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May 4, 2015

**Dear Sir or Madam:**

**RE: COMMENTS ON PROPOSED WHISTLEBLOWER PROGRAM**

This comment letter was written by a group of University of Toronto law students and Anita Anand, Professor of Law & Academic Director of the Centre for the Legal Profession at the University of Toronto. We are currently in the process of writing a research paper about whistleblowing regimes within Canada and internationally. Accordingly, we have reviewed the Proposed Framework for an OSC Whistleblower Program (the "Whistleblower Program").<sup>1</sup> We are generally supportive of the initiative, and believe that it can help to resolve enforcement matters in a more effective and efficient manner. Above all, we support the Whistleblower Program because it is consistent with the mandate of the Ontario Securities Commission (the "OSC") to protect investors and maintain confidence in capital markets.<sup>2</sup>

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<sup>1</sup> OSC Staff Consultation Paper 15-401, "Proposed Framework for an OSC Whistleblower Program" (Feb 3 2015).

<sup>2</sup> S 1.1 OSA.

In this letter, we provide comments on some of the individual components of the Whistleblower Program. We address the following specific issues: background research; the eligibility regime; inclusion of culpable individuals; amount of monetary reward; and anti-retaliation protections.

## **Background**

In order to understand corporate behaviour in the absence of a whistleblowing regime, we undertook a review of the twenty largest TSX issuers by market capitalization. We sought to assess whether these companies self-regulated in this area. Each of the twenty issuers adopted some form of internal whistleblower policy and, in many respects, the policies were substantially similar to each other. Most policies encouraged employees to report code of conduct violations, some even mandating it as an employee duty. In addition, most corporations maintained confidential ethics hotlines for employees, but in some cases employees were encouraged to approach their direct manager or legal department before deferring to the hotline. No policy offered compensation to complainants. Thus, corporations differ in their approaches to whistleblowing, though they seem to support whistleblowing as a general matter. An overarching useful aspect of the Whistleblower Program therefore will be to establish consistency across corporations in this area. We turn now to consider the issue of eligibility.

## **Eligibility**

We see an issue with the OSC's discretion to decide who is eligible to be protected under the Whistleblowing Program. Individuals face major employment and reputational risks when providing information under the Program. In addition to

these deterrents, the possibility of being ineligible to collect a monetary award because they are deemed to be ineligible is a major disincentive for employees to provide information. We ask the Commission to consider a relatively low threshold for eligibility under the Whistleblowing Program.

### **Culpable Individuals**

This section addresses instances in which culpability has not been determined given that we support the OSC's decision to provide a remedial whistleblowing option to individuals who are not culpable of any wrongdoing. As a general matter, we believe that culpable, or potentially culpable, individuals should be eligible to gain the protection of the Whistleblowing Program subject to limitations. Such individuals will often be the most reliable and possibly the only source of critical information. Moreover, the Whistleblowing Program may also deter future wrongful conduct because those who violate securities law would be aware of the possibility that a co-conspirator might turn against them and report the wrongdoing, potentially anticipating receiving a reward.

Culpable individuals generally have fewer incentives to come forward, because unlike non-culpable whistleblowers, they face potential legal, professional and reputational risks. Thus, it is important that they are incentivized to come forward to help bring the illegal activity to light and prevent it from continuing. The significant (informational) benefits to be gained by including culpable individuals must, however, be balanced with potential negative consequences. For example, providing monetary or other rewards to culpable individuals may send confusing messages to the public. Rewarding people who have acted in a morally or legally questionable

manner may undermine the integrity of the Whistleblowing Program. Balance could be achieved by allowing culpable (or potentially culpable) whistleblowers to receive awards but on a reduced level. Further, awards to culpable whistleblowers could have an established upper limit to lessen the potential systemic reputational impact of massive rewards for complicit whistleblowers, such as the infamous \$104 million reward given to Bradley Birkenfeld.<sup>3</sup>

Whistleblowers who are definitely complicit in wrongdoing should arguably be treated differently. Other regimes have disqualified people who are ultimately convicted from collecting from a whistleblowing regime. We recommend disqualifying people who are identified as the planner or the initiator of the fraud, including those who: designed, structured, drafted, arranged, formed the plan leading to an act; took steps to start, introduce, originate, set into motion, promote or otherwise initiate an underlying act; and knew or had reason to know that crime could result from planning and initiating the underlying act. Rewarding such individuals would arguably be inconsistent with the ethical principles behind the Whistleblowing Program. Additionally, providing such a reward could be a “reverse incentive” as it might encourage potential corporate wrongdoers to plan and initiate fraud themselves. Such individuals should not be eligible for rewards under the Whistleblower Program.

