47 Colborne Street, Suite 203, Toronto, ON M5E 1P8

SISKINDS | THE LAW FIRM

EMAIL doug.worndl@siskinds.com

DELIVERED BY E-MAIL AND COURIER

December 6, 2011

Office of the Secretary
John Stevenson
Ontario Securities Commission
20 Queen Street West,
Suite 1900, Box 55
Toronto, ON M5H 3S8
jstevenson@osc.gov.on.ca

Dear Mr. Stevenson:

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

On Friday October 21 the Ontario Securities Commission ("OSC") announced, pursuant to OSC Staff Notice 15-704[1], that it is pursuing a package of new enforcement initiatives "…aimed at resolving enforcement matters more quickly and effectively." The OSC stated that these initiatives "are intended to contribute to a higher volume of protective orders made in the public interest, at the earliest opportunity, for the benefit of investors and the capital markets."

We appreciate the opportunity to comment on these proposals.

Respectfully, we are of the view that no-contest settlements are contrary to the fundamental tenets of Canadian securities regulation, and to the interests of the investing public in particular. As stated recently by United States District Court Judge Jed S. Rakoff in rejecting a proposed no-admission/no-denial settlement between staff of the United States Securities and Exchange Commission ("SEC") and Citigroup:

> "…in any case like this that touches on the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives, there is an overriding public interest in knowing the truth. In much of the world, propaganda reigns, and truth is confined to secretive, fearful whispers. Even in our nation, apologists for suppressing or obscuring the truth may always be found. But the S.E.C., of all agencies, has a duty, inherent in its statutory mission, to see

1 OSC Staff Notice 15-704 "Request for Comments on Proposed Enforcement Initiatives", October 21, 2011, (2011) 34 OSCB 10720 ("SN 15-704")

DIRECT
TELEPHONE (416) 362-8334 x224
FACSIMILE (416) 362-2610

HEAD OFFICE
TELEPHONE (519) 672-2121
FACSIMILE (519) 672-6065

> that the truth emerges; and if it fails to do so, this Court must not, in the name of deference or convenience, grant judicial enforcement to the agency's contrivances."[2]

"No-contest settlements" are central to the OSC's package of initiatives. These are settlements whereby alleged wrongdoers agree to settlement terms – e.g. payment of a fine, or a ban on their being an officer or director of a public company for a period of time, or other prophylactic measures – without having to admit that they did anything wrong. The OSC appears to have adopted the view that these settlements are for the "benefit of investors." The United States experience suggests the contrary, however.

No-contest settlements have been a feature of SEC practice for some time, even in recent years, during which there has been a breathtaking lack of accountability for the financial meltdown of 2008.

In our respectful submission, no-contest settlements are bad public policy and reflect a troubling inclination to favour the interests of issuers and their directors and officers over those of investors.

While our focus is on "no-contest settlements", we have more general comments on the overall tenor of Staff Notice 15-704 which is unduly concerned with the ability of OSC Enforcement Staff to arrive at quick settlements at the expense of arriving at meaningful settlements.

Our criticism of no-contest settlements is essentially three-fold and may be summarized as follows:

> **Accountability:** The mandate of the OSC – fostering investor protection and capital markets integrity – requires that capital markets participants be accountable for their actions. The proposed no-contest settlements enable respondents who have breached Ontario securities laws or who have otherwise acted in a manner that is contrary to the public interest to avoid being held to account for their wrongdoing in all but the most egregious cases.
>
> **Integrity of Process**: The integrity of the OSC's process requires not only transparency but a just connection between regulatory sanction and the conduct being sanctioned. Regulatory sanctions agreed by OSC Enforcement Staff and wrongdoers in a settlement must be approved in the public interest by a panel of independent Commissioners sitting in an adjudicative capacity. As has been the

---

2 *S.E.C. v. Citigroup Global Markets Inc.* (November 28, 2011 Unreported Opinion and Order of Jed. S. Rakoff, U.S.D.J., 11 Civ. 7387 JSR, (S.D.N.Y.) ("*Citigroup*")

case with all securities regulators across Canada, such public interest settlement approval must be based on a publicly disclosed evidentiary foundation and not merely be a "rubber stamp", with the only parties having knowledge of the nature and extent of the wrongdoing being the wrongdoer and OSC Enforcement Staff. No-contest settlements make the required approval in the public interest impossible.

Investor Compensation: Accountability requires not simply regulatory accountability by way of prospective prophylactic sanction and administrative fine, but also financial accountability to investors who have been harmed by the misconduct of the wrongdoer. If the end product of an OSC enforcement proceeding is evidence of corporate wrongdoing that has harmed investors, such investors should be able to lawfully use such evidence to enforce their rights pursuant to the *OSA* and obtain just compensation. There is nothing wrong with a securities regulator facilitating investors' recovery of compensation in private litigation, and everything right with it. The OSC seems too preoccupied with the goal of being perceived by the issuer community as a neutral arbiter between investors and issuers. We believe that the OSC should not shy away from being seen as the protector of the investing public, for whose benefit the securities laws ultimately exist.

Some background

The mandate of the OSC is to pursue the purposes of the *OSA*, namely:

(a) to provide protection to investors from unfair, improper or fraudulent practices; and

(b) to foster fair and efficient capital markets and confidence in capital markets.[3]

Everything the OSC does – whether it is the staff of the Enforcement Branch prosecuting wrongdoers, or appointed Commissioners determining policy objectives and priorities, or a panel of Commissioners adjudicating enforcement proceedings – must be consistent with the two-fold purposes of the *OSA*.

When an individual or company is the subject of enforcement action by OSC Enforcement Staff (depending on the nature of the proceeding) there can be a quasi-criminal prosecution before a judge of the Ontario Court of Justice (*OSA* s. 122); a regulatory hearing before a panel of the Commission (*OSA* s. 127); or an application before a judge of the Ontario Superior Court of

3 Ontario *Securities Act*, RSO 1990, c. S.5, as am. (the "*OSA*"), s. 1.1

Justice (*OSA* s. 128). The vast majority of OSC proceedings are by way of regulatory hearing before the Commission although in recent years OSC enforcement staff have brought a number of s. 122 criminal prosecutions. Applications pursuant to s.128 in the Superior Court are rare.

The proposed introduction of no-contest settlements is in respect of s. 127 regulatory proceedings. Pursuant to s. 127, the Commission may make orders which, in its opinion, are in the public interest after a hearing. Such proceedings are commenced after an investigation has been undertaken by OSC Enforcement Staff, and specific allegations of wrongdoing have been made. Recent examples of concluded s. 127 administrative proceedings giving rise to a hearing and an adjudication include *Re: The Matter of Biovail Corporation, Eugene Melnyk et al*. (the "Biovail Matter"), and *Re: The Matter of Coventree Inc. et al.* A more recent example of a s. 127 proceeding which has just gotten underway with no hearing date yet scheduled is *Re: The Matter of Sino-Forest Corporation et al.*[4]

In the course of such s. 127 proceedings, a respondent and OSC Enforcement Staff may negotiate a settlement of a matter without a full-blown hearing. Where there are multiple respondents, it may be that a negotiated settlement will be achieved with some respondents but not others. Such was the case in the Biovail Matter where settlements were negotiated with the company Biovail, as well as three of its officers. There was no settlement with then Chairman and CEO Eugene Melnyk, and the case against him proceeded to a 27 day hearing before a panel of three Commissioners.

Until now, it has been the practice of the OSC, and indeed all securities regulators across Canada, to require the settling respondent – the wrongdoer – to admit to having engaged in specific conduct which was in breach of a provision of the *OSA*, contrary to the public interest, or both.

There are a number of very good reasons for this, not the least of which is that the Commission is required to approve any such negotiated settlement pursuant to s. 127 "in the public interest". For example, if OSC Enforcement Staff and a respondent arrive at settlement terms – say, the individual respondent is banned from being an officer or director of a public company in Ontario for a period of time and must pay an administrative penalty – a panel of Commissioners must exercise their discretion in making an order approving such a settlement in the public interest. This can only be done if there is some evidence of the respondent's conduct which would justify such an order.

