



# OSC Staff Consultation Paper 15-401

## Proposed Framework for an OSC Whistleblower Program

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OSC

ONTARIO  
SECURITIES  
COMMISSION

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# 1. Summary

The OSC is considering introducing a Whistleblower Program to encourage individuals with knowledge of possible breaches of Ontario securities law to report this information to the OSC. A Whistleblower Program is one of a number of initiatives by the Enforcement Branch aimed at resolving enforcement matters more quickly and effectively, including no-contest settlements, a clarified process for self-reporting and enhanced public disclosure of credit granted for cooperation.

The purpose of this consultation paper is to seek feedback from investors, issuers, advisors, other market participants and potential whistleblowers on the OSC Whistleblower Program being considered.

The Whistleblower Program would be applicable to whistleblowers who report serious misconduct that results in administrative proceedings or a settlement heard by the Commission under s.127 of the *Securities Act* (Ontario) (s.127). Only whistleblower information provided after the commencement of the program would be eligible for the program. One of the purposes of the program is to identify securities law misconduct that would not otherwise come to the attention of the OSC.

We know from our review of the U.S. Securities and Exchange Commission's (SEC) whistleblower program that over 50% of the tips the SEC received in 2014 related to corporate disclosure and financial statements, insider trading, market manipulation, unregistered offerings and other matters.<sup>1</sup> These types of cases involve sophisticated players, raise complex issues, and are difficult to uncover without the assistance of a whistleblower. We believe whistleblowers could be a valuable source of information for these types of investigations.

We are considering establishing an OSC Whistleblower Program that addresses the following five key elements:

- 1. Whistleblower Eligibility** - Established criteria would define whistleblower eligibility requirements and describe the characteristics of information expected to be reported;
- 2. Financial Incentive** - A monetary incentive 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 and we would not generally expect the whistleblower to testify at the administrative proceeding;

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<sup>1</sup> 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program, online U.S. Securities and Exchange Commission <http://www.sec.gov/about/offices/owb/annual-report-2014.pdf>.

4. **Whistleblower Protection** - Anti-retaliation measures would be implemented and used to deter employers from retaliating against employees who provide information internally or to the OSC; and
5. **Program Administration** - The Whistleblower Program would be administered and promoted in a manner to encourage and facilitate whistleblowers coming forward with quality information needed to support more effective enforcement of securities laws.

We believe that each of these key elements is necessary to support a successful Whistleblower Program at the OSC. However, we believe that the payment of a financial incentive is most critical to the success of the program.

We are considering offering an eligible whistleblower a financial award of up to 15% of the total monetary sanctions awarded (excluding cost awards) in a Commission hearing or settlement in which total sanctions or settlement payments exceed \$1 million. The maximum amount of any award could be capped at \$1.5 million. Payment of the award to a whistleblower would not be contingent on collection of the sanction monies but would only be paid upon final resolution of the matter, including any appeals. It is anticipated the OSC would fund the program through payments to the OSC of administrative penalties, disgorgement and settlement amounts that are not otherwise paid to harmed investors (these are “Funds Held Pursuant to Designated Settlements and Orders” by the OSC). The determination of the amount of a whistleblower award would be discretionary and would be recommended by a Staff committee which includes the Director of Enforcement and would then be approved at the discretion of the Commission.

While a Whistleblower Program is expected to bring many benefits to the OSC and support the Enforcement Branch’s goals of investor protection, accountability and deterrence, there are issues that would need to be addressed prior to implementation. Implementation of a Whistleblower Program as outlined in this consultation paper would require legislative amendments to include anti-retaliation provisions in the *Securities Act* (Ontario). Staff would seek legislative amendments, as necessary, following review of the consultation feedback.

We also anticipate that there may be concerns from issuers and registrant firms about the possible impact of an OSC Whistleblower Program on the operation of their internal compliance systems. We recognize the importance of effective internal compliance systems to identify, correct and self-report misconduct as a first line of action in promoting compliance with securities laws for the ultimate benefit of investors and our markets. An OSC Whistleblower Program is not intended to undermine these internal systems. Those systems may fail however for a number of reasons including if an individual fears retaliation as a result of raising concerns within the organization. The Whistleblower Program would allow an individual to report serious misconduct to the OSC regardless of the operation of those systems.

If a whistleblower reports misconduct through internal channels, failure by issuers and registrant firms to then promptly and fully report serious breaches of Ontario securities law to Staff, or continuance of the inappropriate conduct or failure to correct the problems, may result in no credit for cooperation when the issuer or registrant is ultimately brought to account for the misconduct. Further, an issuer’s

or registrant's inaction in the face of misconduct identified by a whistleblower will be considered an aggravating factor in Staff's recommendations on sanctions.

The following consultation paper discusses the proposed OSC Whistleblower Program, including each of the key elements, in more detail.

## 1.1 Purpose of Consultation

The purpose of this consultation paper is to seek feedback from investors, issuers, advisors, other market participants and potential whistleblowers on the OSC Whistleblower Program being considered.

The comment period will be open for 90 days and will end on May 4, 2015.

## 2. Background

In October 2011, OSC Staff Notice 15-704 *Request for Comments on Proposed Enforcement Initiatives* was published for comment. This notice, while not specifically seeking comment on the possibility of a new Whistleblower Program at the OSC, did indicate that Staff was considering the issue. The OSC received some comments in favour of establishing a Whistleblower Program.

The Whistleblower Program is one of a number of initiatives by the Enforcement Branch aimed at resolving enforcement matters more quickly and effectively, including no-contest settlements, a clarified process for self-reporting and enhanced public disclosure of credit granted for cooperation.

The OSC currently has an Inquiries & Contact Centre which accepts tips about possible breaches of securities laws, however no incentives or awards are provided. While the Inquiries & Contact Centre has provided the Enforcement Branch with valuable tips, the OSC Whistleblower Program would be aimed at encouraging whistleblowers with high quality information regarding serious misconduct to come forward. The OSC Whistleblower Program would operate as a distinct program in the Enforcement Branch, independent of the Inquiries & Contact Centre.

### 2.1 Why Should the OSC Consider a Whistleblower Program?

Whistleblowing has become a topic of much discussion and focus in recent years. In 2011, the SEC adopted its whistleblower program and has received widespread attention for some large payouts to whistleblowers resulting from successful enforcement actions "pursuant to which ongoing frauds were stopped in their tracks".<sup>2</sup> In Canada, the Canada Revenue Agency (CRA) launched its Offshore Tax Informant Program (OTIP) in early 2014. These programs are described below in section three. In

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<sup>2</sup> 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program, online U.S. Securities and Exchange Commission <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf>. At page 1, the report went on to say that "the bigger story is the untold numbers of current and future investors who were shielded from harm thanks to the information and cooperation provided by whistleblowers. At the end of the day, protecting investors is what the Whistleblower Program is all about."

other countries, regulatory organizations that have whistleblower programs in place or under consideration have contemplated changes to whatever “tips” system they currently have.

