This is the unedited transcript of the roundtable discussion of OSC Staff Consultation Paper 15-401 Proposed Framework for an OSC Whistleblower Program on June 9, 2015 which we received directly from the transcriber. We are posting the transcript in this form to make it available as soon as possible.

ONTARIO SECURITIES COMMISSION

ROUNDTABLE DISCUSSION RE
WHISTLEBLOWER ROUNDTABLE

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DATE: Tuesday, June 9th, 2015
HELD AT: Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario

BEFORE:
MARY CONDON Commissioner
ALAN LENCZNER Commissioner
TIM MOSELEY Commissioner
PANELLISTS:

John Pecman         Competition Bureau

Jane Norberg        U.S. Securities and Exchange Commission

Marian Passmore     Canadian Foundation for Advancement of Investor Rights

Dimitri Lascaris    Siskinds

Connie Craddock     OSC Investor Advisory Panel

Daniel Pugen        McCarthy Tetrault

David Hausman       Fasken Martineau

Jordan Thomas       Labaton Surcharow

Megan Telford       TD Bank Group

Sheila A. Murray    C.I. Financial Corp.

Linda Fuerst        Lenczner Slaght

Christine Wiedman   University of Waterloo
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INTRODUCTION AND OPENING REMARKS:

    MS. CONDON: Well, good morning everybody. It's nice to see that everyone is so self-disciplined as that hush falls over -- at 9:01 before I even had to say anything. So this is a very good start for our session this morning.

    Welcome to all of you, and of course in particular, welcome to all of our distinguished panelists who have come to give us the benefit of their experiences, and we'll look forward to having a discussion with you all.

    My name is Mary Condon. I'll chair the roundtable this morning. To my left is my fellow commissioner, Alan Lenczner. Sorry, Alan.

    MR. LENCZNER: Never got it right.

    MS. CONDON: And to my right, my other fellow commissioner, Tim Moseley.

    So you all know, of course, why we're here this morning. We, the OSC enforcement staff, published a consultation paper on a potential whistleblower program in February this year, and very aware, course, that introducing such a program in Canada would be the first of its kind for securities regulators and, therefore, important to make sure
that we had a full consultation and a full
opportunity for comment on the issues.

In the process of receiving written
comments on the consultation paper, we received,
although not very numerous comments compared to their
initiatives that we've engaged in, very high quality,
very detailed, very insightful comments. And, in
particular, if you've had a chance to look at them,
you'll see there are a number of issues about which
there is broad agreement and then others about which
there is less agreement.

So on that basis, we thought that it
would be extremely helpful to host this roundtable
this morning, offer you the opportunity to hear from
experts and those who have some experience in
interacting with this kind of program in order to
help us advance the conversation.

Of course, for us, as commissioners,
we're really looking at this process as a way for us
to get some advice so then how we should move forward
and decide about the proposal that has been made by
staff to us.

So we've set this up so that we have
three separate themes that we want to pursue this
morning. One of them -- the first one will deal with
the question of the effectiveness of a whistleblower program and really getting the views on the table about why we should do this and what the advantages and challenges might be, and we have the benefit of some participants in that session who have already have been involved in implementing and developing whistleblower programs.

So what we're going to do after that is have a second panel dealing with anti-retaliation issues, which came very -- came across very loud and clear as an issue that we really needed to be thinking very carefully about if we were going to make such a program work.

And then finally the last session will deal with issues of how this kind of whistleblower program would interact with existing compliance mechanisms internally within organizations that we regulate.

So what we're going to do is address each of these themes. Each of the speakers on each theme will have five minutes to express their views and their thoughts, and then we'll open for discussion.

Obviously, the commissioners will have questions that we want to ask of each speaker, but
also other panelists for other sessions this morning should feel free to jump in at any point and we can have a very general and useful conversation.

For those of you in the audience who want to join the conversation, we have comment cards on the chairs so that you can put a question in writing, it will be fed up by staff members who are assisting us to give us the comment cards, and then if there is an opportunity we'll ask the question on your behalf at the roundtable. If not, of course, we take all those questions away with us and consider them as we continue to consider the next steps in this process.

So just a couple of housekeeping issues before we jump into our first substantive discussion. Please turn off all of your devices that will chirp and beep during the next few hours.

We have a transcriber who is going to provide a transcript of the proceedings this morning and we will post that on our website as soon as it is available to us to do so, so that those who are not able to attend this morning will have the benefit of the conversation. It is obviously a public roundtable. There are a couple of members of the media in attendance.
So that, I think, concludes the introduction, and I have the pleasure of moderating the first panel of our conversation this morning which is dealing with the question of the effectiveness of whistleblower programs. So we're going to move right into that issue.

We have four panelists who are here on my right. We have John Pecman from the Competition Bureau. We have Jane Norbert from the U.S. Securities and Exchange Commission, Marian Passmore from Fair Canada, and Dimitri Lascaris from Siskinds, LLP.

Each of them has a particular perspective on the question of effectiveness of whistleblower programs and we look forward to hearing those views.

Before I turn it over to the first participant, John, who will tell us how -- what experience the Competition Bureau has had with these kinds of programs, again, I'll just make the point that there are a number of whistleblower-type programs in existence both within and without the securities regulations space.

IROC has had a whistleblower program for a number of years and, of course, overseas in the
UK and Australia there are whistleblower programs also in those jurisdictions. The difference with some of those programs is that they do not offer financial incentives to whistleblowers to come forward.

So I think in terms of our thinking about this at the OSC, the landscape really changed once we had the opportunity to review the experience of the SEC, which introduced a new version of a whistleblower program following the Dodd-Frank Act in 2010 and which has been described by the SEC chair as a game changer.

So we're very excited, therefore, to have some ability to learn from the SEC's experience.

So let me, just before I turn it over to John, mention that obviously some of you will have had the chance to look at the consultation paper that we published. A key feature of the program that the OSC enforcement staff are proposing is that there would be a financial incentive to eligible whistleblowers of up to 15 percent of total monetary sanctions, including administrative penalties and disgorgement where those sanctions exceed $1 million. However, as currently proposed, the award would be capped at $1.5 million.
There is also a number -- there are a number of considerations that are put forward in the consultation paper about the issue of who could be eligible for that whistleblower award, and that's also an issue that hopefully we'll be able to get into in our discussion.

So without further adieu, I'm going to turn it over to John and ask him to speak about the programs that currently exist in the arena of competition regulation.

TOPIC 1: EFFECTIVENESS OF WHISTLEBLOWER PROGRAMS

PRESENTATION BY MR. PECMAN:

MR. PECMAN: Thank you. Thank you very much. I'm pleased to be here to talk to the group today about our experiences with whistleblowing.

I'm going to cycle back a little bit in terms of context of who we are, the Competition Bureau.

Our role is to promote and protect competition and innovation and markets, and we do that through administration and enforcement of the Competition Act. The Competition Act has both criminal and civil provisions, and we're primarily dealing now, on the whistleblowing side, with the
criminal provisions. And those pertain to bid
rigging and price fixing, which have fairly severe
penalties: statutory maximum jail times for
individuals up to 14 years and fines for each count,
$25 million.

These types of offences take place in
secret, secret deals, so we are very dependent on
whistleblowers to enable us to detect in the first
instance, and then to go through with the
investigation, obtain their cooperation, and
ultimately in the prosecution sense.

The other interesting feature is the
bureau is an investigative body. We work with --
closely with the Crown prosecutors. They're
independent. They make charging decisions, and
they're also responsible for granting immunity and
leniency from prosecution, which is our two largest
programs to incite people to whistleblow.

So our immunity program, developed back
in 1991, informally at the time. The OSC chair was
in fact the commissioner, Howard Wetston. And the
arrangement is a company or individual comes forward,
identifies an offence, cooperates with us to stop the
conduct, they are eligible for immunity from
prosecution.
And it's a very significant carrot for individuals and companies, particularly given the fact that there is always a risk of being detected. And so companies using this game theory of deciding whether or not they should come in -- once they determined they have committed an offence, whether or not to come in and seek immunity from prosecution. A huge reward given the size of the penalties that are involved.

So, again, the immunity applicant gives us a call, we indicate that there are markers available for immunity. They disclose the offence to us. We recommend immunity to the Crown, and it's the Crown who grants immunity.

In 2007 we developed a leniency program for those that lose the race for immunity. Because it is a race. Whoever comes in and rats out their competitors first gets the immunity. So it is a race. And those that lose still have opportunities for cooperation discounts. Our leniency program provides for 50 percent discount off the usual fine limits, as well as immunity from prosecution for individuals.

So it encourages other participants to come in as well, making it easy for us to ultimately
investigate and prosecute these types of offences.

So these programs have been highly successful and, just by indication, since 2011 we've -- the government has collected $88 million in fines under the cartel provisions, the bid rigging and price fixing. Of those, $86 million of the fines come from leniency applicants that have pled guilty. So about 99 percent of our success in terms of, if you measure it by way of fines, comes to us from our successful immunity leniency programs.

And we're not alone. Most anti-trust agencies around the world have similar programs where they give a pass to encourage companies to cooperate with the authority and to enable the authority to actually go out and investigate these matters. Otherwise, they, for the most part, likely go undetected.

So we think there is huge value in providing these incentives. Not necessarily a reward, but it is immunity from prosecution and billing (ph) not to have to pay a fine. Highly successful programs. I encourage you to use those.

We receive between 15 to 20 applications for immunity and leniency each per year. So it keeps us quite occupied. The problem is they
are very appealing and enticing in that given the
volume of work that comes in the door through the
whistleblower program, we're not doing as many
investigations from the ground up, if you will, with
intelligence detecting ourselves. And it could be a
problem because people won't come from in for
immunity if you are not actually conducting
investigations as well.

The bureau also has a standalone
whistleblowing programming and provision in the
Competition Act. It does not provide a reward to the
whistleblower but it does have anti-retaliation
measures. Within the past few years we've started
promoting the program more, advertising that it
exists and trying to encourage people to participate
in that.

We have not had a lot of success, maybe
because there aren't financial rewards. We have a
couple of cartel investigations emerge from that
program, but the success is not there.

So why I'm interested in participating
today -- I'm very curious to hear others' experiences
about a reward program on the whistleblower side
exclusively, as opposed to the grant of leniency and
immunity.
So that's basically what I want to bring forward, again, are really successful and -- successful all around the world, immunity leniency programs.

MS. CONDON: Thanks very much, John.

Just before I turn it over to Jane, can I just ask, you mentioned that the immunity program gets started by somebody giving us a call. Can you say a little bit about what the sort of internal process is within the Competition Bureau for sort of starting the process with someone looking for leniency or immunity?

MR. PECMAN: I can do that, and I did that for many years, taking the calls.

So our senior deputy of our cartels and deceptive marketing practices branch, is the taker of the calls, the initial call as a marker. It's usually counsel that calls on behalf of the company or the individual and questions whether or not the marker is available for a certain product. Because if they are not in first, obviously a marker is not available, immunity is not available. So that's the first question.

So we go to our the records, determine
whether or not a marker is available, and then indicate it is available. And then we obtain some bare bones information about the nature of the offence on a hypothetical basis, following which we set up a date for a proffer.

So companies will come in with their attorney, will have a prepared proffer in terms of their admission, again on a hypothetical basis, will disclose the type of evidence they have, the witnesses, the documents. And that information is compiled by the bureau, Competition Bureau, and a recommendation then is made to the Crown on whether or not to formally grant immunity or leniency following the proffer process.

MS. CONDON: Thank you. And can I just follow-up on one other issue? You mentioned this possibility that resources put into the whistleblower program perhaps -- and the related programs perhaps take away from the resources available for ground up investigations.

MR. PECMAN: Right. It's a zero sum game. We have a fixed budget. And if your plate is full with these immunity and leniency requests and you are working on that, it means you are not doing the other side of the business. Again, you have to
be careful. I think about 20 percent of our cases
come through the traditional means, whether a
complaint or a detection through just reading a
newspaper, and we'll start an investigation that way.

So it is something that we are wary
weary of, and understand that that could happen and
could ultimately undermine your whistleblowing
program if you are not actively investigating as
well.

MS. CONDON: Okay. Thank you very
much. Very helpful.

Jane, I'm going to turn to you.

Obviously, we're very interested in learning more
from the SEC's experience. It's got a very robust
and rigorous whistleblower program over the last
number of years, and perhaps if we could ask you to
give us a general sense of how it works and also in
particular what you think the factors driving its
success in particular have been over the last couple
of years.

PRESENTATION BY MS. NORBERG:

MS. NORBERG: Absolutely. Let me start
by saying I'm very honoured to be here, and thank you
for having me.

I was thinking about what to say about
the effectiveness whistleblower programs. When I'm
thinking about some words that have been used to
describe the U.S. SEC's program, and you had actually
referred to it. I think our chair, Chair White, said
it best when she said that it can be a game changer,
and I think that that is a true statement.

Before I get into my remarks, let me
start by saying that what I say here today are my own
opinions and not necessarily reflective of the
commission -- the U.S. Securities Exchange Commission
and its staff.

In the almost four years since the
SEC's whistleblower program has been operational, the
number of whistleblower program tips we've received
has increased by 20 percent. So in fiscal year 2013
we received over 3,200 tips and then in fiscal year
2014 we received over 3,600 tips, and that translates
to about 10 whistleblower program tips coming in a
day.

The tips come in from every state in
the United States, as well as 60 foreign countries.
And you may well be interested to know that Canada is
always in our top three countries outside the United
States where we receive whistleblower program tips.

The last fiscal year we received 58
whistleblower tips from Canada. And the tips that we receive run the gamut of securities law allegations. The most frequent are corporate disclosures and financial statements offering fraud and market manipulation. And we receive incredibly high quality tips that not only cause us to open investigations, but also enable us to bring enforcement actions much quicker and save on those resources, which is very important when you have limited resources within your organization.

These tips have also enabled -- and I think this is incredibly important -- have enabled staff to stop fraud quicker and, at times, have TROs or asset freezes which have stopped investor funds from being dissipated by the fraudsters. And I think that's an incredibly big thing when it comes to whistleblowers. And then coming in and being able to point us to perhaps where investor funds might be and us being able to unravel the fraud quicker is that it does result in investor funds being saved.

Whistleblowers also provide ongoing assistance to the SEC staff during these investigations. They review and explain documents, provide technical analysis, have pointed us to specific financial transactions, and been witnesses
in our cases.

Since the program's implementation
we've paid 17 whistleblowers over $50 million. The
highest reward to date has been over $30 million that
we've paid to one individual, and that person was
outside the United States.

We paid officers, we paid audit and
compliance professionals, we've paid insiders as well
as individuals who had nothing to do with the company
at all. And the profiles of each of these
whistleblower award recipients is very different,
with a common thread being that each of them gave
information that was so specific, timely and credible
that it caused us to open an investigation or to --
or they significantly contributed to an ongoing
investigation.