The Commissioners will not merely "rubber stamp" a settlement simply because OSC Enforcement Staff have recommended it. There have been instances where, based on the

4 At this stage, the Sino-Forest Matter has involved temporary orders to cease-trade their securities; with no formal Notice of Hearing on the merits with Statement of Allegations yet issued by OSC Enforcement Staff.

admitted misconduct of a respondent, adjudicating Commissioners have concluded that the settlement terms were not in the public interest and would not approve them. In such circumstances, OSC Enforcement Staff and the respondent may have to go back to the negotiating table and come up with different terms, failing which the matter may press on to a full public hearing. Such a rejection of an agreed settlement occurred in *Re: The Matter of Eugene N. Melnyk, Roger Rowan, Watt Carmichael et al.* and in *Re: The Matter of M.C.J.C. Holdings Inc. and Michael Cowpland.* In both instances, the settling respondents and OSC Enforcement Staff negotiated different settlement terms which, based on the facts as admitted by the respondents, were eventually approved by presiding Commissioners as being in the public interest.

What is important to note is that the Commissioners can only exercise their discretion to make orders in the public interest when it has publicly disclosed evidence or admitted facts about the respondents' conduct before it.

For example, the settlements achieved in the Biovail Matter included admissions on the part of the settling parties, of conduct which was contrary to the public interest. In the settlement with Biovail, that company made specific admissions regarding serious deficiencies in its required financial disclosure.

The proposed "no-contest" settlements would have the Commission approving settlements by simply accepting the joint submission by OSC Enforcement Staff and respondent's counsel (who is hardly objective) that the settlement terms are in the public interest. Prosecutors would say something like a lengthy and expensive hearing will be avoided, and the investing public will be protected because the wrongdoer has agreed to pay a fine, and not be a market participant for a period of time, and promises not to do again whatever it is that he or she may have done (but does not admit).

The problem is, of course, that the public and the adjudicating Commissioners will not know what it is that the wrongdoer did as the no-contest settlement permits the respondent to not admit anything.

Furthermore, investors – from individuals with investments in their RRSPs to large institutional investors like public pension funds who may have a significant stake in an implicated issuer – are left to wonder what it was that the wrongdoer did to justify the sanction agreed to by OSC Enforcement Staff and whether that wrongdoer's conduct caused or contributed to their investment losses. No one would know whether the sanction is too harsh or too lenient – whether it is a sweetheart deal for a wrongdoer who may have some unknown influence over the process; or whether the sanction is disproportionately harsh to a wrongdoer who may be unrepresented or whose counsel is not adequately representing his interests.

It is the role of the adjudicating Commissioners to guard the integrity of the enforcement process by ensuring that an agreed sanction is not only in the public interest but consistent with principles of natural justice. This cannot be done in a vacuum without any admissions by the wrongdoer of the misconduct.

In short, with no-contest settlements the wrongdoers are not held to account, and the process is entirely lacking in transparency. Such a process is contrary to the public policy underlying the *OSA* – namely investor protection and capital markets integrity.

Why the change in policy?

In SN 15-704, the stated purposes for no-contest settlements may be superficially worthwhile: to expedite the resolution of enforcement matters; to reduce the expense associated with contested enforcement actions; to obtain regulatory sanctions earlier; and to facilitate the cooperation of individuals who settle early.

However, these are based on the faulty premise that the reason that enforcement matters take too long and are too expensive is because wrongdoers are more reluctant to settle prosecutions when they have to admit their wrongdoing which admissions can potentially be used in civil law suits by investors who have been harmed.

Until now, OSC Enforcement Staff, when negotiating settlements with wrongdoers, are able to insist upon admissions, and wrongdoers and their counsel do not like it; so OSC Enforcement Staff may have to go through the time and effort to prepare their case for a public hearing, at which point the wrongdoers, if they are inclined to settle, agree to make the necessary admissions in order to avoid a potentially lengthy and costly public hearing with the accompanying notoriety.

The OSC proposal for no-contest settlements rationalizes that if OSC Enforcement Staff can remove the impediment to settlement – the admissions of wrongdoing – then settlements can be achieved more quickly at less cost. This may be true[5], but where is the accountability? Paying a fine and agreeing to abide by Ontario Securities law in the future is not accountability.

By this no-contest settlement proposal, the OSC may be turning its back on investors who have been harmed, in an effort to allow wrongdoers avoid having to admit what they did, and in so doing allow OSC Enforcement Staff to close their files more quickly.

This is not only bad public policy, it is wrong.

---

5 Although we are unaware of any data that establishes that no-contest settlements actually speed up the enforcement process.

History of no-contest settlements in Canada

The consideration of no-contest settlements is not new to Canada. What is new is that we have a senior regulatory authority, the OSC, actually advocating them.

In the early 1990's, the Honourable G. Arthur Martin chaired a special advisory Committee to the Attorney General of Ontario on, among other things, plea agreements in the criminal law context. Justice Martin – among our most distinguished appellate judges, who was appointed to the Bench after a stellar career as a defence lawyer – rejected the suggestion that there may be a plea agreement where the accused refuses to admit his or her guilt or maintains innocence:

> "It would be, in the Committee's view, compromising the integrity of the judicial process to permit a plea of guilty and sentencing to proceed where an accused person is not prepared to acknowledge the central precondition of a guilty plea, namely his or her guilt. While an accused may have a valid interest in so doing, his or her narrow objectives, while perhaps very important, are not the sole focus of the administration of justice in this respect. As stated by the Supreme Court, the trial judge ought not to permit the integrity of the process over which he or she presides to be compromised.
>
> […]
>
> A plea of guilty must be an admission by the accused of all of the legal ingredients necessary to constitute the crime charged. A guilty plea must be unequivocal."[6]

In our view, these principles are equally applicable to proceedings before the Ontario Securities Commission. Indeed, until SN 15-704, all major capital markets regulators in Canada, including the OSC, have rejected the concept of no-contest settlements.

In September 2000, the *Lawyers Weekly* canvassed the views of market regulators on no-contest settlements.[7] What the regulators said 11 years ago is timely.

Then OSC Director of Enforcement Michael Watson, Q.C., echoed the *Martin Report*'s legitimate concerns about justice and process:

---

6 *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, the Honourable G. Arthur Martin, Chair (1993) (the "*Martin Report*").

7 "No contest pleas: What the Regulators Say", *The Lawyers Weekly*, (September 15, 2000)

> "Sanctions imposed without admission of relevant facts and culpability achieve only one of the many objectives of the enforcement process. To the extent the sanctions remove a wrongdoer from the marketplace, the market is protected. However, such sanctions should also provide deterrence and serve an educational function. Where there has been no admission as to what occurred, achieving these objectives is significantly impaired.
>
> There is, in addition, an important principle to the process that is violated. The tribunal which imposes the sanctions is fulfilling a quasi-judicial function. Where the tribunal is presented with nothing more than allegations, it is impossible, in my view, for the tribunal to impose appropriate sanctions on a principled basis, where there has been neither a finding nor an admission of wrongdoing. Allegations are nothing more than allegations until they are either proved or admitted. Without a factual foundation before the tribunal, it has nothing upon which it can exercise its quasi-judicial function."[8]

A similar position was taken on behalf of the Toronto Stock Exchange, by Tom Atkinson, then the exchange's Director, Market Regulation Enforcement:

> "The plea of *nolo contendere* [no-contest] puts into issue the role of the regulator. As a self-regulatory organization (SRO), the Exchange has no vested interest in accepting something less than a clear admission of wrongdoing to achieve a settlement.
>
> It is an inefficient use of resources to take issues that are being litigated at the SRO level and to discard these findings or admissions only to re-litigate the whole process again in front of a trial judge who may have no expertise in matters dealing with securities. Exchange discipline hearings take place before specialized tribunals comprised of persons with detailed securities industry experience.
>
> The role of the regulator is the protection of the public. This requires the Exchange to enforce the rules of the Exchange and to ensure penalties for wrongdoing create the appropriate level of specific and general deterrence to prevent future violations. Inserting a watered-down version of the guilty plea does nothing to enhance specific or general deterrence."[9]

---

8 "No contest pleas: What the Regulators Say", *The Lawyers Weekly*, (September 15, 2000)

9 "No contest pleas: What the Regulators Say", *The Lawyers Weekly*, (September 15, 2000)

Douglas M. Hyndman, then Chair, British Columbia Securities Commission ("BCSC") stated the following about the topic:

> "The British Columbia Securities Commission considers it important that the decision-maker have a factual and legal basis to determine whether orders are in the public interest. This comes either from the findings of fact and law following a hearing or from the admissions of the respondent in a settlement agreement. In our view, the findings or admissions underlying a regulatory enforcement order also play an important role in educating market participants about the commission's interpretation of regulatory standards and the commission's view of the seriousness of particular misconduct."[10]

It is important to note that these three senior capital markets regulators who came out so strongly against no-contest settlements continue play a very significant role in the regulation of our capital markets:

- Michael Watson is now Special Advisor, Capital Markets Enforcement with the RCMP Integrated Market Enforcement Program.

- Tom Atkinson succeeded Michael Watson as the Director of Enforcement at the OSC, and will be responsible for the administration of the no-contest settlements he so persuasively and properly rejected 11 years ago when he was Director of Market Regulation Enforcement at the Toronto Stock Exchange.

- Douglas Hyndman was appointed Chair and CEO of the Canadian Securities Transition Office ("CSTO"). He is in charge of the team which has been working on the transition from several provincial securities regulators to a national securities regulator (subject, of course, to Supreme Court of Canada's decision on the reference regarding the proposed Canadian Securities Act). In addition to being the Chair of the BCSC and the CSTO, Mr. Hyndman has chaired the CSA – the association of all Canadian Securities Administrators, including the OSC.

The contrary view of the defendants'/respondents' bar

In spite of this, but not surprisingly, the defendants'/respondents' bar have been urging the OSC to adopt "no-contest" settlements for more than 10 years.

---

10 "No contest pleas: What the Regulators Say", *The Lawyers Weekly*, (September 15, 2000)

Leading defendants'/respondents' counsel Joel Weisenfeld wrote in September 2000, just as equity markets began their 18 month plunge after the burst of the dotcom bubble:

> "It is difficult to reconcile the antipathy of Canadian securities regulators to a no-contest plea with the American routine acceptance of this method of resolution as a means of achieving the public interest goals of securities regulation. If public confidence in the integrity of the capital markets is the paramount objective of Canadian securities regulation, then perhaps we should be looking to the American way of resolution of proceedings through no-contest pleas."[11]

Similar sentiments were expressed by another leading defendants'/respondents' counsel Jeffrey Leon in an op-ed article in the *National Post* in February 2006 urging the OSC to reconsider its traditional rejection of no-contest settlements. Mr. Leon contrasted the Canadian practice with that of the U.S.:

> "Unfortunately, in Ontario, respondents to the OSC proceedings do not have the option of pleading no-contest. This is in contrast to the situation in the United States, where securities proceedings can be resolved through no-contest pleas."[12]

Mr. Leon went on to argue that it would somehow be unfair to a respondent that his or her admission of wrongdoing could be used by shareholders seeking compensation in the civil courts for losses which were a result of that wrongdoing. Mr. Leon argued that it would be unfair to require respondents' admissions of wrongdoing to the Ontario Securities Commission "…to create the foundation for subsequent civil proceedings, often class actions."[13]

We fail to understand the unfairness.

If an individual market participant engaged in actionable misconduct, and they want to avoid a public hearing where a panel of OSC Commissioners may so find, then a settlement with OSC Staff should not be a device used strategically to avoid accountability to injured investors.

Most recently, leading members of the defendants'/respondents' bar, including Mr. Weisenfeld, Mr. Leon and 11 others, made a formal submission regarding SN 15-704 ("Defendants'/Respondents' Submission"). They not only endorsed no-contest settlements but advocated that their use be expanded beyond that currently contemplated by SN 15-704.

---

11 Joel Weisenfeld, "Canadian regulators should consider no-contest pleas", The Lawyers Weekly, (September 15, 2000)

12 Jeffrey S. Leon and Cheryl D. Dusten, "Saying Yes to No Contest: A Securities Concept Long Overdue", National Post, Tuesday February 14, 2006, page FP 19

13 Jeffrey S. Leon and Cheryl D. Dusten, "Saying Yes to No Contest: A Securities Concept Long Overdue", National Post, Tuesday February 14, 2006, page FP 19

- **Protection from Ourselves**

In the Defendants'/Respondents' Submission, they cite the following as a reason to adopt no-contest settlements:

> "We have directly experienced the enormous amount of time and resources expended by Commission Staff and Respondents in negotiating the language of settlement agreements, which can be significantly reduced when matters are settled on a no-contest basis."

In our view this submission is circular, given that the "enormous amount of time and resources expended by Commission Staff" is caused, at least in part, by the very lawyers making the submission and their clients. What they are saying, in effect, is that their clients do not like to have to make admissions of their wrongdoing; therefore, on their clients' behalf they resist doing so, and that process takes a lot of time and Commission Staff resources. That waste of time, they say, can be eliminated by simply giving them and their clients what they want, namely a quick settlement without their clients having to make any admissions of their wrongdoing.

This is not in the interest of investor protection and capital markets integrity.

- **The Slippery Slope**

The Defendants'/Respondents' Submission also argues that the OSC's leadership on this issue should cause other self-regulatory organizations ("SROs") to similarly offer no-contest settlements and in many circumstances no-contest settlements might be an appropriate means of dealing with matters such as dealer supervisory issues arising out of individual registrant misconduct.

In short, the Defendants'/Respondents' Submission is saying that no-contest settlements are such a good idea, in their view, that SROs like IIROC[14] should adopt them in settling professional disciplinary proceedings involving member misconduct.

From our perspective, what they are advocating is an expansion of the no accountability zone from the OSC to SROs – thus enabling even more matters to be swept under the carpet – matters like the failure of brokerages to supervise their employees, which employees have caused harm to retail investors. The Defendants'/Respondents' Submission is thus taking the fear of class action civil liability articulated in SN 15-704 down to a grass roots level.

---

14 IIROC – Investment Industry Regulatory Organization of Canada.

There is nothing in this which even remotely advances investor protection and capital markets integrity, and we refer to Tom Atkinson's comments cited above when he was in charge of enforcement at the TSX (which enforcement function has been taken over by IIROC):

> "The role of the regulator is the protection of the public. This requires the Exchange to enforce the rules of the Exchange and to ensure penalties for wrongdoing create the appropriate level of specific and general deterrence to prevent future violations. Inserting a watered-down version of the guilty plea does nothing to enhance specific or general deterrence."[15]

- **What's wrong with derivative use of admissions? The OSC relies on derivative use of admissions and findings from criminal proceedings. Why shouldn't investors be able to rely on admissions and findings from OSC proceedings?**

The Defendants'/Respondents' Submission refers to no-contest settlements as a way to prevent derivative use of admissions by wrongdoers:

> "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."

This is a variation on Mr. Leon's op-ed article from 2006 wherein he argued that it would be unfair for respondents' admissions of wrongdoing to be used against them in civil suits by investors.

In our view, there is nothing wrong with wrongdoers' admissions of fact and regulatory liability being used by investors to assist them in proving their civil claims against such wrongdoers pursuant to the *OSA* or otherwise. It should be encouraged. There is no unfairness.

