OSC Notice of Policy Adopted under Securities Act

OSC Policy 15-601 *Whistleblower Program*

July 14, 2016

NOTICE OF POLICY

The Ontario Securities Commission (**OSC** or the **Commission**) has, under section 143.8 of the *Securities Act* (Ontario) (the **Act**), adopted OSC Policy 15-601 *Whistleblower Program* (the **Policy**), following a 60 day public comment period. The Policy is effective July 14, 2016.

SUBSTANCE AND PURPOSE OF THE POLICY

The purpose of the Policy is to provide guidance on the Whistleblower Program (the **Program**) that has been implemented by the Commission. The Program is designed to encourage individuals to report and submit to the Commission information on serious securities-related misconduct (excluding tips related to criminal or quasi-criminal[1] matters). Under the Program, individuals who meet certain eligibility criteria and who voluntarily submit information to Commission Staff (**Staff**) regarding a breach of Ontario securities law, may be eligible for a financial incentive (**whistleblower award**). Specifically, the whistleblower award may be payable if it is determined that the information submitted was of meaningful assistance to Staff in investigating the matter and obtaining a decision of the Commission under section 127 of the Act or section 60 of the *Commodity Futures Act* (Ontario) (the **CFA**), and results in a final order for monetary sanctions and/or voluntary payments totaling $1,000,000 or more.[2] The Program has the potential to increase our effectiveness in vigorously enforcing Ontario securities laws, resulting in greater deterrence against serious misconduct in the marketplace.

The Commission believes that whistleblowers could be a valuable source of specific, timely and credible information for enforcement actions concerning a wide variety of market misconduct, particularly in the areas of accounting and financial reporting, insider trading, market manipulation and general misrepresentation in corporate disclosure.

The Policy sets out all of the following:

- the Program being implemented by the Commission;
- the practices generally followed by the Commission and by Staff in administering the Program in accordance with the requirements of Ontario securities law;
- 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

[1] Offences pursued under section 122 of the Ontario *Securities Act*, RSO 1990, c S5.
[2] Definitions of monetary sanctions and voluntary payments are set out in the Policy.

- the factors considered in determining eligibility for, and the amount of, a whistleblower award.

In addition to the Policy, on April 19, 2016 the Government of Ontario passed certain amendments to the Act, which formed part of the *Budget Measures Act, 2016*. These amendments, which are a fundamental aspect of the Program, consist of anti-reprisal measures designed to protect employee whistleblowers from employer retaliation. These protections are necessary in order to encourage employee whistleblowers to come forward and report possible securities law violations.

The Act's anti-reprisal provisions protect whistleblowers from retaliation in the workplace by:

i. making it a violation of securities law to take reprisal against a whistleblower, thereby permitting Staff to prosecute the employer through a proceeding under section 122 or 127 of the Act; and

ii. rendering contractual provisions designed to silence a whistleblower unenforceable.

A reprisal is any measure taken against an employee that "adversely affects" their employment. It includes, among other things, disciplining, demoting or suspending the employee, or threatening to do so, terminating or threatening to terminate them, intimidating them and imposing or threatening to impose a penalty relating to their employment.

Staff may take enforcement action against employers who take reprisal against whistleblowers, whether they report misconduct internally, to the OSC, to a recognized self-regulatory organization like IIROC or the MFDA, or to a law enforcement agency.

BACKGROUND

Staff published Proposed OSC Policy 15-601 (the **Proposed Policy**) on October 28, 2015 for a 60 day public comment period (the **Comment Period**). In response, Staff received 19 comment letters. The comments received were from a range of stakeholder groups, including issuers, issuers' counsel, regulatory bodies, professional associations, investor and whistleblower advocates, as well as academics. Staff considered the comments received and thank all the commenters. A list of commenters is attached in **Appendix A** to this Notice.

In addition to the Comment Period for the Proposed Policy, Staff also published OSC Staff Consultation Paper 15-401 *Proposed Framework for an OSC Whistleblower Program* (the **Staff Consultation Paper**) on February 3, 2015 for a 90 day comment period (the **Consultation Period**). As well, Staff held a public Whistleblower Roundtable on June 9, 2015 (the **Roundtable**).

SUMMARY OF WRITTEN COMMENTS

A summary of written comments received during the Comment Period together with Staff's responses is attached at **Appendix B**.

As a result of the comments Staff received, the Policy reflects changes to certain aspects of the Program described in the Proposed Policy. Staff do not consider the changes to be material and are not republishing the Policy for a further comment period.

Some notable changes from the date of publication are as follows:

(i) Definition of "original information"

The definition of "original information" in the Proposed Policy excluded information the whistleblower obtained in connection with the provision of legal advice. In order to be eligible for an award, the information provided must be "original information". As one commenter noted, this exclusion in the Proposed Policy was inconsistent with section 15(2), under which a whistleblower who obtained information in connection with providing legal services to, or conducting the legal representation of, a client or employer that is, or that employs, the subject of the whistleblower submission may be eligible for an award. The definition of "original information" in the Policy has been revised to remove this inconsistency.

