Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9 Canada
Tel: 416-863-2400 Fax: 416-863-2653

January 12, 2015

VIA E-MAIL

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

RE: Comments on Proposed OSC Policy 15-601 - Whistleblower Program

Dear Sirs:

We are pleased to respond to your request for comments with respect to the proposed Whistleblower Program.

Blake, Cassels & Graydon LLP is a national law firm with a significant capital markets practice. We represent a large number of market participants, including public issuers of varying size across multiple industry sectors, registrants, and investors.

We have five comments regarding the Proposed Policy.

1. Use of internal reporting and compliance mechanisms.

We are concerned that the Proposed Policy, by creating financial incentives for reporting to regulators, results in significant disincentives to employees to report accounting, internal control, audit and similar concerns through internal reporting and compliance mechanisms already and specifically required and established for that purpose. As well, in many cases, it may provide significant incentives for

employees to breach their duties to their public issuer and registrant employers to report such information to them internally.

National Instrument 52-110 Audit Committees mandates and requires the audit committee of each issuer to establish procedures for the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls or auditing matters and for the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or accounting matters. Every reporting issuer subject to the Instrument is required to comply with these requirements.

(Incidentally, it was not clear why this mechanism, established under securities laws for this purpose, is not expressly included in the definition of "internal compliance and reporting mechanism" in the Proposed Policy.)

Securities market registrants, as part of their internal control mechanisms, also generally establish such internal reporting and compliance mechanisms which are often broader in scope than those contemplated under National Instrument 52-110.

We note that many market participants have invested significant time and resources, ultimately at the expense of their shareholders, to establish these mechanisms, including the use of third party providers.

As currently proposed, the Proposed Policy may well significantly deter the use, and thus undermine the usefulness, of those reporting mechanisms. Offering incentives to report outside of existing mechanisms has the potential of discouraging whistleblowers from reporting internally to their

employers first in accordance with his or her employer's internal compliance procedures, thereby significantly reducing the effectiveness of such procedures. This may also result in behaviour which creates a conflict with the employee's duties to his employer to maintain confidentiality of information. In many situations, it may also directly conflict with the employee's duties and obligations to his or her employer to report such information and concerns to their employers internally and, as important, to take actions, beyond reporting, to address and rectify any such issues.

The Notice and Request for Comment itself recognized "the importance of effective internal compliance systems to identify, correct and self-report misconduct as a *first line of action* [our emphasis] in promoting compliance with securities laws". Not requiring initial internal reporting as a condition of reward eligibility is inconsistent with the stated importance of such reporting being "the first line of action".

We note the Commission's rationale for not requiring the use of internal reporting and compliance mechanisms as a condition of reward eligibility was that "there may be extenuating circumstances for the whistleblower that might otherwise impede his or her reporting to internal compliance and reporting mechanism."

In our experience, issuers and registrants that, either pursuant to applicable requirements, or their own initiative, have established such reporting mechanisms have done so on a basis that does not result in any impediments to good faith reporting. To the contrary, our experience is that the legal obligations under securities and corporate law relating to disclosure and compliance, and regulatory and civil liability at a corporate and indeed personal level, not to mention reputational concerns, provides significant incentives for issuers and registrants to avoid taking actions which would impede the good

faith reporting of concerns regarding accounting or similar matters. Audit committees, to whom concerns can ultimately be reported under the mechanisms required under National Instrument 52-110, are required to be, and are, composed entirely of independent directors who have significant personal legal and reputational incentives to address good faith complaints seriously. As well, the fact that there is a requirement to establish anonymous reporting (to which the anti-retaliation provisions also apply) makes it even less likely there would be such impediments.

