



The Case For Whistleblower Protection

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Introduction

Regulators have long understood that increasing regulation and the stepping up of enforcement activity is not enough to stem the flow of illicit funds. Aware that no authority has the infrastructure or resources necessary to micro manage the policing of financial institutions and the corporate world, authorities have lately turned their efforts towards encouraging self policing.

This has resulted in a growing emphasis by regulators on transparency and rewarding the spread of an ethical corporate culture. More recently, regulators are discussing and extending whistleblower protection clauses to encourage employees to raise concerns.

There has been increasing recognition of whistleblower activity since the 2008 financial crisis, an event that uncovered shocking levels of corporate corruption and collusion. Several research reports produced by the Association of Certified Fraud Examiners (ACFE) consistently point to whistleblowing as the number one method of uncovering financial mismanagement or crime, above other methods such as audits and regulatory reviews.

It comes as no surprise, therefore, to see an increase in whistleblower protection clauses by governments around the world.

Despite the growing legislation, whistleblowers are still often penalized for stepping forward, even where regulation exists to protect them. Whistleblowing on suspicious actions of an employer is often not an easy choice for an individual to make as it is so fraught with personal risk. There is much that can be done by both governments and organizations to encourage people to speak out against corporate misdemeanours – it is in the governments' interest to protect their financial system from potential reputational damage and loss, and it is in the organizations' interests to uncover any misconduct while there is still an opportunity to remediate associated risk.

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Whistleblowing around the world

Countries that get it right include Iceland and the UK. Iceland, in particular, is seen as a role model in terms of whistleblower protection. Following the country's economic crash in 2008, Iceland's government worked aggressively to claw its way back into financial health.

Unlike other affected countries, Iceland identified and persecuted individuals who were identified as culpable and complicit in some of the questionable financial practices that caused the financial devastation. Its whistleblower policies were successful not only because of the robustness of the legal framework, but because of the lack of stigma associated with the practice. Regulators have worked hard to change the culture and stigma that are attached to whistleblowing, so that whistleblowers in Iceland are seen as loyal to the country, not the corporation, and this appears to be a crucial aspect to the success of their program.

Recent regulator activity has been noted in developing and ambitious economies such as Nigeria. The government there launched a website in December 2016 for the purpose of reporting information anonymously through a secure portal. Should the information help in the recovery of stolen public funds, the whistleblower benefits from between 2.5% to 5% of the total money recovered, a significant incentive that has helped the government retrieve billions of dollars.

Other countries have updated or instituted whistleblower protection laws in recent years, and while these efforts are recognised, there remains an issue with implementation. Governments in South Korea, Japan and South Africa for example have extended limited protection to whistleblowers.

Countries with a complete lack of whistleblower protection may surprise many people - Denmark, for example. Perhaps less surprising is Switzerland, a country that has been in the news in the past for its opaque financial regulation.

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Emerging financial hubs in the MENA region

This lack of activity in certain centres means that for the several emerging financial hubs in the MENA region there is room to compete. Centres such as Dubai, Doha, Cairo, Casablanca and Riyadh are increasingly recognized as emerging financial hubs. Of this list, only Dubai and Tunisia financial authorities appear to be actively addressing whistleblower protection, giving them an edge not only against other centres in their region but against financial hubs in other centres.

While the world's biggest financial centers - New York, London and Tokyo - have been at the top of rankings for decades, they are now challenged by various centers in the developing world, including the Middle East and North Africa.

International investors are attracted to some of the world's fast-growing financial markets, and money tends to favour strong governance codes. Regulation and the rule of law are paramount for investors seeking long term sustainability. Whistleblower protection clauses are one of the methods that policy makers can use to indicate that they are serious about good governance and growth. Encouraging organizations to create robust governance frameworks that protects employees should they decide to flag suspicious activity shows a strong government and societal commitment to anti-corruption.

It is a common assumption that traditional markets, with well established AML regimes, offer robust protection for whistleblowers but while some of the more established economies do have good policies in place, many do not.

Whistleblower protection clauses, therefore, offer developing centres an opportunity to advance their economies.

Whistleblowing in UAE: It's complicated

While the institution of whistleblower protection is generally viewed as positive by many, it appears that the environment is unsupportive in many Dubai-based organizations.

According to research, 6 out of 7 organizations in Dubai allow employees to report wrongdoing anonymously. However, the UAE has a strict privacy law and this may conflict with the whistleblower protection.

Many whistleblower policies also contain requirements that are not in line with international best practice and may substantially impede the process of whistleblower, rather than encourage. For example, most organizations surveyed require whistleblowers to report internally as a first step, leaving the decision to take the matter further in the hands of senior executives; and if the employee is found to have made a false claim, they will be subject to disciplinary action.