### **Amount of Monetary Award**

Monetary awards are an integral component of an effective whistleblowing regime and have been proven to be effective in incentivizing whistleblowing in other

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<sup>3</sup> Saunders, Laura “Whistleblower Get \$104 Million” (2012) *Wall Street Journal*, September 11 <<http://www.wsj.com/articles/SB10000872396390444017504577645412614237708>>.

jurisdictions such as the United States.<sup>4</sup> However, the amount of compensation is critical to its efficacy.<sup>5</sup> One of the main benefits of monetary incentives is the potential for a broad set of whistleblowers to be captured by such a program. Even those who fear retaliatory action may nonetheless come forward if the award is substantial enough to outweigh risks such as retaliation.

The proposed amount under the Whistleblowing Program is 15 percent of any recovery amount, up to a ceiling of an award \$1.5 million, with no awards being given for recoveries below \$1 million. This cap is necessary to prevent excessive and false reporting. However, the proposal that there be no award for recoveries below \$1 million may make some employees reluctant to report and may not properly address costs faced by the whistleblower. Specifically, employees may be reluctant to report if they are unsure of the amount that may be recovered from reporting or if they face industry blacklisting. As discussed below, retaliatory action is one of the primary reasons that employees do not 'blow the whistle'.<sup>6</sup>

### **Retaliation Protections**

While a monetary award can incentivize a whistleblower, the fallout from blowing the whistle can deter employees and other individuals from coming forward. Evidence suggests that retaliation by employers against known whistleblowing employees is quite common.<sup>7</sup> Consequently, any whistleblowing regime must address the problem of retaliation by an employer - which the OSC attempts to do through proposed anti-retaliation provisions being included in the *Securities Act* (Ontario) and

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<sup>4</sup> Dodd-Frank Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1844 (2010).

<sup>5</sup> Alexander Dyck et al., "Who Blows the Whistle on Corporate Fraud?" (2010) 65 J. FIN. 2213.

<sup>6</sup> Luke R. Hornblower, Outsourcing Fraud Detection: The Analyst as Dodd-Frank Whistleblower, (2011) 6 J. Bus. & Tech. L. 287.

<sup>7</sup> Alexander Dyck et al., *supra* note 5 at 41.

a private cause of action being for the employee who suffers retaliation from an issuer from blowing the whistle.

However, issues of overlap arise when considering other statutes that also address retaliation by employers against whistleblowers. For example, the *Criminal Code* (Canada) contains provisions that make illegal retaliation by employers disciplining, demoting, or otherwise adversely affecting the career prospects of an employee. Such retaliation by an employer is punishable by a prison sentence of up to five years.<sup>8</sup> While such an anti-retaliation provision is only operative if the act(s) reported by the whistleblower constitute a criminal offence, there may nonetheless be a scenario where both OSC staff (under the OSC's proposed enforcement framework under a section 127 OSA proceeding) and the Crown (pursuant to s. 425.1(1) CCC) investigate and ultimately seek enforcement against retaliation by an employer. In such a scenario, it is unclear how the OSC would proceed: would it seek concurrent enforcement of a financial penalty against the issuer alongside the Crown seeking a prison sentence, or would the OSC defer to the Crown's proceeding against the employer (e.g. OSC would only pursue punishment if the Crown declined to pursue proceedings)? For purposes of consistency and predictability, guidelines containing OSC's procedures related to anti-retaliation should be provided.

In addition, the OSC's proposed strategy seems to focus on actions once retaliation has taken place, leaving unattended the threats of retaliation that an employer may make pre-emptively to deter an employee from blowing the whistle. An employee may refuse to 'blow the whistle' in the first place due to threatened retaliation by his or her employer. To respond to such a situation, any provisions

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<sup>8</sup> *Canadian Criminal Code*, RSC 1985, c C-46, ss. 425.1(1).

relating to employee retaliation should also cover *threatened* retaliation -- though we understand that such retaliation may be difficult to detect.

Thank you for taking the lead on this important initiative and for providing members of the public with an opportunity to comment on it. We understand that this is an initiative of the OSC but hope that this will be a precedent for other jurisdictions, and the cooperative securities regulator, to follow.

Please feel free to contact us if you have any questions regarding this submission.

Yours truly,

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