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a guide to managing whistleblowers

insight into Canada's first paid whistleblower program by a securities regulator

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introduction

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After much anticipation, the Ontario Securities Commission (the "**OSC**") launched a paid whistleblower program on July 14, 2016. The OSC is a regulatory body which administers and enforces compliance with Ontario's securities legislation and governs the securities industry and capital markets in Ontario. The OSC's role is to protect investors and foster fair and efficient markets. It makes rules to prevent misconduct and maintain integrity of the markets. The whistleblower program is a recent initiative designed to further the OSC's mandate (the "**Program**").

The Program encourages individuals to report misconduct relating to securities and listed companies. Whistleblowers who provide high quality information about misconduct relating to securities that leads to an administrative proceeding or voluntary payments may receive a financial award.

Following the success of a similar program by the U.S. Securities and Exchange Commission, the OSC considered introducing a whistleblower program. The OSC provided a 60 day public comment period. A number of stakeholders participated in the comment process, including issuers, lawyers, regulatory bodies, professional associations, academics, inves-

tors and whistleblower advocates. The OSC also held a 90-day consultation period on the proposed framework of the policy and a public roundtable discussion.

The launch of the Program recognizes that securities fraud and misconduct are difficult to discover. The financial award feature is an incentive for the public to come forward with information to assist the regulatory body. This document provides an overview of Canada's first paid whistleblower program, a brief look into the similar U.S. program and identifies potential implications for Canadian employers.

1:
nuts and bolts of the whistleblower program

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Individuals that meet eligibility criteria and who voluntarily submit information to the OSC staff may be eligible for a whistleblower award if the information was meaningful and resulted in a final order imposing monetary sanctions and/or the making of a voluntary payment of $1 million or more.

The purpose of the Program is to encourage individuals to blow the whistle on serious securities-related misconduct by submitting information to the OSC staff. Information related to criminal or quasi-criminal matters is excluded from the Program. These excluded matters are pursued under a separate part of Ontario's securities legislation. The Program specifies eligibility criteria for information, for whistleblowers and for the whistleblower award. The Program is aimed at encouraging whistleblowers to come forward with specific, timely and credible information concerning a wide variety of market misconduct such as in the areas of accounting and financial reporting, insider trading, market manipulation and general misrepresentation in corporate disclosure. By September 27, 2016, the Program had already received more than 30 tips.

On June 29, 2017, the OSC released its 2017-2018 Statement of Priorities. One of the OSC's proposed priorities is to raise awareness of the OSC whistleblower Program, including promoting better public understanding of the anti-retaliation measures for whistleblowers and developing a more proactive outreach program to reach potential high value whistleblowers.

1. eligible information

A whistleblower cannot expect to obtain a financial award by submitting any kind of information related to securities law violations. The OSC Program provides certain criteria that must be met before a whistleblower can expect to reap financial gains.

Under the Program, information eligible for a whistleblower award must relate to a serious violation of Ontario securities law. The information provided must be original, voluntarily submitted, of high quality and must provide meaningful assistance to the OSC staff, resulting in a final order imposing monetary sanctions and/or the making of a voluntary payment of $1 million or more. The information is original if it is not already known to the OSC staff from any other source. The information must come from one of the following two sources:

1) from the whistleblower's independent knowledge derived from the whistleblower's experiences, communications and observations in employment, business or social interactions; or

2) from the whistleblower's critical analysis of publically available information provided the analysis reveals information that is not generally known or available to the public.

Original information excludes information that the whistleblower obtained in the following circumstances:

- from a communication that was subject to solicitor-client privilege;
- 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
- by means or in a manner that violates applicable criminal law.

The eligible information must also be voluntarily submitted. This means that the information is not submitted at the request or inquiry of the OSC or another securities authority or law enforcement agency. The voluntary requirement also excludes information that the whistleblower has a legal duty to report to the OSC, another securities regulator, a securities-related SRO or a law enforcement agency.

The original and voluntary information has to be of high quality and contain sufficient timely, specific and credible facts relating to the alleged violation of Ontario securities law. The information has to result in meaningful assistance to the OSC staff in investigating the matter and in obtaining an award eligible outcome.

In short, a whistleblower cannot receive an award for information that the OSC staff determines to be:

- misleading or untrue;
- speculative or lacks specificity;
- subject to solicitor-client privilege;
- publically known;
- obtained by a means or in a manner that constitutes a criminal offence under applicable law; or
- not related to a violation of Ontario securities law.