However, taking the Commission's position as stated, the cost benefit analysis of providing incentives with potentially unintended and detrimental effects to the use of internal reporting mechanisms, because, in a very few cases, there may be "extenuating circumstances" impeding such internal reporting, appears disproportionate. To address this concern in a more targeted and proportionate fashion, we would propose that it be a requirement to receive a reward through the Program that the information be reported through the internal reporting and compliance mechanisms of the issuer or registrant first, unless the whistleblower can establish that, to use the words of the Commission, there were "extenuating circumstances" for the whistleblower that would "have impeded his or her reporting" through such a mechanism. Such extenuating circumstances could be defined to include situations in which an issuer has not complied with its obligations to establish internal reporting mechanisms under National Instrument 52-110, including the provision of anonymous reporting.

Consistent with the objective of internal reporting and compliance mechanisms being the "first line of action" with respect to compliance matters, it would be inconsistent with such mechanisms to permit employees and others who learn of such information because they are involved in investigating or responding to an employee's concerns reported through a company's internal reporting and compliance mechanisms to be eligible as a whistleblower for rewards. To permit otherwise would

potentially deter employees responsible for managing such mechanisms from fulfilling their responsibilities in a full and timely manner as they pursue an award. In addition, employees who utilize the internal reporting mechanism may be incented not to do so, because other employees within the organization who receive the information through the internal reporting and compliance mechanism may receive a reward for that information. Accordingly, in our view, the definition of "original information" should also exclude any information that was provided through an internal reporting and compliance mechanism (other than the employee initially utilizing such mechanism to begin with). Similar corrective changes should be made to section 15 of the Proposed Policy with respect to those who are ineligible for a whistleblower award. A corresponding change should be made to Proposed Policy to exclude from those eligible to receive an award individuals who obtain the information in this manner.

2. <u>Solicitor-Client Privilege</u>

Under Ontario professional rules, a lawyer is at all times required to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and is required not to divulge any such information unless authorized by the client or where required by law to do so, or otherwise permitted under other limited circumstances contemplated by such rules. The professional rules clearly address situations where lawyers employed or retained by an organization come to know that the organization has acted or is acting or intends to act dishonestly, fraudulently, criminally or illegally. In this case, reflecting the fact the client is the organization, the rules provide for "up the ladder" reporting, and potential withdrawal in such circumstances.

The proposal that external counsel and in-house counsel may be considered eligible for financial rewards for disclosure of information that would be permitted under applicable provincial and territorial professional rules creates significant confusion, as there is no such exception provided for under professional rules. As we understand it, such rules do not permit such disclosure of information by a lawyer to a regulator in these circumstances, let alone to receive a financial reward.

Moreover, any premise that applicable provincial and territorial professional rules may, or even could, be changed to permit disclosure of such information in the circumstances contemplated by the Proposed Policy, is also incorrect. Although the professional rules are important in this regard, the privilege itself is recognized under law, irrespective of the wording of applicable provincial and territorial professional rules. For example, the Supreme Court of Canada held in *R v. McClure* [2001] 1 S.C.R. 445 (paras. 31-34), that solicitor-client privilege should be "as close to absolute as possible". The scope of communications subject to solicitor-client privilege is not simply defined by what the professional rules do or do not permit.

The proposed exception allowing for lawyers to disclose information to a regulator is accordingly misleading and suggests that there are circumstances under which such disclosure could be provided under the Proposed Policy. The objective of solicitor-client privilege is directly impacted by allowing for the expectation of such an exception. The exceptions provided in clauses 15(1)(c) and (d) should provide that there is no eligibility for rewards for anyone who obtained information in connection with providing legal services to, or conducting the legal representation of, a client, without exception.

In a related vein, at least in the case of whistleblowers in the categories referred to in clauses 15(1)(c), (d) and (f) of the Proposed Policy, the anti-retaliation provisions should not apply. An expectation

should not be created that a breach of professional rules can be “reasonable” or in “good faith”, and accordingly the Proposed Policy should not create an expectation that a lawyer who breaches client confidences will be able to avail themselves of anti-retaliation provisions.

Consideration in this vein should also be given to excluding from anti-retaliation individuals identified in clauses 15(1)(a), (b), (e) and (g) of the Proposed Policy as well.