Another key to an effective
whistleblower program are the confidentiality of
submissions as well as anti-retaliation protection.
I know we have a whole other panel here to talk about
that, so I'm not going that talk about that right now
other than to say, I think that each of those
features -- the confidentiality and
anti-retaliation -- are just as important as the
monetary awards.
I think you need to have all three to have a successful program, and I do think that what the OSC has proposed does strike a very good balance with all three.

The implementation of the SEC's program has also caused companies to take a look at their internal compliance functions and make sure that they are robust, and make sure that they have a culture of anti-retaliation, that they are not going to tolerate retaliation for a whistleblower. I also think that that is very good byproduct of an effective whistleblower program.

Whistleblowers, at the end of the day, serve a very valuable function. Their information does help uncover securities law fraud and stop fraud much quicker.

So if the question is can a whistleblower program be effective, I'm here to tell you today, because I have a front row seat, yes, it can be very effective. And I hope that the OSC has as much success with their program, if they choose to adopt it, as we have had with ours. And I'm happy to answer any questions.

MS. CONDON: Thank you very much, Jane. In fact, your comments really raise quite a number of
questions that I would like to jump in and ask you, and I'm sure perhaps others might have questions as well.

So let me just -- there are a number of different issues. Let me just pause on your reference to information that's specific, timely and credible as a marker for a successful tip from a whistleblower.

I take it that you, at the SEC, have a dedicated office and an infrastructure to deal with this issue. So is that assessment, that the information is timely and credible, being done by the whistleblower office or is it being done sort of generally by enforcement and investigation staff within the organization?

MS. NORBERG: So there's a separate office called the office of market intelligence, which is within our enforcement division, separate from the whistleblower office. So we take the tips and the whistleblower kicks in, but then they all go through a central database. And our office and market intelligence has a dedicated staff of I think 60 to 70 individuals who triage every single tip that comes in, and they decide which ones are the specific, timely and credible ones that are, I guess,
worthy to being sent to enforcement staff and to take
our resources to take a further look at.

MS. CONDON: It sounds as though you
have a very well thought-out infrastructure and, in
particular, that you have detailed tracking
mechanisms that allow you to be able to tell us how
many tips come from which jurisdiction and how many
tips are associated with different kinds of
misconduct.

Was that a challenge for the SEC to
sort of find the resources in the budget to set that
process up?

MS. NORBERG: Well, I think that -- so
what had happened is -- before actually the
whistleblower office was implemented, it was sort of
in conjunction, there was a big overhaul of our
intelligence and how we gather intelligence, because
we have offices not only in Washington DC, but all
over the country. And somebody could send a tip into
our Salt Lake office and somebody could send
something into the Washington DC office and looking
at them both separately, it might not look like a
great tip, but putting them both together it's a big
tip.

So we wanted to find a way to gather
all this intelligence in one place to make it more useable, and so we did create a system that we input all of our tips, complaints and referrals into, and that is the central intelligence database. And that's where the information gets triaged and it gets sent out, but it is always there.

So we always consider everything in our database as active intelligence. Even if it's not being worked at the moment, it's possible another piece of information could come in later that might make us take a second look at that other tip that came in.

MR. LENCZNER: Can I just ask a couple of questions? One is, you talked about officers being whistleblowers, and corporate officers in Canada are usually the top three to five people. So I don't know if they're the same in the States. I would like you to comment on that. Is there any culpability on their part? Have they been participants and you take in whistleblowing from culpable people and pay them?

MS. NORBERG: Okay, so the first question I'll take is we do pay officers of companies, and, yes they can be someone from the CEO on down. They have different standards to meet
eligibility requirements to get a whistleblower award. So technically their information is excluded from our definition of original information unless there are certain exceptions.

There are two pieces here. So you can be an officer of a company and get your information completely outside of your company. Let's just say you're an officer of company and you are an investor. And as an investor in another company there is some kind of fraud that you find out about and you report it. That has nothing to do with you being an officer, right, so that's okay.

If you are an officer of company you are going to be held to a higher standard, so there are certain exceptions that we have when an officer of a company can get paid, and that is if they report internally, there has to be some showing that they have reported internally, and then they come to us 120 days later because it appears the company is doing nothing. Then they can report to us and technically get paid under the whistleblower program.

There are two other exceptions. If there is going to be imminent harm to investors, or if the company is doing something to discourage an investigation or to try to cover up something from
our staff, then they can immediately come to us and still be eligible to be paid at the end of the day. So they are definitely held to a much higher standard than a whistleblower.

MR. LENCZNER: Thank you.

MS. CONDON: Jane, I'm sure there will be another opportunity later in the morning for us to ask you some more questions, but at this point I'm going to turn the floor over to Marian Passmore, who is here on behalf of Fair Canada who also submitted a written comment letter to us.

So thank you for that comment letter and I am going to ask you to elaborate on your description of why it is that Fair Canada is in favour of introducing the whistleblower program at the OSC.

PRESENTATION BY MS. PASSMORE:

MS. PASSMORE: Certainly. Thank you for asking Fair Canada to speak to this important issue and for being a member of this panel.

Firstly, I just would like to spend a few moments on what we think the whistleblower program will accomplish.
We think that a properly designed whistleblower program will be a very useful enforcement tool to help combat fraud and other wrongdoing in our capital markets in Canada. As we've heard from the SEC, their program has resulted in high quality and extremely useful tips on very serious securities frauds that would have been very difficult to detect without the whistleblower coming forward.

The academic literature backs us up. It suggests that whistleblowers play a key role in uncovering fraud and provide some of the most important information about corporate fraud in particular.

In one study, it found that over 40 percent of uncovered frauds are a result of whistleblower tips. The whistleblower brings to the regulators' attention evidence of wrongdoing that otherwise may go undetected or would take much more time and resources to uncover.

In the absence of the whistleblower, the regulator often faces looking for the needle in the proverbial haystack.

Having this program would help stop some of the wrongdoing that harms investors and
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companies and should improve deterrence. It should result in a higher level of confidence in our securities markets, less of the -- importantly less of the investing public money will go to illegitimate and unproductive use, resulting in more efficient capital formation.

It should also result in a reduction in the unfair competitive advantage that some companies can achieve by engaging in undetected violations.

Finally, it should result in an optimal amount of resources being spent on internal compliance than is done presently, which should also include detection of wrongdoing and deterrence.

What does the program need to be effective and work? While a significant number of whistleblowers will report wrongdoing regardless of any financial compensation, we think it's important not to rely on the notion that people will do the right thing. It must be recognized that some people will assess whether it's worth taking significant risks of being a whistleblower.

Financial compensation along with confidentiality and anti-retaliation provisions are essential components, as they can tip the balance in favour of reporting and their absence may result in
it not being reported.

With respect to the threshold and cap
the OSC has proposed, we believe that the threshold
should be lowered. A fine of a million dollars in
our view is less frequent here than in the United
States, and the cap of a million-and-a-half dollars
should be increased, as this maximum payment may
sound like a lot of money but may not be adequate
compensation for many in the financial services
industry or in key corporate positions given
significant earnings they will forego as a result of
speaking up and putting their careers as risk.

Criminal sanctions should also be
worthy of compensation. In Canada, it doesn't appear
that criminal sanctions are associated with fines.
There's no reason the whistleblower should not
receive compensation if the wrongdoer ends up in jail
rather than simply fined.

The public is going to need to be aware
of the program and have a clear single process for
using it. The process for in-take should be clear
for whistleblowers and should not compromise the
whistleblower.

The way the tips are processed needs to
be set up so that the person can maintain anonymity,
if they want to, and/or maintain their confidentiality.

It's crucial also to the success of the program that there be sufficient resources and expertise devoted to running it. Simply reallocating any existing enforcement budget of the OSC, we don't think will signal to the market that the OSC is serious about the program and, in practice, will not result in success.

Similarly, whistleblowers need to know that there is money available for payment. Given provincial securities regulators' low collection rates on fines, we can't tie the amount of the whistleblower award to the amount collected in the individual matter as the whistleblower rarely ends up with any compensation with the current fine collection rates.

If designated funds from fines are used, there has to be enough in the fund to pay whistleblowers or other funding provided to it.

Finally, we think -- we also think the whistleblower program should have administrative fairness built into it. The process of determining whether to pay an amount to the whistleblower should be provided in writing with reasons. The process for
applying for compensation and the eligibility for it should be clear and transparent.

We think it's important to see the impact that the whistleblower program will have on the OSC's enforcement efforts. To do this, the OSC should be disclosing the number and types of complaints that it receives today and the number of investigations it pursues, whether through a whistleblower or otherwise. It can then demonstrate that there is an increase in whistleblower tips or an increase in the nature of the types of wrongdoing it uncovers as a result of the program.

At present, there's a dearth of information as to the prevalence and incidents of fraud and other wrongdoing and this is another area that we think needs to change.

In conclusion, we think that the program will help the OSC improve its enforcement (inaudible) -- it's properly designed and will further its mandate.

MS. CONDON: Thank you, Marian. So let me ask you a couple questions before I turn the floor over to Dimitri.

So one of the issues that you've raised is the question of the threshold for an award, and
this is a theme that's come out in some of the comment letters, that the proposal doesn't have this quite right. Some people think the threshold is too low, some people think that there needs to be a bit of a sliding scale process.

Let me ask you about the issue of paying for tips that result in sanctions that are not monetary at all, so sanctions such as conduct bans and other ways of putting people outside of the purview of the market for a period of time or permanently. This was an issue that was raised in at least one of the comment letters. Does Fair Canada have a view on this?

MS. PASSMORE: We have a view that a conduct ban did not suggest that the matter was of serious misconduct that would result in a whistleblower award; that if there was serious misconduct, that it shouldn't simply be a registrant conduct ban from the market. There should be other associated penalties that would be meted out so that that wouldn't meet the threshold.

MR. LENCZNER: Can I just jump in, and this is for everybody.

The Supreme Court of Canada has told us that sanctions are supposed to be looking to the
future, not punishing the past. It's not supposed to be punishment, although there is a general deterrence. If you've got a registrant and you ban him from the market because he's seriously misconducted himself for the rest of his life, it's professional debt.

Adding an administrative penalty over a million dollars, which is a threshold, sort of smacks a little bit of punishment. You've already taken him out of the market. You've already deterred others. You've already dealt with it. So how do we -- I'm asking the question -- how do we reconcile all of this? For anybody.

MS. CONDON: Connie, you look like you want to jump in.

MS. CRADDOCK: It's not the first time I'll say as a non-lawyer, the SROs do that. People are banned -- suspended or banned, and a financial penalty is imposed. Not as often as some of us would like, and that hasn't seemed to be challenged. It is practice, is it not?

MS. MURRAY: I can say it's practice, but very often they impose a penalty that never gets collected because once they are no longer subject to IROC --
MS. MURRAY: IROC can't enforce it.

MS. CRADDOCK: Absolutely, because the commissions won't give the IROC the authority to collect fines.

MR. HAUSMAN: I had a burning question that arose from something that Jane had said. How -- and this is a question, and I don't know if there is anybody to answer it. How is the OSC going to coordinate with other CSA members?

MS. CRADDOCK: I had that question.

MR. HAUSMAN: In other words, is the OSC going to -- it technically has jurisdiction for issuers and registrants for which it's not the principal regulator. You take those cases, but generally, I mean, the way things have worked for the past 10 years at least is that's deferred to the principal regulator. So if there is a whistleblower in company X, company X's principal regulator is in Quebec or British Columbia, what's going happen?

MS. CONDON: That's a great question. As I sit here today, I don't have the answer to that question, but I appreciate it's something that we need to think about.

Obviously, I think from the OSC's
perspective, the issues that we're most interested in
are issues that we would be investigating and
pursuing as enforcement actions ourselves. I think
there are representatives from other CAS
jurisdictions in the audience. I think they are here
in part because they are interested in hearing the
discussion and considering perhaps whether to move
into the same direction, although I can't speak for
them, of course.

So it's possible that one of the things
for the future might be a pipeline of information
that is shared across the CSA jurisdictions. But I
think for now, we're primarily interested in how this
would allow us to enforce issues that we would be
enforcing in Ontario.

MR. HAUSMAN: Well, that means that
potential whistleblowers obviously have to be
informed at the get-go. I mean, if you look at we're
not the principal regulator for this issue, or
notwithstanding that it's got an office here and you
work here and you live here, that you don't meet the
eligibility criteria, and that we recommend that you
make an anonymous call to British Columbia Securities
Commission where you'll get no financial reward, no
guarantees of protection, potentially no protection
against retaliation, et cetera.

It's something that is will come as a surprise to people, because even I do this for a living, I always have to look on SEDAR to see who the principal regulator is, find out who the complainants...

MS. CONDON: I think you are raising a very good point, and I think this could be something, somebody -- either Marian or Jane made the point about having clear guidance for whistleblowers in order to make the program effective as to how they should do this and where they should go and what the implications of being a whistleblower would be up front in order that they make an informed decision. So that I think that would be -- clearly be part of the mix in terms of letting people know that if this is not something the OSC was taking enforcement action about then they're not --

MS. CRADDOCK: I just wanted to add that is something that I wanted to raise in some --

MS. CONDON: So we'll come back to that.

MR. THOMAS: Commissioner Condon, I wanted to share a couple of things that may be of help to you and the other commissioners.
My background -- I was at the SEC and I had a leadership role in developing whistleblower program, and then I left and now represent corporate whistleblowers.

The first thing that may be helpful for you to know are the three big drivers that I think led to the SEC developing the SEC whistleblower program. At that time the program was considered, the financial crisis had just occurred and the Madoff scandal had surfaced. At that time, the SEC and the other financial watchdogs did extensive soul searching across the organization about how they could be better, and the first kind of question was, what was the vision? What was the vision for the organization?

Was it to be expansive or just be better at what they were currently doing? And the answer is they wanted to be more aggressive, had a more ambitious vision for enforcement.

The second question was, were the strategies and tactics that they were using essentially the status quo effective? And the answer was, it was not.

And the third question was basically, what do we have to lose? Okay. Because in a
whistleblower context, you pay for success. So you are developing a program that allows for it to work.

If you establish a program and people don't come or they don't come with the kind of thing you want, you don't pay. And so the cost for establishing the program, yes, there are costs for establishing the office of the whistleblower. But otherwise, essentially you're just feeding more tips into your enforcement staff and you are able to triage it. Yes, they have limited resources, but the thinking was they would have the opportunity to do better cases.

So I think those are important questions for you also to consider.

I do think that -- and I share Jane's view that the three main components of a successful whistleblower program had been proposed in the working paper that was circulated, but I think if there is one aspect of your proposal that could be fatal, it's in the financial incentives.

The way I understand it, it said that basically you'll pay up to 15 percent, or $1.5 million as max. But there's no floor.

