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ONTARIO SECURITIES COMMISSION

POLICY HEARING ON PROPOSED ENFORCEMENT INITIATIVES

OSC STAFF NOTICE 15-704

MONDAY, JUNE 17th, 2013

PANEL

Mary G. Condon,

James E.A. Turner

Judith N. Robertson

TABLE OF CONTENTS

AGENDA:

--- Upon commencing at 10:00 a.m.

OPENING REMARKS:

VICE-CHAIR CONDON: Please be seated. Good morning, everyone. I'm very pleased to convene this policy hearing to discuss a number of proposals made by OSC Enforcement staff.

My name is Mary Condon. I am one of the two Vice-Chairs here at the Ontario Securities Commission. I'm joined on this panel by my fellow Vice-Chair, James Turner, to my right, and Commissioner Judith Robertson.

I thought that before we got the proceedings underway I might just make a couple of comments about the background to today's proceedings. This is a hearing to consider issues that were raised by OSC staff notice 15-704, which proposed a number of new enforcement initiatives.

It was issued for public comment in October of 2011 and it generated a significant number of comments in response, along with public debate in other fora about various aspects of the proposals. And as a result of that significant interest in the initiatives, it was determined that the Commission should hold this consultation today to allow a number of those who commented in writing to amplify their

comments orally and also simply to have a public dialogue about the issues raised by staff's proposals.

Now, prior to today's hearing, the OSC Enforcement Staff published a brief comment that was intended to clarify some of the issues that they raised in their original staff notice and they also commissioned a paper prepared by Mr. Philip Anisman which was intended to canvass some of the recent developments on similar issues in the United States, and both those documents, the clarifying comments and the paper by Mr. Anisman have been published and are available on the OSC's website.

In terms of the format of today's consultation, each of the participants who indicated an interest in participating today has been allocated twenty minutes to make a presentation. We'll start with OSC enforcement staff.

During each of the participant's twenty minutes the members of this panel may have some questions, and so we may fall off our schedule a little bit, but not materially hopefully. We have had to make some last minute adjustments to the schedule of the speakers as a result of the fact that, regrettably, one of the intended participants has fallen ill, so there is a revised copy of the schedule which should be

available on all of the chairs today.

Finally, I would just remind everyone that this is a public hearing. We have a court reporter who will be preparing a transcript of the entire proceedings this morning and that transcript will be posted on the OSC's website within a week or so.

So, with that, let me begin or let me invite, rather, the first speaker to begin, Mr. Tom Atkinson on behalf of Enforcement Staff.

PRESENTATION BY MR. TOM ATKINSON

MR. ATKINSON: Good morning, Vice-Chairs Condon, Turner and Commissioner Robertson. I'm here today on behalf of the OSC Enforcement Staff to address the proposed enforcement initiatives that were published for comment in 2011.

I would like to thank everybody who commented on our proposals. The input we have received has been very helpful in helping us further these initiatives.

Let me say at the outset, we remain committed to these initiatives. We strongly believe that they will increase the effectiveness of Enforcement in protecting the public interest and advance the OSC's mandate of investor protection and

fair and efficient capital markets.

My remarks today will focus on a proposed no-contest settlement program. This initiative has generated the vast majority of comments. We did not receive many comments on the other three proposals. Those comments generally supported them as useful tools for enhancing our enforcement program.

I recognize that the Panel has read the 2011 proposal, our update published June 7th, and the research paper we commissioned from Mr. Anisman, who is here in the audience today. Today I'm going to elaborate on how the no-contest program would work, but first I would like to talk a little bit about our enforcement goals.

The OSC Enforcement Program is really designed to meet three goals; investor protection, accountability and deterrence. To work quickly and effectively, we are able to resolve enforcement matters, the better outcome for investors in the capital markets.

This means we can issue a higher volume of protective orders earlier, we can achieve sanctions closer to the time the misconduct, which reinforces our deterrence message, and we can free up staff's resources to take more actions and focus more of our

efforts on investigating serious financial crime.

Let me be clear, this is not a free pass for wrongdoers. There are hurdles which must be met, which I will detail in a moment, but it's not just about numbers. Numbers can gives us a proxy for investor protection efforts, but they are not the whole story.

Our cases our getting increasingly complex. They involve novel products, multiple markets and cross-border issues, along with multiple respondents. This has significantly impacted the timeliness of our enforcement actions.

Many respondents are concerned about civil liability issues when dealing with us; they continually raise it. As a result, we now have over eighty cases in litigation. This number has been steadily increasing over the past few years and I believe this trend will continue.

Increased litigation also impacts the Commission's hearing panels. As I know they sat for more than 300 days last year alone.

Our resources are limited. We cannot realistically prosecute and litigate every matter that comes to our attention. We have to deploy our resources as efficiently as possible and we have to

achieve the best outcome for investors in the market. We must be open to other ways of resolving enforcement actions.

We believe that a no-contest settlement program, again with high hurdles, would be a key tool in helping us resolve matters more quickly and effectively in the public interest.

Let me give you an example. Looking back, we identified five cases where respondents could have been eligible for a no-contest settlement program. These cases reflect to varying degrees our criteria of cooperation, self-reporting and remediation by the respondent. They also reflect post-hearing outcomes that we believe could have been negotiated through a no-contest settlement.

In these five case alone the investigation and litigation time equated to 19 staff members working full-time for five years. The possibility of no-contest settlement could have resulted in an early resolution of these cases, the resource savings could have been redirected to investigate and pursue other matters.

The benefits of no-contest settlements are clear. We could reach settlements where the sanctions could be proportionate to the conduct without

going through a lengthy contested hearing. We can impose protective orders sooner, harmed investors would be compensated.

Again, this is not a free pass. Respondents would need to meet high hurdles, a public hearing would be held. Respondents would suffer reputational damage and be required to pay penalties and address investor harm.

So let me clarify how the program would work. Let me talk about criteria. First, we do not intend to resolve all of our cases through a no-contest settlement. This is not a one-size-fits-all approach. As I have mentioned, there are high hurdles. No-contest settlements would not be available in circumstances involving egregious, fraudulent or criminal conduct, or where the harm suffered by investors is not addressed.

In our recent notice we listed a number of factors that we would have to evaluate to determine the no-contest settlement would be appropriate. We would look at the extent of cooperation and the timeliness of the self-reporting by the proposed respondent in the investigation. We would need to assess whether remedial steps that were taken to address the misconduct were sufficient. We would want

to ensure that the respondent disgorged amounts obtained or losses avoided as a result of the misconduct or, where possible, to the benefit of investors who were harmed by it.

The settlement of enforcement action involves the evaluation and balancing of many factors to achieve the best regulatory outcome in the public interest. This is what we do every day now.

Now, let me talk a little bit about lack of admissions. Concerns have been raised about the lack of admissions in no-contest settlement agreements. They mostly relate to the Commission's jurisdiction in approving settlement orders without admissions and the impact no admissions would have on private civil actions.

With respect to the Commission's jurisdiction, Section 127 of the Securities Act simply permits orders to be made in the public interest. There is nothing in the letter or spirit of Section 127 that limits the ability of the Commission to consider or approve no-contest settlements.

To make an order under Section 127(1), the Commission need only be of the opinion that it is in the public interest to approve a settlement agreement introduced and the respondent. Mr. Anisman

makes the same point in his research paper.

The settlement agreement would include the facts, staff's position or declarations that the facts are accurate based on their investigation of a particular matter, and a statement that the respondent's conduct contravened the Act or engaged in conduct contrary to the public interest.

The agreement would also likely include a statement by the respondent that they neither admit nor deny the accuracy of the facts or the allegations and conclusions set out by staff. It would also include an acknowledgment that they accept the settlement agreement as a basis for resolving the proceedings.

The Commission would also have submissions of staff and the respondents concerning the facts in the settlement agreement and the factors that are relevant to consideration of whether to approve the settlement in the public interest.

The Commission would have an opportunity to carefully consider the facts and terms of the settlement agreement and ask questions of staff and the respondents to clarify any facts or concerns.

On the basis of these facts and submissions, the Commission would exercise its

jurisdiction to approve a no-contest settlement agreement if it concludes that the settlement agreement is in the public interest.

Again, there is no free pass. As I noted earlier, a no-contest settlement would result in reputational damage, protective orders and investor compensation where possible, and a public hearing would take place. All of this helps us achieve our enforcement goals.

Now, with respect to civil actions, there are concerns that the lack of admissions would negatively affect the ability of aggrieved investors to seek financial redress through private civil action. The civil actions under part 23.1 of the Securities Act are intended to complement public enforcement of securities law violations; however, our responsibility is still to obtain the best regulatory outcome that we can for the investors in the market. This must remain our focus.

Compensation for investors is important. We looked at the paper that was put together by Siskinds and we concluded that no-contest settlements would not impede investors from obtaining compensation in class actions. The paper noted that class actions rarely use admissions from a Commission settlement.

Admissions do not increase a respondent's exposure to class actions, and the potential for these admissions in a securities regulatory settlement is far from a determining factor in counsel's decision to bring a class action.

In conclusion, Enforcement staff believe that our no-contest settlement program would advance the OSC's mandate of investor protection and fair and efficient capital markets.

There are no free passes in this program, the hurdles are high, but this gives us another tool which we can use to achieve the best regulatory outcome from investors. This includes issuing more protective orders earlier, seeking compensation for investors where possible, and sending a strong message of deterrence to those who violate securities law.

Simply put, this is all about how we can use best our resources to get the maximum result for investors. Thank you for this opportunity to speak. I'm happy to answer any questions that you have.

VICE-CHAIR CONDON: Thank you, Mr. Atkinson. Let me just begin with this issue about the Commission's jurisdiction and the public interest to make orders. So is it staff's position, then, that

as long as the settlement agreement recites facts which are not denied, either in the agreement or outside of it, by the respondent, that that is a sufficient hook or basis for the Commission to exercise its public interest under Section --

MR. ATKINSON: I don't think you would be relying exclusively on the facts. You would be relying on the settlement agreement as a whole, which would include the remediation that took place, the sanctions. You know, this will tell you how it will affect the investors, how it will affect the capital markets.

So, yes, you would rely on those facts from staff to be true that were neither admitted nor denied by the respondent, but it also would include the remediation that took place, perhaps money that would be returned to investors, perhaps the penalties involved. You would look at the whole picture to determine whether that was in the public interest.

What I'm saying to you is the Act doesn't prohibit you from doing that, and that's in alignment with Mr. Anisman's conclusions.

VICE-CHAIR CONDON: So one of the things that in sanctioning the Commission has recently been interested in is this notion of proportionality. That

orders that are made are proportional both to the facts at issue or in relation to the facts at issue and also in relation to similar issues determined by other panels.

Is there going to be a basis for that kind of assessment to be made in these no-contest settlements?

MR. ATKINSON: If I'm hearing you correctly, what your concern may be, that the penalties may not be, in fact, proportionate to the behaviour we're seeing in the market. This really doesn't change the fact. We'll still have to have a principled basis to consider what penalties are appropriate and we would have to -- just as we do today, really, what this is doing is having those penalties paid, you know, perhaps six months from the time of contact versus four or five or six years later.

VICE-CHAIR CONDON: I will just point out that given that under the Act penalties are only accessible in the context of a breach of a law, that this is some kind of a voluntary payment.

MR. ATKINSON: It would a voluntary payment, but in a settlement agreement you can settle for -- people can make voluntary payments. That way we can achieve our regulatory ends, even it's just a

breach of the public interest.

VICE-CHAIR TURNER: Mr. Atkinson, I think I heard you say that the settlement agreement would have facts that were proffered by staff and they would have staff's view as to whether or not the conduct contravened the Act or was contrary to the public interest.

MR. ATKINSON: Yes.

VICE-CHAIR TURNER: Then, of course, it would have the settlement.

MR. ATKINSON: Right.

VICE-CHAIR TURNER: But the respondent would not acknowledge either the facts or the breaches or contraventions.

MR. ATKINSON: They would acknowledge the -- they would agree that what was in the settlement agreement, the Commission could base its decision on whether the settlement was in the public interest or not, they would neither admit nor deny the facts, that's correct.

VICE-CHAIR TURNER: I had one other maybe more technical question, but I think generally our settlement agreements provide that a respondent agrees not to make any statement inconsistent with the terms of the settlement agreement.

MR. ATKINSON: Right, and that won't change. The settlement agreements, I think, would look very similar to what they do now. The only real difference would be a recitation by staff that we believe the facts to be true and either admit or deny clause. All those other -- all those other messages would be in there.

If I could put it in context in terms of enforcement strategy overall for you, if you look at the criminal and fraudulent behaviour, you know, with that behaviour, we're finding in the administrative process they're not paying the fines, they're not paying attention to our administrative process, so we are starting to put those people in jail now. We are going to continue to do that and we have made a recent announcement that we are partnering with various police forces to intensify those efforts.

On insider trading we have invested a lot in technology and in human resources in order to really up our game in terms of -- and you can see we are having some success in that area now.

On the administrative side, this, sort of, third area, we are getting the cases out, but the problem is litigation takes a long time. It's a very expensive, long practice and, you know, we need to

innovate in this area as well.

We have had -- we have used the same process for a long -- the last 30 years, as long as I have been around anyway in litigation and we need to innovate. I mean, it's amazing to me how our markets have changed and how trading has changed, yet our -- we have kept the same process. You know, we have realtime surveillance, we should have at least near time enforcement. We need to get there somehow.

People need to know what the rules are and they need to know now. I think we need to do better for investors in terms of if we can get some money back for them, let's try to do that, but we need to set clear rules in the marketplace. Waiting for the appeal period to pass six years later, you know, to me it just -- we are not doing the job we need to be doing.