2. eligible whistleblowers

An individual, including persons who are employees, former employees, suppliers, contractors, clients and anyone else that meets the eligible information criteria may be able to receive a whistleblower award. The 'individual' criteria means businesses and organizations cannot be whistleblowers.

Multiple whistleblowers may independently report information relating to the same misconduct. In such a situation, the whistleblowers are placed in line for awards, based on the timing of their report to the OSC. Individuals may also jointly submit a report to the OSC. The allocation of the award amount amongst the various whistleblowers will depend on multiple factors including the amount and effectiveness of the assistance provided.

Given the risk whistleblowers may undertake in reporting potential misconduct, the Program allows whistleblowers to submit information anonymously through a whistleblower's lawyer. However, a whistleblower will generally have to identify themselves to the OSC before an award is paid out so that the OSC can determine eligibility.

The Program excludes various individuals from eligibility for an award. Certain individuals are generally ineligible for a whistleblower award based on their role in legal, compliance, investigation or audit functions. Such individuals include in-house counsel, officers, members of the board of directors, chief compliance officers and auditors. In this regard, the Program generally excludes whistleblowers who obtain information in connection with providing legal services or conducting an internal or financial audit, unless the disclosure of that information would otherwise be permitted under the legal or auditing professional rules and regulations.

Other ineligible whistleblowers include any of the following:

- employees or contractors of the OSC, another securities regulatory authority, an SRO or law enforcement agency;
- a spouse, parent, child, sibling or resident of the same household of an employee, former employee or contractor of the OSC, another securities regulatory authority, an SRO or law enforcement agency;
- those who acquired the information from a person ineligible for a whistleblower award, unless the information is about a possible violation of Ontario securities law involving that person;
- those who have been convicted of a criminal offence in relation to the subject matter;
- those who in dealings with the OSC knowingly make statements or submit information that is misleading or untrue or that does not state a fact that is required to be stated to make the statement not misleading;
- those who make frivolous, vexatious or meritless submissions; or
- those who obtained the information in circumstances that bring the administration of the Program into disrepute.

Whistleblowers who are ineligible due to their role in legal, compliance, investigation or audit functions can become eligible under the Program. These whistleblowers can become eligible if at least 120 days have elapsed since the individual provided the information to appropriate internal supervisors through the appropriate internal channels, or 120 days have elapsed since the individual received the information and in the circumstances became aware that the internal supervisors were already aware of the information. The appropriate internal channels include the entity's audit committee, chief legal officer, chief compliance officer (or their respective functional equivalents) or the individual's supervisor.

Further, an ineligible whistleblower can become eligible if the whistleblower has a reasonable basis to believe that disclosure is necessary to avoid substantial injury to the financial interests of the entity or investors, or that the subject of the whistleblower submission is engaging in conduct that will impede an investigation of the misconduct.

Culpable individuals are not automatically excluded from a whistleblower award. However, the level of culpability is one of the factors that will be considered in determining the amount of any whistleblower award that may be made. To determine whether the monetary sanction threshold is met for a financial award, the OSC will not take into account any voluntary payments or monetary sanctions that are based on the conduct directed, planned or initiated by the whistleblower. Any voluntary payments or sanctions will be deducted from any whistleblower award paid to a complicit whistleblower. Further, the OSC is not precluded from taking enforcement action against the whistleblower for their role in the violation.

3. whistleblower award

The novelty of the Program is the financial incentive provided to the whistleblowers. The whistleblower programs of the Investment Industry Regulatory Organization of Canada, the Competition Bureau, and the Mutual Fund Dealers Association and the newly launched Autorité des marches financiers (Quebec's financial sector regulatory body) program do not offer financial incentives. The Canada Review Agency's Offshore Tax Informant Program provides a form of financial incentive by paying individuals who report major internal tax non-compliance a percentage of federal tax collected because of the information provided. The Alberta Securities Commission recently announced plans to implement a whistleblower program.

The OSC will authorize the payment of an award after it has determined that the whistleblower is eligible, that there was an award eligible outcome and the award amount.

If the whistleblower is eligible for an award and the total monetary sanctions ordered and/or voluntary payments made are at least $1 million, then the OSC will grant an award ranging from 5% to 15% of the total, up to a maximum of $1.5 million. If the OSC collects at least $10 million, then the maximum award amount is increased to $5 million.