Now, the SEC tried that, okay. They had an insider trading program for almost 20 years
that was not used, okay. There were very few awards paid out. And I can tell you why in a second.

So we have precedent for that not working. Okay. And Attorney General Holder, the last major speech he did before he left, he said, we want a banking whistleblower program that has monitoring sanctions in excess of 1.5, because it's inadequate to get people to come forward. So you have those things.

What I can tell you -- so we have the DOJ experience, and then we have the SEC experience at 1.5 not being enough. But I will tell you, representing corporate whistleblowers, senior people who have a lot of lose, they generally distrust the government. They generally worry, question whether the regulators and law enforcement authorities are going to be aggressive and effective.

The program, unlike the False Claims Act program where they bring a case and then the government chooses to intervene or not intervene, essentially whistleblowers are coming and having to trust you.

So if you're adding yet one more component of uncertainty into your process, I think that you're going to lose the kind of people that the
SEC has the benefit of getting.

    When you, Commissioner Lenczner, asked
about officers, I represented the first officer that
received the SEC whistleblower award. I can tell you
there is no chance that that senior person would have
come to a program that was so discretionary. And so
I think I'm trying to think through, kind of, from
the organizational regulator perspective why you want
to cap or why you want -- not to have a floor. I
think that perhaps it's -- you don't want people to
get too much. Well, the percentage does that.
Percentage is a natural regulator.
    And I'll give you an example.

    MR. LENCZNER: Except we do it without
collection. You do it on -- or the SEC does it with
collection. And we don't collect very much. We're
terrible at it.

    MR. THOMAS: But the program you are
considering has the potential to change that. The
SEC whistleblower program, one of the factors is, you
can get the whistleblower award if you help them find
the fruits of the misconduct.

    So your collection rates might improve
because all the people who are selling them things,
helping them hide things are coming forward to you.
But I'll tell you, this component is critical. If you were asking to pick amongst the weaknesses in the current proposal to fix, it's the floor. Okay. If you start with a 10 to 15 percent range and then you work your discretion within that range, you're going to have a much better chance.

To give you a sense of what could be here, okay. The Deutsche bank case announced by the SEC two weeks ago -- in the last two weeks -- the investment vehicles were Canadian. The institutional investors were Canadian. The SEC received a $55 million sanction. And this wasn't even a fraud settlement. It was a non-fraud settlement in your backyard.

Now, if this is the kind of case that you want to do and if you want people to come to you, you have to fix the financial incentives.

MS. CONDON: Thank you very much for that intervention.

I'm going the turn the floor over to Dimitri Lascaris for his view on how this kind of program would interact with the class action practice that he's engaged in and how, from your perspective, this kind of program could increase the effectiveness of enforcement strategy by securities regulators.
PRESENTATION BY MR. LASCARIS:

MR. LASCARIS: Thank you for having me, Commissioners. It's a privilege to be here.

As you indicated, I act for plaintiffs in private securities litigation. I have not served in an enforcement capacity for a regulator, but I believe that many of the obstacles that private litigants confront arise in the regulatory context.

One obstacle that we also confront is that those who commit securities fraud inevitably seek to avoid detection and many violators of the securities laws are highly adept at doing so.

Well placed whistleblowers are often indispensable to defeat those efforts of detection avoidance. They may know where the bodies are buried. They can lead investigators to critical evidence that is buried in a mountain of extraneous information.

Whistleblowers can fill in gaps in the documentary record. They can help investigators to connect the dots when the documentary records are too difficult to comprehend. Whistleblowers may have been privy to critical inculpatory statements that are not evidenced by any documentation.

So in short, they can be an invaluable
resource for white collar law enforcement.

This is particularly true in a world of constrained regulatory resources. The most efficient use should be made of those resources and the targeted investigations that are facilitated by whistleblower cooperation advances efficient use of constrained regulatory resources.

But there is a problem in the whistleblowing context, and that is currently the risks and the rewards are misaligned. The benefits of fraud detention accrue to the company shareholders, but the risks of exposing the fraud are borne by the whistleblower. And this is the classic free rider problem.

I've had occasion to deal with dozens of potential whistleblowers in my career as a plaintiff's lawyer and almost without exception they ask, why should I bear the risk of retaliation when the benefits of my telling the truth will flow inevitably to others who are not bearing those risks.

This is a perfectly rational question for anyone to ask, particularly someone who supports a family from his or her employment. That whistleblowers are frequently the targets of retaliation is well known and I suggest that you
cannot seriously dispute it. Our comment letter identifies a number of high profile instances of retaliation of many others that we have not discussed, and I urge you, if you have not read the review of those instances of retaliation, to do so.

Now, some observers, some commentators say the proposed program will perversely incentivize whistleblowers to report claims without merit. But with respect, I say that this is a dubious assertion.

If the claim has no merit, then those who are tempted to report it will know that there is a high risk of reporting a claim will result in no benefit to them while leaving them exposed to legal action and liability from those who were the targets of the unmeritorious claim.

Furthermore, we should have confidence in securities regulators to identify claims that are devoid of merit. Indeed, I'm sure that securities regulators already do this on an almost daily basis because, as we all know, irate investors who suffered losses for no reason other than a poor investment decision will often complain. They do that to our firm and we have to sort through unmeritorious claims every day.

So we suggest that we should have
confidence, as I say, in the ability of regulators to filter out those unmeritorious claims should they be put forward.

In any event, any time there is a misalignment of risk and reward perverse incentives already exist. Namely, those who witness frauds have an incentive to remain silent because they bear all the risk of reporting the problem but stand to gain nothing from this exposure.

So if we actually care about perverse incentives we should be supporting a whistleblower program and not opposing it.

However, these programs are only effective if the potential reward is sufficient in the mind of the whistleblower to justify that risk of retaliation.

A cap of 1.5 million -- and I'm going a agree with Jordan at this point -- is highly inadequate in, my respectful view. Given that whistleblowers are frequently blackballed from their industry, they must be eligible for an award that can provide them long-term financial security, and $1.5 million is simply not enough money nowadays for long term financial security for the whistleblower and his or her family.
Bear in mind also that prudent whistleblowers will want to retain legal counsel from the outset to advise them, firstly, with respect to their exposure under their employment or confidentiality agreement, and secondly, to represent them in their negotiations and deals with the regulator. And that's a very significant expense for them to have to bear, and the lower the potential award, the less likely it is that they are going to be willing to bear that expense.

So speaking about the financial -- and I'm going back to something which again Mr. Thomas mentioned.

Speaking about the Financial Institutions Reform, Recovery, and Enforcement Act, which currently caps payments to whistleblowers at $1.6 million, former U.S. Attorney General Eric Holder called this limit a paltry sum and stated that $1.6 million was, quote, "unlikely to induce an employee to risk his or her lucrative career in the financial sector." I agree.

Those are my comments.

MS. CONDON: Thanks very much, Dimitri.

GENERAL DISCUSSION OF TOPIC 1:

MS. CONDON: So why do you think it is
that some of the commenters take the view that we should follow the UK and the Australian model and not offer financial incentives at all? Is there some sense in which there is a cultural difference or is this -- how is it that those programs, those jurisdictions operate without any providing financial incentives?

MR. LASCARIS: I can't say that I'm familiar with the success rate in those programs. I suspect they not particularly effective. I don't think we should be calling upon potential whistleblowers to be heroes. As I say, they have livelihoods they have to be concerned about. Oftentimes they support people from their careers and we have to be realistic about what ultimately will motivate people to come forward and take on these risks.

It may be that there's a cultural difference between, for example, our jurisdiction and that of the United States which makes us hesitant to reward whistleblowers. But my admittedly somewhat cynical view is that what's really going on here is those who oppose it know that these programs are effective, and that's precisely why they don't want them, with all due respect.
MR. HAUSMAN: Before you sort of assess what the -- how big the incentive is or not, I think somebody has to ask CRA whether this is taxable as income or not. Because I don't know if the whistleblower award comes from office or employment or business or -- in other words, I think a key question is whether you have to pay tax on the award you get. And until you really know that, you can't really measure whether it's a sufficient incentive or not, because that comes out of the Federal government.

MR. LASCARIS: And the lower the cap the more material that question is going to be.

MR. HAUSMAN: That's right. But I think that's a question that the OSC is going to need to get an opinion on so they can properly advise people. I think you can't really set the threshold unless you understand what the actual financial consequence is to the person who is going to receive it.

MS. CONDON: Christine, would you like to comment?

MS. WIEDMAN: Yes, if I could, just about the effectiveness of the monetary incentives. I don't have statistics on the UK and
Australia, but just looking at the U.S. case there was an interesting paper in Journal of Finance that was looking at who detected the fraud, the different players, and they found that employees are certainly a significant player. And then what they did is they compared industries that were covered under the FCA, the False Claims Act, versus those that were not, because monetary incentives would be working in those industries -- this is pre-Dodd-Frank, would not in others.

And they found employees were -- 41 percent of the frauds were brought to light by employees in cases where there were FCA incentives but only 14 percent were brought forward by employees in all other industries. So I think that is one example of the effectiveness of monetary incentives in giving employees some compensation for the significant risk that they take.

MS. NORBERG: Can I just add that I think that any country who is considering monetary incentive should take a look at our annual report every year and see how many citizens from their own countries are reporting to the U.S. Something is incentivizing them to us.

MS. MURRAY: What's the average size of
an award under SEC's program currently?

MS. NORBERG: That's a very good question. So ours is different from the OSC's proposal because ours are based on collections. Sometimes there are collections and sometimes there are not. Sometimes there are huge collections, sometimes very small.

So interestingly -- and I did take a look at this when I realized you had a $1.5 million cap -- of the 17 whistleblowers we've paid so far, only three of those awards have been over the $1.5 million. Again, that's based on collections, and certainly as we continue to pay more, it can be all over the board.

So I think there can be incentive for $1.5 million, but I do also hear from people who have certainly lost their jobs or feel they are blackballed from the industry, and these are people who are making millions of dollars a year on Wall Street, and it might be harder to incentivize them.

But I think the draw of not having a cap -- of having a much higher cap, would be that there's a potential to get it.

You know, in our program we did pay somebody 30 million, we did pay somebody 15 million,
and so there is a potential to receive those kinds of sums, where if it's capped, you know, it might disincentivize certain people.

MR. THOMAS: There's no question --

MS. CONDON: One quick followup and then Jordan and then Alan, and I think we have to cut off this discussion because we have to move on to the next session.

But just on this point about uncertainty. If the award is tied to collection, how do you reassure the whistleblower who comes in with a tip that this is a valuable thing they should be doing, even though at the end of the day unless you collect they are not going to get anything?

MS. NORBERG: So that's why I think -- I'm sorry, the confidentiality and the anti-retaliation are just as important because that also -- if someone is on the fence, they think that they might get award but they are not sure, think they can come in anonymously and remain confidential, we have certain limited exceptions to the confidentiality, and they can be protected from retaliation, I think that might get them off the fence, to come in and take a chance that their tip might be effective.
You also have to remember that not
everybody comes in for the money. I mean, people are
coming in because it's the right thing to do. Or
because they reported internally to their company and
repeatedly their company is doing nothing and they
feel it's my duty to go and report it.

So not everybody is coming for the
money. I think at the end of the day it's a nice
thing if they can get paid, if we do have that
(inaudible) enforcement action, but not everybody is
there for the money.

MS. CONDON: Is that something you
could track? You are collecting a lot of data.
Would it be helpful to find out from people what
motivated them to come in?

MS. NORBERG: It could be interesting,
but we have not tracked that.

MS. CONDON: Jordan?

MR. THOMAS: Couple things.

First, when the SEC developed a
program, only 20 percent of SEC enforcement actions
had monetary sanctions in excess of a million
dollars, okay. It was a reflection of the SEC
wanting high quality tips that they weren't otherwise
getting, okay.
So when you're thinking about the million dollar threshold that I know Marian and her organization expressed concerns about that, you might look at what is the top X percent of monetary sanctions that you are getting and then think about maybe a threshold there.

Another statistic that I think is important for you to know is that 80 percent of -- in excess of 80 percent of the Department of Justice false claims cases were originated now by whistleblowers. Okay. And last year they generated $8 billion in recoveries for the government and in prior couple years it was $3 billion or more.

So when you are start thinking about, kind of, the potential for program like this over time -- like, the SEC program started with zero awareness. Now surveys show it's about 60 percent awareness in the financial service industry.

As it penetrates you get growth and -- I recognize there were questions earlier about how do we triage this with limited resources. Potentially your people are going to be able to work on better cases and refer out other things or just not work at the small amounts. So those are --

MS. CONDON: Jordan, I'm going to ask
you and other panel members, when you are intervening
if you could just be careful to speak into the
microphone. There are some people at the back of the
room who are not able to hear your comments.

Sheila, one quick comment and then
we're going to have to stop.

MS. MURRAY: This will, I'm sure, come
up again. I think the triage issue is a huge issue,
and if you are not -- we're going to be talking about
internal compliance systems. I think if you are not
letting the company do their job first, you're going
to be overwhelmed, and I think you guys are. How
many whistleblower complaints did you have this year?

MS. NORBERG: 2014 we had 3,600, but I
don't feel we're overwhelmed. We have the resources.

MR. THOMAS: I can tell you that before
the SEC whistleblower program the SEC received 30,000
complaints referrals a year. They essentially had a
10 percent increase with this. But I'm very
interested in your conversation.

MS. CONDON: Then I think we are just
bang on time. We had to stop the discussion on the
first topic and I'm going turn the floor over to Alan
to get us started on questions of anti-retaliation.

TOPIC 2: WHISTLEBLOWER PROTECTIONS:
ANTI-RETALIATION MEASURES AND WHISTLEBLOWER CONFIDENTIALITY

MR. LENCZNER: The second panel today is going to be speaking to two topics primarily, anti-retaliation and confidentiality protections. We have some excellent panelists, Connie Craddock from the Investor Advisory Panel, Daniel Pugen from McCarthy's Employment and Labour Group, David Hausman from Faskens, who deals with securities litigation, and Jordan Thomas whom you've already heard was at the SEC and now acts on behalf of whistleblowers.

So just a couple of introductory comments.

As you know, the OSC envisions two avenues for enforcing the prohibition against retaliation. One is by enforcement by staff, by bringing a section 127 proceeding, and two, is giving a statutory cause of action to a whistleblower to bring a civil claim.

Generally, the papers that we received were in support of anti-retaliation protections, and were in support of the scope of them, being that there should be anti-retaliation protection both for internal reporting and for those who would report to the OSC.
Another comment that came out was whether or not there should be anti-retaliation protections for someone who is himself or herself culpable, and the commentators were divided on that theme.

The other area that we're going to deal with is the question of confidentiality, and here the question is how much confidentiality can be offered and when whether it be invaded.

