ASSOCIATION DES BANQUIERS CANADIENS
CANADIAN BANKERS ASSOCIATION

Box 348, Commerce Court West
199 Bay Street, 30th Floor
Toronto, Ontario, Canada M5L 1G2
www.cba.ca

Andrea Cotroneo
CBA General Counsel & Corporate Secretary, VP Communications, Consumer and Business Policy
Tel: (416) 362-6093 Ext. 214
acotroneo@cba.ca

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

Dear Ms. Turcotte:

The Canadian Bankers Association (**CBA**) works on behalf of 60 domestic banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 280,000 employees. The CBA advocates for effective public policies that contribute to a sound, successful banking system that benefits Canadians and Canada's economy. The Association also promotes financial literacy to help Canadians make informed financial decisions and works with banks and law enforcement to help protect customers against financial crime and promote fraud awareness. www.cba.ca.

The CBA welcomes the opportunity to comment on the Ontario Securities Commission's (**OSC**) OSC Policy 15-601 – *Whistleblower Program* (the **Policy**). We support regulatory initiatives that are intended to deter, detect and ultimately reduce occurrences of corporate misconduct and illegal activity. We are concerned, however, that some of the proposals set out in the Policy could have negative unintended consequences for the reporting of securities law breaches in Ontario. We have set out our concerns in greater detail below and recommended modifications to the framework described in the Policy that would address these concerns, along with suggested changes that we believe would enhance the rigour and effectiveness of a whistleblower program.

Section 16: Internal reporting

Our primary concern is that implementation of the framework set out in the Policy may negatively impact the effectiveness of banks' internal reporting, escalation and compliance systems, with subsequent negative impacts on clients. The introduction of monetary incentives for disclosure to the OSC could result in employees' circumvention of job accountabilities and disruption to existing lines of escalation within organizations since bank employees have a responsibility to escalate concerns to their manager or other individuals in positions of authority within their banks. The unintended consequence that could result from the OSC's offer of a monetary reward is that some employees could be motivated to neglect their reporting obligations to their employer, in order to pursue personal gain.

One potential negative impact of the circumvention of an institution's internal escalation process is that a systemic issue may not be revealed until the OSC notifies the institution, or even until the OSC completes its investigation, which could take a long time. In the interim, clients would be negatively affected. We therefore recommend that the final framework for the whistleblower program require whistleblowers to report a specific instance of potential misconduct internally at least once before they can be eligible for an award for reporting the same instance of misconduct to the OSC. This would assist in preserving internal reporting systems and communication, both within compliance departments and between compliance departments and business lines, and fostering these relationships so that issues would be addressed proactively.

We are also concerned about a whistleblower's eligibility for an award in the circumstances described in section 16(2). While it is important for a whistleblower to report a matter internally first, granting an award to a whistleblower under section 16(2) seems to overreach, especially since the employer organization, rather than the whistleblower, would have provided the information to the OSC first, and particularly if the misconduct has been avoided or minimized. If the eligibility for an award in section 16(2) is retained, we would recommend that the 120 day period be significantly extended. An internal investigation of a serious or complex matter could take a significant amount of time to be resolved, at which point the employer would have to decide whether or not to report the matter to the OSC. We also suggest that the 120 day period in section 16(3) be similarly extended.

Section 1: Definition of "original information" and Section 5: Whistleblower assistance

In order to be consistent with section 15(1), we suggest that the OSC incorporate the following exclusions to the definition of "original information" in the Policy:

- frivolous, vexatious or meritless information;
- information obtained in circumstances which would bring the administration of the program into disrepute; and
- information obtained in connection with providing internal audit or external assurance services to, or conducting an internal or financial audit of, a client or employer that is, or that employs, the subject of the whistleblower submission.

We note that the definition of "original information" excludes information the whistleblower obtained through a communication that was subject to solicitor-client privilege. We recommend that the OSC exclude from the definition of "original information" all privileged information, including information that is the subject of litigation privilege and/or settlement privilege. Similarly, with respect to whistleblower assistance in section 5(1)(c), all privileged information, including information that is subject to litigation privilege and/or settlement privilege, should be excluded from the additional information that OSC staff may request a whistleblower to provide.

Section 2: Procedure for submitting original information

We request additional details regarding the process for submitting original information and the forms involved. In particular, we would appreciate the opportunity to review and comment on the whistleblower information form referred to in section 2. That section also references a declaration in which the whistleblower will make certain declarations, "among other things." We seek clarification on what further declarations the OSC contemplates the whistleblower making and whether the OSC intends to provide a form of declaration.

Section 14: Information eligible for a whistleblower award

In order to ensure rigour around the types of information that the OSC accepts as complaints, we request that the OSC articulate the specific serious breaches of securities law that it aims to address via a whistleblower program. We suggest that the whistleblower program be limited to such serious breaches as theft, fraud, market manipulation, insider trading, and material misrepresentations & material omissions (for issuers). Limiting the whistleblower program to these types of breaches would likely reduce frivolous reports to the OSC and would provide a better understanding of what types of enforcement actions and possible awards might result from establishing the program. Furthermore, reporting to the OSC should be based on clear criteria or thresholds that are connected to the types of misconduct that the OSC is attempting to address.

Section 14(3) sets out the types of information that are ineligible for a whistleblower award, including information that OSC staff determines is subject to solicitor-client privilege. We recommend that this section provide that all privileged information, including information that is subject to litigation privilege and/or settlement privilege, is ineligible for a whistleblower award.

