

CONSULTATION PAPER



NO. 141 WHISTLEBLOWING

7 July 2021

PREFACE

Why are we issuing this Consultation Paper?

1. This Consultation Paper seeks public comment on the DFSA's proposals to introduce whistleblowing measures applicable to DFSA Authorised Firms, Designated Non-Financial Business or Profession (DNFBP) and Registered Auditors (collectively called DFSA Regulated Entities or Regulated Entities) operating in the DIFC.
2. The proposed Whistleblowing measures introduce various requirements and protections, applicable across a range of DFSA Regulated Entities, which build on existing requirements and aim to move towards a more consistent approach to reporting and recording misconduct. We would appreciate stakeholders' views on these issues.

Who should read this Consultation Paper?

3. The proposals in this Consultation Paper should be of interest to DFSA Regulated Entities, to potential applicants, and to their advisers.

Terminology

4. In this CP, defined terms have the initial letter of a word, or of each word in a phrase, capitalised and are defined in the Glossary Module (GLO). Unless the context otherwise requires, where capitalisation of the initial letter is not used, the expression has its natural meaning. Some of the commonly used terms are set out below:

Term	Definition
Authorised Person	An Authorised Firm or an Authorised Market Institution.
Regulated Entity	Means: <ul style="list-style-type: none"> • an Authorised Person; • a Registered Auditor; or • a DNFBP.
Regulatory concern	In relation to an Authorised Person, a concern held by any person that the Authorised Person, an officer or employee of the Authorised Person or an Affiliate of the Authorised Person has or may have a) contravened a provision of legislation administered by the DFSA; or b) engaged in money laundering, fraud or any other financial crime. In relation to a Registered Auditor or DNFBP, a concern held by any person that the Registered Auditor or DNFBP or an officer or Employee of the Registered Auditor DNFBP has or may have a) contravened a provision of legislation administered by the DFSA; or b) engaged in money laundering, fraud or any other financial crime.
Whistleblower	Means a person that has reported, or intends to report, a regulatory concern.

What are the next steps?

5. Please send any comments online by clicking [here](#). You will need to identify the organisation you represent in providing your comments. The DFSA reserves the right to publish, including on its website, any comments you provide, unless you expressly request otherwise at the time of making comments. The deadline for providing comments is **7 September 2021**.
6. Following this public consultation, we expect to proceed to make the relevant changes – amended as appropriate to reflect points raised in consultation - to the DFSA's Rulebook and Sourcebook. The proposed changes to the Regulatory Law (DIFC Law No. 1 of 2004, “the Regulatory Law”) will be submitted to His Highness the President of the DIFC for his consent that the changes should be passed, for assent, to His Highness the Ruler. You should not act on the proposals until the relevant changes to the laws and the DFSA's Rulebook and Sourcebook are made. We shall issue a notice on our website telling you when this happens.

Structure of this Consultation Paper

7. The remainder of this Consultation Paper contains:
 - a) Background - Whistleblowing;
 - b) Section 1 – Proposals for whistleblowing;
 - c) Section 2 – Whistleblowing policies and procedures;
 - d) Annex 1: Questions in this Consultation Paper;
 - e) Appendix 1: Regulatory Law 2004;
 - f) Appendix 2: General Module (GEN);
 - g) Appendix 3: Auditor Module (AUD);
 - h) Appendix 4: Authorised Market Institutions Module (AMI);
 - i) Appendix 5: Anti-Money Laundering, Counter Terrorist Financing and Sanctions Module (AML); and
 - j) Appendix 6: Regulatory Policy and Process Sourcebook Module (RPP).

Background - Whistleblowing

What is Whistleblowing?

