Canadian Coalition for
GOOD GOVERNANCE
THE VOICE OF THE SHAREHOLDER

December 15, 2011

John Stevenson
Secretary
Ontario Securities Commission
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Dear Sir:

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

We have reviewed the above Notice and Request for Comments (the "Notice") and thank you for the opportunity to provide you with our comments.

Representing the interests of institutional shareholders, CCGG promotes good governance practices in Canadian public companies to best align the interests of boards and management with those of their shareholders. We also seek to improve Canada's regulatory framework to strengthen the efficiency and effectiveness of the Canadian capital markets. CCGG has 48 members who collectively manage almost $2 trillion of savings on behalf of most Canadians. A list of our members is attached to this submission.

In general, CCGG applauds the OSC for examining ways to resolve enforcement matters more quickly and effectively, although we are concerned by some of the proposed initiatives. In addition, we suggest that it is important for all of the issues raised in the Notice to be addressed uniformly across the country so that respondents' rights will not depend on the province in which they happen to reside.

Our comments with respect to each initiative are set out below.

Clarified process for self-reporting

CCGG has no objection to the "proffer" process described in the Notice, which we understand will simply codify and clarify OSC staff's current practices. In our members' view, it is particularly important that (as proposed by OSC staff) proffer agreements will not provide any "derivative use immunity" prohibiting the Commission from using any evidence derived from statements provided by a party against that party for the offence in question or any related offence. Similarly, we agree that it is important that proffer

agreements do not provide any immunity from prosecution for perjury, obstructing justice, or the giving of contradictory evidence.

Enhanced public disclosure of credit for cooperation

Similarly, CCGG agrees that there should be greater transparency regarding the 'credit for cooperation' that has been given by OSC staff to parties that have self-reported violations of securities laws or otherwise cooperated with OSC staff. CCGG agrees that better disclosure of the credit given to cooperating parties will likely encourage other parties to cooperate and therefore may facilitate the faster resolution of some cases.

No-Enforcement Action Agreements

CCGG generally supports the use of No-Enforcement Action Agreements which, like the proposed proffer process, appear to simply codify the current practice of OSC staff. CCGG agrees that the Notice sets out most of the relevant factors to be considered before a No-Enforcement Action Agreement is offered to a party. We believe, however, that any final rules or guidelines regarding No-Enforcement Action Agreements should contain an explicit statement by the OSC that such an agreement, and the immunity it offers a potential respondent, is extraordinary and available only in limited circumstances.

In CCGG's opinion, it is particularly important to focus on the timing of any self-reporting before a No-Enforcement Action Agreement is offered. It should be exceptionally rare for any party who has already been identified as a potential respondent by OSC staff to be offered a No-Enforcement Action Agreement. In our view, any such agreement should be offered only in very narrow circumstances where the evidence against the party is otherwise unavailable or the party provides new information that provides compelling and verifiable evidence against other potential respondents. In other circumstances, a party's willingness to self-report and cooperate with OSC staff could be addressed through the credit for cooperation program.

CCGG would like to draw to OSC staff's attention the rules relating to immunity agreements from the Competition Bureau. Those rules provide that an immunity agreement will be granted to a potential respondent only if the Bureau is unaware of an offence and the party is the first to disclose it or if the Bureau is aware of an offence but the party is the first to come forward before there is sufficient evidence to warrant a proceeding. In addition, if the party requesting immunity is the only party involved in the offence, that party will not be eligible for an immunity agreement. While recognizing that there are differences between proceedings under the Competition Act and proceedings under the Securities Act, we believe that the same principles are relevant to the proposed No-Enforcement Action Agreements. In our view, if No-Enforcement Action Agreements are too widely available and their use is not strictly controlled, there is a significant risk that their use will subvert the integrity of the enforcement process.

A no-contest settlement program

CCGG does not agree that the OSC's proposed no-contest settlement program will protect the public interest or investors. In our view, requiring a party to admit the truth of the allegations made by OSC staff is an important aspect of any settlement. CCGG is concerned that absent any stigma or reputational effects associated with settling a proceeding brought by OSC staff, such settlements, and any fines or payments associated with them, will simply become a "cost of doing business" for market participants, with minimal deterrent effect. In addition, there is a risk that allowing no-contest settlements will lead the public to

believe that the case against the respondent was weak or merely based on a "technical" violation of the law. While respondents who settle on a no-contest basis may be prevented from making public statements overtly denying the allegations, there would be no way to prevent such denials from being made privately, including to other market participants. Absent any formal admissions, those denials would inevitably carry more weight. All of these issues associated with no-contest settlements have the potential to negatively impact the integrity of the enforcement process and the public perception of it.

CCGG is aware that no-contest settlement agreements are routine in the United States and have been used by the Competition Tribunal in Canada. CCGG believes, however, that caution is warranted before this concept is imported into Canada in the securities law context. It is widely acknowledged that the intensity of public and private enforcement of securities laws in the United States is virtually unparalleled elsewhere in the world. The Securities and Exchange Commission ("SEC") routinely extracts significant penalties, criminal enforcement is robust and there is a well-developed class action regime. In this environment, no-contest settlements are seen as necessary and have not diminished the intensity of enforcement in the United States or the public perception of it.

