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By Email - comments@osc.gov.on.ca

Grace Knakowski, Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, ON M5H 3S8

Dear Sirs/Mesdames:

Re: OSC Notice and Request for Comment - Proposed Change to OSC Policy 15-601 *Whistleblower Program*

I am writing to the Ontario Securities Commission (the "**OSC**" or the "**Commission**") in light of proposed changes to OSC Policy 15-601 *Whistleblower Program* ("the **Policy**"). As discussed below, I am not writing in relation to the proposed changes per se, which seem to be reasonable as far as they go. Rather, I am writing to suggest other changes to the Policy that I believe deserve consideration. In particular, I urge the Commission to consider amending the Policy to deal with the situation where a whistleblower causes or allows his or her whistleblower complaint to become public, since that is almost certainly inconsistent with the philosophy underlying the Policy.

I am a Partner at Fasken Martineau DuMoulin LLP with more than 40 years of experience in the practice areas of mergers and acquisitions, corporate finance, securities regulation, and business law. My perspective shared in this comment letter has been informed by, among other things, my experience with, and input received from, clients that are impacted by the OSC Whistleblower Program (the "**Program**") and its corresponding Policy. However, this letter should not be considered as having been written on behalf of any client of the firm.

Confidentiality is Vital to a Successful Whistleblower Program

OSC Staff published Consultation Paper 15-401 on February 3, 2015 in relation to a proposed framework for an OSC whistleblower program. Part 7 of that paper discusses at length the importance and need to protect a complainant's confidentiality and assumes that a whistleblower's complaint will be filed and maintained on a confidential basis.

Similarly, the OSC published a transcript of a June 9, 2015 roundtable discussion of the proposed framework for a whistleblower program. The panelists underscored the importance of confidentiality. As Jane Norberg of the U.S. Securities and Exchange Commission said at page 20, "Another key to an effective whistleblower program are the confidentiality of

submissions as well as anti-retaliation protection." Similarly, Connie Craddock of the OSC Investor Advisory Panel said at pages 57-8, "If people are going to come to a regulator they have to have confidence that the risk they are taking is worthwhile, and key to that is the robust confidentiality protection and anti-retaliation protection that can be provided to the whistleblower."

The importance of confidentiality was recognized in the draft OSC Policy 15-601 issued for comment on October 28, 2015. For example, Part 3 of that draft sets forth whistleblower protections in the context of confidentiality. Section 9 of the draft also recognized that, just as confidentiality is important to protect the whistleblower, it is also incumbent upon the whistleblower to maintain confidentiality:

> "(1) All information submitted by a whistleblower to the Program is to be kept confidential by the whistleblower. The Commission expects that whistleblowers will not disclose any information provided to the Commission, including the fact that the whistleblower has made a report to the Commission, except to the whistleblower's legal counsel, if any.
>
> (2) The Commission also expects that whistleblowers will 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."

That provision was incorporated into section 9 of OSC Policy 15-601 verbatim when it was issued in final form.

A breach of section 9 may have consequences for the whistleblower as set forth in section 15(1):

> "Subject to the exceptions in subsection (2), whistleblowers in one or more of the following categories will generally be considered ineligible for a whistleblower award:
> ...
>
> (b) those who disclosed the fact of their report to the Commission, the existence or scope of an enforcement activity or the content of the whistleblower's submission to the Commission, contrary to section 9 of this Policy".

The Current Gap in the Whistleblower Policy

(i) Disclosure to the media

There seems to be an emerging pattern of companies being made subject to a "short and distort" strategy whereby, after an investor has taken a short position, the investor or others acting in concert with the investor take steps to cause statements to be made to the public which contain misrepresentations with a view to driving down the price of the relevant securities. For example, whistleblower complaints may be filed with the OSC. Then copies of those complaints may be made available by the whistleblower or persons acting in concert to select members of the press

(but not to the relevant issuer) together with copies of any OSC letter acknowledging the complaints. That issuer may be asked to comment but typically can say virtually nothing without copies of the whistleblower complaints, which almost certainly will not be provided (since the press will not reveal sources). The press can nevertheless publish a story regarding the whistleblower reports and state that the OSC is conducting an investigation in relation to the allegations in the whistleblower reports. Other news media will typically follow suit. In the result, the relevant issuer may see its publicly traded securities rapidly lose value to the prejudice of securityholders holding long positions, particularly where there are no corporate developments to justify a decline in value. However, a loss in value of the securities would certainly be helpful to short sellers seeking to take advantage of the situation.

