



PROSPECTORS &  
DEVELOPERS  
ASSOCIATION  
OF CANADA

May 4, 2015

**The Secretary**  
**Ontario Securities Commission**  
20 Queen Street West  
22nd Floor  
Toronto, Ontario M5H 3S8  
Fax: 416-593-2318  
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**Re: OSC Staff Consultation Paper 15-401 on proposed framework for an OSC Whistleblower Program**

Dear Sirs/Mesdames:

This letter is submitted on behalf of the Prospectors & Developers Association of Canada (PDAC) in response to the invitation to comment on the Proposed Whistleblower Framework.

The PDAC is the national voice of Canada's mineral exploration and development community. With a membership of over 9,000 individual and 1,200 corporate members the PDAC's mission is to promote a responsible, vibrant and sustainable Canadian mineral exploration and development sector. The PDAC encourages leading practices in technical, environmental, safety and social performance in Canada and internationally. The PDAC is also known worldwide for its annual convention that is regarded as the premier event for mineral industry professionals. The PDAC Convention has attracted over 30,000 people from 125 countries in recent years and will be held March 6 to 9, 2016, at the Metro Toronto Convention Centre (MTCC) in downtown Toronto.

The PDAC is advocating for regulatory reforms that accomplish the following key policy goals:

1. Facilitate capital raising from a broadened base of investors;
2. Reduce the unnecessary regulatory burden, duplications and compliance costs;
3. Improve enforcement and criminal prosecution of fraud.



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We are supportive of the OSC's Whistleblower Program, which we feel is a one of the key initiatives by the Enforcement Branch to help them resolve enforcement matters more quickly and effectively. The Whistleblower initiative, if effective in achieving its goals, could help to address one of PDAC's advocacy goals, which is to improve enforcement and criminal prosecution of fraud (see Goal 3 above).

### **General Comments on the Proposed Framework**

Although we acknowledge that the US SEC's whistleblower program has had success, we do not think that the same conditions apply in the Canadian capital markets for it to work as effectively here. Canadian capital markets are structured differently with 13 regulatory bodies, and the size of the markets in this country are much smaller than those in the U.S. The ability to collect information through a Whistleblower Program in Canada is hampered by the jurisdictional limits for the OSC, which only covers a single province.

We disagree with the inclusion of a financial incentive as we feel that it will lead to several undesired outcomes, namely:

1. Concerns about manipulation and abuse of the proposed Whistleblower program driven by financial rewards (for example, bounty hunting behaviour and framing companies for financial gains);
2. OSC Inquiries & Contact Centre may not have adequate resources to cope with inquiries once the program is in place;
3. The program could lead to overly cautious issuers seeking legal advice on every securities related issue thereby increasing compliance costs.

Reporting of fraud should be a moral obligation and not driven by financial incentives. As mentioned in the proposal, both the United Kingdom and Australia's Whistleblower Programs do not include financial incentives. Given that the UK and Australia are closer to Canada when it comes to the size of capital markets, the OSC should consider a system that is similar to theirs.



The proposed framework states: “The OSC would fund the program through payments to the OSC of administrative penalties, disgorgement and settlement amounts that are not otherwise paid to harmed investors (these are “Funds Held Pursuant to Designated Settlements and Orders” by the OSC).” Issuers could experience higher participation fees from the OSC in order to cover for the financial incentives indirectly. In a difficult financing environment for junior issuers, this would create additional burden on them. Although the OSC program is based on the SEC’s, the SEC only provides financial awards from monetary sanctions collected. The OSC will have to increase its fee structure thus increasing cost to issuers in order to fund the program.

### **Specific Consultation Questions**

#### Whistleblower Eligibility

1. *Are any of the eligibility criteria or exclusions problematic? If so, which one(s) and why?*

No.

2. *Are there additional eligibility criteria or exclusions we should consider?*

No.

3. *Should individuals culpable in the conduct being reported be eligible for a whistleblower award?*

Yes.

4. *One of the eligibility criteria is that information provided by a whistleblower must lead to a completed enforcement outcome. Should we consider instead using an alternate trigger such as the information leading to a Statement of Allegations issued by Staff?*

No.

5. *Should the Chief Compliance Officer or equivalent position be ineligible for a whistleblower award?*

Yes.



PROSPECTORS &  
DEVELOPERS  
ASSOCIATION  
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6. *Do you agree that individuals should not be required to report misconduct to their organizations' internal compliance programs in order to be eligible for a whistleblower award?*

Yes.

### Financial Incentives

1. *Are the proposed financial incentives significant enough to encourage potential whistleblowers to report misconduct?*

We do not support financial incentives (See general comments above).

