

Appendix 1

The text in this Appendix is new and not underlined and struck through in the usual manner.

The DFSA Sourcebook



Regulatory Policy and Process (RPP)

Chapter 4

Supervisory and Enforcement Powers



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4 SUPERVISORY AND ENFORCEMENT POWERS

4-1 INTRODUCTION

4-1-1 This chapter provides information on how the DFSA will generally exercise its powers when conducting supervisory or enforcement activities. These powers can be exercised in respect of any Persons, including an Authorised Person, Ancillary Service Provider or Auditor (collectively referred to as “firms” in this chapter unless otherwise stated), an Authorised Individual or Principal Representative.

4-1-2 Chapter 5 of the RPP describes how the DFSA will exercise additional powers when conducting enforcement activities.

4-1-3 A reference to:

- (a) an Article in this chapter is a reference to an Article in the Regulatory Law 2004, unless otherwise stated; and
- (b) the Law in this chapter is a reference to any legislation administered by the DFSA.

4-1-4 The range of powers available to the DFSA is primarily set out in the Regulatory Law 2004. Some of the key powers in this chapter include the power to:

- (a) request information and documents and access premises (see Article 73);
- (b) require an Authorised Person to provide a report from an independent expert (see Article 74);
- (c) impose restrictions on an Authorised Person’s business (see Article 75) or dealings with relevant property (see Article 76);
- (d) impose conditions and restrictions on an Authorised Person’s Licence (see Article 49);
- (e) impose conditions and restrictions on an Authorised Individual’s status (see Article 57);
- (f) withdraw an authorisation or Licence of an Authorised Person (see Articles 50 and 51);
- (g) restrict a person from performing any functions in connection with provision of Financial Services or Ancillary Services (see Article 58(1)), or restrict, suspend or withdraw an Authorised Individual’s status (see Article 58(2); and
- (h) suspend, vary or withdraw the registration of an Ancillary Service Provider (see Article 60) or Auditor (see Articles 98 and 105).

4-1-5 When the DFSA exercises a power specified in this chapter, it will generally follow the decision making procedures set out in chapter 6 of this Sourcebook

(except for sections 4-2 to 4-3). Chapter 6 also sets out, among other matters, whether a Person will:

- (a) receive prior written notice and have a suitable opportunity to make representations prior to the DFSA's exercising a power;
- (b) receive reasons of any decision to exercise such power; and
- (c) have a right of appeal to the Regulatory Appeals Committee.

4-2 POWER TO REQUEST INFORMATION AND DOCUMENTS

4-2-1 In order to supervise the conduct and activities of an Authorised Person, Ancillary Service Provider, Fund, Auditor or any director, officer, employee or agent of such person, the DFSA requires access to a broad range of information relating to a Person's business. Such information is usually provided to the DFSA on a voluntary basis. In particular, an Authorised Person and Authorised Individual is expected to deal with the DFSA in an open and cooperative manner and disclose to the DFSA any information of which the DFSA would reasonably expect to be notified.

4-2-2 Pursuant to Article 73 of the Regulatory Law 2004, the DFSA may require a relevant Person to give information and produce documents about its business, transactions or employees to the DFSA. When the DFSA requires the giving of information or production of documents, it will give the Person a written notice specifying what is required to be given or produced.

4-2-3 The DFSA may also apply to the Court to make an order for information and documents under Article 73 from specified Persons located outside the jurisdiction of the DIFC.¹

4-3 POWER TO ACCESS PREMISES

4-3-1 The DFSA may enter the premises of an Authorised Person, Ancillary Service Provider, Fund or Auditor during normal business hours or at any other time as may be agreed, for the purpose of inspecting and copying information or documents (at the relevant Person's expense) stored in any form on such premises, as it considers necessary or desirable to meet the objectives of the DFSA.²

4-3-2 The DFSA will provide reasonable notice to an Authorised Person, Ancillary Service Provider, Fund or Auditor when it seeks information, documents or access to premises. In exceptional circumstances, such as where any delay may be prejudicial to the interests of the DIFC, the DFSA may seek access to premises without notice.

4-4 POWER TO REQUIRE A REPORT

4-4-1 The DFSA may require an Authorised Person to provide it with a report from an independent expert on specified matters under Article 74 of the Regulatory Law 2004.

4-4-2 There are a variety of circumstances where the DFSA may consider it appropriate to require the production of a report. These circumstances include, but are not limited to:

- (a) where the DFSA has concerns as to the adequacy of systems and controls (such as compliance, internal audit, anti money laundering, risk management and record keeping);
- (b) where the DFSA seeks verification of information submitted to it; or
- (c) where remedial action is required to ensure the Authorised Person complies with DFSA Laws and Rules.

