



Markets Brief

Listed Funds and the Offering of Units

Issue No 10 – September 2014

Introduction

Welcome to the tenth issue of Markets Brief. In this edition we take a closer look at the regulation applicable to establishing a Listed Fund in the Dubai International Financial Centre (DIFC). This activity typically involves having a Prospectus approved by the DFSA, offering the Units of the Fund, and the admission to trading of the Fund's Units on an Authorised Markets Institution (AMI), which in the DIFC will be NASDAQ Dubai. The aim of this Markets Brief is to provide an overview of the various DFSA Rules applicable to Listed Funds and provide guidance on how the DFSA would expect market parties to apply the Rules. This should facilitate the process of establishing a Listed Fund in the DIFC. We hope that this Market Brief addresses many of the queries we have received from interested market participants.

The DFSA laws and Rules which apply to Listed Funds overlap those for other listed Securities but are, in fact, markedly different. However, the aim of the two listing regimes is the same, being the provision of adequate disclosure so that potential investors are able

to make an informed investment decision. The DFSA may require a Reporting Entity (i.e. the entity responsible for having Units in a Fund admitted to trading, which is generally the Fund Manager) for a Listed Fund to make additional disclosures in its Prospectus beyond those which are mandated in the Collective Investment Rules (CIR). Any additional disclosures required by the DFSA will vary from case to case. In this Markets Brief we set out some additional disclosures which we consider to be "best practice".

Guidance

Please note that the contents of this communication are not intended to be Guidance as contemplated by the Regulatory Law 2004 and the contents should neither be interpreted, nor relied upon, as Guidance. You should refer to the DFSA Rules for Guidance or contact the DFSA if you require individual guidance.

We recommend that independent legal advice is obtained if you are unsure about any aspect of the DFSA markets regime which may apply to you.

Defined terms are identified in this publication by the capitalisation of the initial letter of a word or each word in a phrase and are defined in the Glossary Module of the DFSA Rulebook.

1. Regulatory framework

Collective Investment Funds are governed by the Collective Investment Law 2010 (CIL) and the CIR. Where a Fund is listed, certain requirements of the Markets Law 2012 (Markets Law) and the Markets Rules (MKT) apply to the Listed Fund and the Fund Manager.

Listed Funds and their Reporting Entities are, therefore, partly regulated under the Markets Law and MKT and partly regulated by the CIL and CIR. This Markets Brief is intended to provide guidance in that respect.

2. Types of Collective Investment Funds

A Listed Fund is defined in the Glossary (GLO) Module of the DFSA Rulebook as “a Collective Investment Fund that is admitted to the Official List of Securities”. The Official List of Securities is a list of Securities which are admitted to trading on an AMI in the DIFC (NASDAQ Dubai) and which is maintained by the DFSA. The definition of Collective Investment Fund (CIF) covers any arrangement with respect to any kind of property created for the purpose of generating profits for investors (called “Unitholders”) from the acquisition, holding, management or disposal of the property where two additional conditions are met. The first is that the Unitholders do not have the day-to-day control over the management of the property. Instead, the Fund property is managed by a Fund Manager. The second is that the individual Unitholders’ contributions (i.e. investments) in the Fund are either ‘pooled’ or ‘managed as a whole’.

The Fund Manager, not the Fund itself, becomes the Reporting Entity once the Fund is listed.

The DFSA has excluded certain arrangements from being considered a CIF even though they fit the definition of a Fund. You can find these excluded arrangements in CIR 2.1. Any reference in the DFSA regulation to a Fund is a reference to a Collective Investment Fund (other than those excluded arrangements).

A Listed Fund can be either a Domestic Fund or a Foreign Fund. A Fund is a Domestic Fund if it is established or domiciled in the DIFC or if it is an External Fund. There are three types of Domestic Funds: Public Funds, Exempt Funds and Qualified Investor Funds (QIF)¹. Any Fund that does not meet the Domestic Fund criteria is a Foreign Fund. Three types of Funds can be listed on an AMI: Domestic Public Funds, Foreign Public Funds and External Public Funds. Exempt Funds and QIFs cannot be listed.

