

Appendix 1

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



The DFSA Rulebook

General Module

(GEN)

1 INTRODUCTION

1.1 Application

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1.2 Overview of the module

Guidance

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9. Chapter 10 contains two sets of Transitional Rules:
 - a. ~~These Rules 10.1.2 and sections 10.2, 10.3, 10.4 and 10.5~~ impact on various modules of the Rulebook, particularly COB and CIR. These Rules enable Authorised Firms to make a smooth transition to the Current Regime that came into force on 1 July 2008 under Rulemaking Instrument No 56, following the DFSA's "Key Policy Review" outlined in Consultation Paper 52. They also provide for the continued application of some of the provisions of the Previous Regime under the Current Regime. [Added][RM58][VER14/07-08]; and
 - b. Section 10.6 contains Transitional Rules that allow, with effect from 4 January 2009:
 - i. an Authorised Person to carry on a Financial Service in respect of a Designated Investment as if that Designated Investment were a Structured Product; and
 - ii. a Designated Investment included in an Official List of Securities before that date to continue to be a listed Structured Product.

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- 2.11.1 (1) In Rule 2.2.2 Advising on financial products or credit means giving advice which:

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Guidance

Promotional material that does not contain any information about any particular financial product (such as flyers containing general information about any financial service provider) would not be generic advice. However, their distribution may amount to arranging and may therefore require authorisation. In any case, an ~~AF~~ Authorised Firm distributing such material ~~must~~ is required to comply with Rule 6.1 of COB section 3.2. Communication can be oral, printed or in electronic form.

10 TRANSITIONAL RULES

10.1 Application

10.1.1 (1)—This chapter applies as follows:

- (a) Rule 10.1.2 and sections 10.2, 10.3, 10.4 and 10.5 apply to every Person to whom a provision of the Previous Regime applied;
- (b) Rule 10.6.2 applies to a Person who has been authorised to carry on a Financial Service in respect of a Designated Investment as defined in Rule 10.6.1; and
- (c) Rule 10.6.3 applies to a Reporting Entity which has its Designated Investments included in an Official List of Securities of an Authorised Market Institution and to an Authorised Market Institution where its Official List of Securities includes Designated Investments as defined in Rule 10.6.1.

10.1.2 (2) For the purposes of the provisions referred to in Rule 10.1.1(a) this chapter:

“Commencement Date” means 1 July 2008, the date on which the Current Regime came into force under rule-making instruments No 56 and No.58.

“Current Regime” means the Rules in force on the Commencement Date;

“Previous Regime” means the Rules that were in force immediately prior to the Commencement Date;

“Transitional Rules” means the Rules in this chapter; and

any specific reference to a module is a reference to that module under the Current Regime, unless otherwise specified.

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10.6 Specific relief – Designated Investments

10.6.1 In this section, the term Designated Investment has the meaning that it had under this module immediately prior to 4 January 2009.

10.6.2 An Authorised Person that is authorised under its Licence to carry on a Financial Service in respect of a Designated Investment may carry on that Financial Service as if that Designated Investment were a Structured Product.

10.6.3 For the purposes of the requirements in OSR and AMI modules, a Designated Investment which is included in an Official List of Securities of an Authorised Market Institution immediately prior to 4 January 2009 is deemed to be a Structured Product.

Guidance

Under Rule 10.6.3, a Reporting Entity which had its Designated Investments included in an Official List of Securities of an Authorised Market Institution prior to 4 January 2009 will be treated as the Reporting Entity of Structured Products. Therefore, OSR and AMI Rules that apply to a Reporting Entity in relation to a Structured Product will apply to that Reporting Entity.

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App2 INVESTMENTS

~~A2.1 Definition of an investment~~

A2.1 General definition of investments

Investments

A2.1.1 (1) An Investment is, subject to (3), either:

(a) a Security; or

(b) a Derivative.

as defined in Rule A2.1.2 or Rule A2.1.3.

(2) Such a Security or Derivative includes:

(a) a right or interest in the relevant Security or Derivative; and

(b) any instrument declared as a Security or Derivative pursuant to Rule A2.4.1(1).

