



# Registration Applications/Filings and the OSC's Whistleblower Program

**November 22, 2018**

**OSC**

ONTARIO  
SECURITIES  
COMMISSION

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# Agenda

1. CSA Staff Notice 33-320 *The Requirement for True and Complete Applications for Registration* – Mark Skuce, Senior Legal Counsel, Compliance and Registrant Regulation Branch
2. Outside Business Activities and Form 33-109F5 *Change of Registration Information* – Kamaria Hoo, Registration Supervisor, Compliance and Registrant Regulation Branch
3. Common Issues in Reports of Exempt Distributions – Kian Sleggs, Business Analyst, Compliance and Registrant Regulation Branch
4. The OSC's Whistleblower Program – Ashok Menen, Investigation Counsel, Enforcement Branch



# **Part 1 - CSA Staff Notice 33-320 *The Requirement for True and Complete Applications for Registration***

# Overview

1. Impetus for the Staff Notice
2. Review of the Staff Notice
3. Practices for stakeholder consideration

This presentation is based on, but not limited to, the Staff Notice.

# Why is (Non-)Disclosure an Issue?

- Three criteria for suitability for registration (initial and ongoing):
  - Integrity
  - Proficiency
  - Solvency
- Disclosure on a registration application form (both initial and ongoing) serves two important functions:
  - The required information provided by the individual informs OSC Staff's assessment of whether they are suitable for registration.
  - Required information withheld by the individual affects OSC Staff's assessment of whether they are suitable for registration (in particular, the integrity criteria).

# Team 4

- Formed in 2010, and coincided with introduction of power by the Director to suspend registration.
- Staffed primarily by lawyers with litigation experience.
- Investigates allegations of misconduct by applicants and registrants, which often include integrity-related issues.

# Pervasiveness of Problem

- Misleading application cases have been around since the earliest days of the OSC Bulletin.
  - The first decision ever reported in the OSC Bulletin – *Re Base*, (1949) OSCB 10 (January) – dealt with an applicant who did not disclose that he had previously been refused a securities license in Quebec.
  - In the 2017/18 fiscal year, the OSC received approximately 7,600 applications for registration by individuals, and regulated approximately 68,000 registered individuals (the majority being mutual fund dealing representatives).
  - The issue of misleading applications for registration, and of detrimental information not being reported by registrants, has become a significant one.
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# Development of Staff Notice

- In late 2016, OSC Staff engaged with other members of the CSA to propose the publication of a CSA Staff notice addressing the issue of false or misleading registration applications.
- Owing to population size, the issue has arisen most often in Ontario, but other jurisdictions have experience with the problem as well (see for example: *R. v. Fileccia* (Manitoba), *Re Jane Doe* (Alberta) and *Re Ryan* (BC)).
- After consultation with all provinces, territories, and the SROs, CSA Staff Notice 33-320 *The Requirement for True and Complete Applications for Registration* was published on July 13, 2017.

# Objectives of Notice

1. Alert stakeholders to the issue
2. Summarize statutory obligations
3. Address common reasons given for non-disclosure
4. Provide guidance for completing applications

# The Issue

“The keystone to the registration system is the application form. A desire and an ability to answer the questions in it with candour in many respects can be said to be the first test to which the applicant is put.” (*Re Thomas* (1972)).

# Statutory Obligations

- NI 33-109
  - s. 2.2: “[...] an individual who applies for registration under securities legislation must submit a completed Form 33-109F4 to the regulator [...]”.
  - s. 4.1: “[...] a registered individual or permitted individual must notify the regulator of a change to any information previously submitted in respect of the individual's Form 33-109F4 as follows: (a) for a change of information previously submitted in items 4 [*Citizenship*] and 11 [*Previous employment*] of Form 33-109F4, within 30 days of the change; (b) for a change of information previously submitted in any other items for Form 33-109F4, within 10 days of the change.
  - s. 5(1): “A sponsoring firm must make reasonable efforts to ensure the truth and completeness of information that is submitted in accordance with this Instrument for any individual.”

# Statutory Obligation

- *Securities Act:*
  - s. 122(b): “Every person who [...] makes a statement in any application [...] required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading [...] is guilty of an offence and on conviction is liable to a fine of not more than \$5 million or to imprisonment for a term of not more than five years less a day, or to both.”

