

1 This is the unedited transcript of the roundtable  
2 discussion of OSC Staff Consultation Paper 15-401 Proposed  
3 Framework for an OSC Whistleblower Program on June 9, 2015  
4 which we received directly from the transcriber. We are  
5 posting the transcript in this form to make it available as  
6 soon as possible.  
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8 ONTARIO SECURITIES COMMISSION  
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12 ROUNDTABLE DISCUSSION RE  
13 WHISTLEBLOWER ROUNDTABLE  
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17 DATE: Tuesday, June 9th, 2015  
18 HELD AT: Ontario Securities Commission  
19 20 Queen Street West  
20 22nd Floor  
21 Toronto, Ontario  
22

23 BEFORE:

24 MARY CONDON Commissioner  
25 ALAN LENCZNER Commissioner  
26 TIM MOSELEY Commissioner  
27  
28  
29

1 PANELLISTS:  
2  
3 John Pecman Competition Bureau  
4  
5 Jane Norberg U.S. Securities and Exchange  
6 Commission  
7  
8 Marian Passmore Canadian Foundation for  
9 Advancement of Investor Rights  
10  
11 Dimitri Lascaris Siskinds  
12 Connie Craddock OSC Investor Advisory Panel  
13 Daniel Pugen McCarthy Tetrault  
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16 Megan Telford TD Bank Group  
17 Sheila A. Murray C.I. Financial Corp.  
18 Linda Fuerst Lenczner Slaght  
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1 --- Upon commencing at 9:02 a.m.

2 INTRODUCTION AND OPENING REMARKS:

3 MS. CONDON: Well, good morning  
4 everybody. It's nice to see that everyone is so  
5 self-disciplined as that hush falls over -- at 9:01  
6 before I even had to say anything. So this is a very  
7 good start for our session this morning.

8 Welcome to all of you, and of course in  
9 particular, welcome to all of our distinguished  
10 panelists who have come to give us the benefit of  
11 their experiences, and we'll look forward to having a  
12 discussion with you all.

13 My name is Mary Condon. I'll chair the  
14 roundtable this morning. To my left is my fellow  
15 commissioner, Alan Lenczner. Sorry, Alan.

16 MR. LENCZNER: Never got it right.

17 MS. CONDON: And to my right, my other  
18 fellow commissioner, Tim Moseley.

19 So you all know, of course, why we're  
20 here this morning. We, the OSC enforcement staff,  
21 published a consultation paper on a potential  
22 whistleblower program in February this year, and very  
23 aware, course, that introducing such a program in  
24 Canada would be the first of its kind for securities  
25 regulators and, therefore, important to make sure

1 that we had a full consultation and a full  
2 opportunity for comment on the issues.

3 In the process of receiving written  
4 comments on the consultation paper, we received,  
5 although not very numerous comments compared to their  
6 initiatives that we've engaged in, very high quality,  
7 very detailed, very insightful comments. And, in  
8 particular, if you've had a chance to look at them,  
9 you'll see there are a number of issues about which  
10 there is broad agreement and then others about which  
11 there is less agreement.

12 So on that basis, we thought that it  
13 would be extremely helpful to host this roundtable  
14 this morning, offer you the opportunity to hear from  
15 experts and those who have some experience in  
16 interacting with this kind of program in order to  
17 help us advance the conversation.

18 Of course, for us, as commissioners,  
19 we're really looking at this process as a way for us  
20 to get some advice so then how we should move forward  
21 and decide about the proposal that has been made by  
22 staff to us.

23 So we've set this up so that we have  
24 three separate themes that we want to pursue this  
25 morning. One of them -- the first one will deal with

1 the question of the effectiveness of a whistleblower  
2 program and really getting the views on the table  
3 about why we should do this and what the advantages  
4 and challenges might be, and we have the benefit of  
5 some participants in that session who have already  
6 have been involved in implementing and developing  
7 whistleblower programs.

8           So what we're going to do after that is  
9 have a second panel dealing with anti-retaliation  
10 issues, which came very -- came across very loud and  
11 clear as an issue that we really needed to be  
12 thinking very carefully about if we were going to  
13 make such a program work.

14           And then finally the last session will  
15 deal with issues of how this kind of whistleblower  
16 program would interact with existing compliance  
17 mechanisms internally within organizations that we  
18 regulate.

19           So what we're going to do is address  
20 each of these themes. Each of the speakers on each  
21 theme will have five minutes to express their views  
22 and their thoughts, and then we'll open for  
23 discussion.

24           Obviously, the commissioners will have  
25 questions that we want to ask of each speaker, but

1 also other panelists for other sessions this morning  
2 should feel free to jump in at any point and we can  
3 have a very general and useful conversation.

4           For those of you in the audience who  
5 want to join the conversation, we have comment cards  
6 on the chairs so that you can put a question in  
7 writing, it will be fed up by staff members who are  
8 assisting us to give us the comment cards, and then  
9 if there is an opportunity we'll ask the question on  
10 your behalf at the roundtable. If not, of course, we  
11 take all those questions away with us and consider  
12 them as we continue to consider the next steps in  
13 this process.

14           So just a couple of housekeeping issues  
15 before we jump into our first substantive discussion.  
16 Please turn off all of your devices that will chirp  
17 and beep during the next few hours.

18           We have a transcriber who is going to  
19 provide a transcript of the proceedings this morning  
20 and we will post that on our website as soon as it is  
21 available to us to do so, so that those who are not  
22 able to attend this morning will have the benefit of  
23 the conversation. It is obviously a public  
24 roundtable. There are a couple of members of the  
25 media in attendance.

1           So that, I think, concludes the  
2 introduction, and I have the pleasure of moderating  
3 the first panel of our conversation this morning  
4 which is dealing with the question of the  
5 effectiveness of whistleblower programs. So we're  
6 going to move right into that issue.

7           We have four panelists who are here on  
8 my right. We have John Pecman from the Competition  
9 Bureau. We have Jane Norbert from the U.S.  
10 Securities and Exchange Commission, Marian Passmore  
11 from Fair Canada, and Dimitri Lascaris from Siskinds,  
12 LLP.

13           Each of them has a particular  
14 perspective on the question of effectiveness of  
15 whistleblower programs and we look forward to hearing  
16 those views.

17           Before I turn it over to the first  
18 participant, John, who will tell us how -- what  
19 experience the Competition Bureau has had with these  
20 kinds of programs, again, I'll just make the point  
21 that there are a number of whistleblower-type  
22 programs in existence both within and without the  
23 securities regulations space.

24           IROC has had a whistleblower program  
25 for a number of years and, of course, overseas in the



1 UK and Australia there are whistleblower programs  
2 also in those jurisdictions. The difference with  
3 some of those programs is that they do not offer  
4 financial incentives to whistleblowers to come  
5 forward.

6 So I think in terms of our thinking  
7 about this at the OSC, the landscape really changed  
8 once we had the opportunity to review the experience  
9 of the SEC, which introduced a new version of a  
10 whistleblower program following the Dodd-Frank Act in  
11 2010 and which has been described by the SEC chair as  
12 a game changer.

13 So we're very excited, therefore, to  
14 have some ability to learn from the SEC's experience.

15 So let me, just before I turn it over  
16 to John, mention that obviously some of you will have  
17 had the chance to look at the consultation paper that  
18 we published. A key feature of the program that the  
19 OSC enforcement staff are proposing is that there  
20 would be a financial incentive to eligible  
21 whistleblowers of up to 15 percent of total monetary  
22 sanctions, including administrative penalties and  
23 disgorgement where those sanctions exceed \$1 million.  
24 However, as currently proposed, the award would be  
25 capped at \$1.5 million.

1           There is also a number -- there are a  
2 number of considerations that are put forward in the  
3 consultation paper about the issue of who could be  
4 eligible for that whistleblower award, and that's  
5 also an issue that hopefully we'll be able to get  
6 into in our discussion.

7           So without further adieu, I'm going to  
8 turn it over to John and ask him to speak about the  
9 programs that currently exist in the arena of  
10 competition regulation.

11 TOPIC 1: EFFECTIVENESS OF WHISTLEBLOWER PROGRAMS

12 PRESENTATION BY MR. PECMAN:

13           MR. PECMAN: Thank you. Thank you very  
14 much. I'm pleased to be here to talk to the group  
15 today about our experiences with whistleblowing.

16           I'm going to cycle back a little bit in  
17 terms of context of who we are, the Competition  
18 Bureau.

19           Our role is to promote and protect  
20 competition and innovation and markets, and we do  
21 that through administration and enforcement of the  
22 Competition Act. The Competition Act has both  
23 criminal and civil provisions, and we're primarily  
24 dealing now, on the whistleblowing side, with the

1 criminal provisions. And those pertain to bid  
2 rigging and price fixing, which have fairly severe  
3 penalties: statutory maximum jail times for  
4 individuals up to 14 years and fines for each count,  
5 \$25 million.

6           These types of offences take place in  
7 secret, secret deals, so we are very dependent on  
8 whistleblowers to enable us to detect in the first  
9 instance, and then to go through with the  
10 investigation, obtain their cooperation, and  
11 ultimately in the prosecution sense.

12           The other interesting feature is the  
13 bureau is an investigative body. We work with --  
14 closely with the Crown prosecutors. They're  
15 independent. They make charging decisions, and  
16 they're also responsible for granting immunity and  
17 leniency from prosecution, which is our two largest  
18 programs to incite people to whistleblow.

19           So our immunity program, developed back  
20 in 1991, informally at the time. The OSC chair was  
21 in fact the commissioner, Howard Wetston. And the  
22 arrangement is a company or individual comes forward,  
23 identifies an offence, cooperates with us to stop the  
24 conduct, they are eligible for immunity from  
25 prosecution.

1                   And it's a very significant carrot for  
2 individuals and companies, particularly given the  
3 fact that there is always a risk of being detected.  
4 And so companies using this game theory of deciding  
5 whether or not they should come in -- once they  
6 determined they have committed an offence, whether or  
7 not to come in and seek immunity from prosecution. A  
8 huge reward given the size of the penalties that are  
9 involved.

10                   So, again, the immunity applicant gives  
11 us a call, we indicate that there are markers  
12 available for immunity. They disclose the offence to  
13 us. We recommend immunity to the Crown, and it's the  
14 Crown who grants immunity.

15                   In 2007 we developed a leniency program  
16 for those that lose the race for immunity. Because  
17 it is a race. Whoever comes in and rats out their  
18 competitors first gets the immunity. So it is a  
19 race. And those that lose still have opportunities  
20 for cooperation discounts. Our leniency program  
21 provides for 50 percent discount off the usual fine  
22 limits, as well as immunity from prosecution for  
23 individuals.

24                   So it encourages other participants to  
25 come in as well, making it easy for us to ultimately

1 investigate and prosecute these types of offences.

2           So these programs have been highly  
3 successful and, just by indication, since 2011  
4 we've -- the government has collected \$88 million in  
5 fines under the cartel provisions, the bid rigging  
6 and price fixing. Of those, \$86 million of the fines  
7 come from leniency applicants that have pled guilty.  
8 So about 99 percent of our success in terms of, if  
9 you measure it by way of fines, comes to us from our  
10 successful immunity leniency programs.

11           And we're not alone. Most anti-trust  
12 agencies around the world have similar programs where  
13 they give a pass to encourage companies to cooperate  
14 with the authority and to enable the authority to  
15 actually go out and investigate these matters.  
16 Otherwise, they, for the most part, likely go  
17 undetected.

18           So we think there is huge value in  
19 providing these incentives. Not necessarily a  
20 reward, but it is immunity from prosecution and  
21 billing (ph) not to have to pay a fine. Highly  
22 successful programs. I encourage you to use those.

23           We receive between 15 to 20  
24 applications for immunity and leniency each per year.  
25 So it keeps us quite occupied. The problem is they

1 are very appealing and enticing in that given the  
2 volume of work that comes in the door through the  
3 whistleblower program, we're not doing as many  
4 investigations from the ground up, if you will, with  
5 intelligence detecting ourselves. And it could be a  
6 problem because people won't come from in for  
7 immunity if you are not actually conducting  
8 investigations as well.

9           The bureau also has a standalone  
10 whistleblowing programming and provision in the  
11 Competition Act. It does not provide a reward to the  
12 whistleblower but it does have anti-retaliation  
13 measures. Within the past few years we've started  
14 promoting the program more, advertising that it  
15 exists and trying to encourage people to participate  
16 in that.

17           We have not had a lot of success, maybe  
18 because there aren't financial rewards. We have a  
19 couple of cartel investigations emerge from that  
20 program, but the success is not there.

21           So why I'm interested in participating  
22 today -- I'm very curious to hear others' experiences  
23 about a reward program on the whistleblower side  
24 exclusively, as opposed to the grant of leniency and  
25 immunity.

1                   So that's basically what I want to  
2 bring forward, again, are really successful and --  
3 successful all around the world, immunity leniency  
4 programs.

5                   MS. CONDON: Thanks very much, John.

6                   Just before I turn it over to Jane, can  
7 I just ask, you mentioned that the immunity program  
8 gets started by somebody giving us a call. Can you  
9 say a little bit about what the sort of internal  
10 process is within the Competition Bureau for sort of  
11 starting the process with someone looking for  
12 leniency or immunity?

13                   MR. PECMAN: I can do that, and I did  
14 that for many years, taking the calls.

15                   So our senior deputy of our  
16 cartels and deceptive marketing practices branch,  
17 is the taker of the calls, the initial call as a  
18 marker. It's usually counsel that calls on behalf  
19 of the company or the individual and questions  
20 whether or not the marker is available for a  
21 certain product. Because if they are not in  
22 first, obviously a marker is not available,  
23 immunity is not available. So that's the first  
24 question.

25                   So we go to our the records, determine

1       whether or not a marker is available, and then  
2       indicate it is available. And then we obtain some  
3       bare bones information about the nature of the  
4       offence on a hypothetical basis, following which we  
5       set up a date for a proffer.

6               So companies will come in with their  
7       attorney, will have a prepared profer in terms of  
8       their admission, again on a hypothetical basis, will  
9       disclose the type of evidence they have, the  
10      witnesses, the documents. And that information is  
11      compiled by the bureau, Competition Bureau, and a  
12      recommendation then is made to the Crown on whether  
13      or not to formally grant immunity or leniency  
14      following the profer process.

15             MS. CONDON: Thank you. And can I just  
16      follow-up on one other issue? You mentioned this  
17      possibility that resources put into the whistleblower  
18      program perhaps -- and the related programs perhaps  
19      take away from the resources available for ground up  
20      investigations.

21             MR. PECMAN: Right. It's a zero sum  
22      game. We have a fixed budget. And if your plate is  
23      full with these immunity and leniency requests and  
24      you are working on that, it means you are not doing  
25      the other side of the business. Again, you have to



1 be careful. I think about 20 percent of our cases  
2 come through the traditional means, whether a  
3 complaint or a detection through just reading a  
4 newspaper, and we'll start an investigation that way.

5 So it is something that we are wary  
6 weary of, and understand that that could happen and  
7 could ultimately undermine your whistleblowing  
8 program if you are not actively investigating as  
9 well.

10 MS. CONDON: Okay. Thank you very  
11 much. Very helpful.

12 Jane, I'm going to turn to you.  
13 Obviously, we're very interested in learning more  
14 from the SEC's experience. It's got a very robust  
15 and rigorous whistleblower program over the last  
16 number of years, and perhaps if we could ask you to  
17 give us a general sense of how it works and also in  
18 particular what you think the factors driving its  
19 success in particular have been over the last couple  
20 of years.

21 PRESENTATION BY MS. NORBERG:

22 MS. NORBERG: Absolutely. Let me start  
23 by saying I'm very honoured to be here, and thank you  
24 for having me.

25 I was thinking about what to say about

1 the effectiveness whistleblower programs. When I'm  
2 thinking about some words that have been used to  
3 describe the U.S. SEC's program, and you had actually  
4 referred to it. I think our chair, Chair White, said  
5 it best when she said that it can be a game changer,  
6 and I think that that is a true statement.

7           Before I get into my remarks, let me  
8 start by saying that what I say here today are my own  
9 opinions and not necessarily reflective of the  
10 commission -- the U.S. Securities Exchange Commission  
11 and its staff.

12           In the almost four years since the  
13 SEC's whistleblower program has been operational, the  
14 number of whistleblower program tips we've received  
15 has increased by 20 percent. So in fiscal year 2013  
16 we received over 3,200 tips and then in fiscal year  
17 2014 we received over 3,600 tips, and that translates  
18 to about 10 whistleblower program tips coming in a  
19 day.

20           The tips come in from every state in  
21 the United States, as well as 60 foreign countries.  
22 And you may well be interested to know that Canada is  
23 always in our top three countries outside the United  
24 States where we receive whistleblower program tips.

25           The last fiscal year we received 58

1 whistleblower tips from Canada. And the tips that we  
2 receive run the gamut of securities law allegations.  
3 The most frequent are corporate disclosures and  
4 financial statements offering fraud and market  
5 manipulation. And we receive incredibly high quality  
6 tips that not only cause us to open investigations,  
7 but also enable us to bring enforcement actions much  
8 quicker and save on those resources, which is very  
9 important when you have limited resources within your  
10 organization.

11           These tips have also enabled -- and I  
12 think this is incredibly important -- have enabled  
13 staff to stop fraud quicker and, at times, have TROs  
14 or asset freezes which have stopped investor funds  
15 from being dissipated by the fraudsters. And I think  
16 that's an incredibly big thing when it comes to  
17 whistleblowers. And then coming in and being able to  
18 point us to perhaps where investor funds might be and  
19 us being able to unravel the fraud quicker is that it  
20 does result in investor funds being saved.

21           Whistleblowers also provide ongoing  
22 assistance to the SEC staff during these  
23 investigations. They review and explain documents,  
24 provide technical analysis, have pointed us to  
25 specific financial transactions, and been witnesses

1 in our cases.

2 Since the program's implementation  
3 we've paid 17 whistleblowers over \$50 million. The  
4 highest reward to date has been over \$30 million that  
5 we've paid to one individual, and that person was  
6 outside the United States.

7 We paid officers, we paid audit and  
8 compliance professionals, we've paid insiders as well  
9 as individuals who had nothing to do with the company  
10 at all. And the profiles of each of these  
11 whistleblower award recipients is very different,  
12 with a common thread being that each of them gave  
13 information that was so specific, timely and credible  
14 that it caused us to open an investigation or to --  
15 or they significantly contributed to an ongoing  
16 investigation.

