FundEX Investments Inc.
400 Applewood Crescent
3rd Floor
Vaughan, ON L4K 0C3

Tel: 905-305-1651
Toll-free: 1-800-324-6048
Fax: 905-305-1698
Toll-free: 1-866-282-2010

May 11, 2015

Via email to comments@osc.gov.on.ca

Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, ON
M5H 3S8
ATTN: THE SECRETARY

Dear Sirs/Mesdames:

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

FundEX Investments Inc. ("FundEX" or "We") is a national mutual fund dealer and wholly owned subsidiary of iA Financial Group (Industrial Alliance). FundEX has grown to become one of Canada's largest mutual fund dealers and supports over 600 registered agents across Canada and administers over $12 billion in assets.

FundEX appreciates the opportunity to submit comments in response to the proposal by the Ontario Securities Commission ("OSC" or "the Commission") to introduce a whistleblower program in the province of Ontario pursuant to OSC Staff Consultation Paper 15-401 published on February 3, 2015.

We strongly support the overarching goals of the Commission in identifying and rectifying violations of securities laws. We believe that a carefully drawn whistleblower scheme can offer significant assistance in the Commission's aim to deter certain behavior by market participants and bolster the efficiency and effectiveness of its enforcement program. The proposed rules, however, do not fully address the intrinsic conflicts that exist as a result of the significant financial and other incentives inherent within the whistleblower provisions. For a whistleblower program of this type to be effective, certain tensions must be balanced: First, the regulations must establish minimum standards for whistleblower status to diminish false, spurious or frivolous claims and institute an appropriate process to sort out meritorious allegations. Second, it must require and promote the use of internal compliance systems and reporting processes as the first and foremost method of addressing misconduct. Third, persons who are themselves culpable or complicit in potential wrongdoing should not be unequivocally entitled to an award or protection from retaliation in any circumstance. Fourth, the whistleblower program should not be implemented in a manner that inhibits companies from taking appropriate disciplinary or corrective action against internal wrongdoers.

The Final Rules Should Promote The Development And Maintenance of Robust Internal Compliance Procedures, Not Incentives To Bypass Them.

We appreciate that, in proposing the whistleblower program, the Commission is not seeking to undermine the efforts of companies to investigate potential securities law violations directly. However, as proposed, the program may have the unintended, deleterious effect of eroding corporate compliance by enticing employees or agents to directly bypass their company's internal compliance mechanisms, effectively displacing long-standing policies of efficient and reliable internal reporting systems. While the Commission's proposal includes provisions intended not to discourage whistleblowers of corporations with vigorous compliance programs to first report internally, it does not adequately *encourage* employees or agents to do so. We fear that the proposed whistleblower program

FundEX INVESTMENTS INC.

FundEX Investments Inc.
400 Applewood Crescent
3rd Floor
Vaughan, ON L4K 0C3

Tel: 905-305-1651
Toll-free: 1-800-324-6048
Fax: 905-305-1698
Toll-free: 1-866-282-2010

supports a type of avaricious mentality among employees and agents who, lured by exponentially rising bounties, have every incentive to report malfeasance to the Commission instead of to their company. More alarming, though, is the possibility that a whistleblower might stand to gain by collecting evidence for the Commission while the unlawful matter worsens.[1] Any fulsome normative argument calling for the necessity of whistleblowers as an aid to regulatory enforcement must consider that a whistleblower who provides information to the Commission does so in lieu of offering the same to an internal compliance department, which might very well be in a position to swiftly investigate and, if necessary, remedy the illegality.

