

Guidance

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Whistle-blower Guidance

Purpose

Whistle-blowers are a valuable source of information to identify Misconduct¹ in Ontario’s financial services sectors. The Financial Services Regulatory Authority of Ontario (“**FSRA**”) recognizes the value of Whistle-blowers and has implemented a Whistle-blower Program (the “**Whistle-blower Program**”) to allow individuals and entities to provide information, either personally or anonymously through a lawyer, related to Misconduct in the Regulated Sectors,² furthering FSRA’s statutory objects which include protecting the rights and interests of consumers, credit union members, and pension plan beneficiaries (collectively “**Consumers/Beneficiaries**”).

To detect Misconduct and protect Consumers/Beneficiaries, the Whistle-blower Program will provide protection to certain individuals or entities who:

¹ Please see the definition of “Misconduct” under the “Scope” heading.

² Please see the definition of “Regulated Sector” under the “Scope” heading.

- (1) come forward in good faith with valuable, timely and primarily non-public (i.e., insider) information related to Misconduct in a Regulated Sector
- (2) request FSRA maintain their identity in confidence
- (3) receive an assurance of confidentiality from FSRA³ (“**Whistle-blower**”)

To support implementation of the Whistle-blower Program, this Guidance:

- (1) communicates FSRA’s approach to determining who qualifies as a Whistle-blower under the *Financial Services Regulatory Authority of Ontario Act, 2016* (“**FSRA Act**”),⁴ and who receives the protections outlined in this Guidance
- (2) outlines FSRA’s interpretation of the Whistle-blower protections in the FSRA Act, including the type and scope of protections and the recourse available to Whistle-blowers
- (3) informs individuals and entities how they can submit information to FSRA’s Whistle-blower Program.

Scope

This Guidance applies to any individual or entity that has information related to an alleged or intended contravention (i.e., “**Misconduct**”) under one of the following Acts (the sectors regulated by such Acts being the “**Regulated Sector**”):⁵

- the *Credit Unions and Caisses Populaires Act*
- the *Financial Professionals Title Protection Act*
- the *Insurance Act*

³ The FSRA Act grants FSRA’s Chief Executive Officer (“CEO”) authority over whistleblower complaints. However, for the purposes of this Guidance, reference will be made to FSRA as the CEO may delegate authority to FSRA employees, as permitted by s 10(2.3) of the *Financial Services Regulatory Authority of Ontario Act*.

⁴ *Financial Services Regulatory Authority of Ontario Act, 2016*, SO 2016, c 37, schedule 8 [FSRA Act].

⁵ In this Guidance, the definition of “Regulated Sector” means an Act listed in or prescribed under the definition of “regulated sector” in s 1(1) of the FSRA Act.

- the *Loan and Trust Corporations Act*
- the *Mortgage Brokerages, Lenders and Administrators Act*
- the *Pension Benefits Act*
- the *Pooled Registered Pension Plans Act*; or
- such other legislation as may be prescribed

This Guidance also applies to any individual or entity who is the subject of a Whistle-blower complaint and affects all entities regulated by FSRA as well as their directors, officers and employees where applicable, including

- accident benefits service providers
- co-operative corporations
- corporate insurance agencies
- credit unions and caisses populaires
- insurance adjusters
- insurance agents
- insurance brokers
- insurance companies
- loan and trust corporations
- mortgage administrators
- mortgage agents
- mortgage brokers
- mortgage brokerages
- pension plan administrators

Rationale and background

FSRA's Whistle-blower program aims to encourage individuals or entities who are aware of Misconduct in the Regulated Sectors to inform FSRA so that appropriate action can be taken. Such action may include an investigation and, where necessary, enforcement proceedings to protect Consumers/Beneficiaries. To encourage the reporting of Misconduct, FSRA will take all reasonable efforts to ensure individuals and entities who identify Misconduct in a Regulated Sector can provide that information to FSRA on a confidential basis without fear of reprisal through the provision of formal Whistle-blower protection under the Whistle-blower Program.

Encouraging Whistle-blowers to come forward by offering them statutory protection furthers FSRA's statutory objects under the FSRA Act in relation to the Regulated Sectors by:

- contributing to public confidence
- deterring deceptive or fraudulent conduct, practices and activities
- promoting high standards of business conduct
- protecting the rights and interests of consumers, pension plan beneficiaries and members of a credit union.⁶

FSRA's approach to the Whistle-blower Program will be guided by the following principles:

- **Transparency:** FSRA's practices and procedures in respect of information provided by Whistle-blowers, as well as the level of protections that it can offer a Whistle-blower, will be openly and clearly communicated.
- **Risk-based:** FSRA's response to Misconduct will be proportionate to the risk identified by the Whistle-blower and potential harm to the public.
- **Consumer/Beneficiary Centric:** FSRA's Whistleblower Program is designed to encourage Whistle-blowers to come forward with information that will help FSRA identify Misconduct with a view to more effectively protecting Consumers/Beneficiaries.

