

### 5.1.3 OSC Notice of Policy Amendment to OSC Policy 15-601 Whistleblower Program

#### OSC NOTICE OF POLICY AMENDMENT TO OSC POLICY 15-601 WHISTLEBLOWER PROGRAM

October 4, 2018

The Ontario Securities Commission (OSC, or the Commission) has amended OSC Policy 15-601 *Whistleblower Program* (the Policy).

#### Substance and Purpose of the Amendment

The purpose of the change is to clarify that in-house counsel who report information under the Policy in breach of applicable provincial or territorial bar or law society rules or equivalent rules applicable in another jurisdiction will not be eligible for a whistleblower award.

#### Background

The Policy came into effect in July 2016. It provides guidance on the OSC's Whistleblower Program (the Program), and is designed to encourage individuals to report and submit to the Commission information on serious securities-related misconduct. Under the Program, individuals who meet certain eligibility criteria and who voluntarily submit original information to Commission Staff (Staff) regarding a breach of Ontario securities law may be eligible for financial compensation (whistleblower award) if it is determined that the information submitted: (i) 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) or section 60 of the *Commodity Futures Act* (Ontario) and (ii) results in an order for monetary sanctions and/or voluntary payments of \$1,000,000 or more.

The Policy also describes the type of information that may be eligible for a whistleblower award and the criteria that would make an individual eligible for a whistleblower award, as well as the factors considered in determining the amount of an award.

#### Eligibility of in-house counsel for a whistleblower award

The Policy is not intended to override applicable provincial or territorial bar or law society rules or equivalent rules applicable in another jurisdiction or to incent misconduct on the part of in-house counsel. Indeed, the following provisions in the Policy are intended to protect against conduct that would violate a lawyer's professional obligations:

- the definition of 'original information' that may qualify for a whistleblower award expressly excludes information that a whistleblower has obtained through a communication that was subject to solicitor-client privilege;
- subsection 14(3) of the Policy provides that no whistleblower award will be provided for information that Staff determines is subject to solicitor-client privilege;
- subsection 15(1) of the Policy provides that a lawyer will generally be considered ineligible for a whistleblower award unless the disclosure of the information would otherwise be permitted by the lawyer under applicable provincial or territorial bar or law society rules or equivalent rules applicable in another jurisdiction (see s. 15(1) (c) and (d)). (This reflects that fact that in some jurisdictions disclosure by a lawyer may now or in the future be permitted under applicable law society rules or the equivalent.); and
- Part 4, item F of the Whistleblower Submission Form A requires in-house counsel to state whether disclosure of the information he or she is providing is permitted under applicable provincial or territorial bar or law society rules or the equivalent rules applicable in another jurisdiction.

The Policy contains exceptions from ineligibility for certain otherwise ineligible classes of individuals. They may be eligible for a whistleblower award if they fall within one or more of the exceptions set out in subsection 15(2) of the Policy, as follows:

- (a) the whistleblower has a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the subject of the whistleblower submission from engaging in conduct that is likely to cause or continue to cause substantial injury to the financial interest or property of the entity or investors;
- (b) the whistleblower has a reasonable basis to believe the subject of the whistleblower submission is engaging in conduct that will impede an investigation of the misconduct; or
- (c) at least 120 days have elapsed since the whistleblower provided the information to the relevant entity's audit committee, chief legal officer, CCO (or their respective functional equivalents) or the individual's supervisor, or,

at least 120 days have elapsed since the whistleblower received the information, if in the circumstances the whistleblower received the information, the whistleblower became aware that one or more of those individuals were already aware of the information.

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 made the change described below.

**Change to Policy**

The Commission has changed the Policy by replacing the words in subsection 15(2): “A whistleblower listed in paragraphs 1(d) to (h)” with the words “A whistleblower listed in paragraphs (e) to (h)”, so that subsection 15(2) will read:

*“A whistleblower listed in paragraphs (1)(e) to (h) [of subsection 15(1)] may be eligible for an award if ...”*

This change means that the exceptions from ineligibility set out in subsection 15(2) of the Policy do not apply to in-house counsel in respect of matters that arise while the in-house counsel is acting in a legal capacity. The change is also intended to further clarify that the Commission does not wish to receive information that is subject to solicitor-client privilege or the provision of which would otherwise be in breach of applicable provincial or territorial bar or law society rules or equivalent rules applicable in another jurisdiction. Specifically, the change clarifies that in Ontario, in-house counsel acting in a legal capacity are ineligible for a whistleblower award because their duty to protect the confidentiality of their clients’ information would preclude them from making a whistleblower submission under the rules governing the legal profession in the province.

If the in-house counsel is not acting in a professional legal capacity, this change should not affect them.

**Summary of Written Comments**

The Commission received six comment letters in connection with the proposed change. A list of the comments received is included as Appendix A to this Notice. A summary of those comments, and the Commission’s response, is included as Appendix B.

