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John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West, Box 1903
Toronto, ON M5H 3S8

Dear Mr. Stevenson,

Re: Proposed Whistleblower Program – Consultation Paper 15-401

This letter constitutes McBride, Bond Christian LLP's submission on the Commission's Consultation Paper 15-401: Proposed Framework for an OSC Whistleblower Program ("Whistleblower Program").

I. Introduction

McBride Bond Christian LLP is an Ottawa-based law firm. Our Financial Advisory Group is led by John Hollander and Harold Geller. Both have served on versions of the OSC's Investor Advisory Panel.

We act for investors and advisors in litigation and regulatory matters. Our work is not limited to the IIROC and MFDA silos. We also work with investment counsel/portfolio managers and with investors in life insurance products, with life agents and with Managing General Agencies.

To inform our views in preparing this submission, we reviewed literature from several sources. We also met with and discussed the OSC's proposals with non-partisan industry experts who have experience with assisting potential whistleblowers and whistleblowers.

We consider the creation of a whistleblowing program, such as proposed by OSC Staff is in the best interests of investors in Ontario. We submit several recommendations to improve the proposal.

II. Proposed Whistleblower Program

The February 3, 2015 proposal would greatly improve market efficiency and protect Ontario investors. It contains excellent summaries of

- The problems that should be addressed by a potential whistleblowing program
- Past attempts at addressing these problems
- Options pursued by other jurisdictions

We support the basis for the Whistleblower Program. Whistleblowers provide essential and timely information with respect to Securities Act violations. Often, whistleblowers are insiders

who have unique and critical information on wrongdoings by industry participants. This information is often kept secret from those who could – and should – put a stop to such misconduct. Investment misconduct often occurs in circumstances shrouded in secrecy augmented by trusted relationships.

But for a whistleblower, the secretive nature of the wrongdoing might never be discovered, or only after further harm is caused. Violations of securities law not only causes harm to investors, it also impedes the efficiency of capital markets. This risk is significant. The countervailing argument to the Whistleblower Program appears to be based on a denial of unequivocal evidence that some registrants have failed to report misconduct in the past, as opposed to protecting investors or market efficiency.

III. 'Ethical' Issues with Whistleblowing

We support the OSC's proposition that the Whistleblower Program is an essential tool to assist the regulator to identify and investigate the violation of securities law. Measures such as this encourage early intervention – thus limiting harm to Ontario's investors. The Program motivates registrants to self-report misconduct. While no such motivation should be needed, experience proves its need. For those registrants who already make reports, there is no downside to this proposal, in our view.

In the Whistleblower Program, OSC staff identifies the industry's 'ethical' concerns:

- Many whistleblowers are guilty of participation in the very acts which they report.
- In Ontario, the Security Act licensing system obliges self-reporting and already encourages reporting of misconduct within the dealer.

These ethical concerns fail to accept actual experience. In our submission, actual experience should win out – otherwise the debate is not about protecting investors. Many whistleblowers will have to make significant self-sacrifices even with the protection proposed in the Whistleblowing Program. The Program merely attempts to align interests and mitigate this sacrifice.

We unequivocally support active compliance programs and enforcement actions against wrongdoers. Actual experience calls for a proactive program to stop misconduct. The ethical dilemma inherent in rewarding wrong-doing whistleblowers is just a necessary cost of accomplishing the more important goal of investor protection and market integrity. Prevention and disclosure of misconduct (consumer protection) must take precedence.

III. Specific Recommendations

Whistleblower Eligibility

As presented in the Proposal, whistleblower eligibility criteria appear to be in the early drafting stage. We support the creation of a fair and transparent process. Thus our recommendations will be presented briefly for identification purposes:

1. Most whistleblowers will be individuals in the industry. However, those who may perform "independent analysis" should also qualify for this program. There is no reason to bar the work of a group where the OSC's enforcement is improved through such data collection and reports. This part of the proposal should be extended.

2. The criteria set out in section 5.1 are a good starting place. However, they remain unclear. What is "serious misconduct"? A minor harm to many investors may be serious. Is there a dollar threshold to qualify as "serious"? Confusion arises from the absence of a definition of "serious misconduct" in the Proposal. It is not sufficient to allow OSC Staff, on a discretionary basis, to rely solely on their own subjective evaluation of what is "serious" without explicit guiding rules. Seriousness should be directly correlated to the risk of harm to investors. This may have been the intention of the focus item "misconduct that poses particularly significant risk for investors" or it may include IAs and IRs in the focus item "misconduct by persons occupying positions of substantial authority, responsibility or influence or who have a fiduciary or other enhanced obligations". Both definitions lack clarity.

3. The "Examples of Misconduct" listed do not provide much guidance. There is no explanation of the distinction between "misconduct" and "serious misconduct".

4. The discussion of culpability of whistleblowers is troubling. As noted above, giving a break to wrongdoers may be a necessary compromise to mitigate on-going harm as a result of past practices. The "duty to warn" investors by registrants is supported by the proposed whistleblower protection; some registrants have failed to warn investors of misconduct which may have caused harm, despite the registrants knowing of such harm or potential harm.

Our proposals

- We propose an alternative dual trigger for eligibility to be treated as a whistleblower under the Program. The mere report of a "serious" misconduct should trigger the protection (herein "WB Protection"). The financial incentives should be triggered by commencement of enforcement actions (herein "WB Compensation").

- All whistleblowing reports by dealer's compliance department staff should be considered for WB Protection but only on the basis of OSC Staff discretion. There is no reason to deny WB Protection to members of this group if they show that were unable to effect change internally. Perhaps they uncovered potential misconduct by their superiors. Further consideration is necessary, whether this group should be eligible for WB Compensation.