17 Another key to an effective  
18 whistleblower program are the confidentiality of  
19 submissions as well as anti-retaliation protection.  
20 I know we have a whole other panel here to talk about  
21 that, so I'm not going that talk about that right now  
22 other than to say, I think that each of those  
23 features -- the confidentiality and  
24 anti-retaliation -- are just as important as the  
25 monetary awards.

1                   I think you need to have all three to  
2           have a successful program, and I do think that what  
3           the OSC has proposed does strike a very good balance  
4           with all three.

5                   The implementation of the SEC's program  
6           has also caused companies to take a look at their  
7           internal compliance functions and make sure that they  
8           are robust, and make sure that they have a culture of  
9           anti-retaliation, that they are not going to tolerate  
10          retaliation for a whistleblower. I also think that  
11          that is very good byproduct of an effective  
12          whistleblower program.

13                   Whistleblowers, at the end of the day,  
14          serve a very valuable function. Their information  
15          does help uncover securities law fraud and stop fraud  
16          much quicker.

17                   So if the question is can a  
18          whistleblower program be effective, I'm here to tell  
19          you today, because I have a front row seat, yes, it  
20          can be very effective. And I hope that the OSC has  
21          as much success with their program, if they choose to  
22          adopt it, as we have had with ours. And I'm happy to  
23          answer any questions.

24                   MS. CONDON: Thank you very much, Jane.  
25          In fact, your comments really raise quite a number of

1 questions that I would like to jump in and ask you,  
2 and I'm sure perhaps others might have questions as  
3 well.

4           So let me just -- there are a number of  
5 different issues. Let me just pause on your  
6 reference to information that's specific, timely and  
7 credible as a marker for a successful tip from a  
8 whistleblower.

9           I take it that you, at the SEC, have a  
10 dedicated office and an infrastructure to deal with  
11 this issue. So is that assessment, that the  
12 information is timely and credible, being done by the  
13 whistleblower office or is it being done sort of  
14 generally by enforcement and investigation staff  
15 within the organization?

16           MS. NORBERG: So there's a separate  
17 office called the office of market intelligence,  
18 which is within our enforcement division, separate  
19 from the whistleblower office. So we take the tips  
20 and the whistleblower kicks in, but then they all go  
21 through a central database. And our office and  
22 market intelligence has a dedicated staff of I think  
23 60 to 70 individuals who triage every single tip that  
24 comes in, and they decide which ones are the  
25 specific, timely and credible ones that are, I guess,

1       worthy to being sent to enforcement staff and to take  
2       our resources to take a further look at.

3                   MS. CONDON:  It sounds as though you  
4       have a very well thought-out infrastructure and, in  
5       particular, that you have detailed tracking  
6       mechanisms that allow you to be able to tell us how  
7       many tips come from which jurisdiction and how many  
8       tips are associated with different kinds of  
9       misconduct.

10                   Was that a challenge for the SEC to  
11       sort of find the resources in the budget to set that  
12       process up?

13                   MS. NORBERG:  Well, I think that -- so  
14       what had happened is -- before actually the  
15       whistleblower office was implemented, it was sort of  
16       in conjunction, there was a big overhaul of our  
17       intelligence and how we gather intelligence, because  
18       we have offices not only in Washington DC, but all  
19       over the country.  And somebody could send a tip into  
20       our Salt Lake office and somebody could send  
21       something into the Washington DC office and looking  
22       at them both separately, it might not look like a  
23       great tip, but putting them both together it's a big  
24       tip.

25                   So we wanted to find a way to gather

1 all this intelligence in one place to make it more  
2 useable, and so we did create a system that we input  
3 all of our tips, complaints and referrals into, and  
4 that is the central intelligence database. And  
5 that's where the information gets triaged and it gets  
6 sent out, but it is always there.

7 So we always consider everything in our  
8 database as active intelligence. Even if it's not  
9 being worked at the moment, it's possible another  
10 piece of information could come in later that might  
11 make us take a second look at that other tip that  
12 came in.

13 MR. LENCZNER: Can I just ask a couple  
14 of questions? One is, you talked about officers  
15 being whistleblowers, and corporate officers in  
16 Canada are usually the top three to five people. So  
17 I don't know if they're the same in the States. I  
18 would like you to comment on that. Is there any  
19 culpability on their part? Have they been  
20 participants and you take in whistleblowing from  
21 culpable people and pay them?

22 MS. NORBERG: Okay, so the first  
23 question I'll take is we do pay officers of  
24 companies, and, yes they can be someone from the CEO  
25 on down. They have different standards to meet



1 eligibility requirements to get a whistleblower  
2 award. So technically their information is excluded  
3 from our definition of original information unless  
4 there are certain exceptions.

5           There are two pieces here. So you can  
6 be an officer of a company and get your information  
7 completely outside of your company. Let's just say  
8 you're an officer of company and you are an investor.  
9 And as an investor in another company there is some  
10 kind of fraud that you find out about and you report  
11 it. That has nothing to do with you being an  
12 officer, right, so that's okay.

13           If you are an officer of company you  
14 are going to be held to a higher standard, so there  
15 are certain exceptions that we have when an officer  
16 of a company can get paid, and that is if they report  
17 internally, there has to be some showing that they  
18 have reported internally, and then they come to us  
19 120 days later because it appears the company is  
20 doing nothing. Then they can report to us and  
21 technically get paid under the whistleblower program.

22           There are two other exceptions. If  
23 there is going to be imminent harm to investors, or  
24 if the company is doing something to discourage an  
25 investigation or to try to cover up something from

1       our staff, then they can immediately come to us and  
2       still be eligible to be paid at the end of the day.  
3       So they are definitely held to a much higher standard  
4       than a whistleblower.

5                   MR. LENCZNER: Thank you.

6                   MS. CONDON: Jane, I'm sure there will  
7       be another opportunity later in the morning for us to  
8       ask you some more questions, but at this point I'm  
9       going to turn the floor over to Marian Passmore, who  
10      is here on behalf of Fair Canada who also submitted a  
11      written comment letter to us.

12                   So thank you for that comment letter  
13      and I am going to ask you to elaborate on your  
14      description of why it is that Fair Canada is in  
15      favour of introducing the whistleblower program at  
16      the OSC.

17      PRESENTATION BY MS. PASSMORE:

18                   MS. PASSMORE: Certainly. Thank you  
19      for asking Fair Canada to speak to this important  
20      issue and for being a member of this panel.

21                   Firstly, I just would like to spend a  
22      few moments on what we think the whistleblower  
23      program will accomplish.

1                   We think that a properly designed  
2 whistleblower program will be a very useful  
3 enforcement tool to help combat fraud and other  
4 wrongdoing in our capital markets in Canada. As  
5 we've heard from the SEC, their program has resulted  
6 in high quality and extremely useful tips on very  
7 serious securities frauds that would have been very  
8 difficult to detect without the whistleblower coming  
9 forward.

10                   The academic literature backs us up.  
11 It suggests that whistleblowers play a key role in  
12 uncovering fraud and provide some of the most  
13 important information about corporate fraud in  
14 particular.

15                   In one study, it found that over  
16 40 percent of uncovered frauds are a result of  
17 whistleblower tips. The whistleblower brings to the  
18 regulators' attention evidence of wrongdoing that  
19 otherwise may go undetected or would take much more  
20 time and resources to uncover.

21                   In the absence of the whistleblower,  
22 the regulator often faces looking for the needle in  
23 the proverbial haystack.

24                   Having this program would help stop  
25 some of the wrongdoing that harms investors and

1 companies and should improve deterrence. It should  
2 result in a higher level of confidence in our  
3 securities markets, less of the -- importantly less  
4 of the investing public money will go to illegitimate  
5 and unproductive use, resulting in more efficient  
6 capital formation.

7 It should also result in a reduction in  
8 the unfair competitive advantage that some companies  
9 can achieve by engaging in undetected violations.

10 Finally, it should result in an optimal  
11 amount of resources being spent on internal  
12 compliance than is done presently, which should also  
13 include detection of wrongdoing and deterrence.

14 What does the program need to be  
15 effective and work? While a significant number of  
16 whistleblowers will report wrongdoing regardless of  
17 any financial compensation, we think it's important  
18 not to rely on the notion that people will do the  
19 right thing. It must be recognized that some people  
20 will assess whether it's worth taking significant  
21 risks of being a whistleblower.

22 Financial compensation along with  
23 confidentiality and anti-retaliation provisions are  
24 essential components, as they can tip the balance in  
25 favour of reporting and their absence may result in

1 it not being reported.

2           With respect to the threshold and cap  
3 the OSC has proposed, we believe that the threshold  
4 should be lowered. A fine of a million dollars in  
5 our view is less frequent here than in the United  
6 States, and the cap of a million-and-a-half dollars  
7 should be increased, as this maximum payment may  
8 sound like a lot of money but may not be adequate  
9 compensation for many in the financial services  
10 industry or in key corporate positions given  
11 significant earnings they will forego as a result of  
12 speaking up and putting their careers at risk.

13           Criminal sanctions should also be  
14 worthy of compensation. In Canada, it doesn't appear  
15 that criminal sanctions are associated with fines.  
16 There's no reason the whistleblower should not  
17 receive compensation if the wrongdoer ends up in jail  
18 rather than simply fined.

19           The public is going to need to be aware  
20 of the program and have a clear single process for  
21 using it. The process for in-take should be clear  
22 for whistleblowers and should not compromise the  
23 whistleblower.

24           The way the tips are processed needs to  
25 be set up so that the person can maintain anonymity,

1 if they want to, and/or maintain their  
2 confidentiality.

3 It's crucial also to the success of the  
4 program that there be sufficient resources and  
5 expertise devoted to running it. Simply reallocating  
6 any existing enforcement budget of the OSC, we don't  
7 think will signal to the market that the OSC is  
8 serious about the program and, in practice, will not  
9 result in success.

10 Similarly, whistleblowers need to know  
11 that there is money available for payment. Given  
12 provincial securities regulators' low collection  
13 rates on fines, we can't tie the amount of the  
14 whistleblower award to the amount collected in the  
15 individual matter as the whistleblower rarely ends up  
16 with any compensation with the current fine  
17 collection rates.

18 If designated funds from fines are  
19 used, there has to be enough in the fund to pay  
20 whistleblowers or other funding provided to it.

21 Finally, we think -- we also think the  
22 whistleblower program should have administrative  
23 fairness built into it. The process of determining  
24 whether to pay an amount to the whistleblower should  
25 be provided in writing with reasons. The process for

1 applying for compensation and the eligibility for it  
2 should be clear and transparent.

3 We think it's important to see the  
4 impact that the whistleblower program will have on  
5 the OSC's enforcement efforts. To do this, the OSC  
6 should be disclosing the number and types of  
7 complaints that it receives today and the number of  
8 investigations it pursues, whether through a  
9 whistleblower or otherwise. It can then demonstrate  
10 that there is an increase in whistleblower tips or an  
11 increase in the nature of the types of wrongdoing it  
12 uncovers as a result of the program.

13 At present, there's a dearth of  
14 information as to the prevalence and incidents of  
15 fraud and other wrongdoing and this is another area  
16 that we think needs to change.

17 In conclusion, we think that the  
18 program will help the OSC improve its enforcement  
19 (inaudible) -- it's properly designed and will  
20 further its mandate.

21 MS. CONDON: Thank you, Marian. So let  
22 me ask you a couple questions before I turn the floor  
23 over to Dimitri.

24 So one of the issues that you've raised  
25 is the question of the threshold for an award, and

1 this is a theme that's come out in some of the  
2 comment letters, that the proposal doesn't have this  
3 quite right. Some people think the threshold is too  
4 low, some people think that there needs to be a bit  
5 of a sliding scale process.

6 Let me ask you about the issue of  
7 paying for tips that result in sanctions that are not  
8 monetary at all, so sanctions such as conduct bans  
9 and other ways of putting people outside of the  
10 purview of the market for a period of time or  
11 permanently. This was an issue that was raised in at  
12 least one of the comment letters. Does Fair Canada  
13 have a view on this?

14 MS. PASSMORE: We have a view that a  
15 conduct ban did not suggest that the matter was of  
16 serious misconduct that would result in a  
17 whistleblower award; that if there was serious  
18 misconduct, that it shouldn't simply be a registrant  
19 conduct ban from the market. There should be other  
20 associated penalties that would be meted out so that  
21 that wouldn't meet the threshold.

22 MR. LENCZNER: Can I just jump in, and  
23 this is for everybody.

24 The Supreme Court of Canada has told us  
25 that sanctions are supposed to be looking to the



1 future, not punishing the past. It's not supposed to  
2 be punishment, although there is a general  
3 deterrence. If you've got a registrant and you ban  
4 him from the market because he's seriously  
5 misconducted himself for the rest of his life, it's  
6 professional debt.

7 Adding an administrative penalty over a  
8 million dollars, which is a threshold, sort of smacks  
9 a little bit of punishment. You've already taken him  
10 out of the market. You've already deterred others.  
11 You've already dealt with it. So how do we -- I'm  
12 asking the question -- how do we reconcile all of  
13 this? For anybody.

14 MS. CONDON: Connie, you look like you  
15 want to jump in.

16 MS. CRADDOCK: It's not the first time  
17 I'll say as a non-lawyer, the SROs do that. People  
18 are banned -- suspended or banned, and a financial  
19 penalty is imposed. Not as often as some of us would  
20 like, and that hasn't seemed to be challenged. It is  
21 practice, is it not?

22 MS. MURRAY: I can say it's practice,  
23 but very often they impose a penalty that never gets  
24 collected because once they are no longer subject to  
25 IROC --

1 (Speaker overlap)

2 MS. MURRAY: IROC can't enforce it.

3 MS. CRADDOCK: Absolutely, because the  
4 commissions won't give the IROC the authority to  
5 collect fines.

6 MR. HAUSMAN: I had a burning question  
7 that arose from something that Jane had said.

8 How -- and this is a question, and I  
9 don't know if there is anybody to answer it. How is  
10 the OSC going to coordinate with other CSA members?

11 MS. CRADDOCK: I had that question.

12 MR. HAUSMAN: In other words, is the  
13 OSC going to -- it technically has jurisdiction for  
14 issuers and registrants for which it's not the  
15 principal regulator. You take those cases, but  
16 generally, I mean, the way things have worked for the  
17 past 10 years at least is that's deferred to the  
18 principal regulator. So if there is a whistleblower  
19 in company X, company X's principal regulator is in  
20 Quebec or British Columbia, what's going happen?

21 MS. CONDON: That's a great question.  
22 As I sit here today, I don't have the answer to that  
23 question, but I appreciate it's something that we  
24 need to think about.

25 Obviously, I think from the OSC's

1 perspective, the issues that we're most interested in  
2 are issues that we would be investigating and  
3 pursuing as enforcement actions ourselves. I think  
4 there are representatives from other CAS  
5 jurisdictions in the audience. I think they are here  
6 in part because they are interested in hearing the  
7 discussion and considering perhaps whether to move  
8 into the same direction, although I can't speak for  
9 them, of course.

10           So it's possible that one of the things  
11 for the future might be a pipeline of information  
12 that is shared across the CSA jurisdictions. But I  
13 think for now, we're primarily interested in how this  
14 would allow us to enforce issues that we would be  
15 enforcing in Ontario.

16           MR. HAUSMAN: Well, that means that  
17 potential whistleblowers obviously have to be  
18 informed at the get-go. I mean, if you look at we're  
19 not the principal regulator for this issue, or  
20 notwithstanding that it's got an office here and you  
21 work here and you live here, that you don't meet the  
22 eligibility criteria, and that we recommend that you  
23 make an anonymous call to British Columbia Securities  
24 Commission where you'll get no financial reward, no  
25 guarantees of protection, potentially no protection

1 against retaliation, et cetera.

2 It's something that is will come as a  
3 surprise to people, because even I do this for a  
4 living, I always have to look on SEDAR to see who the  
5 principal regulator is, find out who the  
6 complainants...

7 MS. CONDON: I think you are raising a  
8 very good point, and I think this could be something,  
9 somebody -- either Marian or Jane made the point  
10 about having clear guidance for whistleblowers in  
11 order to make the program effective as to how they  
12 should do this and where they should go and what the  
13 implications of being a whistleblower would be up  
14 front in order that they make an informed decision.  
15 So that I think that would be -- clearly be part of  
16 the mix in terms of letting people know that if this  
17 is not something the OSC was taking enforcement  
18 action about then they're not --

19 MS. CRADDOCK: I just wanted to add  
20 that is something that I wanted to raise in some --

21 MS. CONDON: So we'll come back to  
22 that.

23 MR. THOMAS: Commissioner Condon, I  
24 wanted to share a couple of things that may be of  
25 help to you and the other commissioners.

1                   My background -- I was at the SEC and I  
2                   had a leadership role in developing whistleblower  
3                   program, and then I left and now represent corporate  
4                   whistleblowers.

5                   The first thing that may be helpful for  
6                   you to know are the three big drivers that I think  
7                   led to the SEC developing the SEC whistleblower  
8                   program. At that time the program was considered,  
9                   the financial crisis had just occurred and the Madoff  
10                  scandal had surfaced. At that time, the SEC and the  
11                  other financial watchdogs did extensive soul  
12                  searching across the organization about how they  
13                  could be better, and the first kind of question was,  
14                  what was the vision? What was the vision for the  
15                  organization?

16                 Was it to be expansive or just be  
17                 better at what they were currently doing? And the  
18                 answer is they wanted to be more aggressive, had a  
19                 more ambitious vision for enforcement.

20                 The second question was, were the  
21                 strategies and tactics that they were using  
22                 essentially the status quo effective? And the answer  
23                 was, it was not.

24                 And the third question was basically,  
25                 what do we have to lose? Okay. Because in a

1     whistleblower context, you pay for success. So you  
2     are developing a program that allows for it to work.

3             If you establish a program and people  
4     don't come or they don't come with the kind of thing  
5     you want, you don't pay. And so the cost for  
6     establishing the program, yes, there are costs for  
7     establishing the office of the whistleblower. But  
8     otherwise, essentially you're just feeding more tips  
9     into your enforcement staff and you are able to  
10    triage it. Yes, they have limited resources, but the  
11    thinking was they would have the opportunity to do  
12    better cases.

13            So I think those are important  
14    questions for you also to consider.

15            I do think that -- and I share Jane's  
16    view that the three main components of a successful  
17    whistleblower program had been proposed in the  
18    working paper that was circulated, but I think if  
19    there is one aspect of your proposal that could be  
20    fatal, it's in the financial incentives.