The apparent success of the SEC’s program suggests that assistance from individuals outside the regulator can ultimately help regulators do a better job of stopping serious misconduct earlier. Whistleblower Programs are a means to achieve more efficient and effective regulation in that they provide regulators with an additional tool to identify and investigate violations of securities laws.

A Whistleblower Program at the OSC would be a first for securities regulators in Canada and would represent a new source of information to support enforcement activity. An appropriately designed and resourced program would have the potential to lead to more efficient and vigorous enforcement of Ontario securities laws, resulting in greater deterrence against serious misconduct in the marketplace.

### 3. Summary of Whistleblower Programs at Other Organizations

As part of our research, we looked at whistleblower programs at securities regulators and other organizations in Canada and internationally, and spoke to representatives from these organizations.

Summary of programs with financial incentives	
SEC	10-30% of monies collected on sanctions > \$1 million
Canada Revenue Agency (OTIP)	5-15% of federal tax collected, where tax collected exceeds \$100,000

The SEC will pay a financial award to one or more whistleblowers who voluntarily provide the SEC with original information that leads to the successful enforcement by the SEC in a federal court or through administrative action where the SEC obtains monetary sanctions totaling more than \$1,000,000. Provided certain conditions are met, the SEC will apply criteria to determine the amount of the award, which can range from 10% to 30% of the monetary sanctions collected. The determination of the amount of a financial award is in the discretion of the SEC. As of the end of the SEC’s 2014 fiscal year, the SEC reported that it had received 10,193 tips and complaints from whistleblowers since inception of the program.

In Canada, the CRA’s OTIP will allow the CRA to pay individuals who report major international tax non-compliance, a percentage of federal tax collected as a result of the information provided. The reward amount is between 5-15% of the tax monies recovered where the tax collected exceeds \$100,000. This is, to our knowledge, the first whistleblower program of its kind in Canada to offer a financial incentive.

Both the Investment Industry Regulatory Organization of Canada and the Competition Bureau have had whistleblower programs in place for a number of years. The Mutual Fund Dealers Association launched its whistleblower program in 2014. Internationally, both the Financial Conduct Authority in

the United Kingdom and the Australian Securities and Investments Commission (ASIC) have whistleblower programs. None of these programs offer a financial incentive.

## 4. Proposed Whistleblower Program

A principal objective of a Whistleblower Program is to motivate those with inside knowledge or information that relates to possible serious breaches of Ontario securities law to come forward and share that information with the OSC. Such information might otherwise be difficult or impossible for the OSC to obtain on a timely basis. Another objective is to increase the number and efficiency of complex securities law cases investigated and brought forward by the OSC by obtaining high quality information from knowledgeable individuals. These cases could also potentially benefit from continued cooperation from an informed whistleblower throughout the investigation period. A Whistleblower Program may also motivate issuers and registrants to self-report misconduct so that they can avail themselves of the OSC's credit for cooperation program, which would not be available if the misconduct is first reported to the OSC by a whistleblower.

In order to meet these objectives, a Whistleblower Program should be structured to encourage individuals with high quality information to come forward as early as possible.

After a review of best practices from whistleblower programs adopted by the SEC and other securities regulators outside Canada, we believe that a Whistleblower Program will meet the OSC's objectives if it addresses the following key elements:

- 1. Whistleblower Eligibility** - Established criteria would define whistleblower eligibility requirements and describe the characteristics of information expected to be reported;
- 2. Financial Incentive** - A monetary incentive 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 and we would not generally expect the whistleblower to testify at the administrative proceeding;
- 4. Whistleblower Protection** - Anti-retaliation measures would be implemented and used to deter employers from retaliating against employees who provide information internally or to the OSC; and
- 5. Program Administration** - The Whistleblower Program would be administered and promoted in a manner to encourage and facilitate whistleblowers coming forward with quality information needed to support more effective enforcement of securities laws.

We believe that each of these key elements is necessary to support a successful Whistleblower Program at the OSC as discussed in more detail below.

## 5. Whistleblower Eligibility

Not all whistleblowers who provide information to the OSC would be eligible for a financial award. We have considered the necessary criteria that a whistleblower would have to meet in order to be eligible to receive a financial award.

The whistleblower must:

- be an individual;
- provide information that meets the criteria in section 5.1 below; and
- not fall into one of the categories identified in section 5.2 below that would render the whistleblower ineligible to receive a financial award under the program.

We expect whistleblowers would be either knowledgeable individuals in the employ of a market participant or individuals who have done independent analysis and have credible concerns about possible misconduct by a market participant or others. Whistleblowers may also be individuals who have knowledge about serious market misconduct because they are involved in that conduct. We are considering whether a culpable whistleblower could nonetheless qualify for a payment under the program.

### 5.1 Characteristics of Information Expected to be Reported

We would be seeking information from whistleblowers that helps us to deliver timely and effective enforcement. The information would need to meet the following eligibility criteria:

The information must:

- Be of high quality;
- Be original information, provided on a voluntary basis, that relates to a possible serious violation of Ontario securities laws that has occurred, is occurring or is about to occur; and
- Lead to the commencement of OSC administrative proceedings, which result in an enforcement outcome, including a settlement, with an order or agreement to pay total monetary sanctions of more than \$1,000,000 (excluding costs).

Each of these criteria is discussed in more detail below.

#### High quality information

Our aim is to receive high-quality original information that:

- relates to serious misconduct in the marketplace;
- is timely (misconduct that has recently occurred, is ongoing or about to occur);

- is credible and detailed, with well-organized supporting documentation;
- has the potential to stop further harm from occurring; and
- is likely to save significant time and staff resources in conducting an investigation.

The Whistleblower Program is aimed at serious securities law misconduct that could be subject to a s.127 administrative proceeding brought by the OSC. Whistleblowers may be able to provide quality tips relating to a wide spectrum of market misconduct. We are particularly focused on matters that involve:

- widespread and extensive harm to investors or the capital markets, or that provide an opportunity for extensive harm to be averted;
- particularly abusive or extensive misconduct;
- misconduct by persons occupying positions of substantial authority, responsibility or influence or who have fiduciary or other enhanced obligations; or
- misconduct that poses particularly significant risks for investors.

For illustrative purposes, we have provided some examples below of the types of cases that we believe an OSC Whistleblower Program may help us detect and bring forward and the type of whistleblower who might be the source of that information.

<b>Examples of Misconduct</b>	
Misleading financial statements	Accounting personnel may report deceptive reporting practices such as earnings manipulation or reporting of non-existent revenues.
Illegal insider trading and tipping/selective disclosure	Individuals with knowledge of pending transactions or material undisclosed facts may become aware of illegal insider trading or tipping occurring prior to the information becoming public.
Market manipulation	Individuals within issuers may become aware of activities undertaken by individuals within the organization or others outside the organization to manipulate share prices.
Illegal distributions and unregistered sales of securities	Salespeople from companies engaging in sales of securities without registration and without a prospectus may come forward as whistleblowers.
Registrant misconduct	Employees may report other employees who are failing to deal fairly, honestly and in good faith with clients, breaching their know your client and suitability obligations, providing misleading or false information and/or failing to identify and disclose conflicts of interest.

