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Delivered By Email: comments@osc.gov.on.ca

May 1, 2015

Dear Sirs/Mesdames:

Re: OSC Staff Consultation Paper 15-401 – Proposed Framework for an OSC Whistleblower Program

We are pleased to offer our comments on the Proposed Framework for an OSC Whistleblower Program.

By way of background, Siskinds LLP is a leading securities class action firm that acts exclusively for plaintiffs. Since 2004, we have been plaintiffs' counsel in 49 actions under Parts XXIII and XXIII.1 of the Ontario *Securities Act* (the "***OSA***"). In the course of prosecuting these actions, we have interacted with dozens of whistleblowers involving a broad array of reporting issuers in Canada.

In our view, the proposed Whistleblower Program, if properly implemented, will assist investors and the OSC by facilitating transparency in the capital markets and furthering the goals of the *OSA*. The international experience with whistleblower programs indicates that corporate insiders and others will come forward to reveal misconduct if they have a reasonable prospect of securing adequate compensation for the substantial personal risks to which whistleblowers are often exposed.

Accordingly, we endorse the OSC's proposed Whistleblower Program, with certain enhancements outlined below.

Whistleblowers Face Severe Personal and Financial Challenges

In our work on behalf of investors, we routinely interact with whistleblowers.

Generally, these whistleblowers are reluctant to report corporate misconduct if doing so might entail the disclosure of their identities to the board or senior management of the reporting issuer. This is understandable, as many whistleblowers have paid a heavy personal and professional price for bringing their employers' malfeasance to light. If Ontario is interested in ensuring that whistleblowers report misconduct, there must be proper incentives to compensate whistleblowers for the risks to which they expose themselves and their families when they choose to step forward. In the absence of such compensation, whistleblowers are

confronted by a classic 'free rider' dilemma: whistleblowers assume the risks discussed below while others, principally the shareholders of the reporting issuer, yield the benefits of the corporate malfeasance being brought to an end.

Monetary compensation is not only a just reward for integrity, but it is also necessary to induce the whistleblower to assume the three major risks that whistleblowers face. Each such risk alone is a substantial deterrent to reporting; the Whistleblower Program must address all of them to be successful.

First, whistleblowers face **legal retaliation**. Employers can commence groundless claims on the ostensible basis that the disclosure of corporate malfeasance violates a confidentiality obligation. The cost of prosecuting such a claim may be immaterial to a reporting issuer, but the cost of defending it is often devastating to an individual.

Second, whistleblowers face **reputational retaliation**. Some employers will seek to discredit whistleblowers in the public domain, using their considerable public relations resources to destroy whistleblowers' personal and professional reputations.

Third, whistleblowers face **financial retaliation**. Not only will they be dismissed from their current employment (a virtual certainty, given the historical record), but they are often unable to find future employment, as companies will be reluctant to hire a "troublemaker" for whom the previous employer is unwilling to provide a positive reference. Thus, they risk being "blackballed" by the entire industry and never finding employment in their field.

These three concerns constitute a substantial barrier to reporting. They are not hypothetical—examples of whistleblowers paying a heavy personal price for exposing corporate misconduct abound.

One such example is Michael Winston, who reported to regulators alleged misconduct at Countrywide Financial, the mortgage lender, in connection with its lending practices. Mr. Winston's disclosures were the basis for a documentary and led to Senate hearings and ultimately spurred new legislation to combat financial corruption. Despite his substantial contributions to the stability of the capital markets, Mr. Winston now considers himself "unemployable," is worried about supporting his family and is embroiled in costly litigation with his former employer.[1]

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[1] Matt Taibbi, "A Whistleblower's Horror Story" *Rolling Stone* (18 February 2015), online: Rolling Stone <http://www.rollingstone.com/politics/news/a-whistleblowers-horror-story-20150218>.

Similarly, Richard M. Bowen III reports that he repeatedly warned the management of Citibank about "critical" credit risks assumed by the bank. He stated that he even sent an email to a group of Citigroup executives, including Robert E. Rubin, a former Treasury secretary who was then chairman of the bank's executive committee, reporting on "the breakdowns in internal controls and resulting significant but possibly unrecognized financial losses." He alleges that his warnings were ignored, and that he was dismissed from the company. The *New York Times* called the treatment accorded to Mr. Bowen "seemingly appalling."[2] Mr. Bowen's story illustrates another reason that whistleblowers are crucial to the regulation of capital markets. While corporations increasingly adopt internal reporting procedures, these are often ineffectual, and legitimate employee concerns are often ignored.