21            The way I understand it, it said that  
22    basically you'll pay up to 15 percent, or  
23    \$1.5 million as max. But there's no floor.

24            Now, the SEC tried that, okay. They  
25    had an insider trading program for almost 20 years

1 that was not used, okay. There were very few awards  
2 paid out. And I can tell you why in a second.

3 So we have precedent for that not  
4 working. Okay. And Attorney General Holder, the  
5 last major speech he did before he left, he said, we  
6 want a banking whistleblower program that has  
7 monitoring sanctions in excess of 1.5, because it's  
8 inadequate to get people to come forward. So you  
9 have those things.

10 What I can tell you -- so we have the  
11 DOJ experience, and then we have the SEC experience  
12 at 1.5 not being enough. But I will tell you,  
13 representing corporate whistleblowers, senior people  
14 who have a lot of lose, they generally distrust the  
15 government. They generally worry, question whether  
16 the regulators and law enforcement authorities are  
17 going to be aggressive and effective.

18 The program, unlike the False Claims  
19 Act program where they bring a case and then the  
20 government chooses to intervene or not intervene,  
21 essentially whistleblowers are coming and having to  
22 trust you.

23 So if you're adding yet one more  
24 component of uncertainty into your process, I think  
25 that you're going to lose the kind of people that the

1 SEC has the benefit of getting.

2           When you, Commissioner Lenczner, asked  
3 about officers, I represented the first officer that  
4 received the SEC whistleblower award. I can tell you  
5 there is no chance that that senior person would have  
6 come to a program that was so discretionary. And so  
7 I think I'm trying to think through, kind of, from  
8 the organizational regulator perspective why you want  
9 to cap or why you want -- not to have a floor. I  
10 think that perhaps it's -- you don't want people to  
11 get too much. Well, the percentage does that.  
12 Percentage is a natural regulator.

13           And I'll give you an example.

14           MR. LENCZNER: Except we do it without  
15 collection. You do it on -- or the SEC does it with  
16 collection. And we don't collect very much. We're  
17 terrible at it.

18           MR. THOMAS: But the program you are  
19 considering has the potential to change that. The  
20 SEC whistleblower program, one of the factors is, you  
21 can get the whistleblower award if you help them find  
22 the fruits of the misconduct.

23           So your collection rates might improve  
24 because all the people who are selling them things,  
25 helping them hide things are coming forward to you.



1           But I'll tell you, this component is  
2           critical. If you were asking to pick amongst the  
3           weaknesses in the current proposal to fix, it's the  
4           floor. Okay. If you start with a 10 to 15 percent  
5           range and then you work your discretion within that  
6           range, you're going to have a much better chance.

7           To give you a sense of what could be  
8           here, okay. The Deutsche bank case announced by the  
9           SEC two weeks ago -- in the last two weeks -- the  
10          investment vehicles were Canadian. The institutional  
11          investors were Canadian. The SEC received a  
12          \$55 million sanction. And this wasn't even a fraud  
13          settlement. It was a non-fraud settlement in your  
14          backyard.

15          Now, if this is the kind of case that  
16          you want to do and if you want people to come to you,  
17          you have to fix the financial incentives.

18          MS. CONDON: Thank you very much for  
19          that intervention.

20          I'm going the turn the floor over to  
21          Dimitri Lascaris for his view on how this kind of  
22          program would interact with the class action practice  
23          that he's engaged in and how, from your perspective,  
24          this kind of program could increase the effectiveness  
25          of enforcement strategy by securities regulators.

1 PRESENTATION BY MR. LASCARIS:

2 MR. LASCARIS: Thank you for having me,  
3 Commissioners. It's a privilege to be here.

4 As you indicated, I act for plaintiffs  
5 in private securities litigation. I have not served  
6 in an enforcement capacity for a regulator, but I  
7 believe that many of the obstacles that private  
8 litigants confront arise in the regulatory context.

9 One obstacle that we also confront is  
10 that those who commit securities fraud inevitably  
11 seek to avoid detection and many violators of the  
12 securities laws are highly adept at doing so.

13 Well placed whistleblowers are often  
14 indispensable to defeat those efforts of detection  
15 avoidance. They may know where the bodies are  
16 buried. They can lead investigators to critical  
17 evidence that is buried in a mountain of extraneous  
18 information.

19 Whistleblowers can fill in gaps in the  
20 documentary record. They can help investigators to  
21 connect the dots when the documentary records are too  
22 difficult to comprehend. Whistleblowers may have  
23 been privy to critical inculpatory statements that  
24 are not evidenced by any documentation.

25 So in short, they can be an invaluable

1 resource for white collar law enforcement.

2 This is particularly true in a world of  
3 constrained regulatory resources. The most efficient  
4 use should be made of those resources and the  
5 targeted investigations that are facilitated by  
6 whistleblower cooperation advances efficient use of  
7 constrained regulatory resources.

8 But there is a problem in the  
9 whistleblowing context, and that is currently the  
10 risks and the rewards are misaligned. The benefits  
11 of fraud detection accrue to the company  
12 shareholders, but the risks of exposing the fraud are  
13 borne by the whistleblower. And this is the classic  
14 free rider problem.

15 I've had occasion to deal with dozens  
16 of potential whistleblowers in my career as a  
17 plaintiff's lawyer and almost without exception they  
18 ask, why should I bear the risk of retaliation when  
19 the benefits of my telling the truth will flow  
20 inevitably to others who are not bearing those risks.

21 This is a perfectly rational question  
22 for anyone to ask, particularly someone who supports  
23 a family from his or her employment. That  
24 whistleblowers are frequently the targets of  
25 retaliation is well known and I suggest that you

1 cannot seriously dispute it. Our comment letter  
2 identifies a number of high profile instances of  
3 retaliation of many others that we have not  
4 discussed, and I urge you, if you have not read the  
5 review of those instances of retaliation, to do so.

6 Now, some observers, some commentators  
7 say the proposed program will perversely incentivize  
8 whistleblowers to report claims without merit. But  
9 with respect, I say that this is a dubious assertion.

10 If the claim has no merit, then those  
11 who are tempted to report it will know that there is  
12 a high risk of reporting a claim will result in no  
13 benefit to them while leaving them exposed to legal  
14 action and liability from those who were the targets  
15 of the unmeritorious claim.

16 Furthermore, we should have confidence  
17 in securities regulators to identify claims that  
18 are devoid of merit. Indeed, I'm sure that  
19 securities regulators already do this on an almost  
20 daily basis because, as we all know, irate investors  
21 who suffered losses for no reason other than a poor  
22 investment decision will often complain. They do  
23 that to our firm and we have to sort through  
24 unmeritorious claims every day.

25 So we suggest that we should have

1 confidence, as I say, in the ability of regulators to  
2 filter out those unmeritorious claims should they be  
3 put forward.

4 In any event, any time there is a  
5 misalignment of risk and reward perverse incentives  
6 already exist. Namely, those who witness frauds have  
7 an incentive to remain silent because they bear all  
8 the risk of reporting the problem but stand to gain  
9 nothing from this exposure.

10 So if we actually care about perverse  
11 incentives we should be supporting a whistleblower  
12 program and not opposing it.

13 However, these programs are only  
14 effective if the potential reward is sufficient in  
15 the mind of the whistleblower to justify that risk of  
16 retaliation.

17 A cap of 1.5 million -- and I'm going a  
18 agree with Jordan at this point -- is highly  
19 inadequate in, my respectful view. Given that  
20 whistleblowers are frequently blackballed from their  
21 industry, they must be eligible for an award that can  
22 provide them long-term financial security, and  
23 \$1.5 million is simply not enough money nowadays for  
24 long term financial security for the whistleblower  
25 and his or her family.

1                   Bear in mind also that prudent  
2 whistleblowers will want to retain legal counsel from  
3 the outset to advise them, firstly, with respect to  
4 their exposure under their employment or  
5 confidentiality agreement, and secondly, to represent  
6 them in their negotiations and deals with the  
7 regulator. And that's a very significant expense for  
8 them to have to bear, and the lower the potential  
9 award, the less likely it is that they are going to  
10 be willing to bear that expense.

11                   So speaking about the financial -- and  
12 I'm going back to something which again Mr. Thomas  
13 mentioned.

14                   Speaking about the Financial  
15 Institutions Reform, Recovery, and Enforcement Act,  
16 which currently caps payments to whistleblowers at  
17 \$1.6 million, former U.S. Attorney General Eric  
18 Holder called this limit a paltry sum and stated that  
19 \$1.6 million was, quote, "unlikely to induce an  
20 employee to risk his or her lucrative career in the  
21 financial sector." I agree.

22                   Those are my comments.

23                   MS. CONDON: Thanks very much, Dimitri.

24                   GENERAL DISCUSSION OF TOPIC 1:

25                   MS. CONDON: So why do you think it is

1 that some of the commenters take the view that we  
2 should follow the UK and the Australian model and not  
3 offer financial incentives at all? Is there some  
4 sense in which there is a cultural difference or is  
5 this -- how is it that those programs, those  
6 jurisdictions operate without any providing financial  
7 incentives?

8 MR. LASCARIS: I can't say that I'm  
9 familiar with the success rate in those programs. I  
10 suspect they not particularly effective. I don't  
11 think we should be calling upon potential  
12 whistleblowers to be heroes. As I say, they have  
13 livelihoods they have to be concerned about.  
14 Oftentimes they support people from their careers and  
15 we have to be realistic about what ultimately will  
16 motivate people to come forward and take on these  
17 risks.

18 It may be that there's a cultural  
19 difference between, for example, our jurisdiction and  
20 that of the United States which makes us hesitant to  
21 reward whistleblowers. But my admittedly somewhat  
22 cynical view is that what's really going on here is  
23 those who oppose it know that these programs are  
24 effective, and that's precisely why they don't want  
25 them, with all due respect.

1                   MR. HAUSMAN: Before you sort of assess  
2 what the -- how big the incentive is or not, I think  
3 somebody has to ask CRA whether this is taxable as  
4 income or not. Because I don't know if the  
5 whistleblower award comes from office or employment  
6 or business or -- in other words, I think a key  
7 question is whether you have to pay tax on the award  
8 you get. And until you really know that, you can't  
9 really measure whether it's a sufficient incentive or  
10 not, because that comes out of the Federal  
11 government.

12                   MR. LASCARIS: And the lower the cap  
13 the more material that question is going to be.

14                   MR. HAUSMAN: That's right. But I  
15 think that's a question that the OSC is going to need  
16 to get an opinion on so they can properly advise  
17 people. I think you can't really set the threshold  
18 unless you understand what the actual financial  
19 consequence is to the person who is going to receive  
20 it.

21                   MS. CONDON: Christine, would you like  
22 to comment?

23                   MS. WIEDMAN: Yes, if I could, just  
24 about the effectiveness of the monetary incentives.

25                   I don't have statistics on the UK and



1 Australia, but just looking at the U.S. case there  
2 was an interesting paper in Journal of Finance that  
3 was looking at who detected the fraud, the different  
4 players, and they found that employees are certainly  
5 a significant player. And then what they did is they  
6 compared industries that were covered under the FCA,  
7 the False Claims Act, versus those that were not,  
8 because monetary incentives would be working in those  
9 industries -- this is pre-Dodd-Frank, would not in  
10 others.

11 And they found employees were --  
12 41 percent of the frauds were brought to light by  
13 employees in cases where there were FCA incentives  
14 but only 14 percent were brought forward by employees  
15 in all other industries. So I think that is one  
16 example of the effectiveness of monetary incentives  
17 in giving employees some compensation for the  
18 significant risk that they take.

19 MS. NORBERG: Can I just add that I  
20 think that any country who is considering monetary  
21 incentive should take a look at our annual report  
22 every year and see how many citizens from their own  
23 countries are reporting to the U.S. Something is  
24 incentivizing them to us.

25 MS. MURRAY: What's the average size of

1 an award under SEC's program currently?

2 MS. NORBERG: That's a very good  
3 question. So ours is different from the OSC's  
4 proposal because ours are based on collections.  
5 Sometimes there are collections and sometimes there  
6 are not. Sometimes there are huge collections,  
7 sometimes very small.

8 So interestingly -- and I did take a  
9 look at this when I realized you had a \$1.5 million  
10 cap -- of the 17 whistleblowers we've paid so far,  
11 only three of those awards have been over the  
12 \$1.5 million. Again, that's based on collections,  
13 and certainly as we continue to pay more, it can be  
14 all over the board.

15 So I think there can be incentive for  
16 \$1.5 million, but I do also hear from people who have  
17 certainly lost their jobs or feel they are  
18 blackballed from the industry, and these are people  
19 who are making millions of dollars a year on Wall  
20 Street, and it might be harder to incentivize them.

21 But I think the draw of not having a  
22 cap -- of having a much higher cap, would be that  
23 there's a potential to get it.

24 You know, in our program we did pay  
25 somebody 30 million, we did pay somebody 15 million,

1 and so there is a potential to receive those kinds of  
2 sums, where if it's capped, you know, it might  
3 disincentivize certain people.

4 MR. THOMAS: There's no question --

5 MS. CONDON: One quick followup and  
6 then Jordan and then Alan, and I think we have to cut  
7 off this discussion because we have to move on to the  
8 next session.

9 But just on this point about  
10 uncertainty. If the award is tied to collection, how  
11 do you reassure the whistleblower who comes in with a  
12 tip that this is a valuable thing they should be  
13 doing, even though at the end of the day unless you  
14 collect they are not going to get anything?

15 MS. NORBERG: So that's why I think --  
16 I'm sorry, the confidentiality and the  
17 anti-retaliation are just as important because that  
18 also -- if someone is on the fence, they think that  
19 they might get award but they are not sure, think  
20 they can come in anonymously and remain confidential,  
21 we have certain limited exceptions to the  
22 confidentiality, and they can be protected from  
23 retaliation, I think that might get them off the  
24 fence, to come in and take a chance that their tip  
25 might be effective.

1           You also have to remember that not  
2 everybody comes in for the money. I mean, people are  
3 coming in because it's the right thing to do. Or  
4 because they reported internally to their company and  
5 repeatedly their company is doing nothing and they  
6 feel it's my duty to go and report it.

7           So not everybody is coming for the  
8 money. I think at the end of the day it's a nice  
9 thing if they can get paid, if we do have that  
10 (inaudible) enforcement action, but not everybody is  
11 there for the money.

12           MS. CONDON: Is that something you  
13 could track? You are collecting a lot of data.  
14 Would it be helpful to find out from people what  
15 motivated them to come in?

16           MS. NORBERG: It could be interesting,  
17 but we have not tracked that.

18           MS. CONDON: Jordan?

19           MR. THOMAS: Couple things.

20           First, when the SEC developed a  
21 program, only 20 percent of SEC enforcement actions  
22 had monetary sanctions in excess of a million  
23 dollars, okay. It was a reflection of the SEC  
24 wanting high quality tips that they weren't otherwise  
25 getting, okay.

1           So when you're thinking about the  
2 million dollar threshold that I know Marian and her  
3 organization expressed concerns about that, you might  
4 look at what is the top X percent of monetary  
5 sanctions that you are getting and then think about  
6 maybe a threshold there.

7           Another statistic that I think is  
8 important for you to know is that 80 percent of -- in  
9 excess of 80 percent of the Department of Justice  
10 false claims cases were originated now by  
11 whistleblowers. Okay. And last year they generated  
12 \$8 billion in recoveries for the government and in  
13 prior couple years it was \$3 billion or more.

14           So when you are start thinking about,  
15 kind of, the potential for program like this over  
16 time -- like, the SEC program started with zero  
17 awareness. Now surveys show it's about 60 percent  
18 awareness in the financial service industry.

19           As it penetrates you get growth and --  
20 I recognize there were questions earlier about how do  
21 we triage this with limited resources. Potentially  
22 your people are going to be able to work on better  
23 cases and refer out other things or just not work at  
24 the small amounts. So those are --

25           MS. CONDON: Jordan, I'm going to ask

1 you and other panel members, when you are intervening  
2 if you could just be careful to speak into the  
3 microphone. There are some people at the back of the  
4 room who are not able to hear your comments.

5 Sheila, one quick comment and then  
6 we're going to have to stop.

7 MS. MURRAY: This will, I'm sure, come  
8 up again. I think the triage issue is a huge issue,  
9 and if you are not -- we're going to be talking about  
10 internal compliance systems. I think if you are not  
11 letting the company do their job first, you're going  
12 to be overwhelmed, and I think you guys are. How  
13 many whistleblower complaints did you have this year?

14 MS. NORBERG: 2014 we had 3,600, but I  
15 don't feel we're overwhelmed. We have the resources.

16 MR. THOMAS: I can tell you that before  
17 the SEC whistleblower program the SEC received 30,000  
18 complaints referrals a year. They essentially had a  
19 10 percent increase with this. But I'm very  
20 interested in your conversation.

21 MS. CONDON: Then I think we are just  
22 bang on time. We had to stop the discussion on the  
23 first topic and I'm going turn the floor over to Alan  
24 to get us started on questions of anti-retaliation.

25 TOPIC 2: WHISTLEBLOWER PROTECTIONS:

1 ANTI-RETALIATION MEASURES AND WHISTLEBLOWER

2 CONFIDENTIALITY

3 MR. LENCZNER: The second panel today  
4 is going to be speaking to two topics primarily,  
5 anti-retaliation and confidentiality protections. We  
6 have some excellent panelists, Connie Craddock from  
7 the Investor Advisory Panel, Daniel Pugen from  
8 McCarthy's Employment and Labour Group, David Hausman  
9 from Faskens, who deals with securities litigation,  
10 and Jordan Thomas whom you've already heard was at  
11 the SEC and now acts on behalf of whistleblowers.

12 So just a couple of introductory  
13 comments.

14 As you know, the OSC envisions two  
15 avenues for enforcing the prohibition against  
16 retaliation. One is by enforcement by staff, by  
17 bringing a section 127 proceeding, and two, is giving  
18 a statutory cause of action to a whistleblower to  
19 bring a civil claim.

20 Generally, the papers that we received  
21 were in support of anti-retaliation protections, and  
22 were in support of the scope of them, being that  
23 there should be anti-retaliation protection both for  
24 internal reporting and for those who would report to  
25 the OSC.

1           Another comment that came out was  
2           whether or not there should be anti-retaliation  
3           protections for someone who is himself or herself  
4           culpable, and the commentators were divided on that  
5           theme.

6           The other area that we're going to deal  
7           with is the question of confidentiality, and here the  
8           question is how much confidentiality can be offered  
9           and when whether it be invaded.