The OSC will consider numerous factors to determine the amount of the award. The following factors may increase the award:

- the timeliness and significance of the information provided by the whistleblower;
- the whistleblower's degree of assistance;
- the positive impact on the investigation or enforcement proceeding;
- remediation and recovery efforts of the whistleblower;
- the whistleblower's internal reporting efforts, if applicable;
- any unique hardships faced as a result of the report; and
- the whistleblower's contribution to the OSC's mandate and priorities.

Factors which may decrease the amount of the award include the following:

- erroneous or incomplete information;
- culpability of the whistleblower;
- unreasonable delay in reporting;
- refusal to provide additional assistance when requested;
- interference with the OSC staff's investigation; and
- interference with internal compliance and reporting mechanisms.

In the event that the OSC decides not to grant a whistleblower award, the whistleblower has no remedy and cannot contest the decision.

4. protections for whistleblowers

Although the Program provides that the OSC will endeavour to make all reasonable efforts to maintain confidentiality, there are two significant exceptions:

(a) when required by law, including where the OSC is required to disclose the whistleblower's identity in connection with an administrative proceeding in order to permit a respondent to make a full answer and defence; or

(b) when the OSC determines it is necessary to disclose the information to various enumerated regulatory authorities, provided that the OSC will not disclose the whistleblower's identity without consent.

The OSC's position is that any requests under the *Freedom of Information and Personal Protection of Privacy Act* ("**FIPPA**") to disclose a whistleblower's identity will be denied. However, it is possible that a whistleblower's identity may be disclosed pursuant to a *FIPPA* request as the final decision rests with the Information and Privacy Commissioner of Ontario or a court of competent jurisdiction.

The Program and the Ontario *Securities Act* include anti-retaliation measures to deter employers from retaliating against whistleblowers, including but not limited to disciplining, demoting, penalizing or harassing a whistleblower. The Ontario *Securities Act* also voids contractual non-disclosure provisions that preclude a whistleblower from providing information to the OSC, an SRO or a law enforcement agency. This approach is similar to what has been adopted and widely publicized by the U.S. Securities Exchange Commission ("**SEC**").

However, it is important to note that providing information to the OSC does not immunize culpable whistleblowers from potential future enforcement actions by the OSC. After receiving the information, the OSC may decide to investigate and prosecute the whistleblower for its role in the violation of Ontario securities law. Simply making a whistleblower complaint does not insulate the individual from any possible adverse consequences.

2: the U.S. whistleblower program

the U.S. whistleblower program

The Program was heavily inspired by the SEC whistleblower program, implemented in 2010. The U.S. program has largely been declared a success.

If the U.S. program is any indication of the OSC Program's future, the Ontario securities markets should prepare for increased investigations and potentially successful actions that result in monetary awards for whistleblowers.

1. brief overview

The U.S. program, as in the OSC Program, provides a monetary award to an individual or group of individuals who voluntarily provide original information about a possible violation of securities laws that leads to a successful enforcement action. The U.S. program excludes any information which is subject to attorney-client privilege, unless permitted by attorney professional rules. An individual who obtained information as an officer, director, trustee, partner, or

auditor from another person or learnt of the information through the company's internal process for identifying law violations, is also excluded.

To receive a U.S. whistleblower award, the monetary sanctions must exceed $1 million. Awards are in an amount equal to 10% to 30% of the monetary sanctions collected.

The 2016 annual report of the SEC whistleblower program reported that over $111 million in awards have been granted to 34 whistleblowers since the beginning of the program. In the fiscal year 2016 alone, over $57 million was awarded to whistleblowers. The information provided by the 34 whistleblowers assisted with enforcement proceedings leading to over $584 million in monetary sanctions.

The U.S. program has seen a significant increase in whistleblower tips. The SEC received 3,001 tips in 2012, 3,238 in 2013, 3,620 in 2014, 3,923 in 2015 and 4,218 in 2016. The tips have covered a full range of potential federal securities law violations, with the most common ones relating to corporate disclosures, financial impropriety, offering fraud and market manipulation.

