

# WHISTLEBLOWER LAWS IN THE FINANCIAL MARKETS: LESSONS FOR EMERGING MARKETS

Christian Chamorro-Courtland & Marc Cohen \*

## TABLE OF CONTENTS

I. INTRODUCTION .....	188
A. What is a Whistleblower? .....	191
B. The Disadvantages of Blowing the Whistle .....	191
II. THE CURRENT LAW IN THE UAE .....	193
A. Financial Crime in the UAE .....	194
B. Stock Exchange Fraud in the UAE .....	196
III. THE DUBAI INTERNATIONAL FINANCIAL CENTER .....	197
A. AML/CTF Legislation .....	198
B. Reporting AML/CTF Offences .....	199
C. The Dubai Economic Security Center .....	201
IV. INTERNAL WHISTLEBLOWER POLICIES .....	203
A. A UAE Perspective .....	206
V. EXTERNAL WHISTLEBLOWER LEGISLATION .....	206
A. What are the Requirements for Becoming a Whistleblower? .....	207
B. Legitimacy of the Whistleblower .....	209
C. Protection from Retaliation .....	209
D. Confidentiality Agreements .....	210
E. Financial Rewards .....	211
1. The Size of the Reward .....	212
2. Time for Reporting .....	214
3. Should Criminals Receive Rewards? .....	215
F. Immunity and Reduction in Penalties .....	216
G. Anonymous Reporting .....	218
H. Penalties for False Claims .....	219

---

\* Dr. Christian Chamorro-Courtland (LLB, LLM, PhD) and Marc Cohen (JD, Active Member of the Florida Bar) are Assistant Professors in Business Law & Ethics at Zayed University (College of Business), United Arab Emirates. The authors would like to thank Khalid Saleh Al-Shamma of the Emirates Securities & Commodities Authority and Nick Alves of the Dubai Financial Services Authority for time to interview with them. This paper was inspired by a presentation at the Emirates Securities & Commodities Authority on November 24th 2015 for *UAE Innovation Week 2015*. The authors would also like to thank Zayed University for their generous contribution by providing the Research Incentive Fund grant. Any errors are those of the authors alone.

VI. INTERNAL VERSUS EXTERNAL REPORTING .....220

VII. DO WHISTLEBLOWER POLICIES AND LAWS DETER WRONGDOING? .....222

VIII. CONCLUDING REMARKS AND RECOMMENDATIONS.....224

**ABSTRACT**

This article argues that policy-makers in emerging markets with financial centers should adopt whistleblower policies and legislation in order to reduce economic crimes and protect investors. The authors chose the United Arab Emirates (UAE) as a case study because it is an emerging market with important regional financial centers, and it has a unique legal system that uses civil law, common law, and sharia law. Although the focus is on implementing a comprehensive set of whistleblower laws and policies in the UAE securities and commodities markets, the best practices that are outlined in this article are transnational in nature, meaning that the model we provide for blowing the whistle internally and externally can easily be adopted in other jurisdictions. The principles outlined in this article are particularly useful for policy-makers in emerging markets that are considering adopting whistleblower legislation. First, this article analyzes the current legal framework for protecting whistleblowers in the UAE under federal law and in Dubai under the new Dubai Economic Security Center Law. Second, it recommends that the UAE federal government adopt whistleblower legislation in order to reduce wrongdoing in their financial markets. Third, it analyzes whistleblower legislation in other jurisdictions in order to provide a comparative analysis and determine what the best practices are for protecting whistleblowers in the major financial markets of the world. In particular, this article analyzes and critiques the whistleblower legislation in the United States in order to provide a set of best practices for the UAE to adopt for their financial markets (in particular, the securities and commodities markets).

**I. INTRODUCTION**

“I went from making \$300,000 a year—plus stock options, plus, plus, plus—to making \$30,000 . . . Yes, there is a price I’ve paid. Anybody who got near me paid a price.” - Jeffrey S. Wigand<sup>1</sup>

Many countries around the world have begun to introduce legislation to protect whistleblowers. In particular, many jurisdictions have focused on passing

---

<sup>1</sup> Rick Lyman, *A Tobacco Whistle-Blower’s Life is Transformed*, N.Y. TIMES (Oct. 15, 1999), <http://www.nytimes.com/1999/10/15/us/a-tobacco-whistle-blower-s-life-is-transformed.html>.

whistleblower laws for their financial markets in order to reduce wrongdoing and increase investor confidence in these markets. The protections and incentives that whistleblowers receive under local laws, however, vary significantly from one jurisdiction to another. This article argues that policy-makers in emerging markets with financial centers should adopt whistleblower policies and legislation that reduce economic crimes and protect investors. In order to narrow the discussion, the authors chose the United Arab Emirates (UAE) as a case study because it is an emerging market with two important financial centers; furthermore, the UAE has a unique legal system that uses civil law, common law and sharia law.<sup>2</sup> The whistleblower laws and policies that we describe in this article are transnational in nature, meaning that policy-makers, regulators, and businesses should be able to adopt them in any legal system and country around the world.

This article analyzes the current legal situation in the UAE and recommends that the federal government adopt whistleblower legislation to reduce wrongdoing in their financial markets (in particular, the securities and commodities markets). First, this article considers the limited protection that whistleblowers receive under the current federal law in the UAE. Second, it analyzes the level of protection that whistleblowers receive in Dubai under the new Dubai Economic Security Center Law.<sup>3</sup> The new law, which creates a new regulator (the Dubai Economic Security Center, or DESC), will provide some protection to whistleblowers in Dubai. In particular, the protection will extend to whistleblowers that report wrongdoing that occurs in any financial market located in Dubai, which includes the Dubai Mercantile Exchange, NASDAQ Dubai stock markets, and businesses registered in the Dubai International Financial Center (DIFC) free zone. The authors argue, however, that the DESC has some shortcomings and will not provide adequate protection to whistleblowers in Dubai.

Third, as the DIFC and the new Abu Dhabi Global Market (ADGM) aim to become the leading financial centers in the region, having a comprehensive set of whistleblowing laws will provide them with a competitive advantage over other emerging markets with financial centers. In order to achieve this goal, the authors argue that the UAE government should adopt federal legislation to protect whistleblowers in the UAE. This article outlines a set of best practices for policy-makers in the UAE to adopt for their securities and commodities markets. It takes into consideration cultural sensitivities in the UAE that might impede the effective implementation of such laws. The authors argue that a comprehensive set of whistleblower laws should reduce violations of securities and commodities laws and increase confidence in the markets that are regulated by the Emirates

---

<sup>2</sup> The UAE is predominantly a civil law country that restrictively uses sharia law (e.g. Muslims can use sharia law for certain family law matters). Furthermore, a common law system has been adopted for doing business in the Dubai International Financial Center and the Abu Dhabi Global Market.

<sup>3</sup> Dubai Law No. 4 of 2016 (U.A.E.).

Securities & Commodities Authority (ESCA), which include the Dubai Gold & Commodities Exchange (DGCX), Abu Dhabi Securities Exchange (ADX), and the Dubai Financial Markets (DFM). We also argue that the ESCA is in the best position to regulate violations in the securities and commodities markets. Therefore, this article provides an original contribution to the legal literature, as there has never been an analysis of the UAE's laws in the context of introducing whistleblower policies and laws.

Fourth, this article also argues that local organizations and their stakeholders will benefit if they provide a clear and comprehensive set of 'internal' whistleblower policies for their employees, as this should encourage internal reporting of wrongdoing.

Fifth, this article analyzes whistleblower legislation in other jurisdictions to provide a comparative analysis and determine what the best practices are for protecting whistleblowers in the major financial markets of the world. In particular, this article analyzes and critiques the whistleblower legislation in the United States introduced for the securities and commodities markets under the Dodd-Frank Act<sup>4</sup> (DFA), as this is the most comprehensive legislation for protecting whistleblowers in the world to date. We suggest improvements and highlight areas of legal uncertainty in order to create a clearer set of laws that increases legal certainty for whistleblowers as well as for businesses. Although the focus of this article is on implementing a comprehensive set of whistleblower laws and policies in the UAE securities and commodities markets, the best practices outlined by the authors are transnational in nature, meaning that a similar model could also be adopted in financial markets in other jurisdictions.<sup>5</sup> The principles outlined in this article are particularly useful for policy-makers in emerging markets that are considering adopting whistleblower legislation.

This article follows the following structure: first, it defines "whistleblower" and discusses the disadvantages of blowing the whistle in jurisdictions where there are no protective laws or policies. Second, it analyzes the level of financial crime and stock exchange fraud in the UAE under the current legal regime. Third, it analyzes the whistleblower protection regime under the new Dubai Economic Security Center Law. Fourth, it describes the current legal regime in the DIFC and argues that the current laws for combating money laundering and terrorism financing could also provide guidance for adopting a more comprehensive set of whistleblower laws at the federal level. Fifth, it considers the content of effective internal whistleblower policies and external whistleblower laws, and it considers where the whistleblower should report first. Sixth, it considers whether whistleblower laws are effective in deterring wrongdoing. Finally, it recommends that policymakers in the UAE create federal

---

<sup>4</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act, 7 U.S.C. § 26, 15 U.S.C. § 78u-6 (2012) [hereinafter DFA].

<sup>5</sup> For example, in Singapore, Hong Kong, or Qatar.

legislation for the protection of whistleblowers in securities and commodities markets.

### **A. What is a Whistleblower?**

A whistleblower, informant, or insider is a person that reports wrongdoing, either internally<sup>6</sup> or externally,<sup>7</sup> when a business engages in illegal and unethical<sup>8</sup> activities that harm stakeholders,<sup>9</sup> other businesses, the government, or the environment.

First, a whistleblower may be a person that has information about wrongdoing committed by the employees or management at a business. In these cases, a person blows the whistle out of a personal belief that the wrongdoing is unethical, or they are incentivized by the prospect of receiving a financial reward.

Second, a whistleblower might also be personally engaged in the wrongdoing with other colleagues or with the prior knowledge or direction of management. In these cases, a person may blow the whistle for various reasons: (i) they may have been unfairly pressured to engage in the wrongdoing; (ii) they personally believe the wrongdoing is unethical; (iii) they fear the repercussions of being caught by law enforcement agencies; or (iv) they seek to obtain a personal benefit such as a reward or a reduction in penalties for violating the law (e.g. a reduced prison sentence or fine).

### **B. The Disadvantages of Blowing the Whistle**

There are several disadvantages for whistleblowers in companies without a whistleblower policy and in countries without whistleblower laws. For example, whistleblowers may have their employment contract terminated, especially in cases where senior management is involved in the wrongdoing. Similarly, they may not be able to find another job in the same industry if they are placed “on a blacklist of unemployable potential re-offenders.”<sup>10</sup> Employees and managers of the whistleblown company may also retaliate against whistleblowers and their

<sup>6</sup> For example, to the employer or the compliance department of the corporation.

<sup>7</sup> For example, to the relevant government enforcement agency, e.g. regulators, auditors, ombudsmen, the police, or the media.

<sup>8</sup> Unethical activities are included in the definition because the law may not have made a particular activity illegal at the time of reporting.

<sup>9</sup> A stakeholder is anyone that has an interest or is affected by a business; for example, employees, directors, customers and shareholders are internal stakeholders. Whereas creditors, suppliers, other businesses, the government and the community are external stakeholders.