Eligibility requirements

This section outlines the requirements that an individual or entity will need to meet to be considered a Whistle-blower under the FSRA Act and receive the protections under the Whistle-blower Program.

Not every individual or entity who submits information through the Whistle-blower Program will be granted Whistle-blower status and offered protection by FSRA. The protections and recourses in the Whistle-blower Program, as outlined in this Guidance, are only available to individuals or

⁶ FSRA Act, supra note 4, s 3.

entities who meet the requirements set out in the FSRA Act,⁷ and who receive a written assurance of confidentiality from FSRA.

Individuals or entities who do not meet the requirements under the Whistle-blower Program, or who do not receive a written assurance of confidentiality from FSRA, will not be considered Whistle-blowers under the FSRA Act and will not benefit from the protections afforded under the Whistle-blower Program. Please read this Guidance carefully before you provide information to FSRA under the Whistle-blower Program.

Individuals or entities who wish to remain completely anonymous may choose to retain a lawyer to submit information to FSRA's Whistle-blower Program. Further information on submissions by lawyers is outlined in the "Submission Process" section of this Guidance.

Requirements

FSRA will consider an individual or entity to be a Whistle-blower and entitled to protection under the Whistle-blower Program, if they:

- a. disclose to FSRA, in good faith, information related to Misconduct in a Regulated Sector
- b. request that their identity as a Whistle-blower be kept confidential
- c. are provided with a written assurance of confidentiality by FSRA.⁸

Good faith

To be entitled to protection under the Whistle-blower Program, Whistle-blowers are required to disclose information related to Misconduct to FSRA in good faith. FSRA interprets "good faith" in subsection 20.5(a) of the FSRA Act to mean that Whistle-blowers who provide information to FSRA do so with an honest belief that there has been Misconduct and without any intention of defrauding or taking advantage of FSRA or another party. In this context, good faith requires an

⁷ For the purposes of ss 20.6 to 20.8, a person or entity is a whistle-blower if: (a) the person or entity discloses to the Chief Executive Officer, in good faith, an alleged or intended contravention of an Act listed in or prescribed under the definition of "regulated sector" in s 1(1); (b) the person or entity requests that their identity as a whistle-blower be kept confidential; and (c) the Chief Executive Officer provides the person or entity with an assurance of confidentiality, subject to s 20.8.

⁸ See FSRA Act, supra note 4, s 20.8.

individual or entity to come forward without the intent of personally benefiting from the disclosure, either by personally profiting or by gaining advantage in a dispute or disagreement.

Whistle-blowers vs. Complainants

Generally, FSRA does not consider a “Complainant” to qualify as a Whistle-blower. Individuals or entities who are considered a Complainant will not be able to rely on the protections under the Whistle-blower Program.

In FSRA’s view, a “**Complainant**” is typically an individual or entity who is dissatisfied with a product or service they received from a regulated entity or licensed individual and is not an employee or other person with inside knowledge of the entity providing such product or services. A complainant may or may not have information related to Misconduct in a Regulated Sector. For example, a pension plan member who is identifying a concern regarding their individual benefit provided from a pension plan (e.g., alleging that a benefit has been incorrectly calculated, or that a plan administrator has not complied with Ontario pension legislation) is generally a Complainant and not a Whistle-blower.

In addition, an individual or entity must request that their identity be kept confidential. Whistle-blowers are generally concerned about potential reprisals as a result of providing information they have obtained in the course of their employment or as a function of having access to primarily non-public information. Where the nature of the Misconduct reported requires that the identity of the individual be disclosed in order to address alleged harm to the individual, FSRA would not be able to grant Whistle-blower protection.⁹

Whistle-blowers, in contrast, are often an existing or former employee or another person with inside information (e.g., present or former board member, agent, director or officer, vendor, broker, third party representative or competitor) of a regulated entity Alternatively, a Whistle-

⁹ For example, a pension plan member who alleges that a miscalculation of his or her pension benefit in contravention of the *Pension Benefits Act*, RSO 1990, c P.8. (“PBA”) would generally not be considered a Whistle-blower because the information provided is specific to the individual and any alleged Misconduct could not be addressed by FSRA through the Whistle-blower Program. Rather, the individual would have recourse as a Complainant since the PBA specifically allows for such issues to be addressed through FSRA’s regulatory authority under s 87 of the PBA.

