatory Law states that Licensed Functions of an Authorised Firm shall be carried out by its Authorised Individuals. Accordingly, where an Authorised Firm's Licence is withdrawn, the authorised status of its Authorised Individuals will also be withdrawn from the same date. However, this does not remove the obligation on an Authorised Firm to provide a statement under GEN Rule 11.7.3 where an Authorised Individual has been dismissed or requested to resign; and
- (c) Where a Fund Manager or the Trustee makes a request under GEN Rule 11.4.1, the Fund Manager or the Trustee will need to satisfy the DFSA that it has made appropriate arrangements in accordance with the requirements under the Collective Investment Law 2010 and the CIR module with respect to the continuing management of the Fund for which it is the Fund Manager or the Trustee, as the case may be.

3-3 SUPERVISION OF REPRESENTATIVE OFFICES

3-3-1 The DFSA expects to undertake periodic visits to Representative Offices as part of its risk based approach to supervising firms. The DFSA may also include Representative Offices in thematic visits.

3-3-2 Onsite visits to Representative Offices are likely to focus on issues including:

- (a) confirming that activities undertaken by the Representative Office are allowed under its licence;
- (b) reviewing the adequacy of its systems and controls to comply with its AML responsibilities;
- (c) reviewing the material distributed by the Representative Office to ensure it is clear, fair and not misleading;
- (d) any solvency concerns with the head office or Group; and
- (e) the firm's disclosure of its regulated status.

3-3-3 The onsite visit is likely to include interviews with the Principal Representative and a review of relevant records.

3-4 SUPERVISION OF DNFBPs

3-4-1 The DFSA expects to undertake periodic visits to the place of business of a DNFBP as part of its risk based approach to supervising firms. The DFSA may also include DNFBPs in thematic visits.

3-4-2 Onsite visits to DNFBPs will generally focus on their compliance with relevant AML/CTF laws and the Rules contained in the AML module. This may include the DFSA testing the firm's systems and controls for conducting a money laundering risk assessment, customer due diligence and complying with relevant United Nations Security Council Sanctions and Resolutions.

3-4-3 The onsite visit is likely to include interviews with senior management and a review of relevant records. Depending on the outcome of the visit, the DFSA may provide a letter to the firm to discuss its findings.

3-4-4 The DFSA will also receive an Annual AML Return from a DNFBP (see AML Rule 14.5.1) which will assist the DFSA in its supervision of DNFBPs.

3-5 SUPERVISION OF REGISTERED AUDITORS

3-5-1 The DFSA undertakes periodic visits of Registered Auditors as part of its risk based approach to supervising firms. The DFSA may include Registered Auditors in some thematic visits.

3-5-2 A Registered Auditor must complete an annual information return form for each calendar year and submit the form to the DFSA by 31 January of the following year.

3-5-3 The DFSA is likely to undertake a desk based review of the content of the annual information return form it receives from a Registered Auditor. Prior to scheduling an onsite visit, the DFSA may make a request for further information from the Registered Auditor.

3-5-4 The onsite visit is likely to include interviews with senior management and a review of files/documentation.

3-6 SUPERVISION OF AUTHORISED MARKET INSTITUTIONS

Introduction

3-6-1 The Regulatory Law establishes a principles-based framework for the licensing and supervision of Authorised Market Institutions and for taking regulatory action against those licensed institutions. This framework is supplemented by supervisory powers and other requirements in the Markets Law 2012.

3-6-2 The Markets Law 2012 establishes a framework in relation to how an Authorised Market Institution may administer and operate an Official List of Securities and stipulates some specific Rule requirements in respect of this.

Official list of securities

3-6-3 Where an Exchange administers and operates an Official List of Securities, the risk-based approach to supervision also applies to the carrying on of this activity.

Group supervision

3-6-4 When the DFSA licenses an Authorised Market Institution, it takes into consideration the relationship with any wider Group to which the Authorised Market Institution may belong or with other Persons closely linked to it. The DFSA will also take into account lead or consolidated supervision to which an Authorised Market Institution or its Group may be subject in another jurisdiction. This may lead to the DFSA placing some reliance on the supervisory arrangements in another jurisdiction or creating and participating in special arrangements for the supervision of the Authorised Market Institution and its Group. The Authorised Market Institution is expected to provide information required or reasonably

requested in relation to these consolidated or lead supervisory arrangements before final supervisory arrangements are established.

3-6-5 Each relationship will be considered on a case by case basis and according to the risks posed by the Authorised Market Institution's activities identified during supervisory arrangements. Such supervisory arrangements may include a process to be agreed by the DFSA, the Authorised Market Institution itself and other relevant regulators.

3-6-6 Effective co-operation with regulators will provide for prompt exchange of information and co-operation in relation to supervision and enforcement between jurisdictions. This may include exchanges of information and co-operation in respect of activity conducted by an Authorised Market Institution. Usually co-operation arrangements will be in the form of memoranda of understanding. The information exchange will enhance the DFSA's understanding of the operations of the Group and the effect on the Authorised Market Institution.

Application for a Change in Control

3-6-7 Chapter 8 of the AMI module sets out the requirements relating to a change in control. These requirements are similar to those for an Authorised Firm which are set out at paragraphs 3-2-33 to 3-2-37.

Directions Power

3-6-8 Article 26 of the Markets Law 2012 empowers the DFSA to give an Authorised Market Institution certain directions in relation to the Authorised Market Institution's duties under DFSA-administered laws. It also gives the DFSA a power to direct an Authorised Market Institution to do specified things including closing the market, suspending transactions and prohibiting trading in Investments. Article 26 also empowers the DFSA to exercise the powers contained in the Authorised Market Institution's Rules for participants as though it was the Authorised Market Institution where it considers that the Authorised Market Institution has not exercised the powers under those Rules.

3-6-9 In considering whether to exercise such powers, the DFSA may take into account factors including:

- (a) what steps the Authorised Market Institution has taken or is taking in respect of the issue being addressed in the planned direction;
- (b) the impact on the DFSA's objectives if a direction were not issued; or
- (c) whether it is in the interests of the DIFC.

3-6-10 The written notice given by the DFSA will specify what an Authorised Market Institution is required to do under the exercise of such powers. Though the DFSA is not required to do so under the Markets Law 2012, in most cases the DFSA will contact the Authorised Market Institution prior to issuing such a direction.

3-6-11 Article 35 of the Markets Law 2012 allows the DFSA to direct an Authorised Market Institution to suspend or delist Securities from its Official List of Securities. Such directions

may take effect immediately or from a date and time as may be specified in the direction. Chapter 9 of the MKT contains details in this regard.

3-7 BUSINESS TRANSFER SCHEMES

General background

3-7-1 This section sets out information relating to a financial services business transfer scheme, i.e., a scheme by an Authorised Firm to transfer all or a part of a financial service business to another body. A reference in this section to “the Law” is to the Regulatory Law, to an “Article” is to an Article of the Law and to a “transfer scheme” is to a financial services business transfer scheme.

3-7-2 Part 9 of the Law sets out requirements applying to financial services business transfer schemes. In particular, Article 106 provides that no transfer scheme is to have effect unless a Court order has been made in relation to the scheme.

3-7-3 Article 107 defines a “transfer scheme” as a scheme where:

- (a) the whole or part of the business carried on through an establishment in the DIFC by an Authorised Firm (“the firm concerned”) is to be transferred to another body (“the transferee”) and the business to be transferred consists in whole or in part of financial services business; or
- (b) the Fund Property of a Fund, or of a sub-fund of an Umbrella Fund (“the Fund concerned”), is to be transferred to another Fund.

3-7-4 The need for a Court order sanctioning a transfer scheme arises because a transfer of business may interfere with agreements between an Authorised Firm and its clients (without the consent of each client), and may also affect the rights of other persons, such as creditors. The Court is best placed to hear and consider representations from persons who may be adversely affected by the scheme. It is then able, if appropriate, to make various orders binding all persons concerned that are necessary to give legal effect to the transfer.

Applying to the Court

3-7-5 Under Article 108 the Authorised Firm concerned, the transferee or both may apply to the Court for an order sanctioning a transfer scheme.

3-7-6 If an Authorised Firm or transferee is considering a transfer scheme, it should discuss the scheme with the DFSA as soon as practicable, to enable the DFSA to consider whether any particular issues are likely to arise, and to establish a practical timetable for the scheme.

3-7-7 It is important for an applicant to plan a timetable as there are various steps it must take under Article 111 (some of which involve the DFSA) before the Court may determine an application. For example, an applicant to the Court must:

- (a) arrange for a report on the terms of the transfer scheme (a “scheme report”) to be prepared by a person nominated or approved by the DFSA who appears to have the skills necessary to enable him to make a proper report (an “independent expert”);

- (b) give written notice of the transfer scheme to all interested parties (as determined by the DFSA); and
- (c) publish a notice in a newspaper best suited to bringing the transfer scheme to the attention of any persons who may be affected by it. Depending on where the Authorised Firm's business and clients are located, notice may be necessary in more than one newspaper.

3-7-8 The scheme report is a key document in the process that will assist and be relied upon by the Court in deciding whether or not to approve the proposed scheme and will also inform and be relied upon by the DFSA and persons potentially affected by the scheme. The DFSA will, therefore, only nominate or approve a person to make the report if the person has appropriate expertise and is independent of both the proposed transferor and transferee. That is, the person should be neutral and not have any potential conflicts of interest, so that the report is objective. The scheme report, as well as being objective, must set out clearly and in sufficient detail, the independent expert's opinion as to the likely effects and impact of the scheme on clients and third parties and each opinion must be supported by appropriate analysis and rationale.

3-7-9 In limited circumstances the DFSA may direct that a scheme report or notice is not required. However, the DFSA may only do so if it appears to the DFSA that, by reason of urgency, it is in the interests of the DIFC that the scheme report or notice is not provided (see Article 111).

3-7-10 Article 109 provides that when an application is made to the Court, the following persons may be heard by the Court:

- (a) any person who alleges that he would be adversely affected by the carrying out of the scheme; and
- (b) the DFSA.

3-7-11 Under Article 108 the Court may grant an order sanctioning the transfer scheme if it considers that, in all the circumstances of the case, it is appropriate to do so. Under Article 112 the Court must also be satisfied that:

- (a) before the transfer takes effect, the transferee will have any authorisation necessary to enable the business to be carried on in the place in which it is to be transferred; and
- (b) the transferee will possess adequate financial resources to carry on that business in accordance with the legislation applicable in that place.

3-7-12 Article 110 sets out the various types of orders that the Court can make relating to a transfer scheme.

Alternative Arrangements

3-7-13 Under Article 113 the DFSA may, by Rules, modify the provisions in Part 9 in specified cases. The DFSA has made such Rules in Chapter 12 of GEN and in Chapter 16 of CIR.

3-7-14 The effect of GEN Chapter 12 is that a business transfer scheme is not required to be sanctioned by a Court order to be effective if certain other alternative arrangements have been made. These alternative arrangements apply only to transfer schemes that do not involve a transfer of:

- (a) Banking Business;
- (b) Insurance business; or
- (c) Fund Property.

3-7-15 The first type of arrangement is if the Authorised Firm or transferee has been able to obtain the consent of each client who will be affected by the scheme. This option recognises that sometimes, if there are only a small number of clients, it may be practicable to obtain the agreement of all clients whose interests may be affected. Any communication sent to the client should set out clearly what the client is being asked to consent to. Also, it should then be clear that the client has provided its consent.

3-7-16 The second type of arrangement is if the transfer of business is expressly permitted under agreements between clients and the Authorised Firm or transferee concerned and the procedures in those agreements have been complied with. For example, in some cases agreements expressly provide for the transfer of accounts or novation of contracts to another person in accordance with a specified procedure.

3-7-17 Finally, in limited cases, a person may apply to the DFSA for its written consent to the transfer scheme. The DFSA does not expect Authorised Firms to regard this as their first option. The DFSA expects to receive applications seeking its consent to a transfer scheme only in very limited circumstances if the scheme is not complex or contentious. Under GEN 12.1.5, the DFSA may give its consent only if it is reasonably satisfied of a number of matters including that:

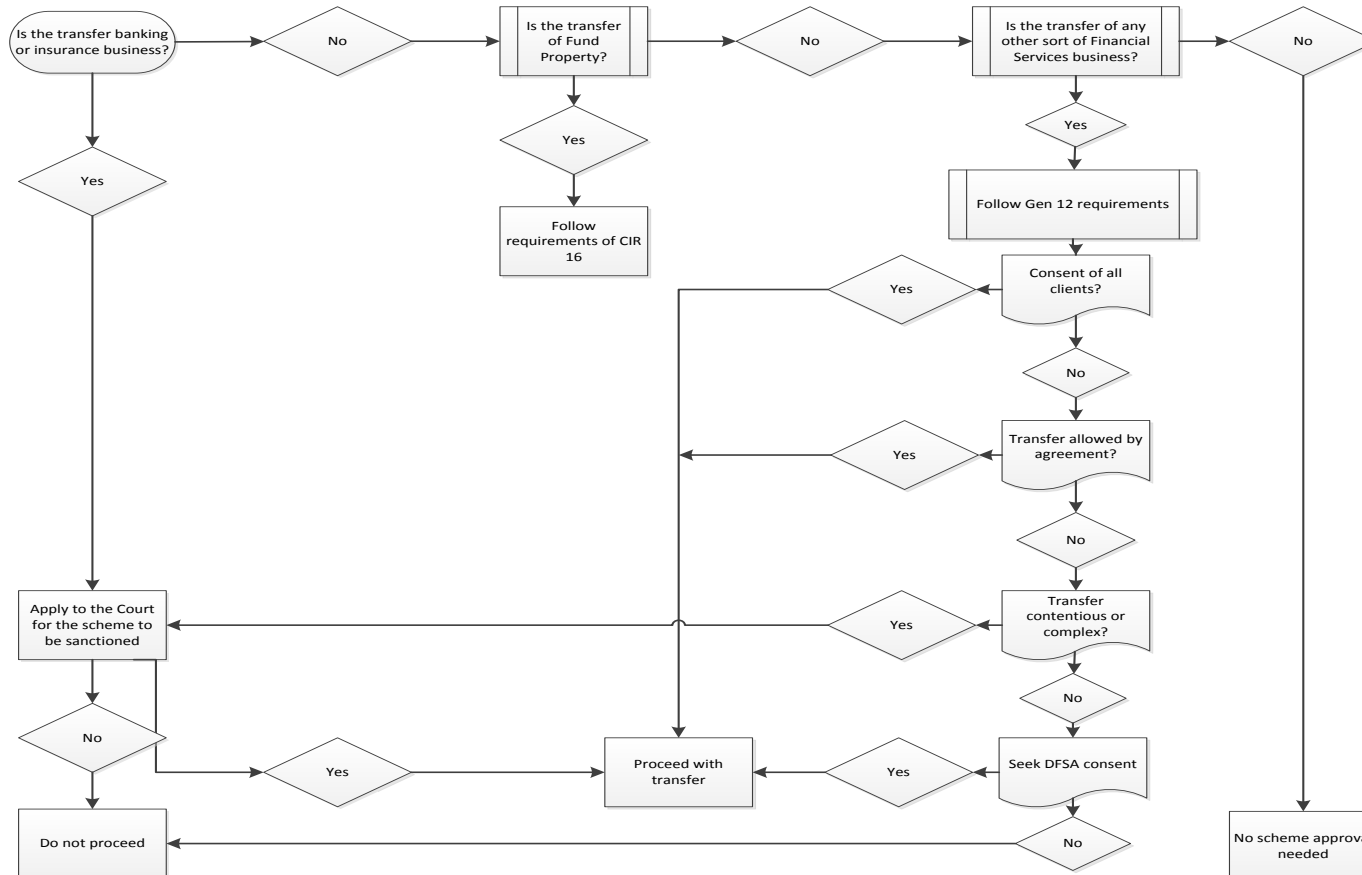
- (a) it is more appropriate and proportionate, and in the overall interests of clients, for the DFSA's consent to be sought rather than an application being made to the Court;
- (b) the applicant has taken all reasonable steps to pursue other options for giving effect to the scheme (e.g. seeking the consent of clients or using procedures in existing agreements);
- (c) the scheme is not likely to result in any material prejudice to the interests of clients of the Authorised Firm; and
- (d) implementation of the scheme will not result in the Authorised Firm or transferee contravening a law or Rule.

3-7-18 The onus is on the Authorised Firm and the transferee to ensure that a transfer of business under an alternative arrangement is legally effective. For example, obtaining the consent of the DFSA may mean that it is not necessary to apply for a Court order, but it does not of itself give legal effect to the transfer.

3-7-19 Further, just because an alternative mechanism in GEN 12 may be available does not prevent the Authorised Firm or transferee from applying for a Court order sanctioning a transfer scheme under Part 9 of the Law if they consider it appropriate to do so. For example, an application for a Court order is likely to be more appropriate if the scheme is complex (e.g. there are complex property interests involved), is likely to be contentious, is likely to affect a large number of persons or if additional legal certainty is sought.

3-7-20 The following flowchart sets out in simplified form some of the options available to an Authorised Firm or transferee. The flowchart and the information in this Chapter is only intended to be a summary of the procedures for a transfer of business. For full information a person reading this Chapter should also read Part 9 of the Law, Chapter 12 of GEN and Chapter 16 of CIR.

BUSINESS TRANSFER SCHEMES



4 SUPERVISORY AND ENFORCEMENT POWERS

4-1 INTRODUCTION

4-1-1 This chapter provides information on how the DFSA will generally exercise its powers when conducting supervisory or enforcement activities. These powers can be exercised in respect of any Persons, including an Authorised Person, DNFBP or Registered Auditor (collectively referred to as “firms” in this chapter unless otherwise stated), an Authorised Individual, Key Individual, Audit Principal or Principal Representative.

4-1-2 Chapter 5 of the RPP describes how the DFSA will exercise additional powers when conducting enforcement activities.

4-1-3 A reference to:

- (a) an Article in this chapter is a reference to an Article in the Regulatory Law, unless otherwise stated; and
- (b) the Law in this chapter is a reference to any legislation administered by the DFSA.

4-1-4 The range of powers available to the DFSA is primarily set out in the Regulatory Law. Some of the key powers (see Appendix 1) include the power to:

- (a) request information and documents and access premises (Article 73);
- (b) require an Authorised Person to provide a report from an independent expert (Article 74);
- (c) impose prohibitions or restrictions on an Authorised Person’s business (Article 75) or dealings with relevant property (Article 76);
- (d) issue a direction to an Authorised Person or Affiliate for prudential purposes (Article 75A);
- (e) impose conditions and restrictions on an Authorised Person’s Licence or endorsement (Article 49);
- (f) impose conditions and restrictions on an Authorised Individual or Key Individual (Article 56);
- (g) withdraw an authorisation or endorsement on a Licence or withdraw the Licence (as a whole) of an Authorised Person (Articles 50 and 51);
- (h) suspend an authorisation or endorsement on a Licence or suspend the Licence of an Authorised Person (Article 52);
- (i) restrict, suspend or withdraw an Authorised Individual or Key Individual’s status (Article 58(1));

- (j) restrict a person from performing any functions in connection with provision of Financial Services (Article 59), and
- (k) impose conditions and restrictions on, or suspend, vary or withdraw the registration of, a Registered Auditor or Audit Principal (Articles 98 and 98A).

4-1-5 When the DFSA exercises a power specified in this chapter (except for sections 4-2 and 4-3), it will generally follow the decision making procedures set out in Chapter 7 of the RPP.

4-2 POWER TO REQUEST INFORMATION AND DOCUMENTS

4-2-1 In order to supervise the conduct and activities of an Authorised Person, DNFBP, Domestic Fund, Registered Auditor or any director, officer, employee or agent of such person, the DFSA requires access to a broad range of information relating to a Person's business. Such information is usually provided to the DFSA on a voluntary basis. In particular, Authorised Persons, Authorised Individuals and DNFBPs are expected to deal with the DFSA in an open and cooperative manner and disclose to the DFSA any information of which the DFSA would reasonably expect to be notified.

4-2-2 Under Article 73 of the Regulatory Law, the DFSA may require a Person referred to in 4.2.1 to give information and produce documents about its business, transactions or employees to the DFSA. When the DFSA requires the giving of information or production of documents, it will give the Person a written notice specifying what is required to be given or produced.

4-2-3 The DFSA may exercise its powers under Article 73 in respect of such a Person either within, or outside, the DIFC.

4-3 POWER TO ACCESS PREMISES

4-3-1 The DFSA may require any Authorised Person, DNFBP, Domestic Fund or Registered Auditor to allow the DFSA to enter its premises during normal business hours or at any other time as may be agreed, for the purpose of inspecting and copying information or documents (at the relevant Person's expense) stored in any form on such premises, as it considers necessary or desirable to meet the objectives of the DFSA.²

4-3-2 The DFSA will provide reasonable notice to an Authorised Person, DNFBP, Domestic Fund or Registered Auditor or other person when it seeks information, documents or access to premises. In exceptional circumstances, such as where any delay may be prejudicial to the interests of the DIFC, the DFSA may seek access to premises without notice.

4-4 POWER TO REQUIRE A REPORT

4-4-1 Under Article 74, the DFSA may require an Authorised Person to provide it with a report from an independent expert on specified matters.

² Article 73(2), GEN Rule 11.1.2.(d).

4-4-2 There are a variety of circumstances where the DFSA may consider it appropriate to require the production of a report. These circumstances include, but are not limited to:

- (a) where the DFSA has concerns as to the adequacy of systems and controls (such as compliance, internal audit, anti-money laundering, risk management and record keeping);
- (b) where the DFSA seeks verification of information submitted to it; or
- (c) where remedial action is required to ensure the Authorised Person complies with DFSA Laws and Rules.

4-4-3 GEN section 11.12 sets out various requirements relating to the appointment of an independent expert. In particular, it is noted that:

- (a) the DFSA will give written notification to the Authorised Person concerning the purpose of the proposed report, the scope, the timetable for completion and any other relevant matters;
- (b) the independent expert is required to be appointed by the Authorised Person and be nominated or approved by the DFSA;
- (c) an Authorised Person is required to include specific requirements in a contract with an independent expert;
- (d) an Authorised Person is required to ensure it provides all assistance that the independent expert may reasonably require and ensure that the independent expert co-operates with the DFSA; and
- (e) an Authorised Person is required to pay for the services of the independent expert.

4-4-4 The DFSA notes that any information given or documents produced under Article 74 are admissible in evidence in administrative and civil proceedings, provided that any such information or documents also comply with any requirements relating to the admissibility of evidence in such proceedings.

4-5 POWER TO RESTRICT AN AUTHORISED PERSON'S BUSINESS OR PROPERTY

4-5-1 The DFSA has a power under Article 75 to impose prohibitions or restrictions on an Authorised Person's business. This includes prohibiting an Authorised Person from entering into specific types of transactions, from soliciting business from specific types of persons or from carrying on business in a specific manner. The DFSA may also require an Authorised Person to carry on business in, and only in, a specified manner. The DFSA may also prohibit an Authorised Person from using a particular name or description.³

³ Article 75(1)(a)(iv).