(3) Where a Rule provides that a Security or Derivative has a different classification for a specified purpose, it shall have that effect for that specified purpose and no other purpose.

Guidance

1. An example of the application of Rule A2.1.1 (3) is Rule A2.1.2(2), where a Derivative is treated as a Security for the purposes of the requirements in PIB.

Security

A2.1.2 (1) For the purposes of Rule A2.1.1(1)(a), a Security is:

- (a) a Share;
- (b) a Debenture;
- (c) a Warrant;
- (d) a Certificate;
- (e) a Unit; or
- (f) a Structured Product.

(2) For the purposes of the requirements in PIB, each Derivative specified in Rule A2.1.3 is to be treated as a Security.

Derivative

A2.1.3 For the purposes of Rule A2.1.1(1)(b), a Derivative is:

- (a) an Option; or
- (b) a Future.

A2.2 Definitions of specific securities

A2.2.1 For the purposes of Rule A2.1.2:

A2.1.1 An Investment means:

Shares

- (a) a Share is a share or stock in the share capital of any Body Corporate (wherever incorporated) or any unincorporated body but excluding a Unit in a Collective Investment Fund;

Debentures

- (b) ~~a debenture or other~~ a Debenture is an instrument creating or acknowledging indebtedness, whether secured or not, including but not limited to:

- ~~(i)~~ a debenture;
- ~~(ii)~~ debenture stock;
- ~~(iii)~~ loan stock;
- ~~(iv)~~ a bond; or
- ~~(v)~~ a certificate of deposit;

but ~~excluding~~ excludes:

- ~~(vi)~~ (i) an instrument creating or acknowledging indebtedness for, or for money borrowed to defray, the consideration payable under a contract for the supply of goods or services;
- ~~(vii)~~ (ii) a cheque or other bill of exchange, a banker's draft or a letter of credit (but not a bill of exchange accepted by a banker);
- ~~(viii)~~ (iii) a banknote, a statement showing a balance on a bank account, or a lease or other disposition of property; and
- ~~(ix)~~ (iv) a Contract of Insurance;

Guidance

1. A Debenture may include a bond, debenture stock, loan stock or note. Certain Islamic products ("Sukuk") structured as a debt instrument can also fall within this definition.
2. If the interest or financial return component on a debt instrument is to be calculated by reference to fluctuations of an external factor such as an index, exchange rate or interest rate, that does not prevent such an instrument being characterised as a Debenture.

Warrants

- (c) ~~a warrant or other~~ a Warrant is an instrument that confers on the holder a right entitling the holder to subscribe for any investment of the kind specified by (a) or (b) acquire an unissued Share, Debenture or Unit;

Guidance

A Warrant confers on the holder an entitlement (but not an obligation) to acquire an unissued Share, Debenture or Unit, thereby distinguishing it from a call Option which entitles the holder, upon exercise, to acquire an already issued (i.e. existing) Security.

Certificates

- (d) ~~a certificate, receipt or other~~ a Certificate is an instrument:
- (i) ~~which confers on the holder contractual or property rights (other than rights of the type described in (e)): (i) to or in respect of a Share, Debenture, Unit or Warrant any investment of the kind specified by (a), (b) or (c), being an investment held by a Person (the first Person) other than the Person on whom the rights are conferred by the certificate, receipt or instrument (the second Person); and~~
 - (ii) ~~the transfer of which may be effected by the holder without the consent of that other second Person;~~

but excludes rights under an Option;

Guidance

Certificates confer rights over existing Shares, Debentures, Units or Warrants held by a Person and include receipts, such as Global Depository Receipts (i.e. GDRs).

