



**AUTORITÉ  
DES MARCHÉS  
FINANCIERS**

**Proposed Framework  
for a Whistleblower  
Program**

**Whistleblower Task Force**

(February 20, 2016 version)

# **Proposed Framework for a Whistleblower Program**

## **1. Introduction**

In the context of the publication by the Ontario Securities Commission (“OSC”) of a proposed Whistleblower Program<sup>1</sup> in February 2015, AMF Enforcement created a task force to examine whistleblower programs in Canada and around the world and identify the elements that should be included in a program for Québec. The proposed program has been approved by top management in the Fall of 2015.

To this end, we compiled the findings of enforcement bodies in general and more specifically securities regulators which have set up such programs, including the U.S. Securities and Exchange Commission (“SEC”), the U.K.’s Financial Conduct Authority (“FCA”) and the Australian Securities and Investment Commission (“ASIC”).

The information gathered reflects strong support for whistleblower programs, with or without a financial award, as well as significant benefits to regulators.

**Objectives of whistleblower programs:** Obtain original information about violations of laws and/or regulations.

It is generally understood that employees and subcontractors have access to strategic information or information not readily available. Their reporting of wrongdoing and their cooperation allow authorities to act more quickly, uncover offences that might not have been detected otherwise, minimize the impacts on victims and ideally prevent further wrongdoing.

Different sources indicate how valuable such programs can be.

**Impact of whistleblower programs:** Both officially and in informal discussions about the Dodd-Frank Whistleblower Program, SEC representatives are very positive about the usefulness and quality of the reports of wrongdoing they have received.

Other than the number of reports received, scant factual data have been made public by the organizations that administer such programs, making it difficult to determine their true impact. We therefore reviewed empirical research,<sup>2,3,4,5</sup> and it

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<sup>1</sup> OSC Staff Consultation Paper 15-401: Proposed Framework for an OSC Whistleblower Program, February 3, 2015.

<sup>2</sup> CALL, A.C., MARTIN, G.S., SHARP, N.Y. and WILDE, J.H. (2014). “The Impact of Whistleblowers on Financial Misrepresentation Enforcement Actions.” Available at SSRN 2506418, 2014 (submitted for publication).

highlights the following limitations and advantages:

- Employees are the main category of individuals who report and therefore help reveal fraud.
- Reports by whistleblowers in cases of financial misrepresentation have the following impacts:
  - 1) higher monetary sanctions,
  - 2) longer prison terms, and
  - 3) extended investigations and prosecutions, possibly because the cases involved a more in-depth investigation.
- The implementation of the Dodd-Frank Whistleblower Program has had a positive impact on the value of U.S. equities and an even greater impact on corporations whose internal whistleblower systems were the weakest. U.S. businesses would therefore reap the benefit of the new provisions, which are likely to boost investor confidence.

Our work on the content of a whistleblower program allowed us to identify the type of information targeted as well as the protective measures and incentives that could attract whistleblowers.

## 2. Current situation

The oldest statute containing the notion of whistleblowing is the *False Claim Act*,<sup>6</sup> adopted at the end of the 19<sup>th</sup> century in the United States and substantially amended in 1986. In Canada, the Competition Bureau broke new ground with its whistleblowing provisions in 1999, giving the first whistleblower, often someone involved in the offence, immunity for reporting unfair practices. Other initiatives date back to the beginning of the 21<sup>st</sup> century<sup>7</sup> and more recently with respect to the regulation of securities and financial practices.

A number of whistleblower programs were set up between 2005 and 2013 by different enforcement agencies in Canada: the Public Sector Integrity Commissioner of Canada with its *Public Servants Disclosure Protection Act*,<sup>8</sup> the Canada Revenue Agency

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<sup>3</sup> ACFE (2014). "Report to the Nations on Occupational Fraud and Abuse." 2014 Global Fraud Study. Association of Certified Fraud Examiners, Inc., Austin, TX.

<sup>4</sup> DYCK, A., MORSE, A. and ZINGALES, L. (2007). "Who Blows the Whistle on Corporate Fraud?." Working paper 12882. National Bureau of Economic Research, Cambridge, MA, February 2007.

<sup>5</sup> BALORIA, V., MARQUARDT, C. and WIEDMAN, C. (2014). "A Lobbying Approach to Evaluating the Whistleblower Provisions of the Dodd-Frank Reform Act of 2010" (July 2014). Available at: <http://ssrn.com/abstract=1923310> or <http://dx.doi.org/10.2139/ssrn.1923310>.

