FAIR | Canadian Foundation *for* Advancement *of* Investor Rights

January 12, 2016

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
Sent by email to: comments@osc.gov.on.ca

Re: OSC Notice and Request for Comment on Proposed OSC Policy 15-601 – Whistleblower Program

FAIR Canada is pleased to offer comments to the Ontario Securities Commission ("OSC") regarding its proposed whistleblower program that is set out in Proposed OSC Policy 15-601 (the "Proposed Policy") and its related Notice dated October 28, 2015 (the "Notice").

FAIR Canada is a national, charitable organization dedicated to putting investors first. As a voice for Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

1. Executive Summary

1.1. FAIR Canada commends the OSC for moving forward to implement a whistleblower program. A properly designed whistleblower program will help combat fraud and other wrongdoing, thereby helping the OSC to fulfill its mandate to protect investors and foster fair and efficient capital markets and confidence in those markets. Such a program will help the OSC to discover and put a stop to wrongdoing early and quickly and thereby minimize investor losses.

1.2. FAIR Canada believes that the Proposed Policy (with recommended changes suggested below) should be implemented promptly but that the necessary statutory amendments should be sought forthwith so that all required elements of an effective whistleblower program – confidentiality for the whistleblower, anti-retaliation provisions and financial compensation - have full legal effect. If the whistleblower program is a policy which sets forth expectations but does not provide legal rights and remedies to prospective whistleblowers and does not impose legal obligations on capital market participants, Ontario's whistleblower program will not have the impact it otherwise could.

1.3. FAIR Canada believes the Proposed Policy needs to be revised so its provisions provide greater assurance as to when a whistleblower will be eligible for financial compensation; further details of suggested changes to accomplish this are outlined in Section 2.10 to 2.12 below. Compared to the SEC's whistleblower program, the Policy is not as forthright, is too opaque and may have set the bar too high. We are concerned that there are a number of ways in which, as a result of the Proposed Policy's drafting, there is unnecessary uncertainty as to whether a whistleblower who comes forward will receive any compensation. This may result in potential whistleblowers determining it is not worth taking the risks and may not incentivize market participants to establish and maintain robust compliance policies and procedures, proper governance and

improved internal audit procedures.

1.4. *Funding of Program* - The OSC Notice and Proposed Policy is silent as to the source of the funds to pay whistleblowers. Transparency as to the level and source of funding for the program is needed. In order for the program to be successful there needs to be public disclosure of adequate funding for compensating whistleblowers and operating the program. In addition, the Commission should consider adding to its criteria for determining the amount of a financial award to a whistleblower a provision that prohibits the Commission from taking into consideration the balance of its designated funds (or other source of funding that it determines).[1]

1.5. *Financial Compensation* - FAIR Canada supports the revisions made to the calculation of the financial reward to allow for compensation to go beyond a $1,500,000 cap if collected sanctions or voluntary payments amount to $10,000,000 or more; however, FAIR Canada continues to be of the view that the threshold amount is too high, and the percentage amount is too low. See Section 2.1 to 2.3 below for more detailed comments.

1.6. *Proceedings Where Compensation Warranted* – FAIR Canada believes that whistleblowers should be compensated in circumstances not only where there is a monetary sanction or voluntary payment in the amount of $1,000,000 or more but also when staff of the Commission decide to proceed, given the seriousness of the wrongdoing, quasi-criminally or criminally against the wrongdoers with the result that there is no monetary sanction but there is jail time. The Proposed Policy needs to be adjusted to take into account the differences between our enforcement processes and that in the United States in order to further its underlying goals. In addition, we believe that the Commission should have the discretion to provide a financial reward to a whistleblower when there is a suspension from trading or being an officer or director of any corporation for a period of 10 years or more or a lifetime ban, even in the absence of a monetary fine that reaches $1,000,000.

1.7. *Related Actions* - FAIR Canada believes that the Proposed Policy should specify that it will also pay an award based on amounts awarded (or/and collected) or outcomes achieved in related actions and should define related actions to include: criminal proceedings brought by the RCMP, criminal proceedings brought by the Ontario provincial police; the self-regulatory organizations (the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada) and other regulatory proceedings.