Section 15: Whistleblowers who are ineligible for a whistleblower award

The OSC requested comments on whether in-house counsel should be eligible for a whistleblower award. In our view, in-house counsel should not be eligible for a whistleblower award, even on the exceptional basis set forth in the Policy, largely because the risk of undermining solicitor-client privilege is too great. If the eligibility of in-house counsel for whistleblower awards is retained, we would recommend that the requirement that at least 120 days have elapsed since the whistleblower provided the information to the entity's audit committee, chief legal officer, chief compliance officer or the individual's supervisor be greatly extended because in-house counsel may be privy to internal investigation procedures and results on an ongoing basis.

We seek clarification on the current stance in the Policy on the eligibility for an award of whistleblowers who obtain information in connection with the provision of legal services. The definition of original information excludes information the whistleblower obtained in connection with the provision of legal advice to a client or employer, on whose behalf the whistleblower or the whistleblower's firm acts or provides services. According to section 14, in order to be eligible for an award, the information must be original information. In contrast, pursuant to section 15(2), a whistleblower who obtained information in connection with providing legal services to, or conducting the legal representation of, a client or employer that is, or that employs, the subject of the whistleblower submission may be eligible for an award. These provisions appear to be in conflict: the definition of original information excludes information obtained in connection with the provision of legal advice, so such information would not be eligible for an award; however, section 15(2) allows for the possibility of an award in such circumstances. We request clarification from the OSC on this point.

In order to maintain the integrity and effectiveness of banks' strong internal reporting, escalation and compliance systems, we recommend that members of a corporation's audit department be excluded as eligible whistleblowers. Under section 15(1)(e), audit department members are generally considered ineligible for an award, but they may be eligible pursuant to section 15(2).

We also request clarification on the meaning of "directors or officers" in section 15(1)(g). The varied and sometimes inconsistent use of such titles in the market may create unnecessary confusion in the application of the Policy.

Section 18: Amount of whistleblower award

The introduction of a whistleblower program that offers monetary awards increases the incentive for issuers and registrants to self-report misconduct or perceived potential misconduct for inappropriate reasons. For instance, issuers and registrants may decide to provide a large amount of unnecessary information to the OSC for fear that possible under-reporting could negatively impact the issuer's or registrant's relationship with the OSC, which would result in over-reporting and a resulting strain on OSC resources.

We are also concerned that a monetary incentive could potentially lead to an increase in frivolous whistleblower reports that, in turn, would require the OSC and issuers/registrants to expend more resources to investigate issues that are ultimately revealed to be trivial. These concerns would be addressed in part by ensuring rigour around the process of initial assessment and recommendation to Enforcement Staff. It would be helpful to have greater clarity regarding how this process would work before a whistleblower program is put in place.

We recommend that any monetary award be contingent upon and paid from actual recoveries of these monies through the OSC's enforcement process. Pursuant to section 18(5), if the monetary sanctions and/or voluntary payments in a proceeding are equal to or greater than $10,000,000 and the OSC actually collects an amount equal to or greater than $10,000,000, then the whistleblower may receive an award of between 5% and 15% of the amount collected from that proceeding to a maximum of $5,000,000. Awards in connection with proceedings where the monetary sanctions and/or voluntary payments are less than $10,000,000 should also be based on actual monies collected. This would help to reduce baseless claims, as potential whistleblowers would understand this condition before making a report to the OSC. Moreover, the punitive costs of the whistleblower program would effectively be shifted to the wrongdoers, rather than to all market participants.

Treatment of privileged information

The Policy provides that no whistleblower award will be provided for information that OSC staff determines to be subject to solicitor-client privilege. In addition, the definition of "original information" excludes information the whistleblower obtained through a communication that was subject to solicitor-client privilege. However, the Policy is silent on what the OSC would do to ensure that it does not receive privileged information. The Policy does not set out how whistleblowers would be warned against disclosing privileged information, inadvertently or otherwise. The Policy contemplates that a whistleblower would sign a declaration. We recommend that the declaration cover privilege issues, including a warning to potential whistleblowers that the OSC does not wish to obtain privileged information.

The Policy is also silent on the process surrounding a determination of a violation of privilege and how the OSC would respond in the event that a whistleblower does reveal privileged information. We seek clarification on the process that would be followed if information that is later determined to have been privileged is used as the basis of a finding of misconduct or if privileged information forms the basis of an investigation that expands into non-privileged information. OSC staff

should not be permitted to rely on privileged information in any proceedings resulting from information received from a whistleblower. The Policy should confirm that OSC staff will:

(1) view privileged information as inadmissible in any subsequent hearing,
(2) agree that the privilege has not been waived as a result of the disclosure by the whistleblower, and
(3) agree that privileged information will not be further disclosed to third parties.

Availability of credit for cooperation

The Policy does not address how the whistleblower program would affect the OSC's credit for cooperation program. Credit for cooperation should be expressly available to entities that are targets of a report, especially where the whistleblower has not reported the issue internally. A prohibition on credit for cooperation for an issuer or registrant when a whistleblower is first to report is inappropriate. There may be circumstances, for example, where an issuer is undertaking a good faith review of an issue in advance of making a voluntary report, and where a whistleblower decides to report in the interim. Rather than an unequivocal prohibition, we suggest that the Policy provide that where an entity self-reports independent of an earlier whistleblower report, credit for cooperation should remain available for that entity.

Section 24: Factors that may decrease the amount of a whistleblower award

Section 24(3)(g) lists interference with internal compliance and reporting mechanisms as a factor that may decrease the amount of a whistleblower award. The conditions for whether the whistleblower undermined the integrity of such systems are cumulative, such that all of the conditions must be met for the whistleblower to be considered to have undermined the systems. It is unclear why the OSC has taken this approach, given that the fulfillment of any one of the conditions would undermine the systems.

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In closing, we thank you again for the opportunity to share our comments on the Policy. We have taken this opportunity to set out aspects of the Policy that are of concern to our member banks and would be pleased to respond directly to any questions you may have regarding the foregoing. Thank you for taking our views into consideration.

Yours truly,