COMMISSIONER ROBERTSON: Just a little bit on the investor harm side. Can you be a bit more specific about what you actually mean by -- I think your statement was the no-contest option would not be available where investor harm had not been redressed. What do you mean by redressed? Do you mean money repaid or --

MR. ATKINSON: Not necessarily. I think

we want to get money back to investors, if we can. You know, you have all those problems of you have to identify the routes -- I think you can identify the monetary harm, so you have all those same hurdles. But investor -- by investor harm, there can be remediation done by the respondent that protects investors in the future as well. Making changes so they are not repeating their improper behaviour so no future investors are harmed.

I think it's not a condition precedent that investors would get their money back, but I think where we can we should try do that.

VICE-CHAIR TURNER: What are your current numbers on the proportionate matters that are settled versus go to litigation? I think you said you currently have 80 matters in litigation?

MR. ATKINSON: Right. I think it's about 60 percent.

VICE-CHAIR TURNER: 60 percent.

MR. ATKINSON: Yeah. I'm not positive on that figure, but I know the numbers that are settling are increasing, right, so that's my big concern. And we have done -- these are very complex litigation we're doing and, you know, the past two months we have done two interventions in the Supreme

Court. These are not small matters and they take an enormous amount of resources.

The Commission has said repeatedly that settlements are in the public interest, so let's try to get there.

VICE-CHAIR CONDON: We have a couple more minutes, so you can be in the hot seat a little bit longer.

You mentioned at the outset of your remarks, and this was clearly something that came up in the public comments. You mentioned in your remarks that one of the objectives here is deterrence. I think that a number of the people who commented were concerned that we would lose sight of the achievement of that objective in the context in which respondents were not admitting any wrongdoing or any conduct contrary to the public interest. So can you comment a bit on how you see that objective continuing to be achieved in this context?

MR. ATKINSON: Well, one thing I'm concerned about right now is I'm not sure if we're achieving that now with some of these long, drawn out matters. What happens right now if the matter doesn't settle, the first thing that happens, the respondents deny that their behaviour was improper, then we go into

litigation. You know, you will make your ruling, then a penalty -- if you make an assessment of a penalty, then it goes into an appeal period. They're still denying, denying.

At the end they may say, okay, you're right at the end, our behaviour wasn't proper. We fixed that years ago.

I'm not sure that has the deterrent impact as someone saying, okay, six months ago we did something improper, we're paying for it now, we are remediating, we are solving this problem, we shouldn't have done this. I think that's a much stronger deterrent message.

VICE-CHAIR TURNER: I think I know what the answer to this question is, but that slippery slope argument. Once you add no-contest settlements everyone is going to want one of those because obviously it's better, from a respondent's point of view.

MR. ATKINSON: I think that's really a toss though. That's a toss to accept or not.

We have put clear pre-conditions to address that and, you know, I don't think -- I clearly don't think that every case is appropriate for this type of settlement.

VICE-CHAIR CONDON: Just on that, I

think this will probably b3 the last question, unless Commissioner Robertson has something else.

In the sort of matter that has multiple respondents, I think this may get, in part, to Vice-Chair Turner's question as well, has staff sort of thought through the implications of engaging or being willing to agree to a no-contest settlement with one of those respondents or, you know, will it be necessary to agree with all of the respondents --

MR. ATKINSON: Yes --

VICE-CHAIR CONDON: -- because at the end of the day there would then be a hearing on the merits if everyone didn't get the benefit of this, so some of the things that people would have agreed to on the basis of a no-contest basis would have to come out anyway.

MR. ATKINSON: You know, we have to look at cases as they come up, but we did think of that. I think that we can enter against, say, a dealer, for example, and then proceed. You know, we're not going to get the benefits, I guess, if we do proceed in litigation against the individuals. So I think we may save some time though.

I think we could enter into -- all of them into no-contest settlements, some of them. You

know, it will vary. I would have to have a real factual situation to sit down and analyze. It just depends on -- it could be a respondent who has very good systems in place, so that may be appropriate for the organization, but it may not be appropriate, the behaviour might be egregious on the individual's part. We would have to deal with that another way. You're right, we would lose the benefit of some of those savings.

VICE-CHAIR CONDON: All right, Mr. Atkinson. I think we're -- we have had enough of an opportunity to ask you questions. Our next speaker is Mr. Pascutto from FAIR.

VICE-CHAIR TURNER: Good morning, Mr. Pascutto.

PRESENTATION BY ERMANNO PASCUTTO:

MR. PASCUTTO: Good morning, Mr. Vice-Chair. Being up here and looking at you reminds me of the days in the 1980s when I was Executive Director and you were general counsel.

VICE-CHAIR TURNER: I worked for you. No more.

MR. PASCUTTO: Well, let me finish. And Joe Groia was the head of Enforcement. And I recall that the two of you made a concerted effort to keep me

away from the counsel table at any Commission hearing, just to try to keep me in my office. So just a little awkward being here, given your efforts to keep me away from this table.

We did provide a submission and I think we made it clear that we had concerns about no-contest settlements as presently conceived and, in particular, that they would make it more difficult for investors to recover losses and that it would not help to deter corporations or individuals from violating securities laws.

In particular, we indicated that we didn't agree with the concept of the OSC staff seeking regulatory neutrality as between wrongdoers and victims. We think that that's an important concept to address.

We strongly believe that the OSC is ultimately -- as -- a key part of its core function is that it's a consumer protection agency in the securities field and it's important that -- I think historically we have always referred to investors. I think maybe forty years ago investors were a small proportion of the population, but today almost everyone, almost every adult Canadian, is an investor in one way or another, whether they are buying

Registered Education Savings Plans for their children, they're investing their RSPs for their retirement.

I think the statistics show just the many, many, many millions of Canadians, many millions of people in Ontario who own mutual funds alone. So really, we are -- maybe we should even look at the terminology that we use, because I think too many people think that investors is only rich people. But really, I think the OSC is a consumer protection agency in the financial services area. And certainly organizations like the Financial Services Authority in London have come closer to recognizing that.

So we do not agree with the concept of regulatory neutrality as between wrongdoers who are involved in breaches of securities laws and have harmed investors. The consumers are the investors who have suffered the harm.

We don't think it's the role of the OSC to protect persons who have violated securities laws from having admissions used against them in civil suits by investors.

The original notice referred to the concept of compensation of investors, however, we felt that that was somewhat ambiguous. A new notice has been issued in the last week and, again, we felt that

that notice was somewhat ambiguous and not particularly clear.

We recommend that the factors to be considered by OSC staff and the Commission panel when considering a case, if we're proceeding with no-contest settlements, that one of the factors that should be considered is to expressly and clearly include as a separate factor the extent to which there has been compensation or restitution to persons harmed by the defendant's conduct.

The OSC staff that was very recently issued refers to one of the factors being remedial action, and that compensation is an example of remedial action, as is enhancing internal controls.

So from the wording of the revised -- the recent staff notice, a defendant who would meet the criteria for a no-contest settlement, if it takes remedial action to address internal controls without necessarily compensating any of the investors that have been harmed.

Now, we have heard some further clarification this morning from Mr. Atkinson, and I think Staff seems to be moving closer to the concept of the importance of having compensation or restitution for investors, so what we are recommending is that if

you're moving ahead with no-contest settlements, that compensation of investors or consumers be expressly identified as a separate factor to be considered by both staff and the Commission.

This does not necessarily mean that staff should only enter into a no-contest settlement or that the Commission should only approve a no-contest settlement when there had been a hundred percent or full compensation; however, the existence of compensation or restitution should be a major factor that the Commission considers when entering into a no-contest settlement.

Another factor that we recommend should clearly be articulated in any policy of no-contest settlements is that any monetary sanction or cost award should actually be paid by the defendant as part of any no-contest settlement. We note that in the OSC enforcement activity report for 2012 which was released in February of this year, the OSC disclosed that only 6.3 percent of monetary sanctions and fines assessed from settlements had been collected.

Now, I understand that there are going to be some situations where it's going to be simply impossible to collect the settlement award, but the number of 6.3 percent when there is a settlement struck

me as extraordinarily low, and it may be that there's something in the numbers because I think in the past I think I have seen figures of 75 percent. But even at 75 percent --

VICE-CHAIR TURNER: So let me ask you the question. So you're saying that a respondent, if they don't have enough money to pay the financial sanction, they shouldn't be entitled to a settlement?

MR. PASCUTTO: They should be required to admit to the facts and admit to the finding of a violation. If they're not really delivering what they agreed to in a settlement -- you know, if they're agreeing to pay a fine or to compensate investors, but they don't actually pay the fine and they don't actually compensate investors, if it's an empty agreement, why then give them the benefit of a no-contest settlement?

VICE-CHAIR TURNER: I mean, I think there are a couple of factors. One is we tend to impose the sanction we think is the appropriate sanction, whether or not somebody is able to pay at the time. And, secondly, we may want to be able to go after that person subsequently for financial recouping in the event that they do end up having assets.

MR. PASCUTTO: Yes, and I'm not saying

that you should change that practice in terms of settlements generally, but it should be an express provision, I think, of no-contest settlements that the actual -- any promises that they make about paying cost awards and fines and compensating settlements, that it actually happens.

VICE-CHAIR TURNER: So you are not objecting to that approach where there are no no-contest settlements?

MR. PASCUTTO: No, we're not, because I recognize if someone defrauds investors of five millions dollars that a $5,000 fine is not appropriate, even if they have no ability to pay more than that. I mean, I understand the rationale that the Commission has in terms of imposing fines or agreeing to settlements where clearly the person is unable to pay, but it might be helpful in terms of transparency and accountability if it were identified in the settlement that it's not clear that that fine will be paid.

VICE-CHAIR TURNER: I didn't want to interrupt your presentation, but I knew you loved questions.

MR. PASCUTTO: I love questions. I think it's also important that any no-contest settlement should include a full and accurate statement

of all of the relevant facts. There's a suggestion in the paper that the evidence would be provided to a Commission panel at a confidential pre-hearing settlement conference, but that the formal public hearing with the Commission panel would not necessarily receive the same evidence that had been presented at the confidential hearing.

It's our admission that the failure to provide a full statement of all the relevant facts in public so that the Commission and panel can make a proper assessment of the basis for the findings and/or proposed sanctions is inconsistent with the principles of transparency and accountability that the Commission has endorsed. And we agree with the statements of Judge Rakoff in the SEC case involving CitiCorp, and I take it you don't want me to read...

VICE-CHAIR CONDON: No, that's fine, thank you. I think we've read those quotes a number of times.

MR. PASCUTTO: It's an excellent quote about how it's difficult to come to a view as to fairness or reasonableness or adequacy without knowing what the facts are.

I think while there's general agreement with the substance of what Mr. Justice Rakoff has been

saying in terms of the importance of the facts, there have been questions about whether it was appropriate for a court that is looking at a settlement that had been entered into by the SEC to ask those kinds of questions, whether in the context of the American system whether the judge was exceeding his jurisdiction by asking for further facts and evidence. So there's a general view of some commentators that the judge should simply show deference to a decision of the SEC to settle and should not be involved in second guessing the judgment of the SEC.

I would submit that the criticism as to -- the jurisdictional criticism that has been levied against Judge Rakoff has no application to a Commission panel considering an OSC staff settlement. The Commission panel, the Commissioners, should not themselves be deferring or showing deference to staff and simply rubber stamping a decision of staff.

There is quite a distinction between the SEC making a decision, entering into a settlement and going to a completely separate organization and asking for that -- because they don't have the power to issue certain injunction orders. And going to get that part of the settlement endorsed by the court, it's quite different from a situation where you have a unitary

agency and the decision makers ultimately are the Commissioners.

So we think it's important that the Commission panel itself understand that they have a responsibility to understand the facts and the evidentiary basis so they can come to an independent decision as to the reasonableness and fairness of the case and of the adequacy of any sanction.

Now, that doesn't necessarily mean you want the Commission second guessing minutia of the settlement, saying, well, we would have given a four month suspension instead of a six month suspension, but the core elements of it really have to be satisfactory to the Commission.

I think the Commission, in order to exercise its judgment, needs to have a pretty full statement of the facts and it should be in a public hearing, not a confidential hearing. It shouldn't be that the panel that's hearing it publicly relies on the fact that some other panel heard more evidence and more facts prior.

VICE-CHAIR CONDON: Just to get back to the core of the issue though, what Mr. Pascutto says is the facts will be there. They won't necessarily be admitted to by the responding party, but they're going

to be described in sufficient detail that there will be a public interest basis for agreeing to a settlement or approving the settlement by a Commission panel.

MR. PASCUTTO: We totally endorse that. It's just that when we were reading the original staff notice it appeared that there would be a detailed description of the facts to the pre -- the confidential pre-hearing, but not the same information available to the panel in a public hearing.

We think it's important not only for the panel, but for the public and for the markets to see the basis, the factual basis for the case and why the result is fair and reasonable and that the sanction is appropriate, so we think it's important that there be sufficient facts in public to reach that.

VICE-CHAIR TURNER: I think that we would agree with that proposition as a matter of principle.

COMMISSIONER ROBERTSON: I just had a follow up. Just sort of the combination of transparency around the notion you offered that compensation need not necessarily be one hundred percent. So have you thought through, from the perspective of perception in the market, how much transparency it would need or what you would like to

see in a case where a no-contest settlement has compensation that's not a hundred percent for covering the investors harm? You know, transparency on the facts versus the settlement demand.