10           As you know, in Canada we have a  
11           Stinchcombe -- Regina v. Stinchcombe provision which  
12           requires disclosure of everything that staff has  
13           obtained through its investigation that should be  
14           given to the respondent. And what about if the  
15           whistleblower is called as a witness at the hearing?  
16           There's also the question of whether a whistleblower  
17           could initially remain anonymous by providing the  
18           information through a lawyer and, thus, at least for  
19           a time, protect confidentiality.

20           So with those sort of background ideas  
21           I'm going to ask Connie, first of all, to -- and  
22           you've already indicated you have lots of comments --  
23           but to give us your thoughts on what -- the  
24           sufficiency of the proposed anti-retaliation and  
25           confidentiality protections.



1 MS. CRADDOCK: Thank you, Alan.

2 PRESENTATION BY MS. CRADDOCK:

3 MS. CRADDOCK: First, I would like to  
4 say the Investor Advisory Panel supports the  
5 introduction of a whistleblower program in Ontario.  
6 We believe that we need new and better tools to  
7 strengthen enforcement and compliance in this  
8 province. I think the evidence is clear. We hope it  
9 will be a game changer for Ontario Securities  
10 Commission as well and that we'll have easier and  
11 more timely access to serious and systematic issues  
12 that our current compliance and enforcement programs  
13 are not discovering.

14 Whistleblowers obviously face huge  
15 personal risks. The risk of retaliation is real, and  
16 from what I've read in my limited experience, it  
17 seems to me frequent. And the cost of doing the  
18 right thing can be very high.

19 I think we've already heard from some  
20 people who were involved with these kinds of programs  
21 that the issue of trust is key. If people are going  
22 to come to a regulator they have to have confidence  
23 that the risk they are taking is worthwhile, and key  
24 to that is the robust confidentiality protection and  
25 anti-retaliation protection that can be provided to

1 the whistleblower.

2 Let me just address some aspects of the  
3 confidentiality protection that we think will be  
4 needed so that whistleblowers can have confidence  
5 when they come to the regulator.

6 An independent office is obviously  
7 clear, and we were certainly heartened in reading the  
8 submission from OSC staff to see the work that had  
9 been done looking at examples of successful  
10 whistleblower programs.

11 We obviously support evidence-based  
12 policy and we think that there's some really clear  
13 examples, particularly in the SEC, on how to set up  
14 an independent office where people are going to be  
15 able to approach that office with some confidence of  
16 having their confidentiality protected.

17 We think that they need to be able to  
18 come forward anonymously by a lawyer. I understand  
19 this is what the SEC program permits.

20 Whistleblowers should not be required  
21 to put themselves at risk by going first to the firm.  
22 I should also say very clearly that the Investor  
23 Advisory Panel fully supports and does not want to  
24 see anything that would undermine current corporate  
25 compliance efforts within the firm. They are

1 critical, they're part of the system, and they need  
2 to be enhanced. We think a program like this  
3 properly implemented will complement those promises,  
4 they won't undermine them.

5 The IAP submission expressed the  
6 concern that the OSC should not share whistleblower  
7 information with organizations that do not have the  
8 same confidentiality or, for that matter,  
9 anti-retaliation protections in place. In practice,  
10 this is going to be very difficult to achieve.

11 I should say the Investor Advisory  
12 Panel has, as well, consistently called on the OSC to  
13 move unilaterally where it's necessary to protect  
14 investors of Ontario when they do not have the  
15 support of their fellow CSA members, which happens  
16 often enough given the nature -- call it mosaic on a  
17 good day -- and a balkanized system on others.

18 So we have called on the OSC to move  
19 ahead to protect investors, and we really are pleased  
20 to see you doing this.

21 But in saying that, we recognize that  
22 in practice it's going to be very difficult for you  
23 to do this. The CSA partners will not have these  
24 protections in place, nor perhaps equally important,  
25 will the SROs. The kinds of complaints and reports

1 that you are going to get are not going to be always  
2 your issues only. They are often going to involve  
3 the SRO firms and yours, and CSA partners.

4 So how you are going to be able to  
5 ensure confidentiality and, equally important,  
6 anti-retaliation measures in place. It's a question.  
7 It's one thing to start conversations with your CSA  
8 partners. You have oversight over the SROs. Those  
9 conversations can start immediately in terms of  
10 ensuring that their registrants have these kinds of  
11 protections as well.

12 In terms of the anti-retaliation  
13 measures that the OSC proposal includes, we would be  
14 fully supportive of them. And again, would reiterate  
15 the concern about the gap in whistleblower protection  
16 that exists.

17 I just would maybe make a final  
18 comment, and I'm trying to do this as quickly as I  
19 can even though as usual we have lots to say, but  
20 there's so many people around the table that have  
21 important contributions to make that I'm trying to  
22 make this brief.

23 The issue of firms having employment  
24 contracts now that require their employees not to  
25 report wrongdoing to the regulators is something that

1 can only be a real dismay to people who are concerned  
2 about that investor protection. I have no idea, and  
3 I don't know if you do, how widespread this practice  
4 is. But if it takes a whistleblower proposal for you  
5 to take in measures that would stop this happening,  
6 then the whistleblower proposal is important enough  
7 on its own to do it.

8 I would simply ask, again, not as a  
9 lawyer, but given the requirement to act fairly  
10 honestly and in good faith and the requirement of  
11 public interest, how it's possible that those kinds  
12 of employee contractual provisions are permissible  
13 today under our securities regulatory regime. But  
14 certainly we would see this as an important component  
15 of your moves to implement anti-retaliation measures  
16 that this practice, to the extent it exists, would be  
17 curtailed, indeed eliminated, and we think it's  
18 absolutely essential that you move strongly on the  
19 anti-retaliation and confidentiality provisions so  
20 that people have trust.

21 And I would just say as well that the  
22 IAP fully supports the concern that your monetary  
23 award be higher. I think that's necessary, too.

24 Thank you.

25 MR. LENCZNER: Thank you, Connie. And

1 with regard to your last question, I'm going to ask  
2 Daniel, when he goes next, to address that about the  
3 employment contracts and what has to be contained  
4 within them because he's really the expert in that  
5 field.

6 MS. CRADDOCK: I would be interested to  
7 hear as well how regulators see this to be  
8 (inaudible) their current role.

9 MR. LENCZNER: I was interested in your  
10 comment that the whistleblower should not be obliged  
11 to go first to his own firm. Why do you say that?

12 MS. CRADDOCK: I think if you've got a  
13 hard and fast rule like that, that there are  
14 circumstances where if they go first to their firm  
15 they know that retaliation will take place, the  
16 evidence will disappear and you're not going to be  
17 able to have a successful prosecution.

18 MS. FUERST: I will be dealing with  
19 that on our panel, but I think the assumption that  
20 there is going to be retaliation is a broad  
21 overstatement of the reality of most of the financial  
22 institutions that I deal with as clients in my  
23 practice. I just don't think that is a fair  
24 reflection of the market here.

25 MR. LASCARIS: If I may. It doesn't have

1 to be across-the-board retaliation. There has to be  
2 a significant risk of retaliation in the mind of the  
3 whistleblower for there to be a deterrent to report.  
4 Again, I urge you to look at our comment letter.  
5 There are numerous high profile examples, and we've  
6 only touched on some of them, where there were  
7 repeated attempts to report internally at major  
8 financial institutions, including JP Morgan, and  
9 those attempts were rebuffed and the person suffered  
10 retaliation.

11 MS. FUERST: My only comment, I'm not  
12 sure the U.S. experience is necessarily relevant in  
13 Canada. I do think we have a different culture --  
14 business culture in Canada than we do in the United  
15 States.

16 MR. HAUSMAN: I think also, in terms of  
17 discussing this -- and this is just trying to draw  
18 bridges between the different things we're speaking  
19 about -- we're speaking about financial rewards,  
20 we're talking about difficulties in collecting and so  
21 forth.

22 You understand that you do -- you will  
23 collect, you will collect from major institutions. I  
24 think there's a difference between reporting  
25 internally in the context of financial institutions,

1 major public issuers and boiler rooms, for example,  
2 where people are engaged in unregistered trading.

3 The context of internal reporting  
4 doesn't even apply there, there's nobody to report  
5 to. So I think that's really important to define  
6 your terms. In other words, when you are speaking  
7 about anti-retaliation in the context of the  
8 organizations, I think you can have faith in them.

9 But you have to be able to assess what  
10 your whistleblower's whistleblowing about. If your  
11 whistleblower is whistleblowing about a bucket shown  
12 (inaudible) that's operating in some apartment unit  
13 somewhere, obviously there is no internal reporting.

14 MR. THOMAS: One of the things -- the  
15 SEC looked at this question very closely -- is the  
16 idea of requiring internal reporting or requiring  
17 simultaneous internal reporting. And we certainly  
18 understood the concerns of the corporate community.  
19 Many of them said -- after Sarbanes-Oxley we invested  
20 substantial resources in building out these wonderful  
21 well-developed systems for internal reporting. And  
22 they were right. They did.

23 The thing that is -- the bridge that  
24 was too far, and I suspect that it would be too far  
25 here, is the trust of the employees in the employer.



1 Because I don't doubt the sincerity of the council  
2 here. I don't even doubt the sincerity of the  
3 leadership of the organizations that they represent.

4 But if the employees don't trust the  
5 fancy new systems, and they don't use them, which is  
6 the status quo, then you have to look at  
7 alternatives.

8 And what the SEC did was it would sell  
9 them (ph) online, but essentially they basically said  
10 we're going to put extensive incentives to make  
11 people go internally so they can trust. So if JP  
12 Morgan or -- pick your favourite organization that  
13 was -- that has good systems and great people, people  
14 report internally, and they will get more for it if  
15 they choose to go externally later.

16 So that trust gap is key. And if you  
17 believe that the corporate community is different  
18 than the experience in the U.S., this is an excellent  
19 time for a survey.

20 MS. CRADDOCK: I would just like to add  
21 to that.

22 I'm not trying to suggest that the  
23 industry is going to be behave in a nefarious and  
24 negative way. I simply think that if you've got that  
25 kind of requirement baked into the program at the

1 beginning the people won't have the trust to come  
2 forward.

3 MS. NORBERG: If I can add to that, at  
4 the SEC I think what we decided is that we wanted to  
5 empower the whistleblower to make the decision  
6 themselves; that if they are comfortable, that their  
7 internal compliance program is robust enough that  
8 it's going to protect them, report internally first.

9 And also just want to say that in our  
10 last annual report of the award recipients who had  
11 the whistleblower awards that were employees of the  
12 company, 80 percent of them had reported internally  
13 first.

14 So anyone who thinks it might destroy  
15 internal compliance as you know it, it has really  
16 been proven unfounded in the United States because,  
17 believe or not, most people like their companies.  
18 They actually want to believe the company is going to  
19 do the right thing, and it's only after they report  
20 it internally and the company either turned a blind  
21 eye or wasn't taking appropriate steps that the  
22 whistleblowers came to us and reported.

23 MR. LENCZNER: Thank you.

24 So this brings us to our next panelist  
25 and that is Daniel Pugen. So, Daniel, what are your

1 views on how the proposed protections fit into the  
2 landscape of employment law and whether they will  
3 achieve the desired results?

4 MR. PUGEN: Thank you, Mr. Lenczner.

5 PRESENTATION BY MR. PUGEN:

6 MR. PUGEN: I was going to jump in  
7 there at times but decided not to. Hopefully some of  
8 my comments touched upon what other panelists have  
9 said.

10 Full disclosure. I'm partner in the  
11 labour group at McCarthy Tetrault. I only practice  
12 on the management side, so I only represent  
13 companies.

14 Just, Connie -- one of the comments you  
15 made about how prevalent are these contracts. We  
16 were actually talking about this before we started.  
17 How prevalent are these contracts where there are  
18 prohibitions on disclosing to the regulator.

19 I can tell you they are not common at  
20 all. I can tell you from my own personal experience  
21 of doing this for 12 years, I would say I've seen it  
22 maybe half a dozen times.

23 MS. MURRAY: And my understanding is,  
24 is there not law indicating that's enforceable in  
25 Ontario?

1                   MR. PUGEN: Yes. So first of all, if  
2                   there is the whistleblower protection that is passed,  
3                   because the contract would be off side with  
4                   legislation the clause would not be enforceable.

5                   MS. FUERST: It also wouldn't be  
6                   enforceable because we can't ask someone to contact  
7                   contravene the law. So keeping something from a  
8                   regulator, particularly in the financial services  
9                   industry, would contravene the law.

10                  MS. PASSMORE: Wouldn't that have a  
11                  chilling effect regardless of whether it's  
12                  enforceable because the individual employee might not  
13                  know it's unenforceable. So if it's in there, they  
14                  are going to think it's true.

15                  MR. THOMAS: Then they will have to  
16                  hire a lawyer at their own expense to figure it out,  
17                  which they may not be willing to do.

18                  As I said, I've dealt with many  
19                  whistleblowers who aren't willing to do that.

20                  The question I had for you -- I'm sorry  
21                  to interrupt. I'm very interested to know is -- I  
22                  would be shocked if a well -- if a competent lawyer  
23                  would draft an employment agreement that explicitly  
24                  prohibits reporting to a regulatory or disclosing  
25                  wrongdoing.

1                   What I would be more concerned about is  
2     language that's broad enough that could be  
3     interpreted to impose liability on the employee who  
4     reports the wrongdoing because of the confidential  
5     nature of the information. That's the more likely  
6     scenario and one that is, nevertheless, going to be  
7     very problematic getting people to come forward in  
8     the face of an employment confidentiality.

9                   MR. HAUSMAN: Do most whistleblowers  
10    who come forward in U.S., are they represented by  
11    counsel?

12                  MS. NORBERG: I think it's all over the  
13    board. Some are, some aren't. In speaking about  
14    these agreements, I would actually challenge you,  
15    Daniel, to go back and take a look at some of the  
16    agreements you drafted, and even if it doesn't say  
17    you cannot report to the OSC or you cannot report to  
18    Securities Exchange Commission, in there it can be  
19    implicit -- and you have to remember, you have to  
20    look at it through the eye of an employee who is not  
21    represented. Someone who has just been terminated  
22    and needs their severance. And if they read it and  
23    they think, I report to the SEC or the OSC, they're  
24    going to take me to court and they are going to pull  
25    back my severance or they are going to make me

1       forfeit my options, or whatever it is that the  
2       agreement says, and that has a chilling effect.

3                       We hear it every single day on our  
4       hotline. People call and say, there's something I  
5       want to report to you but I don't think I can because  
6       I signed this agreement when I was terminated from  
7       employment.

8                       And we recently brought a case against  
9       a company where they said in their confidentiality  
10      requirements basically you can tell no one about what  
11      we're talking about today, about these underlying  
12      allegations, and it didn't explicitly say, you can't  
13      go to the SEC. But we still brought an enforcement  
14      action based on it.

15                      So I think you have to go back and  
16      really see when we read the contract in total, is  
17      there a carve out to go to the regulator?

18                      MR. LENCZNER: Let's let Daniel -- go  
19      ahead.

20                      MR. PUGEN: What I was going to say is  
21      there's no doubt that an employee faces challenges  
22      obviously when they are handed a detailed written  
23      agreement. I don't think anyone can say otherwise.

24                      But I would push back a bit and say  
25      that the way the law has developed and the way one of

1 the agreements had been interpreted by the courts, I  
2 don't think it's a stretch to say they have  
3 interpreted mostly in the employee's favour,  
4 especially when you get some of these restrictive  
5 covenants and non-competition or confidential  
6 information. So the law has stepped in to the courts  
7 to offer some protection. But I take your point and  
8 I agree.

9 I would say in Ontario it is very  
10 common for employees to retain counsel, even before  
11 they are let go. It's a bit different than in the  
12 U.S.

13 Everyone needs to get their advice, but  
14 the law already offers some protections in that  
15 regard.

16 I'll move into some of my general  
17 remarks and then hopefully people can jump in. Thank  
18 you for allowing me to share my two cents.

19 So as I mentioned earlier, I practice  
20 on the management side of labour and employment law  
21 at McCarthy's. A couple of introductory comments.

22 First, there are no whistleblower  
23 protections in some of the legislation I deal with  
24 every day.

25 So what are those statutes? Human

1 Rights code which protects discrimination and  
2 harassment and employment services, Employment  
3 Standards Act which deals with minimum standards of  
4 employment by vacations and minimum wage, the  
5 Occupation Health and Safety Act which deals with  
6 health and safety, and the Labour Relations Act which  
7 deals with the formation of unions and the rules  
8 around that.

9           And there is no whistleblowing  
10 protection. There certainly is anti-retaliation  
11 protections, but there is no provision in those  
12 statutes that says if you report this misconduct you  
13 are going to get a payout. I'll give you one  
14 example.

15           There's a recent case, human rights  
16 tribunal, that is in the papers where there was a  
17 very messy situation of sexual harassment. Two  
18 employees end up getting around \$150,000. Now, there  
19 were tips that went into the Human Rights Commission  
20 but none of those people were paid out anything, and  
21 the only award was to the two impacted individuals.

22           So there are no whistleblower  
23 protections. That's the first point.

24           The second point is in employment  
25 disputes usually what you are dealing with is



1 something that impacts the employee individually. So  
2 they filed a complaint. Unless you have a union that  
3 says well, this policy could impact the industry or  
4 all the employers, you don't have a situation where  
5 someone complains to a regulator about a general  
6 practice at work. So, for example, in that human  
7 rights case you didn't have anyone sending in tips.  
8 And similarly, you don't have employees sending in  
9 tips to the regulators where it doesn't impact them  
10 personally.

11 So on the anti-reprisal provisions, I  
12 think it would be helpful if I actually read out one  
13 of the provisions from the Employment Standards Act  
14 just to give you a sense of how broad the protection  
15 is. And that's in section 74. This is how it reads:

16 "No employer shall intimidate, dismiss  
17 or penalize an employee because of the following:

18 "That employee asks the employer to  
19 comply with this act and the regulations." In other  
20 words, please pay me over time.

21 "Two. The employer makes inquiries  
22 about his or her rights under the act." So in other  
23 words, what are the rules around overtime,  
24 Mr. Supervisor.

25 "Three. They file a complaint to the

1 ministry." So I think that's getting at the actual  
2 proposed whistleblower provisions.

3 "Attempts to exercise a right under the  
4 act." For example, wants to go on parental leave.  
5 "Gives information to an employment standards  
6 officer." Any information.

7 "Testifies in the proceeding under the  
8 act or is eligible or will become eligible for a  
9 leave."