A Fund, including a Listed Fund, can have additional attributes, making it a Specialist Fund. The types of Specialist Funds distinguished in the CIR² are an Islamic Fund³, Fund of Funds, Feeder Fund, Master Fund, Private Equity Fund, Property Fund, Real Estate Investment Trust (REIT), Hedge Fund and Umbrella Fund. A Fund, whether Domestic or Foreign, may attract more than one definition of specialist class of Funds at the same time. Generally, by its nature, a Private Equity Fund can only be an Exempt Fund or a QIF and, therefore, such a Fund cannot be listed.

3. Making an application to the DFSA for approval of a Listed Fund Prospectus

¹ A Fund is a QIF if (a) it has 50 or fewer Unitholders; (b) its Units are offered to persons only by way of a Private Placement; (c) all its Unitholders are persons who meet the criteria to be classified as Professional Clients; and (d) the initial subscription to be paid by a person to become a Unitholder is at least US\$500,000.

² CIR 3.1.

³ The Islamic Finance Rules (IFR) Chapter 6 sets out additional requirements that apply where a Fund is managed or held out as being managed as an Islamic Fund.

MKT 6.3.1 sets out what needs to be submitted to the DFSA if you wish to have Units of a Fund admitted to trading on an AMI (by having it included in the Official List of Securities maintained by the DFSA). A submission should be made to the DFSA by a Sponsor, on behalf of the Fund Manager. The DFSA Rules relating to the Sponsor regime can be found in MKT Chapter 7. The DFSA has published a Markets Brief on the Sponsor regime which can be found on the DFSA website.

Most importantly, the submission to the DFSA involves a Prospectus relating to the Fund. In the case of a Domestic Public Fund, the Prospectus has to comply with the requirements in the CIL and CIR that apply to a Public Fund.⁴ The Prospectus of a Foreign Fund has to be prepared in accordance with the requirements in the relevant foreign jurisdiction as well as CIR 15.1.2 and CIR 15.1.3. In certain instances, the DFSA can impose conditions or restrictions on the foreign offer document. See section 6 below on Foreign Funds.

4. How long does approval of a Listed Funds Prospectus take?

The provisions on the review and approval process, including on timing, of Listed Fund Prospectuses can be found in MKT 6.3.1 and 6.3.2. These are substantially similar to the Rules for non-Fund Prospectuses, as included in MKT Chapter 2. The DFSA has published a Markets Brief on the DFSA Listing Regime, which can be found on the DFSA website. This Markets Brief includes information on the review and approval process.

We will approve a Listed Fund Prospectus when we are reasonably satisfied that the

⁴ Article 51 CIL

Prospectus complies with all the requirements applicable to that Prospectus.⁵

5. Listing a Domestic Public Fund

5.1. Introduction

A Domestic Fund is a Public Fund if it has, or intends to have, more than 100 Unitholders, or if some or all of its Units are offered to investors by way of a public offer or if its Unitholders include Retail Clients.⁶

We note that if the Fund is a Property Fund, it is required to be closed-ended to be able to list and has to be structured as an Investment Company or an Investment Trust. This means that an existing open-ended Property Fund would need to be converted to a closed-ended Fund to be able to list in the DIFC.⁷

5.2. Prospectus content requirements

A Fund Prospectus has to contain all the information which a person and his professional advisers would reasonably require and expect to find in a Prospectus to be able to make an informed decision to become a Unitholder of the Fund.⁸ In CIR APP7,⁹ you can find a list of topics on which disclosure is required for a Domestic Public Fund Prospectus. An overarching principle under the CIL is that the presentation of the information in the Prospectus has to be clear, fair and not misleading.¹⁰

Additional disclosures will have to be included in the Prospectus if the Fund is a Specialist Fund, such as an Islamic Fund or REIT. These requirements can be found in the CIR. In case of an Islamic Fund they can be found in IFR Chapter 6.