In contrast, enforcement in Canada is widely perceived as weak and criminal enforcement of market-related offences is rare. As a result of the legal framework for secondary market liability, including the liability limits, private enforcement through civil actions has not developed to the same extent as it has in the United States. In light of the issues we have identified above, we do not agree that it is appropriate to import no-contest settlement agreements into the Canadian enforcement context. Although no-contest settlement agreements may result in more cases being settled relatively quickly, we do not think that the value of a quick settlement justifies the potential harm we have discussed above.

It is worth noting that the use of no-contest settlement agreements has been subject of recent judicial criticism in the United States[1] and in addition, at least one SEC Commissioner has commented that it might be necessary to re-visit their use.[2] In the very recent *Citigroup* case,[3] Judge Rakoff commented that no-contest settlements were not in the public interest and result in the public "...being deprived of ever knowing the truth in a matter of obvious public importance".[4] He went on to conclude that

> ...the SEC's long-standing policy – hallowed by history but not by reason – of allowing defendents to enter into Consent Judgments without admitting or denying the underlying allegations deprives the Court of even the most minimal assurance that the substantive injunctive relief it is being asked to impose has any basis in fact...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 truth lies.[5]

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[1] See, for example, *SEC* v. *Bank of* America 09 Civ. 6829 (S.D.N.Y. 2009) , *SEC* v. *Vitesse Semiconductor Corporation*, 10 Civ. 9239 (S.D.N.Y. 2010), *SEC* v. *Citigroup Global Markets Inc.* 11 Civ. 7387 (S.D.N.Y. 2011)

[2] See February 4, 2011 speech by Commissioner Luis A. Aguilar available at http://www.sec.gov/news/speech/2011/spch020411laa.htm

[3] *Supra*, note 1

[4] *Supra*, note 1 at 9

[5] *Supra*, note 1 at 9-10. Although in Canada settlement agreements are approved by securities regulators and not by the courts, in CCGG's view, Judge Rakoff's comments are relevant and applicable in the Canadian context, particularly his focus on the public interest which the OSC also is required to protect.

CCGG does not believe that the OSC or any other securities regulator should be concerned that requiring respondents to admit the truth of the factual allegations against them may result in those admissions being used by aggrieved investors in related civil actions. Since the purposes of Ontario's *Securities Act* are to protect investors and the integrity of Ontario's capital markets, we do not regard the use of admissions in settlement agreements in related proceedings brought by investors as inherently objectionable. In fact, we think that the inclusion of the secondary market liability provisions in the *Securities Act* reflect a legislative intention to have private enforcement operate together with public enforcement efforts.

If the OSC accepts CCGG's recommendation not to proceed with its no-contest settlement proposal, but remains concerned about the effect of settlement admissions on respondents, it could consider developing legislation to provide that admissions made in settlement agreements can be used only for limited purposes in civil proceedings arising out of the same facts. For example, if the OSC does not accept that admissions made in settlement agreements should be used as proof of the truth of those facts in civil proceedings, at a minimum it seems appropriate for them to be used for the purposes of cross-examination at trial or an application for leave under s. 138.8 of the *Securities* Act. Legislative provisions regarding the use of settlement admissions could be addressed in a national Securities Act (assuming it is passed) and/or the relevant Evidence Acts. Such a legislative approach would satisfy requests for greater protection for respondents while also maintaining the integrity of the enforcement process and its deterrent effect.

If, contrary to CCGG's recommendations, no-contest settlement agreements ultimately are allowed, in our view they should be offered only in very limited and exceptional circumstances. The OSC should develop and publicly disclose detailed criteria to establish when such a settlement might be appropriate. For example, a proceeding arising out of a difficult disclosure decision, which was made in good faith but was subsequently determined by OSC staff, in their expert judgement, to have been in error, might be one example of the type of case in which a no-contest settlement agreement might be appropriate. In addition, staff should be required to publicly disclose why a no-contest settlement agreement was offered in each individual case. The OSC should also ensure that any respondent in a no-contest settlement agreement is prevented from making any exculpatory statements after the agreement is approved which suggests, implicitly or explicitly, that the facts contained in the settlement agreement are inaccurate, misleading or untrue[6].

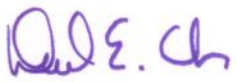
Executive Director's Settlements

CCGG also is concerned with the statement in the Notice that OSC staff intend to make greater use of Executive Director's Settlements as part of its no-contest settlement agreement program. Even without the addition of a no-contest component, Executive Director's Settlements always give rise to some level of concern, given that they are not subject to approval by an OSC panel. We understand that they have not been used frequently or at all in recent years. We think it is important to carefully consider how Executive Director's Settlements will relate and intersect with the proposed reforms contained in the Notice. We note, for example, that there is significant overlap between the goals, rationales and criteria set out in the original *Guidelines for the Approval by the Executive Director of Settlements of Enforcement Matters* dated November 28, 2008 and those set out in the current Notice. At a minimum, CCGG is of the view that those

[6] The common practice of respondents in the United States issuing exculpatory press releases after a no-contest settlement agreement is approved is one of the factors that has led Commissioner Aguilar to question their continued use. See note 2, *supra*.

guidelines must be updated and re-considered in light of the overall set of proposed reforms contained in the Notice.

Yours very truly,



Daniel E. Chornous, CFA
Chair of the Board
Canadian Coalition for Good Governance

CCGG MEMBERS

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