<sup>10</sup> Kim R. Sawyer et al., *The Necessary Illegitimacy of the Whistleblower*, 29 BUS. & PROF. ETHICS J. 85, 86 (2010).

family members in the form of physical, psychological, or verbal harassment, including threats, demotions and denied promotions, reduction in salary and denied raises, public humiliation, and attacks on their credibility.<sup>11</sup>

Several studies and cases have demonstrated the retaliation experienced by whistleblowers. A study conducted by Grace and Cohen<sup>12</sup> in 1990 on 233 whistleblowers in the United States found that 90% had lost their jobs or were demoted, 27% faced lawsuits, and 26% had psychiatric or medical referrals after blowing the whistle.<sup>13</sup> Furthermore, a survey conducted by Rothschild and Miethe of 761 whistleblowers in the United States found that 69% lost their job or were forced to retire, 64% received negative performance evaluations, 68% had their work closely monitored by supervisors, 69% were criticized or avoided by their colleagues, and 64% were blacklisted from getting another job in the same industry.<sup>14</sup>

Jeffrey Wigand is a perfect example of retaliation against a whistleblower where there were no whistleblower protection laws. Dr. Wigand was a senior executive at Brown & Williamson (B&W), which was the third largest tobacco company in the United States in 1993.<sup>15</sup> Wigand was fired from B&W for confronting his bosses about misleading consumers regarding dangerous additives in cigarettes. Wigand subsequently informed the media that B&W and other tobacco companies were lying to the public about these dangerous additives. In response to him blowing the whistle, Wigand received death threats, B&W ran a smear-campaign in the media in order to discredit him, and a court upheld the confidentiality agreement that he signed as part of his B&W employment contract, as a result imposing a restraining order prohibiting him from disclosing any confidential information to parties outside the company. Despite this, the valuable inside information that Wigand provided to the media ultimately allowed the US Department of Justice to reach a \$246 billion settlement with the major tobacco companies.<sup>16</sup>

Therefore, these types of retaliation were common occurrences in the United States before the existence of whistleblower protection legislation. The purpose of whistleblower laws<sup>17</sup> and policies is to eliminate—or at least

<sup>11</sup> “The organization concerned does not recognise [the whistleblower] . . . as a stakeholder and typically tries to discredit them so that they do not have the credibility to influence other stakeholders who may be able to exert the necessary influence.” *Id.* at 88.

<sup>12</sup> DAMIAN GRACE & STEPHEN COHEN, *BUSINESS ETHICS: AUSTRALIAN PROBLEMS* (2nd ed. 1998).

<sup>13</sup> *Id.* at 149.

<sup>14</sup> Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption*, 26 *WORK & OCCUPATIONS* 107, 109, 120 (1999).

<sup>15</sup> Lyman, *supra* note 1.

<sup>16</sup> *See id.*

<sup>17</sup> The whistleblower laws considered in this article only apply to people who blow the whistle on a corporation, and not to people who blow the whistle on the government, i.e. Edward Snowden.

minimize—these risks and provide the necessary incentives for someone with knowledge of corporate wrongdoing to report the information internally or externally. These incentives may include providing protection against retaliation, providing financial rewards and a reduction in penalties for the whistleblower.

## II. THE CURRENT LAW IN THE UAE

Although there is an obligation to report criminal activity to the “concerned authorities” under Article 274 of the UAE Penal Code,<sup>18</sup> instances of whistleblowing are rare in the UAE because there are currently no federal laws that explicitly protect whistleblowers. Whistleblowers may receive limited protection under the UAE Labor Law, which states that:

Termination by the employer of an employee’s service is considered *arbitrary* if the cause for such termination has nothing to do with the work. In particular, *termination* is considered arbitrary if the employee’s service has been terminated on grounds, or a *reasonable complaint* lodged by him to the competent authorities, or on grounds of a justifiable action brought by him against the employer<sup>19</sup>

If the employee has been *arbitrarily dismissed*, the competent court has the jurisdiction to give judgement against the employer for payment of *compensation* to the employee.

The court shall determine the amount, taking into consideration the nature of work sustained by the employee, period of service and after investigation of dismissal circumstances. Provided that in all cases the amount of *compensation* should not exceed the employee’s pay for a period of *three months*, to be worked out on the basis of last pay due to him<sup>20</sup>

Therefore, the “termination” of an employee that files a “reasonable complaint” is considered an “arbitrary dismissal,” which entitles the employee to a maximum of three months’ worth of salary as compensation. The application of this law, however, is legally uncertain. It is unclear what exactly is meant by a “reasonable complaint” and to which “competent authority” this complaint should be made. This law does not provide a sufficient incentive for a whistleblower to

<sup>18</sup> Federal Law No. 3 of 1987, art. 274 (U.A.E) (outlining Issuance of the Penal Code).

<sup>19</sup> Federal Law No. 8 of 1980, art. 122, (U.A.E.) (emphasis added).

<sup>20</sup> *Id.* art. 123(a) (emphasis added), *amended by* Federal Law No. 12 of 1986 (U.A.E.).

report internally or externally. It does not protect the employee against retaliation, and the financial reward is not sufficient to blow the whistle, as the whistleblower will likely remain unemployed for more than three months after the wrongdoing is reported. Furthermore, this law has never been tested in the UAE courts, so its application is uncertain.<sup>21</sup>

The law may also discourage an employee that has knowledge of wrongdoing occurring inside the corporation from reporting to the authorities. Article 374 of the UAE Penal Code states that an employee “who is entrusted with a secret by virtue of their profession, trade, position” is liable to “punishment by detention for a period of not less than one year and by a fine of not less than twenty thousand dirhams” for disclosing such a secret.<sup>22</sup> Therefore, it is uncertain whether a whistleblower can be held personally liable to the business under this provision for disclosing confidential information to the authorities.

Moreover, Article 905(5) of the UAE Civil Code states that “the employee must keep the industrial or trade secrets of the employer, including after the termination of the contract, as required by the agreement or by custom.”<sup>23</sup> Therefore, a person may be reluctant to blow the whistle, as the business may be able to file a civil suit against the whistleblower for damages. Overall, UAE federal law does not provide the prospective whistleblower with the necessary incentives and protections to report wrongdoing to the proper authorities.

#### **A. Financial Crime in the UAE**

This article argues that “[w]histleblowing has an important role to play in society as a means of reducing corruption and fraud and preventing mistakes leading to disasters.”<sup>24</sup> Whistleblower laws have the potential to reduce financial crimes<sup>25</sup> in the UAE, which would provide the UAE with a competitive advantage over other emerging financial centers in the region, such as Qatar, Singapore, and Hong Kong.<sup>26</sup> There is data suggesting that financial crime is prevalent in UAE businesses and in the financial markets.

---

<sup>21</sup> DLA PIPER, *WHISTLEBLOWING: AN EMPLOYERS GUIDE TO GLOBAL COMPLIANCE* 7 (2nd ed. 2015) [hereinafter *DLA PIPER STUDY*].

<sup>22</sup> Federal Law No. 3 of 1987, art. 379 (quoting an unofficial translation from Arabic).

<sup>23</sup> Federal Law No. 5 of 1985, art. 905(5) (U.A.E.) (discussing Civil Transactions Law of the U.A.E.).

<sup>24</sup> *DLA PIPER STUDY*, *supra* note 21.

<sup>25</sup> “Financial crimes” (which are also known as “economic crimes”) encompass a broad range of crimes including, but not limited to, securities and commodities laws violations (market manipulation, insider trading, unauthorized use of customer assets), money laundering, terrorist financing, asset misappropriation, cybercrime, fraud, bribery, and corruption.

<sup>26</sup> “There is currently no statutory legislation offering protection for whistleblowers in Hong Kong.” *DLA PIPER STUDY*, *supra* note 21, at 23. There are no such laws in Qatar



PricewaterhouseCoopers (PWC) wrote a report based on a survey conducted on “*Economic Crime in the UAE*.”<sup>27</sup> They noted that the most common economic crimes experienced by businesses in the UAE are asset misappropriation, cybercrime, fraud, bribery, and corruption.<sup>28</sup> The impact of these crimes can be severe, and “47% of survey respondents believe[d] that the greatest collateral damage from economic crime [was] on employee morale, whilst damage to business relationships and reputation [were] also of concern.”<sup>29</sup>

Furthermore, the financial losses experienced by over half of the companies as a result of these economic crimes were not negligible. Fifty-six percent of the respondents reported that their organization had lost between 100,000 and 5 million USD as a result of an economic crime. The losses were severe for 3% of the respondents, which reported that the organization lost more than 100 million USD.<sup>30</sup>

The PWC Report notes that internal staff at the senior management level perpetrated 75% of the frauds experienced by the respondents.<sup>31</sup> This figure may explain why only 27% of respondents reported an economic crime within their organization, which is “well below the global average of 37%.”<sup>32</sup> This justifies the need for external whistleblowing laws, as an internal whistleblowing policy may not provide a whistleblower with adequate protection if someone at the senior management level is committing the fraud.

When asked what factor respondents felt had contributed the most to economic crime committed by internal staff, 92% of our UAE respondents blamed “opportunity” to commit economic crime. This profile of internal fraudster with an opportunity to commit fraud presents an interesting challenge to UAE respondents. The influence of corporate controls should be most effective in restricting internal frauds, and yet this appears not to be happening in practice.<sup>33</sup>

---

or Singapore either. “Laws to protect whistle-blowers, anti-corruption watchdogs and non-governmental anti-corruption agencies are non-existent [in Qatar].” BERTELSMANN STIFTUNG, BTI 2016 – QATAR CORRUPTION REPORT 27 (2016), [http://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI\\_2016\\_Qatar.pdf](http://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI_2016_Qatar.pdf). “Currently in Singapore, there is no specific legislation in place to tackle whistle blowing.” Ghui, *The Need for Whistleblowers to Be Protected by Law and Authorities*, ONLINE CITIZEN (July 15, 2016), <http://www.theonlinecitizen.com/2016/07/15/the-need-for-whistle-blowers-to-be-protected-by-law-and-authorities/>.

<sup>27</sup> PRICEWATERHOUSECOOPERS, *ECONOMIC CRIME IN THE UAE* (2014) [hereinafter PWC REPORT].

<sup>28</sup> *Id.* at 1.

<sup>29</sup> *Id.* at 3.

<sup>30</sup> *Id.* at 1.

<sup>31</sup> *Id.* at 3.

<sup>32</sup> PWC REPORT, *supra* note 27, at 1.

<sup>33</sup> *Id.* at 3.

The authors argue that clear whistleblower policies and laws should reduce “opportunity” for employees to commit economic crimes. If people have better incentives to blow the whistle, fraudsters will be wearier of perpetrating a crime. The PWC Report notes that 54% of crimes are reported to law enforcement agencies by the corporation in order to discipline the perpetrators of the economic crimes.<sup>34</sup> However, we were unable to find information on how economic crimes are directly reported by a whistleblower to law enforcement agencies. In addition to imposing harsh penalties under the UAE Penal Code, the UAE federal government should create a comprehensive set of whistleblowing laws in order to increase the number of crimes that are directly reported to law enforcement agencies, which will reduce the number of economic crimes committed in the UAE.

### **B. Stock Exchange Fraud in the UAE**

The UAE government has also been concerned about the increasing instances of fraud, insider trading,<sup>35</sup> and market manipulation<sup>36</sup> at two of the UAE’s major stock exchanges—the DFM<sup>37</sup> and the ADX.<sup>38</sup> We believe that this illegal activity is damaging investor confidence in the UAE financial markets,<sup>39</sup>

---

<sup>34</sup> *Id.* at 4.

<sup>35</sup> “Insider trading is the buying or selling of a security by someone who has access to material, nonpublic information about the security.” *Insider Trading*, INVESTOPEDIA, <http://www.investopedia.com/terms/i/insidertrading.asp> (last visited Apr. 15, 2017).

<sup>36</sup> “Manipulation is the act of artificially inflating or deflating the price of a security. In most cases, manipulation is illegal. It is much easier to manipulate the share price of smaller companies, such as penny stocks, because they are not as closely watched by analysts as the medium and large-sized firms.” *Manipulation*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/manipulation.asp> (last visited Apr. 15, 2017).

<sup>37</sup> “The Dubai stock index has swung wildly last year, soaring as much as 60 per cent and then giving up all those gains at one stage. Leveraged buying of stocks through margin trading at brokerages has sometimes fuelled [sic] speculative buying, FNC members told the Government.” *New Law Expected to Have Harsher Penalties for Stock Exchange Fraud, Manipulation*, GULF NEWS (Jan. 7, 2015), <http://gulfnnews.com/business/sectors/markets/new-law-expected-to-have-harsher-penalties-for-stock-exchange-fraud-manipulation-1.1437848> [hereinafter GULF NEWS, *New Law*].