⁵ MKT 6.3.2(1)

⁶ Article 16 CIL

⁷ CIR 13.4.1(1)

⁸ Article 52(2) CIL

⁹ CIR 14.3.1(a) refers to CIR APP5. The correct reference is to CIR APP7. This will be corrected in due course.

¹⁰ Article CIL 52(1)

5.3. Domestic Public Funds - Financial promotion regime and Offering of Units of a Fund

Pursuant to MKT 6.3.7 the Reporting Entity of a Listed Fund (i.e. the Fund Manager) must ensure that any financial promotions, such as pre-marketing, roadshow and book building relating to the Units of a Domestic Fund comply with the requirements relating to financial promotions in the CIL and the CIR.

Article 19 of CIL deals with the marketing of Units of Funds, which involves Offers of Units of a Fund. Offering a Unit means making an offer, or making an invitation to make an offer, of a Unit of a Fund to a prospective investor, which, if accepted, gives rise to a contract for the issue or sale of Units in the Fund.

Financial promotions include advertisements or other forms of promotions, marketing or inducements offered to prospective investors in Units, which fall short of concrete Offers or invitations which can lead to immediate contracts for the issue or sale of Units, as described above (and which attract the prospectus disclosure regime in the CIL).

Because financial promotions are widely cast, any disclosures made by a Fund Manager of a Listed Fund in accordance with the Markets Law, such as for the purpose of complying with the on-going reporting requirements of the DFSA, are expressly excluded from being treated as financial promotions. However, that exclusion does not apply to express Offers or invitations relating to a Unit of a Fund which attract the prospectus disclosure regime under CIL.

In addition, CIR 4.1.2, 4.1.3 and 4.1.4 list a number of activities that are deemed to be excluded transactions and offers. This means they do not constitute an Offer of a Unit that would attract the prospectus disclosure obligations. These excluded activities include an offering to sell or transfer a Unit by a Person that owns this Unit where the offer can

only be accepted by the Person to whom the offer is made, and is not made by way of a financial promotion. Another example would be where an Authorised Firm such as a broker undertakes an execution-only transaction in relation to a Unit of a Fund for or on behalf of a client.

Pursuant to Article 53(1) CIL a person undertaking a financial promotion in respect of a Prospectus must ensure that the information contained in the Prospectus complies with the CIL and CIR, the Fund Manager has filed a copy of the Prospectus with the DFSA and that the financial promotion states where a copy may be collected in the DIFC. Because the financial promotion relates to a Prospectus for a Listed Fund, the Prospectus referred to in Article 53(1) CIL will have been approved by the DFSA in accordance with MKT 6.3.2. Article 53(2) CIL permits a person to issue a financial promotion before the Prospectus is issued (and approved by the DFSA) provided the financial promotion clearly states that a Prospectus will be issued and where a copy of the Prospectus may be collected in the DIFC. We note that the DFSA has published a Markets Brief on Financial Promotions and Offers which can be found on the DFSA website. In that Markets Brief we explained the DFSA financial promotions regime under MKT. The financial promotion regime explained here is under the CIL and CIR.

5.4. Domestic Fund corporate governance requirements

MKT 6.4 deals with the governance requirements relating to a Listed Fund. It consists of a provision on Affected Person Transactions, MKT 6.4.1. Affected Persons are, in relation to a Fund, its Fund Manager, its board of directors, its Custodian, its Trustee, any Advisor and holders of 5% or more of the Units of the Fund. For Domestic Listed Funds the Rule states that the Reporting Entity must ensure that no transaction with respect to the Fund Property is entered into with an Affected Person except in accordance with the CIL and

CIR provisions on Affected Person transactions. The substantive provision is CIR 8.3.2, which states that the Fund Manager has to ensure that transactions in respect of Fund Property undertaken with an Affected Person are on terms at least as favourable to the Fund as any comparable arrangement on normal commercial terms negotiated at arm's length with an independent third party and provides a mechanism for that purpose.

