Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8
416.362.2111 MAIN
416.862.6666 FACSIMILE

OSLER

Toronto
Montréal
Calgary
Ottawa
Vancouver
New York

January 15, 2016

SENT BY E-MAIL (comments@osc.gov.on.ca)

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

Dear Sirs/Mesdames:

Proposed Ontario Securities Commission Policy 15-601 - Whistleblower Program

Osler, Hoskin & Harcourt LLP ("Osler") welcomes the opportunity to comment on the proposed Ontario Securities Commission (the "Commission") Policy 15-601 – Whistleblower Program (the "Proposed Policy"), which reflects certain changes to the Commission's whistleblower initiative since the release of the Staff Consultation Paper 15-401 on February 3, 2015.

As we expressed in our comment letter dated May 4, 2015, Osler is supportive of initiatives that encourage persons with relevant information about possible securities wrongdoing to come forward to regulators without fear of, and with protection against, retribution. In Canada, paying money to people for information as contemplated by the Proposed Policy is novel, and ought to be applied with great care. While we recognize Staff's need for greater access to otherwise elusive information to assist in uncovering wrongdoing and pursuing perpetrators, Canada is not the United States, and the role and historic approach of capital markets regulators here is distinct from our southern neighbours. We believe that the Commission should be careful to ensure that any adopted whistleblower policy not undermine the essential emphasis placed on the promotion of prevention and proactive compliance, rather than punishment of wrongdoing. Any policy, therefore, should enhance, rather than undermine the important role of internal compliance programs. As well, we also caution Staff not to focus unduly on monetary awards and monetary sanction thresholds and instead consider a policy approach that reflects the Commission's overriding public protecting mandate.

With these general considerations in mind, we emphasize the following:

1. Protections for whistleblowers from retaliation should be of paramount importance.

2. It is necessary to provide robust protections for whistleblowers' confidentiality (but informants should understand that disclosure of their identity and information disclosed may (and likely will) be sought by respondents as part of their defence).

3. The Proposed Policy should not undermine internal compliance programs.

4. Whistleblower awards should not be tied to the imposition and size of monetary sanctions.

5. Since the criteria for any award would be more qualitative than quantitative, there should be a process for making eligibility submissions and/or appealing Staff's determination.

These specific points, as well as others, are discussed in greater detail below.

A. Specific Recommendations

1. Protections for whistleblowers from retaliation should be of paramount significance

The primary focus of the Proposed Policy should be the protection of whistleblowers from retribution. Given its importance, as discussed in the Staff Consultation Paper, providing anti-retaliation protection to whistleblowers should be made the primary priority, in our view, rather than focusing on financial rewards for whistleblowers. And there are a number of initiatives that could be pursued to advance this priority. For example, the Commission could urge the provincial government to make statutory amendments to the *Securities Act* that would permit the Commission to exercise the full complement of its remedial powers under section 127 against employers who retaliate against employees. Amendments to the *Securities Act* could create civil remedies that could allow whistleblowers to seek damages from employers who retaliated in the face of a whistleblower complaint. Moreover, while the Proposed Policy states that the Commission "expects" that employers will not retaliate against whistleblowers, in our view, the mere expression of an expectation does not go far enough. Even without an amendment to the *Securities Act*, the Commission can state in the Proposed Policy that it considers an act of retribution by an employer against a whistleblower to be contrary to the public interest, and that employers who pursue retributive action will be subject to orders under section 127 to the extent applicable.

2. It is necessary to provide robust protections for whistleblowers' confidentiality

There is an apparent inconsistency between the removal in the Proposed Policy of the exception to confidentiality in subsection 11(b) of the Staff Consultation Paper and the remaining subsection 5(1)(d). We were encouraged to see the deletion of subsection 11(b) from the latest version of the Proposed Policy. That section would have allowed Staff to disclose the identity of a whistleblower entirely at Staff's discretion. However, section 5(1)(d), which remains in the Proposed Policy, permits Staff to request that a whistleblower provide testimony at a Commission proceeding; this appears to undermine any benefits that may arise from the deletion of subsection 11(b). The fact that subsection 5(1)(d) remains suggests that a whistleblower can still be called to testify by Staff in its discretion, which does not provide whistleblowers with the necessary protections of keeping their identity

confidential. In our view, subsection 5(1)(d) should also be removed from the Proposed Policy to ensure that Staff can provide whistleblowers with meaningful assurances that their identities will not be revealed except in extraordinary circumstances, including with their consent.

