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By E-Mail

Ontario Securities Commission
20 Queen Street West, Suite 1903, Box 55
Toronto, ON M5H 3S8

Attention: Katie Daniels, Deputy Director, Enforcement Branch

Dear Sirs/Mesdames:

Re: OSC Staff Notice 15-704 – *Request for Comments on Proposed Enforcement Initiatives* (the "Notice)

Introduction

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 during the extended comment period in continuing stakeholder consultations regarding the enforcement initiatives (the "**Initiatives**") proposed in the Notice.

We respectfully request the opportunity to make submissions at the upcoming policy hearing. We intend to elaborate at that hearing on some of the ideas discussed in this letter.

Overview

This supplemental comment letter speaks exclusively to the "no contest" enforcement proposal (the "**No Contest Proposal**") included in the Notice.

As indicated in our initial comment letter of December 20, 2011, we support the Initiatives including the No Contest Proposal. While we believe that the No Contest Proposal has merit, we believe that it needs to be presented for further public comment in considerably more detail.

In summary, we recommend in this letter that the OSC reissue the Notice with a form of no contest settlement agreement and make clear that such settlement agreement will include agreed facts and other features which will continue to be made public once the settlement agreement is approved by an OSC panel. We make some suggestions below about the structure and content of the settlement agreement.

We also recommend that the reissued Notice set out in much more detail the "credit for co-operation" process that is envisaged in the Notice as a pre-condition to any no contest outcome. We make suggestions below about changes in the process that we believe would encourage greater use of self-reporting and remediation by co-operating parties.

Comments on No Contest Proposal

A number of comment letters[1] have questioned whether the adoption of a no contest enforcement action is consistent with the purposes of the Securities Act (Ontario) ("OSA") or the "fundamental principles" the OSC is to follow in achieving the purposes of the legislation[2].

In our view, these criticisms assume that the factual underpinning for an order issued in a no contest settlement will somehow not be visible to OSC enforcement panels or the public. Yet the Notice only says the OSC's usual form of settlement agreement will be "modified". It is a shortcoming of the Notice that it does not provide a draft of the form of settlement agreement that the OSC staff has under consideration.

The assumption by commenters that no contest settlement agreements will not contain agreed facts drives predictions that the No Contest Proposal will make it impossible for OSC enforcement panels to evaluate the appropriateness of the sanctions agreed to by co-operating respondents. Such panels, it is suggested, will be put in the same untenable position as Judge Rakoff of the Southern District of New York who has refused to approve some recent high profile settlements reached by the SEC. In these proposed settlements, Judge Rakoff was presented with a court file containing a detailed SEC complaint setting forth allegations of serious misconduct and was being asked to issue an order of the Court without any agreement by the SEC and defendants as to the facts supporting the order.

The procedure followed in Ontario is quite different from the one followed in the U.S. We believe that no contest settlement agreements submitted to OSC hearing panels should continue to contain sufficient agreed facts to allow the panel to apply the legal principles that must be considered before an order can be granted in the public interest under section 127 of the OSA. What the "no contest" approach requires is not that the underlying facts be suppressed but rather that the settling respondent not have to characterize its conduct as being either illegal or contrary to the public interest.

We believe that settlement agreements should not only set forth some agreed facts in neutral language but should also allow the respondent to include as part of the agreement the respondent's view of mitigating factors and other information and belief that provides context for any order that is issued. OSC staff should not have to endorse the part of the settlement agreement that summarizes the respondent's position.

Since the inclusion in the settlement agreement of agreed facts is needed so that an OSC settlement panel can apply the legal principles established by section 127 of the OSA and also so that the result can be understood by the public and promote confidence in capital markets, we believe there is merit in instituting legally effective limitations, by way of OSC rule, on the use of

[1] See for example Siskinds December 6, 2011 comment letter at p.1 and .Emerson Advisory Dec 20, 2011 comment letter for example at pp 3-4.
[2] OSA ss 1.1. and 2.1.

public settlement agreements as evidence in parallel civil claims and, if possible, regulatory proceedings arising out of the same facts as those underpinning no contest settlements.

We believe that this approach still achieves the purposes of the OSA because the no contest settlement agreement will always impose a sanction and have a deterrent effect. Such agreements will protect investors and foster confidence in the capital markets despite the fact that the respondent does not characterize its conduct as lawful or as falling below a public interest standard.

Specifically, and in summary, we believe that the no contest settlement agreement should contain the following essential features:

(a) sufficient agreed facts stated in neutral language to explain to the hearing panel and ultimately to the public the conduct giving rise to the agreed sanction together with mitigating factors such as self-reporting and co-operation;

(b) at the option of the co-operating respondent, a "statement of the respondent's position" presenting those facts and circumstances which the co-operating respondent wishes to add to provide context for the panel or the public. This would not form part of the "agreed facts";

(c) the language that must be used to convey the "neither admits nor denies" message;

(d) a covenant by the co-operating respondent not to make any statement that tends to minimize the importance of the settlement or to make any statement that the settlement was agreed to out of expediency; and

(e) a statement limiting the ability of third parties to use the settlement agreement as evidence in connected proceedings.

With respect to (e), we recommend that by way of amendment to its rules or the OSA regulations, the OSC create a legally effective means of preventing the settlement agreement from being used in connected proceedings. Other commentators such as the signatories of the letter submitted on behalf of members of the defence bar have made this point and have provided examples of relevant legislation that accomplishes this objective.

Eligibility for No Contest Outcome

We recommend that the No Contest Proposal be amended to expand eligibility to include parties with enforcement histories that have nonetheless been substantially compliant with securities legislation for extended periods of time.

The no contest settlement program is predicated on self-reporting by the co-operating respondent of "misconduct" in a timely manner, the taking of corrective action including the payment of compensation and on other forms of continuing co-operation on a with prejudice basis.

Admitting to misconduct and paying compensation in advance of a no contest settlement is inconsistent with the principle of "no contest" because both self-reporting and the payment of compensation imply liability on the part of the respondent.

To make the objectives of the Notice more achievable, it is necessary that respondents be able to self-report without having to explicitly concede from the outset that misconduct, violations of law or conduct contrary to the public interest have occurred. Rather, self-reporting should be the first step in a process that includes remediation and culminates in a settlement. The proffer

agreement proposed is consistent with this approach. Here again the community would benefit from a revised Notice that included a draft of a proffer agreement.

The purpose of the No Contest Proposal would be defeated if other securities regulators commenced regulatory proceedings after a settlement agreement were signed. Even today, some practice must be in place to avoid "piling on" by other regulators after a settlement is reached with a co-operating party. A revised Notice could usefully address this important practical issue.

We appreciate the opportunity to provide these supplemental comments and look forward to elaborating on them at the policy hearing.

Yours truly,