

## Annex A

In this annex underlining indicates new text and striking through indicates deleted text.

N.B. This consultation paper and these regulations are made for the purposes of the new Companies Law 2018 (which is to come into force Q3 2018 and, is administered by DIFCA and the Registrar of Companies). Accordingly, the proposals in this Annex A are being consulted upon jointly by the DFSA and DIFCA.



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# Protected Cell Company (PCC) Regulations

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## **Protected Cell Companies (PCC) Regulations**

### **CONTENTS**

The contents of this module are divided into the following chapters, sections and appendices:

The Board of Directors of the DIFCA, in the exercise of the powers conferred on them under Articles 136 and 155 of the Companies Law 2018 hereby make these Regulations.

## **1. INTRODUCTION**

### **1.1 Application and interpretation**

#### **1.1.1 These Regulations apply to:**

- (a) a person making an application to incorporate a Protected Cell Company under the Law;
- (b) a Protected Cell Company;
- (c) if a protected Cell Company is a Fund, to the Fund Manager of that Company; and
- (d) an Officer of a Protected Cell Company.<sup>1</sup>

#### **1.1.2 Capitalised terms are defined terms in:**

- (a) the Law or Regulations made under the Law;
- (b) the Regulatory Law 2004;
- (c) the Collective Investment Law 2010 and Rules made under that law; and
- (d) the Insolvency Law 2009 and Regulations made under that law.

#### **1.1.3 Where capitalisation of the initial letter is not used, an expression has its natural meaning, unless otherwise provided in Regulation 12.1.5 or the context requires otherwise.**

#### **1.1.4 These Regulations are referred to as the ~~Company~~ (PCC) Regulations.**

#### **1.1.5 (1) In these ~~Company~~ (PCC) Regulations, the following terms have, subject to (2), the following meanings:**

- (a) 'administrative receiver' has the meaning given in the Insolvency Law 2009;
- (b) a 'cell' is a cell created by a Protected Cell Company for the purpose of segregating and protecting cellular assets in the manner provided by these PCC Regulations;

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<sup>1</sup> The term Officer is now defined in the Companies Law 2018 to include directors.

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- (c) 'cell share capital' comprises the proceeds of the issue of cell shares;
- (d) 'cell shares' are Shares created and issued by a Protected Cell Company in respect of one of its cells pursuant to the provisions of section 12.9 the proceeds of the issue of which, the "cell share capital", shall be comprised in the cellular assets attributable to that cell;
- (e) a 'cell transfer order' is an order within the meaning given in section 12.20;
- (f) 'cellular assets' comprise the assets of the Protected Cell Company attributable to the Company's cells pursuant to Regulation 12.11.2;
- (g) a 'cellular dividend' is a dividend payable by a Protected Cell Company in respect of cell shares pursuant to the provisions of Regulation 12.9.4;
- (h) a 'Closed Ended Protected Cell Company' has the meaning given in Regulation 12.2.1(2)(b);
- ~~(i) 'Fund' and "Fund Manager" have the respective meanings given under the Collective Investment Law 2010;~~
- (i) 'Insolvency (PCC) Regulations' means the Regulations contained in chapter 8 of the Insolvency Regulations;
- ~~(k) 'Insurance Business' has the meaning given in the business rules made under the Regulatory Law 2004;~~
- (j) 'liquidator' has the meaning given in the Insolvency Law 2009;
- ~~(m) 'Managing a Collective Investment Fund' has the meaning given in the GEN module of the DFSA Rulebook;~~
- (k) a reference to a 'Shareholder' is, as the context requires, a reference to a holder of a Share or of a cell share;
- (l) 'non-cellular assets' are assets of a Protected Cell Company which are not cellular assets, pursuant to Regulation 12.11.4;
- (m) an 'Open Ended Protected Cell Company' has the meaning given in Regulation 12.2.1(2)(a);
- (n) 'Protected Cell Company' is a Company incorporated as, or converted into, a Protected Cell Company in accordance with the provisions of these PCC Regulations; and

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(o) 'receiver' has the meaning given in the Insolvency Law 2009.<sup>2</sup>

(2) Where an Umbrella Fund is formed as a Protected Cell Company for the purposes of the Collective Investment Law 2010, any references to the following terms in the Regulations must be read in relation to such a Fund as meaning, unless otherwise provided, as follows:

- (a) a reference to a "cell" as a reference to a Sub-Fund;
- (b) a reference to "cell share capital" as a reference to the proceeds of the issue of Units of a Sub-Fund;
- (c) a reference to "cell shares" as a reference to the Units issued by a Sub-Fund;
- (d) a reference to "cellular assets" as a reference to the Fund Property of a Sub-Fund;
- (e) a reference to a "cellular dividend" as a reference to a dividend payable by a Sub-Fund;
- (f) a reference to a Director of the Company as a reference to a Director of the Fund Manager of the Umbrella Fund;
- (g) a reference to "non-cellular" assets, as a reference to the assets of the Protected Cell Company which are not cellular assets of any particular Sub-Fund;
- (h) a reference to a Protected Cell Company as a reference to an Umbrella Fund; and
- (i) a reference to a "Sshareholder", unless the context requires otherwise, as a reference to a Unitholder of a Sub-Fund.

(3) In reference to an Umbrella Fund referred to in (2), any requirement applicable to a Protected Cell Company under these PCC Regulations is a requirement applicable to its Fund Manager, unless otherwise provided or the context requires otherwise.

~~In reference to an Umbrella Fund referred to in (2), any references to the terms Fund Manager, Governing Body, Unitholder or any other capitalised term has the meaning given to that term in the Collective Investment Law 2010 or any rules made for the purposes of that law.~~

**1.1.6** In accordance with Article 136(2)(b) of the Law, where there is any inconsistency between the provisions of:

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<sup>2</sup> We propose to remove some of the capitalised terms in the current text, such as 'Fund Manager' or 'Managing a Collective Investment Fund', in reliance on the draft Regulations 1.1.2 and 1.1.3.

