

**Appendix 2**

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



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## Notice of Amendments

to the DFSA Rulebook in relation to the  
Financial Promotions Regime

(See Consultation Paper No. 72 for more details)

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<b>GENERAL MODULE (GEN)</b>
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**~~3~~ FINANCIAL SERVICES WHICH MAY BE CARRIED ON IN OR FROM THE DIFC****~~3.1~~ Application**

~~3.1.1~~ Chapter 3 applies to every Authorised Firm and Authorised Market Institution.

**~~3.2~~ Permitted Financial Services for Authorised Firms**

~~3.2.1~~ 2.2.4 Pursuant to Article 42(1)(a) of the Regulatory Law 2004 an Authorised Firm, subject to the Rules in this section, may carry on any one or more of the following Financial Services: other than Providing Money Services.

- ~~(a)~~ Accepting Deposits;
- ~~(b)~~ Providing Credit;
- ~~(c)~~ Dealing in Investments as Principal;
- ~~(d)~~ Dealing in Investments as Agent;
- ~~(e)~~ Arranging Credit or Deals in Investments;
- ~~(f)~~ Managing Assets;
- ~~(g)~~ Advising on Financial Products or Credit;
- ~~(h)~~ Managing a Collective Investment Fund ~~— [Added][VER8/04-06]~~
- ~~(i)~~ Providing Custody;
- ~~(j)~~ Arranging Custody;
- ~~(k)~~ Effecting Contracts of Insurance;
- ~~(l)~~ Carrying Out Contracts of Insurance;
- ~~(m)~~ Insurance Intermediation; ~~— [Amended][VER6/12-05]~~
- ~~(n)~~ Insurance Management;
- ~~(o)~~ Managing a Profit Sharing Investment Account;
- ~~(p)~~ Operating an Alternative Trading System; ~~— [Added][VER4/08-05]~~
- ~~(q)~~ Providing Trust Services; ~~— [Added][VER7/01-06] [Amended][VER11/08-06]~~
- ~~(r)~~ Providing Fund Administration; ~~— [Added][VER8/04-06]~~

[Amended][VER11/08-06]

- ~~(s) Acting as the Trustee of a Fund; and [Added][VER11/08-06]~~
- ~~(t) Operating a Representative Office.~~

**Guidance**

~~The consequence of Rule 3.2.1 is that no Person may carry on the Financial Service of Providing Money Services.~~

- ~~3.2.2~~ **2.2.5** The Financial Services of Effecting Contracts of Insurance and Carrying Out Contracts of Insurance may be carried on only by an Authorised Firm which by virtue of its Licence is permitted to carry on such Financial Services and no other Financial Services.
- ~~3.2.3~~ **2.2.6** The Financial Service of Managing a Profit Sharing Investment Account may be carried on only by an Authorised Firm which by virtue of an appropriate endorsement on its Licence is permitted to conduct Islamic Financial Business.
- ~~3.2.4~~ **2.2.7** The Financial Service of Managing a Collective Investment Fund may be carried on in respect of an Islamic Fund only by an Operator which by virtue of an appropriate endorsement on its Licence is permitted to conduct Islamic Financial Business.
- ~~3.2.5~~ **2.2.8** A Financial Service may be carried on with or for a Retail Client only by an Authorised Firm which is permitted to do so by endorsement on its Licence.
- ~~3.2.6~~ **2.2.9** An Authorised Firm which is licenced to carry on the Financial Service of Operating a Representative Office may not be licenced to carry on any other Financial Service.
- ~~3.2.7~~ **2.2.10** An Authorised Firm (other than a Representative Office) may carry on an activity of the kind described in Rule 2.26.1 that constitutes marketing without the need for any additional authorisation to do so.

~~**3.3 Permitted Financial Services for Authorised Market Institutions**~~

- ~~3.3.1~~ **2.2.11** Pursuant to Article 42(1)(b) of the Regulatory Law 2004 an Authorised Market Institution may carry on any one or more of the following Financial Services:
  - (a) Operating an Exchange; or
  - (b) Operating a Clearing House.

**Guidance**

- 1. An Authorised Market Institution may in addition to the Financial Services set out in Rule ~~3.3.1~~ **2.2.11** also carry on one or more ancillary activities specified under Rule 2.2.2 but only in circumstances where the relevant activity is carried on as a

necessary part of the AMI's business as an Exchange or for the purpose of, or in connection with the provisions of clearing or settlement services.

2. The majority of these activities do not amount to Financial Services as the activities are not carried on by way of business (see Rule 2.3.4). However, pursuant to Rule 2.3.4 certain activities do amount to Financial Services. One of the activities is Operating an Alternative Trading System which cannot, pursuant to Rule ~~3.3.4~~ 2.2.11, be carried on by an AMI.