2. internal policies

Like the commentators to the OSC Program, the U.S. commentators urged making internal reporting a precondition to a whistleblower award. The U.S. program established the following incentives for internal reporting:

- whistleblowers that participate in internal compliance systems prior to filing a complaint under the program may earn a higher whistleblower award; and

- whistleblowers may remain eligible for a reward for information reported internally, if the information is provided to the SEC within 120 days of reporting internally.

The 2016 U.S. program statistics indicate that almost 65% of award recipients were insiders of the entity about which they reported information to the SEC. The 2016 fiscal year-end report found that, of the award recipients who were current or former employees, approximately 80% raised their concerns internally to their supervisors or compliance personnel, or understood that their supervisor or relevant compliance personnel knew of the misconduct, before reporting their information to the SEC.

Improving internal reporting is not just a responsibility of the U.S. program. The companies have to take it upon themselves and be proactive. The U.S. program has recommended directors to act as gatekeepers for their shareholders. Issuers are expected to have established policies and procedures that allow employees to submit complaints easily and without the fear of retaliation.

3. employee protections

The U.S. program has certain anti-retaliation protections for individuals who act as whistleblowers. Some of these protections include each of the following:

- no one can take any action to impede an individual from communicating with the SEC about possible securities law violations, including enforcing or threatening to enforce a confidentiality agreement;
- an employer may not discharge, demote, suspend, threaten, harass, or take any other retaliatory action against an employee who provides information under the program, initiates, testifies in, or assists in an investigation;

- individuals who experience retaliation from employers because of whistleblowing have a private cause of action in federal court; and
- it is likely that the employment retaliation protections also apply when individuals report potential violations internally within public companies.

In practice, the U.S. program has taken action against anti-retaliation measures that whistleblowers have faced to ensure that individuals continue to participate in the program. In one such example, SEC charged a firm with retaliating against the whistleblower after learning that the whistleblower reported potential misconduct. The firm retaliated by removing the whistleblower from the whistleblower's position, assigning the whistleblower the task of investigating the conduct reported, marginalizing the whistleblower and stripping the whistleblower's responsibilities. Considering the retaliation the whistleblower faced, the whistleblower award paid 30% of the sanctions, the maximum permitted by the program.

In another example, a company was charged for including language in confidentiality agreements that impeded whistleblowers from reporting under the program. Specifically, the agreement prevented employees from discussing the substance of internal investigation interviews without the approval of the company's legal department.

The leadership of the SEC and its whistleblower program have also publicly confirmed on a number of occasions their commitment to taking action against conduct or agreements which seek to block or prevent whistleblowers from reporting potential misconduct.

Within the span of a short period, the U.S. program appears to be working well in the post-financial crisis era. The program has also provided a reason for companies to search for novel ways to improve internal culture and compliance with effective policies and procedures.

3: impact of the program on employers

impact of the program on employers

The success of the OSC Program hinges on the willingness of individuals with relevant material information about potential misconduct and violations to come forward. Employers can expect the OSC to take significant steps against any employer retaliation or internal procedures that discourage employees from approaching the OSC.

1. protection measures

The Program strongly emphasizes protection measures to encourage participation. Employers are strictly prohibited from retaliating against a whistleblower. Any agreement provisions that are designed to silence whistleblowers and prevent employees from providing information to assist with an OSC investigation are void.

An employer cannot take any measure that adversely affects an employee, including any of the following:

- terminating or threatening to terminate;
- demoting, disciplining or suspending, or threatening to demote, discipline or suspend an employee;
- imposing or threatening to impose a penalty relating to the employment of an employee; or
- intimidating or coercing an employee.

The OSC Program also states that the OSC will make all reasonable efforts to keep the identity of a whistleblower confidential except when required by law or when the OSC determines it is necessary to disclose to other entities with the consent of the whistleblower.

On July 11, 2017, the OSC released its Annual Summary Report for Dealers, Advisers and Investment Fund Managers. The OSC states that it will be working to identify restrictive provisions in employment contracts, severance agreements, confidentiality agreements and other related agreements, that seek to prevent employees from reporting violations to the OSC, SROs or law enforcement agencies. In particular, the OSC is concerned with contracts containing terms that:

- permit disclosure "only as required by law";
- limit types of information that an employee may report;
- prohibit all disclosure, without exception;
- require an employee to represent that it has not assisted in an investigation involving the employer; and
- require notification or consent from an employer prior to reporting information.