# Form F4

- 22 Items
- Items where disclosure issues are most commonly encountered:
  - Item 10 Current employment, etc.
  - Item 11 Previous employment and other activities
  - Item 12 Resignations and terminations
  - Item 14 Criminal disclosure
  - Item 16 Financial disclosure

# How is Non-Disclosure Detected?

- Criminal background checks
- Bankruptcy searches
- Notices of termination and supporting documents
- Internet searches
- OSC intelligence sources (e.g., previous investigations)

# How is Non-Disclosure Addressed?

- Investigations are typically handled by Team 4.
- Registrant/applicant can expect to be interviewed, under oath/affirmation, and in the presence of a court reporter.
- Critical questions:
  - **Did the individual disclose the matter to his/her firm?**
    - If the answer is “yes”, it is less likely that OSC Staff will pursue regulatory action against the individual. In that case, OSC Staff will likely follow up with the firm for an explanation as to why the matter was not reported on NRD in a timely manner.
  - **If the individual did not disclose the matter to his/her firm (and the OSC), why?**
    - Is there a legitimate explanation, or did the individual act with an intention to mislead, recklessness, or willful blindness, or with an unreasonable level of care?



# Guiding Principles During Non-Disclosure Review

1. Disclosure is an important integrity test (*Re Thomas* (1972)).
2. Integrity is broader than dishonesty. Integrity also encompasses a duty of care in one's work product (*Re John Doe* (2010)).
3. Unreasonable assumptions, forgetfulness or misunderstandings undermine the effectiveness of the self-reporting regime and are therefore unlikely to be accepted as reasons for non-disclosure (*Re Couto* (2012)).

# Possible Outcomes

- An applicant who is found to have failed to disclose required information without a valid explanation may have their application refused (*Re John Doe* (2010) and *Re Couto* (2012)).
- A registrant who is found to have failed to update required information without a valid explanation may have their registration suspended (*Re Milligan* (2018) and *Re Coulson* (2018)).
- In particularly egregious cases, a misleading application for registration may be referred to the Enforcement Branch, and could even result in a criminal prosecution (*R v. Khalkali* (2014)).

# Practices for Stakeholder Consideration

- Culpable non-disclosure is by its nature an act of deception, and if someone is intent on deceiving their sponsor firm, it will be difficult to prevent them from doing so. But, there are steps that can be taken to mitigate the risk:
  - Require applicant to complete the application in full.
  - Review the completed application before it is submitted. Carefully examine narrative sections such as descriptions of past experience and reasons for termination.
  - Police criminal record check (non-pardoned convictions only) and police information check (other information such as charges, absolute and conditional discharge) at time of recruitment/application.
  - Bankruptcy search.
  - Obtain Notice of Termination from applicant.
  - Internet searches (initial and at time of branch audit).
  - Require applicant to review Staff Notice prior to application.
  - Codes of Conduct.
  - Annual compliance attestations.
  - Once notified, prioritize reporting and investigate after.
  - Branch managers/colleagues play an important role.
  - Remember Watergate: The cover-up is often worse than the crime itself.



## **Part 2 - Outside Business Activities (OBAs) and 33-109F5 (F5) Filings**

# Overview

- OBA filing expectations & common deficiencies
- Conflicts of interest & what should be reported
- Restricted Client terms and conditions & examples of positions of influence
- 33-109F5 (**F5**) filing expectations & best practices

# Expectations Regarding OBAs

## Registrants must:

- Have policies and procedures in place to identify changes to F4 information.
- Have policies and procedures in place to identify and address conflicts of interest with respect to OBAs, including potential influence or client confusion due to undue influence.
- Document any action and analysis the firm takes to determine an OBA does not require reporting.
- Notify the regulator of updates to Item 10 of the F4 within 10 days of the change

# Common Deficiencies

- Insufficient description of the outside firm business activities and the individual's duties – titles are not sufficient details.
- Inappropriate or insufficient assessment of actual or potential conflict.
- Addressing conflict of interest of an OBA in the item 10 entry of the sponsoring firm on NRD – Conflicts of interest questions must be addressed in the entry of the OBA itself.

# Things to Consider When Evaluating Conflicts of Interest

- Will the individual have sufficient time to properly carry out their registerable activities, including remaining current on securities law and product knowledge.
  - Will the individual be able to properly service clients.
  - Is there potential for client confusion.
  - Are there effective controls and supervision in place to manage the risk.
  - Does the OBA present a conflict of interest for the individual and should that conflict of interest be avoided or can it be appropriately managed.
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# Things to Consider When Evaluating Conflicts of Interest (cont'd)

- Does the OBA place the individual in a position of power or undue influence over current or potential clients.
- Can potential clients be categorized as vulnerable.
- Does the OBA provide the individual with access to privileged, confidential or insider information relevant to their registerable activities.
- Does the individual have privacy privileges in regards to information disclosed by clients.

