

## **Appendix 1**

### **Marking-up**

In this appendix, underlining indicates new text and striking through indicates deleted text except for Chapters 4 and 5 which have been comprehensively revised and restated without being marked-up.

### **Footnotes**

Readers should also note that footnotes are provided as a guide to the source of the legislative provision or to provide a rationale for the proposals. The footnotes are for information purposes only and are not part of the legislative proposals.

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# **PROPOSED CHANGES TO REGULATORY LAW 2004**

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## **PART 2: THE DFSA**

### **CHAPTER 1 – THE STRUCTURE OF THE DFSA**

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#### **9 Structure of the DFSA**

The DFSA shall be made up of:

- (a) the Chairman of the DFSA;
- (b) the DFSA Board of Directors;
- ~~(c) the Regulatory Appeals Committee of the DFSA Board of Directors;~~
- ~~(d)~~ (c) the Financial Markets Tribunal ~~of~~ appointed by the DFSA Board of Directors;
- ~~(e)~~ (d) the Chief Executive and members of his staff; and
- ~~(f)~~ (e) ~~other~~ any DFSA committees as may be duly appointed from time to time.

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***NB – the following Chapters 4 and 5 have been comprehensively revised and restated without being marked-up.***

### **CHAPTER 4 – THE FINANCIAL MARKETS TRIBUNAL**

#### **26 Constitution of the Financial Markets Tribunal**

- (1) The DFSA shall maintain a tribunal of the DFSA called the Financial Markets Tribunal (referred to as the “FMT”).<sup>1</sup>
- (2) The DFSA Board of Directors:
  - (a) shall appoint persons for fixed terms to serve as the president and members of the FMT; and

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<sup>1</sup> Based on Article 31(1) of the existing Regulatory Law 2004 but with “maintain” instead of “establish”.

- (b) may reappoint the president or any of the members for further fixed terms.<sup>2</sup>
- (3) None of the following persons shall be the president or a member of the FMT:
  - (a) the Chairman of the DFSA;
  - (b) the Chief Executive of the DFSA; or
  - (c) any other Board Member, director, officer, employee or agent of the DFSA or of any other agency or body of the DIFC established under Dubai Law.
- (4) The president and members of the FMT shall have relevant qualifications, expertise and experience in the regulatory aspects of financial services and related activities.<sup>3</sup>
- (5) The DFSA Board of Directors may dismiss the president or any of the members of the FMT for just cause. For the purpose of this Article, just cause means inability, incapacity or misbehaviour.<sup>4</sup>

## **27 Powers and Functions of the FMT**

- (1) The powers and functions of the FMT are to hear and determine references<sup>5</sup> and regulatory proceedings<sup>6</sup> as prescribed in Chapter 5 of Part 2.
- (2) The FMT may do whatever it deems necessary for or in connection with, or reasonably incidental to, performing its functions and exercising its powers conferred for the purposes of Article 27(1), including the giving of directions as to practice and procedure to be followed in the FMT in the hearing and determination of references or regulatory proceedings.<sup>7</sup>
- (3) The president of the FMT may establish one or more panels of the FMT to exercise the powers and perform the functions of the FMT.<sup>8</sup>

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<sup>2</sup> Based primarily on Article 31(2) of the existing Regulatory Law 2004.

<sup>3</sup> Based on 31(4) of the existing Regulatory Law 2004, but preferring the construction of existing 26(6) (RAC).

<sup>4</sup> Based on 31(5) of the existing Regulatory Law 2004 plus aspects of 21(6) and (10).

<sup>5</sup> Use of the word “references” rather than “appeals” is to reflect the policy that the FMT power to review a DFSA decision is a “de novo” review which permits the FMT to review a decision in its entirety. It does not look only at whether the decision taken was legally correct. The drafting is based on the language of section 133 of UK’s Financial Services and Market Act (“FSMA”) 2000.

<sup>6</sup> This is new and brings in the jurisdiction to cover regulatory proceedings, which was found in the Markets Law 2012.

<sup>7</sup> Based on 31(6) of the existing Regulatory Law 2004 but amended for consistency with Article 8(2), and with the addition of an example drawn from paragraph 10 schedule 13 of FSMA 2000.

<sup>8</sup> Based loosely on 26(8) of the existing Regulatory Law 2004 (RAC).

- (4) The president of the FMT or the chairman of a panel appointed to hear and determine a reference or regulatory proceeding may make any procedural order or order granting interim relief that the FMT has the power to make.<sup>9</sup>
- (5) For the purpose of a reference or regulatory proceeding, the president of the FMT or the chairman of a panel appointed to hear and determine the proceeding:
- (a) may appoint one or more persons, who shall be independent and an expert in their field, to assist the FMT in deciding any of the issues arising in the proceeding, including assistance in the examination of the parties' experts and witnesses; and
  - (b) shall provide the parties with an opportunity to make submissions on the expert's assistance and shall mention in its decision the issues on which, and the extent to which, such assistance was relied upon by the FMT.<sup>10</sup>
- (6) Subject to the Law and Rules, the FMT may make rules of procedure governing the commencement, hearing and determination of references and regulatory proceedings, including as to:
- (a) rules of evidence;
  - (b) the manner in which powers may be exercised;
  - (c) the manner in which conflicts of interest of members of the FMT may be prevented;
  - (d) the manner in which an FMT appointed expert may provide assistance to the FMT;
  - (e) notification to the Chief Executive of the commencement of a reference or regulatory proceeding; and
  - (f) the manner in which the Chief Executive may appear and be heard in the reference or regulatory proceeding.<sup>11</sup>

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<sup>9</sup> Based on 26(12) and 31(7) of the existing Regulatory Law 2004. Note that we have added "regulatory proceedings".