MR. PASCUTTO: I think that that's difficult to say sort of in the abstract and that's going to have to be judged on a case by case basis. You know, it may be that the defendant achieved some level of profit from its activities, but that the level of harm far exceeded the profit. So even though they disgorged the full amount, there just wasn't enough to have full compensation for investors.

I think it's -- the idea is not to bind the staff or to bind the Commission, but that to have them look at the facts of every particular case and say one of our express criteria is compensation for investors, so have we achieved a proper and a good result in terms of compensation for investors before we agree to this no-contest settlement.

VICE-CHAIR CONDON: If I can weigh in on this, then, let's say we're talking about insider trading, which is an issue where there will be some clear challenges in terms of compensation because, really, the injured party is the market as a whole as opposed to specific investors who traded against the

trader.

Would that then be the sort of circumstance in which you would say this is an issue that shouldn't be amenable to a no-contest settlement or is that really an issue of, you know, a voluntary payment being made and the ultimate destination of that voluntary payment not being harmed investors, but some other good cause?

MR. PASCUTTO: Again, because every case is going to be different, and there are some cases where it's difficult to assess to actually compensate investors, what I'm suggesting is that there be an express identification of investor compensation or restitution as a criteria, but without handcuffing the Commission or the staff in the facts of any particular case.

VICE-CHAIR CONDON: Thank you.

MR. PASCUTTO: I would like to mention a couple of other points in terms of -- in terms of going beyond no-contest settlements, because that was not the only item mentioned.

One of the things that we recommended to staff is that they -- that the staff -- actually, the staff originally identified that it was looking at the introduction of a whistle blower program under which

incentives would be provided to persons who provide the OSC with information about misconduct, and we wholeheartedly supported the concept of a whistle blower program and urged the OSC to move forward with that as soon as possible.

Now, at this point twenty months have passed and we have seen no developments whatsoever on a whistle blower program. We have whistle blower programs in the United States --

VICE-CHAIR TURNER: Do you think compensation has to be part of that or monetary payment to people?

MR. PASCUTTO: I don't think -- you know, it perhaps can be done in stages. I think the first stage is to move forward with a program so people can identify publicly that you have a policy, you have a program on how to handle whistle blowers. We certainly would support the concept of incentives of financial incentives. Of course, protection from retaliation is probably as important as financial incentives, but we would support the concept of financial incentives.

It doesn't mean that you necessarily have to copy the SEC and it doesn't mean that you have to have unlimited amounts of potential financial

incentives, but there are many breaches of securities law, and insider trading is a perfect example of that, where it's very difficult to assemble evidence that can prove a case beyond -- you know, to the appropriate standard without having someone come forward and provide information. It's hard to identify the case, it's hard to prove the case, because it's not like some other cases where you've got someone who has defrauded investors, investors who know they have been defrauded and lost the money.

In the case of insider trading, the trading looks perfectly fine and it depends entirely what's in the mind of an individual. You could have two individuals trading, one of whom thinks there is a rumour about a takeover and it's not insider trading. Someone else who is in the market does have the information from an insider and trades. The people who are selling, I mean, they don't know who they're dealing with and it would just be fortuitous as to who they happen to be dealing with.

So it's really very much what is in the mind -- what is the knowledge of the defendant. I think you're going to have a much greater likelihood of having successful insider trading cases if you have people inside of organizations coming forward and

disclosing that information to the OSC.

Certainly the SEC considers that its whistle blower, which is still very much in its early days, you know, has been successful. I happened to read this morning that the SEC announced on I think Friday a second -- the second ever Dodd Frank Whistle Blower Award and the SEC individual, the chief of the office of the whistle blower said we're likely to see more awards at a faster pace now that the program has been up and running and tips that we have gotten are leading to successful cases. He identified that the reason we haven't seen so many at this point is because simply it takes years for the cases from the time the whistle blower comes in to the time the case is completed.

So this particular case that was identified as a whistle blower case was started two years ago and it was only two years later that you see it through. So they have many other cases in the system and, you know, they believe that the financial incentives are a key component of that program, the whistle blower program, gaining traction.

VICE-CHAIR CONDON: I think it might be time to wrap up, Mr. Pascutto. Do you have one more final comment you want to make?

MR. PASCUTTO: A final comment is a couple of years ago we published a report on financial fraud and in there we indicated that the Commission as part of its -- because this is not about no-contest settlement, but making enforcement more effective and efficient. As part of that -- and preventing harm.

As part of that, the Commission should create a duty of registrants to report market misconduct in the same way that lawyers have a duty to identify serious misconduct by lawyers. That's ongoing to the Law Society that registrants should have a similar duty. We've also included that in our submissions. Again, something we would like to see the Commission consider. Thank you.

VICE-CHAIR CONDON: Thank you very much for your comments. So I think it's time for us to take a quick break. That's what's on the schedule next, so we will resume perhaps at about five minutes after eleven. So 11:05. Thank you.

--- Recess taken at 10:52 a.m.

--- On resuming at 11:07 a.m.

VICE-CHAIR CONDON: Please be seated. So our next commenters are a number of people sitting in front of me and I'll let you decide who is speaking first and who is taking turns.

PRESENTATION BY J. DOUGLAS, L. FUERST AND D. HAUSMAN:

MR. DOUGLAS: We're something of a committee. Thank you, Madam Chair. My name is Jim Douglas and on my immediate right is Linda Fuerst, who is a partner at Lenczner Slaght and on her right is David Hausman, who is a partner at Faskens.

We are here representing an ad hoc group of 13 counsel who made a joint submission in respect of staff's proposals in November of 2011. I want it to be clear that we are not here on behalf of any particular client. We are not here on behalf of our firms or on behalf of any firms of the lawyers who were participants in the joint submission that we made. So we are -- we like to think of ourselves as a group of reasonably informed participants.

VICE-CHAIR CONDON: Can never have too many of those.

MR. DOUGLAS: For the most part you will see from the names that they are counsel who appear regularly before the Commission. In the case of Ms. Fuerst, Mr. Hausman and myself, we have been on both sides of the hearing room. Today we join staff again on their side of the hearing room in support of staff's position with respect of the option of, in appropriate

cases, a no-contest settlement model.

As I said, Ms. Fuerst, Mr. Hausman and myself have all been prosecutors for the Commission staff in the past. I think, in fact, Ms. Fuerst and I came along just after Vice-Chair Turner had left and around --

VICE-CHAIR TURNER: And cleaned up all the mess that was left behind.

MR. DOUGLAS: That's right. And just around the time that Mr. Pascutto was moving on, I have to say, which would suggest to me that both of you are older than me. I'm somewhat envious of the fact that that you both have hair still. I'm even more envious of the fact that Mr. Pascutto has no grey hair, which strikes me as somewhat of a modern miracle.

Having said that, we are not advocating obviously that no-contest settlements be something that is universally utilized by staff. They tend to be in the United States, as you know, more often than not the case. We are simply advocating that a no-contest settlement be one of the various things that are in staff's tool kit and in the Commission's discretion to ensure that the purposes of the Act are achieved to a robust enforcement regime. And, frankly, I tried to trace the history of the settlement process at the OSC

and I stand corrected by Vice-Chair Turner if I'm wrong in this, but I don't believe that there's anything in the Act or has ever been anything in the Act that addressed the settlement issue of a public interest hearing.

In fact, in the early years there were no public interest hearings. It was only during the regime of Mr. Pascutto, Mr. Groia and Mr. Turner that the public interest provisions in what were at that time Sections 123 and 124 of the Act began to be regularly utilized. They are now the most common of the administrative hearing procedures that are brought by staff. They are now under Section 127 of the Act, but in the early years of the Commission's existence there were few, if any, public interest hearings and there were certainly no settlements.

And the first settlement, I believe, was in the Union Gas case and it was -- it's very difficult to find these things because the bulletin was not well maintained in those days and only some things show up, so I'm relying upon the collective knowledge of the ad hoc committee to try and sort out what transpired in the past, but -- and then we went through a period where settlements took a variety of forms. And Mr. Anisman's very helpful paper gives you some of the

history, but perhaps the most -- the clearest and easiest to see where no-contest settlements were used and regularly used by the Commission historically without the Commission expressing any concern about them was in the Price Waterhouse settlement that arose in connection with the NBS case that the Commission had on in the late 80s and early 90s.

In that case -- and I will provide you with a copy of the NBS case or the Price Waterhouse case, but the case comes on as a settlement, it's clearly a no-contest settlement, the terms of which are set out in paragraph 5 of the settlement agreement, which simply says that Price Waterhouse and Mr. Smith, who was the auditor in question, neither admits nor denies the accuracy of the facts and allegations that are made and the Commission has no difficulty making an order where -- on the basis of a settlement that's neither opposed nor consented to, concluding that the settlement is in the public interest and should be approved.

So in early days the template that is used today was not a universal requirement. It didn't become a universal requirement, by my review, until quite a bit more recently, because we went through a period of time in the 90s where we had a series of

settlements that I would characterize as the staff says, respondent says era where what happened was that staff would set out the facts that they intended to prove in the context of a contested hearing and the respondent would set out their position in relation to the facts, which was often not an admission of any of those facts, but rather the respondent's own characterization of the facts, the respondent's own position as to how Ontario securities law would apply to those facts and, nevertheless, the Commission found it within its jurisdiction and found itself capable in those instances of approving those settlements in the public interest.

As I said, it's only much more recently that the template that is currently used, which is a series of admissions by the respondent, coupled with a bundle of sanctions with certain protective language has become the standard for settlements.

Throughout the period of time the jurisdiction was the same. It was the public interest. And if we go back, and I went back to look at -- it's also curious to know that two year's worth of the Securities Act is slightly thinner than one year worth of the Securities Act today, but if you go back to the early 90s, Section 123 and 124 simply said that if you

could take away someone's trading privileges in the public interest, then you could take away their registration in the public interest, and that was it.

On the basis of that, proceedings were mounted, settlements were entered into, no contest in many instances, and the Commission's jurisdiction remains the same after Section 127 is introduced. When it's introduced it looks very much like Section 123 and 124 initially and then it evolves over time.

Perhaps the most important part of the evolution occurs in 1994 when the purposes section is added to the Act. And I think that the Commission, when it considers this issue, should bear in mind what those purposes are and how those purposes have been interpreted both by the Commission and by the courts.

The purposes of the Act, as I'm sure you have been read this many times, are simply to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets.

In my submission and in our submission, when you're considering this issue, you should be considering whether no-contest settlements can be consistent with those purposes. And it's the submission of our ad hoc committee that there are

instances where those purposes will be served by a no-contest settlement and there is no reason for the Commission to exclude that possibility simply because, by some strange twist over the years, we moved from a regime that had flexibility for no-contest settlements or settlements based on admissions, to a regime where you can only achieve a settlement now if you enter into a template form agreement with staff that requires admissions. And that template was not imposed by the Commission. That's a staff advent. It comes out of staff, it doesn't come from the Commission.

The first agreement that I can recall, it was Stonebridge Farms, and it was simply on the basis that it was thought that we needed some type of agreement to put in front of the Commission, but there was no requirement in the Act or otherwise as to what the contents of that would be.

The Commission's deliberations in this respect are helped, in my view, by what the courts have said, particularly the Supreme Court of Canada, about the scope of the public interest jurisdiction. And the scope of the public interest jurisdiction as the Supreme Court set out in Asbestos, which was a 2000 decision of the Supreme Court of Canada, is that it's prospective, so that it's not looking back to either

necessarily compensate, it's not looking back to necessarily punish. It's prospective, preventative and curative. Those are the three catch phrases that the Supreme Court of Canada uses, and they borrow those phrases from Commission jurisprudence, starting with Mithras and moving forward.

So when the Commission considers this issue, it should be considered in the context of those purposes and how they have been interpreted by the courts.

In our submission, it may be that investor compensation is consistent with those purposes in some instances, but it is not a necessary element to achieving those purposes in all cases. And all we're advocating is that the Commission retain flexibility in this area.

And if there is one point of departure that we have with staff, it is that staff would straitjacket when and how no-contest settlements should be used. As was obvious from the questions that were posed both to Mr. Atkinson and Mr. Pascutto, each time the panel asked a difficult question about a particular type of case, each of them said, we have to know the facts, we have to look at that individual case in order to be able to adequately respond to your question.

And that's consistent as well with the jurisprudence. The public interest has been described by the courts in this province, particularly in a case called Gordon Capital and David Vaughan, as being determined by the exigencies of the facts of each individual case that comes before the Commission.

The Commission has a huge amount of flexibility in determining what is in the public interest, informed by the purposes of the Act. In our respectful submission, placing no-contest settlements in an a priori straitjacket would be inconsistent with the public interest and each case will be decided on its own merits, both if it's a contested case and if the case comes forward for settlement purposes.

On the question of -- you have heard some submissions and you have a very good and informative paper from Mr. Anisman on this point, but it is important to bear in mind that you are quite distinct from the SEC. You are, as Mr. Pascutto pointed out, a unified tribunal. Staff are acting at the direction ultimately of the chair and the CEO.

In my respectful view, it can be presumed that they are acting in the public interest. You are not separate from staff and there are reasons that that has occurred historically. There has been

some criticism of that from time to time, but the state of affairs at this point in time is that the chair is the CEO of this organization and that staff act at his direction or her direction, depending upon who is in that position at any given point in time.

So staff can be allowed the presumption that they are acting in the public interest. The presumption also would be that they have a reasonable likelihood of success in proving a statement -- the facts set out in any statement of allegations. A settlement only comes before you where there has been a statement of allegations and because of the Martin report, which goes back a very long way now, which determines when and if a prosecutor can launch a proceeding, the Martin reports applies to staff's activity at the Commission, just as it applies to the Crown law office.