The MKT APP4 corporate governance best practice standards do not apply to (the Fund Manager of) a Listed Fund. Instead, for a Fund, Article 39 CIL and CIR 10.3 set out fairly detailed independent oversight arrangements for Public Funds, including the requirement for an Oversight Committee and an Eligible Custodian or Trustee. These oversight provisions are designed to promote the sound management of the Fund.

5.5. Domestic Fund financial reporting obligations

The Reporting Entity of a Listed Fund must prepare annual financial reports, interim financial reports and preliminary financial results in respect of the Listed Fund. These have to be disclosed to the market and lodged with the DFSA. These reports and statements have to be prepared in accordance with the requirements in the CIL and CIR.¹¹ CIR 9 contains the requirements for Domestic Fund periodic reports. CIR 9.5 contains a table of contents for annual and interim reports.

5.6. Domestic Fund continuing obligations requirements

MKT 6.5 sets out the market disclosure requirements of inside information relating to a Listed Fund. MKT 6.6 deals with the disclosure of interests by Connected Persons of Listed Funds. MKT 6.7 deals with the Disclosure of material interests.

¹¹ MKT 6.9.1(a)

MKT 6.8 sets out other matters, specified in MKT APP3, that require market disclosure by a Reporting Entity of a Listed Fund. MKT APP3 lists events that lead to a disclosure requirement. It also states the time within which this disclosure to the market has to be made.¹²

MKT 6.9 sets out the requirements on the accounting periods and financial reports for Listed Funds.

Pursuant to MKT 6.10.1 market disclosures have to be made in accordance with MKT 4.7. The DFSA has published a Markets Brief on Ongoing Market Disclosure. For more information we refer you to that Markets Brief, which can be found on the DFSA website.

5.7. Funds Prospectus under CIR versus Shares Prospectus pursuant to MKT

The disclosure requirements for Prospectuses for a Public Offer, or the listing of Shares on an AMI, are set out in APP1 to the Market Rules. A1.1 lists the information to be included in the Registration Statement and A1.2 the information for the Securities Note. Compared with CIR and specifically CIR APP7, these lists require, in certain respects, different, additional or more detailed disclosure for a Share Prospectus than for a Fund Prospectus.

However, the DFSA would consider it best practice for a Listed Fund Prospectus to contain additional information not explicitly required by CIR, which is targeted mainly at non-listed Public Funds.

Some key prospectus content areas on the Listed Fund or the Fund Manager, as the case may be, on which we may ask content to be

¹² Item 6 of APP3 relating to the disclosure of financial information in relation to Listed Funds contains a mistake and is incomplete. This will be corrected in due course. Until such time, the corresponding item 6 in APP2 should be applied by analogy.

included in a Listed Fund Prospectus in addition to those in APP7 and CIR are:

- Statement of the working capital adequacy of the Fund Manager
- Statement of significant changes in the financial position and prospects of the Issuer
- Where a Fund has commenced operations: historical financial information for the Fund
- Where a Fund has commenced operations: selected financial information
- Where a Fund has commenced operations; operating and financial review
- Risk factors
- History and development of the Issuer
- Profit forecasts or estimates
- Details on administrative, management, governing and supervisory bodies and senior management, their conflicts of interests and shareholdings and stock options
- Information on major shareholders
- Related Party Transactions
- Dividend policy
- Legal proceedings
- Statement of significant changes in the financial position and prospects of the Issuer
- Share capital
- Articles of association
- Material contracts
- Investment restrictions
- Persons Responsible
- Auditors
- Third party information and statements by experts and declarations of any interest
- Physical commodities
- Service Providers
- Custody
- Documents on display
- Information on holdings

- Reasons for the Offer of the Units
- Terms and conditions of the Offer of the Units
- Rights attaching to and information related to the Units offered and admitted to trading
- Distribution and allotment
- Price stabilisation and market making
- Dilution effects
- Investments by Controllers and lock-in arrangements.