**No Additional Changes**

No additional changes have been made to the Policy as a result of the comments we received.

**Blackline**

A blackline showing the amendment to the Policy is included as Appendix C to this Notice.

**Effective Date**

The change to the Policy is effective immediately.

**Appendix A**

**List of Commenters**

**Author**

Peter M. Jacobsen and Abbas A. Kassam (Bersenas Jacobsen Chouest Thomson Blackburn LLP)

Jon Levin (Fasken Martineau DuMoulin LLP)

Ari Levy

Lawrence Ritchie and Shawn Irving (Osler, Hoskin & Harcourt LLP)

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Matthew Wylie (Law Society of Ontario)

## Appendix B

**Summary of Comment Letters Received on Proposed Amendment to OSC Policy 15-601 and Staff Responses to Comments**

Comments received on the proposed amendment to OSC Policy 15-601 are summarized below, under the following key headings:

1. Support for the proposed amendment
2. Eligibility of in-house counsel
3. Request for further clarification
4. Concern regarding shortsellers
5. Other proposed changes

Issue	Comment Summary	Staff Response
1. Support for proposed amendment	Three commenters expressed support for the proposed amendment, with one commenter stating that it would add clarity with respect to counsel's eligibility for whistleblower awards.	Staff appreciate the commenters' support for this initiative.
2. Eligibility	<p>a. One commenter expressed the view that there should be a full prohibition on whistleblower awards for lawyers.</p> <p>b. Two commenters expressed the view that in-house counsel disclosing information obtained in a non-legal capacity should be eligible for a whistleblower award.</p>	<p>a. Under the amended Policy, both external and in-house counsel acting in their professional legal capacity would be potentially eligible for a whistleblower award only in cases where disclosure is permitted under the applicable law society rules. With respect to in-house counsel employed outside of Ontario, s. 15(1)(d) of the Policy states that in-house counsel will have to comply with the law society rules that apply in their jurisdiction.</p> <p>b. Neither the original nor the amended Policy would preclude this possibility. The OSC clarified in its Notice and Request for Comment that the proposed changes do not affect in-house counsel <u>not</u> acting in a professional legal capacity (see "Impact of proposed change").</p>
3. Request for further clarification	Two commenters expressed concerns with what they perceived to be a lack of clarity as to when an in-house counsel might be eligible for a whistleblower award. They also requested additional guidance from the OSC, including on how OSC staff would determine whether information obtained through the Whistleblower Program is subject to solicitor-client privilege.	With respect to privileged information, the proposed amendment is intended to further clarify that the Commission does not wish to receive information that is subject to solicitor-client privilege or which would otherwise result in non-compliance with applicable provincial or territorial bar or law society rules or equivalent rules applicable in another jurisdiction. The whistleblower form, which must be certified as true and complete, also addresses this issue and will assist staff in identifying information subject to privilege.
4. Concern regarding shortsellers	One commenter expressed concern that a purported whistleblower could make an unfounded complaint to the OSC and allow the fact of that complaint to become public, while simultaneously shorting the issuer that was the subject of the complaint. The commenter proposed several policy and operational changes to address their concerns.	Staff thank the commenter for their input. Changes to the Policy that are unrelated to the eligibility of in-house counsel for whistleblower awards are beyond the scope of this initiative.

<p>5. Other proposed changes</p>	<p>a. One commenter suggested that the OSC provide for a “Last Chance” route where a whistleblower could anonymously advise a company that they were in possession of information that might form part of a whistleblower complaint and ask the company to take certain immediate actions, including making restitution, within a specified period of time.</p> <p>b. One commenter recommended implementing blockchain-enabled software solutions to help issuers with their disclosure obligations, improve transparency, quantify qualitative aspects of compliance, create an auditable trail and provide a due diligence defence.</p>	<p>a. Staff thank the commenter for their input. Changes to the Policy that are unrelated to the eligibility of in-house counsel for whistleblower awards are beyond the scope of this initiative.</p> <p>b. Staff thanks the commenter for their input. Changes to the Policy that are unrelated to the eligibility of in-house counsel for whistleblower awards are beyond the scope of this initiative.</p>
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**OSC POLICY 15-601  
WHISTLEBLOWER PROGRAM**

**PART 1 – PURPOSE AND INTERPRETATION**

**Purpose**

The Ontario Securities Commission (the Commission) has adopted OSC Policy 15601 *Whistleblower Program* (the Policy) to provide guidance on:

- the Whistleblower Program (the Program) that has been implemented by the Commission;
- the practices generally followed by the Commission and by Staff of the Commission (Commission Staff) in administering the Program in accordance with the requirements of Ontario securities law;
- the nature of the information that may be eligible for the payment of a financial incentive (whistleblower award) and the criteria that would make an individual eligible for a whistleblower award; and
- the factors considered by: (i) Commission Staff in recommending that a whistleblower be eligible for the payment of a whistleblower award and the amount of a whistleblower award; and (ii) the Commission in determining a whistleblower's eligibility and the amount of the whistleblower award.