(ii) Confidentiality of information submitted to the Program and the fact of a report

Subsection 9(1) of the Proposed Policy indicated that all information submitted by a whistleblower to the Program, including the fact of the report, was expected to be kept confidential by the whistleblower. In response to comments received that the Policy should not restrict whistleblowers in using the information provided to the Commission; for example, to assist with an internal investigation, this expectation has been removed. The Policy continues to restrict whistleblowers from disclosing information received from Staff or with respect to Staff's investigation.

(iii) Eligibility of auditors

Two commenters requested that members of a corporation's audit department be excluded as eligible whistleblowers or that their eligibility be restricted to situations where the disclosure would be permitted under the relevant rules of professional conduct.

We are of the view that professionals can assess any obligations or duties they may have in the circumstances and make their own determination as to whether to report to the Commission. We have added similar language applying to auditors as the Proposed Policy contained in subsections 15(1)(c) and (d) for lawyers regarding permissible disclosure under applicable regulatory rules.

(iv) 120 day exception to ineligibility

The Proposed Policy allowed for an exception to ineligibility where at least 120 days had elapsed since the whistleblower provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or functional equivalents) or the individual's supervisor. The Policy adds that this exception will also apply where at least 120 days has elapsed since the whistleblower received the information, if the whistleblower received it in circumstances indicating that one or more of those individuals were already aware of the information. This change was made in response to a comment received that noted that a whistleblower should not be required to report information to a person when the whistleblower knows that person is already aware of it.

(v) Factors that may decrease an award

One commenter requested clarity on whether a whistleblower award may be reduced if any, as opposed to all of the factors listed in paragraph 24(3)(g) of the Proposed Policy is found to exist, The commenter further suggested that the existence of any one of the listed factors could undermine the internal compliance and reporting mechanisms of an employer which would support a reduced whistleblower award. Staff agree and section 25(3)(g) has been changed to indicate that any of the listed factors could undermine the internal compliance and reporting mechanisms of an employer which would support a reduced whistleblower award. Previously, the wording indicated all factors must exist to support a reduced award.

QUESTIONS

Please refer your questions to:

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Appendix A – List of Commenters

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John Tuzyk, Chris Hewat, Darren Littlejohn, Andrea York and Andrew McLeod (Blake, Cassels & Graydon LLP)
Canadian Foundation for Advancement of Investor Rights
Robert Balcom (George Weston Limited)
Peter Dent (Transparency International Canada)
Brent Cotter, Adam Dodek, Malcolm Mercer, Amy Salyzyn and Alice Woolley
A. Dimitri Lascaris, Douglas Worndl, Daniel Bach and Ronald Podolny (Siskinds LLP)
John P. Manley, P.C., O.C. (Canadian Council of Chief Executives)
Michael Thom (The Canadian Council for Canadian CFA Institute Societies)
Mark Adams (AGF Management Limited)
Canadian Bankers Association
Todd Monaghan
Darrell Bartlett (Knowledge First Financial Inc.)
Kevin Dancey (Chartered Professional Accountants of Canada)
OSC Investor Advisory Panel
Kenmar Associates
Bernard Pinsky (Clark Wilson LLP)
Harold Geller (McBride Bond Christian LLP)
Janet E. Minor (The Law Society of Upper Canada)
Osler, Hoskin & Harcourt LLP
Brad Jones (E-mail)
Del Blackstock (E-mail)

Appendix B

Summary of Comment Letters Received on Proposed OSC Policy 15-601 and Staff Responses to Comments

Comments received on the Proposed OSC Policy 15-601 are summarized below, under the following key headings:

1. General Comments
2. Eligibility
3. Financial Incentive
4. Confidentiality
5. Anti-Retaliation
6. Program Structure

	Issue	Comment Summary	Staff Response
General Comments			
1.	***Support for the Proposed Policy***	Most commenters expressed support for the overarching goals of the Policy.	
Eligibility			
2.	***In-house counsel***	Eleven commenters provided comments on the issue of in-house counsel eligibility. Concerns expressed by commenters focused on a potential conflict with the Law Society Rules (the "*Rules*") and included the following: • It may be very difficult for a lawyer to disclose information under the Policy without offending the professional standard that obliges a lawyer to maintain the confidentiality of client information and without breaching solicitor-client privilege where applicable. As a result, a policy suggesting it may be possible to do so is confusing. • It creates the perception of a conflict of interest between the lawyer's self-interest and the duties and responsibilities counsel has to the organization which could discourage officers and directors from approaching counsel with significant legal issues or concerns. • The exclusions in section 15(1) prohibiting disclosures that are	We have considered comments regarding the eligibility of in-house counsel and have determined that in-house counsel should not be precluded from eligibility, provided that, either: (i) the disclosure of the information would otherwise be permitted under applicable provincial or territorial bar or law society rules or the equivalent rules applicable in another jurisdiction (this same exception applies to external counsel); or (ii) they fall within one or more of the exceptions set out in subsection 15(2) of the Policy (this does not apply to external counsel). The rules of professional conduct in other jurisdictions may contain exceptions not available to lawyers in Ontario. Accordingly, we have added the phrase "or the equivalent rules applicable in another