Given that 75% of unethical conduct in the UAE is perpetrated by senior managers, it is in the interests of an organization to not only set down clear guidelines for whistleblowers, but to also actively create safe spaces within their organizations that will encourage whistleblowers to come forward. This is especially needed if a whistleblower is reporting an action by a colleague who is higher up the command chain.

The value of creating a safe space for whistleblowers cannot be understated - with regulatory pressure on senior executives for increased transparency, it is of substantial benefit for executives to have a high level of awareness.

Whistleblowing and emerging centres in MENA

Country	Whistleblower status
UAE	Adopted Dubai Law No. 4 of 2016 on Financial Crimes which includes protection for those that report crimes to the newly established Dubai Centre for Economic Security.
Qatar	Recognised as a country with low levels of corruption but no specific whistleblower protection.
Saudi Arabia	Anti-corruption law that rewards disclosure.
Tunisia	Adopted Article 17 in February 2017 that protects whistleblowers.
Egypt	Employees and citizens have a right to report on wrongdoings in government institutions, but can be penalized and fined or jailed for six months if the report is shown to be false.
Morocco	2011 law gave judges and prosecutors powers to protect trial witnesses and whistleblowers.

Dubai and Tunis lead the way

Both Dubai and Tunis have sent a clear message to the financial community that they are to be taken seriously as financial hubs with the recent adoption of a whistleblower clause.

Dubai Law No. 4 of 2016 on Financial Crimes provides protection for people who report crimes to the Dubai Centre for Economic Security (DCES), an agency that has been specifically created for the purpose to reduce financial crime levels.

Anyone reporting suspicious activity to the DCES is guaranteed freedom, security and protection under Article 19. No legal or disciplinary action can be taken against them. Organizations are expected to put processes in place to create a safe space that enables people who wish to make a report. To reduce risk of transgression, it's important that this process should be verifiable should the need arise.

Tunisia adopted Article 17 that protects whistleblowers in February 2017. The government is working towards establishing the country as an economic leader in the region and as such has agreed on a five year strategy that includes a package of reforms initiated during the 2011 revolution. The strategy emphasises the improvement of the business environment.

These new laws are a very welcome development, however until the application is proven it's important to note that employees should proceed with caution, and seek legal advice before raising their hand.

“ *Organizations are expected to put processes in place to create a safe space that enables people who wish to make a report* ”

How organizations can prepare

Organizations based in the countries with reforms such as whistleblower protection clauses will undoubtedly benefit from the appearance of a strengthened rule of law.

Recent whistleblower cases, however, illustrate that even certified, gold-plated compliance policies do not guarantee protection against retaliation when confidential information is publicly exposed. A vital element of protection is the support by top level management. Many employees have stood up for justice thinking that they were protected by organizational codes of conduct, only to find that not only were their jobs at risk but their careers.

It is useful, therefore, to understand the intricacies of whistleblowing protection, and to know why it is important to not only demarcate standards of behaviour in organizational policy, but to ensure that these standards are clearly articulated into practice.