Options

- ~~(e) an option to acquire or dispose of:~~
- ~~(i) a Security or contractually based investment;~~
 - ~~(ii) currency of any country or territory;~~
 - ~~(iii) commodities of any kind; or~~
 - ~~(iv) an option to acquire or dispose of an investment of the kind specified by this paragraph by virtue of (a), (b) or (c);~~

Units

- ~~(f) (e) a Unit is a unit in or a share representing the rights or interests of a Unitholder in a Fund in a Collective Investment Fund; and~~

Structured Products

- (f) a Structured Product is an instrument comprising rights under a contract where:
- (i) the gain or loss of each party to the contract is ultimately determined by reference to the fluctuations in the value or price of property of any description, an index, interest rate, exchange rate or a combination of any of these as specified for that purpose in the contract (“the underlying factor”) and is not leveraged upon such fluctuations;
 - (ii) the gain or loss of each party is wholly settled by cash or set-off between the parties;
 - (iii) each party is not exposed to any contingent liabilities to any other counterparty; and
 - (iv) there is readily available public information in relation to the underlying factor;
- but excludes any rights under an instrument:
- (v) where one or more of the parties takes delivery of any property to which the contract relates;
 - (vi) which is a Debenture; or
 - (vii) which is a Contract of Insurance.

Guidance

1. Instruments previously known as Designated Investments are now included within the definition of Structured Products.
2. The reference in Rule A2.2.1(f)(i) to “property of any description” covers tangible or intangible property, including Securities.

A2.3 Definitions of specific derivatives

A2.3.1 For the purposes of Rule A2.1.3:

Options

- (a) An Option is an instrument that confers on the holder, upon exercise, rights of the kind referred to in any of the following:
- (i) a right to acquire or dispose of:

- (A) a Security (other than a Warrant) or contractually based investment;
- (B) currency of any country or territory;
- (C) a commodity of any kind;
- (ii) a right to receive a cash settlement, the value of which is determined by reference to:
 - (A) the value or price of an index, interest rate or exchange rate; or
 - (B) any other rate or variable; or
- (iii) a right to acquire or dispose of another Option under (i) or (ii).

Guidance

1. For example, a call Option confers on the holder, upon exercise, a right but not an obligation to acquire an issued (i.e. existing) Security, thereby distinguishing it from a Warrant which entitles the holder, upon exercise, to acquire an unissued Share, Debenture or Unit.
2. Options over a ‘contractually based investment’ referred to in Rule A2.3.1(a)(i)(A) covers Options over Futures.
3. Cash settled Options such as Index Options are covered under Rule A2.3.1(a)(ii). Other cash settled Options that are covered under this Rule include instruments which confer rights determined by reference to climatic variables, inflation or other official economic statistics, freight rates or emission allowances.
4. Options over Options are covered under A2.3.1(a)(iii).

Futures

- (g) (b) a Future is an instrument comprising rights under a future or other contract:
 - (i) for the sale of a commodity or property of any other description under which delivery is to be made at a future date and at a price agreed on when the contract is made, but excluding rights under any contract which is made for commercial purposes and which is not subject to the rules of a regulated exchange; or and that contract:
 - (A) is made or traded on a regulated exchange;
 - (B) is made or traded on terms that are similar to those made or traded on a regulated exchange; or
 - (C) would, on reasonable grounds, be regarded as made for investment and not for commercial purposes; or

(ii) where the value of the contract is ultimately determined by reference, wholly or in part, to fluctuations in:

- (A) the value or price of property of any description; or
- (B) an index, interest rate, exchange rate, any combination of these, or other factor designated for that purpose in the contract; and

which is wholly settled by cash or set-off between the parties but excluding rights under ~~excludes~~:

- (C) rights under a contract where one or more of the parties takes delivery of any property to which the contract relates;
- (D) a contract under which money is received by way of deposit or an acknowledgement of a debt on terms that any return to be paid on the sum deposited or received will be calculated by reference to an index, interest rate, exchange rate or any combination of these or other factors; or
- (E) a Contract of Insurance; ~~or~~ .

Guidance

1. An over the counter (OTC) contract may qualify as a Future under Rule A2.3.1(b)(i)(C) if it can reasonably be regarded as being made for investment and not for commercial purposes. Some of the indicative factors that such a contract is reasonably likely to be made for commercial rather than investment purposes include the following:
 - a. a party to the contract is the producer or a user of the underlying commodity;
 - b. the delivery of the underlying commodity is intended to take place within 7 days of the date of the contract;
 - c. there is no provision made in the contract for margin arrangements; and
 - d. the terms of the contract are not standardised terms.
2. A contract under Rule A2.3.1(b)(i) can provide for the physical delivery of the underlying commodity or property. Further, the price agreed under such a contract can be by reference to an underlying factor, such as by reference to an index or a spot price on a given date.
3. Contracts for differences (CFDs) fall under the definition in A2.3.1(b)(ii) and may include credit default swaps (CDSs) and forward rate agreements (FRAs). More exotic types of Derivative contracts may also fall within the definition in A2.3.1(b)(ii). These can include weather or electricity derivatives where the underlying factor by reference to which the parties' entitlements are calculated can be the number of days in a period in which the temperature would reach below or above a specified level.