blower can be a licensee who possesses valuable, timely and primarily non-public information related to Misconduct, and wishes to have their identity protected because of concerns related to potential reprisals against them by their employer or others. Generally, the type of information provided by a Whistle-blower is not publicly available.¹⁰

Before submitting information to FSRA’s Whistle-blower Program, please ensure you meet the above criteria to qualify as a Whistle-blower and are not a Complainant. FSRA will not offer an assurance of confidentiality to a Complainant.

If you are dissatisfied with a product or service you have received from a regulated entity or licensed individual you can [file a complaint with FSRA](#).

Whistle-blower protections

This section outlines the protections that FSRA can offer Whistle-blowers under the Whistle-blower Program as well as the limited circumstances in which a Whistle-blower’s identity may be disclosed.

This section applies to individuals or entities who meet the requirements of a Whistle-blower under the Whistle-blower Program and who are provided with a written assurance of confidentiality by FSRA. If you do not receive a written assurance of confidentiality from FSRA, the protections and recourse under the Whistle-blower Program listed in this section will not apply to you.

1. Identity protection

FSRA is required by law to keep confidential and not disclose the identity of a Whistle-blower, including any information or record that may reasonably be expected to reveal the identity of a Whistle-blower, subject to the exceptions listed in the FSRA Act and described below.¹¹

¹⁰ For example, a CFO reporting information not available to the public about financial irregularities in a credit union regulated by FSRA, or a key employee or executive reporting about non-compliance by an insurance company may be considered Whistle-blowers and are encouraged to submit any information they have about the Misconduct to FSRA’s Whistle-blower Program.

¹¹ FSRA Act, supra note 4, s 20.8(2).

Where FSRA determines an individual or entity is a Whistle-blower under the FSRA Act, that individual or entity will be given the following assurance of confidentiality:

FSRA will keep confidential, and not disclose the identity of a Whistle-blower or any information or record that could reasonably be expected to reveal the identity of the Whistle-blower. A Whistle-blower's identity will only be disclosed where (a) required by law or (b) where a valid exception under subsection 20.8(2) of the FSRA Act applies.

(a) Disclosure required by law

FSRA will take all reasonable efforts to maintain the confidentiality of a Whistle-blower's identity and information. However, a Whistle-blower's identity, and any information or record that could reasonably be expected to reveal the identity of the Whistle-blower, may be subject to disclosure during a legal proceeding. FSRA will make all reasonable efforts to resist any disclosure requests for a Whistle-blower's identity. In the limited circumstances identified in this Guidance, however, FSRA **cannot guarantee** that a Whistle-blower's identity will not be disclosed in all cases because the final decision in respect of disclosure of the Whistle-blower's identity will be made by a court or tribunal and not by FSRA.

Freedom of information

A Whistle-blower's identity, and any information or record that could reasonably be expected to reveal the identity of the Whistle-blower, is exempt from disclosure under Ontario's *Freedom of Information and Protection of Privacy Act* ("**FIPPA**").¹² As a result, FSRA's view is that requests for information related to a Whistle-blower's identity under FIPPA can be successfully resisted through the protections available in section 20.8 of the FSRA Act and subsection 67(2) of FIPPA.

(b) Exceptions under the FSRA Act

FSRA may disclose a Whistle-blower's identity if:¹³

¹² See *ibid*; see also *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 [FIPPA].

¹³ FSRA Act, *supra* note 4, s 20.8(2).

- (a) the Whistle-blower consents; or
- (b) the disclosure is made to law enforcement because there are reasonable grounds to believe that the Whistle-blower has committed an offence under the *Criminal Code (Canada)* or a statute governing a Regulated Sector that is related to the Whistle-blower's disclosure to FSRA.

2. Protection from civil liability

Whistle-blowers will not be liable in any civil proceeding for providing information to FSRA which relates to Misconduct in a Regulated Sector or for bringing a proceeding in response to a reprisal taken against them.¹⁴

3. Protection from reprisals

What is a reprisal

Whistle-blowers may be fearful of coming forward with information due to the negative repercussions (or reprisals) that may occur if the person or entity who is the subject of a Whistle-blower's disclosure to FSRA discovers their identity. Reprisals can include:¹⁵

- terminating, demoting, disciplining, penalizing or intimidating or threatening to do any of these in respect of a Whistle-blower's employment, contract, position or office; or
- any act or failure to act that detrimentally affects the Whistle-blower

The prohibition against reprisals has broad application and prohibits direct or indirect reprisals beyond the scope of matters related to the Whistle-blower's employment. FSRA interprets subsection 20.6(1) of the FSRA Act to also include any act or failure to act directed at any individual or entity related to the Whistleblower (e.g., a family member or employer of the Whistle-blower) and which, when assessed objectively, detrimentally affects the Whistle-blower, as constituting a reprisal.