In fact, the OSC makes use of admissions of fact and criminal liability obtained from the criminal courts in its regulatory proceedings. See, for example, *In the Matter of Patrick Joseph Kinlin* (2000)[16] where OSC Enforcement Staff, in order to prove its case in an enforcement proceeding, read into the record before the Commission evidence and Kinlin's guilty plea from a proceeding brought under the *Criminal Code*. Furthermore, s. 127(10) of the *OSA* makes it explicit that a s. 127 public interest enforcement order can be made against a respondent based on, among other things, the respondent's conviction in any jurisdiction of an offence arising from

---

15 "No contest pleas: What the Regulators Say", *The Lawyers Weekly*, (September 15, 2000)

16 (2000), 23 OSCB 6535

a transaction, business or course of conduct related to securities or an order made against the respondent by another securities regulatory authority.

So, the OSC can base their own enforcement proceedings on admissions and findings of fact made in criminal courts of other jurisdictions or by other securities regulators, but injured investors making use of admissions and findings of fact before the OSC is seen as problematic?

We fail to see how this position set out in the Defendants'/Respondents' Submission is consistent with investor protection and capital markets integrity.

- **The Slippery Slope / Protection from Ourselves Part II**

In addition to advocating an extension of no-contest settlements to proceedings before SROs like IIROC, the Defendants'/Respondents' Submission advocates that no-contest settlements should not be restricted to qualifying respondents as set out in SN 15-704.

Their submission states:

> "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 obtain, 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."

This is a variation on their earlier theme that the length of time associated with negotiating agreed statements of fact could be avoided by allowing wrongdoers to not have to admit anything.

Here, the Defendants'/Respondents' Submission is saying that where it is vital to sanction a respondent because he or she is immediately dangerous to the capital markets, no-contest settlements should be available even where such a respondent would not fit the criteria set out in 15-704. For example, if a director or officer has conducted him or herself in a manner which is particularly egregious and dangerous to the capital markets, their argument is that a no-contest settlement should be an enforcement option if it means getting such an individual banned from our capital markets more quickly. In our view, this logic is perverse as the proposal creates a moral hazard – rewarding those who are the most culpable with a no-contest settlement which allows them to avoid accountability.

In any event, the Commission already has the authority to make temporary orders regarding restrictions in the trading in securities, and removing exemptions (*OSA* s. 127(5)), and the OSC may bring an application to the Ontario Superior Court of Justice for an interim order, including an order prohibiting an individual from being a director or officer of a public company if the Court deems it appropriate (*OSA* s. 128 (4)). The s. 127(5) procedure is used frequently. We are unaware of the s. 128(4) procedure ever being used.

Therefore, the OSC has the tools at its disposal to address these issues raised by the Defendants'/Respondents' Submission without resorting to no-contest settlements which allow wrongdoers to avoid accountability.

- **OSC Rule 12 does not inform the issue**

The Defendants'/Respondents' Submission refers to OSC Rule 12 as a means whereby the OSC can inform itself in order to satisfy the public interest concerns expressed by Judge Rakoff in *Citigroup* (discussed below). Indeed, SN 15-704 also refers to Rule 12:

> "Recent amendments to the OSC's Rules of Procedure (Rule 12) have eliminated the explicit requirement for admissions in the settlement agreement to be presented to the Commission panel for approval."[17]

OSC Rule 12 was last amended in August 2010. These amendments were directed at a confidential pre-hearing Settlement Conference whereby a proposed settlement agreement could, in effect, be pre-screened by a Commission Panel (who would not ultimately sit on a hearing of the matter on its merits). The Panel would provide its view as to whether the terms of the proposed settlement would be in the public interest.

If, in the view of the Panel at the Settlement Conference, the proposed settlement agreement was not in the public interest, then the OSC Enforcement Staff and the respondent could attempt to negotiate different settlement terms, without the public knowing the terms of the initial failed settlement.

If the settlement terms presented to the Panel at the Settlement Conference are deemed to be in the public interest, then a public settlement hearing will be convened and the presiding Panel will include one or more members from the Panel who already approved the settlement at the confidential pre-hearing settlement conference.

---

17 SN 15-704, p. 10723

Following approval of the settlement agreement at the public settlement hearing, the OSC publishes the terms of the settlement agreement including any written reasons by the panel explaining why the agreement was approved in the public interest.

The purpose of the rule change was to provide certainty to the settlement process, only making public that which has been agreed and approved by the Commission and which is binding on the Commission and the respondent. Under present procedure, what is ultimately approved by the Commission is not a no-contest settlement; rather it is a settlement agreement with agreed statements of facts including admissions of wrongdoing.

There is nothing in the current Rule 12 or the previous Rule 12 (which was effective in March 2009) which stipulates what is to be contained in the proposed Settlement Agreement.

There are practice guidelines published by the OSC in July 1997 which specify that a proposed settlement "should be evidenced by a written settlement agreement between staff and the respondent" and that settlement agreement "should contain a full and accurate statement of the relevant facts by the respondent."

The practice described in the 1997 guidelines – that settlement agreements contain admissions of fact – is what has guided OSC Enforcement Staff. SN 15-704 seeks to change that practice to allow no-contest settlements.

The Defendants'/Respondents' Submission that the confidential pre-screening of a proposed settlement agreement pursuant to Rule 12 should satisfy concerns about the evidentiary foundation of a s. 127 approval order, entirely misses the point. They are talking about a secret settlement hearing without the follow-on public hearing where all is disclosed. The OSC's process must be transparent. The investing public has a right to know what the settling wrongdoer has done. There can be no accountability without transparency.

In the criminal law, where plea agreements are entered into by the Crown and the accused, approval of the court is required. Such approval is based on, among other things, an allocution by the accused of what he or she did. There are many reasons for this including:

- The court must be able to determine whether the agreed punishment fits the crime.
- The court must be satisfied that the accused is freely and unequivocally admitting what he or she did with the understanding of the consequences of what is being admitted.
- In order for there to be general and specific deterrence, the accused and the public must know and understand what the accused did and how the agreed sanction for such conduct is just.

As stated by the *Martin Commission* (quoting the Supreme Court of Canada), "…the trial judge ought not to permit the integrity of the process over which he or she presides to be compromised."

For constitutional reasons[18] Crown attorneys in this Province are under more pressure to clear their dockets in a timely manner than OSC Enforcement Staff, yet they are not permitted to enter plea agreements without admissions of wrongdoing.

Proposed Use of Executive Director Settlements

We also have concerns about the suggestion in SN 15-704 that there may be greater use of the Executive Director's Settlement ("EDS") and these will be "no-contest" EDSs.

An EDS is a settlement entered into by Commission Staff with the consent and approval of the OSC's Executive Director prior to the formal commencement of proceedings.

Guidelines for the Approval by the Executive Director of Settlements of Enforcement Matters[19] were published in 2008 ("Guidelines").

The EDS, to our knowledge, has not been used in any significant way by OSC Enforcement Staff. By the Guidelines, it would appear that the intention is that the EDS may only be used for very minor matters involving technical inconsequential breaches of the *OSA* and these may only be used before formal Enforcement Proceedings have been commenced.

It is important to note that the Executive Director is not an impartial Commissioner, appointed by the Lieutenant Governor in Council and sitting in an adjudicative capacity. Rather, the Executive Director is the most senior employee of the OSC (*OSA* s. 3.6). As the OSC Chair statutorily functions as CEO (*OSA* s. 3(7)), as a practical matter the Executive Director functions like a COO. Executive Directors are generally individuals who performed senior corporate functions in the private sector prior to joining the OSC. They are the chief administrator at the OSC.

Notwithstanding that the EDS has rarely been used, and the Executive Director is not an impartial Commissioner sitting in an adjudicative capacity, the Guidelines require that:

18 *R. v. Askov*, [1990] 2 S.C.R. 1199 (S.C.C.).

