

DFSA and QFCRA review and update their enforcement policies and processes

The Dubai Financial Services Authority ("**DFSA**") has released Consultation Paper No. 81 regarding the Exercise of Regulatory Powers, Enhancements to the Regulatory Law 2004 and RPP Sourcebook. The consultation is open for comment until 21 January 2012.

The Qatar Financial Centre Regulatory Authority (the "**QFCRA**") has announced its Enforcement Policy Statement that sets out its policies, processes and procedures in relation to its use of enforcement powers. The Enforcement Policy Statement came into effect on 1 January 2012.

DFSA Consultation

Removing the Enforcement Module of the DFSA Rulebook

The consultation proposes deleting the Enforcement Module ("**ENF**") of the DFSA Rulebook and recommending to the Ruler of Dubai that the substantive enforcement powers be included within the provisions of the Regulatory Law 2004 (the "**Regulatory Law**").

The DFSA also proposes to release three additional chapters to its sourcebook known as the Regulatory Policy and Process Module ("**RPP**") covering policy and guidance in respect of (i) supervisory and enforcement powers, (ii) enforcement, and (iii) decision making.

This approach to enforcement is that which is currently used by the UK Financial Services Authority ("**UK FSA**") and the additions to RPP are comparative to the Enforcement Guide issued by the UK FSA.

DFSA's approach to enforcement

Chapters 4 and 5 of RPP discuss the key powers which the DFSA uses when conducting either supervisory or enforcement action, the DFSA's approach to enforcement, how it commences and conducts investigations and how it exercises its powers to address misconduct and contraventions of laws and rules.

These chapters broadly follow the information and guidance currently contained in ENF. However, the DFSA have taken the opportunity to review and update its enforcement policies and processes.

The key policy changes are as follows:

Identification of conduct requiring action

– the DFSA has formalised its complaints handling policies. The guidance makes clear that the DFSA is capable of receiving and assessing two types of complaints: regulatory complaints and complaints against the DFSA and its employees. Complaints against the

DFSA and its employees are administered and assessed by the DFSA's Office of General Counsel.

Regulatory complaints are assessed through the DFSA's complaints management function and, where a contravention is identified, passed to the relevant DFSA division for further consideration. The DFSA now explicitly states that it will consider the disciplinary record and compliance history of a person involved in a suspected contravention when making a recommendation to the Enforcement Committee to commence an investigation.

Commencement of investigations

– previously, a person making a complaint would be informed of the conclusion of the assessment of a complaint, unless to do so would adversely affect the investigation or the Dubai International Financial Centre's interest more generally. The new procedure states that the DFSA will send an acknowledgement letter to the complainant which includes the

relevant details of the DFSA officer assigned to assess the complaint but the DFSA is not bound to disclose to any party that an investigation is ongoing or the basis upon which an investigation is commenced.

Persons subject to investigation may be notified that an investigation has commenced and the general nature of the investigation, however the DFSA is not required to make such a notification if it is likely to compromise or prejudice the outcome of the investigation. Similarly, where a person has not been informed of the commencement of an investigation, the DFSA will not advise the person of the conclusion of the investigation. Presumably then, where the investigation is likely to lead to the DFSA making use of its enforcement powers, the person subject to investigation will be informed at some stage prior to its conclusion. The discretion of the DFSA to notify a person regarding the commencement of an investigation will need to be balanced with the DFSA's stated enforcement philosophy of acting fairly, openly, accountably and proportionally. The DFSA will also need to consider that persons subject to the supervision of other financial services regulators or professional bodies will often have reporting obligations that are triggered by the commencement of an investigation and they should be informed as soon as possible once the investigation is commenced and again when it is discontinued so that they can update other regulators.

Previously, the DFSA has stated that it will not generally make public the fact that it is or is not investigating a particular matter and listed the exceptions when this information may be made public. This is not addressed in the new guidance.

Information gathering – the guidance makes clear that the DFSA has three different avenues for obtaining information and documents: voluntary submission, by request pursuant to Articles 73 and 80 and by order of the court. There is a greater emphasis on firms providing information on a voluntary basis on the premise that firms are required to cooperate with the regulator.

'Information' is to be interpreted broadly and guidance suggests it should include (i) knowledge communicated or received concerning a particular matter, fact or circumstance, (ii) knowledge gained through work, commerce, study, communication, research or instruction, including information that is not factual or accurate, (iii) data obtained as output from a computer or any type of processed data, (iv) an explanation or statement about a matter, (v) the identification of a person, matter or thing, and (vi) the provision of a response to a question.

