

ALYIANT2YOU: Regulatory Brief

Whistleblower Protection in the DIFC

Introduction

On 28 February 2022, Regulatory Law Amendment Law DIFC Law No.1 of 2022 (“**Regulatory Law Amendment**”) was enacted to include a new Whistleblower Protection regime in Regulatory Law DIFC Law No.1 of 2004 (“**Regulatory Law**”). The Regulatory Law applies in the jurisdiction of the Dubai International Financial Centre (“**DIFC**”). The amendments to the Regulatory Law by the Regulatory Law Amendment **came into force on 7 April 2022**, along with amendments to several Rulebook Modules of the Dubai Financial Services Authority (“**DFSA**”), namely the General Module (“**GEN**”), the Anti-Money Laundering, Counter-Terrorist Financing and Sanctions Module (“**AML**”), the Authorised Markets Institutions Module (“**AMI**”) and the Auditor Module (“**AUD**”). In addition, an updated consolidated version of the Regulatory Policy and Process module of the DFSA Sourcebook has been issued by the DFSA and which also **came into effect on 7 April 2022** (“**RPP Sourcebook – April 2022 Edition**”). Unless otherwise defined in this paper, any defined terms identified by the capitalization of the initial letter of a word or a phrase, are defined in the applicable laws, rules and regulations.

The DFSAs Whistleblowing Regime

The new whistleblower protection regime applies to every “Regulated Entity” in the DIFC, which have been defined in the amended Regulatory Law as: (a) an “Authorised Person”; (b) a “Registered Auditor”; and (c) a “DNFBP” (Designated Non-Financial Business or Profession).

A new Article 68A is added to the Regulatory Law. Under Article 68A (1), a person who makes a disclosure of information specified under Article 68A (2) to a person specified in Article 68A (3) is entitled to the protection under Article 68A (4). The protection provided under Article 68A is broad as it appears to extend to a person who has or even has no formal connection with the Regulated Entity.

In terms of Article 68A(2) of the Regulatory Law, the disclosure of information made by a person must: (a) relate to a **reasonable suspicion** that a Regulated Entity, any officer or employee of a Regulated Entity or, an ‘Affiliate’ of an Authorised Person or an officer or employee of the Affiliate has or may have: (i) contravened a provision of the Regulatory Law, the Rules (made by the DFSA under the Regulatory Law (for example the Rulebook Modules of the DFSA)) or any other legislation administered by the DFSA; or (ii) engaged in money laundering, fraud or any other financial crime; and (b) be made in **good faith**.

Article 68A(3) of the Regulatory Law provides that for the purposes of Article 68A(1), the disclosure of information is made to one or more of the following: (a) the Regulated Entity; (b) an officer of the Regulated Entity; (c) in the case of an Authorised Person, to a person performing a “Licensed Function” for the Authorised Person; (d) an “Auditor”, or a member of the audit team, of the Regulated Entity; (e) the DFSA; (f) a criminal law enforcement agency in the United Arab Emirates; or (g) any other person prescribed by the Rules for the purposes of Article 68A.

The protection provided to a person under Article 68A(4) of the Regulatory Law are: (a) the person shall not be subject to any civil or contractual liability for making the disclosure; (b) no contractual, civil or other remedy or right shall be enforced against the person by another person for making the disclosure; and (c) the person shall not be dismissed from current employment, or otherwise subject to any action by the employer or any related third party of the employer which is reasonably likely to cause detriment to that person, for making the disclosure.

In context of Article 68A(4)(c), Article 68A(5) of the Regulatory Law provides that a DIFC Court may, on application of an aggrieved person, make any order for relief where the person has been subject to any loss of employment or other detriment or action.

Article 68A(6) of the Regulatory Law states that it is not necessary for a person who makes a disclosure of information to identify himself to qualify for protection under Article 68A. In terms of Article 68A(7) of the

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Regulatory Law, nothing in Article 68A limits any other protection under the Regulatory Law to a person providing information to the DFSA or to any other person referred to in Article 68A(3) of the Regulatory Law.

DFSA Rulebook Modules

Whistleblowing protection provisions in: the GEN Module (applicable to an Authorised Person), the AML Module (the whistleblowing provisions set out in the AML Module apply to DNFBPs) the AMI Module (applicable to an Authorised Market Institution) and the AUD Module (applicable to a Registered Auditor), make provision for the requirements of: (i) policies and procedures and (ii) record of whistleblowing reports. The provision in the AMI Module for Whistleblowing refers to an AMI's need to comply with the Whistleblowing requirements set out in the GEN Module.

In terms of **policies and procedures**, each type of Regulated Entity must have appropriate and effective policies and procedures in place: (a) to facilitate the reporting of regulatory concerns made by whistleblowers; and (b) to assess and, where appropriate, escalate regulatory concerns reported to it. The policies and procedures must be in writing and must periodically be reviewed to ensure they are appropriate, effective and up to date. By way of **record of whistleblowing reports**, each type of Regulated Entity must maintain a written record of each regulatory concern reported to it by a whistleblower, including appropriate details of the regulatory concern and the outcome of its assessment of the reported concern. The GEN, AML and AUD Modules provide Guidance by the DFSA as to the above requirements.

