ASSOCIATION DES BANQUIERS CANADIENS
CANADIAN BANKERS ASSOCIATION

Box 348, Commerce Court West
199 Bay Street, 30th Floor
Toronto, Ontario, Canada M5L 1G2
www.cba.ca

Andrea Cotroneo
CBA General Counsel & Corporate Secretary
Tel: (416) 362-6093 Ext. 214
acotroneo@cba.ca

May 4, 2015

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario
M5H 3S8

Dear Sirs/Mesdames:

The Canadian Bankers Association works on behalf of 60 domestic banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 280,000 employees. The CBA advocates for effective public policies that contribute to a sound, successful banking system that benefits Canadians and Canada's economy. The Association also promotes financial literacy to help Canadians make informed financial decisions and works with banks and law enforcement to help protect customers against financial crime and promote fraud awareness. www.cba.ca.

The CBA welcomes the opportunity to comment on the Ontario Securities Commission's (**OSC**) Staff Consultation Paper 15-401- *Proposed Framework for an OSC Whistleblower Program* (the **Consultation Paper**). We support regulatory initiatives that are intended to deter, detect and ultimately reduce occurrences of corporate misconduct and illegal activity. We are concerned, however, that some of the proposals set out in the Consultation Paper could have negative unintended consequences for the reporting of securities law breaches in Ontario. We have set out our concerns in greater detail below and recommended modifications to the framework described in the Consultation Paper that would address these concerns.

Our primary concern is that implementation of the framework set out in the Consultation Paper may negatively impact the effectiveness of banks' internal reporting, escalation and compliance systems, with subsequent negative impacts on clients. The introduction of monetary incentives for disclosure to the OSC could result in employees' circumvention of job accountabilities and disruption to existing lines of escalation within organizations since bank employees have a responsibility to escalate concerns to their manager or other individuals in positions of authority within their banks. The unintended consequence that could result from the OSC's offer of a monetary reward is that some employees could be motivated to neglect their reporting obligations to their employer, in order to pursue personal gain.

One potential negative impact of the circumvention of an institution's internal escalation process is that a systemic issue may not be revealed until the OSC notifies the institution, or even until the OSC completes its investigation which could take a long time. In the interim, clients would be

negatively affected. We recommend that the OSC include provisions in the final framework for the whistleblower program that are designed to encourage the continued use of internal programs, as did the U.S. Securities and Exchange Commission (**SEC**) and have set these out in our comments below on Part 5.2 of the Consultation Paper. We have also set out below our comments on specific parts of the Consultation Paper, along with suggested changes that we believe would enhance the rigour and effectiveness of a whistleblower program.

Part 5.1: *Characteristics of Information Expected to be Reported*

Applicability of Whistleblower Program

We request that the OSC articulate the specific serious breaches of securities law that it aims to address via a whistleblower program, and suggest that the whistleblower program be limited to such serious breaches as Theft, Fraud, Market Manipulation, Insider Trading, Material Misrepresentations & Material Omissions (for issuers). Limiting the whistleblower program to these types of breaches would likely reduce frivolous reports to the OSC. This would also impact Part 9.2 *Process for Determining Awards*, as we will have a better understanding of what types of enforcement actions and possible awards might result from establishing the program.

Reducing Frivolous Reports

The introduction of a whistleblower program that offers monetary awards increases the incentive for issuers and registrants to self-report misconduct or perceived potential misconduct for inappropriate reasons. For instance, issuers and registrants may decide to provide a large amount of unnecessary information to the OSC for fear that possible under-reporting could negatively impact the issuer or registrant's relationship with the OSC, which would result in over-reporting and a resulting strain on OSC resources. It would be preferable that reporting to the OSC be based on clear criteria or thresholds that are connected to the types of misconduct that the OSC is attempting to address. We are also concerned that a monetary incentive could potentially lead to an increase in frivolous whistleblower reports that, in turn, would require the OSC and issuers/registrants to expend more resources to investigate issues that are ultimately revealed to be trivial. These concerns would be addressed in part by ensuring rigour around the process of initial assessment and recommendation to Enforcement Staff. It would be helpful to have greater clarity regarding how this process will work before a whistleblower program is put in place.

How Information is Obtained

We are concerned about the means by which whistleblowers under the proposed program might obtain the information that they subsequently provide to the OSC. Specifically, we are concerned that individuals might perceive a potential financial reward as incentive to obtain data or other information that they would otherwise not be entitled to, for example, by accessing private records of individuals or corporations that are confidential and properly maintained by an issuer or registrant. We therefore recommend that the OSC consider the means by which an individual obtains the reported information in addition to "original and voluntary" qualities of the information described in the Consultation Paper.

Part 4: *Proposed Whistleblower Program*

Availability of Credit for Cooperation

The Consultation Paper is unclear on how the whistleblower program would affect the OSC's credit for cooperation program. The summary in Part 1 notes that a whistleblower reporting

misconduct "may result in no credit for cooperation" for an issuer or registrant; however, Part 4 seems to suggest that credit for cooperation would be unavailable "if the misconduct is first reported to the OSC by a whistleblower". We do not believe that an unequivocal prohibition on credit for cooperation for an issuer or registrant when a whistleblower is first to report is appropriate. There may be circumstances, for example, where an issuer is undertaking a good faith review of an issue in advance of making a voluntary report, and where a whistleblower decides to report in the interim. Rather than an unequivocal prohibition, we suggest that the policy provide that where an entity self-reports independent of an earlier whistleblower report, credit for cooperation should remain available for that entity.