Another example is Carmen Segarra, a lawyer who was employed by the Federal Reserve Bank of New York as a "bank examiner" – a representative of the Federal Reserve that attends at a regulated bank's premises to monitor its performance. According to media reports, as part of her duties, Ms. Segarra raised serious concerns about Goldman Sachs, one of the banks regulated by the Federal Reserve. Ms. Segarra alleges that, despite raising her concerns, she was repeatedly ignored by supervisors who valued internal consensus above all else. She was eventually terminated. Ms. Segarra is suing the Federal Reserve Bank of New York for wrongful termination.[3]

Many other examples have been reported in the media. Paul Moore, a whistleblower and former manager at the UK bank HBOS, allegedly lost his job after correctly warning of the excessive risk taken on by the bank.[4] John Kim, a top staffer at the World Bank, exposed alleged wrongdoing at the organization. He was put on administrative leave and then dismissed.[5] Hervè Falciani, a former HSBC employee who reported the bank's practices to French authorities is now being prosecuted in Switzerland for revealing bank secrets and is

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[2] William D. Cohan, "Was This Whistle-Blower Muzzled?" *New York Times* (21 September 2013), online: The New York Times Company <http://www.nytimes.com/2013/09/22/opinion/sunday/was-this-whistle-blower-muzzled.html?pagewanted=all&_r=0>.

[3] Chicago Public Media and Ira Glass, "536: The Secret Recordings of Carmen Segarra Transcript" *This American Life from WBEZ* (26 September 2014), online: Chicago Public Media <http://www.thisamericanlife.org/radio-archives/episode/536/transcript>.

[4] Robert Peston, "Why Sir James Crosby Resigned" *Peston's Picks* (11 February 2009), online: The BBC <http://www.bbc.co.uk/blogs/legacy/thereporters/robertpeston/2009/02/why_crosby_resigned.html>.

[5] Richard Behar, "The Fate of A World Bank Whistle-Blower" *Forbes Business* (27 June 2012), online: Forbes.com LLC <http://www.forbes.com/sites/richardbehar/2012/06/27/the-sad-fate-of-a-world-bank-whistle-blower/>.

living under the protection of the French authorities. In his own words, he is "paying a price that is unfair" for exposing banking misconduct.[6]

Empirical research indicates the above examples are consistent with the broad trends in the financial industry. A British study which reviewed the files of 1,000 workers who approached a whistleblowing helpline for advice found that three out of four whistleblowers who had raised concerns with their managers had their concerns ignored. Cathy James, the chief executive of the charity Public Concern at Work, which runs the helpline, observed that the study demonstrated why "speaking up in the workplace may seem futile or dangerous to many individuals. They [employers] are still shooting the messenger and overlooking crucial opportunities to address concerns quickly and effectively."[7]

While it is true that some individuals have come forward to expose misconduct with no reasonable prospect of compensation (save for the satisfaction of having acted ethically), a society that is serious about ensuring fair and efficient capital markets cannot depend on individual heroism to expose corporate malfeasance and help protect the rights of investors. It has to do more.

This is particularly true in a society where enforcement resources are constrained. A regulator who is investigating potential misconduct but who does not have the guidance of a whistleblower is often searching for the proverbial needle in a haystack, and often must examine a large body of potentially relevant evidence in order to identify a few pieces of evidence that are critical to proving malfeasance. However, whistleblowers often know what evidence exists to prove the fraud and can direct regulators to that evidence, and sometimes furnish that evidence themselves to the regulator. Whistleblowers can also assist regulators to connect the dots, or to fill in the gaps in a disjointed or incomplete documentary record. All of this results in a lower expenditure of scarce investigative and prosecutorial resources.