The Commission has implemented the Program to encourage individuals to report information on serious securities- or derivatives-related misconduct (excluding tips related to criminal or quasi-criminal<sup>1</sup> matters) to the Commission or, where appropriate in the circumstances, through an internal compliance and reporting mechanism. The Commission believes that the Program may assist in preventing or limiting harm to investors that may result from such misconduct.

The Program is established in furtherance of the Commission's mandate to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets. It is also in keeping with the principle that effective and responsive securities regulation requires timely, open and efficient administration and enforcement of the Ontario *Securities Act*, RSO 1990, c S5, as amended (the Act) by the Commission.

Under the Program, individuals who meet certain eligibility criteria and who voluntarily submit information to Commission Staff regarding a breach of Ontario securities law may be eligible for a whistleblower award if it is determined that the information submitted was of meaningful assistance to Commission Staff in investigating the matter and obtaining a decision of the Commission that results in a final order imposing monetary sanctions and/or the making of a voluntary payment of \$1,000,000 or more.

**Definitions**

1. In the Policy

"award eligible outcome" means a Commission order made under section 127 of the Act or section 60 of the *Commodity Futures Act* (Ontario), RSO 1990, c C.20, as amended (the CFA), including without limitation an order made in connection with the approval of a settlement, as modified as a result of any appeal, 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 and the later of the following has occurred:

- (a) the appeal period in section 9 of the Act or section 5 of the CFA has expired; or
- (b) the right to appeal the Commission's decision has been exhausted;

"information that has been voluntarily submitted" means:

- (a) information that the whistleblower voluntarily provided to the Commission before a request, inquiry or summons related to the subject matter of the information provided, was directed at the whistleblower or anyone representing the whistleblower, by the Commission, another securities regulator, an SRO, or a law enforcement agency;
- (b) information that the whistleblower voluntarily provided to another securities regulator, a securities-related SRO or a law enforcement agency, before receiving a request, inquiry or summons from the Commission; and

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<sup>1</sup> Offences pursued under section 122 of the Ontario *Securities Act*, RSO 1990, c S5.

- (c) excludes information:
  - (i) provided in response to a request, inquiry or summons by the Commission, another securities regulatory authority, an SRO or a law enforcement agency; or
  - (ii) that is required to be reported by the whistleblower to the Commission, another securities regulatory authority, an SRO or a law enforcement agency, as a result of a pre-existing legal duty;

“internal compliance and reporting mechanism” includes an individual’s supervisor, a whistleblower hotline, an ombudsman, the compliance department, or any other established mechanism for reporting misconduct at the entity at which the individual works;

“monetary sanctions” include administrative penalties ordered under paragraphs 127(1) 9 of the Act or 60(1) 9 of the CFA and disgorgement ordered under paragraphs 127(1) 10 of the Act or 60(1) 10 of the CFA;

“Ontario securities law” includes Ontario securities law, as that term is defined in subsection 1(1) of the Act, and Ontario commodity futures law, as that term is defined in subsection 1(1) of the CFA;

“original information” means:

- (a) information that is not already known to the Commission from any other source, that the whistleblower obtained:
  - (i) from the whistleblower’s independent knowledge, derived from the whistleblower’s experiences, communications and observations in employment, business or social interactions; or
  - (ii) from the whistleblower’s critical analysis of publicly available information, if the analysis reveals information that is not generally known or available to the public; and
- (b) excludes information the whistleblower obtained in the following circumstances:
  - (i) through a communication that was subject to solicitor-client privilege;
  - (ii) from an allegation made in a judicial or administrative hearing, an enforcement matter of a securities-related self-regulatory organization (SRO), a government report, hearing, audit or investigation, or news media, unless the whistleblower is the source of the information; or
  - (iii) by a means or in a manner that violates applicable criminal law;

“voluntary payments” mean payments made to the Commission, excluding any costs voluntarily paid;

“whistleblower” means an individual, or two or more individuals acting jointly, who:

- (a) voluntarily provide(s) original information relating to a violation of Ontario securities law that has occurred, is ongoing or is about to occur, to the Commission; and
- (b) submit(s) the information in the form described in sections 2 or 3 of the Policy;

“whistleblower award” means a financial award that the Commission determines should be paid to an eligible whistleblower following an award eligible outcome in an enforcement proceeding through the process described in section 22 of the Policy.

