



CONSULTATION PAPER NO. 94

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**PROPOSED CHANGES TO THE FMT JURISDICTION,
TO THE DFSA'S SUPERVISORY POWERS AND
TO THE DFSA'S APPROACH TO DECISION MAKING**

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Part A: Introduction and Overview

Why are we issuing this paper?

1. This Consultation Paper (CP) includes the results of public consultation on CP90, proposed changes arising from that consultation and further proposals resulting from the DFSA's review of its supervisory powers. We undertook the review to assess whether the current supervisory powers are adequate and effective to enable the DFSA to achieve its regulatory objectives,¹ in line with the standards set by relevant international standard setters,² and also in light of our own supervisory experience in the past decade. This CP also includes further proposals on the DFSA's approach to decision making.
2. This CP contains two sets of proposals on which we seek public comments:
 - (a) the first set is the position adopted by the DFSA relating to CP90 proposals to enhance the administrative review of DFSA decisions by the Financial Markets Tribunal (FMT) – with further refinements to the original proposals in light of public comments received and through our own initiative (see Parts B and D). Where CP90 only set out proposed changes at the level of laws, this CP also proposes changes at the level of Rulebook Modules;³ and
 - (b) the second set is detailed proposals to enhance the DFSA's supervisory powers resulting from the comprehensive review of the DFSA's current powers, as indicated in CP90 (see Part C).

Overview of proposals

3. The DFSA intends (subject to the outcome of this further consultation) to move forward with the overall set of proposals consulted on in CP90, namely to:
 - (a) expand the jurisdiction of the FMT to include matters currently falling within the jurisdiction of the Regulatory Appeals Committee (RAC);
 - (b) abolish the RAC; and
 - (c) adapt its own approach and processes:
 - (i) to decision making, which was discussed at a high level in CP90 (see

¹ The DFSA's powers, functions and objectives are set out in Article 8 of the Regulatory Law 2004.

² There are three main international standard setters in financial services, which are the Basel Committee on Banking Supervision (BCBS or Basel); the International Association of Insurance Supervisors (IAIS); and the International Organization of Securities Commissions (IOSCO).

³ Some parts of the DFSA's RPP Sourcebook would also need amending to reflect the changes proposed if implemented. As the Sourcebook contains guidance and not rules, these changes are not included here.

also Part D of this CP); and

(ii) to setting the level of fines, which was discussed in detail in CP90.

4. From the review of its supervisory powers, the DFSA proposes:
- (a) some minor changes to powers to make sure that the DFSA's regime is sufficiently in line with international standards for financial services regulation (see paragraphs 39 to 48);
 - (b) a number of changes to powers that our supervisory experience suggests are necessary (see paragraphs 49 to 76); and
 - (c) amendments to ensure a more consistent and coherent approach to the due process requirements that apply when the DFSA exercises its supervisory powers (see paragraphs 77 to 93).
5. It is important to note that both the CP90 proposals and the supervisory powers proposals have a common theme, which is to promote proper observance of due process procedures when the DFSA exercises its discretionary supervisory powers, so leading to consistent, transparent and proportionate use of such powers.
6. Under these proposals, while the DFSA would make the first instance decisions in the exercise of its supervisory powers, the FMT - which would provide the independent mechanism for the review of the DFSA's first instance decisions – would also exercise the supervisory powers available to the DFSA when making its decisions. In doing so, the FMT would step into the shoes of the original decision maker, which is the DFSA.
7. Both the DFSA, in its first instance decision making, and the FMT, in the exercise of its administrative review powers, are bound by the administrative law principles which underlie due process procedures when carrying out their respective roles. See paragraphs 77 to 93 for details of the “due process” procedures applicable to the DFSA's decision making.

Who should read this paper?

8. The proposals in this paper would be of interest to all regulated persons, as well as financial market participants generally, together with their professional advisers.

Terminology in this paper

9. In the remainder of this paper, defined terms are identified by the capitalisation of the initial letter of a word or of each word in a phrase and are defined 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.
10. A reference to FMT in this CP includes, where appropriate, a reference to RAC under the current regime. The changes proposed in CP90 and this CP, which recommend the expansion of the FMT jurisdiction to absorb the current RAC powers, thereby removing the need to maintain two tribunals, are still very much proposals, and should not be read as enacted law.

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11. In addition, there are a number of key concepts used in this paper, such as:
- (a) the expressions “due process” and “due process requirements” – to refer to the administrative law requirements that apply to the DFSA when making regulatory decisions (also known as “rules of natural justice” or “procedural fairness principles” in some jurisdictions). These require administrative decision makers to act without bias, to give the person affected a fair opportunity to make representations⁴ and to make sure that their decisions are based on all material considerations, when making their decisions;
 - (b) the expression “decision maker” – to refer to those making decisions to exercise the DFSA’s supervisory powers for and on behalf of the Chief Executive of the DFSA, including any committee of such persons;
 - (c) the expression “regulated persons” – to refer to Authorised Firms, Authorised Market Institutions, Authorised Individuals, Key Individuals, Registered Auditors, Domestic Funds, Principal Representatives or Designated Non-Financial Businesses or Professions (DNFBPs);
 - (d) the expression “regulated firms” – to refer to Authorised Firms and Authorised Market Institutions; and
 - (e) the expression “supervisory powers” – to encompass the regulatory powers of the DFSA, including its licensing, supervision, investigatory and enforcement powers.

How to provide comments?

12. All comments should be in writing and sent to the address or email specified below. If sending your comments by email, please use the Consultation Paper number in the subject line. You may, if relevant, identify the organisation you represent in providing your comments. The DFSA reserves the right to publish, including on its website, any comments you provide, unless you expressly request otherwise at the time of making comments.

Comments to be addressed or emailed to:

Consultation Paper No. 94
Policy and Legal Services
DFSA
PO Box 75850
Dubai, UAE

Email: consultation@dfsa.ae

Tel: +971(0)4 3621500

⁴ The administrative law principle of ‘hearing the other side’ is designed to ensure that decision makers take into account the views of the persons whose rights, interests and legitimate expectations are likely to be affected by their decisions when making those decisions.

What happens next?

13. The deadline for providing comments on this consultation is **5 May 2014**.
14. Once we receive your comments, we shall consider if any further amendments are required to these proposals. For the proposals in this paper, we may then proceed to recommend the proposed changes to the various DFSA-administered laws to the President for enactment by the Ruler. If those proposed changes to the laws are enacted, we shall then proceed to make the relevant changes to the DFSA's Rulebook. You should not act on the proposals until the relevant changes to the laws and DFSA Rulebook are made. We shall issue a notice on our website telling you when this happens.

Structure of this paper

15. The proposals in this paper are structured as follows:
 - (a) Part A: Introduction and Overview;
 - (b) Part B: Outcome of public consultation on CP90;
 - (c) Part C: Review of the DFSA's supervisory powers;
 - (d) Part D: The DFSA's approach to decision making;
 - (e) Annex 1: List of questions asked in this Consultation Paper;
 - (f) Appendix 1: draft amendments to the Regulatory Law 2004 ("Regulatory Law");
 - (g) Appendix 2: draft amendments to the Markets Law 2012 ("Markets Law");
 - (h) Appendix 3: draft amendments to the Collective Investment Law 2010 ("CI Law");
 - (i) Appendix 4: draft amendments to the Islamic Finance Business Law 2004;
 - (j) Appendix 5: draft amendments to the Investment Trust Law 2006;
 - (k) Appendix 6: draft amendments to the AMI Module;
 - (l) Appendix 7: draft amendments to the GEN Module;
 - (m) Appendix 8: draft amendments to the MKT Module;
 - (n) Appendix 9: draft amendments to the PRS Module;
 - (o) Appendix 10: draft amendments to the REC Module;
 - (p) Appendix 11: draft amendments to the FER Module;
 - (q) Appendix 12: draft amendments to the PIB Module;
 - (r) Appendix 13: draft amendments to the PIN Module;
 - (s) Appendix 14: draft amendments to the TKO Module;
 - (t) Appendix 15: draft amendments to the GLO Module; and
 - (u) Appendix 16: draft amendments to the AML Module.