Case study in the failure of internal reporting mechanisms

The events surrounding the attempts made by Alayne Fleischmann to bring corporate wrongdoing to the attention of her employer provide a helpful case study in the failure of internal control mechanisms, even at the world's largest financial institutions. Fleischmann worked for JP Morgan as a transaction manager. She alleges that she had attempted,

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[6]Stefano Pozzebon, "HSBC Whistle-Blower: You have to know how banks work to understand the size of this scandal" *Business Insider* (20 February 2015), online: Business Insider Inc. <http://www.businessinsider.com/interview-with-herv-falciani-hsbc-2015-2>.

[7] Rajeev Syal, "Whistleblowers' claims of wrongdoing being ignored" *The Guardian* (May 14, 2013), online: The Guardian <http://www.theguardian.com/business/2013/may/14/whistleblowers-claims-ignored>.

repeatedly, to warn her bosses that the quality of the loans the bank was buying, securitizing and selling to investors was substantially poorer than the bank's own disclosure suggested. In her words, permitting the bank to mislead the investors as to the quality of the loans it was securitizing was "like watching an old lady get mugged on the street . . . I [could not] sit by any longer."[8]

Her concerns were ignored.[9] Despite her concerns, management pressured Fleischmann and others to carry on business as usual, and intimidated them from raising further concerns. Fleischmann and her colleagues were explicitly told *not* to share their concerns with their supervisor by e-mail, presumably to avoid creating a "paper trail." On December 15, 2006, Fleischmann raised her concerns with Greg Boester, a managing director. She was ignored. In early 2007, Fleischmann sent a long e-mail memorandum to another managing director, William Buell. The e-mail warned Buell of the consequences of reselling the bad loans as securities and gave detailed descriptions of the breakdowns in the bank's diligence process. She was ignored. The bank continued to sell securitized loans without properly disclosing the poor quality of the assets in the pool to investors. In February 2008, Fleischmann was laid off from JP Morgan.[10]

Fleischmann's memorandum was eventually obtained by the U.S. Department of Justice, which subpoenaed her to testify against the bank. Fleischmann noted in a later interview that, as her role as a whistleblower became public, she "watched [her] job possibilities evaporate." She added: "I could be sued into bankruptcy. I could lose my licence to practice law. I could lose everything."[11] She stated that the assumption employers like hers make is that "[she] won't blow up [her] life" to report corporate misconduct, and keep quiet.[12] She is currently unemployed. Fleischmann will not be compensated as a whistleblower, because the SEC's whistleblower program was not in operation at the time she uncovered the alleged

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[8] Fairfax Media, "Alayne Fleischmann: The woman who cost JPMorgan $US9 billion" *Sydney Morning Herald* (8 November 2014), online: Fairfax Media <http://www.smh.com.au/business/world-business/alayne-fleischmann-the-woman-who-cost-jpmorgan-us9-billion-20141108-11izmz.html>.

[9] The allegations concerning Alayne Fleischmann emerge from media reports on the matter.

[10] Krysia Collyer, "Canadian Whistleblower's Testimony Leads to Multi-Billion Dollar Settlement" *Global News* (20 February 2015), online: Shaw Media Inc. <http://globalnews.ca/news/1841103/canadian-whistleblowers-testimony-leads-to-multi-billion-dollar-settlement/>; Kira Brekke, "Matt Taibbi and JPMorgan Chase Whistleblower Explain $9 Billion Cover-Up (Video)" *HuffPost Live* (7 November 2014), online: TheHuffingtonPost.com, Inc. <http://www.huffingtonpost.com/2014/11/07/matt-taibbi-jpmorgan-chase-alayne-fleischmann_n_6124186.html>; Matt Taibbi, "The $9 Billion Witness: Meet JPMorgan Chase's worst nightmare" *Rolling Stone* (6 November 2014), online: Rolling Stone <http://www.rollingstone.com/politics/news/the-9-billion-witness-20141106?page=2>.

[11] Fairfax Media, *supra.*

[12] Matt Taibbi, "The $9 Billion Witness," *supra.*

wrongdoing. As a leading U.S. whistleblower attorney observed, had the whistleblower program been in operation, and had Fleischmann made use of it, she would have likely received a percentage of the fine JP Morgan ultimately agreed to pay to the regulators, and her job would have been protected.[13]

In the absence of compensation, and faced with indifference or retaliation for raising the matter internally, a prospective whistleblower is justified in asking why she should place her family's livelihood, savings and reputation at considerable risk by coming forward to expose corporate misconduct to the regulators. For these reasons, a Whistleblower Program that would provide a degree of compensation for assuming such risks is both timely and vital to ensure the integrity of Canadian capital markets.

