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ARTICLE

Whistleblower Policy Bulletin

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A key addition has been made to the Policy since it was released for comment. The Policy now references the fact that the *Securities Act*, R.S.O. 1990 c. S. 5 (the "*Securities Act*") has been amended to include a provision which (a) acts to protect employees against reprisal from employers, and (b) voids certain contractual provisions which may preclude or purport to preclude whistleblowers from reporting.

Following the U.S. example where the SEC has had a whistleblower program in effect since 2010, the purpose of the Policy is to assist the Commission in identifying and investigating violations of securities and/or derivatives misconduct by offering a financial incentive to whistleblowers who come forward and report instances of misconduct. Also of note, on June 20, 2016, the *Autorité des marchés financiers* (the "AMF") launched its own whistleblower program. However, unlike the U.S. and Ontario programs, the Québec program does not offer rewards to whistleblowers.

With the advent of the Policy, reporting issuers and registrants should be reviewing and enhancing compliance systems in order to foster a culture of internal reporting of misconduct.

Who is (in)eligible?

A "whistleblower" is an individual or two or more individuals who provide voluntary, original information regarding a violation of securities law that has occurred or is about to occur.

Somewhat controversially, individuals complicit in misconduct may still be eligible for an award, though the amount of the award will likely be decreased and no immunity will be provided by the Commission. Those who have been criminally convicted in relation to the information will not be eligible.

A whistleblower may report anonymously if he or she is represented by a lawyer and the lawyer completes the information form. Before any payment of a whistleblower award will be made to an anonymous whistleblower, 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.

Internal or external auditors, CCOs, directors, officers and in-house counsel (more on this later) may be eligible for an award if:

- They have a reasonable basis to believe that the disclosure of the information is necessary to prevent the subject of the whistleblower submission from engaging in the conduct at issue;
- They have a reasonable basis to believe the subject of the whistleblower submission is engaging in conduct that will impede an investigation; or
- 120 days have elapsed since they provided the information to the entity's audit committee, chief legal officer, CCO, or supervisor.

The Impact on Internal Compliance

The policy expressly encourages whistleblowers who are employees to first report potential violations through internal channels (reports can and should be made to compliance, internal whistleblower hotline, CCO, or an ombudsman). However, the policy does not specifically require a whistleblower to make an internal report as it recognizes that there may be circumstances in which it may not be possible for a whistleblower to report to an internal compliance and reporting mechanism.

Reporting issuers and registrants should immediately start reviewing and updating policies and procedures to include clear processes for employees to voice concerns and a clear indication of the internal chain of command for whistleblowing in order to encourage internal reporting. In addition, companies should ensure that they develop appropriate policies and procedures surrounding the investigation of any internal whistleblowing reports, which include a consideration of whether the investigation is to be initiated by, at the request of, or in conjunction with internal legal counsel so as to maintain privilege, whether external counsel or forensic accountants need to be retained, and ultimately whether the matter needs to be reported to the Commission.

All internal policies and procedures should include explicit anti-retaliation provisions. If an employee makes an internal or an external report, the OSC expects that employers will not discipline, demote, terminate, harass and/or retaliate. After much discussion, the OSC has enshrined this protection at section 121.5 of the *Securities Act*. Reprisals by an employer against an employee in certain circumstances are expressly prohibited and contractual provisions between employers and employees that preclude or purport to preclude whistleblowers from reporting securities misconduct can be voided by virtue of s. 121.5 of the *Securities Act*. This new provision may be enforced pursuant to sections 122 or 127 of the *Securities Act*.

The Award

An "award eligible outcome" is defined as one which results in the imposition of total monetary sanctions or voluntary payments by one or more respondents in the amount of \$1 million or more.

The final ceiling on whistleblower awards has increased since Staff's initial Consulting Paper, but remained the same since comments closed in January 2016. The award will be a percentage between 5 and 15 percent of the total monetary sanctions imposed up to \$1.5 million. However, if the OSC collects on these sanctions in an amount equal or greater than \$10 million, the award can be as high as \$5 million.

In order to merit an award, the information submitted by the whistleblower must be original, of high quality, contain sufficient timely, specific and credible facts relating to the alleged violation, and be of meaningful assistance to Staff. The information cannot be subject to solicitor-client privilege or obtained in connection with provision of legal advice to a client or employer on whose behalf the whistleblower acts or provides services.

The information must relate to a breach of Ontario securities law, the definition of which has been expanded to include the definition found in the *Commodity Futures Act*.

Lawyers as Whistleblowers?

Technically in-house counsel may qualify as whistleblowers under the policy if they meet the exceptions set out in section 15(2) of the Policy. However, a lawyer's confidentiality obligations under the *Rules of Professional Conduct* mean that any whistleblower report made by in-house counsel would likely be in breach of the *Rules of Professional Conduct*.

Conclusion




Ready or not, this Policy will likely have a profound impact on the way in which registrants and reporting issuers deal with employee concerns regarding internal controls and how those concerns are reported to regulators, if need be. It is critical for registrants and reporting issuers to implement a robust internal reporting system which encourages and fosters employees to come forward to the company first in order to allow for a proactive response to potential areas of concern.

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