<sup>6</sup> *False Claim Act*, 31 USC § 3729.

<sup>7</sup> In the U.K. and Australia.

<sup>8</sup> SC 2005, c. 46.

“CRA”) and its Offshore Tax Informant Program, the *Unité permanente anticorruption* (“UPAC”) under the *Anti-corruption Act*,<sup>9</sup> the Investment Industry Regulatory Organization of Canada (“IIROC”) and the Mutual Fund Dealers Association (“MFDA”). The Ontario Securities Commission (“OSC”) asked for comments about its proposed Whistleblower Program last spring and during the Fall of 2015. Their program is set to be launched during the Summer of 2016.

These initiatives echo the programs set up in the U.S. by the Internal Revenue Service (“IRS”) in 2007 and the Securities and Exchange Commission (“SEC”) under the *Dodd-Frank Wall Street Reform and Consumer Protection Act*<sup>10</sup> (“Dodd-Frank”) in 2011.<sup>11</sup> Under its program, the IRS offers a financial award to whistleblowers regarding taxpayers who do not pay their fair share of tax. If the information is used, the whistleblower can receive up to 30% of the amount recovered, including penalties.

A consensus has been reached among enforcement authorities that whistleblowing provides information about violations of the law that would otherwise be difficult to obtain. The goal is to intervene on a timely basis, minimize the consequences of such offences, particularly for the victims, and ideally prevent wrongdoing that might otherwise go undetected.

A representative of the SEC’s Enforcement division pointed out the value of whistleblowers in investigations: The information provided is *specific, timely and greatly contributes to investigations on an ongoing basis*. Quality information provided by whistleblowers is used not only to open files, but also to stop fraud more quickly, locate and freeze assets and ultimately return assets to investors. Confidentiality is crucial to the program but anti-reprisal (or anti-retaliation) measures and financial awards are also important in attracting whistleblowers.

### **3. Terminology**

In Québec a whistleblower program would be part of an information-gathering process that is already in place at the AMF. We’re referring to the complaint examination mechanism and the source management policy.

A whistleblower program would involve the addition of a new channel of communication since different forms of collaboration require different treatment, particularly in terms of keeping the informer’s identity secret. We will distinguish the terms “complainant,” and “whistleblower,” below and describe the mechanisms for dealing with information received from them. The advantage of distinguishing each of them is to target individuals

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<sup>9</sup> CQLR, c. L-6.1.

<sup>10</sup> *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, 124 Stat 1376.

<sup>11</sup> This statute also applies to activities governed by the U.S. Commodity Futures Trading Commission (“CFTC”). The rules for the CFTC’s whistleblower program are similar to the SEC’s. They have been in effect since August 12, 2011.

who should be protected and encouraged to cooperate with the AMF as part of any whistleblower program.

### **3.1. Complainant**

A complainant is generally the victim of a reported scheme—normally an investor or a consumer of financial products and services in AMF cases. This individual is currently the most important source of information leading to the launch of an investigation. A complainant may also be a competitor or industry observer, such as an employee of a financial institution or registered firm who discovers an offence or suspects one is being committed in the workplace and reports it to the AMF. In either case, contact is generally made with the AMF Information Centre and/or with AMF Complaint Examination and Compensation.

A complainant's motivation in contacting the AMF often stems from a loss, whether actually incurred or not, or because the person is a registrant or reporting issuer acting out of a sense of duty or seeking to report unfair competition. These persons generally do not require protection or immunity unless they are a party to the offence or a cooperating witness.

The current complaint management mechanism seems adequate for dealing with information obtained from complainants.

### **3.2. Whistleblower**

A whistleblower is generally a person who, due to his occupation, has strategic access to privileged information. He may be a current or former employee, a director, a co-worker of the person whose actions are reported or a service provider. Due to his position at work or in the industry, a whistleblower is more vulnerable to workplace and/or personal reprisals. A whistleblower program would minimize such consequences.

Except for complainants, we believe that whistleblowers, described above, require special treatment to keep their identity secret given the risks they run by sharing information with the AMF. They include reputational risk and workplace or physical reprisals. Consequently we have suggested some legislative amendments aimed at improving protective measures provided by the program.

