

OSC Notice and Request for Comment
Proposed OSC Policy 15-601 - Whistleblower Program

October 28, 2015

The OSC is publishing the Proposed OSC Policy 15-601 – Whistleblower Program (the Proposed Policy) for a 60 day comment period.

PURPOSE

The purpose of the Proposed Policy is to describe a Whistleblower Program (the Program) which is designed to encourage individuals to report and submit to the Ontario Securities Commission (the Commission) information on serious securities- or derivatives-related misconduct. Under the Program, individuals who meet certain eligibility criteria and who voluntarily submit information to Commission Staff (Staff) regarding a breach of Ontario securities law, may be eligible for a financial incentive (whistleblower award) if it is determined that the information submitted was of meaningful assistance to Staff in investigating the matter and obtaining a decision of the Commission under section 127 of the *Securities Act* (Ontario), RSO 1990, c S.5, as amended (the Act) or section 60 of the *Commodity Futures Act* (Ontario) RSO 1990, c C.20, as amended (the CFA), that results in an order for monetary sanctions and/or voluntary payments totalling \$1,000,000 or more¹. The Program has the potential to increase our effectiveness in vigorously enforcing Ontario securities laws, resulting in greater deterrence against serious misconduct in the marketplace.

The Commission believes that whistleblowers could be a valuable source of specific, timely and credible information for enforcement actions concerning a wide variety of market misconduct, particularly in the areas of accounting and financial reporting, insider trading, market manipulation and general misrepresentation in corporate disclosure.

The Proposed Policy sets out: the Program proposed to be adopted by the Commission; the practices expected to be generally followed in administering the Program in accordance with Ontario securities law; the nature of the information that may be eligible for the payment of a whistleblower award and the criteria that would make an individual eligible for a whistleblower award; and the factors considered in determining eligibility for and the amount of a whistleblower award.

BACKGROUND AND SUMMARY OF THE PROPOSED POLICY

Staff published OSC Staff Consultation Paper 15-401: *Proposed Framework for an OSC Whistleblower Program* (the Staff Consultation Paper) on February 3, 2015 for a 90 day comment period (the Consultation Period). In response, Staff received 17 comment letters. The comments received were from a range of stakeholder groups, including issuers, issuers' counsel, registrants, investor and whistleblower advocates, as well as academics. Staff has considered the

¹ Definitions of monetary sanctions and voluntary payments are set out in the Proposed Policy.

comments received and thanks all the commentators. A list of commentators is attached in Appendix A to this Notice.

In addition to the formal comment process, Staff also held a public Whistleblower Roundtable on June 9, 2015 (the Roundtable).

Overall, stakeholder feedback was supportive of the Commission proceeding with the Program or supportive of the underlying goal of deterring and detecting misconduct. Some commentators had concerns with particular aspects of the proposed Program and suggested measures to improve its effectiveness. One commentator was particularly averse to the Program as proposed in the Staff Consultation Paper. The commentator expressed concern that the Program draws the line between the goals of enforcement and government intrusion into the affairs of reporting issuers in the wrong place.

Most of the comments received focused on the following themes:

- Whistleblower eligibility – whether Chief Compliance Officers (CCOs) or those with an equivalent function, culpable whistleblowers, or whistleblowers who provide privileged information to Staff should be considered eligible for a financial award
- Financial incentive – whether the proposed award was sufficient to incentivize whistleblowers to come forward in light of the personal risks that these individuals may encounter
- Whistleblower confidentiality – would we be able to provide adequate protection to whistleblowers given limitations such as our statutory obligations for disclosure in contested proceedings
- Anti-retaliation measures – the importance of striking the right balance between protecting legitimate whistleblowers and market participants’ concerns about frivolous reports, culpable whistleblowers and employers’ ability to address their conduct
- Impact of the Program on internal compliance systems – the importance of designing a program that would promote the use of a market participant’s internal compliance system

After considering the comments received and feedback from the Roundtable, the Proposed Policy reflects changes to certain aspects of the Program that were set out in the Staff Consultation Paper. These changes are highlighted in the section below titled “Summary of Changes to the Staff Consultation Paper”.

Below is a summary of the key components of the Program. This is not a complete list of all of the components of the Proposed Policy.

(i) Procedure for submitting original information

The Proposed Policy sets out the steps to be followed in order to submit original information to the Commission.