19 *Guidelines for the Approval by the Executive Director of Settlements of Enforcement Matters*, (2008) 31 OSCB 11407 (the "*Guidelines*")

> "The overriding consideration, in every case, will be the Executive Director's determination that entering into an Executive Director's Settlement is in the public interest."[20]

By SN 15-704, it is suggested that OSC Staff proposes to make greater use of the EDS and that these will be no-contest EDSs.

Our general criticism of Commissioner approved no-contest settlements applies with greater force to the no-contest EDS.

With a no-contest EDS, the Executive Director will still have to determine that the settlement is in the public interest, and this will be done without any factual or evidentiary foundation of what the wrongdoer did. Furthermore, these EDS agreements are entered before a formal enforcement proceeding has been commenced, so there will be no statement of allegations as to what OSC Enforcement Staff believes the wrongdoer did based on their investigation. There is potential for abuse in the form of wrongful conduct being swept under the carpet, and the individual responsible for overseeing this process is a senior administrator, not a Commissioner.

Why has the Commission suddenly become receptive to the defendants'/respondents' position?

We note that in the press release announcing SN 15-704, it is stated that:

> "In developing these policy initiatives, staff considered the current enforcement policies and practices of the Commission and those of other regulatory organizations. Staff also took into account ongoing dialogue with investors, market participants and the securities litigation bar."[21]

The investing public would be very interested to know who was consulted by OSC Staff and what other regulatory organizations they considered.

As perhaps the most active law firm in Canada representing investors, we were not consulted, nor are we aware of any consultation with any of our colleagues at other investor law firms prior to SN 15-704. That investor counsel were not consulted should not be surprising, because in our view, there would be near universal criticism of the no-contest settlement proposal. Quite simply, the proposal is not in the interest of investors who have been harmed by the wrongful conduct of respondents to OSC Enforcement proceedings.

---

20 *Guidelines* at p. 11408.

21 October 21, 2011 Press Release: "OSC Introduces New Policy Initiatives to Strengthen Enforcement", Ontario Securities Commission, Toronto, Ontario ("Press Release")

We assume that the Press Release reference to consultation with the securities litigation bar means that OSC Staff consulted with members of the defendants'/respondents' bar like the 13 lawyers who signed the Defendants'/Respondents' Submission.[22] There would be near universal support for the no-contest settlement proposal by those who represent defendants/respondents who have committed wrongful acts, because that constituency uniquely benefits from the proposal.

The Press Release also refers to dialogue with investors. We note that one investor group, the Small Investor Protection Association ("SIPA") in its submission of November 1, 2011, was highly critical of the no-contest settlement initiative:

> "So there is some appeal to making selective and judicious compromises to speed things up. However, if market participants don't have to be accountable for their actions and simply can make the problem go away by coughing up money, where's the pain, let alone the deterrence in that.
>
> It should be noted that in the U.S., Judge Jed S. Rakoff of the Federal District Court of Manhattan recently suggested that permitting the defendant to neither admit nor deny misconduct was indefensible. He said "An agency of the United States [the SEC] is saying, in effect, "Although we claim that these defendants have done terrible things, they refuse to admit it and we do not propose to prove it, but will simply gag their right to deny it." We too find the proposal to permit defendants/respondents to neither admit nor deny conduct to be indefensible."[23]

As to the other regulatory organizations OSC Staff consulted, we note that no other securities regulator in Canada has adopted such an initiative. To this the SIPA Response incisively asks:

> "If the arguments are so persuasive, why isn't this a CSA Initiative?"[24]

Perhaps the view of Douglas Hyndman, the former CSA Chair and current CEO of the CSTO referred to above carries more weight among other CSA regulators than the advocacy of the defendants'/respondents' bar on behalf of their clients.

---

22 We are not aware whether the OSC consulted with the Securities Advisory Committee before issuing the proposal. However, if it did so, we note that virtually every member of that committee is a member of the Bay Street bar.

23 November 1, 2011 Response of Small Investor Protection Association to OSC Staff Notice 15-704 Request for Comments on Proposed Enforcement Initiatives ("SIPA Response"), at p. 2

24 SIPA Response, at p. 3

"Regulatory Neutrality"

If a wrongdoer is reluctant to make admissions because of civil liability exposure, why would the regulator be inclined to assist him or her?

The answer may lie in remarks by OSC Chair Howard Wetston to the Economic Club of Canada earlier this year. When describing upcoming OSC Enforcement Initiatives, Chair Wetston had this to say about the proposed no-contest settlements:

> "Such agreements would allow us to aggressively discipline individuals and companies *while retaining regulatory neutrality in parallel litigation such as class-action suits.* These agreements are widely used in the U.S. to encourage settlements." [Emphasis added][25]

By regulatory neutrality we assume that Chairman Wetston means that the OSC will not take sides in civil litigation arising out of the same facts and circumstances which may have given rise to the regulatory proceeding. While this may appear to make sense superficially, in our view it is inconsistent with the OSC's mandate as defined by the *OSA.*

The private enforcement of securities law is built into the *OSA*. Parts 23 and 23.1 of the *OSA* are civil liability provisions which enable investors to sue for compensation. These provisions were enacted as part of a broader public policy initiative to advance investor protection and capital markets integrity through the private enforcement of securities laws by civil action including, where warranted, by class action. This private enforcement is to work in tandem with the public enforcement of securities law through regulatory prosecution. In so doing, the objective of this two-pronged enforcement is to maximize compliance with Ontario securities laws and to promote investor protection and the integrity of Ontario capital markets.

In our view, the regulator should be encouraging investors to enforce their rights pursuant to the *OSA*, rather than running interference. While the OSC and Chairman Wetston may be of the view that no-contest settlements are consistent with the OSC's perceived role of neutrality when it comes to civil suits by investors, no-contest settlements are not neutral as they help wrong-doers evade accountability at the expense of investors. Investor protection and capital markets integrity are *not* matters of regulatory neutrality.

In a November speech to capital markets participants, OSC Chair Howard Wetston stated:

---

25 "Strong Regulation, Strong Capital Markets", Speech by Howard Wetston, Chair, Ontario Securities Commission The Economic Club of Canada, February 23, 2011, p.9

> "Our strategic review has identified the need for a clearly identifiable point of responsibility for investor interests, including greater analysis of the needs of retail investors. We recognize that there is a perception that the OSC could be more focused on investors. We have a lot to do – but we are doing a lot."[26]

We whole heartedly support the need for the regulator to do more for investors. However, the no-contest settlement proposal suggests an underlying antipathy to the private enforcement of securities laws by investors, and certainly does not further the interests of investors – retail or otherwise.

No-contest settlements in the US

- **US criticism of no-contest settlements**

Notwithstanding the desire of defendants'/respondents' counsel, and indeed the current OSC Chair, to emulate US regulatory practice (the ineffectiveness of which has been laid bare since the latest market melt-down), there has been very pointed criticism of no-contest settlements in the United States.