Examples of Misconduct	
Timely disclosure/ Misleading disclosure	<p>Employees may report a reporting issuer’s failure to disclose material changes. Employees may become aware of significant developments that have not been publicly disclosed on a timely basis because the reporting issuer is deliberately withholding the information because of concerns about the impact on the issuer’s share price.</p> <p>Employees may become aware of false or misleading information about the reporting issuer’s operations that is released to the public by the issuer.</p>

## Original and voluntary information

“Original information” is information or facts that the OSC does not already know about. Individuals may come to know information or facts as a result of their observations or discussions in an employment, business or social context. Facts that are publicly available do not constitute original information. However, a critical analysis of those publicly available facts may be considered original information if the analysis brings to light serious misconduct not previously known.

The information should be provided to the OSC on a voluntary basis. The information must not have been requested by Staff of the Commission or compelled under the *Securities Act*. Further, the information must not have been requested or compelled by another securities commission (i.e. a provincial securities commission or the SEC) or a self-regulatory agency (i.e. IIROC) in connection with an investigation or a review. We would encourage whistleblowers to report information on a timely basis.

## Enforcement outcome eligible for award

In order for a whistleblower to be eligible for a financial award, the information provided by the whistleblower should result in a hearing before the Commission or a settlement hearing under s.127. The matter must be concluded with the imposition of monetary sanctions or an agreed payment.

Staff would use its discretion in determining whether the whistleblower information directly led to such proceedings. Staff would consider whether the information provided by the whistleblower caused Staff to open an investigation or broaden the scope of an existing investigation, and whether the information was credible and detailed and contributed in a meaningful way, to the initiation or conduct of the investigation and the outcome. Staff would consider whether the allegations in the proceeding relate, in whole or in part, to violations of securities laws that were identified by the whistleblower in the original information submitted. This assessment would be made after the administrative matter was concluded and monetary sanctions were imposed, or after a settlement was approved by the Commission.

An enforcement outcome eligible for an award under the Whistleblower Program is one in which there would be specific monetary sanctions awarded against the named respondent(s). There would have to be an order of total monetary sanctions or settlement payment (excluding cost awards) of more than \$1,000,000. Further, the outcome would have to be final and no longer appealable. We appreciate that

in certain cases it might take some time, even years, before a matter has gone through the appeals process and is finally concluded. Nevertheless, a final decision with sanctions or payment imposed would be needed before a payment could be made to a whistleblower.

## 5.2 Ineligibility for Whistleblower Award

There are a number of circumstances in which individuals would not be eligible to receive a whistleblower award, including where the individual:

- provides information that is misleading or untrue, has no merit, or lacks specificity;
- is culpable in the conduct being reported (see the discussion below);
- provides information that is subject to solicitor-client privilege;
- provides information obtained through the course of a financial audit when engaged to provide audit services;
- has or had job responsibilities as a Chief Compliance Officer (CCO) or equivalent position or is or was a director or officer at the time the information was acquired, and acquired the information as a result of an organization's internal reporting or investigation processes for dealing with possible violations of securities laws;
- is or was employed by the Commission, a self-regulatory agency, or law enforcement, at the time the information was acquired; or
- obtains or provides the information in circumstances which would bring the administration of the OSC Whistleblower Program into disrepute.

### Culpable individuals

The OSC would accept information from an individual who provides information on matters in which he or she actively and improperly participated. Depending on the particular circumstances, we would not automatically exclude an individual with some culpability from qualifying as a potential whistleblower. However, the level of culpability will be a relevant consideration in determining whether a whistleblower award is made to the individual and the amount of the award. We specifically seek comment on this issue. Participation in the Whistleblower Program by a culpable individual would not prohibit the OSC from taking enforcement action against the individual for his or her role in the misconduct.

The argument in favour of allowing culpable whistleblowers to receive an award is that it may lead to high quality information being received. An individual who is culpable may be the best source of information about the conduct being reported. They would likely be able to provide detailed information about the possible violations of Ontario securities laws, including information about the circumstances and others involved. Receiving this type of information would allow Staff of the Commission to conduct effective and timely investigations and enforcement proceedings.

However, allowing culpable individuals to receive whistleblower awards may send an inappropriate message to the market and may harm the overall integrity of the Whistleblower Program. Further, culpable individuals may have credibility issues which could greatly reduce the value of their information. However, this issue could be mitigated through corroborating evidence prior to the decision to commence proceedings.

While excluding culpable individuals from whistleblower awards may deter these individuals from reporting to the OSC, there are other incentives for these individuals to come forward. In particular, individuals that are or have been involved in the conduct may be able to avail themselves of other incentives by self-reporting as set out in OSC Staff Notice 15-702 – *Revised Credit for Cooperation Program*. The incentives under that program may include a narrower scope of allegations against the individual, a reduction of sanctions recommended by Staff in connection with an enforcement proceeding against the individual or a no-contest settlement agreement.

We note the SEC does not provide amnesty to culpable whistleblowers under its whistleblower program but it does potentially provide them with monetary awards. However, culpability is a factor that may decrease the amount of a whistleblower’s award.<sup>3</sup> Further, for the purposes of determining whether the \$1 million threshold for payment has been satisfied, the SEC will not count any monetary sanctions that the culpable whistleblower is ordered to pay or that “are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated”. Further, if the SEC concludes that a culpable whistleblower is eligible for an award, any amount that the whistleblower or such entity pays in sanctions will not be included in the calculation of the amounts collected for the purpose of making a payment.<sup>4</sup>

### **Solicitor-client privilege and auditors’ professional obligations**

An individual would not be eligible for a whistleblower award if that person provided information that is subject to solicitor-client privilege. This exclusion recognizes the importance of solicitor-client privilege to the administration of justice.

Similarly, an individual is not eligible for a payment if that person obtained information as a result of having been engaged to provide audit services.

### **Individuals with compliance roles and those who acquire information as a result of an internal process for reporting misconduct**

We propose to exclude from eligibility the Chief Compliance Officer (CCO) (or equivalent position) and officers and directors who learn of misconduct as a result of an entity’s internal processes for dealing with potential violations of securities laws. However, not all those who learn of possible misconduct through an internal reporting process or investigation would be ineligible. For example, compliance department staff who are aware of the misconduct and observe a failure by the CCO to address it, would be able to provide information to the OSC and be considered for an award, provided all other eligibility criteria are satisfied.

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<sup>3</sup> SEC Rule 240.21F-6(b)(1)

<sup>4</sup> SEC Rule 240.21F-16

## Internal reporting

We recognize that robust internal compliance programs play a key role in protecting the integrity of the capital markets and we encourage individuals to report to their compliance personnel as a first step. We do not propose to require individuals to report conduct internally prior to providing information to the OSC. However, we would encourage individuals to do so. See further discussion in section 10.

Since one of the factors for eligibility is that information must not already be known to the OSC, a potential whistleblower may be concerned that reporting to compliance personnel instead of directly to the OSC may result in the whistleblower not meeting the eligibility criteria for the program if someone else reports directly to the OSC during the period of time the matter is being investigated by the organization. If the whistleblower subsequently reports the matter to the OSC due to a failure by the organization to respond to the matter, the information would already be known to the OSC. However, in these circumstances we would consider the timing of the initial internal reporting to determine who provided the information first. In certain circumstances, it may be possible for more than one individual to qualify as a whistleblower.