<sup>38</sup> “The Abu Dhabi Securities Exchange last month banned four traders from the market, but neither named them nor gave any reason for the ban.” *Id.*

<sup>39</sup> “Members of the FNC complained illegal margin buying and insider trading by certain brokers who possess information that is not available to other investors and use such knowledge to gain unfair advantage over the rest of the market have greatly damaged the investor confidence in the market.” *Id.*

and the current regulatory safeguards are insufficient to detect and deter these illegal activities.<sup>40</sup>

In response to this problem, the Federal National Council (FNC)<sup>41</sup> and the ESCA have proposed a new law that “will introduce tougher penalties of three years in jail and up to Dh10 million for those involved in fraud on and manipulation of the stock markets.”<sup>42</sup> We argue that aside from harsher punishments for criminals, an effective whistleblower regime could act as an effective deterrent and minimize fraud in the financial markets. Such a regime would also help regulators in discovering financial fraud.

### III. THE DUBAI INTERNATIONAL FINANCIAL CENTER

The DIFC<sup>43</sup> is a financial center with a common law jurisdiction, its own legislation, its own court system, and its own financial regulator—the Dubai Financial Services Authority (DFSA).<sup>44</sup> The DIFC aims to become the leading financial center in the region. Its success stems from being established in a “free zone,” which exempts registered businesses from the UAE’s commercial, corporate, and civil laws.<sup>45</sup> There are limitations, however, as the businesses established in the DIFC are not exempted from federal criminal laws,<sup>46</sup> such as the federal legislation dealing with Anti-Money Laundering and Combating Terrorist Financing (AML/CTF), which the DIFC’s members have to follow. Furthermore, businesses operating in the DIFC will soon need to adhere to the new rules

---

<sup>40</sup> “Ahmad Al Shamsi, a member from Ajman, demanded strict action be taken against market manipulators, saying that checking malpractices in the stock market has been ineffective.” *Id.*

<sup>41</sup> The FNC is the UAE’s advisory body in the legislative branch. *What is the Federal National Council?*, GULF NEWS (May 3, 2009, 11:35 PM), <http://gulfnnews.com/news/uae/government/what-is-the-federal-national-council-1.266221>.

<sup>42</sup> GULF NEWS, *New Law*, *supra* note 37.

<sup>43</sup> The DIFC is recognized as a financial free zone under: Federal Law No. 8 of 2004, arts. 1, 10 (U.A.E.); Federal Decree No. 35 of 2004 (U.A.E.); and Dubai Law No. 9 of 2004 (U.A.E.).

<sup>44</sup> The DFSA regulates “Authorized Firms,” which include banks, insurance companies, investment banks, asset managers, and fund administrators, providing financial services in the DIFC. Dubai Law No. 9 of 2004 (U.A.E.).

<sup>45</sup> “These Zones and Financial Activities shall also be subject to all Federal laws with the exception of Federal civil and commercial laws.” Federal Law No. 8 of 2004, art. 3(2).

<sup>46</sup> “The Financial Free Zones and all the operations conducted therein shall be subject to the provisions of Federal Law No. 4 of 2002 regarding *the Criminalisation of Money Laundering*.” Federal No. 8 of 2004, art. 3(1) (U.A.E.) (emphasis added); WOUTER H. MULLER ET AL., *ANTI-MONEY LAUNDERING: INTERNATIONAL LAW AND PRACTICE* 655 (2007).

introduced under Law No. 4 of 2016 on the Dubai Economic Security Center, which is discussed below.

The DIFC is a bijural system; this means that the DIFC's common law system, which is used for dealing with commercial law matters, needs to be compatible with the federal civil law system, which is used for dealing with criminal law matters.<sup>47</sup> The bijural nature of this system has introduced additional legal uncertainty for prospective whistleblowers that want to report wrongdoing to the DFSA. The following section analyzes how the federal AML/CTF legislation has affected prospective whistleblowers that want to report wrongdoing to the DFSA under the current legal regime.

#### **A. AML/CTF Legislation**

The UAE has passed legislation regarding the Criminalization of Money Laundering<sup>48</sup> and Combating Terrorism Offences,<sup>49</sup> which criminalizes AML/CTF and introduces harsh punishments including fines, confiscation of proceeds, and harsh prison sentences.<sup>50</sup> These laws must be followed by businesses operating in the DIFC in order to ensure full compliance with the federal law.<sup>51</sup> In 2012, the DFSA became the single regulator, supervisor, and enforcer of AML/CTF rules in the DIFC. The DFSA Rulebook notes that:

The AML Module of the DFSA Rulebook cannot be read in isolation from relevant UAE legislation. The UAE criminal law applies in the DIFC and, therefore, persons in the DIFC must be aware of their obligations in respect of criminal law as well as these Rules contained in the AML Module of the DFSA

---

<sup>47</sup> “Bijuralism can be approached from several angles. The simple co-existence of two legal traditions, the interaction between two traditions, the formal integration of two traditions within a given context . . . or, on a more general level, the recognition of and respect for the cultures and identities of two legal traditions.” France Allard, *The Supreme Court of Canada and Its Impact on the Expression of Bijuralism*, DEP'T JUST. CAN., <http://justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b3-f3/bf3a.html#introduction> (last updated Apr. 1, 2016).

<sup>48</sup> UAE Federal Law No. 4 of 2002 arts. 1, 70 (U.A.E.) (outlining the criminalization of money laundering).

<sup>49</sup> UAE Federal Law No. 1 of 2004, arts. 1, 45 (U.A.E.) (outlining the combating of terrorism offences).

<sup>50</sup> The regulator can impose penalties on wrongdoers, which includes prison for a maximum of 7 years, and fines of up to AED 300,000. Federal Law No. 4 of 2002, art. 13. The Central Bank may impose personal liability for directors or employees who “know” about money laundering and fail to act or report it. This includes prison and a fine of up to AED 100,000. *Id.* art. 15.

<sup>51</sup> Regulators must provide mechanisms for regulated firms to report suspicious cases of AML. *Id.* art. 11.

Rulebook. Relevant UAE criminal laws include Federal Law No. 4 of 2002 regarding the *Criminalization of Money Laundering*, Federal Law No. 1 of 2004 regarding *Combating Terrorism Offences* and the Penal Code of the United Arab Emirates. The Rules in the AML Module of the DFSA Rulebook should not be relied upon to interpret or determine the application of the criminal laws of the UAE.<sup>52</sup>

The DFSA, however, only has the authority to impose civil penalties<sup>53</sup> on organizations that violate the AML/CTF legislation. The DFSA currently has to report any information that it receives on criminal matters to the UAE Ministry of Justice and the relevant federal authority. In the future, the DFSA will have to report to the DESC. For instance, the UAE Central Bank has been tasked with the federal authority of regulating against money laundering in the UAE, and it is responsible for imposing criminal penalties under the AML/CTF legislation and the UAE Penal Code. Therefore, the powers of the DFSA are limited, and it must cooperate with the Central Bank and the other federal law enforcement authorities to impose criminal penalties and punish any offenders committing AML/CTF crimes in the DIFC.

## **B. Reporting AML/CTF Offences**

The Central Bank and the DFSA require financial institutions to have extensive customer due diligence policies as part of their AML/CTF programs.<sup>54</sup> The DFSA Rulebook requires businesses that are registered in the DIFC to nominate a Money Laundering Reporting Officer (MLRO). In cases where a

---

<sup>52</sup> DUBAI FINANCIAL SERVICES AUTHORITY, THE DFSA HANDBOOK: ANTI-MONEY LAUNDERING, COUNTER-TERRORIST FINANCING AND SANCTIONS MODULE 4, 5, [http://dfsa.complinet.com/net\\_file\\_store/new\\_rulebooks/d/f/DFSA\\_CP89\\_App1.pdf](http://dfsa.complinet.com/net_file_store/new_rulebooks/d/f/DFSA_CP89_App1.pdf) (last visited Jan. 30, 2017) [hereinafter DFSA RULEBOOK] (emphasis added). Any criminal investigation and resulting penalties would be performed by UAE authorities. DUBAI FINANCIAL SERVICES AUTHORITY, ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM: THE DFSA APPROACH 1, <https://www.dfsa.ae/Documents/Leaflets%202010/AML%20and%20CFT%20-%20The%20DFSA%20Approach%20English.pdf> (last visited Apr. 9, 2017) [hereinafter DFSA APPROACH].

<sup>53</sup> This is consistent with the power of other financial regulators around the world, such as the US Securities and Exchange Commission, which can only impose civil penalties. Criminal penalties must be imposed by the US Department of Justice. Linda Chatman Thomsen, INTERNATIONAL INSTITUTE FOR SECURITIES MARKET DEVELOPMENT 2005 PROGRAM 1 (2005), [https://www.sec.gov/about/offices/oia/oia\\_enforce/overviewenfor.pdf](https://www.sec.gov/about/offices/oia/oia_enforce/overviewenfor.pdf)

<sup>54</sup> *Anti Money Laundering (AML) in the United Arab Emirates (UAE)*, BANKER'S ACAD., <http://bankersacademy.com/resources/free-tutorials/57-ba-free-tutorials/608-aml-uae-sp-875> (last visited Jan. 25, 2017).

person or an employee knows or suspects, or has reasonable grounds for knowing or suspecting that a person is engaged in or attempting money laundering or terrorist financing, they must report the matter internally to the MLRO,<sup>55</sup> which will investigate and submit an external Suspicious Activity Report to the DFSA. Therefore, there is a limited whistleblower procedure already in place at the DIFC for reporting AML/CTF offences.

For example, NASDAQ Dubai's<sup>56</sup> policy specifies that the MLRO acts

as the point of contact to receive internal suspicious transaction reports, taking the appropriate action and making the relevant notifications pursuant to anti money laundering legislation applicable in the DIFC (including applicable UAE legislation) and under the [Recognized Member] AML Regime. Such notifications shall include notifying NASDAQ Dubai and DFSA of all suspicious transactions relating to dealings on or connected with transactions on NASDAQ Dubai.<sup>57</sup>

The DFSA has exercised its authority in imposing civil penalties on companies that have violated the DIFC's AML/CTF legislation on multiple occasions.<sup>58</sup> For example, the DFSA fined ABN-Amro \$640,000 for AML deficiencies<sup>59</sup> and imposed a significant fine of \$8.4 million on the DIFC branch of Deutsche Bank AG for serious contraventions, which included providing false information to the DFSA and failing to follow the AML procedures in its Private Wealth Management business.<sup>60</sup>

---

<sup>55</sup> See DFSA RULEBOOK, *supra* note 52, at 47.

<sup>56</sup> NASDAQ Dubai is incorporated in the DIFC.

<sup>57</sup> NASDAQ Dubai, *Anti-Money Laundering Notice Rule 2.19*, Notice No. 01/07 (Feb. 11, 2007), [http://www.nasdaqdubai.com/assets/docs/regulation/1%20-%20AML%20Notice%20\(11.02.07\)%20-%202001.07.pdf](http://www.nasdaqdubai.com/assets/docs/regulation/1%20-%20AML%20Notice%20(11.02.07)%20-%202001.07.pdf).

<sup>58</sup> A less severe fine was imposed by the DFSA on United Investment Bank Limited (UIB) of \$56,000 for failing to conduct due diligence on its clients and have effective systems and controls to prevent opportunities for money laundering. *UIB Fined for Flouting DFSA's Anti-Money Laundering Rules*, EMIRATES 24/7 (May 20, 2015), <http://www.emirates247.com/business/economy-finance/uiib-fined-for-flouting-dfsa-s-anti-money-laundering-rules-2015-05-20-1.591354>.

<sup>59</sup> Matthew Amlot, *DFSA Fines ABN AMRO for Anti-Money Laundering Deficiencies*, CPI FINANCIAL (Nov. 4, 2015), <http://www.cpifinancial.net/news/post/33469/dfsa-fines-abn-amro-for-anti-money-laundering-deficiencies>.

<sup>60</sup> The DFSA acknowledged "that it was a small number of individuals in the firm who provided false information to the DFSA but believes that, with better governance within the Bank, this would have been identified and addressed earlier." It is suggested that whistleblowing laws may have even encouraged an insider to report the violations to the DFSA earlier. *DFSA Fines Deutsche Bank AG for Serious Breaches*, DFSA (Apr. 15, 2015) <https://www.dfsa.ae/News/News-Detail/DFSA-Fines-Deutsche-Bank-AG-for-Serious-Breaches>.