A2.4 Financial instrument declared as an investment

- A2.4.1** (1) The DFSA may, subject to (5), declare by written notice any financial instrument or class of financial instruments to be a particular type of an existing Security or Derivative as defined in these Rules or a new type of a Security or Derivative. It may do so on such terms and conditions as it considers appropriate.
- (2) The DFSA may exercise the power under (1) either upon written application made by a Person or on its own initiative.
- (3) Without limiting the generality of the matters that the DFSA may consider when exercising its power under (1), it must consider the following factors:
- (a) the economic effect of the financial instrument or class of financial instruments;
 - (b) the class of potential investors to whom the financial instrument is intended to be marketed;
 - (c) the treatment of similar financial instruments for regulatory purposes in other jurisdictions; and
 - (d) the possible impact of such a declaration on any person issuing or marketing such a financial instrument.
- (4) A Person who makes an application for a declaration under (1) must address, as far as practicable, the factors specified in (3).
- (5) The DFSA must publish any proposed declaration under (1) for public consultation for at least 30 days from the date of publication, except where:
- (a) it declares a financial instrument to be a particular type of an existing Security or Derivative;
 - (b) it determines that any delay likely to result from public consultation is prejudicial to the interests of the DIFC; or
 - (c) it determines that there is a commercial exigency that warrants such a declaration being made without any, or shorter than 30 day, public consultation.

Guidance

1. The terms and conditions that may be imposed on a declaration made by the DFSA under Rule A2.4.1(1) can include who should be the Reporting Entity and the type of disclosure requirements that should apply to that Reporting Entity.

2. If any issuer of a new financial instrument has any doubt as to whether that instrument can be included in an Official List of Securities as a particular type of a Security, that Person should first raise those issues with the relevant Authorised Market Institution before making an application to the DFSA for the exercise of the declaration power under this Rule. The DFSA has a discrete power to object to any proposed inclusion of a Security in an Official List of Securities of an Authorised Market Institution (see Article 17(14) of the Markets Law 2004).

Rights and interests

- ~~(h) any right to or interest in anything which is specified by any of (a)–(g)-~~

Designated Investment ~~[Added][VER5/09-05]~~

- ~~(i) rights under any contract where:~~
- ~~(i) the value of the contract is ultimately determined by reference, wholly or in part, to fluctuations in an index of Shares;~~
 - ~~(ii) the index referred to is acceptable to the DFSA;~~
 - ~~(iii) the contract is wholly settled by cash or set-off between the parties but excludes rights under:

 - ~~(A) a contract where one or more of the parties will or may take delivery of any property to which the contract relates;~~
 - ~~(B) a contract under which money is received by way of deposit on terms that any return to be paid on the sum deposited will be calculated by reference to an index, interest rate, exchange rate or other factor; or~~
 - ~~(C) a Contract of Insurance~~~~
 - ~~(iv) the rights under the contract are such as to ensure that the profit or loss of either party is proportioned directly to the fluctuations in question, and not leveraged upon them; and~~
 - ~~(v) the holder of the rights under the contract is not exposed to contingent liabilities with any counterparty.~~

Guidance ~~[Added][VER5/09-05]~~

The DFSA will determine an index is acceptable based on, but not limited to, whether:

- ~~a. the index of shares is broad-based;~~
- ~~b. the shares constituting the index are traded on one or more recognised exchanges; and~~
- ~~c. information concerning the composition, weighting and calculation of the index is publicly available.~~

A2.1.2 ~~A Designated Investment is excluded from being an Investment of a type specified under (a) to (h) of Rule A 2.1.1. [Added][VER5/09-05]~~