## **4. Components of a whistleblower program in the context of the AMF**

The task force has reviewed the components of a possible program. It began by reviewing the nature and origin of the information being sought. It also distinguished internal reporting from external reporting and concluded that there would be no significant negative impact of a whistleblower program on existing internal reporting mechanisms in the businesses concerned.

#### 4.1. Nature and origin of information sought

We are generally seeking information from whistleblowers about an offence under the laws and regulations administered by the AMF pursuant to *An Act respecting the Autorité des marchés financiers*<sup>12</sup> (“AMF Act”):

- *Deposit Insurance Act*<sup>13</sup>
- *An Act respecting insurance*<sup>14</sup>
- *An Act respecting financial services cooperatives*<sup>15</sup>
- *An Act respecting the distribution of financial products and services*<sup>16</sup> (“Distribution Act”)
- *Derivatives Act*<sup>17</sup>
- *An Act respecting trust companies and savings companies*<sup>18</sup>
- *Securities Act*<sup>19</sup> (“Securities Act”)
- *An Act respecting the Mouvement Desjardins*<sup>20</sup>
- Title VII of the *Automobile Insurance Act*<sup>21</sup>
- *Money-Services Businesses Act*<sup>22</sup> (“MSBA”)

Regarding the MSBA, amendments have been proposed that would increase the AMF’s authority to take action, including through cease-trade and freeze orders. These amendments to the AMF’s investigatory powers would lead to more effective action based on information from whistleblowers.

More specifically, whistleblowers should provide information about a violation of the laws and regulations administered by the AMF that meets the following criteria:<sup>23</sup>

- Original information, i.e. information that is not publicly known and might otherwise go undetected by the AMF;
- Timely (still current);
- Credible and detailed, specific and verifiable;
- Voluntarily submitted;
- Obtained legally and not subject to solicitor client privilege.

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<sup>12</sup> CQLR, c. A-33.2, s. 7.

<sup>13</sup> CQLR, c. A-26.

<sup>14</sup> CQLR, c. A-32.

<sup>15</sup> CQLR, c. C-67.3.

<sup>16</sup> CQLR, c. D-9.2.

<sup>17</sup> CQLR, c. I-14.01.

<sup>18</sup> CQLR, c. S-29.01.

<sup>19</sup> CQLR, c. V-1.1.

<sup>20</sup> SQ 2000, c. 77.

<sup>21</sup> CQLR, c. A-25.

<sup>22</sup> CQLR, c. E-12.000001.

<sup>23</sup> Criteria are based on the OSC and SEC programs.

and ideally, but not necessarily:

- Helps limit the consequences of the violation;
- Leads to legal action or plays a meaningful role in reaching a conclusion;
- Helps save resources normally earmarked by the AMF.

Some programs include criteria to determine a whistleblower's eligibility or exclusion.<sup>24</sup> Eligible whistleblowing is normally considered "protected." In requiring that a person be eligible, it is understood that the person may take advantage of the protection mechanisms and be eligible for a financial award under the program. In our opinion, strict eligibility or exclusion criteria would not be advisable since without them we would maintain the latitude needed to make decisions on a case-by-case basis as to how to treat reports that do not fit into these parameters.

#### **4.2. Internal reporting**

A person wishing to report illegal conduct or situations can do so in the workplace according to internal corporate mechanisms or externally, to a designated authority. Most of the programs we examined encourage whistleblowers to report wrongdoing internally before doing so externally.

Without imposing specific internal whistleblowing practices on reporting issuers and registrants, other than the provisions prescribed by Regulation 52-110, we believe that it would be appropriate, as part of any future whistleblower program, to remind prospective whistleblowers of the importance of using existing internal channels. This would create a balance between an employee's duty of loyalty and the duty to report wrongdoing which could seriously harm the public interest. However, as we and our counterparts at other organizations have pointed out, a whistleblower would always be able to contact the AMF directly if he fears unfair treatment or reprisals for reporting a wrongdoing. Furthermore, it would be interesting to look at the advisability of publicizing certain practices similar to those encouraged under Ontario's Credit for Cooperation Program. For example, the implementation of an internal whistleblower program by a reporting issuer could be encouraged by advertising the fact that, if the company is charged with an offence, the existence of such a program at the time of the alleged wrongdoing could constitute a mitigating factor both in terms of the sentence and the choice of forum (administrative or penal).