As you know, in Canada we have a Stinchcombe -- Regina v. Stinchcombe provision which requires disclosure of everything that staff has obtained through its investigation that should be given to the respondent. And what about if the whistleblower is called as a witness at the hearing? There's also the question of whether a whistleblower could initially remain anonymous by providing the information through a lawyer and, thus, at least for a time, protect confidentiality.

So with those sort of background ideas I'm going to ask Connie, first of all, to -- and you've already indicated you have lots of comments -- but to give us your thoughts on what -- the sufficiency of the proposed anti-retaliation and confidentiality protections.
MS. CRADDOCK: Thank you, Alan.

PRESENTATION BY MS. CRADDOCK:

MS. CRADDOCK: First, I would like to say the Investor Advisory Panel supports the introduction of a whistleblower program in Ontario. We believe that we need new and better tools to strengthen enforcement and compliance in this province. I think the evidence is clear. We hope it will be a game changer for Ontario Securities Commission as well and that we'll have easier and more timely access to serious and systematic issues that our current compliance and enforcement programs are not discovering.

Whistleblowers obviously face huge personal risks. The risk of retaliation is real, and from what I've read in my limited experience, it seems to me frequent. And the cost of doing the right thing can be very high.

I think we've already heard from some people who were involved with these kinds of programs that the issue of trust is key. If people are going to come to a regulator they have to have confidence that the risk they are taking is worthwhile, and key to that is the robust confidentiality protection and anti-retaliation protection that can be provided to
the whistleblower.

Let me just address some aspects of the confidentiality protection that we think will be needed so that whistleblowers can have confidence when they come to the regulator.

An independent office is obviously clear, and we were certainly heartened in reading the submission from OSC staff to see the work that had been done looking at examples of successful whistleblower programs.

We obviously support evidence-based policy and we think that there's some really clear examples, particularly in the SEC, on how to set up an independent office where people are going to be able to approach that office with some confidence of having their confidentiality protected.

We think that they need to be able to come forward anonymously by a lawyer. I understand this is what the SEC program permits.

Whistleblowers should not be required to put themselves at risk by going first to the firm. I should also say very clearly that the Investor Advisory Panel fully supports and does not want to see anything that would undermine current corporate compliance efforts within the firm. They are
critical, they're part of the system, and they need
to be enhanced. We think a program like this
properly implemented will complement those promises,
they won't undermine them.

The IAP submission expressed the
cconcern that the OSC should not share whistleblower
information with organizations that do not have the
same confidentiality or, for that matter,
anti-retaliation protections in place. In practice,
this is going to be very difficult to achieve.

I should say the Investor Advisory
Panel has, as well, consistently called on the OSC to
move unilaterally where it's necessary to protect
investors of Ontario when they do not have the
support of their fellow CSA members, which happens
often enough given the nature -- call it mosaic on a
good day -- and a balkanized system on others.

So we have called on the OSC to move
ahead to protect investors, and we really are pleased
to see you doing this.

But in saying that, we recognize that
in practice it's going to be very difficult for you
to do this. The CSA partners will not have these
protections in place, nor perhaps equally important,
will the SROs. The kinds of complaints and reports
that you are going to get are not going to be always
your issues only. They are often going to involve
the SRO firms and yours, and CSA partners.

So how you are going to be able to
ensure confidentiality and, equally important,
anti-retaliation measures in place. It's a question.

It's one thing to start conversations with your CSA
partners. You have oversight over the SROs. Those
conversations can start immediately in terms of
ensuring that their registrants have these kinds of
protections as well.

In terms of the anti-retaliation
measures that the OSC proposal includes, we would be
fully supportive of them. And again, would reiterate
the concern about the gap in whistleblower protection
that exists.

I just would maybe make a final
comment, and I'm trying to do this as quickly as I
can even though as usual we have lots to say, but
there's so many people around the table that have
important contributions to make that I'm trying to
make this brief.

The issue of firms having employment
contracts now that require their employees not to
report wrongdoing to the regulators is something that
can only be a real dismay to people who are concerned about that investor protection. I have no idea, and I don't know if you do, how widespread this practice is. But if it takes a whistleblower proposal for you to take in measures that would stop this happening, then the whistleblower proposal is important enough on its own to do it.

I would simply ask, again, not as a lawyer, but given the requirement to act fairly honestly and in good faith and the requirement of public interest, how it's possible that those kinds of employee contractual provisions are permissible today under our securities regulatory regime. But certainly we would see this as an important component of your moves to implement anti-retaliation measures that this practice, to the extent it exists, would be curtailed, indeed eliminated, and we think it's absolutely essential that you move strongly on the anti-retaliation and confidentiality provisions so that people have trust.

And I would just say as well that the IAP fully supports the concern that your monetary award be higher. I think that's necessary, too.

Thank you.

MR. LENCZNER: Thank you, Connie. And
with regard to your last question, I'm going to ask Daniel, when he goes next, to address that about the employment contracts and what has to be contained within them because he's really the expert in that field.

MS. CRADDOCK: I would be interested to hear as well how regulators see this to be (inaudible) their current role.

MR. LENCZNER: I was interested in your comment that the whistleblower should not be obliged to go first to his own firm. Why do you say that?

MS. CRADDOCK: I think if you've got a hard and fast rule like that, that there are circumstances where if they go first to their firm they know that retaliation will take place, the evidence will disappear and you're not going to be able to have a successful prosecution.

MS. FUERST: I will be dealing with that on our panel, but I think the assumption that there is going to be retaliation is a broad overstatement of the reality of most of the financial institutions that I deal with as clients in my practice. I just don't think that is a fair reflection of the market here.

MR. LASCARIS: If I may. It doesn't have
to be across-the-board retaliation. There has to be a significant risk of retaliation in the mind of the whistleblower for there to be a deterrent to report.

Again, I urge you to look at our comment letter. There are numerous high profile examples, and we've only touched on some of them, where there were repeated attempts to report internally at major financial institutions, including JP Morgan, and those attempts were rebuffed and the person suffered retaliation.

MS. FUERST: My only comment, I'm not sure the U.S. experience is necessarily relevant in Canada. I do think we have a different culture -- business culture in Canada than we do in the United States.

MR. HAUSMAN: I think also, in terms of discussing this -- and this is just trying to draw bridges between the different things we're speaking about -- we're speaking about financial rewards, we're talking about difficulties in collecting and so forth.

You understand that you do -- you will collect, you will collect from major institutions. I think there's a difference between reporting internally in the context of financial institutions,
major public issuers and boiler rooms, for example, where people are engaged in unregistered trading.

The context of internal reporting doesn't even apply there, there's nobody to report to. So I think that's really important to define your terms. In other words, when you are speaking about anti-retaliation in the context of the organizations, I think you can have faith in them.

But you have to be able to assess what your whistleblower's whistleblowing about. If your whistleblower is whistleblowing about a bucket shown (inaudible) that's operating in some apartment unit somewhere, obviously there is no internal reporting.

MR. THOMAS: One of the things -- the SEC looked at this question very closely -- is the idea of requiring internal reporting or requiring simultaneous internal reporting. And we certainly understood the concerns of the corporate community. Many of them said -- after Sarbanes-Oxley we invested substantial resources in building out these wonderful well-developed systems for internal reporting. And they were right. They did.

The thing that is -- the bridge that was too far, and I suspect that it would be too far here, is the trust of the employees in the employer.
Because I don't doubt the sincerity of the council here. I don't even doubt the sincerity of the leadership of the organizations that they represent.

But if the employees don't trust the fancy new systems, and they don't use them, which is the status quo, then you have to look at alternatives.

And what the SEC did was it would sell them (ph) online, but essentially they basically said we're going to put extensive incentives to make people go internally so they can trust. So if JP Morgan or -- pick your favourite organization that was -- that has good systems and great people, people report internally, and they will get more for it if they choose to go externally later.

So that trust gap is key. And if you believe that the corporate community is different than the experience in the U.S., this is an excellent time for a survey.

MS. CRADDOCK: I would just like to add to that.

I'm not trying to suggest that the industry is going to be behave in a nefarious and negative way. I simply think that if you've got that kind of requirement baked into the program at the
beginning the people won't have the trust to come forward.

MS. NORBERG: If I can add to that, at the SEC I think what we decided is that we wanted to empower the whistleblower to make the decision themselves; that if they are comfortable, that their internal compliance program is robust enough that it's going to protect them, report internally first.

And also just want to say that in our last annual report of the award recipients who had the whistleblower awards that were employees of the company, 80 percent of them had reported internally first.

So anyone who thinks it might destroy internal compliance as you know it, it has really been proven unfounded in the United States because, believe or not, most people like their companies. They actually want to believe the company is going to do the right thing, and it's only after they report it internally and the company either turned a blind eye or wasn't taking appropriate steps that the whistleblowers came to us and reported.

MR. LENCZNER: Thank you.

So this brings us to our next panelist and that is Daniel Pugen. So, Daniel, what are your
views on how the proposed protections fit into the landscape of employment law and whether they will achieve the desired results?

MR. PUGEN: Thank you, Mr. Lenczner.

PRESENTATION BY MR. PUGEN:

MR. PUGEN: I was going to jump in there at times but decided not to. Hopefully some of my comments touched upon what other panelists have said.

Full disclosure. I'm partner in the labour group at McCarthy Tetrault. I only practice on the management side, so I only represent companies.

Just, Connie -- one of the comments you made about how prevalent are these contracts. We were actually talking about this before we started. How prevalent are these contracts where there are prohibitions on disclosing to the regulator.

I can tell you they are not common at all. I can tell you from my own personal experience of doing this for 12 years, I would say I've seen it maybe half a dozen times.

MS. MURRAY: And my understanding is, is there not law indicating that's enforceable in Ontario?
MR. PUGEN: Yes. So first of all, if
there is the whistleblower protection that is passed,
because the contract would be off side with
legislation the clause would not be enforceable.

MS. FUERST: It also wouldn't be
enforceable because we can't ask someone to contact
contravene the law. So keeping something from a
regulator, particularly in the financial services
industry, would contravene the law.

MS. PASSMORE: Wouldn't that have a
chilling effect regardless of whether it's
enforceable because the individual employee might not
know it's unenforceable. So if it's in there, they
are going to think it's true.

MR. THOMAS: Then they will have to
hire a lawyer at their own expense to figure it out,
which they may not be willing to do.

As I said, I've dealt with many
whistleblowers who aren't willing to do that.

The question I had for you -- I'm sorry
to interrupt. I'm very interested to know is -- I
would be shocked if a well -- if a competent lawyer
would draft an employment agreement that explicitly
prohibits reporting to a regulatory or disclosing
wrongdoing.
What I would be more concerned about is language that's broad enough that could be interpreted to impose liability on the employee who reports the wrongdoing because of the confidential nature of the information. That's the more likely scenario and one that is, nevertheless, going to be very problematic getting people to come forward in the face of an employment confidentiality.

MR. HAUSMAN: Do most whistleblowers who come forward in U.S., are they represented by counsel?

MS. NORBERG: I think it's all over the board. Some are, some aren't. In speaking about these agreements, I would actually challenge you, Daniel, to go back and take a look at some of the agreements you drafted, and even if it doesn't say you cannot report to the OSC or you cannot report to Securities Exchange Commission, in there it can be implicit -- and you have to remember, you have to look at it through the eye of an employee who is not represented. Someone who has just been terminated and needs their severance. And if they read it and they think, I report to the SEC or the OSC, they're going to take me to court and they are going to pull back my severance or they are going to make me
forfeit my options, or whatever it is that the agreement says, and that has a chilling effect.

We hear it every single day on our hotline. People call and say, there's something I want to report to you but I don't think I can because I signed this agreement when I was terminated from employment.

And we recently brought a case against a company where they said in their confidentiality requirements basically you can tell no one about what we're talking about today, about these underlying allegations, and it didn't explicitly say, you can't go to the SEC. But we still brought an enforcement action based on it.

So I think you have to go back and really see when we read the contract in total, is there a carve out to go to the regulator?

MR. LENCZNER: Let's let Daniel -- go ahead.

MR. PUGEN: What I was going to say is there's no doubt that an employee faces challenges obviously when they are handed a detailed written agreement. I don't think anyone can say otherwise.

But I would push back a bit and say that the way the law has developed and the way one of
the agreements had been interpreted by the courts, I
don't think it's a stretch to say they have
interpreted mostly in the employee's favour,
especially when you get some of these restrictive
covenants and non-competition or confidential
information. So the law has stepped in to the courts
to offer some protection. But I take your point and
I agree.

I would say in Ontario it is very
common for employees to retain counsel, even before
they are let go. It's a bit different than in the
U.S.

Everyone needs to get their advice, but
the law already offers some protections in that
regard.

I'll move into some of my general
remarks and then hopefully people can jump in. Thank
you for allowing me to share my two cents.

So as I mentioned earlier, I practice
on the management side of labour and employment law
at McCarthy's. A couple of introductory comments.

First, there are no whistleblower
protections in some of the legislation I deal with
every day.

So what are those statutes? Human
Rights code which protects discrimination and harassment and employment services, Employment Standards Act which deals with minimum standards of employment by vacations and minimum wage, the Occupation Health and Safety Act which deals with health and safety, and the Labour Relations Act which deals with the formation of unions and the rules around that.

And there is no whistleblowing protection. There certainly is anti-retaliation protections, but there is no provision in those statutes that says if you report this misconduct you are going to get a payout. I'll give you one example.

There's a recent case, human rights tribunal, that is in the papers where there was a very messy situation of sexual harassment. Two employees end up getting around $150,000. Now, there were tips that went into the Human Rights Commission but none of those people were paid out anything, and the only award was to the two impacted individuals.

So there are no whistleblower protections. That's the first point.

The second point is in employment disputes usually what you are dealing with is
something that impacts the employee individually. So they filed a complaint. Unless you have a union that says well, this policy could impact the industry or all the employers, you don't have a situation where someone complains to a regulator about a general practice at work. So, for example, in that human rights case you didn't have anyone sending in tips. And similarly, you don't have employees sending in tips to the regulators where it doesn't impact them personally.

So on the anti-reprisal provisions, I think it would be helpful if I actually read out one of the provisions from the Employment Standards Act just to give you a sense of how broad the protection is. And that's in section 74. This is how it reads:

"No employer shall intimidate, dismiss or penalize an employee because of the following:

"That employee asks the employer to comply with this act and the regulations." In other words, please pay me over time.

"Two. The employer makes inquiries about his or her rights under the act." So in other words, what are the rules around overtime,

Mr. Supervisor.

"Three. They file a complaint to the
ministry." So I think that's getting at the actual proposed whistleblower provisions.

"Attempts to exercise a right under the act." For example, wants to go on parental leave. "Gives information to an employment standards officer." Any information. "Testifies in the proceeding under the act or is eligible or will become eligible for a leave."

