



Markets Brief

Offers of Securities

Issue No. 3 – November 2012

Introduction

This is the third edition of the Markets Brief. In this brief, we wish to examine offers of Securities to the public (a “public offer”) in or from the Dubai International Financial Centre (“DIFC”), available exemptions, and other key obligations imposed on Persons who make such offers.

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.

Technical explanations given in this brief are for illustrative purposes and should not be considered or relied upon as a legal advice. 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 brief 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.

Background

The recently implemented Markets Law 2012 (“Markets Law”) includes some important changes from the Markets Law 2004, in respect of public offers.

The DFSA has published this third edition of the Markets Brief because we have received a number of queries from Authorised Firms regarding the new Markets Law requirements, particularly in relation to the definition of a public offer and the resulting obligations related to public offers.

The general prohibition

Under Article 11 of the Markets Law, a Person is prohibited from making a public offer of Securities in or from the DIFC, or from having Securities admitted to trading on an Authorised Market Institution (“AMI”), unless such Person does so in accordance with the Markets Law and Markets Rules.

Please note that the word Securities has the meaning given in A2.1.2 of the General Module of the DFSA Rulebook and Securities include Shares, Debentures, Warrants, Certificates, Units and Structured Products.

Approved prospectus

The new regime, which is closely aligned with the European Union’s Prospectus Directive, focusses on two types of activities

which trigger the requirement to issue an Approved Prospectus. These are:

- an offer of Securities to the public in or from the DIFC; and
- the admittance of Securities to trading on an AMI.

A Prospectus is an Approved Prospectus if it is approved by the DFSA under the Markets Rules. The DFSA will approve a Prospectus if it is satisfied that all the requirements relating to the Prospectus Offer, including the requirements on Prospectus structure and contents are met.

What is a ‘public offer’?

Under Article 12 of the Markets Law an Offer of Securities to the Public means:

“a communication to any Person in any form or by any means, presenting information on the terms of the offer and the Securities offered, so as to enable an investor to decide to buy or subscribe to those Securities...”

There are three parts to the definition:

- a communication to any Person in any form or by any means;
- presenting information on the terms of the offer and the Securities offered; and
- so as to enable an investor to decide to buy or subscribe to those Securities.

Therefore, to amount to an offer, all three criteria would need to be met. There must be a communication to a Person, presenting certain information and the information must be such as to enable the Person to decide to buy the Securities in question.

Am I making a public offer?

The public offer regime in the DIFC is very broad. The general prohibition in Article 11 captures both the Person making an offer in the DIFC and the Issuer, wherever located.

Please note that while the DFSA is happy to discuss a Person's particular circumstances, it is our policy not to provide formal guidance on whether a particular set of circumstances amounts to a public offer that requires a Prospectus to be published. Where a Person may be subject to the legislation concerning public offers, they should take legal advice on applying the legislation to their own particular circumstances. It is only in full knowledge of the relevant facts (including how the potential offer may be conducted) that it would be possible to come to any definitive view on whether their activities amount to a public offer in or from the DIFC that requires a Prospectus to be published.

Excluded communications

Excluded from the definition of a public offer is any communication in connection with:

- the trading of Securities admitted to trading on an AMI within the DIFC; and
- Any communication in connection with trading of Securities that are listed and traded on a Regulated Exchange which is made in the ordinary course of business of an Authorised Firm or Recognised Member.

These exclusions are designed to carve out most secondary trading of Securities from the scope of the general prohibition under Article 11 of the Markets Law 2012.

Exemptions

There are a number of exemptions from the requirement to issue an Approved Prospectus in relation to a public offer (“Exempt Offers”). This Markets Brief will not list them all but we highlight some of the more common exemptions:

- an offer made to or directed at only Professional Clients other than natural Persons;
- an offer in or from the DIFC which is directed at fewer than 50 Persons in any

12 month period, excluding Professional Clients who are not natural persons;

- an offer where the total consideration to be paid by a Person to acquire the Securities is at least \$100,000, or an equivalent amount in another currency;
- an offer where the Securities are denominated in amounts of at least \$100,000, or an equivalent amount in another currency; and
- an offer where the total aggregate consideration for the Securities offered is less than \$100,000, or an equivalent amount in another currency, calculated over a period of 12 months (i.e. small offers).

The full list of exemptions can be found at Markets Rule 2.3.1. If an offer does not meet one of the exemptions then a prospectus must be approved by the DFSA.

It is the responsibility of the Person who is making an Exempt Offer in or from the DIFC to make sure that the Exempt Offer criteria in the Markets Rules are observed strictly and where required, appropriately monitored for compliance. Failure to do so may amount to a breach of Article 14(1) of the Markets Law.

Pre-marketing

The DFSA does not consider that genuine pre-marketing of an offer to promote the subscription or acquisition of Securities (for example, by way of a “Pathfinder Prospectus”) would amount to a public offer if the purpose of the marketing is simply to ascertain interest in the offer. However, once a price is fixed or a price range is announced, the offer is likely to amount to a public offer which requires an Approved Prospectus.

