

# **CONSULTATION PAPER NO.137**



## **REFINEMENTS TO THE EMPLOYEE MONEY PURCHASE REGIME**

**16 DECEMBER 2020**

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## PREFACE

### Why are we issuing this Consultation Paper?

1. This Consultation Paper (CP) seeks public comment on proposed refinements to the DFSA's Employee Money Purchase regime. These proposals are designed to address a number of practical issues the DFSA has encountered in administering the EMP regime.

### Who should read this CP?

2. The proposals in this paper will be of interest to:
  - (a) employees of DIFC businesses;
  - (b) DIFC employers;
  - (c) Operators and Administrators of Employee Money Purchase Schemes;
  - (d) persons offering foreign EMP schemes to DIFC employers and employees;
  - (e) life insurers conducting pension fund management;
  - (f) persons conducting other financial services that involve an interest in an Employee Money Purchase Scheme; and
  - (g) persons who intend to carry out the activities specified in (c) - (f) above.

### Terminology

3. Defined terms have the initial letter of the word capitalised, or of each word in a phrase. Definitions are set out in the [Glossary Module \(GLO\)](#). Unless the context otherwise requires, where capitalisation of the initial letter is not used, the expression has its natural meaning. Some commonly used terms in this paper are noted below.<sup>1</sup>

Term	Meaning
Administrator	A person acting as the Administrator of an EMP Scheme
Beneficiary	A person nominated as the beneficiary to receive Core Benefits payable to a Member
Core Benefits	Please see paragraph 10(a).
DFSA EMP regime	The requirements in the DFSA laws and the Rulebook modules that are administered by the DFSA
DIFC scheme	An EMP scheme established in the DIFC
Employment Law regime	The requirements in the DIFC Employment Law and Employment Regulations that are administered by DIFCA
EMP scheme	An Employee Money Purchase Scheme
Member of an EMP scheme	An employee of a Participating Employer

<sup>1</sup> Some of these terms can be defined terms.

Exempt EMP scheme	A foreign EMP scheme which is exempt from DFSA regulation
Foreign EMP scheme	An EMP scheme established outside the DIFC (a Non-DIFC Scheme)
Non-DIFC Scheme	A Foreign EMP Scheme
Operator	A person Operating an EMP scheme
Participating Employer in an EMP scheme	An employer making contributions to an EMP scheme in respect of its employees

### What are the next steps?

4. Please send any comments using the [online response form](#). You will need to identify the organisation you represent when providing your comments. The DFSA reserves the right to publish, including on its website, any comments you provide. However, if you wish your comments to remain confidential, you must expressly request so at the time of making comments, and give your reasons for so requesting. The deadline for providing comments on this consultation is **17 January 2021**.
5. Following the public consultation, we will proceed to make the relevant changes to the DFSA Rulebook as appropriate to reflect points raised in consultation. You should not act on the proposals until the relevant changes are made. We will issue a notice on our website when this happens.

### Structure of this CP

- Part I Background;
- Part II Permitted foreign EMP schemes;
- Part III Contributions to DIFC EMP schemes;
- Part IV Other changes applicable to Operators and Administrators;
- Part V Application of AML procedures;
- Part VI Transitional arrangements;
- Appendix 1 – Draft amendments to GEN;
- Appendix 2 – Draft amendments to COB;
- Appendix 3 – Draft Amendments to GLO;
- Appendix 4 – Draft amendments to PIB; and
- Annex 1 – Questions in this consultation paper.

## Part I Background

### Interaction between the DFSA EMP regime and the DIFC Employment Law regime

6. The DFSA introduced its Employee Money Purchase regime (“DFSA EMP regime”)<sup>2</sup> in February 2020 to coincide with, and to support, the changes introduced by the Dubai International Financial Centre Authority (DIFCA) to the DIFC Employment Law. The Employment Law and the Employment Regulations,<sup>3</sup> collectively referred to as the Employment Law in this paper, govern the contributions that DIFC employers must make to an EMP scheme, in respect of their employees, to provide those employees an end of service employment benefit.
7. The Employment Law regime and the DFSA EMP regime are designed to provide a comprehensive and cohesive regulatory framework for the management and operation of EMP schemes. While both regimes are generally operating as intended, the DFSA and DIFCA have found there are some aspects of their respective regimes that need strengthening and refinement. While this CP contains the amendments and clarifications to the DFSA EMP regime, the proposed changes to the Employment Law regime are contained in a DIFCA consultation. The key features of the Employment Law regime and the DFSA’s EMP regime are set out below, given the close interaction between the two, to provide context to the DFSA proposals.

#### Key features of the Employment Law regime

8. An EMP scheme under the Employment Law is defined as an arrangement where:
  - (a) the main purpose of the arrangement is to provide Money Purchase Benefits<sup>4</sup> in respect of employment; and
  - (b) such benefits are payable on termination of employment or on the occurrence of another specified event.
9. Under the Employment Law, every DIFC employer must, with effect from 1 February 2020, make a minimum monthly contribution called a Core Benefit to an EMP scheme that is a Qualifying Scheme, in respect of each employee (other than certain exempt employees).<sup>5</sup> Those contributions are to provide an end of service benefit to the employees.
10. The benefits payable to a Member from an EMP scheme under the Employment Law comprise of:
  - (a) the Core Benefit paid by each DIFC employer to a Qualifying Scheme, which must be calculated at 5.83% of the monthly basic wage of the employee, in the first five years of service and, thereafter, at 8.33%; and
  - (b) the investment performance of the assets of the scheme (which can be positive or

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<sup>2</sup> The DFSA’s EMP regime is mainly contained in GEN sections 2.30 and 2.31, and COB Chapter 12. They came into force on 20 January 2020.

