

The OSC's proposed Whistleblower Program

February 18, 2015

On February 3, 2015, the Ontario Securities Commission (OSC) released Staff Consultation Paper 15-401. The OSC proposed a whistleblower program aimed at encouraging individuals with high quality information regarding serious misconduct to come forward. The program would fall under the Enforcement Branch, independent of the Inquiries and Contact Centre which currently accepts tips about possible breaches of securities laws without incentives or awards. Modeled after a similar program administered by the Securities and Exchange Commission (SEC) in the United States, the OSC's program would be, if implemented, a first for Canada's securities regulators.

Why introduce a whistleblower program?

The proposed OSC Whistleblower Program is intended to encourage individuals with knowledge to report possible breaches of Ontario's securities laws. Since cases of misconduct usually involve sophisticated individuals and raise complex issues which may be difficult to uncover without assistance, the OSC is of the view that the Whistleblower Program would allow for the resolution of enforcement matters more quickly and effectively. Furthermore, the Whistleblower Program may also motivate issuers and registrants to self-report misconduct in order to take advantage of the OSC's credit for cooperation program (OSC Staff Notice 15-702), which is unavailable if the misconduct is first reported to the OSC by a whistleblower.

The SEC's experience

The SEC rewards whistleblowers who voluntarily provide original information leading to successful enforcement. However, the SEC must obtain monetary sanctions totaling more than US\$1 million in order for a whistleblower to be eligible for an award. Financial awards can range from 10% to 30% of the monetary sanctions collected. Since the inception of the program, the SEC has received 10,193 tips and complaints from whistleblowers. The SEC announced its largest whistleblower award to date, more than US\$30 million, on September 22, 2014.^[1] Like the SEC's program, the OSC's proposed whistleblower regime would likely apply to foreigners. However, the OSC's regime would cap awards at CA\$1.5 million.

How would the Whistleblower Program function?

The OSC's Whistleblower Program would be available to whistleblowers who report serious misconduct that results in administrative proceedings or a settlement heard by the OSC under s.127 of the *Securities Act* (Ontario). Upon final resolution of a matter, including any appeals, the OSC would offer an eligible whistleblower a monetary award of up to 15% of the total monetary sanctions awarded (excluding cost awards) in an OSC hearing or settlement in which total

sanctions or settlement payments exceed CA\$1 million. The award would be capped at a maximum amount of CA\$1.5 million. OSC Staff, including the Director of Enforcement, would recommend the amount of the award for approval by the OSC.

The determination of the amount of the financial award would be discretionary and would involve a detailed assessment of each situation against established criteria. With respect to information, the OSC would consider whether the information contributed in a meaningful way to the investigation and to the outcome of the s.127 proceeding and whether it positively affected the timeliness and efficiency of the investigation. With respect to the whistleblower, some factors that would form part of the award assessment would include:

- i. how cooperative the whistleblower was during the course of the investigation;
- ii. what steps the whistleblower had taken, if any, to report the misconduct through internal compliance systems before reporting to the OSC;
- iii. whether the whistleblower reported the information either through internal compliance systems or to the OSC in a timely manner; and
- iv. the level of culpability of the whistleblower in the conduct being reported.

Who is eligible to be a whistleblower and what type of information can they provide?

Whistleblowers who provide information to the OSC must meet the eligibility requirements to collect a financial award. The whistleblower must:

- i. be an individual;
- ii. provide information that is (1) high quality, (2) original and voluntary, and (3) results in a hearing before the OSC or a settlement hearing under s.127[2]; and
- iii. not fall into an ineligible whistleblower category

High-quality information

High-quality information includes such information that:

- i. relates to serious misconduct in the marketplace;
- ii. is timely (misconduct that has recently occurred, is ongoing or about to occur);
- iii. is credible and detailed, with well-organized supporting documentation;
- iv. has the potential to stop further harm from occurring; and
- v. is likely to save significant time and Staff resources in conducting an investigation.

Original and voluntary information

Original information is information or facts of which the OSC is not already aware. However, the OSC may engage in a critical analysis of publicly available facts that may be considered original information if that analysis brings to light serious misconduct not previously known by the OSC. The information should also be voluntary (not requested or compelled under the *Securities Act* or by other securities commissions or self-regulatory agencies in connection with reviews or investigations). The SEC would be considered as another securities commission and thus information compelled by the SEC would not give rise to the whistleblower's eligibility for financial award.

Information resulting in a hearing before the OSC or a settlement hearing under s.127

A s.127 matter must be concluded with the imposition of monetary sanctions or an agreed payment. After the

administrative matter is concluded and monetary sanctions are imposed, or after a settlement is approved by the OSC, Staff will use their discretion to assess factors, including whether:

- i. the whistleblower's information directly led to such proceedings;
- ii. the information provided by the whistleblower caused Staff to open an investigation or broaden the scope of an existing investigation;
- iii. the information was credible and detailed, and contributed in a meaningful way to the initiation or conduct of the investigation and the outcome; and
- iv. 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.