The trade-off of this, of course, is that Staff may not be able to directly rely on the information obtained from a whistleblower as part of its subsequent enforcement case. Tips or information obtained from a whistleblower then could only be used to assist in an investigation, pointing Staff in a certain direction. Although a respondent would likely seek disclosure of an informant's identity to assist in its defence, Staff should not be permitted to *require* an informant to testify without the whistleblower's voluntary consent.

3. The Proposed Policy should not undermine internal compliance programs

We understand the rationale for including financial rewards in the Proposed Policy to encourage and incent individuals with knowledge of potential securities violations to come forward to report such wrongdoing. However, we are of the view that any whistleblower program should also unequivocally encourage an organization to promote, maintain and continuously improve its own "culture of compliance". Internal compliance should not be given secondary importance. We have concerns that the Proposed Policy may encourage employees to circumvent an organization's internal compliance regime by channeling information directly to Staff in return for a monetary reward, which would not be similarly available from the organization, thereby undermining the proper function of organizational compliance efforts. Put another way, the Proposed Policy could undermine the important role of designated compliance officials and their ability to support internal protocols by encouraging employees to sidestep or ignore internal protocols in favour of seeking financial reward by reporting directly to the Commission. While the Proposed Policy encourages whistleblowers who are employees to report potential securities law violations through established workplace protocols, including by offering the possibility of a greater award if a whistleblower follows an internal reporting regime, it stops short of making this a condition to receiving a whistleblower award.

Accordingly, we continue to be of the view that eligibility to receive a whistleblower award be dependent on the individual seeking the whistleblower award satisfying the Commission that the employee fully availed himself/herself of the internal compliance and complaint procedures of his/her organization, *unless* that individual demonstrates that it was not reasonable or possible to do so in the circumstances.

For these reasons, we maintain that recourse to internal compliance and/or complaint programs should be a threshold requirement with regards to eligibility as a general principle, subject to very narrow, identified exceptions.

4. Whistleblower awards should not be tied to the imposition and size of monetary sanctions

The regulation of securities in Canada is significantly different from the United States, and therefore caution should be exercised in adopting a whistleblower policy that is modeled on the one adopted by the United States Securities and Exchange Commission (the "SEC"). We are concerned that, as drafted, the Proposed Policy too closely reflects the SEC regime by placing undue emphasis on the imposition of monetary sanctions, transforming the role of the Commission from a traditional policymaking body into a law enforcement agency.

We recognize the need for certainty in securities regulation. However, if the Proposed Policy is to be effective, it should not be exclusively tied to monetary sanctions ultimately imposed by the Commission. There are a number of non-monetary sanctions at the Commission's disposal, such as cease trade orders, market prohibitions and trading bans, which provide proactive protection for the market, its participants and investors. These remedies, in most cases, are more effective and a more appropriate use of the Commission's protective and preventative powers, than the imposition of monetary sanctions, which are often more retributive in nature. If a whistleblower provides information that contributes to such a valuable "protective and preventative" sanction, he/she should not be precluded from a whistleblower award for the sole reason that the monetary sanction imposed was less than the threshold amount which has been proposed.

As an overarching comment, we remain concerned that tying whistleblower awards to the size and achievement of financial penalties is inconsistent with the traditional preventative and protective functions of Canadian securities regulators. As stated in our previous comment letter, securities regulators exercising their public interest jurisdiction should be focused more on driving behaviours toward greater compliance than on penalizing offending conduct. The Proposed Policy's emphasis on the achievement of monetary sanctions seems to deviate from the Commission's principal role as a public protecting body and may inadvertently lead to the inflation of the quantum of penal sanctions. In our view, and as stated above, any policy that is implemented should be focused primarily on providing whistleblowers with real and substantial protections against retribution from employers, rather than emphasizing financial rewards.

Instead of tying the eligibility of a whistleblower award to the imposition of a monetary sanction and/or voluntary payment, we propose that the Commission use its discretion in adopting a transparent process that is built on the principle that the amount and eligibility of the whistleblower award takes into account the following factors:

(a) The importance of the whistleblower's information to the outcome.

(b) The outcome in protecting the public and preventing securities violations.

(c) The risk that the whistleblower takes on in reporting the information.

(d) Whether the whistleblower complies with internal compliance program(s).

(e) The timing of the whistleblower's report, whether through internal compliance programs or to the Commission.

(f) Whether the Commission would have otherwise received the information.

As drafted, by making eligibility for an award dependent on the imposition of a monetary sanction, the Proposed Policy may actually *discourage* or delay early reporting. Whistleblowers may wait until losses accumulate to help ensure they meet the eligibility threshold and/or qualify for a larger whistleblower award. Rather than adopting a retrospective analysis, the Commission should exercise its traditional proactive and protective roles by evaluating the following: "but for the whistleblower's actions, what would be the harm to the public?"