In November 2003, the chief securities regulator for the State of Massachusetts, William F. Galvin, was highly critical of "neither admit nor deny" settlements which had become endemic among securities law enforcement in the US:

> "Government laws and law enforcement have failed because they have failed in the past to aggressively and promptly enforce the law. For too long, a culture of compromise and accommodation has overwhelmed enforcement efforts. Too often, the guilty neither admit nor deny any wrongdoing and routinely promise not to cheat again until they can come up with a more clever way to do what they just said they wouldn't do again.
>
> For too long, while the merry-go-round of accusation and non-admission goes round and round, investors have been the losers."[27]

Even the SEC has expressed some reservations about the practice. In a February 2011 speech to the industry, SEC Commissioner Luis A. Aguilar expressed his "wish" that corporate defendants be held to account:

---

26 "Regulating in the New Financial Reality", Speech by Howard Chair, Ontario Securities Commission, OSC Dialogue 2011, November 1, 2011, pp. 13-14

27 William F. Galvin, Secretary of the Commonwealth of Massachusetts testifying before the Financial Management, The Budget and International Security Subcommittee, U.S. Senator Peter G. Fitzgerald, Chairman, November 3, 2003, at p. 18

> "An additional wish for 2011 is to see defendants take accountability for their violations and issue *mea culpas* to the public. I hope that 2011 brings an end to the press release issued by a defendant after a settlement explaining how the conduct was really not that bad or that the regulator over-reacted. I hope that this revisionist history in press releases will be a relic of the past. If not, it may be worth revisiting the Commission's practice of routinely accepting settlements from defendants who agree to sanctions "without admitting or denying" the misconduct."[28]

One of the most forceful criticisms of the "neither admit nor deny" settlement can be found in recent decisions of the Honourable Judge Jed S. Rakoff of the United States District Court for the Southern District of New York. In the US, some civil settlements between the SEC and wrongdoers must be approved by a Federal Court Judge in a manner similar to the required approval by a panel of OSC Commissioners of settlements proposed by OSC Enforcement Staff. Judge Rakoff has been asked to approve "no-contest" settlements, and he clearly does not favour them.

In his September 14, 2009 decision in Bank of America[29] Judge Rakoff was asked to approve a settlement arising out of the acquisition by Bank of America ("BofA") of Merrill Lynch in 2008. In that case, the SEC had alleged that BofA materially misled its shareholders about year-end performance bonuses and other discretionary compensation paid to Merrill executives prior to closing the transaction. The SEC alleged that contrary to BofA's representation that no such year-end bonuses and discretionary payments would be made, in fact $5.8 billion in such payments – nearly 12% of the total consideration on the transaction – would be paid to Merrill executives. In spite of these allegations, the SEC and BofA filed a joint submission asking Judge Rakoff to approve a settlement of the SEC's case by BofA paying a $33 million fine while not having to admit any of the allegations made by the SEC. In rejecting the proposal Judge Rakoff stated:

> "The proposed Consent Judgment in this case suggests a rather cynical relationship between the parties: the S.E.C. gets to claim that it is exposing wrongdoing on the part of the Bank of America in a high-profile merger; the Bank's management gets to claim that they have been coerced into an onerous settlement by overzealous regulators. And all this is done at the expense of not only the shareholders, but also of the truth."[30]

---

28 Speech of SEC Commissioner Luis A. Aguilar: "Setting Forth Aspirations for 2011 Address to Practicing Law Institute's SEC Speaks in 2011 Program", United States Securities and Exchange Commission, at p. 3

29 *S.E.C. v. Bank of America Corporation* 653 F.Supp.2d 507 9S.D.N.Y. ("*Bank of America*")

30 *Bank of America* at p.6

Following this rejection, the parties engaged in extensive discovery, the BofA waived attorney-client privilege in respect of the matter, and the SEC presented a 35 page statement of facts and a 13 page statement of supplemental facts which were agreed to by BofA. In addition, the parties presented to the Court hundreds of pages of deposition testimony and other relevant evidentiary material. Having presented this and other evidence to the Court, a revised proposed settlement was put forward to Judge Rakoff for approval, increasing the amount of the fine to $150 million (almost 5 times the original $33 million proposed), and including various other prophylactic measures. Later, while providing the Court's approval of the revised settlement (albeit reluctantly), Judge Rakoff stated:

> "In short the proposed settlement, while considerably improved over the vacuous proposals made last August in connection with the Undisclosed Bonuses case, is far from ideal. Its greatest virtue is that it is premised on a much better developed statement of underlying facts and inferences drawn therefrom, which, while disputed by the Attorney General in another forum, have been carefully scrutinized by the Court and found not to be irrational. Its greatest defect is that it advocates very modest punitive, compensatory, and remedial measures that are neither directed at the specific individuals responsible for the nondisclosures nor appear likely to have more than a modest impact on corporate practices or victim compensation. While better than nothing, this is half-baked at best."[31]

In his March 21, 2011 decision in Vitesse Semiconductor[32] Judge Rakoff commented on the SEC's use of no admit / no deny settlements, the lack of accountability by wrongdoers, and the public's right to know:

> "The result is a stew of confusion and hypocrisy unworthy of such a proud institution as the S.E.C. The defendant is free to proclaim that he has never remotely admitted the terrible wrongs alleged by the S.E.C.; but by gosh, he had better be careful not to deny them either (though, as one would expect, his supporters feel no such compunction). Only one thing is left certain, the public will never know whether the S.E.C.'s charges are true, at least not in a way that they can take as established by these proceedings."[33]

This past month, Judge Rakoff revisited the issue when he was asked to approve a proposed no-contest settlement between the SEC and Citigroup whereby Citgroup would pay $285 million in respect of fraud charges related to a mortgage-bond transaction. By way of a preliminary ruling, he directed the parties seeking his settlement approval to answer a number of questions the first

---

31 *S.E.C. v. Bank of America Corporation* 2010 WL 624581 (S.D.N.Y.) (*"Bank of America No. 2")*

32 *S.E.C. v. Vitesse Semiconductor Corp*. 2011 771 F. Supp.2d 304 (S.D.N.Y.) ("*Vitesse*")

33 *Vitesse*, at p.309

two of which are directed at "no admit, no deny" settlements, and are worth considering in the context of SN 15-704:

> "1) Why should the Court impose a judgment in a case in which the S.E.C. alleges serious securities fraud but the defendant neither admits nor denies wrongdoing?
>
> 2) Given the S.E.C.'s statutory mandate to ensure transparency in the financial marketplace, is there an overriding public interest in determining whether the S.E.C.'s charges are true? Is the interest even stronger when there is a parallel criminal case?" [34]

Counsel appeared for a hearing on November 9, and the SEC is reported to have argued, citing a 1984 appeal case[35], that Judge Rakoff was *not* to assess whether the proposed no-contest settlement served the public interest. To this, Judge Rakoff is reported to have responded to SEC counsel: "I'm supposed to exercise my power, but not my judgment?"

In written reasons just released on November 28, Judge Rakoff rejected the Citigroup settlement and the SEC's argument that the approving court is not to assess whether the proposed no-contest settlement is in the public interest.

> "…the Court concludes, regretfully, that the proposed Consent Judgment is neither fair, nor reasonable, nor adequate, nor in the public interest. Most fundamentally, this is because it does not provide the Court with a sufficient evidentiary basis to know whether the requested relief is justified under any of these standards. Purely private parties can settle a case without ever agreeing on the facts, for all that is required is that a plaintiff dismiss his complaint. But when a public agency asks a court to become its partner in enforcement by imposing wide-ranging injunctive remedies on a defendant, enforced by the formidable judicial power of contempt, the court, and the public need some knowledge of what the underlying facts are: for otherwise, the court becomes a mere handmaiden to a settlement privately negotiated on the basis of unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance."[36]

---

34 *S.E.C. v. Citigroup Global Markets Inc.* (October 27, 2011 Unreported endorsement of Jed. S. Rakoff, U.S.D.J., 11 Civ. 7387 JSR, S.D.N.Y.)

35 *S.E.C. v Randolph* 736 F.2d 525 (9th Cir.C.A.) It is important to note that the *Randoph* case referred to the approving district court judge deferring to the SEC's expert judgment as to whether a proposed settlement was in the public interest and to not substitute the court's judgment on that important issue. With the OSC's proposal before us, what is contemplated is that the panel of OSC Commissioners adjudicating the matter would defer to the judgement of OSC Enforcement Staff as to what is in the public interest.

