

When the regulator comes knocking...

Regulated companies or individuals within the DIFC may well find themselves subjected to an investigation by DFSA. Rajesh Vyakarnam examines the DFSA's role, its powers and what you can do to be prepared.



request for information. The request may be informal, or a formal Notice under the Regulatory Law, DIFC Law No.1 of 2004 (the "Regulatory Law"). There is very little that the DFSA can't ask for from a company or Authorised Person.

The DFSA can ask for information or documents that it decides may be relevant to its investigation. In order to obtain information the DFSA can:

- Enter the business premises to obtain documents;
- Demand the production of documents;
- Require attendance at interviews; and
- Require any further assistance from time to time.

Firms operating within the Dubai International Financial Centre ("DIFC") will know that it is a unique free-zone that operates under its own laws, determines disputes in its own Courts and is independently regulated by the Dubai Financial Services Authority ("DFSA").

For the past 10 years the DFSA has acted as an independent regulator of financial services conducted in or from the DIFC. It is responsible for policy and rulemaking, authorisation of companies and their officers, supervision and enforcement.

THE DFSA'S POWERS

The DFSA's powers cover companies and 'Authorised Persons' that are incorporated in the DIFC and/or conduct their business from within the DIFC. The DFSA has the power to enforce regulations and impose sanctions. The latter may range from small fines to permanent suspensions.

REQUESTS FOR INFORMATION

The starting point for any DFSA action is typically a

WITHHOLDING INFORMATION OR DOCUMENTS

There is very little scope for refusing a demand for information. Confidentiality, privilege and self-incrimination are not valid reasons.

If a document is within the company or Authorised Person's 'custody, possession or control', the DFSA could use the Regulatory Law to compel disclosure. This may include seeking an order through the DIFC Courts.

Certain exceptions could apply depending on the circumstances. If a company or Authorised Individual holds documents for companies incorporated under foreign laws, and those foreign laws make the disclosure of such information an offence, the DFSA may first have to seek the approval of the applicable foreign court to compel disclosure or seek consent from the 'owner' for voluntary disclosure and a waiver from the prohibition under that foreign law.

For example, under the Confidential Relationships (Preservation) Law 2015 ("CPRL") of the Cayman Islands a company holding 'confidential information' (as defined by the CPRL), relating to the business function of a company incorporated under the laws

of the Cayman Islands, may have grounds to refuse the production of documents to the DFSA. This must be examined on a case-by-case basis and legal advice should be obtained.

WHERE CAN THE DFSA GET INFORMATION FROM?

The DFSA may also seek information from third parties, who it believes hold relevant information.

If a company or Authorised Person uses a 'Registered Auditor' (registered with the DFSA), the DFSA may seek disclosure from that Auditor.

Pursuant to the Regulatory Law, Registered Auditors owe independent duties of disclosure to the DFSA and can be asked to disclose information relating to a company or Authorised Person under investigation. They could provide this disclosure without notice (depending on the terms of engagement between the Registered Auditor and that company). If the company or Authorised Person can be linked by ownership or shared management to companies outside the DIFC, and those non-DIFC companies used Registered Auditors, information about those non-DIFC companies could also be obtained by the DFSA via this route.

WHAT ACTIVITIES CAN BE THE SUBJECT OF AN INVESTIGATION?

Breaches covered by the DFSA will include acting outside of the scope of a license, engaging in activities that amount to misconduct (fraud, deception, dishonesty), or failing to abide by 'Core Principles' as defined in the DFSA Rulebook (including acting without integrity, due skill or care and diligence; failing to observe market conduct, to deal openly and honestly with the DFSA or to take care to ensure that the business is managed and controlled effectively). There are also further obligations in relation to anti-money laundering, proper KYC and handling of client funds.

While it has not been seen as yet with the DFSA, other regulators including the FCA in England have started to interpret these obligations widely. In 2014 the FCA sanctioned an Authorised Person for 'lack of fitness or propriety' because he evaded train fares. This contravened his general duty to act with integrity, but did not relate to his regulated function. Whether or not the DFSA takes a similarly broad approach remains to be seen.

WHAT SHOULD YOU DO?

(i) The internal review

When a Notice (formal or informal) arrives, the starting point will often be to decide whether or not to conduct an internal investigation.

This can be unattractive due to the cost or use of internal resources. However, the benefits can outweigh the apparent hassle. A review will help to

determine whether there are any areas of risk and help to deal with the investigation more efficiently. The DFSA may even be persuaded to modify the scope of its investigation depending on the findings of the internal review. The review could also provide confidence that any mitigating or relevant factors are fully considered by the DFSA.

It should be noted that this internal review may not itself be privileged. The DFSA could ask to see copies of anything relevant including the final report.

(ii) Interviews

Companies should ensure that lawyers are present at interviews and that notes are taken. If the interviews are recorded, the DFSA should be asked to provide copies of the tapes or transcripts.

(iii) Separate legal representation

The interests of a company or Authorised Persons (who are employees of that company) may be better served by engaging separate counsel. The individuals may not feel comfortable unless their interests are protected independently. Whilst this may result in some loss of control over the investigation by the company, it may help the company to mitigate some risk.

(iv) Reputation management

News of the DFSA's investigation, or request for information can be damaging to companies and individuals. Steps should be taken to mitigate this damage, including identifying potential sources of leaks within the company (employees or cyber) and engaging with online reputation management firms to deal with stories that appear online.

WHAT NEXT?

Clear protocols should be established for the production and custody of documents, together with which third party companies are used for financial auditing.

If DFSA comes knocking you should seek advice from your lawyers as soon as possible. They will help you to deal with requests for documents, ring-fence areas of risk, engage with the DFSA to establish scope and timelines, manage reputational risks and deal with enforcement or sanction proceedings. 🛡️



Text by:
RAJESH VYAKARNAM, senior associate, KBH Kaanuun