



OSC Policy 15-601

Whistleblower Program

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Disclaimer

The views expressed in this presentation are those of the authors and do not necessarily reflect those of the Ontario Securities Commission or the Staff of the Ontario Securities Commission.

Purpose of a Whistleblower Program

- Enforcement's goals are *investor protection, accountability* and *credible deterrence*
- The more quickly and effectively matters are resolved, the better the outcome for investors and Ontario's capital markets
- The OSC Whistleblower Program is an additional tool designed to assist us in identifying and investigating more complex securities matters (i.e. financial reporting, disclosure, insider trading)
- Opportunity for reporting issuers and registrants to review and enhance their compliance systems and to foster an environment where internal reporting of misconduct is encouraged

OSC Whistleblower Program

- 1) **Eligibility for a Whistleblower Award** – Policy sets out: (i) criteria for information eligible for a whistleblower award and (ii) the categories of individuals who are ineligible for a whistleblower award, and exceptions to those categories
- 2) **Financial Incentive** – A whistleblower award would be offered to eligible whistleblowers who provide the OSC with timely, credible and robust information that leads to an enforcement outcome in a s. 127 Commission proceeding
- 3) **Confidentiality** – We would use all reasonable efforts to protect the identity of the whistleblower
- 4) **Whistleblower Protection** – Recent Act Amendments make it a violation of Ontario Securities law to retaliate against whistleblowers
- 5) **Procedure for Submitting Information and Award Process** – Policy describes how to submit information to the Whistleblower Program, under what circumstances Staff may communicate with a whistleblower and the process for determining whistleblower awards

Whistleblower Eligibility

- The whistleblower and information provided by the whistleblower would have to meet certain conditions for a payment to be made
- These include certain eligibility and information criteria such as:

- High quality and original information (not subject to solicitor client privilege)
- Truthful information is provided
- Certain individuals excluded (including D&O, Chief Compliance Officer and in-house legal counsel) unless certain conditions apply

- Culpable whistleblowers may be eligible for an award, but degree of culpability is a factor that may decrease amount of award

Financial Incentive

- Eligible whistleblowers may receive an award of between 5 and 15% of the total sanctions imposed and/or voluntary payments made, in cases where these amounts total \$1 million or more
- Up to \$1.5 million, not contingent on collections
- \$1.5 - \$5 million, only paid if sanctions collected (capped at \$5 million)
- Payment to the whistleblower would only be assessed after the matter is concluded (including any appeals) and sanctions are imposed
- Determination of award amount based on set criteria, including what steps the whistleblower had taken to report the misconduct through internal compliance systems before reporting to the OSC

Confidentiality

- We will use all reasonable efforts to protect the identity of the whistleblower
- Whistleblowers would generally not be required to testify as part of an administrative proceeding
- Confidentiality will not be maintained where:

- Disclosure is required to be made to a respondent in connection with a s. 127 administrative proceeding to permit a respondent to make full answer and defence
- When the Commission provides the information to another body pursuant to s. 153, except the whistleblower's identity will not be disclosed without the whistleblower's consent

- Whistleblower may remain anonymous for a time if represented by legal counsel, but their identity must be disclosed to OSC prior to receiving a whistleblower award

Whistleblower Protections

- Recent Act Amendments:
 - Make it a violation of securities law to take a reprisal against a whistleblower
 - Render contractual provisions designed to silence a whistleblower unenforceable
- A reprisal is any measure taken against an employee that “adversely affects” their employment
 - Includes, among other things, disciplining, demoting or suspending the employee, or threatening to do so, terminating or threatening to terminate them, or intimidating them
- Staff may commence a s. 127 proceeding in these cases
- Protections apply to whistleblowers who report through internal compliance systems and those that report directly to the OSC

Procedure for Submitting Information and Award Process

- Whistleblower to complete information form and read and sign certification (Staff may request a whistleblower provide additional information)
- Process for determining whistleblower awards would include a Staff recommendation reviewed by a Staff committee, including the Director of Enforcement
 - The Commission would review the Staff committee's recommendation, determine if a whistleblower is eligible and if so, may exercise its discretion to modify the amount of the award
- Communications with whistleblowers
 - Communications by Staff with whistleblowers in response to a specific whistleblower submission would be limited to ensure compliance with s. 16 of the Act and OSC Staff Notice 15-703

Whistleblower Site

www.OfficeOfTheWhistleblower.ca

- Serves two main purposes:
 - Primary source of information about the Program for the public and potential whistleblowers
 - Avenue through which potential whistleblowers submit the online form

Why Market Participants Should Prepare

- Research shows that the number one reason that motivates whistleblowers to come forward is so that the misconduct will stop
- In a 2015 Report to Congress, SEC whistleblower statistics disclosed that half of the awards paid were to current or former employees and 80% had raised their concerns internally before reporting to the SEC because of non-action
- Key take away – does your organization have appropriate channels for individuals to report securities misconduct

Promote Internal Reporting

- Is there a strong “tone at the top” that supports and values internal whistleblowers?
- Do employees fully understand the internal reporting systems available for reporting possible misconduct?
- Are compliance and internal control systems working effectively as designed?
- Are whistleblowers encouraged to report complaints internally? (i.e. confidentially, no fear of retaliation)
- What is the Board involvement in the reporting process?
- Do you have policies that address the appropriate investigative response needed to assess allegations?

Questions?