

## **2012 DFSARAC 1 International Investment Group K.S.C.**

### **Notice of Decision**

1. On 14 June 2012 a Panel of the Regulatory Appeals Committee (“RAC”) comprising Robert Owen, Michael Blair QC and Georg Wittich heard the Appeal of International Investment Group KSCC (“IIG” or “the Applicant” or the “Company”) against the Decision by the Executive of the DFSA dated 19 April 2012 to de-list IIG Funding Ltd (“IIGFL”) from the Official List of Securities, which decision had been stayed by the RAC chairman on 20 May until 30 June to permit the hearing of the Appeal, and was further stayed until 15 July 2012 pending issue of the Panel’s Decision.
2. On behalf of the Applicant, Peter Somekh and Ms Kerry Graham (both of DLA Piper) appeared in person at the Hearing and Mahmoud Hassib participated by telephone. On behalf of the Executive, Nicholas Alves, Matthew Shanahan and Ms Azaa Abdel-Bari appeared at the Hearing.
3. The Panel had before it the Record (supplied by the Executive), the Applicant’s Statement of Appeal dated 7 June, the Executive’s Statement of Response dated 11 June and various supporting documents and written submissions from the Parties which were requested by the Panel prior to the Hearing.

### **DECISION**

4. The Panel has unanimously decided to uphold the Decision by the Executive to de-list IIGFL from the Official List of Securities, based on the findings below.

### **BACKGROUND (including facts that are not in dispute)**

5. IIGFL, the Issuer, issued Islamic Trust Certificates to a value of US\$ 200,000,000, maturing on 10 July 2012 (the Sukuk) pursuant to an Offering Circular dated 5 June 2007. The Reporting Entity and Obligor was IIG. The Certificates were listed on NASDAQ Dubai on 14 June 2007. The Sukuk securities were offered under an Exempt Offer in accordance with the Offered Securities Rules (“OSR”). They were not admitted for trading on NASDAQ Dubai and have thus been traded over the counter.
6. IIG, incorporated in Kuwait in 1987, is an investment company specialising in providing corporate finance advisory services and is also engaged in a range of other activities in various sectors.
7. The DFSA supervises IIG as the Reporting Entity for the Sukuk securities issued by IIGFL and listed on the DFSA’s Official List of Securities. The DFSA’s supervisory role relates primarily to the disclosure and listing rule requirements under the Markets Law 2004 and the OSR. Article 27 of the Markets Law requires a Reporting Entity to file with the DFSA its audited

financial statements in accordance with the OSR. OSR 8.2.1 requires a Reporting Entity to make timely disclosure of Material Information. This includes the annual report and financial statements, which must be disclosed not later than 120 days after the end of its financial year.