Proposed Changes to the Draft Framework

Siskinds LLP proposes the following changes to the draft Framework to further encourage whistleblowers, facing substantial personal risk, to come forward.

Financial Incentive

Currently, the financial incentive is proposed to be capped at 15%, up to a maximum limit of $1.5 million.[14] In our view, this financial incentive is inadequate to properly compensate whistleblowers and will thus fall short of its intended goal.

In our experience, individuals with valuable information concerning corporate wrongdoing tend to be senior employees or executive officers, often with substantial compensation packages. As discussed above, in alerting the regulators, these individuals face severe risks, including dismissal, legal action and reputational damage. They may never work again in their field. If such individuals put their jobs and reputations on the line, the whistleblowing program must enable them to recover an award that would compensate them for at least a substantial portion of the earnings they will forego as a result of blowing the whistle.

Programs that provide appropriate compensation to whistleblowers have been successful in the United States. Former Attorney General Eric Holder, speaking at the 25th anniversary of the *False Claims Act* amendments, which enhanced whistleblower protections for individuals

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[13] Jordan Thomas, chair of the whistleblower representation practice at Labaton Sucharow, quoted at: "SEC Whistleblower Program Gaining Steam, But Too Late for Alayne Fleischmann" *Value Walk* (18 November 2014), online: Valuewalk.com <http://www.valuewalk.com/2014/11/sec-whistleblower-program-3/>.

[14] OSC Staff Consultation Paper 15-401, Proposed Framework for an OSC Whistleblower Program, section 6.1 ("OSC Consultation Paper").

reporting fraud against the government, called the impact of the whistleblowing legislation "nothing short of profound."[15] The SEC's whistleblowing program, which in September 2013 provided a $14 million award to an anonymous whistleblower,[16] has, according to SEC's Chair Mary Jo White, "had a significant impact on [SEC] investigations."[17] She further noted that tips from whistleblowers have helped SEC's Enforcement Division identify more possible fraud and to do so earlier than would otherwise have been possible. Similarly, the SEC's Associate Director of Enforcement Steve Cohen has observed that the introduction of a whistleblower program "clearly turbocharge[d]" SEC's enforcement program.[18] Finally, former SEC Chair Mary Schapiro has recently stated that SEC's whistleblower program has "really helped fuel the SEC enforcement program in a meaningful way."[19]

As the former U.S. Attorney General Holder recently observed in a speech at the New York University School of Law, low limits upon awards risk defeating the purpose of the whistleblowing programs. Speaking about the *Financial Institutions Reform, Recovery and Enforcement Act* ("**FIRREA**"), which currently caps payments to whistleblowers at $1.6 million, Mr. Holder called this limit a "paltry sum" and stated that $1.6 million was "unlikely to induce an employee to risk his or her lucrative career in the financial sector." He called for FIRREA limits to be increased, stating that higher whistleblowing rewards would improve the Justice Department's ability to gather evidence of wrongdoing in a timely fashion and would

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[15] Attorney General Eric Holder, 25th Anniversary of the *False Claims Act* Amendments of 1986 delivered at Washington, DC, United States, January 31, 2012, online: The United Department of Justice <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-25th-anniversary-false-claims-act-amendments-1986>.

[16] Yaron Nili, "The SEC Whistleblower Program Year in Review" *The Harvard Law School Forum on Corporate Governance and Financial Regulation* (30 August 2014), online: The President and Fellows of Harvard College <http://blogs.law.harvard.edu/corpgov/2014/08/30/the-sec-whistleblower-program-year-in-review/>.

[17] Mary Jo White, "A Few Things Directors Should Know About the SEC" (Speech delivered at the Stanford University Rock Center for Corporate Governance Twentieth Annual Stanford Directors' College, 23 June 2014), online: U.S. Securities and Exchange Commission <http://www.sec.gov/News/Speech/Detail/Speech/1370542148863#.VP3mW2d0z5o>.

[18] "SEC's Cohen Predicts Major Whistleblower Awards Soon" *Corporate Crime Reporter* (12 June 2013), online: Corporate Crime Reporter <http://www.corporatecrimereporter.com/news/200/seccohenwhistleblower06122013/>.