So the anti-retaliation protections, at least in employment standards, are extremely, extremely broad. I don't think it's the intent to draft them that broadly. But it's just something for the commission to consider when it goes through its next steps in developing with language.

So you have the anti-reprisal provisions in employment standards as well as the human rights code.

So just as than example, employees terminated because they ask for accommodation for a disability. That's a textbook reprisal issue.

Or even if they reported internally and they suffer a penalty, and I'll get into that issue because I do think it's quite an important one and I do agree that part of the whistleblowing should be
that you go internally first.

There were some very helpful comments in the papers placing parameters around that, which I agree with as well, but I do think it's important enough to get it to go that way.

From a labour relations perspective, employee tries to start a union and the employer moves them to another location or they suffer some adverse consequence, another reprisal situation.

Under Health and Safety, an employee is kicked off their health and safety committee because they make too much noise or try and enforce the act.

These are all penalties that happened. I can tell you that even though there isn't the financial incentive, I'm quite busy with these complaints and others, so they do occur.

But my own personal view is, I think without the financial incentive, at least in the whistleblowing context when you're dealing with some of these issues which aren't your typical employment disputes -- they aren't as minor as, say, hey, I wasn't paid my vacation, paid my overtime, you probably need the financial incentive. I'll leave it to some of the other experts to determine where the line is, the floor and ceiling.
But I tend to agree that you wouldn't
get the types of information you want without the
financial incentive. The anti-reprisal is probably
not enough.

There are a couple other points on the
reprisal. Just from a legal perspective, it's
important to remember that once an employee raises
their hand and says that -- trying to exercise his
statutory rights, the legal onus shifts to the
employer immediately to prove that a hundred percent
of the reason for taking the action against the
employee -- for example, an employee says, I need to
take a leave of absence, and the employee is demoted.
Maybe it's a coincidence, maybe it's not. I have
both of those situations right now. The employer has
to prove that a hundred percent of the reason is not
tainted.

So it's a difficult evidentiary hurdle
for employers.

So I did read in the materials, and I
thought it was quite interesting, that apparently the
U.S experience is that a lot of the employees are not
successful in their anti-retaliation cases. I'm not
sure what the legal standards at play are. I suspect
they aren't as employee-favourable as they would be
One of the other issues which I found quite interesting was the issue of disciplining the whistleblower despite the anti-retaliation provision. What do you do if the whistleblower does this in bad faith? There was comments about that.

I mean, first of all, I think it's unlikely that someone could do that. I can tell you from my own practice I do get bad faith complaints. But, again, those complaints are aware the person stands to profit personally in more immediate fashion.

It's very rare, I think, that you would get bad faith complaints through this whistleblowing process where it could be years and years before you get a resolution.

In fact, our human rights tribunal has said that an employee can't maliciously bring a complaint forward. If they do, even if they are retaliated against, they won't have the protection. There is some -- you can call it helpful case law from the employer's perspective.

It is a high onus, though, if the employee sincerely believes that they, for example, were racially discriminated against, they will have
the protection.

The last issue I want to go through is the raising the issue internally before going to the regulator, which I agree with.

Interestingly, the Supreme Court of Canada has said in this Merck case -- and I did print it out and I did get through the headnote --

MS. CONDON: Sounds like a good lawyer.

MR. THOMAS: It's also highlighted.

MR. PUGEN: Interestingly in that case, it involved a whistleblowing provision in Saskatchewan labour standards legislation, and an employee of a union complained of some financial misconduct. That employee went to the union, or the leadership of the executives.

At the end of the day, she had to go all the way to the Supreme Court for the court to uphold that, yes, it was appropriate for her to go up the ladder, so-to-speak.

I agree with that because it's consistent with labour relations policy and the way our labour relations and health and safety system is designed in Ontario.

So under the labour relations regime every collective agreement has an agreements
procedure where the parties are to work together, complaints are supposed to go internally first.

From a health and safety perspective, same thing. There's an internal responsibility system, there's a joint health and safety committee. Complaints are expected to be worked out between the parties.

Now, the situation is --

MR. LENCZNER: I'm going to have to cut you off, Daniel, because we're going to lose our time. So thank you, and we'll hold the questions until we've heard from David and Jordan and then -- because I want to give them a chance to put their perspective.

So, David, can I call on you to tell us whether there's the appropriate balancing of the protections with the employment concerns?

PRESENTATION BY MR. HAUSMAN:

MR. HAUSMAN: I guess I should state my perspective as well. Perhaps my bias. I'm a securities litigation lawyer. I would say that although I'm a free agent, I'm professionally and personally empathetic to internal compliance systems within big organizations, if I can put it that way.

But I think that reading the notice
and --

(Speaker overlap)

MR. HAUSMAN: Reading the staff notice and the comments that had been received, I think there's a few matters that there's broad consensus about.

Certainly anti-retaliation measures of some sort are essential and fair. And I think the second thing that you can discern from all the comments received, what we've heard today, is that to the extent possible, confidentiality is the best protection against retaliation.

And thirdly, although this seems to be an issue in the U.S., I think you would probably see broad consensus among everyone in the room that anti-retaliation protection should apply both to whistleblowers who come to a regulator, whistleblowers who go to a self-regulatory organization, and to whistleblowers who bring their complaints internally.

That that is even a question in the U.S. surprised me, because I think it's essential to incentivize people to bring their complaints within their organizations. And as I say, my bias is that that should take -- that should be the primary --
that should be a necessary pre-condition. That's just my bias. It's not really this particular topic.

So the next question is, how to put in place an appropriate anti-retaliatory regime?

So the first thing is that there already are protections in securities law, but they are not adequate in my submission.

The first is that audit committees are required by law to protect confidentiality in terms of whistleblower complaints on accounting measures. I don't know why there isn't an equivalent provision in 31.103 pertaining to registrants, and I don't know why the protection in the national instrument for reports to audit committees doesn't extend to governance committees as well, or to board of directors more generally. Those are easy changes that make sense, and they would apply across Canada so they would address some of the concerns that Connie raised about other CSA members and so forth.

So that is a national initiative. I think that that ought to be considered in 31.103 and also in this sort of corporate governance provisions in 52, and so forth.

Because confidentiality really is the best assurance of anti-retaliation. And I can tell
you that having participated in board level internal investigations, and in internal investigations among registrants, confidentiality is preserved. And there is an advantage there.

The advantage is that -- and, Daniel, you'll correct me if I'm wrong -- but in an internal investigation an employer does not owe an employee who is the target of an internal investigation disclosure obligations. So if asked, the question is none of your business who complained. What is your response to these allegations? But there's no Stinchcombe -- there's no Stinchcombe in an internal investigation. There is here.

MR. PUGEN: David, I just challenge that. I think it depends on the regime at play. So for example, under the human rights regime a lot of employers have been dinged, for lack of a better word, for not having a fair investigation under that statutory regime.

But I think just generally, I tend to agree. Like any employment dispute, if the facts are bad enough, the courts will find a way to penalize the bad player.

MR. HAUSMAN: All I'm saying -- for example, an audit committee can't disclose to a
target of an internal investigation, for example, a controller CFO, that there's been a complaint because they would be violating securities law. So obviously that's an advantage.

The second question is, the difficult question is, how do you create a legal regime that gives people adequate protection against retaliation.

Civil remedy, in my view, is the most appropriate. But, of course, the quid pro quo for that -- and what I mean is I don't think it should be the subject of an extra provision in the enforcement provisions of the Securities Act.

The reason I say that is simply that this is not -- the commission isn't a specialized tribunal on employment matters. So it would be very odd to have a commission hearing about the type of things that Daniel deals with in terms of retaliation, which is subtle. It's not just termination. It's constructive dismissal, it's job harassment, and I don't think that that is the proper type of matter to be dealt with by a specialized tribunal in financial products, and I don't think that decisions that are made in that vein would receive much deference at divisional court, which I think is important.
So the alternative to that, in my view, is two-fold: One is obviously there's a breach of confidentiality that is owed under a national instrument or otherwise at law. So that is something that can be the subject matter of a commission proceeding because it's fairly obvious that if somebody complained confidentially, the word got out that it was on somebody's fault, that is a finding that can easily be made in the commission proceeding. And that jurisdiction already exists for audit committees and I think should exist for registrants as well, and I don't think there's much dispute about that.

For a civil remedy to be effective, then the measure of damages can't be decompensatory, there's got to be something like double or trouble. Because otherwise it's just duplicative of a wrongful dismissal case and there's access to justice -- people need to retain counsel, counsel have to work like Dimitri on contingency fees. That's -- it has to be meaningful, but I think the civil remedy is the most appropriate.

I'm just going to cut right now to disclosure.

In my view, whistleblowers who come to
the OSC should and will receive protection through
the investigative stage, obviously, but to think that
that anonymity will be protected in one's notice of
hearing is illusory.

I think illusory because -- leaving
aside the fact that I think staff would be inclined
to call these people as witnesses notwithstanding
what the notice says, the problem is that staff will
want to disclose the identity of the whistleblower.
And I can tell you that from personal experience
because I had a near-death experience.

One-year hearing at the OSC, probably
the most important case in the 30 -- my whole life,
and we received a favourable decision from the panel
on the disclosure matter. It was appealed, and
four years later in divisional court we nearly lost
the whole year because the divisional court disagreed
and thought that the material we didn't disclose
ought to have been disclosed.

Staff would be very loathe -- that's
why you get such comprehensive disclosure because you
don't want to have to make a mistake and jeopardize
all the work you've done at a hearing.

So when you look at the cases that
apply Stinchcombe -- and there's one in Alberta,
Ironside -- when you look at it, the threshold for relevance is really, really low. And, of course, you can impact tactical decisions by the respondents. The name of the whistleblower will be disclosed in a hearing.

MR. LENCZNER: I've going to have to stop you. Thank you. That's very helpful. Okay, Jordan.

PRESENTATION BY MR. THOMAS:

MR. THOMAS: So I would like to share with you some observations as a first responder to corporate wrongdoing, both at the Department of Justice, the SEC, and as someone who represents corporate whistleblowers.

In these roles I've seen firsthand the devastation that can be caused by corporate wrongdoing. Over time I've come to believe that significant corporate wrongdoing is rarely caused by rogue police (ph), insufficient compliance resources, inadequate policies and procedures, or compliance personnel that lack vision.

I have found that big misconduct often results from a long chain of little mistakes, one breakdown in ethical judgment cascading to another breakdown and then another, in time isolating the
seemingly random bad choices tends to snowball in front page scandals.

Ultimately, I've concluded that the most common causes of significant corporate wrongdoing is that organizations involved lack the culture of integrity and that too often they discourage speaking up.

It's not something that leaders of financial watchdog organizations regulate say into a mic, but I'll say it for them.

Given the vast scope and complexity of our markets, products and transactions, security violations can be difficult to detect, investigate and prosecute without inside information and assistance from participants in the scheme or others that work or are associated with them.

As a result, responsible organizations, regulators and law enforcement authorities cannot effectively and efficiently police the marketplace if individuals are unwilling to report wrongdoing.

While in law enforcement, one of the great mysteries to me was why more witnesses did not come forward and assist us. After all, in many ways corporate scandals are like bank robberies. They are rarely one-man jobs and there are almost always
In a real world, it's highly unlikely that $2 billion could have been lost by trade at UBS. More than one billion dollars of client funds simply disappear at MF Global, with a live (inaudible) could be manipulated by Barclays and many other banks without many people knowing about it.

For some reason, individuals with relevant information have remained silent, disengaged and disenfranchised while countless investors have been seriously harmed.

Now, this has been something that I've spent five, six years thinking about. And to explore this question when I went into private practice, my law firm commissioned surveys, and our most recent one was commissioned with the University of Notre Dame to find out what people know, because the starting question is: Do people know about wrongdoing? And we found in our most recent survey of U.S. and UK financial service professionals, 47 percent believe their competitors engage in illegal and unethical behavior.

23 percent believe their colleagues had engaged in illegal or unethical behavior. 22 percent had firsthand knowledge of wrongdoing in their own
workplace. And the statistics got worse from there. But what we know is people know things. And the question is, why aren't they speaking up?

Now, I can tell you that the first kind of answer that we came up with -- and I believe continue to be true -- is that the incentives and protections in the United States were inadequate.

And we developed a program that had three pillars: The ability to report anonymously, which is the cornerstone of the SEC whistleblower program. Most people think about the money. But for people who come to me, they are most concerned about retaliation and blacklisting.

This is the show. Because if you make a million dollars a year you're not really betting on the OSC to come through for you. You're more worried about stopping the wrongdoing in the workplace and not losing your job or your livelihood or the thing you love to do.

The second thing is employment protections. A note here, the U.S. has had a whistleblower protections for a long time. They, by themselves, were inadequate. So as you are balancing what mix of components you have for your program,
robust whistleblower protections are inadequate by themselves.

And the last thing, of course, are financial incentives.

Now, one of the things that we didn't know at the time in which we developed the SEC whistleblower program -- something that I was shocked by when I went into private practice is, the prevalence of agreements that discourage or prevent people from coming forward.

And at first I thought it was just -- I was two blocks from Wall Street -- maybe particular firms near Wall Street had these bad agreements and the rest didn't have them. So I began talking to whistleblower counsel around the country and we continue to see these agreements.

So we petitioned the SEC to look into this area. We also -- we added questions to Notre Dame's survey on this question. And you'll find what we found interesting.

I would encourage you to do the same sort of survey here in Canada. We found that 16 percent of respondents said that the policies and procedures in their workplace prohibited them from going to law enforcement authorities about wrongdoing
in the workplace. 10 percent said that they were asked to sign or did sign an agreement that prohibited them from going to law enforcement authorities.

It should be noted, these agreements did not just apply to securities violations. They applied to public safety issues, they applied to anything. Basically there was no carve out.

When we asked the question -- we looked at the people who made over $500,000, which on Wall Street is about half of the people -- the numbers went up to 28 percent for policies and 25 percent for agreement.

So even if Canada is a much kinder and gentler and honourable place, if your numbers are even a third of that, I would run, not walk, to fix this. Okay?

Now, the other thing that I would like to talk to you about is retaliation. I can tell you that the vast majority of my clients are people that reported internally and they perceive they are retaliated against.

And I will tell you that again you don't have to trust me. There have been surveys done on this. The Notre Dame survey that just came out
found that 19 percent of people said they feared reporting wrongdoing in the workplace because of retaliation.

Now, we say that their fear is ungrounded because of the honourable organizations that exist here in Canada, but that fear is real, it prevents people from coming to you.

Another survey put out -- done by the Ethics Resource Centre, the leading think tank on ethics in the United States, and they have been doing national business ethics for some time, found that 21 percent of people who did report wrongdoing internally perceived that they were retaliated.

Again, we can say that that perception is false, it's misguided, uninformed. But it affects their ability. It affects people's desire to come forward because --

MR. LENCZNER: Okay, I'm going to stop you just to ask you one quick question then we'll take a break.

