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The Secretary
Ontario Securities Commission
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Dear Sirs/Mesdames:

**OSC Staff Consultation Paper 15-401**

We appreciate the opportunity to comment on the framework for a whistleblower program (the "**Whistleblower Program**") being considered by the Ontario Securities Commission (the "**OSC**") as set out in OSC Staff Consultation Paper 15-401 – *Proposed Framework for an OSC Whistleblower Program* (the "**Consultation Paper**"). We understand that the proposed Whistleblower Program is one of a number of initiatives by the OSC aimed at improved enforcement of securities laws and we appreciate that the Whistleblower Program involves a careful exercise of line drawing between the goals of enforcement, on the one hand, and government intrusion into the affairs of reporting issuers, on the other hand. However, we are concerned that the proposed Whistleblower Program draws the line in the wrong place, and we discuss herein the following concerns:

- The potential for financial awards to create perverse incentives
- The potential for misuse of confidential or privileged information
- The role of the OSC in enforcing the proposed anti-retaliation provisions
- The inherent imbalance in the proposed anti-retaliation provisions
- The perceived incentive for employees to circumvent internal compliance procedures
- The limits on maintaining the confidentiality of a whistleblower's identity

**Creation of Perverse Incentives**

We acknowledge that offering a financial award would recognize the personal and professional risks undertaken by speaking up about misconduct, as suggested in the Consultation Paper. We also note that the maximum financial award of $1.5 million being considered by the OSC is less

enticing than the potential for unlimited financial awards available under the whistleblower program adopted by the U.S. Securities and Exchange Commission (the "**SEC**"). However, we are concerned that offering any form of financial award for information from whistleblowers could create perverse incentives which may ultimately have negative consequences in terms of enforcement and investor protection.

First, offering a financial incentive could encourage whistleblowers motivated by financial gain to report claims that are without merit, thereby straining the resources of the OSC and the targeted reporting issuer to deal with such claims. This could also result in the misuse of information by employees, as discussed below. Second, offering a financial incentive could encourage whistleblowers to stand by and allow potential future misconduct to ripen into actual misconduct which would have a greater likelihood of resulting in an award, thereby actually increasing instances of securities law violations. Third, offering a financial incentive could potentially discourage a whistleblower from reporting internally first in accordance with his or her employer's internal compliance procedures, thereby undermining the effectiveness of such procedures. As discussed below, we believe that the Whistleblower Program should, at a minimum, incentivize whistleblowers to report misconduct internally prior to reporting to the OSC.

**Misuse of Information**

The Consultation Paper indicates that the OSC is proposing the Whistleblower Program as a way to obtain timely, original and credible information, with well-organized supporting documentation, in respect of serious securities law misconduct that is otherwise difficult to detect. Incentivizing an employee to disclose to the OSC information regarding his or her employer could result in behaviour that is at odds with the employee's obligation to maintain the confidentiality of such information and, in many circumstances, the employee's fiduciary and/or contractual obligations to his or her employer. A breach of such obligations may, depending on the particular situation, permit an employer to terminate the employee for cause. In addition, disclosure by the employee of confidential information may result in the unintended disclosure of information that is subject to privilege. Although we note that the proposed Whistleblower Program excludes from consideration for an award any information that is subject to solicitor-client privilege (we assume the reference to solicitor-client privilege is intended to include other forms of privilege as well, such as litigation privilege and settlement privilege), an employee may not be able to ascertain whether information is in fact subject to privilege and the disclosure of such information could result in the potential loss of such privilege.

We assume that the exclusion of information that is subject to solicitor-client privilege is intended to exclude lawyers from being eligible to receive an award. In this regard, we believe that a broader exclusion for any information obtained by lawyers in connection with their representation of a client would be appropriate, similar to the OSC's proposed exclusion for information obtained by auditors in the performance of their services. This approach would be consistent with the rules of professional conduct which generally do not permit lawyers to blow the whistle on their clients.