PART B Outcome of public consultation on CP90

CP90 proposals

16. The DFSA published CP90 *Proposed changes to the FMT jurisdiction and enhancements to the DFSA's enforcement powers* on 16 September 2013, and the consultation period closed on 16 November. We received responses to the consultation from three stakeholders – two from law firms and one from a compliance consultancy- for which we are grateful.
17. In CP90 we proposed that the current FMT should continue, but with an expanded jurisdiction absorbing the responsibilities currently undertaken by the RAC. If these proposals come into effect, the DFSA would have a single tribunal for the review of decisions it makes when exercising its supervisory powers. The main arguments in favour of these changes are not repeated in detail here, but can be found in paragraphs 41 to 50 of CP90.
18. Although the changes proposed in CP90 are significant, they represent an evolution of the current arrangements, preserving and building on what has worked well with the FMT in its present guise.

Consultation responses

19. Respondents to CP90 were generally supportive of the proposed changes and, in particular, of the aim to make review of DFSA decisions more independent, in line with international best practice. Respondents were also supportive of the proposal to expand the jurisdiction of the FMT to include the powers presently exercised by the RAC. There was support for the proposal that, as now, a DFSA Board member could not be a member of the FMT with its broader responsibilities.
20. When considering the key design features (paragraphs 56 to 63 of CP90), and consequent proposals, one respondent questioned whether the DFSA Board should continue to appoint FMT members, or whether this should become the responsibility of a separate body.
21. As noted above, the proposals in CP90 are an enhancement of the current arrangements. It is intended to retain the FMT in its current form, while conferring on it additional jurisdiction currently covered by the RAC. While the appointment of the FMT members remains with the DFSA Board under these proposals, the proposals in CP90 have been designed to make the future FMT more independent than the existing FMT, where the DFSA Board has power not only to appoint, but also to terminate, without cause, the appointment of any member of the FMT. Under these proposals, FMT members would be appointed for fixed terms and may only be dismissed for just cause, which is limited to “inability, incapacity or misbehaviour”. It is our view, therefore, that these proposals significantly increase the independence of the FMT by ensuring that members of the FMT have security of tenure.
22. One respondent suggested that detailed membership criteria for potential FMT members should be set out in the legislation. Our view is that the requirement set out in the proposed Article 26(4) (please see Appendix 1) – namely that the members of the FMT shall have relevant qualifications, expertise and experience in the regulatory aspects of financial services and related activities - is sufficient and appropriately flexible to ensure that members are properly equipped for their task.

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23. In a similar vein, one respondent queried whether the FMT would have sufficient legal expertise. We would also note that the current FMT has considerable legal expertise amongst its members. Again, we believe that the requirement quoted above is sufficient to ensure that this aspect is considered when the members of the future FMT are appointed.
 24. On the proposed structure of the FMT, one respondent questioned whether the proposed drafting properly expressed the grounds of appeal of a FMT decision to the DIFC Court. We have considered this question and revised drafting is set out in the proposed Article 32 to make clear that a right of review to the Court is only on a question of law (please see Article 32 in Appendix 1).
 25. One respondent asked whether the DFSA's approach to publicising disciplinary matters would change, given the proposals in CP90. Our current approach, which is set out in section 5-19-9 of the RPP Sourcebook, was put in place only at the end of 2012, and we see no reason to change it at this time as we believe it remains appropriate.
 26. On the proposed approach to the setting of fines, a respondent asked whether the DFSA intended to introduce a system of fixed discounts to proposed fines for early settlement of disciplinary matters and whether further guidance would be provided on the proposed five-step approach to setting the level of fines. We do not propose to introduce a system of fixed discounts at this stage, although we would expect to consider this possibility again in future when we have greater experience of operating this model. The guidance proposed to be included on the five-step approach, in Chapter 6 of the RPP Sourcebook (please see Appendix 3 of CP90) is, we believe, sufficiently detailed at this stage of the DFSA introducing a new approach. Again, we would anticipate expanding this guidance in future, in the light of experience of operating under the new approach.
 27. Lastly, we agreed with the comment of one respondent that the concept of sanctions in the proposed Article 28 is not fully specified. This is now addressed in the proposed right of referral in Article 90 (please see Article 90 in Appendix 1).

Costs of investigations

28. In paragraph 133 of CP90 we said we would consider further our proposed policy in regard to the circumstances in which we would take into account costs arising from undertaking the relevant enforcement action (for example, investigation costs) when determining the amount of a financial penalty. We are currently considering this issue, as part of a debate on recovery of costs of investigation more generally. We may publish proposals on this issue in due course.

PART C Review of the DFSA's supervisory powers

1. An overview of the DFSA's supervisory powers

29. The DFSA is an integrated financial services regulator with both prudential and conduct regulation responsibilities for the banking, insurance and securities sectors. There are nearly one hundred distinct discretionary administrative powers available to the DFSA, which are designed to support the DFSA's supervisory functions.
30. These powers fall into four broad categories, which are the licensing (i.e. the gatekeeper) powers, supervision powers, investigatory and enforcement powers, and cooperative and collaborative powers.⁵
31. The key licensing powers of the DFSA include its powers to:
- (a) license and authorise firms providing financial services (i.e. regulated firms) and certain individuals performing senior management and control functions within regulated firms, and do so with or without restrictions or conditions attaching to such authorisations as appropriate;
 - (b) grant endorsements allowing regulated firms to conduct specific activities, such as providing Islamic Financial Services, offering Financial Services to retail investors and acting as trade repositories, and do so with or without restrictions or conditions as appropriate; and
 - (c) approve or object to persons becoming Controllers of regulated firms or increasing their existing level of control, including requiring Controllers to take specified actions in relation to the regulated firms of which they are, or propose to become, Controllers.
32. The key aspects of the DFSA's supervision powers include its powers to:
- (a) obtain information from regulated firms, including through on-site visits;
 - (b) obtain information about regulated firms and their conduct from third parties;
 - (c) direct regulated firms to enter into, or not enter into, specified types of transactions; and
 - (d) require regulated firms to hold additional or a specified type of capital or take such other actions as appropriate for prudential purposes.
33. The key investigatory and enforcement powers of the DFSA include its powers to:
- (a) requisition information or enter premises of regulated firms or any third parties where the DFSA forms a reasonable opinion that a breach of legislation it administers has occurred or is likely to occur;

⁵ The last category of powers, although traditionally not seen to be as significant as the conventional supervisory and enforcement powers, have become increasingly important as a valuable means available to regulators to ensure effective supervision and regulation of financial services and related activities, because of the international nature of financial services and activities and their providers.

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- (b) fine or censure persons who have breached or are breaching the legal requirements applicable to such persons;⁶ and
 - (c) revoke authorisations, endorsements or licences, or take any other disciplinary actions as appropriate, including accepting from regulated firms enforceable undertakings.

34. The cooperation and collaborative powers of the DFSA are its powers to:

- (a) share information and cooperate with other regulators through arrangements such as Memoranda of Understanding (MoUs); and
- (b) delegate its functions to other regulatory agencies and accept delegations from other regulatory agencies, particularly for investigatory purposes.

2. Review of the DFSA's supervisory powers

35. As indicated in paragraph 10 of CP90, we have undertaken a comprehensive review of the DFSA's current supervisory powers to assess whether those powers:

- (a) are effective and adequate in meeting the DFSA's regulatory objectives and its guiding principles;
- (b) meet the relevant standards set by international standard setters for supervisors regulating the banking, insurance and securities sectors, while also addressing specific features of the DIFC as a jurisdiction; and
- (c) are exercisable through processes which are appropriate for the nature of the relevant power and the outcome intended to be achieved through the exercise of that power, and in a transparent manner.

36. We identified some gaps in the DFSA's supervisory powers. These gaps fell into five broad categories and are discussed below (see paragraph 37). In developing proposals to address the identified gaps, we have tried to ensure that:

- (a) the DFSA's decision making processes remain well-aligned and consistent with the underlying intent of the relevant powers;
- (b) there are consistent processes for exercising similar powers;
- (c) there is proper adherence to the administrative law principles of due process that apply to the DFSA when making certain decisions; and
- (d) there is sufficient flexibility available to the DFSA in exercising those powers so that the DFSA decisions are proportionate to the conduct and activities to which the decision relates.

⁶ A reference in this paper to the DFSA's fining and censure powers includes the CP90 proposals to enhance the DFSA powers to fine and censure Persons for breaches of legislation it administers subject to certain controls.