To the extent that a corporation's internal ethics and compliance guidelines contemplate or require an employee or agent to advise management immediately upon learning any facts regarding a potential illegality, the corporation's compliance system would be severely hampered if the employee or agent could, without consequence, assemble, and even retain, information privately and disclose it to the Commission in the first instance, frustrating management's opportunity to address the potential transgression and leaving the responsible corporation in a quandary. The possibility of a subjective increase in the whistleblower reward for internal reporting is not enough to combat the large risk of company remediation efforts and resulting decrease or elimination of a payment. We believe that, in order for whistleblowers to be eligible for an award, they should be required, absent extraordinary circumstances, to exercise reasonable efforts to exhaust all available internal processes a corporation has established for reporting compliance concerns. Whistleblowers should be obligated to demonstrate that they have made a good faith attempt to use the corporation's range of internal reporting mechanisms. In the event, however, that the Commission determines not to mandate internal reporting, we suggest that it consider adding compliance with internal reporting programs to the list of factors it will consider in its criteria for evaluating the amount of an award.

That the proposed rules do not require the Commission to notify a company when it is the subject of a whistleblower complaint is also deeply troubling. Failing to allow the corporation to be involved at the earliest possible moment when an issue of possible misconduct is unearthed is wholly inconsistent with principles of strong corporate governance. Whistleblowers should not be financially incented to, nor should the Commission, conceal from the corporation issues that it otherwise would readily investigate and resolve. If the Commission does not require internal reporting *prior* to disclosure to the Commission, it is critical that it mandate simultaneous reporting to the corporation, or alternatively that the Commission immediately provide information regarding the whistleblower claim to the corporation to afford it the opportunity to address the alleged violation and appropriately discharge its common law duty to supervise its employees and agents. We recognize, nonetheless, that there may be instances in which a whistleblower may not wish to first report to the corporation out of a concern that senior management may be so entrenched in the wrongdoing that it is unlikely that a meaningful investigation will befall. Thus, under such circumstances, the Commission should reserve the right to allow the whistleblower to circumvent the company's compliance system if there is a substantial, reasonable and legitimate belief that the investigative process may be endangered.

Both logic and law dictate that a corporation acts through its employees as agents.[2] The *respondeat superior* principles that courts use to impute liability stem from tort law's agency principles, which hold companies

---

[1] In a spectacular example of such behavior, an executive at TAP Pharmaceutical Products ("TAP") in the United States spent more than half a year at the company gathering evidence of suspected fraud, later compiling additional evidence over the course of eight years as an ex-employee while also filing a *qui tam*[2] action alleging similar misbehavior at a company rival, Zeneca. While the relator received a staggering $126 million for such efforts, the defendants connected to the alleged wrongdoing at TAP were later cleared. (*See* Neil Weinberg, *The Dark Side of Whistleblowing*, FORBES, Mar. 14, 2005, at 90, 91.)

[2] *See* Kathleen F. Brickley, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 629-30 (1988).

FundEX INVESTMENTS INC.

FundEX Investments Inc.
400 Applewood Crescent
3rd Floor
Vaughan, ON L4K 0C3

Tel: 905-305-1651
Toll-free: 1-800-324-6048
Fax: 905-305-1698
Toll-free: 1-866-282-2010

responsible for the acts and omissions of their employees,[3] leaving largely unresolved the central issue of when a company's compliance system is sufficient, in either design or implementation, to safeguard the corporate enterprise from vicarious responsibility for agents' actions. A company with clearly articulated policies and procedures to deter and detect unlawful behaviour still faces vicarious liability for the acts of rogue employees and agents, regardless of the effectiveness of its compliance program. In practice, regulators and plaintiffs bear a light burden when proving that an employee's (or agent's) acts fell within the scope of employment and that it was designed to benefit the corporation. To prevail in such circumstances, the company must demonstrate that it acted reasonably in establishing a compliance program aimed at deterring, detecting, disciplining and disclosing illegal behavior. The company must also provide evidence of how the program operated in the particular scenario, such as when and whether the wrongdoers were adequately and periodically trained, the kinds of incentive plans that could have either led to or discouraged the behavior, the types of auditing and monitoring programs that were in place to detect or deter the behavior, and any self-disclosure. If the company is found to have adopted or ratified the conduct, or failed to correct it, it could not avail itself to any form of due diligence defence.