	Issue	Comment Summary	Staff Response
		impermissible under law society rules do not adequately resolve the above concerns, since a lawyer's ethical obligations are defined by common law, in addition to the law society rules. Further, the exceptions in 15(2) conflict with a lawyer's professional obligations, and would appear to directly conflict with the "reporting-up" obligations in the *Rules*. • Given the strict limits on disclosure set out in the *Rules*, it is unlikely that there will be whistle-blowing by lawyers except in very rare cases. Comments in support of in-house counsel eligibility included the following: • The OSC should not make any policy or rule that should be seen to derogate or modify the professional duties and responsibilities of lawyers. However, whether the lawyer is professionally permitted or obliged to report wrongdoing to the Commission should be left to the lawyer, having regard to the lawyer's professional obligations. The responsibility for determining whether that lawyer complied with his or her duties should be the subject of review and determination by the professional regulatory authority. • Lawyers, like other whistleblowers face real risks of termination and black-listing from the industry as a result of whistleblowing. One commenter suggested the provisions in sections 14 and 15(2) appear to be in conflict: the definition of original information excludes information obtained in connection with the provision of legal advice, so such information would not be eligible for an award; however, section 15(2) allows for the possibility of an award in such circumstances.	jurisdiction" to 15(1)(c) and (d). Our rationale for including in-house counsel is that their role often extends to business activities and conduct that go far beyond providing privileged legal advice. We understand that lawyers have professional obligations with regard to confidentiality. Whistleblowers choosing to voluntarily provide information to the Commission are responsible for assessing their professional obligations and duties. In our view, professionals are best placed to make this assessment in the circumstances and make their own determination as to whether to report to the Commission. The Policy does not override those obligations and duties. The payment of the financial incentive is intended to recognize the personal and professional risks undertaken by speaking up about misconduct. The definition of "original information" excludes information obtained through a communication that was subject to solicitor-client privilege. We will seek to discourage any whistleblowers from submitting solicitor-client privileged information to the Program. We agree with the comment concerning the definition of original information and have revised the drafting of the Policy.
3.	***Auditors***	Two commenters requested that members of the corporation's audit department be excluded as eligible whistleblowers. One of these commenters expressed concern that the exceptions in section 15(2) provide an incentive for chartered professional accountants to breach their confidentiality obligations and could undermine public trust in auditors' professionalism and responsibility. Auditors already have a duty to detect and report to management any securities law violations. If management does not satisfy the auditor's concerns, the auditor is professionally bound to exercise a range of effective responses. This commenter noted that the 120-day exception in section 15(2)(c) is particularly inappropriate in the context of an audit as it provides an incentive for external audit	We have considered comments regarding the eligibility of auditors and have determined that they should not be ineligible provided they fall within one or more of the exceptions set out in subsection 15(2) of the Policy. We are of the view that professionals are best placed to assess their obligations and duties in the circumstances and make their own determination as to whether to report to the Commission. We believe the 120 day period set out in 15(2)(c) is an appropriate length of time for an entity to conduct at the very least a preliminary review of serious

	Issue	Comment Summary	Staff Response
		professionals to circumvent their managers and client after 120 days. In the alternative, the commenter requested that the Program restrict the eligibility of auditors to situations in which the disclosure would be permitted under the relevant rules of professional conduct, as sections 15(1)(c) and (d) provide for lawyers.	misconduct that has been brought to their attention. We have added similar language in 15(1)(e) for auditors as applies to lawyers under sections 15(1)(c) and (d).
4.	***Directors and officers***	Four commenters commented on the eligibility of directors and officers for a whistleblower award. Two of the commenters were in support, one was against and one requested further clarity. One commenter requested clarification on the meaning of "directors or officers" in subsection 15(1)(g). Comments in support suggested the Policy strikes an appropriate balance by requiring first reporting "up the chain of command" in order for directors and officers to be eligible. Further, one commenter noted that independent directors and certain officers may have evidence of wrongdoing, but may not be in a position to make an internal change. Comments opposed to the eligibility of directors and officers highlighted the possibility of conflicts of interest with respect to fiduciary duties owed to the corporation, given that directors and officers are required to act on concerns in addition to merely reporting them. Given this requirement to resolve issues, this commenter considered a lapse in time insufficient to eliminate this conflict.	We have considered comments regarding the eligibility of directors and officers and have determined that they should not be precluded from eligibility, provided that they fall within one or more of the exceptions set out in subsection 15(2) of the Policy. Whistleblowers choosing to voluntarily provide information to the Commission are responsible for assessing their obligations and duties. Similar to our view with regard to in-house counsel and auditors, directors and officers are best placed to make this assessment in the circumstances and make their own determination as to whether to report to the Commission. The Policy does not override those obligations and duties. The definitions of "director" and "officer" on which the Policy is based are taken from section 1(1) of the *Securities Act*.
5.	***Culpable whistleblowers***	Two commenters disagreed with a culpable whistleblower being eligible for an award. Three commenters expressed support. Concerns with eligibility for culpable whistleblowers included: • Permitting such persons to benefit monetarily from their improper and/or illegal actions will not serve as a deterrent to similar action in the future and runs counter to efforts to promote ethical business conduct; • Even if ineligible, culpable individuals would still have an incentive to come forward, since the OSC has discretion to treat more leniently those who provide information that is helpful to an investigation (or as an alternative, the OSC could provide immunity and leniency programs to whistleblowers). One commenter accepted culpability as a factor in determining the award but	Subsection 17(1) of the Policy states that whistleblowers who are complicit in the misconduct on which they report may be eligible to receive an award. However, under paragraph 25(3)(b) of the Policy, the degree of their culpability is a factor that may decrease the amount of the award. This approach recognizes that culpable whistleblowers could be a valuable source of detailed knowledge about the misconduct. As subsection 17(5) makes clear, the Commission would not be precluded from taking enforcement action against the culpable whistleblower for their role in the misconduct.