# OBAs That Should be Reported

- All employment and business activities with the sponsoring firm and outside of the sponsoring firm
- All officer and director or equivalent positions (paid/unpaid). These may include non-leadership positions
- Activities where the individual is in a position of power, influence or position that places the individual in contact with potentially vulnerable clients regardless of whether the position is voluntary or paid.

# Commonly Undisclosed OBAs that Should be Reported

- Having more than a negligible % ownership (i.e. over 1%) in a holding company
- Trustee
- Landlord/owner of tenanted building
- Tax planning services

# OBA's that require Restricted Client terms & conditions

- The OSC proposes Restricted Client terms and condition on OBA's that are considered to have influence.
- The next two slides provide examples of positions of influence so firms understand which OBA's will require Restricted Client terms and conditions.

# Examples of Positions of Influence

- Pastor or equivalent, lay pastor, elder, president & other figure heads of the Church
- Teaching at an accredited school and administering grades
- Coaching a professional or feeder team to the pros/semi-pros
- Mentoring youth through an organization, life coach
- Caring for vulnerable people (old/sick/disabled/challenged), sitting on a committee that makes decisions about patrons for care

# Examples of Positions of Influence (cont'd)

- Doctor, nurse, pharmacist, naturopath
- Lawyer, anyone who works for a law firm, lawyer or client to whom attorney/client privilege is extended
- Immigration official, consultant, agent or equivalent
- Roles handling investments of an organization

# Expectations Regarding F5s

## Notice of Change to a Firm's Information

- Notify the principal regulator of a change to any information previously submitted in Form 33-109F6 (**F6**) via a completed F5
  - within 30 days of a change in Part 3
  - within 10 days of a change in any other part of the F6 or the attached Schedule B .

## When an F5 is not required

- A business location change, other than the head office, should be submitted in a completed Form 33-109F3 via NRD.
- Addition/termination/change of a sponsoring firm's officer, partner or director if the firm submits a completed Form 33-109F1, 33-109F4 or 33-109F7 via NRD.

# F5 Filing Best Practices

- If submitting an F5 to reflect changes to the F6, always attach a blackline of the amended sections of the form.
- **Part 3.1 – Business model change** – Description of activities current and proposed should be separated by heading.
- **Part 3.12 – Ownership change** – highlight on the chart who is being added/removed, the percentage change, whether it triggered an 11.9/11.10 notice or not, the type of business a newly added affiliate or subsidiary operates.
- **Part 7 - Regulatory action update** - be clear whether the notice of change is with regards to the registrant firm or its affiliates. Submit documentation along with any notice regarding the registrant firm.





# Part 3 - Common Issues in Reports of Exempt Distribution

# Common Issues in Reports of Exempt Distribution

## NRD NUMBER OR REGISTRANT NAME IS DEFICIENT ON FORM

- The NRD number and registrant firm name do not match in the following item(s) on the Form 45-106F1: **4 (Underwriter Information)** or **Item 8 (Compensation Information)**

**ITEM 4 – UNDERWRITER INFORMATION**

If an underwriter is completing the report, provide the underwriter's full legal name and firm National Registration Database (NRD) number.

Full legal name

Does the Underwriter's Firm have an NRD Number?  No  Yes Firm NRD number  [\(Registrant Search\)](#)

If the underwriter does not have a firm NRD number, provide the head office contact information of the underwriter.

Street address  Municipality  Province/State  Postal/ZIP code

Country  Telephone number  Website (if applicable)

**PERSON 1** Add Person Delete Current < 1 of 1 >

**a) Name of person compensated and registration status**

Indicate whether the person compensated is a registrant.  No  Yes Is the person an individual or non-individual?  Individual  Non-Individual

If the person compensated is an individual, provide the full legal name of the individual.

Family name  First given name  Secondary given names

If the person compensated is not an individual, provide the following information.

Full legal name of non-individual  Firm NRD number (if applicable)  [\(Registrant Search\)](#)

Two red arrows point to the 'Full legal name' field in Item 4 and the 'Name of person compensated and registration status' section header in Person 1.

# Common Issues in Reports of Exempt Distribution

## COMPENSATED PERSON FIELD IS DEFICIENT ON SCHEDULE 1

at t	Is the purchaser a registrant?	Is the purchaser an insider of the issuer?	Full legal name of person compensated for distribution to this purchaser
	N	N	XYZ Capital Inc.

- If the person compensated is a registered firm, provide the firm NRD number only.
- Otherwise, provide the full legal name of person compensated.
- When indicating multiple compensated persons in the same line, separate them using a semi-colon.