10 So the anti-retaliation protections, at  
11 least in employment standards, are extremely,  
12 extremely broad. I don't think it's the intent to  
13 draft them that broadly. But it's just something for  
14 the commission to consider when it goes through its  
15 next steps in developing with language.

16 So you have the anti-reprisal  
17 provisions in employment standards as well as the  
18 human rights code.

19 So just as than example, employees  
20 terminated because they ask for accomodation for a  
21 disability. That's a textbook reprisal issue.

22 Or even if they reported internally and  
23 they suffer a penalty, and I'll get into that issue  
24 because I do think it's quite an important one and I  
25 do agree that part of the whistleblowing should be

1 that you go internally first.

2           There were some very helpful comments  
3 in the papers placing parameters around that, which I  
4 agree with as well, but I do think it's important  
5 enough to get it to go that way.

6           From a labour relations perspective,  
7 employee tries to start a union and the employer  
8 moves them to another location or they suffer some  
9 adverse consequence, another reprisal situation.

10           Under Health and Safety, an employee is  
11 kicked off their health and safety committee because  
12 they make too much noise or try and enforce the act.

13           These are all penalties that happened.  
14 I can tell you that even though there isn't the  
15 financial incentive, I'm quite busy with these  
16 complaints and others, so they do occur.

17           But my own personal view is, I think  
18 without the financial incentive, at least in the  
19 whistleblowing context when you're dealing with some  
20 of these issues which aren't your typical employment  
21 disputes -- they aren't as minor as, say, hey, I  
22 wasn't paid my vacation, paid my overtime, you  
23 probably need the financial incentive. I'll leave it  
24 to some of the other experts to determine where the  
25 line is, the floor and ceiling.

1                   But I tend to agree that you wouldn't  
2 get the types of information you want without the  
3 financial incentive. The anti-reprisal is probably  
4 not enough.

5                   There are a couple other points on the  
6 reprisal. Just from a legal perspective, it's  
7 important to remember that once an employee raises  
8 their hand and says that -- trying to exercise his  
9 statutory rights, the legal onus shifts to the  
10 employer immediately to prove that a hundred percent  
11 of the reason for taking the action against the  
12 employee -- for example, an employee says, I need to  
13 take a leave of absence, and the employee is demoted.  
14 Maybe it's a coincidence, maybe it's not. I have  
15 both of those situations right now. The employer has  
16 to prove that a hundred percent of the reason is not  
17 tainted.

18                   So it's a difficult evidentiary hurdle  
19 for employers.

20                   So I did read in the materials, and I  
21 thought it was quite interesting, that apparently the  
22 U.S experience is that a lot of the employees are not  
23 successful in their anti-retaliation cases. I'm not  
24 sure what the legal standards at play are. I suspect  
25 they aren't as employee-favourable as they would be

1 here.

2 One of the other issues which I found  
3 quite interesting was the issue of disciplining the  
4 whistleblower despite the anti-retaliation provision.  
5 What do you do if the whistleblower does this in bad  
6 faith? There was comments about that.

7 I mean, first of all, I think it's  
8 unlikely that someone could do that. I can tell you  
9 from my own practice I do get bad faith complaints.  
10 But, again, those complaints are aware the person  
11 stands to profit personally in more immediate  
12 fashion.

13 It's very rare, I think, that you would  
14 get bad faith complaints through this whistleblowing  
15 process where it could be years and years before you  
16 get a resolution.

17 In fact, our human rights tribunal has  
18 said that an employee can't maliciously bring a  
19 complaint forward. If they do, even if they are  
20 retaliated against, they won't have the protection.  
21 There is some -- you can call it helpful case law  
22 from the employer's perspective.

23 It is a high onus, though, if the  
24 employee sincerely believes that they, for example,  
25 were racially discriminated against, they will have

1 the protection.

2 The last issue I want to go through is  
3 the raising the issue internally before going to the  
4 regulator, which I agree with.

5 Interestingly, the Supreme Court of  
6 Canada has said in this Merck case -- and I did print  
7 it out and I did get through the headnote --

8 MS. CONDON: Sounds like a good lawyer.

9 MR. THOMAS: It's also highlighted.

10 MR. PUGEN: Interestingly in that case,  
11 it involved a whistleblowing provision in  
12 Saskatchewan labour standards legislation, and an  
13 employee of a union complained of some financial  
14 misconduct. That employee went to the union, or the  
15 leadership of the executives.

16 At the end of the day, she had to go  
17 all the way to the Supreme Court for the court to  
18 uphold that, yes, it was appropriate for her to go up  
19 the ladder, so-to-speak.

20 I agree with that because it's  
21 consistent with labour relations policy and the way  
22 our labour relations and health and safety system is  
23 designed in Ontario.

24 So under the labour relations regime  
25 every collective agreement has an agreements

1 procedure where the parties are to work together,  
2 complaints are supposed to go internally first.

3 From a health and safety perspective,  
4 same thing. There's an internal responsibility  
5 system, there's a joint health and safety committee.  
6 Complaints are expected to be worked out between the  
7 parties.

8 Now, the situation is --

9 MR. LENCZNER: I'm going to have to cut  
10 you off, Daniel, because we're going to lose our  
11 time. So thank you, and we'll hold the questions  
12 until we've heard from David and Jordan and then --  
13 because I want to give them a chance to put their  
14 perspective.

15 So, David, can I call on you to tell us  
16 whether there's the appropriate balancing of the  
17 protections with the employment concerns?

18 PRESENTATION BY MR. HAUSMAN:

19 MR. HAUSMAN: I guess I should state my  
20 perspective as well. Perhaps my bias. I'm a  
21 securities litigation lawyer. I would say that  
22 although I'm a free agent, I'm professionally and  
23 personally empathetic to internal compliance systems  
24 within big organizations, if I can put it that way.

25 But I think that reading the notice

1 and --

2 (Speaker overlap)

3 MR. HAUSMAN: Reading the staff notice  
4 and the comments that had been received, I think  
5 there's a few matters that there's broad consensus  
6 about.

7 Certainly anti-retaliation measures of  
8 some sort are essential and fair. And I think the  
9 second thing that you can discern from all the  
10 comments received, what we've heard today, is that to  
11 the extent possible, confidentiality is the best  
12 protection against retaliation.

13 And thirdly, although this seems to be  
14 an issue in the U.S., I think you would probably see  
15 broad consensus among everyone in the room that  
16 anti-retaliation protection should apply both to  
17 whistleblowers who come to a regulator,  
18 whistleblowers who go to a self-regulatory  
19 organization, and to whistleblowers who bring their  
20 complaints internally.

21 That that is even a question in the  
22 U.S. surprised me, because I think it's essential to  
23 incentivize people to bring their complaints within  
24 their organizations. And as I say, my bias is that  
25 that should take -- that should be the primary --



1 that should be a necessary pre-condition. That's  
2 just my bias. It's not really this particular topic.

3 So the next question is, how to put in  
4 place an appropriate anti-retaliatory regime?

5 So the first thing is that there  
6 already are protections in securities law, but they  
7 are not adequate in my submission.

8 The first is that audit committees are  
9 required by law to protect confidentiality in terms  
10 of whistleblower complaints on accounting measures.  
11 I don't know why there isn't an equivalent provision  
12 in 31.103 pertaining to registrants, and I don't know  
13 why the protection in the national instrument for  
14 reports to audit committees doesn't extend to  
15 governance committees as well, or to board of  
16 directors more generally. Those are easy changes  
17 that make sense, and they would apply across Canada  
18 so they would address some of the concerns that  
19 Connie raised about other CSA members and so forth.

20 So that is a national initiative. I  
21 think that that ought to be considered in 31.103 and  
22 also in this sort of corporate governance provisions  
23 in 52, and so forth.

24 Because confidentiality really is the  
25 best assurance of anti-retaliation. And I can tell

1 you that having participated in board level internal  
2 investigations, and in internal investigations among  
3 registrants, confidentiality is preserved. And there  
4 is an advantage there.

5           The advantage is that -- and, Daniel,  
6 you'll correct me if I'm wrong -- but in an internal  
7 investigation an employer does not owe an employee  
8 who is the target of an internal investigation  
9 disclosure obligations. So if asked, the question is  
10 none of your business who complained. What is your  
11 response to these allegations? But there's no  
12 Stinchcombe -- there's no Stinchcombe in an internal  
13 investigation. There is here.

14           MR. PUGEN: David, I just challenge  
15 that. I think it depends on the regime at play. So  
16 for example, under the human rights regime a lot of  
17 employers have been dinged, for lack of a better  
18 word, for not having a fair investigation under that  
19 statutory regime.

20           But I think just generally, I tend to  
21 agree. Like any employment dispute, if the facts are  
22 bad enough, the courts will find a way to penalize  
23 the bad player.

24           MR. HAUSMAN: All I'm saying -- for  
25 example, an audit committee can't disclose to a

1 target of an internal investigation, for example, a  
2 controller CFO, that there's been a complaint because  
3 they would be violating securities law. So obviously  
4 that's an advantage.

5 The second question is, the difficult  
6 question is, how do you create a legal regime that  
7 gives people adequate protection against retaliation.

8 Civil remedy, in my view, is the most  
9 appropriate. But, of course, the quid pro quo for  
10 that -- and what I mean is I don't think it should be  
11 the subject of an extra provision in the enforcement  
12 provisions of the Securities Act.

13 The reason I say that is simply that  
14 this is not -- the commission isn't a specialized  
15 tribunal on employment matters. So it would be very  
16 odd to have a commission hearing about the type of  
17 things that Daniel deals with in terms of  
18 retaliation, which is subtle. It's not just  
19 termination. It's constructive dismissal, it's job  
20 harassment, and I don't think that that is the proper  
21 type of matter to be dealt with by a specialized  
22 tribunal in financial products, and I don't think  
23 that decisions that are made in that vein would  
24 receive much deference at divisional court, which I  
25 think is important.

1                   So the alternative to that, in my view,  
2   is two-fold: One is obviously there's a breach of  
3   confidentiality that is owed under a national  
4   instrument or otherwise at law. So that is something  
5   that can be the subject matter of a commission  
6   proceeding because it's fairly obvious that if  
7   somebody complained confidentially, the word got out  
8   that it was on somebody's fault, that is a finding  
9   that can easily be made in the commission proceeding.  
10   And that jurisdiction already exists for audit  
11   committees and I think should exist for registrants  
12   as well, and I don't think there's much dispute about  
13   that.

14                   For a civil remedy to be effective,  
15   then the measure of damages can't be decompensatory,  
16   there's got to be something like double or trouble.  
17   Because otherwise it's just duplicative of a wrongful  
18   dismissal case and there's access to justice --  
19   people need to retain counsel, counsel have to work  
20   like Dimitri on contingency fees. That's -- it has  
21   to be meaningful, but I think the civil remedy is the  
22   most appropriate.

23                   I'm just going to cut right now to  
24   disclosure.

25                   In my view, whistleblowers who come to

1 the OSC should and will receive protection through  
2 the investigative stage, obviously, but to think that  
3 that anonymity will be protected in one's notice of  
4 hearing is illusory.

5 I think illusory because -- leaving  
6 aside the fact that I think staff would be inclined  
7 to call these people as witnesses notwithstanding  
8 what the notice says, the problem is that staff will  
9 want to disclose the identity of the whistleblower.  
10 And I can tell you that from personal experience  
11 because I had a near-death experience.

12 One-year hearing at the OSC, probably  
13 the most important case in the 30 -- my whole life,  
14 and we received a favourable decision from the panel  
15 on the disclosure matter. It was appealed, and  
16 four years later in divisional court we nearly lost  
17 the whole year because the divisional court disagreed  
18 and thought that the material we didn't disclose  
19 ought to have been disclosed.

20 Staff would be very loathe -- that's  
21 why you get such comprehensive disclosure because you  
22 don't want to have to make a mistake and jeopardize  
23 all the work you've done at a hearing.

24 So when you look at the cases that  
25 apply Stinchcombe -- and there's one in Alberta,

1 Ironside -- when you look at it, the threshold for  
2 relevance is really, really low. And, of course, you  
3 can impact tactical decisions by the respondents.  
4 The name of the whistleblower will be disclosed in a  
5 hearing.

6 MR. LENCZNER: I've going to have to  
7 stop you. Thank you. That's very helpful.

8 Okay, Jordan.

9 PRESENTATION BY MR. THOMAS:

10 MR. THOMAS: So I would like to share  
11 with you some observations as a first responder to  
12 corporate wrongdoing, both at the Department of  
13 Justice, the SEC, and as someone who represents  
14 corporate whistleblowers.

15 In these roles I've seen firsthand the  
16 devastation that can be caused by corporate  
17 wrongdoing. Over time I've come to believe that  
18 significant corporate wrongdoing is rarely caused by  
19 rogue police (ph), insufficient compliance resources,  
20 inadequate policies and procedures, or compliance  
21 personnel that lack vision.

22 I have found that big misconduct often  
23 results from a long chain of little mistakes, one  
24 breakdown in ethical judgment cascading to another  
25 breakdown and then another, in time isolating the

1 seemingly random bad choices tends to snowball in  
2 front page scandals.

3                   Ultimately, I've concluded that the  
4 most common causes of significant corporate  
5 wrongdoing is that organizations involved lack the  
6 culture of integrity and that too often they  
7 discourage speaking up.

8                   It's not something that leaders of  
9 financial watchdog organizations regulate say into a  
10 mic, but I'll say it for them.

11                   Given the vast scope and complexity of  
12 our markets, products and transactions, security  
13 violations can be difficult to detect, investigate  
14 and prosecute without inside information and  
15 assistance from participants in the scheme or others  
16 that work or are associated with them.

17                   As a result, responsible organizations,  
18 regulators and law enforcement authorities cannot  
19 effectively and efficiently police the marketplace if  
20 individuals are unwilling to report wrongdoing.

21                   While in law enforcement, one of the  
22 great mysteries to me was why more witnesses did not  
23 come forward and assist us. After all, in many ways  
24 corporate scandals are like bank robberies. They are  
25 rarely one-man jobs and there are almost always

1 witnesses.

2 In a real world, it's highly unlikely  
3 that \$2 billion could have been lost by trade at UBS.  
4 More than one billion dollars of client funds simply  
5 disappear at MF Global, with a live (inaudible) could  
6 be manipulated by Barclays and many other banks  
7 without many people knowing about it.

8 For some reason, individuals with  
9 relevant information have remained silent, disengaged  
10 and disenfranchised while countless investors have  
11 been seriously harmed.

12 Now, this has been something that I've  
13 spent five, six years thinking about. And to explore  
14 this question when I went into private practice, my  
15 law firm commissioned surveys, and our most recent  
16 one was commissioned with the University of Notre  
17 Dame to find out what people know, because the  
18 starting question is: Do people know about  
19 wrongdoing? And we found in our most recent survey  
20 of U.S. and UK financial service professionals,  
21 47 percent believe their competitors engage in  
22 illegal and unethical behavior.

23 23 percent believe their colleagues had  
24 engaged in illegal or unethical behavior. 22 percent  
25 had firsthand knowledge of wrongdoing in their own



1 workplace.

2                   And the statistics got worse from  
3 there. But what we know is people know things. And  
4 the question is, why aren't they speaking up?

5                   Now, I can tell you that the first kind  
6 of answer that we came up with -- and I believe  
7 continue to be true -- is that the incentives and  
8 protections in the United States were inadequate.

9                   And we developed a program that had  
10 three pillars: The ability to report anonymously,  
11 which is the cornerstone of the SEC whistleblower  
12 program. Most people think about the money. But for  
13 people who come to me, they are most concerned about  
14 retaliation and blacklisting.

15                   This is the show. Because if you make  
16 a million dollars a year you're not really betting on  
17 the OSC to come through for you. You're more worried  
18 about stopping the wrongdoing in the workplace and  
19 not losing your job or your livelihood or the thing  
20 you love to do.

21                   The second thing is employment  
22 protections. A note here, the U.S. has had a  
23 whistleblower protections for a long time. They, by  
24 themselves, were inadequate. So as you are balancing  
25 what mix of components you have for your program,

1 robust whistleblower protections are inadequate by  
2 themselves.

3 And the last thing, of course, are  
4 financial incentives.

5 Now, one of the things that we didn't  
6 know at the time in which we developed the SEC  
7 whistleblower program -- something that I was shocked  
8 by when I went into private practice is, the  
9 prevalence of agreements that discourage or prevent  
10 people from coming forward.

11 And at first I thought it was just -- I  
12 was two blocks from Wall Street -- maybe particular  
13 firms near Wall Street had these bad agreements and  
14 the rest didn't have them. So I began talking to  
15 whistleblower counsel around the country and we  
16 continue to see these agreements.

17 So we petitioned the SEC to look into  
18 this area. We also -- we added questions to Notre  
19 Dame's survey on this question. And you'll find what  
20 we found interesting.

21 I would encourage you to do the same  
22 sort of survey here in Canada. We found that  
23 16 percent of respondents said that the policies and  
24 procedures in their workplace prohibited them from  
25 going to law enforcement authorities about wrongdoing

1 in the workplace. 10 percent said that they were  
2 asked to sign or did sign an agreement that  
3 prohibited them from going to law enforcement  
4 authorities.

5 It should be noted, these agreements  
6 did not just apply to securities violations. They  
7 applied to public safety issues, they applied to  
8 anything. Basically there was no carve out.

9 When we asked the question -- we looked  
10 at the people who made over \$500,000, which on Wall  
11 Street is about half of the people -- the numbers  
12 went up to 28 percent for policies and 25 percent for  
13 agreement.

14 So even if Canada is a much kinder and  
15 gentler and honourable place, if your numbers are  
16 even a third of that, I would run, not walk, to fix  
17 this. Okay?

18 Now, the other thing that I would like  
19 to talk to you about is retaliation. I can tell you  
20 that the vast majority of my clients are people that  
21 reported internally and they perceive they are  
22 retaliated against.

23 And I will tell you that again you  
24 don't have to trust me. There have been surveys done  
25 on this. The Notre Dame survey that just came out

1 found that 19 percent of people said they feared  
2 reporting wrongdoing in the workplace because of  
3 retaliation.

4 Now, we say that their fear is  
5 ungrounded because of the honourable organizations  
6 that exist here in Canada, but that fear is real, it  
7 prevents people from coming to you.

8 Another survey put out -- done by the  
9 Ethics Resource Centre, the leading think tank on  
10 ethics in the United States, and they have been  
11 doing national business ethics for some time, found  
12 that 21 percent of people who did report wrongdoing  
13 internally perceived that they were retaliated.