In addition, in order to be eligible, specific total monetary sanctions or settlement payments with respect to a named respondent(s) would have to be at least CA\$1 million and would have to be final and not appealable.[3]

Ineligible whistleblower categories

A whistleblower that falls into one of the following categories would be ineligible to receive the financial award under the program. Ineligible whistleblowers are those who:

- i. provide information that is misleading or untrue, has no merit, or lacks specificity;
- ii. are culpable in the conduct being reported[4];
- iii. provide information that is subject to solicitor-client privilege;
- iv. provide information obtained through the course of a financial audit when engaged to provide audit services;
- v. have or had job responsibilities as Chief Compliance Officers (CCO) or equivalent positions, or are or were directors or officers 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[5];
- vi. are or were employed by the OSC, self-regulatory agencies, or law enforcement at the time the information was acquired; or
- vii. obtain or provide the information in circumstances which would bring the administration of the OSC Whistleblower Program into disrepute.

What are proposed whistleblower protection initiatives?

Confidentiality

The OSC is of the view that whistleblowers must have the option of keeping their identities confidential and expects that whistleblowers would not generally be required to testify as part of s.127 administrative proceedings. To achieve the confidentiality objective, the OSC proposes to adopt a policy which would provide that the OSC would use all reasonable efforts to keep a whistleblower's identity confidential (and information that could be reasonably expected to reveal the whistleblower's identity) subject to three express exceptions. The exceptions would be:

- i. when disclosure is required to be made to a respondent in connection with an s.127 administrative proceeding to permit a respondent to make full answer and defence;
- ii. when the relevant information is necessary to make Staff's case against a respondent; and
- iii. when the OSC 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 OSC is considering adopting a policy which would enable a whistleblower to remain anonymous to the OSC, at

Anonymity

least for a period of time after providing information. The justification behind whistleblower anonymity arises due to concerns that potential whistleblowers may be reluctant to be identified in cases where their identities are inadvertently disclosed or ordered to be disclosed and where information provided results in an investigation but not a proceeding.

The OSC also imagines a new role for legal counsel where, in order to remain anonymous to the OSC, a whistleblower would need to be represented. Legal representation would enable whistleblowers to receive advice respecting the criteria they would have to satisfy in order to potentially qualify for a financial award. However, whistleblowers would ultimately be required to disclose their identities to the OSC before receiving any financial award to allow the OSC to assess the eligibility requirements.

Protection from retaliation

The OSC contemplates the creation of measures to protect whistleblowers from retaliation by their employers. Importantly, anti-retaliation protections should be available to both individuals who report possible violations of the *Securities Act* through an internal compliance reporting system (up the ladder) and those who report directly to the OSC. The OSC intends 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 provisions would:

- i. make it a violation of securities law to retaliate against a whistleblower and permitting Staff to prosecute the employer through a proceeding under s.127;
- ii. give a whistleblower a civil right of action against an employer who violates the anti-retaliation provision; and
- iii. render contractual provisions designed to silence a whistleblower unenforceable.

Similar prohibitions to those above exist in federal and Ontario statutes including labour and employment-related statutes and statutes implementing other regulatory regimes. For example, the *Competition Act* prohibits employers from taking retaliatory action against employees who report employer misconduct or refuse to engage in illegal acts. The OSC envisions two possibilities for enforcing the prohibition against retaliation in the *Securities Act*: (i) enforcement by Staff in an s.127 proceeding; and (ii) enforcement by the whistleblower through a statutory civil right of action under the *Securities Act*.

What are potential roadblocks and concerns?

The proposed Whistleblower Program would require legislative amendments to include the discussed anti-retaliation provisions in the *Securities Act*. Furthermore, the OSC recognizes concerns raised by issuers and registrant firms about the possible impact of the program on the operation of internal compliance systems. The OSC states that it recognizes the importance of internal systems but also that such systems are vulnerable to failure as individuals may fear retaliation resulting from their use.

Issuers and registrant firms should be aware that whistleblower reports may result in no subsequent credit for cooperation by the OSC if the issuer or registrant does not promptly and fully report a serious breach of securities law to OSC Staff or fails to correct the problem. In addition, inaction by issuers and registrant firms that are aware of misconduct will be considered an aggravating factor in the OSC Staff's recommendations on sanctions.

Comments

The OSC is inviting feedback on the proposed Whistleblower Program and is seeking written comments until May 4,

2015.

Contact any of Jason A. Saltzman, Michael Schafler or Matthew Fleming at Dentons to find out more about OSC's Proposed Whistleblower Program.

[1] The award is also significant in terms of scope as it was made to a foreign whistleblower. In that case, the SEC stated that there is a sufficient "US territorial nexus" whenever information provided, in a case brought in the United States, leads to the successful enforcement of a covered action concerning violations of the US securities laws. In addition, the whistleblower asserted that the award should have been greater. However, the SEC rejected this claim on the basis that the whistleblower delayed in coming forward. Therefore, the whistleblower's conduct may impact the amount of any award.

[2] The specific total monetary sanctions or settlement payments with respect to a named respondent(s) would have to be at least \$1 million and would have to be final and not appealable.

[3] The OSC 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.

[4] Depending on the particular circumstances, the OSC may accept information from an individual who provides information on matters in which he or she actively and improperly participated (the level of culpability will be a relevant consideration).

[5] Not all individuals who learn of possible misconduct through an internal reporting process or investigation would be ineligible (e.g. 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).

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