

OSC Whistleblower Roundtable Provides Food For Thought



We recognize the increasing reliance and institutionalization s of whistle blower programs as one of the most significant developments in the realm of regulatory enforcement in recent years. Notwithstanding the identified benefits of providing regulators and law enforcement personnel with unprecedented access to information and evidence to assist them in their pursuit of white collar transgressors, they have the potential of imposing real impediments to compliance officers, and corporate officers and directors in their ability to manage a meaningful internal compliance regime. On June 9, 2015 the OSC hosted a roundtable discussion (the “Roundtable”) on its proposed whistle blower program framework, OSC Staff Consultation Paper 15-401 – Proposed Framework for an OSC Whistleblower Program (the “Whistleblower Program”).

Background to the OSC Whistleblower Program

The OSC issued the Whistle blower Program on February 3, 2015. Notably, the Whistle blower Program would offer cash incentives to whistleblowers totaling up to \$1.5 million, which the OSC says will “motivate those with inside knowledge or information that relates to possible serious breaches of Ontario securities law to come forward and share that information with the OSC”. A detailed summary of the Whistleblower Program is found in our previous blog post, “ Will the OSC’s Proposed Whistleblower Program Bolster Enforcement Activity Notwithstanding Unique Challenges?”. The OSC called for comments from the public regarding the elements of the proposed framework. The comment period lasted from February to May 2015 yielding 17 comment letters from organizations, and individuals working at organizations including law firms, universities, and investor interest groups. We were among the law firms to submit a comment letter on the Whistleblower Program.

Summary of OSC Roundtable Discussion

The panel assembled by the OSC for the Roundtable further discussed and explored the issues raised in the Whistleblower Program and the comment letters. The Roundtable featured discussions reflecting the viewpoints of investors, market participants, members of the securities litigation bar and other stakeholders. Specifically, it included counsel who act for whistleblowers, legal and compliance representatives from securities registrants, and representatives from the Securities Exchange Commission (the "SEC"), the Competition Bureau, academia and other interested organizations. OSC Commissioners Mary Condon, Alan Lenczner and Tim Mosley moderated the Roundtable.

The Roundtable focused on the following topics:

- ***The Effectiveness of Whistleblower Programs*** – The Round table reviewed whistleblower programs in other jurisdictions and organizations, including the SEC program, and programs in place at the Investment Industry Regulatory Organization of Canada and the Competition Bureau. Panelists presented their views on the potential effectiveness of the OSC's Whistleblower Program. Particular focus was placed on the proposed eligibility requirements of the Whistleblower program, including the eligibility of culpable individuals to receive awards. Additionally, the level of effectiveness of the Whistleblower Program's proposed \$1.5 million cap on incentivizing individuals with information to come forward was discussed at length, and contrasted to the SEC's whistleblower award program, which is uncapped and has paid a whistleblower award in excess of USD \$30 million.
- ***Whistleblower Protections – Anti-Retaliation Measures and Whistleblower Confidentiality*** – The Panel discussed the importance of protecting individuals who come forward with information and debated the merits of the suggestion that organizations in Canada would retaliate against individuals who provided information to the OSC. Panelists canvassed the potential role of a whistleblower as a witness in proceedings commenced based on his or her information.
- ***Impact of an OSC Whistleblower Program on Internal Compliance Systems*** – Opposing views were offered by Panelists on whether an individual's failure to make use of internal compliance programs should at all affect eligibility to receive an award. As discussed in our previous blog post on the Whistleblower Program, We believe that any whistleblower program implemented by the OSC should encourage an organization to maintain and continuously improve its "culture of compliance". Further, We believe that eligibility to receive a whistleblower award must be dependent on satisfactory proof that individuals sought to fully avail themselves of the internal compliance and complaint procedures of their organization, or provide proof that there were compelling reasons why it was not possible to do so (Osler Comments on OSC's Proposed Whistleblower Program). This onus on the whistleblower should also be applicable to an individual who is in a compliance role at the organization he or she is providing information about. This approach is comparable to the approach taken to compliance officers under the SEC's whistleblower program, as demonstrated by the SEC's announcement several weeks prior to the Roundtable. On April 22, 2015, the SEC announced its second ever whistleblower award to an individual with compliance responsibilities to the organization alleged to be engaged in misconduct. SEC rules allow compliance officers to receive whistleblower payments for reporting misconduct in circumstances where investors could suffer substantial harm. In this case the compliance

officer reported the misconduct to the SEC after management at the organization had become aware of the potential imminent harm to investors but failed to take steps to prevent the harm.

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