And the Martin report says that only if you have a reasonable likelihood of success -- you don't have to be certain of success, you have to have a reasonable likelihood of success, can you bring a proceeding if you are in the position of a prosecutor. Staff has always adhered to the principles in the Martin report. So armed with that and with the fact that Rule 12 now says that there will be a

pre-settlement conference where one of the members of the settlement panel will sit on the pre-settlement conference, you will have, in my respectful view, adequate assurances that what staff is bringing before you is in the public interest from their perspective and that they should be given at least that presumption.

VICE-CHAIR CONDON: Mr. Douglas, I don't want to throw you off your presentation, but I think we do need to come to the issue, which I think is the source of significant debate here. And the thing that is different in your historical catalogue is, of course, the existence of secondary market civil remedies today and the question of interrelationship between settlement agreements before the OSC and its capacity to mount civil actions.

So in your view, what do you say to the perception that if the Commission moves to no-contest settlements that it will make it more difficult for plaintiff investors to launch actions in the civil realm? Is there a necessary connection between those two types of proceedings that the Commission should be attentive to.

MR. DOUGLAS: Mr. Hausman is going to address that.

VICE-CHAIR CONDON: Okay, sorry.

MR. DOUGLAS: However, I will answer very briefly and then I'll turn matters over to -- I don't know whether they have decide who is going first, but the administrative purposes of the Commission, nowhere in the Act does it say that investor compensation is part of the purposes. As I said before, it may be consistent in some instances with investor protection and preservation of the integrity of the capital markets, but it is not necessarily consistent in all instances.

So that the legislature has not conferred or required the Commission to become a collection and compensation agency and having tried it on a couple of occasions, I can tell you that you will have to be three times the size that you currently are if you become a collection and compensation agency. We tried it in Seakist, one of the no-contest settlements that Mr. Anisman refers to in his paper, and I can assure you that it is no mean task to become a collection and compensation agency.

VICE-CHAIR CONDON: So if it's hard for the Commission to do it in terms of its own purposes, what does that mean for, as you say, this interrelationship between settlements occurring at the

administrative level and a separate proceeding in the civil courts?

MR. DOUGLAS: There is a regime in the civil courts and it is designed to address those compensation issues. It is not necessarily part of the Commission's jurisdiction to be concerned when adjudicating a matter or considering the settlement of a matter as to whether or not compensation will or won't be more readily achieved.

The Commission's administrative jurisdiction is to ensure that prospectively investors are protected and that the capital -- then that the integrity of the capital markets is preserved. So that may require the removal of someone from the capital markets, that may require any one of a number of remedies that are available under Section 127. Section 127 does not speak to compensation and that's -- nor does it suggest anywhere in the Act that you should act or the Commission's jurisdiction should be a corollary to the compensation regime that the courts have for many years had jurisdiction over.

VICE-CHAIR CONDON: Can I just ask one more question before I turn it over. So is it then the case -- there have been comments that the respondent's counsel in practice find it challenging to agree to the

settlements where these admissions are made and the reason they find -- apparently the reason they find it challenging to find the language that will satisfy both sides is because of the desire not to admit things that could be raised against them in the civil court.

So is that perception incorrect or --

MR. HAUSMAN: I think that perception is correct and I think that what you have to do is look at no-contest settlements in the context of cooperation. So in terms of the circumstances where a Commission might find that it's in the public interest to approve a settlement on a no-contest basis, certainly the concern would be civil liability.

But the panel would be looking prospectively. In other words, in terms of specific deterrence. In terms of specific deterrence, Mr. Atkinson spoke about disputed resolution. Obviously an effective specific deterrent is an efficient and quick one. But probably more interesting is the question of general deterrence. In other words, from the decisions that are made by the Commission, both after contested hearings and approving settlements, he questioned how this will affect other market actors who might be minded to engage in the same market conduct.

With respect to civil liability, that's

entirely extraneous, it's irrelevant. In other words, an investors agreement written in a proceeding based on secondary market disclosure, is only interested in compensation and is only interested in history. But from the perspective of the Commission, the Commission is concerned about deterring those market actors and others. So from a general deterrent perspective, how is that perceived?

Well, the marketplace will be able to read the allegations and they will see whether the sanction that's imposed is proportional to the allegation. In terms of the decision, the important public interest decision made by the Commission whether to accept a no-contest settlement, the way to look at it within the lens of general deterrence is to think of credit for cooperation as part of general deterrence.

In other words, from our perspective, general deterrence is a series of carrots and sticks. The sticks are that we will impose a sanction, even if it's not required to specifically deter you, but to deter others. That's the stick. The carrot is that the Commission has a real interest in having parties come forward with issues of concern. That's the purpose of the credit of cooperation policy 15-702. It's not one that works terribly well right now and

that's because cooperation is in the eye of the beholder and credit is also in the eye of the beholder.

But if people realize or if the market realizes that if you follow the directives of the policy, credit for cooperation and you self-police, self-report and self-correct, that you have the opportunity to enter into no-contest settlements, then that will promote that type of activity in the marketplace.

Now, the civil liability regime is entirely different, because from the perspective of a shareholder, there is no concern as to what the company's policies or practices will be going forward.

MS. FUERST: If I might just comment as well on the interplay between Commission proceedings and civil proceedings and pick up on some of the points that my friends have made. I just wanted to point out, as we indicate in our written submissions, that the Ontario legislature has recognized in other legislative context the benefits of prohibiting the use of civil -- or the use in civil proceedings of evidence adduced and admissions made in regulatory proceedings.

The Regulated Health Professions Act which governs disciplinary proceedings against physicians and other healthcare professionals, The

Professional Engineers Act, The Chartered Accountants Act, The Certified General Accountants Act, The Certified Management Accountants Act, The Ontario College of Teachers Act, The Social Work and Social Services Work Act, The Police Act and The Insurance Brokers Act, among others, all contain provisions that prevent documents prepared for and evidence in admission given at a disciplinary hearing from being used in a civil proceeding for a collateral purposes.

As a result, all of those professionals, physicians, accountants, insurance brokers, teachers and social workers, are able to settle disciplinary proceedings without the fear that their admissions could be used against them in a civil action.

None of the commentators who opposed no-contest settlements have presented any evidence or arguments that consumers of healthcare or of those professional services have suffered any tangible harm as a result of preventing the collateral use of admissions made in disciplinary hearings in civil proceedings. We say that in the absence of a similar provision in the Securities Act, no-contest settlements in appropriate circumstances make good sense and are not contrary to the public interest.

I also point out that there is no

evidence from the plaintiff's class action bar that their inability to rely upon admissions of wrongdoing in an OSC enforcement proceeding would, in fact, constitute a barrier to the ability of these investors from recouping losses in the civil courts. Aggrieved investors now have the benefit of a very sophisticated and successful class action securities bar here in Canada. Aggrieved investors have the advantage of broad discovery rights in those class proceedings whereby they are able to get at evidence of potential wrongdoing and to obtain admissions through that process.

Aggrieved investors in Canada also now have the access to not only funding by the Law Foundation, but also third party private funders, and the courts have recognized and blessed those arrangements. So, at best, all that aggrieved investors could potentially be deprived of by virtue of the Commission deciding in some cases to approve no-contest settlements would be an evidentiary shortcut, but that's it.

So we say that that's simply no compelling case that, in fact, investors are going to suffer any material harm if the Commission decides to entertain no-contest settlements in appropriate cases.

I just wanted to point out as well a couple of considerations of fairness and, as you have heard from Mr. Atkinson, there are increasingly lengthy Commission proceedings which impose burdens upon the Commission as an adjudicative body and also burdens on Enforcement Staff, but so too do those lengthy hearings impose a burden on respondents who are forced to defend a proceeding that they would otherwise likely settle but for the fact that they are forced to make admissions of wrongdoing.

Unlike staff, if a respondent is forced to contest staff's allegations and loses at the end of a contested hearing, the respondent is on the hook for staff's costs. Unlike staff, if a respondent succeeds at the conclusion of a contested hearing, he has no opportunity to recoup his own substantial defence expenses. So to require a respondent to go to the expense of defending a case that he would otherwise settle, but for the requirement that he make admissions, we say is simply unfair given the current cost regime in place at the OSC.

That unfairness is amplified where the respondent is a reporting issuer defending a proceeding based upon historical wrongdoing by the issuer or its officers and director, because the reality is that in

that case it's the current shareholders who are forced to cover the cost of that defence.

The last point that I did want to make is a reputational issue. Some of the commentators have suggested that settling an OSC proceeding without an admission of wrongdoing is somehow a free ride and without any reputational stigma. I think those of us who sit on this side of the bar say that that is an extremely naive view of the world. In fact, every enforcement proceeding that's brought does have significant reputational stigma for the respondents involved.

You are well aware of the fact that all enforcement proceedings are posted on the OSC website in perpetuity, as well as the Commissioners will be fully aware, just about every proceeding and most settlements are attended by members of the press, are the subject of reporting in the press, and that's all information in the electronic domain that remains available in perpetuity.

So unless I could be of any further assistance, those are my submissions.

COMMISSIONER ROBERTSON: I'll just ask the question plainly, which is how do you reconcile, leaving aside whether we should or not, the point that

there is a perception that an admission of wrongdoing will harm the position in the civil courts, versus the proposal that you say that, you know, in fact, there is no harm to a civil proceedings possibility for redress.

MR. HAUSMAN: I think the fact is that civil proceedings take their own course. They proceed through the go ahead motions that are required, discovery -- certification, discovery, trial, and there are many class proceedings that are brought by plaintiffs where there is no enforcement proceeding at all.

In other words, it's not a necessary condition of succeeding in a class proceeding based on a secondary market disclosure or primary market disclosure that there be also an enforcement proceeding. Often there isn't. One of the reasons why the legislation was passed in the first place in terms of secondary market disclosure was that there was an acknowledgment that the Commission staff will not bring a proceeding in every case of disclosure, particularly ones that are negligently made.

In other words, the civil liability provisions work all on their own without the necessity of a leg up from an enforcement proceeding.

MR. DOUGLAS: Could I add one thing to

that? The risk analysis that one goes through in a settlement, either in a civil proceeding or a Commission proceeding, is quite different. If you're facing, as a registrant, a prospective order that your registration is going to be taken away from you and you are going to be removed from the capital markets, you might well be inclined to settle with Commission staff a case that has only a five percent risk of loss from your perspective, whereas you would never settle a civil case where you are exposed only to retroactive damages where you have only a five percent risk of loss, or you would rarely settle that sort of case.

It's important for the Commission to recognize that the calculus of settlement that respondents go through at the Commission level is very different than the calculus of settlement that defendants go through in a civil proceeding and it's largely because your jurisdiction is prospective and your jurisdiction is -- carries with it the right to continue in the business that you have chosen to be part of. So that, as I said, the risk analysis is extremely different.

VICE-CHAIR CONDON: Can I just follow up on that then? Then we put that up against -- you did address this earlier, but if I can come back to it, the

issue of investor compensation. I mean, staff is saying that one of their, sort of, factors that they will look to to allow no-contest settlements or agree to no-contest settlements is where investors have been largely, if not fully, compensated.

So from your point of view, though, that is also, I assume, something of a red herring issue. That for the registrant who is going to suffer reputational damage or loss of business, compensation to investors already harmed is less significant.

MR. DOUGLAS: Yes. But I'm not suggesting it couldn't be a factor that staff and the Commission take into account. I'm simply suggesting it shouldn't be a requirement to the Commission to approve a no-contest settlement.

MR. HAUSMAN: The importance of that factor would depend on the circumstances. The Commission, given that it's exercised prospective power in the case of a registrant, for example, would be much more concerned that policies and procedures have been corrected, they would be much more concerned whether there had be self-reporting of the circumstances giving rise to the case in the case of an issue where they might be concerned about what disclosure practices are going forward. Because, of course, there is nobody to

represent the investor who has hasn't invested yet. That's what the Commission is there for. That's why it exercises the jurisdiction prospectively. People who have lost money have already lost money, they have their remedies. But those investors who have not yet come in contact with the issuer or market participants are of central concern to the Commission, and to nobody else.

That's why compensation may be a factor, but it might not be as important as what corrective measures have been taken. It might not be as important as who the Commission is dealing with in a particular case. For example, in a disclosure case, the wrongdoer, the wrongdoer in that case may be an entity that is actually having its litigation strategy directed by an independent committee that had nothing to do with the particular circumstances that give rise to the case. If those people want to act to preserve the balance sheet of the companies for all their constituents, including existing shareholders, that's got to be a consideration as well.

VICE-CHAIR CONDON: I think we have run out of time, so unless you have any --

VICE-CHAIR TURNER: No, I'm fine. Well, let me ask this one question quickly. Just that it

doesn't seem like, based on a review of the settlements, that there are very many cases in which facts or admissions in a settlement actually get used in a class action. You hear counsel being worried about it, but --

MR. DOUGLAS: The difficulty is that you are -- you really only see, in my respectful view, the tip of the iceberg. If you consider the -- and the statistics are more robust in the United States, but if you consider that something in the order of 90 percent of these cases settle for something in the order of ten percent, and when I say that I mean the civil cases, something in the order of ten percent of the face amount of the claim, then it's difficult for you, with all due respect, Vice-Chair Turner, to be able to ascertain to what extent these settlements are being utilized as leverage in the context of settlement discussions in civil cases and ultimate settlements of civil cases that are going on out there.

The flip side of that is, I think I can anecdotally assure you, that the mere fact that staff has done all of this work and extracted all of these admissions is not leading to a reduction in the contingency fees that are being sought by the plaintiff's class action bar. It's not likely that

simply because Commission staff has insisted on admissions that Mr. Lascaris will reduce his contingency from thirty to five percent.