	Issue	Comment Summary	Staff Response
		requested that the OSC issue detailed guidance on how discretion regarding this factor ought to be exercised. Another commenter stated that the OSC should retain the discretion to decide on a case-by-case basis if the level of culpability of an individual would make a whistleblower award inappropriate.	
6.	***Internal reporting, escalation and compliance systems: a requirement to report internally***	Eight commenters provided comments on whether a whistleblower must report internally before reporting to the OSC. Comments in support of not requiring whistleblowers to report internally first and instead leaving it up to the whistleblower to decide where to report included the following: • Individuals face many risks in reporting possible wrongdoing within their firms including thwarted career advancement, termination, difficulty finding future employment, and consequences for the person's health and family relationships; • Less wrongdoing will be uncovered if people are required to report internally first; • Allowing the individual to choose whether to report internally or externally will incentivize improvements to corporate internal reporting systems. Comments in favour of an internal reporting requirement included the following: • It will support the requirements under National Instrument 52-110 *Audit Committees* ("NI 52-110") as well as audit committees and audit reporting generally and minimize the need for restated financial statements and withdrawn audit reports; • The lack of such a requirement could encourage employees to circumvent an internal compliance regime by channeling information directly to the Commission in return for a monetary reward, which would not be similarly available from the organization. It is thus inconsistent with the stated importance of such reporting being "the first line of action"; • The Policy may provide incentives for employees to breach their duties to their employers to report information internally and to maintain confidentiality of information. One commenter suggested that an exception to such a requirement could be where the whistleblower can establish "extenuating circumstances" for him or her that would "have impeded his or her reporting" through such a mechanism.	We recognize the importance of effective internal compliance systems to identify, correct and self-report misconduct. These systems, if operating effectively, promote compliance with securities laws for the ultimate benefit of investors and the capital markets. The Policy includes several measures to encourage internal reporting by whistleblowers: • Section 25 provides that a factor that may increase a whistleblower award is whether the whistleblower participated in an internal compliance reporting system and, conversely, a factor that may decrease an award is whether a whistleblower undermined or interfered with an internal compliance and reporting system. • Subsection 16(2) maintains the internal whistleblower's place as "first in line" if a second whistleblower subsequently submitted information to the Commission or the entity self-reported on the same matter, provided the first whistleblower reports to the OSC within 120 days of the internal report. • The anti-reprisal protections for whistleblowers contained in section 121.5 of the *Securities Act* amendments would apply equally to whistleblowers who report internally or to the OSC. • Whistleblowers are not required to keep their whistleblower submission confidential, and may share the information with their employer concurrently or at any time if they

