

Via email

OSC Investor Advisory Panel
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The Secretary
Ontario Securities Commission
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Re: OSC Staff Consultation Paper 15-401: Proposed Framework for an OSC Whistleblower Program

This letter constitutes the Investor Advisory Panel's submission on the Commission's Consultation Paper 15-401: Proposed Framework for an OSC Whistleblower Program ("Whistleblower Program"). The IAP is an independent body formed by the Ontario Securities Commission (OSC) in August 2010. We are charged with providing input on the Commission's policy initiatives, including proposed rules and policies, the annual Statement of Priorities, concept papers and specific issues. Our mandate is to represent the views of investors.

We consider the OSC's Proposed Whistleblower Program to be in the interests of investors in Ontario and support the proposed framework presented by the OSC in Staff Consultation Paper 15-401. This response follows the structure of the OSC Staff Consultation Paper and outlines specific concerns and recommendations related to each area.

2. Background:

2.1 - 3 - Why Should the OSC Consider a Whistleblower Program: The IAP accepts the OSC's proposition that the Whistleblower Program is an additional tool to assist in identifying and investigating violations of securities laws. It is in Ontarians' interest to pursue this goal with all reasonably available tools, including whistleblowers. The OSC commentary in section 2.1 and 3 of the Whistleblower Program provides compelling examples of successful comparable programs. A successful program will enable the OSC to learn of wrong-doing on a timely basis and it will motivate registrants to self-report misconduct.

In the Whistleblower Program, OSC staff identify potential industry concerns with these programs more generally. The IAP acknowledges that there are two strong 'ethical' concerns with any whistleblowing program:

1. Many whistleblowers may have some degree of culpability ; and
2. In Ontario, the Security Act licensing system obligates self reporting and encourages internal dealer reporting of wrong doings.

Conceptually, market participants should 'do the right thing.' However, in reality, when faced with the potential loss of financial security or career, many will put their own interests first. The Whistleblower Program addresses this issue by attempting to align self-interest and self-preservation with the wish to 'do the right thing' by offering confidentiality, whistleblower protection, and a monetary incentive to eligible whistleblowers who provide the OSC with timely, credible and robust information leading to an enforcement outcome. At the same time, it is undeniable that many whistleblowers will make significant self-sacrifices even with the protections proposed in the Whistleblower Program.

Compliance and enforcement: The IAP supports effective compliance programs and enforcement actions against wrongdoers. The IAP also accepts that practical accommodations such as a whistleblower program are necessary to both expose and stop wrongdoing and prevent it in future. Examples of regulatory accommodation include the longstanding principle of considering mitigating circumstances, including self-directed remedial work by dealers and compensation of investors, during the penalty phase of prosecution, and the Credit for Cooperation Program. Another example of the same kind of accommodation is the recent introduction of "No Contest Settlement Program" which is widely supported by industry.

Response to specific proposals:

While we acknowledge the Whistleblower Program is in the proposal stage, we offer these comments for consideration by the OSC in the drafting of subsequent policy.

5. Whistleblower Eligibility - According to the proposal, established criteria would define whistleblower eligibility requirements and describe the characteristics of information expected to be reported. The IAP supports the OSC's overall approach to whistleblower eligibility and offers the following comments on what it has proposed.

Who can be a whistleblower: The Proposal states that, among other criteria, the whistleblower must be an individual. There is no reason to bar the work of a group. This part of the proposal should be amended.

5.1 Characteristics of Information expected to be reported - The criteria set out in section 5.1 are a good starting place but require further elaboration and detail in a subsequent iteration. For example, the term “serious misconduct” is not clearly defined. The IAP recommends more explicit guidance and submits that ‘seriousness’ should include the criterion of “serious risk of harm to an actual or potential investor or investors”. At the same time, the examples of misconduct in the proposal do not make a clear distinction between “misconduct” and “serious misconduct”. The IAP urges that the ‘Examples of Misconduct’ be reworked and expanded to illustrate serious misconduct and that an “analogous grounds” provision be added as is common in other regulators’ Rules.

5.2 Ineligibility for Whistleblower Award - This section of the proposal outlines a number of circumstances in which individuals would not be eligible to receive a whistleblower award.

Chief Compliance Officers (CCO), directors, officers - The proposal identifies individuals who would not be eligible to receive a whistleblower award, including individuals who have or had job responsibilities as a Chief Compliance Officer or equivalent position or is or was a director or officer at the time the information was acquired (and who acquired the information through an organizations internal reporting or investigation processes).