3. Key findings of the review

37. The key findings which resulted from the review of the DFSA's supervisory powers are as follows:
- (a) our regime is substantially compliant with the international standards set by BCBS, IAIS and IOSCO,⁷ except in two minor respects (see paragraphs 39 to 48);
 - (b) there are five substantive changes to the DFSA regime which are considered desirable, in light of our past supervisory and enforcement experience, to enhance the DFSA's effectiveness as a regulator;
 - (c) there are instances where similar supervisory powers available to the DFSA are not subject to similar due process procedures, and so some adjustments are proposed to promote consistency and transparency by the DFSA in exercising its supervisory powers;
 - (d) there are some unintended errors or anomalies which should be removed; and
 - (e) there is scope to rationalise some of the current powers and associated procedures to promote greater clarity and efficiency in the use of those powers and procedures.
38. We have set out below our proposals to address the above points, including benchmarking and some options we have considered in developing these proposals.

4. Proposals to enhance compliance with international standards

39. Our assessment against the international standards of BCBS, IAIS and IOSCO⁸ did not reveal any substantial gaps (with the exception of two enhancements discussed below). This is because, after enactment by the Ruler of the relevant Law changes, we implemented in 2012 a series of changes to address some identified gaps in the DFSA regime,⁹ resulting from the self-assessment we undertook against those standards in preparation for an assessment by the IMF and World Bank as part of their joint Financial Sector Assessment Program.

4.1 Powers to deal with affiliates of regulated firms as part of consolidated supervision

40. Under the current DFSA regime the DFSA has the power, for the purposes of ensuring that regulated firms are prudently and soundly managed, both to approve

⁷ Although we have not specifically dealt with FATF standards, we have only recently revamped the DFSA regime to achieve full compliance with those standards.

⁸ The standards set by BCBS, IAIS and IOSCO are constantly evolving to address identified and emerging risks in the financial sector following the instability that began in the 2008 financial market crisis. The effects of that crisis continue to influence the international regulatory community and hence there is a trend towards increased regulation, particularly to address systemic risks.

⁹ See CP84 proposals, which came into effect on 16 August and 23 December 2012, for rule changes and law changes respectively.

Controllers¹⁰ of regulated firms as fit and proper persons to be such Controllers and to require such Controllers to take specific actions (e.g. to provide additional capital to the regulated firm) or to constrain them from taking specific actions (e.g. refrain from interfering with the management of the regulated firm). However, the DFSA does not currently have any powers directly to require any affiliates of a regulated firm to take any action, or refrain from taking any action, relating to regulated firms.

41. Under the BCBS standards relating to consolidated supervision¹¹ the regulator is required to have supervisory powers not only to deal with the parent companies of a regulated firm (i.e. Controllers), where it is necessary to do so to ensure prudent and sound management of the firm, but also to deal with any companies affiliated with the parent companies (i.e. companies within the same group as the regulated firm but which do not fulfil the test for being a “Controller”). To meet this standard, the supervisor needs to be able to limit the range of activities which the members of the consolidated group may conduct.
42. For example, using such a power the DFSA could direct an affiliate in a specified location to cease trading activities, where we felt these activities were reasonably likely to expose the regulated firm, or its group, to excessive risks that were not properly managed.
43. The DFSA has indirect powers to deal with companies affiliated with parent companies of regulated firms (through its Controller powers). For consolidated supervision of groups, we believe that having extended powers that enable the DFSA to direct affiliated companies within the group is a more effective and expedient means of achieving compliance with the relevant BCBS standards.

Proposal

44. We propose to recommend a DFSA power to bring our regime into full alignment with the BCBS standards relating to consolidated supervision. Such a power would enable the DFSA, for the purposes of effective consolidated supervision of groups to which regulated firms belong, to take appropriate supervisory measures to prevent such companies, including their affiliates, acting in a manner that would have an adverse impact on the safety and soundness of the regulated firm and its group. Such a power would be exercised subject to appropriate due process requirements to minimise the scope for any disproportionate use of such a power by the DFSA (see Article 75A in Appendix 1).

Issues for consideration

- Q1:** Do you have any concerns or comments about the proposed recommendation of a power for the DFSA, when it is acting as the consolidated (or group) supervisor, relating to affiliates of Controllers of regulated firms?

¹⁰ Controllers of regulated firms are defined to include Persons having at least 10% or more of the shares or voting rights of the regulated firm or a holding company of such a firm. See GEN Rule 11.8.2 and AMI Rule 8.1.2.

¹¹ See BCP 12: Consolidated supervision, essential criteria 5 and 6.

4.2 Misuse of names

45. Currently the risk of the use of misleading and deceptive names by regulated firms is mitigated because such persons, as part of registering a company for the purposes of carrying on financial services in the DIFC, are required to register a company name with the Registrar of Companies (RoC). The RoC will not approve a name if it is misleading or deceptive, and would also not allow specific terms, such as “bank”, “insurance” and “trust” to be used by a regulated firm unless the DFSA has consented to the use of that name.¹²
46. BCBS principles require¹³ that the permissible activities of institutions that are licensed and supervised as banks are clearly defined and the use of the name “bank” and any derivations is limited to institutions licensed and supervised as banks to ensure that the general public is not misled. Although this requirement is substantially met because the DFSA would not, as a supervisory practice, consent to the use of the term “bank” unless the firm is to hold a licence to Accept Deposits,¹⁴ the definition of the Financial Service of Accepting Deposits (in the GEN module) does not expressly refer to “bank” or “banking activities”.
47. To strengthen the current regulatory regime of the DFSA to prevent the possible use by regulated firms of names or derivations of names which could be potentially misleading to the public, we believe the inclusion of a specific prohibition against the use of misleading and deceptive names is warranted (see Article 75 in Appendix 1).

Proposal

48. We propose to recommend supplementing the current power available to the DFSA¹⁵ - to prohibit an Authorised Person from using a name for a Fund or sub-fund of a Fund (it manages) - with a more general power where the DFSA may prohibit the use of any misleading name or any derivation of such a name by regulated firms. We also propose a rule making power so that the DFSA may, where it considers appropriate, prescribe certain names which are prohibited except in specified circumstances.

Issues for consideration

- Q2:** Do you agree that the DFSA should have a wider prohibition power with respect to the use of potentially misleading names by regulated firms? If not, why not?

5. Proposals for substantive enhancements to the DFSA’s existing powers

49. There are five areas in which changes are recommended to enhance the DFSA’s supervisory powers. These are:
- (a) introducing a general prohibition against misconduct relating to financial services and financial products;

¹² The DIFC Companies Regulation No. 2.3.2.

¹³ BCP 4.

¹⁴ An exception to this practice is where the firm in question is a branch of an organisation with the name “bank” in its home jurisdiction. As, legally, these are the same entity the branch could use the name “bank” whether or not its DFSA licence allowed it to Accept Deposits.

¹⁵ See Article 75(1)(a)(iv) of the current Regulatory Law.

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- (b) allowing the DFSA a power to suspend an Authorised Firm, while the DFSA assesses whether any permanent action, such as imposing a condition or restriction on the licence, or revoking the licence, is warranted;
 - (c) harmonising the regulatory regime for Key Individuals of Authorised Market Institutions with the equivalent regime applicable to Authorised Individuals of Authorised Firms;
 - (d) simplifying the DFSA's current procedures for obtaining information from, or inspecting the premises of, persons located outside the DIFC for regulatory purposes; and
 - (e) extending the current two year period within which the DFSA must commence enforcement actions against any person upon such person ceasing to be a regulated person.

5.1 Prohibition against misconduct

- 50. The DFSA regime currently does not include a general prohibition against misconduct in relation to the carrying on of financial services and to financial products. Such a general prohibition is considered appropriate because the current prohibitions relating to misleading and deceptive conduct, which are mainly in the Markets Law, are limited to markets-related misconduct involving Investments (i.e. securities and derivatives specified in GEN App2).¹⁶
- 51. Under the DFSA regime, financial services can be provided in relation to products which are not defined as Investments (for example, insurance products or Profit Sharing Investment Accounts). Our enforcement experience so far has been that, in a number of instances, the DFSA was unable to take appropriate enforcement action against individuals who engaged in misconduct as such conduct was not related to Investments and did not amount to market abuse as defined in the Markets Law. Therefore, in order to be more effective as a regulator and to ensure the integrity of the DIFC financial markets, a prohibition with wider coverage than the market abuse provisions in the Markets Law is desirable. The DFSA would then be able to take action against conduct relating to, or in connection with, financial services or financial products where such conduct is thought to be misleading or deceptive, fraudulent or dishonest.¹⁷
- 52. A general prohibition against misconduct covering both financial products and financial services is found in both the UK regime and the Australian regime, with the difference that whilst the Australian prohibition invokes civil liability, the UK prohibition invokes criminal liability. In developing the proposal, we have drawn from both regimes.