### **3. FINANCIAL PROMOTIONS**

#### **3.1. Application**

**3.1.1** This chapter applies to any Person who approves, makes or intends to make a Financial Promotion in or from the DIFC.

**3.1.2** Rules 3.4.1 to 3.6.3 do not apply to a Person who makes an Offer which is in accordance with the requirements relating to:

- (a) an Offer of Securities under the Markets Law 2004 and the OSR Rules; or
- (b) an Offer of Units under the Collective Investment Law 2010 and CIR Rules.

#### **3.2 Overview**

**3.2.1** The Rules in this chapter are made for the purposes of the Financial Promotions Prohibition in Article 41A of the Regulatory Law 2004.

##### **Guidance**

1. Article 41A(3) of the Regulatory Law 2004 defines a Financial Promotion as:  
*“Any communication, however made, which invites or induces a Person to:*
  - (a) *enter into, or offer to enter into, an agreement in relation to the provision of a financial service; or*
  - (b) *exercise any rights conferred by a financial product or acquire, dispose of, underwrite or convert a financial product.”*
2. The Guidance in this chapter is designed to help explain the scope of the Financial Promotions Prohibition.
3. The definition of a Financial Promotion is very broad and encompasses the definitions of a “financial promotion” in Article 19(3) of the Collective Investment Law 2010 and OSR Rule 2.2.1(3). A Financial Promotion also includes “marketing material” as defined elsewhere in the Rulebook.

4. The DFSA considers that a Financial Promotion may be made in any manner and by any form including, but not limited to, an oral, electronic or written communication and includes an advertisement, or any form of promotion or marketing. A disclaimer stating that a communication is not a Financial Promotion would not, on its own, prevent a communication from being a Financial Promotion.
5. A Person who is permitted to make a Financial Promotion in the DIFC pursuant to these Rules should ensure that in making such a Financial Promotion he does not breach the Financial Services Prohibition in Article 41 of the Regulatory Law 2004.
6. Depending on the nature and scale of the activities, if a Person makes Financial Promotions on a regular basis or for a prolonged period while physically located in the DIFC, for example by way of a booth, meetings or conferences, the DFSA may consider such activities as constituting the carrying on of a Financial Service, such as Operating a Representative Office. The DFSA considers that in the context of Financial Promotions, "a regular basis" would be anything more than occasional and "a prolonged period" would usually be anything more than 3 consecutive days.

### **3.3 Definition of a Financial Product**

- 3.3.1** Pursuant to Article 41A(4) of the Regulatory Law 2004, "financial product" in Article 41A(3)(b) of the Regulatory Law 2004 is hereby prescribed to mean an Investment, a Credit Facility, a Deposit, a Profit Sharing Investment Account, or a Contract of Insurance.

### **3.4 Scope of the Financial Promotions Prohibition**

- 3.4.1** (1) A Person shall not, subject to (2), make a Financial Promotion in or from the DIFC unless that Person is an Authorised Person.
- (2) A Person other than an Authorised Person may make a Financial Promotion in or from the DIFC if, and only to the extent that, the Person:
- (a) is licensed and supervised by a Financial Services Regulator in the UAE;
  - (b) is a Recognised Person or External Fund Manager;
  - (c) is a Reporting Entity and makes a Financial Promotion in or from the DIFC exclusively for the purpose of discharging its mandatory disclosure requirements; or
  - (d) makes an exempt Financial Promotion as specified in (3).
- (3) For the purposes of (2)(d), a communication is an "exempt Financial Promotion" if it is:
- (a) approved by an Authorised Firm;

- (b) directed at and capable of acceptance exclusively by a Person who appears on reasonable grounds to be a Professional Client of the type specified in COB Rule 2.3.2(2);
- (c) made to a Person in the DIFC (the “recipient”) as a result of an unsolicited request by the recipient to receive the Financial Promotion;
- (d) made or issued by or on behalf of a government or non-commercial government entity; or
- (e) made in the DIFC by a Person in the course of providing legal or accountancy services and which may reasonably be regarded as incidental to and a necessary part of the provision of such services.

**3.4.2** A Person does not breach the Financial Promotions Prohibition if:

- (a) the Person causes a Financial Promotion to be made in the course of providing a facility which is a mere conduit for the making of the Financial Promotion;
- (b) the Person is located outside the DIFC and makes a Financial Promotion which appears, on reasonable grounds, to be a communication which is not directed at or intended to be acted upon by a Person in the DIFC; or
- (c) the Financial Promotion is not made for a commercial or business purpose.

