

Appendix 2

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

Note: some text that is not being amended is included for reference only.

The DFSA Sourcebook



Regulatory Policy and Process (RPP Sourcebook)

5 ENFORCEMENT

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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. However, to be eligible for a discount on the amount of a financial penalty, settlement must be agreed within the period specified by the DFSA (see section 6-8). 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.~~

~~**5-15-7**~~ **5-15-8** Settlement in particular circumstances should not be regarded as binding precedent for future settlement discussions.

~~**5-15-8**~~ **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.~~

Settlement Decision Makers

5-15-9 The process for reaching a settled outcome is different to the process for the DFSA to exercise formally a discretionary power. For example, most of the DFSA's formal decision making policy in chapter 7 of RPP and many of the requirements in Schedule 3 to the Regulatory Law do not apply.

5-15-10 The decision about whether to accept a settlement offer will be taken by a senior member of DFSA staff who has not been directly involved in establishing the evidence on which the decision to take the action is based. That person is referred to as a Settlement Decision Maker.

5-15-11 Settlement Decision Makers will generally come from the same pool of staff as persons who may be on a Decision Making Committee (DMC) (see section 7-7). The DMC is the DFSA's decision maker for enforcement decisions in cases that have not been resolved through settlement. If a Settlement Decision Maker has been involved in considering a matter which ultimately does not result in agreement, then that person will generally not be a member of the DMC for that matter.

5-15-12 The case team will conduct the settlement negotiations with the Person(s) concerned. If agreement is reached, the case team will recommend to the Settlement Decision Maker that the settlement be approved. It will be for the Settlement Decision Maker to decide, on behalf of the DFSA, whether to accept the settlement on the agreed terms. If approved, the agreed terms will then be included in the appropriate form of settlement as set out in the following paragraphs.

Form of Settlement

5-15-13 ~~5-15-14~~ 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~~14); or
- (b) an Enforceable Undertaking (EU) (see ~~5-15-13~~15).

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

5-15-14 ~~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

5-15-15 ~~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

5-15-16 ~~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.

5-15-17 ~~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.

5-15-18 ~~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.

5-15-19 ~~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

5-15-20 ~~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

5-15-21 ~~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.

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.

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5-17 Publicity

5-17-1 This section describes how the DFSA may comment publicly on investigations, enforcement actions and other formal regulatory decisions¹, subject to any independent determinations by the Financial Markets Tribunal (FMT) or Court.

General policy on publicity of enforcement actions

¹In 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.

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) ~~is are~~ not normally published prior to ~~the issuing of a notice of decision~~ being given to a Person (see RPP 5-17-9 to 5-17-11). Reasons for this include:

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

FMT or a court

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

Disclosure of Decisions

DMC

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 when a matter is referred to the FMT (see RPP 15-17-11) 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, as required by Article 29 of the Regulatory Law, the DFSA will publish that fact appropriate information about the decision which has been referred to the FMT unless publication would, in the DFSA's opinion, be prejudicial to the interests of the DIFC or the FMT has made an order that such information should not be published otherwise ordered. When the referral has been heard and determined, or the FMT proceedings have otherwise come to an end, the DFSA expects to publish information about the decision outcome of those proceedings (subject only to the FMT ordering otherwise – 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),² when an investigation is ongoing. However, the DFSA retains discretion to publicise such a suspension if it is considered appropriate.

² That is, suspensions of Authorised Individuals, Key Individuals, Registered Auditors or Audit Principals pending completion of an investigation.

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.