While members agreed that compliance staff who act as whistleblowers should be considered for protections on a discretionary basis, opinion was not unanimous on the inclusion of CCOs, corporate directors and officers.

Culpable individuals - The proposal makes it clear that the OSC would accept information from an individual who provides information on matters in which he or she actively and improperly participated. However, the level of culpability will be a relevant consideration in determining eligibility for an award and the amount of the reward. At the same time, participation in the program by a culpable individual would not prohibit the OSC from taking enforcement action against him or her based on their role in the wrongdoing. The IAP agrees with this proposal.

Monetary penalty - The panel also has concerns that restricting eligibility for awards to those successful prosecutions resulting in a monetary penalty of over \$1 million is unduly restrictive.

5.3 Declaration required - The proposal sets out a 120-day timeframe for eligibility from internal firm reporting by the whistleblower to subsequent whistleblowing to the OSC. The IAP recommends a flexible approach to timing. For example, an internal report may take longer however the countervailing concern is that the internal delay combined with a dealer registrant’s failure to warn investors on uncovering wrongdoing could lead to

further harm. We suggest that 120 days be extendable on a discretionary basis with clear guidelines but consideration should also be given to whether the delay caused harm to investors.

6. Financial Incentive - The OSC believes that the payment of a financial incentive is critical to the success of the program and that whistleblowers may face negative consequences for reporting information about misconduct. The proposal sets out criteria for determining in the source, amount, and criteria for determining financial incentive.

6.1 Amount of monetary award - The IAP recognizes the challenge in funding potential financial incentives. We recommend removing the hard cap of \$1.5 million. We believe this is too low a limit to be attractive.

Monetary awards calculation should also, where applicable, consider the (legitimate) cost to a whistleblower to blow the whistle (e.g. job loss, impediment(s) to career development, legal proceedings, retaliation, etc.). It might also be reasonable to believe that the confidentiality/protection commitment will occasionally accidentally fail.

We recommend the OSC consider a compensation scheme with two thresholds: 1) a cap on a basic whistleblower compensation that is provided without regard to collection of penalties; and 2) additional enhanced whistleblower compensation upon collection of additional funds (above the Whistleblower Program limit) from wrongdoers.

We further suggest that the issue of availability of funds collected be decided based on the annual collections (after an initial transition period) through the Whistleblower Program, not an individual report.

7. Confidentiality - The proposal recognizes that in order for a Whistleblower Program to be successful, whistleblowers must have the option of keeping their identities confidential.

Informed whistleblowers - The IAP recommends that complete confidentiality be maintained until the OSC fully informs the potential whistleblowers of the limits of whistleblower protection when a direct report is made. In our view, the OSC should consider receiving initial reports and disclosures through an arms-length office that would only provide the whistleblower's information to the OSC staff after informing the whistleblower of the limits of the protection the Commission can provide to him or her.

Sharing whistleblower information with third parties - The IAP recommends the OSC should share information received through the Whistleblower Program only with organizations that offer the same whistleblower protections.

8. Whistleblower Protections - To encourage whistleblowers to come forward and report possible securities law violations, the proposal seeks to have measures put in place to protect whistleblowers from retaliation from their employers.

Create significant incentives - Given the possibility of retaliation, the IAP reiterates its recommendation for a dual threshold for whistleblower compensation.

Bar or discourage employment contracts that discourage whistleblowing - The existence of contractual and policy provisions which indirectly bar or discourage whistleblowing are of great concern to the IAP.

9. Program Structure - The OSC proposal includes a separate intake unit within the Enforcement Branch to deal with whistleblower submissions and the administration of the program in order to maintain confidentiality and ensure whistleblowers are dealt with in accordance with the terms of the program.

This segregation as proposed, subject to recommendation for greater protection of confidentiality, appears to be reasonable. Key IAP concerns at this early stage are protection of confidentiality and early communication and clarification (prior to whistleblower identification to the OSC) of the terms and scope of the whistleblower's eligibility. To that end, the IAP reiterates its recommendation that no information should be shared until after eligibility is determined and the whistleblower is advised of the limits of the confidentiality and retaliation protections.

Conclusion

The IAP is fully supportive of the OSC's Whistleblower Program. We believe it will strengthen the enforcement activities of the Commission and strengthen the investor protection regime. We look forward to commenting on future iterations of the policy.