



ITG Canada Corp.

The Exchange Tower, 130 King Street West, Suite 1040, Toronto, Ontario M5X 1B1
Tel: 416.874.0900 www.itg.com

Secretary of the Commission,
Ontario Securities Commission
20 Queen Street West
Toronto, ON M5H 3S8
Stevenson@osc.gov.on.ca
Via email

January 16, 2012

ITG would like to thank the Ontario Securities Commission (OSC) for the opportunity to provide comments on the proposal to improve the effectiveness of the OSC enforcement regime, as outlined in OSC Staff Notice 15-704. The fact that the OSC has opened this policy process to the public for commentary on these new proposals is a harbinger of a more transparent commission which is open to fresh ideas to help foster greater confidence in the processes which support and strengthen Canadian Capital markets.

Proposed No Enforcement Action Agreement

Participants are currently bound by existing Gatekeeper obligations. The proposed “No Enforcement Action” agreement would further encourage self-reporting, and thus would strengthen the OSC’s cases. However, to mitigate misuse, the OSC should consider all aspects of the reported infractions, including: the involvement of the participant, their contribution to preventing further damage to Capital Markets by the self-reporting, the participant’s potential history of involvement in other breaches of regulations, and the severity and frequency of the alleged infractions. While it is impossible to foresee all future situations, it would be wise to lay the ground rules as to what is acceptable self-reporting in order to provide comfort to those who would seek to strengthen the positive enforcement of securities laws; thus participants can be assured of the safeguards promised under this new regime. Encouraging self-reporting should increase the knowledge and awareness of the OSC, and make the OSC more efficient and effective. Such a program should help to weed out potential abuses earlier on, thus minimizing the negative impact on Canadian Capital Markets.

It should be noted that while the OSC Staff Notice 15-702 Credit for Cooperation was a positive first step, relatively few participants have availed themselves of this program. In part, this was



due to misunderstandings as to what were the expectations regarding what kind of credit would be extended, what kind of cooperation could be expected, and what would be the most effective process to approach the OSC. This last point should be considered by the OSC, since otherwise participants fearing a variation of the classic “prisoner’s dilemma” may continue to be fearful of reporting to the OSC lest even their minimal, coincidental or unintended involvement might not be considered a safe harbor, should the OSC have already started to investigate the action in question.

While the written clarification that the OSC would not initiate proceedings against the reporting participant under Sections 122, 127 and 128 of the *Securities Act* should provide some comfort, will the reporting participant be protected against prosecution by the other various securities commissions in Canada? The OSC is unable to confer immunity from criminal enforcement or civil liability, but will there be a multijurisdictional agreement between the various separate provincial securities commissions? Furthermore, would the participant also be subject to sanctions by any Canadian Self Regulatory Organizations? Without this assurance of immunity from other Canadian regulators, participants may still be reluctant to step forward. In addition, will there be boundaries set wherein the OSC would be limited to use the No-Enforcement Action Agreement to focus on the allegations under consideration? Without addressing these concerns, these considerations might render the program ineffective.

Proposed No Contest Settlement Program

In light of the recent reconsiderations by the United States Securities Exchange Commission (SEC) regarding their own separate policy of no-contest settlement, some may mistakenly take this as a signal not to proceed with the bold proposal by the OSC. Instead, the OSC should forge ahead to create its own path in efforts to improve its capability to make public breaches of securities laws. Some of the lengthy and unsuccessful cases of the past may have been settled with greater public good, had there been such a no-contest settlement mechanism. Such a program would inform the public more expediently, and at a fraction of the litigation costs. The industry would know the damage done, the fines agreed to, and who were involved, even if the settlement officially reads “no-contest.”

Equally important, the quicker settlements with first time offenders, with participants agreeing to curtail the activity in question, should provide for greater confidence in Canadian Capital markets. If the outcome is a greater proportion of settlements, then participants globally will know that the rules are enforced effectively in Canada. Naturally, this program should only be made available to those for whom this is their first significant offense of securities regulations.



Further, the OSC should clarify what is expected in terms of what is acceptable for providing compensation to affected third parties, where applicable. Typically such settlements are negotiated, and third parties would now have considerable leverage to demand unreasonable terms should they know that their settlement is critical to the success of the participant's "No Contest" agreement. In light of this, perhaps instead it would suffice for the participant to have demonstrated that they made a reasonable and *bona fide* settlement offer, and were actively engaged in discussions with an aim of arriving at a settlement.

"Proffer" Agreements as means to clarify the process of Self Reporting

The proposed process of providing immunity under the proffer agreement seems quite logical. However, there is a concern about the same jurisdictional immunity issues as above regarding immunity from other securities commissions and regulators in Canada. Participants may not participate in the program if their immunity is limited to one commission.

Enhanced Public Disclosure of Credit Granted for Cooperation

ITG agrees that the public disclosure will foster a greater public appreciation for the validity of these programs. Increased transparency of information and awareness of the effectiveness of this program should reinforce the strength of effective regulation, and thus the integrity of Capital Markets in Canada.

Summary

In sum, we thank the OSC again for opening the process up to public comment. We hope that our comments have been helpful in validating the OSC's direction while providing some thoughts to consider in shaping the proposals. Should there be an opportunity to comment in a Policy Hearing, ITG would be delighted to share its thoughts on this important policy shift.

Kuno Tucker

A handwritten signature in blue ink, appearing to read "Kuno Tucker", is positioned above the typed name.

Chief Compliance Officer,
ITG Canada Corp.