OSC STAFF NOTICE 15.704
COMMENTS ON THE PROPOSED ENFORCEMENT INITIATIVE
FOR A NEW NO CONTEST SETTLEMENT PROGRAM

The undersigned welcome and support the addition of a no contest settlement alternative as a form of resolution of securities regulatory enforcement issues as a means of providing Staff of the Commission and responding parties with further flexibility to conclude enforcement matters and achieve securities regulatory objectives.

The Current State of Affairs at the Commission

On the completion of an investigation there exists already a range of options for Staff to conclude a matter, reflecting the principle that Staff and the Commission should have flexibility in order to achieve securities regulatory objectives.

Currently, enforcement investigations by Staff conclude in a number of ways in addition to contested hearings and settlements involving admissions of facts and regulatory liability, including Staff closing the investigation file without commencing proceedings, delivery of a warning letter (whether made public or not), offering the party a voluntary non-enforcement resolution on terms and conditions of registration, and Executive Director settlements (which do not require a public settlement approval hearing).

The Rationale for No Contest Settlements

By "no contest settlements," we mean settlements (i) between Staff and a respondent, (ii) resulting in a settlement agreement, (iii) where the respondent does not admit the allegations made by Staff, (iv) that result in an order made by a panel of the Commission under section 127 of the *Act*, (v) with the consent or non-opposition of the respondent.

No contest settlements add an option for Staff and the Commission to facilitate meeting their securities regulatory objectives in an expeditious and economic manner. Achieving a settlement in a matter, especially at an earlier point in time in the proceeding, frees up Staff resources to pursue other cases. We have directly experienced the enormous amount of time and resources expended by Staff and Respondents in negotiating the language of settlement agreements, which can be significantly reduced when matters are settled on a no contest basis. As such, no contest settlements are another "regulatory tool" available to Staff and the Commission "to take action against those who engage in activities that are adverse to investors' interests or raise market integrity concerns" (see: "Request for Comments Regarding Statement of Priorities for Fiscal Year Ending March 31, 2012," (2011), 34 OSCB 2265; and see: "Strong Regulation, Strong Capital Markets", speech by Howard Wetston, February 23, 2011 at page 9).

Leadership on this issue by the OSC should cause the Self-Regulatory Organizations to similarly offer no contest settlements as an option, where appropriate, to conclude their matters. This can be ensured through the terms of the recognition orders of the SROs issued by the OSC in this jurisdiction. A no contest settlement might in many circumstances be the appropriate means of dealing with matters such as dealer supervisory issues arising out of individual registrant misconduct (a recent regulatory recommendation) and inadvertent dealer operational failures.

Currently, settlement agreements entered into between Staff and respondents containing factual and legal admissions typically contain a privative clause to the effect that the admissions are made solely for the purposes of the particular regulatory proceeding and cannot be used in any other proceeding (or in any civil proceeding). These clauses are problematic in that their legal effect is uncertain.

Statutes regulating industries and professions such as the *Professional Engineers Act*, the *Chartered Accountant Act* and the *Regulated Health Professions Act* contain provisions that protect all parties (and indeed complainants and witnesses who are nonparties) from having information and documents gleaned from the regulatory investigation and proceeding, including admissions of fact and regulatory liability found in settlement agreements and the settlement approval hearing, used in other proceedings. Absent a legislative amendment to the Ontario *Securities Act*, a no contest settlement option would serve to protect parties from similar derivative use of admissions and findings of fact and regulatory liability.[1]

No Contest Settlements Should Not Be Restricted By Eligibility Requirements

The proposed OSC program ring-fences the eligibility for a no contest settlement within the Credit for Co-Operation Program. While we acknowledge that there is a strong likelihood that cooperating market participants who fulfill the elements of self-reporting, remedial action, cooperation with Staff, and a clean enforcement and regulatory record are more likely candidates for entering into a no contest settlement with Staff, there are other situations and circumstances that may dictate it being in the public interest for such a settlement to occur. For example, in a matter where Staff have concluded that obtaining administrative sanctions against a party are vital (such as removing trading exemptions or suspending a director or officer of a public company or a registrant), yet the case against the party is legally or factually complex, success may be difficult to attain, or may take many years of litigation to conclude, and therefore there is considerable risk of not obtaining the sanction order, or obtaining a sanction order after further damage has been caused to investors and the capital markets.

[1] The effectiveness of an amendment to the *Act* is also uncertain given that the prohibition would likely not have extraterritorial effect, and may not have effect in respect of proceedings in Ontario involving federal statutes.

Including No Contest Settlements As A Resolution Option: The Effect On Enforcement And Regulation

There appears to be a concern expressed in media articles that no contest settlements would become a common occurrence, with negative implications for enforcement and regulation. Past experience does not support this concern.

The CP Ships and Portus-type resolutions were essentially "one-off" cases and similar resolutions have not been widely pursued by securities regulators; and Executive Director settlements have not replaced settlement agreements followed by Commission approval. The option of another resolution of a similar nature does not carry a floodgates risk; in other words, there is no risk that all matters would end up settling on a no contest settlement basis. No contest settlements would be appropriate for some cases and not others, with Staff and the Commission playing a gatekeeper role. Furthermore, no contest settlements would still provide the Commission an opportunity to give reasons for making an order in the public interest and to comment on the enforcement and regulatory issues engaged by the no contest settlement, thus allowing settlements to continue to contribute to the Commission's broader regulatory objectives.

NO CONTEST SETTLEMENTS IN THE UNITED STATES

Most settlements of US SEC charges are concluded by way of no contest settlements. Many significant SEC cases are tried in civil courts before a Federal Court Judge. US District Court Judge Jed S. Rakoff has raised serious concerns with no contest settlements in several recent hearings before him. These concerns focus on the lack of information before the Court as to why the proposed settlement is fair, reasonable, adequate and in the public interest in cases where the SEC has alleged serious securities fraud.

However, in Ontario, the OSC has made it an enforcement priority to commence quasi-criminal prosecutions (as opposed to administrative proceedings before the OSC) in cases involving serious securities fraud. In such cases, no contest settlements would not be an available form of resolution. Moreover, OSC Rule 12, which deals with settlement conferences, provides a mechanism for the Commission to obtain, on a confidential basis, exactly the type of information required to satisfy the public interest conditions for approval of a no contest settlement, including meeting the concerns that have been addressed by Judge Rakoff in the U.S.

THE RATIONALE FOR SETTLEMENTS

Much of the criticism of the OSC proposal for a no contest settlement alternative seems to focus on the choice of settlement of securities regulatory enforcement matters over a contested hearing before a Panel of Commissioners on the merits of the case. This ignores the longstanding reality on the ground; that approximately 7 out of 10 cases conclude by way of settlement as opposed to an adjudication following a hearing. The OSC has long accepted the benefits of settlement in enforcement cases. Settlements eliminate uncertainty of result at a contested hearing, provide

flexibility and creativity to the parties to fashion a settlement appropriate to the specific circumstances of the case, limit time delays for the imposition of sanctions and avoid the high costs of proceedings for the Commission and respondents alike.

CONCLUSION

In circumstances where achieving a timely efficient and effective conclusion and an immediate sanction (which could include investor compensation) is in the public interest, no contest settlements meet the regulatory objectives of investor protection and preservation of market integrity, and therefore should be welcomed.

All of which is respectfully submitted, this 29th day of November, 2011[2]

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[2] The views expressed in this submission are strictly personal to the individual signatories and not of their respective law firms.