4-4-3 GEN section 11.12 sets out various requirements relating to the appointment of an independent expert. In particular, it is noted that:

- (a) the DFSA will give written notification to the Authorised Person concerning the purpose of the proposed report, the scope, the timetable for completion and any other relevant matters;
- (b) the independent expert is required to be appointed by the Authorised Person and be nominated or approved by the DFSA;
- (c) an Authorised Person is required to include specific requirements in a contract with an independent expert;
- (d) an Authorised Person is required to ensure they provide all assistance that the independent expert may reasonably require and ensure that the independent expert co-operates with the DFSA; and
- (e) an Authorised Person is required to pay for the services of the independent expert.

4-4-4 The DFSA notes that any information given or documents produced under Article 74 are admissible in evidence in administrative and civil proceedings, provided that any such information or documents also comply with any requirements relating to the admissibility of evidence in such proceedings.

4-5 POWER TO RESTRICT AN AUTHORISED PERSON'S BUSINESS OR PROPERTY

4-5-1 The DFSA has a power under Article 75 to impose restrictions on an Authorised Person's business. This includes prohibiting an Authorised Person from entering into specific types of transactions, from soliciting business from specific types of persons or from carrying on business in a specific manner. The DFSA may also require an Authorised Person to carry on business in, and only in, a specified manner.

4-5-2 Pursuant to Article 76, the DFSA is also empowered to prohibit or require an Authorised Person to deal with any relevant property in a certain manner.³ The terms “dealing” and “relevant property” are defined in Article 76 as follows:

- (a) “dealing” in relation to property includes the maintaining, holding, disposing and transferring of property; and
- (b) “relevant property” in relation to an Authorised Person means:
 - (i) any property held by the person, acting within the capacity for which it holds a Licence, on behalf of any of the clients of the person, or held by any other person on behalf of or to the order of the person acting within such capacity; or
 - (ii) any other property which the DFSA reasonably believes to be owned or controlled by the person.

4-5-3 In determining whether to exercise its Article 75 and 76 powers, the DFSA will take into account the circumstances set out in GEN Rule 11.13.1 (a) to (m).

4-6 POWER TO IMPOSE CONDITIONS AND RESTRICTIONS ON AN AUTHORISED PERSON’S LICENCE

4-6-1 Pursuant to Article 49 of the Regulatory Law 2004, the DFSA may at any time by written notice to an Authorised Person on its own initiative, or at the request of an Authorised Person:

- (a) impose conditions and restrictions or additional conditions and restrictions on a Licence; and
- (b) vary or withdraw conditions and restrictions imposed on a Licence.⁴

4-6-2 In determining whether to exercise its Article 49 power, the DFSA will take into account the circumstances including, but not limited to, the following:

- (a) where the Authorised Person’s resources (these include financial resources as well as human resources) are inadequate for the scale or type of activity which the firm is licensed to undertake;
- (b) where the Authorised Person has not conducted its business in compliance with the Laws and Rules;
- (c) where the Authorised Person has conducted its business in such a way that it has not ensured full compliance with applicable money laundering and counter terrorism legislation; or
- (d) where the DFSA has some concern about the fitness and propriety of the Authorised Person, but not such as to warrant the withdrawal of its Licence.

4-7 POWER TO WITHDRAW AN AUTHORISATION IN RESPECT OF ONE OR MORE FINANCIAL SERVICES OR A LICENCE

4-7-1 The DFSA may exercise its powers under Article 50(1) to withdraw the authorisation under a Licence to carry on one or more Financial Services where:

- (a) the Authorised Person is or has been in breach of one or more restrictions or conditions applicable to its Licence;
- (b) the Authorised Person is in breach of the Regulatory Law 2004, Rules or other legislation administered by the DFSA;
- (c) the Authorised Person is no longer fit and proper to carry on a Financial Service;
- (d) the Authorised Person has failed for a period of at least twelve consecutive months to carry on one or more Financial Services for which it is authorised under a Licence;
- (e) the Authorised Person requests the withdrawal; or
- (f) the DFSA considers that the exercise of the power is necessary or desirable in the pursuit of its objectives.

4-7-2 The DFSA may exercise its powers under Article 51 to withdraw a Licence where:

- (a) as a consequence of withdrawal of authorisation in relation to one or more Financial Services under Article 50, the Authorised Person is no longer authorised to carry on a Financial Service;
- (b) the Authorised Person is no longer fit and proper to hold a Licence;
- (c) the Authorised Person has failed to remove a Controller or take such other action as required by the DFSA under Article 64; or
- (d) the Authorised Person requests the withdrawal.