As was previously the case, the DFSA will allow a reasonable period for compliance to any information/document request, however the previous benchmark of three business days has been removed.

Interviews – it is currently the DFSA's policy that compulsory interviews will only be conducted in circumstances where a person refuses or is otherwise prevented from taking part in a voluntary interview, or there is some doubt as to that person's cooperation at voluntary interview. Going forward the DFSA may choose to conduct a compulsory interview as opposed to a voluntary interview based on the more general circumstances of a particular case.

Conclusion of investigations – where the Financial Markets Tribunal or a court finds a person guilty of a contravention of DFSA law or regulation, the DFSA is entitled to make an application for recovery of costs in respect of the investigation. Currently it is the DFSA's policy to make such an application exceptionally where the person in question has hindered the investigation by unnecessarily prolonging the investigation or failing to provide, or providing, false information. These restrictions are not carried forward into the revised guidance suggesting that the DFSA will seek to recover the costs of an investigation in a greater number of instances.

Penalties – the DFSA have taken the opportunity to expand upon the factors that it will take into account when determining whether to impose a financial penalty and the quantum of that financial penalty. The DFSA's objectives are now an explicit factor for consideration, as is the deterrent effect of the financial penalty on both the person committing the contraventions and on other persons from committing contraventions.

Changes to decision-making processes

The DFSA also proposes changing its processes for imposing administrative fines and censures. The new process will follow a "decision-maker" model where an individual has the authority to impose the fine or censure. The decision maker will be a person with no previous or direct involvement in the matter to which the decision relates.

Chapter 6 of RPP sets out the decision making procedures which

the DFSA will generally follow when exercising its powers.

Depending on the type of enforcement action being imposed, the decision maker will have to comply with prior representation procedures or post representation procedures. In most cases the decision maker will provide a person with a right of representation prior to making his decision. This will involve the decision maker issuing a notice setting out the basis for exercising the relevant enforcement power and providing suitable opportunity for the affected person to make representations. These representations can either be made in writing or orally. The decision maker is then obliged to take into consideration these representations before making his decision. Decisions are required to be made by way of written notice and will include the reasons upon which the decision maker has made his decision as well as any right of appeal the person may have to the Regulatory Appeals Committee (previously the Financial Markets Tribunal).

Post representation procedures will apply in certain circumstances such as when providing a person with a prior opportunity to make representations could give rise to a delay which may be prejudicial to the interests of the DIFC. Factors that the decision maker will take into consideration when determining whether a consequential delay would be prejudicial to the interests of the DIFC include the extent or risk of loss to DIFC regulated entities or customers, the seriousness of any breach of the law rules, and the risk that a person may be used or has been used to facilitate money laundering or other financial crime. Where a post representation right is

given, the decision maker is obliged to either confirm, vary or withdraw his decision taking into consideration the representations made.

QFCRA's Enforcement Policy Statement

The Enforcement Policy Statement gives information regarding the policies, processes and procedures that the QFCRA will follow when using its enforcement powers and aims to provide comfort to QFC participants that enforcement powers will be used in a fair and transparent manner.

In the same manner adopted by the UK FSA and the proposed approach of the DFSA, the Enforcement Policy Statement provides guidance on the criteria used by the QFCRA when assessing misconduct and deciding which cases require further investigation, the QFCRA's approach to regulatory investigations and use of its information gathering powers, its decision making processes and policies in respect of taking disciplinary action. However, under the Financial Services Regulations, an enforcement procedure will not be considered invalidated on the grounds of procedural irregularity. Furthermore, if it is the intention of the QFCRA to promote a predictable and transparent regulatory regime then firms should be able to rely on QFCRA guidance in the Enforcement Policy Statement to a greater extent than is currently provided for. For example, following the lead of the UK FSA, an express acknowledgement that guidance can be used to assess whether it could have been reasonably understood or predicted at the time that the conduct in question fell below the standards required

would provide additional comfort for firms.

Potential limitations of the QFCRA's policy

Commencement of investigations – prior to the commencement of an investigation, the QFCRA will normally contact the persons subject to investigation with a view to having scoping discussions, the purpose of which is to present the reasons for an investigation and to potentially outline some of the information and/or documents that the QFCRA may require. However, the occurrence of a scoping discussion prior to the formal commencement of an investigation may be prejudicial to the relevant firm. Firms are statutorily entitled to legal representation during an investigation and may be denied this right if they are not notified in advance that an investigation has commenced. This will be of particular importance in respect of discussions regarding the scope of the investigation and the obligations of the firm in respect of the investigation.