#### **4.3. Protective measures under the program**

Our work indicates that, contrary to other informers, a whistleblower's job or career is almost always at stake, which means that multiple forms of protection will be required if the person blows the whistle internally or if it is impossible to keep his identity a secret:

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<sup>24</sup> The Australian Securities and Investments Commission and the U.K.'s Financial Conduct Authority provide for eligibility criteria whereas the SEC, the IRS and the CRA exclude whistleblowers who have been charged with a crime related to the reported wrongdoing.

anti-reprisal measures as well as tools to prevent or defend against civil lawsuits. Within the framework of the whistleblower program, whistleblowers will be allowed to remain anonymous and the most comprehensive conditions will be put in place in order to reduce any potential problems related to this type of whistleblowing.

We examined the protective measures currently in place in Québec, and more specifically in the laws and regulations administered by the AMF in terms of the confidentiality of information and the identity of individuals, anti-reprisal protection as well as immunity against civil recourses. We also made recommendations on how to improve the system or overcome perceived gaps.

#### **4.3.1. Anonymity**

Anonymous whistleblowing, such as by telephone or mail, makes it difficult or impossible for investigators to contact the person if more information is required to pursue the investigation.

Despite this issue associated with anonymous reports of wrongdoing, we recommend that certain mechanisms be put in place to facilitate communication with investigators while ensuring the whistleblower's anonymity. We deem anonymity to be an effective shelter and a powerful incentive inspiring whistleblowers to report information regarding violations of laws under the AMF's jurisdiction.

We do not recommend the option of requiring whistleblowers to take action through a lawyer or other intermediary as the OSC recently proposed. We believe that such a requirement would discourage some whistleblowers from coming forward. However, it is essential that AMF employees assigned to whistleblowers who wish to remain anonymous undergo training on how to convince them to identify themselves or encourage them to remain in contact with a designated employee.

#### **4.3.2. Confidentiality**

Confidentiality is key to an effective whistleblower program. It allows the AMF to keep related information and documents confidential while ensuring the protection of the identity of whistleblowers and the documents in their possession. Like all information that the AMF receives in connection with an inspection or investigation, information obtained from whistleblowers will therefore be treated as confidential.<sup>25</sup>

We identified the current protection regimes primarily by analyzing the AMF's powers and duties pursuant to the AMF Act and certain other statutes applicable to public bodies. It appears that there is already a set of protective measures which ensure that information and documents sent to the AMF remain confidential. We will review these

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<sup>25</sup> See in particular sections 16 of the AMF Act, 16 of *An Act respecting insurance*, 395 of *An Act respecting trust companies and savings companies*, 297 of the *Securities Act* and 131.7 of *An Act respecting financial services cooperatives*.



provisions to determine whether they offer sufficient protection in connection with a program to encourage the reporting of offences under the laws administered by the AMF.

#### **4.3.2.1 Confidentiality of information and documents**

The AMF Act generally prohibits persons employed by the AMF from communicating or allowing to be communicated information obtained under the AMF Act or a regulation thereunder.<sup>26</sup> As well, under the AMF Act, investigations are to be held *in camera*.<sup>27</sup> Information gathered from a whistleblower which leads to an investigation pursuant to the laws administered by the AMF will therefore be treated in confidence. Like the prohibition against communicating information imposed on AMF employees, this is not an absolute guarantee but reasonable assurance of confidentiality since, as mentioned above, in rare circumstances, information may have to be disclosed with the AMF's authorization.

The *Act respecting access to documents held by public bodies and the protection of personal information*<sup>28</sup> ("Access Act"), which applies to the AMF,<sup>29</sup> also provides significant protection regarding the confidentiality of information and documents. Under the Access Act, the AMF, as a public body, must refuse to disclose information to a body responsible for the prevention and detection of statutory offences if its disclosure would likely hamper an investigation or reveal a confidential source of information.<sup>30</sup> The AMF therefore could not be compelled to disclose its source without a search warrant or communication demand.<sup>31</sup>

Lastly, with respect to securities, under sections 297.1 to 297.6 of the Securities Act and section 93 of the Derivatives Act, the AMF may communicate any information, including personal information, without the consent of the person concerned, to other persons or bodies responsible for enforcing the law. Such information may be provided, in particular, under agreements between the AMF and national or international regulators respecting the exchange of information.<sup>32</sup> However, the authorities who receive the information agree to keep the information confidential, except in the case of a search or where the law compels them to disclose it. The authorities must take certain steps to ensure that the information provided remains confidential.