In the event of an OSC enforcement action resulting from an external whistleblower tip in which the information was not first reported internally, the Commission's proposal should be amended to permit corporations to establish a due diligence defence for possessing an effective, well-maintained compliance structure. Moreover, if the corporation is able to successfully establish a due diligence defence, the sanction and monetary penalties imposed on the corporation should be reduced, and more significantly, there should be an absolute bar to the recovery of an award by a whistleblower under the reward program. A due diligence defence for corporations with an effective compliance culture would help to alleviate the concerns that the whistleblower proposal underscores by reinforcing the ability for corporations to develop, implement and maintain a competent compliance regime, and empowering those that do.

Unless The Ability To Rely On The Anti-Retaliation Provisions Is More Narrowly Defined, In Practice Employees or Agents May Claim Termination, However Legitimate, Resulted From Retaliatory Action.

As proposed, the anti-retaliation protections would reach beyond direct disclosures to the Commission involving securities law violations to cover, among other things, employee submissions through internal reporting channels. While this position may have some surface appeal insofar as it arguably encourages employees to invoke internal procedures for self-correction, the allure is quickly dispelled once the company is faced with the prospect of whistleblower litigation. Moreover, because the Commission broadly defines "whistleblower" to include *any* individual who provides information to the OSC concerning a potential violation of securities laws, and as the proposed anti-retaliation provisions are deemed to apply to *any* whistleblower, the risk of litigation in which retaliation is alleged is significant.

We submit that modifications to the provisions are essential to prevent companies from being barraged with meritless lawsuits cloaked in the mantle of retaliation claims.[4] Otherwise, as the proposed rules provide little guidance regarding the anti-retaliation provisions and the parameters of conduct that may subject a corporation to retaliation claims, corporations may be unable to effectively address violations of law or company policy by

---

[3] *See Developments in the Law – Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1241-58 (1979).

[4] *See* U.S. Chamber Institute for Legal Reform *et l., File Number S7-33-10, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34-63237 (*Nov. 3, 2010) <https://www.sec.gov/comments/s7-33-10/s73310-189.pdf>.

FundEX INVESTMENTS INC.

FundEX Investments Inc.
400 Applewood Crescent
3rd Floor
Vaughan, ON L4K 0C3

Tel: 905-305-1651
Toll-free: 1-800-324-6048
Fax: 905-305-1698
Toll-free: 1-866-282-2010

employees or agents without confronting allegations of retaliation in litigation.[5] While, as a matter of law, corporations should be free to take adverse employment action against employees or agents for non-retaliation reasons, even where such individuals have provided information to the OSC, as a practical matter, void of clarifying rules reaffirming this legal principle, the expansive anti-retaliation measures of the proposed program will prompt a wave of litigation alleging retaliation in such circumstances. Corporations will then be forced to devote considerable resources to defending against the onslaught of vexatious litigation, at the sacrifice of corporate enterprise and innovation.

We recognize that the Commission must strike a balance to provide appropriate protections to employees who make whistleblower claims in good faith, even if the claims are ultimately determined to be invalid. We believe strongly, however, that employees or agents who make frivolous submissions to the Commission, or who provide information for the sole purpose of availing themselves of a possible defence against a subsequent termination, should not be granted a shield that would preclude a corporation from terminating or otherwise changing the employment status of the employee or agent. In making this observation, we urge the Commission to make clear in its final rules that the anti-retaliation provisions do not apply to employment actions based on factors other than whistleblower status. In particular, the rules should address what may be relatively common issues under the whistleblower program – whether a corporation may take remedial or punitive action against an employee or agent for involvement in wrongdoing reported to the Commission, for collusion in other misconduct in violation of the corporation's policies, or for failure to report information concerning potential misdeeds as required by a corporate code of conduct. Under the proposed anti-retaliation provisions, such action is permissible, and the rules should make explicit this common sense principle, so as to forestall costly, even if ultimately unsuccessful, employment litigation.

In addition to evading a sizable economic burden, this modification to the proposed rules would be fully consistent with long-established policies of the OSC, as well as the Department of Justice Canada and other federal and provincial enforcement agencies, which have repeatedly underscored that a chief element of an assertive corporate compliance program is the company's demonstrated practice of imposing discipline and corrective action to address compliance violations. Clarifying the rules as suggested would enable prudent companies to continue to achieve this critical element of a well-conceived, functional compliance regime. Absent this clarification, the continued viability of internal reformatory compliance processes would be imperiled and would stand in contravention of abiding government and regulatory policy.