## **PART 2 – HOW TO SUBMIT ORIGINAL INFORMATION TO THE WHISTLEBLOWER PROGRAM**

### **Procedure for submitting original information**

- 2. The Commission expects whistleblowers who submit original information to the Program to:
  - (a) complete the whistleblower submission form available at [www.officeofthewhistleblower.ca](http://www.officeofthewhistleblower.ca);
  - (b) read and certify in writing, among other things, that the whistleblower has read and understands the Policy and has submitted information that, to the best of their knowledge and belief, is true and complete;
  - (c) be aware that it is an offence under subsection 122(1) of the Act or subsection 55(1) of the CFA to make a statement to the Commission that is misleading or untrue or does not state a fact that is required to be stated

to make the statement not misleading and that the whistleblower may be prosecuted for knowingly providing misleading or untrue information to the Commission; and

- (d) submit the completed whistleblower submission form and certification online, or send it by mail to the address in section 27 of the Policy.

**Procedure for submitting original information anonymously**

- 3. A whistleblower may submit original information to the Program anonymously if:
  - (a) the whistleblower is represented by a lawyer;
  - (b) the whistleblower completes the whistleblower submission form described in 2(a), signs the certification described in 2(b), and provides the completed and signed form to the whistleblower's lawyer;
  - (c) the whistleblower's lawyer completes the whistleblower submission form available at [www.officeofthe whistleblower.ca](http://www.officeofthe whistleblower.ca), on an anonymous basis on behalf of the whistleblower;
  - (d) the whistleblower's lawyer reads and certifies in writing, among other things, that the lawyer has been provided with a completed and signed whistleblower submission form by the whistleblower; and
  - (e) the whistleblower's lawyer submits the completed anonymous whistleblower submission form and lawyer certification online or sends it by mail to the address in section 27 of the Policy.

**Anonymous whistleblowers**

- 4. Before any payment of a whistleblower award will be made to a whistleblower who has provided information on an anonymous basis under section 3 of the Policy, the Commission will generally require the whistleblower to provide the Commission with his or her identity, and any additional information necessary to enable the Commission to verify that the whistleblower is not ineligible for a whistleblower award under section 15 of the Policy.

**Whistleblower assistance**

- 5. (1) Beyond the whistleblower's initial submission, Commission Staff may request that a whistleblower provide certain additional information, including:
  - (a) explanations and other assistance so that Commission Staff may evaluate and use the information submitted by the whistleblower;
  - (b) where the whistleblower has knowledge of documents that support the whistleblower's submission to the Program but does not have possession of the documents, a description of, and, when known, a precise location for the documents;
  - (c) all additional information in the whistleblower's possession that is related to the subject matter of the whistleblower's submission, except information subject to solicitor-client privilege or obtained by a means or in a manner that constitutes a criminal offence under applicable law;
  - (d) testimony at a Commission proceeding, if necessary; and
  - (e) information relating to whether the whistleblower is eligible for a whistleblower award.
- (2) Commission Staff do not expect a whistleblower to obtain documents or other things that are not in the whistleblower's possession or control.

**Use of information and documents submitted**

- 6. Information or documents submitted to the Commission by a whistleblower are collected in accordance with Ontario securities law.
- 7. The Commission has no obligation to use the information or documents submitted by a whistleblower. Regardless of whether the information or documents submitted by a whistleblower ultimately results in the payment of a whistleblower award, the Commission may still use the information or documents for any purpose in carrying out its mandate.



8. (1) Any documents or things provided to the Commission may be used by the Commission, in its discretion, to determine whether there has been a violation of Ontario securities law.
- (2) Any documents or things provided to the Commission will not be returned to the person who submitted the documents or things.

**Confidentiality of information**

9. The Commission expects that whistleblowers will maintain as confidential any information provided to a whistleblower by Commission Staff or of which the whistleblower becomes aware because of the whistleblower's ongoing participation in the investigation of a matter.

**Obtaining information about the status of a matter**

10. (1) Commission Staff will generally not provide information about the status of a matter to a whistleblower or make public any information about a matter it may be investigating, including whether an investigation has been undertaken. This is in part because of Commission Staff's duty to comply with section 16 of the Act and section 12 of the CFA, as described in OSC Staff Notice 15-703 *Guidelines for Staff Disclosure of Investigations*.
- (2) Commission Staff may communicate information about a matter to a whistleblower in the following circumstances:
  - (a) if no further action is to be taken on the basis of the information provided by the whistleblower, or if a decision is made not to proceed with the matter, Commission Staff may, in Commission Staff's discretion, inform the whistleblower who provided the information but need not provide an explanation or reasons;
  - (b) if the information provided by the whistleblower leads to an investigation, this fact will not be communicated to the whistleblower unless it is necessary for Commission Staff to inform the whistleblower of the investigation in order to proceed with the investigation;
  - (c) once there is a public announcement of a notice of hearing, statement of allegations or settlement agreement, communication with a whistleblower who submitted information to the Program is in the discretion of Commission Staff;
  - (d) if there has been an award eligible outcome, and the Commission needs to determine whether the whistleblower is eligible for a whistleblower award, Commission Staff may contact the whistleblower to request additional information to confirm the whistleblower's eligibility for an award.

