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January 11, 2016

Ontario Securities Commission
20 Queen St W
20th floor
Toronto, ON M5H 3S8

Dear Sirs/Mesdames:

Re: OSC Staff Consultation Paper 15-601
Proposed Framework of an OSC Whistleblower Program

Further to our letter of May 1, 2015, and the publication of Proposed OSC Policy 15-601 *Whistleblower Program* (the "Proposed Policy") we are pleased to offer our comments on the Proposed Policy.

The Commission's work to date will help ensure that the Proposed Policy meets its goals. The decision to adopt of some of the proposals made in our May 1, 2015 letter is particularly encouraging. Some of the most important changes made include that:

i) the financial incentive is no longer capped at $1.5 million, as earlier proposed, but at $5 million, subject to recovery;

ii) culpability will not present an automatic bar to an award, rather the degree of whistleblower culpability will be among a number of factors which will be considered in determining whether and to what extent a potential whistleblower award will be decreased; and

iii) a prohibition on retaliation will be introduced in the Ontario *Securities Act*.

In setting the maximum amount of an award at $5 million in the Proposed Policy, the Commission exercised its judgment and this is, undoubtedly, a step in the right direction. However, when measured against the personal, financial and reputational risks faced by whistleblowers, a cap of $10 million, subject to recovery, is more likely to drive the sort of behaviour that the Commission hopes to encourage.

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The Commission posed two questions in its October 28, 2015 Notice and Request for Comment. Our responses follow.

1. In-house counsel eligibility

In-house counsel should not be barred from potential eligibility for a whistleblower award; however, the Commission should not purport to make any policy or rule which may be seen as in any way derogating from or modifying the professional duties and responsibilities of lawyers.

The very complex question of whether in-house counsel may be a "whistle-blower" has been addressed in Ontario by the Law Society of Upper Canada ("LSUC") after extensive consultation with stake-holders and having regard to the lawyers' duties of confidentiality and loyalty to their clients as elaborated by the Supreme Court of Canada.

The *Law Society of Upper Canada Rules of Professional Conduct* ("*LSUC Rules*"), rule 3.2-8 (Dishonesty, Fraud, etc. when Client and Organization) and Commentary 1 to 6 thereon, Section 3.3 (Confidentiality), rules 3.3-1.1, 3.3-3 (Justified or Permitted Disclosure) and Commentary 5.1 thereon all address the question posed by the Commission from the perspective of the legal profession and its regulatory authority, the LSUC.

In particular, Commentary 5.5 to Rules 3.3-1.1 and 3.3-3 states:

> **5.1** A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when he or she becomes aware that the organization may commit a dishonest, fraudulent, criminal, or illegal act. This problem is sometimes described as the problem of whether the lawyer should "blow the whistle" on their employer or client. Although the rules make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 3.2-7) and provide a rule for how a lawyer should respond to conduct by an organization that was, is or may be dishonest, fraudulent, criminal, or illegal (rule 3.2-8), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Assuming the exceptions do not apply, there are, however, several steps that a lawyer should take when confronted with the difficult problem of proposed misconduct by an organization. The lawyer should recognise that their duties are owed to the organization and not to the officers, employees, or agents of the organization (rule 3.2-3)) and the lawyer should comply with rule 3.2-8, which sets out the steps the lawyer should take in response to proposed, past or continuing misconduct by the organization.

This procedure recognizes counsel's duty to his or her client (the corporate employer) and not any individual officer or director, and calls for "up-the-ladder reporting," ultimately to the Company's Board of Directors. If the organization, despite the lawyer's advice, continues with the wrongful conduct, the *LSUC Rules* require the lawyer to withdraw from acting in the particular matter and in some, but not all cases, withdrawal means resigning from their position or relationship with the organization (rule 3.2-8, Commentary 5 and 6).

