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Ontario Securities Commission
20 Queen Street West
P.O. Box 55, 19th Floor
Toronto, Ontario
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Attention: Mr. John Stevenson
Secretary to the Commission

Dear Mr. Stevenson,

Re: Comments on Proposed Guidelines for Executive Director's Settlements

This letter responds to the Notice and Request for Comments on the Commission's proposed policy entitled "Guidelines for the Approval by the Executive Director of Settlements of Enforcement Matters" that was published on March 21, 2008; (2008) 31 OSCB 3311-15 (March 21)(the "Proposed Policy").

The Proposed Policy recognizes that the Executive Director has a discretion to determine to initiate an investigation, to control its conduct and to determine whether to commence proceedings under the *Securities Act* (Ontario) (the "Act") and, concomitantly, that she has a discretion to resolve matters that may become the subject of a formal proceeding under the Act by entering a settlement agreement. It attempts to define the circumstances in which the Executive Director may settle such proceedings without approval by a panel of commissioners ("Director's Settlements") and to confine and structure the exercise of this discretion. It would permit the Executive Director to enter a Director's Settlement only prior to the commencement of formal proceedings, would confine such settlements to relatively insignificant matters not involving "egregious" conduct and it identifies factors that the Executive Director should consider before approving a Director's Settlement.

The Proposed Policy deserves commendation for several reasons. It reflects a formal recognition by the Commission of the utility and desirability of Director's Settlements; it announces the Commission's intention to supervise the conduct of its enforcement staff in entering such settlements; and it follows the procedure mandated by section 143.8 of the Act for the adoption of policies, the observation of which appears to have been overlooked in the past with respect to enforcement policies. The latter is particularly desirable in that it provides an opportunity for the Commission to test a proposed policy and for interested persons to respond in an open manner before its adoption.

This comment letter focuses on the three major elements of the Proposed Policy, namely, the limited circumstances in which a Director's Settlement would be permitted, the nature of the matters that can be resolved by a Director's Settlement and the factors that are relevant to a determination by the Executive Director to approve a Director's Settlement. In addition, it addresses the procedures contemplated in the Proposed Policy and the ongoing supervision of Director's Settlements by the Commission.

Availability of Director's Settlements

The Proposed Policy would limit Director's Settlements to matters concerning which formal proceeding have not been initiated. It states that the Executive Director's discretionary authority to approve a Director's Settlement is consistent with the discretion that the Executive Director has "prior to the commencement of a formal proceeding, to decide such matters as (i) whether particular circumstances will be investigated, (ii) whether an investigation will be closed and on what terms, and (iii) whether a formal proceeding will be commenced." But this discretionary power does not explain the limitation of Director's Settlements in the Proposed Policy. The Executive Director's discretion to conduct and close investigations continues after formal proceedings have been commenced. The Executive Director may continue to determine which circumstances will be pursued in the course of an investigation and whether the investigation will be expanded or closed and on what terms. In addition, the Executive Director may determine whether a formal proceeding will be withdrawn. None of these determinations requires the Commission's approval under the Act or under current practice.

There is no reason in principle or policy that should preclude a Director's Settlement after the initiation of formal enforcement proceedings. Director's Settlements are desirable not only to encourage the resolution of enforcement matters at an early stage prior to the initiation of formal proceedings, as stated in the Proposed Policy, but because they provide a flexible means of dealing with persons whose conduct is not egregious and does not require a hearing before a Commission panel to protect investors or the integrity of Ontario's securities market. As Director's Settlements are less formal than those that require approval by a panel of commissioners, they provide a mechanism to achieve fair results where the conduct being investigated is not sufficiently serious to require an order to be made under section 127 of Act. They thus extend the Commission's panoply of agreed sanctions and enhance its ability to resolve less serious enforcement matters appropriately.

This may be the case both before and after formal proceedings have been commenced. Prior to the commencement of formal proceedings, the Commission's enforcement staff is not subject to the disclosure obligations that come into play under the Commission's Rules of Practice when formal proceedings are initiated. As a result, a person being investigated usually will not have an opportunity to address all of the information obtained by enforcement staff in the course of its investigation before a proceeding is brought. Once a proceeding has been commenced and the respondent has received disclosure materials, he will have an opportunity to explain information on the basis of which enforcement staff have initiated the proceeding. It may then become clear to enforcement staff that the conduct in question was less egregious than had been thought when the proceeding was commenced. In such circumstances, enforcement

staff may conclude that the proceeding should be withdrawn or that an order under section 127 is not warranted and that a Director's Settlement would be appropriate.