Furthermore, the DFSA is required to submit a report to the UAE Central Bank's Anti-Money Laundering and Suspicious Cases Unit or to the Attorney General of Dubai if the reported activity is criminal in nature.<sup>61</sup> At the time of writing this article, however, there is no public record of criminal penalties being imposed on any business in the DIFC for violating the AML/CTF rules.<sup>62</sup>

### **C. The Dubai Economic Security Center**

Dubai has passed a law to create a new regulator to combat economic crimes in the Emirate of Dubai.<sup>63</sup> The Dubai Economic Security Center, which has not yet been established at the time of writing, will have the power, *inter alia*, to “combat corruption and crimes of fraud, bribery, embezzlement, destruction of public property, forgery, counterfeiting, money laundering and financing of terrorism or illegal organizations, or other crimes that may be committed at entities subject to DESC’s jurisdiction.”<sup>64</sup> In order to achieve this goal, the DESC can monitor, investigate, and sanction any organizations that are committing an economic crime.

The new law applies to all private and public organizations established in Dubai, including inside any free zones. Therefore, the DESC has jurisdiction in the DIFC. Furthermore, the DESC has broad powers to create new regulations and secure the cooperation of other governmental bodies, such as the Dubai Attorney General and the DFSA. However, it does not appear that the DESC can force the ESCA to cooperate in an investigation because the ESCA is a federal regulator.

The DESC Law is the first time that a law in the UAE provides some specific protections to whistleblowers. First, Article 19(a) of the DESC Law states that:

The DESC shall provide the necessary protection for a whistleblower, and this protection shall include: (1) providing the necessary protection at its place of residence; (2) non-disclosure of information related to its identity and whereabouts; (3) providing protection at its workplace and making sure that

<sup>61</sup> DFSA RULEBOOK, *supra* note 52, at 16–22, 42–44; DFSA APPROACH, *supra* note 52, at 1.

<sup>62</sup> Interview with Nick Alves, Legal Counsel, DFSA (Jan. 27, 2016) (on file with the author).

<sup>63</sup> Dubai Law No. 4 of 2016 (U.A.E.). *See also* Adam Vause, Zara Merali & Lara Bander, *Dubai Introduces New Economic Security Centre Regulator*, DLA PIPER (May 29, 2016), <https://www.dlapiper.com/en/abudhabi/insights/publications/2016/05/dubai-introduces-new-economic-security-centre/>.

<sup>64</sup> Dubai Law No. 4 of 2016, art. 7(1) (U.A.E.). All the quotes from this new legislation are from an unofficial translation from Arabic.

the whistleblower is not subject to any discrimination or mistreatment.<sup>65</sup>

The new law protects whistleblowers from retaliation by the employer and guarantees to keep the identity of the whistleblower confidential. Second, Article 19(b) mentions that a whistleblower's disclosure of confidential information about a wrongdoing to the DESC shall not constitute a violation of the employee's confidentiality agreement.<sup>66</sup> Third, Article 19 (c) states that: "no legal or disciplinary action may be taken against the whistleblower unless they made a false reporting."<sup>67</sup>

Therefore, although the new law provides some important protection for whistleblowers, there is still some legal uncertainty. It remains unclear whether a whistleblower will be protected under the law if they report the wrongdoing to an agency other than the DESC. For instance, it is unclear whether whistleblowers would receive protection if they only reported the wrongdoing internally to the employer, or if they reported externally to the police, the DFSA, or the ESCA instead of the DESC. The DESC Law must clarify to whom a whistleblower can report in order to receive protection. Otherwise, the new legislation may not reduce criminal infractions, as whistleblowers will be unwilling to report criminal activities if they are uncertain of the protection that they will receive under the law.

The DESC Law does not go far enough to incentivize somebody with knowledge of wrongdoing to blow the whistle because it does not offer a reward or a reduction in penalties for a whistleblower that was also complicit in the wrongdoing. Although the DESC Law stresses that an employer may not terminate the employment contract of an employee who blows the whistle, having mere job security may not be enough incentive for someone to inform the government of wrongdoing. Furthermore, although the DESC Law protects the identity of the whistleblower, a reward may be a necessary incentive for a whistleblower to report wrongdoing in situations where the employer and the other employees know the whistleblower's identity. Many businesses will be reluctant to hire someone who has blown the whistle on their previous employer, as whistleblowers may be viewed as untrustworthy troublemakers.<sup>68</sup> Therefore, a reward would ensure that a whistleblower could survive if or until they found another job.

The DESC Law only extends to organizations that are doing business in Dubai. Whistleblowers at an office outside of Dubai whose company has offices in multiple Emirates might not receive whistleblowing protection under the law,

---

<sup>65</sup> *Id.* art. 19(a).

<sup>66</sup> Dubai Law No. 4 of 2016 (U.A.E.).

<sup>67</sup> *Id.*

<sup>68</sup> "In countries such as Germany and France, a stigma remains attached to anonymous informing and a mistrust of anyone who could be considered to be an informant." DLA PIPER STUDY, *supra* note 21, at 37.



as they may still be subject to the laws of the Emirate in which they work or in which the company conducts business. This can also be a major disadvantage of the new law. The UAE must introduce federal whistleblower legislation in the financial markets in order to encourage whistleblowers to report to the relevant federal regulators—thereby reducing economic crimes throughout the country—and to simplify the reporting process.

#### IV. INTERNAL WHISTLEBLOWER POLICIES

Internal whistleblower policies—which often form a part of an organization's code of ethics—should be drafted with the necessary incentives for someone that has knowledge of minor infractions to report the information internally. A comprehensive internal whistleblowing policy is in the best interest of the business, as this should provide the managers with the opportunity to address any problems internally and resolve any minor issues at an early stage before these problems have the chance of developing into a major corporate governance failure. Businesses that do not have an internal whistleblowing policy may find that the wrongdoing continues to go unreported and undetected, which means that the potential penalties will be more severe.

Furthermore, the authors argue that regulators should require medium and large businesses<sup>69</sup> to adopt internal whistleblowing policies. It may be in the best interest of regulators for whistleblowers to report any minor infractions of the law internally, as regulators generally have limited resources and manpower to follow up on all the information that is provided by whistleblowers. Regulators generally restrict themselves to only investigating cases involving egregious violations of the law, which are the cases where larger recoveries can be made and larger fines can be imposed on the wrongdoers.

These policies need to be clear and provide a transparent compliance procedure that would incentivize employees to report the wrongdoing internally. The policy should provide detailed information on where an employee can report the wrongdoing, including the name, phone, email, and location of a contact inside the business for internal reporting, as well as a contact outside the business for external reporting. The policy must also make clear that whistleblowers will be protected from retaliation, including the loss of their job. This should provide the

---

<sup>69</sup> Small businesses generally have too few employees where one would need to report on the actions of others without being personally involved in the wrongdoing. Although the definition of a medium and large sized business can vary from one country to another, for purposes of this paper, the definition shall only revolve around the number of employees within the business itself. As an example, “[i]n the European Union, a small-sized enterprise is a company with fewer than 50 employees, while a medium-sized enterprise is one with fewer than 250 employees.” *Small and Midsize Enterprises—SME*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/smallandmidsizeenterprises.asp?o=40186&l=dir&qsrc=999&qo=investopediaSiteSearch> (last visited Jan. 26, 2017).

necessary incentive for an employee to first blow the whistle internally before blowing the whistle externally. Furthermore, it is argued that internal policies should not offer rewards to whistleblowers, as this may appear that the business is paying the employee in exchange for their silence of not reporting externally.

In order to encourage reporting, larger businesses should have independent compliance departments where the wrongdoing can be reported. Theoretically, this should reduce the fear that an employee may have of reporting the wrongdoing in situations where their superiors are committing the wrongdoing or are forcing the employee to act unethically or break the law. A business can enhance transparency by externally outsourcing its compliance department. For example, the DFSA found that 2 out of 11 firms that were selected to participate in on-site inspections had outsourced compliance officers.<sup>70</sup>

The use of external compliance departments, however, is controversial, and it may create certain problems. The Securities and Exchange Commission (SEC) in the United States highlighted the various vulnerabilities associated with outsourcing the compliance function: (i) outsourced Chief Compliance Officers (CCO) were unable to identify the risks faced by the firm they were working for, and some were unsure if the investment firms that they worked for had written policies in place to mitigate risks; (ii) some of the CCOs were not able to create policies that were tailored to address risks faced by a specific investment firm as they lacked the specific knowledge required; (iii) some CCOs were not able to identify the same risks as the managers of the investment firms; and (iv) some CCOs failed to ensure that firms were complying with the firm's policies and failed to regularly visit their firms' offices.<sup>71</sup> Therefore, external CCOs may not be able to properly detect wrongdoing in a firm or properly address any wrongdoing that is reported by a whistleblower.

---

<sup>70</sup> DUBAI FINANCIAL SERVICE AUTHORITY, *Corporate Governance Thematic Review of Authorized Firms in the Dubai International Financial Center (DIFC)* (2014), <https://www.dfsa.ae/Documents/Corporate%20Governance%20Thematic%20Review%202013/Corporate%20Governance%20Report%20English%20Final%20Aug%202011%202014.pdf> [hereinafter DFSA, THEMATIC REVIEW] (discussing data that was collected by the DFSA in a survey it conducted on 220 firms about their corporate governance policies, processes, procedures, systems, and controls, and overall compliance with DFSA regulations). The outsourcing of compliance officers is also a common practice in other countries. For instance, the Charles Schwab Corp. reported that 38 percent of investment firms in the US outsource some part of their compliance function. Charles Schwab & Corp., *Independent Advisors' Revenue and Assets Rebound for Record Year, Says 2011 Charles Schwab RIA Benchmarking Study*, REUTERS (July 5, 2011), <http://www.reuters.com/article/idUS118848+05-Jul-2011+BW20110705>.

<sup>71</sup> See generally Kristen Bartlett et al., *Investment Firms and Compliance Professionals Beware: SEC Finds Risks Associated with Outsourcing Compliance Function*, MONDAQ (Nov. 24, 2015), <http://www.mondaq.com/unitedstates/x/446106/Securities/Investment+Firms+and+Compliance+Professionals+Beware+SEC+Finds+Risks+Associated+with+Outsourcing+Compliance+Function>.

For businesses that have internal compliance departments, there will be cases where the business does not act to resolve the wrongdoing that was reported by the employee. This may occur at businesses where the majority of the employees and the senior management are involved in the wrongdoing.<sup>72</sup> In these cases, it is possible that the business will retaliate against the whistleblower when the wrongdoing is presented to the business.

To encourage internal reporting, an employer could also provide a “whistleblowing hotline,”<sup>73</sup> a phone number or email address used to report anonymously to the employer. These hotlines are problematic in some countries, however, as they may contravene privacy and data protection laws.<sup>74</sup> An employer may not be allowed to bring an action against a wrongdoer if the evidence was obtained through an anonymous source.<sup>75</sup> Although some organizations in the UAE already provide a hotline for their employees to report wrongdoing, it is unclear whether these hotlines are compatible with the UAE’s strict privacy laws.<sup>76</sup> It is also unclear whether an organization will be able to bring an action against an employee using information that was obtained from an anonymous whistleblower.<sup>77</sup> Therefore, the law may need to be amended in the UAE to maximize the effectiveness of hotlines.

---

<sup>72</sup> This occurred in the case of Jeffrey Wigand. See Barnaby J. Feder, *Details of Tobacco Executive’s Assertions are Disclosed*, N.Y. TIMES (Jan. 27, 1996), <http://www.nytimes.com/1996/01/27/us/details-of-tobacco-executive-s-assertions-are-disclosed.html?ref=collection%2Ftimestopic%2FWigand%2C%20Jeffrey>.

<sup>73</sup> DLA PIPER STUDY, *supra* note 21, at 42–44.

<sup>74</sup> “[F]ollowing a series of court cases in France and Sweden, the legality of whistleblowing hotlines has increasingly been called into question largely on the basis that they contravene European data protection regulations.” *Id.* at 42.