<sup>3</sup> The DIFC Employment Law No.2 of 2020, as amended by DIFC Law No. 4 of 2020, and the Employment Regulations in force before 1 February 2020.

<sup>4</sup> Defined in the Employment Law as benefits calculated solely by reference to assets of the scheme, less any deductions for administrative expenses or commission.

<sup>5</sup> Exempt Employees include UAE and GCC nationals employed by a DIFC employer. See Article 3 of Schedule 1 of the Employment Law.

negative), less costs and charges of operating the scheme.<sup>6</sup>

11. The contributions made by an employer in respect of each employee to a Qualifying Scheme referred to in paragraph 10(a) are invested by the operator of that scheme, based on the investment options chosen by the relevant employee. Employees of a Qualifying Scheme to which their DIFC employer is making contributions are members of that scheme. Those members bear the investment risk, as well as the cost of operation of the scheme. As a result, the benefits payable to a member can increase or decrease, from the total contributions made by the employer in respect of that member, depending on the performance and costs of the investment options chosen by the member, out of an investment menu offered by the operator.
12. A Qualifying Scheme must have a current Certificate of Compliance<sup>7</sup> before it can receive employer contributions in respect of their employees. A DIFC employer must apply to the Board of Directors of DIFCA for a Certificate of Compliance. The DIFCA Board will only issue a Certificate of Compliance if the scheme meets the Qualifying Scheme criteria in the Employment Law.<sup>8</sup>
13. There are three types of Qualifying Schemes that may receive DIFC employer contributions:
  - (a) an EMP scheme established in the DIFC that meets the criteria in paragraph 14;
  - (b) a foreign EMP scheme, which meets the criteria in paragraph 15; or
  - (c) a foreign EMP scheme that meets the 'deemed' Qualifying Scheme criteria in paragraph 16.
14. An EMP scheme established in the DIFC must, to be a Qualifying Scheme:
  - (a) be created as a trust under the DIFC Trust Law;
  - (b) have a DFSA licensed Operator and Administrator responsible for the operation and administration of the scheme;
  - (c) meet the scheme requirements under the DFSA regime, as well as under the DIFC Employment Regulations; and
  - (d) have the oversight of a Supervisory Body, or of another alternative arrangement, that meets the criteria in the Employment Regulations.<sup>9</sup>
15. For a foreign EMP scheme to be a Qualifying Scheme, it must:
  - (a) be established in a Recognised Jurisdiction in accordance with the regulatory requirements applicable to EMP schemes in that jurisdiction;

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<sup>6</sup> See Article 66(7) of the Employment Law.

<sup>7</sup> See Article 3 of Schedule 1 of the Employment Law for the definition of a Certificate of Compliance. A Certificate of Compliance must be renewed every year.

<sup>8</sup> A deemed qualifying scheme, referred to in paragraph 16, must have a certificate of exemption issued by DIFCA.

<sup>9</sup> See Employment Regulation 2.1.4.

- (b) have the functions of each the Operator and Administrator of the scheme being undertaken by separate entities who meet the requirements for Operators and Administrators of EMP schemes under the Employment Regulations;
  - (c) have the oversight of a Supervisory Body, or another alternative arrangement that meets the specified criteria in the Employment Regulations; and
  - (d) adopt Qualifying Scheme Rules similar to those prescribed in the Employment Regulations.<sup>10</sup>
16. For a foreign EMP scheme to be 'deemed' a Qualifying Scheme,<sup>11</sup> the scheme must meet either of the two following criteria:
- (a) the DIFC employer must be under a statutory duty in a country outside the DIFC to make pension, retirement, saving or any substantially similar contributions into a scheme in that country in respect of its DIFC employees; or<sup>12</sup>
  - (b) the DIFC employer must, with the prior written consent of its DIFC employees, make contributions to a defined benefit scheme:
    - (i) that is larger than the Core Benefits; and
    - (ii) has an operator regulated and supervised in a Recognised Jurisdiction which provides an equivalent level of regulation as applicable to an Operator of a DIFC EMP scheme.<sup>13</sup>

#### Overview of the DFSA EMP regime

17. The Regulatory Law defines an EMP scheme as an arrangement:
- (a) where the main purpose of it is to provide benefits to members in respect of their employment;
  - (b) the benefits are payable upon termination of employment or on another specified occurrence; and
  - (c) the amount payable is determined by reference to:
    - (i) the contributions made by an employer to the scheme in respect of its employees (members), whether or not the members may make additional contributions; and
    - (ii) the investment performance of the scheme assets.<sup>14</sup>
18. The business of Operating an EMP Scheme and Acting as the Administrator of an EMP Scheme are two discrete Financial Services.<sup>15</sup> To conduct these businesses in or from

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<sup>10</sup> See Employment Regulation 2.1.5.

<sup>11</sup> For these 'deemed' schemes, the DIFCA Board issues a 'certificate of exemption', instead of a Certificate of Compliance.

<sup>12</sup> See Employment Regulations 2.1.7(a).

<sup>13</sup> See Employment Regulations 2.1.7(b).

<sup>14</sup> See Schedule 1 of the Regulatory Law.

<sup>15</sup> See GEN Rules [2.30.1](#) and [2.31.1](#).

the DIFC, a person must have a DFSA licence.