8. Article 19 (1) of the Markets Law permits the DFSA, in accordance with its Listing Rules, to de-list securities from an Official List of Securities where it is satisfied that there are circumstances that warrant such action or such action is in the interests of the DIFC. The DFSA Listing Rules (contained in Appendix 6 of the OSR) specify in more detail the circumstances in which the DFSA may exercise its right to de-list securities. These include failure by the Issuer to comply with any provision of the OSR or Markets Law.
9. IIG was at the time of issue of the Sukuk securities listed on the Kuwait Stock Exchange ("KSE"). The business activities of IIG, as well as its status as a listed company, are regulated by the Kuwait Capital Markets Authority ("KCMA"). Prior to April 2011, supervision of the ongoing obligations of companies listed in Kuwait was carried out by the KSE, with approval of financial statements by the Central Bank of Kuwait ("CBK").
10. In April 2010, IIG failed to make payment of the Periodic Distribution Amount of US\$ 3,353,062 due on 12 April 2010. IIG also failed to file its 2009 audited accounts, which were due by 30 April 2010. This constituted a breach of Article 27 of the Markets Law and OSR 8.2.1. IIGFL was consequently suspended by NASDAQ Dubai from its Official List of Securities. IIG's 2009 accounts were finally disclosed on 30 September 2010. NASDAQ Dubai agreed to lift the suspension when a report on IIG's financial position, to be prepared by KPMG, was made public. The KPMG report was circulated on a confidential basis to certain Certificate holders on 4 November 2010. On 27 December, the DFSA imposed a formal requirement on IIG to disclose the report publicly. This finally happened on 10 January 2011.
11. On 13 January 2011, the DFSA Executive sent a private warning to IIG (the "Private Warning Letter") in relation to its breach of OSR 8.2.1 through failure to disclose the contents of the KPMG report to the market as a whole when it first became available on 4 November 2010. This warning stated that, should IIG fail to comply with OSR 8.2.1 or other DFSA-administered legislation or Rules in future, the DFSA would take steps to bring enforcement action against IIG, which might include de-listing its securities from the Official List.
12. IIG subsequently failed to file its 2010 accounts by 30 April 2011 and the Sukuk securities were consequently suspended again by NASDAQ Dubai on 2 May 2011.
13. On 12 February 2012, the KCMA de-listed the equity securities of IIG from the KSE. The DFSA made telephone calls and sent emails to IIG requesting immediate disclosure of this de-listing. On 7 March 2012, IIG made an announcement to the market about its de-listing from the KSE, stating that it had appealed against the decision.
14. On 15 March 2012, the DFSA (which had taken over maintenance of the Official List of Securities from NASDAQ Dubai with effect from October 2011) wrote to IIG informing the Company that it proposed to de-list the Sukuk securities from the Official List, due to IIG's breaches of the Markets Law and OSR, and invited IIG to make representations. IIG made such

representations on 9 April 2012. After considering these representations, the DFSA Executive wrote to IIG on 19 April 2012 (the "Decision Letter") confirming its final decision to de-list the securities of IIGFL on 20 May 2012. On 23 May 2012 IIG filed its Notice of Appeal with the RAC, after being given leave to extend the deadline for submission of the Appeal.

15. Up to the present time, IIG still has not disclosed its 2010 financial statements, nor has it disclosed its financial statements for 2011, which were due on 30 April 2012.

### **APPLICANT'S GROUNDS for APPEAL**

16. The primary grounds advanced by the Applicant for its Appeal were that its failure to provide annual accounts for 2010 and 2011 is due largely to the failure initially of the CBK (while it carried responsibility for supervising disclosure by listed companies in Kuwait) and subsequently of the KCMA to grant approval for the issue of these financial statements. The Panel understands that, for IIG's external auditors to be able to issue a final report on the Company's financial statements, approval must be obtained from the relevant regulatory body in Kuwait.
17. IIG submitted its financial statements for 2010 to the CBK on 31 March 2011. Amendments were made to these at the instigation of IIG to address issues raised in the auditors' draft report and they were re-submitted to the CBK on 23 November 2011. IIG also submitted statements for the periods ending 31 March and 30 June 2011 to the CBK. The former were also amended and re-submitted in December 2011. The CBK raised numerous queries concerning aspects of the accounts. In January 2012, the CBK returned the statements to IIG and instructed the company to redirect them to the KCMA, which had assumed responsibility for approving such statements with effect from September 2011. The statements were accordingly submitted to the KCMA on 24 January 2012. Their approval is still awaited. IIG wrote to KCMA on 20 March 2012 seeking confirmation of the status of the financial statements and requesting a meeting. IIG still await a response to these requests.
18. The Applicant submitted that, due to the above circumstances, it is incapable of complying with its disclosure obligations under the Markets Law.
19. IIG further submitted that the KCMA has reversed its decision of 12 February 2012 to de-list the equity securities of IIG from the KSE, although no such decision appears to have taken effect up to the present time.

### **SUBMISSIONS by the DFSA EXECUTIVE**

20. The DFSA Executive's submission to the Panel made the following principal points:
  - The state of IIG's audited accounts is a matter within the control of IIG and the lack of approval of the financial statements must reflect serious concerns on the part of the regulators in Kuwait about the business and/or financial statements of IIG.
  - IIG had not, as averred in its submission, made "strenuous efforts" to rectify the situation and to comply with its obligations under the Markets Law and OSR.

