

Corporate Securities Law

February 11, 2015

OSC Staff Proposes Whistleblower Program

Staff of the Ontario Securities Commission (OSC) is considering introducing a whistleblower program to encourage reporting of breaches of Ontario securities law. The program, if implemented, would be the first of its kind for securities regulators in Canada (although whistleblower programs have been implemented in Canada in the context of tax and competition legislation).

Staff is requesting comments on its proposal by May 4, 2015.

Program Objectives

Staff's stated objectives for the program, which are outlined in *Staff Consultation Paper 15-401 – Proposed Framework for an OSC Whistleblower Program* are to:

- motivate those with inside knowledge or information relating to possible serious breaches of Ontario securities law (and that might otherwise not be available to Staff) to share that information with Staff,
- increase the number and efficiency of complex securities law cases investigated and brought forward by Staff, and
- motivate issuers and registrants to self-report misconduct to receive the benefit of the OSC's credit for cooperation program (which would not be available if the misconduct is first reported to Staff by a whistleblower).

Program Elements

Building significantly on the model adopted in the United States by the Securities and Exchange Commission (SEC), which is attracting attention in the context of large payouts being made to whistleblowers, Staff is proposing a framework for the program with the following basic elements:

- *Whistleblower Eligibility.* The whistleblower would have to be an individual who provides high quality, original information on a voluntary basis leading to the commencement of OSC administrative proceedings and resulting in an enforcement outcome (including a settlement) with an order or agreement to pay more than \$1 million (excluding costs) (the "**Threshold**"). The proposal prescribes certain categories of individuals who would not be eligible, including individuals in compliance roles. Individuals who participated in the reported activity are not automatically ineligible; the level of their culpability will be a factor in determining whether an award is to be made.
- *Financial Incentive.* A financial award of up to 15% of the total monetary sanctions (excluding cost awards) could be awarded where the total sanctions or settlement payments exceed the Threshold. The maximum amount of any award would be capped at \$1.5 million. The determination to make, and the ultimate amount of, an award would be wholly in the discretion of the Commission (based upon Staff recommendation), regardless of whether an individual satisfies the prescribed criteria.

Goodmans^{LLP} Update

- *Confidentiality.* The OSC would use all reasonable efforts to keep a whistleblower's identity confidential, subject to certain exceptions (e.g., when the relevant information is necessary to make Staff's case against a respondent). The OSC is considering whether to adopt a policy that would allow a whistleblower to remain anonymous and interact with Staff through legal counsel (at least until the determination of any financial reward, in order for the OSC to determine eligibility).
- *Whistleblower Protection.* To encourage whistleblowers to come forward and deter employer retaliation, Staff would have the ability to prosecute a retaliating employer, whistleblowers would have a civil right of action against a retaliating employer, and contractual provisions to silence whistleblowers would be unenforceable.

While Staff is considering establishing the program through the adoption of an OSC Policy, certain elements of the program (such as anti-retaliation protection) would require legislative amendments.

Considerations Regarding the Proposal

The proposal raises numerous issues, including:

- whether the right criteria has been identified for eligibility,
- the potential impact on internal reporting systems,
- whether the financial incentives, which in contrast to the SEC model would be "capped", are sufficient,
- whether the triggers for those incentives are appropriate, and
- whether, and if so to what extent, anonymity is appropriate.

For further information on the OSC's proposed whistleblower program, contact any member of our Corporate Securities Group.