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- (a) the DFSA administered legislation applicable to a Protected Cell Company; and
- (b) the Law and Regulations made thereunder,

the provisions in (a) shall prevail over the provisions in (b) and be taken to exclude, waive or modify the Law or Regulations to the extent of any such inconsistency, unless expressly provided otherwise or the context requires otherwise. ~~In accordance with Article 114 of the Law, and subject only to Regulations 1.1.4, where these Company (PCC) Regulations are inconsistent with any provision of the Law or the Companies Regulations, these PCC Regulations shall prevail and shall be taken to exclude, waive or modify the Law or Regulations to the extent of any such inconsistency.~~

**1.1.7** ~~For the avoidance of doubt, t~~he provisions of the Regulatory Law 2004, the Collective Investment Law 2010 and the Markets Law 2012,<sup>3</sup> and any Rules made for the purposes of those laws, continue to apply to an Umbrella Fund and its Fund Manager and any other person carrying on any function or service in relation to the Fund unless otherwise provided in these Regulations or the context requires otherwise.

**1.1.8** ~~In accordance with Article 114(2)(b) 136(2)(b) of the Law, the application of Article 51(1) and (2) 68(1) and (2) of the Law is modified in relation to its application to a Protected Cell Company formed solely~~ mainly for the purpose of conducting business of a Fund so as to permit such a Company to be managed by one director, which may be a body corporate its sole Corporate Director in accordance with the requirements in section 8.1A of the CIR module of the DFSA Rulebook.

## **1.2 Protected Cell Companies as a type of company**

- 1.2.1** (1) Subject to the provisions of these PCC Regulations and of the Law, a person may, pursuant to Article 114-136(1) of the Law:
- (a) incorporate a type of Company which shall be a Protected Cell Company either as an Open Ended Protected Cell Company or a Closed Ended Protected Cell Company; or
  - (b) convert, if so authorised by its Articles of Association and by a Special Resolution, an existing Company into an Open Ended Protected Cell Company or a Closed Ended Protected Cell Company,

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<sup>3</sup> An Umbrella Fund, if listed, is subject to the Markets Law 2012 and Rules made under that law, hence the proposal to include a reference to those legislation in this Regulation.

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subject to, and for the purposes of, the requirements in Regulation 12.4.1.

(2) For the purposes of these PCC Regulations:

(a) an Open ended Protected Cell Company is a Company whose Articles of Association comply with Regulation 12.3.3, provided that such a Company is incorporated as, or converted into, an Open Ended Protected Cell Company in accordance with the provisions of these Regulations; and

(b) a Closed Ended Protected Cell Company means a Protected Cell Company other than an Open Ended Protected Cell Company.

**1.2.2** A Protected Cell Company may create one or more cells for the purpose of segregating and protecting cellular assets in the manner provided by these PCC Regulations.

**1.2.3** A Protected Cell Company is a single legal person and the creation by a Protected Cell Company of a cell does not create, in respect of that cell, a legal person separate from the Company.

### **1.3 Name and Articles of Association of a Protected Cell Company**

**1.3.1** The name of a Protected Cell Company shall, without prejudice to the application of Articles 33 and 34 of the Law, include the expressions as provided below:

(a) in the case of a Closed Ended Protected Cell Company, the expression 'Protected Cell' or 'PCC'; and

(b) in the case of an Open Ended Protected Cell Company, the expression 'Open Ended' immediately preceding the expression 'Protected Cell Company' or 'PCC' referred to in (a).

**1.3.2** Each cell of a Protected Cell Company shall have its own distinct name or designation.

**1.3.3** (1) The Articles of Association of a Protected Cell Company shall state that it is an Open Ended Protected Cell Company with a variable share capital.

(2) The Articles of Association of an Open Ended Protected Cell Company shall contain a provision to the effect that its Ushareholders ~~are entitled to have their shares redeemed by the Fund Manager upon request at a price based on the net asset value of the property of the relevant cell~~ in to have their Sshares redeemed or repurchased by the Fund Manager, at a value calculated based on the net asset value of the

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Fund Property in the manner provided in section 8.6 of the CIR module of the DFSA Rulebook.<sup>4</sup>

- 1.3.4** A Company may, in order to comply with Regulation 12.3.3, alter its ~~a~~Articles of Association by Special Resolution.

### 1.4 Permissible uses and DFSA consent

- 1.4.1** (1) A Company shall not be incorporated as, or operate as, a Protected Cell Company, and an existing Company shall not be converted into, or operate as, a Protected Cell Company, unless:
- (a) the Company is formed, and will operate, for the purpose of conducting Insurance Business or the business of a Fund; ~~and~~
  - (b) the requirements under paragraphs (2), (3) and (4) are met; and
  - ~~(c)~~(b) the DFSA has given its prior written consent.
- (2) A Protected Cell Company formed for the ~~sole~~ main<sup>5</sup> purpose of conducting Insurance Business shall be formed as a Closed Ended Protected Cell Company.
- (3) A Protected Cell Company formed for the ~~sole~~ main<sup>6</sup> purpose of conducting the business of an Umbrella Fund shall be formed as an Open Ended Protected Cell Company.
- (4) An Umbrella Fund referred to in (3) that is, or intends to be:
- (a) a Public Fund, shall be registered as a Public Company; and
  - (b) an Exempt Fund or Qualified Investor Fund, shall be registered as a Private Company.<sup>7</sup>
- 1.4.2** Where under Regulation 12.4.1(1)(c) the DFSA grants consent following any representations from an applicant as to the proposed activities or objectives of the Protected Cell Company, including any such representations in a business plan, the Protected Cell Company must not carry out any activity or pursue any objective contrary to the effect of those representations without obtaining the further prior written consent of the DFSA.

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<sup>4</sup> Proposed amendment better aligns the language in this Regulation with the redemption provisions in CIR.

<sup>5</sup> This is in line with the conversion of 'sole' purpose test to 'main' purpose test for Funds.

<sup>6</sup> See above.

<sup>7</sup> This change results from the prohibition now included in the Collective Investment Law following CP 115 proposals.

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**1.4.3** An application for consent under Regulation 12.4.1(1)(c) ~~12.4.1(1) or 12.4.2~~ shall be made in such manner as the DFSA may direct.