8. While there is no agreed technical definition of a whistleblower, a simple dictionary definition reads “a person who tells someone in authority about something illegal that is happening, especially in a government department or a company”.¹
9. Although the codification of whistleblowing laws and rules differ considerably across jurisdictions, whistleblowing practices, and the like, exist in almost every jurisdiction. Typically, whistleblowers report in one or more of the following ways:
 - a. *Internal reporting* – an individual may report directly to the firm where the breach was identified. This form of internal reporting may be achieved through formal or informal channels, depending on the policies and procedures adopted by the firm in question. In certain jurisdictions, specific conditions need to be met for the individual reporting the breach to be considered a whistleblower. Some firms will have an appointed whistleblower champion or department that deals with allegations of misconduct within the firm;
 - b. *External reporting to a regulator* – an alternative course is for an individual to report directly to the relevant regulatory authority that is responsible for supervising the firm where the breach was identified; or
 - c. *Public/Media* – in certain cases, an individual may opt to go public with the information. This typically happens when the individual perceives there being sufficient public interest in the matter to warrant wider circulation of the wrongdoing.
10. The reporting we are referring to in this Consultation Paper refers to, for example, internal reporting within a Regulated Entity, or external reporting to a regulator, in respect of a regulatory concern.

What are the current requirements in the DIFC relating to Whistleblowing?

DFSA-administered Laws and Regulations

11. Requirements to report breaches to the DFSA are covered in certain provisions in DFSA-administered Laws and Regulations.
 - A. Regulatory Law 2004
12. Articles 67, 68 and 104 of the DIFC Law No. 1 of 2004 (“Regulatory Law”) cover obligations of disclosure to the DFSA by a Regulated Entity and outline that no person should be subjected to detriment or loss or damage merely by making a notification or providing information or documents to the DFSA.
 - B. Authorised Market Institutions (AMI) Module
13. AMI 5.12.1 sets out that all Authorised Market Institutions (AMI) must have appropriate procedures and protections to enable Employees to disclose any information to the

¹ <https://dictionary.cambridge.org/dictionary/english/whistle-blower>

DFSA or to other appropriate bodies involved in the prevention of Market Abuse, money laundering or other financial crime or any other breaches of relevant legislation.

14. As such, an AMI is required to have policies and procedures to enable Employees to make protected disclosure, made in good faith, of information which, in the reasonable belief of the Employee making the disclosure, tends to show that one or more of the following has been, is being, or is likely to be, committed:
 - a. crimes;
 - b. breaches of legislation;
 - c. miscarriage of justice;
 - d. putting health and safety of individuals in danger, and
 - e. deliberate concealment of such breaches).

C. General Module (GEN)

15. There are then sections within GEN that set out rules relating to the notification of certain matters, including GEN 5.3.11 and 5.3.12, which require Authorised Persons to establish, maintain and document breaches of any legislation applicable in the DIFC. Also, GEN 11.10.7 sets out requirements for an Authorised Person to notify the DFSA, including if it becomes aware of any significant breaches of DFSA-administered Laws or Rules, and matters which could have a significant effect on its reputation or affecting its fitness and propriety.

D. Regulatory Policy and Processes Sourcebook (RPP)

16. RPP Section 5-3 sets out that the DFSA will handle, in a confidential manner, the reports it receives concerning breaches of DFSA-administered Laws or Rules. RPP Section 6-6 sets out mitigating and aggravating factors in the DFSA will consider when an individual or a firm makes a report relating to a breach of a DFSA-administered Law or Rule.

DIFC Laws

17. DIFC Law No. 7 of 2018 (DIFC Operating Law) is administered by the DIFC Authority (DIFCA). Article 64 is headed 'Whistleblower Protection' and sets out protections for a person who makes a disclosure relating to a suspected contravention by a "*Registered Person*".
18. The whistleblowing protections conferred by the DIFC Operating Law provide:
 - a. protection for a person disclosing information to an officer or Director of a Registered Person (i.e. 'internal' whistleblowing);
 - b. protection to whistleblowers from any detrimental action that could be taken by an employer, including dismissal from current employment; and
 - c. that the identity of the individual shall remain confidential, unless otherwise required by a Court order or for a 'regulatory purpose'.

19. While a Registered Person includes a Regulated Entity, the protection only covers reporting of a suspected contravention of a Law or Regulation administered by the Registrar of Companies (i.e. not a contravention of a DFSA-administered Law or Rule).