4-5-2 Under Article 76, the DFSA is also empowered to prohibit or require an Authorised Person to deal with any relevant property in a certain manner.⁴ The terms “dealing” and “relevant property” are defined in Article 76 as follows:

- (a) “dealing” in relation to property includes the maintaining, holding, disposing and transferring of property; and
- (b) “relevant property” in relation to an Authorised Person means:
 - (i) any property held by the person on behalf of any of the clients of the person, or held by any other person on behalf of or to the order of the person; or
 - (ii) any other property which the DFSA reasonably believes to be owned or controlled by the person.

4-5-3 In determining whether to exercise its Article 75 and 76 powers, the DFSA will take into account the circumstances set out in GEN Rule 11.13.1 (a) to (m).

4-6 POWER TO IMPOSE CONDITIONS AND RESTRICTIONS ON AN AUTHORISED PERSON'S LICENCE OR ENDORSEMENT

4-6-1 Under Article 49, the DFSA may at any time by written notice to an Authorised Person on its own initiative, or at the request of an Authorised Person:

- (a) impose conditions and restrictions, or additional conditions and restrictions, on a Licence or in relation to a Licence endorsement; and
- (b) vary or withdraw conditions and restrictions imposed on a Licence or in relation to a Licence endorsement.⁵

4-6-2 In determining whether to exercise its Article 49 power, the DFSA will take into account the circumstances including, but not limited to, the following:

- (a) where the Authorised Person's resources (including financial resources as well as human resources) are inadequate for the scale or type of activity which the firm is licensed to undertake;
- (b) where the Authorised Person has not conducted its business in compliance with the Laws and Rules;
- (c) where the Authorised Person has conducted its business in such a way that it has not ensured full compliance with applicable money laundering or counter terrorism legislation; or
- (d) where the DFSA has some concern about the fitness and propriety of the Authorised Person, but not such as to warrant the withdrawal of its Licence.

⁴ Article 76.

⁵ Articles 49(1) and (2).

4-7 POWER TO WITHDRAW AN AUTHORISATION OR ENDORSEMENT IN RESPECT OF ONE OR MORE FINANCIAL SERVICES OR A LICENCE

4-7-1 The DFSA may exercise its powers under Article 50(1) on its own initiative to withdraw an authorisation under, or an endorsement on, a Licence to carry on one or more Financial Services where:

- (a) the Authorised Person is or has been in breach of one or more restrictions or conditions applicable to its Licence or relating to a Licence endorsement;
- (b) the Authorised Person is in breach of the Regulatory Law, Rules or other legislation administered by the DFSA;
- (c) the Authorised Person is no longer fit and proper to carry on a Financial Service for which it has an authorisation or an activity for which it has a Licence endorsement;
- (d) the Authorised Person has failed for a period of at least twelve consecutive months to carry on one or more Financial Services for which it is authorised under a Licence or an activity for which it has a Licence Endorsement; or
- (e) the DFSA considers that the exercise of the power is necessary or desirable in the pursuit of its objectives.

4-7-2 The DFSA may exercise its powers under Article 51 to withdraw a Licence where:

- (a) as a consequence of withdrawal of authorisation in relation to one or more Financial Services under Article 50, the Authorised Person is no longer authorised to carry on a Financial Service;
- (b) the Authorised Person is no longer fit and proper to hold a Licence;
- (c) the Authorised Person has failed to remove a Controller or take such other action as required by the DFSA under Article 64; or
- (d) the Authorised Person requests the withdrawal.

4-7-3 In determining whether to exercise its Article 50 and 51 powers, the DFSA will have regard to all relevant matters. These include, but are not limited to, the following:

- (a) when the DFSA has serious concerns about the manner in which the business of the Authorised Person has been or is being conducted;
- (b) when the DFSA considers it necessary to protect regulated entities and customers in the DIFC;
- (c) whether any alleged contraventions affect or have the potential to affect the DFSA's objectives;
- (d) the nature, seriousness and impact of any alleged contravention and whether the alleged contravention is on-going;

- (e) when the Authorised Person no longer satisfies the relevant criteria set out in chapter 7 of the GEN module, chapters 2 and 7 of the AMI module and section 2-2 of this module in respect of the fitness and propriety to carry on a Financial Service or hold a Licence;
- (f) when the activities of the Authorised Person have ceased; and
- (g) when the Authorised Person's resources seem to the DFSA inadequate for the scale or type of activity which the firm is authorised to undertake.

4-7-4 Where an Authorised Person requests the DFSA to withdraw its Licence, then such a Person should complete and submit the relevant form to the DFSA (see SUP 6 Form - AFN Sourcebook). This form sets out a number of matters which the DFSA will consider before processing such an application to withdraw a Licence.

4-8 POWER TO IMPOSE CONDITIONS AND RESTRICTIONS ON THE STATUS OF AN AUTHORISED INDIVIDUAL OR KEY INDIVIDUAL

4-8-1 Under Article 56, the DFSA may at any time by a written notice to an Authorised Individual or Key Individual and the Authorised Firm or Authorised Market Institution in relation to which the Authorised Individual or Key Individual, respectively, is an officer, employee or agent:

- (a) impose conditions and restrictions, or additional conditions and restrictions, on the grant of Authorised Individual or Key Individual status; and
- (b) vary or withdraw conditions and restrictions imposed on the grant of such status.

4-8-2 The DFSA may exercise this power in circumstances including, but not limited to, the following:

- (a) where the Authorised Individual or Key Individual has not acted effectively or responsibly or has not exercised the expected level of skill, care and diligence in carrying out the Licensed Function;
- (b) where the conduct of the Authorised Individual or Key Individual falls below the standards expected; or
- (c) where the DFSA has some concern about the fitness and propriety of the Authorised Individual or Key Individual, but not such as to warrant the suspension or withdrawal of an Authorised Individual or Key Individual's status.

4-9 POWER TO RESTRICT, SUSPEND AND WITHDRAW THE STATUS OF AN AUTHORISED INDIVIDUAL OR KEY INDIVIDUAL

4-9-1 Under Article 58(1), the DFSA has the power to restrict an individual from performing Licensed Functions, or to suspend or withdraw an individual's Authorised Individual or Key Individual status, if it reasonably concludes that:

- (a) the individual is in breach, or has been in breach of, an obligation that applies as a result of their Authorised Individual or Key Individual status; or

- (b) an individual is no longer fit and proper to perform a role in respect of which he is an Authorised Individual or Key Individual.⁶

4-9-2 In determining whether to exercise its Article 58(1) power, the DFSA will have regard to all relevant matters including, but not limited to, the criteria for assessing the fitness and propriety of an Authorised Individual as set out in chapter 7 of GEN, for Key Individuals the criteria set out in chapter 3 of AMI and section 2-3 of this Sourcebook.

4-9-3 The DFSA may also withdraw the Authorised Individual or Key Individual status of an individual under Article 58(2) if:

- (a) the individual becomes bankrupt;
- (b) the individual is convicted of a serious criminal offence;
- (c) the individual becomes incapable, through mental or physical incapacity, of managing his affairs;
- (d) the individual or the relevant Authorised Person asks the DFSA to withdraw the relevant status; or
- (e) the Licence of the relevant Authorised Person is withdrawn.

4-9-4 In determining whether to exercise its power under Article 58(2)(b), the DFSA will give particular consideration to offences involving dishonesty, fraud or a financial crime.

4-10 POWER TO RESTRICT INDIVIDUALS

4-10-1 Under Article 59(1), if the DFSA reasonably believes that a natural person is not fit and proper to perform any functions in connection with the provision of Financial Services, it may restrict that Person from performing any or all such functions.

4-10-2 Article 59 enables the DFSA to impose a restriction in respect of all functions or in respect of specific functions. The restriction may also apply to functions whether or not they are Licensed Functions. Whether a general restriction, or a more specific restriction, is imposed by the DFSA may depend on the facts of the matter, including:

- (a) the concerns upon which the DFSA determines that a natural person is not fit and proper to perform any functions; and
- (b) the need to protect the integrity of the DIFC and ensure the confidence of participants in the market.

4-10-3 In determining whether to exercise its power under Article 59(1), the DFSA may have regard to all relevant matters including, but not limited to, the criteria for assessing the fitness and propriety of Authorised Individuals as set out in chapter 7 of GEN, for Key Individuals the criteria set out in chapter 3 of AMI and section 2-3 of this Sourcebook.

⁶ Article 58(1).

4-11 POWERS RELATING TO THE REGISTRATION OF A REGISTERED AUDITOR OR AUDIT PRINCIPAL

4-11-1 The DFSA has the power to impose conditions or restrictions upon a Registered Auditor or Audit Principal.⁷ The DFSA has the power in respect of a Registered Auditor or Audit Principal to withdraw its registration or suspend its registration.⁸

4-11-2 The DFSA may exercise its powers to suspend registration of a Registered Auditor or Audit Principal on its own initiative in the following circumstances:

- (a) the Registered Auditor or Audit Principal is in breach of, or has been in breach of, one or more restrictions or conditions applicable to its registration;
- (b) the Registered Auditor or Audit Principal is in breach of, or has been in breach of, the Regulatory Law or the Rules;
- (c) the Registered Auditor or Audit Principal is no longer fit and proper;
- (d) the Registered Auditor has failed for a period of at least 24 consecutive months to provide Audit Services permitted under its registration;
- (e) if the Audit Principal becomes a bankrupt, is convicted of a serious criminal offence, has become incapable of managing his affairs or is no longer employed by the Registered Auditor who appointed him; or
- (f) in the case of an Audit Principal, if the registration of their Registered Auditor is suspended or withdrawn.⁹

4-12 MISCELLANEOUS POWERS

Endorsements

4-12-1 The DFSA has the power to:

- (a) impose conditions and restrictions;¹⁰ or
- (b) withdraw or vary conditions and restrictions,¹¹

on an endorsement to conduct Islamic Financial Business.

4-12-2 In respect of an endorsement on a Licence to conduct business with Retail Clients, the DFSA has the power to impose conditions and restrictions, or withdraw or vary conditions and restrictions under Article 49 (see section 4-6 of this chapter).

⁷ Articles 98(3) and (6).

⁸ Article 98A(1).

⁹ Article 98A(2).

¹⁰ Article 12 of the Law Regulating Islamic Financial Business 2004.

¹¹ Article 12 of the Law Regulating Islamic Financial Business 2004.

4-12-3 In determining whether to exercise such powers, the DFSA will have regard to all relevant matters including, but not limited to, one or more of those circumstances specified in 4-6-2 in respect of imposing, varying or withdrawing conditions and restrictions.

Funds

4-12-4 The DFSA has the power to withdraw the registration of a Public Fund in one or more of the circumstances set out in Article 32 of the Collective Investment Law.¹² In determining whether to exercise this power, the DFSA can withdraw the registration of a Public Fund only if it considers that:

- (a) the withdrawal is in the interests of the Unitholders of the Fund; or
- (b) appropriate steps have been taken or may reasonably be taken to protect the interests of the Unitholders.

Direction Powers for Prudential Purposes

4-12-5 Under Article 75A, the DFSA may for, prudential purposes, direct a particular Authorised Firm, or Authorised Firms within a specified class, to:

- (a) comply with any specified additional capital or liquidity requirements;
- (b) apply a specific provisioning policy or treatment of specified assets;
- (c) comply with specified limits on material risk exposures;
- (d) comply with specified limits on exposures to related parties;
- (e) meet additional or more frequent reporting requirements; or
- (f) take such other action as is specified in the direction.

4-12-6 Where the DFSA issues a direction under Article 75A to Authorised Firms within a specified class, the direction will remain in force for a period of no more than 12 months in the first instance, unless the DFSA specifies a shorter period of time in the notice. The DFSA considers that such a direction should remain in force for a limited period as it has a Rule making power under the Regulatory Law at its disposal, which the DFSA would ordinarily use where it was proposing to change its Rules relating to Authorised Firms within a specified class.

4-12-7 The DFSA may also direct an Affiliate of an Authorised Person to take specified steps or not to carry out specified activities.¹³ The DFSA may give such a direction to an Affiliate if the DFSA is the consolidated supervisor of the Group to which the Authorised Person belongs and is satisfied that the direction is necessary or desirable for the effective prudential supervision of the Group.¹⁴ A direction may, for example, include a requirement that the

¹² Article 32 of the Collective Investment Law 2010.

¹³ Article 75A(2).

¹⁴ Article 75A(2).

Affiliate limit any activities reasonably likely to expose the Authorised Person or its Group to excessive risks or risks that are not properly managed.

Appendix 1 – Key Powers

Powers against an Authorised Person's Licence

Article 49

conditions or restrictions on a licence or licence endorsement

Article 50

withdrawal of one or more financial services or licence endorsement

Article 51

withdrawal of the licence

Article 52

suspension of one or more financial services, licence endorsement, or licence

Powers in respect of individuals

Article 56

Impose conditions and restrictions on the status of an Authorised Individual or Key Individual

Article 58

restrict, suspend or withdraw the status of an Authorised Individual or Key Individual

Article 59

restrict an individual performing one or more functions

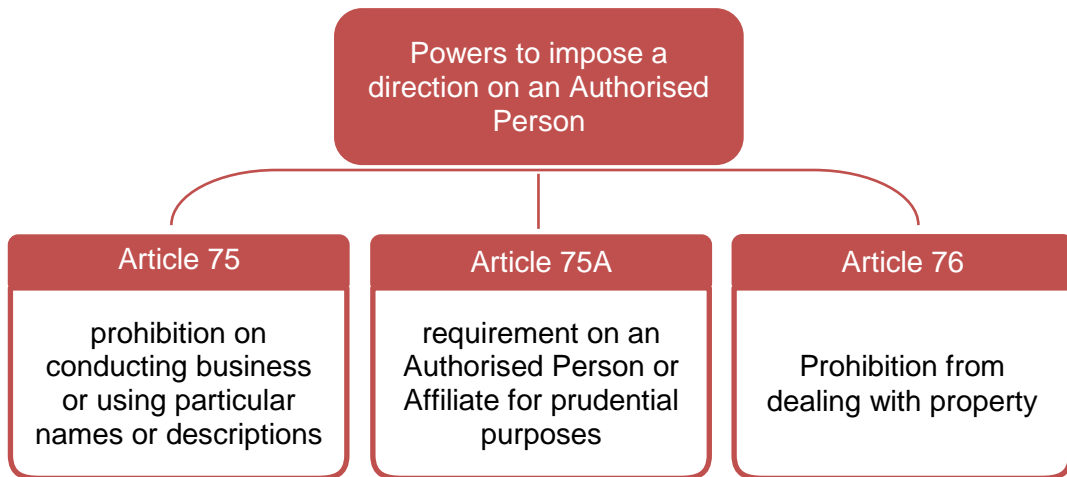
Powers to request information from an Authorised Person

Article 73

obtain information and documents

Article 74

require a report by an independent expert



5 ENFORCEMENT

5-1 THE DFSA'S APPROACH TO ENFORCEMENT

Introduction

5-1-1 This chapter sets out the DFSA's approach to enforcement and how it commences and conducts investigations, and exercises its powers to address any misconduct or contravention of the Law, Rules or other legislation administered by the DFSA. The DFSA's approach to imposing a penalty can be found in chapter 6 of this sourcebook.

5-1-2 A reference to:

- (a) an Article in this chapter is a reference to an Article in the Regulatory Law, unless otherwise stated;
- (b) the Law in this chapter is a reference to any legislation administered by the DFSA; and
- (c) a notice of decision includes, where applicable, a Decision Notice.

Enforcement philosophy

5-1-3 The DFSA's enforcement philosophy is guided by the following principles, which govern the DFSA's approach to fulfilling its objectives as set out in Article 8:

- (a) the DFSA adopts a risk based approach to regulation. This means that the DFSA will generally focus its efforts on those activities that it perceives as posing the greatest risk to the fulfilment of its objectives;
- (b) the DFSA will act swiftly and decisively to stop conduct which threatens the integrity of the DIFC or the stability of the financial services industry in the DIFC, minimise its effects, and prevent such conduct re-occurring;
- (c) the DFSA works closely with home state regulators of international firms to ensure that there is a co-ordinated approach to regulation;
- (d) the DFSA will act fairly, openly, accountably and proportionally in the exercise of its enforcement powers; and
- (e) the DFSA will not publish details of the commencement or conduct of investigations, unless it is in the furtherance of the DFSA's objectives or the public interest to do so. The DFSA will generally publish details of the outcome of an enforcement action in keeping with its fair and transparent approach and to maintain the integrity of the DIFC by deterring contraventions of Laws or other misconduct.

5-2 ENFORCEMENT FRAMEWORK

Introduction

5-2-1 The DFSA will take an enforcement action in line with its objectives and enforcement philosophy and may conduct investigations where there is a suspected contravention of the Law.

General contravention provisions

5-2-2 A Person contravenes the Law when that Person:

- (a) does an act or thing that the Person is prohibited from doing by or under the Law;
- (b) does not do an act or thing that the Person is required or directed to do by or under the Law; or
- (c) otherwise contravenes a provision of the Law.¹⁵

Involvement in contravention

5-2-3 If a Person is knowingly concerned in a contravention by another Person of the Law then, under Article 86, both Persons may be held liable for committing a contravention.

5-2-4 A Person is “knowingly concerned” in a contravention¹⁶ if the Person:

- (a) has aided, abetted, counselled or procured the contravention;
- (b) has induced, whether by threats or promises or otherwise, the contravention;
- (c) has in any way, by act or omission, directly or indirectly, been knowingly involved in or been party to, the contravention; or
- (d) has conspired with another or others to effect the contravention.

Enforcement process

5-2-5 When taking enforcement action, the DFSA will generally adopt the enforcement process described in this chapter. The DFSA’s enforcement process is comprised of the following elements:

- (a) Assessment of complaints and referrals (section 5-3);
- (b) Commencement of an investigation (section 5-4);
- (c) Information gathering (section 5-5);

¹⁵ Article 85.

¹⁶ Article 86(7).

- (d) Remedies (section 5-6); and
- (e) Conclusion of the Investigation (section 5-19).

See Appendix 1 for a diagram of the enforcement process.

5-3 ASSESSMENT OF COMPLAINTS AND REFERRALS

5-3-1 The assessment of complaints and referrals concerning suspected misconduct or suspected contraventions of the Law is a key function of the DFSA's regulatory remit and enforcement framework. Every complaint and referral, regardless of source, is assessed to determine whether an investigation or other action ought to take place.

Sources of complaints and referrals

5-3-2 The DFSA may become aware of suspected misconduct or suspected contraventions of Laws from a variety of sources including:

- (a) members of the public;
- (b) its supervisory activities; and
- (c) other external regulatory authorities or law enforcement agencies.

Complaints

5-3-3 The DFSA receives and assesses two types of complaints:

- (a) regulatory complaints (see 5-3-6 to 5-3-8 below); and
- (b) complaints against the DFSA and its employees (see 5-3-12 to 5-3-13 below).

5-3-4 A Person wishing to lodge a complaint with the DFSA should do so in writing. A complaint can be lodged:

- (a) electronically via the complaints portal on the DFSA website (see <http://www.dfsa.ae>);
- (b) by facsimile to 04 362 0801;
- (c) by sending the complaint to PO Box 75850 Dubai, UAE; or
- (d) delivering the complaint to the DFSA at Level 13, The Gate Building, DIFC.

5-3-5 When a complaint is received, the DFSA will send an acknowledgement letter to the complainant which will include the contact details of the DFSA complaints management function.

Regulatory Complaints

5-3-6 Complaints received by the DFSA from members of the public which relate to:

- (a) any conduct of or dissatisfaction with any Person regulated by the DFSA;

- (b) a potential contravention of a Law or Rule; or
- (c) any conduct that causes, or may cause, damage to the reputation of the DIFC or the financial services industry in the DIFC;

are classified as regulatory complaints and are assessed through the DFSA's complaints management function.

5-3-7 If, during the assessment of a regulatory complaint, the DFSA identifies suspected misconduct or a suspected contravention of a Law, it will refer the complaint to the relevant DFSA division for further consideration. Thereafter, the relevant division assumes responsibility for the complaint.

5-3-8 All complaints lodged with the DFSA are held in confidence in accordance with the Regulatory Law. However, in order to assess a complaint properly, the DFSA may need to speak to third parties including any Person who is the subject of the complaint.

Referrals

5-3-9 There are two types of referrals, internal and external. Internal referrals originate from the DFSA's supervisory activities conducted by the Supervision or Markets Division. The DFSA's supervisory framework is designed to detect and mitigate risks to the DIFC and the financial services industry in the DIFC. An internal referral occurs when a DFSA supervisory division refers a matter to the Enforcement Division, when the supervisory division has identified possible contraventions of Laws and Rules.

5-3-10 When Enforcement receives an internal referral, the referring division may continue to be responsible for the on-going supervision of the Person who is the subject of the referral.

5-3-11 The DFSA may also receive allegations of misconduct through an external referral from other regulatory authorities and law enforcement agencies. Such allegations are generally received pursuant to the IOSCO or IAIS Multilateral Memoranda of Understanding (MMoU), or bilateral arrangements for the exchange of information between the DFSA and other regulatory and enforcement agencies.

Complaints against the DFSA and its employees

5-3-12 Complaints about the conduct and activities of the DFSA and its employees are administered and assessed separately by the DFSA's Office of General Counsel.

5-3-13 Information on how the DFSA's Office of General Counsel assesses complaints against the DFSA and its employees can be found on the DFSA's website (see <http://www.dfsa.ae>).

5-4 COMMENCEMENT OF INVESTIGATIONS

Introduction

5-4-1 Upon receipt of an internal or external referral, the allegation will be assessed to determine if there is a suspicion of a contravention of the Law. If a suspicion arises and it is appropriate and expedient, then the DFSA may commence an investigation.

5-4-2 In determining whether to commence an investigation, the DFSA will consider a number of factors including, but not limited to:

- (a) the nature, seriousness and impact of the suspected contravention and whether the suspected contravention is on-going;
- (b) whether the suspected contravention affects, or has the potential to affect, the DFSA objectives;
- (c) whether those involved in the suspected contravention are likely to co-operate;
- (d) whether it is likely that the suspected contravention may be proven;
- (e) the disciplinary record and compliance history of the Person or Persons involved in the suspected contravention;
- (f) whether, if proven, a suitable remedy is available;
- (g) the extent to which another law enforcement agency or Financial Services Regulator can adequately address the matter and, if so, that body's attitude toward the matter;
- (h) the nature of any request for assistance made by another regulator or body under Article 39; and
- (i) whether any party who may have suffered some detriment as a result of the suspected contravention is able to take his own remedial action.

Investigation determination

5-4-3 Article 78 empowers the DFSA to conduct such investigations as it considers appropriate and expedient:

- (a) where it has reason to suspect that a contravention of the Law or the Rules is being or may have been committed; or
- (b) further to a request for assistance made under Article 39.

5-4-4 Whether an investigation of a matter is appropriate and expedient is determined by reference to factors such as those set out in paragraph 5-4-2.

