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January 6, 2016

VIA EMAIL: comments@osc.gov.on.ca

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

OSC Notice and Request for Comment
Proposed OSC Policy 15-601 Whistleblower Program

Dear Ms. Turcotte:

Knowledge First Financial Inc. ("Knowledge First" or "We") is a nationally registered scholarship plan dealer and wholly-owned subsidiary of the Knowledge First Foundation. Knowledge First has been providing peace of mind education savings solutions to Canadians for over 50 years and currently administers over $3.5 billion in education savings for over 287,000 customers, through a national network of over 350 registered Sales Representatives.

Knowledge First appreciates the opportunity to comment on the proposal by the Ontario Securities Commission ("OSC" or "Commission") to introduce a whistleblower policy (the "Proposed Policy") in the province of Ontario, pursuant to OSC Notice and Request for Comment published on October 28, 2015 (the "October 2015 Notice").

We support the overall goals of the Proposed Policy in furthering the OSC's mandate of protecting investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets. We also recognize and agree that the Proposed Policy is in keeping with the principle that effective and responsive securities market regulation requires timely, open and efficient administration and enforcement of the Ontario *Securities Act* (the "Act").

Knowledge First Financial Inc. / La Première financière du savoir inc.
50 Burnhamthorpe Rd. W., Suite 1000, Mississauga, Ontario L5B 4A5
Service: 1 800 363-7377 • Fax: 1 800 668-5007 • E-mail: contact@kff.ca • Head Office/Siège social: 1 866 701-7001
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However, we do have some concerns with the Proposed Policy, specifically relating to the difficulty of interpreting potentially reportable events and the provisions relating whistleblowers voluntarily providing information.

In preparing our comments, we have reviewed the October 2015 Notice as well as the original OSC Staff Consultation Paper 15-401 published February 3, 2015 ("Consultation Paper") and all of the comment letters received on both the Consultation Paper and the October 2015 Notice. We offer our comments in the spirit of assisting the OSC in achieving the delicate balance of promoting a mechanism for individuals to report potentially serious violations of the Act and related securities regulatory requirements that will help to protect and foster confidence in the capital markets and the need to avoid inaccurate, incomplete or otherwise inappropriate reporting. We ask that you consider our comments in light of the difficulty in attempting to strike this balance.

Difficulty in Interpreting Reportable Events

Section 14 of the Proposed Policy sets out the type of information that would constitute a reportable event that the OSC expects would lead to a potential whistleblower award. In particular, this section states that the information:

> *"will relate to a serious violation of Ontario securities law and will be*
> *a. original information*
> *b. information that has been voluntarily submitted*
> *c. of high quality and contain sufficient timely, specific and credible facts relating to the alleged violation of Ontario securities law; and*
> *d. of meaningful assistance to Commission Staff in investigating the matter and obtaining an award eligible outcome.*

We acknowledge the need to stipulate the reporting of serious violations of Ontario securities law only. However, without further guidance it will be very difficult for many whistleblowers, especially line staff members of registrants and market participants, to make such a distinction. Not only is the whistleblower expected to know what the applicable law or regulatory requirement is but the individual must also be able to assess its seriousness. Yet with the possibility of a potential award, the whistleblower may choose to forgo an analysis of the applicable law or its seriousness and simply report

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the matter, with the hope it will be analyzed and viewed favorably by Commission Staff. This scenario may lead to various unintended and potentially negative consequences:

- time, effort and resources by the Commission staff to review and analyze reported events that will ultimately not qualify for an award, where such time, effort and resources could be directed to more productive activities;
- whistleblowers becoming discouraged by being advised that their reported event is not considered to have met the reporting requirements of the Proposed Policy, leading to a reluctance to report future events;
- reduced productivity and work effort of whistleblowers, who spend time and effort analyzing and gathering information on an event that is ultimately not considered to have met the reporting requirements of the Proposed Policy, negatively impacting the efficiency and profitability of their respective employers.

We recognize that the potential for whistleblowers reporting events that ultimately do not meet the reporting requirements of the Proposed Policy can be reduced where the whistleblower first reports the event through their employers' internal compliance and reporting protocols. However, as noted in section 16(1) of the Proposed Policy, whistleblowers are only *encouraged*, not required to first report such matters internally. We also recognize that if whistleblowers were *required* to first report all matters internally, this may reduce the effectiveness of the Proposed Policy and possibly inhibit whistleblowers from coming forward.

Recommendations:

To resolve this reporting dilemma, we recommend that the Proposed Policy include, either in the body or a schedule, guidance and examples of potential serious violations of Ontario securities law. Commission staff can draw on and summarize its own past enforcement decisions, judgements and settlements that are already in the public domain to prepare such guidance. Users of the guidance can be appropriately cautioned that such information is not exhaustive and is only given as examples to help understand the common areas of Ontario securities law that have produced significant enforcement matters in the past and to provide context on their respective significance.

