

The New DIFC Markets Law Regime - A Catalyst for NASDAQ Dubai?

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The end result was the enactment of a new Markets Law DIFC Law No 1 of 2012 (New Markets Law) and associated Markets Rules (MKT) (Markets Rules) which replace in their entirety the 2004 DIFC Markets Law and the Offered Securities Rules. In addition, certain supporting amendments were also made to Regulatory Law DIFC Law No. 1 of 2004 as well as to the following DFSA Rulebook modules:

- (a) Fees Module (FER);
- (b) Takeover Rules Module (TKO);
- (c) Representative Office Module (REP);
- (d) Price Stabilisation Module (PRS);
- (e) Recognition Module (REC);
- (f) Glossary Module (GLO);
- (g) Authorised Market Institutions Module (AMI);
- (h) Collective Investment Rules (CIR);
- (i) Islamic Finance Rules (IFR); and
- (j) General Module (GEN).

All of the changes referred to above ("New Regime") came into force on 5 July 2012.

The New Regime represents a significant change to the DIFC legal framework relating to a number of areas including:

1. prospectus;
2. authorised market institutions;
3. obligations of reporting entities;
4. market disclosure;
5. accounting periods and financial reporting;
6. market abuse; and
7. listed funds.

Going into a detailed review of all of the changes brought about by the New Regime is beyond the scope of this article (although we would be pleased to provide specific advice regarding any aspect of the New Regime). The focus of this article is to consider the impact of the New Regime on the following questions in the context of an offer of securities regulated under the New Regime: (i) when is a prospectus required?; and (ii) if required, what information should a prospectus include? It is important to note that an offer of units in a collective investment fund is subject to separate considerations which are not covered by this article (and references in this article to "securities" do not include such units).

PROSPECTUS REQUIREMENTS

Prospectus Trigger:

Prior to the New Regime, in the context of an offer of securities, the issue of whether a prospectus was needed and, if so, what it had to contain were determined by first categorising the offer of securities as

either being a public, exempt or unregulated offer. However, under the New Regime, unless subject to exemptions (examples of which are given below), a prospectus will be required in either of the following two circumstances:

- an offer of securities to the public in or from the DIFC; and
- having securities admitted to trading on NASDAQ Dubai.

Offer of Securities to the Public:

Whereas the previous definition of “offer of securities” referred to “offers” and “invitations” directly or indirectly targeting investors, under the New Regime an “offer of securities to the public” takes place if there is “a communication to any person in any form 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 (...)”.

This broad definition has been narrowed down by certain exclusions. For example, communications made in connection with the trading of securities that are listed and traded on a regulated exchange and in the ordinary course of business of an authorised firm or recognised member are not considered to constitute an offer of securities that requires a prospectus.

Exemptions from Prospectus Requirement:

As was the case under the old legal framework relating to offers of securities, the definition of an “offer of securities” under the New Regime requiring the issuance of a prospectus is subject to certain listed exemptions (offers coming within these exemptions being referred to as “exempt offers”). Examples of exempt offers where a prospectus is not required include:

- offers that are only made to institutional professional clients;
- offers involving a total consideration of USD 100,000 or less; and
- offers directed at fewer than 50 persons (and where no such persons are natural persons) in any 12 month period.

Secondary Sales:

Under the old regime, if securities had previously been offered by way of a prospectus, no subsequent (secondary) offers of those securities were treated as new offers requiring a further prospectus. However, under the New Regime, any subsequent offer of securities that had previously been offered to the public will be considered as a new offer and the issue of whether a prospectus is required or not for that subsequent offer must again be assessed by reference to the definitions of “offer of securities” and “exempt offers” contained in the New Regime.

Prospectus Content - Summary:

Where a prospectus is required, it will be required to contain a prospectus summary section which must contain the following key information relating to the offer:

- the risks associated with and essential characteristics of the issuer, and guarantor, if any, of the securities, including their assets, liabilities and financial position;
- the risks associated with and essential characteristics of the relevant securities including rights attaching to those securities;
- general terms of the offer, including estimated expenses charged to the investor;
- whether the securities are to be admitted to trading and if so, the details relating to such admission; and
- reasons for the offer and the proposed use of proceeds.

Prospectus Validity:

A prospectus issued under the New Regime is valid for a period of 12 months from the date of its approval for the purposes of making an offer to the public or having securities admitted to trading, provided that it contains all relevant information. There are restrictions on the extent to which historical data can be included in any prospectus (for example, financial information cannot be older than 18 months from the date of the prospectus). Further, if there is a significant change in, material mistake or inaccuracy affecting any material contained in a prospectus, or if a significant new matter arises during a prospectus' validity, then a supplementary prospectus is required to be produced.

Prospectus Approval:

Whereas before there was no formal prospectus approval process, under the New Regime a prospectus undergoes a formal approval by the DFSA.

The DFSA will only approve the prospectus where it is reasonably satisfied that:

- the prospectus meets all the applicable requirements in the New Markets Law and the Markets Rules;
- the board of directors of the issuer complies with and has adequate systems and controls in place to ensure on-going compliance with the applicable requirements; and
- the issuer has received all the necessary consents as required under the New Markets Law and the Markets Rules.

Of course, the approval of a prospectus by the DFSA does not mean that the DFSA accepts any responsibility for the accuracy, comprehensiveness or merits of the information included in the prospectus. The responsibility for the contents of a prospectus will remain with the issuer and/or advisors and experts responsible for verifying statements in the prospectus.

The issuer may file a draft prospectus with the DFSA for an informal review to avoid approval delays upon the actual submission. Should the DFSA not approve the prospectus, the issuer can appeal the decision to the DFSA's Regulatory Appeals Committee.

CONCLUSION

In a public statement, Ian Johnston, Chief Executive Officer of the DFSA said: "These changes bring our markets regime into closer alignment with the EU requirements while retaining features necessary to accommodate regional needs and circumstances".

From these changes, it is clear that the DFSA is committed to making a continuous effort to ensure its legislative and regulatory standards follow best international practices. However, it will be interesting to see whether these changes will result in increased capital markets activity in the DIFC.

For more details, please see: www.dfsa.ae/LegalFramework/Legislation/AmendmentstoLegislation and/ or contact the author of this article.