GENERAL DISCUSSION ON TOPIC 2:

So how do we get over that? If there's this perception, this fear, is it the legislation?

Could we put in -- how do you get over it?

MR. THOMAS: That's a great question,
Commissioner. The first thing you do is you add a provision to your whistleblower provision that allows you to enforce this.

MR. LENCZNER: The Securities Commission?

MR. THOMAS: Yes. Let me tell you why that matters, because I know that that's not the view of my distinguished panelists.

But here the problem is that organizations have wonderful resources, talented counsel, and not every employee has those benefits, and when it comes down to a knife fight with an organization over retaliation some don't play. Okay. And that's particularly important as it relates to these agreements, because these agreements say you can't show or talk about this agreement to anyone without carve outs for attorneys or anybody else.

They don't have carve outs for regulators to ask people to waive potential for monetary award. Their confidentiality and disparagement provisions are so broad that they basically -- a common reading of it would be you can't talk about these things.

MR. HAUSMAN: The problem is OSC staff often won't play. In other words, you can't
guarantee that they are going to bring in enforcement proceeding.

MR. THOMAS: I'm not --

MR. LENCZNER: And you've just said

that we're too stupid to be able to be able to deal

with it.

MR. HAUSMAN: Otherwise intellectually

occupied.

MR. LENCZNER: We're going to have to

break here for our morning break but --

MR. THOMAS: I have faith in you.

MR. LENCZNER: -- and I'm going to take

on David in the corner.

MS. CONDON: 15 minutes. We've got to

be back at 11 o'clock sharp.

--- Recess taken at 10:47 a.m.

--- Upon resuming at 11:04 a.m.

MS. CONDON: If everyone can take their

seats. Thank you very much to everybody for

returning and coming back for the last session, which

is going to deal with issues that been simmering

under the surface for the entire morning, and I know

we'll get an opportunity to have a full discussion of

the issue of the relationship between internal

compliance and a potential whistleblower program in
Before I turn it over to my colleague, Tim Moseley, to moderate this session, just a reminder that if anybody in the audience want to ask a question, the easiest way to do it is to write your questions on the cards that are distributed around the room and hold them up and a staff person -- there are several staff people sitting behind here and they will come and take your question from you and give it to the panel.

We may be able to read out that question anonymously before the end of the session, but if we don't, we will take the questions and use them as part of the material that we consider as we move forward considering this initiative. So it will not go to waste.

All right. So with that, I'm going to turn it over to Tim. Thank you.

TOPIC #3: IMPACT OF AN OSC WHISTLEBLOWER PROGRAM ON INTERNAL COMPLIANCE SYSTEMS:

MR. MOSELEY: So the panel session topic for this one is the impact of an OSC whistleblower program on internal compliance systems. Simmering. All right.

We're very fortunate to have four
distinguished panelists who have been largely biting
their tongue. They are bursting to speak now, so
just to introduce briefly, to my far left, Linda
Fuerst is a partner at the law firm of Lenczner
Slaght and has for many years acted, advised and
represented participants and other firms.

To her right, Sheila Murray is
executive vice president, general counsel and
secretary at CI Financial Corp.

Megan Telford is vice president and
global head of employee relations at TD Bank Group.

Professor Christine Wiedman, professor
at the School of Accounting and Finance at the
University of Waterloo, and Christine and some of her
colleagues have done some interesting work that I'll
let her speak about. Very relevant here.

So we have a good representation,
including from some very honourable firms -- that's
honourable with a "u" by the way -- who are just
waiting to get their turn to defend themselves here.

So before we dive maybe right into the
meet of it, perhaps we can just briefly set the
stage.

We have in the topic of the panel
session, as I've said, the impact of a program on
internal compliance systems. And perhaps I'll just try and put a slightly sharper point on that and say -- as we go through this discussion as we're talking about the potential impact of a program on internal compliance systems, I think one of the key questions will be assuming that a program is implemented, what measures might be taken to minimize any negative impact on internal compliance systems, and obviously there's already been some discussion on that this morning, but I think it will be useful to come back to that.

With that, just to set the stage, perhaps we can just clarify a little bit what these internal compliance systems are generally so we know what we're talking about.

Perhaps I'll invite Megan with TD Bank Group to start big in the organization size, talk about the existing ways that employees can report.

PRESENTATION BY MS. TELFORD:

MS. TELFORD: Thank you very much, Commissioner Moseley, for having us, and thank you to my panelists. We have been sitting here very calmly. I'm going to be brief in my comments. One thing -- I think most people in the room I think are actually very well acquainted with internal
compliance systems since I'm going to be addressing those.

Perhaps most importantly, I am what's standing between you and the conversation with internal reporting first, which I get sense is what people want to drive to. So I'm going to be brief for those reasons.

But really when we're talking about internal compliance methods, what really they are is a method to alert management when the organization is either close to or has crossed legal or ethical boundaries. And as most people know, this fits nicely into most compliance programs which were really designed to prevent, protect and respond. So that's a broad definition. Let's really turn to practice. What does that mean in real life for organizations like TD.

And I think one of the thoughtful comments that have come out in this discussion today, and, Dave, you referenced it. This looks and feels very differently, depending the type of organization we're talking about. And the panel beforehand, our panel has spoken about that.

But generally speaking, even with those differences in size and function we can really see
three major ways of reporting. One is the classic whistleblower hotline, and that's generally run by an external party. The benefit of that is a few things. First of all, you can first report anonymously. Second of all, and quite importantly for organizations like mine, it allows both external and often ex-employees to report as well and in addition to internal folks. It's 24/7, which sometimes can be important. These moments of ethical decision-making may come to you at strange times of the day or night and it gives you the opportunity to reach out when the time is right for you. And very importantly for us, it allows an exchange between the reporter and the organization in an anonymous manner for us to ask follow-up questions and for us to discern and report back to the reporter in a way that's appropriate what happened. So that's what you generally see from a whistleblower perspective.

The second way is the ombuds office. And, of course, different financial organizations do this differently. It can be both client-facing or employee. And usually ombuds office have some ability to engage in investigatory powers and they also offer the ability of anonymous reporting.

The third and perhaps the most
interesting is what we would generally call the employee escalation process. And we just recently did some benchmarking of this across our organization to see how other organizations dealt with this. And the benefit of a escalation process is it allows people to complain not just to their manager who may actually be engaged in the wrongdoing, but it provides other avenues in the organization.

It also really addresses the tone from the top and ethical tone setting of the organization, usually allowing access to the CEO or other significant people in the organization when a person who wants to complain has skipped several levels and doesn't feel their complaint is being addressed.

So you may see differences of that, but in most of the organizations that we've looked at those are the three major ways that one comes forward.

I would make two general comments about that. Good internal compliance systems have the ability to deal with conflicts of interest. And by that I mean one of the hardest things to address, particularly in smaller organizations, is of course the main people who look at whistleblower complaints internally -- legal, audit, compliance and HR -- are
often the very people that people are complaining about. So in a small organization how do you
navigate that when the folks that are reading the complaints, it may very well be about them. That's a
very important element.

And the second thing that we face a lot is what is a whistleblower complaint. Even if you
have these very well-established methods, how people choose to complain, the methods they use are personal
to them. So even though we have the hotline, we have all those sort of things, we still get people writing
us anonymous e-mails, we still get people reporting in all different methods. And the important thing is
that you have a culture compliance method internally such that you have a way to gather those complaints
together and get them to the right spot. In other words, you don't let the method drive the results.

So those are my general comments on setting the stage of general report, unless any of my
panel members feel differently they want to speak to.

MR. MOSELEY: Sheila?

PRESENTATION BY MS. MURRAY:

MS. MURRAY: I'm not speaking because we do anything differently.

So I'm with CI Financial, a much
smaller financial organization than TD Bank with a fraction of the employees, but probably toe-to-toe as many people percentage wise engaged in the compliance function.

First of all, I applaud the commission on this forum and on who you've got here as a panel. It's fantastic, because you got a great exchange of views.

We absolutely agree with the whistleblower program. And when I say "we" I'm talking my organization, but I also personally think that it can be a great assistance to the same jobs that Megan and I are trying to do at our organizations every day.

I think we need to all assume that not everyone is a criminal, not every organization is engaged in criminal activities and, frankly, even organizations that have criminal aspects, we're as anxious as the OSC is to surface those, deal with them and get on with our business, because it hurts our reputation, it hurts our business, it hurts our investors. So we're alive in exactly the same goals as you are, of investor protection.

Following Sarbanes-Oxley, as Jordan mentioned, the -- you came out with SOX, Canadian
regulators came out with the Canadian version of that which does impose on reporting issuers certain compliance obligations that crystallize things that hopefully we were all doing already, but that make sure that we do have an internal reporting system and that it's anonymous and that we -- and I think this is part of your program, but if it's not we certainly have got it in, we have a code of ethics and we have a code of ethical reporting and ethical reporting procedure that obligates the company to -- or prohibits the company from engaging in any retaliatory disciplinary action, and there are severe consequences if we do.

We're regulated by the OSC, IROC, and the MFDA. There are compliance obligations with respect to all of those. And the misconduct that the OSC talks about in this discussion paper, which is fantastically laid out, any financial misconduct we have procedures in place, mostly because of -- coming out of Sarbanes-Oxley. And in the audit committee rules we now have an internal auditor who reports directly to our chair of the audit committee who must, by law -- by securities law, be independent, an independent director.

Our internal whistleblowing policy,
that goes right up to the lead director who, again,
must, in accordance with Canadian securities law, be
an independent director, non-tainted with management.

   So that these people, if there is
possibility of financial misrepresentation or any
other kind of disclosure issue, you can go right up.
If there is unethical contact, you can escalate that
up to independent people if you don't feel
comfortable to go internally, as Megan said.

   We also, because of the organization,
and I'm sure you have the same thing, we have
protections against inside trading, selective
disclosure, and, of course, all the registry issues.

   We have more than 50 people out in the
field auditing the activities of our dealer
community, making sure that we engage in tier one
supervision and tier two supervision. We're looking
at every trade that happens.

   As an executive of the organization, I
can't trade in any securities, not just securities at
CI, without reporting that to our compliance
department and nor can my husband. They have a copy
of my husband's trading records.

   So there are a lot of safeguards at
organizations like ours and all the banks, financial
institutions, to try and protect and surface misdeeds. That's not to say no one is perfect. No one is. No one can be.

So programs like yours I think will help surface things that are going on that people -- that don't get escalated or people don't feel comfortable to.

But I would say that where there are robust internal compliance systems and you're subject to SRO oversight, hopefully in those situations the OSC may decide they would like to see people escalate -- except in extreme circumstances, escalate using the internal compliance process, and in extreme circumstances where it's clear that you could justify you won't be protected, or the problem is at the top, then let it go.

MR. MOSELEY: Thanks, Sheila. So that's a perfectly segue into I think coming back to the issue that attracted some attention already this morning, and clearly in the many of the comment letters we got, which is this issue of: Does, should, must the employee report internally first.

So before we dive right into that, can I just throw out a couple of questions that would be useful to weave through our remarks here.
Number one, I think the discussion this morning -- and perhaps not intentionally -- it sounded to me a bit on that issue, bit more binary than maybe it has to be, which is, should there be a requirement that an employee report internally first or not. I think, I'll agree, a possible alternative to those two is could it just be a factor taken into account?

Now, there were comments about the problem with discretion and how that affects the risk calculation of employees. I'm not advocating it necessarily, but I think it would be useful to canvas that as an option.

And then one other thing I think just -- again background to this -- has been alluded to by the panel, and Megan has spoken to exclusively and Sheila has mentioned as well, the different sizes of firms and the different organizational structures and so on is clearly going to be a significant factor in this. We must be careful in the discussion, as we have been so far, not to adopt a one-size-fits-all approach more than is necessary.

With that -- we've decided, by the way, to extend this session to 3 o'clock. I hope you don't mind.
Linda, over to you, please.

MS. FUERST: Did you want me to address the benefits of employee reporting?

MR. MOSELEY: Sure. I mean, come at it -- several questions floating around I think about the topic of employees reporting internally first, so whatever suits you best.

PRESENTATION BY MS. FUERST:

MS. FUERST: I think it's helpful to sort of talk about what the benefits to the organization are, as having employee benefits first internally rather than running up to the regulator. I'm going to leave aside credit for cooperation. That's another topic we can discuss.

But from my perspective, the two main benefits to the organization are financial and reputational.

The bottom line is internal reporting allows the organization to get ahead of the curve by planning and conducting its only internal investigation with the view to figuring out if there is any truth to the internal whistleblower report before any regulatory action and/or any adverse publicity results.

As a preliminary comment, as I said, in
order for an organization to get a handle on what's going on, it's important that it promptly investigate the report. And that in order to maximize the benefits of the internal investigation, to make sure that that investigation is thorough, well-documented and conducted by individuals completely independent of the wrongdoing and obviously capable of conducting an appropriate internal investigation.

If the internal investigation substantiates that wrongdoing occurred, the organization then has the ability of considering and initiating steps to self remediate, and importantly to prevent the recurrence or continuation of the conduct in issue. That ultimately may end up saving the organization significant amounts of money if it is conduct of a recurring nature or continuing nature.

There may be claims that could result by third parties. It gives the organization an opportunity to put an end to that conduct and protect -- financially. Obviously, there's also a benefit to the investors or people who may be harmed by the conduct.

An internal report also gives the organization the opportunity to consider whether it's
desirable or necessary for it to self-report to the regulator and/or to publically disclose the wrongdoing that it's uncovered. If the organization does have an obligation to make public disclosure, either the internal report or the findings of the investigation, it then has the benefit of deciding how best to package the message both internally to its employees and externally to the world, rather than responding to reports in the financial press or publication of an OSC notice of hearing, which obviously has significant representational consequences to the organization.

Self-reporting internal wrongdoing and self-remediation may have its own benefits, as I said, when we talk about credit for cooperation operation.

But, additionally, if an appropriate internal investigation which demonstrates that the report of alleged wrongdoing is completely unfounded, the result of that investigation internally may be of benefit to the organization if and when the OSC later comes knocking at the door, the organization is ready to respond quickly to commission staff.

Even for the commission, from a cost and resources perspective, there may well be great
benefit to the regulator when employees report first
to the employer and a thorough and credible
investigation is conducted by the organization using
its resources rather than commission staff which are,
as you know (inaudible) at the best of times.

So it may well save the commission the
extensive investigation complaints that end up being
frivolous, and ultimately it may also end up being
more cost effective to the organization to be able to
conduct its own investigation first, rather than
responding to a regulatory investigation.

And that's simply because the company
on its business desk is I think more able or better
able to be able to design a targeted investigation
getting at the right sources of information and get
to the answer more quickly than potentially a
far-reaching regulatory investigation.

MR. MOSELEY: Thank you.