4-7-3 In determining whether to exercise its Article 50 and 51 powers, the DFSA will have regard to all relevant matters. These include, but are not limited to, the following:

- (a) when the DFSA has serious concerns about the manner in which the business of the Authorised Person has been or is being conducted;
- (b) when the DFSA considers it necessary to protect regulated entities and customers in the DIFC;
- (c) whether any alleged contraventions affect or have the potential to affect DFSA objectives;

- (d) the nature, seriousness and impact of any alleged contravention and whether the alleged contravention is ongoing;
- (e) when the Authorised Person no longer satisfies the relevant criteria set out in chapter 7 of the GEN module, chapters 2 and 7 of the AMI module and section 2-2 of this module in respect of the fitness and propriety to carry on a Financial Service or hold a Licence;
- (f) when the activities of the Authorised Person have ceased; and
- (g) when the Authorised Person's resources seem to the DFSA inadequate for the scale or type of activity which the firm is authorised to undertake.

4-7-4 Where an Authorised Person requests the DFSA to withdraw its Licence, then such a Person should complete and submit the relevant form to the DFSA (see SUP 6 Form - AFN Sourcebook). This form sets out a number of matters which the DFSA will consider before processing such an application to withdraw a Licence.

4-8 POWER TO IMPOSE CONDITIONS AND RESTRICTIONS ON THE STATUS OF AN AUTHORISED INDIVIDUAL

4-8-1 Pursuant to Article 57 of the Regulatory Law 2004, the DFSA may at any time by a written notice to an Authorised Individual and the Authorised Firm in relation to which the Authorised Individual is an officer, employee or agent:

- (a) impose conditions and restrictions or additional conditions and restrictions on the grant of Authorised Individual status; and
- (b) vary or withdraw conditions and restrictions imposed on the grant of such status.⁵

4-8-2 The DFSA may exercise this power in circumstances including, but not limited to, the following:

- (a) where the Authorised Individual has not acted effectively and responsibly and has not exercised the expected level of skill, care and diligence in carrying out the Licensed Function;
- (b) where the conduct of the Authorised Individual falls below the standards expected; or
- (c) where the DFSA has some concern about the fitness and propriety of the Authorised Individual, but not such as to warrant the suspension or withdrawal of an Authorised Individual's status.

4-9 POWER TO RESTRICT, SUSPEND AND WITHDRAW THE STATUS OF AN AUTHORISED INDIVIDUAL

4-9-1 Pursuant to Article 58(2) of the Regulatory Law 2004, the DFSA has the power to restrict a Person from performing Licensed Functions, or to suspend or withdraw a Person's Authorised Individual status, if it reasonably concludes that:

- (a) the Person is in breach or has been in breach of an obligation that applies as a result of such Person's Authorised Individual status; or
- (b) a Person is no longer fit and proper to perform the Licensed Function role for which he requires status as an Authorised Individual.⁶

4-9-2 In determining whether to exercise its Article 58(2) power, the DFSA will have regard to all relevant matters including, but not limited to, the criteria for assessing the fitness and propriety of an Authorised Individual as set out in chapter 7 of GEN and section 2-3 of this Sourcebook.

4-9-3 The DFSA may also withdraw the Authorised Individual status of a Person pursuant to Article 58(3) if:

- (a) the Person becomes bankrupt;
- (b) the Person is convicted of a serious criminal offence;
- (c) the Person becomes incapable, through mental or physical incapacity, of managing his affairs;
- (d) the Person or the relevant Authorised Firm asks the DFSA to withdraw the status; or
- (e) the Licence of the relevant Authorised Firm is withdrawn.

4-9-4 In determining whether to exercise its power under Article 58(3)(b), the DFSA will give particular consideration to offences involving dishonesty, fraud or a financial crime.

4-10 POWER TO RESTRICT INDIVIDUALS

4-10-1 If the DFSA reasonably concludes that a natural person is not fit and proper to perform any functions in connection with the provision of Financial Services or Ancillary Services (whether or not they are Licensed Functions), it may restrict that Person from performing any or all such functions.⁷

4-10-2 Article 58(1) of the Regulatory Law 2004 enables the DFSA to impose a restriction in respect of all functions or in respect of specific functions. Whether a general restriction or a more specific restriction is imposed by the DFSA may depend on the facts of the matter, including:

- (a) the concerns upon which the DFSA determines that a natural person is not fit and proper to perform any functions; and
- (b) the need to protect the integrity of the DIFC and ensure the confidence of participants in the market.