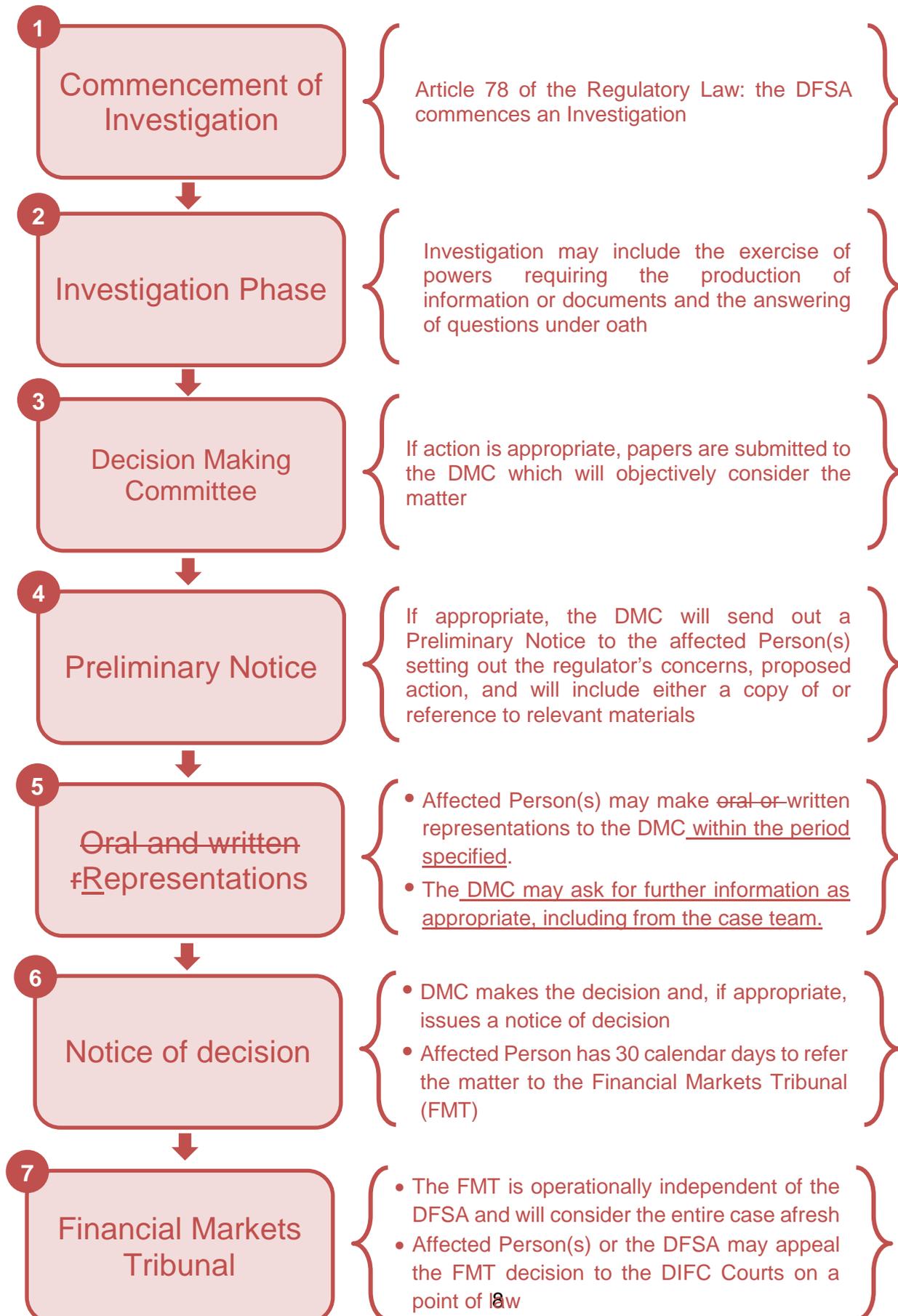
5-17-19 The DFSA will take into consideration any privileged or sensitive information when considering the content of its publications. In doing so, it will also consider the possibility that any publication may also potentially affect the rights of a third party and, if so, will endeavour to give that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

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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:

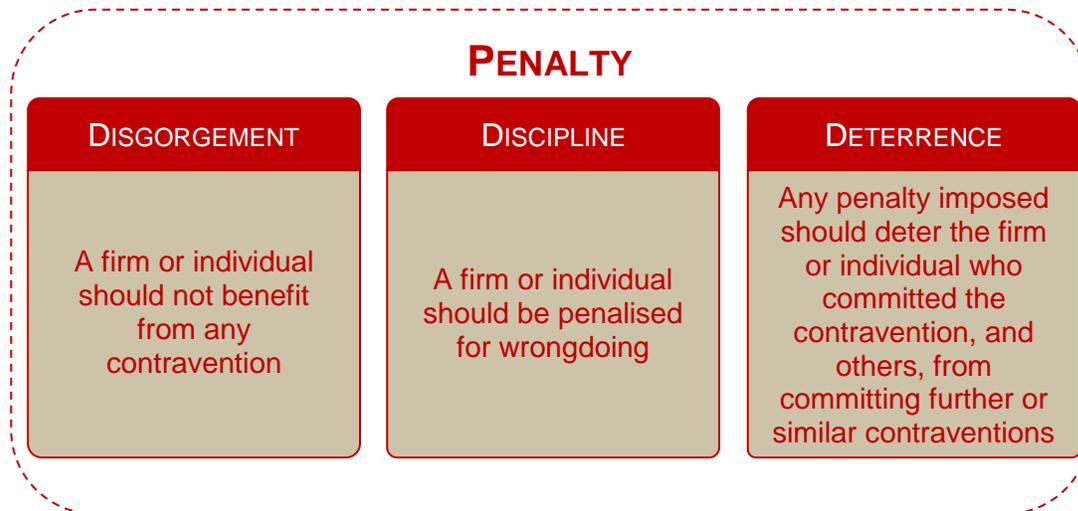
- (a) whether or not deterrence may be effectively achieved by issuing a public censure;
- (b) depending upon the nature and seriousness of the contravention:
 - (i) whether the Person has brought the contravention to the attention of the DFSA;
 - (ii) whether the Person has admitted the contravention 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:

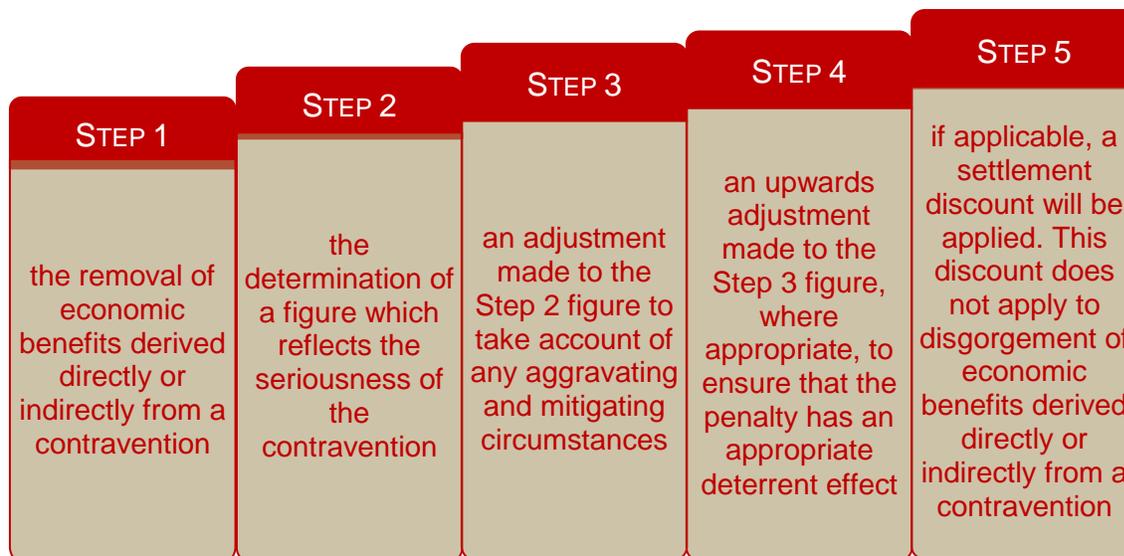
- (a) if the Person has made a profit or avoided a loss as a result of the contravention, on the basis that a Person should not be permitted to benefit from its contravention;
- (b) if the contravention is more serious in nature or degree, on the basis that the sanction should reflect the seriousness 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 from the date when the contravention occurred until the date of the final decision. Interest will be charged at a minimum rate of 1% over the three months Emirates Interbank Offer Rate (“EIBOR”), or at such other rate as the DFSA considers appropriate having regard to the prevailing market lending rates, up to a maximum of 12%.

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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, sSection 6-8 provides that the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the fact that stage at which the DFSA and the firm concerned reached an agreement with the DFSA. 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 from the date when the contravention occurred until the date of the final decision. Interest will be charged at a minimum rate of 1% over the three months “EIBOR”, or at such other rate as the DFSA considers appropriate having regard to the prevailing market lending rates, up to a maximum of 12%.

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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, sSection 6-8 provides that the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the fact that stage at which the DFSA and the individual concerned reached an agreement with the DFSA. The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1.~~

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6-8 ~~DISCOUNT FOR EARLY SETTLEMENT DISCOUNT~~

6-8-1 Persons subject to enforcement action may be prepared to ~~accept~~agree on the amount of any financial penalty, ~~if a settlement discount is applied, and any 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 ~~offer~~ negotiate with the Person concerned ~~the opportunity to settle~~ 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. ~~The DFSA will set clear and reasonable timetables for settlement discussions to ensure they do not unreasonably delay a regulatory or enforcement outcome. In most cases, the DFSA will specify that a Person has 28 days in which to reach agreement with the DFSA. If settlement is agreed within the 28 day period, or such other period allowed by the DFSA, the DFSA will apply a 30% discount to the amount of the financial penalty.~~

6-8-3 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 (see Section 7-7), 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 written 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. The decision maker may also ask the DFSA case team to respond to evidence or issues raised in representations.

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7-7 THE DECISION MAKING COMMITTEE

7-7-1 The DMC is a DFSA committee whose members are DFSA officers, employees or external persons who act under powers delegated by the DFSA Chief Executive. The DMC may be constituted by with one person member sitting alone or by with three members 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~~ considering a matter, the DMC would first review the evidence supporting a proposed DFSA action and decide whether, in light of the evidence, a the Preliminary Notice should be given 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 given issued, the recipient has the right to make representations in relation to the findings and action proposed. The representations must be in writing and must be provided within the period specified in the Notice. Additionally, a recipient may request the DMC to allow it also to make representations in person. However, this is a matter for the discretion of the DMC. The DMC will expect the Person concerned to address two issues to the DMC's satisfaction:

- (a) First, the recipient would need to demonstrate why written representations alone will not be adequate in the particular circumstances. That is, what is it about the matter, and the further representations the recipient wishes to make, that cannot fully be dealt with in writing; and
- (b) Second, the recipient would need to demonstrate why making representations in person, in addition to the representations made in writing, would significantly assist the DMC in reaching a decision.

7-7-5 The DMC will be responsible for ~~hearing and~~ considering the affected person's representations made in response to the Notice, and any further relevant information, and deciding whether or not to give issue the a Decision Notice (or to confirm the original decision if the opportunity to make representations is provided after a Decision Notice is given).

~~The DMC is also the DFSA decision maker for any settlement or 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).