Once that information is received, Staff may request that a whistleblower provide additional information, for example, explanations and other assistance to assist Staff in evaluating and using the information submitted by the whistleblower. However, Staff does not expect a whistleblower to obtain documents or other things that are not in the whistleblower’s possession.

A whistleblower may submit information anonymously, however they may only do so if they are represented by counsel and their counsel follows the required steps. In addition, before a payment of a whistleblower award, the Commission would generally require an anonymous whistleblower to provide the Commission with his or her identity, and any additional information necessary to enable the Commission to verify that the whistleblower satisfies the eligibility requirements.

All information submitted by a whistleblower to the Program is confidential. The Commission expects that a whistleblower would not disclose any information provided to the Program except to the whistleblower's legal counsel, if any.

The Proposed Policy notes that Staff may only provide limited information about the status of a matter to a whistleblower because of Staff's duty to comply with section 16 of the Act and OSC Staff Notice 15-703 – *Guidelines for Staff Disclosure of Investigations*. The Proposed Policy describes the circumstances in which Staff may provide limited information on the status of a matter to a whistleblower.

The Commission encourages whistleblowers who are employees to report potential violations of Ontario securities law in the workplace in accordance with their employer's internal compliance protocols. However, the Commission does not require whistleblowers to do so, recognizing there may be extenuating circumstances for the whistleblower that might otherwise impede his or her reporting to an internal compliance and reporting mechanism.

(ii) *Whistleblower Protections: Confidentiality, Anti-Retaliation and Whistleblower Silencing*

Staff will make all reasonable efforts to keep the identity of a whistleblower, and information that could reasonably be expected to reveal the identity of a whistleblower, confidential subject to the express exceptions set out in the Proposed Policy. In response to comments received, the Proposed Policy confirms that Staff will not disclose the whistleblower's identity, or information that could reasonably be expected to reveal the whistleblower's identity, to any of the entities listed in section 153 of the Act or section 85 of the CFA without the whistleblower's consent.

Staff intends to recommend legislative amendments to the Act which would provide protection to whistleblowers against retaliation by their employer. These measures were described in the Staff Consultation Paper.

As stated in section 13 of the Proposed Policy, the Commission expects that employers will not: discipline, demote, terminate, harass or otherwise retaliate against a whistleblower who reports information about a reasonably held belief that there has been, is ongoing, or will be, a violation of Ontario securities law to an internal reporting and compliance mechanism or to the Commission or another securities regulatory or law enforcement authority; or take action through contractual agreement or otherwise, to impede a whistleblower from reporting a reasonably held belief that there has been, is ongoing, or will be, a violation of Ontario securities law to the Commission or another securities regulatory or law enforcement authority.

Further, in Staff's view, under section 127 of the Act or section 60 of the CFA, Staff may prosecute:

- an employer's retaliatory actions against an employee who reports to an internal compliance and reporting mechanism or to the Commission or another securities regulatory or law enforcement authority; and
- an employer's actions taken through contractual agreement or otherwise to impede an employee from reporting to the Commission or another securities regulatory or law enforcement authority.

In the Staff Consultation Paper, Staff specifically sought comment on whether culpable whistleblowers should be entitled to protection from retaliatory actions by an employer. Many commentators were of the view that culpable whistleblowers should not be eligible in these circumstances. If a whistleblower reports to the Commission regarding a violation of Ontario securities law in which the whistleblower is complicit, Staff may elect not to prosecute any disciplinary action taken against the whistleblower by his or her employer.

(iii) Whistleblower Eligibility

The Proposed Policy sets out the type of information that the Commission expects would lead to award eligibility for a whistleblower. In particular, the information should relate to a serious violation of Ontario securities law and be: original information; voluntarily submitted; of high quality; and contain sufficient timely, specific and credible facts relating to the alleged violation of Ontario securities law; and of meaningful assistance to Staff of the Commission in investigating the matter and obtaining an award eligible outcome.

An award eligible outcome is defined in the Proposed Policy as meaning a Commission order made under section 127 of the Act or section 60 of the CFA, including without limitation an order made in connection with the approval of a settlement, that results in the imposition of total monetary sanctions against, and/or the making of voluntary payments by, one or more respondents in an amount of \$1,000,000 or more. In addition, the appeal period must have expired or the right to appeal must have been exhausted.

The Proposed Policy also sets out the categories of individuals who are ineligible for a whistleblower award, and exceptions to those categories.