14 Again, we can say that that perception  
15 is false, it's misguided, uninformed. But it affects  
16 their ability. It affects people's desire to come  
17 forward because --

18 MR. LENCZNER: Okay, I'm going to stop  
19 you just to ask you one quick question then we'll  
20 take a break.

21 GENERAL DISCUSSION ON TOPIC 2:

22 So how do we get over that? If there's  
23 this perception, this fear, is it the legislation?  
24 Could we put in -- how do you get over it?

25 MR. THOMAS: That's a great question,

1 Commissioner. The first thing you do is you add a  
2 provision to your whistleblower provision that allows  
3 you to enforce this.

4 MR. LENCZNER: The Securities  
5 Commission?

6 MR. THOMAS: Yes. Let me tell you why  
7 that matters, because I know that that's not the view  
8 of my distinguished panelists.

9 But here the problem is that  
10 organizations have wonderful resources, talented  
11 counsel, and not every employee has those benefits,  
12 and when it comes down to a knife fight with an  
13 organization over retaliation some don't play. Okay.  
14 And that's particularly important as it relates to  
15 these agreements, because these agreements say you  
16 can't show or talk about this agreement to anyone  
17 without carve outs for attorneys or anybody else.

18 They don't have carve outs for  
19 regulators to ask people to waive potential for  
20 monetary award. Their confidentiality and  
21 disparagement provisions are so broad that they  
22 basically -- a common reading of it would be you  
23 can't talk about these things.

24 MR. HAUSMAN: The problem is OSC staff  
25 often won't play. In other words, you can't

1 guarantee that they are going to bring in enforcement  
2 proceeding.

3 MR. THOMAS: I'm not --

4 MR. LENCZNER: And you've just said  
5 that we're too stupid to be able to be able to deal  
6 with it.

7 MR. HAUSMAN: Otherwise intellectually  
8 occupied.

9 MR. LENCZNER: We're going to have to  
10 break here for our morning break but --

11 MR. THOMAS: I have faith in you.

12 MR. LENCZNER: -- and I'm going to take  
13 on David in the corner.

14 MS. CONDON: 15 minutes. We've got to  
15 be back at 11 o'clock sharp.

16 --- Recess taken at 10:47 a.m.

17 --- Upon resuming at 11:04 a.m.

18 MS. CONDON: If everyone can take their  
19 seats. Thank you very much to everybody for  
20 returning and coming back for the last session, which  
21 is going to deal with issues that been simmering  
22 under the surface for the entire morning, and I know  
23 we'll get an opportunity to have a full discussion of  
24 the issue of the relationship between internal  
25 compliance and a potential whistleblower program in

1 this session.

2 Before I turn it over to my colleague,  
3 Tim Moseley, to moderate this session, just a  
4 reminder that if anybody in the audience want to ask  
5 a question, the easiest way to do it is to write your  
6 questions on the cards that are distributed around  
7 the room and hold them up and a staff person -- there  
8 are several staff people sitting behind here and they  
9 will come and take your question from you and give it  
10 to the panel.

11 We may be able to read out that  
12 question anonymously before the end of the session,  
13 but if we don't, we will take the questions and use  
14 them as part of the material that we consider as we  
15 move forward considering this initiative. So it will  
16 not go to waste.

17 All right. So with that, I'm going to  
18 turn it over to Tim. Thank you.

19 TOPIC #3: IMPACT OF AN OSC WHISTLEBLOWER PROGRAM  
20 ON INTERNAL COMPLIANCE SYSTEMS:

21 MR. MOSELEY: So the panel session  
22 topic for this one is the impact of an OSC  
23 whistleblower program on internal compliance systems.  
24 Simmering. All right.

25 We're very fortunate to have four

1 distinguished panelists who have been largely biting  
2 their tongue. They are bursting to speak now, so  
3 just to introduce briefly, to my far left, Linda  
4 Fuerst is a partner at the law firm of Lenczner  
5 Slaght and has for many years acted, advised and  
6 represented participants and other firms.

7 To her right, Sheila Murray is  
8 executive vice president, general counsel and  
9 secretary at CI Financial Corp.

10 Megan Telford is vice president and  
11 global head of employee relations at TD Bank Group.

12 Professor Christine Wiedman, professor  
13 at the School of Accounting and Finance at the  
14 University of Waterloo, and Christine and some of her  
15 colleagues have done some interesting work that I'll  
16 let her speak about. Very relevant here.

17 So we have a good representation,  
18 including from some very honourable firms -- that's  
19 honourable with a "u" by the way -- who are just  
20 waiting to get their turn to defend themselves here.

21 So before we dive maybe right into the  
22 meet of it, perhaps we can just briefly set the  
23 stage.

24 We have in the topic of the panel  
25 session, as I've said, the impact of a program on



1 internal compliance systems. And perhaps I'll just  
2 try and put a slightly sharper point on that and  
3 say -- as we go through this discussion as we're  
4 talking about the potential impact of a program on  
5 internal compliance systems, I think one of the key  
6 questions will be assuming that a program is  
7 implemented, what measures might be taken to minimize  
8 any negative impact on internal compliance systems,  
9 and obviously there's already been some discussion on  
10 that this morning, but I think it will be useful to  
11 come back to that.

12 With that, just to set the stage,  
13 perhaps we can just clarify a little bit what these  
14 internal compliance systems are generally so we know  
15 what we're talking about.

16 Perhaps I'll invite Megan with TD Bank  
17 Group to start big in the organization size, talk  
18 about the existing ways that employees can report.

19 PRESENTATION BY MS. TELFORD:

20 MS. TELFORD: Thank you very much,  
21 Commissioner Moseley, for having us, and thank you to  
22 my panelists. We have been sitting here very calmly.

23 I'm going to be brief in my comments.  
24 One thing -- I think most people in the room I think  
25 are actually very well acquainted with internal

1 compliance systems since I'm going to be addressing  
2 those.

3 Perhaps most importantly, I am what's  
4 standing between you and the conversation with  
5 internal reporting first, which I get sense is what  
6 people want to drive to. So I'm going to be brief  
7 for those reasons.

8 But really when we're talking about  
9 internal compliance methods, what really they are is  
10 a method to alert management when the organization is  
11 either close to or has crossed legal or ethical  
12 boundaries. And as most people know, this fits  
13 nicely into most compliance programs which were  
14 really designed to prevent, protect and respond. So  
15 that's a broad definition. Let's really turn to  
16 practice. What does that mean in real life for  
17 organizations like TD.

18 And I think one of the thoughtful  
19 comments that have come out in this discussion today,  
20 and, Dave, you referenced it. This looks and feels  
21 very differently, depending the type of organization  
22 we're talking about. And the panel beforehand, our  
23 panel has spoken about that.

24 But generally speaking, even with those  
25 differences in size and function we can really see

1 three major ways of reporting. One is the classic  
2 whistleblower hotline, and that's generally run by an  
3 external party. The benefit of that is a few things.

4 First of all, you can first report  
5 anonymously. Second of all, and quite importantly  
6 for organizations like mine, it allows both external  
7 and often ex-employees to report as well and in  
8 addition to internal folks. It's 24/7, which  
9 sometimes can be important. These moments of ethical  
10 decision-making may come to you at strange times of  
11 the day or night and it gives you the opportunity to  
12 reach out when the time is right for you. And very  
13 importantly for us, it allows an exchange between the  
14 reporter and the organization in an anonymous manner  
15 for us to ask follow-up questions and for us to  
16 discern and report back to the reporter in a way  
17 that's appropriate what happened. So that's what you  
18 generally see from a whistleblower perspective.

19 The second way is the ombuds office.  
20 And, of course, different financial organizations do  
21 this differently. It can be both client-facing or  
22 employee. And usually ombuds office have some  
23 ability to engage in investigatory powers and they  
24 also offer the ability of anonymous reporting.

25 The third and perhaps the most

1 interesting is what we would generally call the  
2 employee escalation process. And we just recently  
3 did some benchmarking of this across our organization  
4 to see how other organizations dealt with this. And  
5 the benefit of a escalation process is it allows  
6 people to complain not just to their manager who may  
7 actually be engaged in the wrongdoing, but it  
8 provides other avenues in the organization.

9 It also really addresses the tone from  
10 the top and ethical tone setting of the organization,  
11 usually allowing access to the CEO or other  
12 significant people in the organization when a person  
13 who wants to complain has skipped several levels and  
14 doesn't feel their complaint is being addressed.

15 So you may see differences of that, but  
16 in most of the organizations that we've looked at  
17 those are the three major ways that one comes  
18 forward.

19 I would make two general comments about  
20 that. Good internal compliance systems have the  
21 ability to deal with conflicts of interest. And by  
22 that I mean one of the hardest things to address,  
23 particularly in smaller organizations, is of course  
24 the main people who look at whistleblower complaints  
25 internally -- legal, audit, compliance and HR -- are

1 often the very people that people are complaining  
2 about. So in a small organization how do you  
3 navigate that when the folks that are reading the  
4 complaints, it may very well be about them. That's a  
5 very important element.

6 And the second thing that we face a lot  
7 is what is a whistleblower complaint. Even if you  
8 have these very well-established methods, how people  
9 choose to complain, the methods they use are personal  
10 to them. So even though we have the hotline, we have  
11 all those sort of things, we still get people writing  
12 us anonymous e-mails, we still get people reporting  
13 in all different methods. And the important thing is  
14 that you have a culture compliance method internally  
15 such that you have a way to gather those complaints  
16 together and get them to the right spot. In other  
17 words, you don't let the method drive the results.

18 So those are my general comments on  
19 setting the stage of general report, unless any of my  
20 panel members feel differently they want to speak to.

21 MR. MOSELEY: Sheila?

22 PRESENTATION BY MS. MURRAY:

23 MS. MURRAY: I'm not speaking because  
24 we do anything differently.

25 So I'm with CI Financial, a much

1 smaller financial organization than TD Bank with a  
2 fraction of the employees, but probably toe-to-toe as  
3 many people percentage wise engaged in the compliance  
4 function.

5 First of all, I applaud the commission  
6 on this forum and on who you've got here as a panel.  
7 It's fantastic, because you got a great exchange of  
8 views.

9 We absolutely agree with the  
10 whistleblower program. And when I say "we" I'm  
11 talking my organization, but I also personally think  
12 that it can be a great assistance to the same jobs  
13 that Megan and I are trying to do at our  
14 organizations every day.

15 I think we need to all assume that not  
16 everyone is a criminal, not every organization is  
17 engaged in criminal activities and, frankly, even  
18 organizations that have criminal aspects, we're as  
19 anxious as the OSC is to surface those, deal with  
20 them and get on with our business, because it hurts  
21 our reputation, it hurts our business, it hurts our  
22 investors. So we're alive in exactly the same goals  
23 as you are, of investor protection.

24 Following Sarbanes-Oxley, as Jordan  
25 mentioned, the -- you came out with SOX, Canadian

1 regulators came out with the Canadian version of that  
2 which does impose on reporting issuers certain  
3 compliance obligations that crystallize things that  
4 hopefully we were all doing already, but that make  
5 sure that we do have an internal reporting system and  
6 that it's anonymous and that we -- and I think this  
7 is part of your program, but if it's not we certainly  
8 have got it in, we have a code of ethics and we have  
9 a code of ethical reporting and ethical reporting  
10 procedure that obligates the company to -- or  
11 prohibits the company from engaging in any  
12 retaliatory disciplinary action, and there are severe  
13 consequences if we do.

14                   We're regulated by the OSC, IROC, and  
15 the MFDA. There are compliance obligations with  
16 respect to all of those. And the misconduct that the  
17 OSC talks about in this discussion paper, which is  
18 fantastically laid out, any financial misconduct we  
19 have procedures in place, mostly because of --  
20 coming out of Sarbanes-Oxley. And in the audit  
21 committee rules we now have an internal auditor who  
22 reports directly to our chair of the audit committee  
23 who must, by law -- by securities law, be  
24 independent, an independent director.

25                   Our internal whistleblowing policy,

1 that goes right up to the lead director who, again,  
2 must, in accordance with Canadian securities law, be  
3 an independent director, non-tainted with management.

4 So that these people, if there is  
5 possibility of financial misrepresentation or any  
6 other kind of disclosure issue, you can go right up.  
7 If there is unethical contact, you can escalate that  
8 up to independent people if you don't feel  
9 comfortable to go internally, as Megan said.

10 We also, because of the organization,  
11 and I'm sure you have the same thing, we have  
12 protections against inside trading, selective  
13 disclosure, and, of course, all the registry issues.

14 We have more than 50 people out in the  
15 field auditing the activities of our dealer  
16 community, making sure that we engage in tier one  
17 supervision and tier two supervision. We're looking  
18 at every trade that happens.

19 As an executive of the organization, I  
20 can't trade in any securities, not just securities at  
21 CI, without reporting that to our compliance  
22 department and nor can my husband. They have a copy  
23 of my husband's trading records.

24 So there are a lot of safeguards at  
25 organizations like ours and all the banks, financial



1 institutions, to try and protect and surface  
2 misdeeds. That's not to say no one is perfect. No  
3 one is. No one can be.

4 So programs like yours I think will  
5 help surface things that are going on that people --  
6 that don't get escalated or people don't feel  
7 comfortable to.

8 But I would say that where there are  
9 robust internal compliance systems and you're subject  
10 to SRO oversight, hopefully in those situations the  
11 OSC may decide they would like to see people  
12 escalate -- except in extreme circumstances, escalate  
13 using the internal compliance process, and in extreme  
14 circumstances where it's clear that you could justify  
15 you won't be protected, or the problem is at the top,  
16 then let it go.

17 MR. MOSELEY: Thanks, Sheila. So  
18 that's a perfectly segue into I think coming back to  
19 the issue that attracted some attention already this  
20 morning, and clearly in the many of the comment  
21 letters we got, which is this issue of: Does,  
22 should, must the employee report internally first.

23 So before we dive right into that, can  
24 I just throw out a couple of questions that would be  
25 useful to weave through our remarks here.

1                   Number one, I think the discussion this  
2 morning -- and perhaps not intentionally -- it  
3 sounded to me a bit on that issue, bit more binary  
4 than maybe it has to be, which is, should there be a  
5 requirement that an employee report internally first  
6 or not. I think, I'll agree, a possible alternative  
7 to those two is could it just be a factor taken into  
8 account?

9                   Now, there were comments about the  
10 problem with discretion and how that affects the risk  
11 calculation of employees. I'm not advocating it  
12 necessarily, but I think it would be useful to canvas  
13 that as an option.

14                   And then one other thing I think  
15 just -- again background to thi -- has been alluded  
16 to by the panel, and Megan has spoken to exclusively  
17 and Sheila has mentioned as well, the different sizes  
18 of firms and the different organizational structures  
19 and so on is clearly going to be a significant factor  
20 in this. We must be careful in the discussion, as we  
21 have been so far, not to adopt a one-size-fits-all  
22 approach more than is necessary.

23                   With that -- we've decided, by the way,  
24 to extend this session to 3 o'clock. I hope you  
25 don't mind.

1 Linda, over to you, please.

2 MS. FUERST: Did you want me to address  
3 the benefits of employee reporting?

4 MR. MOSELEY: Sure. I mean, come at  
5 it -- several questions floating around I think about  
6 the topic of employees reporting internally first, so  
7 whatever suits you best.

8 PRESENTATION BY MS. FUERST:

9 MS. FUERST: I think it's helpful to  
10 sort of talk about what the benefits to the  
11 organization are, as having employee benefits first  
12 internally rather than running up to the regulator.  
13 I'm going to leave aside credit for cooperation.  
14 That's another topic we can discuss.

15 But from my perspective, the two main  
16 benefits to the organization are financial and  
17 reputational.

18 The bottom line is internal reporting  
19 allows the organization to get ahead of the curve by  
20 planning and conducting its only internal  
21 investigation with the view to figuring out if there  
22 is any truth to the internal whistleblower report  
23 before any regulatory action and/or any adverse  
24 publicity results.

25 As a preliminary comment, as I said, in

1 order for an organization to get a handle on what's  
2 going on, it's important that it promptly investigate  
3 the report. And that in order to maximize the  
4 benefits of the internal investigation, to make sure  
5 that that investigation is thorough, well-documented  
6 and conducted by individuals completely independent  
7 of the wrongdoing and obviously capable of conducting  
8 an appropriate internal investigation.

9           If the internal investigation  
10 substantiates that wrongdoing occurred, the  
11 organization then has the ability of considering and  
12 initiating steps to self remediate, and importantly  
13 to prevent the recurrence or continuation of the  
14 conduct in issue. That ultimately may end up saving  
15 the organization significant amounts of money if it  
16 is conduct of a recurring nature or continuing  
17 nature.

18           There may be claims that could result  
19 by third parties. It gives the organization an  
20 opportunity to put an end to that conduct and  
21 protect -- financially. Obviously, there's also a  
22 benefit to the investors or people who may be harmed  
23 by the conduct.

24           An internal report also gives the  
25 organization the opportunity to consider whether it's

1 desirable or necessary for it to self-report to the  
2 regulator and/or to publically disclose the  
3 wrongdoing that it's uncovered. If the organization  
4 does have an obligation to make public disclosure,  
5 either the internal report or the findings of the  
6 investigation, it then has the benefit of deciding  
7 how best to package the message both internally to  
8 its employees and externally to the world, rather  
9 than responding to reports in the financial press or  
10 publication of an OSC notice of hearing, which  
11 obviously has significant representational  
12 consequences to the organization.

13           Self-reporting internal wrongdoing and  
14 self-remediation may have its own benefits, as I  
15 said, when we talk about credit for cooperation  
16 operation.

17           But, additionally, if an appropriate  
18 internal investigation which demonstrates that the  
19 report of alleged wrongdoing is completely unfounded,  
20 the result of that investigation internally may be of  
21 benefit to the organization if and when the OSC later  
22 comes knocking at the door, the organization is ready  
23 to respond quickly to commission staff.

24           Even for the commission, from a cost  
25 and resources perspective, there may well be great

1 benefit to the regulator when employees report first  
2 to the employer and a thorough and credible  
3 investigation is conducted by the organization using  
4 its resources rather than commission staff which are,  
5 as you know (inaudible) at the best of times.

6           So it may well save the commission the  
7 extensive investigation complaints that end up being  
8 frivolous, and ultimately it may also end up being  
9 more cost effective to the organization to be able to  
10 conduct its own investigation first, rather than  
11 responding to a regulatory investigation.