The Executive Director should be permitted to approve a Director's Settlement in circumstances like this. Indeed, precluding a Director's Settlement once a formal proceeding has been brought, as the Proposed Policy would do, is likely to increase the existing pressure on the subject of an investigation to enter a Director's Settlement in order to reduce the damage to reputation that invariably results from the notice of hearing and statement of allegations that accompany commencement of a formal proceeding. In short, the Commission should permit the Executive Director to approve a Director's Settlement at any time the Executive Director concludes, on the merits of the matter, that it is in the public interest to do so.

Such determinations should not be based on the status of a proceeding. They should be made on the basis of the type of sanction that the conduct in question warrants in the view of enforcement staff and the Executive Director. Approval by a panel of commissioners should be mandatory only when the sanction that the Executive Director considers appropriate in the public interest must be imposed by the Commission in an order made under section 127 of the Act. For example, if the sanctions agreed to in a settlement agreement include a cease trade order, a denial of exemptions, a prohibition against acting as a director or officer of an issuer or an administrative fine, a Director's Settlement would not be available, as only the Commission has authority to impose such sanctions under Act. In circumstances where the public interest does not require such a sanction, there is, and should be, nothing to preclude a Director's Settlement if the Executive Director concludes that such a settlement would be in the public interest.

The considerations that are relevant to this determination are pragmatic, based on the circumstances of the matter in light of factors like those outlined in the Proposed Policy as relevant to approval by the Executive Director of a permissible Director's Settlement. Extending the availability of Director's Settlements beyond the commencement of a proceeding will make available all of the benefits identified in the Proposed Policy both before and after a proceeding has been commenced and will enhance the fairness of the process by allowing less onerous settlements in any circumstances in which they satisfy the public interest on the facts of the case. In short, permitting such settlements would benefit both the Commission and respondents, as it would permit settlements to protect market integrity and investors in a more flexible, efficient and fair manner.

Factors Relevant to a Director's Settlement

The Proposed Policy distinguishes between the "nature of matters that can be resolved" by a Director's Settlement, which it treats as quasi-judicial, and factors that are to be considered by the Executive Director when determining whether to approve a Director's Settlement. Nevertheless, there is substantial overlap between the criteria to be applied to these two categories under the Proposed Policy, and in application they are likely to be largely indistinguishable.

The Proposed Policy states that the Executive Director should not approve a settlement where, in her opinion, (1) the matter raises an important or novel policy issue or could be viewed

as a significant shift in policy or a significant precedent, (2) the alleged conduct is egregious, or (3) the settlement imposes significant terms or obligations. The first limitation based on the policy implications of a settlement should not be a factor in determining whether a Director's Settlement is available. Settlement agreements should not be used as vehicles to declare new policy or a significant change in existing policy. Settlements do not create precedents that establish policy. They are, and should be treated as, a means of resolving a specific case on its facts and nothing more. While settlements may provide an accumulation of experience which may lead the Commission to reconsider existing policy issues or address new ones, they do not individually involve a full consideration by the Commission of policy implications or even of all the facts relating to the matter, but only of the facts agreed to by enforcement staff and the other party. The potential policy implications of a settlement resolution, therefore, should not be a factor limiting the availability of a Director's Settlement. Rather, policy implications should be considered only as a factor in determining whether a specific settlement should be approved by the Executive Director, along with the other factors outlined in the Proposed Policy with respect to the seriousness of the conduct under consideration, the nature of the sanctions that flow from it and the effectiveness of the settlement in achieving the Act's objectives.

The factors identified in the Proposed Policy with respect to approval of a settlement by the Executive Director relate to the three types of "jurisdictional" considerations. They emphasize the individual's past conduct (compliance with securities laws and prior enforcement actions), the nature and seriousness of the misconduct in question, including the person's intention, the harm to investors and others, the person's cooperation, and the appropriateness and effectiveness of the settlement, presumably including the sanctions, in achieving the Act's regulatory and policy objectives. These are central to the second and third categories that the Proposed Policy states are inappropriate for Director's Settlements. All of them are relevant to and considered by enforcement staff when determining the sanctions that are necessary for a settlement agreement to be reached. As suggested above, the manner in which they are addressed, and reflected in the proposed sanctions, should determine whether a settlement should be approved by the Executive Director or whether it requires approval of a Commission panel.

This approach, if accepted, may result in a limitation on the sanctions available in a Director's Settlement that the Proposed Policy would permit. The Proposed Policy would permit a Director's Settlement to require a voluntary payment to be made for the benefit of third parties for subsequent allocation by the Commission in its discretion. The Act contemplates, however, that such payments must be made either under a section 127 order that imposes an administrative fine or disgorgement or "to settle enforcement proceedings commenced by the Commission" (Act, s. 3.4). Consideration should be given to whether settlements requiring such payments should have to be approved by a Commission panel.