In accordance with the Proposed Policy, a whistleblower who is complicit in the violation of Ontario securities law reported on by the whistleblower may be eligible for a whistleblower award. However, the Commission does not grant immunity from prosecution for a whistleblower who is complicit in the violation of Ontario securities law reported. The provision of information to the Commission by a culpable whistleblower would not preclude the Commission from taking enforcement action against the whistleblower for the whistleblower's role in the violation of Ontario securities law.

(iv) Whistleblower Awards

To receive a whistleblower award, the Commission generally expects that a whistleblower would have voluntarily provided original information that would have been of meaningful assistance to Staff in an administrative proceeding under section 127 of the Act or section 60 of the CFA that resulted in an award eligible outcome following a hearing or a settlement.

If there is an award eligible outcome, the Commission would pay an eligible whistleblower a

whistleblower award of between 5 and 15% of the total monetary sanctions imposed and/or voluntary payments made. If the total monetary sanctions imposed and/or voluntary payments made in a proceeding, or multiple related proceedings is equal to or greater than \$10,000,000, the maximum amount of any whistleblower award is \$1,500,000, unless the Commission collects monetary sanctions and/or voluntary payments in respect of that proceeding in an amount equal to or greater than \$10,000,000, in which case the whistleblower award would not be limited to \$1,500,000 and the whistleblower may receive a whistleblower award of between 5 and 15% of the monetary sanctions and/or voluntary payments collected from that proceeding up to a maximum of \$5,000,000.

At the conclusion of an administrative proceeding under section 127 of the Act or section 60 of the CFA, Staff would prepare a recommendation containing an analysis of the eligibility of a whistleblower for an award, including an evaluation of the information provided and the amount and effectiveness of assistance provided by the whistleblower. A Staff Committee, including the Director of Enforcement, would review the Staff recommendation and then provide its recommendation to the Commission regarding whether the whistleblower is eligible for an award and a recommended award amount.

The Commission has the discretion to ultimately determine award eligibility and the amount. If the Commission determines that the whistleblower is eligible, the discretion to determine an award remains within the 5 to 15% range. The Commission's determination to grant a whistleblower award and any amount awarded to a whistleblower would not be subject to appeal.

A whistleblower award would only be made following the expiry of a respondent's right to appeal and/or the conclusion of any appeal arising out of the proceeding brought based on the information provided by the whistleblower.

The Proposed Policy contains additional information concerning criteria for determining the amount of a whistleblower award, including factors that may increase or decrease the amount within the 5 to 15% range.

ANTICIPATED COSTS AND BENEFITS

The Commission believes investors and the capital markets would be the major beneficiaries of the Program.

The Commission believes the Proposed Policy would create appropriate incentives for the individual or entity with the most specific, timely and credible information to report to the Commission concerning serious misconduct that may otherwise go undetected. This would support the Commission's mandate pursuant to the purposes of the Act: investor protection; and maintaining fair and efficient capital markets and confidence in capital markets. Due to the Proposed Policy's potential effect on Staff's ability to identify and pursue misconduct, the Commission believes the Proposed Policy would result in more efficient and effective regulation and direct benefits to investors. In addition, the Proposed Policy may deter misconduct, and may also encourage self-reporting of misconduct.

Since the Proposed Policy is focused on whistleblowers who voluntarily report misconduct, the Proposed Policy does not impact issuers directly. During the Consultation Period, Staff received comments noting issuer concerns that the Program could undermine internal compliance systems by creating an incentive for employees to report to the Commission rather than through available

internal processes. The Commission recognizes 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. The Proposed Policy reflects this recognition and has been drafted with a view to incentivize robust compliance systems.

The internal reporting provisions at section 16 of the Proposed Policy expressly state that the Commission encourages whistleblowers who are employees to report potential violations of Ontario securities law in the workplace in accordance with their employer's internal compliance protocols. However, the Commission does not require whistleblowers to do so, recognizing there may be extenuating circumstances for the whistleblower that might otherwise impede his or her reporting to an internal compliance and reporting mechanism.

Whistleblowers are incentivized to report internally by two factors. First, whether a whistleblower participated in internal compliance systems by reporting the possible securities law violation through an internal compliance and reporting mechanism before or at the same time as reporting to the Commission is a factor that may increase the amount of a whistleblower award. Second, Staff recommends that the legislative amendments referred to above would be available for whistleblowers irrespective of whether they report internally or to the Commission.