**PART 3 – WHISTLEBLOWER PROTECTIONS**

**Confidentiality**

11. (1) Commission Staff will make all reasonable efforts to keep the identity of a whistleblower, and information that could be reasonably expected to reveal the whistleblower's identity, confidential, subject to the following exceptions:
  - (a) when required by law, including circumstances where Commission Staff is required to make disclosure of the whistleblower's identity in connection with an administrative proceeding under section 127 of the Act or section 60 of the CFA in order to permit a respondent to make full answer and defence; or
  - (b) subject to subsection (2), when Commission Staff determines that it is necessary for the purposes of the Act or the CFA to disclose the information to any of the entities listed in section 153 of the Act or section 85 of the CFA.

**Consent to disclose to another regulatory authority**

- (2) The Commission will not disclose the whistleblower's identity, or information that could be reasonably 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.

**Freedom of information**

12. (1) The Commission will recommend that requests for information relating to a whistleblower's identity, or information that could be reasonably expected to reveal the whistleblower's identity, made under the *Freedom of Information and Personal Protection of Privacy Act* (FOIPPA) be denied based on:

- (a) section 14(1)(d) of FOIPPA, which provides protection for confidential sources of information in a law enforcement context; and
  - (b) section 21(3)(b) of FOIPPA, which protects personal information that has been compiled as part of an investigation into the possible violation of the law.
- (2) In the Commission's view, sections 14(1)(d) or 21(3)(b) of FOIPPA would apply to information provided to the Commission by a whistleblower.
- (3) The Commission cannot guarantee that requests for information made under FOIPPA and relating to a whistleblower's identity, or information that could be reasonably expected to reveal the whistleblower's identity, will not be disclosed, because the final decision with respect to access to records resides with the Information and Privacy Commissioner of Ontario or a court of competent jurisdiction.

**No reprisals**

13. Section 121.5 of the Act prohibits reprisals by an employer against an employee in certain circumstances and voids certain contractual provisions between employers and employees that preclude or purport to preclude whistleblowers from reporting securities- or derivatives-related misconduct to their employers, the Commission, recognized self-regulatory organizations or law enforcement agencies, which may include employee codes of conduct that would impede such reporting. This provision may be enforced under section 122 or 127 of the Act.

**PART 4 – ELIGIBILITY FOR A WHISTLEBLOWER AWARD**

**Information eligible for a whistleblower award**

14. (1) The Commission expects that information that will be eligible for a whistleblower award under the Program will relate to a serious violation of Ontario securities law and will be
- (a) original information;
  - (b) information that has been voluntarily submitted;
  - (c) of high quality and contain sufficient timely, specific and credible facts relating to the alleged violation of Ontario securities law; and
  - (d) of meaningful assistance to Commission Staff in investigating the matter and obtaining an award eligible outcome.
- (2) The Commission expects all of the criteria in subsection (1) to be met before the Commission makes a whistleblower award. Information that meets only some of the criteria, such as information from an investor who believes that he or she has suffered a loss as a result of an alleged breach of Ontario securities law, would generally not be eligible because the information would not ordinarily meet the criteria set out in paragraphs (1)(c) and (d). The Commission recognizes that there may be circumstances when an investor may submit information of sufficient depth and quality to meet all of the criteria in subsection (1) and may therefore be eligible for a whistleblower award.
- (3) No whistleblower award will be provided for information that Commission Staff determines is:
- (a) misleading or untrue;
  - (b) speculative or lacks specificity;
  - (c) subject to solicitor client privilege;
  - (d) publicly known;
  - (e) obtained by a means or in a manner that constitutes a criminal offence under applicable law; or
  - (f) not related to a violation of Ontario securities law.