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<sup>26</sup> Section 16 of the AMF Act.

<sup>27</sup> Section 12 of the AMF Act. Section 244 of the Securities Act has the same effect.

<sup>28</sup> CQLR, c. A-2.1.

<sup>29</sup> Section 36 of the AMF Act.

<sup>30</sup> Section 28 of the Access Act.

<sup>31</sup> S. 487.012 of the *Criminal Code*, RSC 1985, c. C-46.

<sup>32</sup> See in particular the *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information*, of which the AMF is a signatory. Available on-line: [https://www.sec.gov/about/offices/oia/oia\\_bilateral/iosco.pdf](https://www.sec.gov/about/offices/oia/oia_bilateral/iosco.pdf).

Given the various provisions for protecting information and documents held by the AMF, we believe that confidentiality would be sufficiently protected in this regard under a whistleblower program.

#### **4.3.2.2 Concealing a whistleblower's identity**

Other than the measures mentioned above intended to keep information reported by a whistleblower confidential, the AMF will take the necessary steps to maximize a whistleblower's chances of relying on the informer privilege rule and thus ensure that his identity will not be revealed in connection with the accused's right to a full and complete defence.

In certain circumstances, a person who provides information can take advantage of "informer privilege" under common law, which will ensure that his identity is not disclosed. Informer privilege will only be lifted if the disclosure of the whistleblower's identity is necessary for the accused to defend himself against the charges brought against him.<sup>33</sup>

Moreover, note that a whistleblower's identity may be disclosed to another financial market regulator pursuant to sections 297.1 to 297.6 of the Securities Act and 93 of the Derivatives Act through information-sharing agreements to achieve more effective law enforcement. However, the organizations that have signed such agreements with the AMF will generally be required to take the necessary steps to protect such information, subject to applicable principles of natural justice.

We believe that, from a legislative standpoint, the provisions designed to protect a whistleblower's identity and the confidentiality of the information provided are sufficient and we do not recommend the adoption of additional measures in this regard.

Other than the protection provided by law, we believe that the coding of sources of information upstream will provide optimal additional protection while reducing the risk that evidence disclosed to the accused will identify the whistleblower. In the event the identity is revealed inadvertently or for example if the person's testimony is necessary, other protection and incentive measures are included in the program.

#### **4.3.3. Anti-reprisal protection**

Given the serious social and workplace consequences that whistleblowers could face and the impossibility or non-relevance of preserving the whistleblower's identity in certain cases, it is important to set up anti-reprisal measures to reassure whistleblowers and encourage them to come forward. The measures examined below are designed to

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<sup>33</sup> For example, informer privilege can be lifted when there is a basis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused. *R. v. Leipert*, [1997] 1 SCR 281 at par. 21.

protect individuals who could face reprisals after reporting a violation of the laws administered by the AMF.

We note that in Canada, anti-reprisal measures are limited to employer-employee relationships. It therefore seems that in Québec, two sets of rules could apply to protect an employee who faces reprisals after reporting wrongdoing. The latter is further discussed below and suggest legislative amendments where protection seems insufficient.

#### **4.3.3.1 Section 124 of *An Act respecting labour standards*<sup>34</sup>**

Pursuant to section 124, an employee credited with two years of uninterrupted service can apply for redress under the measures set forth in section 128 of *An Act respecting labour standards* (“ALS”) if he believes he has not been dismissed for a good and sufficient cause. The possible remedies are reinstatement, reimbursement of salary that was not paid during the dispute, as well as any other measure considered fair and reasonable taking into account all the circumstances of the matter.

However, we believe that this recourse is not enough to protect employees who would want to share information with the AMF as part of a whistleblower program.

Introduce a legislative amendment to broaden the corrective measures offered to an employee who faces reprisals for internally or externally reporting facts related to an offence under the laws administered by the AMF, whether or not the report leads to an investigation or prosecution.

- The recourse prescribed under section 124 ALS<sup>35</sup> for dismissal without good and sufficient cause as well as its remedies only protect an employee with two years of uninterrupted service who is dismissed. The remedies associated with section 124 do not provide corrective measures against other forms of reprisal, such as suspension, discrimination or any other sanction against the whistleblower.
- We believe that all employees who have been the victims of unfair reprisals should benefit fully from the remedies under the ALS, including the rules in sections 122 and following.

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<sup>34</sup> CQLR, c. N-1.1.