4-10-3 In determining whether to exercise its power under Article 58(1), the DFSA may have regard to all relevant matters including, but not limited to, the criteria for assessing the fitness and propriety of Authorised Individuals as set out in chapter 7 of GEN and section 2-3 of this Sourcebook.

4-11 POWER TO VARY OR WITHDRAW THE REGISTRATION OF AN ANCILLARY SERVICE PROVIDER

4-11-1 The DFSA has the power to vary or withdraw the registration of an Ancillary Service Provider pursuant to sections 4.5 and 4.6 of the ASP Module and Article 60(4) of the Regulatory Law 2004. The DFSA may exercise this power where it is satisfied that:

- (a) the Ancillary Service Provider has failed to carry on an Ancillary Service in the DIFC for a continuous period of 12 months or more; or
- (b) the Ancillary Service Provider has breached, or is breaching, the Laws or Rules of the DIFC.⁸

4-11-2 In determining whether to exercise its powers to withdraw the registration of an Ancillary Service Provider, the DFSA may have regard to all relevant matters including, but not limited to, the circumstances specified in 4-7-3 as relevant to an Ancillary Service Provider.

4-12 POWER TO VARY, SUSPEND OR WITHDRAW THE REGISTRATION OF AN AUDITOR

4-12-1 The DFSA has the power in respect of an Auditor to:

- (a) withdraw its registration;⁹ and
- (b) suspend its registration.¹⁰

4-12-2 The DFSA may exercise such powers where it has reasonable grounds to believe that:

- (a) the Auditor is no longer fit and proper; or
- (b) the Auditor has breached, or is breaching, the Regulatory Law 2004, Rules or other legislation administered by the DFSA.

4-12-3 In determining whether to exercise such powers, the DFSA will have regard to all relevant matters including, but not limited to, the circumstances as relevant to an Auditor specified in 4-7-3.

4-13 MISCELLANEOUS POWERS

Endorsements

4-13-1 The DFSA has the power to:

- (a) impose conditions and restrictions or additional conditions and restrictions;¹¹
or
- (b) withdraw or vary conditions and restrictions,¹²

on an endorsement to conduct Islamic Financial Business.

4-13-2 In respect of an endorsement on a License to conduct business with Retail Clients, the DFSA has the power to impose conditions and restrictions, or withdraw or vary conditions and restrictions pursuant to Article 49 (see section 4-6 of this chapter).

4-13-3 In determining whether to exercise such powers, the DFSA will have regard to all relevant matters including, but not limited to, one or more of those circumstances specified in 4-6-2 in respect of imposing, varying or withdrawing conditions and restrictions.

Funds

4-13-4 The DFSA has the power to withdraw the registration of a Public Fund in one or more of the circumstances set out in Article 32 of the Collective Investment Law.¹³ In determining whether to exercise this power, the DFSA can withdraw the registration of a Public Fund only if it considers that:

- (a) the withdrawal is in the interests of the Unitholders of the Fund; or
- (b) appropriate steps have been taken or may reasonably be taken to protect the interests of the Unitholders.

Auditors

4-13-5 The DFSA may direct¹⁴ an Authorised Person and Public Listed Company to appoint an auditor, where an auditor has not been appointed by such person.

4-13-6 Where an auditor appointed by an Authorised Person and Public Listed Company is not suitable in the opinion of the DFSA, the DFSA may direct¹⁵ the auditor to remove itself as auditor from such person.

Citations

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- ¹ Article 73(3) of the Regulatory Law 2004
 - ² Article 73(2) of the Regulatory Law 2004, GEN Rule 11.1.2.(d)
 - ³ Article 76 of the Regulatory Law 2004
 - ⁴ Article 49(1) of the Regulatory Law 2004
 - ⁵ Article 57 of the Regulatory Law 2004
 - ⁶ Article 58(2) of the Regulatory Law 2004
 - ⁷ Article 58(1) of the Regulatory Law 2004
 - ⁸ ASP Sections 4.5 and 4.6.
 - ⁹ Article 98(3) of the Regulatory Law 2004
 - ¹⁰ Article 105 of the Regulatory Law 2004
 - ¹¹ Article 12 of the Law Regulating Islamic Financial Business 2004
 - ¹² Article 12 of the Law Regulating Islamic Financial Business 2004
 - ¹³ Article 32 of the Collective Investment Law 2010
 - ¹⁴ GEN Rule 8.4.6 and MKT Rule 5.2.6
 - ¹⁵ GEN Rule 8.4.7 and MKT Rule 5.2.7