¹⁴ Ibid, s 20.6(3).

¹⁵ Ibid, s 20.6.

(a) Whistle-blowers' recourse

Whistle-blowers who are subject to a reprisal for providing information to FSRA may:

- (1) make a complaint to be dealt with by final and binding settlement by arbitration under a collective or other agreement that provides for such a resolution; or
- (2) bring a civil proceeding in the Superior Court of Justice.¹⁶

An arbitrator or court may then re-instate the Whistle-blower's employment, position, contract or office with the same seniority or status and/or order compensation (including expenses and benefits lost) of up to two times the amount that would have been paid, but for the reprisal, including interest. The arbitrator or court may also order additional compensation, taking into considering the nature of the reprisal and any resulting losses.¹⁷ Where the Whistle-blower brings a civil proceeding or has such matter dealt with by arbitration, there is a presumption that the person or entity alleged to have contravened the anti-reprisal protections under the FSRA Act has directed the reprisal against the Whistle-blower, and they must prove that they did not do so.¹⁸

Further, any provision in an agreement, such as a confidentiality or non-disclosure provision in an employment, settlement confidentiality or non-disclosure agreement, that prevents a Whistle-blower from providing information, cooperating with FSRA or giving evidence during a hearing, is void.

(b) FSRA enforcement powers

Where an individual or entity takes a reprisal against a Whistle-blower, FSRA may take the following action in respect of the person or entity suspected of taking the reprisal:

- conduct examinations or investigations or make inquiries

¹⁶ Ibid, s 20.6(3).

¹⁷ Ibid, s 20.6(5).

¹⁸ Ibid, s 20.6(4).

- require any person or entity to provide information or produce any document that is relevant to the examination, investigation or inquiry
- enter, and have access to, any business premise that contains information related to the examination, investigation or inquiry¹⁹ or
- a charge alleging an offence against the individual or entity.

Offences

It is an offence to take reprisals against a Whistle-blower. Maximum penalties under the FSRA Act are \$500,000 and/or one year of imprisonment for individuals and \$1,000,000 for corporations.²⁰ Directors and officers of a corporation, partners in a partnership or members of a directing body can be held liable if they participate in or fail to take reasonable care to prevent a reprisal against a Whistle-blower.²¹

Submission process

This section outlines how to submit information under the Whistle-blower Program as well as what you should expect during the process. It also explains how you can submit information to FSRA under the Whistle-blower Program, completely anonymously, through a lawyer (i.e., FSRA will never know your identity).

FSRA will only accept information from Whistle-blowers through the Whistle-blower Program's online submission page, other than where accommodations are required under the *Accessibility for Ontarians with Disabilities Act, 2005*.²² Please read this Guidance in full before providing any information to FSRA under the Whistle-blower Program.

Please visit the home page for FSRA's [Whistle-blower Program](#).

¹⁹ Ibid, s 20.9(1).

²⁰ Ibid, s 20.11.

²¹ Ibid, s 20.10(2) & (3).

²² SO 2005, c 11.

Individual submissions

Individuals and entities will be required to confirm the following before submitting information under the Whistle-blower Program:

- I have read and understand the contents of this Guidance, including the circumstances in which my identity may be disclosed by FSRA.
- I have valuable, timely and primarily non-public information related to Misconduct in a Regulated Sector.
- I am coming forward in good faith.
- I request that FSRA keep my identity confidential.
- I certify that all of the information provided in my submission, including my name and description of Misconduct, is true and complete.
- I understand that FSRA may disclose my identify to a law enforcement agency without my consent if I have committed an offence under the *Criminal Code (Canada)* or under a Regulated Sector statute which is related to the misconduct outlined in this application.

Anonymous submissions through a lawyer

Individuals or entities who wish to provide information to FSRA under the Whistle-blower Program completely anonymously (i.e., FSRA will never know your identity as your lawyer is not required to provide it to FSRA) may retain a lawyer to submit information on their behalf.²³ All communications will be between FSRA and the lawyer designated to act on behalf of the individual or entity.