¹⁶ Article 56 of the current CI Law contains another limited prohibition, which is against misleading and deceptive statements in Fund Prospectuses. As it is limited to prospectus disclosure, it does not have as wide an effect as the proposed prohibition.

¹⁷ Whilst there is some overlap in the boundaries of what constitutes 'misleading and deceptive', 'fraudulent' and 'dishonest' conduct, together these concepts provide comprehensive coverage of the kind of activities which can bring disrepute to DIFC financial markets. Appropriate action could then be taken against persons engaging in such conduct. As the DIFC regime is civil and commercial, to the extent any such conduct constitutes criminal activities, the DFSA would refer such matters to the UAE criminal authorities.

Proposal and options

53. We propose to recommend a general prohibition against a person carrying on, in or from the DIFC, conduct in relation to a financial product or a financial service that is misleading or deceptive, or is likely to mislead or deceive, is fraudulent or is dishonest (see Article 41B in Appendix 1). This prohibition would not in any way limit or restrict the application of the market abuse provisions in the Markets Law; instead it would complement those provisions.
54. In developing this proposal, we have considered the option of extending the prohibition to all misconduct, regardless of whether or not it is carried on in connection with financial services or financial products.¹⁸ We have, however, considered it more appropriate to limit the scope of the prohibition to misconduct relating to financial services and to financial products because:
- (a) benchmarking we have undertaken shows that the relevant prohibitions under the UK and Australian regimes are limited to misconduct relating to financial services and to financial products;
 - (b) the DFSA is a financial services regulator and its core function is regulating financial services and related activities in the DIFC as set out in its founding legislation;
 - (c) there is a general body of law of obligations applicable in the DIFC (of which the DFSA is not the enforcer), which covers the wide field relating to misrepresentations and deceit, where an action in tort is available to a person who suffers loss or damage as a result of misrepresentations or deceit of another person (see chapters 4 and 5 of the DIFC Law of Obligations); and
 - (d) there are other regulatory agencies responsible for other aspects of activities which are conducted in the DIFC, such as the DIFC Authority and the RoC, or in the State more broadly.¹⁹

Issues for consideration

- Q3:** Do you have any concerns about the proposal to recommend a general prohibition against conduct which is misleading or deceptive (or is likely to be so), fraudulent or dishonest, relating to financial services and to financial products? If so, what are they and how should they be addressed?
- Q4:** Do you think the proposed prohibition against misconduct should be broader in scope than confined to financial services and financial products and instead be applicable to all misleading and deceptive conduct? If so, why?

¹⁸ Most types of misconduct relate to financial products and services and so such misconduct would fall within the proposed prohibition.

¹⁹ To the extent the DFSA has wider responsibilities that go beyond financial services and markets, such as in relation to AML/CFT, those regulatory obligations are based on specific powers and specific scope.

5.2 Suspensions

55. The DFSA does not currently have a formal suspension power which it can use as an interim measure with Authorised Persons whilst considering whether or not any more permanent action, such as the imposition of a licence condition or restriction, or revoking a licence, should be taken.²⁰ Although the DFSA has some powers which it may use as an interim measure pending a more permanent action (for example, the power to prohibit an Authorised Person from entering into specified transactions, soliciting business from specified persons or carrying on business in a specified manner),²¹ such powers are of a limited and bespoke nature. The available powers are not as effective as a general suspension power. Such a power would be particularly helpful if the DFSA formed a reasonable opinion that allowing a firm to continue its activities under its licence could be detrimental to the interests of the DIFC (e.g. our statutory interest in protecting users of the financial services industry in the DIFC), whilst also needing more time to obtain sufficient evidence to support a permanent action (or withdraw the suspension in the event there are insufficient grounds to warrant any further action).
56. The UK regime contains a formal suspension power where the regulator may suspend, for a period it considers appropriate but not exceeding 12 months, any permission which a person has to carry on financial services. Such a suspension can be general or may relate only to the carrying on of an activity in specified circumstances. This power is in addition to the restriction and revocation powers available to the UK regulator.²² Similarly, the Australian regime contains a formal suspension power available to the regulator to suspend a regulated firm from carrying on financial services, along with its powers to vary or revoke a licence of such a person. As a result, the regulator has the flexibility to determine which of the three actions is more appropriate in given circumstances.²³

Proposal

57. We propose to recommend a formal suspension power so that the DFSA may, in appropriate cases, suspend the regulated status of a firm while considering whether a more permanent action is warranted. We also propose to recommend, as under the UK regime:
- (a) to limit the maximum period for which a suspension can be imposed to 12 months, as it is consistent with the interim nature of the action required under this power; and
 - (b) to allow a regulated firm, in appropriate circumstances, to continue limited activities whilst the suspension is in place.

This power, if available to the DFSA, would be expected to be used sparingly and be used subject to appropriate due process requirements (see Article 52 in Appendix 1).

²⁰ Note the DFSA has a formal power of suspension against Authorised Individuals under Article 58 of the current Regulatory Law.

²¹ See Article 75 of the current Regulatory Law.

²² See Article 206A of the UK Financial Services Markets Act of 2000, which was introduced in 2010.

²³ See subdivision C of Division 4, Part 7.6 of the Corporations Law (sections 915A – section 915J) which contains the provisions dealing with ASIC's power to vary, suspend or revoke licences.

Issues for consideration

- Q5:** Do you have any concerns about the proposal to recommend a formal suspension power for the DFSA which it may use with Authorised Persons in appropriate cases? If so, what are those concerns and how should they be addressed?
- Q6:** Do you have any concerns about the proposed 12 month limit on the period for which a suspension can be imposed? If so, what are those concerns and how should they be addressed?

5.3 Harmonising the regimes for regulated individuals

58. Under the current Regulatory Law, the DFSA has a wide set of formal powers relating to Authorised Individuals performing Licensed Functions within an Authorised Firm. Although the Key Individuals of Authorised Market Institutions (AMIs) perform within the AMI similar senior management and control functions to Authorised Individuals, the range of powers the DFSA may exercise in relation to Key Individuals is not as comprehensive as the range available to the DFSA in relation to Authorised Individuals. While some differences between the two regimes applicable to Authorised Individuals and Key Individuals are appropriate, we have found that a substantive harmonisation between the two regimes is warranted.
59. The DFSA powers relating to Authorised Individuals are set out in the Regulatory Law. It provides that the DFSA may prescribe certain functions within an Authorised Firm as “Licensed Functions” and require Authorised Firms to ensure that none of its officers, employees or agents performs the functions prescribed as Licensed Functions without the DFSA’s prior authorisation of the relevant individuals to carry out those functions. Functions such as the senior executive officer, directors, finance officer, compliance officer, senior manager and money laundering reporting officer are prescribed Licensed Functions of Authorised Firms.²⁴
60. The DFSA’s powers relating to Authorised Individuals include the power to authorise them, the power to withdraw authorisations relating to one or more Licensed Functions of an Authorised Individual, the power to impose conditions or restrictions relating to that status, and the power to restrict, suspend or withdraw the Authorised Individual status.²⁵ Authorised Individuals are also subject to additional requirements by virtue of being Authorised Individuals themselves.²⁶
61. The DFSA powers to regulate Key Individuals are currently contained in the AMI module and comprise mainly the requirement that any individual performing Key Individual functions must be approved by the DFSA before assuming the duties of such functions.²⁷

²⁴ These proposals would remove the need to prescribe Key Individual functions as part of the Licensing Requirements of an AMI.

²⁵ See Articles 56- 59 of the current Regulatory Law.

²⁶ See Article 43(4) and (5) of the Regulatory Law.