Section 1: Whistleblowing

Whistleblower protection

Protection

20. While the above DFSA-administered Laws and Rules include requirements (excluding the provision in the AMI Module) to report certain matters to the DFSA, and to have appropriate systems and controls in place to ensure this compliance, we do not believe they are sufficient. They do not mention the term “whistleblower,” nor do they provide the same degree of protection for whistleblowers, for example, as provided for in Article 64 of the DIFC Operating Law.
21. Therefore, we believe it is necessary to build on the requirements set out in paragraphs 11-16, and put in place protections that will encourage a person to speak up when something does not look or feel right in a Regulated Entity. We know that individuals may be reluctant to speak out about misconduct because of the possibility of suffering personally, as a consequence. They worry about being labelled disloyal or as a troublemaker, and the possibility of losing their job or being without a residence visa.
22. On that basis, we have considered what measures, if any, we can put in place to prevent a person from suffering any dismissal, demotion, or other detriment in their employment when reporting a regulatory concern. We are therefore, proposing changes to the Regulatory Law to provide, among other things, protection to a person making a report to the Regulated Entity or DFSA, which expressly state that they should not be subject to any action by an employer that is likely to cause detriment. This provision has broadly been adopted from Article 64 of the Operating Law. However, unlike Article 64, we are not proposing to require a person making a whistleblowing report to disclose their identity, as this may deter some whistleblowers.
23. This enhanced protection would be available to any person (whether an officer, employee or agent of the Regulated Entity, for example) disclosing information in relation to a *reasonable suspicion* that a Regulated Entity, an officer or employee of a Regulated Entity or an Affiliate of an Authorised Person has or may have:
- a. contravened a provision of this Law, the Rules or any other legislation administered by the DFSA; or
 - b. engaged in money laundering, fraud or any other financial crime and where the disclosure is made in good faith.

This protection would also apply whether a Whistleblower makes the disclosure to a person within an Entity (such as a director, officer or compliance officer) or directly to the DFSA, for example.

24. The requirements that the disclosure must relate to a *reasonable suspicion* and be made in *good faith* are concepts that are commonly used in legislation and have an established meaning under case law. For example, what is a “reasonable suspicion” will depend on the particular circumstances. While “suspicion” is a relatively low threshold, the notion of reasonableness imports an objective test to the suspicion. Similarly, the concept of “good faith” requires, for example, that something is done honestly rather than for a

dishonest or malicious purpose. Under the proposed text, it is for the person making the disclosure to establish that these tests are met in order to receive protection. However, we are also considering whether the burden of proof should be shifted, so that it is placed instead on a person asserting that a disclosure by a whistleblower was not based on a reasonable suspicion or was not made in good faith.

25. We would also like to be very clear that even though we are proposing the inclusion of whistleblower protection in the Regulatory Law, it would be for an individual, rather than the DFSA, to enforce this protection.
26. In addition to this protection, the DFSA is also proposing to update the Penalty Guidance in respect of penalties imposed on a firm as set out in the RPP Sourcebook. We are proposing to add to the list of aggravating and mitigating factors, which could increase or decrease the amount of a financial penalty applied, the treatment, if any, of a whistleblower involved in disclosing a contravention.

Confidentiality

27. We would like to emphasise that any reports made to the DFSA will be treated as confidential information. Article 38 of the Regulatory Law prohibits the DFSA from disclosing the confidential information it receives.
28. There are exceptions to this requirement, including if disclosure of confidential information is required by law (e.g. by a court order), or if there is a mandatory requirement made under other legislation. The DFSA also has the discretion to provide confidential information to other civil or criminal law enforcement agencies, in order to assist them in performing their functions.
29. These types of exceptions are not unusual, they exist in most jurisdictions. Though they may sometimes apply, the DFSA will do everything it can to maintain the confidentiality of a whistleblower's identity, as far as practically possible.

Promoting awareness

30. We believe it is important that all employees and officers of DFSA Regulated Entities are aware of the protections that are available to them when making whistleblowing reports. Given this, we are proposing that all Regulated Entities must inform all their employees and officers about the protections we are introducing. We are not going to prescribe how this should be done, rather we will leave it up to the Entity to select the most appropriate avenue to meet this requirement. For example, it could be part of the policies and procedures set out in Section 2, or it could be part of an employee induction programme and subsequent staff outreach sessions.