<sup>10</sup> This is a new provision, based broadly on Article 18(1)-(3) of the DIFC Courts Law

<sup>11</sup> Based on 27(3) and 32(2) of the existing Regulatory Law 2004. Note that we have added "regulatory proceedings".

## CHAPTER 5 – PROCEEDINGS IN THE FINANCIAL MARKETS TRIBUNAL

### 28 References

- (1) In this Chapter, unless the context provides otherwise:
- (a) a ‘reference’ is a proceeding before the FMT to review a decision of the DFSA under this Article;<sup>12</sup> and
  - (b) an ‘officer, employee or agent’ of a person includes a person who proposes to become an officer, employee or agent of a person.<sup>13</sup>
- (2) The FMT has jurisdiction to hear and determine any reference where:
- (a) a person seeks review of a<sup>14</sup> decision of the DFSA in relation to an application by that person for a Licence or for an extension to the scope of a Licence;
  - (b) a person who is an applicant for authorisation, an Authorised Firm or Authorised Market Institution seeks review of a decision of the DFSA to impose or vary a condition or restriction to its Licence;
  - (c) an Authorised Firm or Authorised Market Institution seeks review of a decision of the DFSA in relation to the exercise of its power to withdraw a Licence or to withdraw an authorisation in relation to a Financial Service;
  - (d) an officer, employee or agent of an Authorised Firm seeks review of a decision of the DFSA in relation to his application for Authorised Individual status or for extension of his status;
  - (e) an Authorised Individual seeks review of a decision of the DFSA to impose or vary a condition or restriction to the grant of Authorised Individual status;
  - (f) a person seeks review of a decision of the DFSA to:
    - (i) issue a written notice under Article 58(1);
    - (ii) vary a written notice to which he is subject, under Article 58(7);<sup>15</sup> or

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<sup>12</sup> A new definition to add clarity to the subject-matter.

<sup>13</sup> Based on 27(1) of the existing Regulatory Law 2004.

<sup>14</sup> Note that we use “seek review of” instead of “appeals”, which is consistent with the objective of avoiding a focus on the rightness or wrongness of the DFSA’s original decision, and rather focusing on the de-novo character of the proceeding. The term “review” signifies that this is an administrative review, in contrast to a judicial review.

- (iii) refuse to vary or withdraw a written notice following his request pursuant to Article 58(8);
  - (g) an Authorised Individual seeks review of a decision of the DFSA to:
    - (i) issue a written notice under Article 58(2) ;
    - (ii) vary or withdraw a written notice to which he is subject, under Article 58(7);<sup>16</sup>
    - (iii) refuse to vary or withdraw a written notice following his request or the request of an Authorised Firm pursuant to Article 58(8); or
    - (iv) suspend or withdraw his Authorised Individual status under Article 58(2), (3) or (5);
  - (h) a person seeks review of a decision of the DFSA in relation to its application for registration as an auditor or for the withdrawal of the registration by the DFSA;
  - (i) a controller, an Authorised Firm or an Authorised Market Institution seeks review of a decision of the DFSA made pursuant to its powers under Article 64 or the Rules made for the purposes of that Article;
  - (j) a person seeks review of a decision of the DFSA in relation to its application for registration as an auditor;
  - (k) a person seeks review of a decision of the DFSA to impose a sanction on that person under Article 90; or
  - (l) the reference is brought under such other jurisdiction as may be conferred by or under this Law, the Rules or any other legislation administered by the DFSA.
- (3) A person may commence a reference to the FMT only in circumstances where the FMT has jurisdiction to hear and determine the reference under this Article.<sup>17</sup>
- (4) A reference must be commenced:

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<sup>15</sup> Sub-paragraphs (i) and (ii) replace current Article 27(2)(f)(i) which is considered potentially ambiguous as it only refers to Article 58(1), and not 58(7).

<sup>16</sup> Sub-paragraphs (i) and (ii) replace current Article 27(2)(g)(i) which is considered potentially ambiguous as it only refers to Article 58(2), and not 58(7).

<sup>17</sup> Based on 28(1) of the existing Regulatory Law 2004.

- (a) within 30 days of the relevant decision of the DFSA; or
  - (b) within such further period not exceeding 30 days as may be approved by the FMT where it is satisfied that such approval is appropriate in the circumstances.<sup>18</sup>
- (5) At the conclusion of a reference, the FMT may do one or more of the following:
- (a) affirm the original decision of the DFSA which is the subject of the reference;
  - (b) vary that original decision;
  - (c) set aside all or part of that original decision and make a decision in substitution;
  - (d) decide what, if any, is the appropriate action for the DFSA to take and remit the matter to the Chief Executive;
  - (e) make such order in respect of any matter or any of the parties which it considers appropriate or necessary in the interests of:
    - (i) the DFSA's regulatory objectives; or
    - (ii) the DIFC; or
  - (f) issue directions for giving effect to its decision, save that such directions may not require the DFSA to take any step which it would not otherwise have the power to take.

## **29 Regulatory proceedings**<sup>19</sup>

- (1) In this Chapter, unless the context provides otherwise, a 'regulatory proceeding' is a proceeding before the FMT to hear and determine an issue of a regulatory nature as prescribed under the Law or the Rules or any other legislation administered by the DFSA.<sup>20</sup>
- (2) The FMT has jurisdiction to hear and determine any regulatory proceeding as may be prescribed under the Law, the Rules, or any other legislation administered by the DFSA.<sup>21</sup>

<sup>18</sup> Based on 28(3) of the existing Regulatory Law 2004.

<sup>19</sup> This drafting is primarily based on existing Article 70 of the Markets Law 2012.

<sup>20</sup> A new definition to add clarity to the subject-matter.

