Compliance Support Services

3377 Bristol Dr.
Burlington, ON
L7M 1Y8
Tel. 905-331-0389
Cell:289-208-1979
www.compliancesupport.ca
email: smcmanus@compliancesupport.ca

October 28, 2011

Ontario Securities Commission
20 Queen Street West, Suite 1903
Toronto, ON M5H 3S8

Attention: Office of the Secretary

Dear Sirs:

Re: OSC Staff Notice 15-704 - Request for Comments on Proposed Enforcement Initiatives

I am writing as the principal of **Compliance Support Services** to provide comments on the welcome initiatives set out in OSC Staff Notice 15-704. **Compliance Support Services** offers bilingual regulatory compliance assistance to market intermediaries in all categories of registration. All Ontario client firms and their individual registrants to whom we provide services will be affected by these proposed changes.

1. General Comments

First, I applaud this proposal for its intelligence and underlying recognition that the health of the capital markets in Ontario can only be fostered by cooperation among all participants. As a representative of market intermediaries, it has been my general experience that registrants want to comply, try to comply but invariably fail to comply on some level due to a variety of factors including the complexity of requirements, the rate of change in the industry and ever-dwindling resources. An enforcement system that recognizes this, rather than holds registrants to an "absolute liability" standard of performance without nuance for the varying degrees of culpability is counter-productive to healthy markets. There needs to be an acknowledgement that sometimes mistakes are made, in fact, mistakes are likely to be

made. But not every mistake warrants the devotion of sparse regulatory resources, a hefty, sometimes business-crippling fine, nor the energy and additional resources from the firm before the matter can be put to rest. The initiatives proposed here go a long way toward remedying current policy shortcomings in that regard.

2. **No-Enforcement Action Agreement**

It is not surprising that statistics show that the Credit for Cooperation program introduced in 2002 did not reach its intended goals. Even then, the concept was a good one, but as the Notice describes, market participants have not accessed it for the reasons described and others.

Generally speaking, the key elements of the No-Enforcement Action Agreement described in the Notice are workable. However, in my view, the circumstances in which an Agreement is available, as currently expressed, are too narrow or too unclear to be useful. For example, the Notice states:

"A factor informing whether an Agreement is available in a specific circumstance will be the timing of the self-reporting. For example, there may be more than one person who may choose to self-report their involvement in multi-party non-compliant activity. Generally, it will be the first such self-reporting individual who will be eligible for such an Agreement. The aim is to create an incentive for early self-reporting. Individuals who self-report subsequently may be entitled to other forms of credit for their cooperation. However, depending on the circumstances, it may be possible for more than one individual to receive the benefit of an Agreement with the same fact situation."

It is difficult to appreciate why the timing of the self-reporting is critical to the availability of the Agreement. While early self-reporting is desirable to expedite an investigation already underway, being second or third in line without other factors detracting from the value of self-reporting appears to be a somewhat arbitrary basis for limiting its availability. Further, if the option is going to be made available to the "second or third in line" as the last sentence in the above paragraph suggests, it would be helpful if the circumstances under which staff would entertain the possibility were more clearly stated. (See suggestions below). The clearer the approach, the more likely it is that industry participants will be engaged by this initiative.

The more difficult statement in the Notice as it relates to the No-Enforcement Action Agreement is the following:

"Staff are of the view that an Agreement will likely be entered into if the information relates to misconduct in the marketplace that might be difficult or impossible for OSC staff to detect on a timely basis (for example, multi-party conduct such as insider trading or market manipulation) or is reasonably expected to cause OSC enforcement action against another person whose involvement in the misconduct reflects a higher degree of severity or participation".

Depending on staff approach, this statement could be used to severely restrict the availability of this route to participants. In fact, based on the broad strokes with which the proposed No-Contest Settlement Program is painted, it seems that the policy intention is just that: to make by-passing the Enforcement Process altogether a very limited alternative.

In my view, if that is the perception among industry participants, the outcome of this initiative will be as disappointing as the 2002 Credit for Cooperation program. The door to this option must be opened wider so that those whose compliance failings are *de minimus* or not impactful can be assured that they can do the right thing without bankrupting their firm through the Enforcement process. If a firm discovers its own failing, remediates it, puts the matter (and any affected investors) right and reports it to staff, is it really necessary to devote regulatory time and resources to running such a matter through *any kind* of Enforcement channel?

SROs for example, also have the "warning letter" or "cautionary letter" route, used primarily for cases where minor violations are made, usually as a first "offence" and where little or no harm has ensued. I recognize that the Commission also uses this tool but its availability and the considerations that play into its use are not clear from this Notice. I would suggest that to achieve the ends of not just "Enforcement" but of enhancing overall compliance in the industry, this process ought to be built out and clarified. It is efficient, it is less costly to both the participant and the regulator, it achieves the ends of improving compliance but does not close the door to more severe sanctions down the road, should the situation warrant them.

As you have also alluded to in the Notice, other regulators have developed sophisticated policies for "tiered" methods of dealing with matters, depending on their severity. FINRA, for example has the Minor Rule Violation Plan (MRVP) which explores at length the policy considerations for disposing of a matter in an expedited way.

Staff would be wise to develop screening criteria based on a strong policy foundation that would help drive the decision to turn a particular matter in one direction or another from the outset. The screening criteria could be built upon the penalty guidelines already developed by other regulators, including Canadian and US SROs and could include (but not be limited to):

1. Is there a general public protection issue involved?
2. Has there been specific investor harm?
3. Are there integrity issues involved or is this more of a technical nature?
4. Does this matter raise an issue that needs to be made public for general deterrence purposes?
5. Does the participant have a prior disciplinary history or prior cautionary letters?
6. What corrective actions have been taken to remedy the failing?
7. What benefits, if any, were received by the participant and have they been disgorged?
8. Have any harmed investors been made whole?
9. Is the primary offending party leaving the firm/industry?
10. Is the firm abandoning the line of business which gave rise to the compliance failing?
11. Is the firm surrendering its registration?

If these and other possible questions are answered in a way that shows the self-reporter in a favourable light, it is difficult to imagine what benefit there could be to *anyone* in taking *any* Enforcement action at all.

3. New No-Contest Settlement Program

This is well thought-out and will almost certainly help expedite the resolution of Enforcement matters.

4. Clarified Process for Self-Reporting

This too is welcome. The more clarity provided here, including the criteria staff will consider in channeling a matter one way or another, the more likely there will be buy-in from participants and therefore, higher compliance standards and a healthier market.

5. Enhanced Public Disclosure of Credit Granted for Cooperation

This too will undoubtedly improve industry buy-in and provide greater certainty on possible outcomes for those considering cooperation. It would be most helpful here to draw a direct link between the cooperation and the effect it had on reducing penalties or improving outcomes for participants involved in hearings or settlements. E.g. this conduct would ordinarily result in a fine of $50,000 but staff acknowledges that $30,000 was spent by the registrant in improving internal controls and making the investor whole, therefore the fine is accordingly reduced to $20,000.

Thank you for the opportunity to comment on this important initiative.

Yours Truly,

S. A. McManus

Stephanie A. McManus LL. B.
Compliance Support Services
e&oe