Obligation to report

31. We would like to take the opportunity to remind all Regulated Entities of their obligations under Article 67 of the Regulatory Law to disclose to the DFSA:
 - a. a breach, or likely breach of a provision of the Law or Rules or other legislation administered by the DFSA;
 - b. a failure, or likely failure, to comply with any obligation to which a person is subject under such legislation; or
 - c. any other matter as the DFSA may prescribe in the Rules,

which may be attributed to the conduct of the Regulated Entity or its directors, officers, employees or agents.

32. There are no proposed changes to this provision.

Please see draft Article 67(6), 67(7), 68A, 104(7), 104(8) and Schedule 1 of the Regulatory Law in Appendix 1, draft GEN 5.4 in Appendix 2, and draft RPP Section 6-5-8(m) in Appendix 6.

Issues for consideration

Q1: Do you agree with our proposals to enhance the protection provided to a whistleblower, including from suffering any detriment in their employment? If not, why not?

Q2: Do you agree with our proposals to place the burden on the whistleblower to show that the disclosure of information was based on a reasonable suspicion and made in good faith? Alternatively, do you believe that the burden of proof should be shifted to the person asserting that the protection should not apply? If so, why?

Q3: Do you agree with our proposals to update the Penalty Guidance in respect of the mitigating and aggravating factors to reflect the treatment of a whistleblower when determining a penalty?

Q4: Do you agree with our proposals for Regulated Entities to inform employees and officers about the protections we are proposing?

Section 2: Policies and procedures

Policies and procedures

33. Having whistleblowing policies and procedures in place shows an Entity's' commitment to listen the concerns of their employees. It also helps to send a positive message that the Entity has an open culture and wants it employees to speak up.
34. On this basis, the DFSA is proposing that all Regulated Entities put in place policies and procedures to facilitate the reporting of concerns by whistleblowers for the assessment and, where appropriate, the escalation of those concerns.
35. We are proposing to add Rules and Guidance to sections in the GEN, AML and AUD Modules to set out the types of policies and procedures we expect Entities to put in place. As a part of these proposals, we will remove the current requirements relating to whistleblowing in AMI 5.12.1, and replace them with the new measures set out in GEN 5.4. Any written policies and procedures should reflect the nature, scale and complexity of the Regulated Entity's business.
36. We expect the policies and procedures to cover:
- internal arrangements to allow for the disclosure of regulatory concerns;
 - procedures to deal with, assess and escalate whistleblower reports within the Entity and, where appropriate, to the DFSA or any other relevant authority;
 - reasonable measures to protect the identity and confidentiality of the whistleblower;

- d. reasonable measures to protect the whistleblower from suffering any detriment;
 - e. procedures to provide feedback to the Whistleblower, where appropriate; and
 - f. measures setting out how the Entity will manage any conflicts of interest and the fair treatment of any person accused of committing a breach by a whistleblower.
37. Entities should generally encourage the reporting of concerns within the Entity first, however, we understand that there may be circumstances in which it is appropriate, or a Whistleblower may prefer, to report the concern directly to the DFSA, or another relevant authority. Section 3 covers reports to the DFSA.
38. The policies and procedures should focus on encouraging the reporting to the DFSA of regulatory concerns, as opposed to employment disputes or HR matters, although the DFSA would still be interested in such issues to the extent they may raise issues about the culture within a Regulated Entity.
39. We are aware of concerns that some provisions in the UAE Criminal Laws are very broad, and could inadvertently cover certain actions by whistleblowers. However, we believe that these can be alleviated by the policies and procedures we are proposing, for example, by encouraging internal and confidential reporting first within an Entity.

Records

40. We are also proposing that Regulated Entities maintain appropriate records of whistleblower reports made, including details of the report and the outcome of the assessment of the report. If no reports have been made, we would expect an Entity to note that no reports have been made.
41. We expect records to be made available to the DFSA on request. This would allow us to review reports made and understand how they were dealt with. The production of records will also help to assist the DFSA in our review of whistleblowing policy as set out in Section 4.