### Whistleblowers who are ineligible for a whistleblower award

15. (1) Subject to the exceptions in subsection (2), whistleblowers in one or more of the following categories will generally be considered ineligible for a whistleblower award:
- (a) those who without good reason refused a request for additional information from Commission Staff under section 5 of the Policy;
  - (b) those who disclosed information provided to a whistleblower by Commission Staff or of which the whistleblower becomes aware because of the whistleblower's ongoing participation in the investigation of a matter, contrary to section 9 of the Policy;
  - (c) those who obtained information in connection with providing legal services to, or conducting the legal representation of, a client 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;
  - (d) 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;
  - (e) those who obtained information in connection with providing internal audit or external assurance services to, or conducting an internal or financial audit of, a client or employer that is, or that employs, the subject of the whistleblower submission, unless disclosure of that information would otherwise be permitted by an auditor under the applicable rules of professional conduct;
  - (f) those who obtained information while conducting an inquiry or investigation into possible violations of law by a client or employer that is, or that employs, the subject of the whistleblower submission;
  - (g) those who were directors or officers of the entity that is, or that employs, the subject of the whistleblower submission at the time the information was acquired;
  - (h) those who had job responsibilities as Chief Compliance Officers (CCO) of or a functionally equivalent position at the entity that is, or that employs, the subject of the whistleblower submission at the time the information was acquired;
  - (i) those who are or were employed by or an independent contractor for the Commission, another securities regulatory authority, an SRO or a law enforcement agency at the time the information was acquired;
  - (j) a spouse, parent, child, sibling or resident of the same household of an employee, former employee or contractor of the Commission, another securities regulatory authority, an SRO or a law enforcement agency at the time the information was acquired;
  - (k) those who acquired the information from a person who is ineligible for a whistleblower award, unless the information is about a possible violation of Ontario securities law involving that person;
  - (l) those who have been convicted of a criminal offence in relation to the subject matter of the matter for which the whistleblower could otherwise receive an award;
  - (m) those who, in their dealings with the Commission, knowingly make statements or submit information that is misleading or untrue or does not state a fact that is required to be stated to make the statement not misleading;
  - (n) those who make a frivolous, vexatious or meritless submission to the Program; or
  - (o) those who obtained or provided the information in circumstances which would bring the administration of the Program into disrepute.

### Exceptions

- (2) A whistleblower listed in paragraphs (1)(~~d~~e) to (h) may be eligible for a whistleblower award if:

- (a) the whistleblower has a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the subject of the whistleblower submission from engaging in conduct that is likely to cause or continue to cause substantial injury to the financial interest or property of the entity or investors;
- (b) the whistleblower has a reasonable basis to believe the subject of the whistleblower submission is engaging in conduct that will impede an investigation of the misconduct; or
- (c) at least 120 days have elapsed since the whistleblower provided the information to the relevant entity's audit committee, chief legal officer, CCO (or their respective functional equivalents) or the individual's supervisor, or, at least 120 days have elapsed since the whistleblower received the information, if in the circumstances the whistleblower received the information, the whistleblower became aware that one or more of those individuals were already aware of the information.

### **Internal reporting**

16. (1) The Commission encourages whistleblowers who are employees to report potential violations of Ontario securities law in the workplace through an internal compliance and reporting mechanism in accordance with their employer's internal compliance and reporting protocols. However, the Commission does not require whistleblowers to do so, recognizing that there may be circumstances in which a whistleblower may appropriately wish not to report to an internal compliance and reporting mechanism.
- (2) 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.
- (3) If a whistleblower submits information about a violation of Ontario securities law to the Commission but delays doing so to permit 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 will 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.

### **Culpable whistleblowers**

17. (1) A whistleblower who is complicit in the violation of Ontario securities law about which the whistleblower submitted information to the Commission may nonetheless be eligible for a whistleblower award.
- (2) 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.
- (3) In determining whether the required \$1,000,000 threshold for an award eligible outcome has been satisfied for the purposes of making any whistleblower award, the Commission will not take into account any voluntary payments made by a complicit whistleblower or monetary sanctions that a complicit 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.
- (4) Any portion of the voluntary payment made by, and/or monetary sanctions awarded against, a whistleblower who is complicit in the violation of Ontario securities law reported to the Commission, will be deducted from any whistleblower award paid to a complicit whistleblower.
- (5) The provision of information to the Commission by a culpable whistleblower does not preclude the Commission from taking enforcement action against the whistleblower for the whistleblower's role in the violation of Ontario securities law.

## **PART 5 – WHISTLEBLOWER AWARDS**

### **Amount of whistleblower award**

18. (1) If there is an award eligible outcome, the Commission will pay an eligible whistleblower a whistleblower award of between 5 and 15% of the total monetary sanctions imposed and/or voluntary payments made in the relevant proceeding or multiple related proceedings.

- (2) The Commission will determine the percentage amount of the whistleblower award based on the factors set out in section 25 of the Policy.
- (3) If multiple related proceedings arise based on information provided by a whistleblower, the total monetary sanctions imposed and/or voluntary payments made in each proceeding will be considered to determine whether the \$1,000,000 threshold for an award eligible outcome has been met.
- (4) 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 subject to subsection (5).
- (5) 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, and 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, the whistleblower award will not be limited to \$1,500,000 and the whistleblower may receive a whistleblower award of between 5 and 15% of the monetary sanctions or voluntary payments collected from that proceeding to a maximum of \$5,000,000.

**Enforcement outcome eligible for a whistleblower award**

19. To receive a whistleblower award, the Commission generally expects that a whistleblower will be eligible and have voluntarily provided original information that was of meaningful assistance to Commission 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.