<sup>21</sup> New, but drawing inspiration from Articles 70(1)-(3) of the Markets Law 2012. Such jurisdiction is currently prescribed in the Markets Law (Article 70), Collective Investment Law (Article 71) and Investment Trust Law (Article 29), and also Chapter 11 of the AMI Module.

- (3) The DFSA or any other person may commence a regulatory proceeding in the FMT only in circumstances where the FMT has jurisdiction pursuant to this Article to hear and determine the matter.<sup>22</sup>
- (4) A regulatory proceeding may be brought either:
- (a) by the DFSA; or
  - (b) by another person with:
    - (i) sufficient interest in the matter to which the regulatory proceeding relates; and<sup>23</sup>
    - (ii) the consent of the DFSA or, where such consent is denied, with the consent of the FMT.<sup>24</sup>
- (5) At the conclusion of a regulatory proceeding, the FMT may do one or more of the following:
- (a) declare that a person has committed a contravention of a specified provision;
  - (b) impose a fine on a person in respect of a contravention, of such amount as it considers appropriate;
  - (c) censure the person by any means, including by way of publishing a notice of censure;
  - (d) make an order requiring the person to effect restitution or compensate any other person for such period and on such terms as the FMT may direct;
  - (e) make an order requiring the person to account for, in such form and on such terms as the FMT may direct, such amounts as the FMT determines to be profits arising from wrongdoing or any other form of unjust enrichment as determined by the FMT;
  - (f) make an order requiring the person to cease and desist from such activity as the FMT may stipulate;

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<sup>22</sup> Based on Article 28(1) of the existing Regulatory Law 2004, but adapted to suit the broader range of jurisdictions now covered by these provisions.

<sup>23</sup> This is the test for standing in judicial review proceedings in England and Wales. This has been added to ensure that the person commencing a regulatory proceeding has an interest in the proceedings and thus to ensure that frivolous and vexatious litigation is avoided. The DFSA expects to use the "sufficient interest test" when considering the issue of consent under Article 29(4)(b)(ii) and will look to the English case law when assessing whether a person has sufficient interest.

<sup>24</sup> Based on Article 70(5) of the Markets Law 2012.

- (g) make an order requiring the person to do an act or thing;
- (h) make an order prohibiting the person from holding office at any body corporate carrying on business in the DIFC; or
- (i) make a finding, declaration or order of a type prescribed under the Law, Rules or any other legislation administered by the DFSA.<sup>25</sup>

### **30 Conduct of a reference or regulatory proceeding**

- (1) In this Article, unless the context otherwise provides, a “proceeding” is a reference or a regulatory proceeding.
- (2) A person shall commence a proceeding by giving the FMT a written notice in the form provided for in the rules of procedure of the FMT.<sup>26</sup>
- (3) Subject to Article 30(5), on the commencement of a proceeding, the president of the FMT shall, without undue delay:
  - (a) select and appoint a panel of one or more members of the FMT to exercise the powers and perform the functions of the FMT to hear and determine the matter; and
  - (b) appoint a panel member to be the panel chairman.
- (4) For the purpose of Article 30(3), the president of the FMT may appoint himself as the chairman or as a member of a panel in a proceeding.<sup>27</sup>
- (5) (a) Where:
  - (i) a proceeding is commenced before the FMT;
  - (ii) there are common parties or there is a common question of law or fact in any other proceeding commenced before the FMT; and
  - (iii) the president of the FMT is satisfied that it is in the interests of justice and efficiency and is in the interests of the DIFC to make a direction under this Article;

the president of the FMT may direct that:

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<sup>25</sup> Aside from (i), the drafting is drawn almost directly from the existing powers of the FMT under Article 34(4) of the existing Regulatory Law 2004.

<sup>26</sup> Based on Article 28(2) of the existing Regulatory Law 2004.

<sup>27</sup> New. This paragraph is proposed to remove a potential ambiguity.

- (iv) the proceedings be consolidated, heard and determined by the FMT constituted as a single panel, on such terms as the president may direct;
  - (v) the proceedings are to be heard at the same time, or one following another; or
  - (vi) a proceeding is to be stayed until the determination of another.<sup>28</sup>
- (b) Where two or more original proceedings are consolidated into a single proceeding under Article 30(5)(a) the FMT panel constituted for the consolidated proceeding shall, in hearing and determining issues relevant to each of the original proceedings, have the same powers in relation to those issues as the FMT panel would have had in the original proceedings.<sup>29</sup>
- (6) In hearing and determining a proceeding, the FMT may:<sup>30</sup>
- (a) receive and consider any evidence by way of oral evidence, written statements or documents, even if such evidence may not be admissible in civil or criminal proceedings in a court of law;
  - (b) determine the manner in which such evidence is received by the FMT;
  - (c) where the proceeding is a reference, consider any evidence relating to the subject-matter of the reference, whether or not such evidence was available to the DFSA at the time of the decision to which the reference relates;<sup>31</sup>
  - (d) by notice in writing require a person to attend before it at any sitting and to give evidence and produce any item, record or document in his possession relating to the subject matter of the proceeding;
  - (e) administer oaths;

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<sup>28</sup>Based on a consolidated Article 27(6) and 32(6) of the existing Regulatory Law 2004, but with extensive reworking.

<sup>29</sup>Based on a consolidated Article 27(7) and 32(7) of the existing Regulatory Law 2004, but with extensive reworking.

<sup>30</sup>The various limbs in this provision are based on Article 29(2) of the existing Regulatory Law 2004.