²³ Please note that individuals and entities are responsible for any costs related to retaining a lawyer. FSRA does not provide any reimbursement.

Individuals or entities should review the [Individual Submission Form](#) with their lawyer and either provide the requested content to their lawyer in writing or confirm the content before their lawyer submits the content to FSRA's Whistle-blower Program using the lawyer submission option.

Lawyers will be asked to certify the following before submitting information on behalf of their client to FSRA under the Whistle-blower Program:

- I have read and understand this Guidance and have explained it to my client.
- I have received from my client, or reviewed with my client, the content of the Individual Submission Form before submitting this information to FSRA.
- I have verified the identity of my client (through valid government issue photo ID).
- I am authorized to interact with FSRA and act on my client's behalf (including accepting an assurance of confidentiality should it be offered).
- I have confirmed with my client that, to the best of their knowledge, all of the information provided in this submission is true and complete.

Additional submissions

Once you or your lawyer submit information to FSRA under the Whistle-blower Program, you or your lawyer will receive a one time ID and password. This ID and password will allow you or your lawyer to submit additional information to FSRA and track the progress of your submission. Please ensure you or your lawyer write down this ID and password and store it in a password protected space. You will not be able to access this ID and Password again.

FSRA staff will communicate the following information to you, or your lawyer, through a secure Whistle-blower web page:

- whether more information is needed; and/or
- where FSRA considers you to be a Whistle-blower under the FSRA Act and will provide you with a written assurance of confidentiality.

Assurance of confidentiality

FSRA's assurance of confidentiality will be made available to Whistle-blowers, or to a Whistle-blower through their lawyers, via letter through FSRA's secure Whistle-blower web page. FSRA will provide Whistle-blowers with a written assurance of confidentiality only after their information is screened by FSRA and it is determined the Whistle-blower meets the requirements of the Whistle-blower Program as set out in this Guidance.

Whistle-blower records

FSRA is legally required to retain all records submitted to FSRA under the Whistle-blower Program. This includes information associated with individuals or entities who are not considered Whistle-blowers, not offered an assurance of confidentiality and who do not benefit from the protections under the Whistle-blower Program as outlined in this Guidance. FSRA will apply all available legal protections and will only disclose information submitted to it under the Whistle-blower Program where required or authorized by law.

Confidentiality

Whistle-blowers and lawyers representing Whistle-blowers should treat all information they provide to FSRA under the Whistle-blower Program as confidential, including their submissions and any information they acquire through their participation in the Whistle-blower Program.

Assistance

Whistle-blowers may be asked to assist FSRA by providing additional information as needed, as well as work with FSRA to locate information related to the Misconduct described in their application. This may include the Whistle-blower testifying at an enforcement proceeding where such disclosure is required.

Use of information

FSRA takes a progressive, measured and proportional approach to enforcement. This means that where a regulated entity or individual has not complied with regulatory requirements, FSRA will determine the appropriate action after considering the evidence and the unique circumstances of the non-compliance or non-adherence to a particular obligation, including the seriousness and nature of the contravention, risk to consumers and pension plan beneficiaries,

potential impact on stakeholders, nature of regulated entity or licensee, past behaviour, efforts to remediate and mitigate, and the need for deterrence. FSRA will strive to be measured in its approach to compliance and enforcement, assuming good faith by the regulated entity unless circumstances indicate otherwise.²⁴

As a result, FSRA may use the information submitted to it under the Whistle-blower Program, at its discretion, for any purpose related to its statutory mandate. However, FSRA is not required to use any information submitted to it under the Whistle-blower Program.

All information submitted to FSRA under the Whistle blower Program is collected under the authority of the FSRA Act.

Additional information

For questions about the Whistle-blower Program, this Guidance or the submission process in general, please refer to FSRA's website and Whistle-blower page.

About this guidance

This document is consistent with [FSRA's Guidance Framework](#). As Interpretation guidance, it describes FSRA's view of requirements under its legislative mandate (i.e., legislation). Non-compliance with the above Guidance can lead to enforcement action.

This Guidance is also an Approach. Approach Guidance describes FSRA's internal principles, processes and practices for enforcement action and the application of Chief Executive Officer discretion. Approach Guidance may refer to compliance obligations but does not in and of itself create a compliance obligation. Visit [FSRA's Guidance Framework](#) to learn more.

²⁴ FSRA's response to reprisals may not follow the principles outlined above in this paragraph if necessary to give effect to the purposes of the Whistle-blower Program, including encouraging and protecting Whistle-blowers.