2. Detailed Comments on the Proposed Policy

Financial Compensation to Whistleblowers

2.1. *Threshold Amount* - FAIR Canada continues to believe that the threshold amount of$1,000,000 in sanctions in order to be eligible to receive any compensation (award) is too high and we believe that in light of relative amounts awarded in Ontario as compared to the SEC, a threshold amount of $750,000 would be more appropriate.[2]

[1] See Section 21F(h)(1) of the Exchange Act,15 U.S.C. 78u-6(h)(1) in the Unites States that explicitly does so;

[2] See our submission to the OSC dated May 4, 2015 at page 10; available online at http://faircanada.ca/wp-content/uploads/2011/01/150501-Final-Whistleblower-Program-Submission-May-1-signed.pdf.

2.2. *Percentage Awarded* - The actual percentage awarded has been set at between 5% and 15% of the amount of the sanctions imposed whereas the SEC's whistleblower program is set at between 10% and 30% of the monetary sanctions that the Commission and other authorities are able to collect. FAIR Canada is of the view that whistleblowers in Canada need to be compensated at the same level as whistleblowers eligible under the SEC Whistleblower Program, especially in light of the lower sanction amounts that tend to be awarded in Canada and the cap on the total amount that can be awarded. In addition, having a higher percentage would allow for instances where more than one eligible whistleblower comes forward and both need to be compensated for their efforts.[3]

2.3. *Variable Cap* – We support the Proposed Policy which allows a whistleblower to be compensated or awarded beyond the cap of $1,500,000 in situations where $10 million or more in monetary sanctions or voluntary payments is collected. This is preferable to a hard cap of $1,500,000. FAIR Canada makes the following points in relation to this dual payment structure:

(i) *It provides a mechanism for paying sufficient compensation to whistleblowers in senior positions having comprehensive and detailed knowledge of wrongdoing.* For such people, a hard $1,500,000 cap will act as a disincentive because it will not properly compensate them for the substantial future earnings they will forgo as a result of speaking up and putting their career at risk.

(ii) *It allows for the possibility of improved collection rates.* Whistleblowers will know that greater compensation can be available if very large amounts are collected, and therefore whistleblowers will be motivated to come forward in respect of major violations and to provide leads on the location of assets. This will, in turn, result in OSC enforcement staff being able to pursue enforcement proceedings involving the types of matters that, in the past, have been too difficult to pursue both in substance and from a collection standpoint.

(iii) *Such payments are more likely to occur through voluntary settlements.* It should be noted that fines under Section 127(9) of the Ontario Securities Act are limited to $1,000,000 and the General Offences provisions under Section 122 allow for a fine of not more than $5 million. In contrast, voluntary settlements can go beyond these amounts. For example, the recent settlement with Ernst & Young in relation to the Sino-Forest and Zungui Haixi Corporation matter, was in the amount of $8,000,000.[4] While this does not go beyond the $10,000,000 threshold, it is possible that a subsequent voluntary settlement might, especially if combined with another, related proceeding.

Proceedings Where Compensation Warranted

2.4. FAIR Canada believes that whistleblowers should be compensated in circumstances not only where there is a monetary sanction or voluntary payment in the amount of $1,000,000 or more but also when staff of the Commission decide to proceed, given the seriousness of the

[3] See for example, the example provided in the 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program at pate 11-12, available online at http://www.sec.gov/about/offices/owb/annual-report-2014.pdf, which refers to the SEC awarded three whistleblowers collectively 30% of the recoveries in an SEC action where the whistleblowers provided information and continued to assist and cooperate with Commission staff and another situation where two whistleblowers shared an award of $875,000.