<sup>31</sup>This limb is based on Article 29(2)(b) of the existing Regulatory Law 2004. The redrafting creates a de-novo review regime where new evidence and matters can be taken into account, even if unavailable at the earlier time of the decision, and to that extent the revised drafting follows section 133(3) of the UK FSMA 2000 under the Financial Services and Markets Tribunal, prior to the Upper Tribunal having jurisdiction.

- (f) examine or cause to be examined on oath or otherwise a person attending before it and require the person to answer truthfully any question which the FMT considers appropriate for the purpose of the proceeding;
  - (g) order a witness to provide evidence by sworn statement for the purpose of the proceedings;
  - (h) order a person not to publish or otherwise disclose any material disclosed by any person to the FMT;
  - (i) where the proceeding is a reference, stay the decision of the DFSA to which the reference relates and any related steps proposed to be taken by the DFSA until the FMT has determined the reference; and
  - (j) exercise such other powers or make such other orders as the FMT considers necessary<sup>32</sup> for or ancillary to the conduct of the proceeding or the performance of its function.
- (7) Proceedings and decisions of the FMT shall be heard and given in public unless the FMT orders otherwise, or its rules of procedure provide otherwise.<sup>33</sup>
  - (8) Any finding of fact in a proceeding shall be determined on the balance of probabilities.<sup>34</sup>
  - (9) A decision of the FMT may be taken by a majority.<sup>35</sup>
  - (10) At the conclusion of a proceeding, the FMT may also make an order requiring a party to the proceedings to pay a specified amount, being all or part of the costs of the proceedings, including those of any party.
  - (11) Where the FMT makes an order requiring a party to the proceedings to pay a party's costs under Article 30(10), such costs may be recovered from the recipient of the order in a court of competent jurisdiction as a debt due to the party which incurred the relevant costs.
  - (12) Upon making its decision, the FMT must without undue delay inform each party to the proceeding in writing of:

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<sup>32</sup> 'as may be necessary' has been changed to 'as the tribunal considers necessary' which we believe changes the threshold from an objective test, to a subjective test determined by the tribunal.

<sup>33</sup> This is equivalent to Articles 27(4) and 32(3) of the existing Regulatory Law 2004. Currently, the FMT rules of procedure provide that proceedings will be in public unless ordered otherwise. The DFSA considers that circumstances could potentially arise where, for example, the rules could prescribe a type of review to be heard in private unless ordered otherwise. Accordingly, the paragraph is proposed to be left as before, though comment is welcomed on this point.

<sup>34</sup> This is based on Article 32(4) of the existing Regulatory Law 2004 in relation to the FMT, and there was no equivalent relating to the RAC.

<sup>35</sup> The current law is silent on whether a decision is to be unanimous or by majority. This 'majority' provision is derived from paragraph 12(1) of Schedule 13 to the UK's FSMA 2000.

- (a) such decision and the reasons for such decision, including its findings on material questions of fact and identifying the evidence or other material on which those findings were based;<sup>36</sup>
  - (b) the date on which the decision is to take effect; and
  - (c) where applicable, the date by which payment of any fine, restitution or compensation must be made.<sup>37</sup>
- (13) A certificate that purports to be signed by the president or proper officer of the FMT and which states that the FMT on a specified day made a specified decision, including a finding that a specified person has committed a contravention of a specified provision of the Law or of the Rules or of any other legislation administered by the DFSA,<sup>38</sup> or made a specified finding of fact is, in any other proceedings before FMT, or proceedings before the Court, where relevant:
- (a) conclusive evidence of the decision of the FMT made on that day;
  - (b) prima facie evidence that the person contravened that provision; and
  - (c) prima facie evidence of the relevant finding of fact.<sup>39</sup>

### **31 Enforcement**

- (1) A person commits a contravention if that person, without reasonable excuse:
- (a) fails to comply with a lawful order, notice, prohibition or requirement of the FMT;
  - (b) having been lawfully required by the FMT to attend before it, does not attend or leaves the place where his attendance is so required without the permission of the FMT;

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<sup>36</sup> The drafting is based on section 43(2B) of the Australian AAT Act 1975.

<sup>37</sup> The existing RAC provisions (Article 29) do not require the RAC to provide notice of a decision in writing. This is at variance with the requirement of the FMT to give written notice under Article 34(4) of the existing Regulatory Law 2004. It is also at variance with the current requirements of the DFSA to give written notice and reasons for decisions to issue fines and censures under Articles 90 and 91. Accordingly, we propose a new provision here based largely on Articles 90 and 91, which are also used elsewhere in this drafting as a basis for the new DFSA power to impose a sanction.

<sup>38</sup> The preceding reference to a finding in relation to a contravention is borrowed from Article 34(6) of the existing Regulatory Law 2004 (FMT).

<sup>39</sup> Based on Articles 29(5) (RAC) and 34(6) (FMT) of the existing Regulatory Law 2004. We have added that such a certificate provides evidence in other proceedings not only the Court but also before the FMT, as provided in the similar Article 69 of the Markets Law.

- (c) hinders or deters any person from attending before the FMT, giving evidence or producing any item, record or document, for the purposes of any reference or regulatory proceeding;
- (d) threatens or causes any loss to be suffered by any person who has attended before the FMT, on account of such attendance;
- (e) threatens or causes any loss to be suffered by any member of the FMT or any person assisting the FMT at any time; or
- (f) engages in conduct, including without limitation the:
  - (i) destruction of documents; or
  - (ii) giving of information that is false or misleading;

that is intended to obstruct the FMT in the exercise of any of its powers.<sup>40</sup>

- (2) Without limiting the application of Article 31(3), where a person commits a contravention under Article 31(1) the FMT may make one or more orders imposing a fine on the person of such amount as it considers appropriate, censuring the person, requiring the person to effect restitution or compensation, requiring the person to cease and desist from such activity as the FMT may stipulate, or requiring the person to do any act or thing.<sup>41</sup>
- (3) Where a person fails to comply with a decision, lawful order, notice, prohibition or requirement of the FMT, or fails to pay a fine lawfully imposed by the FMT, the Court may, on application of:
  - (a) the FMT; or
  - (b) any party to the reference or regulatory proceeding, including the DFSA,<sup>42</sup>

make any order as it thinks fit to enforce such decision, order, notice, prohibition, requirement or fine.<sup>43</sup>

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<sup>40</sup> Based on Article 30(1) (RAC) of the existing Regulatory Law 2004 and consistent with Article 35(1) (FMT) of the same law.