<sup>75</sup> This is the case in Australia and South Africa, where evidence obtained through an anonymous call cannot be used by prosecutors. “Many other countries limit what can be reported beyond local management or local law enforcement agencies, are suspicious of hotlines and anonymity as leading to malicious and unfounded accusations, require ‘proportionality’ balancing the scope of the investigation against the seriousness of the violation and limit collection and transmittance of personally identifiable information used in the investigation.” *Id.* at 37, 43.

<sup>76</sup> Although the UAE does not have any specific “data protection” legislation, the following laws protect personal data: Federal Law No. 3 of 1987 (discussing the Penal Code); Federal Law No. 5 of 2012, arts. 4, 21 (U.A.E.) (discussing the combating of cybercrimes); Federal Law No. 3 of 2003, arts. 37, 72–74 (U.A.E.) (establishing the Telecom Law). See generally Ken Dearsley et al., *DLA Piper’s Data Protection Laws of the World*, EDRM (Mar. 2012), <http://www.edrm.net/resources/data-privacy-protection/data-protection-laws/united-arab-emirates>.

<sup>77</sup> “[A]nonymous reporting poses significant problems for employers in investigating those reports and taking appropriate action.” DLA PIPER STUDY, *supra* note 21, at 42.

### **A. A UAE Perspective**

The DFSA conducted a survey on authorized firms in the DIFC and found that 74% of them had a whistleblowing policy.<sup>78</sup> However, the report does not provide further details on the content of these policies and whether they require internal or external reporting of the wrongdoing.<sup>79</sup> Therefore, we extended our research to analyze the whistleblowing policies of seven large businesses<sup>80</sup> in the UAE, which revealed the following: (1) all of the policies identified either an individual or a committee that specifically handled whistleblower claims within the organization; (2) six of the policies allowed an employee to report the wrongdoing anonymously; (3) all of the policies included a provision that the organization is committed to protecting a whistleblower from retaliation by other employees; (4) all of the policies included a provision that would subject an employee that makes false claims to disciplinary action; and (5) all of the policies required the whistleblower to maintain confidentiality by only reporting the wrongdoing internally. Furthermore, two of the policies went so far as to highlight that only the business was allowed to determine whether to report the wrongdoing externally to the relevant regulatory authorities.

It appears that although whistleblowers will receive some protection from retaliation for reporting internally, none of the policies provide whistleblowers with the option of reporting externally. As mentioned earlier in this article, there are times where internal reporting is not an option if all of the senior management are aware of the wrongdoing and have no intention of stopping it. To stop this behavior, it is necessary to have a clear set of whistleblower laws that provide the employee with the necessary incentives to blow the whistle externally.

## **V. EXTERNAL WHISTLEBLOWER LEGISLATION**

The following section will discuss the advantages of having whistleblower laws. It will look at specific whistleblower cases and legislation and make recommendations that should be adopted as federal legislation in the UAE or any other emerging market.

---

<sup>78</sup> DFSA, THEMATIC REVIEW, *supra* note 70, at 19.

<sup>79</sup> *Id.*

<sup>80</sup> The whistleblower policies are from the following UAE organizations: DU, ENOC, NBAD, Al Etihad Credit Bureau, Fujairah Gold Company, MGT Group, and Emirates Steel Company. The whistleblowing policies are on file with the authors and can be found on the websites of these companies.

### **A. What are the Requirements for Becoming a Whistleblower?**

To provide legal certainty, whistleblowing laws should provide a clear definition of who qualifies as a whistleblower. The law should include information on which regulator a whistleblower must report to and the reporting requirements that are necessary for a whistleblower to receive protection under the law. Any ambiguity in the law may discourage people with knowledge of wrongdoing from reporting it. Furthermore, legislation that is ambiguous could result in litigation, which can be costly to a whistleblower and ultimately result in little or no protection.

For example, there is currently legal uncertainty in the United States over the requirements for qualifying as a whistleblower. The DFA introduced a new whistleblower program for reporting violations in the securities markets to the SEC and violations in the commodities markets to the Commodities Futures Trading Commission (CFTC).<sup>81</sup> The DFA defines a whistleblower as a person or group of people “who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the [SEC].”<sup>82</sup> Although the DFA has had success under its whistleblower provisions,<sup>83</sup> we have observed that there are still several concerns in its current form. These concerns have been highlighted within some recent court cases where employees have been fired from their jobs for blowing the whistle internally rather than to the SEC.<sup>84</sup> At this point, the US Courts of Appeals are divided on how to interpret the DFA as it relates to who qualifies as a “whistleblower.”

In the case of *Asadi v. G.E. Energy (USA), L.L.C.*,<sup>85</sup> the 5th Circuit Court of Appeals held that an employee who does not report directly to the SEC is not a whistleblower under the DFA. Asadi, who was an employee of the defendant, was fired one year after disclosing internally the alleged wrongdoing. He then proceeded to sue the company for wrongful termination under the DFA. The 5th District Court of Appeals heard this case in order to determine whether Asadi qualified as a whistleblower under the DFA. The court decided that he was not entitled to any relief under the DFA because he did not fall under the definition of a whistleblower, as he never reported this wrongdoing to the SEC. The court felt that since the definition in the DFA was clear, as a whistleblower is

---

<sup>81</sup> DFA, 15 U.S.C. § 78u-6(b)–6(h). Since the whistleblower programs for the SEC and the CFTC are nearly identical, this article will focus on the SEC’s whistleblower program in order to avoid repetition.

<sup>82</sup> *Id.* § 78u-6(a)(6) (emphasis added).

<sup>83</sup> “Since August 2011, the [SEC] has received a total of 18,334 whistleblower tips”. U.S. SEC. & EXCH. COMM’N, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 23 (2015), <https://www.sec.gov/whistleblower/report-spubs/annual-reports/owb-annual-report-2015.pdf> [hereinafter SEC REPORT TO CONGRESS].

<sup>84</sup> *Asadi v. G.E. Energy (U.S.A.), L.L.C.*, 720 F.3d 620 (5th Cir. 2013); *Berman v. Neo@Ogilvy L.L.C.*, 801 F.3d 145 (2d Cir. 2015).

<sup>85</sup> *See Asadi*, 720 F.3d 620.

defined as someone who has reported directly to the SEC, Asadi was not deemed to be a whistleblower or entitled to receive any protection under the DFA, since he only reported the wrongdoing internally.

In the case of *Berman v. Neo@Ogilvy L.L.C.*, the 2nd Circuit Court of Appeals heard a similar issue to Asadi regarding the definition of a whistleblower under the DFA.<sup>86</sup> In this case, the plaintiff was fired from his position six months before reporting any information to the SEC.<sup>87</sup> “In operational terms, the issue is whether an employee who suffers retaliation because he reports wrongdoing internally, but not to the SEC, can obtain the retaliation remedies provided by *Dodd-Frank*.”<sup>88</sup> The 2nd Circuit reached their final decision by relying on an Interpretive Rule<sup>89</sup> that was issued by the SEC which argued that employees who only report wrongdoing internally should still be classified as whistleblowers under the definition of the DFA.<sup>90</sup> Consequently, this decision created a circuit split on whether one qualifies as a whistleblower under the DFA if they have only reported the wrongdoing internally.<sup>91</sup>

These two cases demonstrate that it is critical for legislation to be well written in order to avoid legal uncertainty and litigation. As an issue of fairness and to encourage employees to also report improper behavior to their employer, the authors argue that employees who only report internally should still be defined as “whistleblowers” and be entitled to the same protections as individuals who report externally. These protections would be limited, however, to protection from retaliation. A whistleblower that only reports internally should not be entitled to a reward. As discussed earlier, this is because employers should not pay employees for their information and potential silence. Furthermore, since no external agency has knowledge of the information, they also have no ability to pay a reward. To avoid any problems, the authors recommend that in egregious cases, the whistleblower should first report the information externally to the regulator and then immediately report internally to the organization. This places the whistleblower in a good position as they will receive protection against retaliation and could be entitled to receive a reward.

---

<sup>86</sup> See *Neo@Ogilvy*, 801 F.3d 145.

<sup>87</sup> *Id.* at 149.

<sup>88</sup> *Id.* at 147.

<sup>89</sup> Interpretation of the SEC’s Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 75592, 2015 WL 4624264 (Aug. 7, 2015).

<sup>90</sup> “In issuing the final whistleblower rules, the Commission included a rule to clarify that the employment retaliation protections provided by the [DFA] . . . apply not only to individuals who report wrongdoing to the SEC but also to employees who, among other things, report potential securities law violations internally to their employers . . . In addition, in August 2015, the Commission issued interpretive guidance clarifying that the *Dodd-Frank* anti-retaliation provisions apply to individuals who report information of possible securities law violations irrespective of whether they report such information internally or to the Commission.” SEC REPORT TO CONGRESS, *supra* note 83, at 2.

<sup>91</sup> *Neo@Ogilvy*, 801 F.3d 145.

## **B. Legitimacy of the Whistleblower**

In order to have a proper functioning whistleblower protection regime, it is imperative for the regulator to demonstrate publicly that it acknowledges the “legitimacy”<sup>92</sup> of whistleblowers. Otherwise, there is a risk that someone will not blow the whistle externally if the regulator is unresponsive to information revealed internally. For instance, a regulator may be unwilling to act in situations where the whistleblower reveals a major violation of the law that should have been easily detected by the regulator during a routine inspection of the business.

This kind of information is likely to tarnish the reputation of a regulator, and it may raise questions in the eyes of the public about whether the regulator is capable of fulfilling their duty to regulate effectively. In support of this view, Sawyer, Johnson, and Holub have noted that “[w]hen a whistleblower appears, it often suggests that the monitor is not monitoring, at least not with maximum efficiency. Whistleblowers then assume the role of the independent regulator and become competitors of the regulator.”<sup>93</sup>

The regulator can acknowledge the legitimacy of the whistleblower by demonstrating that they are open to receiving tips from whistleblowers, that they are willing to provide financial incentives for original information, and that they are protecting the whistleblower by taking action against employers that retaliate against the employee whistleblower. This legitimacy provides legal certainty and the necessary incentives for the whistleblower to report externally to the regulator. It also provides the regulator with the ability to receive information that they otherwise might never have come in contact with resulting from businesses’ rights to procedural due process or been able to access without the help of the employee whistleblower before the potential for destruction occurred.<sup>94</sup>

## **C. Protection from Retaliation**

Whistleblower laws should provide a whistleblower with adequate protection from retaliation by their employer or other employees of the business. This should include protection from discrimination, physical or psychological abuse, intimidation, the threat of a demotion, a reduction in pay, and other financial reprisals, e.g. loss of perks or bonuses. The law should specify that an employer cannot terminate an employee’s employment contract because the employee blew the whistle.

---

<sup>92</sup> See Sawyer et al., *supra* note 10, at 92.

<sup>93</sup> *Id.*

<sup>94</sup> Procedural due process refers to a person or entity that is entitled to “a course of formal proceedings (as legal proceedings) carried out regularly and in accordance with established rules and principles.” *Due Process*, MERRIAM-WEBSTER DICTIONARY (2017).

For example, in the context of a whistleblower that reports a securities law<sup>95</sup> violation to the SEC in the US, the DFA provides that “[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower.”<sup>96</sup> In cases of retaliation, the whistleblower is entitled to receive relief in the form of

- (i) reinstatement with the same seniority status that the individual would have had, but for the discrimination; (ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and, (iii) compensation for litigation costs, expert witness fees, and reasonable attorney’s fees.<sup>97</sup>

The law should also specify that corporate directors could be held personally liable for retaliating against a whistleblower that reports either internally or externally. For example, in the US case of *Wadler v. Bio-Rad Labs, Inc.*,<sup>98</sup> the CEO and the Board of Directors of Bio-Rad Labs were held personally liable for terminating an employee’s employment contract shortly after he internally reported that the company was violating the Foreign Corrupt Practices Act.<sup>99</sup> The United State District Court of Northern California held that corporate directors might be held personally liable for retaliating against a whistleblower under both the Sarbanes-Oxley Act<sup>100</sup> and the DFA.<sup>101</sup> Furthermore, we argue that financial penalties should be imposed on directors that fail to provide a whistleblower with adequate protection from retaliation committed by other employees.