The truth of the situation, namely that the allegations contained in the whistleblower complaints are just allegations and are unproved would likely not be relevant to the market's reaction. As well, even if the OSC is looking into the whistleblower complaints (as one would expect), it is likely incorrect for the media to characterize that as an OSC investigation.

One might suspect that, from the point of view of the relevant whistleblowers, they would have been comforted by the lack of material adverse consequences to them from the foregoing events other than the potential loss of a whistleblower award. That potential loss would likely not be considered by them to be of concern for a number of reasons including the possibility that there never would be a whistleblower award, the likelihood that the short sale profit would dwarf any possible whistleblower award and the reality that the short sale profit is immediate while any whistleblower award would be far down the road at best.

I must also observe that, as discussed above, while confidentiality is fundamental to the whistleblower regime, there appear to be examples where multiple whistleblowers have communicated and coordinated with each other regarding their whistleblower reports such that they have likely acted in concert in relation to the filing of those reports and their delivery to the press.

(ii) No prohibition against disclosure to the media by whistleblowers

Under the Policy and OSC Staff Notice 15-703 (the "**Staff Notice**"), OSC Staff are generally prohibited from making public any information about a matter it may be investigating, including whether an investigation has been undertaken. This prohibition is subject only to limited exceptions. The purpose of the prohibition against disclosure, according to the Staff Notice, is in part to protect against potential prejudice to the investigation and those who are under investigation. In contrast, that same prohibition does not apply to whistleblowers. As such, there seems to be no protection for anyone named in a whistleblower report in situations where a whistleblower deliberately discloses unproven complaints to the media for purposes of pursuing a personal agenda.

Disclosure to the Media Ought to be Prohibited or Discouraged

As must be evident from the foregoing, where what should be a confidential whistleblower complaint is disclosed to the media, such disclosure puts the person or company named in the whistleblower report in an immediately disadvantageous position: the media may publish the existence of the whistleblower report and portions of its contents. As well, the media may state that the OSC is inquiring into or investigating the allegations, which would be interpreted by at least some readers as being the equivalent of a formal OSC investigation. At the same time, the subject company is unable to respond effectively to the allegations even where they are not meritorious without having a copy of the whistleblower complaint. In the result, improper disclosure of a whistleblower complaint to the media may damage the issuer's reputation without any legitimate basis and may facilitate the intentional manipulation of securities prices.

Suggested Policy Revisions

I suggest for your consideration a number of possible further revisions to the Policy that might be effective in terms of achieving a more balanced whistleblower regime including the following:

1. The Policy could provide that, if a whistleblower causes or allows his or her whistleblower report to become public, the OSC may no longer consider the report to have been submitted pursuant to, to be subject to or entitled to the benefit of the Policy.

2. The Policy could further provide that, if a whistleblower causes or allows his or her whistleblower report to become public, the OSC may provide copies of same and any related filings or submissions to the person or company that is the subject matter of the whistleblower report.

3. The Policy could further provide that, if a whistleblower causes or allows his or her whistleblower report to become public, the OSC may investigate whether that is part of an improper attempt by the whistleblower or others acting in concert with the whistleblower to manipulate the price of securities, in which event, the OSC may proceed against the whistleblower and/or anyone acting in concert with the whistleblower.

Final Comments

According to the Policy, the Program was "established in furtherance of the Commission's mandate to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets." A whistleblower program should be of benefit in terms of that mandate. However, there must be a proper balance between the interests of a bona fide whistleblower versus the interests of a person or company who is wrongly and unfairly accused of wrongdoing by a whistleblower with an agenda. I suggest that the Policy as presently drafted does not achieve that balance but, rather, is open to abuse. Thus, I am of the view that Policy revisions of the type discussed above are worthy of implementation.

If you would like me to elaborate on the points made above or I can be of further assistance, please do not hesitate to contact me.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

Jon Levin