

A Director's Guide to EXECUTIVE COMPENSATION



Volume 10, No. 3 Winter 2015

Updates from Canada's Regulators

This newsletter describes some of this year's more significant publications from the Ontario Securities Commission (OSC) and the Canadian Securities Administrators (CSA). It includes a review of the OSC's proposed new whistleblower program, the first of its kind in Canada, along with a review of the OSC's and CSA's enforcement activities. Understanding how public companies and their directors and officers are regulated and the sanctions they may face can help them to put in place proper protocols and procedures to reduce their potential liability exposure and ensure good corporate governance.

OSC Whistleblower Program

On February 3, 2015, the OSC released its proposal for its new whistleblower program for public comments, in OSC Staff Consultation Paper 15-401.¹ The program, the first of its kind in Canada, encourages the reporting of serious misconduct of Ontario securities law to the OSC. The program is established in furtherance of the OSC'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.

To ensure the success of the program, staff would use all reasonable efforts to keep a whistleblower's identity confidential. The OSC would consider requesting a legislative amendment to the *Securities Act* (Ontario) to include anti-retaliation provisions that would make it a violation to retaliate against a whistleblower in the workplace and providing those who experience retaliation with a statutory right of action. It seems these amendments would be essential to the success of the proposed new enforcement tool, especially considering employees may well be the source of this information and could face significant retaliation if left unprotected.

On June 9, 2015, the OSC held a roundtable to meet with interested stakeholders to discuss the proposed whistleblower program. The transcript of the roundtable discussion is available online.²

On October 28, 2015, the OSC released its proposed whistleblower policy for comment, Proposed OSC Policy 15-601 – *Whistleblower Program*.³ Under the program, individuals who meet the

These quarterly newsletters provide practical advice and current legal comments on executive compensation and compensation governance and disclosure. These newsletters will be of interest to directors, executives, lawyers and human resources professionals.



Nadine Côté is an employment and executive compensation lawyer at CSuite Law. She is also the author of *Executive Compensation: A Director's Guide*, the only comprehensive book in Canada on executive compensation.

General Editor & Author
ncote@csuitelaw.com

CONTENTS

OSC Whistleblower Program	1
OSC Enforcement Activity.....	2
CSA Enforcement Report	3
CSA Continuous Disclosure Review ..	4
CSA Proxy Advisory Firm Guidance..	4

From the Editor

This newsletter reviews some of the recent publications released by the OSC and the CSA. It is helpful for public companies in Canada and those contemplating going public, along with their executive officers and legal, human resources and compensation advisors remain current on the requirements and the enforcement findings of the OSC and the CSA to ensure they are satisfying their legal and fiduciary obligations.

eligibility criteria and who voluntarily submit information to the OSC may be eligible for an award. To be eligible for an award, the information submitted must be of meaningful assistance to the OSC in investigating the matter and obtaining a decision that results in monetary sanctions or the making of a voluntary payment of \$1 million or more.

The amount of the whistleblower award could range from 5-15% of the monetary sanctions imposed or voluntary payments. If the amount of the monetary sanction imposed or voluntary payment is at least \$10 million, the maximum amount of the award is \$1.5 million. However, if the OSC collects monetary sanctions or voluntary payments of at least \$10 million, then the maximum award rises to \$5 million. As such, the amount of the award takes into consideration, among other factors, the ability of the OSC to collect.

The proposed policy sets out procedures to provide information anonymously to the OSC, which includes being represented by a lawyer. It also

provides that OSC staff will make all reasonable efforts to keep the identity of a whistleblower and information that could reasonably be expected to reveal the whistleblower's identity confidential, with exceptions.

The proposed policy prohibits employers from retaliating against employees who are whistleblowers. It states that the OSC expects employers will not discipline, demote, terminate, harass or otherwise retaliate against a whistleblower who reports information about a reasonably held belief that there has been, is ongoing, or will be, a violation of Ontario securities law to an internal reporting and compliance program or to the OSC or another regulatory agency or law enforcement authority, nor will employers impede a whistleblower from doing so.