# Common Issues in Reports of Exempt Distribution

## COMPENSATED PERSON FIELD IS DEFICIENT ON SCHEDULE 1

- The name provided must be consistent with name of the person compensated as provided in Item 8 of the report.

Example Firm Inc.	<i>If the person compensated is not an individual</i> Full legal name of non-individual
	Example Firm Inc.

- For individuals and non-registered firms, please include the full name of the firm and not short forms or initials.

Example Firm Inc.	✓
Example	✗
EFI	✗

- No need to indicate "N/A" if there is no compensated person.

# Resources

- **The OSC's Exempt Market webpage:**
  - <http://www.osc.gov.on.ca/en/exempt-market.htm>
- **Upcoming OSC SME Institute Webinars:**
  - [http://www.osc.gov.on.ca/en/Companies\\_upcoming-seminars\\_index.htm](http://www.osc.gov.on.ca/en/Companies_upcoming-seminars_index.htm)



# Part 4 - The Ontario Securities Commission's Whistleblower Program



# Overview

- Background on the OSC's Whistleblower Program
  - Confidentiality, Anti-Reprisal Protections, Financial Incentives, etc.
- OSC Whistleblower Desk Review
  - Key Findings

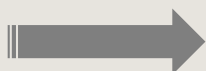
# Background on the OSC's Whistleblower Program

- Launched the Office of the Whistleblower and implemented OSC Policy 15-601 (July 2016)
- Tool designed to assist in identifying and investigating more complex and hard to detect securities misconduct such as financial reporting and insider trading violations

200 tips



**10% (19) led to an OSC investigation**



**35% (68) shared with other OSC branches or other regulators**

> 200 interactions on OSC's Whistleblower Hotline



# Information Being Sought

**Report securities misconduct in Ontario, for example:**

**Misstatements  
in Financial  
Statements**

**Misleading  
Disclosure in  
Public Filings**

**Fraud**

**Illegal  
Insider Trading**

## **Tips must:**

- Be high quality with timely, specific and credible facts
- Identify:
  - who is involved,
  - what happened, and
  - when the misconduct occurred or may occur

# Tips Process and Awards



**Whistleblower(s)**

**Single or joint**

**Exclusions and exceptions**

**Anonymous reporting option  
with legal counsel**

**Submit tip  
to OSC  
OWB**



**Tip analysis, OSC investigation and admin proceeding**



**If  $\geq$  \$1M  
sanctions or  
voluntary  
payments**

**Award possible, up to \$5M  
Between 5 and 15% of sanctions or voluntary payments**

# Protections for Employee Whistleblowers

**Confidentiality** of whistleblower identity “all reasonable efforts”

**Section 121.5 prohibits reprisals** for whistleblowing.

‘Reprisals’ may include:

- termination
- demotion
- disciplinary action
- intimidation or coercion  
(or threats of the above)



**Civil cause of action in the Superior Court**

- reverse onus
- possible remedies

**Void contractual provisions** that silence whistleblowers

# OSC Desk Review

**Restrictive provisions in agreements with employees**



Ontario Securities Act voids contractual provisions that preclude or purport to preclude an employee from: reporting securities misconduct; or assisting in an investigation or proceeding

2018 Targeted Review of 30 Registered Firms  
(IFMs, PMs, & EMDs)

“significant portion of the firms reviewed had employment agreements that contained inappropriate language.”

“language that may inhibit possible disclosure to the OSC, SROs or law enforcement agencies”...

*Source: OSC Compliance and Registrant Regulation’s Annual Summary Report for Dealers, Advisers and Investment Fund Managers, August 2018*

# Practical Considerations



***Research shows that whistleblowers want to report internally***



OSC Program includes measures to incentivize whistleblowers to report internally but does not require them to do so



83% of employees who received awards from the U.S. SEC first raised concerns internally before reporting to U.S. SEC

(Source: 2017 U.S. SEC's Annual Report to Congress on Whistleblower Program)

**Complements other OSC Enforcement tools – credit for cooperation and no-contest settlements**

# Resources

- **Website and online portal**  
[www.officeofthewhistleblower.ca](http://www.officeofthewhistleblower.ca)
- **Whistleblower Hotline:**  
**1-888-OSC-5553 (1-888-672-5553)**
- OSC Policy 15-601 *Whistleblower Program*
- OSC Staff Notice 33-749 *Annual Summary Report for Dealers, Advisers and Investment Fund Managers, pages 35 to 36, under the heading "Protection from reprisals"*





# Questions?

[RegistrantOutreach@osc.gov.on.ca](mailto:RegistrantOutreach@osc.gov.on.ca)