Part 5.2: *Ineligibility for Whistleblower Award*

Scope of Ineligible Whistleblowers

With respect to which individuals would be ineligible to receive a whistleblower award, we would recommend an expansion of the excluded categories beyond just chief compliance officers and those acting in equivalent roles. Specifically, we would support exclusion of all compliance officers, in order to maintain the integrity and effectiveness of banks' strong internal reporting, escalation and compliance systems. For the same reason, we also recommend that members of a corporation's audit department be excluded as eligible whistleblowers.

Treatment of Privileged Information

The Consultation Paper proposes that whistleblowers who provide privileged information to the OSC would not be eligible for the program. However, the Consultation Paper is silent on what the OSC will do to ensure that it does not receive privileged information, and how it will respond in the event that a whistleblower does reveal privileged information. On the first point, the Consultation Paper does not set out how whistleblowers will be warned against disclosing privileged information, inadvertently or otherwise. The Consultation Paper contemplates that a whistleblower will sign a declaration. The OSC may want to consider ensuring that the declaration adequately covers privilege issues, including a warning to potential whistleblowers that the OSC does not wish to obtain privileged information. With regards to the second point, OSC staff should not be permitted to rely on privileged information in any proceedings resulting from information received from a whistleblower. The OSC's Staff Notice should confirm that OSC staff will:

(1) view privileged information as inadmissible in any subsequent hearing,
(2) agree that the privilege has not been waived as a result of the disclosure by the whistleblower, and
(3) agree that privileged information will not be further disclosed to third parties.

Impact on Internal Reporting, Escalation and Compliance Systems

As noted above, we are concerned that the whistleblower process as proposed would undermine the internal arrangements to address misconduct that issuers have put into place. We therefore recommend a requirement for whistleblowers to report a specific instance of potential misconduct internally at least once before they can be eligible for an award for reporting the same instance of misconduct to the OSC. This would assist in preserving internal reporting systems and communication both within compliance departments, and between compliance departments and business lines, and fostering these relationships so that issues will be addressed proactively.

If the ability to report first directly to the OSC is retained, we would support steps that could encourage an individual to report on a specific instance of potential misconduct through internal reporting systems prior to reporting the same to the OSC. The Consultation Paper notes that the OSC is considering whether prior internal reporting should be a factor used in supporting a higher award level for a whistleblower. We would support this measure, which we note has been adopted by the SEC. The SEC also considers a whistleblower's interference with internal reporting systems as a factor that can adversely affect the amount to be awarded, which we suggest the OSC also adopt as a consideration when determining award levels. In assessing interference, the SEC will, for instance, take into account whether there is evidence that the whistleblower knowingly interfered with the issuer's established legal, compliance or audit procedures to prevent or delay detection of the reported misconduct or whether the whistleblower provided any false representations that hindered the issuer's efforts to detect, investigate or remediate the reported misconduct. Another step that the SEC has taken to encourage internal reporting is permitting an individual to receive a whistleblower award for reporting a violation internally as long as the company provides that information to the SEC. In this circumstance, the whistleblower could potentially receive a greater award because the individual would be attributed credit for any information uncovered during the company's subsequent internal investigation. Finally, the SEC has set out a period of time during which the whistleblower can report internally and still be eligible for an award. After reporting a violation internally, a whistleblower will have 120 days during which he or she can report the same violation to the SEC and still be eligible for a whistleblower award. If the OSC proceeds with permitting whistleblowers to first report directly to the OSC, we encourage the OSC to consider including in its final whistleblower program the steps that the SEC has taken to encourage whistleblowers to report internally.

Part 6.2: *Funding Whistleblower Awards*

We recommend that any monetary award be contingent upon and paid from actual recoveries of these monies through the OSC's enforcement process. In this manner, the punitive costs of the whistleblower program will effectively be shifted to the wrongdoers, rather than to all market participants.

Interaction with Existing Regulatory Frameworks

Part 3 and Appendix A of the Consultation Paper provide summaries of other organizations' whistleblower programs. We note that the there is a lack of clarity in the Consultation Paper regarding the relationship between the OSC's proposed program and certain existing programs. We are concerned that this may lead to duplication of oversight and enforcement efforts, or result in conflicts in how varying requirements are implemented. The most likely sources of duplication or potential conflict are the programs run by the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada. Entities regulated by these self-regulatory organizations, some of whom are wholly owned subsidiaries of banks, already have certain self-reporting responsibilities. The introduction of a whistleblower program by the OSC would add potential operational complications for business and control functions, as well as duplication or coordination issues if parent banks and subsidiaries have to deal with inquiries involving more than one regulatory agency.

****

In closing, we thank you again for the opportunity to share our comments on the Consultation Paper. We have taken this opportunity to set out aspects of the Consultation Paper that are of

concern to our member banks and would be pleased to respond directly to any questions you may have regarding the foregoing. Thank you for taking our views into consideration.

Yours truly,