	Issue	Comment Summary	Staff Response
		Five commenters were of the view that, in order to be eligible for the financial award, whistleblowers should be required to exercise reasonable efforts to exhaust all available internal compliance/reporting processes. Two commenters recommended that the failure to participate in the internal reporting mechanisms should also decrease the potential reward, taking into account the feasibility of internal reporting. Another commenter suggested that it would be appropriate for an employee to report to the OSC concurrently with reporting internally, as long as such reporting was a requirement. One commenter was satisfied that the Policy encourages whistleblowers to report potential violations internally but recommends that further definition of what is meant by encouragement should be put in place.	choose to do so. The Policy leaves the issue of where to report up to the whistleblower's discretion. We believe this is an important aspect of the Program. In our view, the decision of whether to report internally first should be a decision of the whistleblower. The whistleblower is best placed to determine the appropriate channel through which to report in their particular circumstances. In our view, the existence of the Program will promote improvement in internal compliance systems and will not undermine these systems. Reports by the SEC suggest that the SEC whistleblower program has not undermined internal reporting.[1]
7.	***Internal reporting, escalation and compliance systems: other comments***	Two commenters requested that the Policy clearly spell out what is meant by "extenuating circumstances" that might impede internal reporting either by way of examples or factors that would be considered. One commenter recommends that paragraph 15(2)(c) be revised as follows: "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 functional equivalents) or the individual's supervisor or *since you received the information, if you received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents) or your supervisor was already aware of the information"*. According to the commenter a whistleblower should not be required to report information to a person when the whistleblower knows that the audit committee, chief legal officer, CCO or supervisor is already aware of it.	The reference to "extenuating circumstances" in 16(1) has been removed and instead has been replaced by a statement that "there may be circumstances in which a whistleblower may appropriately wish to report to an internal compliance and reporting mechanism". The whistleblower will determine whether, in his or her view, the internal reporting mechanism is an available channel through which to report. This may not be the case, for example, where the individual reviewing the internal reports is the subject of the whistleblower's concerns. We agree with the comment regarding 15(2)(c) and have added wording to capture the suggested change.
8.	***Internal reporting - 120 day periods in section 16***	Eight commenters provided comments on this issue. Seven commenters expressed support, while one commenter expressed concerns. Comments around the 120 day period in: (i) 16(2) to allow for a whistleblower to be eligible for an award where an employer self-reports misconduct to the OSC as long as the whistleblower reports the same	The 120 day requirement in subsection 16(2) was included in the Policy in order to support timely reporting to the Commission, particularly in situations where the harm is ongoing or about to occur. It is also intended to encourage whistleblowers to report matters to an internal compliance and

[1] In a speech given April 30, 2015, SEC Chair White stated that "all indications are that internal compliance functions are as strong as ever – if not stronger – and that insiders continue to report possible violations internally first." SEC Chair White has also stated that, as of the SEC's 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program, over 80% of whistleblowers who were company insiders who received awards, first raised their concerns internally to their supervisors or compliance personnel before reporting to the SEC.

	Issue	Comment Summary	Staff Response
		information to the OSC within 120 days of the initial internal report; and (ii) 16(3) to "hold the place in line" for a whistleblower who reports internally first included: • It provides finality to the allocation of the award and encourages the timely reporting by whistleblowers of information in their possession to the OSC; • The 120 day period is reasonable for even large companies with the proper systems in place and a longer reporting period may lead to harm to investors or the capital markets by virtue of the event not being reported or investigated in a sufficiently timely manner; • It encourages industry players to take self-correction steps at the earliest possible stage. This commenter suggested using the 120 days as a guideline rather than a strict maximum, since internal processes may sometimes take longer than 120 days; • One commenter was of the view that the word "generally" in subsection 16(3) creates uncertainty; and • Another commenter, who supported the 120 day period, stated that there should be a requirement for a whistleblower who has reported internally to wait before making a report to the OSC: (i) for a minimum of 120 days following the initial internal report; or (ii) for their employer to report the whistleblower's information to the Commission, whichever happens earlier. One commenter who opposed eligibility for a whistleblower under section 16(2) stated that if a whistleblower is eligible for an award despite the employer providing a report to the OSC, that the 120 day period should be significantly extended. The commenter also suggested that the 120 day period in section 16(3) be similarly extended to provide more time for an internal investigation into the alleged misconduct.	reporting mechanism. The Commission has indicated that the timeframe within which it expects a timely report is relatively short. In our view, 120 days is an adequate time period for an entity to conduct at the very least a preliminary review. Subsection 16(3) provides that the Commission will generally consider the timing of the initial internal report in determining who submitted the information first, provided that not more than 120 days have passed since the initial internal report. The use of the word "generally" is needed to consider the possibility that there may be circumstances where it would be inappropriate to hold the whistleblower's place in line.