5-4-5 Whether the DFSA has "reason to suspect" a contravention of the Law is a question which the DFSA will determine on the facts and circumstances, available at the time, of the determination.

5-4-6 While the DFSA is not bound to disclose, to any party, that an investigation has commenced or is on-going or the basis upon which an investigation is commenced, it may notify a Person who is the subject of an investigation that an investigation has commenced, and the nature of the investigation.

5-4-7 The DFSA will not make a notification referred to in 5-4-6 if to do so is likely to compromise or prejudice the investigation. The DFSA will not advise a Person of the conclusion of an investigation unless the Person has earlier been notified of its commencement.

5-4-8 The decision to commence an investigation is not a decision that can be referred to the Financial Markets Tribunal for review.

5-5 INFORMATION GATHERING

Introduction

5-5-1 Once an investigation is commenced, the DFSA may exercise its powers to gather information to advance its objectives.

5-5-2 The DFSA's information-gathering powers may only be exercised by delegates of the Chief Executive. The delegation need not be limited to DFSA employees. The Chief Executive may delegate DFSA powers to non-DFSA staff who are able to assist a DFSA investigation.

5-5-3 Similarly, where the DFSA is exercising its powers on behalf of another regulator, it may also delegate powers to a representative of that regulator.¹⁷

Article 80 Powers

5-5-4 During an investigation, the DFSA may obtain relevant information and documents on a compulsory basis, principally through the exercise of its powers under Article 80(1), and on a voluntary basis.

5-5-5 The Article 80(1) power to obtain information is a key component of the DFSA's investigative powers. Without the compulsory powers in Article 80(1), the DFSA would not be able to conduct effective and thorough investigations into suspected misconduct or suspected contraventions of the Law, and consequently would not be able to meet its objectives.

5-5-6 The powers under Article 80(1) are different from the supervisory powers under Article 73(1). The key distinctions are that the Article 80 powers may be used:

- (a) only for the purposes of an investigation; and
- (b) in circumstances where the DFSA considers that a Person is or may be able to give information or produce a document which is or may be relevant to an investigation.

¹⁷ Article 40.

5-5-7 By comparison, the Article 73(1) power permits the DFSA to request information and documents from an Authorised Person, DNFBP, Domestic Fund, Registered Auditor and any director, officer, employees or agent of such person, which the DFSA considers is necessary or desirable to meet the objectives of the DFSA.

5-5-8 When the DFSA uses its powers under Article 80(1) (b), (c), (d) or (e), it will provide a written notice to the Person on whom the requirement is being imposed.

Inspection

5-5-9 Article 80(1)(a) empowers the DFSA to enter business premises of a Person during the course of an investigation for the purpose of inspecting and copying information or documents. This power will be exercised when the DFSA considers that such Person is or may be able to provide information or documents that are or may be relevant to an investigation.

5-5-10 The DFSA will generally not provide prior notice of an inspection in circumstances where the provision of prior notice may prejudice the investigation.

5-5-11 When exercising its power to enter business premises under Article 80(1)(a), the DFSA may:¹⁸

- (a) require any appropriate Person to:
 - (i) make available any relevant information stored at the business premises for inspection or copying; or
 - (ii) convert any relevant information into a physical form capable of being copied; and
- (b) use the facilities of the occupier of the business premises, free of charge, to make copies.

Production of information

5-5-12 Article 80(1)(b) empowers the DFSA to require a Person to give, or procure the giving of, information. The DFSA considers that the term “information” should be interpreted broadly, in accordance with its ordinary meaning.

5-5-13 Information may include, for example, the following:

- (a) knowledge communicated or received concerning a particular matter, fact or circumstance;
- (b) knowledge gained through work, commerce, study, communication, research or instruction;

¹⁸ Article 80(2).

- (c) data obtained as output from a computer by means of processing input data with a program or any data at any stage of processing including input, output, storage or transmission data;
- (d) an explanation or statement about a matter;
- (e) the identification of a Person, matter or thing; and
- (f) the provision of a response to a question.

5-5-14 The DFSA will allow a reasonable period for compliance with the requirement to give information. The reasonableness of the requirement will depend upon the circumstances of each case. The DFSA may, in some circumstances, require the giving of information straightaway where the giving of prior notice may prejudice the investigation.

Production of documents

5-5-15 Article 80(1)(c) empowers the DFSA to require a Person to produce, or procure the production of, specified documents. The DFSA considers that the term “document” should be interpreted broadly, in accordance with its ordinary meaning. Specified documents may include, for example, any record of information, including:

- (a) anything on which there is writing;
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for Persons qualified to interpret them;
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph.

5-5-16 This power can only be used when an investigation has commenced and the DFSA considers that the Person to whom the notice is addressed is, or may be, able to produce documents which may be relevant to the investigation.

5-5-17 Article 80(1)(c) empowers the DFSA to require production of original documents or copies. Whether original or copy documents are required by the DFSA will be determined taking into account the facts and circumstances of the investigation.

5-5-18 When exercising its Article 80(1)(c) power, the DFSA may retain possession of any original document for so long as is necessary for the investigation to which the notice relates. When a Person is unable to produce documents in compliance with a requirement made by the DFSA, the DFSA may require the Person to state, to the best of that Person’s knowledge or belief, where the documents may be found and who last had possession, custody or control of those documents.

5-5-19 The DFSA will allow a reasonable period of time for compliance with the requirement to produce documents. The reasonableness of the requirement will depend upon the circumstances of each case. The DFSA may, in some circumstances, require the production of documents straightaway, where the giving of prior notice may prejudice the investigation.

Compulsory interview

5-5-20 Article 80(1)(d) empowers the DFSA to require a Person (the interviewee) to attend before an officer, employee or agent of the DFSA (the interviewer) for a compulsory interview to provide oral evidence relevant to an investigation it is conducting.

5-5-21 During the course of an investigation, not all interviews will be conducted under compulsion. The DFSA may, where appropriate, conduct voluntary interviews. The decision as to whether a compulsory or voluntary interview will be conducted will depend upon the circumstances of the particular case.

5-5-22 A Person attending a compulsory interview must first be served with a written notice requiring his attendance. An interviewee is not entitled to refuse or fail to answer a question on the basis that his answers may incriminate him or make him liable for a penalty.¹⁹

5-5-23 A compulsory interview will be conducted in private and the interviewer may give directions²⁰ to the interviewee regarding:

- (a) who may be present during the interview;
- (b) swearing an oath, or giving an affirmation, that the answers provided will be true;
- (c) what, if any, information may be disclosed by the interviewee or any other Person present at the interview to any third party;
- (d) the conduct of any Person and the manner in which they will participate during the interview; and
- (e) answering any question which is relevant to the investigation.

5-5-24 An interviewee is entitled to legal representation during the course of a compulsory or voluntary interview. At the conclusion of the interview, the lawyer will be permitted to address any issues with the interviewer or interviewee relevant to the investigation. However, the lawyer is not permitted to answer questions on behalf of the interviewee or obstruct the investigation.

5-5-25 All compulsory interviews will be recorded. The DFSA will, upon a written request from the interviewee at the conclusion of the interview, provide the interviewee or his lawyer with a copy of the recording or a transcript of the interview. The provision of a recording or transcript may be subject to any reasonable conditions imposed by the DFSA.

Assistance

5-5-26 Article 80(1)(e) empowers the DFSA to require a Person to give it any assistance in relation to an investigation which the Person is able to give.

5-5-27 The DFSA considers that providing assistance may include requiring a Person to do a physical act or provide information to advance an investigation. For example, this may

¹⁹ Article 82.

²⁰ Article 80(3).

include the situation where the DFSA requires a Person to provide assistance by commenting on the accuracy of a document or compiling information that had been stored in a different manner.

5-5-28 The power under Article 80(1)(e) can be used independently, or in conjunction with, the exercise of other Article 80(1) powers. For example, the DFSA can exercise its powers under Article 80(1)(d), to require a Person to attend a compulsory interview and under Article 80(1)(e), to require the interviewee to provide reasonable assistance during the interview. For example, the interviewee may be required, during the interview, to draw a diagram, or locate and produce a document referred to in an answer to a question.

Confidentiality

5-5-29 When carrying out its regulatory functions, the DFSA must maintain confidentiality of information, unless disclosure is expressly sanctioned by Article 38. The DFSA's Policy Statement with respect to Confidential Regulatory Information outlines its policy in respect of the treatment of information and documents.

5-5-30 The DFSA may also impose obligations of confidentiality in respect of information and documents provided during the exercise of its powers under Article 80(1).

5-5-31 The DFSA can make directions²¹ to protect the confidentiality of information and documents which are part of a compulsory interview.

5-5-32 The DFSA can direct the recipient of an Article 80(1) (b), (c), (d) or (e) notice not to disclose the receipt of the notice, or any information relating to compliance with it, to any other Person, other than his legal representative, if it considers that such disclosure may hinder an investigation²².

5-5-33 Confidentiality directions are made to ensure that an investigation is not prejudiced by the disclosure of the nature of the information sought or the questions asked during an investigation. In each case, the DFSA needs to consider whether or not such directions are appropriate in the circumstances of that matter.

Protections

5-5-34 Parties who are required to comply with a requirement made by the DFSA during the course of an investigation, and Persons who are the subject of an investigation, benefit from certain protections in the Regulatory Law, including:

- (a) Article 38, which provides that confidential information provided to the DFSA must not be disclosed except in certain limited circumstances;
- (b) Article 80A(2), which provides that where a Person takes part in a compulsory interview, any statements made during the interview cannot be disclosed by the DFSA to a law enforcement agency for the purpose of criminal proceedings unless the Person consents to the disclosure or the DFSA is required by law or court order to disclose the statement; and

²¹ Article 80(3)(b).

²² Article 80A(6).

- (c) Article 81, which ensures that a Person who is required to comply with a requirement made during the course of an investigation cannot be subject to any liability or liable in any proceeding because of that Person's compliance with the requirement.

Claims of privilege and other protections

5-5-35 A claim by a Person that information is a Privileged Communication is not of itself an excuse for failing to comply with a requirement made by the DFSA during the course of an investigation.²³

5-5-36 A lawyer may refuse to comply with a requirement to provide information where to comply would require the lawyer to disclose a Privileged Communication made by, to, or on behalf of, the lawyer in his capacity as a lawyer in relation to a client.

5-5-37 Should a lawyer refuse to disclose a Privileged Communication, the lawyer must disclose sufficient information to identify the Person entitled to claim the privilege and the document which contains the privileged information. In such a case, the DFSA considers it appropriate for a lawyer to secure those documents, pending the resolution of any claim for privilege.

Enforcement of the DFSA's investigative powers

5-5-38 The DFSA will enforce compliance with its requirements, under Articles 73, 74 or 80, whenever there is less than full compliance by seeking orders in the DIFC Court.²⁴

5-5-39 Articles 84(1) and (2) empower the DFSA to apply to the Court for an injunction or the issue of a search warrant in order to enforce compliance with its requirements under Articles 73, 74 or 80. An application to the Court for a search warrant will be made in circumstances where:

- (a) information or documents were required to be given or produced by the exercise of a compulsory power;
- (b) the documents or information required to be produced have not been given or produced; and
- (c) the DFSA has reasonable grounds to suspect that within the next three business days, the information or those documents are, or may be, on particular premises.

5-5-40 Should the Court exercise its discretion to issue a search warrant, it may be addressed to a named Dubai Police Officer together with any other individual, including a DFSA officer or third party, named in the warrant.

5-5-41 The DFSA may exercise its right to apply for a search warrant, rather than seeking compliance with its requirement through some other process (such as an injunction), only where it is satisfied that:

²³ Article 82.

²⁴ Article 84(1).

- (a) the preconditions in Article 84(2) for the issue of a warrant are met;
- (b) the DFSA considers it necessary or desirable to seek the assistance of the Dubai Police;
- (c) there does not appear to be a legitimate basis for non-compliance; and
- (d) in the absence of the execution of a search warrant, the information or documents sought may be removed or destroyed or otherwise not made available.

5-5-42 Any material seized by officers of the DFSA pursuant to a search warrant issued under Article 84 may be dealt with by the DFSA as if the material had been produced to it under a notice to produce documents.

Obstruction of the DFSA

5-5-43 A Person must not, without reasonable excuse, engage in conduct that is intended to obstruct the DFSA in the exercise of its investigative powers by any means including, but not limited to, the following:

- (a) the destruction of documents;
- (b) the failure to give or produce information or documents specified by the DFSA;
- (c) the failure to attend before the DFSA at a specified time and place to answer questions;
- (d) the giving of information that is false or misleading; or
- (e) the failure to give any assistance in relation to an investigation which the Person is able to give²⁵.

5-5-44 Any breach of Article 83 will be regarded seriously by the DFSA and appropriate action will be taken.

Return of information and documents

5-5-45 Where the DFSA²⁶ has obtained originals of information or documents during the course of an investigation, the DFSA will usually return such information or documents to the Person, from whom the information and documents were received, as soon as practicable after the conclusion of the investigation or related proceedings.

5-5-46 Where information or documents have been produced to the DFSA in the course of an investigation to assist another regulator or agency, the DFSA may²⁷ release the information or documents to that other regulator or agency. The information and documents will usually be returned to the Person, from whom the information and documents were

²⁵ Article 83.

²⁶ Article 80A(3).

²⁷ Article 38.

received, as soon as practicable after receiving them back from the other regulator or agency.

5-6 REMEDIES

5-6-1 At the conclusion of an investigation, the DFSA may:

- (a) take no further action;
- (b) commence a settlement negotiation;
- (c) accept a settlement;
- (d) accept an enforceable undertaking;²⁸
- (e) seek to have the matter referred to a decision-maker (see Chapter 7);
- (f) commence Court proceedings;²⁹
- (g) exercise a power on behalf of another regulator;³⁰ and
- (h) delegate a power to another regulator.³¹

5-6-2 There are a range of remedies which the DFSA may pursue to achieve its objectives and the DFSA may, in any matter, pursue more than one remedy. The types of remedies, along with an indication of the DFSA's approach to the use of these remedies, are set out in sections 5-7 to 5-18 of this chapter and in chapter 4.

5-6-3 The Decision Making Committee (DMC) is an internal committee of the DFSA established to consider and make certain regulatory decisions of the DFSA. For more information on the DMC see section 7-7 in chapter 7.

5-6-4 Whilst not an exhaustive list, the DFSA may refer a matter for determination to the DMC for the:

- (a) imposition of a fine;³²
- (b) imposition of a censure;¹⁹
- (c) imposition of conditions or restrictions on a Licence or in relation to a Licence endorsement;³³
- (d) withdrawal of an authorisation under, or endorsement on, a Licence;³⁴

²⁸ Article 89.

²⁹ Articles 84, 92, 93, 94 and 95.

³⁰ Article 39.

³¹ Article 40.

³² Article 90.

³³ Article 49.

³⁴ Article 50.

- (e) withdrawal of a Licence;³⁵
- (f) imposition of conditions or restrictions on an Authorised Individual or Key Individual;³⁶
- (g) restriction or suspension of an Authorised Individual or Key Individual, or the withdrawal of his or her authorisation;³⁷
- (h) withdrawal of the registration of a DNFBP;
- (i) revocation of recognition;
- (j) appointment of a manager;³⁸ or
- (k) withdrawal or suspension of the registration of a Registered Auditor or Audit Principal;³⁹

5-6-5 When the DFSA uses a power specified in sections 5-7 to 5-9 in this chapter, it will follow the decision making procedures set out in Schedule 3 of the Regulatory Law. See also chapter 7 of the RPP regarding the DFSA's decision making process.

5-6-6 When the DFSA uses a power specified in sections 5-10 to 5-18 in this chapter, it will follow the procedures set out in the relevant section.

5-6-7 The DFSA does not have criminal jurisdiction. Should criminal conduct be identified, then it will be referred to the appropriate law enforcement agency.

5-7 APPOINTMENT OF MANAGERS

5-7-1 Under Article 88, the DFSA may require an Authorised Person to appoint one or more individuals to act as a manager of the business of the Person on such terms as the DFSA may stipulate. Such individuals must be nominated or approved by the DFSA.

5-7-2 The types of circumstances in which the DFSA may exercise this power are set out in Article 88(3). For example, the DFSA may require an Authorised Person to appoint a manager where it has concerns about the solvency or the level of compliance with prudential requirements of an Authorised Person.

5-7-3 An Authorised Person may receive an opportunity to make representations prior to being required to appoint a manager in accordance with the procedures set out in Schedule 3 of the Regulatory Law. However, in circumstances of urgency, the DFSA may not give advance notice of the proposed requirement and may not provide the relevant Authorised Person with the opportunity to make representations prior to the imposition of the requirement.

³⁵ Article 51.

³⁶ Article 56.

³⁷ Article 58.

³⁸ Article 88.

³⁹ Article 98A.

5-7-4 When the DFSA does require an Authorised Person to appoint a manager, it will do so in writing, setting out:

- (a) that the Authorised Person is required to appoint a manager;
- (b) the time by which such manager must be appointed;
- (c) the reasons for the Authorised Person being required to appoint a manager;
- (d) the individual nominated by the DFSA to be the manager or the process by which approval may be given by the DFSA; and
- (e) the fact that the Authorised Person may have the decision reviewed by the Financial Markets Tribunal.

5-7-5 The DFSA recognises that the use of its Article 88 power to appoint a manager is likely to have a significant impact on an Authorised Person. Accordingly, the DFSA is likely to exercise such power only in exceptional circumstances.

5-7-6 In considering whether a manager should be appointed, the DFSA will take into consideration all relevant circumstances including, but not limited to, the following matters:

- (a) the nature and extent of the business of the Authorised Person;
- (b) the nature of the DFSA's concerns in relation to the Authorised Person and whether they affect, or have the potential to affect, the DFSA's objectives;
- (c) whether the DFSA's concerns in relation to the Authorised Person may be addressed by the appointment of a manager;
- (d) where the DFSA considers it necessary to protect regulated entities and customers in the DIFC;
- (e) whether an appropriately qualified manager may be available and willing to undertake the appointment;
- (f) the likely duration of the appointment; and
- (g) the likely impact of costs associated with the appointment of a manager.

5-8 FINES

5-8-1 The DFSA may seek to impose a fine under Article 90 on a Person whom it considers has contravened a provision of the Law. The DFSA may impose a fine in any amount considered appropriate.

5-8-2 In determining whether to impose a fine and the quantum of the fine, the DFSA will take into consideration the circumstances of the conduct and will be guided by the penalty guidance set out in chapter 6 of the RPP.

5-8-3 The decision to impose a fine on a Person will be made by the DMC.

5-8-4 Prior to making a decision, the DMC will follow the procedures set out in Schedule 3 of the Regulatory Law (see also chapter 7 of the RPP).

5-8-5 If a Person receives a notice imposing a fine and does not pay the full amount of the fine, the DFSA may recover so much of the fine as remains outstanding as a debt due, together with costs incurred by the DFSA in recovering such amount.

5-9 CENSURES

5-9-1 The DFSA may, under Article 90, seek to censure a Person whom it considers has contravened a provision of the Law and Rules it administers.

5-9-2 The decision to censure a Person will be made by the DMC. Prior to making a decision, the DMC will follow the procedures set out in Schedule 3 of the Regulatory Law (see chapter 7 of the RPP).

5-9-3 In determining whether to censure a Person, the DFSA will take into consideration the circumstances of the conduct and will be guided by the penalty guidance set out in section 6-3 of this sourcebook.

5-10 INJUNCTIONS AND ORDERS

5-10-1 The DFSA has a broad power to make an application to the Court for injunctive relief and other orders (Article 92). The DFSA may seek orders including, but not limited to:

- (a) an order restraining a Person that is engaging in conduct that would constitute a contravention of the Law;
- (b) an order requiring a Person to do an act or thing to remedy a contravention or to minimise loss or damage; or
- (c) any other order as the Court sees fit, including an order restraining the transfer of assets or the movement of individuals.

5-10-2 In deciding whether an application for an injunction or other order is appropriate in any given case, the DFSA will consider all relevant circumstances including, but not limited to, the following matters:

- (a) the nature, seriousness and impact of the contravention and whether the contravention is on-going;
- (b) whether the contravention affects, or has the potential to affect, the DFSA's objectives;
- (c) whether any party who may have suffered some detriment as a result of the contravention is able to take their own remedial action;
- (d) where the DFSA considers it necessary to protect regulated entities and customers in the DIFC;

- (e) whether there is a danger of assets being dissipated or removed from the jurisdiction of the Court;
- (f) whether there is a danger that the Person or Persons may leave the jurisdiction and, if so, the effect that their absence may have on the effectiveness of the Court's orders;
- (g) the costs the DFSA would incur in applying for and enforcing an injunction or other orders and the likely effectiveness of such an injunction or other order;
- (h) the disciplinary record and compliance history of the Person;
- (i) whether a suitable remedy is available;
- (j) the extent to which another law enforcement agency or Financial Services Regulator can adequately address the matter and, if so, that body's attitude to the matter; and
- (k) whether there is information to suggest that the Person who is the subject of the possible application is or has been involved in money laundering, terrorist financing or other form of financial crime or criminal conduct.

5-11 CIVIL PROCEEDINGS

5-11-1 Article 94 provides that where a Person has:

- (a) intentionally, recklessly or negligently committed a breach of duty, requirement, prohibition, obligation or responsibility imposed under the Law; or
- (b) committed fraud or other dishonest conduct in connection with the matter arising under the Law;

the Person is liable to compensate any other Person for any loss or damage caused to that other Person as a result of such conduct.

5-11-2 Article 94(2) provides that the Court may, on application of the DFSA, or of a Person who has suffered the loss or damage, make orders for the recovery of damages or for compensation or for the recovery of property or other order as the Court sees fit, except where such liability is excluded under the Law and Rules administered by the DFSA.

5-11-3 Article 94 gives the DFSA, and any aggrieved Persons, broad powers to make application for recovery of damages and other orders where there has been an identified contravention of the Laws and Rules administered by the DFSA. An aggrieved Person may exercise rights provided under Article 94 independently of, or contemporaneously with, the DFSA.

5-11-4 The DFSA may decide not to commence proceedings in every case where there may have been a relevant contravention. This does not, however, prevent any aggrieved Person from commencing his own proceedings.

5-11-5 In determining whether to commence proceedings, the DFSA will take into account all relevant circumstances. It is not possible to provide an exhaustive list of the circumstances

that may be taken into account, as they may depend on the facts of the particular matter. However, the following list indicates some of those matters that may be considered:

- (a) the nature, seriousness and impact of the suspected contravention and whether the alleged contravention is on-going;
- (b) whether the conduct and contravention affects, or has the potential to affect, the DFSA objectives;
- (c) whether any party who may have suffered some detriment as a result of the alleged contravention is able to take his own remedial action;
- (d) in circumstances where more than one Person has suffered loss or damage:
 - (i) the number of those that have suffered loss or damage and the amount of loss or damage involved; and
 - (ii) whether it is convenient or possible for a class of aggrieved Persons to run a proceeding;
- (e) the cost that the DFSA would incur in applying for or enforcing any order that it is successful in obtaining;
- (f) whether the conduct in question can be adequately addressed by the use of other regulatory powers;
- (g) whether there is information to suggest that the Person is or has been, involved in money laundering, terrorist financing or other form of financial crime or criminal conduct; and
- (h) whether the DFSA has a reasonable prospect of success in the relevant proceedings.