[19] Barry B. Burr, "Schapiro: Multitude of trading venues a regulatory challenge for SEC" *Pensions & Investments*, (31 March 2015) online: Pension & Investments Online: <http://www.pionline.com/article/20150331/ONLINE/150339969/schapiro-multitude-of-trading-venues-a-regulatory-challenge-for-sec>.

"mak[e] it easier to complete investigations and to stop misconduct before it becomes so widespread that it foments the next crisis."[20]

Furthermore, given the sophistication of the parties involved, and the severe consequences faced by whistleblowers, such individuals are almost certain to consult counsel before approaching the OSC with revelations. They are likely to continue to retain counsel throughout the whistleblowing process. (Counsel assist the regulators by screening for unmeritorious claims and helping whistleblowers present their claims to the regulators in the clearest and most concise fashion.)[21] A low cap on awards means that it is not tenable to retain counsel on an hourly basis or contingency. Either way, legal costs will further reduce the amount of compensation—and any incentive to come forward.

The cap on the award available to whistleblowers should be increased, to be commensurate with the threat faced by such individuals. We propose a dual-cap system, as follows:

1. an award of up to 15% of the total monetary sanctions imposed, to be capped at $1,500,000, to be granted to eligible whistleblowers regardless of whether the penalty is ultimately collected from the wrongdoer(s); and

2. a further award, capped at $10 million, without a percentage restriction, to be paid only upon the successful recovery by the OSC of the monetary penalty from the wrongdoer(s).

In this way, the financial exposure for the OSC will be limited, as under the present proposal, in cases where it fails to collect on the penalties imposed. However, a larger upside, which more appropriately corresponds to the risks borne by whistleblowers, would exist in cases where the OSC successfully collects from the wrongdoer the amount of the monetary penalties.

It should be noted that the increased cap would not impose a burden on the taxpayer, as it would only be triggered if a penalty is actually collected. To the contrary, it will benefit the taxpayer, as properly administered whistleblower programs increase the overall amounts of penalties collected. A recent academic study found that a whistleblower's involvement in an

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[20] Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law, (New York City, 17 September 2014), online: The United States Department of Justice <http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>.

[21] "Why Whistleblower Laws Work," Taxpayers Against Fraud Education Fund, online: Taxpayers Against Fraud Education Fund <http://www.taf.org/why-whistleblower-laws-work>.

enforcement action is associated with a "significant increase in penalties," and that whistleblowers have enabled U.S. regulators to obtain penalties of $16.86 billion, or 56%, beyond what they would have been able to obtain without whistleblower involvement.[22]

Eligibility for Award

The current proposal makes whistleblowers who are deemed "culpable in the conduct being reported" ineligible for an award. The discussion section notes that whistleblowers with "some culpability" may, depending on the circumstances, not be "automatically" excluded from eligibility for an award. The OSC specifically seeks comment on this issue.[23]

Based on our experience interacting with whistleblowers, we conclude that, unfortunately, the corporate officers who are in the best position to expose corporate misconduct have frequently taken part in it, often under pressure. Moreover, the culpability of whistleblowers ranges greatly, from a low level employee who played a minor role in corporate misconduct to a senior officer who planned it.

It is of course crucial, from a policy perspective, to bar individuals who were central to the fraud from recovery as whistleblowers. However, a blanket prohibition on all "culpable" individuals will also catch those who did not plan or initiate the fraud, but were merely executing the instructions given to them by more senior management or who were otherwise peripheral to the fraud. Nor should the status as an officer of a company be an automatic bar to eligibility. Indeed, as the SEC has observed in granting a whistleblower award of over $475,000 to a former company officer, "[c]orporate officers have front-row seats overseeing the activities of their companies."[24]

A blanket prohibition on awards to "culpable" whistleblowers is not in the interests of investors and capital markets at large. Instead, culpability should be taken into account in the setting of the award, among other factors. In this endeavour, the "Relator's Share Guidelines" published by the U.S. Department of Justice may be instructive (a "relator" is the U.S. terminology for a whistleblower).[25] These guidelines provide for a 15% reward as a basic

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[22] Andrew C. Call, et al., "The Impact of Whistleblowers on Financial Misrepresentation Enforcement Actions," (8 December 2014) (Social Science Research Network) at pp 4-5, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506418>.