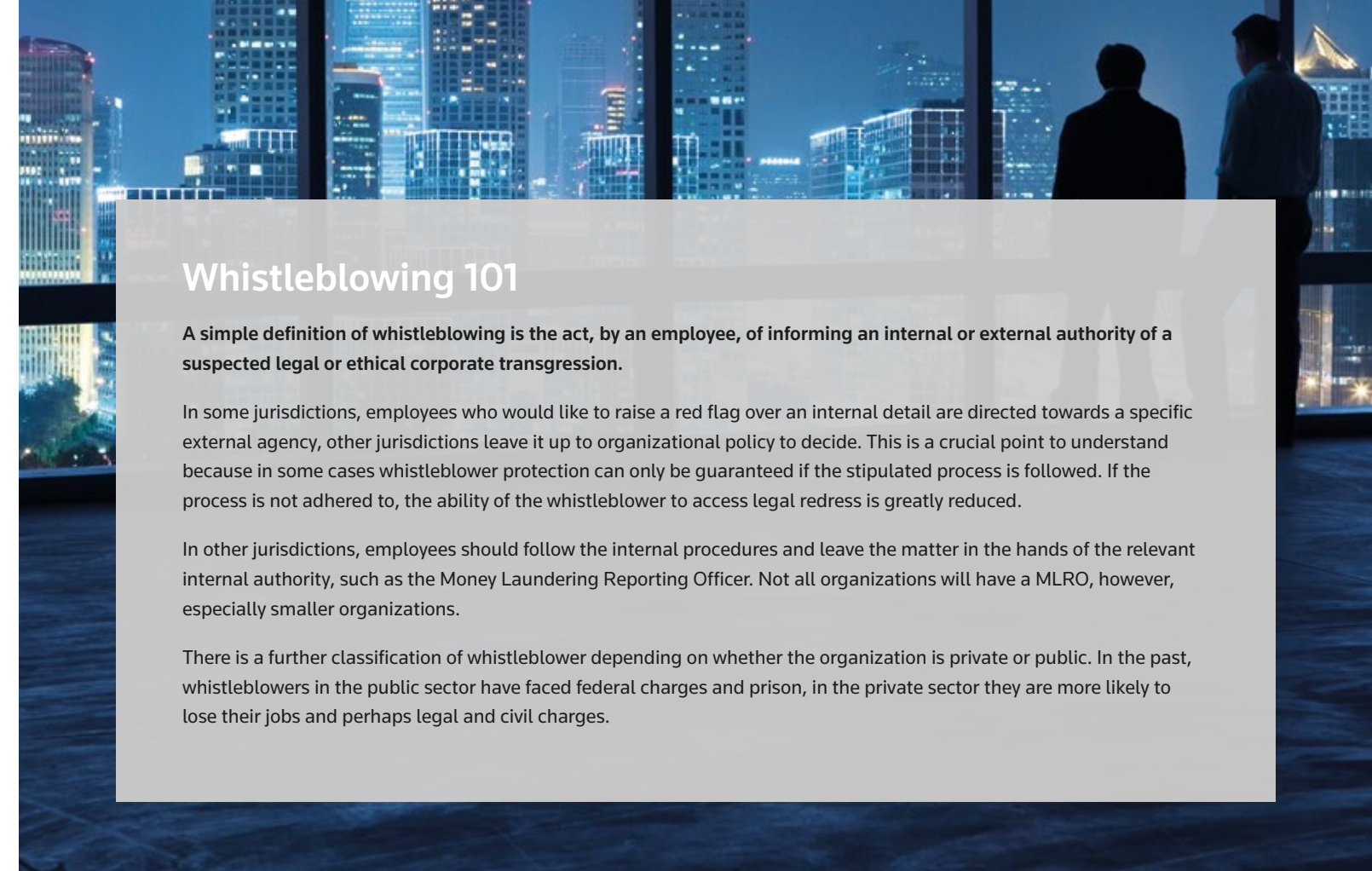
Due to a degree of ambiguity around the concept of whistleblowing, efforts to affording whistleblower protection can be a complicated journey for some. Given the increasing focus on whistleblowers, it is to be expected that this will change as regulation on the subject increases in scope and detail, and further guidance will probably be released.

The ambiguity may be contributing to some of the obstacles for employees and managers, however. It may also contribute to a lack of clear and unequivocal communication on the topic from top leadership, and may undermine internal reporting, thus reducing the ability to remediate risk.

Providing a safe space for employees to raise concerns does not have to be complex and the benefits of such a policy have been proven to be valuable.

Encourage employees to raise their hands:

- Publish a well-defined, accessible whistleblower protection policy
- Present clear and regular communication from senior management on the topic
- Offer regular training and awareness workshops
- Ensure evidence of support of protection by top management
- Provide secure and easily accessible reporting facilities
- Guarantee anonymity



Whistleblowing 101

A simple definition of whistleblowing is the act, by an employee, of informing an internal or external authority of a suspected legal or ethical corporate transgression.

In some jurisdictions, employees who would like to raise a red flag over an internal detail are directed towards a specific external agency, other jurisdictions leave it up to organizational policy to decide. This is a crucial point to understand because in some cases whistleblower protection can only be guaranteed if the stipulated process is followed. If the process is not adhered to, the ability of the whistleblower to access legal redress is greatly reduced.

In other jurisdictions, employees should follow the internal procedures and leave the matter in the hands of the relevant internal authority, such as the Money Laundering Reporting Officer. Not all organizations will have a MLRO, however, especially smaller organizations.

There is a further classification of whistleblower depending on whether the organization is private or public. In the past, whistleblowers in the public sector have faced federal charges and prison, in the private sector they are more likely to lose their jobs and perhaps legal and civil charges.

The protection of whistleblowers can be a gamechanger

We are in a time of shifting geopolitical power bases, with an apparent backlash against globalization. There is a notable political trend towards protectionism – although this hasn't always translated into policy - and at the same time there is a slowdown in global trade. Amid this, proactive governments are doing what they can to encourage investment, and whistleblower protection clauses can help significantly by enhancing reputations.

It appears that some regulators have realized this and are legislating accordingly. These new laws in various countries, and especially in the MENA region, are a welcome development, but it is in the application that the laws will succeed or fail. Organizations therefore play a vital role in assuring the international business community that the rule of law will be adhered to.

In this regard, companies are advised to review and update their whistleblower policies and procedures as they relate to their operations in specific jurisdictions, in accordance with any recent regulatory updates.

Companies should also check with their vendors to ensure that any association is not tainted by the risk of weak whistleblower policies, and ensure that employees are able to report violations of law internally without fear of sanction or retaliation. While this may be an exhausting task, due diligence is always preferred to an unpleasant surprise.

“ *...due diligence is always preferred to an unpleasant surprise...* ”

Author's details

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