Potential whistleblowers should be strongly encouraged to review such guidance prior to reporting an event under the Proposed Policy. Further, whistleblowers should be encouraged to first report matters

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internally through the employers' own internal compliance and reporting protocols. If the whistleblower is not comfortable reporting internally, the guidance should encourage whistleblowers to seek external counsel prior to reporting. Given the public policy benefits of this initiative, we suspect a number of law firms would be willing to assist whistleblowers in assessing potentially reportable events in a confidential, low-cost manner, under the guise of solicitor-client privilege.

Submitting vs. Requesting Information

Sections 2 and 3 of the Proposed Policy set out the requirements for whistleblowers in submitting original information to the Commission. "Original information" is defined in the Definitions section of the Proposed Policy to mean:

> 1. *information that is not already known to the Commission from any other source, that the whistleblower obtained:*
>   i. *from the whistleblower's independent knowledge, derived from the whistleblower's experiences, communications and observations in employment, business or social interactions; or*
>   ii. *from the whistleblower's critical analysis of publicly available information, if the analysis reveals information that is not generally known or available to the public..."*

We appreciate the need for the Commission to obtain as much original information as possible in assessing each reported event. We also recognize that registrants and market participants cannot claim confidentiality over information that may indicate or represent a potentially serious violation of Ontario securities law. However, we are concerned that with such a broad definition of "original information", whistleblowers may be voluntarily providing information that the individual neither has authorized access to or authorization to release such information from its owner or responsible party. This may include information relating to customers, investors, suppliers, contractors and other arms' length third parties who have provided information on the basis that its confidentiality be protected by the receiving party under the requirements of the Personal Information Protection and Electronic Documents Act ("PIPEDA") and other similar provincial acts covering privacy of information, including that in Ontario.

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Recommendation:

To resolve this issue, we recommend that whistleblowers who are employees of a market participant or registrant instead file an initial report describing the possible securities law violation and voluntarily include either publicly available information or information that within the whistleblower's specific access and authority to release, by virtue of their employment duties. By its definition, this would exclude any information that identifies and/or is uniquely personal to a customer, investor, supplier, contractor or any other arms' length party that the employer holds confidential information on behalf of.

Upon reviewing the whistleblower's initial report, Commission Staff could request additional information from the whistleblower, consistent with the definition of "original information" as set out in the Proposed Policy. However, by responding to a request for such potentially confidential information rather than voluntarily supplying such information, the whistleblower faces less risk of repercussion. Many firms, including Knowledge First, have privacy policies that allow for the disclosure of confidential information to satisfy a regulatory request. A request for further information from a whistleblower in support of the filing of a reported event would meet this test. Further, this procedure would allow Commission Staff to complete a preliminary review of the reported event and determine if the event is worthy of following up on to request more information.

Specific Consultation Questions

The October 2015 Notice requested responses on the following questions:

- Do you agree with in-house counsel being eligible for a whistleblower award? If not, why?
- Is the 120 day reporting period relating to the timing of internal reports as set out in section 16 of the Proposed Policy an appropriate time limit?

Our responses to these questions are as follows:

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In-House Counsel Eligible for Whistleblower Award

We do not support including in-house counsel in the group of whistleblowers who could be eligible for a potential award, even where the disclosure of information is otherwise permitted by a lawyer under applicable provincial or territorial bureau or law society rules.

Unlike the CCO and other officers and directors that the policy proposes may be eligible for a whistleblower award we believe the role of in-house counsel is unique. We believe that allowing in-house counsel to be eligible for a whistleblower award creates the perception of a conflict of interest between the duties and responsibilities the counsel has to the organization and any duties the counsel may believe they have to themselves.

We recognize that the proposed policy does not intend to interfere with solicitor-client privilege when it comes to in-house counsel possessing information that the counsel could consider reportable. However, the possibility that the in-house counsel may be motivated to report a matter as whistleblower, with the potential of an award, may raise question with officers and directors of the firm leading to a hesitancy in approaching the counsel with significant legal issues or concerns. For this reason, we believe sanctity of the solicitor-client privilege and the duties and responsibilities of the in-house counsel towards the interests of the firm outweigh the need to allow in-house counsel to be eligible for a whistleblower award.

In addition, this view seems to be consistent with a recent U.S. court decision involving the efforts of an in-house counsel in seeking a whistleblower award. In a 2013 decision a State of New York circuit court upheld a lower court ruling which dismissed an action brought by a former general counsel who was seeking a whistleblower award on the basis that "such measures were necessary to prevent the use of [the former general counsel's] unethical disclosures against defendants."[1]

120 Day Reporting Period

We support this period of time as it gives market participants and registrants time to respond to internally reported events. A lesser reporting period may be insufficient for many organizations such as Knowledge First that hold quarterly board meetings and require sufficient time leading up to such meetings to prepare relevant materials for the Board of Directors. A longer reporting period may lead to

[1] United States ex. rel. Fair Laboratory Practices Associates v. Quest Diagnostics Inc.

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harm to investors or the capital markets by virtue of the event not being reported or investigated in a sufficiently timely manner.

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We thank you once again for this opportunity to comment on this important proposal and welcome any questions you may have on our comments.

Sincerely,
KNOWLEDGE FIRST FINANCIAL INC.

Darrell Bartlett, CPA, CA, CIA
Chief Compliance Officer

Cc: R. George Hopkinson
President & Chief Executive Officer

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