2. *Are the factors listed in section 6.3 appropriate for considering the amount of a whistleblower award? What other factors should be considered, if any?*

We do not support financial incentives (See general comments above).

3. *Should the OSC propose award levels (for example 5%, 10% or 15%) instead of a general range of "up to 15%"? Should an eligible whistleblower who meets all of the terms of the program be guaranteed a minimum percentage (e.g. 5%)?*

We do not support financial incentives (See general comments above).

4. *Should the maximum amount of a whistleblower award be capped? If so, is the proposed cap of \$1.5 million appropriate?*

We do not support financial incentives (See general comments above).

5. *Should the threshold for determining a whistleblower award be based on total sanctions and payments of more than \$1 million or a different amount?*

We do not support financial incentives (See general comments above).

6. *Should voluntary compensation payments made by respondents to investors to address investor harm be included in the calculation of a whistleblower award?*

We do not support financial incentives (See general comments above).



7. *Should financial awards to whistleblowers be based solely on sanction monies and settlement payments recovered from respondents? What impact could this have on the attractiveness of the program to whistleblowers?*

We do not support financial incentives (See general comments above).

8. *Should whistleblowers be able to receive awards where the enforcement outcome is significant conduct bans, compliance reviews of firms or voluntary payments to investors, rather than monetary penalties?*

No.

9. *Should the OSC consider alternate methods of funding a Whistleblower Program, which could include an amount for whistleblower awards in the OSC's annual operating budget?*

We strongly discourage any additional fees on issuers.

10. *Is the potential for whistleblower reporting under an OSC Whistleblower Program a motivating factor for market participants to self-report misconduct?*

Reporting misconduct should be a moral obligation and not driven by financial reward. Motivation driven by financial reward could have unintended consequence identified in our general comment section.

### Confidentiality

1. *Should whistleblowers be able to remain anonymous to the OSC when they provide information?*

Yes. This will increase the likelihood of receiving information. However, we are concerned about the OSC's ability to maintain anonymity of individuals. Additional measures should be taken that could improve confidentiality of individuals through the use of technology or services from third parties. OSC should explore these options.

2. *Are there other steps we could take to provide whistleblowers with greater comfort as to anonymity?*

Yes. The use of new technology and third party service providers could play a role. For instance, the ability to provide encrypted digital information should be available to whistleblowers.



### Whistleblower Protection

1. *Do our proposed anti-retaliation provisions provide sufficient protection?*

Not certain that it does. OSC should explore other means to improve retaliation.

2. *Should culpable whistleblowers also potentially be entitled to anti-retaliation protection?*

Yes.

3. *What other means should the OSC consider to pre-empt measures taken by employers to silence whistleblowers?*

OSC could provide a means to receive information digitally and anonymously while also providing a method to contact the whistleblower if and when needed. Many whistleblowers may not have confidence in the OSC to maintain full confidentiality at all times. Therefore, a means to confidentially of the whistleblower could provide the whistleblower a method by which to maintain contact in a full confidential mode. This way the OSC never really knows who the whistleblower is and true full confidentiality is maintained.

### General

1. *Do you think the OSC should proceed with an OSC Whistleblower Program on the terms as described?*

In principle, we agree with an OSC Whistleblower Program, but not with the terms as described in the proposal. In particular, we do not agree that there should be a monetary reward.

2. *Does this program provide sufficient incentives for potential whistleblowers to come forward with information regarding possible serious breaches of Ontario securities laws?*

No. There is a need to improve how confidentiality of identity is maintained and financial reward should be abandoned.

3. *Are the whistleblower protections described in this paper sufficient? If not, why not?*

No. See response to Q3 in the Whistleblower Protection section.

4. *Are there any other issues that we have not identified that should be considered?*



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Without a national whistleblower Program, the OSC will not be effective in benefiting from its intended purpose. We recommend that the whistleblower program to be expanded to include all of the Canadian jurisdictions. Without a harmonized framework, the benefit of such a program will be lost. In addition, confidentiality methodology should be improved.

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PDAC appreciates this opportunity to provide our comments. If you have any questions regarding the foregoing, please do not hesitate to contact me.

Sincerely,

Rodney N. Thomas, P.Ge.  
President  
Prospectors & Developers Association of Canada (PDAC)

Cc:

Jim Borland: Co-Chair, PDAC Securities Committee  
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*This submission was originally authored by Samad Uddin (Director, Capital Markets, PDAC), with the support of Jim Borland (Co-Chair, PDAC Securities Committee) and PDAC Securities Committee members*