<sup>35</sup> Section 124 ALS reads as follows: “ An employee credited with two years of uninterrupted service in the same enterprise who believes that he has not been dismissed for a good and sufficient cause may present his complaint in writing to the Commission des normes, de l’équité, de la santé et de la sécurité du travail or mail it to the address of the Commission des normes, de l’équité, de la santé et de la sécurité du travail within 45 days of his dismissal, except where a remedial procedure, other than a recourse in damages, is provided elsewhere in this Act, in another Act or in an agreement. [...]”

- We suggest adding a reference to section 122 ALS in the AMF Act and including a consequential amendment to the ALS by adding *An Act respecting the Autorité des marchés financiers*<sup>36</sup> to paragraph 122(7) ALS:

**122.** *“No employer or his agent may dismiss, suspend or transfer an employee, practise discrimination or take reprisals against him, or impose any other sanction upon him: [...] (7) on the ground of a disclosure by an employee of a wrongdoing within the meaning of the Anti-Corruption Act (chapter L-6.1) [or within the meaning of An Act respecting the Autorité des marchés financiers (chapter A-33.2)] or on the ground of an employee's cooperation in an audit or an investigation regarding such a wrongdoing.”*

- Amending section 122(7) ALS will avoid creating an alternative regime to section 124 ALS which could ultimately give an employee fewer rights since the courts have held that the prescribed recourse is separate from that under section 124 ALS.

#### **4.3.3.2 Alternative action in damages to complete corrective measures under ALS**

The corrective measures available under the ALS are not appropriate under all circumstances. For example, the measures would not help a service provider who incurs reprisals by the person who hired it for providing information to the AMF, since the service provider is likely not an employee.

Also, under certain circumstances it is difficult to imagine that the employment relationship between a whistleblower and his employer will be maintained. We therefore believe that it would be appropriate to give an alternative recourse to whistleblowers who share information with the AMF in addition to what is available in the ALS.

Legislative amendment to provide for civil action in damages available to both an employee and a service provider who is the victim of reprisals for internally or externally reporting facts related to a violation of the laws administered by the AMF, whether or not the information led to an investigation or prosecution.

- This amendment would create an alternative recourse for a whistleblower who incurs reprisals, including dismissal, and does not want to be reinstated or take advantage of any other corrective measure which could be ordered pursuant to sections 122 and 124 of the ALS.

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<sup>36</sup> RSQ c. A-33.2.

- This amendment would also give a recourse to a service provider who incurs reprisals by an entity that enlisted its services, for reporting wrongdoing to the AMF.
- The provision should state that such civil action in damages does not deprive a whistleblower of any other recourse prescribed by law.

#### **4.3.3.3 Section 425.1 of the *Criminal Code***

Under section 425.1 of the *Criminal Code*, an employer or a person in a position of authority commits an offence if he takes a disciplinary or reprisal measure with the intent to compel the employee to abstain from providing information respecting an offence contrary to a provincial or federal law, or because the employee has provided such information. We do not believe that section 425.1 of the *Criminal Code* provides enough protection for two main reasons.

First, the burden of proving beyond a reasonable doubt that reprisals were intended in response to whistleblowing is very onerous for an employee.<sup>37</sup> Second, the protection offered by section 425.1 of the *Criminal Code* only applies to reports made “to a person whose duties include the enforcement of federal or provincial law,” and this excludes internal reporting.<sup>38</sup>

Legislative amendment to create an offence in the case of reprisals against an employee or service provider who internally or externally reports facts related to an offence in violation of the laws administered by the AMF, whether or not the information leads to an investigation or prosecution by the AMF.

The inclusion of an offence for unjustified reprisals against an employee or sub-contractor who shares information with the AMF would allow the AMF to remain in control of lawsuits that may be launched and simply add a charge as part of the prosecution resulting from the information provided, where applicable.

- This amendment would prohibit reprisals against employees who blow the whistle internally, contrary to section 425.1 of the *Criminal Code*, and would allow the AMF to bring penal proceedings itself against an employer who takes reprisal measures against a whistleblower.

<sup>37</sup> Phase 3 Report on Implementing the OECD Anti-bribery Convention in Canada, March 2011, p. 55, par. 173.

<sup>38</sup> In its Consultation Paper, the OSC also says that it is interested in including anti-reprisal protection in its *Securities Act* despite the existence of s. 425(1) of the *Criminal Code* because, among other things, that provision only applies when information is provided to a person whose duties include the enforcement of federal or provincial law.