**1.4.4** ~~The DFSA may, in its absolute discretion, refuse to grant its consent under Regulation 1.4.1(1) or 1.4.2. The DFSA may only grant its consent, under Regulation 12.4.1(1)(c), where it is satisfied that the requirements under these PCC Regulations and under other applicable legislation administered by it are met by the applicant.~~

**1.4.5** Without limiting any requirement to which a Protected Cell Company may be subject under other legislation applicable in the DIFC, a Protected Cell Company, and if it is an Umbrella Fund, its Fund Manager, must provide written notice to the DFSA of:

- (a) any proposed alteration to the company's Articles of Association;
- (b) any proposed reconstruction or merger involving the company;
- (c) any proposal to appoint a cell receiver, or to appoint a receiver or administrative receiver, or to wind up the affairs of the company;
- (d) any proposal to replace a Director of the company, to appoint any additional Director or to decrease the number of Directors;
- (e) if the company is an Umbrella Fund, its Fund Manager; and
- (f) any event or circumstance which may materially adversely affect the fitness and propriety of a Director to act as such.

**1.4.6** Effect must not be given to any proposal in Regulation 12.4.5 unless the DFSA has given written approval to the proposal.

**1.4.7** If the DFSA refuses to grant:

- (a) consent under Regulation [~~12.4.1(1)(c)]~~12.4.1(1) or 12.4.2~~; or~~
- (b) approval under Regulation [12.4.6],

the DFSA shall, without undue delay, inform the applicant in writing of such refusal ~~and, where requested by the applicant, the reasons for such refusal.~~ The procedures under App 2 apply to such a decision.

**1.4.8** In accordance with Article 297(2)(j) of the Regulatory Law 2004, the Financial Markets Tribunal has jurisdiction to hear and determine any referral appeal where:

- (a) an applicant refers ~~appeals against~~ a decision of the DFSA in relation to an application for consent under Regulation ~~12.4.1(1) or 12.4.2~~ 1.4.1(1); or

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- (b) an applicant ~~refers~~ ~~appeals against~~ a decision of the DFSA in relation to an application for approval under Regulation 12.4.6.

### 1.5 Incorporation of, or conversion into, a Protected Cell Company

**1.5.1** An application for the incorporation of a Company as a Protected Cell Company shall be made by:

- (a) the filing of an application to the Registrar in accordance with Article 44 10 of the Law and applicable Regulations or otherwise in such form and manner, and accompanied by such documents and information, verified in such manner, as the Registrar may require; and
- (b) the submission to the Registrar of a copy of any consent of the DFSA given under Regulation 12.4.1(1).

**1.5.2** An application for the conversion of an existing Company into a Protected Cell Company shall be made by:

- (a) the filing of an application to the Registrar in such form and manner, and accompanied by such documents and information, verified in such manner, as the Registrar may require;
- (b) the submission to the Registrar of the Company's Articles of Association with such amendments as may be necessary to facilitate the conversion of the Company into a Protected Cell Company;
- (c) the submission of a copy of the Company's Special Resolution approving any such change to its Articles of Association and the conversion of status of the Company to a Protected Cell Company; and
- (d) the submission of a copy of any consent of the DFSA given under Regulation 12.4.1(1).

**1.5.3** An application made under Regulation 12.5.1 or 12.5.2 shall be accompanied by the appropriate fee prescribed in App1.

### 1.6 Withdrawal of the DFSA consent

**1.6.1** The DFSA may revoke its consent to operate a Protected Cell Company if it appears to it that:

- (a) any requirement for the continuation of the consent is no longer satisfied;
- (b) the Company or any Director of the Company, and if it is an Umbrella Fund, its Fund Manager:

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- (i) has contravened any requirement under the Law or these PCC Regulations;
  - (ii) has contravened any requirements applicable to the Company under the Regulatory Law 2004, Collective Investment Law 2010 or rules made under those laws;
  - (iii) has failed to comply with a condition or restriction in relation to the grant of consent; or
  - (iv) has, in purported compliance with any such requirement or any such condition or restriction, knowingly or recklessly given the DFSA or ~~to~~ the Registrar information which is false or misleading in a material particular;
- (c) no activity relevant to the grant of the consent has been carried on in relation to the Company for the previous 12 months; or
- (d) it is in the interests of the DIFC to revoke the consent in order to protect the interests of shareholders or creditors, or potential shareholders or creditors, of the Company.

**1.6.2** For the purposes of Regulation 12.6.1(d), the DFSA may take into account any relevant matter, including those relating to or affecting:

- (a) the Company, and if it is an Umbrella Fund, its Fund Manager;
- (b) any person employed by or associated with the Company, or the Fund Manager;
- (c) any Director of the Company;
- (d) any person exercising influence over any Director of the Company;
- (e) any body corporate in the same group as the Company;
- (f) any Director of a body corporate referred to in (e);
- (g) any person exercising influence over a body corporate referred to in (e);  
or
- (h) the interests of a Sshareholder or creditor.

**1.6.3** Before revoking any consent, the DFSA will consider whether any necessary and appropriate steps have been taken to secure one or more of the following under the Insolvency (PCC) Regulations:

- (a) a cell receivership order in relation to one or more cells;
- (b) appointment of a receiver or administrative receiver to the Company; or

(c) the winding up of the Company.

**1.6.4** Upon deciding to revoke its consent, the DFSA will, without undue delay, inform the Company in writing of such revocation. The procedures in App 2 apply to such a decision.

**1.6.5** In accordance with Article ~~297(2)(j)~~ of the Regulatory Law 2004, the Financial Markets Tribunal has jurisdiction to hear and determine any referral ~~appeal~~ where a Protected Cell Company ~~appeals against~~ refers a decision of the DFSA to revoke its consent under this section.

## **1.7 Directions by the DFSA**

**1.7.1** The DFSA may give a direction to a Protected Cell Company and any of its Directors and, if the Protected Cell Company is an Umbrella Fund, to its Fund Manager, under this section 12.7 if it appears to the DFSA that:

- (a) any requirement for the continuation of the DFSA's consent is no longer satisfied;
- (b) the Company or any of its Directors, or its Fund Manager, as is relevant:
  - (i) has contravened any requirement imposed by or under the Law or the Regulations;
  - (ii) has failed to comply with a condition or restriction in relation to the grant of consent; or
  - (iii) has, in purported compliance with any such requirement or any such condition or restriction, knowingly or recklessly given the DFSA or the Registrar information which is false or misleading in a material particular; or
- (c) it is desirable and in the interest of the DIFC to revoke the consent.