²⁷ Key Individual functions of an AMI are prescribed along similar lines to those of Licensed Functions of an Authorised Firm, i.e. Members of the AMI’s Governing Body, Senior Executive Officer, Finance Officer, Compliance Officer, Risk Officer, Money Laundering Reporting Officer and Internal Auditor. The main

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62. The reason for the difference between the regimes applicable to Authorised Individuals and to Key Individuals is mainly historical. At the time the DFSA regime was first established some ten years ago, it was not considered necessary to have as extensive a regulatory regime for Key Individuals as was applicable to Authorised Individuals, as we followed the UK model for regulating AMIs which did not contain such requirements. However, our regulatory experience has demonstrated that the functions within an AMI, performed by Key Individuals, play a vital role in the effectiveness of the regulation of AMIs in much the same way as the role played by Authorised Individuals within an Authorised Firm, and hence the desirability of substantially similar powers to regulate such individuals.
63. As part of the overhaul of the AMI regime in 2012 we implemented the first stage of harmonising the two regimes applicable to individuals by prescribing the roles of Key Individuals and requiring them to be licensed by the DFSA before being able to perform their functions, but we were unable to harmonise the two regimes, to the extent it required changes to the Regulatory Law. As we are now proposing changes to the Regulatory Law, we now intend to complete the harmonisation of the two regimes.

Proposals

64. We propose to recommend extending the DFSA's powers in the Regulatory Law, relating to Authorised Individuals of Authorised Firms, to Key Individuals of AMIs. Such an extension would enable the DFSA to:
- (a) prescribe by Rules which functions are Key Individual functions of an AMI;
 - (b) grant authorised status to individuals to perform one or more Key Individual functions;
 - (c) withdraw authorisations relating to one or more Key Individual functions;
 - (d) impose conditions or restrictions relating to a Key Individual's authorised status;
 - (e) restrict, suspend or withdraw the authorised status of such individuals.

(See Appendix 1, Articles 56 and 58.)²⁸

These proposed changes would, if taken forward, render the Key Individual approval powers of the DFSA currently contained in the AMI module redundant.

65. As part of harmonisation of the provisions applicable to Authorised Individuals and Key Individuals, we also propose to recommend placing in the Regulatory Law the prohibition currently contained in the GEN module²⁹ against carrying on any functions as an Authorised Individual without being authorised by the DFSA. This would result in bringing together in the Law the two related prohibitions, i.e. representing to be an

difference between Licensed Functions and Key Individual functions is that the latter include the roles of risk officer and internal auditor.

²⁸ Some of these powers, for example, those in (a) and (b), are already available to the DFSA in the AMI Module; we propose that they be moved to the Regulatory Law.

²⁹ See GEN Rule 7.4.1(2).

Authorised Individual or Key Individual (which requires representations being made to third parties), and performing Authorised Individual or Key Individual functions (which can be carried out internally within a regulated firm) without being appropriately authorised by the DFSA. We also propose to retain the current terminology of “Key Individuals” with respect to the control functions which are prescribed for AMIs because, first, it is established and familiar terminology and, secondly, it provides flexibility for different roles to be prescribed for Authorised Firms (in the GEN module) and AMIs (in the AMI module). There are already some differences in the regulatory requirements applicable to Key Individuals and Authorised Individuals, and we do not propose to remove those. For example, we do not propose to apply the Principles³⁰ applicable to Authorised Individuals to Key Individuals.

Issues for consideration

- Q7:** Do you have any concerns or comments relating to the proposals to recommend harmonising the DFSA regimes for regulating Authorised Individuals of Authorised Firms and Key Individuals of AMIs? If so, what are they and how should they be addressed?
- Q8:** Do you have any concerns about the proposals to retain the current terminology of Authorised Individuals and Key Individuals? If so, what are they and how should they be addressed?
- Q9:** Do you have any concerns about the proposals not to apply to Key Individuals similar Principles to those applicable to Authorised Individuals?

5.4 Procedures for obtaining information from persons outside the DIFC

66. There are some procedural requirements that apply to the DFSA’s powers to obtain information, where such persons are located outside the DIFC. These procedures are designed to respect jurisdictional requirements applicable in the jurisdictions outside the home jurisdiction of a regulator. However, our enforcement experience has been that there are some practical difficulties with regard to the current procedures, which we propose to address without also impacting on the sovereignty and territoriality of other jurisdictions.
67. There are two types of general powers currently available to the DFSA to obtain information from persons, including those located outside the DIFC, for its supervisory and investigatory purposes.
68. For supervisory purposes, the DFSA may, where it considers necessary or desirable for meeting the objectives of the DFSA, require an Authorised Person, auditor, Fund, DNFBP or any director, officer, employee or agent of such a person to give, or produce, or procure the giving or production of, any specified information or documents, or enter the premises of such a Person (in or out of the DIFC) for the purposes of inspecting or copying information or documents stored in any form on

³⁰ See Section 4.4 of the GEN module which contains six principles applicable to Authorised Individuals. These principles are overarching obligations and require them to: observe high standards of integrity; act with due skill, care and diligence; observe proper standards of conduct; deal with the DFSA in an open and cooperative manner; take reasonable care to ensure that business of the firm is managed and controlled effectively; and comply with the applicable legislation.

such premises during normal business hours or at any other time as may be agreed.³¹

69. For investigatory purposes, the DFSA has somewhat wider powers than those referred to above to be able to obtain information.³² These investigatory powers can be exercised against both regulated persons (and their directors, officers, employees or agents) and against unregulated persons, whether such persons are located in or outside the DIFC. They enable the DFSA, where it considers that a person is or may be able to give information or produce documents relevant to an investigation it has commenced:
- (a) to enter the business premises of that person during normal business hours to inspect and copy such information or documents stored in those premises;
 - (b) to require in writing such a person to give or produce, or procure the giving or production of, such specified information or documents (in such form as the DFSA may reasonably require) by the end of a reasonable period and at a place specified by the DFSA;
 - (c) to require in writing such a person to attend before an officer, employee or agent of the DFSA for a compulsory interview at a specified time; or
 - (d) to require in writing such a person to give the DFSA any assistance which the person is able to give in relation to the investigation.
70. However, where a person is located outside the DIFC, the DFSA may only exercise the powers referred to in paragraph 69 in compliance with the applicable requirements in the relevant jurisdiction including, where appropriate, informing or proceeding in collaboration with the relevant local regulator.³³
71. Our enforcement experience has shown that following the legal requirements applicable to a person located outside the DIFC, for the purposes of obtaining information from such a person, can become a protracted and time consuming task. This is particularly so where the applicable local requirements are not easy to identify, or there are complex regulatory regimes attracting lengthy processes.

Proposals

72. In order to overcome the procedural difficulties and uncertainties noted above, whilst also respecting the sovereignty of jurisdictions outside the DIFC when seeking information from persons located outside the DIFC, we propose to recommend the following:
- (a) if the person is a regulated person (see the definition in the proposed Article 80(7) in Appendix 1), then the DFSA may exercise the powers;
 - (b) if the person is not a regulated person, then the DFSA would either:

³¹ See Article 73 of the current Regulatory Law.

³² See Article 80 of the current Regulatory Law.

³³ See Article 80(7) of the current Regulatory Law.

- (i) utilise any MoU, or other arrangements it may have, with the relevant regulators in the jurisdiction in which the person from whom the information is sought (or the premises it wishes to inspect) is located; or
- (ii) seek a court order from the DIFC courts enabling the DFSA to obtain such information.³⁴

As a matter of policy, the DFSA would expect to make use of MoUs, which it has in place with other regulators, to obtain information wherever this is possible.

Issues for consideration

Q10: Do you have any concerns relating to the proposed processes for obtaining information from persons located outside the DIFC? If so, what are they and how should they be addressed?

5.5 The period within which DFSA may bring enforcement actions

- 73. The current requirements contain a time limit within which the DFSA can bring enforcement action against regulated entities after they end their regulated status. This is because, under Article 63 of the Regulatory Law, the DFSA may only exercise its powers relating to Authorised Firms, Authorised Market Institutions, Authorised Individuals, Registered Auditors, Domestic Funds, Principal Representatives and DNFBPs for a period of two years from the date on which the relevant licence or registration of such a person is withdrawn. Where the DFSA has commenced any proceedings in the FMT within this two year period, the relevant provisions remain in force until those proceedings, including any related appeals, are concluded.
- 74. Our enforcement experience has shown that conduct that may amount to breaches of the requirements applicable to licensed or registered persons does not necessarily come to light within two years of the withdrawal of their licensed/registered status. We have looked at the UK regime on which our enforcement provisions are substantially based. The UK regulator has the power to take enforcement action against a person for any misconduct engaged in by that person as an approved person for a period of three years from becoming aware of the relevant misconduct, provided it commences proceedings against that person within the three year period.³⁵
- 75. Further, our enforcement experience has shown that, to be effective as a regulator, the DFSA's power to take action should not be confined to previously regulated entities and their authorised or key individuals. Instead, the DFSA should also be able to take action against any other employees of the previously regulated entities if they are found to have knowingly been involved in the relevant misconduct. Therefore, we recommend introducing provisions to cover this gap.

