

December 20, 2011

John Stevenson, Secretary
Ontario Securities Commission
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Dear Sirs/Madams:

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

The Canadian Bankers Association (“CBA”) works on behalf of 53 domestic banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 267,000 employees. The CBA advocates for effective public policies that contribute to a sound, successful banking system that benefits Canadians and Canada’s economy. The CBA also promotes financial literacy to help Canadians make informed financial decisions and works with banks and law enforcement to help protect customers against financial crime and promote fraud awareness.

We appreciate the opportunity to participate in stakeholder consultations regarding the Ontario Securities Commission’s (“OSC”) proposed enforcement initiatives, as outlined in the OSC Staff Notice 15-704 – *Request for Comments on Proposed Enforcement Initiatives* (the “Notice”).

General Comments

We support the OSC’s efforts to develop new enforcement initiatives to facilitate a faster and more effective resolution of enforcement matters and commend the OSC on its leadership in taking this significant step in securities enforcement. We believe that many of the initiatives set out in the Notice will contribute to successful enforcement outcomes in an efficient, measurable and practical manner.

We would also encourage the other securities commissions in Canada to adopt similar measures to ensure a harmonized approach to enforcement initiatives across the country.

While we lend our overall support to the proposed enforcement initiatives, we have outlined below some suggestions for making the proposed initiatives stronger, along with several requests for greater clarity.

As well, by way of a general comment which is not directly related to the proposals outlined in the Notice, we note that the use of Executive Director settlements (i.e., agreements entered into between OSC staff and respondents, and approved by the Executive Director that do not need to be approved by an OSC hearing panel) has been limited. As the OSC embarks on a project to enhance the transparency and efficiency of certain of its enforcement measures, we would encourage the OSC to do the same regarding Executive Director settlements.

Enhanced Public Disclosure of Credit Granted for Cooperation

The OSC states in the Notice that it has received feedback from market participants and their counsel indicating that self-reporting could be enhanced if persons had better access to information about the credit that was granted by the OSC to cooperating persons in other or comparable circumstances. In order to respond to this matter, the OSC is formalizing enhancements to the manner in which it publicly discloses the credit that has been granted to cooperating persons.

We understand the importance of encouraging more market participants and other parties to come forward with their information and cooperate with the OSC. We also agree that the proposed public disclosure of granted cooperation credits would enhance the transparency of the enforcement process. However, taking into account the relatively small size of the Canadian market, and the uncertainty regarding the type of information that would be disclosed, we are concerned that such public disclosure could discourage market participants and other parties from participating in this process.

We therefore ask the OSC to clarify (i) the nature of the information that could be disclosed and the form of such disclosure, and (ii) allow the industry an opportunity to comment on that clarification. We think that the OSC should carefully balance the need for public disclosure against its possible adverse effects on the cooperating party and/or related ongoing investigations or proceedings. As well, it is very important to ensure that non-public information is not inadvertently disclosed through this process. We would also encourage the OSC to consider allowing cooperating parties to opt out of such disclosure.

No-Enforcement Action Agreements

In section 7 of part 1 of the Notice, the OSC states that the No-Enforcement Action Agreement will be revoked under certain circumstances, and that staff will not be precluded from commencing any appropriate proceeding against the party. We would appreciate knowing who at the OSC would have the discretion to revoke an agreement, and whether any such revocation would be appealable. It would also be helpful if the OSC provided more detailed guidance on instances where an agreement would be revoked.

Also, in our view, section 7(c), which contains the ground that allows the OSC to revoke an agreement on the basis that the self-reporting person or entity is found to have benefited by their misconduct to a greater extent than previously disclosed, is unnecessary. We believe that this ground is subsumed in section 7(b), which contains the requirement to provide full and accurate information to OSC staff.

In addition, we would appreciate more clarity regarding the circumstances in which a No-Enforcement Action Agreement will be unavailable to a market participant. In particular, we would be interested to know who at the OSC would make that determination, and whether any such determination would be appealable.

No-Contest Settlement Program

The OSC proposes to make the No-Contest Settlements unavailable to respondents who have “previously been the subject of enforcement or regulatory activity by the OSC or any other agency”. We are concerned that this restriction is too broad¹, and that it would unnecessarily impede the OSC’s ability to deal expeditiously with certain enforcement matters, resulting in the issuance of fewer protective orders than would otherwise be the case. Therefore, we suggest that the OSC consider whether any such restriction is necessary.

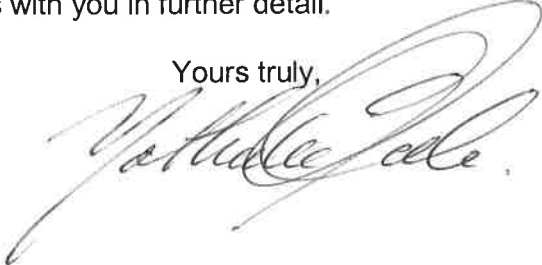
Clarified Process for Self-Reporting

We appreciate the OSC’s attempt to provide greater clarity regarding the credit for cooperation program and support various aspects of the proposal to formalize the proffer process, such as reporting through an intermediary.

Regarding the proposal to use proffer agreements, we would appreciate an opportunity to review and comment on a proposed draft of such proffer agreements. We encourage the OSC to engage in an industry consultation in that regard. In our view, it is important that any such mechanism be devised very carefully, taking into account all the relevant details, including terms and conditions of cooperation, and the type and scope of immunity provisions. Immunity provided by the OSC in respect of proffer agreements may not survive subpoenas by authorities undertaking criminal investigations, both in Canada and abroad. It is therefore important that any proffer agreements and immunity promised in respect of them by the OSC be carefully drafted.

We appreciate the opportunity to comment on the proposed enforcement initiatives, as outlined in the Notice. We would be pleased to discuss our comments with you in further detail.

Yours truly,



¹ For instance, if a firm has been active in the capital markets for a certain period of time (in some cases, decades), it is quite likely that it has been the subject of enforcement or other regulatory activity by the OSC or any other agency at one time or another.