**Role of the OSC in Enforcing Anti-Retaliation Provisions**

The Whistleblower Program includes proposed amendments to the *Securities Act* (Ontario) (the "**Act**") to include anti-retaliation provisions which would make it a violation of securities laws to retaliate against a whistleblower. The proposed provisions would allow the OSC to bring an enforcement proceeding under section 127 of the Act and also provide a whistleblower with a statutory right of action against his or her employer, which statutory right of action would provide for remedies similar to those available under the SEC's whistleblower program.

We see the logic of conferring on whistleblowers a statutory right of action for violations of the anti-retaliation provisions by their employers. However, we question whether the OSC has the relevant expertise and resources to exercise its public interest jurisdiction in proceedings to enforce the anti-retaliation provisions, beyond imposing financial penalties on employers for violating securities laws. Rather, we believe that the more appropriate forum for these matters is either a specialized tribunal or a court.

**Suggestion to Balance the Anti-Retaliation Provisions**

We note that the proposed Whistleblower Program would increase the regulatory burden on reporting issuers by forcing them to address and respond to claims of alleged misconduct by whistleblowers in the regulatory context, as opposed to in accordance with their internal compliance procedures. While the OSC would presumably ignore information that has no merit as suggested in the Consultation Paper, a would-be whistleblower is otherwise free to disclose information that may be harmful to his or her employer without fear of any risk of retaliation. In order to address this imbalance, we believe that consideration should be given as to whether the anti-retaliation provisions should also provide for measures that may be taken by employers against employees or former employees who report to the OSC what prove to be clearly unmeritorious claims of misconduct.

**Internal Reporting**

National Instrument 52-110 – *Audit Committees* provides that the audit committee of a reporting issuer must establish procedures for the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters. Many reporting issuers have adopted whistleblower policies that require internal reporting not only of questionable accounting practices but also violations or potential violations of its code of conduct or other policies.

The proposed Whistleblower Program does not require that a whistleblower first report internally alleged misconduct by his or her employer before reporting such misconduct to the OSC. As noted in the Consultation Paper, this feature of the Whistleblower Program could result in employees circumventing internal compliance procedures. As the information provided to the OSC must be original, a whistleblower who reports internally first may be concerned that he or she will no longer be eligible for an award if another person or the employer reports to the OSC

while the matter is being considered internally. Although it is indicated in the Consultation Paper that the OSC would consider the timing of the initial internal reporting to determine the whistleblower's eligibility for an award and as a factor in determining the amount of any award, we believe that there should be stronger encouragement, or even a requirement, that the whistleblower report the alleged misconduct internally prior to reporting to the OSC. Similar to the SEC's whistleblower program, we believe that it is more appropriate for a period of time from the date of internal reporting to have elapsed before a whistleblower can provide information to the OSC. We do not believe that the public interest is better served by increasing the number of OSC enforcement proceedings as opposed to encouraging internal reporting leading to voluntary compliance by reporting issuers.

**Culpability of a Whistleblower**

The Consultation Paper indicates that culpable individuals are not automatically excluded from qualifying as whistleblowers, although the level of culpability will be a relevant consideration in determining the amount of any award. We agree with the view expressed in the Consultation Paper that allowing culpable individuals to receive whistleblower awards may send an inappropriate message to the market and may harm the overall integrity of the Whistleblower Program. We submit that the credit for cooperation program is a more appropriate method of motivating individuals to come forward with information regarding misconduct in which they are participating.

**Maintaining a Whistleblower's Confidentiality**

It is indicated in the Consultation Paper that the OSC would use all reasonable efforts to keep confidential a whistleblower's identity. We submit that maintaining the confidentiality of a whistleblower's identity would be challenging, given the necessary exceptions referred to in the Consultation Paper, including the exception for disclosure in order to permit a respondent to make a full answer and defence. We appreciate that anonymity may be an important consideration for some whistleblowers in deciding whether or not to come forward, but it is equally important for a respondent to be given the opportunity to challenge the credibility of the information and the circumstances in which it was obtained.

We appreciate the opportunity to comment on the framework for the proposed Whistleblower Program.

Yours very truly,

*Davies Ward Phillips & Vineberg LLP*