	Issue	Comment Summary	Staff Response
9.	***Type of information submitted by whistleblowers***	*i. General comments* One commenter suggested that information submitted by whistleblowers under the Program should be limited to serious breaches such as theft, fraud, market manipulation, insider trading, and material misrepresentations & material omissions. This would likely reduce frivolous reports to the OSC and provide further clarity to potential whistleblowers. Furthermore, this commenter suggests that reporting to the OSC should be based on clear criteria or thresholds that are connected to the types of misconduct that the OSC is attempting to address. *ii. Original information* One commenter suggested that the standard for eligibility of information may be too high. The issues of whether there is a "serious violation", information "of high quality" and containing "sufficient timely, specific and credible facts relating to the alleged violation of securities laws", and that the information be "of meaningful assistance" should go to the quantum of the award rather than whether the whistleblower is eligible for an award. This commenter also suggested that subsection 14(3) is unnecessary. One commenter suggested that the OSC incorporate the following exclusions to the definition of "original information": • Frivolous, vexatious or meritless information; • Information obtained in circumstances which would bring the administration of the program into disrepute; and • Information obtained in connection with providing internal audit or external assurance services to, or conducting an internal or financial audit of, a client or employer that is, or that employs, the subject of the whistleblower submission. One commenter suggested that the definition of "original information" should also exclude any information that was provided through an internal reporting and compliance mechanism (other than the employee utilizing such mechanism to begin with). This avoids a circumstance where another employee who received the information through internal reporting gives that information to the OSC to receive an award. A similar exclusion should be made in section 15 of the Policy to exclude from those eligible to receive an award individuals who obtain the information in this manner. *iii. Privileged information* Two commenters suggest that all privileged information should be excluded from the definition of "original information", including information that is the subject of litigation privilege and/or settlement privilege. This exclusion should also be	*i. General comments* The Program is available to accept reports of all types of serious securities misconduct. Frivolous reports will be triaged by Staff as is the current practice. *ii. Original information* We disagree that the standard for eligibility of information is too high. The Program has the potential to increase our effectiveness in vigorously enforcing Ontario securities laws, resulting in greater deterrence against serious misconduct in the marketplace. The receipt of high quality, specific and credible information is necessary to achieve the objectives of the Program. Those who make a frivolous, vexatious or meritless submission to the Program and those who obtained or provided information in circumstances which would bring the administration of the Program into disrepute are ineligible for an award under paragraphs 15(1)(n) and (o). Further, Staff will take steps to discourage unmeritorious claims of misconduct. For example, we will ask whistleblowers to complete a certification containing a caution that it is an offence under the Ontario *Securities Act* to knowingly provide false or misleading information to the OSC. We have determined that those who receive information through internal reporting should not be precluded from eligibility. We have not made the change to the definition of "original information" to exclude information provided through an internal reporting and compliance mechanism. *iii. Privileged information* The Whistleblower Submission Form will indicate that whistleblowers should not reference or attach any documents that may reflect legal advice, that are communications with a lawyer for the purpose of

	Issue	Comment Summary	Staff Response
		incorporated into subsection 5(1)(c) of the Policy. One commenter also requests clarification on how the OSC will ensure that it does not see privileged information and recommends that the declaration, signed by whistleblowers, cover privilege issues, including a warning that the OSC does not wish to obtain privileged information. The commenter also requests clarification of the OSC's anticipated response in the event that a whistleblower does reveal privileged information. According to this commenter, the OSC should not be permitted to rely on privileged information in any proceeding and the Policy should confirm that OSC staff will: • View privileged information as inadmissible in any subsequent hearing; • Agree that the privilege has not been waived as a result of the disclosure by the whistleblower; and • Agree that privileged information will not be further disclosed to third parties. *iv. Authorization to access and release information* Another commenter expressed concern that a broad definition of "original information" will encourage whistleblowers to voluntarily provide information that they neither have authorized access to, nor authorization to release. This could include information relating to customers, investors, suppliers, contractors and other arms' length third parties who have provided information on the basis that its confidentiality be protected under the requirements of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and other similar acts. The commenter recommends that whistleblowers provide an initial report describing the possible securities law violation using information that is either publicly available or that is within the whistleblower's authority to access and release. Upon reviewing this initial report, Staff could then request additional information from the whistleblower, consistent with the definition of "original information" as set out in the Policy.	obtaining legal advice or related working papers or that may otherwise be subject to solicitor-client privilege. Asking whistleblowers not to submit documents subject to litigation or settlement privilege would be asking the whistleblower to make an assessment that they may not be in a position to make so we have not made the suggested change. Staff currently has in place protocols to deal with privileged information. These protocols will be applied to whistleblower submissions. *iv. Authorization to access and release information* The Whistleblower Submission Form will highlight that the Commission is not asking whistleblowers to obtain documents or other things that are not in their possession or control. PIPEDA contemplates non-consensual disclosure to appropriate bodies in certain circumstances, including where there is a reasonable belief that the information relates to a contravention of the laws of a province.

	Issue	Comment Summary	Staff Response
Financial Incentive			
10.	**General Comments**	Seven commenters provided comments on the Policy's current approach to the financial incentive for whistleblowers. While many commenters continue to support the offering of a financial incentive to whistleblowers, some expressed concerns that a financial incentive could result in frivolous whistleblower reports and other negative consequences. These concerns were similar to those raised and considered after an extensive consultation period which included the publication of OSC Staff Consultation Paper 15-401 *Proposed Framework for an OSC Whistleblower Program* in February 2015 and the public OSC Whistleblower Roundtable held in June 2015.	The Policy includes a financial incentive for whistleblowers. The financial incentive is a critical element of the Program. As noted above, other elements of the Program are aimed at discouraging unmeritorious claims of misconduct. The Policy contains incentives for whistleblowers to report in a timely manner. For example, the timeliness of a report is a factor that may increase a whistleblower award (paragraph 25(2)(a)) and conversely, an unreasonable delay in reporting may decrease the amount of a whistleblower award (paragraph 25(3)(c)), including "whether the whistleblower was aware of relevant facts but failed to take reasonable steps to report the violations or prevent the violations from occurring or continuing". The Program will only apply to administrative proceedings under section 127 of the *Securities Act* or section 60 of the *Commodity Futures Act*. We are targeting complex securities law matters, such as insider trading, market manipulation and disclosure cases, which are squarely within the Commission's purview and typically handled administratively. Criminal proceedings and proceedings brought by SROs or other regulators are not within the scope of the Program. The Commission is an independent adjudicative tribunal and will continue to impose sanctions with regard to the matter at hand and exercise its discretion on sanctions as a result of the misconduct, not as a result of the involvement of a whistleblower.
11.	**Amount of incentive**	There were a number of suggestions to change the financial incentive, including capping the award at $10 million, increasing the percentage award maximum beyond 15%, reducing the eligibility threshold to below $1 million and allowing awards based on non-monetary sanctions. One commenter supported the Policy's "variable cap" approach to the	The Commission considered comments regarding the threshold for awards and concluded that the proposed $1 million threshold for award eligibility, with a 5-15% award range should remain to ensure a sustainable Program, with awards of up to $5 million