<sup>41</sup> Based on Article 30(2) (RAC) of the existing Regulatory Law 2004 which provides that a person who contravenes Article 30(1) may be liable to orders in the FMT, including imposition of fines and censures. However, as the FMT will become a review tribunal, it is now necessary to specify the types of orders that may be made, which are drawn from current Article 34(4). Note the contrast with existing Article 35(2) (FMT) where the FMT is constrained to making orders imposing fines and censures in the event of contravention of Article 35(2). The DFSA prefers to adopt the broader scope of the RAC provisions, though with the specified list of potential orders.

<sup>42</sup> Existing Article 30(3)(b) confers this power on the Chief Executive of the DFSA at the request of the FMT. We think the more appropriate model is that all parties (including the DFSA) have the right to enforce an FMT determination.

### **32 Appeal from a decision of the FMT**

- (1) A party to a reference or a regulatory proceeding may, with the permission of the FMT or the Court, appeal a decision of the FMT to the Court on a point of law.<sup>44</sup>
- (2) In this Article:
  - (a) “permission” means, in the first instance, permission of the FMT and where this is denied, permission of the Court; and
  - (b) “a party” includes the DFSA.

### **33 Savings and Transitional**

- (1) For the purposes of this Article:
  - (a) “previous Law” means the Regulatory Law 2004 as it was in force immediately prior to the commencement of the [DIFC Laws Amendment Law of 2014]; and
  - (b) “current Law” means the provisions of this Law that came into force under the [DIFC Laws Amendment Law of 2014], including as amended from time to time.
- (2) The Financial Markets Tribunal that was established under the previous Law continues as if it had been established under the current Law.<sup>45</sup>
- (3) The Regulatory Appeals Committee that was established under the previous Law continues only for the purposes of Article 33(5).
- (4) Except as provided in Article 33(5) and (6):
  - (a) anything done or omitted to be done under or for the purposes of the previous Law, including a contravention, is deemed to be done or omitted to be done under or for the purposes of the current Law; and
  - (b) nothing in the current Law affects:
    - (i) any right, privilege, remedy, obligation or liability accrued to or incurred by a person under the previous Law; or

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<sup>43</sup> Based on Article 30(3) (RAC) of the existing Regulatory Law 2004 and consistent with existing Article 35(3) (FMT).

<sup>44</sup> The permission aspect is based on section 137 of the UK’s FSMA 2000.

<sup>45</sup> Based on section 261 of the ASIC Act.

- (ii) any investigation or legal or administrative proceeding commenced or to be commenced in respect of such a right, privilege, remedy, obligation or liability.<sup>46</sup>
- (5) Any proceeding instituted in the Financial Markets Tribunal or the Regulatory Appeals Committee under the previous Law shall continue under the previous Law, and for that purpose, the provisions in Chapters 4 and 5 of Part 2 of the previous Law shall continue in force and effect until such time as the proceedings, and any related appeals and proceedings, are complete.<sup>47</sup>
- (6) Where there is a contravention of Article 30(1) or 35(1) of the previous Law, proceedings may be instituted in the Financial Markets Tribunal pursuant to Article 30(2) or 35(2) of the previous Law, and, for that purpose, the provisions in Chapters 4 and 5 of Part 2 of the previous Law shall continue in force and effect until such time as those proceedings, and any related appeals and proceedings, are complete.<sup>48</sup>
- (7) The DFSA may make Rules prescribing any transitional or saving provisions as appear to the DFSA to be necessary or desirable to give effect to, or facilitate, the transition from the previous Law to the current Law.

**34 not in use**

**35 not in use**

***NB – the following Chapters 6 and onwards are marked-up to show proposed amendments in the usual manner.***

## **CHAPTER 6 - THE CHIEF EXECUTIVE OF THE DFSA**

### **36 The Powers and Functions of the Chief Executive**

The powers and functions of the Chief Executive are, so far as is reasonably practicable, to:

- (a) exercise the executive power of the DFSA by taking such steps as are reasonable and which he considers appropriate to meet the objectives of the DFSA;

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<sup>46</sup> Based on similar transitional provisions in the Collective Investment Law and Markets Law.

<sup>47</sup> This new drafting is partly based on Article 63(2) of the Regulatory Law. Accordingly the extension is not capped at two years, but rather runs for as long as it takes to bring the proceeding to completion. Not that this extends to “related appeals and proceedings” – this means that a later application to enforce a decision of the earlier FMT or RAC would be brought in that earlier jurisdiction.

<sup>48</sup> This clarification is considered desirable because, in particular, proceedings for the failure to comply with an order of the RAC may be brought in the FMT pursuant to Article 30(2) of the existing Regulatory Law. As there may be confusion about whether these are proceedings under the previous or current law, it is useful to preserve the previous process for such proceedings.