[23] OSC Consultation Paper, section 5.2.

[24] "Former Company Officer Earns Half-Million Dollar Whistleblower Award for Reporting Fraud Case to SEC", U.S. Securities and Exchange Commission (2 March 2015), online: SEC <http://www.sec.gov/news/pressrelease/2015-45.html#.VSU79Wd0w3F>.

[25] "DOJ Relator's Share Guidelines" (October 1997), online: 11 TAF Quarterly Review <http://blog.whistleblowersattorneys.com/wp-content/uploads/pdf/DOJRelatorShareGuidelinesp.17.pdf>.

amount which is increased or decreased on the basis of a number of factors. In particular, the award may be increased if:

1. The relator reported the fraud promptly.
2. When he learned of the fraud, the relator tried to stop the fraud or reported it to a supervisor or the Government.
3. The filing, or the ensuing investigation, caused the offender to halt the fraudulent practices.
4. The complaint warned the Government of a significant safety issue.
5. The complaint exposed a nationwide practice.
6. The relator provided extensive, first-hand details of the fraud to the Government.
7. The Government had no knowledge of the fraud.
8. The relator provided substantial assistance during the investigation and/or pretrial phases of the case.
9. At his deposition and/or trial, the relator was an excellent, credible witness.
10. The relator's counsel provided substantial assistance to the Government.
11. The relator and his counsel supported and cooperated with the Government during the entire proceeding.
12. The case went to trial.
13. The *False Claims Act* recovery was relatively small.
14. The filing of the complaint had a substantial adverse impact on the relator.

Awards may be decreased if:

1. The relator participated in the fraud.
2. The relator substantially delayed in reporting the fraud or filing the complaint.
3. The relator, or relator's counsel, violated *False Claims Act* procedures.

4. The relator had little knowledge of the fraud or only suspicions.
5. The relator's knowledge was based primarily on public information.
6. The relator learned of the fraud in the course of his Government employment.
7. The Government already knew of the fraud.
8. The relator, or relator's counsel, did not provide any help after filing the complaint, hampered the Government's efforts in developing the case, or unreasonably opposed the Government's position in litigation.
9. The case required a substantial effort by the Government to develop the facts to win the lawsuit.
10. The case settled shortly after the complaint was filed or with little need for discovery.
11. The *False Claims Act* recovery was relatively large, compared to awards previously given in similar circumstances.[26]

Similarly to the above guidelines, we propose that a holistic approach accounting for various factors, including the whistleblower's role in the reported misconduct, be adopted in setting the award.

[26] To this list, we would add membership in a "criminal organization," as that term is defined in the *Criminal Code*, which should disqualify the whistleblower from any award.

Cooling Off Period

In the past, Canadian corporate counsel have raised the concern that any whistleblower program would encourage employees to circumvent internal reporting procedures and, instead of raising their concerns with their employers, report on corporate misconduct to the regulator. In our view, this concern ignores the realities that whistleblowers confront.

As stated above, there are numerous, high-profile examples of whistleblowers who attempted to address their concerns through internal reporting mechanisms, and who were then ignored and later subjected to retaliation. Therefore, with good reason, many whistleblowers fear internal reporting, and will remain silent if they are obliged to report internally.

If despite these realities the OSC elects to condition eligibility for an award on the whistleblower's use of internal reporting mechanisms, the OSC should adopt a brief "cooling off" period, whereby an employee wishing to report corporate misconduct to the regulator must first raise his or her concerns with the employer, and only if such concerns are ignored 90 days following the complaint would the employee be eligible for any award pursuant to the proposed Whistleblower Program.

A cooling off period will ensure that internal reporting procedures are respected but, if they are ignored, employees are encouraged to report misconduct and are eligible for financial awards.

Non-Disclosure Agreements and Interference with Internal Whistleblowers

American experience demonstrates that, in response to whistleblower legislation, some companies have imposed upon their employees non-disclosure agreements which condition employment or severance payments on termination upon the employee refraining from speaking to the regulators.[27] The SEC recently announced its first ever settlement with a company accused of "muzzling" whistleblowers through restrictive employment agreements.[28] Such agreements are an explicit attempt to circumvent the whistleblower legislation.