OSC Enforcement Activity

On March 2, 2015, the OSC announced the results of its enforcement activity in 2014. The following results are noteworthy:

- 22 proceedings were commenced by the OSC, which included 8 cases before the courts, 6 of which were commenced under section 122 of the *Securities Act* (Ontario) and 2 under the *Criminal Code of Canada*.
- The proceedings commenced by the OSC involved 26 individual respondents and 19 company respondents.
- Proceedings were concluded against 48 individuals and 43 companies in 2014. Of these, 87 respondents had their proceedings concluded before the tribunal of the OSC, 58 by means of a hearing and 29 by a settlement agreement. Of the other matters, 2 defendants had their cases concluded before the court under the *Securities Act* (Ontario) and two defendants by way of court proceedings under the *Criminal Code of Canada*.
- Of the 4 concluded proceedings before the courts, two defendants received jail terms. One was sentenced to 3 years in jail after pleading guilty

PROFESSIONAL DEVELOPMENT FOR HR PROFESSIONALS

Canadian HR Reporter brings you a series of timely webinars throughout the year, covering virtually every aspect of the human resources profession — for just \$69 plus tax per webinar!

You can participate in live webinars or peruse the catalogue of past webinars and listen in whenever it is most convenient for you.

Our webinar series gives you the most current HR-related information, trends, practices, and insights for your professional development.



HRReporter CANADIAN
THE NATIONAL JOURNAL OF HUMAN RESOURCE MANAGEMENT www.hrreporter.com

For more detailed information, and to register, visit
www.hrreporter.com/webinars

to 2 charges under the *Criminal Code of Canada*. Another was sentenced to 60 days in jail for breaching the *Securities Act* (Ontario). Both sentences were rendered following investigations by the OSC in partnership with the police.

- 67 cease trade orders were issued, down from 159 in 2013
- 37 director and officer bans were issued, down from 67 in 2013
- Approximately \$73 million was the total for the administrative penalties and settlements, disgorgement orders and costs, up from approximately \$58 million in 2013. The court fines under the *Securities Act* (Ontario) were \$5,000 and the court restitution orders under the *Criminal Code of Canada* were nearly \$5 million.
- The OSC received 79 requests for assistance, of which 18 were international, 39 were from the USA and 22 were domestic.
- The OSC made 34 requests for assistance, of which 10 were

international, 17 were to the USA and 7 were domestic.

- As at December 31, 2014, there were 10 cases under the *Securities Act* (Ontario) and 2 cases under the *Criminal Code of Canada* going before the courts.

The enforcement report also notes that the OSC made its first use of no-contest settlements, which is a new enforcement tool introduced in 2014. In no-contest settlements, a respondent does not have to make a formal admission regarding its alleged misconduct. There were two no-contest settlements in 2014 involving four corporate respondents, one respondent paid the OSC \$8 million to advance the OSC's mandate and the other three respondents agreed to pay more than \$13.5 million to clients.

CSA Enforcement Report

The CSA released its 2014 Enforcement Report.⁴ There were 105 proceedings commenced, involving 189 individuals and 92 companies, down from

the 112 proceedings commenced in 2013, involving 160 individuals and 110 companies, and 145 cases commenced in 2012, involving 242 individuals and 146 companies. Of the 105 proceedings commenced in 2014, 7 involved illegal insider trading and 4 involved disclosure violations, down from 13 illegal insider trading and 14 disclosure violations in 2013, and 19 illegal insider trading and 14 disclosure violations in 2012. The CSA issued 24 asset freeze orders relating to 29 individuals and 18 companies, relating to over \$18 million in bank accounts.

There were 105 cases concluded, involving 149 individuals and 106 companies. By comparison, 133 cases were concluded in 2013, involving 216 individuals and 166 companies, and 135 cases were concluded in 2012, involving 206 individuals and 116 companies. The cases concluded in 2014 were concluded as follows: 31% by settlement agreement; 56% by contested hearing before a tribunal and 13% by a court decision under the securities legislation.



Ontario Court of Appeal — Osgoode Hall

The cases concluded in the most recent fiscal year resulted in the following orders and penalties:

- Fines and administrative penalties of approximately \$58 million, which included approximately \$87,850 for illegal insider trading and \$79,500 for disclosure violations.
- Restitution, compensation and disgorgement of over \$65 million, which included approximately \$27,000 for illegal insider trading and \$23 million for fraud.
- Courts in Ontario, Alberta and Quebec also ordered jail terms for 5 individuals, ranging from 2 months to 3 years, totaling approximately 7½ years of jail time.