**1.7.2** Without limiting the generality of Regulation 12.7.1, a direction under this section 12.7 may:

- (a) require the ~~Company~~ the Fund Manager to cease the issue or redemption, or both the issue and redemption, of cell shares or any class of cell shares in an Umbrella Fund; or
- (b) require the Company or any Director of the Company, or the Fund Manager, as the case may be, to present a petition to the Court to:
  - (i) make a cell receivership order in relation to one or more cells;

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- (ii) make an order or orders for the appointment of a receiver or administrative receiver to the Company; or
- (iii) make an order or orders for the winding up of the Company;

under the Insolvency (PCC) Regulations.

**1.7.3** Subject to Regulation 12.7.4, if the DFSA revokes its consent, such revocation does not affect the operation of any direction given under this section 12.7 which is then in force. The DFSA may give further directions under this section 1.7 in relation to a Company where the DFSA consent has been revoked, if a direction under this section was already in force at the time of the revocation.

**1.7.4** If a cell receivership order, an order appointing a receiver or administrative receiver, or a winding up order, has been made by the Court, no direction under this section is to take effect in relation to the Company concerned.

**1.7.5** The DFSA may, on its own initiative, or on the application of the Company or the Fund Manager, as the case may be, revoke or vary a direction given under this section if it appears to the DFSA:

- (a) in the case of revocation, that it is no longer necessary for the direction to take effect or to continue in force; or
- (b) in the case of variation, that the direction should take effect or continue in force in a different form.

**1.7.6** A direction takes effect:

- (a) immediately, if the notice states that that is the case; or
- (b) on such date as may be specified in the notice.

**1.7.7** If the DFSA proposes to give a direction under this section on its own initiative, ~~or gives such a direction with immediate effect, it will give written notice to the Company~~ the procedures in App 2 apply to the decision to give such a direction.

**1.7.8** The notice will:

- (a) ~~give details of the direction;~~
- (b) ~~inform the person to whom it is given as to when the direction takes effect;~~
- (c) ~~state the DFSA's reasons for giving the direction and for its determination as to when the direction takes effect; and~~
- (d) ~~inform the person to whom it is given that he may make representations to the DFSA within such period as may be specified in the notice.~~

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**1.7.9** ~~If, having considered any representations made by a person to whom the notice was given, the DFSA decides:~~

- ~~(a) to give, or not to give, the direction in the way proposed;~~
- ~~(b) to give the direction in a way other than proposed; or~~
- ~~(c) if the direction has been given, to revoke, or not to revoke, the direction;~~

~~it will give written notice to the Company and, where requested by the Company, the reasons for such decision.~~

**1.7.10** In accordance with Article ~~297(2)(j)~~ of the Regulatory Law 2004, the Financial Markets Tribunal has jurisdiction to hear and determine any referral appeal where a Protected Cell Company or a Director of the Company, or the Fund Manager, as the case may be, refers ~~appeals against~~ a decision of the DFSA made under this section 12.7 in relation to a direction.

## 1.8 Applications to the Court

**1.8.1** This section 12.8 applies if the DFSA could give a direction, or has given a direction, under Regulation 12.7.1, in relation to a Protected Cell Company.

**1.8.2** The Court may, on application of the DFSA under this section 12.8, make one or more of the following orders:

- (a) an order removing any Director of the Company and replacing any such person with a person or persons nominated by the DFSA or as the Court may consider appropriate;
- (b) an order removing the Fund Manager of the Company and replacing that manager with an appropriately licensed Fund Manager nominated by the DFSA or by the Shareholders of the Fund;
- (c) a cell receivership order, an order appointing a receiver or administrative receiver, or an order for the winding up of the Company, pursuant to the Insolvency (PCC) Regulations; or
- (d) any other order as the Court thinks fit.

**1.8.3** The DFSA will:

- (a) give written notice of the making of an application under this section to:
  - (i) the Company or the Fund Manager in the case of an Umbrella Fund; and;
  - (ii) where the application seeks the removal of any Director of the Company, that individual ~~Director~~; and

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- (b) take such steps as it considers appropriate for bringing the application to the attention of the Sshareholders of the Company.

**1.8.4** The Court may, on application of a person who is subject to a direction under section 12.7, make any orders it thinks fit in relation to the making of the direction, including, but not limited to, orders:

- (a) revoking the direction;
- (b) varying the direction;
- (c) requiring the direction to be complied with in a manner that the Court considers appropriate; or
- (d) requiring the DFSA to do any act or thing.

## **1.9 Cell shares, and share capital and cellular-dividends**

**1.9.1** Unless the context requires otherwise, for the purposes of application of the Law and Regulations to a Protected Cell Company, a reference to a share is taken to include a reference to a cell share.

**1.9.2** A Protected Cell Company may, in respect of any of its cells, create and issue cell shares. The cell share capital shall ~~be comprised in~~ the cellular assets attributable to the cell in respect of which the cell shares were issued.

**1.9.3** The proceeds of the issue of Shares other than cell shares created and issued by a Protected Cell Company shall ~~be comprised in~~ the Company's non-cellular assets.

**1.9.4** A Protected Cell Company may pay cellular dividends in respect of cell shares.

**1.9.5** (1) In the case of a Protected Cell Company conducting Insurance Business, ~~c~~Cellular dividends may be paid in respect of cell shares by reference only to the cellular assets and liabilities, or the profits and losses, attributable to the cell in respect of which the cell shares were issued. When determining whether or not profits are available for the purpose of paying a cellular distribution under Article ~~426~~8 of the Law, no account need be taken of:

- (a) the profits and losses, or the assets and liabilities, attributable to any other cell of the Company; or
- (b) non-cellular profits and losses, or assets and liabilities.

(2) In the case of an Umbrella Fund, cellular dividends may be paid in respect of cell shares by reference only to the cellular assets and liabilities, or the profits and losses, attributable to the cell in respect of

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which the cell shares were issued, in accordance with the dividend distribution policy of the Umbrella Fund as set out in its Articles of Association and the most recent Prospectus. When determining whether or not profits are available for the purpose of paying a cellular distribution, no account need be taken of:

- (a) the profits and losses, or the assets and liabilities, attributable to any other cell of the Company; or
- (b) non-cellular profits and losses, or assets and liabilities.