RPP Sourcebook – April 2022 Edition

RPP Sourcebook – April 2022 Edition includes provisions in the context of the new whistleblowing regime, covering: (a) for financial penalties imposed on a firm, the inclusion in the list of mitigating and aggravating factors for a contravention (see also above discussion on new Article 68A(2) of the Regulatory Law regarding 'contravention'), "the treatment, if any, of a whistleblower involved in disclosing a contravention"; and (b) for financial penalties imposed on an individual, the inclusion in the list of mitigating and aggravating factors for a contravention, "the conduct of the individual (whether as a whistleblower or not) in bringing (or failing to bring) quickly, effectively and completely the contravention to the DFSA's attention (or the attention of other regulatory authorities, where relevant)".

DFSA's SEO Letter

On 23 March 2022, the DFSA issued a letter to the Senior Executive Officers of Regulated Entities titled "Whistleblowing Regime", in which the DFSA amongst other matters, set out that Regulated Entities will be given **6 months from 7 April 2022** to develop their policies and procedures and **from 7 October 2022**, all Regulated Entities should expect to discuss and demonstrate the application of their policies and procedures when engaging with the DFSA. However, the enhanced legal protections in the Regulatory Law (see above), which prohibit Regulated Entities from subjecting whistleblowers to detriment will commence on **7 April 2022**. In terms of the SEO Letter, the DFSA intends to carry out a review of the whistleblowing regime and its implementation in mid-2023 to determine whether the requirements have been effective and implemented appropriately.

On 7 April 2022, the DFSA on its website announced the launch of the DFSA's regulatory regime for Whistleblowing, which also contains an in-depth explanation of the regime.

DIFC Operating Law

Whilst the Whistleblower Protection provisions of the Regulatory Law apply in the context of a DIFC "Regulated Entity" (as defined in the Regulatory Law for the purposes of new Article 68A), DIFC Operating Law DIFC Law No. 7 of 2018 ("**Operating Law**") also provides for "**Whistleblower Protection**" in the context of a DIFC "Registered Person" (defined in the Operating Law by listing the various types of legal entities, bodies and structures which are incorporated, registered and continued in the DIFC). The Operating Law applies within the jurisdiction of the DIFC and to any person who operates, conducts or attempts to operate or conduct business in or from the DIFC. In particular, it provides that to the extent that the Operating Law (or the Operating Regulations (of 12 November 2018)) apply to any person to whom any provision of the DFSA administered legislation (for

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example the Regulatory Law, the DFSA Rulebook, the DFSA Sourcebook) also applies, the Operating Law and the (Operating Regulations) do not exempt such person from any requirement applicable to that person under the DFSA administered legislation.

The Whistleblower Protection in the Operating Law is broader in application, in as much as it applies in the context of a 'Registered Person' (see above discussion) regardless of whether or not the Registered Person conducts financial services or non-financial services. The Whistleblower Protection in the Regulatory Law is only applicable to a 'Regulated Entity' (as defined for the purposes of new Article 68A in the Regulatory Law).

Provision for 'Whistleblower Protection' are contained in Article 64 of the Operating Law. Article 64(1) of the Operating Law provides that a person who makes a disclosure of information specified in Article 64(2) to the DIFC Registrar of Companies, a Registered Person's auditor or a member of the audit team, a director or other officer of a Registered Person, is entitled to the protection set out in Article 64(3)(c).

Article 64(2) of the Operating Law provides that for the purposes of Article 64(1), the disclosure of fact made by the person shall: (a) include the identity of that person; (b) relate to a reasonable suspicion that the Registered Person has or may have contravened a provision of the Operating Law, the Operating Regulations or any other legislation administered by the DIFC Registrar of Companies; (c) be made in good faith; and (d) the Registrar shall not disclose the identity of such person unless required to do so for a regulatory purpose or by a DIFC Court.

In the terms of Article 64(3) of the Operating Law, where a person makes disclosure under Article 64(2): (a) such person shall not be subject to any legal or contractual liability for making that disclosure; (b) no contractual, civil or other remedy or right shall be enforced against such person by another person for making that disclosure, or any consequence resulting from such disclosure; and (c) such person shall not be dismissed from his current employment, or otherwise subject to any action by the employer or any related party of the employer which is reasonably likely to cause detriment to that person.

Conclusion

The new Whistleblower Protection provisions introduced into the Regulatory Law and the stated DFSA Rulebook Modules, along with the existing Whistleblower Protection provisions in the Operating Law, play an important role in enhancing the eco-system of checks and balances over businesses operating in the DIFC by strengthening the processes and protections for disclosure of information by stakeholders. Moreover, with a focus of regulators and other stakeholders across the globe being on sustainable finance and the integration of Environmental Social Governance (ESG) considerations into business, 'whistleblowing' is a matter which falls within the consideration of the "S" and "G" factors, impacting amongst others, on employees as well as governance of businesses. Strengthening of the Whistleblower Protection regulatory framework in the DIFC is indicative of the continuous drive forward in the implementation of a robust framework for sustainable finance and ESG integration in the DIFC.

Entities to which the new Article 68A of the Regulatory Law and DFSA Rulebook Modules discussed above apply, need to take steps to comply with the provisions of same. Please contact us at info@alyiantconsultancy.com for any assistance in complying with the requirements of the new Whistleblower Protection regime.

Alyiant Consultancy Limited
Date: 07 April 2022.

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