Culpable Conduct By The Whistleblower Should Not Be Rewarded, Nor Should The Conduct Otherwise Be Protected From Discipline.

As a matter of principle, we believe that the rules should exclude from eligibility of receiving a whistleblower award persons with any degree of direct or indirect responsibility for violations of law, regulation or codes of conduct relating to matters within the scope of the whistleblower complaint. Persons who have engaged in violations, or possible violations, of securities laws may in fact have an incentive under the proposed whistleblower scheme to maximize the seriousness of the violation in an effort to increase the potential amount of their awards. Rather than advising company compliance personnel or approaching the Commission at an early stage of violation,

---

[5] *See generally* Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n, Testimony on Implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (September 30, 2010) *available at* http://www.sec.gov/news/testimony/2010/ts093010mls.htm (noting that the SEC has already experience an "uptick" in the number of whistleblower complaints after the enactment of Dodd-Frank); Melissa Klein Aguilar, *More Whistleblower Reforms in Dodd-Frank Act*, Compliance Week, August 17, 2010 *available at* http://www.complianceweek.com/index.cfm?fuseaction=article.viewArticle&articleId=6114&&msg= (describing Dodd-Frank's expansion of whistleblower protection and noting that it may well lead to an increase in retaliation lawsuits).

FundEX INVESTMENTS INC.

FundEX Investments Inc.
400 Applewood Crescent
3rd Floor
Vaughan, ON L4K 0C3

Tel: 905-305-1651
Toll-free: 1-800-324-6048
Fax: 905-305-1698
Toll-free: 1-866-282-2010

they may determine to wait until the likely monetary sanctions exceed the $1 million threshold before coming forward with information. Although this might also be the case for non-culpable persons, those who may have contributed to the violation raise the spectre of rewarding people with unclean hands, under circumstances where the violation may not have occurred, or risen to its magnitude, without the participation or assistance of a person who then seeks an award based on the violation.[6] In this regard, we are of the view that eliminating the eligibility for whistleblower awards of persons who engage in culpable conduct under the rules should not eliminate the incentive of such persons to step forward with information regarding violations of law. We note, among other things, that a person with some culpability who brings information regarding potential violations of securities laws to the attention of the Commission may still be entitled to leniency for their disclosure and cooperation in the ensuing investigation.

As a practical matter, however, we acknowledge the emerging importance of whistleblowers as a source of essential information in the detection of fraudulent or other unsavoury behavior. We understand that the policy rationale behind whistleblower endowments, even to those who are complicit in the wrongdoing, is to provide benefits to the aspiring whistleblower that outweigh the various costs of reporting information.[7] Although we recognize that the Commission's payment of whistleblower awards may be necessary to incentivize culpable actors to report violations of law,[8] we believe that the rules should afford the Commission a reasonable basis for evaluating a person's culpable conduct and for reducing the percentage of an award based on that assessment and public policy considerations.[9] A proper balance between rewarding culpable whistleblowers for their information and avoiding their reporting merely for pecuniary gain must be thoroughly considered in implementing a reward structure. We encourage the Commission to include the role and culpability of the whistleblower as express criteria that the Commission will consider in determining the amount of any award a whistleblower might receive. Culpability in this context would include not only matters adjudicated in judicial proceedings, but also in administrative, enforcement and other proceedings. We also suggest that this rule should contain an express provision to permit the Commission to deny an award in situations where it concludes that the payment of an award would be against public policy.