- (b) license, authorise, register, recognise, regulate and supervise the conduct of activities and persons required to be regulated by the DFSA by or under Dubai Law or DIFC Law;
- (c) prepare or cause to be prepared in a timely and efficient manner:
  - (i) draft Rules; and
  - (ii) draft standards or codes of practice;

reasonably required to enable the DFSA to perform its statutory functions, and submit such drafts to the DFSA Board of Directors;
- (d) make and issue Guidance which does not constitute a standard or code of practice, and which is reasonably required to enable the DFSA to perform its statutory functions, and advise the DFSA Board of Directors of such Guidance;
- (e) grant waivers and modifications to the application of Rules;
- (f) exercise any power to grant waivers or modifications to the application of other legislation applying in the DIFC where such a power is conferred on the DFSA by that legislation, and advise the DFSA Board of Directors of any such exercise of power;
- (g) investigate or cause to be investigated matters capable of investigation under any legislation administered by the DFSA, undertake remedial or enforcement actions and, where appropriate, commence proceedings before the ~~Financial Markets Tribunal~~ FMT and any other tribunals or courts of appropriate jurisdiction;
- (h) where appropriate to do so, delegate such of his functions and powers as may more efficiently and effectively be performed by officers or employees of the DFSA or committees of such persons,<sup>49</sup> and, with the approval of the DFSA Board of Directors either generally or in relation to any particular matter, by any other person; and
- (i) exercise and perform such other powers and functions as may be delegated to the Chief Executive by the DFSA Board of Directors from time to time.

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<sup>49</sup> Suggested addition to reflect that the DFSA Chief Executive may wish to create committees to exercise his powers to impose sanctions or to make licensing decisions that will affect rights, liabilities and obligations.

## 52 Procedure for Withdrawal

- (1) Subject to Articles 52(2) and (3), the DFSA may only exercise its power under Articles 50 and 51 if it has given the relevant Authorised Firm or Authorised Market Institution a suitable opportunity to make representations in person and in writing to the DFSA in relation to the proposed withdrawal.
- (2) The restriction imposed on the DFSA under Article 52(1) shall not apply if:
  - (a) the DFSA concludes that any delay likely to arise as a result of such requirement is prejudicial to the interests of the DIFC; or
  - (b) the person requests the DFSA to:
    - (i) withdraw its Licence; or
    - (ii) withdraw authorisation in relation to one or more Financial Services under its Licence and the withdrawal goes no wider than such request.
- (3) Where the DFSA takes steps to exercise its powers under Articles 50 or 51 in relation to an Authorised Firm or Authorised Market Institution following a determination of the ~~FMT Regulatory Appeals Committee or Financial Markets Tribunal~~ or a decision of the Court in relation to the conduct of such person, the obligation upon the DFSA to afford that person an opportunity to make representations to the DFSA shall not apply in relation to findings of fact of ~~that committee or tribunal~~ the FMT or the Court as the case may be.
- (4) Where the DFSA has received a representation from a person under this Article, the DFSA shall without undue delay inform such person in writing of its response to such representation.
- (5) Upon deciding to withdraw:
  - (a) authorisation in relation to a Financial Service, or
  - (b) a Licence;the DFSA shall without undue delay inform the relevant person in writing of:
  - (c) such decision;
  - (d) the date on which such withdrawal shall be deemed to take effect; and
  - (e) if relevant, the Financial Service to which such withdrawal relates.

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### **PART 3: LICENCES, AUTHORISATION AND REGISTRATION**

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## **CHAPTER 7 – RESTRICTION, SUSPENSION AND WITHDRAWAL OF AUTHORISED INDIVIDUAL STATUS**

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### **59 Procedure for Restricting Persons or Suspending or Withdrawing an Authority**

- (1) Subject to Articles 59(2) and (3), the DFSA may only exercise its power to:
  - (a) issue or vary a written notice; or
  - (b) suspend or withdraw Authorised Individual status;

under Article 58 if it has given the relevant person a suitable opportunity to make representations in person and in writing to the DFSA in relation to the proposed written notice or variation of notice or suspension or withdrawal.
- (2) The restriction imposed on the DFSA under Article 59(1) shall not apply where:
  - (a) the DFSA concludes that any delay likely to arise as a result of such requirement is prejudicial to the interests of the DIFC;
  - (b) the DFSA proposes to withdraw Authorised Individual status under Article 58(3); or
  - (c) the Authorised Individual has requested the issue or variation of a written notice or the suspension of his status.
- (3) Where the DFSA takes steps to exercise its powers under Article 58 in relation to an Authorised Individual following a determination ~~of the FMT by the Regulatory Appeals Committee or the Financial Markets Tribunal~~ or a decision of the Court relating to the conduct of such person, the obligation upon the DFSA to afford the person an opportunity to make representations to the DFSA shall not apply in relation to findings of fact of ~~the FMT that tribunal or committee~~ or the Court as the case may be.
- (4) Where the DFSA has received a representation from a person under this Article, the DFSA shall without undue delay inform such person in writing of its response to such representation.

- (5) Upon deciding under Article 58 to:
- (a) issue, vary or withdraw a written notice; or
  - (b) suspend or withdraw Authorised Individual status;

the DFSA shall without undue delay inform the relevant person in writing of:

- (c) such decision;
- (d) the date on which the issue, variation or withdrawal of the written notice or suspension or withdrawal of Authorised Individual status shall be deemed to take effect; and
- (e) the Licensed Functions or other functions to which such issue, variation or withdrawal of the written notice or suspension or withdrawal of Authorised Individual status may relate.

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## **CHAPTER 10 - OTHER MATTERS RELATING TO LICENSING**

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### **63 Extended jurisdiction**

- (1) Any power which the DFSA may exercise in relation to an Authorised Firm, Authorised Market Institution, Ancillary Service Provider, Registered Auditor, Authorised Individual, DNFBP or Domestic Fund under the Law or Rules or other legislation administered by the DFSA may continue to be exercised for a period of two years after the date on which:
- (a) the Licence of such Authorised Firm or Authorised Market Institution;
  - (b) the registration of an Ancillary Service Provider or DNFBP or Registered Auditor;
  - (c) the Authorised Individual status of such Authorised Individual;
  - (d) the registration of the Principal Representative; or
  - (e) the registration of a Domestic Fund;

is withdrawn by the DFSA under the Law or other legislation administered by the DFSA.

