

Panel #5: The Impact of Whistleblower Programs on Investor Recovery

This panel examined the impact of whistleblower programs on investor recovery in regulatory enforcement actions and class actions. Moreover, the panel discussed whether financial rewards to whistleblowers augments or diminishes the funds available to harmed investors.

Panellists:

Dominic Auld, Partner at Bleichmar Fonti Tountas & Auld LLP,
Stephen L. Cohen, Associate Director – Enforcement Division at the U.S. Securities and Exchange Commission,
David Conklin, Partner at Goodmans LLP, and
Jordan Thomas, Partner at Labaton Sucharow LLP.

Moderator:

Tom Atkinson, Director of Enforcement at the Ontario Securities Commission

Mr. Atkinson noted that the OSC's final proposal for its Whistleblower Program would be published on October 28, 2015 (can now be found at: https://www.osc.gov.on.ca/en/NewsEvents_nr_20151028_whistleblower-program-public-comment.htm).

Mr. Cohen argued that it is preferable to provide financial rewards to whistleblowers from sources other than investor funds. For example, penalties or disgorgement collected by the Commission can be an alternate source, specifically collected from wrongdoers, for the rewards to whistleblowers. Mr. Cohen lauded the OSC's efforts to put into place a whistleblower program, as many SEC investigations that resulted in investor recovery would never have been brought forward without a whistleblower. Mr. Cohen argued that in his experience, whistleblowers are not necessarily bad corporate citizens, they report internally first, and then come to the Commission. Mr. Thomas added to this by arguing that in many cases, whistleblowers are instrumental in reporting wrongdoing and in doing so early. Moreover, he argued that in the whistleblower context, class counsel and governmental bodies work together to facilitate investor recovery.

Mr. Auld argued that no institutional investor would bring a class action without clear, cogent evidence of the wrongdoing, because they are not willing to litigate on a speculative basis. Therefore, any whistleblower or other public program that brings clear evidence early is highly encouraging. This will encourage investor recovery, as well as cooperation between public authorities and class counsel, which will ultimately benefit retail investors.

Mr. Conklin provided a different perspective on the goals of a whistleblower program. He argued that while the focus of the other panellists' comments was on

compensation to wronged investors, it should also be measured by its effect on businesses. He called for more study into the incentives that will be created by the OSC's proposed program. In comparing the Canadian and American experience, Mr. Conklin argued that due to the different evidentiary burdens on plaintiff and defence counsel in a class action, defence counsel in Canada would usually tender a broad body of evidence to demonstrate that there is no viable case. This sort of evidence would never be tendered in the American motion to dismiss procedure. For this reason, Mr. Conklin argued that whistleblowers would only be helpful insofar that the information that they are supplying is actually unknown.