SUMMARY OF CHANGES TO THE PROGRAM

In response to the comments Staff received during the Consultation Period, the Proposed Policy reflects changes to certain aspects of the Program described in the Staff Consultation Paper and which are reflected in the Proposed Policy as follows:

(i) CFA Proceedings

The Staff Consultation Paper sets forth that the Program would be applicable to whistleblowers who report serious misconduct that results in administrative proceedings or a settlement heard by the Commission under section 127 of the Act. The Proposed Policy adds that proceedings under section 60 of the CFA are also eligible, with the same criteria as with section 127 proceedings. As a result, the Proposed Policy has added references to the CFA where relevant.

(ii) Confidentiality

In the Staff Consultation Paper, Staff listed three exceptions to confidentiality:

- (a) when Staff is required to make disclosure of the whistleblower's identity in connection with a section 127 administrative proceeding in order to permit a respondent to make full answer and defence;
- (b) when the relevant information is necessary to make Staff's case against a respondent; and
- (c) when the Commission determines that it is necessary to accomplish the purposes of the Act to disclose the information to any of the regulatory authorities listed in section 153 of the Act.

Section 11 of the Proposed Policy does not include the second exception under (b) “when the relevant information is necessary to make Staff’s case against a Respondent” in response to comments received indicating that this exception was too broadly worded as well as suggestions that it is subsumed under exception (a). In addition, proceedings under section 60 of the CFA have been added under exception (a).

(iii) Timing of Internal Reporting

Section 16 of the Proposed Policy notes that if a whistleblower submits information about a violation of Ontario securities law to the Commission due to a failure by the whistleblower’s employer organization to respond to a report made by the whistleblower to an internal compliance and reporting mechanism, and another whistleblower has in the intervening period submitted information about the same violation of Ontario securities law to the Commission, the Commission would generally consider the timing of the initial internal report in determining who submitted the information first, provided that not more than 120 days have passed since the initial internal report. The Staff Consultation Paper did not specifically set forth the 120 day time limit.

In addition, the Proposed Policy adds that if a whistleblower reports information about a violation of Ontario securities law to an internal compliance and reporting mechanism, and the whistleblower’s employer organization provides the whistleblower’s information to the Commission, or the results of an audit or investigation initiated in response to information reported by the whistleblower to the employer organization, and an award eligible outcome results from that self-report, the whistleblower may be entitled to a whistleblower award provided the whistleblower reports the same information to the Commission within 120 days of the initial internal report.

(iv) Whistleblower Awards

In the Staff Consultation Paper, Staff proposed that in order for a whistleblower to be eligible for a financial award, the information provided by the whistleblower should result in meaningful assistance to Staff in concluding a contested hearing or a settlement before the Commission pursuant to section 127 of the Act resulting in total monetary sanctions of \$1,000,000 or more, exclusive of costs. In those cases, Staff proposed that the Commission could, in its discretion, pay an eligible whistleblower an award of up to 15% of the total monetary sanctions imposed, exclusive of costs, up to a maximum of \$1,500,000.

Generally, most commentators expressed support for a financial incentive, with many suggesting that the cap of \$1,500,000 should be increased. One commentator who supported the Program disagreed with offering a financial incentive.

In response to the comments Staff received, section 18(1) of the Proposed Policy states that if there is an award eligible outcome, the Commission would pay an eligible whistleblower a whistleblower award of between 5 and 15% of the total monetary sanctions imposed and/or voluntary payments made. The Proposed Policy also includes a revised whistleblower award calculation, in response to comments received about the cap on whistleblower awards. As a result, sections 18(4) and 18(5) of the Proposed Policy state that if the total monetary sanctions imposed and/or voluntary payments made in a proceeding, or multiple related proceedings, is

equal to or greater than \$10,000,000, the maximum amount of any whistleblower award is \$1,500,000, unless the Commission collects monetary sanctions and/or voluntary payments in respect of that proceeding in an amount equal to or greater than \$10,000,000, in which case the whistleblower may receive a whistleblower award of between 5 and 15% of the monetary sanctions and/or voluntary payments collected from that proceeding to a maximum of \$5,000,000.