Just maybe a follow-up question might
be useful to respond to a comment Jane made earlier
this morning about how having a whistleblower program
allows fraud to be stopped more quickly. You fairly
described benefits to the organization of an employer
reporting an individual, so also fairly described
benefits to the market at large, investors and so on.
But on that second path of that, might be interesting to try to reconcile the two comments. Do we know reliably whether fraud does get stopped more quickly for the benefit of the market now with or without a whistleblower program or with or with employees reporting internally first. Do you want to follow --

MS. FUERST: I'm not sure I have the answer to that question.

MS. MURRAY: I'm not sure I have anything other than telling you in our experience what happens.

I think when someone reports -- either as an investor reports to us through our claims procedure, which they often do, or an employee reports something, we're able to get on it very quickly and ring fence what's happening, and also investigate not just the particular fraud or whatever the allegation is, but any holes in our process that might be permitting this.

So I do think that the sooner a corporation understands what's happened and what's being reported on, the quicker they can, as you said, using our own resources, our own knowledge about our company, start to make changes to processes to make
sure that there's no further damage, no further
opportunity for fraud or investor loss. So I think
the earlier companies get on it the better.

MR. HAUSMAN: One other comment is --
also depends on what we're speaking about is what
this subject matter is.

For example, if inside trading, in
example, the organization has the dealer, gatekeeper
obligations and so in the ordinary course they would
be reporting that in any event.

In terms of large-scale fraud --
depends on the nature of the perpetrator of the
fraud. For example, if the fraud -- we haven't had a
major fraud in a financial institution (inaudible) in
that respect.

But I think more commonly it would be
effectively a rogue employee assisting somebody else
committing a fraud. In that circumstance it
probably -- probably would halt the problem more
effectively if -- for example, it's a financial
institution, a bank took steps to freeze bank
accounts before the Securities Commission did, and
also if the Securities Commission received a report
from somebody who's senior in either the legal
department or business or compliance, financial
institution, than a whistleblower, for example, within that organization. So I think you have to define your terms. What is it that we intend to address with this?

MR. MOSELEY: I want to make sure -- can I just try and summarize? You took some words out of my mouth.

It may well depend on the case. May not be a one-size-fits-all to answer this question. Perhaps, Jane, can you give me an answer to address this?

MS. NORBERG: Sure.

What I wanted to say is I do think that internal compliance plays an incredibly important role and I don't want to minimize at all -- that importance of that internal compliance reporting.

I think Linda has said it best when she said, look, we're all on the same page, on the same team. We want to protect investors and regulate markets, and the quicker that something can be stopped the better it is for everyone involved, including your own company, your own shareholders.

I think the way we view it is that if a whistleblower wants to report internally and feels comfortable that the internal compliance system in
place is adequate for them to report, and that some action is going to be taken, because sometimes, as I think people pointed out, sometimes the person that they are required to report to is the one that perhaps was conducting the fraud or was the guilty party or one who is telling them perhaps to do something wrong.

And so it's very uncomfortable, as you can imagine, for that person to report internally, which is why we took a position that we want people to be comfortable reporting, whether it's internally or to us, and we don't require them to report internally. Because the most important thing is that the wrongdoing is stopped and is stopped quickly, and if internal reporting is way to do that, then I think that that is great, and ultimately -- companies are in a very good position to take a look at what's happening internally and to stop it quickly and self-report.

MR. MOSELEY: I want to make sure we give Christine good time to deal with this issue because Christine and her colleagues have done a lot of good work, very relevant to the incentives, the disincentives and so on. So why don't I just turn it over the Christine. Please describe some of the work
that you've done.

PRESENTATION BY MS. WIEDMAN:

MS. WIEDMAN: Thank you very much, and thank you for inviting me to speak on the panel.

I conducted some research with my colleagues Vishal Baloria at Boston College and Carol Marquardt at Baruch University. And I'll talk a little bit about that, and I'll talk a little bit about the academic research to the extent I think it speaks to the issues as well.

We were interested around the time when companies were starting to submit letters to the SEC. They were sort of at the same stage. They had released their proposal and they were talking about the potential harm to their internal compliance system, so similar to the arguments here.

And we were very interested in the whistleblower program as a potential mechanism for deterring and detecting fraud, and we were also interested in trying to evaluate these claims and what the net costs and benefits might be.

So what we did was we looked at the firms that wrote letters to the SEC, and that turned out to be several hundred firms. We focused on the ones that we could get data on.
And, again, we're trying to assess whether this program, from an early perspective, whether investors thought this would have a net cost or net benefit to those parties. What we did was we decided to see what their codes of conduct looked like. So from an outsider or employee perspective reading the codes, and we came up with our own way of -- our own rubric, if you will, of describing what the codes looked like. Part of it was guided by the way we did this. The International Chamber of Commerce has guidelines on whistleblowing, so we were referring that in terms of what we felt was a good program as it would be described. And also there's significant survey research, including from the ethics resource centre, that does argue that management is often involved in the misconduct. And so to the extent that that is the case, we wanted to consider the channels that employees could report that might be relevant. So what we did find when we looked at the codes of the companies that were writing letters, and also a sample of companies that weren't writing letters but were kind of matched in terms of size and
industry, there was a lot of variation in the codes. And we had a baseline that we thought represented a good code. The average was a little below what we subjectively thought was the baseline.

One area that I want to point out is: Does the employee have the ability to report independent of management, that is -- or do they have to report to their direct supervisor, to management of the company. Here we found quite a bit of variation.

35 percent of the sample was what we considered the highest level. That is, most codes allowed options. There were different venues that you could do. 35 percent said you could go to an independent board of director member, or you could report to a hotline that then reports to the audit committee or an independent director, which we thought was the highest, kind of most independent venue.

On the other hand -- and there was a variation below that, but 20 percent require, within their codes, for you to go to your direct supervisor, an area manager or maybe some level of management.

So we thought this was challenging, because research has shown that the organizational
climate matters for reporting whistleblowing from the employee perspective, the interactions that employees have with their supervisors, and certainly, as has been discussed I think by Jordan and Dimitri, that fear of retaliation is a very significant determinant in terms of whether an employee will report.

When we looked at retaliation protection within the codes, as it was described, we found that 95 percent did say they provided retaliation protection. But the majority of companies did not go on to say that they would pursue disciplinary action for those who did retaliate.

So in terms of having trust that you will be protected and the people who retaliated against you would be challenged, we weren't sure that was always clearly articulated.

So the main findings, though, in terms of what were the net benefits. We found that overall the firms that wrote letters who were afraid that the compliance systems that they had established under SOX would be undermined, we found on average their systems had a lower score on average than the firms that did not write letters, which called into question a little bit the validity of their claims. But we also found for those firms, the net -- so we
looked at a number of dates that related to the  
passage of the whistleblower provisions and we found  
that their average stock market reaction around those  
dates was positive.  

So it seems like the market does  
perceive that even though there are costs relating to  
perhaps not reporting internally, overall the market  
viewed it as positive. We also found that the firms  
that had weaker whistleblower programs had more  
positive reaction. So presumably those firms will  
benefit more through approved detection and  
deterrence of fraud. And we found that the firms  
that had the stronger whistleblowing programs, they  
had a kind of a zero reaction.  

So that gave us some reassurance that  
it wouldn't be -- would not necessarily be that  
costly to the firms with strong programs.  

I guess the last comment that I would  
like to throw in here -- this is not from our  
research but from other research, it's that  
employees -- the research suggests when employees are  
surveyed that they do prefer to report internally  
first. That is their choice. And the evidence that  
Jane provided, 80 percent of the whistleblowers, that  
they had reported internally first.
So our research, I think, helped to assuage the concerns that these internal compliance programs would be seriously undermined.

GENERAL DISCUSSION ON TOPIC 3:

MR. MOSELEY: Megan, I want to ask you to follow-up, and I don't want to put you on the spot. You may not be able or interested in answering this.

MS. TELFORD: What an intro.

MR. MOSELEY: Let me declare my -- just over 10 years as chief compliance officer at one of the major banks, I oversaw the implementation of the hotline. I saw every call that came through for many years so I'm very interested in the topic.

Are you prepared or able to comment on the percentage of callers to even up the hotline that chose to remain anonymous? And if not, we could talk a bit maybe what it is more broadly across the industry.

I don't mind saying that at CIBC I was a little surprised -- maybe I shouldn't use surprised, but it's high across the industry, and it was high no matter how strong I think many of us would perceive the anonymity and anti-retaliation protections to have been. For me, that was an
instructive point. I don't know whether you...

MS. TELFORD: Sure. And maybe I'll do
what Jane did and say these views I'm about to
express are mine alone, not TD Bank's.

I can tell you, because Jackie McNeil
who is in audience with me, has the pleasure of
reading every single whistleblower complaint that
comes in to TD. And what we see is that in the
methods we have, so really the ombuds office and the
whistleblower hotline ethics as you explained for us,
where you can choose to be the anonymous, I would say
over 95 percent of people choose to remain anonymous,
particularly people who are internal.

Often what we find interesting is that
people report and then they don't follow up. So it's
like they get it off their chest, they say what they
need to say, and then we write back to them and we
never hear from them again. So they feel they have
done their duty, so to speak, by going forward.

The one thing for me, and I guess these
are my personal views and I know that folks will feel
differently about this, something you mentioned,
Jordan, is we are very interested in what creates
this culture of compliance obviously at the banks.

And I think one of the most important
things you were speaking is to know your audience.

So I'm going to flagrantly breach that go off into a
different topic, because I know here we're really
talking about financial compliance.

But our view, certainly my view, is
what creates a culture of compliance is in ethics an
organization and what can lead to some of these
frauds in other management practices.

So the most helpful information we
get -- and I'm happy to tell you that from what we
can say there aren't major financial frauds happening
at TD Bank on a daily basis -- is really management
practices and conflicts of interest. I know the OSC
very interested in this.

Conflicts of interest in terms of
everything from cases of why I'm being delivered
hedge funds at Christmastime, everything to the
teller who served a client 50 years and they win the
lottery and want to give half the money to that
person. Most importantly, it's really the selection
of services for the bank. So people who may have
some relative at a software company and we want to
buy that software information.

The reason I raise this is to say for
me what's really important, and one of the things I
struggle with about not reporting internally first, is the idea that really financial crimes in that circumstance are receiving greater reward.

In other words, if you report sexual harassment you report all these other things which can be very serious for the bank and creates this overall culture of good behavior, and the idea that you need to report internally and have these discussions so that we can have a good culture without giving financial rewards and allowing people to go outside of that methodology really for financial crimes and the protections they receive in the role of doing it, there's something about it that I struggle with a little bit.

And so people remain anonymous --- I don't have an issue with people remaining anonymous. The issue I have is how we score those two things together.

MR. THOMAS: Commissioner, may I respond?

I agree, and I think many of us would agree that citizens should report wrongdoing. That's just what we should do. But one of the things I've learned from being in law enforcement and dealing with law enforcement people around the world is we're
pragmatic. We do what works.

Right now it's not working. People aren't speaking up enough. And there's a number of things that have been raised here and I think you should think about, because we thought about it at the SEC at the time.

One is every organization isn't built like the fine organizations that are represented here, okay, and so when you're trying to build out a regulation, how do you do it? And it would be great if you could just define what -- the policy, procedures and practices and put them in a check list. But what the problem of those things are -- and I suggest the biggest problem is the culture, and there is no check list for culture.

MR. MOSELEY: Can I interrupt you -- because I don't want to lose that point.

We've already acknowledged that one size fits all may be problematic. Could we deal specifically with and, therefore, what, acknowledging that that is the truth.

MR. THOMAS: Got it. 34 percent of people in the National Business Ethics Survey said they fear retaliation.

MR. MOSELEY: We know. Sorry. I want
to -- and therefore what? How do we design a
whistleblower program, if there is going to be one,
that takes account of these fact?

MR. THOMAS: The question you posed, as
I understood it, was: Should we have internal
reporting or not?

MR. MOSELEY: No, no -- sorry. Very
clear. I think there are a few options -- couple
options on the table. Should there be a requirement
that employees report internally (inaudible) in order
to get a reward, should there is no requirement, or
can it be a factor taken in account in determining
one.

MR. THOMAS: I understand. What I
understand from the panelists is that their
recommendation is that there is a requirement for --

MR. MOSELEY: I don't know about that.

I want to come back to the panel on that question. I
don't think we ever clearly -- so if you don't mind,
I would like to do exactly that now.

MS. FUERST: Recognizing that one size
does not fit all when we're talking about
whistleblower programs, I don't recommend that you
make it a hard and fast requirement. But I do think
that it should be a consideration, criterion to be
...considered in whether or not to grant an award to a whistleblower, not quantum, but in granting an award, whether there was in existence a robust whistleblower program in place at the institution involved that provided for anonymous reporting should be a factor, and if it was bypassed why was it bypassed. But that should be part of the equation, and I think that's the best way to balance the interest of all concerned.

MR. MOSELEY: Sheila?

MS. MURRAY: I absolutely agree. I think that if the OSC can make sure people are aware that it's encouraged about mandatory that they go internally, but that you will look at what was available to the employee. And really, this is only relevant to the employee complainant.

I think that investor complainants have many, many avenues to go to. They've got ombudsmen, they's got RO complaints here, they can go to IROC, they can go to other SROs. Really, I think we're talking about employees internal.

I think -- I agree with Linda. If there is a system in place they should have to explain why they chose not to. They need to be able to tell you at the OSC why they didn't.
They have to know that their financial compensation may be affected by their choice to go to you directly in a situation where maybe they could have gone somewhere else.

MR. MOSELEY: I think it's implicit in your comments, but let me check. We heard comments this morning about some of the challenges that the employee goes through in making a risk calculation, and that uncertainty in the prospect of a reward makes that risk calculation more complicated.

I infer from what you've said that though that your view of the balance is yes, that's true, but having this certain discretion in the program is kind of more important.

MS. MURRAY: I guess I'm encouraged by Jane's comments that a significant percentage comes forward -- 80 percent go ahead through their internal processes before coming to the SEC. So people want to do the right thing. And you'll also find not everybody is motivated by the money. They do want to do the right thing.

MS. CONDON: Marian?

MS. PASSMORE: I was going to say that the SEC program provides a greater conversation to the whistleblower if they go internally first and
then have to go to the SEC as a result of it not
being dealt with appropriately internally.

And so that is the way you get
encouragement: Use internal processes. If the
whistleblower themselves determines that that's where
they want to go but you're not mandating that that be
done, and at the end of the day, the amount of the
award, not whether they get one, is dependent on
whether they went internally.

MR. LASCARIS: I second that. There's
a big difference between placing the question of any
award at all at risk and moderating the quantum. And
we all, I think, seem to agree that there is a
significant percentage of potential whistleblowing
population that fears retaliation -- whether rightly
or wrongly is kind of irrelevant, but that's what
they believe. And if they are forced to report
internally, they won't report.