12           And that's simply because the company  
13 on its business desk is I think more able or better  
14 able to be able to design a targeted investigation  
15 getting at the right sources of information and get  
16 to the answer more quickly than potentially a  
17 far-reaching regulatory investigation.

18           MR. MOSELEY: Thank you.

19           Just maybe a follow-up question might  
20 be useful to respond to a comment Jane made earlier  
21 this morning about how having a whistleblower program  
22 allows fraud to be stopped more quickly. You fairly  
23 described benefits to the organization of an employer  
24 reporting an individual, so also fairly described  
25 benefits to the market at large, investors and so on.

1                   But on that second path of that, might  
2                   be interesting to try to reconcile the two comments.  
3                   Do we know reliably whether fraud does get stopped  
4                   more quickly for the benefit of the market now with  
5                   or without a whistleblower program or with or with  
6                   employees reporting internally first. Do you want to  
7                   follow --

8                   MS. FUERST: I'm not sure I have the  
9                   answer to that question.

10                  MS. MURRAY: I'm not sure I have  
11                  anything other than telling you in our experience  
12                  what happens.

13                  I think when someone reports -- either  
14                  as an investor reports to us through our claims  
15                  procedure, which they often do, or an employee  
16                  reports something, we're able to get on it very  
17                  quickly and ring fence what's happening, and also  
18                  investigate not just the particular fraud or whatever  
19                  the allegation is, but any holes in our process that  
20                  might be permitting this.

21                  So I do think that the sooner a  
22                  corporation understands what's happened and what's  
23                  being reported on, the quicker they can, as you said,  
24                  using our own resources, our own knowledge about our  
25                  company, start to make changes to processes to make

1       sure that there's no further damage, no further  
2       opportunity for fraud or investor loss. So I think  
3       the earlier companies get on it the better.

4                 MR. HAUSMAN: One other comment is --  
5       also depends on what we're speaking about is what  
6       this subject matter is.

7                 For example, if inside trading, in  
8       example, the organization has the dealer, gatekeeper  
9       obligations and so in the ordinary course they would  
10      be reporting that in any event.

11                In terms of large-scale fraud --  
12      depends on the nature of the perpetrator of the  
13      fraud. For example, if the fraud -- we haven't had a  
14      major fraud in a financial institution (inaudible) in  
15      that respect.

16                But I think more commonly it would be  
17      effectively a rogue employee assisting somebody else  
18      committing a fraud. In that circumstance it  
19      probably -- probably would halt the problem more  
20      effectively if -- for example, it's a financial  
21      institution, a bank took steps to freeze bank  
22      accounts before the Securities Commission did, and  
23      also if the Securities Commission received a report  
24      from somebody who's senior in either the legal  
25      department or business or compliance, financial



1 institution, than a whistleblower, for example,  
2 within that organization. So I think you have to  
3 define your terms. What is it that we intend to  
4 address with this?

5 MR. MOSELEY: I want to make sure --  
6 can I just try and summarize? You took some words  
7 out of my mouth.

8 It may well depend on the case. May  
9 not be a one-size-fits-all to answer this question.  
10 Perhaps, Jane, can you give me an answer to address  
11 this?

12 MS. NORBERG: Sure.

13 What I wanted to say is I do think that  
14 internal compliance plays an incredibly important  
15 role and I don't want to minimize at all -- that  
16 importance of that internal compliance reporting.

17 I think Linda has said it best when she  
18 said, look, we're all on the same page, on the same  
19 team. We want to protect investors and regulate  
20 markets, and the quicker that something can be  
21 stopped the better it is for everyone involved,  
22 including your own company, your own shareholders.

23 I think the way we view it is that if a  
24 whistleblower wants to report internally and feels  
25 comfortable that the internal compliance system in

1 place is adequate for them to report, and that some  
2 action is going to be taken, because sometimes, as I  
3 think people pointed out, sometimes the person that  
4 they are required to report to is the one that  
5 perhaps was conducting the fraud or was the guilty  
6 party or one who is telling them perhaps to do  
7 something wrong.

8           And so it's very uncomfortable, as you  
9 can imagine, for that person to report internally,  
10 which is why we took a position that we want people  
11 to be comfortable reporting, whether it's internally  
12 or to us, and we don't require them to report  
13 internally. Because the most important thing is that  
14 the wrongdoing is stopped and is stopped quickly, and  
15 if internal reporting is way to do that, then I think  
16 that that is great, and ultimately -- companies are  
17 in a very good position to take a look at what's  
18 happening internally and to stop it quickly and  
19 self-report.

20           MR. MOSELEY: I want to make sure we  
21 give Christine good time to deal with this issue  
22 because Christine and her colleagues have done a lot  
23 of good work, very relevant to the incentives, the  
24 disincentives and so on. So why don't I just turn it  
25 over the Christine. Please describe some of the work

1 that you've done.

2 PRESENTATION BY MS. WIEDMAN:

3 MS. WIEDMAN: Thank you very much, and  
4 thank you for inviting me to speak on the panel.

5 I conducted some research with my  
6 colleagues Vishal Baloria at Boston College and  
7 Carol Marquardt at Baruch University. And I'll talk a  
8 little bit about that, and I'll talk a little bit  
9 about the academic research to the extent I think it  
10 speaks to the issues as well.

11 We were interested around the time when  
12 companies were starting to submit letters to the SEC.  
13 They were sort of at the same stage. They had  
14 released their proposal and they were talking about  
15 the potential harm to their internal compliance  
16 system, so similar to the arguments here.

17 And we were very interested in the  
18 whistleblower program as a potential mechanism for  
19 deterring and detecting fraud, and we were also  
20 interested in trying to evaluate these claims and  
21 what the net costs and benefits might be.

22 So what we did was we looked at the  
23 firms that wrote letters to the SEC, and that turned  
24 out to be several hundred firms. We focused on the  
25 ones that we could get data on.

1                   And, again, we're trying to assess  
2                   whether this program, from an early perspective,  
3                   whether investors thought this would have a net cost  
4                   or net benefit to those parties.

5                   What we did was we decided to see what  
6                   their codes of conduct looked like. So from an  
7                   outsider or employee perspective reading the codes,  
8                   and we came up with our own way of -- our own rubric,  
9                   if you will, of describing what the codes looked  
10                  like.

11                  Part of it was guided by the way we did  
12                  this. The International Chamber of Commerce has  
13                  guidelines on whistleblowing, so we were referring  
14                  that in terms of what we felt was a good program as  
15                  it would be described. And also there's significant  
16                  survey research, including from the ethics resource  
17                  centre, that does argue that management is often  
18                  involved in the misconduct.

19                  And so to the extent that that is the  
20                  case, we wanted to consider the channels that  
21                  employees could report that might be relevant.

22                  So what we did find when we looked at  
23                  the codes of the companies that were writing letters,  
24                  and also a sample of companies that weren't writing  
25                  letters but were kind of matched in terms of size and

1 industry, there was a lot of variation in the codes.  
2 And we had a baseline that we thought represented a  
3 good code. The average was a little below what we  
4 subjectively thought was the baseline.

5 One area that I want to point out is:  
6 Does the employee have the ability to report  
7 independent of management, that is -- or do they have  
8 to report to their direct supervisor, to management  
9 of the company. Here we found quite a bit of  
10 variation.

11 35 percent of the sample was what we  
12 considered the highest level. That is, most codes  
13 allowed options. There were different venues that  
14 you could do. 35 percent said you could go to an  
15 independent board of director member, or you could  
16 report to a hotline that then reports to the audit  
17 committee or an independent director, which we  
18 thought was the highest, kind of most independent  
19 venue.

20 On the other hand -- and there was a  
21 variation below that, but 20 percent require, within  
22 their codes, for you to go to your direct supervisor,  
23 an area manager or maybe some level of management.

24 So we thought this was challenging,  
25 because research has shown that the organizational

1 climate matters for reporting whistleblowing from the  
2 employee perspective, the interactions that employees  
3 have with their supervisors, and certainly, as has  
4 been discussed I think by Jordan and Dimitri, that  
5 fear of retaliation is a very significant determinant  
6 in terms of whether an employee will report.

7           When we looked at retaliation  
8 protection within the codes, as it was described, we  
9 found that 95 percent did say they provided  
10 retaliation protection. But the majority of  
11 companies did not go on to say that they would pursue  
12 disciplinary action for those who did retaliate.

13           So in terms of having trust that you  
14 will be protected and the people who retaliated  
15 against you would be challenged, we weren't sure that  
16 was always clearly articulated.

17           So the main findings, though, in terms  
18 of what were the net benefits. We found that overall  
19 the firms that wrote letters who were afraid that the  
20 compliance systems that they had established under  
21 SOX would be undermined, we found on average their  
22 systems had a lower score on average than the firms  
23 that did not write letters, which called into  
24 question a little bit the validity of their claims.  
25 But we also found for those firms, the net -- so we

1 looked at a number of dates that related to the  
2 passage of the whistleblower provisions and we found  
3 that their average stock market reaction around those  
4 dates was positive.

5           So it seems like the market does  
6 perceive that even though there are costs relating to  
7 perhaps not reporting internally, overall the market  
8 viewed it as positive. We also found that the firms  
9 that had weaker whistleblower programs had more  
10 positive reaction. So presumably those firms will  
11 benefit more through approved detection and  
12 deterrence of fraud. And we found that the firms  
13 that had the stronger whistleblowing programs, they  
14 had a kind of a zero reaction.

15           So that gave us some reassurance that  
16 it wouldn't be -- would not necessarily be that  
17 costly to the firms with strong programs.

18           I guess the last comment that I would  
19 like to throw in here -- this is not from our  
20 research but from other research, it's that  
21 employees -- the research suggests when employees are  
22 surveyed that they do prefer to report internally  
23 first. That is their choice. And the evidence that  
24 Jane provided, 80 percent of the whistleblowers, that  
25 they had reported internally first.

1                   So our research, I think, helped to  
2                   assuage the concerns that these internal compliance  
3                   programs would be seriously undermined.

4                   GENERAL DISCUSSION ON TOPIC 3:

5                   MR. MOSELEY: Megan, I want to ask you  
6                   to follow-up, and I don't want to put you on the  
7                   spot. You may not be able or interested in answering  
8                   this.

9                   MS. TELFORD: What an intro.

10                  MR. MOSELEY: Let me declare my -- just  
11                  over 10 years as chief compliance officer at one of  
12                  the major banks, I oversaw the implementation of the  
13                  hotline. I saw every call that came through for many  
14                  years so I'm very interested in the topic.

15                  Are you prepared or able to comment on  
16                  the percentage of callers to even up the hotline that  
17                  chose to remain anonymous? And if not, we could talk  
18                  a bit maybe what it is more broadly across the  
19                  industry.

20                  I don't mind saying that at CIBC I was  
21                  a little surprised -- maybe I shouldn't use  
22                  surprised, but it's high across the industry, and it  
23                  was high no matter how strong I think many of us  
24                  would perceive the anonymity and anti-retaliation  
25                  protections to have been. For me, that was an



1       instructive point. I don't know whether you...

2                   MS. TELFORD: Sure. And maybe I'll do  
3 what Jane did and say these views I'm about to  
4 express are mine alone, not TD Bank's.

5                   I can tell you, because Jackie McNeil  
6 who is in audience with me, has the pleasure of  
7 reading every single whistleblower complaint that  
8 comes in to TD. And what we see is that in the  
9 methods we have, so really the ombuds office and the  
10 whistleblower hotline ethics as you explained for us,  
11 where you can choose to be the anonymous, I would say  
12 over 95 percent of people choose to remain anonymous,  
13 particularly people who are internal.

14                   Often what we find interesting is that  
15 people report and then they don't follow up. So it's  
16 like they get it off their chest, they say what they  
17 need to say, and then we write back to them and we  
18 never hear from them again. So they feel they have  
19 done their duty, so to speak, by going forward.

20                   The one thing for me, and I guess these  
21 are my personal views and I know that folks will feel  
22 differently about this, something you mentioned,  
23 Jordan, is we are very interested in what creates  
24 this culture of compliance obviously at the banks.

25                   And I think one of the most important

1 things you were speaking is to know your audience.  
2 So I'm going to flagrantly breach that go off into a  
3 different topic, because I know here we're really  
4 talking about financial compliance.

5 But our view, certainly my view, is  
6 what creates a culture of compliance is in ethics an  
7 organization and what can lead to some of these  
8 frauds in other management practices.

9 So the most helpful information we  
10 get -- and I'm happy to tell you that from what we  
11 can say there aren't major financial frauds happening  
12 at TD Bank on a daily basis -- is really management  
13 practices and conflicts of interest. I know the OSC  
14 very interested in this.

15 Conflicts of interest in terms of  
16 everything from cases of why I'm being delivered  
17 hedge funds at Christmastime, everything to the  
18 teller who served a client 50 years and they win the  
19 lottery and want to give half the money to that  
20 person. Most importantly, it's really the selection  
21 of services for the bank. So people who may have  
22 some relative at a software company and we want to  
23 buy that software information.

24 The reason I raise this is to say for  
25 me what's really important, and one of the things I

1 struggle with about not reporting internally first,  
2 is the idea that really financial crimes in that  
3 circumstance are receiving greater reward.

4 In other words, if you report sexual  
5 harassment you report all these other things which  
6 can be very serious for the bank and creates this  
7 overall culture of good behavior, and the idea that  
8 you need to report internally and have these  
9 discussions so that we can have a good culture  
10 without giving financial rewards and allowing people  
11 to go outside of that methodology really for  
12 financial crimes and the protections they receive in  
13 the role of doing it, there's something about it that  
14 I struggle with a little bit.

15 And so people remain anonymous -- I  
16 don't have an issue with people remaining anonymous.  
17 The issue I have is how we score those two things  
18 together.

19 MR. THOMAS: Commissioner, may I  
20 respond?

21 I agree, and I think many of us would  
22 agree that citizens should report wrongdoing. That's  
23 just what we should do. But one of the things I've  
24 learned from being in law enforcement and dealing  
25 with law enforcement people around the world is we're

1 pragmatic. We do what works.

2 Right now it's not working. People  
3 aren't speaking up enough. And there's a number of  
4 things that have been raised here and I think you  
5 should think about, because we thought about it at  
6 the SEC at the time.

7 One is every organization isn't built  
8 like the fine organizations that are represented  
9 here, okay, and so when you're trying to build out a  
10 regulation, how do you do it? And it would be great  
11 if you could just define what -- the policy,  
12 procedures and practices and put them in a check  
13 list. But what the problem of those things are --  
14 and I suggest the biggest problem is the culture, and  
15 there is no check list for culture.

16 MR. MOSELEY: Can I interrupt you --  
17 because I don't want to lose that point.

18 We've already acknowledged that one  
19 size fits all may be problematic. Could we deal  
20 specifically with and, therefore, what, acknowledging  
21 that that is the truth.

22 MR. THOMAS: Got it. 34 percent of  
23 people in the National Business Ethics Survey said  
24 they fear retaliation.

25 MR. MOSELEY: We know. Sorry. I want

1 to -- and therefore what? How do we design a  
2 whistleblower program, if there is going to be one,  
3 that takes account of these fact?

4 MR. THOMAS: The question you posed, as  
5 I understood it, was: Should we have internal  
6 reporting or not?

7 MR. MOSELEY: No, no -- sorry. Very  
8 clear. I think there are a few options -- couple  
9 options on the table. Should there be a requirement  
10 that employees report internally (inaudible) in order  
11 to get a reward, should there is no requirement, or  
12 can it be a factor taken in account in determining  
13 one.

14 MR. THOMAS: I understand. What I  
15 understand from the panelists is that their  
16 recommendation is that there is a requirement for --

17 MR. MOSELEY: I don't know about that.  
18 I want to come back to the panel on that question. I  
19 don't think we ever clearly -- so if you don't mind,  
20 I would like to do exactly that now.

21 MS. FUERST: Recognizing that one size  
22 does not fit all when we're talking about  
23 whistleblower programs, I don't recommend that you  
24 make it a hard and fast requirement. But I do think  
25 that it should be a consideration, criterion to be

1 considered in whether or not to grant an award to a  
2 whistleblower, not quantum, but in granting an award,  
3 whether there was in existence a robust whistleblower  
4 program in place at the institution involved that  
5 provided for anonymous reporting should be a factor,  
6 and if it was bypassed why was it bypassed. But that  
7 should be part of the equation, and I think that's  
8 the best way to balance the interest of all  
9 concerned.

10 MR. MOSELEY: Sheila?

11 MS. MURRAY: I absolutely agree. I  
12 think that if the OSC can make sure people are aware  
13 that it's encouraged about mandatory that they go  
14 internally, but that you will look at what was  
15 available to the employee. And really, this is only  
16 relevant to the employee complainant.

17 I think that investor complainants have  
18 many, many avenues to go to. They've got ombudsmen,  
19 they's got RO complaints here, they can go to IROC,  
20 they can go to other SROs. Really, I think we're  
21 talking about employees internal.

22 I think -- I agree with Linda. If  
23 there is a system in place they should have to  
24 explain why they chose not to. They need to be able  
25 to tell you at the OSC why they didn't.

1           They have to know that their financial  
2           compensation may be affected by their choice to go to  
3           you directly in a situation where maybe they could  
4           have gone somewhere else.

5           MR. MOSELEY: I think it's implicit in  
6           your comments, but let me check. We heard comments  
7           this morning about some of the challenges that the  
8           employee goes through in making a risk calculation,  
9           and that uncertainty in the prospect of a reward  
10          makes that risk calculation more complicated.

11          I infer from what you've said that  
12          though that your view of the balance is yes, that's  
13          true, but having this certain discretion in the  
14          program is kind of more important.

15          MS. MURRAY: I guess I'm encouraged by  
16          Jane's comments that a significant percentage comes  
17          forward -- 80 percent go ahead through their internal  
18          processes before coming to the SEC. So people want  
19          to do the right thing. And you'll also find not  
20          everybody is motivated by the money. They do want to  
21          do the right thing.

22          MS. CONDON: Marian?

23          MS. PASSMORE: I was going to say that  
24          the SEC program provides a greater conversation to  
25          the whistleblower if they go internally first and

1 then have to go to the SEC as a result of it not  
2 being dealt with appropriately internally.

3           And so that is the way you get  
4 encouragement: Use internal processes. If the  
5 whistleblower themselves determines that that's where  
6 they want to go but you're not mandating that that be  
7 done, and at the end of the day, the amount of the  
8 award, not whether they get one, is dependent on  
9 whether they went internally.