The proposed program provides that the retaliation protections apply irrespective of whether a whistleblower employee satisfies the procedures and conditions to qualify for an award. This suggests that a person who had engaged in, but reported, substantial misconduct, and is consequently disqualified from receiving an award, could be protected from the retaliation by the company in connection with the transgression. Culpable parties already have incentives to report their own misbehaviour in return for leniency. Accordingly, the rules should be amended to exclude from the definition of "whistleblower" rogue employees or agents and those who are aware of

---

[6] *See* American Bar Association, *File No. S7-33-10, Release No. 34-63237, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934* < https://www.sec.gov/comments/s7-33-10/s73310-253.pdf>.

[7] *See* Geoffrey Christopher Rapp, *States of Pay: Emerging Trends in State Whistleblower Bounty Schemes*, 54 S. TEX. L. REV. 53, 59 (2012) (discussing the role of rewards in overcoming the concerns that cause potential whistleblowers to remain silent); *see also* Ashlin Aldinger, Comment, *A Race to the IRS: Are Snitches and Criminals the New Business Model?* 51 HOUS. L. REC. 913-931 (2014) (discussing what motivates whistleblowers to come forward and the potential moral issues with offering bounties to incentivize individuals to report tax noncompliance).

[8] The legacy of the *False Claims Act* (the "FCA") creates an innate conflict of using a 'rogue' to catch a rogue. Whistleblower bounty programs use informants they perhaps should not trust to catch cheats they do not trust. And therein lies the conflict. However, whistleblowers, culpable or not, are typically the only individuals who can, and often do, expose wrongdoing. Without whistleblowers, the scandals they report may never be known. Concurrently, there are concerns that providing bounties to culpable whistleblowers will encourage misconduct and may create an incentive to involve other employees in the wrongdoing. (*See* Robert Howse & Ronald J. Daniels, *Rewarding Whistleblowers: The Costs and Benefits of an Incentive Based Compliance Strategy*, in CORPORATE DECISION-MAKING IN CANADA 525, 538 (Ronald J. Daniels & Randall Morck eds. 1995.)

[9] Public policy considerations and the proper balance between rewarding culpable whistleblowers for their information and avoiding their reporting merely for bounty purposes must be thoroughly considered in implementing any bounty structure. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,000, 34,300-01 (June 13, 2011).

FundEX Investments Inc.
400 Applewood Crescent
3rd Floor
Vaughan, ON L4K 0C3

Tel: 905-305-1651
Toll-free: 1-800-324-6048
Fax: 905-305-1698
Toll-free: 1-866-282-2010

misconduct, yet fail to report it internally. This would disentitle culpable or complicit persons from reward and anti-retaliation eligibility.

The whistleblower proposal must be reevaluated with an eye to greater tailoring and flexibility to permit the OSC to efficiently allocate resources and empower corporations to take swift action, while not overburdening the capital markets. If corporate reporting programs are allowed to be marginalized by the vast financial incentives in the proposed scheme, then the most effective means of combating market malfeasance will wane unused while whistleblower complaints, with or without merit, queue at the OSC. FundEX believes that the final rules the Commission adopts should "operate in tandem with, and support and strengthen, the existing matrix of laws, regulations and policies designed to encourage the reporting of serious violations of law, require the investigation of allegations of wrongdoing, and provide meaningful and compelling response to such allegations."[10] The Commission's whistleblower rules, if carefully crafted, should inure to the benefit of shareholders and the investing public. We encourage the Commission to make every effort in its final rules to be sensitive to the concerns expressed herein and to eliminate incentives for unmeritorious or irresponsible reporting, avoid rewarding culpable persons, and to consider the effects the rules may have on companies' internal compliance programs and legal privileges. A whistleblower program that will elicit high-quality information will contribute significantly to the effectiveness of the Commission's enforcement efforts, while providing necessary protections to corporations and minimizing the burdens both companies and the Commission will incur in responding to meritless claims.[11]

Yours very truly,

"FundEX Investments Inc."

FundEX Investments Inc.

[10] *See* Matthew P. Allen, *The SEC Cooperation Initiative and Its Criminal Roots, ABA Section of Litigation Annual Meeting* (2013).
[11] *See* American Bar Association, *File No. S7-33-10, Release No. 34-63237, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934* < https://www.sec.gov/comments/s7-33-10/s73310-253.pdf>.