[4] Order available online at https://www.osc.gov.on.ca/en/SecuritiesLaw_ord_20140802_227_ernst-young-zungui-haixi.htm.

wrongdoing, quasi-criminally or criminally against the wrongdoers with the outcome of the enforcement thus being jail time rather than a monetary sanction. In addition, we believe that the Commission should have the discretion to provide a financial reward to a whistleblower when there is a suspension from trading or being an officer or director of any corporation for a period of 10 years or more or a lifetime ban, even in the absence of a monetary fine that reaches $1,000,000. The Proposed Policy needs to take into account differences between our enforcement processes and that in the United States in order to further its underlying goals. Our understanding is that there is a real difference between Ontario and the SEC's enforcement processes in this regard, with the latter having, with some frequency, multiple proceedings wherein there will be an administrative proceeding against the wrongdoer(s) which may result in monetary sanctions as well as parallel criminal prosecutions (which also involve not only potential jail time but also monetary sanctions).[5] Our understanding is that in Ontario (and other jurisdictions in Canada), a determination is made by enforcement staff as to whether to proceed administratively *or* quasi-criminally or criminally but parallel proceedings are rare and parallel proceedings where both proceedings result in fines are near to nonexistent. In particular, we are not aware of Canadian criminal proceedings where substantial monetary sanctions have been awarded. Therefore, there is a need to adjust the Proposed Policy to take these differences into account.

2.5. The underlying goal of the Proposed Policy is deterrence and detection of misconduct with the most serious misconduct being the types of matters that the Commission most wants to detect and deter by encouraging individuals to come forward with original information. Financial compensation needs to be available for the most serious types of matters. Accordingly, if an individual comes forward with original information relating to such wrongdoing and the enforcement staff decide to proceed quasi-criminally or hand it over to the RCMP and proceed criminally as a result, the whistleblower should not be ineligible for financial compensation.

Funding of the Whistleblower Program

2.6. As noted in our response to the OSC Staff Consultation Paper, in the United States the Dodd-Frank Act established the Investor Protection Fund ("Fund") and transferred the amount of $450,000,000 into the Fund to fund the whistleblower program and ensure that payments to whistleblowers would not diminish recovery for victims of securities violations.[6] As a result of the presence of the substantial Fund, capital market participants and potential whistleblowers know that monies will be available to make the financial awards to whistleblowers once they met the necessary eligibility criteria.

2.7. The OSC Proposed Policy does not rely on amounts collected (at least, where the amount of the sanction is below $10,000,000). The OSC Notice and the Proposed Policy are silent regarding the source of monies to pay whistleblowers. Transparency as to the level and source of funding for the program is needed. Adequate funding for compensating whistleblowers and operating the program needs to be clear to all market participants in order for the program to be successful. In

[5] The 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program, at page 17, refers to related actions for which an individual may be eligible to receive an award in addition to the successful SEC action, and specifically refers to parallel criminal prosecutions. "Six of the award recipients have received payments based, in part, on collections made in other actions."

[6] See 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program, at page 4.

addition, the Commission should consider adding to its criteria for determining the amount of the award a provision that prohibits the Commission from taking into consideration the balance of its designated funds (or other source of funding that it determines) in order to engender confidence in the program and avoid the perception of a conflict of interest.

Confidentiality Obligations of Whistleblower

2.8. The confidentiality provision at Section 9 deals not with the matter of protecting the individual whistleblower from being publicly revealed but rather the matter of keeping confidential all information disclosed by the whistleblower and the fact of a possible OSC investigation. FAIR Canada asks the OSC to consider whether this provision may prevent the whistleblower from assisting the OSC in some instances.

2.9. Individuals who might not otherwise participate in the investigation may need to be encouraged to assist Commission Staff in some cases, but for this to happen the whistleblower may need to provide those individuals with information that the whistleblower disclosed to OSC staff. Encouraging others to come forward is contemplated in the Proposed Policy as a factor that may increase the amount of an award – e.g., "the level of assistance the whistleblower provided to Commission Staff, including: …(ii) whether the whistleblower appropriately encouraged or authorized others who might not otherwise have participated in the investigation to assist Commission Staff…".[7] Therefore, FAIR Canada recommends that this provision be amended to state that the Commission may require that the whistleblower enter into a confidentiality agreement in a form acceptable to the Commission covering any non-public information and that a violation of the confidentiality agreement may lead to ineligibility to receive an award.

