



CONSULTATION PAPER NO. 72

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**CHANGES TO THE DFSA FINANCIAL
PROMOTIONS REGIME**

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Why are we issuing this paper?

1. This Consultation Paper seeks public comments on the DFSA's proposals to enhance its regulation in respect of the making of Financial Promotions in or from the DIFC. This paper also sets out the proposed changes to the Regulatory Law 2004 and the Rules to achieve the proposed requirements.

Who should read this paper?

2. The proposals in this paper would be of interest to:
 - (a) a Person who makes, or proposes to make, a Financial Promotion in the DIFC;
 - (b) an Authorised Firm which approves, or proposes to approve, a Financial Promotion by another Person; and
 - (c) advisors to Persons in (a) or (b) above.

How is this paper structured?

3. In this paper, we set out:
 - (a) a summary of our proposals and rationale (paragraphs 7 - 11);
 - (b) some background regarding current Financial Promotions restrictions in the DIFC and the rationale for the proposed new regime (paragraphs 12 - 15);
 - (c) an outline of the key elements of our proposals (paragraphs 16 - 24); and
 - (d) other miscellaneous matters (paragraphs 25 - 26).

The proposed changes to the Regulatory Law 2004 and the new Rules are in Appendices 1 - 3.

How to provide comments?

4. 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. 72
Policy and Legal Services
DFSA
PO Box 75850
Dubai, UAE**

Email: consultation@dfsa.ae

Tel: +971(0)4 3621500

What happens next?

5. The deadline for providing comments on the proposals is **23 November 2010**. Once we receive your comments, we shall consider if any further refinements are required to these proposals. We shall then proceed to recommend the proposed changes to the Regulatory Law 2004 to the President for enactment by the Ruler. If the proposed changes to the Regulatory Law 2004 are enacted, we shall then proceed to enact the relevant changes to the DFSA's Rulebook. You should not act on these proposals until the relevant changes to the Regulatory Law 2004 and DFSA Rulebook are made. We shall issue a notice on our website telling you when this happens.

Terminology in this paper

6. In this paper, defined terms are identified throughout 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) or in the proposed amendments. Unless the context otherwise requires, where capitalisation of the initial letter is not used, the expression has its natural meaning.

Summary of proposed changes

7. The DFSA is proposing to introduce a Financial Promotions Prohibition in the DIFC. The scope of the proposed Financial Promotions Prohibition is wide and is loosely based on the UK's "*Restrictions on financial promotion*" in Section 21 of the Financial Services and Markets Act 2000. The proposed prohibition is essentially a "gatekeeper" provision the effect of which is to prohibit the making of a Financial Promotion by any person unless that person is an Authorised Person or is otherwise permitted by the Rules to make the promotion.
8. The DFSA currently has restrictions on offers made by way of a "financial promotion" in relation to certain Securities but not all financial products. These proposals are, therefore, designed to create a comprehensive regime covering Financial Promotions relating to financial services and financial products which fall outside the offer restrictions contained in the Collective Investment Law 2010 and the Markets Law 2004; for example, investment advice in relation to specific Securities or Funds, investment research, corporate finance advice, underwriting and market making. It will also cover Credit Facilities and Deposit products, Profit Sharing Investment Accounts and insurance products.
9. The proposals fill a gap in the regime, and provide the DFSA with a power to bring enforcement action against persons making Financial Promotions which breach the Rules, which at present we cannot effectively do. This will enable the DFSA to better police the perimeter, an area where we have experienced issues. The perimeter issues to date have involved unauthorised persons setting up a marketing presence in the DIFC, "unregulated" conferences, pressure sales into the DIFC by unregulated persons, and financial scams. Part of the rationale for the proposed regime is that the DFSA does not want the DIFC to be used for unregulated financial promotions and wants to limit the ability for boiler rooms to market into (or from) the DIFC.
10. The proposed regime will be based on a high-level prohibition in the Regulatory Law 2004 similar to the Financial Services Prohibition in Article 41. To supplement this we propose Rules set out in a new chapter of GEN. GEN will set out certain exemptions from the prohibition, key definitions, Rules on approval of Financial Promotions by Authorised Firms, and other relevant Rules and Guidance.
11. Our proposals are *de minimis* and will provide greater clarity as to who can make a Financial Promotion in the DIFC and under what circumstances. The proposals will have the greatest regulatory impact on non DFSA-regulated persons, communicating with potential customers who are natural persons.