There may be some circumstances where an issuer's in-house counsel may be permitted to whistle-blow (perhaps, if the reported misconduct is of an employee or director of the issuer, or of an affiliate or subsidiary of the issuer if it can be said that the wrongdoing is by a person or company to whom the lawyer owes no professional obligation); however, whether the lawyer is professionally permitted or obliged to report wrongdoing to the Commission should be left to the lawyer (likely on the advice of his or her own counsel) having regard to the lawyer's professional obligations.

As such, if presented with a whistle-blower who is in-house counsel, the Commission should not make inquiries to satisfy itself that the whistle-blower is not breaching any professional obligations. It will prove very difficult for the Commission to make this assessment correctly with the limited information provided to it. In any event, any breach of professional duty by a lawyer/whistle-blower should be the subject of review and determination by the professional regulatory authority (in Ontario, the LSUC).

We are mindful of what may be considered overlapping mandates of the Commission and the LSUC as they relate to lawyers' interactions with the Commission. The Divisional Court described the issue in the *Wilder* case, and summarized with approval by the Court of Appeal for Ontario:[1]

> [10] The Divisional Court found that the OSC's proposed exercise of jurisdiction over Wilder was not inconsistent with the important role of The Law Society in regulating the legal profession. Both The Law Society and the OSC exercise public interest functions, but (at p. 368 O.R.) "the public interests which they seek to protect are not the same." The Law Society's role, as stated by the Divisional Court at p. 368 is "to govern the legal profession in the public interest, and to ensure that members of the profession do not engage in professional misconduct or conduct unbecoming a barrister and solicitor". The role of the OSC, on the other hand, was described at p. 368 as "that of protecting investors and the proper functioning of Ontario's capital markets. Ensuring proper disclosure and maintaining the integrity of its processes are an

[1] *Wilder v Ontario Securities Commission* (2001), 53 OR (3d) 519 at paras 10-11 (CA), referring to (2000), 47 OR (3d) 361 (Div Ct).

important part of this role." The Divisional Court concluded at p. 368 that there was no basis for holding lawyers immune from the regulatory powers of the OSC:

> In proceedings such as these, the [OSC] is not usurping the role of the Law Society, as its objective is not to discipline the lawyer for professional misconduct; rather, its concern is to remedy a breach of its own Act which violates the public interest in fair and efficient capital markets, and to control its own processes.

> [11] Finally, the Divisional Court rejected the contention that by exercising jurisdiction over Wilder, the OSC would infringe the rule of law by interfering with the independence of the bar. The Divisional Court observed at p. 369 that all the OSC was seeking to do was "to ensure that lawyers, among others, do not mislead" it and that the exercise of that jurisdiction "will not interfere with the ability of lawyers who practise securities law to continue to provide excellent and vigorous representation to their clients."

The *Wilder* case involved the Commission reprimanding a lawyer for making misleading statements to the Commission in the course of representing his client before the Commission. Notably, in affirming the Divisional Court's recognition of the Commission's mandate to reprimand lawyers appearing before it, the Court of Appeal added a caveat that Commission must pay "adequate heed to the importance of solicitor-client privilege."[2]

As a practical matter, because of the strict limits on disclosure set out in the *LSUC Rules*, and the career limiting implications of in-house counsel whistle-blowing, we think it unlikely that there will be whistle-blowing by lawyers except in very rare cases.

As there may be circumstances when such whistle-blowing is both professionally permitted and helpful to the Commission in discharging its public interest mandate of investor protection and fostering integrity in our capital markets, the Proposed Policy should not bar in-house counsel from eligibility for a whistleblower award.

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[2] *Wilder v Ontario Securities Commission* (2001) 53 OR (3d) 519 at paras 29-34 (CA).

2. 120 day time limit

We believe the 120 day limit described in section 16 of the Proposed Policy is appropriate. A 120 day limit provides finality to the allocation of the award, and encourages the timely reporting by whistleblowers of information in their possession to the Commission.

We thank you for the opportunity to comment on the Proposed Policy and would be happy to furnish any further assistance the Commission requires.

Respectfully,

Siskinds LLP

Per: A. Dimitri Lascaris, Douglas Worndl, Daniel Bach and Ronald Podolny