**No award – circumstances**

20. The Commission will generally not make a whistleblower award if:
  - (a) the information submitted is not eligible under section 14;
  - (b) the whistleblower is not eligible under section 15; or
  - (c) the outcome of any proceeding resulting from a whistleblower submission is not an award eligible outcome (e.g., the matter is pursued quasi-criminally, the voluntary payments made and/or monetary sanctions ordered are less than \$1,000,000 or the Commission's decision to order monetary sanctions is overturned on appeal).

**Timeframe for an award**

21. The Commission works to conclude enforcement proceedings as efficiently as possible but it may take several years or more from the date a whistleblower submits the whistleblower submission form and certification until an administrative proceeding under section 127 of the Act or section 60 of the CFA has been concluded or a settlement reached, monetary sanctions have been ordered or voluntary payments made and the respondent's appeal rights have expired, and a whistleblower award can be made.

**Whistleblower award process**

22. (1) At the conclusion of any administrative proceeding under section 127 of the Act or section 60 of the CFA brought based on information submitted by a whistleblower, Commission Staff will prepare a recommendation containing an analysis of:
  - (a) the eligibility of the whistleblower for a whistleblower award, with reference to Part 4 of the Policy; and
  - (b) the amount and effectiveness of assistance provided by the whistleblower based on the award criteria with reference to section 25 of the Policy.

The recommendation will be prepared at this time to ensure that timely information is considered even if any appeals are not yet exhausted, but the quantum may require adjustment as a result of any appeals.

**Staff Committee**

- (2) A Commission Staff committee (the Staff Committee), including the Director of Enforcement, will review the Commission Staff recommendation.

### Staff Committee recommendation

- (3) The Staff Committee will then make a recommendation that will be provided to the Commission regarding the whistleblower's eligibility and, if eligible, the recommended amount for the whistleblower award.

### Eligibility – additional information

- (4) To help the Staff Committee and the Commission assess whether a whistleblower is eligible for a whistleblower award, the Commission or Commission Staff may request additional information from the whistleblower.

### Commission discretion

- (5) The Commission will review the Staff Committee recommendations and determine if a whistleblower is eligible for a whistleblower award, and if so, may exercise its discretion to modify the amount of the whistleblower award recommended by the Staff Committee.

### Authorization for payment of whistleblower award

23. The Commission will authorize the payment of a whistleblower award to a whistleblower once the Commission has determined:
- (a) that the whistleblower is eligible;
  - (b) that there was an award eligible outcome; and
  - (c) the amount to be awarded.

### Public disclosure

24. The Commission may publicly disclose that a whistleblower award has been paid without disclosing the identity of the whistleblower.

### Determining amount of whistleblower award

25. (1) In exercising its discretion to determine the appropriate percentage of a whistleblower award, the Commission may consider the factors set out in subsection (2) and (3) and may increase or decrease the percentage of the whistleblower award based on its analysis of the factors, and/or use the factors to determine how to apportion an award among multiple whistleblowers, if applicable in the circumstances.

### Factors that may increase the amount of a whistleblower award

- (2) The following factors may increase the amount of a whistleblower award:

#### *Timing of Report*

- (a) the timeliness of the whistleblower's initial report to the Commission or to an internal reporting mechanism of the entity involved in committing, or impacted by, the violation of Ontario securities law;

#### *Significance of information*

- (b) the significance of the information provided by the whistleblower, including:
- (i) whether the information provided by the whistleblower caused Commission Staff to open an investigation or broaden the scope of an existing investigation;
  - (ii) the truthfulness, reliability and completeness of the information;
  - (iii) whether the allegations in the proceeding related, in whole or in part, to violations of Ontario securities law identified by the whistleblower; or
  - (iv) the degree to which the information meaningfully contributed to a successful investigation of the violation and obtaining an award eligible outcome;

*Degree of assistance*

- (c) the level of assistance the whistleblower provided to Commission Staff, including:
  - (i) whether the whistleblower provided ongoing, extensive and timely cooperation and assistance by, for example, helping to explain complex transactions, interpreting key evidence, or identifying new and productive lines of inquiry; or
  - (ii) whether the whistleblower appropriately encouraged or authorized others who might not otherwise have participated in the investigation to assist Commission Staff;

*Impact on Investigation or Proceeding*

- (d) as a result of the whistleblower's assistance, less time was needed to investigate or bring an enforcement proceeding;

*Remediation and recovery*

- (e) the whistleblower's efforts to remedy the harm caused by the violations of Ontario securities law that were reported, including assisting the authorities in recovering any amounts obtained as a result of non-compliance with the Act or the CFA;

*Internal compliance and reporting systems*

- (f) whether and the extent to which, the whistleblower or any legal representative of the whistleblower participated in internal compliance and reporting systems by:
  - (i) reporting the possible violations of Ontario securities law through an internal compliance and reporting mechanism before, or at the same time as, reporting them to the Commission; or
  - (ii) assisting in any internal investigation or inquiry concerning the reported violations.
- (g) the impact the whistleblower's report to the Commission or an internal compliance and reporting mechanism had on the behavior of the person or entity that committed the violation, for example by causing the person or entity to promptly correct the violation;