36 *Citigroup* at p. 8

As we cannot improve upon Judge Rakoff's pointed criticism of the no-contest settlement presented to him in *Citigroup*, we will quote him at length as his comments inform the current discussion about SN 15-704:

> "Here, the S.E.C.'s long-standing policy – hallowed by history, but not by reason - of allowing defendants to enter into Consent Judgments without admitting or denying the underlying allegations, deprives the Court of even the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact." [37]
>
> "As for common experience, a consent judgment that does not involve any admissions and that results in only very modest penalties is just as frequently viewed, particularly in the business community, as a cost of doing business imposed by having to maintain a working relationship with a regulatory agency, rather than as any indication of where the real truth lies."[38]
>
> "It is not reasonable, because how can it ever be reasonable to impose substantial relief on the basis of mere allegations? It is not fair, because, despite Citigroup's nominal consent, the potential for abuse in imposing penalties on the basis of facts that are neither proven nor acknowledged is patent. It is not adequate, because, in the absence of any facts, the Court lacks a framework for determining adequacy. And, most obviously, the proposed Consent Judgment does not serve the public interest, because it asks the Court to employ its power and assert its authority when it does not know the facts." [39]
>
> "An application of judicial power that does not rest on facts is worse than mindless, it is inherently dangerous. The injunctive power of the judiciary is not a free roving remedy to be invoked at the whim of a regulatory agency, even with the consent of the regulated. If its deployment does not rest on facts – cold hard solid facts, established either by admissions or by trials – it serves no lawful or moral purpose and is simply an engine of oppression."[40]
>
> "Finally, in any case like this that touches on the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives, there is an overriding public interest in knowing the truth. In much of the world, propaganda reigns, and truth is confined to secretive, fearful whispers.

37 *Citigroup* at p.9

38 *Citigroup* at p. 10

39 *Citigroup* at p. 14

40 *Citigroup* at pp. 14-15

> Even in our nation, apologists for suppressing or obscuring the truth may always be found. But the S.E.C., of all agencies, has a duty, inherent in its statutory mission, to see that the truth emerges; and if fails to do so, this Court must not, in the name of deference or convenience, grant judicial enforcement to the agency's contrivances."[41]

Judge Rakoff is someone who "gets it". Clearly his decision in *Citigroup* draws a line in the sand, rejecting the long standing SEC practice regarding no-contest settlements, and inviting that agency to challenge his decision in the appellate courts.

Is the reality of no-contest settlements which Judge Rakoff so incisively exposes and dismantles really something that we should be importing into this jurisdiction? We think not. And it is noteworthy that Judge Rakoff's comments in *Citigroup* are entirely consistent with the above referenced comments of Canadian securities regulators – including current OSC Director of Enforcement Tom Atkinson – 11 years ago.

- **Material differences in US justice system make no-contest inapplicable here**

Even if one were to overlook the valid criticism of the SEC's use of no-contest settlements by Judge Rakoff and others, significant differences between the US and Canadian approaches to securities prosecutions reveal that no-contest settlements are otherwise inappropriate in Canada.

The SEC and the US Department of Justice work very closely in the investigation and prosecution of those who have breached US securities laws. The Department of Justice is constantly looking over the shoulder of SEC enforcement and significant steps are not taken by SEC enforcement on matters involving criminal investigations without coordination with the U.S. Department of Justice.

It is noteworthy that in at least one of the recent cases where Justice Rakoff chided the SEC over proposed no-contest settlements, he ultimately provided his approval of the settlement because, among other things, there were parallel criminal proceedings which were either ongoing or had concluded. Therefore, his concerns regarding the need for accountability and the public's right to know were allayed somewhat by the US criminal justice process where the necessary admissions and disclosures would be (or had already been made).[42]

This is not how things work in Canada.

---

41 *Citigroup* at p. 15

42 *Vitesse* at p. 310

Prosecutions of securities crimes under the *Criminal Code* are very infrequent in Canada. As described above, it is possible for OSC Enforcement Staff to initiate a provincial offences prosecution in the Ontario Court of Justice pursuant to s.122 of the *OSA*, but these are relatively unusual (until recently) and rarely done in tandem with a s.127 public interest regulatory proceeding.

Unlike the US practice, OSC Commissioners asked to approve a no-contest settlement can rarely if ever be assured that the wrongdoing will be admitted or proved in parallel criminal proceedings and form part of the public record.

In other words, while some may argue that no-contest settlements work in the U.S. (in spite of the criticism of Judge Rakoff and others), the accountability/transparency gaps will never be overcome in Canada because of differences in our process.

Who we are and why we care

We practice in Siskinds' Securities Class Action Group. Our Group has been lead or co-lead counsel on the vast majority of all securities class actions prosecuted in Canada. In addition, we have prosecuted derivative actions, primarily for the recovery of improperly paid compensation to corporate executives by way of options back-dating. We have acted and are acting on behalf of institutional and private investors to recover losses pursuant to Part 23 and Part 23.1 of the *OSA*.

When we resolve cases, corporate governance reform is often a feature of the settlement. For example, as Canadian counsel in the Biovail civil action, Siskinds played a large role in securing by way of settlement the implementation of substantial corporate governance reforms by the issuer.[43] In some settlements we have negotiated, individual defendants have been required to make substantial personal payments as part of the settlement fund.[44] We have also secured, by way of a settlement term, an agreement that an individual respondent not be an officer or director of any Ontario reporting issuer for a period of 10 years.[45] We have therefore negotiated settlements which not only maximize recovery to investors, but also include safeguards against future bad conduct.

---

43 Terms of settlements can be seen at our website: www.classaction.ca and following prompts to "Securities" and "Resolved Actions".
Please see Biovail settlement at pp. 94-102: http://www.classaction.ca/getattachment/classaction-ca/master-page/actions/Securities/Resolved-Actions/Biovail-Corporation/BiovailSettlementAgreement.pdf.aspx?lang=EN

44 Please see Southwestern Resources settlement at para. 4.1 : http://www.classaction.ca/getattachment/classaction-ca/master-page/actions/Securities/Resolved-Actions/Southwestern-Resources-Corporation/Southwestern-Settlement-Agreement.pdf.aspx?lang=EN

45 Please see Bear Lake Gold settlement at para. 5.4: http://www.classaction.ca/Files/pdf-(1)/Bear_Settlement_Agreement.aspx?lang=EN

As we see it, while our clients' interests are not necessarily the same as those of the capital markets regulators, they are at least aligned, for the most part. Investor protection is also at the core of what we do.

In our view, the most effective enforcement of securities laws should include serious financial consequences for wrongdoers as well as the threat of incarceration and regulatory sanction. Indeed, the civil liability provisions of Parts 23 and 23.1 were enacted so that the private enforcement of securities laws by way of class actions can supplement public enforcement in aid of the purposes of the *OSA* – investor protection and capital markets integrity.

Robust private enforcement of securities laws will make our capital markets more competitive internationally. In this regard, we agree with one submission made to the Five Year Review Committee and quoted in the Committee's Final Report in support of the introduction of the Part 23.1 secondary market civil liability regime:

> "…the competitiveness of Canadian capital markets depends, in part, on the ability to demonstrate that Canadian securities laws are as protective of investors' rights as those in other major markets."[46]

When the OSC approves a settlement of a regulatory proceeding, and the respondent is required to admit bad conduct, of course it is of assistance to investors seeking to enforce their rights under the *OSA* by way of class action or otherwise. That is how it should be, and that is what is contemplated by the *OSA.*

While investors suing for recovery benefit from admissions of wrongdoing contained in settlements obtained by OSC Enforcement Staff, the OSC benefits from the work done by investors and their counsel as well.

The civil liability regime of Part 23.1 of the *OSA* provides that the OSC can intervene in proceedings brought by investors pursuant to that Part (*OSA* s. 138.12). As counsel to investors bringing such suits, we are required to furnish to Commission Staff copies of our key court filings (*OSA* ss. 138.8, 138.9), which often include the opinions of qualified experts retained and compensated by the plaintiffs, as well as important, non-public evidence provided to us by former employees of the issuer and other whistle-blowers. Provided that it is consistent with our professional obligations to our clients and the Court, we have had occasion to assist enforcement staff of certain Canadian securities regulators in other ways as well, and have rendered such assistance notwithstanding the regulators' position that it would be inappropriate for enforcement staff to provide assistance to private litigants.