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		whistleblower award. One commenter suggested the damage suffered by the individual whistleblower should be a factor taken into consideration when determining the award quantum for whistleblowers providing information.	in certain circumstances. As set out in paragraph 25(2)(h), a unique hardship experienced by the whistleblower is a factor that may increase an award.
12.	**Length of time in receiving the award**	Two commenters expressed concern for the length of time a whistleblower must wait to receive the award. The commenters suggested that consideration ought to be given to making a payment of a portion of the award at the positive conclusion of the initial proceeding or payment of monetary penalties, which would not be subject to claw back in the event an appeal is ultimately successful.	While the Commission works to conclude enforcement proceedings as efficiently as possible, we recognize that it may take several years from the date a whistleblower makes a submission until an award is paid in the case of an appeal.
13.	**Factors that may decrease the amount of a whistleblower award**	One commenter requested clarity on the requirement that all the conditions in subsection 24(3)(g) be met for a whistleblower award to be decreased, since in their view, the fulfillment of any one of the conditions would undermine the internal compliance and reporting mechanisms of an employer.	We agree that meeting any of the conditions in section 25(3)(g) (previously 24(3)(g)) may result in a decrease to any award and we have revised the Policy to that effect.
14.	**Source of funding**	Two commenters expressed concern that the costs of funding the whistleblower program may be shifted onto compliant market participants. One of these commenters suggested that any monetary award should be contingent upon and paid from actual recoveries of these monies through the OSC's enforcement process. Another commenter suggested that the Policy should be more transparent as to the level and source of funding for the Program. This commenter also suggested adding to the award criteria a provision that prohibits the OSC from taking into consideration the balance of its designated funds (or other source of funding that it determines).	Awards of up to $1.5 million will not be tied to the recovery of sanctions monies and will be paid from funds held pursuant to designated settlements and orders. In cases where the total monetary sanctions/voluntary payments are equal to or greater than $10 million, awards above $1.5 million, up to a maximum of $5 million, will only be paid if the funds are recovered. Whistleblower awards will be funded from funds held pursuant to designated settlements and orders. Award recommendations will be made without regard to availability of funds. We have structured the parameters of the financial incentive to support a sustainable Program. Operation of the Program within the Enforcement Branch will be included in the OSC's operating budget.
15.	**Public disclosure of awards**	One commenter suggests that the OSC should have to publicly disclose that a whistleblower award has been paid, without the identity of the whistleblower	As stated in section 24 of the Policy, "The Commission may publicly disclose that a

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		(unless they have consented). According to the commenter, it is important for the OSC to demonstrate that the Whistleblower Program has improved the number and quality of tips it received. An annual report should be issued by the OSC on the Whistleblower Program or a section of its annual enforcement activity report should be devoted to it.	whistleblower award has been paid. If such an award is paid, it may be publicly disclosed without the identity of the whistleblower." Decisions on disclosure will be made on a case-by-case basis. Results of the operations of the Program will be incorporated as part of the Commission's Enforcement Activity Report.
Confidentiality			
16.		One commenter suggested that the requirement in subsection 9(1) that a whistleblower keep confidential information submitted to the Commission may prevent a whistleblower from assisting the OSC and would not allow a whistleblower to report non-compliance to their employer. One commenter expressed concern that permitting whistleblowers to be called by Staff to testify in a proceeding does not provide whistleblowers with the necessary protections. This commenter suggested that Staff not be permitted to require an informant to testify without the whistleblower's voluntary consent.	We have removed subsection 9(1) which previously indicated that a whistleblower keep confidential information submitted to the Commission. A whistleblower may share the information provided by the whistleblower to the Commission with his or her employer. However, the Policy continues to include the expectation in section 9 (previously subsection 9(2)) that a whistleblower maintain as confidential any information provided to a whistleblower by Commission Staff or that the whistleblower becomes aware of because of the whistleblower's ongoing participation in the investigation of a matter. While it is anticipated that it would only occur in rare cases, the possibility remains that Staff may need to call a whistleblower to testify in a hearing.
Anti-Retaliation			
17.		Eight commenters provided comments on the anti-retaliation measures in the Policy. Four commenters expressed support for the anti-retaliation provisions. Suggestions for broader anti-retaliation protections included amendments to the *Securities Act* to create civil remedies that would allow whistleblowers to seek damages from employers. Commenters expressed concerns including:	On April 19, 2016 the Government of Ontario passed certain amendments to the Act, which formed part of the *Budget Measures Act, 2016*. These amendments, which are a fundamental aspect of the Program, consist of anti-reprisal measures designed to protect employee whistleblowers from employer retaliation. These protections are necessary in order to encourage employee whistleblowers to come forward and report possible securities law violations.