Under the SEC's Whistleblower Program, if an individual reports a matter internally and then submits the information to the SEC within 120 days, the date that the person submitted the information internally is the date that the SEC will consider in determining whistleblower eligibility. The intent is to promote individuals reporting internally while still maintaining their eligibility for a whistleblower award.

### 5.3 Declaration Required

We propose to require individuals submitting information to the OSC under the Whistleblower Program to sign a declaration relating to the eligibility requirements. The declaration would include, for example, that the information had not previously been requested of the individual by another securities commission or self-regulatory agency and that the individual is not ineligible as set out in section 5.2.

#### **Specific Consultation Questions – Whistleblower Eligibility**

- 1. Are any of the eligibility criteria or exclusions problematic? If so, which one(s) and why?**
- 2. Are there additional eligibility criteria or exclusions we should consider?**
- 3. Should individuals culpable in the conduct being reported be eligible for a whistleblower award?**

### **Specific Consultation Questions – Whistleblower Eligibility**

- 4. One of the eligibility criteria is that information provided by a whistleblower must lead to a completed enforcement outcome. Should we consider instead using an alternate trigger such as the information leading to a Statement of Allegations issued by Staff?**
- 5. Should the Chief Compliance Officer or equivalent position be ineligible for a whistleblower award?**
- 6. Do you agree that individuals should not be required to report misconduct to their organizations' internal compliance programs in order to be eligible for a whistleblower award?**

## **6. Financial Incentive**

We believe that the payment of a financial incentive is most critical to the success of the program. Whistleblowers may face negative consequences for reporting information about misconduct. In order to encourage would-be whistleblowers to come forward we believe a financial incentive should be provided if the eligibility criteria and other thresholds are met. Such a payment would recognize the personal and professional risks undertaken by speaking up about misconduct. However, we note that the amount of an award payment would be discretionary and would be recommended by a Staff committee which includes the Director of Enforcement and would be submitted for approval at the discretion of the Commission.

### **6.1 Amount of Monetary Award**

#### **Commission proceedings**

We are considering that the Commission offer an award to an eligible whistleblower of up to 15% of total monetary sanctions imposed in a s.127 administrative proceeding or a payment agreed to in a settlement before the Commission where imposed sanctions or settlement payments are more than \$1,000,000, exclusive of costs. Total monetary sanctions would include the amount of administrative penalties and disgorgement. In cases where total sanctions exceed \$10 million, the maximum amount of any award could be capped at \$1,500,000. Accordingly, the OSC Whistleblower Program would not generate whistleblower awards as large as those seen recently in the United States.

The whistleblower would not receive any award if the information leads to a s.127 administrative proceeding or settlement with total sanctions under \$1,000,000, or if the whistleblower or the information provided does not meet the eligibility criteria set out in section five of this consultation paper.

These thresholds have been designed to obtain high quality information from whistleblowers that will lead to significant enforcement outcomes in administrative proceedings brought before the Commission.

While we propose that the program only apply to administrative matters where there is a monetary penalty in excess of \$1,000,000, we are continuing to consider whether other enforcement orders should also qualify for the program.

We are also considering whether voluntary payments made by a respondent to investors that do not result from a sanction order or settlement should be included in the total amount upon which the award is based. We seek specific comment on this issue.

## **Information leading to multiple proceedings**

It is possible that whistleblower information could lead to the commencement of multiple proceedings before the Commission. The monetary sanctions or settlement payments resulting from each proceeding would be added together to determine whether the total sanctions reached the minimum threshold of \$1,000,000. If a whistleblower meets the eligibility requirements in section 5.1 and the minimum sanctions threshold has been satisfied, the whistleblower could receive an award of up to 15% of the total sanctions or settlement payments from all the Commission proceedings, subject to the award maximum of \$1,500,000.

## **6.2 Funding Whistleblower Awards**

### **Monetary award not contingent on recoveries**

Unlike the SEC and CRA programs, we are proposing that the OSC whistleblower awards would not be based on monies collected. If awards were contingent solely on successful collection of monetary sanctions, whistleblowers would not receive an award in some cases, despite having brought information to our attention that contributed to an award-eligible enforcement outcome. Staff is considering whether whistleblowers should qualify for a potential award for providing the information that led to the enforcement outcome regardless of whether monetary sanctions or settlement payments are recovered. This approach could result in less funds available for other OSC initiatives. See “Funds Held Pursuant to Designated Settlements and Orders” as discussed below.

### **Effect of awards on payments to investors**

An important objective of offering a whistleblower award is to provide sufficient incentive for would-be whistleblowers to come forward with information enabling the OSC to investigate misconduct before investors have suffered significant harm. Receiving timely information about serious misconduct can limit investor losses or result in payments to them. As a result, investors may avoid losses or receive amounts they would not otherwise receive, absent the whistleblower bringing the matter to the OSC’s attention.

When the Commission collects monetary recoveries from sanctions or settlements, its first priority is to allocate those amounts to harmed investors where doing so is practicable, notwithstanding such amounts are otherwise available for allocation to other third parties. These funds are held in an account referred to as “Funds Held Pursuant to Designated Settlements and Orders”. That account is available for other OSC initiatives such as investor education and research projects.

## Alternative sources of funding

We are proposing that the “Funds Held Pursuant to Designated Settlements and Orders” account be the source of funds for whistleblower award payments. The amount that would be available for whistleblower awards would vary from year to year and may be limited given the Commission’s priority to return recovered funds to harmed investors.

Alternatively, the Whistleblower Program could be funded through an allocation from the OSC’s annual operating budget. We seek specific comment on this issue.

### 6.3 Criteria for Determining Award Level

In order to qualify for a whistleblower award, the whistleblower would have to meet all of the eligibility requirements set out in section five “Whistleblower Eligibility”. The determination regarding the amount of the award would be discretionary and would involve a detailed assessment of each situation against established criteria.

In determining the amount of the award, we would consider a number of factors. Those factors would include the role that the whistleblower played and the extent to which the information led to a completed enforcement outcome.

The detailed factors that would be part of the assessment would include the following:	
Information	<ul style="list-style-type: none"><li>• contributed in a meaningful way to the investigation and to the outcome of the s.127 proceeding; and</li><li>• positively affected the timeliness and efficiency of the investigation.</li></ul>
Whistleblower	<ul style="list-style-type: none"><li>• how cooperative the whistleblower was during the course of the investigation;</li><li>• what steps the whistleblower had taken, if any, to report the misconduct through internal compliance systems before reporting to the OSC;</li><li>• whether the whistleblower reported the information either through internal compliance systems or to the OSC in a timely manner; and</li><li>• the level of culpability of the whistleblower in the conduct being reported.</li></ul>

This assessment would only be made after the administrative matter was concluded (including the expiration of any appeal period) and sanctions were imposed or a settlement approved.

## 6.4 Determining Whistleblower Eligibility and Award

The process for determining whistleblower awards is set out in section 9.2.