Background

12. The DFSA already has two specific restrictions on the making of an offer by way of a “financial promotion” in Article 50 of the Collective Investment Law 2010 in relation to Units in a Fund, and Article 19(2) of the Markets Law 2004, in relation to offers of Securities. These restrictions will continue to apply to all persons (including Authorised Firms) as will the detailed rules associated with offers which flow from the above provisions. However, the proposed changes set out in this paper are intended to provide the DFSA with a wider scope of restriction on the making of a financial promotion in the DIFC and to strengthen our regulatory regime. Many international jurisdictions have an extensive regime covering advertising or other forms of Financial Promotion which provide strong protection to retail customers in particular.
13. For a non-Authorised person wishing to make a Financial Promotion in the DIFC, there is currently a lack of certainty as to whether the carrying on of the promotional or marketing activity in the DIFC is permitted or would lead them to breach the Financial Services Prohibition in Article 41 of the Regulatory Law 2004, which prohibits the carrying on of a Financial Service by non-Authorised persons in the DIFC. This is because, depending on the nature of the Financial Promotion and the manner in which it is communicated, the communicator may be carrying on the Financial Service of Arranging Credit or Deals in Investments or Operating a Representative Office. Depending on the nature and scale of the activities, a person who 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, would need to consider whether such activities constitute the Financial Service of 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 be anything more than a week.
14. Our proposed Rules would remove the uncertainty described in paragraph 13 above, by expressly permitting the making of certain Financial Promotions, such as the mere communication of information about a financial service or product, without a requirement to be authorised, by persons permitted to under the Rules. However, the proposed Rules would not permit the person to carry on the Financial Service of Arranging Credit or Deals in Investments or Operating a Representative Office. Our proposals will also permit the DFSA to strengthen the regulatory perimeter and to limit the ability for non-Authorised Persons to make Financial Promotions.
15. The overall outcome of our proposals is that the DFSA will have a greater degree of regulatory oversight and control over who may conduct Financial Promotions in or from the DIFC, and in particular oversight of the standards which such promotions must meet with respect to retail investors. The DFSA will also have greater scope to bring enforcement action in a Financial Promotion case when it deems it necessary in light of its statutory objectives.

Outline of our proposed changes

The Financial Promotions Prohibition

16. The proposed Financial Promotions Prohibition is summarised in paragraph 7. We propose to define 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.”*

17. The proposed definition of a Financial Promotion is designed to be a very broad “umbrella” provision. Its scope covers any “financial service” which would cover any Financial Service as defined in the DIFC or any service which is a financial service in any other jurisdiction. There need not be an offer made and the Financial Promotion may take any form, for example; advertisements, letters, mailshots, emails, faxes, telephone calls, webcasts, face-to-face meetings, roadshows or conferences would all be caught. This, combined with the gatekeeper provision referred to in paragraph 7, creates a broad framework for the Financial Promotions prohibition, from which we carve out “exemptions”.

Issues for consideration

1. Do you have any concerns or comments about our proposed definition of a Financial Promotion?

Exemptions

18. Under our current regulatory framework, when making Financial Promotions, Authorised Firms are required, amongst other things, to comply with relevant provisions in COB 3.2. We also make a determination that such firms are fit and proper at the date of authorisation and on an ongoing basis. Therefore, we do not propose to add any further regulatory burden for Authorised Firms under these proposals other than for firms which choose to approve Financial Promotions on behalf of unregulated third parties.
19. However, we do propose to “exempt” certain persons who either comply with certain criteria or who make a prescribed form of communication, an “exempt Financial Promotion”. However, such exempt persons (with one exception) must ensure that any Financial Promotion is clear, fair and not misleading.
20. The broad prohibition framework is also cut back by a Rule that the person making a Financial Promotion does not breach the Financial Promotions Prohibition if the Financial Promotion is not made for a commercial or business purpose. It is not our intention to capture non-commercial communications such as a conversation or correspondence between friends.

