

Alert

November 22, 2023



The British Columbia Securities Commission Implements a New Whistleblower Program

On November 7, 2023, the British Columbia Securities Commission (the BCSC) implemented a Whistleblower Program (the BCSC Program), under BC Policy 15-604 (the Policy) to encourage individuals to voluntarily provide information about securities misconduct by offering them financial rewards of up to C\$250,000. The Policy is administered by the Commission's Office of the Whistleblower (the OWB) and aims to enhance the BCSC's enforcement capacity and deter wrongdoing in the capital markets. The Policy is effective from November 7, 2023, and applies to information received after this date, including information received after this date that relates to events prior to this date. The Policy is complemented by Notice 15-701 (the Notice), Credit Cooperation in Enforcement Matters, which outlines the outcomes for individuals who have violated securities laws if they cooperate with the BCSC.

Who is eligible under the Policy?

The BCSC is offering whistleblower awards to people who provide tips to the OWB about investment fraud and other misconduct that is being committed by someone in British Columbia or to victims in British Columbia. The type of information that a whistleblower might provide may relate to stocks, bonds, mutual funds, cryptocurrency, or instances where money was exchanged and there was a promise to receive more money back. To be eligible for a whistleblower award, the individual must provide information that meaningfully contributes to certain important enforcement results, such as the issuance of halt trade, temporary, or asset freeze orders, administrative penalties, issuance of a notice of hearing, settlements, or collections. If the information meaningfully contributes to an important result, the OWB may make a recommendation to the executive director of the BCSC as to whether the individual is eligible for an award and how much they should be paid. The executive director will make a decision based on this recommendation.

Individuals are **excluded** from receiving an award if the individual:

- provides information about only their own wrongdoing;
- works for a regulator or law enforcement agency;
- has been previously contacted by the BCSC about the issue; or
- has provided information that is false, misleading, illegal, privileged, or unethical.

Size of the award

The executive director will consider the following factors when determining the size of the award:

- the timeliness and quality of the information;
- the level of cooperation after the individual provides the information;
- how much the information contributes to an important result;
- the seriousness of the misconduct;
- the hardship the individual may face as a result of exposing the wrongdoing; and
- the individual's level of involvement in the wrongdoing.

The Policy sets out the minimum and maximum amounts for each type of result, ranging from



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C\$1,000 to C\$250,000, and a total maximum of C\$500,000 for multiple results or multiple whistleblowers.

Protection offered to whistleblowers

The OWB will only share the individual's information and identity within the BCSC on a need-to-know basis, and will not share it outside the BCSC, unless required by law or if the individual consents. However, the Policy does not guarantee or assure any confidential informer privilege.

The Policy also provides individuals with anti-reprisal protections under section 168.04 of the Securities Act (British Columbia), which prohibits anyone from taking a measure of reprisal against the individual simply because the individual provided information to the BCSC.

Credit for cooperation under Notice 15-701

Individuals are ineligible to receive a monetary award under the Policy if they provide information that pertains solely to their own wrongdoing. However, there remains a potential avenue for cooperation credit under the Notice, which explains the circumstances where persons will receive credit for reporting their behavior and cooperating with the BCSC. If an individual cooperates with the BCSC, the BCSC staff may make certain recommendations, including:

- not commencing enforcement proceedings against the individual;
- commencing enforcement proceedings with less serious allegations;
- seeking a reduced sanction after an enforcement hearing;
- settling the individual's matter on less serious allegations or with reduced sanctions;
- reducing or not seeking costs of the investigation; or
- not referring the matter to the criminal authorities.

Comparing the whistleblower program in British Columbia with Ontario's whistleblower program

In 2016, the Ontario Securities Commission (the OSC) introduced a Whistleblower Program (the OSC Program), under OSC Policy 15-601. The OSC and BCSC Programs both provide mechanisms for determining eligibility and calculating the size of award and offer confidentiality and anti-reprisal protection, in addition to options for anonymity to individuals who provide information. The OSC has published OSC Staff Notice 15-702, Credit for Cooperation, which is similar to the BCSC Notice. The BC Whistleblower program, however, generally provides smaller potential rewards for a wider range of enforcement outcomes.

Below is a high-level overview of the main differences between the OSC and BCSC Programs:

The size of award. Eligible individuals under the OSC Program are eligible to receive awards of higher maximum dollar amounts than eligible individuals under the BCSC Program. Those who submit information to the OSC Program may be eligible for awards of up to C\$5 million compared to a maximum of C\$250,000 under the BCSC Program.

Quantifying the award. The size of an award under the BCSC Program is determined on a set dollar range or percentage for each important result that the information meaningfully contributed to. For example, the minimum and maximum award for a trading halt is different than the minimum and maximum award for a settlement agreement. The director will consider a variety of factors when determining the exact dollar amount within the pre-set range for each important result. On the other hand, the size of an award granted under the OSC Program is based upon the total monetary sanctions imposed, the dollar amount collected by the OSC, and the OSC's consideration of a variety of factors. Whistleblowers whose information leads to a successful enforcement action over C\$1 million in penalties are entitled to a monetary award between 5% to 15% of the total monetary sanctions ordered to a maximum of C\$5 million. Under both programs, the respective commissions have discretion to alter the value of award.

Award payment timeline. The BCSC Program also provides for quicker payment of awards than under the OSC Program. Unlike British Columbia, where an individual is paid as soon as reasonably possible after an important result occurs, the OSC will grant an award **only after obtaining a final order over C\$1 million** and after the appeal period has expired.

Eligibility criteria. The eligibility criteria for an award by the BCSC is primarily outcome-based. Individuals are eligible to receive an award under the BCSC Program if they provide information that meaningfully contributes to enforcement results. The OSC's eligibility criteria extends beyond the outcome. To be eligible for the OSC's Program, individuals must provide all of the following:

- original information;
- information that has been voluntarily submitted;
- information that is of high quality and contains sufficient timely, specific and credible facts relating to the alleged violation of Ontario securities law; and
- information that is of meaningful assistance to the OSC Staff in investigating the matter and obtaining an award eligible outcome.

Exclusion criteria to receiving an award. The OSC Program contains more categories with individuals who are ineligible for a whistleblower award than the BCSC Program.

Reporting mechanisms. Both the BCSC and OSC Programs permit online self-reporting and anonymous reporting, through a lawyer or other mechanism that maintains anonymity. The OSC Program also provides internal reporting opportunities where employees can report potential violations of Ontario securities laws in the workplace through an internal compliance and reporting mechanism in accordance with their employer's internal compliance and reporting protocols. To be eligible for a whistleblower award, the employee must provide the same information to the OSC within 120 days of the initial internal report.

Individuals considering tipping under either the BCSC or OSC whistleblower programs or providing information under a credit for cooperation program should seek legal advice prior to engaging into discussions with any regulator.

If you have any questions, please do not hesitate to contact Lucy Schilling at lschilling@cozen.com or Jeremy Gellis at jgellis@cozen.com.

This article is intended to provide general information only and not legal advice.