**1.9.6** Except as provided in Regulation 12.9.9, a Protected Cell Company must prepare documentary evidence of title to cell shares (in this section referred to as a 'certificate') as follows:

- (a) in respect of any new cell shares issued by it;
- (b) where a shareholder has transferred part only of his holding back to the Company, in respect of the remainder of that holding;
- (c) where a Company has registered a transfer of cell shares made to a person other than the Company;
  - (i) in respect of the cell shares transferred to the transferee; and
  - (ii) in respect of any cell shares retained by the transferor which were evidenced by any certificates sent to the Company for the purposes of registering the transfer; and
- (d) in respect of any cell shares for which the certificate has already been issued but where it appears to the Company that the certificate needs to be replaced as a result of being lost, stolen or destroyed, or having become damaged or worn out.

**1.9.7** Certificates need only be prepared in the circumstances referred to in Regulation 12.9.6(d) if the Company has received:

- (a) a request for a new certificate;
- (b) the old certificate, if there is one;
- (c) such indemnity as the Company may require; and
- (d) such reasonable sum as the Company may require in respect of the expenses incurred by it in complying with the request.

**1.9.8** Each certificate must state:

- (a) the cell to which the cell shares relate;

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- (b) the number of cell shares, the title to which is evidenced by the certificate;
- (c) where the Company has more than one class of cell shares, the class of cell shares, the title to which is evidenced by the certificate; and
- (d) the name of the holder.

**1.9.9** Nothing in these ~~Company~~ (PCC) Regulations require a Company to prepare certificates in the following circumstances:

- (a) where the Articles of Association states that certificates will not be issued and contain provision as to other procedures for evidencing an entitlement to cell shares;
- (b) where a Sshareholder has indicated to the Company in writing that he does not wish to receive a certificate; or
- (c) where legislation applicable in the DIFC provides otherwise for evidencing an entitlement to Sshares.

**1.9.10** A Closed Ended Protected Cell Company may reduce the share capital of a cell if authorised by a Special Resolution and its Articles of Association. Article ~~40~~60 of the Law shall apply to a reduction in the Share capital of a cell as if the cell were a Company and the cell shares the Sshares of a Company for the purpose of that Article.

**1.9.11** An Open Ended Protected Cell Company shall redeem Sshares of a cell at a price based on the net asset value of the property of the cell in accordance with its Articles of Association and the provisions in section 8.6 of the CIR module of the DFSA Rulebook, ~~and, where it does so, chapters 4 and 5~~ 6 and 7 of Part 7 of the Law shall not apply to such redemption of Shares.

## 1.10 Register of shareholders

**1.10.1** No notice of any trust, express, implied or constructive, or foundation is to be entered on the Company's register of shareholders maintained under ~~chapter 2 of Part 6~~ Article 48 of the Law or be receivable by the Company.

**1.10.2** Every Protected Cell Company must keep an index of the names of its Sshareholders, which index must:

- (a) contain, in relation to each Sshareholder, a sufficient indication to enable the account of that Sshareholder in the register to be readily found;
- (b) specify the particular cell or cells to which an account or accounts of that Sshareholder relate;

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- (c) be readily searchable by reference to the account of the Sshareholder or by reference to a cell;
- (d) be kept at all times at the same place as the register of Sshareholders; and
- (e) be altered where necessary within fourteen (14) days after the date of any alteration made to the Rregister of Sshareholders.

**1.10.3** The provisions of Article ~~325~~2 of the Law relating to inspection of the register of shareholders shall be taken to apply also in respect of the index kept under Regulation 12.10.2, with such adaptation as necessary to achieve that purpose.

**1.10.4** Nothing in Regulations 1.10.1 and 1.10.2 is taken to remove the Company's obligations to identify, obtain and maintain ultimate beneficial ownership information of its Shareholders and, the Registrar's powers to obtain such information, for the purposes of Article 60 of the DIFC Operating Law 2018.<sup>8</sup>

### 1.11 Cellular and non-cellular assets

**1.11.1** The assets of a Protected Cell Company shall be either cellular assets or non-cellular assets.

**1.11.2** The cellular assets of a Protected Cell Company comprise the assets of the Company attributable to the cells of the Company.

**1.11.3** The assets attributable to a cell of a Protected Cell Company comprise:

- (a) assets represented by the proceeds of cell share capital and reserves, including retained earnings, capital reserves and share premiums, attributable to the cell; and
- (b) all other assets attributable to the cell.

**1.11.4** The non-cellular assets of a Protected Cell Company comprise the assets of the Company which are not cellular assets.

**1.11.5** Income, receipts and other property or rights of, or acquired by, a Protected Cell Company not otherwise attributable to any cell shall be applied to, and comprised in, the Company's non-cellular assets.

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<sup>8</sup> The proposed provision aligns the PCC Regulations with the requirements in Article 60 of the proposed DIFC Operating Law 2018.

## 1.12 Prohibition on dealings or transactions between cells

### 1.12.1 A Protected Cell Company shall not:

- (a) transfer a cellular asset attributable to a cell of the Company to another cell of the Company; or
- (b) ~~merge amalgamate~~ or consolidate a cell of the Company with, or into, one or more other cells of the Company;

except under the authority of, and in accordance with the terms and conditions of, an order of the Court.

### 1.12.2 In considering whether or not to make an order relating to a proposed transfer, merger or consolidation referred to in Regulation 1.12.1, the Court may:

- (a) hear the representations of the DFSA, if any;
- (b) require the applicant to establish, to the satisfaction of the Court, that the creditors of the Company entitled to have recourse to the cellular assets attributable to the relevant cells ~~consent to the transfer, amalgamation or consolidation as the case may be or otherwise would not be unfairly prejudiced:~~
  - (i) consent to the transfer, ~~amalgamation~~ merger or consolidation; or
  - (ii) would not have their interest unfairly prejudiced by the transfer, ~~amalgamation~~ merger or consolidation; and
- (c) require the applicant to establish, to the satisfaction of the Court, that the Sshareholders of the Company and of each relevant cell:
  - (i) consent to the transfer, ~~amalgamation~~ merger or consolidation ~~as the case may be or otherwise would not be unfairly prejudiced; or~~
  - (ii) would not have their interests unfairly prejudiced by the transfer, merger or consolidation.
- (b) ~~hear the representations, if any, of the DFSA.~~<sup>9</sup>

### 1.12.3 The Court, on hearing an application for an order under this section 12.12, may make an interim order or an order adjourning the hearing, conditionally or unconditionally.