The CSA's 2014 Enforcement Report commented on the OSC's settlement with David Horsley, the chief financial officer of Sino-Forest Corporation, an Ontario reporting issuer. In the agreement, Horsley acknowledged he failed to exercise the skill, care and diligence required of a CFO and permitted Sino-Forest to make inadequate and materially misleading disclosures.

Sino-Forest's operations were in China. Mr. Horsley had no prior experience as an employee of a forestry company or conducting business in China and he could not read or speak Chinese. Sino-Forest's key purchase and sale contracts were in Chinese. Horsley placed undue

reliance on the representations of management in Hong Kong.

Under the settlement, the OSC ordered Horsley to pay \$700,000 in costs and imposed permanent registration and director/officer bans on him. Courts in Ontario and New York subsequently approved the settlement of class action proceedings against Horsley and others, which provided for \$5.6 million to be paid on behalf of Horsley to former Sino-Forest security holders. Considering the personal liability imposed on Horsley, this case is a reminder of the importance of maintaining comprehensive director and officer indemnity insurance.

CSA Continuous Disclosure Review

In July 2015, the CSA released Staff Notice 51-344 *Continuous Disclosure Review Program Activities for fiscal year ended March 31, 2015*.⁵ The CSA completed 1,058 continuous disclosure reviews in fiscal 2015, up approximately from 991 in fiscal 2014. The number of full reviews increased from 221 in fiscal 2014 to 280 fiscal 2015. The number of issue-oriented reviews increased from 770 in fiscal 2014 to 778 in fiscal 2015. The results of the reviews were as follows:

- 32% of issuers were not required to make any changes to their continuous disclosure, up from 24% in 2014 but down from 53% in 2013.

³ OSC Proposed Policy 15-601 – *Whistleblower Program* (28 October 015), online: http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20151028_15-601_policy-whistleblower-program.htm.

⁴ Canadian Securities Administrators, '2014 Enforcement Report', online: <http://er-ral.csa-acvm.ca/>.

⁵ Canadian Securities Administrators, 'Staff Notice 51-344 *Continuous Disclosure*

- 30% of issuers were requested to enhance their disclosure in future filings, down from 37% in 2014 but up from 26% in 2013.
- 21% of issuers had to amend or re-file certain continuous disclosure documents, up from 14% in 2012 and 2013.
- 8% of issuers were cease-traded, placed on a default list or referred to enforcement, down from 9% in 2014 but up from 5% in 2013.
- 9% of issuers were alerted to specific areas where disclosure enhancements should be considered as part of the CSAs effort to educate issuers, down from 16% in 2014 but up from 2% in 2013.

The issues oriented reviews were further broken down as follows: 7% IFRS, 31% NI 52-109, 8% Medical Marijuana, 28% Mining Technical Oil and Gas Disclosure, 10% Mining Investor Presentations and 16% other.

CSA Proxy Advisory Firm Guidance

On April 30, 2015, the CSA adopted National Policy 25-201 *Guidance for Proxy Advisory Firms*.⁶ The policy provides guidance on best practices and disclosure for proxy advisory firms to promote transparency in the services they provide.

Review Program Activities for fiscal year ended March 31, 2015, 2015 July 16, online: http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20150716_51-344_cd-review-fiscal-2015.htm.

⁶ CSA National Policy 25-201 *Guidance for Proxy Advisory Firms* (30 April 2015), online: https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20150430_25-201-proxy-advisory.htm.

Endnotes:

¹ OSC Staff Consultation Paper 15-401 (3 February 2015), online: <https://www.osc.gov.on.ca/en/47231.htm>.

² OSC Roundtable Discussion re Whistleblower Roundtable (9 June 2015), online: https://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20150609_15-401_whistleblower-program-roundtable-transcript.htm.

This newsletter reflects the views of the author(s) and is provided only for informational purposes. This newsletter does not constitute legal, tax, accounting, compensation consulting or other professional advice and cannot be relied upon as providing such advice. Your inquiries on these matters can be directed to Nadine Côté, CSuite Law at ncote@csuitelaw.com