

## Chapter 6

# Request for Comments

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### 6.1.1 OSC Notice and Request for Comment - Proposed Guidelines for Executive Director's Settlements

#### NOTICE AND REQUEST FOR COMMENTS

##### Introduction

The Commission is seeking comments on its proposed guidelines for the approval by the Executive Director of settlements of enforcement matters (referred to in this Notice as "Executive Director's Settlements"). The Commission is publishing the proposed guidelines for a 60 day comment period. Following the comment period and after taking into consideration any comments received, the Commission will publish the guidelines in final form.

##### Background

Practice Guideline 7 of the Commission's current *Rules of Practice* is entitled "Settlement Procedures in matters before the Ontario Securities Commission". Section 5 of Practice Guideline 7 refers to Executive Director's Settlements as follows:

"Prior to the issuance of a Notice of Hearing, staff may settle a matter with the respondent, with the consent of the Executive Director where appropriate."

The Commission has previously published for comment proposed *Rules of Procedure* that will, when adopted, replace the current *Rules of Practice*. Rule 12 under the proposed *Rules of Procedure* deals with settlement agreements. Rule 12 does not include any reference to Executive Director's Settlements. These settlements are addressed in the proposed guidelines.

##### Proposed Guidelines

The early settlement of matters by Enforcement Staff (i.e., prior to the formal commencement of proceedings) and the approval of such settlements is an exercise of staff discretion and is outside the Commission's adjudicative process. However, in the exercise of its oversight of the administration of the *Securities Act*, the Commission may from time to time provide general guidance on:

- the nature of matters that may be resolved by an Executive Director's Settlement; and
- the factors the Executive Director should consider in approving such a settlement.

The proposed guidelines for the approval of Executive Director's Settlements discuss both of these matters, as well as certain other related matters, including:

- consultation by the Executive Director with the Chair and any other Commissioner, in certain circumstances;
- procedure for approval of a settlement; and
- publication of Executive Director's Settlements.

The proposed guidelines have been developed by the Commission for the purposes of:

- encouraging the resolution of matters prior to the initiation of formal proceedings and publication of a Statement of Allegations and Notice of Hearing; and
- bringing transparency with respect to the nature of matters that may be resolved by an Executive Director's Settlement and the Commission's views as to the factors the Executive Director may consider in approving such a settlement.

##### Comments

The Commission invites interested parties to submit their comments on the proposed guidelines in writing. Persons submitting comments should be aware that written comments will be made public and will be published on the Commission's website

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unless confidentiality is requested. If you request confidentiality, the Commission will not place your comments in the public file, but may be required to make your comments available pursuant to a request made under freedom of information legislation.

Comments may be delivered in hardcopy or by e-mail by 5.00 pm on Wednesday, May 21, 2008. (If comments are not sent by e-mail, please forward an electronic version of the comments in MsWord format to the Secretary on CD.)

Please send your comments to the following address:

c/o John P. Stevenson, Secretary to the Commission  
Ontario Securities Commission  
20 Queen Street West  
Suite 1900, Box 55  
Toronto, Ontario M5H 3S8  
[jstevenson@osc.gov.on.ca](mailto:jstevenson@osc.gov.on.ca)

### **Questions**

Please refer your questions to:

Krista Martin Gorelle  
Senior Legal Counsel, General Counsel's Office  
(416) 593 3689  
[kgorelle@osc.gov.on.ca](mailto:kgorelle@osc.gov.on.ca)

### **Text of the proposed guidelines**

The text of the proposed guidelines follows.

March 21, 2008

ONTARIO SECURITIES COMMISSION

GUIDELINES FOR THE APPROVAL BY THE EXECUTIVE DIRECTOR  
OF SETTLEMENTS OF ENFORCEMENT MATTERS

The purposes of the Ontario *Securities Act* (the "Act") are set out in Section 1.1 of the Act as follows:

- (a) to provide protection to investors from unfair, improper or fraudulent practices; and
- (b) to foster fair and efficient capital markets and confidence in capital markets.

**The role of the Executive Director's Settlements in the administration of the Act**

To promote public confidence in the administration of the Act, securities regulation generally, and enforcement proceedings in particular, must be conducted in an open and transparent manner. In resolving enforcement matters, the Commission must balance the requirements for a fair, timely and efficient disposition of matters with the need to encourage compliance by sending effective messages of deterrence. However, for the fair and expeditious administration of the Commission's enforcement authority under the Act, it may be in the public interest to resolve a matter through settlement at an early stage rather than through formal proceedings (after the issue of a notice of hearing) before a Commission panel or in the courts.

The resolution of enforcement matters at an early stage through agreement between Staff and parties alleged to have acted contrary to the Act, can result in more effective and immediate protection of investors and more rapid restoration of confidence in the capital markets than would be achieved through a more protracted formal proceeding. The early resolution of enforcement matters through settlement can also: (i) avoid unnecessary and potentially harmful delays; (ii) avoid circumstances where a detailed but unproven statement of allegations has been publicly issued and remains outstanding for an extended period; (iii) allow for a more flexible approach that achieves the Commission's regulatory objectives; (iv) avoid uncertainty to market participants as to the terms of a possible settlement and as to whether a settlement will be approved; (v) avoid the incurrance of unnecessary costs by market participants and the Commission; and (vi) result in a more efficient use of the Commission's resources.