#### **D. Confidentiality Agreements**

As confidentiality agreements are common in employment contracts, whistleblower legislation must state that a confidentiality agreement in the

<sup>95</sup> Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2012).

<sup>96</sup> DFA, 15 U.S.C. § 78u-6(h)(1)(A). There are mirroring provisions for whistleblowers that report a violation of the *Commodity Exchange Act*, 7 U.S.C. §§ 1–27, to the Commodity Futures Trading Commission, 7 U.S.C. § 26, under the DFA.

<sup>97</sup> DFA, 15 U.S.C. § 78u-6(h)(1)(C).

<sup>98</sup> *Wadler v. Bio-Rad Labs., Inc.*, 141 F. Supp. 3d 1005 (N.D. Cal. 2015).

<sup>99</sup> *Id.* at 1008–10, 1016–19, 1022–24.

<sup>100</sup> *Id.* at 1016–19.

<sup>101</sup> *Id.* at 1022–24. See also Timothy J. Long et al., *So You Want to Accept That Board Position? One More Reason to Pause: Directors Can Be Personally Liable Under Sarbanes-Oxley and Dodd-Frank*, MONDAQ (Nov. 25, 2015), <http://www.mondaq.com/unitedstates/x/446428/Whistleblowing/So+You+Want+To+Accept+That+Board+Position+One+More+Reason+To+Pause+Directors+Can+Be+Personally+Liable+Under+SarbanesOxley+And+DoddFrank>.



whistleblower's employment contract cannot prevent the employee from reporting to the regulator any sensitive information that they learned during their employment at the business. Otherwise, employers could always prevent their employees (e.g. through a court ordered injunction) from reporting wrongdoing by inserting a broad confidentiality agreement in the employment contract.

The DFA<sup>102</sup> and the SEC Regulations do not permit an employer to enforce a confidentiality agreement in cases where the employee is divulging confidential information to the regulator with the purpose of blowing the whistle. The SEC Regulations provide that

No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.<sup>103</sup>

The SEC recently brought administrative proceedings against KBR, Inc. for using restrictive language in their confidentiality agreements that could be interpreted as discouraging employees from blowing the whistle to the SEC.<sup>104</sup> Consequently, KBR, Inc. agreed to amend its policy and pay a settlement of \$130,000 for violating the SEC Regulations.<sup>105</sup>

### **E. Financial Rewards**

While whistleblower laws can protect whistleblowers from retaliation from the organization, these laws are unable to protect the whistleblower from being blacklisted by the industry. Even if the whistleblower's job is protected under the law, a whistleblower may no longer feel welcome at the organization that they blew the whistle on and may have to seek employment elsewhere. For example, Dr. Wigand was blacklisted by the tobacco industry and was essentially forced to find employment in a different industry. He went from making over \$300,000 per year to making only \$30,000 as a teacher.<sup>106</sup> In some cases, the whistleblower's information may lead to the organization having to declare

---

<sup>102</sup> "The rights and remedies provided for in this section may not be waived by any agreement, policy form, or *condition of employment* including by a predispute arbitration agreement." DFA, 7 U.S.C. § 26(n)(1) (emphasis added).

<sup>103</sup> 17 C.F.R. § 240.21F-17(a) (2012).

<sup>104</sup> In The Matter of KBR, Inc., Exchange Act Release No. 74619, 2015 WL 1456619 (Apr. 1, 2015).

<sup>105</sup> See William R. McLucas et al., *Four Things Companies Should Know About the SEC's 2015 Whistleblower Report*, MONDAQ (Nov. 24, 2015), [http://www.mondaq.com/article.asp?articleid=446160&email\\_access=on](http://www.mondaq.com/article.asp?articleid=446160&email_access=on).

<sup>106</sup> See Lyman, *supra* note 1.

bankruptcy if they have to pay huge fines, and its reputation may be destroyed, resulting in the whistleblower having to find new employment as well.

Furthermore, it has been observed that “[w]histleblowers who disclose externally experience stronger retaliation than whistleblowers who disclose internally.”<sup>107</sup> Rothschild and Miethe have noted that reprisals were 10-15% higher against external whistleblowers than for internal whistleblowers. Therefore, protection from retaliation may not be sufficient for some employees to blow the whistle externally, and the law may need to provide an additional incentive in order to encourage external reporting. Arguably, a financial reward may encourage more people to blow the whistle to the regulator.

### 1. The Size of the Reward

The DFA provides that the SEC “shall pay an award” to a whistleblower “who voluntarily provided *original information* to the [SEC] that led to the successful enforcement of the covered judicial or administrative action.”<sup>108</sup> The term “original information” means information that

(A) is derived from the independent knowledge or analysis of a whistleblower; (B) is not known to the [SEC] from any other source, unless the whistleblower is the original source of the information; and (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.<sup>109</sup>

In cases where the SEC recovers monetary sanctions<sup>110</sup> exceeding 1 million USD<sup>111</sup> from the wrongdoers, the whistleblower is entitled to receive between 10% and 30% of the sum recovered.<sup>112</sup> The reward is paid out of the SEC Investor Protection Fund,<sup>113</sup> which was created under the DFA to protect investors that experience losses from the actions of businesses that have violated

<sup>107</sup> Sawyer et al., *supra* note 10, at 90.

<sup>108</sup> DFA, 15 U.S.C. § 78u-6(b)(1) (emphasis added).

<sup>109</sup> *Id.* § 78u-6(a)(3).

<sup>110</sup> “Monetary sanctions” means “any monies, including penalties, disgorgement, and interest, ordered to be paid.” *Id.* § 78u-6(a)(4)(A).

<sup>111</sup> *Id.* § 78u-6(a)(1). For example, the SEC may recover \$300,000 from disgorgements and \$700,000 from a fine imposed on the wrongdoing organization. Therefore, the whistleblower would be entitled to an award of between 10% and 30% of the \$1,000,000 recovered by the SEC.

<sup>112</sup> *Id.* § 78u-6(b)(1)(A)–(B).

<sup>113</sup> DFA, 15 U.S.C. § 78u-6(a)(2), (b)(2).

securities laws. The Fund contained just over 400 million USD by the end of 2015.<sup>114</sup> In 2014, the SEC paid a whistleblower a 30 million USD reward for original information that led to a successful enforcement action against the wrongdoers.<sup>115</sup>

In comparison with the percentages and amounts that the SEC can award a whistleblower, the proposed Ontario Securities Commission (OSC) “Whistleblower Program” in Canada restricts the maximum award that a whistleblower can receive.<sup>116</sup> A whistleblower can receive between 5% and 15% of the total sanctions imposed by the OSC on the wrongdoer in amounts exceeding 1,000,000 CAD.<sup>117</sup> However, if the total imposed sanction is equal to or greater than 10 million CAD, with no recovery by the OSC, then the maximum award that a whistleblower can collect is 1.5 million CAD.<sup>118</sup> If the OSC recovers money that is equal to or greater than 10 million CAD, then the amount awarded to the whistleblower increases to a maximum of 5 million CAD.<sup>119</sup> In no case can a whistleblower in Canada ever be rewarded more than CA 5 million CAD no matter how large the recovery by the Canadian government.<sup>120</sup>

Arguably, whistleblower legislation in the UAE may require the regulator to reward a whistleblower an incentive greater than 30% because of the high political risk that a whistleblower may experience. The UAE government has a significant ownership stake in many publicly listed companies (i.e. state-owned enterprises) operating in the UAE and there may be a high number of politically exposed persons that also own private businesses. Therefore, potential whistleblowers may be reluctant to come forward if the financial rewards are similar to the United States and Canada compared with the risk they will be undertaking by exposing a business. On the other hand, the UAE should include a minimum sum (i.e., 3 million AED) that the regulator must recover before it is required to pay a whistleblower a reward.

When making a determination about the percentage of the monetary sanctions that will be rewarded to the whistleblower within the range provided by the law, the SEC will exercise its “discretion”<sup>121</sup> based on the following:

---

<sup>114</sup> SEC REPORT TO CONGRESS, *supra* note 83, at 27 tbl.

<sup>115</sup> Press Release, U.S. Sec. & Exch. Comm’n, SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014), <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290>.

<sup>116</sup> ONTARIO SEC. COMM’N, OSC POLICY 15-601, WHISTLEBLOWER PROGRAM 11 (2016), [http://www.osc.gov.on.ca/documents/en/Securities-Category1/20160714\\_15-601\\_policy-whistleblower-program.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category1/20160714_15-601_policy-whistleblower-program.pdf) [hereinafter OSC POLICY 15-601].

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> DFA, 15 U.S.C. § 78u-6(c)(1)(A).

(I) [T]he significance of the information provided by the whistleblower to the success of the covered judicial or administrative action; (II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action; (III) the programmatic [sic] interest of the [SEC] in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and (IV) such additional relevant factors as the [SEC] may establish by rule or regulation.<sup>122</sup>

Therefore, the UAE or any other emerging market should introduce similar provisions in any whistleblower legislation that they pass, and allow the relevant regulator to exercise their discretion in providing a financial reward to a whistleblower within a stated minimum and maximum range.

## 2. Time for Reporting

The time for reporting wrongdoing by a whistleblower is critical, especially when a whistleblower reports internally first. Under the DFA, there is no minimum time period for when a whistleblower should report externally after they have reported internally; the only requirement is that they report externally to be qualified as a whistleblower.<sup>123</sup> This could be problematic for someone that blows the whistle internally and then gets fired by the employer before reporting externally, as this person would not be classified as a whistleblower or receive any protections or rewards under the DFA.<sup>124</sup> However, in a contrary position to the DFA, the SEC has argued in their Annual Report to Congress on the Dodd-Frank Whistleblower Program that someone who only reports wrongdoing internally shall qualify as a whistleblower and receive protections against retaliation.<sup>125</sup>

A person who only reports internally should qualify as a whistleblower under the law if they also report the wrongdoing externally within a reasonable time frame. The period of time that a whistleblower is permitted to report externally should not be prolonged, as this provides the business with the opportunity to tamper with or destroy evidence of wrongdoing. As a result, if too

---

<sup>122</sup> *Id.* § 78u-6(c)(1)(B)(i)(I)–(IV).

<sup>123</sup> *Id.* § 78u-6(a)(6).

<sup>124</sup> *Asadi v. G.E. Energy (U.S.A.), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

<sup>125</sup> “In issuing the final whistleblower rules, the [SEC] included a rule to clarify that the employment retaliation protections provided by the [DFA] apply not only to individuals who report wrongdoing to the SEC but also to employees who, among other things, report potential securities law violations internally to their employers.” SEC REPORT TO CONGRESS, *supra* note 83, at 2.

much time passes after the whistleblower has reported the wrongdoing internally, the regulator may be unable to build a case. Therefore, the authors recommend providing a person with 120 days from the date of internal reporting to report externally. This means that a person who reports internally and suffers retaliation by the employer within the 120-day period will receive the same protections as a whistleblower.

This approach is reasonable and provides someone who wishes to report wrongdoing with some level of flexibility. If the internal reporting proves unsuccessful within 120 days, then the person is still able to report externally and receive protection as a whistleblower under the law. Although whistleblowers should always report egregious wrongdoing externally first, a person who blows the whistle internally should be provided with whistleblower protections, as it is presumed that some employees will have a strong sense of loyalty to the business and will decide to report internally first.

Furthermore, it is also important to set a maximum time frame (i.e., a statute of limitations) in which an external report of wrongdoing can be made to a regulator, as one should not be granted an indefinite amount of time without an internal report ever being made to the employer. Under section 21F(h)(1)(B)(iii) of the DFA, the absolute maximum amount of time that can pass to report any wrongdoing is 10 years from the date of the violation, with several exceptions that can limit that time to 6 or 3 years.<sup>126</sup> Time is always of the essence when attempting to prove wrongdoing; therefore, the more time that passes, the more likely it will be harder to collect evidence and prove that the wrongdoing occurred.

### 3. Should Criminals Receive Rewards?

Importantly, the SEC shall deny a reward “to any whistleblower who is convicted of a *criminal violation* related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section.”<sup>127</sup> It is argued by the authors, however, that this provision may severely restrict the number of whistleblowers that report to the regulator any information about large-scale frauds in which they were involved. There is little incentive for a whistleblower to come forward if they will not receive a reward and risk being criminally prosecuted.

