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Blowing the Whistle on the Whistleblower Program

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Davies has submitted a letter to the Ontario Securities Commission (OSC) commenting on Staff's framework for a proposed Whistleblower Program. The Whistleblower Program would be the first of its kind for Canadian securities regulators and only the second whistleblower program in Canada to offer a financial incentive.

As noted in our [comment letter](#), we appreciate that the Whistleblower Program involves a careful exercise in line drawing between the goals of enforcement, on the one hand, and government intrusion into the affairs of reporting issuers, on the other hand. However, we are concerned that the proposed Whistleblower Program draws the line in the wrong place. In our comment letter, we raised the following concerns.

Financial Awards Create Perverse Incentives

Offering any form of financial award for information from whistleblowers could create perverse incentives that may ultimately have negative consequences for enforcement and investor protection, such as

- encouraging whistleblowers to report claims that have no merit, thereby straining the resources of the OSC and the targeted reporting issuer in dealing with those claims;
- encouraging whistleblowers to stand by and allow potential misconduct to ripen into actual misconduct, resulting in an increased award and instances of securities law violations; and
- undermining the effectiveness of internal compliance procedures by discouraging a whistleblower from reporting internally first, in accordance with such procedures.

Misuse of Confidential or Privileged Information

Incentivizing an employee to disclose to the OSC information regarding his or her employer could result in behaviour that is at odds with the employee's obligation to maintain the confidentiality of such information and, in many circumstances, the employee's fiduciary and/or contractual obligations to the employer. In addition, the employee's disclosure of confidential information may result in the deliberate or unknowing disclosure of information that is subject to privilege.

OSC's Role in Enforcing Anti-retaliation Provisions

Staff is proposing two avenues for enforcement of the proposed anti-retaliation provisions:

- enforcement by the OSC under its public interest jurisdiction; and
- enforcement by the whistleblower through a statutory civil right of action.

We question whether the OSC has the relevant expertise and resources to exercise its public interest jurisdiction to enforce the anti-retaliation provisions in proceedings that will necessarily be heavily fact-specific and will require an examination of the employment relationship and whether the employee's dismissal was warranted for reasons unrelated to whistleblowing. Rather, we believe that the more appropriate forum for these matters is either a specialized tribunal or a court.

Imbalance Inherent in the Proposed Anti-retaliation Provisions

While the OSC would certainly ignore information that has no merit, a whistleblower would be free to disclose information that may be harmful to his or her employer without fear of any risk of retaliation. To address this imbalance, the OSC should consider whether the anti-retaliation provisions should also provide for measures that employers may take against employees or former employees who report to the OSC what prove to be clearly unmeritorious claims of misconduct.

Incentive to Circumvent Internal Compliance Procedures

We believe that there should be stronger encouragement, or even a requirement, that the whistleblower report alleged misconduct internally before reporting to the OSC. In our view, it is more appropriate for a period of time to have elapsed from the date of internal reporting before a whistleblower can provide information to the OSC. The public interest is not better served by increasing the number of OSC enforcement proceedings than by encouraging internal reporting leading to voluntary compliance by reporting issuers.

Allowing Culpable Whistleblowers to Receive Awards

We agree with the view expressed by Staff that allowing culpable individuals to receive whistleblower awards may send an inappropriate message to the market and may harm the overall integrity of the Whistleblower Program. We believe that the credit for cooperation program is a more appropriate method of motivating individuals to come forward with information regarding misconduct in which they have participated.

Maintaining the Confidentiality of a Whistleblower's Identity

Maintaining the confidentiality of a whistleblower's identity would be challenging. We appreciate that anonymity may be an important consideration for some whistleblowers in deciding whether or not to come forward, but it is equally important for a respondent to be given the opportunity to challenge the credibility of the information and the circumstances in which it was obtained.

Next Steps

The period for providing comments on the Whistleblower Program has expired. The OSC will host a roundtable discussion in early June to further explore the issues raised by the Whistleblower Program.

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