VICE-CHAIR TURNER: I think I had your first point. I'm not sure I have your second point.

MR. HAUSMAN: I think that also there are authorities where people have sought to use admissions, and this -- in fact, this whole issue arose in a series of cases where investors seeking civil remedies have sought to use admissions made in Commission proceedings, and the authorities went one way or another, but it seems to be settled they can use them.

VICE-CHAIR TURNER: Thank you very much.

VICE-CHAIR CONDON: Thank you very much.

MR. DOUGLAS: I did tell you I would give you a copy of Price Waterhouse, if you're interested, so...

VICE-CHAIR TURNER: I'm always interested.

VICE-CHAIR CONDON: Thank you. Next up is another group presentation, I believe, from the Canadian Bankers' Association.

PRESENTATION BY R. SORELL:

MR. SORELL: I'm sure this will come as

a disappointment, but I'm just going to be speaking. But I'm joined in the audience by two legal counsel from the Canadian Bankers Association, Marina Mandal and Jelena Novikov (ph.), but in the interests of time I'm going to be addressing their submissions.

My name is René Sorell, and as I said, I'm representing the Canadian Bankers Association. We will try to cover just points that haven't been dealt with in a lot of detail already, because I know quite a bit has been covered.

The point of departure for the Canadian Bankers Association is again that when you look at the purposes and the principles that are contained in the Securities Act, one of the ways in which investor protection is achieved for the securities markets is to create a market in which all market participants have an intent of the step forward, self report and remedy or settle allegations of non-compliance.

A lot of the discussion that you've had back and forth about compensation I think don't emphasize enough this fundamental point about the purpose of the securities law which is that, so far as the Commission deals with it, the emphasis that they have is on prophylactic stuff, that the compensatory stuff is distinct from the exercise of its public

interest jurisdiction and that the Securities Act is not an investor compensation statute, it's an investor protection statute and it achieves its purposes in a variety of ways.

Some of that point has been made, but I wanted to make it more because market participants are encouraged to step forward, get credit for cooperation, self report and self correct, and if that's what citizenship is about for a market participant under our securities regime, there's some important implications to that.

We are here in support of this no-contest settlement approach. We disagree with those who oppose no-contest settlements because they view the OSC's proposals as a threat to self help remedies or compensatory remedies and with people who characterize reliance on no-contest settlement proposals as the adoption of a posture of regulatory neutrality where punitive wrongdoers have their interests balanced against the beneficiaries of the securities law, we don't think of that as a realistic statement of the way the Securities Commission does enforcement, and it's certainly a simplistic way of looking at the kind of multi-respondent proceedings that you are involved in all the time where there is a pretty wide range of

interests, responsibilities, and allegations to cope with in a more complex matrix than that kind of simple approach accommodates.

We're here to urge the Securities Commission not to waver from proceeding with these proposals, and we have a couple of reasons for doing that. But we wanted to say as participants in the marketplace that the long period of silence before the helpful notice prepared by the Enforcement Staff came out expressing a commitment to the principles behind these settlement proposal ideas, conveyed to the public, perhaps incorrectly, that the staff and the Commission had wavered in their level of interest in this important topic.

So we urge the Commission to deal with it, to deal with it quickly, and partly for the purpose of making clearer how settlements work in general, because a number of people have commented on the fact that the evolution of settlements is not something that has been the subject of lots of policy statements or deliberate statements over the years. Instead, what you have had is a couple of procedural rules dealing with the problems of maintaining confidentiality if a settlement agreement is not accepted, and if you look at rule 12 -- you're much more familiar with it than I

am -- but if you look at rule 12 in the rules of procedure that the Securities Commission follows, that's a kind of a narrow procedural rule about the way settlements are approved that's very much driven by concerns of confidentiality and the in camera hearing process that the Commission has historically followed to protect parties to settlement proceedings, if the Commission throws out, as they will rarely do, a settlement proceeding.

So one of the things that has occurred to us as we have gone through this exercise is that the settlement process has to be better articulated. While we are sympathetic to the comment that was made by the representatives of the defence bar that you shouldn't straitjacket the process by making it so mechanical and rigid that people who ought to get the benefit of it don't fit within it.

We also think there is a big lack of specificity for the community, both in the settlement process and in the credit for cooperation principles that are supposed to be -- sort of go hand in hand with settlements themselves.

We think that there's also confusion about what it means to approve a settlement agreement. The law is a bit -- I don't think the law is murky, but

the understanding of it is murky. To the extent there are decided cases and we collect a few of them in the written version of the talking point that I'm going to hand up at the end of my remarks, it would appear that when a panel accepts a settlement agreement, they're not so much making factual findings as confirming that on that set of facts, the penalties are appropriate in the exercise of public -- of the public interest power in Section 127, not just the plain words of 127, which I think are excessively relied upon in Mr. Anisman's excellent paper, but the jurisprudence around the exercise of the -- of that power as exemplified by the Mithras Management decision which I'll come on to in a minute.

So we think that the purpose of having facts in a settlement agreement is to make it clear that the principles from time to time from the public interest jurisdiction have been addressed, because those are important principals and sometimes it's not easy to see that they have been applied unless there's agreed facts.

So we see the benefits of a settlement agreement and, really, the rationale for them as showing the public that there has been an informed exercise of public interest discretion, furthering the

goal of transparency because to the extent these things are taken to have precedential value, they also have a general deterrent effect because people understand what the expected standards are.

Settlement agreements also -- sorry.

VICE-CHAIR CONDON: Mr. Sorell, can I stop you there? One of the things that Mr. Atkinson referred to in his comments this morning is the need for accountability. Certainly, again, in some of the comment letters there was a sense that if the Commission were to proceed with no-contest settlements, that there would be the potential for respondents to evade accountability by not having to agree that these facts represent the state of affairs at issue.

So what do you say to that? Do you say that there is any role for a consideration of the accountability of respondents in this?

MR. SORELL: The way that I would see the settlement agreement working and being interpreted is that there are facts which most people do agree to. What they don't agree is that those facts as stated make out conduct that falls below a public interest standard or that violates the law, that in their view, yeah, it happened, but we don't think it reaches a public interest -- it crosses that public interest

trigger. That's what most people in my experience take by the settlement process.

Now, Mr. Atkinson has said that in the process, people who enter into these no-contest proceedings will not even be agreeing to the facts. I think where the Canadian Bankers Association is coming from is that the code by which this thing -- that no-contest settlements agreements are adopted, should be laid out and further comments invited, because these are not trivial, these are not nuances. It might be possible, the community might accept a standard in which they can say we don't agree that the foregoing facts, though we agree that they hurt, violate the necessary standards, we don't agree that -- neither admit nor deny that a public interest standard hasn't been met or that the law has been violated. I think there is room to work with that kind of standard.

What we're looking for, I think, is that we take one more step from what we have done here, which is to lay out something that has a lot more detail about it about what's going to be in a settlement agreement. That has a utility apart from the novelty of these proposals, but also hand in hand with it, we lay out a lot more about credit for cooperation. Because if you view those, as Mr. Hausman

just suggested to you, as related, there is a lot of accountability if you look at the model as being partly credit for cooperation and partly no-contest settlement because you will have done a lot of with prejudice things along the way to earn credit for cooperation. If standards as exacting as those in 15-702 are followed, you will have done a lot.

Now, there has been a lot of talk about the need to -- the desirability or otherwise of having settlements available in civil proceedings. We go along with what the defence bar says. We think that if you look at the jurisdiction of the Securities Commission and how it has been exercised and how the cases have decided it's meant to be exercised, we think that you can have quite a lot of confidence in supporting rules that limit the use, the collateral use in civil proceedings of these rules.

Let me just suggest to you why. If the Securities Commission, as a policy matter, had wanted to embark upon a role as a compensatory -- as a money gatherer, it would have had available to it Section 128 proceedings. They have been there in the statute, they have hardly ever been used. I was involved with a couple of them, they were used only a little bit at the very beginning of the period when they were introduced,

and that just hasn't been the direction that the Securities Commission has gone, partly because again and again in the securities law you see that actions for compensatory damages are proscribed as self help remedies. Maybe the statute eases burdens of proof in relation to those things, but the Commission itself is not a money collector, even though that -- we're not saying that's not a legitimate goal, but it's certainly not part of the -- I don't think it's a fair way of reading what the Securities Act is about.

VICE-CHAIR CONDON: If I can just interject here.

MR. SORELL: Absolutely.

VICE-CHAIR CONDON: Which is just to state the reality that we are in the early days of the civil liability regime and the secondary market area and there have been a few settlements. There hasn't been a lot of judicial guidance about the extent to which these rules will be useful for -- to achieve the compensatory role that investors would like.

So does that, in your mind, impose any additional role for the -- I take your point that the statute doesn't directly deal with the role of the Commission around compensation, but to the extent that you could say, well, there's a separate regime for

that, in practise we haven't yet seen the way that's working on behalf of investors. Does that cause you any concern?

MR. SORELL: It doesn't cause me any concern because if your question is driven by civil liability in the secondary market, there are a whole bunch of remedies that have been around for a long time dealing with misrepresentations of other sorts, in offering memorandums, circulars and so on, those things haven't taken off, but all the same issues arise. Admittedly, the secondary market regime is much more complicated, it has done a lot more balancing, but I think if you look at the family of -- lawsuits allow you to get compensation after the securities law has broken down, apart from the civil liability provisions, but the secondary markets, they don't even envisage being involved in securities law.

The only place where an activist role for securities regulators is envisaged, that I'm aware of, is in section 128. There have been lots of chances to do stuff with section 128, and for whatever reason, people think that's not the way they want to go. So if you take all that history, I don't think it's a problem.

The other thing I would say, which I

think can reinforce you in your confidence that the proposal is okay, is that if you read case law like the Mithras Management and you look at ideas that Mithras Management and the public interest power is supposed to prevent recidivism by the respondent before you, it specifically says it's not about compensation and it's not about punishment. To the extent that general deterrence forms part of it, I think it has become an instrument of punishment, but it has never become an instrument of compensation, even though it's steadily expanded, you know, with cases like Biovail, things like that. Anyway, that's maybe another topic.

We think that there should be a publicly available policy that lays out what settlement agreements are supposed to contain and what the procedure for them is beyond the narrow concerns reflected in rule 12.

You know, we think that for the exercise of the public interest jurisdiction, there must be a statement of agreed facts, that respondents should have the option of laying out mitigating circumstances, that the approach to either admitting nor denying should be as I suggested it was. That you're not admitting that the agreed facts get you over the line of violating the fact or the public interest, and we do think that it

should be permissible in settlement agreements to have language that limits the use in civil proceedings that are parallel or arise out of the same set of facts, but we doubt the efficacy of those and we support suggestions that there be statutory amendments limiting use of the sort that Ms. Fuerst outlined for you.

VICE-CHAIR TURNER: But what you're saying is expressly that the settlement agreement ought to provide that.

MR. SORELL: Yes, I am. I'm saying that that would be -- I'm saying that there should be communicated to the public what you will be expected to say and that you will be expected to agree to facts and that you will be given a chance to either admit nor deny that the public interest has been violated or the law has been violated.

VICE-CHAIR TURNER: But my question was you're saying within a settlement agreement it should have an explicit provision that says none of these admissions shall be used in any other proceeding.

MR. SORELL: Yes, I think that should be allowed. Even if there were disagreement about that or the Commission didn't buy that, I think whatever is allowed, that the next round of your process here should be to publish those things, publish an updated

15-702 and publish what should be in a settlement agreement, because the settlements are a negotiated thing. The use of them should not just be something that is developed primarily by staff on an ad hoc basis. I don't think that works.

Finally, the changes in the credit for cooperation policy, I just wanted to say a word about that because it hasn't got enough attention. The credit for cooperation policy over ten years old. It came out in roughly -- roughly eleven years ago, and the standard that it sets for credit for cooperation is very high and it's paid in advance on a with prejudice basis and then you discussed whether you got credit for cooperation or whether you earned it.

If you look at people that have been given victory laps in the credit for cooperation context, like you use at the press release that Securities Commission Staff issued in CP Ships, where CP Ships was identified as having done all the things that they should have done, that list included huge amounts of disclosure to the Securities Commission, the payment of compensatory amounts, the conduct of an internal investigation, unlimited access to the independent -- advisors to -- the independent directors and advisors of CP Ships and their advisors. I think

that's a very big wish list. You can't have made a major contribution to cooperation without having done all those things or to have sustained so much prejudice.

And what I would say is that the credit for cooperation process, and I've laid it out more particularly in the written remarks that I'll give you and just leave with you, is that there should be with prejudice reporting of facts, but without prejudice negotiations about what happens about them.

In other words, you get credit for coming forward and saying this is what happened. I haven't yet corrected it. Here's what I propose, here's my problems, here's what I'm thinking, and some of that discussion could occur -- there be a bit of a without prejudice window followed by perhaps a settlement agreement which would all be a without prejudice negotiation culminating in a settlement agreement, so -- and with respect to payments, if credit for cooperation involves compensatory arrangements, we say the payor should be able to structure the payment so that it's made to the Securities Commission and the Commission might by order, which can be agreed, as you know, apply those funds in a compensatory fashion. That the mechanics of

compensation would be cited by the Commission and would not operate as a concession of liability by the payor, even if that might be the practical result.