- (2) If, pursuant to the Law, proceedings are commenced before a ~~Financial Markets Tribunal or the Regulatory Appeals Committee~~ the FMT before the expiry of the period of two years referred to in Article 63(1), then the provisions of Article 63(1) shall remain in force until such time as the proceedings and any related appeals and proceedings are completed.

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## **PART 6: CONTRAVENTIONS AND FINES**

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### **87 DELETED Fines**

- (1) ~~Except as provided in Article 90, a fine in relation to a contravention may be imposed either by the Financial Markets Tribunal under Article 34 or by the DFSA under Article 90 but not by both in relation to the same contravention.~~
- (2) ~~Subject to Article 87(3) and Article 90(1), the Law sets no limit on a fine that may be imposed in relation to a contravention.~~
- (3) ~~The President may by means of regulations set or revise a maximum amount of fine applicable in respect of a contravention.~~
- (4) ~~Any fine that is imposed on a person by the Financial Markets Tribunal under Article 34 or by the DFSA under Article 90 is payable to the DFSA within:~~
- (a) ~~the time period ordered or directed for payment; or~~
  - (b) ~~otherwise, within 30 days of the date of imposition of the fine;~~
- ~~unless the person takes such action as may be prescribed in the Law, Rules or other legislation administered by the DFSA to remove his liability to pay the fine.~~
- (5) ~~The Court may order, on application of the DFSA, the recovery as a debt due so much of a fine as is not paid in accordance with Article 87(4).~~
- (6) ~~The DFSA may make Rules in connection with the payment and recovery of fines under this Article.~~
- (7) ~~Nothing in Article 87 affects the powers that the DFSA may have apart from this Article.~~

## PART 7: ENFORCEMENT

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### ~~90~~ Administrative Fine

- ~~(1) The DFSA may fine a person where such person contravenes:~~
- ~~(a) a Rule made by the DFSA; or~~
  - ~~(b) a provision of any legislation administered by the DFSA except for Articles 30 and 35.~~
- ~~(2) Where the DFSA considers that a person has contravened a provision of the Rules or legislation under Article 90(1), it may impose by written notice given to the person a fine, in respect of the contravention, of such amount as it considers appropriate but not exceeding:~~
- ~~(a) \$20,000 in the case of a natural person; or~~
  - ~~(b) \$100,000 in the case of a body corporate;~~
- ~~in respect of each contravention.~~
- ~~(3) The DFSA may exercise its power under Article 90(1) only if it has given the relevant person a suitable opportunity to make representations in person and in writing to the DFSA in relation to the proposed fine.~~
- ~~(4) Upon deciding to impose a fine upon a person, the DFSA must without delay inform the person in writing of:~~
- ~~(a) such decision and the reasons for such decision;~~
  - ~~(b) the date on which the decision is to take effect; and~~
  - ~~(c) the date by which payment of the fine must be made.~~
- ~~(5) If the person has not paid the full amount of the fine within the period specified in the notice, the DFSA may recover so much of the fine as remains outstanding as a debt due, together with costs.~~

### ~~91~~ Administrative Censures

- ~~(1) The DFSA may censure a person where such person contravenes:~~
- ~~(a) a Rule made by the DFSA; or~~

- ~~(b) — a provision of any legislation administered by the DFSA except for Articles 30 and 35.~~
- ~~(2) — The DFSA may exercise its power under Article 91(1) only if it has given the relevant person a suitable opportunity to make representations in person and in writing to the DFSA in relation to the proposed censure.~~
- ~~(3) — Upon deciding to impose a censure upon a person, the DFSA must without delay inform the person in writing of:
  - ~~(a) — such decision and the reasons for such decision; and~~
  - ~~(b) — the date on which the censure is to be made.~~~~
- ~~(4) — The DFSA may censure a person by any means, including by way of publishing a notice of censure.~~

## **90 Sanctions and directions**

- (1) Where the DFSA considers that a person has contravened a provision of any legislation administered by the DFSA, other than in relation to Article 31, the DFSA may by written notice exercise one or more of the powers in Article 90(2) in respect of that person.
- (2) For the purposes of Article 90(1) the DFSA may:
  - (a) fine the person such amount as it considers appropriate in respect of the contravention;
  - (b) censure the person in respect of the contravention;
  - (c) make a direction requiring the person to effect restitution or compensate any other person in respect of the contravention in respect of such period and on such terms as the DFSA may direct;
  - (d) make a direction requiring the person to account for, in such form and on such terms as the DFSA may direct, such amounts as the DFSA determines to be profits or unjust enrichment arising from the contravention;
  - (e) make a direction requiring the person to cease and desist from such activity constituting or connected to the contravention as the DFSA may stipulate;
  - (f) make a direction requiring the person to do an act or thing to remedy the contravention or matters arising from the contravention; or

