

## Corporate Securities Law

November 2, 2015

### OSC Publishes Proposed Whistleblower Program

The Ontario Securities Commission (OSC) has published *Proposed OSC Policy 15-601 -- Whistleblower Program* (the “**Proposed Policy**”), which sets out the details of a proposed whistleblower program intended to encourage reporting of Ontario securities law breaches to the OSC. The OSC is requesting comments on the Proposed Policy by January 12, 2016.

The OSC introduced the program earlier this year with *Staff Consultation Paper 15-401: Proposed Framework for an OSC Whistleblower Program* (see our February 11, 2015 Update, *OSC Staff Proposes Whistleblower Program*). The Proposed Policy incorporates feedback received by the OSC and puts forward a number of significant changes to the program introduced in the Staff Consultation Paper.

#### Highlights of Changes in the Proposed Policy

- *Increased Financial Incentive.* The Proposed Policy increases the maximum award for whistleblowers to \$5 million, from a previous amount of \$1.5 million, for outcomes where the OSC actually collects monetary sanctions and/or voluntary payments in excess of \$10 million. Otherwise, whistleblowers are eligible for a maximum amount of up to \$1.5 million. Depending on the facts surrounding the breach and the attendant whistleblowing, and subject to the maximum amounts, awards can range from 5% to 15% of the total monetary sanctions imposed and/or voluntary payments made.
- *Expanded Eligibility for Awards.* Individuals eligible to receive awards under the Proposed Policy, in certain circumstances, include whistleblowers in compliance roles (such as officers, directors, auditors, legal counsel and chief compliance officers) and those complicit in the securities law violation. The Staff Consultation Paper proposed excluding individuals in these types of compliance roles.

- o While whistleblowers in compliance roles are generally ineligible to receive awards, they may become eligible if (a) they reasonably believe reporting is necessary to prevent substantial injury to the financial interest or property of the entity or investors, (b) they reasonably believe the subject of the whistleblower submission is taking actions to hinder the investigation, or (c) more than 120 days have passed since the whistleblower reported the incident internally. Legal counsel are only eligible for awards where disclosure is permitted under applicable law society rules.
- o Whistleblowers complicit in a securities law violation may be eligible for an award, adjusted according to the degree of culpability, though these individuals are not immune to OSC prosecution.
- *Enhanced Confidentiality.* The Proposed Policy removes a previously proposed exception allowing the OSC to reveal a whistleblower’s identity (or information that could be reasonably expected to reveal it) when deemed necessary to make the OSC’s case against a respondent. The Proposed Policy allows whistleblowers to submit information anonymously if represented by counsel.

The Proposed Policy attempts to balance concerns expressed by market participants. While it creates incentives to report outside of internal reporting mechanisms, it attempts to do so without discouraging the general use of those mechanisms. Similarly, it attempts to protect and compensate legitimate whistleblowers without encouraging frivolous reports.

While the Proposed Policy remains subject to comment, reporting issuers should begin to consider its potential impact and any changes to their internal reporting mechanisms and whistleblowing policies that may become appropriate.

For further information on the Proposed Policy, please contact any member of our Corporate Securities Group.