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January 12, 2015

Josée Turcotte
Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario
M5H 3S8

Email: comments@osc.gov.on.ca

Dear Ms. Turcotte,

Re: OSC Proposed Policy 15-601 - Whistleblower Program

The purpose of this letter is to provide the comments of Transparency International Canada ("TI-Canada") to the Ontario Securities Commission ("OSC") in response to your call for comments on Proposed Policy 15-601 - *Whistleblower Program* (the "Proposed Policy").

As a leading NGO dedicated to combating bribery and corruption, we applaud efforts by the OSC to institute measures to protect whistleblowers in relation to the integrity of Ontario's capital markets. Studies have shown that the outcomes for corporate whistleblowers are rarely positive, so we are particularly pleased to see the OSC's desire to increase protections for whistleblowers.

TI-Canada

TI-Canada is the Canadian chapter of Transparency International ("TI"), which is widely regarded as the leading global anti-corruption NGO. TI's vision is a world in which governments, politics, business, civil society, and the daily lives of people are free from corruption. The mission of TI-Canada is to be the informed voice that promotes anti-corruption practices and transparency in Canada's public sector, business, and society at large. We carry out our mission by promoting compliance with Canadian laws and international conventions against bribery and corruption, by educating the business community, professional organizations, government, and the public, and by developing ethical standards and tools for the conduct of business. We do this through commissioning and conducting research on corruption-elimination and prevention measures, and by assisting the Government of Canada and the provinces to fulfill their obligations.

For more information on TI-Canada, please see: http://www.transparency.ca/1-Overview/index.htm

For more information on TI, please see: http://www.transparency.org/.

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The Proposed Policy - Comments

Too often in recent years internal corporate compliance mechanisms designed to prevent misconduct have failed, even in organizations where compliance systems and processes are ostensibly robust. For examples of how companies with the most sophisticated internal controls can fail to eliminate serious internal misconduct, one needs to look no further than the recent unlawful rigging of the London Interbank Offered Rate by leading financial institutions or the recent emissions scandal at Volkswagen. Given this reality, TI-Canada supports the creation of a program that includes both incentives and the strengthening of protections for internal whistleblowers in general, and specifically in the context of serious securities or derivatives-related misconduct.

Internal Reporting - Section 16

TI also believes that internal reporting of misconduct should remain a priority and be encouraged where appropriate. We do observe an inherent tension between the OSC's emphasis on internal corporate compliance programs and the Proposed Policy's offering of awards to whistleblowers, which can be seen as an incentive for an employee to circumvent an internal system and, instead, go directly to the OSC.

TI believes that effective internal compliance systems are crucial in the fight against corporate wrongdoing. They should remain a priority and be encouraged where appropriate. We therefore are supportive of the OSC's statements at section 16 of the Proposed Policy where potential whistleblowers who are employees are encouraged to report potential violations through internal compliance and reporting mechanisms. However, the existing proposals are deficient in that they do not define or support the encouragement set forth in the policy. If additional measures are not implemented then guidelines to clarify what is meant by encouragement would be necessary.

We also recognize the reality that internal compliance systems can fail or falter; whistleblowers may prefer to report directly to the OSC, even where there is ostensibly a robust internal compliance system in place, for various non-monetary reasons, including their distrust of existing protections by their employer and/or the ineffectiveness of legislated protections.

To address the inherent tension, we recommend the OSC carefully study the impact of the Proposed Policy after its adoption and implement additional measures, where deemed necessary, to encourage internal reporting at the outset and include requirements for OSC issuers to have robust whistleblower protections in place, which are consistent with TI's International Principles for Whistleblower Legislation[1] and the G20 Compendium of Best Practices and Guiding Principles for Legislation.[2]

No award - circumstances - Section 20

Under section 20(b), the Proposed Policy states that an award may not be available where the matter is pursued quasi-criminally, where the monetary sanctions are less than $1,000,000, or where the decision of the OSC is overturned on appeal.

[1] http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation.
[2] http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf.

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We see the circumstances for withholding an award listed in section 20(b) to be problematic under each of these circumstances.

1. *Quasi-Criminal Prosecutions* - it appears contradictory to incentivize whistleblowing through the payment of awards but to withhold the payment of an award in the most serious of cases, i.e. cases pursued through quasi-criminal prosecution under section 122 of the *Securities Act* (Ontario). As stated on the OSC's website, "the OSC pursues cases in court [under section 122] in order to seek sanctions and penalties that send a strong message of deterrence to those who try to exploit investors." By excluding the payment of an award to a whistleblower in cases where the OSC has deemed the matter serious enough to proceed quasi-criminally, the Proposed Policy places the potential whistleblower in an impossible situation of having to determine how the OSC might proceed in their particular case. While TI-Canada recognizes that there may be jurisdictional issues around the payment of awards in cases pursued in the courts under section 122 of the Act, as opposed to cases pursued before the OSC, we urge the OSC to find a solution to this clear flaw in the Proposed Policy.

2. *No award where sanctions ordered are less than $1,000,000* - It is unclear to us why there would be no payment of an award where the sanctions are less than $1,000,000. By setting this minimum standard, it may incentivize awards under $1,000,000 to be agreed to so as to avoid a payment to a whistleblower. It is extremely difficult, if not impossible, for whistleblowers to know in advance if a reported offence might result in a fine of more or less than $1 million or in a plea agreement of just under $1 million. We are concerned that the $1 million threshold may be a significant disincentive for whistleblowers and we, therefore, invite the OSC to further explore whether a minimum needs to be applied at all.

3. *No award where the OSC's decision to order monetary sanctions is overturned on appeal* - It is unclear whether any payment of a whistleblower award would be paid out prior to the resolution of an appeal. Given the risk taken by a whistleblower by coming forward and the length of the potential appeals process, we query whether some non-refundable payment should be made to a whistleblower upon the imposition of a sanction, regardless of appeals.

Amount of Whistleblower Award - Section 18

Under section 18(5), the Proposed Policy sets the maximum payout to a whistleblower at $5,000,000. While we see some potential reasons for this proposed award ceiling (including a distaste for large monetary windfalls), we invite the OSC to articulate its rationale for such a limit. Did the OSC come to this figure (i.e. $5,000,000) through an empirical process? It would be helpful to better understand how this figure was derived.

Culpable Whistleblowers - Section 17

Section 17(2) of the Proposed Policy states that the degree to which a whistleblower is complicit in the conduct that is the subject of the information provided to the OSC is a factor that may decrease the amount of any whistleblower award that may be made. While reducing an award on the basis of a whistleblower's complicity may be rational in principle, it allows for the possible misuse of discretion in its practical application. As such, we would urge the OSC to issue detailed guidance as how this discretion is to be exercised, both for the benefit

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of the potentially complicit whistleblower, and for those responsible for exercising discretion under the Proposed Policy.

Guidance

Following on the importance of practical guidance around determining culpability, we urge the OSC to issue a detailed guidance policy to help those who will be navigating the Proposed Policy. Such guidance should include a question-and-answer section, as well as instructive hypothetical scenarios. It is our opinion that the clearer the guidance, the better chance that the Proposed Policy will be successfully implemented and utilized.

Conclusion

In general, the Proposed Policy seeks a laudable goal. It encourages the reporting of serious securities-or-derivatives-related misconduct and, at the same time, it strengthens protections for those willing to take the risks associated with coming forward in such circumstances. That said, we have attempted in our comments to highlight specific issues with the practical implications of the Proposed Policy that we believe could be better explained or revised to eliminate any uncertainty.

Yours sincerely,

Peter Dent
Chair & President