In our experience, potential whistleblowers are frequently deterred from making full and frank disclosure of malfeasance by the risk of being sued for an alleged violation of a confidentiality

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[27] Stephen M. Kohn, "Corporations cannot muzzle whistleblowers with secrecy agreements any longer", *The Guardian* (7 April 7 2015) online: <http://www.theguardian.com/commentisfree/2015/apr/07/corporations-cannot-muzzle-whistleblowers-with-secrecy-agreements-any-longer>.

[28] Rachel Louise Ensign, "SEC Charges KBR With Violating Whistleblower Protection Rule", *Wall Street Journal* (April 1, 2015), online: < http://www.wsj.com/articles/sec-charges-kbr-with-violating-whistleblower-protection-rule-1427902706 >.

agreement. Where such an agreement exists and may expose the whistleblower to liability, we routinely urge the potential whistleblower to retain independent counsel. Oftentimes, a potential whistleblower will not be prepared to bear the cost of retaining independent counsel and will elect simply to remain silent in order to avoid potential exposure. In those cases where potential whistleblowers do retain independent counsel, they are almost always advised to remain silent in order to avoid litigation over an alleged breach of a confidentiality agreement.

Accordingly, we strongly support the Commission's proposal to expressly provide that provisions of any agreement designed to impede or discourage whistleblowers from reporting possible violations of securities laws to the authorities be deemed unenforceable.

More broadly, we support the Commission's proposal to include a prohibition against retaliation in the proposed Whistleblower Program. Retaliation against whistleblowers appears to be endemic. A recent study found that 82% of employee whistleblowers reported retaliation in the form of being dismissed from employment, quitting under duress, or suffering significantly limited employment opportunity.[29]

We agree with the Commission that, under existing legislation, Staff could bring a proceeding against a retaliating employer under section 127 of the *Securities Act*. However, we propose that provisions dealing with retaliation be expressly added to section 127, to empower Staff to properly address retaliation. To this end, we propose adding the following language to the *Act*:

> s. 127(1) Orders in the public interest -- The Commission may make one or more of the following orders if in its opinion it is in the public interest to make such order or orders:
>
> ...
>
> 11. If a reporting issuer, or an officer or director of a reporting issuer, has directly or indirectly impeded or discouraged any other officer, director or employee of that reporting issuer from reporting to the Commission conduct which is found by the Commission to be in violation of Ontario securities laws in respect of the business and affairs of that reporting issuer, an order

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[29] Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. Fin. 2213, 2240 (2010). See also: Nancy M .Modesitt, *Why Whistleblowers Lose: An Empirical and Qualitative Analysis of State Court Cases*, 62 Kansas Law Rev. 166 (2013).

(i) reprimanding the person or company; and/or

(ii) requiring that the person or company pay an administrative penalty of not more than $1 million for each violation.

12. If a reporting issuer, or an officer or director of a reporting issuer, fails to report to the Commission conduct in respect of the business and affairs of that reporting issuer which is reported to them by any other officer, director or employee of that reporting issuer which is found by the Commission to be in violation of Ontario securities laws, an order

(i) reprimanding the person or company; and/or

(iii) requiring that the person or company pay an administrative penalty of not more than $1 million for each violation.

We believe that the proposed provisions will significantly enhance the efficacy of internal whistleblowing procedures, and deter conduct aimed at silencing whistleblowers.

Conclusion

The proposed Whistleblower Program can be an essential tool to protect investors and Ontario's capital markets. Whistleblowers face severe personal, financial, legal and professional risks when they expose corporate misconduct. These risks will deter all but the bravest and most honourable individuals from coming forward with information that is essential to protect market participants. Given their constrained enforcement resources, regulators need more than heroes. They need the assistance of ordinary people who want to do the right thing but who are rightly worried about retaliation. A robust whistleblower program will mitigate the often devastating risks to which whistleblowers are exposed, and will promote accountability in Ontario's financial markets.

Thank you for your consideration.

Yours truly,

Siskinds LLP

Per:

A. Dimitri Lascaris, Douglas Worndl, Daniel Bach and Ronald Podolny (Siskinds LLP)