3. Anti-Retaliation Measures

Consistent with the foregoing, in a manner consistent with the fulfillment of employee obligations to his or her employer and to strengthen, not discourage, the use of internal reporting and compliance mechanisms, we recommend that a condition of reliance on the anti-retaliation provisions be utilization of the internal reporting and compliance mechanisms, again except where the employee can establish the extenuating circumstances that impeded his or her ability to do so.

We also note the Proposed Policy provides that measures protecting against “retaliation” are available to employees who are contractually limited from reporting to a regulator. We believe that it is important to clarify that employment duties requiring prompt reporting of concerns via internal mechanisms be clearly identified as exceptions from the application of these provisions. As well, there should be a clear exception from these provisions where there has been a failure to report using internal mechanisms where the employer can establish such reporting is part of the employee’s duties.

As noted above, we believe certain categories of individuals should be exempted from the benefit of the anti-retaliation provisions, particularly lawyers who breach their professional obligations to clients in respect of solicitor-client privilege.

4. Award Eligibility

Under Ontario corporate law, codified under the Ontario Business Corporations Act, officers of a corporation, as well as members of the board of directors of a corporation, are required to act with a view to the best interests of the corporation and with due care. These duties are referred to as being fiduciary duties, denoting a high level of obligation and accountability.

Although not necessarily the sole beneficiaries of the existence and discharge of these legal duties, it is most often shareholders of the corporation who benefit from the existence and discharge of these fiduciary duties by officers and directors.

To the extent that an officer or director becomes aware of information of the type that would trigger an award under the Proposed Policy, in acting in accordance with their fiduciary duties, such directors and officers would typically be required to address the matter giving rise to the concerns.

Providing financial incentives to officers and directors to report such information to the regulator, to receive financial rewards, as opposed to reporting such concerns internally if necessary, and taking steps to address and resolve issues in the best interests of the corporation, would be appearing in many instances to be creating a clear conflict of interest for directors and officers with respect to the performance of their fiduciary duties to the corporation, duties mandated by Ontario (and Canadian) corporate statutes, which enure ultimately to the benefit of shareholders.

While we note that the Proposed Policy conditions director and officer eligibility for a reward on a specified lapse of time after internal reporting, it is not clear why the mere lapse of time should provide an opportunity for incentives to be provided to breach fiduciary duties owed by directors and officers to

their corporations. This appears to ignore the fact that the obligations of the directors and officers are not merely to report concerns, but to act on them as appropriate as their fiduciary duties may require.

It does not appear appropriate in any case for directors and officers of corporations to be able to be eligible for financial rewards under the Proposed Policy when their duties require them to address such issues - not personally profit financially from them.

As noted above, given the perverse incentives created, and further disincentives to the use of internal reporting and compliance mechanisms, we believe that those who receive such information via such internal reporting and compliance mechanisms should also be excluded from eligibility for rewards.

5. Rewards and Funding

As the Commission is self-financing, by necessity any rewards which are not funded by non-compliant issuers or their directors and officers will be funded by compliant issuers, and thus, indirectly, by the shareholders of compliant issuers. Compliant issuers already fund enforcement–related activities of the Commission. It is inappropriate, in our view, to require compliant issuers and registrants to also fund rewards to employees of non-compliant issuers and registrants where the Commission has been unable to recover proceeds from non-compliant issuers and related market participants. Indeed, as class actions may result arising out of the whistleblowing concerns, situations could conceivably arise where the shareholders of compliant issuers and registrants fund rewards for employees of non-compliant issuers, while the shareholders of the non-compliant issuer are rewarded with the proceeds of class action proceedings arising out of that non-compliance. Such a result could not be intended and should not be permitted.

* * * * *

Thank you for this opportunity to comment. Our firm comments were prepared by a working group consisting of John Tuzyk, Chris Hewat, Darren Littlejohn, Andrea York and Andrew McLeod. You may direct any correspondence arising out of our comment letter to our Mr. John Tuzyk (john.tuzyk@blakes.com).

Yours very truly,

BLAKE, CASSELS & GRAYDON

12812729.3