### **Specific Consultation Questions – Financial Incentives**

- 1. Are the proposed financial incentives significant enough to encourage potential whistleblowers to report misconduct?**
- 2. Are the factors listed in section 6.3 appropriate for considering the amount of a whistleblower award? What other factors should be considered, if any?**
- 3. Should the OSC propose award levels (for example 5%, 10% or 15%) instead of a general range of “up to 15%”? Should an eligible whistleblower who meets all of the terms of the program be guaranteed a minimum percentage (e.g. 5%)?**
- 4. Should the maximum amount of a whistleblower award be capped? If so, is the proposed cap of \$1.5 million appropriate?**
- 5. Should the threshold for determining a whistleblower award be based on total sanctions and payments of more than \$1 million or a different amount?**
- 6. Should voluntary compensation payments made by respondents to investors to address investor harm be included in the calculation of a whistleblower award?**
- 7. Should financial awards to whistleblowers be based solely on sanction monies and settlement payments recovered from respondents? What impact could this have on the attractiveness of the program to whistleblowers?**
- 8. Should whistleblowers be able to receive awards where the enforcement outcome is significant conduct bans, compliance reviews of firms or voluntary payments to investors, rather than monetary penalties?**
- 9. Should the OSC consider alternate methods of funding a Whistleblower Program, which could include an amount for whistleblower awards in the OSC’s annual operating budget?**
- 10. Is the potential for whistleblower reporting under an OSC Whistleblower Program a motivating factor for market participants to self-report misconduct?**

## 7. Confidentiality

In order for a Whistleblower Program to be successful, we believe that whistleblowers must have the option of keeping their identities confidential. The protection of a whistleblower’s identity would be a key feature of the program because it removes one of the principal impediments to a whistleblower who wishes to come forward but fears potential adverse consequences. We expect that whistleblowers under this proposed program would not generally be required to testify as part of a s.127 administrative proceeding.

Our review of other organizations with whistleblower programs identified that all programs offer whistleblowers some measure of confidentiality. The level of confidentiality protection provided to whistleblowers falls within a spectrum from providing a full statutory guarantee of confidentiality to simply using reasonable efforts to protect a whistleblower's identity.

After reviewing various models for confidentiality protection, we propose to adopt a policy which would provide that the OSC would use all reasonable efforts to keep confidential a whistleblower's identity (and information that could be reasonably expected to reveal the whistleblower's identity) subject to three express exceptions.

The three exceptions would be:

1. When 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;
2. When the relevant information is necessary to make Staff's case against a respondent; and
3. When the Commission provides the information to another regulatory authority, a self-regulatory organization, a law enforcement agency or other government or regulatory authorities pursuant to s.153 of the *Securities Act*.

The Commission would also have to disclose the identity of the whistleblower if ordered to do so by an appropriate authority such as a hearing panel of the Commission or under applicable freedom of information legislation.

Ideally, we believe that all reasonable efforts should be made to keep the identity of the whistleblower confidential and we would not generally require a whistleblower to testify as part of an administrative proceeding. However, for the reasons set out above, complete anonymity may be impossible in every case. We recognize that this approach and the failure to guarantee anonymity may deter some whistleblowers.

Where it is reasonably possible, the terms of confidentiality would be explained to a potential whistleblower in writing prior to the whistleblower providing any information to the Commission.

## 7.1 Anonymous Whistleblowers

We are considering whether to adopt a policy which would enable a whistleblower to remain anonymous to the OSC, at least for a period of time after providing information. Whistleblowers may be more likely to come forward and provide information to the OSC when they know that they can remain anonymous at least until they learn whether the information has resulted in an administrative proceeding. If the information results in an investigation but not a proceeding, a potential whistleblower may be reluctant to be identified to the OSC in case their identity is inadvertently disclosed or ordered to be disclosed.

In order to remain anonymous to the OSC a whistleblower would need to be represented by legal counsel. This would enable the whistleblower to report the information through legal counsel without

disclosing his or her identity. This would also enable the whistleblower to receive advice respecting the criteria the whistleblower has to satisfy in order to potentially qualify for a financial award. We would propose, however, that an anonymous whistleblower would ultimately be required to disclose his or her identity to the OSC before the OSC makes a financial award as we would have to be satisfied that the whistleblower met the eligibility requirements to be a whistleblower.

The limits of anonymity would have to be provided to the potential anonymous whistleblower's counsel in writing before the potential whistleblower provided any information to the OSC.

Accordingly under the proposed program, the OSC:

- would make all reasonable efforts to keep the identity of a whistleblower confidential;
- would not generally expect the whistleblower to testify as part of an administrative proceeding;
- may be required to reveal the identity of the whistleblower when disclosure of the whistleblower's identity is necessary to enable a respondent to make full answer and defence;
- may disclose information that could be reasonably expected to reveal the whistleblower's identity when the relevant information is necessary to make Staff's case against a respondent;
- may disclose the identity of a whistleblower to another regulatory authority, a self-regulatory organization, a law enforcement agency or other government or regulatory authority when the Commission is satisfied that it is in the public interest to do so;
- would disclose the identity of a whistleblower where ordered to do so by an appropriate authority including the Commission;
- would provide a potential whistleblower with a copy of its policy respecting the confidentiality of whistleblowers in advance of the whistleblower providing the OSC with information where it is reasonably possible;
- would receive information from an anonymous whistleblower if the whistleblower is represented by counsel and communicates through that counsel;
- would provide counsel with the requirements for whistleblower eligibility and the OSC's policy respecting anonymous whistleblowers in advance of a whistleblower providing any information; and
- before making a financial award, an anonymous whistleblower would be required to provide his or her identity to the OSC to ensure he or she satisfies the requirements for eligibility for a financial award.

### Specific Consultation Questions - Confidentiality

1. **Should whistleblowers be able to remain anonymous to the OSC when they provide information?**
2. **Are there other steps we could take to provide whistleblowers with greater comfort as to anonymity?**

## 8. Whistleblower Protection

To encourage whistleblowers to come forward and report possible securities law violations, we would seek to have measures put in place to protect whistleblowers from retaliation by their employers. We intend to pursue discussions with the Ontario government to consider the addition of three provisions to the *Securities Act* that would provide a meaningful deterrent against retaliation by employers.

The three provisions are:

1. A provision making it a violation of securities law to retaliate against a whistleblower thereby permitting Staff to prosecute the employer through a proceeding under s.127;
2. A provision giving a whistleblower a civil right of action against an employer who violates the anti-retaliation provision; and
3. A provision to render contractual provisions designed to silence a whistleblower unenforceable.

As described in greater detail below, recommendations for these provisions were drawn from consideration of the SEC and ASIC whistleblower regimes, as well as, anti-retaliation provisions found in other Canadian statutes. We believe that having anti-retaliation measures in place is a key element necessary to support an effective Whistleblower Program.