19. The DFSA regime permits DFSA licensed Operators and Administrators to be the Operator or act as the Administrator of an EMP scheme in the DIFC (i.e., a DIFC scheme), as well as an EMP scheme established outside the DIFC (i.e., a foreign EMP scheme).<sup>16</sup>
20. A DIFC EMP scheme, established for the purposes of the Employment Law regime:
  - (a) must be established as a trust, created under the DIFC Trust Law;
  - (b) must have a DFSA licensed Operator and Administrator;
  - (c) the Operator and Administrator must comply with the detailed conduct requirements relating to EMP schemes under COB chapter 12, in addition to the general requirements applicable to Authorised Firms in the GEN, PIB and AML modules; and
  - (d) must have the DFSA's prior approval of the scheme, which the DFSA can withdraw if the requirements relating to the EMP scheme are not met.
21. There are two types of foreign EMP schemes under the current DFSA regime that can receive DIFC employer contributions under the Employment Law:
  - (a) those that are currently exempt, and will continue to be exempt under our proposals; and
  - (b) those which are commercially operated foreign EMP schemes, currently permitted to be offered from outside the DIFC to DIFC employers, but are to be prohibited under the current proposals.
22. If a foreign EMP scheme does not receive DIFC employer contributions, but instead cater to similar employee benefits payable under regimes outside the DIFC, it is not subject to the Employment Law regime, instead, subject solely to the DFSA regime.
23. The DFSA regime provides an express exemption from the Financial Services Prohibition to operators and administrators of foreign EMP schemes (see paragraph 21(b)) that receive DIFC employer contributions in respect of their employees under the Employment Law (see GEN Rule 2.30.4).<sup>17</sup> To benefit from this exemption, an operator of a foreign EMP scheme must meet the following conditions:
  - (a) the foreign EMP scheme must be established in a Recognised Jurisdiction in accordance with the requirements in that jurisdiction;
  - (b) the persons undertaking the functions of the operator and administrator of the scheme, and also, the advisers to that operator, and the managers of the underlying investments of the scheme, must be regulated and supervised in a jurisdiction outside the DIFC to an equivalent level of regulation as under the DFSA regime;
  - (c) the scheme must appoint an Authorised Firm in the DIFC to act as its agent for the purposes of engaging with, and assisting, members and prospective members

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<sup>16</sup> A foreign scheme is defined as Non-DIFC Scheme in GLO.

<sup>17</sup> There is a similar exemption for Administrators under GEN Rule 2.31.3.

of the scheme (who are the employees of DIFC employers participating in the scheme); and

- (d) the scheme must meet the requirements in the DIFC Employment Law.
24. While the Employment Law regime allows two types of foreign schemes which are 'deemed' Qualifying Schemes (see paragraph 16), these deemed schemes are not expressly dealt with under the DFSA regime. This is because, although DIFC employers participate in such schemes for the purposes of meeting their obligations to make contributions under the Employment Law, such schemes are not generally offered or promoted as open to any DIFC employer and are instead bespoke schemes that are regarded as not being operated by way of business in the DIFC.
25. Under the DFSA regime, giving advice relating to rights under an EMP scheme can only be undertaken by a person holding a licence for Advising on Financial Products.<sup>18</sup> The Financial Promotions regime also applies to the marketing of interests in EMP schemes.<sup>19</sup>

## Part II Permitted foreign EMP schemes

### Proposals relating to foreign EMP schemes

#### Difficulties in assessing equivalence of regulation of foreign EMP schemes

26. To obtain a Certificate of Compliance from the Board of Directors of DIFCA, a foreign EMP scheme that has the benefit of the exemption from the Financial Services Prohibition (referred to in paragraph 15), or is a defined benefit scheme (referred to in paragraph 16(b)), has to be established and operated in a Recognised Jurisdiction. The DIFCA Board can only accept a jurisdiction as a Recognised Jurisdiction, if that jurisdiction is acceptable to the DFSA as providing an equivalent level of regulation as under the DFSA EMP regime. For this purpose, the DFSA needs to undertake an assessment of the regime in the jurisdiction in which the relevant foreign EMP scheme is established.
27. In the first quarter of 2020, we received over a dozen requests from DIFCA to make assessments relating to many jurisdictions. We found the assessment not only extremely difficult and time consuming, but also that it did not lead to any positive findings of equivalence, due to:
- (a) significant differences between the DFSA regime and the models and styles of regulation adopted in other jurisdictions;
  - (b) the variety of regulators and regimes involved; and
  - (c) the different taxonomy used in those jurisdictions.
28. For example, the regulatory regimes in other jurisdictions include pension, gratuity, retirement, superannuation and insurance regimes. These provide vastly varying conduct requirements, often with their own unique features driven by tax and social welfare objectives that play a significant role in the design of employee retirement benefit regulation in other jurisdictions, but which are not necessarily applicable in the DIFC.

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<sup>18</sup> See GEN Rule 2.11.1(1) and (4).

<sup>19</sup> See GEN Rule 3.3.1.

29. A significant difference we commonly found, which deviated from the DFSA regime, related to the operator's role in managing an EMP scheme. Under the DFSA regime, an EMP scheme in the DIFC must have both a licensed Operator and an Administrator, with each facing detailed bespoke conduct requirements. Many other jurisdictions we looked at had only a licensed and regulated operator of the scheme, with the operator having wide flexibility to delegate the administration functions of the scheme to persons lightly regulated or even unregulated.<sup>20</sup> We also found that the applicable conduct requirements varied vastly, depending on the type of financial institution permitted to operate a foreign EMP scheme, such as insurers<sup>21</sup> or trust service providers.<sup>22</sup> The DFSA regime does not permit EMP schemes to be operated by insurers or trust service providers.
30. While not a DFSA requirement, the Employment Law regime requires a foreign EMP scheme that receives DIFC employer contributions to have a Supervisory Board, in line with the Supervisory Body oversight requirement applicable to a DIFC EMP scheme (see paragraph 14(d)). We did not find this to be a common feature at all in other jurisdictions, significantly reducing the scope for foreign EMP schemes to meet the DIFCA's Qualifying Scheme criteria.