- The minimum and maximum amount of a penalty should also be determined.

#### **4.3.3.4 The nullity of contract terms intended to muzzle a whistleblower or prevent him from launching recourses prescribed by law**

Certain terms included in employment or service contracts are designed to prevent the communication to the relevant authorities of any information which is not publicly available. Reprisals or civil lawsuits could be launched against a whistleblower based on such contract terms. The latter applies to employees or service providers who share information with the AMF as part of a whistleblower program.

Legislative amendment whereby contract terms intended to muzzle a whistleblower or prevent him from exercising a recourse prescribed by law are unenforceable against an employee or service provider who shares information with the AMF as part of a whistleblower program.

- The purpose of this amendment would be to prevent reprisals against a whistleblower within the meaning of the AMF Act based on a confidentiality provision.
- The confidentiality clause could continue to apply to other disclosures of information.

#### **4.3.4. Immunity from civil prosecution**

A whistleblower may be intimidated by the prospect of being the subject of a costly civil lawsuit launched by the legal person or individual whose wrongdoing was reported. There are certain laws to protect potential whistleblowers against this type of civil prosecution.

Under section 17.1 of the AMF Act, a person of good faith who reports a failure to comply with an Act referred to in section 7 of the AMF Act is not subject to any civil liability for doing so. In our opinion, this section provides enough protection for whistleblowers, although it is very rarely used.<sup>39</sup>

However, assuming that amendments are made to the AMF Act to introduce the provisions discussed above, section 17.1 could also be amended and worded more clearly.<sup>40</sup>

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<sup>39</sup> Other provisions guarantee immunity from civil prosecution in Québec law, including article 1472 of the Civil Code, sections 104, 105 and 144 of the *Distribution Act* and sections 285.7, 294.3, 295.1 and 295.2 of *An Act respecting insurance*.

<sup>40</sup> In particular the concepts of “failure to comply” and “good faith.”

#### 4.4. Incentives

Lastly, we looked into the issue of financial awards and searched for data which would measure how attractive such an incentive is to potential whistleblowers. As mentioned above, only the SEC currently offers a financial award to what it considers “eligible” whistleblowers, but the OSC is about to follow suit. According to the SEC’s Enforcement Division, introducing a financial award was a “game changer” in terms of reports of wrongdoing. Other jurisdictions, including the U.K., chose not to offer financial awards after looking into the issue. Other than the statistical analysis by researchers Dyck, Morse and Zingales,<sup>41</sup> which in their opinion illustrates the effectiveness of financial awards granted under the *False Claim Act*, the data published by the SEC concerning Dodd-Frank do not allow us to draw any conclusion about the impact of financial awards.

According to available information, the SEC has granted 1,5 award per 1,000 reports of wrongdoing (out of approximately 10,000 reports received to date). This low probability of a financial award can be explained by the fact that the legal proceedings have not been concluded in certain files involving a whistleblower and that the minimum fine of \$1 million has not been imposed, no legal proceeding has been instituted or no investigation has been started. In short, the chance of receiving an award, and thus the attractiveness of such a proposal, seems slim.

Americans are proud of the 20% increase in reports received since the Dodd-Frank program was set up, while the British are seeing a jump of over 400% despite the absence of any financial award. Even if we could determine with certainty the reason for the increase in reports in the U.K. (advertising about the program, its scope, recent policy changes), the growing attractiveness of the U.K. program compares favourably to the U.S. situation.

Other factors should be considered if an award is to be included in a whistleblower program, such as the availability of resources to process reports, how it would be financed and the complexity of managing such a program (granting an award, possible appeals by disgruntled whistleblowers, etc.).

At this stage, given the lack of conclusive data, this aspect of a whistleblower program has not been included considering the context of our organization and market. We suggest for the moment stressing that a whistleblower’s identity will remain confidential and that the information provided will be treated with care.

#### 5. Conclusion

We strongly believe that the whistleblower program will directly contribute to the success of the AMF’s mandate by strengthening our oversight practices aimed at preventing and deterring financial crimes.

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<sup>41</sup> DYCK, A., MORSE, A. and ZINGALES, L. (2007). “Who Blows the Whistle on Corporate Fraud?” Working Paper 12882. National Bureau of Economic Research, Cambridge, MA, February 2007.