5-12 THE COMPULSORY WINDING UP OF A REGULATED ENTITY

5-12-1 The DFSA may apply to the Court for the winding up of a company which is, or has been, an Authorised Person, or operating in breach of the Financial Services Prohibition, where it considers it is just and equitable and in the interests of the DIFC⁴⁰.

5-12-2 In deciding whether such an application is just and equitable and in the interests of the DIFC, the DFSA will consider all relevant circumstances, including but not limited to, the following matters:

- (a) the need to protect the company's Clients, particularly in cases where an Authorised Firm holds or controls Client Assets;
- (b) whether the company has operated in accordance with the laws of the DIFC;

⁴⁰ Article 93.

- (c) where the company has contravened the Law, the nature, seriousness and impact of the contravention and whether the contravention is on-going;
- (d) where the company has contravened the Law, whether any alleged contravention affects, or has the potential to affect, the DFSA objectives;
- (e) where the company has contravened the Law, whether there are any other steps a Person could take or other orders a Court could make to remedy any contravention;
- (f) whether the needs of those operating in the DIFC and the interests of the DIFC are best served by the company ceasing to operate;
- (g) in the case of an Authorised Firm, where the DFSA considers that its Licence should be withdrawn or where it has been withdrawn, the extent to which there is other business that the firm carries on without authorisation;
- (h) whether there is information to suggest that the company is or has been involved in money laundering, terrorist financing or other form of financial crime or other criminal conduct;
- (i) where there is a significant cross-border or international element to the business being carried on by the company, the impact on the business in other jurisdictions and whether another law enforcement agency or Financial Services Regulator can adequately address the matter and, if so, that body's attitude to the matter;
- (j) the extent to which the company has cooperated, and is likely to continue to cooperate, with the DFSA; and
- (k) the nature of the involvement of the officers of a company in the foregoing and whether this suggests a systemic failure within the company.

5-13 MARKETS LAW - ORDERS IN THE INTERESTS OF THE DIFC

5-13-1 Article 68 of the Markets Law 2012 provides that the Court, on application by the DFSA, may make one of a range of orders in relation to a Person, irrespective of whether a contravention has occurred, if it is satisfied that it is in the interests of the DIFC for such an order to be made.

5-13-2 The DFSA may seek orders from the Court, including, but not limited to:

- (a) an order that trading in any Investments cease permanently or for such period as is specified in the order;
- (b) an order that a disclosure be made to the market;
- (c) an order that a Person is prohibited from making offers of Securities in or from the DIFC; or
- (d) an order that a Person is prohibited from being involved in Reporting Entities, Listed Funds or Securities within the DIFC.

5-13-3 Before the DFSA can make an application for an order (whether interim, *ex parte* or final), the DFSA must be satisfied that such an order would be in the interests of the DIFC and will take into account all relevant circumstances, including, but not limited to, the following:

- (a) the nature and extent of the conduct or any other matters in question;
- (b) the effect of the conduct or any other matters on the market and the DFSA's objectives;
- (c) whether the market is currently informed of all material information;
- (d) what steps the relevant Person has taken in respect of the conduct or any other matters being considered;
- (e) whether any other form of relief is available to the DFSA or appropriate in the circumstances;
- (f) whether the relevant conduct or any other matters could have a significant impact on the integrity of the DIFC market or the confidence in that market; and
- (g) the effect of the conduct or any other matters on the interests of participants in the DIFC.

5-14 INTERVENTION POWER

5-14-1 Article 95 empowers the DFSA to intervene as a party in any proceeding in the Court where it considers such intervention appropriate to meet the objectives of the DFSA. Where the DFSA intervenes, it shall be subject to any other law, and have all the rights, duties and liabilities of such a party.

5-14-2 This provision does not affect the ability of the DFSA to seek leave to appear in proceedings as *amicus curiae* (i.e. someone not a party to a case, who volunteers to offer information to assist a court in deciding a matter before it), to make submissions on an issue of significance to the DIFC, or to place material before the Court that may otherwise not be available.

5-14-3 The DFSA will generally only exercise this right of intervention where it forms the view that it will not be able to meet its objectives by simply appearing as *amicus curiae* and that, to serve the interests of the DIFC fully, it is necessary to join the proceeding as a party and stay involved in the matter throughout.

5-15 SETTLEMENT GUIDANCE

5-15-1 A settlement is a resolution, between the DFSA and a Person who is subject to potential enforcement action, to agree an outcome resulting from an investigation. A Person who is or may be the subject of any form of enforcement action arising out of, or during the course of, an investigation may enter into settlement discussions with the DFSA.

5-15-2 Settlement discussions are possible at any stage of the enforcement process, either before or after enforcement action has commenced. When considering whether or not to

enter into negotiations for settlement, or a settlement agreement, the DFSA will consider its objectives.

5-15-3 The DFSA generally considers that the early settlement of an investigation advances its objectives in that it may result in, for example, consumers obtaining compensation sooner, the saving of DFSA and industry resources, and the promotion of good business and regulatory practices.

5-15-4 The DFSA's general view is that settlement discussions should take place as early as possible. However, the DFSA will only be able to settle when it is confident it has sufficient understanding of the nature and gravity of the suspected misconduct to make a reasonable assessment of the appropriate outcome.

5-15-5 The DFSA conducts settlement discussions on a "without prejudice" basis; namely, that no party to the discussions may subsequently rely upon any admissions or statements made during the course of the settlement discussion or on any document recording those discussions.

5-15-6 The DFSA will only settle when the agreed terms result in what the DFSA considers to be an appropriate regulatory outcome.

5-15-7 The DFSA will set clear and reasonable timetables for settlement discussions to ensure they do not unreasonably delay settlement or a regulatory or enforcement outcome. Where the DFSA has concerns that a party to settlement discussions is using negotiations as a means to delay or frustrate the DFSA enforcement action, or as a means of testing the DFSA's evidence (with no genuine intention to settle) the DFSA, having made its concerns known to the other party, will generally bring the settlement discussions to an end and refer the matter to the DMC.

5-15-8 Settlement in particular circumstances should not be regarded as binding precedent for future settlement discussions.

5-15-9 Where appropriate, the DFSA will provide the other party to a settlement discussion with copies of relevant material which it has relied upon in making findings in an investigation. However, some information may not be provided at the settlement stage. This would include information which is privileged, or information which the DFSA does not have the right or authority to disclose to the other party, such as information provided to the DFSA in confidence by another regulator.

Factors the DFSA Will Consider When Contemplating Settlement

5-15-10 In deciding whether a proposed settlement is acceptable, and in accordance with meeting its objectives, the DFSA will consider a number of factors, including but not limited to:

- (a) the nature, seriousness and impact of the conduct or suspected contravention that is the subject of the proposed settlement, and whether the suspected contravention is continuing;

- (b) whether the Person is prepared to acknowledge publicly the DFSA's concerns about the conduct or suspected contravention that is the subject of the proposed settlement, and the necessity for protective or corrective action;
- (c) whether the conduct or suspected contravention that is the subject of the proposed settlement was inadvertent;
- (d) whether the suspected contravention that is the subject of the proposed settlement was the result of the conduct of one or more individual officers or employees of the Person;
- (e) the seniority and level of experience of the individuals involved in the conduct and/or suspected contravention that is the subject of the proposed settlement;
- (f) whether the Person co-operated with the DFSA, including providing complete information about the conduct or suspected contravention that is the subject of the proposed settlement, and any remedial action taken by the Person;
- (g) whether the settlement will achieve an effective outcome for those (such as consumers or investors) who have been adversely affected by the conduct and/or suspected contravention that is the subject of the proposed settlement;
- (h) whether the Person is likely to comply with the terms of the settlement;
- (i) whether the Person's compliance with the Law and Rules generally will be improved;
- (j) the disciplinary record and compliance history of the Person;
- (k) the prospects for a swift resolution of the matter; and
- (l) whether the settlement promotes general deterrence in making regulated entities in the DIFC aware of the conduct or suspected contravention that is the subject of the proposed settlement, and the consequences arising from engaging in similar conduct or contraventions.

Form of Settlement

5-15-11 The DFSA will generally only settle an enforcement matter on the basis of either:

- (a) a notice of decision setting out the action taken (see 5-15-12); or
- (b) an Enforceable Undertaking (EU) (see 5-15-13).

In appropriate cases, the DFSA may settle a matter on the basis of both a notice of decision and an EU. Any settlement entered into by the DFSA, which results in a notice of decision, will be documented in the form of a legally enforceable agreement executed by all parties.

Notice of decision

5-15-12 When the DFSA agrees to settle an enforcement matter, the outcome of the settlement may result in an agreed notice of decision. The issue of such a notice promotes

consistency of regulatory outcomes and transparency of approach to enforcement decision making.

Enforceable Undertakings

5-15-13 An EU is a written promise, made under Article 89, to do or refrain from doing a specified act or acts. It is an alternative mechanism for addressing the DFSA's concerns, including regulating contraventions of the Law. It may, amongst other things, include remedial actions that are not otherwise available under a notice of decision.

Acceptance of an Enforceable Undertaking

5-15-14 An EU may be given by a Person and accepted by the DFSA at any time, either before, during or after an investigation, the making of a decision or the commencement of litigation or proceedings in the Court. The DFSA does not have the power to require a Person to enter into an EU nor can a Person compel the DFSA to accept an EU. This does not mean, however, that the DFSA cannot propose an EU to a Person, during the course of settlement negotiations, or provide a Person with a draft EU to provide guidance as to the terms of an EU that the DFSA would be willing to accept.

5-15-15 The DFSA may accept an EU that it considers necessary or desirable in pursuit of its objectives. Article 89 does not prescribe a particular structure or format to an EU or the circumstances in which an EU would be acceptable to the DFSA. The DFSA will consider all the relevant circumstances of a matter when deciding whether to accept an EU including whether other regulatory tools, for example a notice of decision, might achieve a more appropriate outcome in the particular matter. However, in the context of an enforcement matter, the DFSA will generally only accept an EU that:

- (a) contains an admission or acknowledgement of any contraventions of the Law or the DFSA's concerns;
- (b) contains undertakings that address the DFSA's concerns; and
- (c) contains an agreement to make the EU public, and an agreement not to make public statements that conflict with the spirit of the EU.

5-15-16 A Person offering an EU to the DFSA may also undertake in the EU to pay a pecuniary penalty and/or the DFSA's costs, including any costs associated with compliance with the EU.

5-15-17 An EU will not take effect until it is formally accepted by the Chief Executive of the DFSA or his delegate.

Variation or Withdrawal

5-15-18 Once accepted by the DFSA, an EU can only be withdrawn or varied with the consent of the DFSA in writing. The DFSA will only consider a request to vary an undertaking if:

- (a) the variation will not alter the spirit of the original undertaking;

- (b) compliance with any one or more terms of the undertaking is subsequently found to be impractical or impossible; or
- (c) there has been a material change in the circumstances which led to the undertaking being given.

Compliance with an EU or decision

5-15-19 If the DFSA considers that a Person has not complied with a term of the EU or a decision, the DFSA may apply to the Court for appropriate orders. The DFSA may publish the fact of the application to the Court and any subsequent orders of the Court. The DFSA will also seek the costs of the application.

5-16 COSTS

5-16-1 The DFSA will generally seek litigation costs orders from the Court where it has commenced a proceeding and been successful in achieving all or part of the outcome sought.

5-16-2 Where a Person is found by the FMT or the Court to have contravened a provision of the Law, the FMT or Court may order⁴¹ that Person to reimburse the DFSA in respect of the whole or a specified part of the costs and expenses of the investigation, including the remuneration of an officer involved in the investigation.

Undertakings as to Damages

5-16-3 Under Article 47(1) of the Court Law, the Court shall not require the DFSA to give an undertaking as to damages as a condition for granting an injunction or any order made under DIFC Law. In making any order the Court shall not take into account, in determining the merits of an application for the injunction, that the DFSA has not given an undertaking as to damages.

Enforcement of orders

5-16-4 The DFSA will do all things necessary and, where appropriate, commence relevant actions to ensure full compliance with any orders of the FMT or of the Court which arise out of an investigation.

5-16-5 In particular, Article 90(10) provides that the DFSA may apply to the Court for recovery, as a debt due, of so much of a fine as is not paid by a party together with costs. Further, in appropriate circumstances, the DFSA may apply to the Court for the winding up of a body corporate.

⁴¹ Article 79(2).

5-17 Publicity

5-17-1 This section describes how the DFSA may comment publicly on investigations, enforcement actions and other formal regulatory decisions⁴², subject to any independent determinations by the Financial Markets Tribunal (FMT) or Court.

General policy on publicity of enforcement actions

5-17-2 The DFSA will generally publish, in such form and manner as it regards appropriate, information and statements relating to enforcement actions, including censures and any other matters which the DFSA considers relevant to the conduct. The publication of enforcement outcomes is consistent with the DFSA's commitment to open and transparent processes and its objectives.

5-17-3 In all cases the DFSA retains the discretion to take a different course of action, where it furthers the DFSA's achievement of its objectives or is otherwise in the public interest to do so. For example, the DFSA may decide to publish at an earlier stage than suggested by the general policy, where circumstances justify this.

Commencement and conclusion of investigations

5-17-4 The DFSA generally will not publish information about the commencement, conduct or conclusion of the investigative phase of its enforcement actions.

5-17-5 Where the DFSA has published the fact that it is conducting an investigation and no enforcement action results, the DFSA may issue a press release confirming the conclusion of the investigation and that no action is to be taken.

5-17-6 The DFSA expects not to publish information about referrals to the DMC.

Commencement of proceedings

The Decision Making Committee (DMC)

5-17-7 The DMC will generally be the decision maker for enforcement decisions under Article 90 of the Regulatory Law. Information about matters before the DMC (e.g. a Preliminary Notice) are not normally published prior to the issuing of a notice of decision (see RPP 5-17-9 to 5-17-11). Reasons for this include:

- (a) oral and written submissions in regard to a matter before the DMC are confidential and made in private;
- (b) DMC hearings are held in private; and
- (c) the release of information by the DMC prior to a full and complete consideration of all submissions and facts may be contrary to the DFSA's objectives or not in the public interest.

⁴²In the remainder of the section we refer to 'enforcement actions', for brevity. Formal regulatory decisions are those that are made by the DFSA and are reviewable by the Financial Markets Tribunal.

FMT or a court

5-17-8 The DFSA expects to publish information about the commencement or hearing of proceedings before the FMT or court, unless otherwise ordered by the FMT or court.

Disclosure of DecisionsDMC

5-17-9 The DFSA will generally make public any decision made by the DMC, and will do so in a timely manner after any relevant period to institute a referral of the decision to the FMT has expired or appeal process has come to an end.

5-17-10 In circumstances where the DFSA considers it expedient to publish at an earlier stage, the publication will refer to the right of review which the affected Person has and the time limit for that review. The DFSA would consider it necessary to publish at this early stage where to do so enables it to achieve its objectives or it is in the public interest to do so.

5-17-11 If the affected Person exercises its right of referral, then the DFSA will publish that fact unless otherwise ordered. When the referral has been heard and determined, the DFSA expects to publish the decision (subject only to the FMT – see 5-17-12) which would include the publication of any notice of decision.

FMT or a court decision

5-17-12 The Regulatory Law requires all FMT hearings to be heard in public unless the FMT orders otherwise or its rules of procedure provide otherwise. The FMT may exercise its discretion not to make public any decisions it may make. Where it does determine to publish a decision or interim decision, the FMT will publish these on the DFSA website. Following hearings and decisions by the FMT, the DFSA expects to make timely public disclosure of the FMT's decisions, including any interim decisions, unless otherwise ordered.

5-17-13 Decisions made by the courts will be published by the DFSA in a timely manner, unless ordered otherwise.

5-17-14 This approach is adopted on the basis that any delay in disclosure may hinder and unfairly prejudice the DFSA in achieving some of its primary objectives. For example, non-disclosure may potentially prejudice users and prospective users of financial services in the DIFC if they are acting unaware of facts known in the enforcement action.

Disclosure of settled enforcement actions

5-17-15 The DFSA expects to disclose publicly the outcome of any settlement of an enforcement action, including the notice of decision or EU, to ensure all stakeholders and the general public are clearly informed as to the outcome. Settlement agreements which result in a notice of decision or EU will result in the publication of the relevant notice of decision or EU on the DFSA website as well as an associated press release.

5-17-16 The DFSA may be ordered, or required by law, not to publish information regarding a settlement. For example, disclosure may not occur if a third party has commenced proceedings in the courts in respect of the same conduct and the publication of the

undertaking or settlement may prejudice that party's case in the courts. However, simply because a third party has commenced proceedings does not preclude the DFSA from publishing its settlements, including the notice of decision or EU.

Disclosure of information about certain temporary suspensions

5-17-17 The DFSA will not generally publish information about temporary suspensions imposed under Article 58(5) or Article 98A(5),⁴³ when an investigation is ongoing. However, the DFSA retains discretion to publicise such a suspension if it is considered appropriate.

Content of Publication

5-17-18 The DFSA will generally make appropriate disclosures when publishing notices of decision, EUs, proceedings before, and decisions of, the FMT or a court.

5-17-19 The DFSA will take into consideration any privileged or sensitive information when considering the content of its publications. In doing so, it will also consider the possibility that any publication may also potentially affect the rights of a third party and, if so, will endeavour to give that third party an opportunity to make representations on the publication.

Mode of Publication

5-17-20 Publication may take any one or more forms including, for example, a media release, a statement on the DFSA website, and any other suitable forums as determined by the DFSA.

5-18 MAINTENANCE OF REGISTERS

5-18-1 The DFSA is also required to publish and maintain a register⁴⁴ of:

- (a) grants, withdrawals and suspensions of Licences, Licence endorsements and authorisations of Authorised Persons, Authorised Individuals and Key Individuals;
- (b) all Persons who are the subject of action taken under Article 58(1) and Article 59;
- (c) current and past registrations of DNFBPs; and
- (d) current and past registrations, withdrawals and suspensions of registrations of Registered Auditors and Audit Principals.

5-18-2 The DFSA is not required to publish information on the Register about temporary suspensions imposed under Article 58(5) or Article 98A(5). See 5-17-17 for the DFSA's general policy regarding publicising such suspensions.

⁴³ That is, suspensions of Authorised Individuals, Key Individuals, Registered Auditors or Audit Principals pending completion of an investigation.

⁴⁴ Article 62.

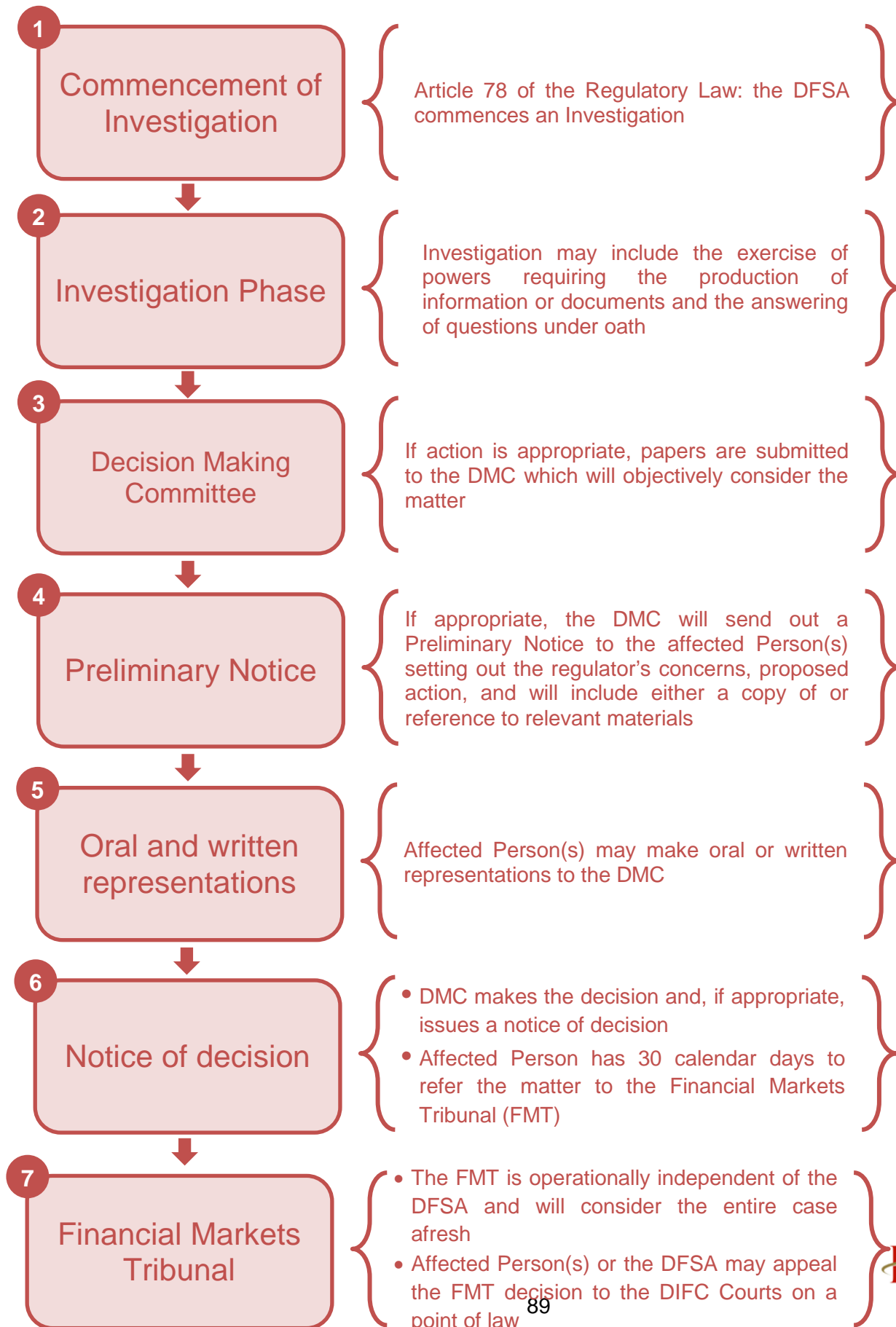
5-19 CONCLUSION OF AN INVESTIGATION

5-19-1 The DFSA will conclude an investigation when:

- (a) it determines to take no further action in response to the suspected contraventions of the Law and Rules subject of the investigation; and
- (b) all remedies and obligations resulting from an investigation are concluded and fulfilled.

5-19-2 The DFSA may determine to take no further action in respect of the suspected contraventions that are the subject of an investigation due to insufficiency of evidence or in circumstances where pursuing an enforcement action in respect of the suspected contraventions would not accord with the DFSA's objectives.

Appendix 1 – The Enforcement Process



6 PENALTY GUIDANCE

6-1 DFSA'S APPROACH TO IMPOSING A PENALTY

6-1-1 This chapter sets out the matters that will be taken into account by the DFSA Executive when determining a "penalty", which includes a "financial penalty" or a "public censure".

