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SENT BY EMAIL (comments@osc.gov.on.ca)

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

Dear Sirs/Mesdames:

Proposed Change to OSC Policy 15-601 Whistleblower Program – OSC Notice and Request for Comment

Osler, Hoskin & Harcourt LLP ("Osler") welcomes the opportunity to comment on the Ontario Securities Commission (the "Commission") Policy 15-601 – Whistleblower Program and the proposed change to the eligibility of in-house counsel for a whistleblower award.

It is Osler's understanding that the proposed change would no longer allow in-house counsel to be eligible for a whistleblower award, except in circumstances where "disclosure of that information would otherwise be permitted by a lawyer under applicable provincial or territorial bar or law society rules, or the equivalent rules applicable in another jurisdiction" (subsection 15(1)(d) of the Whistleblower Program).

We are of the view that the proposal does not go far enough. It is our view that there should be a prohibition from all persons who have acted as external or in-house counsel for a client from being a 'whistleblower' within the Whistleblower Program.

The Law Society of Ontario's Rules of Professional Conduct (the "LSO Rules") are clear: all lawyers, including in-house and external counsel, shall hold their clients' information in strict confidence, subject to very limited exceptions. As section 5.1 of the Commentary under Rule 3.3-3 states:

> 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 recognize 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. [Emphasis added.]

The LSO Rules list the limited circumstances in which a lawyer may disclose confidential information, including where required by law or where there are reasonable grounds for believing that there is an "imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm." In each instance, the LSO Rules state that the lawyer "shall not disclose more information than is required".

It is worth noting that none of the enumerated exceptions under Section 3.3 in the LSO Rules apply to in-house counsel eligibility for a whistleblower award. Since the focus of the Whistleblower Program is on financial crimes, it is highly unlikely that disclosure could be justified on the basis that it was necessary to prevent death or serious bodily harm or any of the other bases for permitted disclosure set out in Section 3.3.

Maintaining the eligibility of in-house counsel for whistleblower awards would put in-house counsel in a problematic ethical situation regarding their professional obligations, since they would be directly incentivized by the Whistleblower Program to take an action that the LSO Rules expressly prohibit. In addition, the current version of the Whistleblower Program would likely create a chilling effect in organizations whereby employees who may be aware of financial crimes being committed by the organization could lose trust in the lawyer's willingness to maintain a confidential solicitor-client relationship.

The LSO Rules specify the steps that a lawyer must take in the event that a lawyer becomes aware that an organization the lawyer represents has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally. Among other things, the LSO Rules require in these circumstances that the lawyer advise the person whom he or she takes instructions from or, if necessary, progressively more senior individuals or groups within the organization, that the conduct is dishonest, fraudulent, criminal or illegal and should be stopped. If the organization continues with such conduct despite the lawyer's advice, the LSO Rules require that the lawyer withdraw from acting.

The Supreme Court of Canada has repeatedly recognized the unique and critical importance of the solicitor-client relationship to the administration of justice. In *Blank v.*

Canada (Minister of Justice), 2006 SCC 39 at para. 26 (per Fish J.), the Court stated as follows: "Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice."

In our view, a program that encourages and incentivizes lawyers to report confidential client information to the Commission in exchange for a monetary reward is at odds with a fundamental principle of Canadian law.

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We thank you again for the opportunity to provide our feedback on the Whistleblower Program. 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"

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