Comment re: OSC STAFF NOTICE 15-704

No Contest Settlements

I recommend against the adoption of the proposed policy on No Contest settlements for two main reasons. It will not achieve the practical benefits that purport to provide the justification for adopting the policy. It is wrong in principle.

The Practical Problem

Counsel for market participants have, for years, been advocating the adoption of a no contest settlement policy. It has been repeated so many times that such a policy would allow OSC Enforcement to resolve cases much more quickly with the utilization of substantially fewer resources, thus allowing staff to pursue considerably more enforcement cases, that it has simply become an accepted fact. One can be confident that the motivation for those who advocate this position is not the desire to assist the OSC in increasing its enforcement output.

It was not uncommon, during my ten years as OSC enforcement director, that many respondents proposed settling without admissions. Sometimes they were straight forward about this position, and other times they simply indicated facts they were prepared to agree to that amounted to no admission whatsoever. Virtually every one of these respondents ultimately made admissions of fact that were sufficient to allow for a settlement. I can think of only two exceptions.

In one, the case proceeding to a hearing, and misconduct on the part of the respondents was found. No efficiency would have been gained by a no contest settlement, as there were also other respondents, against whom a hearing was required.

In the other case, a hearing ensued and staff failed to persuade the tribunal that misconduct had occurred. It cannot be said that efficiency justifies a respondent who did no wrong to pay a penalty in order to avoid a hearing.

Aside from these two cases, I cannot identify any cases where a respondent would have settled on a no contest basis, but did not ultimately settle on the basis of admissions.

A more significant reality of no contest settlements is that, despite the myriad assertions to the contrary, they will not save time and effort. Currently, anyone who works on enforcement settlements will confirm that the vast majority of time spent on settlement discussions is spent on negotiating the wording. If staff believe this step in the process will be avoided with a no contest settlement, they are mistaken. Given that part of a “neither admit nor deny” settlement is “nor deny,” respondents and their counsel will insist on agreeing to the wording of staff allegations, as they will be very concerned as to what they are seen as not denying. The intensity of negotiations on wording will not change.

SEC experience has shown that SEC staff spend as much time negotiating the wording of no contest settlements, as OSC staff spend negotiating settlements with admissions. Some SEC cases have taken as long as two years to resolve no contest settlement wording.

The Principle Problem

It is the foundation of our justice system that there should be no punishment without guilt. In a no contest settlement, guilt is never established. No trier of fact has determined wrongdoing. It will not even have heard any evidence upon which it could make any findings of fact. No admission has been made, *and no inference of admission can be made.*

OSC tribunals frequently agonize over the fitness of a proposed settlement sanction in the context of the facts agreed upon. How will they fulfill their quasi-judicial responsibilities to determine the appropriateness of a penalty when there are no facts before them upon which to make such a determination? There will be no facts against which to weigh the sanction, simply allegations put forward by staff, which in law are clearly not facts. How can an OSC tribunal purport to impose the sanctions available under s.127, without any knowledge as to the respondent's culpability?

There are two main results that are the objective of enforcement action. One is deterrence. The other is the educative effect of describing conduct the Commission believes is harmful to the market.

Public admissions of misconduct are a powerful deterrent. Avoiding admissions of responsibility will substantially reduce the deterrent effect of the process. Anyone who has settled a matter on a no contest basis is entitled to say; "I have never been found guilty of any misconduct. My reputation remains unsullied."

Because there is no determination of facts, it becomes far more difficult for third parties to perceive where the lines have been drawn by the Commission. I do not need to explore the ways in which this issue has recently caused problems for the judiciary in the US. It is exactly the same principle that is being raised by those judges. It would be sad to see the OSC sacrifice principle in the name of an efficiency that probably is non-existent.

Other issues

In recent years many Commissions have adopted a means of protecting their markets against those who have committed wrongdoing in other markets, through the imposition of "reciprocal orders". This policy was adopted as a result of innumerable experiences with "serial offenders" who, having been banned in one province, simply commence operations in another province. Investors have suffered greatly at the hands of those who simply moved their dishonest practices to a province that had not banned them. As a matter of principle, it makes no sense to allow

someone who has been prohibited from trading in Ontario as a result of unlawful insider trading, to be free to trade in BC.

Under the current regime, reciprocating commissions consider admissions made by the respondent, or findings made against them after a hearing, in the originating jurisdiction, and base their sanctions on the facts as found. This is an important feature to protecting Canada's capital markets. If settlements are completed on a no contest basis in Ontario, it is difficult to see how sanctions could be imposed upon the respondent in a reciprocating province if the respondent does not consent to those sanctions.

It would make a complete mockery of the enforcement process if those who settled on a no contest basis were then able to leave the hearing room and assert that they did nothing wrong. If it is the intention of the OSC to prohibit such statements, it should be made clear in the Policy that such statements are prohibited and will result in further consequences.

The media has suggested that no contest settlements will not be available to those who have committed fraud and other serious transgressions. That limitation does not appear within the Policy, so one assumes it is not the intention of the Commission to so limit its availability. If, indeed, such a limitation is contemplated, the Policy should reflect that.

It should also be noted that many of the major players in the securities regime, such as most of the "big banks" have already been subject to sanctions. If it is the intention to preclude those who have previously been disciplined for misconduct from access o the no contest option, it should probably be made clear to them before the policy is enacted that they are not able to participate.

Unfortunately, the likelihood is that exceptions will be made in these and other circumstances such that ultimately the OSC will find itself in the same situation as the SEC now faces. All settlements will be on no contest basis.

Conclusion

George Bernard Shaw once wisely observed "Liberty means responsibility". It is a wise touchstone, one that is lost in a no contest policy. Those who settle on a no contest basis never have to accept responsibility for their misconduct.

One cannot overestimate the deterrent effect of requiring a market participant to admit that they did something wrong. We teach our children important lessons by requiring them to accept responsibility for their conduct. Becoming an adult does not alleviate the burden of responsibility. People who participate in the capital markets enjoy an enormous privilege not open to most of society. They, of all people, should be expected to accept the important responsibilities that go along with such privilege.

The OSC should not allow those who have abused their privilege of participation to escape responsibility for their misconduct.