In certain circumstances it may be appropriate that Staff, with the consent of the Executive Director, exercise its discretion to resolve an enforcement matter prior to the formal commencement of proceedings by entering into a voluntary settlement agreement with a party (an "Executive Director's Settlement"). For this purpose, a proceeding is considered to have been formally commenced either (i) on the issuance of a Statement of Allegations and Notice of Hearing in respect of a proceeding; or (ii) on the consent of the Chair of the Commission to the commencement of a proceeding under Section 122 of the Act in respect of a court proceeding. The settlement of an administrative proceeding that has been formally commenced must be approved by a panel of Commissioners.

Although the Commission recognizes that the decision to enter into an Executive Director's Settlement is an appropriate exercise of Staff's discretion, the Commission, in the exercise of its oversight of the administration of the Act, may from time to time provide general guidance on (i) the nature of matters that may be resolved by an Executive Director's Settlement, and (ii) the factors the Executive Director should consider in approving such a settlement.

**Nature of Matters That Can Be Resolved**

While it is within the discretion of the Executive Director to resolve any matter prior to initiation of a formal Proceeding<sup>1</sup>, the Executive Director should not approve an Executive Director's Settlement where, in her or his opinion,

- (i) the matter or settlement raises an important or novel policy issue or could be viewed as a significant shift in policy or a significant precedent;
- (ii) the alleged conduct is egregious; or
- (iii) the matter or settlement imposes significant terms or obligations.

The Executive Director may approve a settlement agreement for an Executive Director's Settlement containing a provision for a voluntary payment only where the payment has been or is to be made:

- (i) to the Commission to reimburse costs incurred or to be incurred by the Commission;

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<sup>1</sup> The Commission recognizes that the Executive Director has discretion prior to the commencement of a formal proceeding, to decide such matters as (i) whether particular circumstances will be investigated, (ii) whether an investigation will be closed and on what terms, and (iii) whether a formal proceeding will be commenced. Approval of Executive Director's Settlements is consistent with that discretion.

- (ii) for the benefit of third parties for subsequent allocation by the Commission in its discretion; or
- (iii) for the benefit of specific persons or classes of persons identified as having been harmed by any alleged misconduct.

**Factors to be considered in approving an Executive Director's Settlement**

In approving any Executive Director's Settlement, the Executive Director may consider such factors as the Executive Director determines are appropriate or relevant in the circumstances. These factors would generally include:

- The party's history of compliance with securities requirements and any enforcement action taken in respect of the party in the past;
- The manner in which the misconduct arose and/or came to the party's attention, the steps taken by the party in response and, in particular, whether the party would qualify for credit under Ontario Securities Commission Staff Notice 15-702 – *Credit for Cooperation*;
- The nature and seriousness of the misconduct and, in particular, whether the misconduct:
  - (i) would be considered to be a technical breach of the Act, or a more serious violation deserving of the kind of regulatory consequences available only in proceedings either before the Commission or in the courts;
  - (ii) was deliberate or reckless;
- The nature and extent of the harm caused by the misconduct and, in particular, the harm to investors; and
- The appropriateness and effectiveness of the settlement in achieving the regulatory and policy objectives of the Act.

The overriding consideration, in every case, will be the Executive Director's determination that entering into an Executive Director's Settlement is in the public interest.

**Consultation with the Chair or a Commissioner**

The Executive Director may consult with, and seek the advice of, the Chair at any time in connection with the Executive Director's consideration of a proposed settlement. In addition, the Executive Director may obtain the advice of any other Commissioner if the Executive Director is uncertain whether the proposed settlement falls within the scope of these Guidelines and, in particular, the criteria referred to under "Nature of Matters That Can Be Resolved". The advice of such other Commissioner shall relate solely to the question whether the Executive Director is entitled to approve the settlement in accordance with these Guidelines.

If a Commissioner is consulted by the Executive Director in connection with a settlement, that Commissioner may not subsequently be a member of any panel of the Commission in any proceeding in which the conduct to which the proposed settlement relates would be in issue, including any proceeding to consider a proposed settlement.

**Procedure for approval of a settlement by the Executive Director**

The Director of Enforcement, or such other Staff member of the Enforcement Branch as the Director may designate, shall provide to the Executive Director at the time of requesting the Executive Director's approval of a settlement:

- (i) a copy of the proposed settlement agreement to be approved;
- (ii) a memorandum of the Director (or a joint memorandum of the Director and the settling parties) setting out the reasons why the Director (or the Director and the settling parties together) recommends the approval of the settlement and a statement of the Director that he or she believes the settlement can be entered into in accordance with these Guidelines; and
- (iii) any other information the Director (or the Director and the settling parties) believes to be relevant to the Executive Director's determination or that the Executive Director requests.

The Executive Director may, in her or his discretion, adopt such procedures for the consideration and approval of Executive Director's Settlements as she or he deems appropriate consistent with these Guidelines.

**Publication of Executive Director's Settlements**

Every settlement approved by the Executive Director shall be published in the *OSC Bulletin* and posted on the Commission's website as soon as practicable following its approval.

Concurrently with the publication of an approved settlement, the Executive Director may issue a public statement with respect to the settlement if, in her or his discretion, the Executive Director deems it advisable to do so in the public interest.

**Reporting to the Commission**

The Executive Director shall on at least a quarterly basis prepare a written report to the Commission describing any Executive Director's Settlements approved in such period.

**Guidelines Only**

These Guidelines reflect the Commission's policy approach to Executive Director's Settlements and are not intended as prescriptive rules or to affect the legal rights or obligations of any person or the legal validity of any settlement agreement.