6-1-2 The DFSA may also refer to this section when determining an appropriate penalty in settlement agreements, including an Enforceable Undertaking.

6-1-3 Where the DFSA considers that a Person has contravened a provision of any legislation administered by the DFSA, it may impose a penalty on such Person, including:

- (a) an Authorised Person, DNFBP or Registered Auditor (collectively referred to as "firms" in this chapter unless otherwise stated); and
- (b) an Authorised Individual, Principal Representative, Key Individual, Persons Undertaking Key Control Functions, Audit Principal, or "senior management" for the purposes of the AML Module (collectively referred to as "Key Persons" in this chapter unless otherwise stated).

6-2 DECIDING TO TAKE ACTION

6-2-1 When determining a penalty, the DFSA will consider all relevant facts and circumstances. Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive: not all of these factors may be applicable in a particular case, and there may be other factors, not listed, that are relevant. The factors include:

- (a) the DFSA's objectives;
- (b) the deterrent effect of the penalty on:
 - (i) Persons that have committed or may commit the contraventions; and
 - (ii) other Persons that have committed or may commit similar contraventions;
- (c) the nature, seriousness and impact of the contravention, including whether the contravention was deliberate or reckless;
- (d) if the contravention involved a number of Persons, the degree of involvement and specific role of each Person;
- (e) the benefit gained (whether direct or indirect, pecuniary or non-pecuniary) or loss avoided as a result of the contravention;
- (f) the conduct of the Person after the contravention;

- (g) the difficulty in detecting and investigating the contravention that is the subject of the penalty;
- (h) whether the Person committed the contravention in such a way as to avoid or reduce the risk that the contravention would be discovered. A Person's incentive to commit a contravention may be greater where the contravention is, by its nature, harder to detect. The DFSA may impose a more significant penalty where it considers that a Person committed a contravention in such a way as to avoid or reduce the risk that the contravention would be discovered;
- (i) the disciplinary record and compliance history of the Person on whom the penalty is imposed;
- (j) whether the Person acted in accordance with DFSA guidance and other published materials. The DFSA will not take action against a Person for behaviour that it considers to be in line with guidance or other materials published by the DFSA in support of its Rulebook and Sourcebook which were current at the time of the behaviour in question;
- (k) action taken by the DFSA in previous similar cases; and
- (l) action taken by other domestic or international regulatory authorities. Where other regulatory authorities propose to take action in respect of the contravention which is under consideration by the DFSA, or one similar to it, the DFSA will consider whether the other authority's action would be adequate to address the DFSA's concerns, or whether it would be appropriate for the DFSA to take its own action.

Actions against Key Persons

6-2-2 In addition to the general factors in paragraph 6-2-1, there are some additional considerations that may be relevant when the DFSA decides whether to take action against a Key Person. The list is not exhaustive: not all of these factors may be applicable in a particular case, and there may be other factors, not listed that are relevant. The factors include:

- (a) the Key Person's position and responsibilities. The more senior the Key Person responsible for the misconduct, the more seriously the DFSA is likely to view the misconduct, and the more likely it is to take action against the Key Person; and
- (b) whether disciplinary action against the firm rather than the Key Person would be a more appropriate regulatory response.

6-3 FINANCIAL PENALTY OR PUBLIC CENSURE

6-3-1 The DFSA will consider all the relevant circumstances of the case when deciding whether to impose a financial penalty or issue a public censure. As such, the factors set out in section 6-2 are not exhaustive. Not all of the factors may be relevant in a particular case and there may be other factors, not listed, that are relevant.

6-3-2 The criteria for determining whether it is appropriate to issue a public censure rather than impose a financial penalty include those factors that the DFSA will consider in determining the amount of a financial penalty set out in sections 6-5 to 6-7. Some particular considerations that may be relevant when the DFSA determines whether to issue a public censure rather than impose a financial penalty are:

- (a) whether or not deterrence may be effectively achieved by issuing a public censure;
- (b) depending upon the nature and seriousness of the contravention:
 - (i) whether the Person has brought the contravention to the attention of the DFSA;
 - (ii) whether the Person has admitted the contravention and provides full and immediate co-operation to the DFSA, and takes steps to ensure that those who have suffered loss due to the contravention are fully compensated for those losses;
- (c) the DFSA's approach in similar previous cases: the DFSA will seek to achieve a consistent approach to its decisions on whether to impose a financial penalty or issue a public censure; and
- (d) the impact on the Person concerned. It would only be in an exceptional case that the DFSA would be prepared to agree to issue a public censure rather than impose a financial penalty if a financial penalty would otherwise be the appropriate sanction. Examples of such exceptional cases could include:
 - (i) where the application of the DFSA's policy on serious financial hardship (set out in section 6-7) results in a financial penalty being reduced to zero;
 - (ii) where there is verifiable evidence that the Person would be unable to meet other regulatory requirements, particularly financial resource requirements, if the DFSA imposed a financial penalty at an appropriate level; or
 - (iii) where there is the likelihood of a severe adverse impact on a Person's shareholders or a consequential impact on market confidence or market stability if a financial penalty were imposed. However, this does not exclude the imposition of a financial penalty even though this may have an impact on a Person's shareholders.

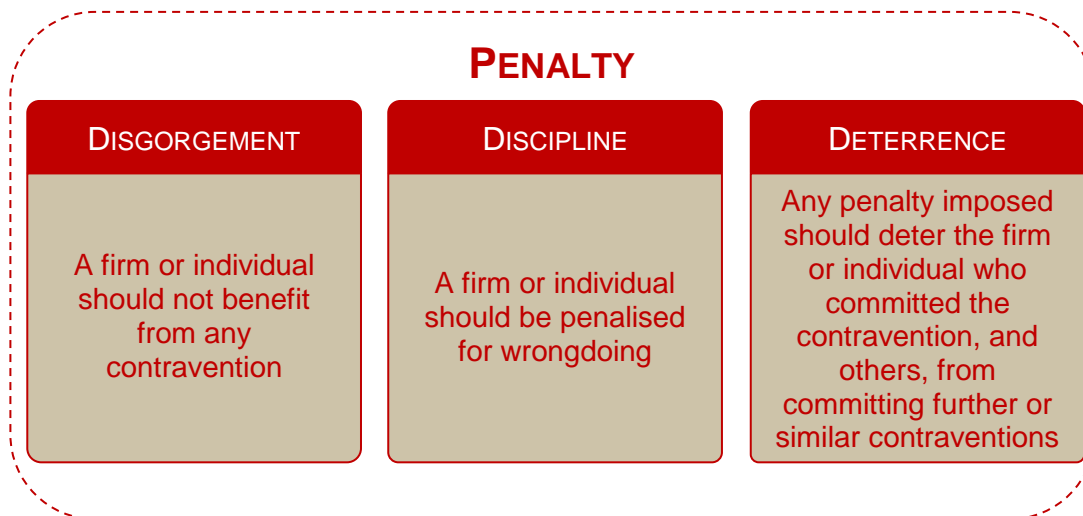
6-3-3 Some particular considerations that may be relevant when the DFSA determines whether to issue a financial penalty rather than impose a public censure are:

- (a) if the Person has made a profit or avoided a loss as a result of the contravention, on the basis that a Person should not be permitted to benefit from its contravention;

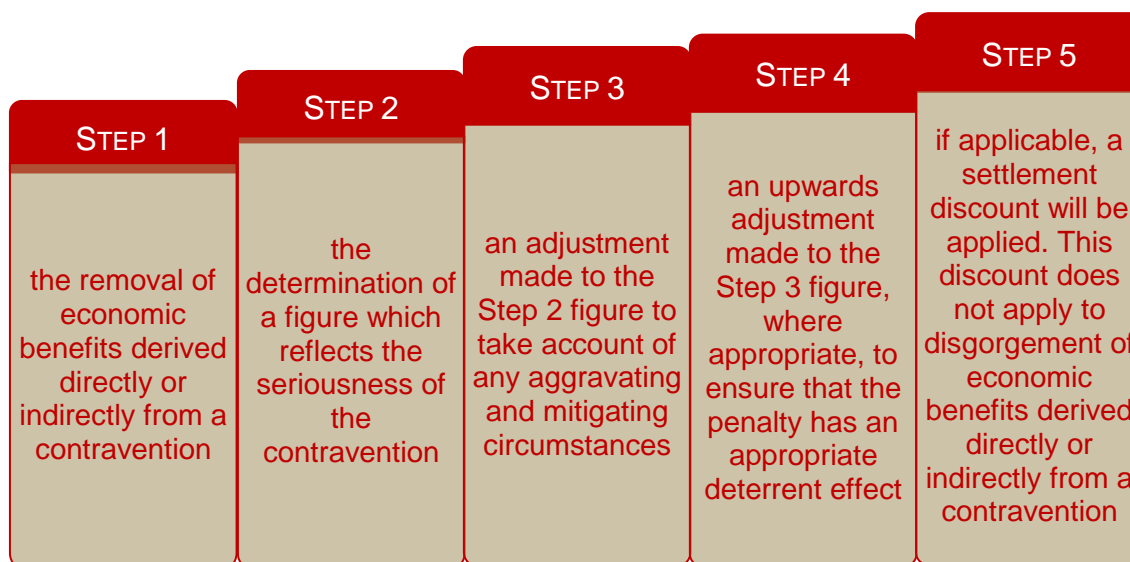
- (b) if the contravention is more serious in nature or degree, on the basis that the sanction should reflect the seriousness of the contravention; other things being equal, the more serious the contravention, the more likely the DFSA is to impose a financial penalty; and
- (c) if the Person has a poor disciplinary record or compliance history, on the basis that it may be particularly important to deter future cases.

6-4 DETERMINING THE APPROPRIATE LEVEL OF FINANCIAL PENALTY

6-4-1 The DFSA's penalty-setting regime is based on three principles:



6-4-2 The total amount payable by a Person subject to enforcement action may be made up of two elements: (i) disgorgement of the benefit received as a result of the contravention; and (ii) a financial penalty reflecting the seriousness of the contravention. These elements are incorporated in a five-step framework, which can be summarised as follows:



6-4-3 The DFSA recognises that a penalty must be proportionate to the contravention. These steps will apply in all cases, although the details of Steps 1 to 4 will differ for cases against firms (section 6-5), and cases against individuals (section 6-6).

6-4-4 The lists of factors and circumstances in sections 6-5 and 6-6 are not exhaustive. Not all of the factors or circumstances listed will necessarily be relevant in a particular case and there may be other factors or circumstances not listed which are relevant.

6-4-5 The DFSA will not, in determining its policy with respect to the amount of penalties, take account of expenses which it incurs, or expects to incur, in discharging its functions.

6-5 FINANCIAL PENALTIES IMPOSED ON A FIRM

Step 1: Disgorgement

6-5-1 The DFSA will seek to deprive a firm of the economic benefits derived directly or indirectly from a contravention (which may include the profit made or loss avoided) where it is practicable to quantify this. The DFSA will ordinarily also charge interest on the benefit.

Step 2: The seriousness of the contravention

6-5-2 The DFSA will determine a financial penalty figure that reflects the seriousness of the contravention. In determining such a figure, the DFSA will take into account various factors, which will usually fall into the following four categories:

- (a) factors relating to the impact of a contravention;
- (b) factors relating to the nature of a contravention;
- (c) factors tending to show whether a contravention was deliberate; and
- (d) factors tending to show whether a contravention was reckless.

6-5-3 Factors relating to the impact of a contravention committed by a firm include:

- (a) the level of benefit gained or loss avoided, or intended to be gained or avoided, by the firm from the contravention, either directly or indirectly;
- (b) the loss or risk of loss, as a whole, caused to consumers, investors or other market users in general;
- (c) the loss or risk of loss caused to individual consumers, investors or other market users;
- (d) whether the contravention had an effect on particularly vulnerable people, whether intentionally or otherwise;
- (e) the inconvenience or distress caused to consumers; and

- (f) whether the contravention had an adverse effect on markets and, if so, how serious that effect was. This may include having regard to whether the orderliness of, or confidence in, the markets in question has been damaged or put at risk.

6-5-4 Factors relating to the nature of a contravention by a firm include:

- (a) the nature of the Laws or Rules contravened;
- (b) the frequency of the contravention;
- (c) whether the contravention revealed serious or systemic weaknesses in the firm's procedures or in the management systems or internal controls relating to all or part of the firm's business;
- (d) whether the firm's senior management were aware of the contravention;
- (e) the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the contravention;
- (f) the scope for any potential financial crime to be facilitated, occasioned or otherwise occur as a result of the contravention;
- (g) whether the firm failed to conduct its business with integrity; and
- (h) whether the firm, in committing the contravention, took any steps to comply with Laws and Rules, and the adequacy of those steps.

6-5-5 Factors tending to show the contravention was deliberate include:

- (a) the contravention was intentional, in that the firm's senior management, or a responsible individual, intended, could reasonably have foreseen, or foresaw that the likely or actual consequences of their actions or inaction would result in a contravention;
- (b) the firm's senior management, or a responsible individual, knew that their actions were not in accordance with the firm's internal procedures;
- (c) the firm's senior management, or a responsible individual, sought to conceal their misconduct;
- (d) the firm's senior management, or a responsible individual, committed the contravention in such a way as to avoid or reduce the risk that the contravention would be discovered;
- (e) the firm's senior management, or a responsible individual, were influenced to commit the contravention by the belief that it would be difficult to detect; and
- (f) the contravention was repeated.

6-5-6 Factors tending to show the contravention was reckless include:

- (a) the firm's senior management, or a responsible individual, appreciated that there was a risk that their actions or inaction could result in a contravention and failed adequately to mitigate that risk; and
- (b) the firm's senior management, or a responsible individual, were aware that there was a risk that their actions or inaction could result in a contravention but failed to check if they were acting in accordance with the firm's internal procedures.

Step 3: Mitigating and aggravating factors

6-5-7 The DFSA may increase or decrease the amount of the financial penalty arrived at after Step 2 (excluding any amount to be disgorged as set out in Step 1), to take into account factors which aggravate or mitigate the contravention. Any such adjustments will be made by way of a percentage adjustment to the figure determined at Step 2.

6-5-8 The following list of factors may have the effect of aggravating or mitigating the contravention:

- (a) the conduct of the firm in bringing (or failing to bring) quickly, effectively and completely the contravention to the DFSA's attention (or the attention of other regulatory authorities, where relevant);
- (b) the degree of cooperation the firm showed during the investigation of the contravention by the DFSA, or any other regulatory authority allowed to share information with the DFSA;
- (c) where the firm's senior management were aware of the contravention or of the potential for a contravention, whether they took any steps to stop the contravention, and when these steps were taken;
- (d) the nature, timeliness and adequacy of the firm's responses to any supervisory interventions by the DFSA and any remedial actions proposed or required by DFSA's supervisors;
- (e) whether the firm has arranged its resources in such a way as to allow or avoid disgorgement and/or payment of a financial penalty;
- (f) whether the firm had previously been told about the DFSA's concerns in relation to the issue, either by means of a private warning or in supervisory correspondence;
- (g) whether the firm had previously undertaken not to perform a particular act or engage in particular behaviour;

- (h) whether the firm concerned has complied with any requirements or rulings of another regulatory authority relating to the contravention;
- (i) the previous disciplinary record and general compliance history of the firm;
- (j) action taken against the firm by other domestic or international regulatory authorities that is relevant to the contravention in question;
- (k) whether DFSA guidance or other published materials had already raised relevant concerns, and the nature and accessibility of such materials; and
- (l) whether the DFSA publicly called for an improvement in standards in relation to the behaviour constituting the contravention or similar behaviour before or during the occurrence of the contravention.

Step 4: Adjustment for deterrence

6-5-9 If the DFSA considers the figure arrived at after Step 3 is insufficient to deter the firm who committed the contravention, or others, from committing further or similar contraventions then the DFSA may increase the financial penalty. Circumstances where the DFSA may do this include:

- (a) where the DFSA considers the absolute value of the financial penalty too small in relation to the contravention to meet its objective of credible deterrence;
- (b) where previous DFSA action in respect of similar contraventions has failed to improve industry standards. This may include similar contraventions relating to different products (for example, action for mis-selling or claims handling failures in respect of 'x' product may be relevant to a case for mis-selling or claims handling failures in respect of 'y' product);
- (c) where the DFSA considers it is likely that similar contraventions will be committed by the firm or by other firms in the future in the absence of such an increase to the financial penalty; and
- (d) where the DFSA considers that the likelihood of the detection of such a contravention is low.

Step 5: Settlement discount

6-5-10 The DFSA and the firm on whom a penalty is to be imposed may seek to agree the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, section 6-8 provides that the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the DFSA and the firm concerned reached an agreement. The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1.

6-6 FINANCIAL PENALTIES IMPOSED ON AN INDIVIDUAL

Step 1: Disgorgement

6-6-1 The DFSA will seek to deprive an individual of the economic benefits derived directly or indirectly from the contravention (which may include the profit made or loss avoided) where it is possible to quantify this. The DFSA will ordinarily also charge interest on the benefit.

Step 2: The seriousness of the contravention

6-6-2 The DFSA will determine a financial penalty figure that reflects the seriousness of the contravention. In determining such a figure, the DFSA will take into account various factors, which will usually fall into the following four categories:

- (a) factors relating to the impact of the contravention;
- (b) factors relating to the nature of the contravention;
- (c) factors tending to show whether the contravention was deliberate; and
- (d) factors tending to show whether the contravention was reckless.

6-6-3 Factors relating to the impact of a contravention committed by an individual include:

- (a) the level of benefit gained or loss avoided, or intended to be gained or avoided, by the individual from the contravention, either directly or indirectly;
- (b) the loss or risk of loss, as a whole, caused to consumers, investors or other market users in general;
- (c) the loss or risk of loss caused to individual consumers, investors or other market users;
- (d) whether the contravention had an effect on particularly vulnerable people, whether intentionally or otherwise;
- (e) the inconvenience or distress caused to consumers; and
- (f) whether the contravention had an adverse effect on markets and, if so, how serious that effect was. This may include having regard to whether the orderliness of, or confidence in, the markets in question has been damaged or put at risk.

6-6-4 Factors relating to the nature of a contravention by an individual include:

- (a) the nature of the Laws or Rules contravened;
- (b) the frequency of the contravention;

- (c) the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the contravention;
- (d) the scope for any potential financial crime to be facilitated, occasioned or otherwise occur as a result of the contravention;
- (e) whether the individual failed to act with integrity;
- (f) whether the individual abused a position of trust;
- (g) whether the individual committed a contravention of any professional code of conduct;
- (h) whether the individual caused or encouraged other individuals to commit contraventions;
- (i) whether the individual held a prominent position within the industry;
- (j) whether the individual is an experienced industry professional;
- (k) whether the individual held a senior position with the firm;
- (l) the extent of the responsibility of the individual for the product or business areas affected by the contravention, and for the particular matter that was the subject of the contravention;
- (m) whether the individual acted under duress; and
- (n) whether the individual took any steps to comply with DFSA rules, and the adequacy of those steps.

6-6-5 Factors tending to show the contravention was deliberate include:

- (a) the contravention was intentional, in that the individual intended, could reasonably have foreseen or foresaw that the likely or actual consequences of his actions or inaction would result in a contravention;
- (b) the individual intended to benefit financially from the contravention, either directly or indirectly;
- (c) the individual knew that his actions were not in accordance with his firm's internal procedures;
- (d) the individual sought to conceal his misconduct;
- (e) the individual committed the contravention in such a way as to avoid or reduce the risk that the contravention would be discovered;

- (f) the individual was influenced to commit the contravention by the belief that it would be difficult to detect;
- (g) the individual knowingly took decisions relating to the contravention beyond his field of competence; and
- (h) the individual's actions were repeated.

6-6-6 Factors tending to show the contravention was reckless include:

- (a) the individual appreciated there was a risk that his actions or inaction could result in a contravention and failed adequately to mitigate that risk; and
- (b) the individual was aware there was a risk that his actions or inaction could result in a contravention but failed to check if he was acting in accordance with internal procedures.

Step 3: Mitigating and aggravating factors

6-6-7 The DFSA may increase or decrease the amount of the financial penalty arrived at after Step 2 (excluding any amount to be disgorged as set out in Step 1), to take into account factors which aggravate or mitigate the contravention. Any such adjustments will be made by way of a percentage adjustment to the figure determined at Step 2.

6-6-8 The following list of factors may have the effect of aggravating or mitigating the contravention:

- (a) the conduct of the individual in bringing (or failing to bring) quickly, effectively and completely the contravention to the DFSA's attention (or the attention of other regulatory authorities, where relevant);
- (b) the degree of cooperation the individual showed during the investigation of the contravention by the DFSA, or any other regulatory authority allowed to share information with the DFSA;
- (c) whether the individual took any steps to stop the contravention, and when these steps were taken;
- (d) any remedial steps taken since the contravention was identified, including whether these were taken on the individual's own initiative or that of the DFSA or another regulatory authority;
- (e) whether the individual has arranged his resources in such a way as to allow or avoid disgorgement and/or payment of a financial penalty;
- (f) whether the individual had previously been told about the DFSA's concerns in relation to the issue, either by means of a private warning or in supervisory correspondence;

- (g) whether the individual had previously undertaken not to perform a particular act or engage in particular behaviour;
- (h) whether the individual has complied with any requirements or rulings of another regulatory authority relating to the contravention;
- (i) the previous disciplinary record and general compliance history of the individual;
- (j) action taken against the individual by other domestic or international regulatory authorities that is relevant to the contravention in question;
- (k) whether DFSA guidance or other published materials had already raised relevant concerns, and the nature and accessibility of such materials;
- (l) whether the DFSA publicly called for an improvement in standards in relation to the behaviour constituting the contravention or similar behaviour before or during the occurrence of the contravention; and
- (m) whether the individual agreed to undertake training subsequent to the contravention.

Step 4: Adjustment for deterrence

6-6-9 If the DFSA considers the figure arrived at after Step 3 is insufficient to deter the individual who committed the contravention, or others, from committing further or similar contraventions then the DFSA may increase the financial penalty. Circumstances where the DFSA may do this include:

- (a) where the DFSA considers the absolute value of the penalty too small in relation to the contravention to meet its objective of credible deterrence;
- (b) where previous DFSA action in respect of similar contraventions has failed to improve industry standards. This may include similar contraventions relating to different products;
- (c) where the DFSA considers it is likely that similar contraventions will be committed by the individual or by other individuals in the future; and
- (d) where the DFSA considers that the likelihood of the detection of such a contravention is low.

Step 5: Settlement discount

6-6-10 The DFSA and the individual on whom a penalty is to be imposed may seek to agree on the amount of any financial penalty and other terms. In recognition of the benefits of such agreements, section 6-8 provides that the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the DFSA and the individual concerned reached an agreement. The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1.

6-7 SERIOUS FINANCIAL HARDSHIP

6-7-1 The DFSA's approach to determining penalties described in sections 6-5 and 6-6 is intended to ensure that financial penalties are proportionate to the contravention. The DFSA recognises that penalties may affect Persons differently, and that the DFSA should consider whether a reduction in the proposed financial penalty is appropriate if such penalty would cause the subject of enforcement action serious financial hardship.