### 8.1 Prohibition Against Retaliation

To encourage whistleblowers to provide the Commission with high-quality information while addressing fears of retaliation, we are considering the inclusion of a prohibition against retaliation in the *Securities Act*. Similar prohibitions exist in a number of Ontario statutes, including labour and employment-related statutes<sup>5</sup> and statutes implementing other regulatory regimes.<sup>6</sup> In those statutes

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<sup>5</sup> See e.g., *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 74; *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 50; *Human Rights Code* (Ontario), R.S.O. 1990, c. H. 19, s. 8.

unrelated to labour and employment, protections are provided for employees who report information or provide documents in good faith, make disclosures in the context of an investigation or give evidence in a proceeding, or who otherwise “seek the enforcement of the act”. Similar prohibitions against retaliation or reprisals exist in public sector whistleblower legislation, implemented federally and in many provinces.<sup>7</sup> The *Criminal Code* makes it an offence for an employer to retaliate against an employee who provides information about offences being committed to individuals involved in the enforcement of federal or provincial law.<sup>8</sup> An element of the Competition Bureau’s Whistleblower Program is a provision of the *Competition Act* that prohibits employers from taking retaliatory action against employees who report employer misconduct or refuse to engage in illegal acts.<sup>9</sup>

The provisions implementing the whistleblower programs of both the SEC and ASIC also prohibit retaliation against whistleblowers. The *Securities Exchange Act* makes it a violation of the Act to “discharge, demote, suspend, threaten, harass...or in any other manner discriminate against, a whistleblower in the terms and conditions of employment” because the whistleblower provided information to the SEC, assisted in an investigation or testified against the employer or made disclosures required under *Sarbanes-Oxley*.<sup>10</sup> In Australia, the *Corporations Act* makes it a criminal offence to victimize a whistleblower for making a protected disclosure.<sup>11</sup>

## 8.2 Enforcement of the Retaliation Prohibition

We envision two avenues for enforcing the prohibition against retaliation in the *Securities Act*:

1. enforcement by Staff in a s.127 proceeding; and
2. enforcement by the whistleblower through a statutory civil right of action.

Under existing Ontario statutes containing prohibitions on retaliating against whistleblowers, victims have the right to file a complaint with the Ontario Labour Relations Board (the OLRB). We think deterrence against retaliation would be greater if the anti-retaliation prohibitions included in the *Securities Act* were enforced by Enforcement Staff who investigated the misconduct uncovered as a result of the whistleblower’s disclosure.

Retaliation could be the subject of a s.127 proceeding brought by Staff. In 2014, the SEC settled its first enforcement action involving the anti-retaliation provisions under 21F(h)(i) of the *Securities Exchange Act*. The settlement related to an action against Paradigm Capital Management Inc. which involved an investigation into trading without the appropriate client disclosure and consent, as well as retaliation against the employee who reported the misconduct to the SEC.<sup>12</sup>

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6 See e.g., *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006 c. 29, s. 46; *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, s. 70; *Retirement Homes Act, 2010*, S.O. 2010, c. 11, s. 115; *Tobacco Control Statute Law Amendment Act, 2005*, S.O. 2005, c. 18, s. 9(4).

7 *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46, s. 19; *Public Interest Disclosure Act1*, S.S. 2011, c. P-38.1, s. 36; *Public Interest Disclosure Act 2012*, S.N.B., c.112, ss.31-32

8 R.S.C. 1985, c. C-46, s. 425.1.

9 *Competition Act*, R.S.C, 1985, c. C-34, s.66.2

10 *Securities Exchange Act of 1934*, s 21F(h).

11 *Corporations Act 2001* (Cth) Part 9.4AAA, 1317AC.

12 *Paradigm Capital Management*, Exchange Act Release No. 72393, 2014 SEC Lexis 2104 (June 16, 2014).

We expect that Staff could pursue allegations of securities law violations and retaliation in a single proceeding in the same manner. If such allegations were proven in a s.127 proceeding, the Commission could order, among other things, that the employer and/or individuals review and amend workplace policies and practices, be reprimanded, resign positions held as directors or officers and that the retaliation be the subject of an additional penalty of up to \$1 million.

Another key element of the anti-retaliation measures implemented by ASIC and the SEC is the ability of the whistleblower to bring a civil action against an employer. Just as other statutory rights of action in the *Securities Act* enhance deterrence of other types of violations of the *Act*, so too would a statutory right of action for whistleblowers deter retaliation. A provision enabling a private right of action in the *Securities Act* and providing for remedies similar to those available under the *Securities and Exchange Act*<sup>13</sup> (which include reinstatement, two times the amount of back pay owed and costs), would also give the whistleblower access to broader remedies than those available to complainants before the OLRB, whose powers are limited to reinstatement and reimbursement for lost wages, but do not include punitive damages.<sup>14</sup>

### 8.3 To Whom Should the Retaliation-Protections Apply?

Anti-retaliation protections should be available to both individuals who report possible violations of the *Securities Act* “up the ladder” through their employer’s internal compliance reporting system and individuals who report directly to the OSC. Whether a whistleblower who reports internally rather than to the SEC is entitled to the anti-retaliation protections in the *Securities Exchange Act* is a live issue in the United States. Some federal district courts have taken an expansive view, finding that one need not report to the SEC in order to be entitled to whistleblower protections.<sup>15</sup> One Circuit Court of Appeal issued a ruling that would narrow the scope of the protections to only those who make a disclosure to the SEC.<sup>16</sup> The SEC has since attempted to clarify that the expansive view should be taken and that anti-retaliation protections should be available to those who report internally as well as to the SEC.<sup>17</sup>

In Canada, the Supreme Court of Canada has held that the retaliation prohibition in s.425.1 of the *Criminal Code* only applies where whistleblower information is given to a law enforcement body, but does not apply where information is communicated up the chain of command.<sup>18</sup> To provide the strongest protection to whistleblowers under the *Securities Act*, we would recommend that the prohibition against retaliation encompass whistleblowers who report wrongdoing to the OSC as well as through internal reporting procedures.

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13 *Securities and Exchange Act of 1934*, s.21F(h)(1)(B)-(C)

14 *Henderson v. Marquest Asset Management Inc.*, 2010 CanLII 34120 (ON LRB) (punitive damages are not available in claims before the OLRB).

15 See e.g., *Rosenblum v. Thomson Reuters (Markets) LLC* 13 Civ 2219 S.D.N.Y. (disclosure to the SEC was not required in order to qualify for anti-retaliation protection).

16 See e.g., *Asadi v. G.E. Energy (USA) LLC* F.3d 620 (5th Cir. 2013).

17 The SEC filed an amicus brief in *Liu v. Siemens AG* an appeal to the Second Circuit Court of Appeals setting out its view that Rule 21F-2 protects employee who blow the whistle regardless of whether they report the information to the SEC.

18 *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] S.C.J. No. 72 at para. 29.