We note that if the DFSA considers it necessary, it can impose conditions or restrictions on an admission of Securities to the Official List.¹³ This includes requiring additional disclosure, for example on the above topics. The DFSA would first contact the Fund Manager to discuss possible solutions.

6. Listing a Foreign Fund

6.1. Definition

Article 13(3) CIL states that a Fund that does not meet the Domestic Fund criteria in Article 13(2) CIL is a Foreign Fund. GLO defines a Foreign Fund as a Fund that is established or domiciled in a jurisdiction other than the DIFC. Pursuant to Article 13(2) CIL Domestic Funds include External Funds, which are Funds established outside the DIFC but managed by a Domestic Fund Manager. Therefore, External Funds are not Foreign Funds.

6.2. Process of Listing a Foreign Fund

Where a person seeks inclusion of a Foreign Fund on the DFSA's Official List of Securities, MKT 6.2.1(b) provides two possible routes to achieve this.

One route is where the Foreign Fund is a Designated Fund from a Recognised Jurisdiction (Article 55 CIL). The other route is where the Fund is not from a Recognised

¹³ Article 34(2)(b) Markets Law

Jurisdiction (and consequently the Fund is also not a Designated Fund).

Both types of Foreign Funds would have to meet the DFSA eligibility for listing requirements. See section 7 below.

Where the offer document is not in English, it must be accompanied by an English translation acceptable to the DFSA.¹⁴

The two routes are discussed hereinafter.

6.3. Designated Funds from a Recognised Jurisdiction

As to the first route, which is set out in MKT 6.2.1(b)(i), under the CIL the DFSA may recognise certain countries and territories where it is satisfied that the law and practice under which funds are regulated in these jurisdictions are broadly equivalent to the DFSA's collective investment regime. The DFSA will also designate certain types of funds in such jurisdictions. The DFSA has published on its website a list of these Recognised Jurisdictions and associated Designated Funds. An offer document relating to a Designated Fund in a Recognised Jurisdiction will be accepted by the DFSA without imposing conditions or restrictions. Jersey, for example, is a Recognised Jurisdiction. For Jersey, the DFSA describes the following type of fund as a Designated Fund: "*Where the scheme is managed in, and authorised under the law of, Jersey, any scheme which is a recognised fund within the meaning of the Collective Investment Funds (Recognised Funds) (Rules) (Jersey) Order 2003.*" A Jersey Fund Manager interested in listing its Jersey fund as a Foreign Fund on NASDAQ Dubai would need to satisfy themselves that their Jersey fund fits that description and, if necessary, make clear their reasoning to the DFSA.

The offer document relating to a Foreign Fund which is a Designated Fund has to comply with

¹⁴ MKT 6.3.3(3)

the requirements applicable to it in the Recognised Jurisdiction, which in our example would be the requirements in Jersey. *Inter alia*, the offer document should be current, under the rules of Jersey.

6.4. Funds from other jurisdictions

As to the second route, the DFSA through MKT 6.2.1(b)(ii), makes it possible for funds that are not from a Recognised Jurisdiction to still be approved by the DFSA as a Foreign Fund. This is on a case-by-case basis. It will be up to the Applicant to demonstrate to the DFSA the equivalency of the regulation applicable to the fund in its home jurisdiction. The DFSA would need to be comfortable that these prospectus requirements are at least equal to the DFSA prospectus requirements applicable to Domestic Public Funds in every material sense. In addition, such an Applicant would have to demonstrate to the DFSA that the offer document relating to the Fund complies with the requirements in a jurisdiction (being its home jurisdiction) which provides a level of regulation which is acceptable to the DFSA.¹⁵ The DFSA has the power to impose conditions or restrictions when presented with an application for approval/acceptance of such an offer document.¹⁶

6.5. Foreign Property Funds

Finally, MKT 6.2.1(b)(iii) requires in relation to a Foreign Fund that meets the criteria of a Property Fund that it is a closed-ended investment vehicle and 60% or more of the Fund's assets comprise Real Property. An open-ended investment vehicle would need to be converted to closed-ended as a precondition to being able to pursue a listing as Foreign Fund.