6-7-2 Where an individual or firm claims that payment of the financial penalty proposed by the DFSA will cause them serious financial hardship, the DFSA will consider whether to reduce the proposed financial penalty only if:

- (a) the individual or firm provides verifiable evidence that payment of the financial penalty will cause them serious financial hardship;
- (b) the individual or firm provides full, frank and timely disclosure of the verifiable evidence, and cooperates fully in answering any questions asked by the DFSA about their financial position; and
- (c) the individual or firm is able to satisfy the DFSA that payment of the financial penalty will cause them serious financial hardship.

6-7-3 There may be cases where, even though the individual or firm has satisfied the DFSA that payment of the financial penalty would cause serious financial hardship, the DFSA considers the contravention to be so serious that it is not appropriate to reduce the financial penalty. The DFSA will consider all the circumstances of the case in determining whether this course of action is appropriate, including whether:

- (a) the individual or firm directly or indirectly derived an economic benefit from the contravention and, if so, the extent of that economic benefit;
- (b) the individual or firm acted fraudulently or dishonestly with a view to personal gain; or
- (c) the individual or firm has spent money or dissipated assets in anticipation of DFSA or other enforcement action with a view to frustrating or limiting the impact of action taken by the DFSA or other authorities.

Individuals

6-7-4 In assessing whether a financial penalty would cause an individual serious financial hardship, the DFSA will consider the individual's ability to pay the financial penalty over a reasonable period, including agreeing to payment of the financial penalty by instalments where the individual requires time to realise his assets, for example, by waiting for payment of a salary or by selling property.

Firms

6-7-5 The DFSA will consider reducing the amount of a financial penalty if a firm will suffer serious financial hardship as a result of having to pay the entire financial penalty. In deciding whether it is appropriate to reduce the financial penalty, the DFSA will take into consideration the firm's financial circumstances, including whether the financial penalty would render the firm insolvent or threaten the firm's solvency. The DFSA will also take into account its statutory objectives, for example, in situations where consumers would be harmed or market confidence would suffer, the DFSA may consider it appropriate to reduce a financial penalty in order to allow a firm to continue in business and/or pay redress.

Withdrawal of authorisation or registration

6-7-6 The DFSA may withdraw a firm's Licence or registration, or the status of registration of an Authorised Individual, Key Individual, Principal Representative or Audit Principal, as well as impose a financial penalty. Such action by the DFSA does not affect the DFSA's assessment of the appropriate financial penalty in relation to a contravention. However, the fact that the DFSA has withdrawn such Licence or registration, as a result of which the firm or individual may have less earning potential, may be relevant in assessing whether the financial penalty will cause the firm or individual serious financial hardship.

6-8 DISCOUNT FOR EARLY SETTLEMENT

6-8-1 Persons subject to enforcement action may be prepared to agree on the amount of any financial penalty, and other conditions which the DFSA seeks to impose by way of such action. Such conditions might include, for example, the amount or mechanism for the payment of compensation to consumers. The DFSA recognises the benefits of such agreements, in that they offer the potential for securing earlier redress or protection for consumers and the saving of cost to the Person concerned, and the DFSA itself, in contesting the financial penalty. The financial penalty that might otherwise be payable, in respect of a contravention by the Person concerned, will, therefore, be reduced to reflect the timing of any settlement agreement.

6-8-2 In appropriate cases the DFSA's approach will be to negotiate with the Person concerned to agree in principle on the amount of a financial penalty having regard to the DFSA's statement of policy as set out in section 5-17 and this chapter. Where part of a proposed financial penalty specifically equates to the disgorgement of profit accrued or loss avoided, then the percentage reduction will not apply to that part of the financial penalty.

7 DECISION MAKING

7-1 INTRODUCTION

7-1-1 This chapter sets out the DFSA's general approach to making decisions when exercising its discretionary powers, including those set out in chapters 4 and 5 of this Sourcebook.

7-1-2 A reference to:

- (a) an Article in this chapter is a reference to an Article in the Regulatory Law 2004, unless otherwise stated; and
- (b) the Law in this chapter is a reference to any legislation administered by the DFSA.

7-1-3 The DFSA is aware that when it makes a decision in the exercise of the wide ranging powers available to it (for example to grant or not to grant a licence or authorisation, or pursue a remedy), such decisions are likely to affect the rights, interests and legitimate expectations of Persons. Therefore, the DFSA has put in place a fair and transparent decision making process when exercising its powers.

7-2 WHO CAN EXERCISE A DFSA POWER?

7-2-1 The DFSA's powers can be exercised by its Chief Executive or any delegate of the Chief Executive. The Chief Executive may delegate his powers:

- (a) to any DFSA officer or employee ("DFSA officer");
- (b) to a committee of DFSA officers, such as the Decision Making Committee ("DMC") (see further at 7-7); and
- (c) with the approval of the DFSA Board, to any other Person

(each referred to in this chapter as a "decision maker").

7-2-2 The decisions which are made by the DFSA fall into three categories:

- (a) decisions which are subject to the procedures in Schedule 3 of the Regulatory Law ("Schedule 3 Decisions") e.g. a decision to withdraw the Licence of an Authorised Person;
- (b) decisions which are subject to a bespoke process instead of the procedures in Schedule 3 ("Bespoke Decisions") e.g. the rejection of new Controller of an Authorised Firm; and
- (c) routine operational decisions ("Operational Decisions") e.g. a DFSA decision to start an investigation against a Person. These decisions are not subject to the procedures in Schedule 3 and are not referable to the FMT, but may be reviewed by way of judicial review in the Court.

7-2-3 The decisions in (a) and (b) above may be referred to the FMT for review and, depending on the nature and impact of the decision, are usually made either by a DFSA officer or by the DMC, a committee of DFSA officers.

7-3 DFSA'S GENERAL APPROACH TO DECISION MAKING

7-3-1 The key elements of the DFSA's approach to decision making include:

- (a) having in place adequate systems and controls to ensure that those making decisions, on behalf of the DFSA, are impartial and not affected by conflicts of interests that may affect their decisions;
- (b) giving a Person in respect of whom the DFSA proposes to make a decision (the "affected person") advance notice about the DFSA's proposed action (with the exception of cases when the DFSA may take immediate action because any delay resulting from advance notice would be prejudicial to the interests of direct or indirect users of financial services in the DIFC or otherwise prejudicial to the interests of the DIFC);
- (c) giving the affected person clear reasons why the DFSA proposes to take the relevant action;
- (d) giving the affected person a suitable opportunity to make representations (in person and in writing) with regard to the DFSA's proposed action;
- (e) taking into account any representations made by, or on behalf of, the affected person before making a final decision, i.e. making any consequential changes to the proposed action given the representations made or other additional material available to the DFSA, as appropriate;
- (f) taking into account only those considerations which are relevant to the matter to be decided upon;
- (g) giving, without undue delay, the affected person a clear statement in writing of the DFSA's final decision, the reasons for that decision and the effective date;
- (h) informing the affected person what rights of review that Person has in respect of the DFSA's decision, and within what period those rights of review must be exercised; and
- (i) having in place adequate mechanisms to enable the affected person to have the DFSA decision properly and impartially reviewed.

7-3-2 In certain circumstances, as set out in (b) above, the DFSA does not have to give an affected person advance notice of its proposed action and a right for that Person to make prior representations to the DFSA before the DFSA makes its final decision. In such circumstances, the DFSA is still obliged to give the affected person a right of representation within 14 days (or other longer period as may be agreed) from the date on which the DFSA decision is made and communicated to the affected person. The DFSA is obliged to consider any representations made by, or on behalf of, the affected person during that period. Decisions that might be made without giving the affected person a right to make prior representations include:

- (a) the issuing of a stop order under Article 25 of the Markets Law 2010; and
- (b) suspension of a Listed Entity's Securities from the Official List of Securities.

7-3-3 Where a right to make representations is exercised by an affected person, the DFSA will communicate to the affected person whether the DFSA confirms its original decision, or otherwise varies or withdraws that decision, given the representations made. Where no representations are made by, or on behalf of, the affected person during the relevant period, the DFSA's original decision will remain in effect and will be confirmed.

Procedural fairness principles

7-3-4 A decision maker is expected to:

- (a) act without bias or conflict of interest;
- (b) give the Person an opportunity to present his case; and
- (c) take into account only those considerations which are relevant to the matter to be decided upon.

Acting without bias or conflict of interest

7-3-5 A decision maker called upon to make a decision is expected to act impartially in doing so. If the decision maker has a vested financial or personal interest in the matter, a conflict of interest may arise that prevents an impartial or unbiased decision being made.

7-3-6 A decision maker who does have a financial or other personal interest in the matter is required to disclose this interest to the DFSA and, if the interest is material, would not be the decision maker in relation to that matter.

Relevant considerations

7-3-7 The decision maker is expected to take into account only those considerations which are relevant to the matter to be decided upon. Taking into account only those considerations which are relevant to the matter necessarily requires disregarding any irrelevant information. This also requires the decision maker to ensure that it has all the material information that is necessary to be able to make the relevant decision. For this purpose, the decision maker may ask for, or obtain, including from any third party sources, further information.

7-4 OPERATIONAL DECISIONS

7-4-1 Some supervisory decisions of the DFSA, by their nature, do not invoke the procedures in Schedule 3. Generally such decisions may also not be referred by the affected person to the FMT for review. These decisions are generally made as part of the DFSA's day-to-day supervision of regulated firms. Examples include its decisions to:

- (a) obtain additional information from an Authorised Firm;
- (b) disclose information about an Authorised Firm to an overseas regulator;

- (c) issue a risk mitigation plan stemming from any supervisory concerns identified in the course of firm visit; or
- (d) commence an investigation.

7-4-2 In making these decisions, the decision maker is still subject to overarching administrative law principles which require him to act in good faith, and in a proportionate and reasonable manner. He is also required, to the extent appropriate, to act in a transparent and consistent manner.

7-5 SCHEDULE 3 DECISIONS

7-5-1 Some DFSA powers, whether in the laws or Rules, must be exercised according to the procedures in Schedule 3. The powers also set out whether the affected person has a right to have the DFSA decision reviewed by the FMT. As Schedule 3 Decisions can have a significant adverse impact on an affected person, the mandatory procedures set out in Schedule 3 are designed to provide procedural fairness.

7-5-2 Examples of Schedule 3 Decisions include where the DFSA, on its own initiative, proposes to:

- (a) impose a fine or censure under Article 90 of the Regulatory Law;
- (b) withdraw the Licence of an Authorised Person; or
- (c) withdraw the status of an Authorised Individual.

7-5-3 To facilitate a consistent approach to decision making, Schedule 3 sets out clearly the steps the DFSA is required to follow in relation to Schedule 3 Decisions.

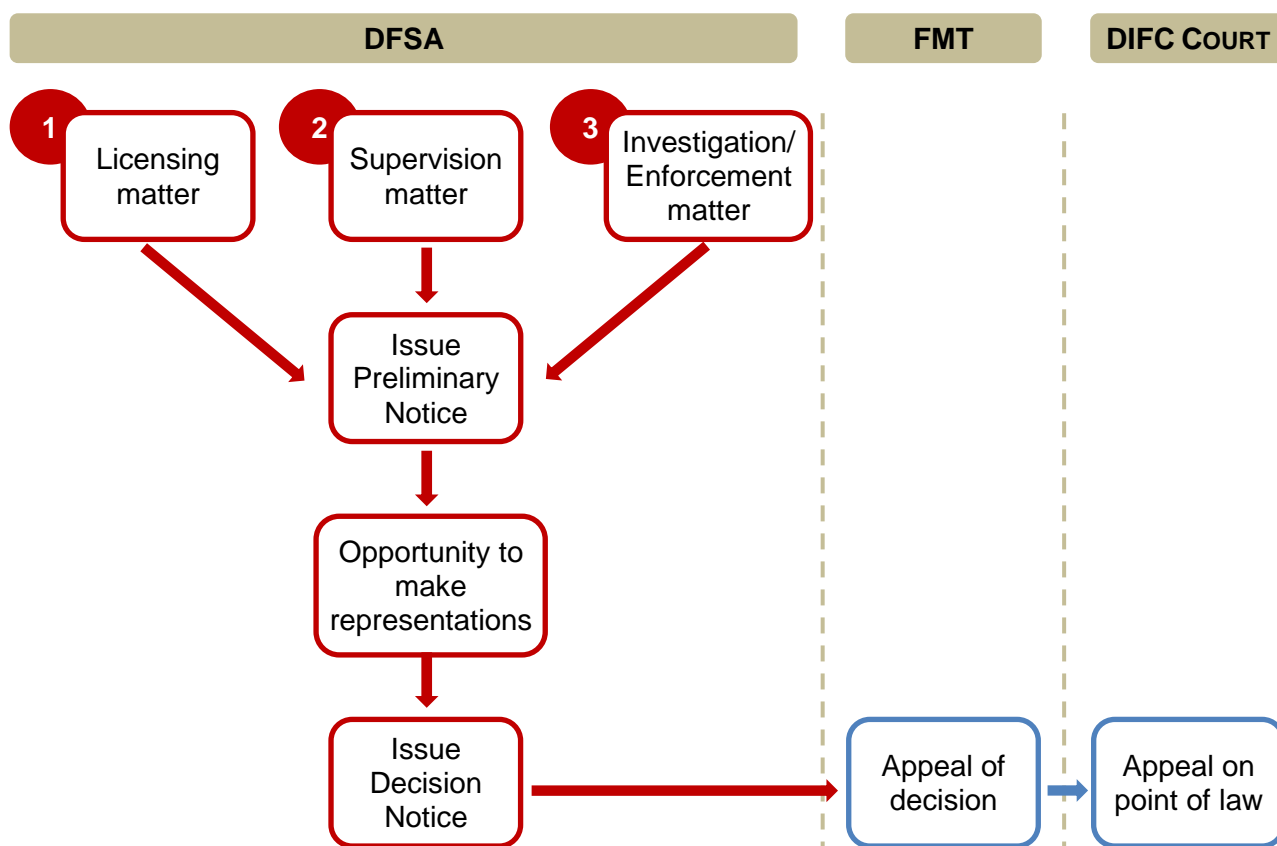
7-5-4 The procedures are designed to ensure procedural fairness by giving (see Figure 1 below):

- (a) advance notice of the DFSA's proposed decision (referred to as the Preliminary Notice), except in the cases referred to in 7-5-6 and the reasons for proposing to make such a decision;
- (b) a suitable opportunity to make representations relating to the proposed decision;
- (c) the DFSA's final decision (referred to as the Decision Notice) and the reasons for that decision, including any changes made to the preliminary decision taking into account any representations made for, or on behalf of, the affected person; and
- (d) notice of the affected person's right to have the DFSA decision reviewed by the FMT and the period within which that right can be exercised.

7-5-5 Schedule 3 Decisions will normally be made either by a DFSA officer or, where the DFSA considers it appropriate, by the DMC. For example, a decision to impose a restriction on an Authorised Firm under Article 76 of the Regulatory Law will typically be made by the head of the team which supervises the Authorised Firm, who may not be operationally

removed from the matter. However, decisions made under Article 90 of the Regulatory Law will ordinarily be made by the DMC.

Figure 1: DFSA's Decision Making Process for Schedule 3 Decisions



7-5-6 Other than Operational Decisions, the Schedule 3 procedures do not apply to some other types of DFSA decisions, including:

- (a) decisions made by the DFSA at the request or with the consent of a Person, e.g. where a Person requests the DFSA to cancel its Licence; and
- (b) a decision by the DFSA to withdraw certain directions, requirements, restrictions, prohibitions or conditions imposed under the Law.

7-6 BESPOKE DECISIONS

7-6-1 Certain DFSA decisions attract bespoke due process requirements. Examples are the DFSA's powers relating to Controllers of regulated firms and the power to approve or reject the Business Rules of an Authorised Market Institution. Bespoke due process decisions can be made either by a DFSA officer or, in appropriate cases, by the DMC. The Schedule 3 procedures do not apply where bespoke due process requirements apply to a power.

7-7 THE DECISION MAKING COMMITTEE

7-7-1 The DMC is a DFSA committee whose members are DFSA officers who act under powers delegated by the DFSA Chief Executive. The DMC may be constituted with one member sitting alone or with three sitting together to consider the relevant matter.

7-7-2 The DMC is often the decision maker for Schedule 3 Decisions. However, on occasion, for Schedule 3 Decisions which are not ordinarily made by the DMC, the DFSA officer acting as a decision maker may refer the decision to the DMC to be made where he considers it appropriate, for example, where he feels that the matter deserves a greater degree of independence and objectivity (taking into account factors such as impact and complexity).

7-7-3 When the DMC sits to consider whether the DFSA should take enforcement action under Article 90 of the Regulatory Law, its member(s) should have had no previous direct involvement in establishing the evidence upon which the decision is based.

7-7-4 When sitting to consider a matter, the DMC would first review the evidence supporting a proposed DFSA action and decide whether, in light of the evidence, the Preliminary Notice should be issued to the affected person. The DMC may, having reviewed the evidence available to it, decide not to proceed with any action. If a Preliminary Notice is issued, the DMC will be responsible for hearing and considering the affected person's representations made in response to the Preliminary Notice and deciding whether or not to issue the Decision Notice.

7-7-5 The DMC is also the DFSA decision maker for any settlement of enforcement action by the DFSA which results in a Decision Notice.

7-8 THE FINANCIAL MARKETS TRIBUNAL

7-8-1 DFSA-administered law and Rules set out when an affected person has a right to refer a DFSA decision to the Financial Markets Tribunal (the "FMT") for its review. Upon a referral, the FMT (which is operationally independent of the DFSA) is required to conduct a full merits review of the DFSA decision. In doing so, the FMT would look at all the relevant facts afresh and take into account all relevant matters, including any matters that the DFSA may have not been aware of, or had disregarded, when the DFSA made its decision.

7-8-2 After review of the DFSA decision, the FMT has the power to make a new decision using the powers available to the DFSA as the original decision maker. This could involve confirmation of the original decision made by the DFSA, substituting the DFSA decision with a new decision, or referring the matter back to the DFSA with a direction for the DFSA to make a fresh decision.

7-8-3 The FMT itself, being an administrative review body, is required to observe rules of procedural fairness, and be objective and transparent in making its decisions. So the FMT has its own due process procedures, which it follows.

7-8-4 To enable an affected person to exercise properly and effectively his right to have the DFSA's original decision referred to the FMT, the DFSA will provide to such a Person a Decision Notice specifying:

- (a) the DFSA's decision and its reasons for making that decision;

- (b) the date on which the decision is to take effect; and
- (c) the Person's right to seek a review of the decision by the FMT; and
- (d) by when the right referred to in (c) has to be exercised.

7-8-5 The Decision Notice must also include a copy of the relevant materials which were considered by the DFSA when making its decision (unless such materials are already held by the affected person or are publicly available).

7-8-6 A decision of the FMT may be reviewed by the DIFC Court but only on a point of law. For more information on the Financial Markets Tribunal, including its rules and procedures, please see the DFSA's website (www.dfsa.ae).

8 CONFIDENTIAL REGULATORY INFORMATION

8-1 INTRODUCTION

8-1-1 This chapter describes how the DFSA protects, uses and discloses confidential information that it receives in the course of regulating financial services in the DIFC. Such information is referred to in this chapter as “confidential information”.

8-2 GUIDING PRINCIPLES

8-2-1 The international best practice standards adopted and applied by the DFSA in the DIFC are those set by international standard setting organisations such as the Basel Committee on Banking Supervision (BCBS), the International Association of Insurance Supervisors (IAIS), the International Organization of Securities Commissions (IOSCO) the Financial Action Task Force (FATF) and the Islamic Financial Services Board (IFSB).

8-2-2 The DFSA’s adherence to these standards is a commitment:

- (a) to enforce and ensure compliance with applicable financial services legislation, consistent with the Basel Core Principles for Effective Banking Supervision, the IAIS Core Principles for Effective Insurance Supervision, the IOSCO Objectives and Principles of Securities Regulation and the FATF Recommendations on combating money laundering, the financing of terrorism and proliferation of weapons of mass destruction;
- (b) to provide the fullest mutual assistance to other financial services regulators regarding cooperation and the exchange of confidential information according to standards and procedures that are equivalent to those prescribed in the IOSCO Multilateral Memorandum of Understanding;
- (c) to seek to ensure that DIFC or foreign laws or regulations about confidentiality or secrecy do not prevent the DFSA from obtaining, securing or disclosing confidential information where required for lawful regulatory purposes;
- (d) to limit the disclosure of confidential information to other financial services regulators and enforcement agencies to what is required for lawfully ensuring compliance with, and enforcement of, applicable financial services and criminal legislation;
- (e) to apply international best practices in obtaining and disclosing confidential information;
- (f) to implement robust internal control systems and procedures that meet international best practices for the handling, storing, processing and securing of confidential information; and
- (g) to implement data protection procedures that are equivalent to those prescribed in the European Union Directives so as to protect individual privacy rights according to international best practices.

8-3 RELEVANT LEGISLATION

8-3-1 The main legislative provisions governing the use of confidential information are set out in Dubai Law No. 9 of 2004, DIFC Regulatory Law No. 1 of 2004, the DIFC Data Protection Law No. 1 of 2007 and the UAE Penal Code, Federal Law No. 3 of 1987.

Regulatory Powers to Obtain Confidential Information

8-3-2 Like other financial services regulators, the DFSA has comprehensive statutory powers to carry out its authorisation, supervision and enforcement functions regarding financial services in and from the DIFC. The Regulatory Law confers powers to require reports, conduct on-site inspections of business premises of authorised entities and individuals, investigate and compel the production of documents, testimony and other information.

8-3-3 The DFSA can also use its powers to obtain information from third party suppliers, including intermediaries and companies that have accepted outsourced functions for regulated entities. These include subsidiaries established in the DIFC and branches in the DIFC of firms authorised in other jurisdictions. The DFSA may also exercise these powers at the request, and on behalf, of foreign regulators and authorities to assist them in performing their regulatory or enforcement functions. Why, when and how this is permissible is described in more detail below.

8-3-4 In short, because the DFSA's statutory mandate is to regulate all financial services provided in and from the DIFC, the DFSA has broad access to confidential information about individuals and firms participating in or connected to the provision of financial services in the DIFC. This includes all market participants, listed companies, reporting entities and their officers and directors.

For example, this means that the DFSA will treat accounts that are booked and held in foreign jurisdictions, but serviced and managed in or from the DIFC, in the same way as if the accounts were booked, held, serviced and managed entirely within the DIFC. Legally and practically the DFSA has complete access to the account information in both situations because the regulated financial service is provided in or from the DIFC. However, if a DIFC regulated financial institution books, holds, services and manages an account entirely in a foreign jurisdiction, the DFSA has no authority to access confidential client account information unless the laws of the foreign jurisdiction permit such access and disclosure.