I have laid this out in point form because it's to just give you a flavour. I think there would be a lot more credit for cooperation if the process were clearer, including what to do, how it's made public, who can do the credit for cooperation process. In my practice I have done it half a dozen times. It's always been a good experience. Staff has always been great. But it is very hard to tell clients to do it because there's absolutely no good news. If you show them 15-702, you said gee, why don't we do a blank cheque, you know. Something has to be done, even though the experience is good, to make this thinking better understood.

VICE-CHAIR CONDON: Before you wrap up, can I ask you one more question on that?

MR. SORELL: Of course.

VICE-CHAIR CONDON: Would your proposal then be that staff should stop investigating at that point? If someone comes forward and says something happened, you know, I'm willing to cooperate, you know, on whatever basis you demand, should staff continue to do -- continue its own investigation into -- in other

words, whether the respondent has actually disclosed enough to get a sense of what the nature of the alleged wrongdoing actually is?

MR. SORELL: No, because I don't think that's realistic. I don't think that the quid pro quo should be that staff stop investigating, but I do think as a practical matter that staff may allow an independent investigation or an internal investigation to unfold. They may want to know the results of it, we have seen a number of examples of this, and may run their examination in parallel. There has been a number of examples of that. Nortel is one of them.

I'm not saying that they would stop their investigation, I'm saying that they work at a technique with the reporter for -- you know, for how the thing goes forward, especially if the reporter is saying, look, we're gathering some facts. It's probably going to take us three weeks before we have a report, what do you think about that, et cetera, and something would be sorted out. I think that would work.

VICE-CHAIR TURNER: So generally you're saying the standard for credit for cooperation is too high. You would lower that standard?

MR. SORELL: I would lower the standard

and if the standard can't be lowered, I would release it for public comment. When the 15-702 came out, it wasn't released for general comment, it was just published. I don't think it ever got that kind of input.

You have set a very good example with this process where you invited a lot of comments and you got a lot of fundamental comments, and that's partly a reflection of how some of these structures didn't get comments before.

VICE-CHAIR CONDON: Thank you very much, Mr. Sorell.

MR. SORELL: I'll leave a few copies. I'll leave a lot of copies with the secretary.

VICE-CHAIR CONDON: So we're going to take a lunch break. We will resume at 1:15. Thank you.

--- Luncheon recess at 12:12 p.m.

--- On resuming at 1:15 p.m.

VICE-CHAIR CONDON: Good afternoon, please be seated. So we will resume our consultation this afternoon with Mr. Lascaris and Mr. Worndl from Siskinds. Thank you.

PRESENTATION BY A. D. LASCARIS AND D.M. WORNDL:

MR. LASCARIS: Thank you. As you know, Mr. Worndl and I are partners in class actions department for Siskinds LLP. We have a fairly active securities class action practice. We do not act for defendants in those cases, which is as much a philosophical decision as anything. Having said this, however, I stress that we're not here on behalf of any client or organization, whether a client or otherwise.

As counsel to investors in securities class actions, we enthusiastically support the work of the OSC and the Enforcement Staff in furthering the purposes of the Act; investor protection, fostering fair and efficient capital markets, and fostering confidence in our capital markets. And any efforts at making the enforcement of the securities laws more efficient we encourage.

However, as is apparent from our December 2011 comment letter, we do not agree with the no-contest settlement proposal. Our submission is essentially that the initial proposal, even as modified recently by staff notice 15-706 should be rejected or, at a minimum, substantially curtailed.

On the no-contest proposal there are two broad schools of thought, I think, emerging from the comments that you have heard here today and in the

letters to the Commission. Those in favour of the proposal emphasize that enforcement matters could be handled more quickly and efficiently if the no-contest option is available, as it is in the United States. They stress, and understandably so, the limited enforcement resources of the regulator.

Parenthetically, it's our view, although this is more simply said than accomplished, and we recognize that, the most rational and effective means of addressing the problem of limited enforcement resources is to enhance those resources.

Conversely, those opposed to the no-contest proposal, including investor rights organizations such as FAIR, CFA, and the CCGG and the former OSC Director of Enforcement, Mr. Watson, have expressed scepticism that the proposal will, in fact, enhance investor protection and clearly we share that scepticism. In explaining why we propose to proceed as follows.

First, I am going to discuss a study that our firm undertook in November of 2012 regarding Ontario Securities class actions and what we view as their tenuous connection over the relationship to OSC settlements. This study was filed last week with the secretary's office and I'm going to outline the results

of it and then explain what we believe to be their significance in the context of this debate.

I will then discuss more broadly our doubts as to the rationale for the proposal and then Mr. Worndl will address certain aspects of the modified proposal which was just published on June 5th and one or two aspects of Professor Anisman's helpful paper of June 4th, which was solicited by Commission staff, we understand, in support of this proposal.

I'll turn then to the study which we have titled "The Tenuous Connection Between Securities Class Actions and OSC settlements." We undertook this study because, frankly, the principal rationale of the no-contest proposal did not accord with our experience in securities class actions. The major consideration behind the proposal was expressly stated to be the respondents' concern that their admissions would be used against them in class actions.

In support of adopting the no-contest program, the OSC staff noted that, "Despite the interest on the part of respondents to resolve the matter with staff, some settlements cannot be finalized because respondents will not make admissions due to the potential risk to them of making public statements."

And the notice then went on to state

that that concern was, "A primary barrier to achieve resolution of enforcement proceedings."

So given that the fear of civil liability has been stated to be the primary barrier to settlements that include admissions, it seems obvious to us that we ought first to examine whether that fear of civil liability is a rational, well grounded one. Therefore, we look at OSC settlements announced in Ontario Securities class actions commenced between January 1st, 2006, when part 23.1 of the Ontario Securities Act came into effect, and October 31st, 2012, which is the date immediately preceding the completion of our study.

We identified 47 securities class actions commenced in Ontario between those dates. In over 80 percent of those cases there was no enforcement proceeding pending at any time during the pendency of the class action and, most importantly, in only approximately five percent of those class actions was a settlement agreement entered into by OSC staff before the class action was resolved.

Now, I pause to note that Mr. -- neither Mr. Atkinson nor any other presenter today appears to take issue with the accuracy or completeness of these figures.

Now, why are so few respondents confronted by live class action claims after they have entered into settlement agreements with OSC staff? Essentially the reason is this. The mere fact that a respondent has made admissions in a settlement agreement does not render civil claims against that respondent viable. Numerous other circumstances must exist in order for there to be a viable class action against a respondent who has admitted the most egregious conduct conceivable under the securities laws.

First, the respondent must have engaged in conduct which caused a sufficiently large amount of legally cognizable damages to render a claim against that respondent economically viable.

Now, in the case of a prospectus or secondary market case, this means that there must have been a misrepresentation, there must have been a revelation of the truth, that revelation must have been accompanied by a significant drop in the price of the related security and the number of persons or the number of shares or other securities purchased during the period that the misrepresentation was uncorrected must be large.

However, in our experience, most

violations of the securities laws do not result in enough legally cognizable damages to render a class action economically viable. We know this because the vast majority of cases we examine we do not find that there is an economically viable basis upon which to proceed against them. I would estimate that in some 90 percent of the cases we looked at a decision is ultimately made not to pursue the case because of an absence of economic viability.

Secondly, even if class damages are sufficiently large to render a class action economically viable, because potential defendants must have sufficient traceable assets to make the prospects of recovery meaningful, and oftentimes this is simply not the case.

I note Mr. Pascutto's observations that only 6.3 percent of penalties are recovered. This strongly suggests that a great many respondents are essentially judgment proof, and if that were not the case it would be difficult to understand so low a rate of recovery.

Third, even if you have sufficiently large damages and a defendant who is essentially capable of satisfying a judgment, there is no point in starting a case if it's time barred. As you know, the

primary and secondary market liability regimes, those being Section 130 of the Securities Act, part 23.1, those claims are subject to an ultimate limitation period of three years, which runs from the date upon which the document containing misrepresentation was released and any settlements, continued admissions that are entered into beyond those three years are extremely unlikely to give rise to any civil liability under either Section 130 or part 23.1 of the Securities Act.

I want to say a couple of words in particular about insider trading cases. That's a subject that has come up today, and rightly so. Presently in Ontario there is no effective means of pursuing a civil claim for insider trading. In theory, Section 134 of the Securities Act provides a civil remedy for insider trading, but that remedy is, I think, as the panel noted, appears to be limited to the seller or purchaser of the securities traded by the insider and, as we all know, in an anonymous securities market it's, practically speaking, impossible for a victim of insider trading to self identify. You simply can't determine on the basis of publicly available information who is on the other side of that trade.

I'll pause here to note that this is not an insuperable problem. It is possible to construct a

regime that would give people a viable remedy, and this has been done in the United States, where I understand that persons who trade contemporaneously with insiders which has been interpreted by U.S. courts to be on the same vein as insider trading, can share on a pro rata basis any gains that are disgorged from the insider, but that is not the regime that we have here.

The significance of this, of course, is that in an insider trading case there is effectively no prospect of admissions in Ontario giving rise to civil liability. There has been, to our knowledge, one successful insider trading class action in Canada. It was a case that was commenced by our firm with Alberta counsel in Alberta against Chinese National Petroleum Corporation and several of its affiliates, and that case settled for $10 million.

It was based, candidly, in large part on admissions extracted by the Alberta Securities Commission in a settlement agreement entered into before the case was commenced. Now, why was that case viable? Because the class proceedings legislation in Alberta and in a couple of other provinces, but not in Ontario, grants the court jurisdiction to appoint somebody who is not a member of the class as a representative of the class. So ultimately there was

the ability in that case in the event that the person who was proposed as a representative could not establish privity with the defendant, there was the ability of that person to be appointed as a representative of the class. In the absence of such a regime, there is effective immunity for civil liability for insider trading.

In our submission, if there is going to be any no-contest policy adopted by the Commission, there should be a blanket exclusion for insider trading cases. In other words, in those cases there should be no possibility of a settlement agreement that does not contain admissions.

VICE-CHAIR TURNER: But you're saying in any event in Ontario you don't have a viable remedy.

MR. LASCARIS: That's correct, in the insider trading context.

VICE-CHAIR CONDON: But you're also saying that your empirical examination of this issue shows that there is not a great deal of linkage between settlements on the one hand and civil actions on the other. So what is the essence of your objection to no-contest settlements?

MR. LASCARIS: The rationale is simply not supported in any event when we're talking about

insider trading cases or other types of securities cases by the empirical evidence. The rationale is that people have a well grounded fear of civil liability, but in 19 out of 20 cases to date, since part 23.1 was called into force, no admissions were entered into for the resolution of the securities class action.

VICE-CHAIR CONDON: So if the rationale was enhancing the efficiency and the effectiveness of enforcement processes at the OSC, would that be acceptable, from your point of view?

MR. LASCARIS: No, and I'm going to get into the reasons why we say that isn't. They primarily relate to accountability.

I want to be clear about this. We think that -- and there have been a couple of instances certainly, the Chinese National Petroleum case is one of them, where admissions contained in the settlement agreement did greatly facilitate compensation. The importance of those cases is not to be underestimated, but our primary concern with the proposal is its implications for the principle of accountability, about which I think there has been too little said today by those who support the proposal.

VICE-CHAIR TURNER: Can I just go to that point. So in the Alberta case, you're saying

admissions as to facts in the settlement with Alberta, what did you do? Can you just read those in before the court on your civil action?

MR. LASCARIS: I believe you can. It will depend upon the particulars of the particular jurisdiction in which the case is being litigated, but whether or not you're ultimately able to do that, the fact that those admissions have been made is, of course, going to place immense pressure on the defendant to pay a meaningful degree of compensation.

VICE-CHAIR TURNER: Whether they're admitted or not admitted?

MR. LASCARIS: Well, if they're put in evidence, yes, that's correct.

But before I get to the principle of accountability, I want to say a couple of words about some recent developments in the United States where, as you know, there has been a vigorous debate about the topic of no-contest settlements. I have provided to Mr. Stevenson at the end of this morning's session two letters, one from Senator Elizabeth Warren of the United States senate, and a response from the current chairperson of the Securities and Exchange Commission, Mary Jo White.

The letter from Senator Warren was dated

May 14th, 2013. It was addressed to Ms. White and the U.S. Attorney General, Eric Holder, and Ben Bernanke of the Federal Reserve. The response from the chairperson of the SEC came only a few days ago, on June the 10th, 2013.

Senator Warren's letter was a follow-up to a February 14th, 2013, hearing before a senate committee entitled, "Wall Street Reform: Oversight of Financial Stability and Consumer and Investor Protections." And in her letter, Senator Warren tried to establish whether there is any empirical research or data in support of the no-contest settlement policy of the SEC. She had asked previously the Department of the Treasury whether they had any internal research or analysis on the trade-offs to the public between settling an enforcement action without an admission of guilt and going forth with litigation. And the OCC, the Office of the Comptroller of the Currency, responded that they did not, "Have any internal research or analysis on the trade-offs of settling without an admission of liability."

Senator Warren then followed up with the SEC, as I've indicated, and by her letter of June 10th, Senator -- SEC Chairperson White acknowledged that the SEC also has not conducted any such analysis. And

Chairperson White then went on to say that she is actively reviewing the scope of the SEC's policy to determine what, if any, changes may be warranted.

You have heard Ms. Fuerst talk about an absence of empirical research to suggest that certain -- consumers of certain professional services have been injured by a policy that precludes the use of admissions in civil litigation. Well, we would say where is the empirical research to support this important change in the practice of the staff of the Commission?

We say, respectfully, that it should be of considerable concern that the OSC would embark on this program at a time when the U.S. model is under great scrutiny, the U.S. congress and the U.S. regulators and the courts, all of them, are taking a hard look at it and there appears to have been little to no meaningful empirical analysis.