The Enforcement Policy Statement also suffers from the same deficiency as the DFSA proposed policy with respect to notification of the commencement and conclusion of investigations. In particular, where the QFCRA decides to discontinue an investigation without taking any action it is not obliged to inform the subject of the investigation of this fact. Again, this is likely to have an adverse effect on firms subject to reporting obligations in respect of other financial services regulators.

Interviews – the Enforcement Policy Statement makes clear that whether an interview is to be conducted on a voluntary or a compulsory basis is a matter for decision by the QFCRA. However, the Enforcement Policy

Statement goes one step further than the DFSA and states that a person asked to attend an interview on a voluntary basis is not entitled to insist that they be compelled to do so. Failure to attend a voluntary interview would be regarded as obstructive behaviour by the QFCRA. There are a number of reasons why a person might prefer a compulsory interview, for example, where they are subject to confidentiality requirements or are a third party who owes a duty of care to the person under investigation. Declining a voluntary interview in such circumstances should not, in our view, constitute obstruction.

Prior and post representation procedures – the QFCRA's policy is that the person subject to a proposed enforcement action will, in most cases, be given the opportunity to make written representations. However, the right to make representations under a notice of proposed action is only required if the enforcement action is either the imposition of a public censure, the imposition of a financial penalty, the appointment of managers or the imposition of a restriction or prohibition in respect of the carrying on specified transactions, activity with specified persons or business in a specified manner. The QFCRA may further choose not to allow representations where it concludes that the delay likely to arise as a result might be prejudicial to the interest or clients of the person concerned. Where prior representations have not been allowed, the Enforcement Policy Statement does not explicitly provide for any post representation procedures.

The Enforcement Policy Statement does however provide for prior and post representation procedures in

respect of "own initiative action" of the QFCRA, i.e., a decision of the QFCRA to impose or vary conditions, restrictions and requirements on the authorisation of a firm or approved individual or withdraw the authorisation altogether.

Private warnings – Unlike the DFSA, the QFCRA have developed a policy on private warnings. However, the intended use and purpose of private warnings under the QFCRA enforcement regime is unclear. The Enforcement Policy Statement says a private warning may be given in circumstances where it is not appropriate to take disciplinary action or enforcement action, yet states that a private warning (and any comments provided in response) forms part of a person's disciplinary record and compliance history. In the event that a private warning is to be treated as part of a firm's disciplinary history, it is inappropriate to issue a private warning in the instance that there is insufficient evidence to take disciplinary or enforcement action (which is currently provided for in the Enforcement Policy Statement). Further clarity on the status of private warnings would be welcomed, especially by firms and individuals that have reporting obligations to other regulators upon the occurrence of any disciplinary and enforcement action.

Clifford Chance comment

A product of Principles Based Regulation

Both the DFSA and the QFCRA will see the development of their respective enforcement policies as in keeping with a system of principles

based regulation. Articulating their respective policies in guidance allows the DFSA and the QFCRA to demonstrate to market participants that enforcement powers are being used in an open and transparent manner, whilst providing a degree of flexibility for the regulator. This guidance is non-binding and procedural irregularity will not render a particular enforcement action invalid.

Furthermore, having a stand-alone policy document (RPP for the DFSA and the Enforcement Policy Statement for the QFCRA) also provides flexibility to change future enforcement policy quickly. Unlike the situation with respect to changes to a DFSA rulebook, the DFSA is under no obligation to publicly consult on changes to RPP. This rule of consultation also applies to the QFCRA's Enforcement Policy Statement; although the QFCRA did opt to consult with select market practitioners in this case.

A few policy wrinkles to iron out

The articulation of comprehensive enforcement policies by the DFSA and the QFCRA provides another reason why international financial institutions looking to conduct business in the Middle East would choose to do so "off-shore" in one of these established financial free zones with their business friendly rules and regulations. Notwithstanding the fact that these policies have a few practical issues to work out, they represent the realisation of an ambition of these regulators to operate on a level of their international peers, such as the UK FSA.

Clifford Chance has a specialist team of contentious and non-contentious regulatory lawyers based in Dubai.

James Abbott was asked by the QFCRA to comment on the Enforcement Policy Statement in his capacity as an industry practitioner.

Clifford Chance will be holding lunchtime seminars regarding the DFSA and QFCRA's enforcement policies and processes in Dubai and Qatar later in January and February. To register your interest please contact:

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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