The case of Bradley Birkenfeld demonstrates that providing a generous reward to a whistleblower that is convicted of a crime in relation to the information being provided can aid the regulator in recovering substantial amounts from wrongdoers. Birkenfeld was hired by UBS bank to recruit US

---

<sup>126</sup> DFA, 15 U.S.C. § 922-21F(h)(1)(B)(iii).

<sup>127</sup> DFA, 15 U.S.C. § 78u-6(c)(2)(B) (emphasis added). Section 15.(1) of the proposed Ontario Securities Commission Whistleblower Legislation in Canada mirrors this section OSC POLICY 15-601, *supra* note 116, at 9.

citizens and advise them on hiding their undeclared wealth for tax evasion purposes in Switzerland.<sup>128</sup> In the process of performing his job, Birkenfeld was aiding and abetting these American clients to violate US tax laws.<sup>129</sup>

In 2009, Birkenfeld decided to blow the whistle to the United States Department of Justice (DOJ) under another whistleblower law in the United States—the Tax Relief and Health Care Act of 2006.<sup>130</sup> On the negative side, Birkenfeld was fined \$30,000 and received a criminal conviction for abetting tax fraud for which he spent 2.5 years in prison. On the positive side, the Internal Revenue Service (IRS) Whistleblower Program provided Birkenfeld with a reward of \$104 million for the valuable information that he provided to the DOJ, despite his criminal conviction. The DOJ was able to impose a \$780 million penalty on UBS, which meant that Birkenfeld was rewarded 13% of the recoveries. Birkenfeld is currently suing the US government because he claims that he was entitled to a higher percentage of the sums recovered, as the IRS was able to recover \$7 billion from other Swiss banks based on the information that he provided.<sup>131</sup>

Although the Birkenfeld case demonstrates that rewarding a whistleblower that was also involved in the criminal activity can lead to substantial recoveries, the legislation should clarify that any reward provided must be final and will be made at the discretion of the regulating authority. Therefore, the regulator should have the discretion to provide a whistleblower that has been criminally convicted for being involved in the egregious conduct with a reward if the information that they provide can help the regulator to recover any misappropriated assets and impose large penalties on the wrongdoers. This criminal conviction can also be used as an additional factor in determining the final amount of the award, as was earlier discussed in this article in the section concerning the size of the reward.

#### **F. Immunity and Reduction in Penalties**

Another feature of whistleblower legislation that could incentivize external reporting is providing a whistleblower that also knowingly participated in the wrongdoing that they are reporting with a reduction in their punishment. For example, whistleblower legislation in the United Kingdom can provide a

---

<sup>128</sup> Eamon Javers, *Why Did the US Pay This Former Swiss Banker \$104 M?*, CNBC (Apr. 30, 2015, 7:10 AM), <http://www.cnbc.com/2015/04/30/why-did-the-us-pay-this-former-swiss-banker-104m.html>.

<sup>129</sup> *Id.*

<sup>130</sup> Tax Relief and Health Care Act of 2006, 26 U.S.C. § 7623 (2012). This statute has similar whistleblowing provisions as the False Claims Act. *See generally* False Claims Act, 31 U.S.C. §§ 3729–33 (2012).

<sup>131</sup> Javers, *supra* note 128.

“wrongdoing” whistleblower with the possibility for a reduction in fines and prison sentences, or immunity.<sup>132</sup>

The Virgin Atlantic and British Airways collusion case suggests that providing immunity or a reduced punishment incentivized external reporting. In 2007, Virgin Atlantic blew the whistle to the United Kingdom Office of Fair Trading (OFT) and reported that they had colluded with British Airways to fix the price of tickets on their transatlantic routes.<sup>133</sup> This was a criminal offence in the United Kingdom under the Enterprise Act 2002<sup>134</sup> and in the United States under the Sherman Act of 1890.<sup>135</sup> For being the first to report this information to the regulator, Virgin Atlantic escaped fines of around £180 million and was provided with immunity from prosecution by the OFT.<sup>136</sup> However, British Airways was not so fortunate. The OFT brought criminal charges against four British Airways executives and imposed a fine of £121.5 million on the company. Furthermore, the DOJ imposed a fine of \$300 million on British Airways, as the illegal activities of both the airlines were transatlantic in nature.

This case demonstrates that someone who has committed wrongdoing may have an incentive to blow the whistle externally if the regulator is able to provide them with immunity or reduce their punishment. It makes sense for a regulator to have this power in situations where a classic prisoner’s dilemma exists.<sup>137</sup> This occurs where multiple wrongdoers are inside a single organization or where multiple corporations have colluded to commit wrongdoing. In these cases, the first one to blow the whistle receives a deal, whereas the other wrongdoers pay the full price for violating the law. Arguably, this could also be a useful tool for securities regulators, since it could reduce the number of cases where securities brokers collude.

---

<sup>132</sup> Serious Organised Crime and Police Act 2005, c. 2 (Eng.).

<sup>133</sup> Alistair Osborne, *BA-Virgin Case Exposes the Wacky World of Whistleblowing*, TELEGRAPH (Apr. 30, 2010, 9:54 PM), <http://www.telegraph.co.uk/finance/comment/alistair-osborne/7660826/BA-Virgin-case-exposes-the-wacky-world-of-whistleblowing.html>.

<sup>134</sup> Enterprise Act 2002, c. 40, § 188(2)(a) (Eng.).

<sup>135</sup> Sherman Anti-Trust Act of 1890, 15 U.S.C. §§ 1–7 (2012).

<sup>136</sup> Osborne, *supra* note 133.

<sup>137</sup> “The prisoner’s dilemma is a paradox in decision analysis in which two individuals acting in their own self-interest pursue a course of action that does not result in the ideal outcome. The typical prisoner’s dilemma is set up in such a way that both parties choose to protect themselves at the expense of the other participant. As a result of following a purely logical thought process, both participants find themselves in a worse state than if they had cooperated with each other in the decision-making process.” *Prisoner’s Dilemma*, INVESTOPEdia, <http://www.investopedia.com/terms/p/prisoners-dilemma.asp#ixzz49TV7SABx> (last visited Feb. 8, 2017).

### **G. Anonymous Reporting**

Under the DFA, whistleblowers are allowed to report anonymously to the SEC through the representation of their lawyer.<sup>138</sup> However, whistleblowers must eventually disclose their identity to the SEC if they want to collect a reward.<sup>139</sup> The SEC has a duty to “not disclose any information, including information provided by a whistleblower to the [SEC], which could reasonably be expected to reveal the identity of a whistleblower,”<sup>140</sup> except for in cases where the whistleblower must testify in “public proceedings” or the SEC provides the information to other regulatory authorities.<sup>141</sup> The SEC has reported that 20% of the whistleblowers that have already received a reward under the SEC whistleblowing program initially reported the information anonymously through their lawyer.<sup>142</sup> The identity of these whistleblowers was not made available to the public even after they revealed their identity to the SEC in order to collect the reward.<sup>143</sup>

Anonymous reporting may not be possible in every country, however. A study conducted by DLA Piper on whistleblowing laws from around the world notes that the cultural context will determine the type of whistleblower regime that a country will adopt.<sup>144</sup> “Another reason for the lack of rigorous whistleblower protection in many countries is a cultural hostility towards whistleblowing, particularly anonymous whistleblowing. This can be attributed in some countries towards an emphasis on the importance of privacy.”<sup>145</sup> Therefore, as with the case of reporting anonymously inside the organization, it is unclear under the laws of many countries, including the UAE, whether a regulator will be able to use evidence against a wrongdoer that was obtained anonymously.<sup>146</sup>

Therefore, the whistleblower legislation should permit the regulator to use evidence against a wrongdoer that was obtained anonymously, provided that the whistleblower reveals their identity to the regulator. The law should permit the regulator to maintain the identity of the whistleblower confidential and secret from the public in order to avoid any unnecessary retaliation against the whistleblower.

---

<sup>138</sup> DFA, 15 U.S.C. § 78u-6(d)(2)(A).

<sup>139</sup> *Id.* § 78u-6(d)(2)(B).

<sup>140</sup> *Id.* § 78u-6(h)(2)(A) (alteration in original).

<sup>141</sup> *Id.* § 78u-6(h)(2)(A)–(D).

<sup>142</sup> SEC REPORT TO CONGRESS, *supra* note 83, at 17.

<sup>143</sup> *Id.*

<sup>144</sup> DLA PIPER STUDY, *supra* note 21, at page 37.

<sup>145</sup> *Id.* at 37.

<sup>146</sup> *Id.* at 42.



## **H. Penalties for False Claims**

Penalties should be imposed on somebody that knowingly provides false information to the regulator or to the business. For example, National Bank of Abu Dhabi's Whistleblowing Policy includes a section about "False Allegations"<sup>147</sup> to prevent anyone from using the policy for their own personal benefit—that is, to receive financial compensation or a promotion. The policy notes that the bank will prosecute any employee who intentionally discloses false actions or information.<sup>148</sup> It is important to include such a provision in whistleblower policies and the law to reduce the number of false claims. However, the punishment should not be extended to instances where the reported information was unknowingly incorrect.

The DFA provides that a whistleblower who reports to the Commodities and Futures Trading Commission (CFTC) and "knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or uses any false writing or document knowing the same to contain false, fictitious, or fraudulent statement or entry, shall not be entitled to an award under this section and shall be subject to [civil and/or criminal] prosecution under section 1001 of the title 18, *United States Code*."<sup>149</sup> It is a curious development that the mirroring provision in the DFA that applies to the SEC does *not* permit the SEC to prosecute a whistleblower that provides it with false information.<sup>150</sup> This suggests that the SEC is unable to impose even civil penalties on whistleblowers that provide false information.

For example, the SEC has recorded several incidents of individuals that abused the program. In one case, the SEC denied 196 claims for an award by one alleged whistleblower.<sup>151</sup> In another case, the SEC denied an individual that knowingly made 25 false claims for an award.<sup>152</sup> The SEC noted that:

The claimant knowingly and willfully made false, fictitious, and fraudulent statements and representations to the [SEC] over the course of several years . . . . The claimant, however, refused to withdraw any of the award claims. Further, the claimant's submission of frivolous claims harmed the rights of legitimate

---

<sup>147</sup> "Any employee or manager who knowingly, with reckless disregard for the truth or bad faith gives false information, or makes a malicious report of wrongful conduct, may be subject to **'disciplinary measures.'**" NAT'L BANK OF ABU DHABI, GROUP WHISTLEBLOWING POLICY 3 (2014), <https://www.nbad.com/content/dam/NBAD/documents/CorpGov/Whistle-Blowing-Policy.pdf>.

<sup>148</sup> *Id.*

<sup>149</sup> DFA, 7 U.S.C. § 26(m).

<sup>150</sup> DFA, 15 U.S.C. § 78u-6(i). This section has been implemented into the SEC's Regulation. See 17 C.F.R. § 240.21F-8 (2016).

<sup>151</sup> SEC REPORT TO CONGRESS, *supra* note 83, at 14.

<sup>152</sup> *Id.*

whistleblowers and hindered the [SEC's] implementation of the whistleblower program by, among other things, delaying the [SEC's] ability to finalize meritorious awards to other claimants and consuming significant staff resources.<sup>153</sup>

The inability of the SEC to impose fines or prosecute people that provide false claims means that their time and resources have been wasted following false leads. Therefore, it is necessary for regulators to be provided with the authority in the whistleblower legislation to impose fines on people that knowingly bring false claims and waste the regulator's time.

## VI. INTERNAL VERSUS EXTERNAL REPORTING

For a prospective whistleblower, a clear set of whistleblower laws can reduce the tension involved in deciding whether to report internally or externally. To resolve this dilemma, three different perspectives should be taken into consideration. From the perspective of the organization, it makes sense for the organization to incentivize their employees to report any wrongdoing internally so that the organization can address the issue before it becomes more serious. The organization will generally gain nothing when an employee reports externally.

