

Chapter 6

Request for Comments

6.1.1 Proposed Change to OSC Policy 15-601 Whistleblower Program – OSC Notice and Request for Comment

OSC NOTICE AND REQUEST FOR COMMENT

PROPOSED CHANGE TO OSC POLICY 15-601 *WHISTLEBLOWER PROGRAM*

The Ontario Securities Commission (OSC, or the Commission) is publishing a proposed change to OSC Policy 15-601 *Whistleblower Program* (the Policy) for a 60-day comment period.

Substance and Purpose

Following further consideration as well as feedback received from the Law Society of Ontario subsequent to the publication of the final Policy, the Commission is proposing a change to the Policy. The purpose of the change is to clarify that in-house counsel who report information under the Policy in breach of applicable provincial or territorial bar or law society rules or equivalent rules applicable in another jurisdiction will not be eligible for a whistleblower award.

Background

The Policy came into effect in July 2016. It provides guidance on the OSC's Whistleblower Program (the Program). The Program is designed to encourage individuals to report and submit to the Commission information on serious securities-related misconduct. Under the Program, individuals who meet certain eligibility criteria and who voluntarily submit 'original information'¹ to Commission Staff (Staff) regarding a breach of Ontario securities law may be eligible for financial compensation (whistleblower award) if it is determined that the information submitted:(i) was of meaningful assistance to Staff in investigating the matter and obtaining a decision of the Commission under section 127 of the *Securities Act* (Ontario) (the Act) or section 60 of the *Commodity Futures Act* (Ontario) (the CFA), and (ii) results in an order for monetary sanctions (i.e., administrative penalties and/or disgorgement orders) and/or voluntary payments of \$1,000,000 or more.

The Policy also sets out the practices generally followed by the Commission and Staff in administering the Program; the nature of the information that may be eligible for the payment of a whistleblower award and the criteria that would make an individual eligible for a whistleblower award; and the factors considered in determining eligibility for, and the amount of, a whistleblower award.

Eligibility of in-house counsel for a whistleblower award

The Policy is not intended to override applicable provincial or territorial bar or law society rules or equivalent rules applicable in another jurisdiction or to incent misconduct on the part of in-house counsel. Indeed, the following provisions in the Policy are intended to protect against conduct that would violate a lawyer's professional obligations:

- the definition of 'original information' that may qualify for a whistleblower award expressly excludes information that a whistleblower has obtained through a communication that was subject to solicitor-client privilege;
- subsection 14(3) of the Policy provides that no whistleblower award will be provided for information that Staff determines is subject to solicitor-client privilege;
- subsection 15(1) of the Policy provides that a lawyer will generally be considered ineligible for a whistleblower award unless the disclosure of the information would otherwise be permitted by the lawyer under applicable provincial or territorial bar or law society rules or equivalent rules applicable in another jurisdiction (see s. 15(1) (c) and (d)). (This reflects that fact that in some jurisdictions disclosure by a lawyer may now or in the future be permitted under applicable law society rules or the equivalent.); and

¹ The definition of "original information" in section 1 of the Policy specifically excludes information obtained through a communication that was subject to solicitor-client privilege.

- Part 4, item F of the Whistleblower Submission Form A requires in-house counsel to state whether disclosure of the information he or she is providing is permitted under applicable provincial or territorial bar or law society rules or the equivalent rules applicable in another jurisdiction.

The Policy contains exceptions from ineligibility for certain otherwise ineligible classes of individuals. They may be eligible for a whistleblower award if they fall within one or more of the exceptions set out in subsection 15(2) of the Policy, as follows:

- (a) the whistleblower has a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the subject of the whistleblower submission from engaging in conduct that is likely to cause or continue to cause substantial injury to the financial interest or property of the entity or investors;
- (b) the whistleblower has a reasonable basis to believe the subject of the whistleblower submission is engaging in conduct that will impede an investigation of the misconduct; or
- (c) at least 120 days have elapsed since the whistleblower provided the information to the relevant entity's audit committee, chief legal officer, CCO (or their respective functional equivalents) or the individual's supervisor, or, at least 120 days have elapsed since the whistleblower received the information, if in the circumstances the whistleblower received the information, the whistleblower became aware that one or more of those individuals were already aware of the information.

The fact that these exceptions would apply to in-house counsel, among others, was in contemplation of situations where an employee serves both legal and non-legal functions within an organization and provides a whistleblower submission that relates to matters that arise while the in-house counsel is acting outside of their legal capacity. It was not intended to incent professional misconduct on the part of in-house counsel. In order to clarify this, the Commission proposes the change described below.

Proposed Change

We propose to change the Policy by replacing the words in subsection 15(2): "*A whistleblower listed in paragraphs 1(d) to (h)*" with the words "*A whistleblower listed in paragraphs (e) to (h)*", so that subsection 15(2) will read:

"A whistleblower listed in paragraphs (1)(e) to (h) [of subsection 15(1)] may be eligible for an award if ..."

The proposed change would mean that the exceptions from ineligibility set out in subsection 15(2) of the Policy would not apply to in-house counsel in respect of matters that arise while the in-house counsel is acting in a legal capacity. The change is also intended to further clarify that the Commission does not wish to receive information that is subject to solicitor-client privilege or the provision of which would otherwise be in breach of applicable provincial or territorial bar or law society rules or equivalent rules applicable in another jurisdiction. Specifically, the proposed change clarifies that in Ontario, in-house counsel acting in a legal capacity are ineligible for a whistleblower award because their duty to protect the confidentiality of their clients' information would preclude them from making a whistleblower submission under the rules governing the legal profession in the province.

Alternatives considered

We considered several alternatives for these purposes, including:

- Do not change the Policy because in-house counsel will understand that the exception in subsection 15(2) is not intended to override their professional obligations. Since we wish to ensure that the provision is clear, this is not an acceptable alternative.
- Change the Policy to require in-house counsel to first seek legal advice or report to the applicable law society before making a submission. The purpose would be to confirm that a proposed whistleblower submission would not be in breach of their obligations as counsel. However, this would create a more cumbersome process.

In our view, the proposed approach provides the greatest clarity to in-house counsel.

Impact of proposed change

We recognize that in some jurisdictions legal counsel are not prohibited from reporting client misconduct and in fact, may be required to report this to an appropriate authority, including a securities regulatory authority. As a result of the proposed change, in-house counsel acting in a legal capacity would be ineligible for an OSC whistleblower award unless the disclosure would otherwise be permitted under applicable law society rules. Any in-house counsel would have to consider when, how and in what capacity they acquired the subject information. If the in-house counsel is not acting in a professional legal capacity, this change should not affect them.

No unpublished study materials

In preparing this proposed change to the Policy, the Commission has not relied on any significant unpublished study, report or decision.

Comments

We request your comments on the proposed change to the Policy. You must submit your comments in writing via email by **March 20, 2018**. If you are sending your comments by email, you should also send an electronic file containing the submissions, using Microsoft Word. All comments received during the comment period will be made publicly available on the OSC website at www.osc.gov.on.ca for transparency of the policy-making process.

Please address and send your comments to:

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Questions

Please refer your questions to:

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