5. There should be a process for making eligibility submissions and/or appealing Staff's determination

We believe that there should be a process provided for under section 22 of the Proposed Policy which gives a whistleblower the right to (i) make brief written submissions in connection with his/her eligibility for a whistleblower award and, if eligible, the amount of the award, and/or (ii) appeal the recommendation of the Staff Committee regarding the whistleblower's eligibility and, if eligible, the recommended amount of the whistleblower award. Whistleblowers in the United States have such a right to appeal under the SEC regime. A right to make submissions and/or appeal the recommendation made by the Staff Committee is a necessary protection of whistleblowers that is consistent with the stated Purpose of the Proposed Policy of furthering the Commission's mandate to foster fair and efficient capital markets and confidence in capital markets. Without such a right, whistleblowers may be discouraged from submitting information to the Commission.

<u>B. Other Considerations</u>

1. Increased maximum amount of whistleblower award to $5 million is appropriate

We are supportive of the increased $5-million maximum threshold for whistleblower awards. However, we maintain that eligibility for an award should not be limited to the imposition of monetary sanctions.

2. Whistleblowers who are ineligible for an award

In our previous comment letter, we expressed the view that whistleblower payments should not be made to individuals whose responsibility it is to identify and investigate alleged wrongdoing and internal complaints. However, we also stated that individuals responsible for compliance in an organization should not be automatically barred from eligibility for a whistleblower payment. Section 15 of the Proposed Policy is responsive to our views by setting out the general rule that individuals responsible for compliance are ineligible for a whistleblower award, with limited exceptions to their ineligibility.

3. Culpable whistleblowers should be eligible for an award in appropriate circumstances

In our previous comment letter, we stated that an individual's culpability should not automatically render that individual ineligible for a whistleblower award. Rather, we agreed with the Staff Consultation Paper 15-401 that the level of culpability should be a factor considered by Staff when determining whether to make a whistleblower award and the amount of any whistleblower award made. The Proposed Policy at section 17 states that the level of culpability is a factor that may decrease the amount awarded. We are of the view that the Commission should have the discretion to decide on a case-by-case basis if the level of culpability of an individual would make a whistleblower award inappropriate.

To this end, in our previous comment letter we suggested an alternative to paying culpable whistleblowers, akin to the system employed by the Competition Bureau of Canada, which provides immunity and leniency programs to culpable whistleblowers. This alternative would allow the Commission to obtain valuable information from culpable individuals without making a whistleblower payment and being seen to the public as rewarding the impugned conduct.

C. Answers to the Specific Questions in the Notice and Request for Comment

We have the following responses in respect of the two specific questions that the Commission posed on page 9 of the Proposed Policy.

Question 1: Do you agree with in-house counsel being eligible for a whistleblower award? If not, why?

Considering that in-house counsel are bound by their professional obligations as lawyers including an obligation to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, in our view, it is unlikely that in-house counsel would find themselves in a position to disclose information on securities misconduct to the Commission. However, assuming without

accepting that such a scenario could exist, we would urge in-house counsel to obtain advice on their professional obligations before approaching the Commission. It is important that the Proposed Policy not be used to encourage unprofessional conduct of lawyers.

Question 2: Is the 120 day period relating to the timing of internal reports as set out in section 16 of the Proposed Policy an appropriate time limit?

In our view, the 120 day period set out in section 16 of the Proposed Policy is a reasonable amount of time. However, we believe that the Proposed Policy should impose a requirement for a whistleblower who has reported information internally at an organization to wait for a specified period of time after making the "initial internal report" within the whistleblower's organization before subsequently reporting that information to the Commission. This waiting period will permit the organization to conduct an investigation and determine how best to proceed, and ensure that the organization's internal compliance function is not entirely undermined mere days or weeks following the initial internal report. In our view, the whistleblower who has reported internally at his/her organization should have to wait before making a subsequent report to the OSC: (i) for a minimum of 120 days following the initial internal report; or (ii) for their employer to report the whistleblower's information to the Commission, whichever happens earlier.

***

We thank you again for the opportunity to provide our feedback on the Proposed Policy. If you would like to discuss this matter further, please contact Lawrence Ritchie or Shawn Irving at 416.862.6608/4733 or lritchie@osler.com/sirving@osler.com.

Yours very truly,

"Osler, Hoskin & Harcourt LLP"

Osler, Hoskin & Harcourt LLP