(v) *Award Eligibility*

In the Staff Consultation Paper, Staff proposed to exclude from award eligibility, auditors, the CCO (or equivalent function) and officers and directors who learn of the misconduct as a result of an entity's internal processes for dealing with potential violations of securities laws. However, Staff recognized that not all of those who learn of possible misconduct through an internal reporting process or investigation would be ineligible.

In response to comments, section 15(2) of the Proposed Policy states that internal or external auditors, CCOs, or those providing an equivalent function, and officers or directors at the time the information was acquired, may be eligible for an award in certain circumstances, including when at least 120 days have elapsed since the individual provided the information through the appropriate internal channels. The Proposed Policy also adds in-house counsel within that same category. However, the definition of "original information" continues to exclude information obtained through a communication that was subject to solicitor-client privilege.

Further, the Proposed Policy adds that external counsel and in-house counsel may be considered eligible for a whistleblower award where disclosure of the information would otherwise be permitted by a lawyer under applicable provincial or territorial barreau or law society rules.

Section 16(2) of the Proposed Policy sets out the circumstances when a whistleblower may be entitled to an award if an organization self-reports misconduct.

In the Staff Consultation Paper, Staff also proposed to exclude culpable whistleblowers from award eligibility. In response to the comments received, section 17 of the Proposed Policy states that a whistleblower who is complicit in the violation of Ontario securities law about which the whistleblower submitted information to the Commission may be eligible for a whistleblower award, however the degree to which a whistleblower is complicit in the conduct that is the subject of the information provided to the Commission is a factor that may decrease the amount of any whistleblower award that may be made. As noted above, the Commission does not grant immunity from prosecution for a whistleblower who is complicit in the violation of Ontario securities law reported.

UNPUBLISHED STUDY MATERIALS

In preparing this Proposed Policy, the Commission has not relied on any significant unpublished study, report, decision or other written materials.

REFERENCE TO ANY PROVISION OF THE ACT, A REGULATION OR A RULE TO WHICH THE PROPOSED POLICY RELATES

The Proposed Policy relates to the framework through which the Commission would receive information on serious securities- or derivatives-related misconduct and would pay awards to eligible whistleblowers, which the Commission believes would lead to more efficient and vigorous enforcement of Ontario securities laws and result in greater deterrence against serious misconduct in the marketplace. Although the Proposed Policy does not relate to a specific section of the Act, the purpose of the Proposed Policy is to provide Staff with an additional tool to carry out its enforcement mandate.

Should legislative amendments for anti-retaliation protections be enacted, as discussed above, Staff will consider whether further guidance is necessary.

SPECIFIC CONSULTATION QUESTIONS

The Commission would welcome responses to the following questions:

1. Do you agree with in-house counsel being eligible for a whistleblower award? If not, why?
2. Is the 120 day period relating to the timing of internal reports as set out in section 16 of the Proposed Policy an appropriate time limit?

COMMENTS

We request your comments on the Proposed Policy. You must submit your comments in writing via email by **January 12, 2016**. 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 for transparency of the policy-making process.

Please address and send your comments to:

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QUESTIONS

Please refer your questions to:

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Appendix A

Comment Letters - OSC Staff Consultation Paper 15-401	
Name	Signed/Contact Persons
Canadian Advocacy Council for Canadian CFA Institute Societies	Cecilia Wong
Canadian Bankers Association	Andrea Cotroneo
Canadian Coalition for Good Governance	Daniel E. Chornous
Davies Ward Phillips & Vineberg LLP	
Canadian Foundation for Advancement of Investor Rights	Neil Gross and Marian Passmore
FundEX Investments Inc.	
Kenmar Associates	Ken Kevinko
McBride Bond Christian LLP	Harold Geller and John Hollander
OSC Investor Advisory Panel	Connie Craddock
Osler, Hoskin & Harcourt LLP	Lawrence Ritchie and Shawn Irving
Prospectors & Developers Association of Canada	Rodney N. Thomas
Robert Patterson	Robert Patterson
Small Investor Protection Association	Stan Buell
SISKINDS LLP	A. Dimitri Lascaris, Douglas Worndl, Daniel Bach and Ronald Podolny
University of Toronto	Anita Anand, Michael Garbuz, Bilal Manji, Duncan Melville, Chad Podolsky and Mohammed Sohail
University of Waterloo, Boston College, Baruch College	Christine Wiedman, Vishal Baloria and Carol Marquardt
Vanguard Investments Canada Inc.	Atul Tiwari