Confidentiality Obligations

8-3-5 Although the DFSA has comprehensive powers to access confidential information so that it can properly discharge its regulatory functions, there are statutory limitations or restrictions on the way the DFSA uses and deals with confidential information. These limitations or restrictions are necessary to protect individual privacy and to assure regulated firms and individuals, and their clients, that the confidential information they provide to the DFSA will be dealt with in confidence and used only for lawful purposes.

Dubai Law No. 9 of 2004

8-3-6 Under Article 7 of Dubai Law No. 9 of 2004, which is the law under which the DFSA was established, the DFSA is required to keep confidential any confidential information obtained, disclosed to or collected by it, in the course of performing its functions. The Article

specifically prohibits the disclosure of confidential information to third parties except in circumstances permitted by DIFC laws and regulations.

The UAE Penal Code

8-3-7 It is a criminal offence under Article 379 of the UAE Penal Code, Federal Law No. 3, (which applies in the DIFC) for any person, including the DFSA, its employees and agents, to disclose confidential information to third parties without having the legal authority to do so. This Article applies to all persons, not just currently serving public officers. However, it imposes more severe penalties on public officers if they disclose such information in cases other than those permitted by the law.

The Data Protection Law

8-3-8 The DIFC Data Protection Law No.7 of 2007 (Data Protection Law) applies in the DIFC. The Data Protection Law protects the personal data of a natural living person; this data is generally also confidential information. The Data Protection Law sets out the requirements for processing personal data and the rights of data subjects.

For example, under the Data Protection Law, the DFSA, as a data controller, is required to process personal data fairly, lawfully, and securely and only for specified, explicit and legitimate purposes. The DFSA is also required to ensure that personal data it processes is accurate and kept up to date.

8-3-9 Under Article 39 of the Data Protection Law, in certain circumstances, specified sections of the Data Protection Law do not apply to the DFSA. This exemption applies if the application of the specified sections of the Data Protection Law would be likely to prejudice the proper discharge of the DFSA's powers and functions under DFSA administered laws, insofar as the relevant powers and functions are designed to protect members of the public against the dishonesty, malpractice or other seriously improper conduct of those operating in the financial services industry.

For example, the DFSA will not normally notify an individual about a request from a foreign authority to provide information about a client of a financial institution if the request is for the purpose of investigating the client's suspected participation in a securities fraud or criminal offence. In such cases, notifying the client or financial institution is likely to jeopardise the investigation and would defeat the public interest.

The Regulatory Law

8-3-10 Article 38(1) of the Regulatory Law parallels the above confidentiality provisions by prohibiting the DFSA, its employees, agents or any person coming into possession of the information from disclosing confidential information unless they have the consent of the person to whom the duty of confidentiality is owed or unless the disclosure is expressly authorised under Article 38(3).

Authorised Powers of Disclosure

8-3-11 The Regulatory Law provides gateways by which the DFSA is permitted to disclose regulatory information for certain purposes and/or to certain persons. The relevant gateways are in Articles 38 and 39.

8-3-12 Under Article 38 of the Regulatory Law, the DFSA may lawfully disclose confidential information:

- (a) where the information is already public;
- (b) where the disclosure is for the purpose of assisting the following persons in the performance of their regulatory functions:
 - (i) the DIFC Registrar of Companies;
 - (ii) a Financial Services Regulator;
 - (iii) a governmental or regulatory authority exercising powers and performing functions relating to anti-money laundering, counter-terrorist financing or sanctions compliance;
 - (iv) a self-regulatory body or organisation exercising and performing powers and functions in relation to financial services;
 - (v) a civil or criminal law enforcement agency; or
 - (vi) a governmental or other regulatory authority, including a self-regulatory body, or organisation exercising powers and performing functions in relation to the regulation of auditors, accountants or lawyers;
- (c) where disclosure is permitted or required under the Regulatory Law or Rules, other DFSA administered laws or any other law applicable in the DIFC; and
- (d) where disclosure is made in good faith for the purposes of performance and exercise of the functions and powers of the DFSA.

8-3-13 Under Article 80A(2) of the Regulatory Law, the DFSA is prohibited from disclosing an individual's compelled testimony to any law enforcement agency for the purpose of criminal proceedings against the person unless the person consents to the disclosure or the DFSA is required by law or court order to disclose the statement.

8-3-14 When the DFSA is requested to disclose confidential information to an Authority referred to in Article 38 or 39, in circumstances other than those referred to in Article 80A(2), the DFSA recognises that the information to be provided is to be used for the sole purpose of assisting the requesting authority in performing its regulatory functions. Consequently, the DFSA requires the requesting authority to keep the information confidential and not to disclose it to any other person without the written consent of the DFSA.

8-3-15 In summary, the above restrictions mean that:

- (a) the DFSA may only use or disclose confidential information to fulfil a DFSA regulatory purpose or legal obligation;
- (b) the DFSA may only disclose confidential information to domestic and foreign regulators and authorities if it is for the purpose of assisting them in the performance of their specific regulatory or enforcement functions regarding financial services and criminal legislation; and

- (c) the DFSA may only disclose an individual's compelled testimony to a law enforcement agency for the purpose of criminal proceedings against the person if the person consents to the disclosure or if the DFSA is required by law or court order to disclose the statement.

Exercising Regulatory Powers on Behalf of Other Authorities

8-3-16 In addition, Article 39 of the Regulatory Law gives the DFSA specific statutory authority to exercise its powers at the request, and on behalf, of the regulators, authorities, bodies or agencies listed in Article 39 ("authority or authorities"). This means that the DFSA may obtain confidential information from DIFC reporting entities, listed companies, regulated firms and individuals, and their clients on behalf of other authorities. The provisions of Article 38 and 39 must often be considered together to determine the limitations on obtaining and sharing confidential information.

8-3-17 Under Article 39, the DFSA may only exercise its powers on behalf of other authorities if the request for assistance comes from:

- (a) the DIFC Registrar of Companies;
- (b) a Financial Services Regulator;
- (c) a governmental or regulatory authority exercising powers and performing functions relating to anti-money laundering, counter terrorist financing or sanctions compliance;
- (d) a self-regulatory body or organisation exercising and performing powers and functions in relation to financial services;
- (e) a civil or criminal law enforcement agency; or
- (f) a governmental or other regulatory authority, including a self-regulatory body, or organisation exercising powers and performing functions in relation to the regulation of auditors, accountants or lawyers,

where the DFSA considers it appropriate for the purpose of assisting the performance of their regulatory functions.

8-3-18 As a matter of policy the DFSA will assist an Article 39 authority unless:

- (a) the request would require the DFSA to act in a manner that would violate applicable UAE criminal laws, DIFC laws or DFSA policies;
- (b) the request is in relation to criminal or enforcement proceedings that have already been initiated in the DIFC or UAE relating to the same facts or same persons, or the same persons have already been penalised or sanctioned on substantively the same allegations or charges and to the same degree by the DFSA or the competent authorities in the UAE;
- (c) the request would be prejudicial to the public interest of the DIFC;
- (d) the requesting authority refuses to give corresponding assistance to the DFSA;

- (e) complying with the request would be so burdensome as to prejudice or disrupt the performance of DFSA regulatory functions and duties; or
- (f) the authority fails to demonstrate a legitimate reason for the request.

8-3-19 If the DFSA decides to obtain and disclose confidential information on behalf of another authority under Article 39, then it must do so in accordance with the provisions of Article 38.

8-3-20 In deciding whether to comply with a request to disclose confidential information under Articles 38 and 39, the DFSA as a matter of policy will satisfy itself that there are legitimate reasons for the request and that the authority requesting the information has the appropriate standards in place for dealing with confidential information. What the DFSA considers to be legitimate reasons are discussed below.

Factors Determining Legitimacy of Requests for Confidential Information

8-3-21 Every request to disclose confidential information will be assessed by the DFSA on a case-by-case basis to determine whether there is a legitimate reason to comply with the request. In determining the legitimacy of a request, the DFSA may consider, in addition to Articles 38 and 39 of the Regulatory Law:

- (a) whether the request will enable the requesting authority to discharge more effectively its regulatory responsibilities to enforce and secure compliance with the financial services laws administered by the requesting authority;
- (b) whether the request is for the purpose of actual or possible criminal, civil or administrative enforcement proceedings relating to a violation of financial services laws administered by the requesting authority;
- (c) whether the requesting authority is governed by laws that are substantially equivalent to those governing the DFSA concerning regulatory confidentiality, data protection, legal privilege and procedural fairness;
- (d) whether the request involves the administration of justice of a law, regulation or requirement that is related to enforcing and securing compliance with the financial services laws of the requesting jurisdiction;
- (e) whether any other authority, governmental or non-governmental, is cooperating with the requesting authority or seeking information from the confidential files of the requesting authority; and
- (f) whether fulfilling the request will foster the integrity of, and confidence in, the financial services industry in the DIFC and the requesting jurisdiction.

Civil Proceedings in the DIFC Court

8-3-22 The DIFC Court's enabling legislation, Dubai Law No. 12 of 2004, in respect of the Judicial Authority at DIFC, gives it exclusive judicial jurisdiction in the DIFC and over DIFC bodies including the DFSA. Therefore, the DFSA is obliged by law to disclose confidential information if it is compelled to do so under an order from the DIFC Court.

Criminal Prosecutions in the UAE Courts

8-3-23 As the UAE criminal laws apply in the DIFC, the DFSA is obliged under Article 78, Part 2 of the UAE Penal Procedures Law Federal Law No. 35 to comply with any legally enforceable demand or order from a competent authority responsible for administering the criminal laws in the UAE. This includes orders or demands to disclose confidential information.

The Effect of Foreign Secrecy Laws in the DIFC

8-3-24 Foreign banking secrecy laws do not apply in the DIFC and do not apply to DFSA regulated entities and their clients in relation to financial services business conducted in or from the DIFC. This is because foreign banking secrecy laws or confidentiality provisions do not have extraterritorial effect. Similarly, the DFSA does not have extraterritorial or direct access to confidential client information if the client's business is booked, held, serviced and managed exclusively in foreign jurisdictions subject to a strict banking secrecy regime.

For example, a request by the DFSA to a foreign regulator or a financial institution for disclosure of confidential client account information will be governed by and be subject to the secrecy laws, if any, of the foreign jurisdiction.

Applications to Request Confidential Information

8-3-25 Generally, for the DFSA to agree to provide confidential information in response to an Article 39 request, the authority will be required to:

- (a) make the request in writing, or if urgent make the request orally and, unless otherwise agreed, confirm it in writing within ten business days;
- (b) describe the confidential information requested and the purpose for which the authority seeks the information;
- (c) provide a brief description of the facts supporting the request and the relevant legal powers authorising the request;
- (d) specify whether the purpose of the request is for actual or possible criminal, civil or administrative enforcement proceedings relating to a violation of the laws and regulations administered by the authority;
- (e) agree that it will not use the confidential information for any other purpose than that for which it was requested unless it has the express permission of the DFSA;
- (f) indicate, if known, the identity of any persons whose rights or interests may be adversely affected by the disclosure of confidential information;
- (g) indicate whether obtaining the consent of, or giving notice to, the person to whom the request for confidential information relates would jeopardise or prejudice the purpose for which the information is sought;
- (h) specify whether any other authority, governmental or non-governmental, is co-operating with the requesting authority or seeking information from the confidential files of the requesting authority;

- (i) specify whether onward disclosure of confidential information is likely to be necessary and the purpose such disclosure would serve;
- (j) agree to revert to the DFSA in the event that it seeks to use the confidential information for any purposes other than those specified in the request;
- (k) agree to keep requested confidential information confidential, including the fact that a request for confidential information was made, except as it conforms to this policy or in response to a legally enforceable demand;
- (l) agree, in the event of a legally enforceable demand, that it, the requesting authority, will notify the DFSA prior to complying with the demand, and will assert such appropriate legal exemptions or privileges with respect to such confidential information as may be available;
- (m) agree that, prior to providing information to a self-regulatory organisation, the requesting authority will ensure that the self-regulatory organisation is able and will comply on an ongoing basis with the confidentiality provisions agreed to between the requesting authority and DFSA; and
- (n) agree to use its best efforts to protect the confidentiality of confidential information received from the DFSA pursuant to the provisions in Articles 38 and 39 of the Regulatory Law, the Data Protection Law and this policy.

For example, in an international securities fraud or money laundering investigation the kind of documents the DFSA may provide to an Article 39 authority may include: documents from contemporaneous records sufficient to reconstruct all securities, derivatives and bank transactions; records of all funds and assets transferred into and out of bank and brokerage accounts relating to these transactions; records that identify the beneficial owner and controller and, for each transaction, the account holder, the particulars of the transaction, and the individual and the authorised financial or market institution that handled the transaction.

Procedural Fairness

8-3-26 When the DFSA intends to disclose confidential information to other bodies pursuant to a statutory gateway, in cases where that information has been obtained from another regulatory or supervisory agency, the DFSA will notify and consult with that agency which provided the information. In these instances, the DFSA does not normally notify the persons potentially affected by the disclosure, although there are exceptions.

8-3-27 The DFSA will normally give notice and an opportunity to make representations and challenge the disclosure in the following circumstances:

- (a) where the disclosure relates to a person's compelled testimony to a law enforcement agency for the purpose of criminal proceedings against the person. Under Article 80A(2) of the Regulatory Law, the DFSA must not disclose a person's compelled testimony to any law enforcement agency for the purpose of criminal proceedings against the person unless the person consents to the disclosure or the DFSA is required by law or court order to disclose the statement;
- (b) where the disclosure of confidential information relates to private civil litigation. In these circumstances, the person requesting the confidential information will be

required to obtain a DIFC Court order compelling the DFSA to disclose the confidential information. The DFSA will notify the person who is the subject of the request so that the person has an opportunity to challenge the request according to the Rules of the DIFC Court;

- (c) where the fairness of the case requires it. Notice may be appropriate where there are serious and legitimate concerns about the appropriateness of the disclosure, for example, where the body requesting the confidential information does not perform a financial services related regulatory function. In addition there may be some other obvious reason why it might be helpful (in order to enable a fully informed decision to be made) to give notice in order to get a response from the subject of disclosure or the source of the information. One of the relevant considerations is whether the body receiving the confidential information is itself obliged to provide the person concerned with an opportunity to make representations, should it decide to rely on the information disclosed to it.

8-3-28 The DFSA will not normally give notice in the following circumstances:

- (a) where it may prejudice an ongoing or pending investigation, whether carried out by the DFSA or the receiving authority or prejudice actions which the DFSA or other authority may want to take as a result of an investigation (e.g. freezing assets before they disappear);
- (b) where it may reveal the identity of informants or persons who provided the DFSA with information about potential misconduct of firms or individuals in the expectation that their identity would be kept confidential;
- (c) where it may prejudice or jeopardise the DFSA's ability to effectively discharge its monitoring and other regulatory functions particularly in its supervisory function where there is frequently a need for real-time disclosures of confidential information by telephone, e-mail or fax;
- (d) where it is agreed or understood that the regulatory practice is that certain confidential information will be passed on without notice, particularly in the context of disclosure to supervisors of international firms;
- (e) where the information disclosed to other agencies is not adverse to the person concerned (e.g. letters to overseas regulators indicating that there is no adverse information, or information as to the authorisation status of firms and individuals);
- (f) where it may undermine other regulators' fitness and propriety tests; or
- (g) where it may seriously prejudice the DFSA's relations with overseas regulators, considering the DFSA's bilateral and international obligations and the need for effective mutual cooperation and information sharing.

8-4 INFORMATION UNDER MEMORANDA OF UNDERSTANDING

8-4-1 The DFSA may obtain confidential information pursuant to a Memorandum of Understanding (MOU)⁴⁵ with another authority. A list of DFSA MOUs is published on the DFSA website.

8-4-2 This section describes how the DFSA protects, uses and discloses confidential information that it receives pursuant to a MOU.

Procedures for assessing disclosure

8-4-3 Article 38 of the Regulatory Law ensures the confidentiality of information provided to the DFSA. This includes any confidential information received by the DFSA from an authority under a MOU or similar arrangement. All information received under a MOU will be expressly marked to indicate that it is confidential regulatory information provided under a MOU from an identified authority.

8-4-4 Article 38 also enables the DFSA to release confidential information to an authority for the purposes of assisting the performance of its regulatory functions. The release of any confidential information by the DFSA to a third party and the method of releasing this information will be assessed and approved by a senior officer of the DFSA with delegated authority to make such a release. The delegated senior officer will consider the relevant provisions of this chapter (particularly section 8-3) in deciding whether to release confidential information to third parties.

8-4-5 Any DFSA staff member identifying the possible release of any confidential information will ensure that the delegated senior officer assessing and approving the release is aware of the origin(s) of the information and the legal basis upon which the release is required to be made.

8-4-6 The DFSA staff member and the delegated senior officer assessing and approving the release will ensure that:

- (a) the receiving party is made fully aware of the protected status of the confidential information;
- (b) the providing authority has been approached to seek written approval for the information's release to the third party;
- (c) where a providing authority does not approve the release of the confidential information, the DFSA takes all reasonable efforts, including any legal steps, to protect the information from disclosure;
- (d) if the DFSA's efforts to protect the confidential information from disclosure are unsuccessful, e.g. to a Court, the DFSA informs the providing authority, and requests the receiving party to ensure that the confidential information is not made public.

8-4-7 Generally, the DFSA will ensure that information released under Article 38 retains its confidential status by imposing conditions on that authority that the information should only be

⁴⁵ A MOU may be a bi-lateral or a multi-lateral MOU.

used for a regulatory purpose and will not be released to any third party without the prior consent of the DFSA.

Where information is subject to a legally enforceable demand

8-4-8 In cases where the confidential information obtained from an authority under a MOU is subject to a legally enforceable demand (such as a subpoena, notice or court order), the DFSA will notify the providing authority when the demand is received by the DFSA.

8-4-9 In the event of a legally enforceable demand, the DFSA will assert any legal rights, exemptions or privileges to protect such confidential information that are legally available to it. These may include, for example, objections to disclosure based on a claim of public interest immunity (see section 8-5 below).

8-5 DISCLOSURE TO A COURT

8-5-1 The DIFC Courts deal exclusively with all cases and claims arising out of the DIFC and its operations. The DIFC Courts have jurisdiction over civil and commercial matters only and do not have criminal jurisdiction. All criminal matters are heard and determined by the Emirati courts.

8-5-2 The DIFC Court's enabling legislation, Dubai Law No. 12 of 2004, gives it exclusive judicial jurisdiction in the DIFC and over DIFC bodies including the DFSA. Therefore, the DFSA is obliged by law to disclose confidential information if it is compelled to do so pursuant to an order from the DIFC Court.

8-5-3 As the UAE criminal laws apply in the DIFC, the DFSA is obliged under Article 78, Part 2 of the UAE Penal Procedures Law Federal Law No. 35 of 1992 to comply with any legally enforceable demand or order from a competent authority responsible for administering the criminal laws in the UAE. This includes orders or demands to disclose confidential information.

Public interest immunity and similar claims

8-5-4 In an appropriate case, and particularly where a party to court proceedings seeks disclosure of confidential information obtained by the DFSA under a MOU (see section 8-4 above), the DFSA will seek to invoke a claim of public interest immunity (PII) to resist the disclosure. In common law, where a government department or other public body considers that the disclosure of particular information in the course of civil or criminal litigation would be seriously harmful to the public interest, the department or body may ask the court not to order disclosure, by making a claim, in civil litigation, of PII, and, in the case of criminal litigation, a similar claim in substance. The DFSA considers that a PII claim would be appropriate, in the context of its functions, where disclosure would prejudice its ability to perform those functions or jeopardise its ability to receive information in the future from certain sources, including overseas regulators, and in such a case it would make the claim on the source's behalf.

8-6 INTERNAL PROCEDURES

Employee Practices and Procedures

8-6-1 The statutory obligation on all DFSA employees, agents and independent contractors to keep information confidential is further reinforced by requiring:

- (a) all DFSA employees, agents and independent contractors to sign an Employment or Consultancy Services Contract that incorporates a confidentiality clause in which they irrevocably agree that during the course of their employment, and thereafter, they shall not communicate any information that might be of a confidential or proprietary nature; and
- (b) all DFSA employees to abide by a Code of Values and Ethics which requires them to comply with their statutory obligations, including the confidentiality obligations under the Regulatory Law.

Physical Management of Confidential Information

8-6-2 The DFSA has also adopted physical measures for management of confidential information, such as:

- (a) restricted working space accessible only through the use of electronic identification cards; and
- (b) best practice electronic and paper document control systems that monitor and audit the use of confidential information.

8-6-3 To ensure the confidentiality obligations in the Regulatory Law and Data Protection Law are met, the DFSA has developed policies concerning the physical management of information by employees in discharging their licensing, supervisory and other regulatory functions. The policies also prescribe procedures regarding information technology security, restricted electronic information access, physical perimeter security, securing evidence, receiving and receipting documentation and designating sensitivity classifications of information.

8-6-4 When the DFSA receives confidential information under its statutory powers under the Regulatory Law to compel production of information and documents, the documents are processed according to prescribed procedures. These procedures include processes for the manual and electronic receipt, storage, retrieval and return of confidential information and documents in and from an Evidence Management Facility purpose built to secure confidential information. Only limited nominated staff have access to the restricted area and the compelled documents while they remain in the custody of the DFSA.

9 WAIVERS AND MODIFICATIONS

9-1 INTRODUCTION

9-1-1 This chapter outlines the DFSA's approach to considering and determining applications to grant relief from legislation, by either waiving or modifying the application of one or more Rules of the DFSA Rulebook or Articles of the Markets Law 2012.

9-1-2 To waive the application of a provision is to give relief to a person from the entire obligation in that provision. A modification can either modify the way in which a person can comply with an obligation in a provision or can give relief from part of the obligation in a provision.

9-2 DFSA'S POWER TO ISSUE RELIEF

9-2-1 The DFSA may, on the application or with the consent of a person, direct that its Rules:

- (a) do not apply to a person; or
- (b) do apply to a person but with such modifications as are set out in a notice issued by the DFSA for this purpose.⁴⁶

9-2-2 Usually such a person is an Authorised Person, but this may not necessarily be the case. For example, in the case of an Offer of Securities the Issuer may apply for relief from the MKT Rules.

9-2-3 The DFSA, in addition to waiving or modifying Rules, has the power to waive or modify Articles of the Markets Law 2012⁴⁷. This power would typically only be exercised where practicality conflicts with a provision of the law and the associated risks are adequately addressed by alternative arrangements put in place by the applicant.

9-2-4 If an application is successful, the DFSA will issue its decision by means of a notice in writing.

9-3 MAKING AN APPLICATION

9-3-1 When applying for relief from a Rule or a provision of the Markets Law 2012 please use the GEN1 form in the AFN Sourcebook.

9-3-2 Currently not in use.

9-3-3 Prior to submitting an application to the DFSA, the applicant should contact their usual DFSA supervisory contact to discuss the application. For Authorised Firms subject to thematic supervision, the dedicated contact portal should be used:

<http://www.dfsa.ae/Pages/ContactUs/SupervisedFirmContactForm.aspx>

9-3-4 If the applicant is not regulated by the DFSA, contact should be made through the general enquiries form on the DFSA website [here](#).