### Proposals relating to foreign EMP schemes not operated by way of business

31. We consider that there is a legitimate need to allow two types of foreign EMP schemes to receive DIFC employer contributions where they are not widely offered to any DIFC employer, but instead are open to a very limited number of DIFC employers, and cannot generally be regarded as operated by way of business in the DIFC, simply because DIFC employers participate in such schemes for the purposes of meeting their obligations to make contributions in respect of their employees under the Employment Law.
32. The first is where a DIFC employer is under a statutory duty in another jurisdiction to make contributions to a scheme in that jurisdiction in respect of its DIFC employees, which are permitted under the current DIFC Employment Regulations (see paragraph 16(a)). To remove the unnecessary regulatory burden on DIFC employers who would, without an exemption, be required to provide in respect of their DIFC employees two end of service benefits, we consider it appropriate to allow these foreign EMP schemes to continue.
33. The second is where a scheme is sponsored by an international group (see paragraph 16(b)), where the benefits are exclusive to the employees of the group, and are available to employees of that group in multiple jurisdictions. Often this type of group plan is more beneficial for the DIFC employees than commercial schemes which are open to any DIFC employer, as the cost of operation of the group-specific scheme is generally borne by the employer. The employee also has the portability of the accrued benefits when moving from one jurisdiction to another within the same group. Sometimes, such group plans are defined benefit plans, where the size of the benefit depends on the number of

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<sup>20</sup> The DFSA regime is substantially modelled on the financial services regime in the Isle of Man for regulating EMP schemes. Jersey, Guernsey and the UK regimes also have similar requirements to the DFSA regime, but not in all respects.

<sup>21</sup> In some jurisdictions, insurers are permitted to manage pension funds. While the DFSA regime also allows life insurers to undertake the activity of managing pension funds (see GEN A4.1.2(g)), insurers are not permitted under the DFSA regime to operate EMP Schemes, as the insurance regime does not have detailed requirements as applicable to operators of EMP schemes.

<sup>22</sup> Some jurisdictions permit trust service providers to operate EMP schemes. While the DFSA regime also has a separate licence category for Providing Trust Services, they are not subject to regulation as Operators of EMP Schemes, who face bespoke and more extensive regulation than Trust Service Providers.

years of service, and may also carry additional benefits, such as death, critical illness and disability cover. We consider it appropriate that DIFC employees have continued access to group plans sponsored by their employer due to the more beneficial nature of such plans.

### *Proposal 1*

34. We consider that both categories of foreign EMP schemes referred to in paragraphs 32 and 33, being non-commercial schemes that are neither operated by way of business in the DIFC nor offered or marketed to any DIFC employers, should continue, without the need for operators of such schemes to be licensed by the DFSA. To provide greater legal certainty we propose to provide an express exemption for such schemes on the basis that they are not operated by way of business merely because DIFC employers participate in such schemes.<sup>23</sup>
35. Given that foreign EMP schemes which would fall under the proposed exemptions in paragraphs 32 and 33 can be referred to in their home jurisdiction as pension, gratuity, retirement savings or superannuation schemes or arrangements, we also propose to clarify that such schemes are included within the proposed exemption.

**Please see draft GEN Rule 2.3.7 and associated Guidance in Appendix 1.**

#### **Questions:**

- 1. Do you agree with our proposal to introduce an express exemption in respect of foreign EMP schemes referred to in paragraph 34? If not, why not?**
- 2. Are there any other similar non-commercial EMP schemes where a similar exemption would be warranted? If so, what are they, and why should they be exempted?**

### *Proposals relating to foreign EMP schemes operated by way of business*

36. We no longer consider that the regulatory outcomes we seek for DIFC EMP schemes can be achieved by allowing non-DIFC operators who establish foreign EMP schemes to offer their schemes widely to DIFC employers for making contributions in respect of their DIFC employees. These are financial services operated by way of business in other jurisdictions. Such services would not be permitted to be offered in the DIFC, if not for the exemption from the Financial Services Prohibition we have provided, on the basis of equivalence of regulation of the operator and administrator of the scheme in the home jurisdiction. This was provided for no reason other than to accommodate the similar exemption given to foreign EMP schemes under the current Employment Law regime.
37. A key objective of the DFSA in establishing the DIFC EMP regime was that the end of service benefits of DIFC employees should have the full benefit of regulation, supervision and oversight of the providers of such services by the DFSA, in addition to the controls provided under the DIFC Employment Law. It was also a key driver that the DIFC should become a centre of excellence for providers of EMP services, as our regime is built upon international best practices and standards. Neither of these objectives can be achieved by allowing commercially-run EMP schemes established and operated outside the DIFC, by persons not regulated under the DFSA regime, to offer their

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<sup>23</sup> If the operator of either type of scheme were to market their scheme or services to other DIFC employers, they would become subject to the full extent of the DFSA regime for EMP schemes and would need to obtain a DFSA licence.

financial services to DIFC employers and employees.

38. We are also concerned that our enforcement capabilities are not as effective in the case of foreign EMP schemes, with their non-DIFC operators and other functionaries located outside the DIFC. Given the predominantly retail nature of the members of EMP schemes,<sup>24</sup> we consider it important that the DFSA has direct supervision and enforcement powers relating to the operator and administrators of an EMP scheme which receives DIFC employer contributions in respect of their DIFC employees. This can only be achieved by not allowing any foreign EMP scheme to be offered or marketed to DIFC employers and employees (except to the extent provided under Proposal 1).

### **Proposal 2**

39. Due to the considerations noted in paragraphs 36 to 38, we propose to remove the current exemptions from the Financial Services Prohibition in GEN Rules 2.30.4 and 2.31.3 that allow non-DIFC operators and administrators to offer their foreign EMP schemes to DIFC employers.

