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# Clean as a whistle

By Neill May

Casual team sports often work on a self-policing principle. For example, in pick-up basketball games, in the absence of a referee, players call fouls on themselves. Self-reporting in those cases, motivated by good sportsmanship, and perhaps peer and/or reputational discipline, generally seems to work pretty well. Now imagine for a moment that there were a financial reward for admitting a foul in those games. Perhaps the potential financial reward would be so large that it significantly exceeds the average player's wealth or income. A typical game might start to look very different: a lot more penalty/foul calls, and a lot less actual sports activity. Players might start fouling each other before the game even starts (or at least claiming to have done so). And, for once, lawyers might get picked early when teams are selected (not bitter, just saying).

Reporting wrongdoing for potentially significant potential rewards is the principle underlying the recent proposal by staff at the Ontario Securities Commission to adopt a whistleblower program for breaches of Ontario securities law. The analogy is a bit strained, because there is no meaningful social good in conscientious reporting of transgressions in recreational sports games, and the prospect of rewards for doing so seems a bit remote. But sports do involve whistles, so there is that symmetry.

Whistleblowing programs have garnered much recent attention, in particular because of the large amounts paid out by the United States Securities and Exchange Commission. Whistleblowing programs are functioning in many jurisdictions for many different purposes. In Canada, the Canada Revenue Agency's Offshore Tax Informant Program offers financial incentives. Other Canadian programs, like those operated by the Investment Industry Regulatory Organization of Canada, the Competition Bureau, the Mutual Fund Dealers Association, and the securities regulators in the United Kingdom and Australia, do not offer financial incentives.

The stated objectives for the OSC's proposed program are unsurprising; they include motivating those with inside knowledge or information relating to possible serious breaches of Ontario securities law to share that information, and

to thereby increase the number and efficiency (the latter presumably refers to the rate of successful prosecutions) of complex securities law cases investigated and brought forward.

Another anticipated benefit of the program, if implemented, is the incentive that would be provided to issuers and registrants to self-report misconduct, in order to receive the benefit of the OSC's credit for co-operation program (which would not be available if the misconduct is first reported by a whistleblower). Issuers would be motivated as well to consider their own internal compliance and whistleblower programs, preferring that legal violations be brought to their attention before they are reported to the regulators.

Internal whistleblower programs are difficult to manage in any event, because however drafted it can be difficult to convince employees that they will not be compromised in the workplace by whistleblowing (and it may even be difficult to prevent them from being so compromised). Now internal whistleblowing programs face the prospect of competing with a regulatory program that offers financial rewards.

An eligible whistleblower under the OSC's proposed program would be an individual (subject to certain exceptions, such as persons in compliance roles) who provides high quality, original information on a voluntary basis that leads to the

commencement of proceedings that result in an enforcement outcome (including a settlement) with an order or agreement to pay more than \$1 million (excluding costs). All reasonable efforts would be used to keep a whistleblower's identity confidential, subject again to certain exceptions, for example, when disclosure is necessary to prosecute the case. In fact, consideration is being given to providing for a whistleblower to remain entirely anonymous and interact with the regulator through legal counsel (at least until the determination of any financial reward, in order for the OSC to determine eligibility).

To encourage whistleblowers to come forward and deter employer retaliation, the program would provide for an 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.

One of the central issues, of course, is what the potential financial rewards might be. Under the proposed program the financial incentives would be up to 15 per cent of the total monetary sanctions with a \$1.5-million limit; much more modest than the SEC's limits, though nevertheless meaningful. An interesting question, for amateur ethicists and/or for those concerned about my hypothetical pick-up basketball game, is whether culpable individuals can themselves report and earn rewards. As proposed, culpability is not an impediment to participation. It is simply a factor to be considered in setting the award. A bit of a perverse incentive.

With all of this talk of whistleblowing, I am tempted to claim I plagiarized this column and try to claim a financial award for having done so. Even if that were possible, I am not certain I have the heart to blame anybody else for my writing. So I will have to be content with waiting to see, with apologies to Snow White, whether other folks will whistleblow while they work. **CL**

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