¹⁵ Pursuant to MKT 6.3.3(1)(b)

¹⁶ MKT 6.3.3(2)

6.6. Foreign Fund financial promotions

Financial promotions relating to the Units of the Fund - such as pre-marketing, roadshow and book building by the Reporting Entity of a Listed Fund (i.e. the Fund Manager) - must, in the case of a Foreign Fund, comply with the equivalent requirements relating to financial promotions applicable to the Fund in the jurisdiction of its domicile or establishment.¹⁷

6.7. Foreign Fund corporate governance requirements

Governance provision MKT 6.4.1(2)(b) states that a Reporting Entity of a Listed Fund must, if the Fund is a Foreign Fund, comply with the equivalent requirements applicable to that Fund in the jurisdiction of its domicile or establishment.

6.8. Foreign Fund periodic financial reporting obligations

MKT 6.9.1 states that a Reporting Entity of a Listed Fund must, in order to comply with the requirements in that section, file with the DFSA the annual financial report and interim financial report and other statements in respect of the Listed Fund. Such reports and statements must be prepared, in the case of a Foreign Fund, in accordance with the applicable requirements in the jurisdiction in which the Fund is domiciled or established. The Guidance to MKT 6.9.1 clarifies that the financial and periodic reporting requirements of Foreign Funds should be similar to the financial reporting requirements applicable to Domestic Funds.

6.9. Foreign Fund continuing obligations requirements

MKT 6.5 (Market disclosure relating to a Listed Fund), MKT 6.6 (Disclosure of interests by Connected Persons of Listed Funds), and MKT 6.7, (Disclosure of material interests) are fully

¹⁷ MKT 6.3.7(b)

applicable to both Foreign and Domestic Listed Funds.

MKT 6.8 (Other matters that require market disclosure) and APP3 referred to therein are also fully applicable to Foreign Funds.¹⁸ APP3 singles out Foreign Funds twice, namely as to the period for the filing of financial information in relation to it¹⁹, and in relation to the winding up of a Listed Foreign Fund.

Finally, MKT 6.10 (Manner of market disclosure), and MKT 6.11 (DFSA power to direct disclosure) are fully applicable to both Foreign and Domestic Funds.

7. Listing Rules and eligibility

The DFSA Listing Rules apply to every Listed Entity and Applicant for admission of Securities to the Official List of Securities, i.e. also to (the Fund Manager of) a Listed Fund. The DFSA published a Markets Brief on Eligibility for Listing, which can be found on our website.

8. Publication of a Fund Prospectus

Once approved by the DFSA, the Fund Prospectus must, in accordance with MKT 6.3.4, be filed as soon as possible with the AMI on which the Units are to be admitted to trading, i.e. with NASDAQ Dubai, and be published in accordance with the requirements in MKT 6.10²⁰. This Rule in turn refers to MKT 4.7.1 on the Manner of Market Disclosure. The DFSA published a Markets Brief on Ongoing Market Disclosure which can be found on our website. We refer you to that Markets Brief for more information.

¹⁸ Please note that item 6 of APP3 relating to the disclosure of financial information in relation to Listed Funds is incomplete and partially incorrect. This will be rectified in due course. In the meantime, in relevant part, the corresponding item 6 in APP2, which sets out the financial information disclosure obligations in relation to other reporting entities, should be applied by analogy.

¹⁹ Item 6.1 APP3

²⁰ MKT 6.3.4 incorrectly refers to MKT 6.9. This should be MKT 6.10 and will be corrected in due course.

Arabic edition

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Contact us

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- Previous editions of the Markets Brief
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- A full text of the Markets Law 2012 and Markets Rules.

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Feedback

We appreciate your feedback and welcome any suggestions that you may have. Please email us at markets@dfsa.ae