- Should dealer staff be obliged to report internally before they seek protection as a whistleblower? No. While internal reporting continues to be encouraged, the fear of retribution after such a report is a known and significant risk. This fear will deter the reporting of serious misconduct, thus harming both markets and investors. Extending WB Protection to those who have not reported internally would circumvent that outcome.

Financial Incentive

1. We are troubled by the limits (caps) placed on financial incentives. We recognize that a challenge arises in funding these.

Our proposal

- We propose a removal of the hard cap and favour a compensation scheme with two thresholds to address the goal encouraging reports against both financially stable and unstable registrants:
    - First, there should be a cap on basic WB Compensation.
    - Second, there should be additional WB Compensation if and when funds are collected from wrongdoers.

2. Compliance Department Staff should be included in this program on a discretionary basis. A prior requirement may be that WB Compensation only be offered if there is evidence of an attempt to resolve the issue internally unless superiors at the registrant are implicated. It should be rare indeed when a CCO would qualify. On the other hand, compliance officers are well placed to uncover serious misconduct as well as systemic misconduct. Dealer compliance staff is exposed to potential retribution for doing the right thing so they should receive the proposed WB Protection and, in some cases, WB Compensation.

3. Internal Reporting is an important issue. Past efforts to encourage internal whistleblowing have been highly problematic. While such reports have worked in some cases, there are troubling cases when such disclosures have resulted in

    - Retribution by the dealer.
    - Failure of the dealer to fairly address the allegations.
    - Outright failure to report to the OSC.

    We are aware of no reliable empirical evidence of the extent of these troubling cases. Lawyers within the industry have experience with these failures – examples known to the authors raises serious concerns.

4. The time frame from internal report to OSC report in the Proposal is 120 days. To be practical, this is insufficient. Internal report should not be discouraged. If successful in

triggering appropriate dealer response, this process could easily take more than a year. Thus, the industry may have good suggestions as to a more appropriate time frame. The significant countervailing concern is a dealer's failure to warn at-risk investors upon uncovering suspicion of misconduct. The OSC will have to weigh the hope that responsible dealers will act promptly to investigate and report (as well as fulfil a duty to warn those potentially harmed or actually harmed) versus the process delay/rejection likely in less responsible and responsive dealers. We suggest that 120 days be extendable on a discretionary basis with clear guidelines. Another consideration is the dealer's incentive to delay possible claims to create Limitations Act defences.

Confidentiality

1. Confidentiality is the cornerstone of any whistleblowing program. The current proposal offers significantly greater confidentiality protection to whistleblowers who are sophisticated than it does to those who are not. Sophisticated whistleblowers will use a lawyer as an intermediary to conduct all dealings with the OSC until whistleblowing protection is extended to that specific whistleblower. On the other hand, anyone leaving a message or contacting a hotline will risk loss of confidentiality from that initial contact without understanding the implications. This is unfair and prejudicial to unsophisticated potential whistleblowers.

Our proposal

- We recommend that all reports be treated as confidential until the OSC fully informs the potential whistleblowers of the consequences of a direct report. A better policy would provide that initial reports be received by an arms' length office and only passed to the OSC when the eligibility criteria for the whistleblower protections have been approved by the OSC. This would address the inequity between sophisticated and unsophisticated whistleblowers. Alternately, a panel of lawyers could provide initial advice as a pre-requisite to the OSC accepting a whistleblower report. Compensation of the panel is an issue for further consideration if this option is explored.

2. The OSC has identified issues with the receipt of whistleblower reports to SROs (IIROC and MFDA) and other third parties. Both IIROC and the MFDA have notional whistleblower policies, but they lack the confidentiality protection proposed by the OSC. Their regimes provide inferior protections and lack compensation. There is great concern that some whistleblowing reports to these SROs have resulted in action only against the representatives despite compelling evidence of either active participation or condonation by the dealer.

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Our proposal

- The OSC's Whistleblowing Program should not risk the confidentiality of the whistleblower as a result of sharing information received under the Program either with SROs or other third parties, unless the same protections offered by the OSC are extended to the whistleblower by the party receiving the information.

- We urge to the OSC to bring the CSA's attention to the problems with the SROs' whistleblowing programs and urge the CSA to require the SROs to adopt a program similar to that of the OSC. There is a real possibility that whistleblowing reports might involve FSCO or Canada Revenue Agency, as examples. Sharing the whistleblower's information would improve compliance and enforcement, but without similar protections, as those proposed in the Whistleblowing Program, such sharing would put the whistleblower at greater risk. For example, the MFDA has no similar protections for whistleblowers and sharing of information by the OSC about the whistleblower would negate the OSC protection offered to the OSC's whistleblower.

Whistleblower Protections

1. Given the possibility of retaliation, the OSC financial compensation cap should be enhanced to provide significant incentive for reporting. This is a key reason for recommending the dual threshold for Whistleblower Compensation. According to some industry experts, dealer staff and advisors put their careers at risk by reporting misconduct; careers worth substantial sums annually.

2. The existence of contractual and dealer policy provisions which discourage reports of misconduct are also of great concern. Any discouragement of whistleblowing reports should result in harsh sanctions as against the dealer. Any registrant who has contracts, policies, or otherwise attempts to discourage whistleblowing to the OSC or SROs should be sanctioned for acting unfairly and dishonestly. Such discouragement is currently found in some representative contracts and dealers' policy and procedure manuals, directives and notices.

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Conclusion

We support the OSC's Whistleblowing Proposal. It will reduce harm to investors. In pursuing this proposal, the OSC has taken a step forward in its primary obligation to protect Ontario's investors.

Yours truly

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McBride Bond Christian LLP