*Unique hardship*

- (h) any unique hardships experienced by the whistleblower resulting from the whistleblower's report to the Commission or an internal compliance and reporting mechanism;

*Contribution to the Commission's mandate*

- (i) the degree to which providing an award to the whistleblower would:
  - (i) enhance the Commission's ability to pursue the purposes of the Act or the CFA;
  - (ii) encourage the submission of high quality information from other whistleblowers, having regard to the whistleblower's submission of significant information and meaningful assistance, even when the monetary sanctions available for collection were limited or potential monetary sanctions were reduced or eliminated by the Commission because, for example, the entity self-reported following the whistleblower's report to an internal reporting mechanism;

*Contribution to the Commission's priorities*

- (j) whether the subject matter of the action is a Commission priority because:
  - (i) the reported misconduct involved regulated entities or fiduciaries;
  - (ii) the violations of securities laws were particularly serious given the nature of the violation, the age and duration of the violation, the number of violations and the repetitive or ongoing nature of the violations;

- (iii) the danger to investors or others presented by the violations involved in the enforcement actions, including the amount of harm or potential harm caused by the underlying violations, the type of harm resulting from or threatened by the underlying violations, and the number of individuals or entities harmed; or
- (iv) without the information, Commission Staff would have been unable or unlikely to investigate the matter.

**Factors that may decrease the amount of a whistleblower award**

- (3) The following factors may decrease the amount of a whistleblower award:

*Erroneous or incomplete information*

- (a) the information provided by the whistleblower was difficult for Commission Staff to use because, for example, the whistleblower had little knowledge of the violation of Ontario securities law, or the information provided by the whistleblower contained errors, was incomplete or lacking in detail, unclear or not organized;

*Whistleblower culpability*

- (b) the degree to which the whistleblower was culpable or involved in the violations reported that became the subject of the Commission's enforcement proceeding, including:
  - (i) the whistleblower's role in the reported violations of Ontario securities law;
  - (ii) whether the whistleblower benefitted financially from the violations;
  - (iii) whether the whistleblower has violated Ontario securities law in the past;
  - (iv) the egregiousness of the whistleblower's conduct; and
  - (v) whether the whistleblower knowingly interfered with the Commission's investigation of the violations;

*Unreasonable delay in reporting*

- (c) whether the whistleblower unreasonably delayed reporting the violation(s) of Ontario securities law, including:
  - (i) whether the whistleblower was aware of relevant facts but failed to take reasonable steps to report the violations or prevent the violations from occurring or continuing;
  - (ii) whether the whistleblower was aware of the relevant facts but only reported them after learning about a related inquiry, investigation, or enforcement action; and
  - (iii) whether there was a legitimate reason for the whistleblower to delay reporting the violations;

*Refusal of assistance*

- (d) the whistleblower refused to provide additional information or assistance to the Commission when requested pursuant to section 5 of the Policy;

*Interference with Commission Staff's investigation*

- (e) the whistleblower or the whistleblower's lawyer negatively affected Commission Staff's ability to pursue the matter;
- (f) the whistleblower or the whistleblower's lawyer violated instructions provided by Commission Staff;

*Interference with internal compliance and reporting mechanisms*

- (g) whether the whistleblower undermined the integrity of internal compliance and reporting systems by:
  - (i) interfering with an entity's established legal, compliance or audit procedures to prevent or delay detection of the reported violation of Ontario securities law;



- (ii) making any material false, fictitious or fraudulent statements or representations that hindered an entity's efforts to detect, investigate, or remediate the reported violation of Ontario securities law; or
- (iii) providing any false writing or document knowing the writing or document contained any false, fictitious or fraudulent statements or entries that hindered an entity's efforts to detect, investigate, or remediate the reported violation of Ontario securities law.

**No appeal**

26. The Commission's determination whether or not to grant a whistleblower award and any amount awarded to a whistleblower are not subject to appeal. No private right of action is conferred on a whistleblower to seek a whistleblower award.

**PART 6 – CONTACT**

**Contact information**

27. Potential whistleblowers who have questions about the Program or their eligibility should contact the Commission's Office of the Whistleblower at:

1-888-OSC-5553

OR visit the website at

[www.officeofthewhistleblower.ca](http://www.officeofthewhistleblower.ca)

To submit information by mail, please send to:

Office of the Whistleblower – Confidential  
Ontario Securities Commission  
22nd Floor  
20 Queen Street West,  
Toronto, ON M5H 3S8

**PART 7 – TRANSITION**

**Transition**

28. No one will be eligible for the payment of a whistleblower award under the Policy for information that is submitted to the Commission before the Policy comes into force on July 14, 2016.