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<sup>9</sup> Minor tidying up, also aligns the language with the 'merger' provisions now included in the new Companies Law 2018.

## 1.13 Separation of assets

**1.13.1** In this section 12.13 and sections 1.14 and 115, an 'officer' means:

- (a) an Officer as defined in the Law;
- (b) a cell receiver as defined in the Insolvency (PCC) Regulations;
- (c) a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of a Protected Cell Company; or
- (d) a person in accordance with whose instructions or wishes the Directors of a Protected Cell Company are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the Directors or the Protected Cell Company).

**1.13.2** ~~Directors and~~ Each officers of a Protected Cell Company, and if it is an Umbrella Fund, its Fund Manager, shall:

- (a) keep cellular assets separate and separately identifiable from non-cellular assets; and
- (b) keep cellular assets attributable to each cell separate and separately identifiable from cellular assets attributable to other cells.

**1.13.3** The duty imposed by Regulation 12.13.2 is not breached by reason only that:

- (a) ~~an the Directors and~~ an the officers of a Protected Cell Company, and if it is an Umbrella Fund, its Fund Manager, causes or permits cellular assets and non-cellular assets to be held:
  - (i) by or through a nominee; or
  - (ii) by a company, the Shares and capital interests of which may be cellular assets or non-cellular assets, or a combination of both; or
- (b) ~~an the~~ an the officers of a Protected Cell Company, and if it is an Umbrella Fund, its Fund Manager, causes or permits cellular assets or non-cellular assets, or a combination of both, to be collectively invested, or collectively managed by an investment manager, provided that the assets in question remain separately identifiable.

**1.13.4** In the event of a contravention of Regulation 12.13.2, each officer of the Company and, in the case of a Fund Manager, each of its Directors:

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- (a) ~~each director or officer in contravention, as the case may be, shall~~ shall incur personal liability for any loss or damage suffered by the Protected Cell Company as a consequence of the contravention; and
- (b) shall severally have a right of indemnity against the non-cellular assets of the Company, unless that person was fraudulent, reckless or negligent, or acted in bad faith.

**1.13.5** Regulations 12.13.4 is subject to Regulation 12.15.1.

### 1.14 Disclosure of dealings with Protected Cell Company

**1.14.1** A Protected Cell Company shall:

- (a) inform any person with whom it transacts that it is a Protected Cell Company;
- (b) for the purposes of that transaction, identify or specify the cell in respect of which that person is transacting, unless that transaction is not a transaction in respect of a particular cell; and
- (c) where the transaction is in respect of a particular cell, inform the person that the cellular assets of that cell, and only those assets, are available to pay the obligations and liabilities of that cell.

**1.14.2** If, in contravention of Regulation 12.14.1, a Protected Cell Company:

- (a) fails to inform a person that he is transacting with a Protected Cell Company, and that person is otherwise unaware that, and has no reasonable grounds to believe that, he is transacting with a Protected Cell Company;
- (b) fails to identify or specify the cell in respect of which a person is transacting, and that person is otherwise unaware of, and has no reasonable basis of knowing, which cell he is transacting with; or
- (c) fails to inform a person that the cellular assets of that cell, and only those assets, are available to pay the obligations and liabilities of that cell;

then, in any such case:

- (d) each officer of the Company and, in the case of a Fund Manager, its each Director, the Directors shall incur personal liability to that person in respect of the transaction; and
- (e) each person referred to in (d) Director shall severally have a right of indemnity against the non-cellular assets of the Company, unless he was fraudulent, reckless or negligent, or acted in bad faith.

**1.14.3** Regulations 12.14.2 is subject to Regulation [12.15.1].

## **1.15 Further provisions concerning personal liability**

**1.15.1** Notwithstanding Regulations 12.13.4 and 12.14.2, the Court may relieve an ~~Director~~ officer, and in the case of an Umbrella Fund, a Director of its Fund Manager, as the case may be, of all or part of his personal liability thereunder if he satisfies the Court that he ought fairly to be so relieved, because:

- (a) he was not aware of the circumstances giving rise to his liability and, in being not so aware, he was neither fraudulent, reckless or negligent, nor acted in bad faith; or
- (b) he expressly objected, and exercised such rights as he had as such an ~~Director~~ or officer or Director, whether by way of voting power or otherwise, so as to try to prevent the circumstances giving rise to his liability.

**1.15.2** Where, pursuant to Regulation 12.15.1, the Court relieves a person of all or part of his personal liability under Regulation 12.13.4 or 12.14.2, the Court may order that the liability in question shall instead be met from such of the:

- (a) assets of the relevant cell in respect of which the person was dealing or transacting; or
- (b) non-cellular assets of the Protected Cell Company;

as may be specified in the order.

**1.15.3** Any provision in the Articles of Association of a Protected Cell Company, which purports to:

- (a) avoid the incurring of personal liability upon a person in the circumstances described in Regulation 12.13.4 or 12.14.2; or
- (b) indemnify such a person in respect of conduct which would otherwise disentitle him to an indemnity against non-cellular assets by virtue of Regulation 12.13.4 or 12.14.2;

shall be void.

## **1.16 Rights of creditors and implied terms**

**1.16.1** The rights of creditors of a Protected Cell Company shall correspond with the liabilities provided for in section 12.18.