Recommended Changes to Improve Confidence in Proposed Policy

2.10. In the United States, the Dodd-Frank Whistleblower Program set out that in any covered judicial or administrative action, or related action, the Commission shall pay an award to one or more whistleblowers who voluntarily provide original information to the Commission that leads to the successful enforcement by the Commission of a federal court or administrative action or related action in which the Commission obtains monetary sanctions totaling more than $1,000,000. The determination of the amount of the award (between the range of 10 and 30%) is in the discretion of the Commission.[8] In contrast, the Proposed Policy at Section 14 provides as follows:

(1) "The Commission *expects* that information that will be eligible for a whistleblower award under the Program 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

[7] This is a circumstance specified in the Proposed Policy as a factor that may increase the amount of a whistleblower award. See the Proposed Policy at Section 24(2)(c)(ii)).

[8] See Section 21F(h)(1) of the Exchange Act, 15 U.S.C. 78u-6(h)(1) and Sec 240.21F-3 Payment of Awards.

obtaining an award eligible outcome.

(2) The Commission will *expect that all of the criteria in subsection (1) be met* before making a whistleblower award. ..

(3) *No whistleblower award* will be provided for information that Commission Staff determines is:

(a) Misleading or untrue;

(b) Speculative or lacks specificity;

(c) Subject to solicitor client privilege;

(d) Publicly known; or

(e) Not related to a violation of Ontario securities law."

2.11. FAIR Canada believes the Proposed Policy will fail to meet its objectives if the eligibility bar is set too high or if too many caveats are reserved for the exercise of discretion in awarding compensation to a whistleblower. If a person comes forward with original information that is voluntarily provided and that leads to a successful enforcement action (and is otherwise not ineligible as determined by Section 15(1) and (2) of the Proposed Policy), where there is voluntary payment or monetary sanction of $1,000,000 (or jail time or significant ban/suspension as discussed above) then the Commission should be required to pay the whistleblower compensation. There is no need to further qualify this with it having to be a "serious violation" with information "of high quality and contain sufficient timely, specific and credible facts relating to the alleged violation of securities laws" and "of meaningful assistance" and to have to meet all of these criteria before making the award. All of the latter additional requirements should go to the quantum, rather than whether to provide an award. Why should the information have to be of "high quality" so long as it is original information that caused staff to commence an examination, open an investigation, reopen an investigation or inquire concerning different conduct as part of a current investigation or examination? It is also unnecessary to add subsection (3) given the other sections of the Proposed Policy.

2.12. Similarly, Section 5 of the Proposed Policy sets out the type of assistance that Commission Staff may request a whistleblower to provide. The type of assistance provided should be one of the factors that influences the amount of the award rather than its own stand alone provision so long as the whistleblower has voluntarily provided original information that has led to a successful enforcement action with a monetary sanction or voluntary payment of $1,000,000 (and the person is not an ineligible person). By adding this provision, the Proposed Policy suggests that if the whistleblower does not provide the degree of assistance requested by staff, then he or she will not be eligible for an award. This is bolstered by Section 14 as it requires the whistleblower to provide "meaningful assistance to Commission Staff in investigating the matter and obtaining an award eligible outcome".

An Individual's Ability to Choose to Report Internally or Externally and Related Provisions

2.13. FAIR Canada supports the Commission's determination that whistleblowers should not be required to report internally first. However, FAIR Canada does not believe that the Proposed Policy should state, as it does in Section 16(1), that "The Commission encourages whistleblowers who are employees to report potential violations of Ontario securities law in the workplace

through an internal compliance and reporting mechanism in accordance with their employer's internal compliance and reporting protocols…". This is not appropriate.

2.14. Equally, the Proposed Policy should not posit that it is appropriate to not report internally first in situations where there are "…extenuating circumstances for the whistleblower that might otherwise impede his or her reporting to an internal compliance and reporting mechanism."– Such circumstances should not be viewed as "extenuating" given the repercussions that whistleblowers all-too-often face when they do report wrongdoing internally.