Proposal

³⁴ We anticipate that the DIFC Court would, in response to such an application, determine whether or not to grant such an order on the merits of the available relevant evidence and the specific circumstances of the application.

³⁵ It is noted that the general limitation period in the DIFC for a right of action is six years from the date on which the right of action accrued.

76. In line with the UK approach, we propose to recommend extending the period within which the DFSA may take enforcement action against a person for non-compliance with the legislation administered by the DFSA, to which that person was subject as a licensed or registered person, to a period of three years from the date on which the DFSA first becomes aware of the relevant conduct. However, the DFSA is required to commence its enforcement action within the three year period of becoming aware of such conduct. We also propose to provide greater clarity and flexibility for the DFSA to take appropriate enforcement action within the three year period by providing that:
- (a) the DFSA is deemed to be aware of the relevant conduct if it is in possession of information from which it could reasonably be inferred that the conduct occurred;
 - (b) the DFSA is considered to have commenced proceedings within the relevant three year period if it has initiated its own internal procedures for taking enforcement action against the relevant person (by issuing a notice to that person; see Part D), or stayed its own proceedings pending conclusion of any proceedings against that person by any other regulatory agency or judicial or administrative tribunal, or has itself commenced proceedings in the DIFC Court or the FMT; and
 - (c) the DFSA would be able to take enforcement action not only against the previously licensed person, who had committed a breach whilst being licensed, but also against any individual acting for or on behalf of such a person (e.g. an Employee), where that individual was involved in the relevant conduct that constituted the breach.

Please see Article 63 in Appendix 1.

Issues for consideration

Q11: Do you have any concerns about the proposal to recommend extending the DFSA's power to take enforcement action against persons who have ceased to be licensed/registered from the current two year period (from the date of cessation of the licenced/registered status) to a three year period (from the date on which the DFSA first becomes aware of such conduct)? If so, what are those concerns and how should they be addressed?

Q12: Do you have any concerns about the proposed expansion of the DFSA power to take enforcement action against individuals acting for or on behalf of licensed/registered persons where they have knowingly been involved in the relevant conduct? If so, what are those concerns and how should they be addressed?

6. Enhancements to promote consistency and administrative efficiency

77. Our review revealed that the due process requirements applicable to the DFSA when exercising its supervisory powers have some unintended inconsistencies. We have been able to overcome some of those inconsistencies through our supervisory practices by applying full due process requirements (i.e. beyond the minimum requirements under the law) when exercising similar powers. We are now proposing

to take this opportunity to align better the supervisory powers and the DFSA processes for exercising those powers, as well as to simplify them, in light of the underlying objectives of the relevant powers and the DFSA's objectives. As noted in paragraphs 5 to 7, due process requirements are relevant to both the first instance decision making by the DFSA, and the administrative review of such decisions by the FMT, so we set out below in more detail due process procedures, and why are they are needed, and the variations of the due process procedures. Given the importance of due process procedures to the exercise of the DFSA's supervisory powers, one of the key changes we propose is to create a central provision in the Regulatory Law (see Schedule 3 in Appendix 1) that clearly sets out the steps the DFSA is required to follow in order to comply with its due process obligations.

6.1 What are due process procedures and why are they needed?

78. Due process requirements apply to public authorities exercising administrative powers (administrative decision makers), such as the DFSA. These processes are developed in common law (but are applied in civil law jurisdictions as well) to ensure that regulatory agencies or authorities entrusted with wide administrative discretionary powers are subject to appropriate controls when exercising those powers. Such controls are needed because the exercise of these discretionary powers can have a significant adverse impact on rights, interests and legitimate expectations of persons in relation to whom decisions are made.
79. As such, the discretionary powers to which due process requirements apply include the DFSA powers to:
- (a) create rights, interests and privileges – such as the power to grant licences or authorisations to persons enabling such persons to carry on financial services; and
 - (b) interfere with existing rights, interests and legitimate expectations – such as imposing conditions or restrictions on licences or taking enforcement action against misconduct by licensed/authorised persons (e.g. imposing fines, censures or other penalties on such persons).
80. Due process requirements are designed to ensure that powers of regulators are exercised, and regulatory decisions are made, in a fair and transparent manner, consistent with the objectives intended to be achieved by the regulator through the exercise of the relevant powers, including the underlying purpose of such powers.
81. In most common law jurisdictions, there are three essential elements of due process that organisations such as the DFSA must observe when making its regulatory decisions. These are the obligations to:
- (a) act without bias or conflict of interest when making decisions;
 - (b) give the persons whose rights, interests and legitimate expectations are likely to be affected by its decisions a fair right of representation in presenting their case (i.e. hear the other side, preferably before the decision is made, except in limited circumstances where, in the public interest, a right of representation is given after the decision coming into effect, as discussed in paragraphs 82 to 91); and

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- (c) take into account only those considerations which are relevant to the matter to be decided upon, to the exclusion of immaterial or irrelevant considerations.³⁶

82. Although not always consistently stated in the legislation, these due process requirements are generally embedded in the DFSA regime in respect of its various supervisory powers. At its most comprehensive level, the due process requirements that would generally apply to the DFSA when exercising its supervisory powers include:

- (a) having in place adequate systems and controls to ensure that persons making decisions on behalf of the DFSA are impartial and not affected by conflicts of interests that may affect their decisions (see Part D for details of decision making procedures);
- (b) giving a person in respect of whom the DFSA proposes to make a decision ("affected person"³⁷) advance notice about the DFSA's proposed action (but see paragraphs 83 to 85);
- (c) giving the affected person clear reasons why the DFSA proposes to take the relevant action;
- (d) giving the affected person a suitable opportunity to make representations (in person and in writing) with regard to the DFSA's proposed action;
- (e) taking into account any representations made by 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) 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;
- (g) 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
- (h) having in place adequate mechanisms to enable the affected person to have the DFSA decision properly and impartially reviewed.

6.2 **Public interest override**

³⁶ Generally, the considerations which the DFSA must take into account when making decisions using specific powers are found in the relevant provision itself, which may be expanded by regulations. For example, the power to grant a licence is to be exercised taking into account the criteria that are prescribed for the grant of a licence, which include fitness and propriety of the applicant and the adequacy of systems and controls to conduct the financial services proposed to be carried out by the applicant. The power also derives support from the context in which it is stated, and also the objectives the DFSA must pursue as a regulator, as stated in Article 8 of the Regulatory Law. The other relevant considerations include the applicant-specific information that would support the DFSA action to grant a licence, which may be provided by the applicant or be available from third party sources.

³⁷ An affected person can be an existing licensee or authorised person, or a person who is in breach of any applicable legal provisions in the DIFC where the DFSA is proposing to take some enforcement action against such a person.

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83. Where the DFSA believes that a decision which comes into effect immediately is needed in the interests of the DIFC markets (for example, to ensure market integrity or consumer protection), the current regime allows the DFSA the flexibility to provide an affected person a right of representation after making such a decision, instead of the pre-decision right of representation normally allowed.
 84. In such situations, the DFSA is generally required to give the affected person a post-decision right of representation within 14 days (or such other longer period as specified by the DFSA) of the decision being made, along with the reasons for that decision. The remainder of the due process requirements, as discussed in paragraph 82, would then follow.
 85. To be able to rely on this public interest override (see Schedule 3 paragraph 4.(7) in Appendix 1), the DFSA must make a case-by-case assessment of whether the delay likely to result from giving the affected person a right of representation prior to making the decision is likely to be detrimental to the interests of the DIFC. If the DFSA forms such an opinion without proper justification, the DFSA's decision could be challenged on that ground alone, without prejudice to any other grounds on which the decision may be challenged, through administrative or judicial review process.