And if you don't go quite that far, but
you say we're going to potentially deprive you of any
award at all if you don't report internally, it's
effectively requiring them -- for in their minds a
lot of people you are effectively requiring them,
because they are not going to want to take that risk.

If you are going to do anything to
incentivize people to report internally, and there are some valid reasons to try to incentivize them to do that, you should focus on the quantum and still give them the opportunity to make -- to earn significant compensation even if they elect not to overcome their fears and they go --

MS. PASSMORE: Also, because it really depends on the culture of the organization, the whistleblower is going to know what that culture is. They're in a good position to know that, and to know whether going internally is going to be worthwhile or not. I think you have to take that in account for somebody to do something one way or the other.

MR. THOMAS: Have you had a lot of organizations come in and admit they don't have robust policies and procedures?

Because our experience at the SEC, counsel regularly come in and say they have a great organization and policies and procedures and that they are robust. And if the professor, in looking at this, has questions about the quality of that, how are the average employee going to assess that?

I have a different proposal that the Commission could consider, which is a sunsetting provision. Because we don't think this is an issue.
The ethics resource centre found that 90 percent or more reported internally, so it's even higher than the SEC's number. Some of the panelists have indicated that Canada is different, the cultures are even better.

MR. MOSELEY: Sorry, can I interrupt? Could I just ask a clarification?

Of the 90 percent who reported internally, do you know whether many of those reported anonymously and had their anonymity protected within the organization, that might be jeopardized for disclosure reasons under programs. I just want to make sure we understand the relevance.

MR. THOMAS: The way that the ERC looked at that was all internal reporting mechanisms, but significantly and surprisingly the hotlines were used very sparingly, like less than 10 percent. I want to say it was 6 percent.

And so -- but people are reporting. If you did a sunset provision with something like 10 years or five years, because it takes two to four years for most investigations to happen, then you can look back, do surveys, tests whether their concerns are real.

But if you start with what's proposed
here, which is something that adds greater
uncertainties for a whistleblower, I think you're
going lose 34 percent or some equivalent number of
people because they don't trust the organization,
even if they are completely wrong. There's a trust
problem between employers and employees.

MR. MOSELEY: I know Megan wanted to
jump in on this topic. Do you want to add anything?

MS. TELFORD: I completely agree with
the comments that Linda and -- articulated. I think
this is the issue. We're coming from organizations
where we slowly invested a lot of time and effort in
this.

We're concerned about people delaying
before they come forward. I know the statistics and
whatever are easy to sort of show one way or the
other, but I think it's the most respectful way to
address what David was talking about, where you have
situations where people are operating obviously
fraudulent schemes in apartment buildings. It's just
not obviously the business we're in.

I think for us, there is a cultural
element where it should be taken into consideration
if you're going to be respectful to the systems we're
trying to build and support internally.
MS. FUERST: And if you want to incentivize other organizations to improve their internal reporting policies and compliance systems, that's the way to do it, by giving them credit where credit is due.

MS. MURRAY: Rather than have the smaller ones, the cost of compliance is extraordinary and costs of running our business get greater and greater every year because of the regulatory overlay. You will find, I'm afraid, that some companies say leave it to the small company; okay, I'll leave it to these guys.

MR. THOMAS: You're getting credit in the enforcement process, aren't you, because if something is brought to the attention of OSC and the OSC finds misconduct, part of your -- you're going to ask for some level of adjustment because it was a rogue employee and you had great policies and procedures.

MS. MURRAY: Well, give specific credit to cooperation policy --

(Speaker overlap)

MR. MOSELEY: Let's pause there and come to that right next.

Christine, do you have any -- on the
work you've done, do you have any insight on this
question as a requirement or a factor to be
considered?

MS. WIEDMAN: I don't know of any
research that specifically addresses this. I just
can say again that perceptions of the employee affect
whether or not they intend to report, and the
retaliation and the perceived culture, whether they
believe this would be dealt with fairly or unfairly
is -- appears in the research to have a very big
impact on whether they intend to report.

So I do agree with the comments that if
you make the award contingent on reporting internally
I think you will get significantly fewer
whistleblowers reporting.

MR. PUGEN: Just a quick point, and I
may have said in the general comments, I can't
remember, but in other regimes where there is
anti-retaliation there is no requirement to go
internally first. For example, if you want to file a
human rights compliant or a health and safety
complaint.

But that was just changed for
employment standards complaints. So the commission
may want to consider the experience of the Ministry
of Labour where now certain complaints have to be
brought to the employer first.

Now, these complaints may be a bit
minor when compared to large scale corporate fraud,
but the reason why they did this was because they had
so many complaints and the underlying policy was,
well, if the employer knew of them, some of these
complaints can be dispatched with a bit of formal
complaint to the Ministry.

So you have a recent experience in the
last year where that changed, so there may be some
helpful insight.

MR. MOSELEY: Thank you. Can we come
back -- I don't want the lose the point -- Jordan's
comment about certain credit for cooperation. I know
Linda wanted to address this.

MS. FUERST: Under the current staff
credit for cooperation policy here, credit is given
in terms of, you know, possibility of a no-contest
settlement or reduced penalties or other potential
regulatory benefits on the basis that the
organization promptly self-reports -- or
self-policies, self-reports and then self-remediates
any wrongdoing.

As it's currently drafted, the concern
is that the whistleblower program that doesn't encourage employees to report first is going to deprive organizations of the benefits of that credit for cooperation policy.

So one way to deal with that is, as I suggested, making the existence of a robust internal whistleblowing policy something that will be considered in terms of determining whether a whistleblower award should be made.

Another possibility would be to amend the credit for cooperation policy to specifically provide that organizations that promptly self-remediate, regardless of how the wrongdoing comes to the attention of the regulator, will get benefit for the credit for cooperation policy.

MS. CONDON: Thanks. Jane?

MS. NORBERG: I'm just trying to think long and hard about what you were saying about required to report internally or if you didn't report show -- tell why you didn't, if there was -- program in place.

I'm trying to figure out, though, how does that work with confidentiality? So if you're saying someone's required to report internally in order to even get an award, how would they prove it?
Let's just say they called hotline, they're anonymous, then they come to the OSC. What would they have to do to prove that they reported internally without the OSC having to come to you and say, John Smith gave us this whistleblower claim. Did John Smith file something? I'm just trying to figure out how this can possibly work.

MS. FUERST: I'm not saying it should be a requirement. I'm just saying it should be a factor whether or not the whistleblower first reported internally and whether there was good reason for why they did not, particularly in the face of a robust, well-developed whistleblower program of the type that TD and CI have in effect.

MR. MOSELEY: Is your question, though, Jane, how the whistleblower will be able to demonstrate that he or she did report internally?

MS. NORBERG: Yes, I suspect --

(Speaker overlap)

MR. MOSELEY: -- it wouldn't be possible. (Inaudible) hotline, whatever, is administered, but even if people who call anonymously will have --

(Speaker overlap)

MR. THOMAS: At the SEC we give credit
to people, organizations, even when there is a whistleblower. And one of the concerns expressed by some of the corporate counsel here were basically being deprived of the ability to protect current investors during the course of the investigation, and also insights into their organization.

And the experience at the SEC while I was there, and I suspect is continuing, is that the SEC does -- it asks organizations sometimes, or gives them the opportunity to do their own investigation. Not always. They use their discretion to oversee the process. And I don't expect that would change if that's a practice here.

MS. MURRAY: That was going to be one of my questions for you, Jane. How quickly, if you get a complaint, you triage it and determine that there is some merit to this and there is something specific and serious, at what point would you engage with the corporation to let them know and let them start to deal and basically mitigate the damages?

MS. NORBERG: I think it varies. I think it depends on you, the company, and what is being alleged. I couldn't tell you a specific time line.

MR. HAUSMAN: Obviously you can hear a
consensus building around what Linda said. I think it makes a lot of sense.

To my mind, the problem -- only problem is you'd have to be very careful how you draft the policy, because sometimes there's this factor stuff in which the -- you've got, like, A through H as factors and none seems to predominate over the other (inaudible) any other factors to be relevant.

In other words, you have be able to build expectations as to what that actually means. Sometimes I have trouble with the cooperation policy in that regard because things that -- like forms like these are considered to be important factors, how does it meld in with many, many others and it's really difficult to determine how it's interpreted.

So I think that internal reporting ought to be a factor. Where appropriate, it ought to be a very important factor. In some cases it can't be a factor at all because there's nowhere to report to. Some person just telling on some other person, so it's just not a factor at all.

MR. LASCARIS: I just want to be clear, I don't agree with --

(Speaker overlap)

MR. LASCARIS: I don't think that you
should be at risk of being deprived at any reward at all. I think that should be at the option of the whistleblower. And if that person has a fear of retaliation, whether justified or not, they should be able to go outside without any adverse consequences.

(Speaker overlap)

MS. MURRAY: -- in one of the discussion points is whether the anti-retaliation provisions should apply regardless of whether you go to the SEC directly or -- I think that there is consensus around the table on at least one thing, and that is that no employee should be disadvantaged for coming forward with a good faith complaint. And I think we would all agree with that. And I do, by the way, think you need to put good faith in there.

We do have some people who try and raise complaints just to save their jobs, because we have the anti-retaliation and anti-discipline provisions, and you will get a rogue employee trying to secure employment by making a complaint to our chair of the board.

But I think we do all agree that anti-retaliation is an absolutely fundamental component of this. If you want someone to come forward they have to -- they are not going to be
disciplined, they are not going to be terminated.

MR. THOMAS: I agree.

MR. MOSELEY: I'll pause. Turn it over to you.

MS. CONDON: This is a pause, and it's changing the conversation a little bit.

I know we only have a couple more minutes, but one of the issues that hasn't really come to the surface in the discussion at all, and maybe it's because there's a consensus about it, is the issue of eligibility for an award if you are, to some degree, culpable in the behaviour. That was something that was definitely raised in the consultation paper for discussion.

And the comments, as I read them, seemed to suggest a general agreement with the proposition that depending on the level of culpability it was not inappropriate that someone would be able to access a whistleblower award if they came forward at the end of the day.

So I just wanted to take the temperature of the group on that issue in the last couple of minutes.

MS. FUERST: I will be very brief and tell you it is, of course, going to depend on the
circumstances, but I feel that the combination of confidentiality, anti-retaliation and financial reward, the trifecta of this, could encourage the culpable actor possibly to sit on something a little longer, no fear of retaliation really, because he's protected, he or she.

And I look more specifically at the rogue dealer, the rogue advisor, who -- hopefully there are no advisors in the room.

I will say that that's the largest vulnerability for large financial institutions. It's the most -- they have direct contact with investors, and investors are vulnerable to them. The rogue dealer is -- if that rogue dealer is culpable and is engaged in nefarious wrongdoing against vulnerable clients and chooses to sit on that and then blow the whistle to get some money -- well, by the way, the financial institution that employs them is vicariously liable and will be making full restitution to that employee, I see that as a real problem. And we can't retaliate and get back at them.

So the culpable actor -- I would say at the very least the culpable actor should not get the benefit of the anti-retaliation and
anti-disciplinary, I don't believe. And I think that
there should be some sage wisdom coming from you as
an independent tribunal as to whether or not the
culpable actor should be entitled to compensation. I
don't think in every situation they should be.

MR. MOSELEY: Do we have any experience
from the SEC on whether this fear that Sheila
identified has come to pass, that people stand by and
wait?

MS. NORBERG: So at the SEC we do pay
culpable whistleblowers, and I think the thinking
around that is that sometimes you need a little fish
to get to the big fish, so that is why we do pay
culpable whistleblowers.

That being said, there are protections
built into our rules that, in some instances, the
culpable whistleblower will not be paid, and that is
if they are criminally convicted of the same
wrongdoing that they bring to us, then they are
barred from receiving the whistleblower award.

And if they are main actor in the
misconduct and they are -- let's say they are fined
as well, then that does not go into the dollar amount
to get it over the million dollar threshold.

In addition, culpability is a factor
that may decrease an award. So that is the way we look at it.

But the one thing I wanted to mention is when you talk about culpable whistleblowers being protected from retaliation, I don't know if it's different here in Canada, but I wouldn't view a culpable whistleblower as being protected from retaliation. Because if you have committed a crime or wrongdoing within your company I would think that the company can certainly take action against you, and can certainly prove that it's not because you're a whistleblower but because you have committed this wrongdoing. So I think you can really separate those two out.

MR. THOMAS: There's a practical thing that's not being said.

Whistleblowers, because under the SEC whistleblower program, can't get paid for misconduct they have led. So basically let's say there's a $5 million scheme, 2 million they were involved with in some way. 2 million gets excluded, the 10 to 30 percent, but also the fees can't be paid for. So they are left with this $3 million.

But these whistleblowers have to make a big choice, because low level people, they don't have
a big concern. Like, the secretary for a bad guy who
might have delivered the mail for somebody is not
worried being culpable.

The most senior people have great
concerns because there's no immunity under the SEC
whistleblower program. So the most culpable people,
the kind of person you are describing, if he came to
a counsel, we would say, you should not go to the SEC
or the OSC because they are likely to refer or take
action against you for doing this.

So really the challenge is for the
middle people. The most culpable are not going to
play in the program. The minor people, no one would
bring libel.

It's for those people, they have to
navigate how significant was their involvement and
whether the risk of being -- case brought against
them as far as the reward.

So there's a natural kind of regulator
to keep the bad guys who are receiving money that's
beyond what the SEC would not take away from them
monetarily, and the timing is part of -- baked into
the criteria.

In fact, one of the awards, the largest
award to date, they made a point of saying you would
have got a much bigger award if you didn't delay.

MS. NORBERG: Delay is absolutely a
factor that can decrease an award, absolutely, and
we've done it on multiple occasions.

MS. CONDON: All right. I think we
have to close the discussion there. We're slightly
over our deadline of noon.

So two big thank yous on behalf of my
colleagues and myself on the one hand. Thank you to
our very expert and distinguished panelists for
giving the benefit of their time and their insight
and the thoughtfulness with which they prepared their
interventions this morning. We feel that we have
learned a lot and there are many more sophisticated
issues to think about now. So we thank you for that.

And the other thank you, of course, on
behalf of my fellow commissioners and myself is to
the staff of the enforcement branch for putting this
roundtable together, their work in preparing the
consultation paper in the first place and in
orchestrating the conversation that we've had this
morning.

We can undertake that we'll take all of
the comments and the interventions we've heard very
seriously and use them to think about having to move
forward. Thank you all very much for coming this morning.

--- Whereupon at 12:03 p.m. the proceedings were concluded.

This is to hereby certify that the forgoing is a true and accurate transcript of the proceedings to the best of my skill and ability.

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Sandra Brereton
Certified Court Reporter
Registered Professional Reporter