VICE-CHAIR CONDON: Just from a principle point of view, though, is there, in your mind, any basis for distinguishing between the situation of the securities statute from the other various statutes that Ms. Fuerst listed as statutes where admissions are prohibited from being used in other proceedings? Is there a basis for a distinction

as to why this wouldn't happen in securities --

MR. LASCARIS: Again, none immediately comes to mind, but I would suggest to you that the use of no-contest settlements in that context, including the admission of -- admissions into evidence in civil litigation may, in fact, be harming consumers in that context. There is no evidence to suggest that isn't occurring. The fact of the matter is we just don't know.

We're not in a position as a law firm, nor do I suspect -- nor are the investor rights organizations who have offered a view on this issue in a position to offer to this panel meaningful, broad-based empirical analysis. That's something that ought to be done before the Commission embarks on so important a change on its long standing policies.

So with that I would like to conclude with a few words on accountability. In our view, it's not simply about punishment and compensation to those harmed, the principle of accountability, although those are certainly important aspects of accountability. It is also about deterring misconduct and informing the market that the respondent has committed acts that were contrary to the securities laws.

Basically these are the functions that

I'll refer to as deterrents and notice. On the question of deterrence, oftentimes the most significant penalty a respondent can face is the stigma of admissions. Compelling respondents to make such admissions as a condition of settlement can have significant and even severe, where appropriate, reputational consequences for the respondent.

Now, contrary to Ms. Fuerst's submission, it is not our position that there is no stigma attached to a settlement agreement that is devoid of admissions. Our position is that the absence of admission substantially dilutes the stigma attached to a settlement and, therefore, dilutes the deterrence effect of that settlement.

On the question of notice, admissions place the investing public on clear notice that the admitting respondent has engaged in conduct that is violative of the securities laws, and therefore the investing public is making better informed decisions about whether to trust that respondent with their capital or with performing some other important functions such as advisory function in the capital markets.

So the availability of no-contest settlements might well expedite the resolution of

enforcement proceedings, but it will also significantly dilute their value, and what is the point of achieving less investor protection more expeditiously?

VICE-CHAIR CONDON: Mr. Lascaris, just since you raised the issue of empirical evidence, is there any empirical evidence that admissions in Commission proceedings achieve deterrence?

MR. LASCARIS: Not that I'm aware of. There is not a study either way supporting or -- all we can talk about are general principles, and I think at this stage we're left with appeals to common sense.

Again I go back to a fundamental proposition. It may make sense at the end of the day for such a change to be adopted, but in order for that to be done there should be a thorough empirical analysis.

Now, one other thing I want to say about this policy, moving beyond the topic of accountability, although it's related to the question of accountability, is that the no admit, no deny settlement is likely to be very difficult to police.

When suddenly parties, for example, next go to the markets to raise capital they can easily say or imply a nonpublic communication with market participants that they entered into the settlement

merely to avoid the cost and distraction of an enforcement proceeding. Even if there isn't a direct assertion to that effect by the settling respondent, that is certainly an impression that the public may mistakenly form.

And not having such a policy in place would relieve the staff of the Commission from the burden of having to police after the fact no-contest settlements. So there is some efficiency to be gained in that regard.

COMMISSIONER ROBERTSON: Can I just -- I'm not sure if you're going to move on, but on your points on accountability, do you make any difference or distinction, as was made earlier, the distinction between the setting out of facts and agreement or at least not disputing the facts versus the admission of a transgression of the rules?

MR. LASCARIS: I'll tell you anecdotally about experiences I have had as counsel to plaintiffs in securities litigation. We have had occasion to point out that some government, some regulatory authority, not necessarily in the Securities Commission, had made allegations, detailed, credible allegations against a defendant in a class action and a typical response is, those are just allegations and

they carry no weight and they should not influence in any way, shape or form the court's thinking about the merits of the case. I have heard that argument repeatedly. And in the absence of admissions, an actual admission that whatever statements of fact put forward by Commission staff are, in fact, correct, I suggest to you that that statement of facts would have little, if any utility to the investing public, whether in civil litigation or otherwise. So in our view --

VICE-CHAIR TURNER: I think, though, the question was going to whether, if you get an admission as to facts, whether it makes any difference if you go on and admit contravention of a provision of the Securities Act.

MR. LASCARIS: I think it would make a difference, but if there's going to be any constraint put upon or any ability provided to staff to enter into settlements that don't have admissions, at a minimum there should be admissions as to facts.

VICE-CHAIR TURNER: But that probably gets you where you want to be, doesn't it?

MR. LASCARIS: Frankly, it would get us a long way to where we want to be. The fact that there are -- the legal implications of what is admitted factually we can all judge for ourselves, courts can

judge for themselves. The key aspects of a settlement agreement that contain admissions is what are the facts upon which a settlement agreement is based.

So to sum up my part of the submissions, the evidence to support the proposal is, in our respectful submission, lacking and there are significant grounds to believe that no-contest settlements will diminish, not advance, the benefits to the investing public of enforcement proceedings.

On that note I would like to turn the microphone over to Mr. Worndl.

MR. WORNDL: Good afternoon. Thank you for having us. I will address very briefly certain aspects of the clarification contained in the staff notice 15-706, which was released about a week or week and a half ago, and I will also have a couple of comments about Mr. Anisman's paper, which was a very, very helpful paper, I thought.

Regarding 15-706, in our view this clarification does not really address any of the issues raised by us or others on the side of investors, while it does address in a fairly significant way some of the specific concerns of the respondents.

First and perhaps most obviously, the previous pre-condition that there could be no

enforcement history in order for a respondent to be eligible for a no-contest settlement, that was simply eliminated in this last iteration of the agreement.

In staff's words in 15-706, they have removed the requirement, "In order to address the concerns raised by some commentators," and that's troubling from our point of view and, I would suggest, from the point of view of the investor community.

Whereas the initial proposal was represented as a fairly conservative, limited and careful foray into the world of no-contest settlements with a very significant limitation on who would be eligible, now it appears that those who have, for lack of a better term, a regulatory rap sheet, who have done things wrong in the past are now able to benefit from this no-contest proposal, and we think that that is troubling.

And not to belabour the criminal law regulatory analogy, Mr. Douglas in his submission this morning referred to the report of G. Arthur Martin as informing staff's obligations with regard to pleading. He said that everyone knows that the pleading standards set out in the Martin Committee Report applies equally to staff's actions as it does to the Crown.

Well, the Martin report also addressed

the issue of no-contest or nolo contendre settlements and the Martin report clearly rejected them for issues of public policy. I know by your invitation for us to appear, you ask that we simply elaborate upon that which we've already submitted and not simply repeat it. I would refer you to page seven of our submission from December where we talk about the Arthur Martin report and the rejection of the use of no-contest settlements in the criminal context.

A second feature of the proposal which appears to be somewhat watered down is that regarding self reporting. In the initial 15-704, a respondent self reporting appeared quite prominently in terms of the credit for cooperation which was said to underlie the availability of the no-contest settlement. Under the release 15-706 it now suggests a much looser process for an assessment as to eligibility, including the extent to which the respondents provided prompt, detailed and candid cooperation.

It seems to us that this doesn't make self reporting a precondition, but instead allows the respondent to get caught and then cooperate and then have the benefit of this new proposal.

Respondent self-reporting, if at all, is now just one factor to be considered, whereas at least

one reading the initial proposal, I would suggest, would be left with the impression that self-reporting is a condition in order to be able to benefit from this.

A third aspect of the proposal which is somewhat concerning is the requirement that -- or the exclusion that no-contest settlements would be available to those, and then I'm quoting, "To a proposed respondent where the person has engaged in egregious, fraudulent or criminal conduct or where the person's misconduct has resulted in investor harm which remains unaddressed."

Now, the "remains unaddressed" wording was the subject of discussion this morning and it seems to us that addressing investor harm might mean all manner of things. It could mean full compensation, partial compensation or no exemption. All are examples of addressing investor harm.

It seems to us that anything approaching full or even substantial compensation for investors could not be what staff had contemplated, and I think that in response to questions from Commissioner Robertson this morning, Mr. Atkinson acknowledged that addressing investor harm was more prospective in nature, rather than compensation, per se, to those who

have been harmed. I believe his answers were to the effect that it was addressed more at putting together prospective, prophylactic measures to avoid future investor harm.

A final aspect of the proposal which I would like to comment on very briefly is the requirement that it -- the limiting criterion that the person has engaged in egregious fraudulent or criminal conduct. In our view, this criteria is overly subjective.

Among the most significant conduct threatening investors and the integrity of our capital markets is the conduct of gatekeepers who are not doing their job. Would an audit of an annual financial statement which is not GAAS compliant be considered egregious, fraudulent or criminal?

What about members of a board of directors who are asleep at the switch and who have failed to discharge their continuous disclosure obligations? How about underwriters who do a bare minimum by way of due diligence before signing off on a IPO prospectus. The harmed investors would all view this kind of conduct as definitely egregious.

Enforcement Staff may be persuaded that this is really not the sort of thing which would

preclude a no-contest settlement, yet based on our experience, this sort of conduct, which may not be overtly fraudulent or criminal or even reckless, this sort of conduct which is -- can cause the most devastation to investors and present the greatest threat to the integrity of our capital markets.

From where we sit, it would appear that the proposal as modified essentially gives the Commission the same ability to enter into no-contest settlements as the SEC, and as Mr. Lascaris pointed out earlier, the SEC's practice is the subject of great scrutiny and, indeed, criticism at the moment.

In the limited time I have available, I would like to very briefly address two aspects of Mr. Anisman's paper that was solicited by Commission staff and released about a week or so ago. The first is more technical and the second is more broadly related to the public interest.

First, Mr. Anisman points to two examples of no-contest settlements, and I believe Mr. Douglas referred to them in his submissions this morning, the Price Waterhouse settlement and the Seakist settlement. I would hope that these two settlements are not being cited as precedents in support of the no-contest initiative, as they really

prove the point that such settlements enable wrongdoers to avoid accountability.

Very briefly, the Price Waterhouse settlement of April 6th, 1990, was a settlement wherein Price was -- the allegation against Price was that they failed to conduct an audit in accordance with generally accepted auditing standards. In the settlement agreement staff set out its position and stated also that the facts were accurate and based on the investigation and that the conclusions were reasonable and supported by the evidence and then the settlement agreement provided that Price Waterhouse neither admits nor denies the accuracy of the facts or allegations or conclusions of staff.

If you stop right there, I think that's what most people would think a no-contest settlement is. But what the settlement agreement provided, and we filed a copy with the secretary as well of the Seakist settlement, but what happens next is Price is able to state its position, and its position is that it was the victim of fraud in the conduct of their audit.

So even though they neither admitted nor denied the essential allegation against them that they conducted an audit that was not in accordance with GAAS, the settlement agreement provided that they had a

complete defence to those allegations by saying they were a victim of fraud in the course of their audit.

Now, the Seakist settlement, and again we filed a copy of this, in my respectful submission, it's even worse. Nowhere in that settlement could it be described as a no admit, no deny settlement. That was an insider trading case and, indeed, the settlement agreement sets out staffs' allegations detailing the nature and extent of insider trading and then the respondents were permitted to state their position that the required elements of insider trading were not present. They said that the trades were not based on material undisclosed information.

It's true, as Mr. Anisman stated in his paper, that Price Waterhouse and Seakist are examples of the Commission approving settlements where respondents were not required to make any admissions; however, they were not required to make and admission, however, they were not no admit, no deny settlements, not by a long shot. Most charitably, they could be described as we agree to disagree settlements and then sanctions followed.

Mr. Douglas in his submission said, well, you know, the Commission was quite comfortable approving these kinds of settlements in the past, why

shouldn't they be allowed to do so in the future? I would suggest that those settlements were -- ought not to have been approved in the form that they existed at that time.

There was no basis, factual or evidentiary, upon which the Commission was in a position to determine that those settlements were in the public interest because the settlements represented no more than a recitation of pleaded positions of both sides. There was no no deny, it was simply no admit and denied.

Now, I would like to wrap things up, if I could, with a broader question of public policy and that arises out of Mr. Anisman's assessment of the Commission's public interest jurisdiction as it relates to the no-contest proposal. We agree with Mr. Anisman that the determination as to whether no-contest settlements should be permitted is really a matter of what is in the public interest. We also agree that an assessment of what is in the public interest is multi-faceted. Assisting investors seeking compensation is just one factor to be considered, and it's not determinative by any means.

Where we disagree with Mr. Anisman is in the emphasis that he places on only one aspect of the

public interest assessment, namely, the principle to consider as described in Section 2.13 of the Act that there should be timely, open and efficient administration and enforcement of the Act.

In our view, this principle to consider is given far too much weight and appears to be relied upon as an over-arching justification for the no-contest proposal.

As we understand it, the argument goes as follows: The OSC is required to be timely, open and efficient. The current system is taking too long and is costing too much. Therefore, if we introduce no-contest settlements, we will speed things up and we will be a whole lot more efficient in clearing our docket and we will be able to deploy resources elsewhere, and Section 2.13 of the Act allows us to do so.

In our view, timeliness and efficiency are, indeed, very important considerations. However, as Mr. Lascaris pointed out, this problem of timeliness should really be addressed as a resourcing problem, not as a problem involving significant lack of accountability.

In focusing on no-contest settlements as a solution to the timeliness problem, in our view, Mr.

Anisman really gives short shrift to more important considerations; namely accountability and the rule of law. His paper provides a very helpful analysis of the differences between the Canadian and American settlement process, and those differences indeed may minimize the applicability of the Citigroup case, whenever it's decided by the U.S. Court of Appeals. However, the concern about the lack of accountability expressed by Judge Rakoff and other judges in the United States, and, indeed, in widespread commentary, is really the same there as it is here.

