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SENT BY E-MAIL (comments@osc.gov.on.ca)

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

Dear Sirs/Mesdames:

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

Osler, Hoskin & Harcourt LLP ("Osler") welcomes the opportunity to provide feedback on OSC Staff Consultation Paper 15-401: Proposed Framework for an OSC Whistleblower Program (the "Whistleblower Program" or the "Consultation Paper").

Osler Comments on the Consultation Paper:

Generally speaking, Osler agrees with the desirability of initiatives that encourage persons with relevant information about possible wrong-doing to come forward to regulators without fear of retribution. We are of the view that "whistleblower" protections and, in certain circumstances, financial incentives, can be valuable tools for OSC Staff to use to identify and investigate serious breaches of Ontario securities law that otherwise may go undetected. However, and as explained in more detail below, Osler is firmly of the view that any whistleblower program must not come at the expense of or compete with internal compliance structures. Osler is of the view that the following considerations are especially important to the development and ultimate effectiveness of the Program proposed.

We provide our comments by responding to some of the questions posed in the Consultation Paper.

- ***Do you agree that individuals should not be required to report misconduct to their organizations' internal compliance programs in order to be eligible for a whistleblower award?***

  This question touches upon our primary concern regarding the proposed Whistleblower Program: the prospect of incentivizing "whistleblowers" to circumvent an internal compliance regime within an organization, and its potential consequences. We question whether individuals who have not availed themselves of their

organizations' internal compliance and/or complaint programs should be eligible for a whistleblower award. To encourage an organization to maintain and continuously improve its 'culture of compliance', Osler suggests that eligibility to receive a whistleblower award be dependent on satisfactory proof that individuals sought to fully avail themselves of the internal compliance and complaint procedures of the organization. Recourse to internal compliance and/or complaint programs should be a threshold requirement with regards to eligibility, as a general principle.

However, we recognize that in certain limited circumstances, it may be impossible or completely impracticable for an individual to first avail himself or herself of an internal compliance program. In such circumstances, where there is no internal compliance and/or complaint program, or where availing oneself of these programs is impracticable, prospective whistleblowers could be exempt from this threshold eligibility requirement. In this instance, individuals should be required to satisfy OSC Staff that availing themselves of the internal compliance and/or complaint procedures of their organization would be impractical in the specific circumstances.

Without first requiring individuals to exhaust internal compliance and/or complaint programs prior to coming to the OSC under the Whistleblower Program, we are concerned that the Whistleblower Program would significantly diminish the important role internal compliance and complaint programs play in promoting compliance with securities law. We recognize that the American experience is that the majority of whistleblowers come to the Regulator only after unsuccessful attempts have been made to engage internal protocols. However, we are concerned that the absence of an express requirement or a prerequisite to do so may undermine the meaningful role played by designated compliance officials, and their ability to enforce internal protocols. Rather than encouraging effective complaint handling and diligent responses to allegations of malfeasance by incentivizing whistleblowers to go directly to the Regulator, the Whistleblower Program may impose a difficult burden on officials to properly design and operationalize a "best in class" compliance culture within their respective organizations. In addition, allowing individuals to circumvent internal programs may send the wrong message to good corporate citizens who have developed and implemented internal procedures to identify and resolve possible securities law issues that may arise within their organizations. It may also discourage organizations from creating and implementing internal compliance programs. For these reasons, we believe that the best approach would be to put the onus on the individual to satisfy OSC Staff that it is impractical or impossible to report his or her concerns through internal procedures as a condition of eligibility.

- ***Should individuals culpable in the conduct being reported be eligible for a whistleblower award?***

  In our view, an individual's culpability in a matter should not automatically render that individual ineligible for a whistleblower award. Rather, as suggested in the Consultation Paper, the level of culpability should be a factor considered by OSC Staff when determining whether to make a whistleblower award, and the amount of any whistleblower award made. We believe that the automatic ineligibility of individuals with culpability in a matter would be an unnecessary barrier preventing individuals with the most relevant and/or best information about securities law violations from coming forward. The degree of an individual's culpability is often quite case specific, and may not be fully understood by potential whistleblowers, such that having a blanket prohibition may be counterproductive for the Whistleblower Program.

  As an alternative to paying culpable whistleblowers, in our view, a system similar to that employed by the Competition Bureau of Canada, providing immunity and leniency programs to culpable whistleblowers, ought to be considered by OSC Staff as a means to obtain valuable information from culpable individuals without making a whistleblower payment and thus being seen as rewarding the impugned conduct.

- ***Should the Chief Compliance Officer or equivalent position be ineligible for a whistleblower award?***

  We believe that whistleblower payments should not be made to individuals whose responsibility it is to identify and investigate alleged wrongdoing (including potential securities law violations) and internal complaints, and where appropriate, report misdeeds to the Regulator. With that said, we do not believe that all persons responsible for compliance in an organization should be automatically barred from being eligible for a whistleblowing payment. Rather, it should be a relevant and important factor, and the Whistleblower Program should emphasize the expectation that persons responsible for compliance will likely not be eligible for an award, except in exceptional circumstances.

- ***Are the proposed financial incentives significant enough to encourage potential whistleblowers to report misconduct?***

  We doubt that the financial incentives offered to potential whistleblowers under the proposed Whistleblower Program are significant enough to encourage whistleblowers to report misconduct. It is our understanding that the average whistleblower award paid by the SEC is nearly $3 million ($50 million in total awards/17 whistleblower payments), and the highest SEC award made to a whistleblower is $30 million. We believe that the magnitude of the awards made by the SEC plays a key role in the success of the SEC's program. We believe that the Whistleblower Program's proposal to offer a whistleblower up to a maximum of 15% of total monetary sanctions imposed in a s. 127 hearing would result in inadequate monetary incentive to motivate potential whistleblowers to report wrongdoing, given that the Commission's emphasis has traditionally been to proactively prevent wrongdoing, as opposed to penalize with hefty monetary sanctions.

  Historically, administrative penalties imposed by the OSC following hearings under section 127 are less common than non-monetary sanctions. When imposed, administrative penalties are often less than $1 million. Even if disgorgement is included in the amount used to determine the total monetary sanction, whistleblower awards made by the OSC will pale in comparison to those made by the SEC. We do note that the Consultation Paper acknowledges that the OSC Whistleblower Program is not expected to yield whistleblower awards of the magnitude offered by the SEC. However, if the Whistleblower Program is to be effective and robust, in our view, it should not be tied to monetary sanctions imposed by the OSC. Rather, it should be proportionate to the outcome, whether a monetary sanction or otherwise, and reflective of the benefit of the proactive informant to the protection of investors, and the capital markets generally.

- ***Should whistleblowers be able to receive awards where the enforcement outcome is significant conduct bans, compliance reviews of firms or voluntary payments to investors, rather than monetary penalties?***

  As above, we believe that whistleblowers who provide information leading to significant conduct bans, voluntary payments to investors, or meaningful changes to business processes and internal controls, should be eligible to receive a whistleblower award regardless of whether a monetary sanction is imposed. While we agree that the monetary sanction awarded at the conclusion of a matter could be a relevant factor for calculating the amount of a whistleblower award, it should not necessarily be the

most significant factor in the calculation given that the OSC has various tools at its disposal to address violations of securities laws.

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We thank you again for the opportunity to provide our feedback on the Whistleblower Program. If you would like to discuss this matter further, please contact Lawrence Ritchie or Shawn Irving at 416.862.6608/4733 or lritchie@osler.com/sirving@osler.com.

Yours very truly,

"Osler, Hoskin & Harcourt LLP"

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