If a Person intends to distribute marketing materials or act as a book runner to gauge potential investors’ interest, care must be taken by the Person not to inadvertently communicate information on the terms of an offer and the Securities. Also, simply excluding relevant information from a prospectus or other offer document would not

on its own prevent such document from being a public offer.

The DFSA considers that a Person undertaking pre-marketing with a client in relation to an offer should, in order to be clear, fair and not misleading include a prominent statement in the pre-marketing to the effect that:

- it is not an Approved Prospectus but a financial promotion; and
- that investors should not subscribe for any Securities referred to in the financial promotion other than on the basis of information in the Approved Prospectus.

In relation to pre-marketing and the distribution of marketing materials, a Person must have regard to the requirements on the financial promotion prohibition in Article 41A of the Regulatory Law 2004 and in chapter 3 of the General module of the DFSA Rulebook.

Reporting entity status

Under Article 38 of Markets Law, a Person who makes a public offer in or from the DIFC (other than in relation to Units of a Fund) becomes a Reporting Entity. This is the case even if the offer is an Exempt Offer. A Reporting Entity is required to comply with the corporate governance, market disclosure requirements and other continuous obligations in the Markets Law and Rules to the extent relevant.

If a Person who has made a public offer but has not admitted the Securities to trading on an AMI and is not the Issuer of the Securities, such Person may apply to the DFSA to be declared not to be a Reporting Entity. The written application should be emailed to markets@dfsa.ae and should contain general details on the public offer, whether and how the offer meets the requirements to be exempt and why such Person should reasonably be declared not to be a Reporting Entity.

We would consider the application and respond within 5 business days from the date

of receipt of the application. We may take into account when granting a declaration whether the Person has in place appropriate systems and controls to monitor compliance with the Exempt Offer criteria.

Questions & Answers

What is an example of a communication which meets part of the definition of a public offer?

A Person might, as part of a pre-marketing exercise, email a draft information memorandum to a client and this communication might meet the first two criteria of the definition of a public offer (see above). However, it would not amount to a public offer unless the information provided was sufficient to enable the investor to decide to subscribe to the offer. What amounts to an information that will enable a Person to make an investment decision depends on the facts of each case. However, the terms of the offer and the Securities must be sufficiently certain that a Person is able to make a decision to subscribe.

Can the DFSA provide an example of a communication that meets the definition of a public offer?

Where a Person, in relation to a debt issuance programme, provides a base prospectus and the final terms of the programme to its clients, we would regard the provision of that documentation as being a communication that meets all parts of the definition of a public offer. A prospectus which contains an offer price or a firm price range is likely to fall into the definition of a public offer.

What should I do if I make a public offer but I am not the Issuer of the relevant Securities?

In practice, an Authorised Firm might find itself making a public offer in the DIFC on behalf of an Issuer (who may or may not belong to its Group). The first question the firm should ask itself is whether the public offer is exempt under one or more of the

Exempt Offer criteria. If it is not exempt, the firm must produce a prospectus for approval by the DFSA.

What is an Approved Prospectus?

An Approved Prospectus is a Prospectus that is approved by the DFSA in accordance with the requirements in the Markets Rules. The approval of a Prospectus must be sought when a Person finds that the public offer to be made in the DIFC is not exempted under the Exempt Offer criteria.

What should I do if I think that I may have difficulty in monitoring the Exempt Offer criteria in relation to an offer?

Where a Person does not have the appropriate systems and controls to determine or to monitor compliance with the Exempt Offer criteria, such Person should not make an Exempt Offer in the DIFC.

Does the DFSA accept offer documents produced under legislation in a jurisdiction other than the DIFC?

Under Markets Rules, the DFSA may approve an offer document produced under legislation in a jurisdiction whose prospectus requirements are equivalent to that which is required under Markets Rules and the Person who makes the offer meets all the requirements relating to Prospectus Offer as prescribed in the Markets Rules. The offer document must also have been approved in the home jurisdiction within the last 12 months from the date of its submission to the DFSA.

Does the DFSA have any passporting arrangements with other jurisdictions?

Currently, the DFSA has no passporting arrangements with any jurisdiction to facilitate the automatic registration of a prospectus approved in another jurisdiction.

What are requirements relating to offers of Securities from the DIFC?

A Person who makes a public offer from the DIFC into another jurisdiction must notify the DFSA in writing at the timing of filing of the

Prospectus in the jurisdiction where the offer is proposed to be made. In addition, any initial and on-going obligations that are applicable in that jurisdiction must be met.

The notification requirement applies only to a Person who makes a public offer from the DIFC which is not exempted under the Exempt Offer criteria.

Arabic edition

Every Markets Brief is produced in both English and Arabic and is available on the DFSA website.

Contact us

Visit the DFSA website www.dfsa.ae for:

- previous editions of the Markets Brief;
- access to DFSA-administered legislation and the DFSA Rulebook; and
- full text of the Markets Law 2012 and Markets Rules.

For enquiries:

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Feedback

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