**Please see the proposed deletion of GEN Rules 2.30.4 and 2.31.3 in Appendix 1.**

### **Question 3:**

**Do you agree with our proposal to remove the current exemption available to non-DIFC operators and administrators? If not, why not, and how else could the concerns set out in paragraphs 36 to 38 be addressed?**

### **Other proposals relating to foreign EMP schemes**

40. We do not consider it necessary or appropriate for DFSA licensed Operators to establish foreign EMP schemes to which DIFC employers can make contributions, required under the Employment Law, in respect of their DIFC employees. Such a practice gives rise to legal uncertainties and risks from the application to the scheme of the regulatory requirements in the jurisdiction in which the scheme is established.

### **Proposal 3**

41. To address the concern noted above, and in harmony with the approach reflected in the proposal to remove the exemption for foreign EMP schemes to be offered to DIFC employers under Proposal 2, we propose to:
- (a) prohibit a DFSA licensed Operator from establishing and managing a foreign EMP scheme if that foreign scheme is to receive DIFC employer contributions under the Employment Law; and
  - (b) prohibit DFSA licensed Administrators from acting as the administrator of a foreign EMP scheme if that foreign scheme is to receive DIFC employer contributions under the Employment Law.

**Please see draft GEN Rule 2.2.10H in Appendix 1.**

### **Question 4:**

**Do you agree with our proposal to prohibit DFSA licensed Operators and**

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<sup>24</sup> Under our Rules, both employers and employees are deemed retail clients. See COB Rule 2.1.2(4) and (5).

**Administrators from operating, or acting as the administrator of, a foreign EMP scheme that receives DIFC employer contributions? If not, why not?**

#### **Proposals relating to Advising on Financial Products**

42. Under our current definition of Advising on Financial Products, a person giving advice in relation to rights under an EMP scheme, by way of business, needs a DFSA licence. Although not an EMP scheme, there are other types of schemes that provide benefits to members in respect of their employment, where the benefits are payable on termination of employment or other specified event, and the benefits are calculated by reference to contributions made by the employer in respect of the employee and the investment performance of the assets of the scheme. Such schemes can be called a pension, occupational, gratuity, superannuation or employee savings scheme or plan.
43. We consider that persons who receive advice relating to interests in a pension, occupational, gratuity, superannuation or employee savings schemes or plans warrant the same level of protection as those receiving advice relating to interests in EMP schemes.
44. We note that giving advice relating to purely self-funded retirement savings plans are not within our proposal. However, if the assets of a self-funded plan include Investments and other financial products in GEN Rule 2.11.1(4), a person giving advice relating to such plans by way of business will require to be licensed as a firm giving financial product advice.

#### **Proposal 4**

45. We propose to extend the scope of ‘financial products’, under the definition of Advising on Financial Products, to include giving advice on rights or interests in a pension, occupational, gratuity, superannuation or employee savings scheme or plan for the reasons noted in paragraph 43.

**Please see draft GEN Rule 2.11.1(4) in Appendix 1.**

#### **Question 5:**

**Do you agree with our proposal to expand the definition of financial products as set out in paragraph 45? If not, why not?**

#### **Proposal relating to Financial Promotions**

46. We consider that the requirements that apply to persons undertaking Financial Promotions in or from the DIFC should extend to marketing activities relating to rights in pension, occupational, gratuity, superannuation or employee savings schemes or plans offered by service providers outside the DIFC.

#### **Proposal 5**

47. To close that gap, we propose that the definition of Financial Product under GEN Rule 3.3.1 be amended to include rights or interests in a pension, occupational, gratuity, superannuation or employee savings scheme or plan.

**Please see draft GEN Rule 3.3.1 in Appendix 1.**

#### **Question 6:**

**Do you agree with our proposal to expand the definition of financial products for the purposes of Financial Promotions as set out in paragraph 47? If not, why not?**

### Part III Contributions to DIFC EMP schemes

#### Proposals relating to Voluntary Contributions

48. Under the DFSA EMP regime, the main purpose of such a scheme is to provide benefits to members in respect of their employment. This allows an EMP scheme to receive not only mandatory contributions from employers to provide an end of service or similar benefit to their employees, but also voluntary contributions. Often, employees make voluntary contributions to enhance the mandatory contributions made by the employer, for a combination of reasons, such as to:
- (a) have a larger pot of money than otherwise available from the employer mandatory contributions;
  - (b) have a larger benefit than just the employer mandatory contributions, available especially to the beneficiaries such as the dependents of the employee, in the event of ill health or death of the employee;
  - (c) obtain concessional treatment in jurisdictions where voluntary contributions attract lower levels of taxation; and
  - (d) gain cost efficiencies, where other types of wealth management vehicles may be more costly and not easily accessible for employees with smaller amounts available for investment.
49. The DFSA regime recognises that employees who are the members of an EMP scheme may make voluntary contributions to the scheme (see COB Rules 12.3.1(c) and 12.4.3). Although not explicitly stated in our regime, we have expressed the view that if voluntary contributions are to be made by members, those contributions should be withdrawable only upon the termination of employment, rather than before, to maintain a clear distinction between employee benefit schemes, and other wealth management services (such as discretionary portfolio management or managing collective investment funds).
50. We are also concerned that if voluntary contributions were to flow in to an EMP scheme without appropriate controls, such as those relating to AML (see the discussion under Proposal 11), the proper protection and sound management of employee Core Benefits, which should remain the main purpose of EMP schemes under the Employment Law regime, can be eroded.
51. However, there are arguments in favour of greater flexibility for voluntary contributions, and in particular for allowing earlier access (than on the termination of employment) to voluntary contributions. Therefore, to clarify the position and to test public views on these issues, we propose that an Operator be allowed to receive voluntary contributions to an EMP scheme where:
- (a) such contributions are made by way of salary sacrifice made by the employee, so that the contributions to the EMP scheme flow from the DIFC employer's pay roll bank account, and not from the employee's own bank account or by cash contributions;
  - (b) the voluntary contributions are managed by the Operator of the EMP scheme subject to the same conduct requirements applicable to the Operator under COB