6.3 Day-to-day activities that do not warrant formal due process procedures

86. Some supervision powers of the DFSA, by their nature, do not warrant the application of formal due process procedures as discussed above, as the powers are generally used in the normal course of day-to-day administration of the DFSA's supervision of regulated firms. For example:
 - (a) decisions to carry out on-site inspections and off-site reviews of the activities of regulated firms;
 - (b) decisions to obtain additional information from regulated firms;
 - (c) decisions to issue risk mitigation plans stemming from any concerns identified; and
 - (d) decisions to commence an investigation,

are all decisions that do not invoke the formal due process requirements specified in paragraph 82.³⁸

87. However, this does not mean that the DFSA is not subject to administrative law principles when carrying out its day-to-day supervisory activities – it is required to act in good faith, in a proportionate and reasonable manner and, to the extent appropriate, in a transparent and consistent manner. What is not required is that every such decision, particularly where it has no significant impact on rights, interests

³⁸ Some supervision powers fall outside what may be seen as routine day-to-day administration and so attract the formal due process requirements as described in paragraph 82. Examples are the powers to direct regulated firms to enter into, or not enter into, specified types of transactions, or to require regulated firms to hold additional or specified type of capital, or take such other actions as appropriate for prudential purposes. These powers are used not as a matter of routine supervision but are used in specific circumstances to achieve specific regulatory outcomes; they attract formal due process as such decisions have a significant impact on existing rights of regulated firms.

and legitimate expectations of persons, be subject to formal pre-decision and post decision notices and representations, and a right of recourse to the FMT for independent administrative review. To do so would create an administrative burden that would not provide sufficient benefit but, most importantly, would frustrate the DFSA's ability to carry out its day-to-day supervision activities efficiently and effectively. Therefore, we propose to retain substantially the same DFSA approach and processes for carrying on its day-to-day supervision functions.

6.4 Rationalisation of the due process procedures

88. In order to adopt a consistent approach to due process procedures, we believe that it is appropriate to create a central provision in the Regulatory Law (see Schedule 3 in Appendix 1) to set out the full due process procedures which the DFSA would generally follow when exercising its supervisory powers, except where otherwise provided in legislation.³⁹ This approach has the benefits of centralising the due process requirements already found in a number of provisions in the Regulatory Law (see, for example, Articles 49, 59, 90 and 91 in the current Regulatory Law) and giving due prominence to the due process requirements applicable to the DFSA. The relevant DFSA powers to which those procedures apply then cross-refer to this central provision.
89. There are a few circumstances in which the DFSA powers attract their own bespoke due process requirements, which are somewhat more detailed than the generic due process requirements that would be captured by the proposed generic provision. These are mainly the Controller powers, and AMI and markets related powers such as the DFSA power to approve amendments to an AMI's Business Rules, or approve liquidity incentive schemes that are offered on markets. We propose to retain the bespoke due process requirements in light of the unique nature of those powers.

6.5 The DFSA's powers to require specialist reports

90. The DFSA has a number of powers under which it may require regulated firms to provide to the DFSA a report prepared by a specialist or expert. Under these powers, the DFSA can require, at such frequency and in such manner and form as it considers appropriate, regulated firms to provide to it reports prepared by a person either nominated or approved by the DFSA. For example, the DFSA has the power to require:
- (a) an Authorised Firm or an AMI to provide such a report in relation to a matter where it has required the giving of information or production of documents for its supervisory purposes;⁴⁰
 - (b) an AMI to provide to the DFSA a report relating to the conduct or performance of the regulatory functions of the AMI (such as compliance with the terms of

³⁹ There are some instances where bespoke due process requirements are applicable, such as in the case of the procedure in the MKT module for amending the Business Rules of an AMI.

⁴⁰ Under Article 73 of the current Regulatory Law, the DFSA has wide powers to require a regulated person to provide any information or procurement of any documents which the person is, is likely to have or is reasonably likely to be capable of providing or producing. See also Article 74(1).

its Licence, adequacy of its systems and controls and financial matters concerning its operations);⁴¹ and

- (c) a scheme report to be made for the purposes of a financial services business transfer scheme to be approved by the court.⁴²

91. Under the current provisions, the DFSA must only approve or nominate a person for the purposes of preparing a report if that person appears to have the skills necessary to enable him to make such a report. A regulated firm, which is required by the DFSA to provide such an expert report, may currently seek a review of the DFSA decision by the RAC.⁴³
92. However, we note that the power to require such a report by the regulator under the UK regime (where they are called ‘Section 166 reports’) is not subject to full formal due process requirements (i.e. formal notifications and rights of representations, including the right to seek an administrative review of such a decision). We believe retaining the current position with regard to this power is warranted. The cost of preparation of such reports can be significant, and, on balance, the application of the full due process procedures including a right of review of the DFSA decision by the FMT is justified.

6.6 Summary of Proposals

93. In light of the above considerations, we propose to recommend:
- (a) applying the full due process procedures as specified in paragraph 82 to the application of most of the DFSA’s powers;
 - (b) retaining the flexibility for the DFSA to override the obligation to provide a pre-decision right of representation to affected persons in the interest of the DIFC on a case-by-case basis in respect of all the decisions which require full due process;
 - (c) creating an omnibus “due process” provision containing all the key elements of due process procedures (see the proposed Schedule 3 in Appendix 1), as it promotes consistency and clarity; and
 - (d) retaining the current position with regard to:
 - (i) the DFSA’s powers which are used for its day-to-day supervision purposes; and
 - (ii) the power to require specialist reports from regulated firms.

Issues for consideration

Q13: Do you have any concerns relating to the proposed enhancements to the due process requirements applicable to the DFSA? If so, what are they and how should

⁴¹ See Article 74(2) of the current Regulatory Law.

⁴² See Article 111 of the current Regulatory Law.

⁴³ If the proposals in CP90 and this paper are enacted by the Ruler, any review would be by the FMT.

they be addressed?

Q14: Do you have any objections to retaining the full due process requirements for those DFSA powers where it may require an expert report to be produced? If so, why?

7. Additional miscellaneous changes

94. We have identified a few unintended effects, anomalies and consequential changes. We propose to address these by recommending as follows:

- (a) remove the reference in some of its current powers to the DFSA having an ‘absolute discretion’ in relation to the exercise of those powers.⁴⁴ This is inconsistent with the due process obligations that apply to administrative decision making. We propose to remove the references to “absolute discretion” and, instead, propose to include a reference to the relevant criteria which will be used by the DFSA in using the specific powers;
- (b) amendments to enhance and rationalise the DFSA powers relating to endorsements on the licence of an Authorised Person to carry out specific activities, in a manner similar to its powers to grant authorisations (see Article 44 in Appendix 1) and to enable the DFSA to endorse a licence of an Authorised Firm to undertake Trade Repository activities, to mirror the position for AMLs (see Article 45 in Appendix 1 and Rule 7.3.2 in Appendix 7);
- (c) remove the constraint in Article 78 of the current Regulatory Law so that the DFSA may commence investigations where it (not necessarily the Chief Executive as currently required) has reason to suspect a contravention or possible contravention of the legislation administered by the DFSA. Our preferred practice would be to allow such a decision to be made at an appropriate level of authority within the organisation, which would be a committee decision going forward – see Part D (see Article 78 in Appendix 1); and
- (d) remove the reference to acting within the capacity of its Licence in Article 76 of the current Regulatory Law to ensure that the DFSA’s power to issue a prohibition under Article 76 to protect client assets is not unduly constrained by considerations of whether the firm is acting within the scope of its authorisations (see Article 76(1) in Appendix 1).

Issues for consideration

Q15: Do you have any concerns or comments about these proposed recommendations for miscellaneous changes? If so, what are they and how should they be addressed?

Q16: Are there other unintended effects or anomalies that need to be addressed? What are they and why, and how, should they be addressed?

⁴⁴ See Articles 47 and 55 of the current Regulatory Law and Articles 36 and 39 of the current CI Law.