9-3-5 Before making an application, the DFSA expects that the applicant will carry out appropriate research on:

⁴⁶ Article 25 of the Regulatory Law 2004.

⁴⁷ Article 9 of the Markets Law 2012.

- (a) the intention behind the provisions in question and the regulatory outcomes that the provisions aim to achieve;
- (b) whether there are any precedents where the DFSA has previously granted relief, or not granted relief, from the provisions in question; and
- (c) if so, any similarities and differences between the cases where relief has previously been granted and the applicant's case.

9-3-6 In the application, the applicant will need to:

- (a) set out the reasons for requesting the granting of a waiver or a modification;
- (b) explain the impact of the application of the provisions as it stands on the applicant;
- (c) attach any precedent relief supporting the application which may have been issued;
- (d) identify any risks associated with the relief being sought and how the applicant plans to mitigate such risks; and
- (e) in the case of an application to modify a provision, propose wording for the modification.

9-3-7 The reasons stated by the applicant need to show a compelling case for the granting of the relief, as the DFSA does not grant relief lightly. The determination of a waiver or modification is at the discretion of the DFSA and it will generally only grant relief where there is shown to be an appropriate and justifiable reason for doing so.

9-3-8 On occasion, the DFSA may believe that the relief being sought by an applicant may be relevant to, and should be applied to, a large number of persons. In these circumstances instead of requiring the relevant persons to apply for the relief, the DFSA will publish the relief on the homepage of its website and invite the relevant persons to "consent" to the waiver or modification. This is simply done by notifying the DFSA that they wish the notice to apply in relation to their activities.

9-4 CONSIDERING AN APPLICATION

9-4-1 The DFSA will acknowledge an application for relief and may request further information. The time taken by the DFSA to determine the application will depend upon the issues it raises.

9-4-2 It is unlikely that the DFSA will waive the following Rules:

- (a) Rules in GEN chapters 2, 3, 4 and 8;
- (b) Rules in COB chapter 4 and section 7.2; and
- (c) Rules in AML chapters 4 to 7.

However, modification of some of the above mentioned Rules may be possible.

9-4-3 When considering an application, the DFSA attempts to weigh the net regulatory benefit or detriment which would flow from granting the sought relief on the conditions proposed. The DFSA will generally grant relief where:

- (a) it considers that there is a net regulatory benefit; or

- (b) the regulatory detriment is minimal as the relief sought does not conflict with the policy intent of the Rule and the associated risks are adequately mitigated.

9-4-4 Relief will be given to overcome the disproportionate effects of provisions in exceptional cases, the anomalous effects of old provisions in novel cases for which they were not designed, and the unintended side effects of provisions.

For example, it may simply be the case that an applicant, such as an Authorised Firm, needs more time in which to implement certain procedures or to carry out specified tasks. This commonly arises when new Rules are introduced requiring, for example, Authorised Firms to introduce new procedures or to carry out due diligence on financial products.

9-4-5 All applications for waivers and modifications are handled by the Rules and Waivers Committee (RAWC). The objective of the RAWC is to consider and determine applications to waive or modify Rules and provisions of the Markets Law 2012.

9-4-6 The legal standing of the RAWC's work is that the committee does not itself grant waivers or modifications. The committee's role is to consider applications and to make recommendations to the Chief Executive, or his delegate, either to approve or to reject applications for proposed waivers and modifications.

9-4-7 The Chief Executive, or his delegate, may then in relation to waivers or modifications of Rules exercise his power under Article 36(e) of the Regulatory Law 2004 or, in relation to waivers or modifications of Articles of the Markets Law 2012, exercise his powers under Article 36(f) of the Regulatory Law 2004 and issue a notice.

9-4-8 In some cases the RAWC may determine that waivers or modifications should be standardised, that is, made available to any applicant meeting certain criteria. An example of standard relief given is a waiver of the prudential requirements in Chapters 4, 6 and 7 of the PIN Module that would otherwise apply to an Insurer operating as a Branch. Where standard relief is given, the DFSA will consider at the appropriate time whether the relevant Rule or Rules should be amended, so that standard relief need no longer be applied for.

9-4-9 The DFSA may impose conditions on the relief, for example, of additional reporting requirements, and a notice may be given for a specified period of time, after which time it will cease to apply.

9-4-10 If the DFSA decides not to grant relief, it will give reasons for the decision. An applicant may withdraw its application for relief at any time up until the giving of the notice. In doing so, the applicant should give reasons for the withdrawing of the application.

9-5 PUBLICATION OF WAIVERS AND MODIFICATIONS

9-5-1 The DFSA is required to publish all notices concerning waivers and modifications unless it is satisfied that it is inappropriate or unnecessary to do so⁴⁸.

9-5-2 The DFSA will publish a notice in such a way as it considers appropriate for bringing the notice to the attention of:

- (a) those likely to be affected by it; and

⁴⁸ Article 25(4) of the Regulatory Law 2004.

- (b) others who may be likely to become subject to a similar notice.

9-5-3 The principal method of publication of waivers and modifications is by publication on the DFSA website [here](#). The fundamental principle behind publication is transparency. This allows any person dealing with the applicant, for example, its clients and competitors, to know to what extent the relevant legislation applies to the applicant.

9-5-4 If an applicant believes that it is inappropriate or unnecessary for the DFSA to publish the relief, or to publish it after a delay, or without disclosing the identity of the applicant, it should make this clear in its application.

9-6 WITHDRAWAL OR VARIATION OF WAIVERS AND MODIFICATIONS

9-6-1 Under Article 25(5) of the Regulatory Law 2004, the DFSA may:

- (a) on its own initiative, or on the application of the person to whom it applies, withdraw a written notice of relief; or
- (b) on the application of, or with the consent of, the person to whom it applies, vary a written notice of relief.

9-7 ENFORCEMENT OF WAIVERS AND MODIFICATIONS

9-7-1 If a notice of relief directs that a provision is to apply to the applicant with modifications, then a contravention of the modified provision could lead to the DFSA taking enforcement action.

9-7-2 If relief is given subject to a condition, the relief will not apply to activities conducted in breach of the condition and those activities, if in breach of the original provision, could lead to enforcement action.

9-8 EXPIRY AND EXTENSION OF CURRENT WAIVERS AND MODIFICATIONS

9-8-1 Where relief has been granted for a limited period of time (see paragraph 9-4-9) it is the responsibility of the person, to whom the notice applies, to monitor any expiry date.

9-8-2 There is no automatic renewal process for any relief granted by the DFSA for a limited period of time.

9-8-3 It is the responsibility of the person, to whom the notice applies, to notify the DFSA at least two weeks in advance of a notice expiry of their intention to apply for an extension of the relief or explain how they intend to comply with the original provision.

9-8-4 Notification should be made through the same contact point as described in 9-3-3 and 9-3-4, namely either your usual DFSA supervisory contact, the dedicated contact portal or the general enquiries form on the DFSA website.

9-8-5 The DFSA will consider every application for extension of relief in the same manner as an initial application and will not necessarily grant extensions as a matter of course.

10 PERMISSIBLE COMPANY AND TRADING NAMES FOR ENTITIES ESTABLISHED IN THE DIFC

10-1 INTRODUCTION

10-1-1 This chapter sets out the DFSA's policy on the names that Applicants, Authorised Firms, Funds and other entities established in the DIFC should use.

10-1-2 This chapter also sets out the DFSA policy on approving applicants' use of particular names in the DIFC, and when the DFSA will use its prohibition power to prohibit an Authorised Firm, Fund or other entity established in the DIFC from using a name which is contrary to the DFSA's policy.

10-1-3 This chapter is structured as follows:

- (a) Section 10-2 sets out the purpose and scope of the chapter, including who it applies to;
- (b) Section 10-3 explains some of the guiding principles behind the policy;
- (c) Section 10-4 explains the source of the DFSA powers in relation to names of firms;
- (d) Section 10-5 describes the DFSA's general policy on the use by firms of the words "bank", "insurance" and "trust";
- (e) Section 10-6 describes the exceptions to the general policy set out in section 10-5;
- (f) Section 10-7 describes the DFSA policy on other matters such as the use of the words "investment bank", "fund" or "Islamic" and on the use of trading names;
- (g) Section 10-8 sets out the DFSA policy on the use of its power to prohibit the use of a particular name by an Authorised Person or a Fund; and
- (h) Section 10-9 sets out the DFSA policy on giving consent to the use of certain names by unregulated entities.

10-2 PURPOSE AND SCOPE OF THE DFSA'S NAMING POLICY

10-2-1 This policy aims to ensure that entities operating in or from the DIFC use names that are fair and clear so as not to mislead consumers. Naming conventions for Authorised Firms are an important element of consumer protection.

10-2-2 This policy is aimed primarily at entities which are authorised to carry on a Financial Service, which include applicants for Authorisation, or others which otherwise fall within the DFSA regulatory perimeter e.g. funds and trusts (referred to collectively as "firms" in this chapter). However, this policy will also be relevant to unregulated entities to the extent that such a person uses a name that suggests, or could suggest, that the person is authorised to carry on a Financial Service.

10-2-3 This policy applies to any entity in the DIFC that uses or proposes to use in its business name or trading name:

- (a) the word "bank" or any of its derivatives;
- (b) the word "insurer" or any of its derivatives;
- (c) the word "trust" or any of its derivatives;

- (d) any other words connected to financial services;
- (e) any other words which suggest that it is authorised to carry on a Financial Service; and
- (f) any other words that are misleading in light of its actual business activities.

10-2-4 Any reference in this policy to words used in names, such as “bank” or “insurance” includes their derivations, regardless of the language used, unless expressly stated otherwise.

10-3 GUIDING PRINCIPLES

10-3-1 The DFSA has considered and adopted international best practice in formulating this policy. In particular the DFSA has considered the international standards promulgated by the Basel Committee on Banking Supervision in its Core Principles for Effective Banking Supervision. These principles require financial services regulators to control the use of specific words related to the conduct of banking business. The key requirement is set out under “Principle 4”:

“The permissible activities of institutions that are licensed and subject to supervision as banks are clearly defined and the use of the word “bank” in names is controlled”;

10-3-2 The DFSA adopts a similar policy approach for entities which use the word “insurance” or “trust” in their name and for the general use of names connected to financial services which may be misleading to consumers. This is to ensure consistency across industry sectors and to reflect the standards set out in the DIFC Companies Regulations.

10-4 RELEVANT LAWS AND REGULATIONS

10-4-1 In the DIFC, a company, general partnership or limited liability partnership must seek the approval of the Registrar to the use of a particular name. The Registrar also has a very broad power to direct such persons to change their name if the name by which the person is registered is “*misleading, conflicting or otherwise undesirable*” (see for instance Article 19 of the DIFC Companies Law).

10-4-2 Additionally, the DIFC Companies Regulations (COR) contain, in COR 2.3.2, a requirement to seek the prior approval of the DFSA if their proposed name contains:

- “(i) the word ‘bank’, ‘insurance’ or ‘trust’;*
- (ii) words which suggest that it is a bank, an insurance company or trust company; or*
- (iii) words which suggest in some other way that it is authorised to carry on a Financial Service within the DIFC.”*

10-4-3 Regulation 2.2.2 of both the General Partnership Regulations and the Limited Liability Partnership Regulations contain an identical rule.

10-4-4 Under Article 75(1)(a)(iv) of the Regulatory Law 2004, the DFSA has a power to prohibit an Authorised Person from “*using a particular name or description in respect of the Authorised Person*”. Under Article 75(1)(a)(v) of the Regulatory Law, the DFSA can also prohibit an Authorised Person from “*using a particular name for a Fund or sub-fund of a Fund*”.

10-4-5 The DFSA can also exercise the Registrar’s powers under DIFC laws and regulations when acting as the Registrar’s delegate.

10-5 THE GENERAL POLICY ON USE OF THE WORDS “BANK”, “INSURANCE” AND “TRUST”

10-5-1 Any applicant for incorporation or registration in the DIFC needs to seek DFSA consent to the use of certain names, including names which use the words “bank”, “insurance” or “trust”. The DFSA will generally consent to the use of a particular name if the use of the name would not be misleading. The DFSA will generally look at substance over form when considering requests to use a particular name.

10-5-2 The basis upon which the DFSA would consider a business name to be misleading would include:

- (a) where the use of a name is misleading because it does not accurately describe the actual activities of the firm; or
- (b) where the use of a name is misleading because it implies that the firm has a particular status that it in fact does not have.

“Bank”

10-5-3 The DFSA considers that if a firm name includes the word “bank” this can be misleading if the business does not, in fact, have the appropriate licence to carry out any banking activities. It may also mislead actual or potential clients about the quality and quantity of the firm’s financial resources. The word “bank” also suggests that the firm may benefit from the protections afforded to banking customers by a depositor protection scheme or an express or implied government guarantee.

10-5-4 The DFSA policy approach set out above is the same, irrespective of whether a business uses a derivative word such as “banking”, “banker”, “investment bank/banking”, “merchant bank/banking”, “commercial bank” or “private bank/banking”. The word “Bank” is defined in the DFSA Rulebook, Glossary Module (GLO) as:

“An Authorised Firm which holds a Licence authorising it to carry on the Financial Services of Accepting Deposits”

10-5-5 The DFSA will, therefore, only permit a firm to use the word “bank” or any of its derivatives if the firm holds a Licence to Accept Deposits and/or Manage a Profit Sharing Investment Account on an Unrestricted basis. There are exceptions to this general policy, which we set out below in section 10-6.

“Insurance” and “Trust”

10-5-6 The same general principles in 10-5-2 (a) and (b) apply to the use of the words “insurance” and “trust” and any of their derivatives such as “insurer”, “reinsurance”, “reinsurer”, “insurance/reinsurance company”, “insurance/reinsurance broker”, “trustee”, or “trust company”.

10-5-7 In the case of the use of the word “insurance” in a firm name, it should be noted that “Insurance Business” is defined in GLO as:

“The business of Effecting Contracts of Insurance or Carrying Out Contracts of Insurance, including effecting or carrying out contracts of reinsurance (as reinsurer).”

10-5-8 The DFSA will, therefore, only permit a firm to use the word “insurance” or any of its derivatives if the firm holds a Licence to Effect Contracts of Insurance or Carry Out Contracts of Insurance. There are exceptions to this general policy which we set out below in section 10-6.

10-6 EXCEPTIONS TO THE GENERAL POLICY

Branches of non-DIFC companies and partnerships

10-6-1 An exception to the general policy on the use of the terms “bank” and “insurance” set out in section 10-5 above is where the relevant firm is a Branch of a non-DIFC licensed bank or insurance company.

10-6-2 For example, if a firm is a Branch of a bank, which is licenced as a bank in its home state jurisdiction, because the Branch is the same legal entity as its Head Office, it is in fact itself a bank. However, such firms should use their Head Office name with added words which describe their legal status. This is to ensure that the name does not mislead in any way. For example, the Head Office of ABC Bank PLC may call its DIFC Branch “*ABC Bank PLC (DIFC Branch)*”.

10-6-3 The above policy would apply even if the DIFC Branch is not authorised to Accept Deposits. However, the Head Office’s licence in its home state must include authorisation to Accept Deposits or the equivalent local financial service if the firm wishes to use the word “bank” in its name in the DIFC. In other words, if the name of the Head Office includes the word “bank” but the Head Office is not in fact permitted to Accept Deposits, the DIFC Branch will not be permitted to use the word “bank” in its name or would be required to follow the policy set out in paragraphs 10-6-4 to 10-6-6 below.

DIFC-incorporated companies and partnerships

10-6-4 A further exception to the general policy on the use of the terms “bank” and “insurance” set out in section 10-5 above applies to a Domestic Firm. The DFSA would permit a Domestic Firm, whose immediate parent is a Bank or Insurer, to refer to the parent’s name in its name, provided that the name is not actually or potentially misleading.

10-6-5 In order to not be misleading, the DFSA would expect the firm to append words to their parent’s name which describe the firm’s DIFC activities. For example, assuming that ABC Bank PLC has a DIFC subsidiary which is a Category 3C firm, the DFSA would accept the name “*ABC Bank Asset Management Limited*” for the firm.

10-6-6 For the avoidance of doubt, if the DIFC entity does not itself hold a Licence to Accept Deposits, it will not be able to use the name of its parent (which is a bank) without some qualification.

10-6-7 In some cases, a firm’s immediate parent may be an intermediate company. In such cases, provided that the intermediate company is not an operating company (for example, because it has been established to hold the Group’s Middle East subsidiaries or because it was established for tax purposes) the firm may refer to the intermediate company’s parent’s name in their name, provided that the name does not mislead in any way.

10-6-8 For example, assuming that ABC Bank PLC has a subsidiary, ABC Bank Middle East Holdings Ltd, which was established to hold ABC Bank PLC’s Middle East subsidiaries, a

Category 3C DIFC subsidiary of ABC Bank Middle East Holdings Ltd could use the name “ABC Bank Asset Management Limited”.

10-6-9 The examples above would apply equally to insurance companies and intermediaries. In particular, the DFSA would expect an insurance broker or other intermediary which uses the word “insurance” in its name to ensure that its name adequately describes its permitted activities by, for example, appending the word “broker” in the name. The use of the word “insurance” by an insurance intermediary without further description could be misleading; consumers might assume that the firm is an insurer which benefits from a strong capital base.

10-7 OTHER MATTERS

Investment, Merchant or Private Bank

10-7-1 The DFSA considers that firms which include the words “investment bank” in their name pose less risk of misleading the consumers because the concept of an investment bank is less closely associated with deposit taking. Historically, the DFSA has permitted a firm to use the words “investment bank” in its name (in the absence of the firm having a Deposit Taking authorisation) provided that the firm’s activities involve what would commonly be described as investment banking activities. The DFSA considers that investment banking activities would generally include Dealing as Principal in combination with one or more of Providing Credit, and Advising or Arranging on Financial Products or Credit.

10-7-2 When assessing whether a firm is undertaking investment banking activities, the DFSA will adopt a substance over form approach. As a general rule, the DFSA would not consider that a Prudential Category 4 firm is undertaking investment banking activities. The DFSA would adopt the same general policy to the use of the words “merchant bank” or “private bank” in an Authorised Firm’s name.

Fund

10-7-3 The DFSA naming policy for entities which use the word “fund” in their name, including a Fund, adopts the same fundamental principle as that described in section 10-5 above. When considering whether the name of a Fund is appropriate, or whether to permit an entity which is not a Fund to use the word “fund” in its name, the DFSA will adopt a substance over form approach and in particular will consider whether the use of a name is misleading because the name:

- (a) does not accurately describe the actual activities of the firm or Fund; or
- (b) implies that the entity has a particular status that it, in fact, does not have.

10-7-4 An example of a misleading name for a Fund would be where the name does not reflect the actual nature of the investments which the Fund invests in. So “ABC Emerging Markets Fund” would not be an appropriate name for a Fund that does not in fact invest in emerging markets investments. CIR Rule 7.1.4, and the subsequent Guidance, provide further information on what is and is not permissible as regards the name of a Domestic Fund.

Islamic firms

10-7-5 Where a firm uses the word “Islamic” in its name, the DFSA would expect the firm to have an endorsement on its Licence to carry out Islamic Financial Business as an Islamic Financial Institution or by way of an Islamic Window.



Representative offices

10-7-6 An Authorised Firm which is a Representative Office must be a Branch. Therefore, it will generally take the name of its Head Office. However, in order not to mislead consumers, the DFSA will require a Representative Office to ensure that its name adequately describes the very restrictive nature of its Licence e.g. “*ABC Bank DIFC (Representative Office)*”.

Trading names

10-7-7 The DFSA naming policy for firms applies to any trading names used by firms and would also apply to any name used by a firm to describe a particular capability or division of the firm, including on the firm’s website or in brochures. For example, the DFSA would consider it misleading if a Prudential Category 4 firm stated on its website that it has an “investment banking” or “asset management” division in the DIFC.

10-8 USING THE PROHIBITION POWER

10-8-1 Article 75(1)(a)(iv) of the Regulatory Law 2004 permits the DFSA to prohibit an Authorised Person from using a particular name or description in relation to its business. It is a strong power that the DFSA will use if it considers that a prohibition is necessary in order to ensure customers, Authorised Persons or the financial system are not adversely affected.

10-8-2 Before deciding whether to use of the Article 75(1)(a)(iv) power, the DFSA will generally try to resolve any concerns that it has with an Authorised Person’s name using informal channels, and would generally seek a voluntary undertaking by the firm to change its name. However, in urgent cases, the DFSA may use the prohibition power without, or with very little, prior notice in accordance with paragraph 4(7) of Schedule 3 of the Regulatory Law 2004.

10-8-3 Ordinarily, if the DFSA has concerns about an Authorised Person’s name, trading name or business description, it will write to the person explaining its concerns about the particular name and will provide the firm with a period in which to respond to its concerns. If, following receipt of any response, the DFSA remains dissatisfied with the continued use of the particular name, the DFSA will write to the firm and ask the firm to agree to cease using the name. The DFSA will give the person a reasonable period of time in order to change their name. If the person does not agree to change their name or continues to use the name after the time allowed to change the name, the DFSA will use Article 75(1)(a)(iv) of the Regulatory Law in order to prohibit the use of the name. Where a person refuses to comply with an Article 75(1)(a)(iv) notice, the DFSA would generally seek to enforce the notice in the DIFC Court under Article 92 of the Regulatory Law.

10-8-4 The DFSA would take this naming policy into consideration when deciding whether to use its Article 75(1)(a)(iv) power and, in particular, relevant factors that it would consider prior to using the power would include:

- (a) whether the Authorised Person holds the required DFSA Authorisations to carry on the relevant Financial Services;
- (b) the extent to which the Authorised Person’s name or description reflects the substance of the firm’s Financial Services activities in or from the DIFC;

- (c) whether the use of certain words could mislead the public into thinking that the Authorised Firm is operating a banking or insurance business in or from the DIFC when the firm is not; and
- (d) whether the use of certain words could otherwise mislead consumers about the Authorised Person's activities in or from the DIFC.

10-8-5 The DFSA will adopt a similar process and approach when deciding to use its Article 75(1)(a)(v) power in relation to a Fund.

10-8-6 When the DFSA exercises its Article 75(1)(a)(v) power in relation to an Authorised Person, the person may refer the matter to the Financial Markets Tribunal for review.

10-9 UNREGULATED ENTITIES

10-9-1 Where DFSA consent to the use of a particular name is sought by an unregulated entity, the DFSA will only consent to the use of the name if it is reasonably satisfied that the name does not suggest in some way that the person is authorised to carry on a Financial Service in or from the DIFC. Where the DFSA considers that a person in the DIFC, which is an unregulated entity, has a name that uses words which suggest in some way that the person is authorised to carry on a Financial Service in or from the DIFC, the DFSA will write to the person and ask them to cease using the name. The DFSA will give the person a reasonable period of time in order to change their name. If the person continues to use the name after the time allowed to change the name, the DFSA will use legal means to stop the person using the name.