---

46 Five Year Review Committee, Final Report, March 21, 2003, quoting submission from Fasken Martin DuMoulin LLP at page 131

Historically, the only form of assistance that victims of securities fraud have received from Canadian securities regulators has come in the form of admissions in settlement agreements with enforcement staff. By dispensing with admissions, enforcement staff would be leaving aggrieved investors completely in the cold. In *Citigroup*, Judge Rakoff made some critical observations about the regulator paying lip service to helping investors recover their losses:

> While the S.E.C. claims that it is devoted, not just to the protection of investors but also to helping them recover their losses, the proposed Consent Judgment, in the form submitted to the Court, does not commit the S.E.C. to returning any of the total of $285 million obtained from Citigroup to the defrauded investors but only suggests that the S.E.C. "may" do so. In any event, this still leaves the defrauded investors substantially short-changed. To be sure, at oral argument, the S.E.C. reaffirmed its long standing purported support for private civil actions designed to recoup investors' losses. But in actuality, the combination of charging Citigroup only with negligence and then permitting Citigroup to settle without either admitting or denying the allegations deals a double blow to any assistance the defrauded investors might seek to derive from the S.E.C. litigation in attempting to recoup their losses through private litigation, since private investors not only cannot bring securities claims based on negligence, but also cannot derive any collateral estoppel assistance from Citigroup's non-admission / non-denial of the S.E.C.'s allegations."[47]

His observations are in stark contrast with OSC Chair Wetston's remarks about maintaining regulatory neutrality with regard to civil suits by investors seeking to recover their losses.

The current proposal regarding no-contest settlements appears oddly beholden to the interests of corporate wrongdoers with there being no benefit at all to investors harmed by the wrongdoing.

This past June, OSC Chair Weston gave a keynote speech to a group known as Canadian Lawyers Abroad. In his speech, "The Importance of Promoting the Rule of Law,"[48] Mr. Wetston made several statements which we endorse, but which appear inconsistent with his current no-contest settlement proposal. In particular, Chairman Wetston told his international audience:

> "The law must be accessible and so far as possible intelligible, clear and predictable". [49]
>
> "In my view it is "openness" [which is] a natural enemy of arbitrariness and injustice."

---

47 *Citigroup*, at pp. 11-12 (references omitted)

48 "The Importance of Promoting the Rule of Law", Remarks to Canadian Lawyers Abroad by OSC Chair Howard Wetston, June 1, 2011

49 Quoting former Lord Chief Justice of England Tom Bingham

> "Investors need to feel confident to participate in the economy of a country. Clear rules that govern business transactions are an important part of fostering the rule of law and also investor confidence."
>
> "Economic and business regulation are also essential to promoting the rule of law. This includes the effective regulation of monopoly utilities, competition policy and the capital markets. In this regard, I would add that not only are competition officials and regulators expected to act in a manner that is fair, predictable and consistent but also in a manner that is transparent and independent."
>
> "…all IOSCO[50] members commit to implement – under the relevant legal framework – three primary objectives of securities regulation:
>
> - protecting investors;
> - ensuring that markets are fair, efficient and transparent; and
> - reducing systemic risk."

Elements of the rule of law correctly identified by OSC Chair Wetston are clarity, predictability, intelligibility, openness, certainty, fairness, and above all, transparency. None of these are fostered by no-contest settlements.

Only the respondent, his or her counsel and OSC Enforcement Staff will know what evidence was developed regarding the respondents' wrongdoing. A private deal is struck regarding a proposed remedy, and a panel of OSC Commissioners is expected to automatically rubber stamp the settlement without having any knowledge of what the respondent did or did not do.

This process lacks clarity, openness and transparency. The result is a lack of accountability.

Conclusion

We do not believe that it can be reasonably argued that the proposed introduction of no-contest settlements will strengthen regulatory enforcement. Perhaps the strongest evidence of this is the fact that the defendants'/respondents' bar has been urging the OSC to adopt no-contest settlements for more than 10 years. The formal submission recently made by that constituency (and discussed above) re-enforces our position that this initiative is not good for investors and only good for those who have breached Ontario securities laws or otherwise acted in a manner contrary to the public interest.

SN 15-704 states:

50 International Organization of Securities Commissions of which the OSC is a member

> "Notwithstanding the formalization of the No-Co ntest Settlement program, OSC staff will continue to welcome proposals from m arket participants to enter into negotiations aimed at settling enforcement matte rs on a basis that includes an admission of facts, or an admission of non-compli nce with Ontario securities law or conduct contrary to the public interest."[51]

This statement echoes the remarks of SEC Commissi oner Aguilar, quoted above when he expressed his "wish":

> "...to see defendants take accountability for their violations and issue *mea culpas* to the public. I hope that 2011 brings an end to the press release issued by a defendant after a settlement explaining how the co nduct was really not that bad or that the regulator over-reacted."

The investing public would like to know the basis upon which OSC Staff believes that a wrongdoer would voluntarily propose an admission of wrongdoing – a *mea culpa* – when the intended practice of the OSC Staff (like that of the SEC) is to not seek such admissions.

During these challenging economic times, capital mark ets regulation should be stronger not weaker.

As stated by one commentator on the *Citigroup* decision: "The interests of investors and the public should not be sacrificed on the altar of efficiency."[52]

We would be pleased to answer any questions that the Commission may have about our submission.

Yours very truly,

SISKINDS LLP

Siskinds LLP pm:

Douglas M. Worndl and A. Dimitri Lascaris

DW/lp

---

51 SN 15-704, p. 10724

52 Wall Street Journal, "SEC Feels the Citi Heat", November 29, 2011

47 Colborne Street, Suite 203, Toronto, ON M5E 1P8

SISKINDS | THE LAW FIRM

EMAIL doug.worndl@siskinds.com

DELIVERED BY E-MAIL AND COURIER

December 19, 2011

Office of the Secretary
John Stevenson
Ontario Securities Commission
20 Queen Street West,
Suite 1900, Box 55
Toronto, ON M5H 3S8
jstevenson@osc.gov.on.ca

Dear Mr. Stevenson:

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

This is a supplement to our comment dated December 6, 2011 regarding SN 15-704, and the "no-contest settlement" initiative, in particular.

We wanted to bring to the Commission's attention that on Friday December 16 it was announced that the House Financial Services Committee of the United States Congress (the "Committee") will be reviewing the SEC's practice regarding no-admit / no-deny settlements. The Committee will hold hearings on the issue early next year. This is a bi-partisan initiative with hearings supported by both Republican and Democrat members of the Committee.[1]

Committee chairman, Representative Spencer Bachus, Republican from Alabama, is quoted to have said last Friday:

> "...the SEC's practice of using "no-contest settlements" has raised concerns about accountability and transparency."[2]

The leading Democrat on the Committee, Representative Barney Frank of Massachusetts, is quoted as having said regarding the announced hearing:

---

1 Edward Wyatt, "Congress to Examine S.E.C. Settlement Policy", NYTimes.com, December 16, 2011

2 Edward Wyatt, "Congress to Examine S.E.C. Settlement Policy", NYTimes.com, December 16, 2011

> "The policy of signing agreements without forcing firms to admit or deny wrongdoing raises serious issues." [3]

In our view, that the US Congress, with bi-partisan support, is reviewing the SEC's practice regarding no-contest settlements, supports our submission that OSC should withdraw its proposal to introduce no-contest settlements in this jurisdiction.

As stated by us on December 6, we would be pleased to answer any questions that the Commission may have about our submission.

Yours very truly,

SISKINDS LLP

Siskinds LLP

per:

Douglas M. Worndl and A. Dimitri Lascaris

DW/lp

---

3 Edward Wyatt, "Congress to Examine S.E.C. Settlement Policy", NYTimes.com, December 16, 2011