PART D The DFSA's approach to decision making

Guiding principles for decision making

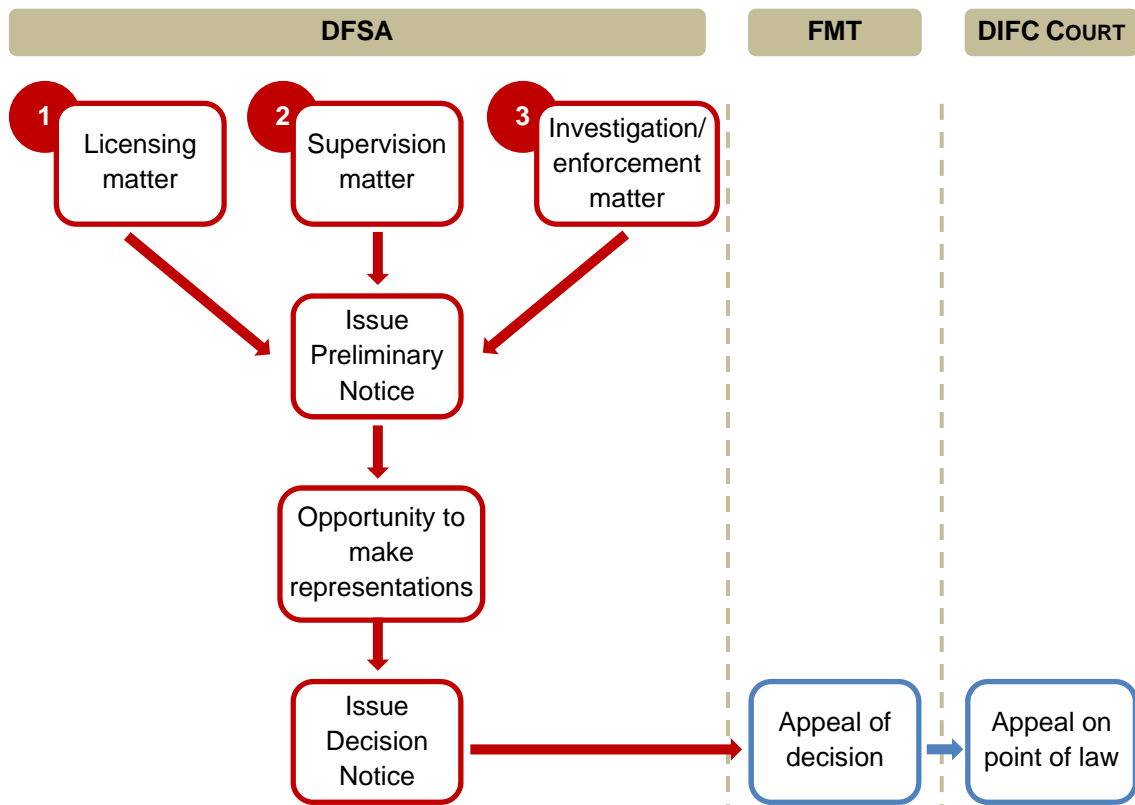
95. Part D of CP90 set out the high level principles of the DFSA's approach to decision making when exercising its supervisory powers. These principles are fundamentally those currently contained in Part 6 of the RPP Sourcebook, as the current approach was based on the due process procedures applicable to the DFSA as an administrative decision maker and has served well during the life of the DFSA to date.
96. However, the proposed enhancements to the DFSA's supervisory powers resulting from CP90 and Part C of this CP have presented the opportunity for us to take a fresh look at the DFSA's internal decision making procedures. We aim to achieve administrative efficiency while adhering to due process procedures. In doing so, we have also taken into account the IOSCO standards relating to supervisory decision making, which require, among other things, that the supervisor has:
- (a) effective internal governance and communication processes that enable supervisory decisions to be taken at a level appropriate to the significance of the issue;
 - (b) the ability to make timely decisions in the case of an emergency; and
 - (c) governance arrangements to ensure real or perceived conflicts of interests are avoided.⁴⁵
97. We noted in CP90 that, in going forward, we expected that the responsibility for making decisions by the DFSA, to exercise its supervisory powers, would be allocated to either a single decision maker or a committee. In making this allocation, we would take into account:
- (a) the nature, scale and complexity of the subject matter to which the decision relates, and the impact that would have upon the affected person, so that a committee, rather than an individual, would be called upon to make decisions in relation to relatively weightier matters;
 - (b) that given the relatively small size of the DFSA as an organisation, practicality requires some decisions to be taken by individuals, rather than a committee; and
 - (c) that always using a committee to make decisions could impose an undue administrative burden which militates against administrative efficiency in making timely decisions, using simple and proportionate procedures.
98. In addition to the above three factors, other relevant considerations are:
- (a) those making decisions need to have (individually for a single decision maker and collectively for a committee) sufficient seniority, authority and expertise for the matter under consideration;

⁴⁵ See IOSCO Principles of Securities Regulation 5.

- (b) ensuring the appropriate degree of objectivity in consideration of any matter; and
- (c) the over-riding need for fairness in our administrative decision making.

99. Under these proposals, the DFSA's decision making procedures (in relation to decisions that can be referred to the FMT) would generally take the form set out in the following diagram.

Figure 1: DFSA Decision Making Process



Issues for consideration

Q17: Do you have any concerns or comments about proposals relating to the DFSA's internal decision making procedures set out above? If so, what are they and how should they be addressed?

Q18: Are there other enhancements that should be made to the DFSA's decision making procedures? What are they and why, and how, should they be made?

ANNEX 1 List of questions asked in this consultation paper

Issues for consideration

- Q1:** Do you have any concerns or comments about the proposed recommendation of a power for the DFSA, when it is acting as the consolidated (or group) supervisor, relating to affiliates of Controllers of regulated firms?
- Q2:** Do you agree that the DFSA should have a wider prohibition power with respect to the use of potentially misleading names by regulated firms? If not, why not?
- Q3:** Do you have any concerns about the proposal to recommend a general prohibition against conduct which is misleading or deceptive (or is likely to be so), fraudulent or dishonest, relating to financial services and to financial products? If so, what are they and how should they be addressed?
- Q4:** Do you think the proposed prohibition against misconduct should be broader in scope than confined to financial services and financial products and instead be applicable to all misleading and deceptive conduct? If so, why?
- Q5:** Do you have any concerns about the proposal to recommend a formal suspension power for the DFSA which it may use with Authorised Persons in appropriate cases? If so, what are those concerns and how should they be addressed?
- Q6:** Do you have any concerns about the proposed 12 month limit on the period for which a suspension can be imposed? If so, what are those concerns and how should they be addressed?
- Q7:** Do you have any concerns or comments relating to the proposals to recommend harmonising the DFSA regimes for regulating Authorised Individuals of Authorised Firms and Key Individuals of AMIs? If so, what are they and how should they be addressed?
- Q8:** Do you have any concerns about the proposals to retain the current terminology of Authorised Individuals and Key Individuals? If so, what are they and how should they be addressed?
- Q9:** Do you have any concerns about the proposals not to apply to Key Individuals similar Principles to those applicable to Authorised Individuals?
- Q10:** Do you have any concerns relating to the proposed processes for obtaining information from persons located outside the DIFC? If so, what are they and how should they be addressed?
- Q11:** Do you have any concerns about the proposal to recommend extending the DFSA's power to take enforcement action against persons who have ceased to be licensed/registered from the current two year period (from the date of cessation of the licenced/registered status) to a three year period (from the date on which the DFSA first becomes aware of such conduct)? If so, what are those concerns and how should they be addressed?
- Q12:** Do you have any concerns about the proposed expansion of the DFSA power to take enforcement action against individuals acting for or on behalf of licensed/registered

persons where they have knowingly been involved in the relevant conduct? If so, what are those concerns and how should they be addressed?

- Q13:** Do you have any concerns relating to the proposed enhancements to the due process requirements applicable to the DFSA? If so, what are they and how should they be addressed?
- Q14:** Do you have any objections to retaining the full due process requirements for those DFSA powers where it may require an expert report to be produced? If so, why?
- Q15:** Do you have any concerns or comments about these proposed recommendations for miscellaneous changes? If so, what are they and how should they be addressed?
- Q16:** Are there other unintended effects or anomalies that need to be addressed? What are they and why, and how, should they be addressed?
- Q17:** Do you have any concerns or comments about proposals relating to the DFSA's internal decision making procedures set out above? If so, what are they and how should they be addressed?
- Q18:** Are there other enhancements that should be made to the DFSA's decision making procedures? What are they and why, and how, should they be made?