The effectiveness of these protections is yet to be seen. A good lesson can be taken from the U.S. program where employers have been penalized for retaliation against whistleblowers and have paid hefty penalties.

2. internal reporting is not mandatory

Throughout the commentary phase of the Program, the commentators expressed major concerns about the potential of the OSC Program to weaken compliance with internal policies. The Program as implemented does not require that whistleblowers first go through their internal company policies for reporting misconduct. The Program does, however, encourage employees to report information internally. For example, participation in internal compliance and reporting systems is a factor which the OSC considers in determining the amount of a whistleblower award.

Employers should revise and develop internal compliance and reporting systems to adapt to these regulatory developments. Internal policies should be revisited to ensure that comprehensive and robust compliance mechanisms are in place. The policies and strategies should encourage employees to report any information relating to possible securities laws violations internally. This is an important preparatory measure which employers should undertake to increase oversight, avoid paying potentially substantial sanctions and resolve any potential misconduct.

Policies should address procedures to:

1. prevent misconduct;
2. respond during a crisis where misconduct has been identified; and
3. recover and steer the outcome of any disclosure of misconduct.

It is crucial for companies to cultivate an environment that encourages internal reporting. One possible approach is to emphasize anonymity and confidentiality. When information relating to possible misconduct has been reported, employers must have clear investigatory steps in place to process and analyze the information. After the investigation has concluded, employers should re-assess their internal procedures and operations. Employees who have provided information cannot be penalized or face retaliation for disclosing potential misconduct.

Learning from the U.S., employers will have to be proactive in improving compliance mechanisms rather than wait to react once an employee has provided information to the OSC.

4: employer strategies

employer strategies

Employers should implement strategic changes now to address the regulatory developments. The following are proactive measures employers might consider implementing.

1. pre-investigation phase

- Review existing compliance policies and procedures for any inconsistency with the OSC Program;
- Review confidentiality agreements and consider whether any provisions prevent employees from reporting information to the OSC;
- The internal policies should be clear, straightforward and easily accessible;
- The employees should have the option of providing tips in multiple ways, including anonymous email and hotline reporting;
- The internal policies should be customized to meet the unique needs of the particular company as there is no "one size fits all" policy;

- Provide training and resources on how to handle tips;
- Implement a special committee or a compliance officer to handle tips;
- Update the code of ethics or code of conduct to emphasize reporting any possible securities law violations; and
- Create possible internal incentives, monetary or otherwise, for whistleblowers to report internally first.

2. investigation phase

- After a tip is received, the organization should take the tips seriously and act promptly;
- The policies and procedures should lay out how the information and any related documents are handled and preserved;
- The tips may involve communicating with different stakeholders, such as the board of directors, senior executives and auditing committees. This requires putting in place well-defined communication and reporting channels;
- Employ adequate resources in dealing with the reported information through effective resource management. The organization should also be able to deal with public relations and regulatory disclosures;
- Consider appropriate follow-up with the whistleblower and keeping the whistleblower apprised on a confidential basis;
- Seek advice of external counsel, if necessary; and
- Keep records of the information provided and the steps taken in the event that the OSC becomes involved.

3. post-investigation phase

- Ensure that no retaliation measures are taken against the whistleblower. This is both to encourage future reporting and to prevent violating the OSC Program policy and legislation;
- Create internal awareness about the OSC anti-retaliation protections to avoid supervisors disciplining any whistleblowers;
- Employers should consider self-reporting to the OSC with input from external counsel; and
- Conduct periodic compliance audits of internal policies.

In the U.S. program, approximately half of the whistleblower award recipients were current or former employees of the company. This should prompt employers in Canada to be proactive and design a strategic internal response. Employers can also use effective internal polices as a defence should the OSC become involved.

conclusion

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The Program was recently implemented and the full impact of it is not yet known. It remains to be seen how frequently the Program will be engaged in enforcement proceedings, whether the tips will result in greater monetary sanctions, and the scope and frequency of monetary awards to whistleblowers.

The OSC Program has been launched amongst much noise and commentary as Canada's first paid Program by a securities regulator. Stakeholders can look to the U.S. whistleblower program, which was used as a model for the Canadian one, to pre-empt some of the potential impacts that employers may face. This allows employers to proactively implement changes rather than be faced with an OSC investigation and the related consequences. Employers should use pro-active strategies to improve internal programs and encourage employees to report internally without fear of reprisal.

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