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- 1.16.2** No such creditor shall have any rights other than the rights referred to in this section 12.16 and in sections 12.17 and 12.18.
- 1.16.3** The following terms shall be implied in every transaction entered into by or on behalf of a Protected Cell Company:
- (a) that no party shall seek, whether in any proceedings or by any other means, to use or apply any cellular assets attributable to any cell of the Company to satisfy a liability not attributable to that cell;
  - (b) that if any party shall succeed by any means in using or applying any cellular assets attributable to any cell of the Company to satisfy a liability not attributable to that cell, that party shall be liable to the Company to pay a sum equal to the value of the benefit thereby obtained by him; and
  - (c) that if any party shall succeed in seizing or attaching or otherwise levying execution against any cellular assets attributable to any cell of the Company to satisfy a liability not attributable to that cell, that party shall hold those assets or their proceeds in a fiduciary capacity for the Company and shall keep those assets or proceeds separate and identifiable for that purpose.
- 1.16.4** All sums recovered by a Protected Cell Company as a result of any such obligation as is described in Regulation 12.16.3(c) shall be credited against any concurrent liability imposed under the implied term set out in Regulation 12.16.3(b).
- 1.16.5** Any asset or sum recovered by a Protected Cell Company pursuant to the implied term set out in Regulations 12.16.3 (b) or (c) or by any other means in the events referred to in those Regulations shall, after the deduction or payment of any costs of recovery, be applied by the Company so as to compensate the cell affected.
- 1.16.6** In the event of any cellular assets attributable to a cell of a Protected Cell Company being seized, attached, levied or otherwise taken in execution in respect of a liability not attributable to that cell, and in so far as such assets or compensation in respect thereof cannot otherwise be restored to the cell affected, the Company shall:
- (a) cause or procure its auditor, acting as expert and not as arbitrator, to certify the value of the assets lost to the cell affected; and
  - (b) transfer or pay to the cell affected, from the cellular or non-cellular assets to which the liability was attributable, assets or sums sufficient to restore to the cell affected the value of the assets lost.
- 1.16.7** Where under Regulation 12.16.6(b) a Protected Cell Company is obliged to make a transfer or payment from cellular assets attributable to a cell of the Company, and those assets are insufficient, the Company shall, so far as possible, make up the deficiency from its non-cellular assets.

## 1.17 Availability of cellular assets to creditors

1.17.1 Without prejudice to the provisions of sections 12.16 and 12.18:

- (a) cellular assets attributable to a particular cell of a Protected Cell Company:
  - (i) are available only to the creditors of the Company who are creditors in respect of that cell and who are thereby entitled to have recourse to the cellular assets attributable to that cell; and
  - (ii) shall be absolutely protected from the shareholders of the Company and from the creditors of the Company who are not creditors in respect of that cell and who accordingly are not entitled to have recourse to the cellular assets attributable to that cell; and
- (b) cellular assets not attributable to a particular cell of a Protected Cell Company shall not be used to satisfy any liability attributable to that cell.

## 1.18 Satisfaction of liabilities attributable to cells

1.18.1 Where any liability arises which is attributable to a particular cell of a Protected Cell Company:

- (a) the cellular assets attributable to that cell shall be used to satisfy the liability; and
- (b) a creditor in respect of that cell shall not be entitled to have recourse against the cellular assets of any other cell or the non-cellular assets of the Company.

1.18.2 Where any liability arises which is not attributable to a particular cell of a Protected Cell Company:

- (a) the liability shall be satisfied solely from the Company's non-cellular assets; and
- (b) a creditor in respect of that liability shall not be entitled to have recourse to the cellular assets of any cell of the Company.

## 1.19 Disputes as to liabilities attributable to cells

1.19.1 The Court, on the application of the Protected Cell Company, the Fund Manager if the Company is an Umbrella Fund, or a creditor in dispute with the Company, and without prejudice to any other right or remedy of any person, may issue a

declaration in the matter of any dispute relating to any one or more of the following:

- (a) whether any right is or is not in respect of a particular cell;
- (b) whether any creditor is or is not a creditor in respect of a particular cell;
- (c) whether any liability is or is not attributable to a particular cell; or
- (d) the amount to which any liability is limited.

### **1.20 Transfer of cellular assets from Protected Cell Company**

**1.20.1** In this section 12.20, a 'cell transfer order' is an order of the Court authorising the transfer of cellular assets attributable to any cell of a Protected Cell Company, but not the non-cellular assets of a Protected Cell Company, to another person, wherever resident or incorporated, and whether or not a Protected Cell Company.

**1.20.2** Subject to Regulation 12.20.3, no transfer of cellular assets attributable to a cell of a Protected Cell Company shall be made except under the authority of, and in accordance with the terms and conditions of, a cell transfer order.

**1.20.3** Nothing in this section 12.20 requires a Protected Cell Company to obtain a cell transfer order to invest, and change investment of, cellular assets or otherwise to make payments or transfers from cellular assets in the ordinary course of the Company's business.

**1.20.4** In considering whether or not to make a cell transfer order in relation to a cell of a Protected Cell Company, the Court may:

- (a) require the applicant to establish to the satisfaction of the Court:
  - (i) that the creditors of the Company entitled to have recourse to the cellular assets attributable to the cell consent to the transfer; or
  - (ii) that those creditors would not be unfairly prejudiced by the transfer; and
- (b) hear the representations, if any, of the DFSA thereon.

**1.20.5** The Court, on hearing an application for a cell transfer order, may make an interim order or an order adjourning the hearing, conditionally or unconditionally.

**1.20.6** The Court may attach such conditions as it thinks fit to a cell transfer order, including conditions as to the discharging of claims of creditors entitled to have recourse to the cellular assets attributable to the cell in relation to which the order is sought.

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**1.20.7** The Court may make a cell transfer order in relation to a cell of a Protected Cell Company notwithstanding that:

- (a) a receiver, administrative receiver, or liquidator has been appointed to act in respect of the Company; or
- (b) a cell receiver has been appointed in respect of the cell or any other cell of the Company.

**1.20.8** A transfer under a cell transfer order of cellular assets attributable to a cell of a Protected Cell Company shall not of itself entitle creditors of that Company to have recourse to the assets of the person to whom the cellular assets were transferred.

**1.20.9** The provisions of this section 12.20 are without prejudice to any power of a Protected Cell Company lawfully to make payments or transfers from the cellular assets attributable to any cell of the Company to a person entitled, in conformity with the provisions of these PCC Regulations.

### 1.21 Accounts and Audit

**1.21.1** If a Protected Cell Company is:

- (a) ~~is formed other than for the sole purpose of conducting a business of a Fund,~~ formed for the purpose of conducting Insurance Business, it ~~shall~~must comply with the requirements in ~~Part 9 of the Law~~ Part 8 of the GEN module of the DFSA Rulebook; and
- (b) formed for the ~~sole~~-main purpose of conducting the business of an Umbrella Fund, it ~~shall~~must comply with the accounting, audit and reporting requirements in chapter 9 of the CIR module of the DFSA Rulebook.