## 8.4 Rendering Unenforceable Whistleblower Silencing Provisions

An issue related to retaliation is any measure implemented by an employer that is designed to silence whistleblowers from reporting wrongdoing to securities regulators. These measures may take the form of confidentiality agreements, separation agreements and employment agreements, containing confidentiality clauses or disparagement clauses that condition certain incentives on not reporting activities to regulators. The SEC launched an investigation into such practices at a firm in March of 2014 after information came to light from a whistleblower from one of the nation's largest government contractors. The SEC sought and obtained the disclosure of hundreds of employee agreements following claims that “employees seeking to report fraud had to sign confidentiality statements barring them from disclosing the allegations to anyone, including federal prosecutors and investigators”.<sup>19</sup>

In May of 2014, Sean McKessy, Chief of the Office of the Whistleblower of the SEC warned in-house counsel against preparing agreements containing these provisions without providing exceptions for regulatory reporting. McKessy suggested that the SEC could enforce this position using its power to bar lawyers from practicing before it.

Although pronouncements like McKessy's will hopefully discourage the use of agreements to impede whistleblowers, the OSC could send a clear and strong message to discourage the use of these contractual provisions. For example, in Australia, the *Corporations Act* provides that no contractual or other right may be enforced against a whistleblower on the basis of the disclosure of a regulatory violation to the authorities.<sup>20</sup> We are considering whether our anti-retaliation provisions should expressly provide that provisions of any agreement designed to impede or discourage whistleblowers from reporting possible violations of securities laws to the authorities not be enforceable.

### **Specific Consultation Questions – Whistleblower Protection**

- 1. Do our proposed anti-retaliation provisions provide sufficient protection?**
- 2. Should culpable whistleblowers also potentially be entitled to anti-retaliation protection?**
- 3. What other means should the OSC consider to pre-empt measures taken by employers to silence whistleblowers?**

## 9. Program Structure

### 9.1 Segregation of Whistleblower Function

To maintain confidentiality and ensure whistleblowers are dealt with in accordance with the terms of the program, we propose setting up a separate intake unit within the Enforcement Branch to deal with

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<sup>19</sup> Higham, Scott, Washington Post, “SEC has opened investigation into KBR, whistleblower’s lawyer says” March 10, 2014.

<sup>20</sup> *Corporations Act 2001* (Cth) Part 9.4AAA, s. 1317AB.

whistleblower submissions and administration of the program. Following the launch of a Whistleblower Program, the Inquiries & Contact Centre would continue to receive information that would not be eligible for the Whistleblower Program.

## 9.2 Process for Determining Whistleblower Awards

The determination to make a whistleblower award and the amount of a whistleblower award would be wholly in the discretion of the Commission, regardless of whether a person satisfies the criteria set out in this consultation paper.

The process we envision for determining whistleblower eligibility and the amount of an award would be as follows:

- The whistleblower intake unit would decide as an initial matter whether a person appears to qualify as a whistleblower under the program;
- The information would be communicated to Enforcement Staff who would decide whether to launch an investigation and, if so, would carry out the investigation in the usual way, with or without assistance from the whistleblower;
- Staff would make a decision whether to commence an administrative proceeding and Staff would not generally disclose to the Panel hearing a matter that a person may qualify for a whistleblower award unless such person is a witness in the proceeding;
- At the conclusion of any Commission administrative proceeding brought forward based on whistleblower information, Enforcement Staff would prepare a recommendation containing an analysis of: i) the eligibility of the whistleblower for an award; and ii) the amount and effectiveness of assistance provided by the whistleblower based on factors such as those set out in section 6.3;
- A Staff committee, including the Director of Enforcement, (the Committee) would review the Staff recommendation. Based on the information, the Committee would exercise its discretion and make a recommendation whether the whistleblower was eligible for a financial award, whether an award should be made and, if so, the proposed amount of the award;
- The Committee's recommendation would be provided to the Commission;
- The Commission would, in its discretion, approve, reject or modify the amount of the recommended award and, if applicable, authorize payment. The OSC would not give reasons for its determination; and
- Any amount awarded to a whistleblower would be publicly disclosed with or without the identity of the whistleblower, as circumstances dictate.

Any determination made with regard to a whistleblower's eligibility for a financial award, whether an award should be made, and the amount of an award would be solely in the discretion of the OSC. Staff is of the view that the determination would not be appealable by the potential whistleblower.

## 9.3 Whistleblower Submission and Claim Procedures

We would expect whistleblowers to submit information to the OSC using a form provided on the OSC's website. The onus would be on the whistleblower to identify that they are submitting information as a whistleblower for eligibility consideration and to self-report that they satisfy the eligibility requirements to be a whistleblower. As discussed above, whistleblowers who wish to remain anonymous would need to be represented by counsel.

## 9.4 Communications with Whistleblowers

It is important for the OSC to actively promote any OSC Whistleblower Program to the public in order to reach potential whistleblowers. Our outreach strategy would include prominence on the OSC website and promotion at OSC external events, along with clear communication of program parameters to manage expectations of whistleblowers and to encourage submissions satisfying the established criteria discussed in section five of this consultation paper.

Communications by Staff with whistleblowers in response to a specific whistleblower submission would be limited to ensure we comply with s. 16 of the *Securities Act* and OSC Staff Notice 15-703 - *Guidelines for Staff Disclosure of Investigations*. If no further action was to be taken on the whistleblower's information, or if a decision was made not to proceed with the matter, Staff would communicate that decision to the whistleblower. However, if the information led to an investigation, this fact would not be communicated to the whistleblower, unless the whistleblower was made aware of the investigation due to continued whistleblower cooperation in the matter. Otherwise, communication with the whistleblower would be limited until there was a public announcement of a notice of hearing, statement of allegations or settlement agreement.

Thereafter, communication with a whistleblower would be in the discretion of Staff. No further communication with a whistleblower would be required or permitted until a final determination was made whether to make a whistleblower award to the whistleblower.

# 10. Impact of OSC Program on Internal Compliance Programs

We recognize the importance of effective internal compliance systems at issuers and registrant firms to identify, correct and enable self-reporting of misconduct as a first line of action in promoting compliance with securities laws for the ultimate benefit of investors and our markets.

When the SEC was developing its whistleblower program, companies in the United States raised concerns that paying for whistleblower tips could result in employees circumventing the organization's internal reporting processes in order to gain financial awards from the SEC.<sup>21</sup> We expect a similar

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<sup>21</sup> Comments on Proposed rules for Implementing the Whistleblower Provision of Section 21F of the *Securities Exchange Act of 1934*, online: US Securities and Exchange Commission <<http://www.sec.gov/comments/s7-33-10/s73310.shtml>>

concern to be identified by issuers and registrant firms in Ontario with regard to an OSC Whistleblower Program. We heard these concerns from one commenter in relation to OSC Staff Notice 15-704.<sup>22</sup>

While this is an understandable concern, a U.S. study found that the financial incentives historically offered in the U.S. through the *qui tam* provisions of the *False Claims Act*<sup>23</sup> (prior to the launch of the SEC's Whistleblower Program) have had "no negative impact whatsoever on the willingness of employees to utilize internal corporate compliance programs or report violations to their managers".<sup>24</sup> Rather, it appears that whether an individual reports internally first (or at all), or reports to a regulator or other enforcement authority, depends on many factors, including the individual's perception as to whether the matter will likely be appropriately addressed internally and whether the individual perceives a risk of retaliation for coming forward.<sup>25</sup> As well, the SEC has recently reported that of the whistleblower award recipients to date who were current or former employees, 80% reported internally first.<sup>26</sup>

An OSC Whistleblower Program would not be intended to undermine internal reporting systems and whistleblowers would be encouraged to report their concerns internally first, in appropriate circumstances.<sup>27</sup> However, the OSC program would be available as a means for an individual to report in circumstances where the individual has concerns with the efficacy of the internal reporting system or where an individual fears retaliation as a result of raising concerns within the organization.