- chapter 12, except for early withdrawals, if permitted under the requirements in (c); and
- (c) if early withdrawal of voluntary contributions were to be permitted other than upon termination of employment, such withdrawals are:
    - (i) allowed not more than twice a year; and
    - (ii) made in a manner that do not adversely impact on the employee's Core Benefits, and the rights and interests of the other members of the scheme, and the scheme itself.
52. We also propose to give Guidance that:
- (a) for the purposes of meeting the requirement in paragraph 51(c), an Operator must have adequate systems and controls to be able to clearly distinguish voluntary contributions from mandatory contributions in respect of a member, including the assets in which those contributions are invested; and
  - (b) once an employee ceases to be a member of an EMP scheme, and if the member were to retain the benefit in the scheme, no further voluntary contributions can be made by the member to the scheme (as contributions can only be made through salary sacrifice coming through the employer's payroll bank account).
53. We have considered whether it is appropriate to place a limit on the level of voluntary contributions that can be made by an employee to an EMP scheme, particularly due to concerns that the larger the voluntary contributions allowed, even if they come through the employer's payroll bank account, the greater the AML risks. Other jurisdictions have ceilings on voluntary contributions, so that employees do not have the benefit of special tax treatment where the voluntary contributions exceed specified ceilings. We are of the view a maximum ceiling on voluntary contributions is warranted, but seek public comment on this issue before imposing such a limit.

### *Proposal 6*

54. We propose that if any voluntary contributions are to be made by an employee who is a member of an EMP scheme, such contributions can only be received by the Operator of the scheme if the proposed requirements in paragraph 51 are met. We also propose to give Guidance as set out in paragraph 52.
55. We seek public comment on whether:
- (a) early withdrawal of voluntary contributions (before termination of employment) should be permitted and, if so, under what conditions;
  - (b) a limit should be placed on the maximum voluntary contributions that can be made to an EMP scheme by a member and, if so, what that ceiling should be;
  - (c) voluntary contributions should only be withdrawable on grounds such as financial hardship; and
  - (d) voluntary contributions should be required to be held in the EMP scheme for a specified minimum period before they could be withdrawn and, if so, what that period should be.

Please see draft COB Rules 12.3.1 and 12.3.6A in Appendix 2.

**Questions:**

**7. Do you have any concerns relating to allowing voluntary contributions subject to the requirements proposed in paragraph 51? If so, what are they and how should they be addressed?**

**8. What are your views relating to the issues noted in paragraph 55?**

**Proposal to open the DIFC EMP regime to Dubai Free Zone employers**

56. It is envisaged that, in the near future, employers in the Commercial Free Zones in Dubai will be able to make contributions to DIFC EMP schemes that are operated and managed by DFSA licensed Operators and Administrators. The objective of this Government of Dubai initiative is to ensure that employees in Dubai Free Zones have the full benefit of the regulatory protection provided under the DIFC regime, so that the employees' end of service or gratuity benefit entitlements are properly segregated from their employers' balance sheet, and properly protected under the DFSA regime.

**Proposal 7**

57. We propose to make provision for Operators of EMP Schemes in the DIFC to receive contributions from employers in Dubai Commercial Free Zones in respect of their employees under the Federal Employment Law applicable in the relevant Commercial Free Zone. We also propose that Proposal 3, which would prohibit Operators and Administrators from acting as the operator or administrator of foreign EMP schemes that receive DIFC employer contributions under the Employment Law, be extended to schemes that receive contributions from Dubai Commercial Free Zone employers.

Please see draft definition of Core Benefits in COB Rule 12.1.2(d) in Appendix 2.

**Question 9:**

**Are there any concerns if employers in Dubai Commercial Free Zones were required to make contributions in respect of their employees to DIFC EMP schemes? If so, what are they, and how should they be addressed?**

**Part IV Other changes relating to Operators and Administrators of EMP schemes**

**Proposal that an Operator be a DIFC Body Corporate**

58. Under the current regime, an Operator of an EMP scheme can be a stand-alone DIFC legal entity (i.e. a body corporate incorporated under the DIFC Companies Law), or be a Branch of a Financial Services provider in another jurisdiction<sup>25</sup> An Administrator of an EMP Scheme, on the other hand, must be a stand-alone legal entity in the DIFC, and cannot be a Branch.
59. When creating the EMP regime, we considered it appropriate to give the Operator the

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<sup>25</sup> A Branch is a Body Corporate established outside the DIFC but has a place of business in the DIFC and is a Recognised Company under the DIFC Companies Law.

flexibility to be either a Branch or a stand-alone DIFC legal entity, while requiring an Administrator to be a stand-alone DIFC legal entity, as it is the entity undertaking the day-to-day operation of the EMP Scheme. The Operator's role is predominantly one of legal accountability for the operation of the EMP scheme, and providing oversight over the functions carried out by the Administrator and other delegates of the Operator.

60. However, we have identified that allowing an Operator to be a Branch could lead to the anomalous situation of some home jurisdiction requirements relating to EMP schemes continuing to apply to the Operator, although the EMP scheme is established in the DIFC. This raises the risk not only of dual regulation, but also of conflicting regulation. This is particularly a concern given the significant differences in the regulatory regimes applicable to EMP schemes in different jurisdictions. Therefore, we propose not to allow an Operator to be a branch.