In our view, the Ontario Securities Commission should be no less concerned about accountability and the no-contest proposal, in our view, is really a significant step backward.

The economies of the United States and Canada have been pushed to the brink by malfeasance on the part of capital market participants. We have all paid and continue to pay a terrible price for this, yet there has been a startling lack of accountability on the part of those responsible.

One well known U.S. documentary called responsible actors on Wall Street "The Untouchables", because they have acted with impunity without any accountability. You know, we deal with investors every

day, whether they're institutional investors like union sponsored pension funds, sophisticated private investors trading on their own account, or, increasingly, retired people who are looking -- who are relying on their investments in order to enjoy a dignified life in their senior years.

A common and consistent refrain that we hear from these investors, particularly those who have suffered losses, is how can these people get away with this. Why are they not being held to account?

VICE-CHAIR CONDON: Mr. Worndl, can I ask you how you translate this concern about accountability or lack of it into the statutory mandate of the Securities Commission? I mean, there really isn't a reference to accountability one way or another in terms of the mandate. And so, from your point of view, how do you draw a line between that concern and the objectives that the Commission needs to pay its closest attention to?

MR. WORNDL: In our respectful submission, the Commission needs to pay attention first and foremost to the statutory purposes of the Act. Investor protection, the integrity of capital markets, and most importantly, in our submission, confidence in those capital markets.

There is a perception that these bad actors are able to get away with things and that perception -- and the perception is that this certain strata of capital market participants not only have been able to get away with wrongdoing, but they will continue to be able to get away with the wrongdoing, and confidence in capital markets requires that this perception be addressed, in my respectful submission.

As stated, in addition to investor protection, the fundamental purposes of the Act are to foster confidence in our capital markets. The introduction of no-contest settlements, in our view, will not only be bad for investors, it will diminish confidence in our capital markets and fuel investor cynicism.

In our respectful submission, the proposal should be rejected by the Commission. Subject to any further questions that you may have, those are our submissions.

VICE-CHAIR CONDON: Thank you. Thank you very much. So I think we now come to our final presenter, Ms. McManus, from Compliance Support Services.

PRESENTATION BY S. A. McMANUS:

MS. McMANUS: Good afternoon, members of

the panel. I would like to start out just by divulging a secret, which is that I love Facebook and I love Facebook largely because I can keep in touch with people that I wouldn't otherwise keep in touch with, but also because people have more time, spend a lot of time looking for quotes and funny little things that inspire, and one of those things came across my page recently and I thought it was applicable today.

It says, "I have reached that age where my brain went from you probably shouldn't say that to, oh, what the hell, let's see what happens."

VICE-CHAIR CONDON: I can only wait in suspense.

MS. McMANUS: So you can imagine that my remarks are going to be a fair bit more radical than anybody you have heard today, but I think they deserve to be heard because I come from a particular sector of the market that you are charged with regulating. So here we go.

First of all, I wanted to tell you a little bit about my background, because I think it's relevant to give context to what I'm about to say. I am a latecomer to the securities industry. I started in 1998 as an enforcement counsel with the IDA and I then went on to become the first director of

enforcement with the MFDA. So I do have a very clear understanding and an affinity for proper regulation.

However, since 2003 I have been working for the industry in some capacity or other, most particularly as -- in the last seven or eight years with my firm providing services to intermediaries; so investment dealers, mutual fund dealers, investment fund managers, portfolio managers, exempt market dealers. Those are largely my client base, and occasionally the individual registrant.

Needless to say, they are very profoundly touched by what you propose in here. And what I also bring to the table, I think, is a fairly national perspective, because I am a member of the bar in Ontario and in Alberta and I have worked across the country in my regulatory capacity and do still in my current capacity. So I think I can speak with a fair bit of persuasion on the issue of how this will touch my client base, the sector that you are responsible for regulating.

One last comment I'll make is that I will be leaning rather heavily on the work of Mr. Malcolm K. Sparrow, who is a Harvard professor, and who wrote a book called "The Regulatory Craft," which is a treatise on alternatives to heavy enforcement and

regulation. And to sum it up in a line, he is a proponent of the adage, "Look after big stuff and let the rest alone."

I very much believe that and my experience has taught me that that is a direction in which I think this system needs to go. I'll start, then, I propose to talk about the mechanics of the approach that were proposed in the enforcement initiatives, the bigger picture of policy drivers behind the proposals, past and present, and the impact in real terms that the current approach is having on market intermediaries and, finally, where I would like to -- you know, the perfect world with which I see enforcement go, enforcement and regulation.

As I pointed out in my comment letter, I think it is an absolute breath of fresh air that, A, we have received this proposal and, B, that we are even holding these hearings. This, to me, represents an unprecedented move on the part of the Ontario Securities Commission to truly understand and reach out and see what's going on in the industry, because I can tell you that from the people I represent, they are heartened to see what's come out of this proposal and to know that you are taking the time to speak with us and to hear us speak.

The only two -- as my comment letter says, the only two qualms I have with the proposal is the first statement that requires that the timing of the self reporting, this is in the non-enforcement agreement context, that the timing of the self reporting is critical. So that a second or third or fourth individual who comes after the first may not have access to the non-enforcement agreement.

I have some difficulty with that because it seems -- apart from the fact that obviously it's driven by a desire to have people come quicker to self-report, the actual sort of -- the good faith and the strength with which a registrant comes and reports himself or herself ought not to be diminished just because they're second or third in line. That ought to be rewarded as well and it has the same underlying effect that I think your other proposals have, which is to improve the efficiency of the system.

And the second is that the -- I think it had to do, again, with the no-contest. In any event, the bottom line was that it was troubling to me that it would only be available in very limited circumstances, as in the case of very complex issues. To me, this initiative, this possibility ought to be broadened, not limited. This ought to be made available to more

participants rather than fewer.

There appears to me to be no reason to limit it in the manner that it was suggested there and, in fact, I think that the diminimous cases, the cases of no investor harm, of technical violations, of no losses, of self remediation and self-reporting, those are the cases that are perfect for this type of initiative and if it's limited and then cuts out those, to me that just -- that would not maximize the benefit of this proposal.

VICE-CHAIR CONDON: Ms. McManus, I don't know if you're going to come on to this, but your letter does indicate a number of factors, you've got eleven of them listed here, that you think should be used as screening criteria with respect to the use of the no enforcement action process.

I wonder if you could -- you know, they really do cover the waterfront in terms of a number of different concepts being involved. Do you have any way -- are these prioritized in the order in which they're listed?

You refer to whether there's a general public protection issue involved, specific investor harm, but then you say does the matter raise an issue that needs to be made public for general deterrence

purposes.

One of the things that we have been hearing throughout the day and earlier is a little bit of a discussion of the relative importance of investor compensation on the one hand and general deterrence on the other. Do you have a view as to which of these should have priority in terms of the use of these flexible methods for enforcement staff?

MS. McMANUS: I haven't weighed those particular criteria, but I do know that in my experience as the Director of Enforcement, what we did was create a matrix at the complaints intake stage that weighted the various factors to decide which channel the matter would go down. How much weight was given to a particular item was a matter of discussion obviously and had to be agreed upon as a matter of policy, but for me, and in my experience, the number one should be was there any investor harm, because if there -- and secondly, was there am ill intent.

If you take those two markets out of the equation, you're left with a technical violation. A technical violation that can be very serious or a technical violation that be diminimous. Once you have gone through that analysis, you can channel it away, send it down one path, save a lot of time and money.

VICE-CHAIR CONDON: Just to make sure I'm clear, where there is no or limited investor harm, limited ill intent, as you put it, those would be the cases in which you would support the use of no enforcement action?

MS. McMANUS: Yes.

VICE-CHAIR CONDON: Thank you.

MS. McMANUS: So in the second instance, the chairman, Mr. Weston, was speaking recently at the Exempt Market Dealers Association on the initiatives of the OSC in the exempt markets with the restrictions to investing there and on the future plans of the OSC.

He quite rightly set out that the goals of the OSC are to deliver responsive regulation, deliver effective enforcement of compliance, deliver strong investor protection, run a modern, accountable and efficient organization and support and promote financial stability.

And that's -- in my view, there is absolutely nothing would wrong with any of those statements. That's exactly what I think you will find members of the industry would actually support as well, and it's in line with the SEC. I have no quarrel with these.

My point today is questioning how these

will be achieved. How resources are allocated, how staff is empowered to accomplish the goals. Because I think as I go along here you're going to discover that there are real disconnects between what the goals are and what's being achieved.

There is no doubt that there have been high profile instances of investor harm. We all feel badly for that, it doesn't help the industry, it doesn't help the investors. We all would like to find a better solution for those investors. But my question is is the answer to wring the life out of the intermediaries, because they are, effectively, the most highly regulated in the continuum of the investment process.

You've got investors, you've got intermediaries, you've got issuers and you've got a regulator. The accountability for the investment process is not equally apportioned among these four stakeholders. The accountability is almost entirely on -- not almost entirely, but much too heavily on the intermediaries who are under the registration reform, now subject to vast, complex and ever increasing burdens of regulation.

It is virtually -- I can assure you, virtually impossible to be one hundred percent

compliant all the time. It is. The best that they can hope for is to get -- is to practise sound risk management and to achieve for almost -- good, you know.

And what's happened in the last, I would say, twenty years or so is the pendulum has swung so dramatically over to investor protection, leaving the intermediaries as the most regulated in that continuum that they are being regulated out of business. I am not making that up, I am not being dramatic, that is the truth.

In 2002 when the MFDA went into business fully regulating mutual fund dealers, there were 220 members. The 2012 annual report showed 121 members. That's not the OSC, I recognize, but I can assure you that the tone of regulation from every regulator, whether SRO or CSA, is more or less the same. Heavy, heavy, heavy investor protection, little regard for understanding of the daily business and requirements of the intermediaries, and not enough attention paid to the other three phases of the stakeholder spectrum.

So what I'd like to do is just give you one or two examples of how this actually affects people, because I think it's important for you to know that. I represented an individual who was the subject of an investigation through a regulator and it settled.

Did not do anything wrong that he knew of, had not -- there had been no client complaints in respect of his service, but he was investigated, nonetheless, for four years. Four years. The regulator went back and back and back and asked and asked and asked armed only with an investor protection mandate and probably not a great understanding of how this fellow did his business. It was different and so it gave them pause, so they investigated.

Finding nothing, they finally figured they found something that they could charge him with, they did. He felt he had done nothing wrong, so represented himself. Went to a hearing and you can imagine the outcome. There was only one legal argument and his naive sort of I didn't do anything wrong argument.

The regulator was unable to produce any precedents for the panel because there were no precedents because what he would done was not a violation. I and my team came in at the penalty stage to review what was done and found that there had been no violation, but now this individual was left with either appeal it, take five year and $100,000, or go to penalty and try to reduce the penalty and drive on, which is what we did.

But the man was so discouraged by this experience that he surrendered his license, and this is not uncommon. This is the effect of overweighting of investor protection and not enough elevation of the role and the importance of the intermediary in the grand scheme of things.

They have to be regulated, yes, the investors have to be protected, yes, but judiciously, fairly and creatively, and this initiative is a very strong step in that direction.

I have other ideas, pie in the sky that I will just will throw out there, what the heck. One -- in a perfect world, I would like to see that, A, as I say, investors be allowed to make their own decisions. If they are not equipped to make their own decisions, then let's, as regulators, focus on educating them. Let's shoot to make Ontario investors the most savvy and educated investors in the world. Let them talk about investment at the kitchen table, let them learn it in schools, let's really get it out there.

Two, understand better what intermediaries do and how they work and how they can't cope with the increasing burden of regulation. Every time there is a First Leaside or a Citigroup or

whatever, a new regulation comes out and the larger compliant and honest players are left to shoulder that burden. The other fallout is the tone of regulation changes. The tone of the administrative side becomes more punitive, more enforcement-like.

So I really am, as I say, on behalf of my clients and on behalf of myself encouraged by this process, by this initiative, and I sincerely hope that going forward we are going to see more of the same and more policy in that direction.

VICE-CHAIR CONDON: Thank you, Ms. McManus. Questions?

VICE-CHAIR TURNER: I have no questions.

VICE-CHAIR CONDON: Thank you for your comments. Now over to Vice-Chair Turner.

CLOSING REMARKS, VICE-CHAIR TURNER:

VICE-CHAIR TURNER: I might have preferred to do the opening remarks rather than the closing remarks.

VICE-CHAIR CONDON: Too late now.

VICE-CHAIR TURNER: But I wanted to just touch on a few things. So what this panel is going to do is take these issues back to the Commission for a full discussion of the issues, probably without a recommendation by us.

Certainly appreciate all the submissions we have received today. Clearly looking at these enforcement initiatives raised important issues. I certainly can say that from the Commission's perspective, I mean investor protection is one of our clear mandates and one of the things that the Commission will consider very carefully is what effect any of these proposals have on investors.

So I think that's all I will say today. It doesn't seem to me that positions are diametrically opposed. I mean, there is some commonality of agreement. For instance, I think there sounded like there was close to some agreement on recognizing that compensation of investors should at least be an important consideration when one is entering into a settlement, but we as a panel will discuss the issues that have been drawn to our attention today, take them back to the Commission and the Commission will consider the staff proposals and ultimately we will disclose publicly what our conclusions will be in the circumstances. Thank you very much for attending.

--- Whereupon the proceedings adjourned at 2:18 p.m.

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