

# Incentivizing Reports Of Misconduct: The OSC Proposes New Whistleblower Program



Citing the success of the Dodd-Frank Whistleblower Program which has operated since 2011 in the United States, the Ontario Securities Commission (the OSC) has proposed a new Whistleblower Program that would reward eligible whistleblowers with up to \$1.5 million for information which leads to the prosecution of a serious financial crime. The OSC's Staff Consultation Paper 15-401 – Proposed Framework for an OSC Whistleblower Program [\[available here\]](#) released for comment on February 3, 2015, describes a program that, if successful, would be the first whistleblower program by a Canadian securities regulator to offer a financial incentive to tipsters for potential information.

The principal objective of the OSC's Whistleblower Program is to motivate individuals with inside knowledge or information that relates to a possible serious breach of securities law to come forward and share that information with the OSC. It is thought that such information might otherwise be impossible for the OSC to obtain on a timely basis. The OSC also hopes to increase the number of complex securities enforcement cases brought forward and the efficiency of prosecutions through high quality information. Lastly, it is anticipated that an incentive based Whistleblower Program might motivate issuers and registrants to self-report misconduct so that they may avail themselves of the OSC's credit for cooperation program. A market participant who is aware of misconduct will not receive "credit for cooperation" if the misconduct is first reported by the whistleblower instead.

The Whistleblower Program largely mirrors the Dodd-Frank Whistleblower Program operated by the U.S. Securities and Exchange Commission (the SEC). The SEC Whistleblower Program has been viewed as generally successful and has resulted in over 10,000 tips since its inception, with awards paid out to fourteen whistleblowers, including a record \$30 million award paid to a whistleblower in September 2014.

The OSC's Whistleblower Program would be operated as a separate unit with the OSC's Enforcement Branch similar to the SEC's Office of the Whistleblower, which is also housed within the SEC's Division of Enforcement.

## **Paying the Whistleblower**

The OSC proposes to offer an eligible whistleblower a financial award of up to 15% of the total monetary sanctions awarded in an OSC hearing or settlement in which the

total sanctions or settlement exceeds \$1 million. Payouts under the Whistleblower Program would be capped at \$1.5 million and would not be paid until the end of all proceedings (including appeals). Moreover, the determination of the amount of a whistleblower award would be discretionary and based on a number of factors, including how cooperative the whistleblower was during the course of the investigation and the extent to which the information contributed by the whistleblower had a meaningful impact on the investigation and outcome.

The size of potential rewards under the Whistleblower Program is markedly less than the SEC Whistleblower Program which may pay whistleblowers up to 30% of monies collected through sanctions. Moreover, unlike the SEC Whistleblower Program, whistleblowers will not be provided an avenue of appeal should the OSC decline to offer an award.

A further key distinction from the SEC Whistleblower Program is that whistleblower awards would not be contingent on the successful collection of sanctions. Awards would be funded by the OSC through the funds that are collected through administrative penalties, disgorgement, and settlements that are not otherwise paid back to victims.

### **The (In)Eligible Whistleblower**

The OSC's proposed Whistleblower Program would not pay out to all tipsters who provide information to the OSC. The information provided by an eligible whistleblower must be of high quality, original and provided on a voluntary basis. Furthermore, the OSC may deny whistleblowers a financial reward in several circumstances, including:

- the whistleblower is employed as the **chief compliance officer** of a registrant or is a **director or officer** of a reporting issuer and **obtained the information as a result of the organization's internal reporting or investigation process**;
- the information is subject to solicitor-client privilege;
- the information proves misleading, untrue or lacks specificity; or
- the whistleblower obtained the information in circumstances which would bring the administration of the OSC Whistleblower Program into disrepute.

In addition to the above, the OSC may exclude a whistleblower who has "culpability" in the conduct being reported from qualifying as an eligible whistleblower. The level of culpability would be considered in determining whether a whistleblower award is made to the individual and the amount of the award. Significantly, the OSC retains the right to take an enforcement action against the whistleblower for his or her role in the conduct.

The OSC does not propose to require that a whistle-blower report any misconduct to compliance personnel of a registrants or other applicable resources within a reporting issuer. The OSC suggests that the Whistle blower Program would "encourage" whistle blowers to report misconduct internally as a first step, but the Whistleblower Program would be available as an avenue for individuals to report misconduct where the individual considers the internal reporting mechanisms to be defective or where he or she fears retaliation as a result of raising concerns using the internal processes.

### **Confidentiality and Protecting the Whistle blower**

The OSC promises that the Whistle blower Program will include a requirement for the OSC to take "reasonable efforts" to protect the identity of the whistleblower. This would include generally not expecting or requiring the whistleblower to testify at any administrative hearing, although there are noted exceptions to this provision.

The Whistleblower Program may allow the whistleblower to remain anonymous by providing information to the Commission through his or her lawyers, although the OSC will only make an award to the whistleblower once he or she identifies him/herself.

In addition to protecting confidentiality, the OSC suggests that the Securities Act (Ontario) would need to be amended to make it a violation of securities law to retaliate against a whistleblower. Contractual agreements designed to silence whistleblowers would be unenforceable to the extent required to allow the whistleblower to provide information to the Commission. The Act would also be amended to provide whistleblowers a civil right of action against employers who violate the anti-retaliation provisions. These provisions exist in other provincial securities legislation and are also proposed in the Provincial Capital Markets Act (released for comment in August 2014) in conjunction with the Cooperative Capital Markets Regulatory System.

Lastly, to maintain confidentiality and to ensure whistleblowers are dealt with in accordance with the terms of the Whistleblower Program, the OSC proposal contemplates setting up a separate unit within the Enforcement Branch to deal with whistleblower submissions and the administration of the Whistleblower Program.

### **Providing Comments to the OSC on the Whistleblower Program**

Throughout the Consultation Paper, the OSC request feedback on specific questions posed. Perhaps the most significant issue is the impact of the Whistleblower Program on the internal compliance systems of registrants and reporting issuers. Will the Whistleblower Program incentivize individuals to circumvent the organization's internal reporting processes in order to gain financial awards from the OSC? The Whistleblower Program seeks to encourage would-be whistleblowers to first report their concerns internally by having staff take this factor into account when contemplating eligibility for an award as well as the amount of the award. Furthermore, the OSC contends that allowing whistleblowers to report directly to the OSC may encourage market participants to self-report inappropriate conduct as soon as they become aware of such misconduct, and in any event, in advance of any whistleblower that had previously reported the misconduct internally. The OSC will generally give a market participant no "credit for cooperation" if the misconduct is reported first by a whistleblower, rather than the market participant itself, if the market participant was aware of the misconduct.

Comments are due on the Consultation Paper by May 4, 2015. The OSC notes that staff intend to host a round table during the comment period in order to encourage further discussion.

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