#### Capital requirements applicable to an Operator

61. A consequence of the proposal not to allow an Operator to be a Branch is that it will no longer be able to rely on the adequacy of the capital requirements applicable to the legal entity, of which it is a Branch. As we propose that an Operator be a DIFC Body Corporate, it will be subject to the relevant prudential requirements in full, which includes a base capital requirement of USD 1 million, or an expenditure based capital minimum (EBCM) of 13 weeks, whichever is the higher.<sup>26</sup>
62. As noted before, the Operator's role differs from that of the Administrator. The Operator is the oversight provider of the Administrator, in carrying out the day-to-day management and administration of the EMP scheme, as the delegate of the Operator. We already took this difference into account when we set the Administrator's EBCM at 18 weeks, instead of the 13 weeks of EBCM applicable to the Operator.
63. We consider that a lower base capital requirement of USD 500,000 is warranted for an Operator of an EMP scheme, while retaining the EBCM to an Operator at the current level of 13 weeks. This is proportionate, given the base capital requirement for a Trust Service Provider holding trust assets is USD 500,000, and unlike Trust Service Providers, who act as trustee for private trusts, Operators are legally accountable for retail EMP schemes that are larger businesses, involving many outsourcing and delegation arrangements.

#### **Proposal 8**

64. To address the issues noted in paragraph 60, we propose to remove the option for an Operator of an EMP scheme to be a Branch, so that it needs to be a stand-alone legal entity in the DIFC.

**Please see draft GEN Rule 7.2.2(5) in Appendix 1**

#### **Proposal 9**

65. In light of the considerations noted in paragraph 63, we propose to lower the base capital requirement for an Operator to USD 500,000.

**Please see draft PIB Rule 3.6.2 in Appendix 4.**

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<sup>26</sup> See PIB Rules 3.5.2, 3.6.2 and 3.7.2.

**Questions:**

- 10. Do you have any concerns relating to our proposals to remove the ability for an Operator to be a Branch? If so, what are they, and how should they be addressed?**
- 11. Do you agree with our proposal to decrease the base capital requirement for an Operator from USD 1 million to USD 500,000? If not, why not?**

**Proposals relating to Foreign EMP schemes with no DIFC employer participation**

66. The DFSA regime permits Operators and Administrators to act for EMP schemes which do not receive contributions (Core Benefits) from DIFC employers in respect of their employees under the Employment Law (and, under Proposal 6, from the employers in Dubai Commercial Free Zones). EMP schemes that do not receive such contributions are generally established in other jurisdictions, and would be subject to the requirements applicable in that other jurisdiction.

**Proposal 10**

67. Where an Operator and Administrator acts for an EMP scheme referred to above, we propose that they be subject to the following additional conduct requirements to ensure that the DFSA has adequate information relating to the activities of the Operator and Administrator by requiring the Operator and Administrator to:
  - (a) comply with the applicable requirements in the jurisdiction in which the EMP scheme is established; and
  - (a) notify the DFSA, as soon as practicable, of any event or matter that has, or could have, a material adverse impact on the ability of the Operator or Administrator to act in accordance with the requirements referred to in (a).

**Please see draft COB Rule 12.2.3 in Appendix 2.**

**Questions 12:**

**Do you agree with our proposal to impose the conduct requirement in paragraph 67 on Operators and Administrators who act for EMP schemes outside the DIFC? If not, why not?**

**Part V Application of AML procedures****Proposals relating to AML procedures**

68. Under the current regime, either the Operator of an EMP scheme, or the Administrator as the delegate of the Operator, must comply with the standards in the AML module in respect of participating employers and members of the scheme.
69. Some ambiguity has arisen relating to the AML screening required to be carried out by the Administrator of an EMP scheme at the point of admission to the scheme of participating employers and members.<sup>27</sup>

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<sup>27</sup> Generally, the main purpose for which employers participate in an EMP scheme is to make contributions to provide employment benefits to their employees. Members do not individually join an EMP scheme, or make

70. Under AML Rule 6.1.1(1), a service provider needs to make a risk-based assessment of every customer and assign a risk rating to the customer relating to money laundering risks. The factors that are to be taken into account include the nature of the product, service or transaction involved, and the particular customer relationship.<sup>28</sup>
71. Under COB Rule 2.1.2(5), participating employers, members and beneficiaries of an EMP scheme are to be treated as retail clients of the Operator and Administrator of the scheme. These persons are treated as retail clients under COB to give them retail protection, even if some may meet the Professional Client criteria. This does not preclude the need to adopt a risk based approach for AML purposes, as the DFSA AML standards are particularly designed to allow a risk-based approach to undertaking customer due diligence.
72. For example, under our AML module, certain types of financial products and services – such as pension, superannuation or similar schemes (such as an EMP schemes), are considered as indicating lower money laundering risk if:
- (a) such schemes provide retirement benefits to employees;
  - (b) contributions to the scheme are made by way of deductions from wages; and
  - (c) the scheme rules do not permit the assignment of the member's interest under the scheme.<sup>29</sup>
73. We consider, for AML purposes, an Administrator must carry out an individual assessment of each participating employer in the EMP scheme. This is because the pivotal customer relationship, which results in the flow of funds (i.e. contributions) to the EMP scheme in respect of members of the scheme, is the relationship which the Administrator has with the participating employer.
74. In contrast, we do not consider that an Administrator needs to undertake a risk based assessment of each individual member of an EMP scheme (or their beneficiaries), because there are many characteristics common to members across the board, that indicate that they pose a low AML risk. For example:
- (a) the controlling customer relationship with the Administrator is with the participating employer, and not with the employees of the participating employer who become members of the scheme;
  - (b) the contributions to the scheme come from the participating employers in respect of the members, and not from the members;
  - (c) a member cannot assign his accrued benefits to another person;<sup>30</sup> and
  - (d) the accrued benefits can only be withdrawn upon termination of employment (although a member may wish to keep the benefit in the scheme after this date,

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direct contributions to the scheme, instead contributions to the scheme come directly from the employer's payroll account.