This is not the case with respect to the payment of costs or a payment for the benefit of specific persons who have been harmed by a respondent's conduct. In fact, a respondent's willingness to compensate persons who have been harmed by his conduct may be a factor militating against a severe sanction that only the Commission has authority to impose.

Procedural Issues

1. Consultation with the Chair or a Commissioner

The Proposed Policy would allow the Executive Director to consult with or seek the advice of the Chair of the Commission in connection with her consideration of a proposed settlement. It also contemplates obtaining advice from another commissioner but only concerning the availability of a Director's Settlement under the Proposed Policy's guidelines relating to the "nature of matters that can be resolved", that is, whether the Executive Director has jurisdiction (the Proposed Policy says "is entitled") to approve the settlement under the terms of the Proposed Policy. The Proposed Policy does not explain the reasons for this distinction.

The limitation on consultation with a commissioner other than the Chair appears arbitrary in view of the substantial identity between the factors that the Executive Director should consider when determining whether to approve a Director's Settlement and those that are included, in more general terms, as going to the nature of the matters that can be resolved under the Proposed Policy. As the Chair does not sit as a panel member in adjudicative proceedings, consultation with him may be acceptable. But broader consultation runs the risk of involving members of the Commission in the settlement negotiation process in an informal manner. Even though a commissioner who is consulted will not be entitled to participate in any subsequent adjudicative proceeding relating to the same matter, including approval of the settlement, in view of the fact that the criteria necessarily involve the merits of the matter, it is questionable whether such consultation should be permitted to occur on an *ex parte* basis.

2. Approval Procedure

The Proposed Policy would establish a procedure for seeking the Executive Director's approval for a Director's Settlement. It contemplates that a memorandum will be provided to the Executive Director by enforcement staff, or jointly by enforcement staff and the settling parties, explaining why they recommend approval of the settlement. A memorandum from both enforcement staff and settling parties is desirable in view of the fact that the settlement agreement invariably results from a joint effort involving negotiations between them. In view of this fact, the settling party, or its counsel, may have a perspective on the settlement agreement that is not shared by enforcement staff, but that would be helpful to the Executive Director in determining whether to approve the settlement. The Proposed Policy, therefore, should give the settling party an opportunity to review and comment on a staff memorandum which is not prepared jointly before it is sent to the Executive Director. While this procedure need not be made mandatory, it should be expressly encouraged in the Proposed Policy.

3. Publication of Director's Settlements

The Proposed Policy requires publication of all Director's Settlements in the OSC Bulletin. It also authorizes the Executive Director to issue a public statement with respect to a settlement if she "deems it advisable to do so in the public interest." The requirement that every Director's Settlement must be published is clearly beneficial. Not only will publication "enhance transparency" and thus impose some discipline on Director's Settlements, it will also

give persons who are subject to investigation an opportunity to review the manner in which other persons in similar situations have been treated. It is a minimum requirement for fairness and accountability.

The reason for authorizing the Executive Director to issue public statements with respect to settlements is less clear and the Proposed Policy does not explain the purpose of such statements. As the publication of Director's Settlements will, following current Commission practice, be announced in a release by the Commission Secretary, it might be inferred that a public statement by the Executive Director is intended to provide her reasons for approving the settlement, where she thinks it desirable. As settlements should not be used as a basis for announcing new policies or policy changes, such statements should be treated with caution, in part for the reasons outlined above with respect to the function of settlements and also because a change in policy is a matter for the Commission. The Proposed Policy should, therefore, discourage such statements by the Executive Director and, if they are to be issued, should confine them to the Executive Director's reasons for approving a settlement on a factual basis.

4. Staff Accountability

The Proposed Policy obligates the Executive Director to prepare a written report to the Commission describing settlements approved by her on at least a quarterly basis. This obligation implies that the report is intended to serve an accountability function that will enable the Commission to supervise Director's Settlements and the Executive Director's settlement practices (as well as to harness the experience they embody) on an ongoing basis. This accountability function should be made express and, perhaps, enhanced. In the interests of transparency, such reports should be published in the OSC Bulletin. In addition, the Policy should state that the Commission will consider such reports with a view to monitoring Director's Settlements and practices relating to them, that the reports may be referred to the OSC Enforcement Advisory Committee for comment, and that they may provide a basis for amending the Policy or adopting further guidelines.

Yours respectfully,

Philip Anisman

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