**1.21.2** Where:

- (a) ~~the Board of the DFSA makes Rules under the Regulatory Law 2004 or rules or regulations under any other applicable DIFC law; or~~
- (b) ~~the DFSA imposes or varies a condition or restriction in relation to a consent, licence or authorisation under the Regulatory Law 2004 or under any other DIFC law, including in relation to a consent under these Company (PCC) Regulations;~~

~~which, in whole or in part, is, are or may be inconsistent with any of the provisions of chapters 2 and 3 of Part 9 of the Law in their application to, or to any class or category of, a Protected Cell Company, or to a class or category of, cells within a Protected Cell Company, such rule or regulation or condition or restriction shall~~

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prevail over the provisions of chapters 2 and 3 of Part 9 of the Law to the extent of the inconsistency.

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### App1 FEES

#### A1.1 Table of fees.

<u>Upon receipt by the Registrar of:</u>	
<u>Application for incorporation of a Protected Cell Company or for conversion to a Protected Cell Company</u>	<u>\$1,000</u>
<u>FMT fees:</u>	
<u>Making a referral to the FMT (which can be waived by the president of the FMT if the person commencing the reference is an individual and if, in the circumstances, the president considers it is equitable to do so)</u>	<u>\$5,000</u>

## **App2 Due Process Requirements**

### **Section 1 – Interpretation**

For the purposes of this Appendix:

a “Relevant Person” means a person in relation to whom a power is exercised or proposed to be exercised by the DFSA.

### **Section 2 – Application of Schedule**

The procedures in this Appendix 2 apply to the DFSA, subject to Section 3, where a provision in these PCC Regulations requires the DFSA to make a decision pursuant to that provision.

### **Section 3 – Decisions to which procedures do not apply**

- (1) The procedures in this Appendix (other than paragraph (2) below) do not apply to a decision by the DFSA in relation to a person, if the person has requested, or consented in writing to, the making of the decision.
- (2) In the cases referred to in paragraph (1) above, the DFSA shall notify the person in writing of the decision and the date on which it is to take effect.
- (3) If the DFSA makes a decision in relation to a Relevant Person after a decision of the FMT or Court relating to the conduct of that person, the requirement to give the person an opportunity to make representations under Section 4 or 6 (as applicable) does not apply in relation to findings of fact of the FMT or Court.

### **Section 4 – Opportunity to make representations before a decision**

- (1) If the DFSA proposes to make a decision to which the procedures in this Appendix apply, it shall first give the Relevant Person:
  - (a) a written notice (a “Preliminary Notice”) containing the information in paragraph (2) below; and
  - (b) an opportunity to make representations to the DFSA in person and in writing concerning the decision the DFSA proposes to take.
- (2) The Preliminary Notice shall:
  - (a) specify the proposed decision;

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- (b) specify the reasons for that proposed decision, including any proposed findings of fact;
  - (c) include a copy of the relevant materials which were considered in making the proposed decision;
  - (d) inform the Relevant Person that they may make representations to the DFSA concerning the proposed decision; and
  - (e) specify how and by when any representations may be made.
- (3) For the purposes of sub-paragraph (2)(c) above, the DFSA:
  - (a) may refer to materials (instead of providing a copy) if they are already held by the Relevant Person or are publicly available; and
  - (b) is not required to provide material that is the subject of legal professional privilege.
- (4) If the DFSA does not receive any representations within the period specified in the Preliminary Notice, it may proceed to make the proposed decision and give the Relevant Person a Decision Notice in accordance with Section 5.
- (5) If the DFSA receives representations within the period specified in the Preliminary Notice, it shall consider the representations in making the decision.
- (6) If, after considering the representations, the DFSA decides:
  - (a) to make the proposed decision (either as proposed or with variations), then it shall give the Relevant Person a Decision Notice under Section 5; or
  - (b) not to make the proposed decision, then it shall as soon as reasonably practicable notify the Relevant Person in writing that it has decided not to make the decision.
- (7) If the DFSA concludes that any delay likely to arise as a result of complying with the procedures in this paragraph would be prejudicial to the interests of a Company or its Shareholders or otherwise prejudicial to the interests of the DIFC:
  - (a) the requirements in paragraphs (1) to (6) above do not apply; and
  - (b) instead the DFSA shall provide the Relevant Person with an opportunity to make representations in accordance with the procedures in 6 after it has made the decision.

## **Section 5 – Decision Notice**

- (1) If the DFSA decides to make a decision to which the procedures in this Appendix 2 apply, it shall, as soon as practicable, give the Relevant Person a written notice (a “Decision Notice”) specifying:
  - (a) the decision;
  - (b) the reasons for the decision, including its findings of fact;
  - (c) the date on which the decision is to take effect; and
  - (d) if applicable, the date by which any relevant action shall be taken by the person.
- (2) The Decision Notice shall include a copy of the relevant materials which were considered in making the decision.
- (3) For the purposes of paragraph (2) above, the DFSA:
  - (a) may refer to materials (instead of providing a copy) if they are already held by the Relevant Person or are publicly available; and
  - (b) is not required to provide material that is the subject of legal professional privilege.

## **Section 6 – Opportunity to make representations after a decision**

- (1) If this paragraph applies under Section 4, paragraph (7), the DFSA shall:
  - (a) provide the Relevant Person with an opportunity to make representations to the DFSA in person and in writing within a period of fourteen (14) days, or such further period as may be determined by the DFSA, from the date on which the Decision Notice is given to the Relevant Person Section 5; and
  - (b) inform the Relevant Person in the Decision Notice that they may make representations concerning the decision and specify how and by when any representations may be made.
- (2) If the DFSA does not receive any representations within the period specified in the Decision Notice, it shall inform the Relevant Person in writing that the decision is to stand.
- (3) If the DFSA receives representations within the period specified in the Decision Notice, it shall consider the representations in deciding whether to confirm, withdraw or vary the decision.

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- (4) If after considering representations received the DFSA decides:
- (a) to confirm the decision, it shall as soon as reasonably practicable notify the Relevant Person in writing that the decision is to stand;
  - (b) to withdraw the decision, it shall as soon as reasonably practicable notify the Relevant Person in writing that the decision has been withdrawn; or
  - (c) to vary the decision, it shall as soon as reasonably practicable give the Relevant Person an amended Decision Notice under Section 5.
- (5) For the avoidance of doubt, the opportunity to make representations under Section 6 does not arise:
- (a) if the Relevant Person was given a Preliminary Notice and the opportunity to make representations under Section 4 before the decision was made; or
  - (b) in respect of an amended Decision Notice given under Section 6, sub-paragraph (4)(c).