21. Additionally, we do not propose to capture within the scope of the prohibition a person who causes a Financial Promotion to be made in the course of providing a facility which is a mere conduit for the making of a Financial Promotion, for example, a venue which hosts a presentation on Financial Services or a website which hosts banner advertisements on financial services.
22. Due to the unique nature of our jurisdiction it may not be evident to a financial promoter that they are targeting persons within the DIFC. It is not our intention to police promotional material where the location of a recipient is unknown to the originator. An example would include the promotional text messages which are commonly distributed in the broader UAE. Therefore, we propose to exempt any promotion which appears, on reasonable grounds, to be a communication which is not intended to be acted upon by, or targeted at, Persons in the DIFC.

Issues for consideration

2. Do you have any concerns or comments about our proposed exemptions from the Financial Promotions Prohibition?

Persons permitted to make Financial Promotions in the DIFC

23. It is proposed that the following persons will be permitted to make Financial Promotions in the DIFC:
 - (a) UAE-regulated firms – we do not propose to prevent firms licensed in the wider UAE from making Financial Promotions to existing or potential clients in the DIFC. However, any Financial Promotion made by a UAE-regulated firm to a prospective client in the DIFC is only exempt where it complies with certain supplementary “clear, fair and not misleading” and past performance Rules (the “CFNM Rules”). Of course such persons will not be permitted to carry on a Financial Service in the DIFC;
 - (b) A Recognised Person and External Fund Manager - these persons are subject to DFSA jurisdiction in some form and, therefore, we propose that their Financial Promotions be exempt provided that they comply with the CFNM Rules;
 - (c) A Reporting Entity – we propose that Reporting Entities which make a communication which may constitute a Financial Promotion when discharging their mandatory reporting obligations should be exempt provided that they comply with the CFNM Rules; and
 - (d) A Person communicating an “exempt Financial Promotion”, described in paragraph 24 below, which complies with the CFNM Rules.

Issues for consideration

- 3. (a) Do you have any concerns or comments about our proposed carve out from the Financial Promotions Prohibition?
- (b) Are our proposed additional CFNM Rules adequate in the circumstances?
- (c) Should the DFSA impose any other conditions on permitted Financial Promotions?

Exempt Financial Promotions

- 24. We propose that if a person makes an Exempt Financial Promotion of the following type, that person will be exempt from the Financial Promotions prohibition:
 - (a) Promotions approved by an Authorised Firm – the DFSA believes that reliance can be placed on an Authorised Person to assess a Financial Promotion’s compliance with our Rules. However, we propose that the Financial Promotion should clearly state that it has been approved by an Authorised Firm and that the Authorised Firm must ensure that the Financial Promotion complies with the Rules on an ongoing basis;
 - (b) Promotions directed exclusively at Professional Clients – one of the main objectives of a Financial Promotions regime is the protection of Retail Clients. Professional Clients arguably need less regulatory protection. However, the DFSA also considered that Professional Clients who are natural persons would benefit from the prohibition’s protection. Therefore, we propose to carve out Financial Promotions which are directed at and capable of acceptance exclusively by Professional Clients of the type listed in COB Rule 2.3.2(2), i.e. non-natural persons;
 - (c) Promotions made to a Person in the DIFC who expressly solicited the Financial Promotion – we propose that Financial Promotions specifically solicited by or on behalf of the recipient should also be exempt. For example, we would not want to capture within the proposed regime a bank which makes a Financial Promotion to a person in the DIFC who expressly wished to receive the information; and
 - (d) Government or Government-Related Entities – we propose that any Financial Promotion communicated by, or on behalf of, a government or non-commercial, government-related entity, should be exempt.

Issues for consideration

- 4. (a) Do you have any concerns or comments about our proposed Exempt Financial Promotions?
- (b) Should all or fewer Clients be afforded protection under our Rules?

Other matters

25. We are proposing that any contract which is entered as a result of a Financial Promotion which breaches the prohibition should be voidable at the option of the person who relied on it.
26. We have also incorporated into our proposed new Rules, some basic requirements which Authorised Firms must comply with when approving a Financial Promotion on behalf of another person. The key Rules in relation to approval include that the Authorised Firm which approves a Financial Promotion must ensure that the Financial Promotion complies with the relevant requirements on an on-going basis and that it includes a clear and prominent statement that it has been “approved by” the relevant Authorised Firm. Firms approving Financial Promotions aimed at Retail Clients will also need to have a retail endorsement on their Licence.

Issues for consideration

5.
 - (a) Do you have any concerns or comments about our proposed Financial Promotions restrictions?
 - (b) Do the proposed changes create any unintended consequences?