--IIG has a history over several years of repeatedly failing to keep the market informed about its financial situation and of breaching its continuous disclosure obligations. This situation has been almost entirely within the control of IIG (examples included the above-mentioned failures to disclose in a timely fashion either the 2009 and 2010 financial statements or information about periodic distributions or the KPMG report or IIG's de-listing from the KSE).

--Regardless of whether IIG's failure to disclose its annual financial statements is due to delays on the part of regulators in Kuwait or to shortcomings on the part of IIG, the DFSA is empowered under Article 19 (1) of the Markets Law to de-list IIG's securities if this is in the interests of the DIFC. The DFSA Executive considers that it is in the interests of the DIFC (including to maintain the integrity and efficient operation of the DIFC's markets and to protect investors in DIFC-listed securities) to de-list IIGFL from the Official List. The Executive drew attention to its statutory objectives under Article 8(3) of the DIFC Regulatory Law 2004 (which include fostering and maintaining fairness, transparency and efficiency in DIFC markets, and protecting users and prospective users of financial services in the DIFC) and considers that these require it to exercise its power to de-list IIGFL's securities in the light of IIG's repeated and continuing breaches of its disclosure obligations. The Executive considers that the DFSA's power under the Markets Law is in no way constrained if part, or even all, of the reasons for an issuer's non-compliance with its regulatory obligations lie outside of its control.

### **FINDINGS of the PANEL**

21. The Panel considered first and foremost the issue of the scope of the DFSA's power to de-list an issuer's securities--whether its power under Article 19 (1) of the Markets Law is constrained if the reason for the Applicant's failure to comply with its regulatory obligations is fully or partially outside its control. The Panel concluded that Rule 35.1 of the Listing Rules in Appendix 6 of the OSR does give the DFSA a clear and unconstrained power to de-list Securities from the Official List in various circumstances, including where the Issuer has failed to comply with any provision of the Listing Rules or any other applicable OSR rule or the Markets Law. Rule 35.1 states that the DFSA may de-list Securities from the Official List if (among other things) it is satisfied that the Issuer has failed to comply with any provision of the Listing Rules or any other applicable OSR Rule or the Markets Law. Neither this Rule nor any other Rule of which the Panel is aware imposes any restriction on this power of the DFSA. An unconstrained power to de-list securities is also consistent with international standards, including those recommended by IOSCO.
22. The Panel then considered whether the Executive had exercised its power appropriately in the circumstances of this case and whether it had followed correct procedures in doing so.
23. In light of the numerous and continuing breaches of the OSR rules and Markets Law which have occurred over a period of several years, the Panel concluded that the Executive's decision was in the interests of the DIFC and was therefore justified. The Private Warning Letter dated 12 January 2011 put IIG on notice that it could be delisted if it failed to comply with OSR 8.2.1 (which requires Reporting Entities to make timely and complete disclosures).

IIG's failure to disclose its 2010 financial statements constitutes a major subsequent rule breach, alongside others.

