

CARRYING THE TUNE: OSC WHISTLEBLOWER PROGRAM COMING SOON

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With the success of the U.S. Securities and Exchange Commission (the "SEC") Dodd-Frank Whistleblower Program as a model, the Ontario Securities Commission (the "OSC") has been developing its own whistleblower program with a targeted implementation of spring 2016. The proposed program was first published as Staff Consultation Paper 15-401: Proposed Framework for an OSC Whistleblower Program on February 3, 2015. Following the close of a 90 day comment period and a public Whistleblower Roundtable that took place on June 9, 2015, the OSC released Policy 15-601 *Whistleblower Program* (the "Program") for comment on October 28, 2015. The comment period for the Program closed on January 12, 2016 and all indications are that the Program will proceed. Once implemented, the Program will be the first of its kind in Canada.

The stated intent of the Program is to prevent and limit harm to investors resulting from serious securities and derivatives-related misconduct (as described in our earlier [bulletin](#)).^[1] Individuals who voluntarily provide information to the OSC about a breach of Ontario securities law might be eligible for an award. In order for a whistleblower to qualify, the information submitted must be of meaningful assistance to the OSC in investigating a matter and obtaining an order, including the approval of a settlement, that imposes monetary sanctions and/or a voluntary payment of \$1 million or more. The individual must meet certain eligibility criteria as well.

The successful SEC whistleblower program has been in effect since August of 2011. Since then, the SEC Office of the Whistleblower (the "OWB") has paid more than US\$ 54 million to both foreign and domestic whistleblowers. The volume of tips received by the OWB has risen dramatically since the program's inception, with more than 4,000 whistleblower tips received in 2015 alone.

The OSC has stated its aim for the Program includes motivating insiders with knowledge of possible or serious breaches of Ontario securities law to report it to the OSC since this information might otherwise be difficult or impossible for the OSC to obtain in a timely manner. The OSC also aims to increase the number and efficiency of complex securities law cases investigated by the OSC with the information provided through the Program.

We have outlined some of the highlights of the Program below. Further information on the Program can be found by clicking [here](#).^[2]

Voluntary Original Information

The Program will only compensate individuals for information voluntarily provided to the OSC, and not as a result of a request, inquiry or summons from the OSC directed at the potential or actual whistleblower or anyone representing the whistleblower. The information must also be original information, which requires that it is not previously known to the OSC and that the whistleblower gained the information from independent knowledge or critical analysis of public information. Notably, voluntary information also includes information provided to another securities regulator or a law enforcement agency before a request, inquiry or summons from the OSC is received by the whistleblower.

Under the proposed Program, regardless of whether the information results in a whistleblower award, the OSC may use the information or documents for other purposes in carrying out its mandate.

Protections for Whistleblowers

Although the Program provides that the OSC will endeavour to make all reasonable efforts to maintain confidentiality, there are two significant exceptions: (a) when the OSC is required to disclose the whistleblower's identity in connection with an administrative proceeding to permit a respondent to make a full answer and defence; or (b) when the OSC determines it is necessary to disclose the information to various enumerated regulatory authorities.^[3]

The OSC's position is that requests under the *Freedom of Information and Personal Protection of Privacy Act* ("FIPPA") to disclose the whistleblower's identity will be denied. However, the final decision rests with the Information and Privacy Commission and as such it is possible a whistleblower's identity may be disclosed pursuant to a FIPPA request.

The Program also includes a "no retaliation" section indicating that the OSC expects employers will not retaliate against whistleblowers, including but not limited to disciplining, demoting, terminating or harassing a whistleblower. This approach is similar to what has been adopted and widely publicized by the SEC.

Whistleblower Award

If a whistleblower is eligible for an award, the OSC will pay 5 to 15 per cent of the total monetary sanctions imposed and/or voluntary payments made. The maximum amount of any award is \$1.5 million, unless the OSC actually collects monetary sanctions and/or voluntary payments equal to or greater than \$10 million, in which case the whistleblower may collect 5 to 15 per cent of the collected amount up to a maximum of \$5 million.

In contrast, the SEC whistleblower program allows reward amounts of between 10 and 20 per cent of the amount recovered by the SEC with no cap on the total award. For example, in 2015, the OWB issued its largest single award for more than US\$30 million to a foreign whistleblower.

There are various factors in the proposed Program that may increase or decrease the whistleblower award. The Program lists factors that may increase an award, including: timing, significance of the information, the degree of assistance provided to the OSC, impact on the investigation or proceeding, and unique hardship of the whistleblower. The listed factors that may decrease an award include: erroneous or incomplete information, the culpability of the whistleblower, unreasonable delay in reporting and interference with either the OSC's investigation or with internal compliance and reporting mechanisms.

If certain conditions are met, in-house counsel, internal and external auditors, directors, officers, Chief Compliance Officers and culpable whistleblowers may be eligible for an award.

The Program does not require internal reporting prior to submitting information to the OSC. As a result, corporate board members, in-house counsel and internal compliance officers need to monitor these developments to ensure internal reporting is prominent.

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[1] See McMillan LLP Securities and Employment and Labour Bulletin "[Blowing the Whistle: The OSC Proposes Canada's First Whistleblower Program](#)" (February 2015).[ps2id id='1' target='']

[2] [OSC News Release: OSC Releases Policy for Whistleblower Program for Public Comment](#)".[ps2id id='2' target='']

[3] However, in these circumstances the identity of the whistleblower may not be disclosed to regulatory authorities without the whistleblower's consent.[ps2id id='3' target='']

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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