If a whistleblower reports misconduct through internal channels, failure by issuers and registrant firms to then promptly and fully report serious breaches of Ontario securities law to Staff, or continuation of the inappropriate conduct or failure to correct the problems, may result in no credit for cooperation when the issuer or registrant firm is ultimately brought to account for the misconduct. Further, this would be considered an aggravating factor in Staff's sanctions recommendations in any administrative proceeding. We encourage issuers and registrant firms to review their internal reporting processes to ensure they are robust and effective.

## 11. Legislative Changes Required

We are considering establishing the OSC Whistleblower Program through the adoption of an OSC policy. It is contemplated that implementation of the program would require legislative amendments to provide anti-retaliation protection for whistleblowers as discussed earlier in this paper, the timing or likelihood of which are uncertain.

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22 15-704 - Request for Comments on Proposed Enforcement Initiatives, online: Ontario Securities Commission – Securities Law & Instruments <<http://www.osc.gov.on.ca/en/33789.htm>>

23 Under the *False Claims Act* in the U.S., a *qui tam* action refers to a lawsuit initiated by a private litigant against an individual or business that is defrauding the government to recover funds on the government's behalf and retain a prescribed portion of the recovery.

24 National Whistleblowers Center, Impact of Qui Tam Laws on Internal Corporate Compliance: National Whistleblowers Center Report to the Securities and Exchange Commission, online: National Whistleblowers Center <[http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=1169&Itemid=1167](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1169&Itemid=1167)>

25 Ibid. The study noted above found that "the overwhelming majority of employees voluntarily utilize internal reporting processes, despite the fact that they were potentially eligible for a large reward under the *False Claims Act*."

26 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program, online U.S. Securities and Exchange Commission <http://www.sec.gov/about/offices/owb/annual-report-2014.pdf>.

27 We are considering that the steps taken by a whistleblower to report internally may be one of the factors used in supporting a higher award level.

## 12. How to Provide Feedback

We welcome feedback from the public on the proposed framework for an OSC Whistleblower Program. In addition to seeking written comments, we will be considering other means to engage with stakeholders during the comment period. Information regarding such engagement will be made available on the OSC's website during the comment period.

In addition to any general comments, we are specifically asking the following questions:

### **Consultation Questions – General**

- 1. Do you think the OSC should proceed with an OSC Whistleblower Program on the terms as described?**
- 2. Does this program provide sufficient incentives for potential whistleblowers to come forward with information regarding possible serious breaches of Ontario securities laws?**
- 3. Are the whistleblower protections described in this paper sufficient? If not, why not?**
- 4. Are there any other issues that we have not identified that should be considered?**

### 12.1 Written Comments

You must submit your comments in writing within 90 days of the date of this consultation paper by May 4, 2015. If you are sending your comments by email, you should also send an electronic file containing the submissions using Microsoft Word. All comments received during the comment period will be made publicly available on the OSC website at [www.osc.gov.on.ca](http://www.osc.gov.on.ca) for transparency of the policy-making process.

Please address and send your comments to:

The Secretary  
Ontario Securities Commission  
20 Queen Street West  
22<sup>nd</sup> Floor  
Toronto, Ontario M5H 3S8  
Fax: 416-593-2318  
Email: [comments@osc.gov.on.ca](mailto:comments@osc.gov.on.ca)

# APPENDIX A - Comparison of Key Elements by Organization

Source: Information obtained from organizations' websites

	Whistleblower (WB) Eligibility	Financial Incentive	Confidentiality	WB Protection	Program Administration
OSC (proposed)	Certain individuals not eligible to be WBs. Seek high quality, original information.	Yes, to eligible WBs. Up to 15% of total monetary sanctions >\$1 million (discretionary).	Keep identity confidential until required to disclose. All reasonable efforts/no guarantee.	Anti-retaliation: prohibition against retaliation by employer and right of civil action by WB.	Separate intake office within Enforcement.
SEC	Certain individuals not eligible to be WBs. Seek high quality, original information.	Yes, to eligible WBs. 10-30% of monies collected on sanctions > \$1 million.	Statutory protection for a WB's identity. Keep confidential until required to disclose.	Anti-retaliation: prohibition against retaliation by employer and right of civil action by WB.	Separate Office of the WB within the Division of Enforcement.
Financial Conduct Authority (UK)	Seek "hard evidence", if the WB has it. Program designed for employees who want to report concerns relating to their employer and is relevant to the functions of the FCA.	No, considered but rejected.	Keep confidential but disclose if required to do so by law or otherwise necessary to meet statutory objectives.	An employee has an administrative recourse to an employment tribunal.	Designated specialists within Enforcement and Financial Crime Division.
ASIC	To be protected as a WB, must meet eligibility criteria which include: must be an officer or employee of the company reported on and WB must identify themselves to ASIC (cannot remain anonymous).	No	Information provided to ASIC in confidence is generally protected by the ASIC Act and remains confidential except where that Act permits its disclosure.	Whistleblowers falling within statutory definition entitled to certain immunities and protections under the <i>Corporations Act 2001</i> . ASIC may investigate allegations of "victimization".	Within Enforcement division.

	<b>Whistleblower (WB) Eligibility</b>	<b>Financial Incentive</b>	<b>Confidentiality</b>	<b>WB Protection</b>	<b>Program Administration</b>
IIROC	Where IIROC has jurisdiction over the individuals involved.	No	Treat information in confidence to the fullest extent possible, but no guarantee.	No specific protection.	Whistleblower Team.
MFDA	Typically employees who raise concerns about potential wrongdoings in their workplaces (subject to MFDA jurisdiction).	No	Maintain confidentiality of WB's identity and information to the fullest extent possible, but no guarantee.	No specific protection.	Whistleblower Team.
Competition Bureau of Canada	Culpable WBs are dealt with under the Bureau's separate immunity and leniency programs.	No	Statutory guarantee of confidentiality, subject to limited exceptions.	Anti-retaliation: Act prohibits employers from retaliating against a WB employee.	Designated specialists within the Criminal Matters Branch.
Canada Revenue Agency (OTIP)	Certain individuals not eligible to be WBs.	5-15% of federal tax collected, where tax collected exceeds \$100,000	Will protect identity of informant to the fullest extent possible under law.  Information is collected under authority of the federal tax legislation and covered by confidentiality provisions of that legislation.	No specific protection.	Unit within Offshore Compliance Division.



The OSC Inquiries & Contact Centre operates from  
8:30 a.m. to 5:00 p.m. Eastern Time, Monday to Friday,  
and can be reached on the Contact Us page of

**[osc.gov.on.ca](http://osc.gov.on.ca)**

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