24. The Panel noted that the practical effect of de-listing IIGFL should be limited, since the Certificates (which have in any event been suspended from NASDAQ Dubai for a long time) will still be capable of being traded over the counter, as before.
25. In relation to the correctness of procedures, the Panel considered whether the wording of the Decision Letter, linked to that of the Private Warning Letter, might have the effect of estopping the Executive from delisting IIGFL. The Decision Letter refers to the fact that IIG "has been in breach of the OSR requirements since May 2010" and states that, as a result of that breach, there has been no transparency in the financial position of IIG for a considerable period of time. It further states that there has been, and continues to be, significant delay in the disclosure of the outstanding audited financial statements. "These matters" are cited as the basis of the Executive's decision to de-list IIGFL.
26. The Private Warning Letter (dated 12 January 2011) states that "Should IIG fail to comply with OSR Rule 8.2.1 *in future* [emphasis added], or any other provision of DFSA-administered legislation or Rules" the DFSA would take steps to bring enforcement action against IIG. This phraseology would, in the Panel's view, estop the DFSA from basing its decision to de-list IIGFL on breaches prior to January 2011.
27. The Panel finally concluded that the wording of the Decision Letter (although not perfectly drafted) can reasonably be interpreted as enabling the DFSA to take action in relation to breaches occurring subsequent to 11 January 2011 .
28. Although the Panel found that the DFSA's power to de-list IIG is not constrained if IIG's failure to comply with its regulatory obligations is due to factors outside its control, the Panel nevertheless examined the validity of the reasons given by IIG for the non-disclosure of its financial statements for 2010 and 2011.
29. It is apparent that IIG has been suffering considerable financial stress since 2009. The evidence suggested that the delays in obtaining regulatory approval from the relevant regulatory authorities in Kuwait were due in part to the need felt by those authorities to ask questions occasioned by the losses incurred by IIG. In the opinion of the Panel, the financial stress being suffered by IIG enhanced the need for the Company to disclose information about its financial position. Even if it were accepted that the Company was prevented from issuing its audited annual financial statements by the lack of approvals from regulatory authorities, the Panel considered that alternative means could have been found to provide information to the market concerning IIG's financial position. The Panel detected no serious effort by IIG to find alternative means of providing such information. Nor did it appear that the efforts of NASDAQ Dubai at relevant times to extract such information were as energetic as they might have been.
30. The Panel considered relevant a letter dated 13 June 2012 which it received from the KCMA in response to an enquiry sent to the KCMA on behalf of the Panel. This letter from the KCMA informed the Panel that the securities of IIG were de-listed from the KSE on 12 February 2012 due to the Company's loss

exceeding 75% of the Company's capital (the losses at 31 December 2010 having reached 277% of the Company's capital) and also due to the Company's failure to pay its stock exchange listing fees for the years 2010-2011 and 2011-2012.

31. A reason advanced on behalf of IIG at the Hearing for the non-disclosure of its financial statements was that commercially sensitive restructuring discussions were in progress and, pending their outcome, the Company did not wish to provide misleading information to the market. The Panel did not accept that this constituted a valid reason for non-disclosure, particularly over such a protracted period of time. If the Company had found itself in such a position, it should have approached the DFSA to seek a waiver from the OSR.
32. An issue raised at the Hearing by the Applicant was whether, if the Panel decided in favour of the Applicant, the DFSA would nevertheless be able to de-list IIGFL after 5 July 2012 using its powers under the Markets Law which had very recently been enacted and which was to come into effect on that date. The Applicant argued that such action would be invalid since the new Markets Law is not intended to have retrospective effect. The matter is not of practical consequence, as the Panel has not upheld the Appeal. Nevertheless, for the record, the Panel accepted the submission of the Executive that if it were to de-list IIGFL on or after 5 July 2012 in reliance on the new MKT Rule 9.6.6 (c) that would also come into effect alongside the new Law, this would not constitute a retrospective action. As a general principle, changes in the law can bring within the scope of a law persons previously untouched because such persons, on the coming into force of the law, immediately meet some new criteria. An act of de-listing on or after 5 July would relate to a condition which the Applicant would meet on that date. It would therefore not, in the view of the Panel, constitute a retrospective action.
33. The Panel wishes to conclude with two comments about elements of the Executive's submission. These comments are intended only to be instructional. They do not change the outcome of the appeal:
  - The Executive, in its Statement of Response (paragraph 5(c)(ii)), stated that "the KCB/CMA's lack of approval of the Applicant's financial statements must reflect serious concerns about the Applicant's business and/or financial statements". The Panel did not find such speculation (for that is all that it was) supportive of the Executive's decision and did not itself rely on it in reaching its decision. . However, it is clear that the Executive had sufficient known facts (set out above) upon which to base its decision.
  - The Executive expressed an opinion that "any RAC decision to reverse or vary the Decision would interfere unnecessarily with the DFSA's carrying on of its obligations under its statutory objectives and would be adverse to the integrity of DIFC markets" (Statement of Response, paragraph 28). In fact, the RAC is empowered to conduct full merits reviews of decisions made by the Executive. Doing so does not of itself create any conflict with the statutory objectives of the DFSA.

5 July 2012

| For the Regulatory Appeals Committee Panel

A handwritten signature in black ink, appearing to read 'Robert Owen', with a stylized, cursive script.

Robert Owen  
Chairman