2.15. Whether a whistleblower reports a violation internally first should be left up to the whistleblower's determination. There are several reasons for this:

(i) Individuals face many risks in reporting possible wrongdoing within their firms. The risks include receiving poor performance reports, thwarted career advancement, termination, difficulty finding future employment, and severe consequences for the person's health and family relationships. We should not oblige them to take those risks.

(ii) Less wrongdoing will be uncovered if we require people to report internally first. Given that the treatment whistleblowers often face will lead them to do a cost-benefit analysis of whether it is worth reporting the matter, we can expect less reporting of wrongdoing if the costs must be incurred, and more wrongdoing will go unstopped.

(iii) An academic analysis of SOX in the United States demonstrates that internal reporting failed to lead to effective efforts to address underlying wrongdoing[9].

(iv) Allowing the individual to choose whether to report internally or externally, while providing incentives to report internally (as the Proposed Policy does at section 24(2)(f) and (g) as does the SEC's Dodd-Frank Whistleblower Program[10]) will improve and enhance corporate internal reporting systems without diverting a significant number of the tips from internal reporting. If firms fear that whistleblowers may be incented to report externally, they will

[9]Richard Moberly, "Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later" 64 S. C. Law Rev 1 (2012) pp 1-54 at page 4, 47, 49-50. At page 49-50 Moberly explains that internal reporting often does not lead to the corporation effectively addressing the problem as most often people report internally to their supervisor, who could block and filter the reports.

[10] As noted in the SEC's Media Release, "SEC Adopts Rules to Establish Whistleblower Program" (May 25, 2011), available online at http://www.sec.gov/news/press/2011/2011-116.htm, the final rules provide incentives to encourage employees to utilize their own company's internal compliance programs (but do not require it) by, for instance:

- "Make a whistleblower eligible for an award if the whistleblower reports internally and the company informs the SEC about the violations"
- "Treat an employee as a whistleblower, under the SEC program, as of the date that employee reports the information internally – as long as the employee provides the same information to the SEC within 120 days. Through this provision, employees are able to report their information internally first while preserving their "place in line" for a possible award from the SEC."
- "Provide that a whistleblower's voluntary participation in an entity's internal compliance and reporting systems is a factor that can increase the amount of an award, and that a whistleblower's interference with internal compliance and reporting is a factor that can decrease the amount of an award."

See also the lengthy discussion of the Incentives for Internal Reporting by the SEC in the Final Rule, at pages 228 to 237.

strengthen their own internal systems to decrease the risk that this will occur. If companies create an environment where employees feel that they will be listened to seriously and their concerns addressed without being retaliated against, they will be more likely to report internally. In addition, the incentives that should be included in the OSC whistleblower program to report internally should make it less likely that significant number of tips will not be reported internally.

(v) FAIR Canada agrees with SEC Chair Mary Shapiro's view that we should allow the whistleblower to have the choice: "I believe that the final recommendation strikes the correct balance – a balance between encouraging whistleblowers to pursue the route of internal compliance when appropriate – while providing them the option of heading to the SEC. This makes sense as well because it is the whistleblower who is in the best position to know which route is best to pursue."[11]

2.16. In addition, the Proposed Policy has already struck the right balance by restricting officers, directors, CCOs and other equivalent positions from being eligible for a reward unless they reported have reported "up the chain of command" to the entity's audit committee or chief legal officer or other appropriate person, and a certain period of time has elapsed (i.e., 120 days) and the company, with knowledge of a possible securities violation, fails to act (section 15(2) of the Proposed Policy).

2.17. The incentive to report internally first (by having internal reporting be a factor that may increase the amount of the award) and the restricted eligibility for key positions (section 15(2)) strike the appropriate balance between encouraging whistleblowers to pursue the route of internal compliance when appropriate while also allowing the whistleblower to decide to report matters directly to the OSC. We therefore recommend that Section 16(1) should be deleted. In the alternative, section 16(1) should be revised so as to not suggest that there must be "extenuating circumstances" that "impede" the individual from reporting to an internal compliance and reporting mechanism.

