

BLOWING THE WHISTLE: THE OSC PROPOSES CANADA'S FIRST WHISTLEBLOWER PROGRAM

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On February 3, 2015, the Ontario Securities Commission (the "**OSC**") issued a Consultation Paper¹ seeking input on a proposed Whistleblower Program (the "**Program**"). The Program follows similar approaches previously adopted by the U.S. Securities Exchange Commission and the Canada Revenue Agency, and is designed to encourage reporting to the OSC of misconduct or possible breaches of Ontario securities law. Reporting will be encouraged through whistleblower protection and financial incentives of up to \$1.5 million. The Program would only be applicable to whistleblowers who report serious misconduct that results in an administrative proceeding or settlement pursuant to the *Ontario Securities Act*² (the "**Act**"). If implemented, the Program would be the first of its kind among Canadian securities regulators. The Program addresses the five key elements summarized below.

1. Whistleblower Eligibility

Not all whistleblowers will be entitled to a financial reward under the Program. To qualify, the whistleblower must be an individual, provide information that meets the listed criteria and not be rendered ineligible. The OSC specifically seeks comments on whether culpable individuals should be eligible for monetary awards under the Program. Regardless, participation by a culpable individual in the Program would not prohibit the OSC from taking enforcement action against the individual for his or her role in the misconduct.

2. Financial Incentives

The OSC proposes awarding eligible whistleblowers up to 15% of the total monetary sanctions, capped at \$1,500,000, in cases where proceedings or settlements generate at least \$1,000,000 in sanctions, exclusive of costs. In circumstances where information leads to multiple proceedings, the total monetary sanctions or settlement would be added together to determine if the threshold has been met. The OSC expects the "Funds Held Pursuant to Designated Settlements and Orders" account to be the source of funds for whistleblower award payments, but is apparently considering alternate sources of funding. Staff at the OSC is also considering whether whistleblowers should still qualify for awards where monetary sanctions and payments are not recovered. It is important to note that any monetary award under the Program would be entirely

discretionary and would involve a detailed assessment of each situation against established criteria.

3. Confidentiality

In order for the Program to be successful, the OSC believes that whistleblowers must be afforded the opportunity for confidentiality. The OSC proposes to adopt a policy that would use "all reasonable efforts" to maintain confidentiality, subject to the following three exceptions: 1. when disclosure is required to allow the respondent to a proceeding the opportunity to make full answer and defence; 2. when the relevant information is necessary to make staff's case against a respondent; and 3. when the OSC provides the information to another agency or authorities pursuant to the Act. The OSC is also considering adopting a policy that would enable whistleblowers to remain anonymous for a period during proceedings. Such individuals would need to be represented by counsel, and would ultimately be required to disclose their identity before the OSC could make a financial award.

4. Whistleblower Protection

The OSC intends to pursue discussions with the Ontario government to consider the addition of three provisions to the Act that would be designed to provide protection to whistleblowers from retaliation by employers. These provisions would: 1. make it a violation of securities laws to retaliate against a whistleblower; 2. provide whistleblowers with a civil right of action against an employer who violates the anti-retaliation provisions; and 3. render contractual provisions designed to silence a whistleblower unenforceable. This last provision tracks the approach advocated by U.S. regulators. The OSC intends for these protections to apply to whistleblowers, regardless of whether they report information "up the ladder" through internal compliance reporting systems or directly to the OSC.

5. Program Administration

To maintain confidentiality and ensure proper functioning of the program, the OSC intends to set up a separate intake unit within its enforcement branch to deal with the Program. The new intake unit would decide as an initial matter whether or not the person reporting the information qualifies under the Program. The matter would then be referred to enforcement staff, who would carry on the investigation in accordance with the OSC's usual processes.

Key Take-Aways

While the Consultation Paper represents the early stages of the Program, it marks a significant step forward in its implementation. The OSC is seeking a wide range of comments related to every aspect of the Program, including caps on awards, thresholds, and the level of discretion exercised by the OSC. Comments may be submitted to the OSC in writing until May 4, 2015. McMillan expects to provide more information on the

Program as it becomes available.

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¹ [*OSC Staff Consultation Paper 15-401*](#) was released on Tuesday, February 3, 2014.

² RSO 1990, Chapter s.5.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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