- (g) make a direction prohibiting the person from holding office in or being an employee of any Authorised Person, DNFBP, Public Listed Company or Domestic Fund.
- (3) Before exercising a power under Article 90(2), the DFSA shall, in accordance with Article 90(4), give the relevant person a suitable opportunity to make representations in person and in writing to the DFSA in relation to the proposed action.
- (4) Where the DFSA proposes to exercise a power under Article 90(2), the DFSA shall without undue delay inform the person by notice in writing of:
- (a) the proposed decision and the reasons for such decision, including its findings on material questions of fact and a reference to the evidence or other material on which those findings were based;<sup>50</sup> and
- (b) the person's right to make representations under Article 90(3).
- (5) If, having heard or received a person's representations made under Article 90(3), or where no such representations are made, the DFSA decides to exercise a power under Article 90(2), the DFSA shall without delay inform the person by notice in writing of:<sup>51</sup>
- (a) the decision and the reasons for such decision;<sup>52</sup>
- (b) the date on which the decision is to take effect;
- (c) where relevant, the date by which payment of any fine, restitution or compensation shall be made; and<sup>53</sup>
- (d) the person's right to refer the matter to the FMT.
- (6) Nothing in this Article prevents the DFSA from exercising any other power that it may exercise under this Law or any other legislation administered by the DFSA.
- (7) The DFSA shall:
- (a) prepare, publish and maintain a statement of its policy in relation to the factors to be considered by the DFSA in exercising a power in respect of a person under Article 90(2)(a) and (b);<sup>54</sup>

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<sup>50</sup> This drafting is based on section 43(2B) of the Australian AAT Act 1975.

<sup>51</sup> Note that the requirement to give a person the opportunity to make representations has been changed to a positive obligation on the DFSA. This will create a more formal "decision notice" structure akin to the UK's FSMA model.

<sup>52</sup> Some of this Article is drawn from the UK's FSMA s.205 – 211.

<sup>53</sup> Based on Articles 90(4) and 91(3) of the existing Regulatory Law 2004. Extended to cover all the sanctions in proposed Article 90(1).

- (b) prepare, publish and maintain a statement of the procedure which the DFSA proposes to follow in relation to the giving of a notice under Article 90(1), which shall be designed to secure, among other things, that the decision which gives rise to the obligation to give any such notice is taken by a decision maker not directly involved in establishing the evidence on which that decision is based; and
- (c) make Rules prescribing the manner of payment and recovery of fines.<sup>55</sup>
- (8) The DFSA may at any time modify or replace a statement published by it under this Article and where it does so it shall publish any modified or replacement statement.
- (9) A statement required to be published under this Article shall be published in a way appearing to the DFSA to be best calculated to bring it to the attention of the public.
- (10) In exercising, or deciding whether to exercise, its power under Article 90(2)(a), the DFSA shall have regard to any statement published by it under this Article and in force at the time when the contravention in question occurred.
- (11) If the person who is subject to a fine under Article 90(2)(a) has not paid to the DFSA the full amount of the fine within the period specified in the notice, the Court may order, on application of the DFSA, the recovery as a debt due so much of the fine as remains outstanding, together with costs.<sup>56</sup>

#### **91A 91 Saving and Transitional**

- (1) For the purposes of this Article:
  - (a) “previous Law” means the Regulatory Law 2004 as it was immediately prior to the [DIFC Laws Amendment Law of 2014] coming into force; and
  - (b) “current Law” means the provisions of this Law that came into force under the [DIFC Laws Amendment Law of 2014].
- (~~1~~) (2) The saving and transitional provisions in this Article ~~apply~~ ~~are applicable in~~ ~~circumstances~~ where the DFSA has issued a notice under Article 90 or 91 of the previous Law. For the purposes of this Article the “previous Law” means the version of the Regulatory Law 2004 in force immediately prior to the DIFC Laws Amendment (No.2) Law of 2012 coming into force.

<sup>54</sup> Some of this is from the UK’s FSMA 2000 section 210 as amended in 2010.

<sup>55</sup> The requirements this Article for the DFSA to publish statements of its policies are based on similar provisions in the UK’s FSMA 2000. Note that the processes for the payment of fines in existing Article 87(4) are proposed to be replaced by the Rules made under (6)(c).

<sup>56</sup> There is a current duplication in the law, in that both existing Articles 87(4) and 90(4) cover the same subject-matter. This redrafted provision is an amalgam of those.

(2) —Where such a notice has been issued by the DFSA, ~~Articles 90 and 91 (as amended) under this law~~ 90 of the current Law shall not affect:

- (a) any right, privilege, remedy, obligation or liability accrued to or incurred by any person; or
- (b) any investigation or legal or administrative proceeding commenced or to be commenced in respect of any right, remedy, privilege, obligation or liability,

in relation to the relevant notice, and any such investigation or legal or administrative proceeding may be instituted, continued or enforced, including any penalty, fine or forfeiture, under ~~this law~~ the current Law subject to Article ~~91A(3)~~ 90(3).

(3) Where such a notice has been issued by the DFSA, Article 90 ~~Articles 90 and 91~~ as prescribed in the previous Law ~~are~~ is deemed to continue in force until such time as necessary for the purposes of any investigation or proceeding specified in this Article to be concluded.

(4) The DFSA may, by Rules, prescribe any transitional or saving provisions as appear to the DFSA necessary or desirable so as to give effect to, or to facilitate, the transition from the previous Law to ~~this~~ the current Law.

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## SCHEDULE 1

### INTERPRETATION

#### 3. Defined Terms

In the Law, unless the context indicates otherwise, the defined terms listed below shall have the corresponding meanings:

Term	Definition
Financial Markets Tribunal	the Financial Markets Tribunal <del>established pursuant</del> referred to in Article 34 <del>26</del> of the Law.
<u>FMT</u>	<u>the Financial Markets Tribunal.</u>
<del>Regulatory Appeals Committee</del>	<del>a standing committee of the DFSA Board of Directors, established under and governed by Chapter 4 of Part 2 of the Law and includes a sub-committee constituted under Article 29 of this Law.</del>
Respondent	<del>a person who is the subject of a matter before the Financial Markets Tribunal or the Court.</del>