Compliance with the requirements

42. We would expect Entities to consider the nature, scale and complexity of their operations when considering what policies and procedures to put in place. We would expect larger, more complex Entities to have more detailed policies and procedures in place.
43. We have not suggested a different approach for branches or subsidiaries. However, if either type of Entity has a reporting line outside the DIFC, to a parent company, they may also look to use that as a whistleblowing reporting line.
44. We would expect the policies and procedures put in place to be reviewed and kept up to date.

Please see draft GEN 5.4 in Appendix 2, draft AUD 4.11 in Appendix 3, draft AMI 5.12.1 in Appendix 4 and draft AML 15.3A in Appendix 5.

Issues for consideration

Q3: Do you agree with the proposal for Regulated Entities to put in place whistleblowing policies and procedures based on the nature, scale and complexity of their operations? If not, why not?

Section 3: Reporting of misconduct to the DFSA

DFSA email address

45. We are proposing to set up a specific whistleblowing email address at the DFSA so that any employee can report breaches in a DFSA Regulated Entity. A Report can be made directly to the DFSA regardless of whether an internal report has been made. We would also note that it is possible to use both an Entity's internal process and report to the DFSA simultaneously or consecutively.
46. The information provided to the DFSA would be treated confidentially, as required by the Regulatory Law and as set out in paragraph 27. Access to that information would be limited to a small number of DFSA staff.
47. There will be a dedicated DFSA webpage setting out information to assist the whistleblower, and Entities, in reporting misconduct to the DFSA.

Potential to reduce penalties or waive other sanctions

48. In some circumstances, employees actively involved in a breach are the only people with sufficient knowledge to be able to provide a useful whistleblower report.
49. The DFSA encourages employees who have been involved in breaches of DFSA-administered Laws and Regulations, or are aware of them, to come forward as Whistleblowers as this will significantly assist the DFSA to achieve its objectives. On this basis, we are proposing to consider their conduct in bringing a breach to the attention of the DFSA. We intend to reflect this in the mitigating factors set out in the Penalty Guidance in the RPP Sourcebook.

Please see draft RPP Section 6-6-8(a) in Appendix 6.

Issues for consideration

Q6: Do you agree with our proposal to establish a specific Whistleblowing email address?

Q7: Do you agree with our proposal to give credit to those providing a Whistleblowing report if they have been involved in the breach?

Section 4: Implementation & Review

Implementation

50. Due to the proposed Regulatory Law changes, and the need to get assent from His Highness the Ruler for these changes, the proposed measures will not take effect until early in 2022. We will inform Entities at the appropriate point in 2022 as to the date we expect the proposed changes to be implemented.

Review

51. We intend to carry out a review of the proposals presented in this Consultation Paper a year after the measures are put in place. This is to determine whether the requirements have been effective and implemented appropriately.

Annex 1: Questions in this Consultation Paper

- Q1: Do you agree with our proposals to enhance the protection provided to a whistleblower, including from suffering any detriment in their employment? If not, why not?**
- Q2: Do you agree with our proposals to place the burden on the whistleblower to show that the disclosure of information was based on a reasonable suspicion and made in good faith? Alternatively, do you believe that the burden of proof should be shifted to the person asserting that the protection should not apply? If so, why?**
- Q3: Do you agree with our proposals to update the Penalty Guidance in respect of the mitigating and aggravating factors to reflect the treatment of a whistleblower when determining a penalty?**
- Q4: Do you agree with our proposals for Regulated Entities to inform employees and officers about the protections we are proposing?**
- Q5: Do you agree with the proposal for Regulated Entities to put in place whistleblowing policies and procedures based on the nature, scale and complexity of their operations? If not, why not?**
- Q6: Do you agree with our proposal to establish a specific Whistleblowing email address?**
- Q7: Do you agree with our proposal to give credit to those providing a Whistleblowing report if they have been involved in the breach?**