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BY EMAIL TO: comments@osc.gov.on.ca

Grace Knakowski
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, ON
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Dear Ms. Knakowski:

**Re: Request for comments regarding changes to OSC Policy
15-601 – In-house counsel eligibility for whistleblowing
awards**

We write in response to the Ontario Security Commission's ("OSC") request for comments regarding a proposed change to OSC Policy 15-601.

Summary of our recommendation

To advance the OSC's goal of encouraging in-house counsel to come forward and thereby advance the likelihood of greater transparency we strongly recommend that the OSC provide more detailed guidance as to when in-house counsel would be eligible for the whistleblowing award. This would include advice on how the Commission staff would determine whether information obtained is subject to solicitor-client privilege. A very clear and detailed directive with examples, from the OSC will be necessary to encourage in-house counsel to disclose information that is properly eligible for the whistleblowers award.

Explanation

The proposed change seeks to address the eligibility of in-house counsel receiving a whistleblower award. The request for comments states with regards to the current policy that contains an exception from ineligibility:

The fact that these exceptions would apply to in-house counsel, among others, was in contemplation of situations where an employee serves both legal and

non-legal functions within an organization and provides a whistleblower submission that relates to matters that arise while the in-house counsel is acting outside of their legal capacity. It was not intended to incent professional misconduct on the part of in-house counsel. In order to clarify this, the Commission proposes the change described below.

The crux of the issue appears to be a lack of clarity around whether the current policy incentivizes professional misconduct through the whistleblower award. Subsection 15(1)(d) current policy states that the following category of whistleblowers (“in-house category”) are ineligible for the whistleblowers award:

those who obtained information in connection with providing legal services to, or conducting the legal representation of, an employer that is, or that employs, the subject of the whistleblower submission, *unless* disclosure of that information would otherwise be permitted by a lawyer under applicable provincial or territorial bar or law society rules, or the equivalent rules applicable in another jurisdiction [emphasis added.]

Under subsection 15(2) of the current policy, there is an exception to the ineligibility of the in-house category if certain criteria are met. The proposed change seeks to remove the applicability of subsection 15(2) to the in-house category. This is apparently in response to the interpretation and concern raised by the Law Society of Ontario that the current applicability of subsection 15(2) overrides the general in-house counsel ineligibility found in subsection 15(1)(d).

However the policy does not clarify other situations around whether in-house counsel would be eligible for the whistleblowing award. Ostensibly, even if the proposed change is adopted; if a future whistleblowing disclosure is permitted by an in-house counsel (for example, under a provincial or territorial bar outside of Ontario), then the disclosure is not ineligible (as it falls under the “*unless*” condition under the in-house counsel category).

Additionally, the request for comments referencing of “situations where an employee serves both legal and non-legal functions within an organization” further complicates the matter. The request states that the proposed change should not affect in-house counsel acting in a legal capacity. In our respectful submission, in-house counsel disclosing information obtained in a non-legal capacity should be eligible for the whistleblowing award.

Generally, whether or not the information disclosed was obtained in a legal or non-legal capacity is dependent on the nature of the relationship of parties giving and

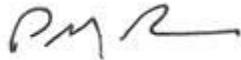
receiving the information; the subject matter; and the circumstances in which the information is received.

Subsection 14(3) of the policy states that no whistleblower award will be provided for information that *Commission staff determines* is subject to solicitor-client privilege. It is unclear how the Commission staff would make such a determination or the process under which in-house counsel could determine eligibility of information. Before the Courts, the determination of whether information obtained was subject to solicitor-client privilege can be contentious.

We are concerned that potential whistleblowers who are employed in an in-house capacity outside of Ontario or have obtained whistleblowing information outside their capacity as legal counsel will lack clarity as to whether they are eligible for the whistleblowing award.

We appreciate the opportunity to comment on the proposed changes to OSC Policy 15-601 and would be pleased to provide further assistance to the OSC.

Yours very truly,
Bersenas Jacobsen Chouest Thomson Blackburn LLP
PER:



Peter M. Jacobsen and Abbas A. Kassam