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		• There should be a clear exception from the application of anti-retaliation provisions where there has been a failure to report using internal mechanisms and the employer can establish such reporting is part of the employee's duties; • There are already common law and workplace standards to protect employees against retaliation; and • That an employer still be able to take disciplinary action to deal with a whistleblower's participation in illegal activities.	The Act's anti-reprisal provisions protect whistleblowers from retaliation in the workplace by: • making it a violation of securities law to take reprisal against a whistleblower, thereby permitting Staff to prosecute the employer through a proceeding under section 122 or 127 of the Act; and • rendering contractual provisions designed to silence a whistleblower unenforceable. In keeping with Staff's position that the whistleblower is best placed to determine which reporting avenue to pursue, the anti-reprisal protections are available equally to whistleblowers who report internally or to the Commission, to a recognized self-regulatory organization like IIROC or the MFDA or to a law enforcement agency. An employer is not prevented from taking action to deal with a whistleblower's participation in illegal activities.
Program Structure			
18.		Several commenters recommended the Commission provide assistance to whistleblowers. These suggestions included the following: • Guidance that whistleblowers should be strongly encouraged to review before submitting information to help those who will be navigating the Policy; • Information about the process for submitting information under the Program; and • If a whistleblower is not comfortable reporting internally, one commenter recommends that the guidance should encourage the whistleblower to seek external counsel prior to reporting. One commenter stated that the Policy does not address how the Whistleblower Program would affect the OSC's credit for cooperation program and suggested that credit for cooperation should be expressly available to entities that are targets of a report, especially where the whistleblower has not reported the issue internally.	Information concerning the Program and alerting potential whistleblowers to a variety of considerations will be available on the Program's website at www.officeofthewhistleblower.ca The Whistleblower Submission Form will be available on this website. The application of OSC Staff Notice 15-792 *Revised Credit for Cooperation Program* is assessed on a case-by-case basis. At present, this is an OSC only initiative. Subsection 11(2) of the Policy provides that the Commission "will not disclose the whistleblower's identity, or information that could reasonably be expected to reveal the whistleblower's identity", to other regulatory bodies or law enforcement without the whistleblower's consent.

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		Four commenters commented on the interaction of the Policy with existing regulatory frameworks. Three of these commenters were concerned about whistleblower confidentiality where information is shared with SROs. One commenter stated that the type of assistance provided by a whistleblower should be one of the factors that influences the amount of the award rather than its own standalone provision as the current section suggests that if the whistleblower does not provide the degree of assistance requested by Staff, then he or she will not be eligible for the award. Two commenters suggested that whistleblowers have the opportunity to make written submissions in connection with the whistleblower award and the ability to appeal the recommendation of the Staff Committee concerning eligibility and quantum. One of the commenters also suggested that written reasons for an award decision be provided in accordance with administrative fairness and that materials which form the basis of an award determination should be available for review by whistleblowers, subject to necessary redactions and confidentiality obligations One commenter recommends that the OSC carefully study the impact of the Policy after its adoption and implement any necessary changes to encourage internal reporting at the outset and include requirements for issuers to have robust whistleblower protections in place.	The Commission believes that whistleblowers could be a valuable source of specific, timely and credible information for enforcement actions concerning a wide variety of market misconduct, including (but not limited to) the areas of accounting and financial reporting, insider trading, market manipulation and general misrepresentation in corporate disclosure. The degree of assistance provided by the whistleblower is a factor that may increase the award (paragraph 25(2)(c)). The statement in 15(1)(a) will apply in situations where the refusal to provide additional information is of a serious nature that impedes the investigation. The program is a voluntary program that is administered as a Commission Policy. As such, Staff's view is that the determination of eligibility and amount of award are not Commission decisions within the meaning of the *Securities Act* (e.g., not decisions of the Commission acting in its adjudicative capacity or other powers under the *Securities Act*). There is no requirement for the Commission to provide written reasons with a whistleblower award determination. The award, if any, flows from the whistleblower's voluntary decision to participate in the Program and is distinct from the quasi-judicial powers the Commission has in carrying out its adjudicative role. The award recommendation will be based on the particular factors relating to the whistleblower's submission. Staff will consider all of these factors in recommending an award. We will periodically assess the Program to ensure it is meeting the targeted objectives.