2.18. In our view, any explanations as to the Commission's rationale for the provisions in the Proposed Policy should be found in a commentary to the Proposed Policy rather than in the Proposed Policy itself. FAIR Canada recommends that Section 15(2)(c) be revised as follows: "at least 120 days have elapsed since the whistleblower provided the information to the relevant entity's audit committee, chief legal officer, CCO (or their functional equivalents) or the individual's supervisor *or since you received the information, if you received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents) or your supervisor was already aware of the information*." (added language in italics) A whistleblower should not be required to report it to a person when the whistleblower knows that the audit committee, chief legal officer, CCO or supervisor is already aware of it. The revised language mirrors the SEC's provision.

2.19. FAIR Canada sees no need to use the word "generally" in Section 16(3) when setting out the rule for who is first in line in instances where the individual waited 120 days to report it to the OSC after reporting it internally and, in the intervening period, another whistleblower has submitted

[11]Mary L. Schapiro, "Whistleblower Program" (Opening statement at SEC Open Meeting, US Securities and Exchange Commission, Washington, DC, May 25, 2011) available online at: https://www.sec.gov/news/speech/2011/spch052511mls-item2.htm.

information about the same violation. The use of the word "generally" creates uncertainty. If the Commission has reasons as to why the rule would not always apply, then it should set out those exceptions.

2.20. With respect to the question posed in the Notice[12] as to whether the 120 day period relating to the timing of internal report is appropriate, FAIR Canada sees no reason why the time frame should be different for Canada than it is in the United States. We are unaware of any significant problems that have arisen in the United States as a result. Accordingly, we think the time frame relating to timing of internal reports is appropriate.

Whistleblower Award Process

2.21. The Commission should provide the whistleblower or his or her legal counsel, with its preliminary determination as to the whether the claim for an award should be allowed or denied and permit the whistleblower an opportunity to respond and put forth any objections. The preliminary determination should be provided in writing with reasons, in accordance with administrative fairness. In addition, we recommend that the materials that form the basis of the award determination should be available for review by the whistleblower, subject to necessary redactions and confidentiality obligations.

2.22. FAIR Canada is strongly of the view that the Commission should have to publicly disclose that a whistleblower award has been paid but agrees that the identity of the whistleblower should not be publicly disclosed without that person's consent. It goes against the underlying objective of the Proposed Policy to not make public the awards. Improvements in prevention, detection and enforcement are more probable with increased accountability by those in the system. It will be important for the OSC to be able to demonstrate that the whistleblower program has improved the number and quality of tips it receives by tracking the number of tips and other complaints it now receives and those it will receive in the future upon implementation of the program, and by disclosing this information. An annual report should be issued by the Commission on the whistleblower program or a section of its annual enforcement activity report should be devoted to it.

2.23. FAIR Canada is of the view that if all of the conditions for a whistleblower award are met, then the Commission should have discretion as to the amount of the award and may consider the factors set out in the Proposed Policy at Section 24(2) and (3).

2.24. FAIR Canada believes that the denial of an award should be appealable to or reviewable by the Ontario Court of Justice within 30 days of a determination issued by the Commission but that if an award is made, the quantum of the award should not be appealable or reviewable. Granting or denying an award involves the appropriate application of eligibility criteria, which a court should be able to examine, but the amount of the award should properly be in the discretion of the Commission.

3. Conclusion

In conclusion, FAIR Canada strongly supports the implementation of an OSC whistleblower program and urges the OSC to consider the recommendations we have made above in order to strengthen the

[12] OSC Notice and Request for Comment on Proposed OSC Policy 15-601 – Whistleblower Program at page 9.

Proposed Policy.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Neil Gross at 416-214-3408 neil.gross@faircanada.ca or Marian Passmore at 416-214-3441 marian.passmore@faircanada.ca.

Sincerely,

Canadian Foundation for Advancement of Investor Rights