**Guidance**

1. Examples of a mere conduit would include a newspaper or magazine, a website carrying third-party banner ads, a postman or courier, a person paid to hand out promotional material to the public and an event venue - unless in each case they were the originator i.e the Person who makes the Financial Promotion.
2. In Rule 3.4.2(b) the DFSA considers that the following non-exhaustive list of factors may each be indicative of whether or not a Financial Promotion is “intended to be acted upon by, or targeted at, Persons in the DIFC”:
  - a. whether it is expressed to be for a Person or type of Person in the DIFC;
  - b. whether it is sent to an address (including a P.O. Box) in the DIFC;
  - c. whether it is physically distributed to Persons in the DIFC;
  - d. whether it takes place in the DIFC;
  - e. whether it makes reference to the DIFC;
  - f. whether it appears in a DIFC publication;
  - g. whether it appears on a DIFC-based or related website or other media;
  - h. whether it is sent to the email of a Person in the DIFC; or

- i. whether it contains a prominent and clear disclaimer on its face that it is not intended to be acted upon by Persons in the DIFC.
  
- 3. The DFSA in applying Rule 3.4.2(c) will generally consider that for a communication to be made “for a commercial or business purpose” there must be a commercial element to the Financial Promotion, whether or not the Financial Promotion actually leads to the provision of any financial service. However, the DFSA considers that “for a commercial or business purpose” requires a commercial or business interest on the part of the communicator and the nature of the communicator’s business need not be related to any specific financial service.
  
- 4. The DFSA considers that a Person located outside the DIFC who makes a Financial Promotion into the DIFC, makes that communication in the DIFC. The DFSA considers that the prohibition in Article 41A(1) applies irrespective of where the communicator of the Financial Promotion is located.

### **3.5 Additional Rules for Financial Promotions**

- 3.5.1** (1) A Person in Rule 3.4.1(2) (a) to (d) must, subject to (2), take reasonable care to ensure that any Financial Promotion it makes in or from the DIFC:
- (a) is clear, fair and not misleading;
  - (b) includes the Person’s name, address and regulatory status;
  - (c) if it is intended only for Professional Clients, is not sent or directed to any Person who appears on reasonable grounds not to be a Professional Client, and contains a clear statement that only a Person meeting the criteria for a Professional Client should act upon it; and
  - (d) which is provided to or directed at a Retail Client and contains any information or representation relating to past performance, or any forecast based on past performance or on any other assumptions:
    - (i) presents a balanced view of the financial products or financial services to which the Financial Promotion relates;
    - (ii) identifies, in an easy to understand manner, the information from which the past performance or forecast is derived and how any key facts and assumptions used in that context are drawn; and
    - (iii) contains a prominent warning that past performance is not necessarily a reliable indicator of future performance.
- (2) A Person described in Rule 3.4.1(2)(a) who makes a Financial Promotion to an existing client in the DIFC is not required to comply

with (1) provided that in making the Financial Promotion that Person complies with the requirements of the relevant Financial Services Regulator in the UAE which relate to Financial Promotions.

**Guidance**

1. In presenting information relating to past performance of a financial product or financial service, a Person should use a reputable independent actuarial, financial or statistical reporting service provider.
2. The effect of Rule 3.5.1(2) is that a Person who is licensed and regulated by a Financial Services Regulator in the UAE is not required to comply with Rule 3.5.1(1) when communicating with an existing client. However, when making a Financial Promotion to a prospective client in the DIFC, Rule 3.5.1(1) does apply to such Persons, as do the prohibitions on the making of offers contained in the Offered Securities Rules and Collective Investment Law 2010 respectively.

**3.5.2** A Person must not, in any Financial Promotion, attempt to limit or avoid any duty or liability it may have under any DFSA-administered laws or the Rules.

## **3.6 Approval of Financial Promotions by an Authorised Firm**

**3.6.1** For the purposes of GEN Rule 3.4.1(3)(a), an Authorised Firm must not approve a Financial Promotion unless:

- (a) the Financial Promotion includes a clear and prominent statement that it has been “approved by” the relevant Authorised Firm; and
- (b) the Financial Promotion is made in accordance with the requirements in Section 3.5.

**3.6.2** An Authorised Firm must not approve a Financial Promotion which is directed at a Person who appears on reasonable grounds to be a Retail Client unless:

- (a) it has an endorsement on its License which permits it to carry on a Financial Service with or for a Retail Client; and
- (b) the scope of its License includes the Financial Service and, if applicable, the particular financial product, to which the Financial Promotion relates.

**3.6.3** An Authorised Firm must ensure that a Financial Promotion it has approved complies with the requirements in this chapter on an on-going basis.

**Guidance**

An Authorised Firm which proposes to approve a Financial Promotion where all or part of that promotion will be real time, such as a live event, will need to consider whether it is able to comply effectively with any relevant Rules in relation to the Financial Promotion or its approval.



**GLOSSARY MODULE (GLO)**

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<u>Financial Promotion</u>	<u>Has the meaning given in Article 41A(3) of the Regulatory Law 2004.</u>
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<u>Financial Promotions Prohibition</u>	<u>Has the meaning given in Article 41A(1) of the Regulatory Law 2004.</u>
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