

OSC STAFF NOTICE 15-704
REQUEST FOR COMMENTS ON PROPOSED ENFORCEMENT INITIATIVES

December 19, 2011

In considering the proposed enforcement initiatives described in OSC Staff Notice 15-704, and particularly no contest settlements, the issues raised by the decision of U.S. District Judge Jed S. Rakoff in *U.S. Securities and Exchange Commission v. Citigroup Global Markets Inc.* 11-cv-7387, U.S. District Court, Southern District of New York (Manhattan) are relevant.¹

I am not necessarily opposed to these initiatives; used judiciously (to coin a phrase), they may be useful. However, I urge caution and vigilant monitoring, ideally by Commissioners who possess the intelligence, independence of mind and intestinal fortitude of Judge Rakoff.

Please keep in mind that staff of the Commission on the one hand and the respondents on the other are both highly motivated to reach settlements: OSC staff (and senior management) get to report good numbers and can boast of increased productivity; and the respondent gets certainty, gets to move on; as the Staff Notice itself points out, the respondent may be able to avoid further damage via civil action (or at the least, success by the plaintiffs in civil actions will be more difficult). But the public interest may not benefit from indiscriminate use of no contest settlements. One of the purposes of a public hearing is for the public to know exactly what happened, for there to be cross examination of witnesses, production of documents, etc. The public is entitled to know who knew what and when.

It is inappropriate to urge settlement in very complex and multi-faceted cases that are difficult to explain to lay persons. Those are precisely the situations where the greatest amount of scrutiny and rigorous inquiry are needed. If cases such as *Citigroup* are settled behind closed doors, with no formal findings of fact, then how is the public to be assured? In the aftermath of the financial crisis, there is a great deal of public suspicion and lack of confidence in the workings of Wall Street. That sentiment may not have extended to Bay Street, or not to the same extent, but in any case settlements that are announced as *fait accompli* will do little to restore confidence in public institutions or the capital markets. So complexity and the length of time and volume of documents needed to examine something or to dispose of a matter in an open forum should not be the criteria in determining whether it should go to no contest settlement. Judge Rakoff is exactly correct: we should not have to take it at their word that the parties to a settlement have learned their lesson and will henceforth comply. To the contrary, we should assume that recidivists will continue doing what they're doing until proved otherwise. Not because the people are "bad", but because that is the way the incentives are structured.

Good regulation is not just about moving cases through the pipeline. It is also about selecting the right cases and having open and public proceedings to examine alleged wrongdoing, with all of the expense, uncertainty, inability to control outcomes and possibilities for inaccurate or distorted reporting in the media that such processes entail. Public hearings are not without their problems, but that does not mean that they should be avoided. More enforcement does not equal better regulation.

¹ Available on line at <http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=1202533762917>

In conclusion, Commissioners should be very careful and err on the side of conservatism in the use or approval of no contest settlements. The capital markets are a public resource; they are not there only (or even primarily) to reward the direct participants, i.e. the issuers and the intermediaries. There is a broader public interest, and that interest calls for market participants to be held accountable if there is a breach of the regulations. Persons who violate securities laws need to be held up to public disapprobation. There has to be an opportunity for policy makers to examine what happened and determine if there was some sort of regulatory gap or failure. If ensuring that this occurs results in slower and more frustrating enforcement proceedings, or market participants being exposed to greater civil liability than they might otherwise, that is surely a price worth paying.

Yours sincerely,

“Susan Han”

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The views expressed in this submission are my personal views only, and do not represent the views of anyone other than the writer, a Toronto-based securities lawyer with Miller Thomson LLP.