10           MR. LASCARIS: I second that. There's  
11 a big difference between placing the question of any  
12 award at all at risk and moderating the quantum. And  
13 we all, I think, seem to agree that there is a  
14 significant percentage of potential whistleblowing  
15 population that fears retaliation -- whether rightly  
16 or wrongly is kind of irrelevant, but that's what  
17 they believe. And if they are forced to report  
18 internally, they won't report.

19           And if you don't go quite that far, but  
20 you say we're going to potentially deprive you of any  
21 award at all if you don't report internally, it's  
22 effectively requiring them -- for in their minds a  
23 lot of people you are effectively requiring them,  
24 because they are not going to want to take that risk.

25           If you are going to do anything to



1     incentivize people to report internally, and there  
2     are some valid reasons to try to incentivize them to  
3     do that, you should focus on the quantum and still  
4     give them the opportunity to make -- to earn  
5     significant compensation even if they elect not to  
6     overcome their fears and they go --

7             MS. PASSMORE:  Also, because it really  
8     depends on the culture of the organization, the  
9     whistleblower is going to know what that culture is.  
10    They're in a good position to know that, and to know  
11    whether going internally is going to be worthwhile or  
12    not.  I think you have to take that in account for  
13    somebody to do something one way or the other.

14            MR. THOMAS:  Have you had a lot of  
15    organizations come in and admit they don't have  
16    robust policies and procedures?

17            Because our experience at the SEC,  
18    counsel regularly come in and say they have a great  
19    organization and policies and procedures and that  
20    they are robust.  And if the professor, in looking at  
21    this, has questions about the quality of that, how  
22    are the average employee going to assess that?

23            I have a different proposal that the  
24    Commission could consider, which is a sunseting  
25    provision.  Because we don't think this is an issue.

1 The ethics resource centre found that 90 percent or  
2 more reported internally, so it's even higher than  
3 the SEC's number. Some of the panelists have  
4 indicated that Canada is different, the cultures are  
5 even better.

6 MR. MOSELEY: Sorry, can I interrupt?  
7 Could I just ask a clarification?

8 Of the 90 percent who reported  
9 internally, do you know whether many of those  
10 reported anonymously and had their anonymity  
11 protected within the organization, that might be  
12 jeopardized for disclosure reasons under programs. I  
13 just want to make sure we understand the relevance.

14 MR. THOMAS: The way that the ERC  
15 looked at that was all internal reporting mechanisms,  
16 but significantly and surprisingly the hotlines were  
17 used very sparingly, like less than 10 percent. I  
18 want to say it was 6 percent.

19 And so -- but people are reporting. If  
20 you did a sunset provision with something like  
21 10 years or five years, because it takes two to four  
22 years for most investigations to happen, then you can  
23 look back, do surveys, tests whether their concerns  
24 are real.

25 But if you start with what's proposed

1 here, which is something that adds greater  
2 uncertainties for a whistleblower, I think you're  
3 going lose 34 percent or some equivalent number of  
4 people because they don't trust the organization,  
5 even if they are completely wrong. There's a trust  
6 problem between employers and employees.

7 MR. MOSELEY: I know Megan wanted to  
8 jump in on this topic. Do you want to add anything?

9 MS. TELFORD: I completely agree with  
10 the comments that Linda and -- articulated. I think  
11 this is the issue. We're coming from organizations  
12 where we slowly invested a lot of time and effort in  
13 this.

14 We're concerned about people delaying  
15 before they come forward. I know the statistics and  
16 whatever are easy to sort of show one way or the  
17 other, but I think it's the most respectful way to  
18 address what David was talking about, where you have  
19 situations where people are operating obviously  
20 fraudulent schemes in apartment buildings. It's just  
21 not obviously the business we're in.

22 I think for us, there is a cultural  
23 element where it should be taken into consideration  
24 if you're going to be respectful to the systems we're  
25 trying to build and support internally.

1 MS. FUERST: And if you want to  
2 incentivize other organizations to improve their  
3 internal reporting policies and compliance systems,  
4 that's the way to do it, by giving them credit where  
5 credit is due.

6 MS. MURRAY: Rather than have the  
7 smaller ones, the cost of compliance is extraordinary  
8 and costs of running our business get greater and  
9 greater every year because of the regulatory overlay.

10 You will find, I'm afraid, that some  
11 companies say leave it to the small company; okay,  
12 I'll leave it to these guys.

13 MR. THOMAS: You're getting credit in  
14 the enforcement process, aren't you, because if  
15 something is brought to the attention of OSC and the  
16 OSC finds misconduct, part of your -- you're going to  
17 ask for some level of adjustment because it was a  
18 rogue employee and you had great policies and  
19 procedures.

20 MS. MURRAY: Well, give specific credit  
21 to cooperation policy --

22 (Speaker overlap)

23 MR. MOSELEY: Let's pause there and  
24 come to that right next.

25 Christine, do you have any -- on the

1 work you've done, do you have any insight on this  
2 question as a requirement or a factor to be  
3 considered?

4 MS. WIEDMAN: I don't know of any  
5 research that specifically addresses this. I just  
6 can say again that perceptions of the employee affect  
7 whether or not they intend to report, and the  
8 retaliation and the perceived culture, whether they  
9 believe this would be dealt with fairly or unfairly  
10 is -- appears in the research to have a very big  
11 impact on whether they intend to report.

12 So I do agree with the comments that if  
13 you make the award contingent on reporting internally  
14 I think you will get significantly fewer  
15 whistleblowers reporting.

16 MR. PUGEN: Just a quick point, and I  
17 may have said in the general comments, I can't  
18 remember, but in other regimes where there is  
19 anti-retaliation there is no requirement to go  
20 internally first. For example, if you want to file a  
21 human rights compliant or a health and safety  
22 complaint.

23 But that was just changed for  
24 employment standards complaints. So the commission  
25 may want to consider the experience of the Ministry

1 of Labour where now certain complaints have to be  
2 brought to the employer first.

3 Now, these complaints may be a bit  
4 minor when compared to large scale corporate fraud,  
5 but the reason why they did this was because they had  
6 so many complaints and the underlying policy was,  
7 well, if the employer knew of them, some of these  
8 complaints can be dispatched with a bit of formal  
9 complaint to the Ministry.

10 So you have a recent experience in the  
11 last year where that changed, so there may be some  
12 helpful insight.

13 MR. MOSELEY: Thank you. Can we come  
14 back -- I don't want to lose the point -- Jordan's  
15 comment about certain credit for cooperation. I know  
16 Linda wanted to address this.

17 MS. FUERST: Under the current staff  
18 credit for cooperation policy here, credit is given  
19 in terms of, you know, possibility of a no-contest  
20 settlement or reduced penalties or other potential  
21 regulatory benefits on the basis that the  
22 organization promptly self-reports -- or  
23 self-polices, self-reports and then self-remediates  
24 any wrongdoing.

25 As it's currently drafted, the concern

1 is that the whistleblower program that doesn't  
2 encourage employees to report first is going to  
3 deprive organizations of the benefits of that credit  
4 for cooperation policy.

5 So one way to deal with that is, as I  
6 suggested, making the existence of a robust internal  
7 whistleblowing policy something that will be  
8 considered in terms of determining whether a  
9 whistleblower award should be made.

10 Another possibility would be to amend  
11 the credit for cooperation policy to specifically  
12 provide that organizations that promptly  
13 self-remediate, regardless of how the wrongdoing  
14 comes to the attention of the regulator, will get  
15 benefit for the credit for cooperation policy.

16 MS. CONDON: Thanks. Jane?

17 MS. NORBERG: I'm just trying to think  
18 long and hard about what you were saying about  
19 required to report internally or if you didn't report  
20 show -- tell why you didn't, if there was -- program  
21 in place.

22 I'm trying to figure out, though, how  
23 does that work with confidentiality? So if you're  
24 saying someone's required to report internally in  
25 order to even get an award, how would they prove it?

1 Let's just say they called hotline, they're  
2 anonymous, then they come to the OSC. What would  
3 they have to do to prove that they reported  
4 internally without the OSC having to come to you and  
5 say, John Smith gave us this whistleblower claim.  
6 Did John Smith file something? I'm just trying to  
7 figure out how this can possibly work.

8 MS. FUERST: I'm not saying it should  
9 be a requirement. I'm just saying it should be a  
10 factor whether or not the whistleblower first  
11 reported internally and whether there was good reason  
12 for why they did not, particularly in the face of a  
13 robust, well-developed whistleblower program of the  
14 type that TD and CI have in effect.

15 MR. MOSELEY: Is your question, though,  
16 Jane, how the whistleblower will be able to  
17 demonstrate that he or she did report internally?

18 MS. NORBERG: Yes, I suspect --

19 (Speaker overlap)

20 MR. MOSELEY: -- it wouldn't be  
21 possible. (Inaudible) hotline, whatever, is  
22 administered, but even if people who call anonymously  
23 will have --

24 (Speaker overlap)

25 MR. THOMAS: At the SEC we give credit



1 to people, organizations, even when there is a  
2 whistleblower. And one of the concerns expressed by  
3 some of the corporate counsel here were basically  
4 being deprived of the ability to protect current  
5 investors during the course of the investigation, and  
6 also insights into their organization.

7 And the experience at the SEC while I  
8 was there, and I suspect is continuing, is that the  
9 SEC does -- it asks organizations sometimes, or gives  
10 them the opportunity to do their own investigation.  
11 Not always. They use their discretion to oversee the  
12 process. And I don't expect that would change if  
13 that's a practice here.

14 MS. MURRAY: That was going to be one  
15 of my questions for you, Jane. How quickly, if you  
16 get a complaint, you triage it and determine that  
17 there is some merit to this and there is something  
18 specific and serious, at what point would you engage  
19 with the corporation to let them know and let them  
20 start to deal and basically mitigate the damages?

21 MS. NORBERG: I think it varies. I  
22 think it depends on you, the company, and what is  
23 being alleged. I couldn't tell you a specific time  
24 line.

25 MR. HAUSMAN: Obviously you can hear a

1 consensus building around what Linda said. I think  
2 it makes a lot of sense.

3 To my mind, the problem -- only problem  
4 is you'd have to be very careful how you draft the  
5 policy, because sometimes there's this factor stuff  
6 in which the -- you've got, like, A through H as  
7 factors and none seems to predominate over the other  
8 (inaudible) any other factors to be relevant.

9 In other words, you have be able to  
10 build expectations as to what that actually means.  
11 Sometimes I have trouble with the cooperation policy  
12 in that regard because things that -- like forms like  
13 these are considered to be important factors, how  
14 does it meld in with many, many others and it's  
15 really difficult to determine how it's interpreted.

16 So I think that internal reporting  
17 ought to be a factor. Where appropriate, it ought to  
18 be a very important factor. In some cases it can't  
19 be a factor at all because there's nowhere to report  
20 to. Some person just telling on some other person,  
21 so it's just not a factor at all.

22 MR. LASCARIS: I just want to be clear,  
23 I don't agree with --

24 (Speaker overlap)

25 MR. LASCARIS: I don't think that you

1 should be at risk of being deprived at any reward at  
2 all. I think that should be at the option of the  
3 whistleblower. And if that person has a fear of  
4 retaliation, whether justified or not, they should be  
5 able to go outside without any adverse consequences.

6 (Speaker overlap)

7 MS. MURRAY: -- in one of the  
8 discussion points is whether the anti-retaliation  
9 provisions should apply regardless of whether you go  
10 to the SEC directly or -- I think that there is  
11 consensus around the table on at least one thing, and  
12 that is that no employee should be disadvantaged for  
13 coming forward with a good faith complaint. And I  
14 think we would all agree with that. And I do, by the  
15 way, think you need to put good faith in there.

16 We do have some people who try and  
17 raise complaints just to save their jobs, because we  
18 have the anti-retaliation and anti-discipline  
19 provisions, and you will get a rogue employee trying  
20 to secure employment by making a complaint to our  
21 chair of the board.

22 But I think we do all agree that  
23 anti-retaliation is an absolutely fundamental  
24 component of this. If you want someone to come  
25 forward they have to -- they are not going to be

1       disciplined, they are not going to be terminated.

2               MR. THOMAS: I agree.

3               MR. MOSELEY: I'll pause. Turn it over  
4 to you.

5               MS. CONDON: This is a pause, and it's  
6 changing the conversation a little bit.

7               I know we only have a couple more  
8 minutes, but one of the issues that hasn't really  
9 come to the surface in the discussion at all, and  
10 maybe it's because there's a consensus about it, is  
11 the issue of eligibility for an award if you are, to  
12 some degree, culpable in the behaviour. That was  
13 something that was definitely raised in the  
14 consultation paper for discussion.

15              And the comments, as I read them,  
16 seemed to suggest a general agreement with the  
17 proposition that depending on the level of  
18 culpability it was not inappropriate that someone  
19 would be able to access a whistleblower award if they  
20 came forward at the end of the day.

21              So I just wanted to take the  
22 temperature of the group on that issue in the last  
23 couple of minutes.

24              MS. FUERST: I will be very brief and  
25 tell you it is, of course, going to depend on the

1 circumstances, but I feel that the combination of  
2 confidentiality, anti-retaliation and financial  
3 reward, the trifecta of this, could encourage the  
4 culpable actor possibly to sit on something a little  
5 longer, no fear of retaliation really, because he's  
6 protected, he or she.

7           And I look more specifically at the  
8 rogue dealer, the rogue advisor, who -- hopefully  
9 there are no advisors in the room.

10           I will say that that's the largest  
11 vulnerability for large financial institutions. It's  
12 the most -- they have direct contact with investors,  
13 and investors are vulnerable to them. The rogue  
14 dealer is -- if that rogue dealer is culpable and is  
15 engaged in nefarious wrongdoing against vulnerable  
16 clients and chooses to sit on that and then blow the  
17 whistle to get some money -- well, by the way, the  
18 financial institution that employs them is  
19 vicariously liable and will be making full  
20 restitution to that employee, I see that as a real  
21 problem. And we can't retaliate and get back at  
22 them.

23           So the culpable actor -- I would say at  
24 the very least the culpable actor should not get the  
25 benefit of the anti-retaliation and

1 anti-disciplinary, I don't believe. And I think that  
2 there should be some sage wisdom coming from you as  
3 an independent tribunal as to whether or not the  
4 culpable actor should be entitled to compensation. I  
5 don't think in every situation they should be.

6 MR. MOSELEY: Do we have any experience  
7 from the SEC on whether this fear that Sheila  
8 identified has come to pass, that people stand by and  
9 wait?

10 MS. NORBERG: So at the SEC we do pay  
11 culpable whistleblowers, and I think the thinking  
12 around that is that sometimes you need a little fish  
13 to get to the big fish, so that is why we do pay  
14 culpable whistleblowers.

15 That being said, there are protections  
16 built into our rules that, in some instances, the  
17 culpable whistleblower will not be paid, and that is  
18 if they are criminally convicted of the same  
19 wrongdoing that they bring to us, then they are  
20 barred from receiving the whistleblower award.

21 And if they are main actor in the  
22 misconduct and they are -- let's say they are fined  
23 as well, then that does not go into the dollar amount  
24 to get it over the million dollar threshold.

25 In addition, culpability is a factor

1 that may decrease an award. So that is the way we  
2 look at it.

3 But the one thing I wanted to mention  
4 is when you talk about culpable whistleblowers being  
5 protected from retaliation, I don't know if it's  
6 different here in Canada, but I wouldn't view a  
7 culpable whistleblower as being protected from  
8 retaliation. Because if you have committed a crime  
9 or wrongdoing within your company I would think that  
10 the company can certainly take action against you,  
11 and can certainly prove that it's not because you're  
12 a whistleblower but because you have committed this  
13 wrongdoing. So I think you can really separate those  
14 two out.

15 MR. THOMAS: There's a practical thing  
16 that's not being said.

17 Whistleblowers, because under the SEC  
18 whistleblower program, can't get paid for misconduct  
19 they have led. So basically let's say there's a  
20 \$5 million scheme, 2 million they were involved with  
21 in some way. 2 million gets excluded, the 10 to  
22 30 percent, but also the fees can't be paid for. So  
23 they are left with this \$3 million.

24 But these whistleblowers have to make a  
25 big choice, because low level people, they don't have

1 a big concern. Like, the secretary for a bad guy who  
2 might have delivered the mail for somebody is not  
3 worried being culpable.

4 The most senior people have great  
5 concerns because there's no immunity under the SEC  
6 whistleblower program. So the most culpable people,  
7 the kind of person you are describing, if he came to  
8 a counsel, we would say, you should not go to the SEC  
9 or the OSC because they are likely to refer or take  
10 action against you for doing this.

11 So really the challenge is for the  
12 middle people. The most culpable are not going to  
13 play in the program. The minor people, no one would  
14 bring libel.

15 It's for those people, they have to  
16 navigate how significant was their involvement and  
17 whether the risk of being -- case brought against  
18 them as far as the reward.

19 So there's a natural kind of regulator  
20 to keep the bad guys who are receiving money that's  
21 beyond what the SEC would not take away from them  
22 monetarily, and the timing is part of -- baked into  
23 the criteria.

24 In fact, one of the awards, the largest  
25 award to date, they made a point of saying you would



1 have got a much bigger award if you didn't delay.

2 MS. NORBERG: Delay is absolutely a  
3 factor that can decrease an award, absolutely, and  
4 we've done it on multiple occasions.

5 MS. CONDON: All right. I think we  
6 have to close the discussion there. We're slightly  
7 over our deadline of noon.

8 So two big thank yous on behalf of my  
9 colleagues and myself on the one hand. Thank you to  
10 our very expert and distinguished panelists for  
11 giving the benefit of their time and their insight  
12 and the thoughtfulness with which they prepared their  
13 interventions this morning. We feel that we have  
14 learned a lot and there are many more sophisticated  
15 issues to think about now. So we thank you for that.

16 And the other thank you, of course, on  
17 behalf of my fellow commissioners and myself is to  
18 the staff of the enforcement branch for putting this  
19 roundtable together, their work in preparing the  
20 consultation paper in the first place and in  
21 orchestrating the conversation that we've had this  
22 morning.

23 We can undertake that we'll take all of  
24 the comments and the interventions we've heard very  
25 seriously and use them to think about having to move

1 forward. Thank you all very much for coming this  
2 morning.

3 --- Whereupon at 12:03 p.m. the proceedings were  
4 concluded.

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This is to hereby certify

10

that the forgoing is a

11

true and accurate transcript

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of the proceedings to the best

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of my skill and ability.

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Sandra Brereton

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Certified Court Reporter

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Registered Professional Reporter

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