<sup>28</sup> AML Rule 6.1.1(1).

<sup>29</sup> AML Rule 6.1.3(1)(b)(v).

<sup>30</sup> A nomination of a beneficiary to receive the accrued benefits is not an assignment of the benefit as such, and applies in the limited event of sickness or death of the member where the member is unable to receive the benefit.

with no additional contributions being possible).

75. Where a member makes voluntary contributions, those too, as we propose (see Proposal 6), must be made by way of salary sacrifice, and will come from the participating employer's payroll bank account. We consider, where voluntary contributions cannot be withdrawn before the termination of employment, each member making such contributions can be considered as low AML risk. However, there may be circumstances where voluntary contributions may pose a higher AML risk, for example, if the voluntary contributions far exceed mandatory contributions or easily withdrawable or transferable by the member before the termination of employment. In such cases, an individual risk based assessment of each such member would be warranted.

### **Proposal 11**

76. To provide greater clarity relating to how the standards in the AML module<sup>31</sup> apply to an Administrator of an EMP scheme (who undertakes AML functions in respect of the scheme as the delegate of the Operator), we propose to provide Guidance that an Administrator of the EMP scheme, for achieving the outcome of AML Rule 6.1.1(1), is:
- (a) expected to undertake a risk-based assessment of every participating employer of the scheme, and assign a risk rating appropriate to that employer;
  - (b) not expected to undertake an individual assessment of every member of the EMP scheme (or their beneficiaries), but instead may assign to each member a low AML risk rating, taking into account the low AML risks associated with the financial service of pension, gratuity, retirement and superannuation schemes where:
    - (i) the contributions are made by the participating employer in respect of each member, and not by the member (except member voluntary contributions in (c)); and
    - (ii) the accrued benefits of the member are not assignable to any third-party; and
    - (iii) expected to undertake an individual assessment of a member in circumstances that can be seen as posing a higher AML risk, such as where voluntary contributions by a member exceed substantially the amount of mandatory contributions in respect of that member, or the voluntary contributions can be easily or freely withdrawable or assignable to others by the member.

**Please see draft Guidance items 2 and 3 under COB Rule 12.2.1 in Appendix 2.**

#### **Questions:**

**13. Do you agree with our proposed Guidance in paragraph 76? If not, why not?**

**14. Are there other issues needing clarification relating to AML procedures applicable to EMP schemes? If so, what are they, and how should they be addressed?**

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<sup>31</sup> As the AML module contains standards which DFSA regulated entities are expected to follow, we consider Guidance would suffice to interpret the provisions in the AML module, rather than amending the AML provisions.

## Part VI Transitional arrangements

### Proposals relating to transitional relief

77. A number of proposals in this paper may require changes to the requirements applicable to Operators and Administrators. For example, the proposal to require an Operator to be a DIFC Body Corporate, instead of a Branch, would require the firm to make a number of changes, including incorporating a DIFC company, obtaining a Licence for that entity, transferring its staff, changing letterheads and other documents, and holding its own capital. These changes are likely to need at least a period of six months.

### *Proposal 12*

78. We propose to provide a period of six months for the transition to the new requirements, if our proposals are to be adopted following public consultation.

#### **Questions:**

- 15. Do you agree with our proposed six-month transitional period? If not, what would be a suitable transitional period?**
- 16. Are there other issues we have not identified in these proposals? What are they, and how should they be addressed?**

## Annex 1: Questions in this Consultation Paper

### Question 1:

Do you agree with our proposal to introduce an express exemption in respect of foreign EMP schemes referred to in paragraph 34? If not, why not?

### Question 2:

Are there any other similar non-commercial EMP schemes where a similar exemption would be warranted? If so, what are they, and why should they be exempted?

### Question 3:

Do you agree with our proposal to remove the current exemption available to non-DIFC operators and administrators? If not, why not, and how else could the concerns set out in paragraphs 36 to 38 be addressed?

### Question 4:

Do you agree with our proposal to prohibit DFSA licensed Operators and Administrators from operating, or acting as the administrator of, a foreign EMP scheme that receives DIFC employer contributions? If not, why not?

### Question 5:

Do you agree with our proposal to expand the definition of financial products as set out in paragraph 45? If not, why not?

### Question 6:

Do you agree with our proposal to expand the definition of financial products for the purposes of Financial Promotions as set out in paragraph 47? If not, why not?

### Question 7:

Do you have any concerns relating to allowing voluntary contributions subject to the requirements proposed in paragraph 51? If so, what are they and how should they be addressed?

### Question 8:

What are your views relating to the issues noted in paragraph 55?

### Question 9:

Are there any concerns if employers in Dubai Commercial Free Zones were required to make contributions in respect of their employees to DIFC EMP schemes? If so, what are they, and how should they be addressed?

### Question 10:

Do you have any concerns relating to our proposals to remove the ability for an Operator to be a Branch? If so, what are they, and how should they be addressed?

### Question 11:

Do you agree with our proposal to decrease the base capital requirement for an Operator from USD 1 million to USD 500,000? If not, why not?

### Question 12:

Do you agree with our proposal to impose the conduct requirement in paragraph 67 on Operators and Administrators who act for EMP schemes outside the DIFC? If not, why not?

**Question 13:**

**Do you agree with our proposed Guidance in paragraph 76? If not, why not?**

**Question 14:**

**Are there other issues needing clarification relating to AML procedures applicable to EMP schemes? If so, what are they, and how should they be addressed?**

**Question 15:**

**Do you agree with our proposed six-month transitional period? If not, what would be a suitable transitional period?**

**Question 16:**

**Are there other issues we have not identified in these proposals? What are they, and how should they be addressed?**