From the perspective of the regulator, the situation is more complicated, as it is in the interest of the regulator for the employee to blow the whistleblower externally if the wrongdoing is egregious widespread. This would increase the chances for a regulator to bring a successful action against—or reach a settlement with—the wrongdoing organization, as a prior internal report by the whistleblower may result in the wrongdoers destroying or hiding important evidence of their wrongdoing. On the other hand, it could be in the interest of the regulator for an employee to report any wrongdoing internally first, especially in cases where only minor violations of the law have occurred. Regulators generally have limited resources and manpower and would prefer that organizations resolve minor violations of the law on their own. Therefore, it is in the best interest of the regulator for an employee to blow the whistle internally in cases where there is minor wrongdoing that can be easily dealt with from inside the organization and externally in cases where the wrongdoing is egregious.

From the perspective of prospective whistleblowers, the situation is extremely complicated where there is no whistleblower policy or specific whistleblower legislation. In these cases, an employee may be reluctant to report the wrongdoing at all. Even in cases where there are whistleblowing policies and laws protecting informants, the employees may be torn over where to report first. The employees may feel that they owe a duty of loyalty to the organization to first report internally in order to give their organization the opportunity to address

---

<sup>153</sup> *Id.*

the wrongdoing before it gets out of control. In cases where the employee reports externally first, the organization may not be provided with the opportunity to address the wrongdoing. A duty of loyalty,<sup>154</sup> however, should not impede an employee from reporting externally in cases where the organization does not take the appropriate action to resolve the wrongdoing after the employee has reported internally.

For those who argue that employees owe strict loyalty to the company, whistleblowing seems to be an act of extreme disloyalty. It puts at risk the reputation of the firm. But this seems to be based on a narrow view of loyalty as if it demands that we do whatever the company or another individual believes to be in their best interest . . . Loyalty cannot imply that we should not report the unethical conduct of others . . . This may imply for an employee that he or she is most loyal when trying to prevent something that could lead to harm for customers, shareholders, or the general public. If there is no proper response internally, or if by the nature of the case, it is not possible to find an internal remedy, then it would seem ethically correct to blow the whistle [externally]. In fact, sometimes there can be a duty to do so. It would be obligatory for an employee to blow the whistle when the level of harm to others is serious, and the employee has clear evidence of the unethical practice that has led to this.<sup>155</sup>

Furthermore, an employee may not be classified as a “whistleblower” under the law in cases where they only report the wrongdoing internally. In these countries, an employee may be compelled to report externally first in order to protect their own interests.

To avoid these dilemmas for whistleblowers, we recommend that effective whistleblower legislation should provide protection from retaliation notwithstanding whether the employee reports internally or externally. This means that employees should be allowed to keep their jobs, and punishments should be imposed on those who retaliate against internally reporting whistleblowers. In cases where the misconduct at the organization is egregious, a whistleblower would be advised to first report externally and wait for instructions from the regulator. This would put the regulator on notice of the wrongdoing and allow them to determine whether to initiate any proceedings against the

---

<sup>154</sup> The SEC’s Annual Report reported that approximately 80% of the whistleblowers reported internally before reporting externally. This high percentage of internal reporting could be explained by an employee’s duty of loyalty. *Id.* at 16–17.

<sup>155</sup> Michael Walsh, *Whistleblowing: Betrayal or Public Duty* (2005), <http://www.erc.org.au.2004>.

organization, or provide the organization with a timeline to remediate the wrongdoing.

External reporting by the whistleblower would have the dual benefit of qualifying the whistleblower for a potential reward and allowing the regulator to take action and intervene before the organization has had a chance to destroy any incriminating evidence. In cases where the misconduct is not serious, the regulator would merely advise the whistleblower to go back to organization and report the information internally while providing an update to the regulator in six months on how the internal report was handled.

## VII. DO WHISTLEBLOWER POLICIES AND LAWS DETER WRONGDOING?

There is evidence that effective whistleblower policies can reduce wrongdoing within an organization.

A 2004 study by the Association of Certified Fraud Examiners (ACFE) of U.S. organizations reported that organizations without proper mechanisms for reporting fraud and unethical behavior suffered fraud-related losses that were almost twice as high as those with such mechanisms. It also found that about 40% of frauds are initially detected through whistleblowing, compared to 24% for internal audits, 11% by accident, 18% through internal controls, and 11% through internal audits.<sup>156</sup>

There is also evidence that an effective set of whistleblower laws will expose wrongdoing within organizations. The laws may even deter wrongdoing from taking place, as people will be scared to commit any wrongdoing if they know that someone has the proper incentives to blow the whistle to the regulator. For instance, after the DFA was introduced in the United States, the number of whistleblower tips to the SEC about securities laws violations increased from 3,001 in 2012 to 3,923 in 2015.<sup>157</sup> In the United Kingdom, the number of tips increased from 157 in 1999 to over 2,000 in 2015 after the adopted whistleblower legislation.<sup>158</sup>

Furthermore, the SEC has paid more than \$54 million to 22 whistleblowers since 2011.<sup>159</sup> In 2015 alone, it paid rewards of more than \$37

---

<sup>156</sup> Mak Yuen Teen, *Whistleblowing: Recent Developments and Implementation*, PRIV. SECTOR OPINION (Global Corporate Governance, Washington D.C.), no. 5, 2007, at 3, <http://www.ifc.org/wps/wcm/connect/d145190048a7e693a757e76060ad5911/GCGF%2BPSO%2Bissue%2B5%2Bscreen.pdf?MOD=AJPERES>.

<sup>157</sup> SEC REPORT TO CONGRESS, *supra* note 83, at 21 tbl.

<sup>158</sup> DLA PIPER STUDY, *supra* note 21, at 36.

<sup>159</sup> SEC REPORT TO CONGRESS, *supra* note 83, at 1.

million to eight whistleblowers<sup>160</sup> including a record amount of \$30 million paid to a single whistleblower.<sup>161</sup> However, although the number of tips has increased,<sup>162</sup> the percentage of whistleblowers that receive a reward is extremely low.<sup>163</sup> This could mean that the SEC has been very careful in scrutinizing the information that whistleblowers provide before they provide the whistleblower with a reward. It could also indicate that the majority of tips are either for minor violations of securities laws (i.e. where the SEC imposes monetary sanctions of less than \$1 million), or the tips do not fall under the definition of “original information.” Lastly, some of the tips may also be false claims that the SEC has chosen to ignore.

It is also clear that regulators must legitimize the actions of whistleblowers in order for whistleblower programs to be effective. For example, the CFTC only recently legitimized whistleblower claims under the DFA. The CFTC issued a public statement in 2013 that its view for “right now” was that “we don’t enforce” the anti-retaliation provision of the DFA.<sup>164</sup> These comments may have dissuaded whistleblowers in the commodities markets from reporting to the CFTC. This may also explain why, in comparison with the SEC, the CFTC has only made three rewards to whistleblowers since 2011, as fewer rewards could be indicative of fewer claims.<sup>165</sup> The CFTC rewarded one whistleblower \$240,000 on May 20, 2014,<sup>166</sup> and another whistleblower \$290,000 on September 29, 2015.<sup>167</sup> The CFTC has recently changed its policy of issuing substantial rewards,

---

<sup>160</sup> *Id.* at 10.

<sup>161</sup> *Id.* at 1.

<sup>162</sup> *Id.* (stating that over 120 claims filed in 2015).

<sup>163</sup> *Id.* at 10 (stating that eight whistleblowers paid in 2015).

<sup>164</sup> “Right now the view of the CFTC is that we don’t enforce [the anti-retaliation provision of the DFA]. Whether that changes in the future, who knows, but that is a stark difference between the SEC’s program and ours.” Rachel Louise Ensign, *Q&A: Christopher Ehrman, Director, CFTC’s Whistleblower Office*, WALL STREET J. (Oct. 18, 2013, 4:29 PM), <http://blogs.wsj.com/riskandcompliance/2013/10/18/qa-christopher-ehрман-director-cftcs-whistleblower-office/> (alteration in original).

<sup>165</sup> Of course, it is possible that the lack of rewards and the lower value paid out could be attributed to whistleblowers reporting only minor infractions of commodities laws to the CFTC. It is also possible that the CFTC receives fewer tips from whistleblowers because there are possibly fewer violations of commodities laws than of securities laws. See generally Tracy Cole et al., *This is not a Test: the CFTC Joins the SEC and IRS in Awarding Substantial Whistleblower Bounties*, BAKER HOSTETLER (Apr. 14, 2016), <http://www.bakerlaw.com/alerts/this-is-not-a-test-the-cftc-joins-the-sec-and-irs-in-awarding-substantial-whistleblower-bounties>.

<sup>166</sup> Press Release No. 6933-14, U.S. Commodity Futures Trading Comm’n, CFTC Issues First Whistleblower Award (May 20, 2014), <http://www.cftc.gov/PressRoom/PressReleases/pr6933-14>.

<sup>167</sup> Press Release No. 7254-15, U.S. Commodity Futures Trading Comm’n, CFTC to Issue Whistleblower Award of Approximately \$290,000 (Sept. 29, 2015), <http://www.cftc.gov/PressRoom/PressReleases/pr7254-15>.

however, as it rewarded \$10 million to a whistleblower in April 2016.<sup>168</sup> The CFTC publicly announced that “[a]n award this size shows the importance that the commission places on incentivizing future whistleblowers.”<sup>169</sup> Therefore, this recognition of a whistleblower’s legitimacy by the CFTC may lead to an increased amount of external tips from whistleblowers.<sup>170</sup>

### VIII. CONCLUDING REMARKS AND RECOMMENDATIONS

The authors have observed throughout this article that effective whistleblower policies and laws can reduce and deter wrongdoing within a company and in a country. Therefore, we recommend that the UAE and any other emerging market adopt federal whistleblower legislation that contains the following essential features:

1. A clear definition of a “whistleblower,” which permits internal and external reporting;
2. Protection against retaliation by the employer;
3. A financial reward, even if the whistleblower is complicit in the wrongdoing;
4. A reduced punishment or immunity for the whistleblower if they were complicit in the wrongdoing;
5. The nullification of confidentiality agreements;
6. Anonymous reporting; and
7. Penalties for false claims.

As mentioned earlier in this paper, given that these principles are “transnational” in nature, they can easily be adopted in other jurisdictions and are particularly useful for policy-makers in emerging markets that are considering adopting whistleblower legislation.

The authors suggest that increased protection for whistleblowers in the UAE can be achieved in two steps. First, the authors recommend that businesses in the UAE should begin introducing clear whistleblower policies within the organization in order to legitimize whistleblowers. Having a clear internal whistleblowing policy is the first step toward convincing more prospective whistleblowers to report knowledge of wrongdoing. The authors have already observed that there are some large businesses in the UAE that have begun to do this.

---

<sup>168</sup> Press Release No. 7351-16, U.S. Commodity Futures Trading Comm’n, CFTC Announces Whistleblower Award of More than \$10 Million (Apr. 4, 2016), <http://www.cftc.gov/PressRoom/PressReleases/pr7351-16>.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

Second, the authors recommend that the UAE pass a federal law to protect whistleblowers in the financial markets, as the empirical research suggests that there are many economic crimes in the UAE that go unreported. Under the new DESC Law, Dubai has made a good attempt to introduce some of these protections for whistleblowers located in Dubai; however, the new law is limited and has some shortcomings. Aside from not providing a reward or a reduction of penalties as an incentive to blow the whistle, the legislation is confined to the jurisdiction of Dubai. Therefore, prospective whistleblowers in the other Emirates do not receive protection under this new regime and remain subject to the current UAE federal laws.

Although there is still some legal uncertainty in the United States, the federal whistleblower legislation there has demonstrated that adequate legal protection and financial incentives for whistleblowers encourages more people with knowledge of wrongdoing to report either internally or externally. Therefore, the authors argue that it is critical for the UAE legislature to pass legislation to protect prospective whistleblowers that have knowledge of wrongdoing in order to reduce economic crimes that are being committed in the UAE securities and commodities markets. In particular, the ESCA should have the power to provide whistleblowers with protection against retaliation and a reward. Overall, introduction of federal whistleblower legislation in the UAE should increase legal certainty and encourage whistleblowers to report internally or externally to reduce wrongdoing and enhance consumer protection in the UAE financial markets. This should increase investor confidence in these markets and give the UAE's two financial centers a competitive edge over other emerging markets in the region.

