

Chapter 5

Rules and Policies

5.1.1 Notice and Guidelines for Executive Director's Settlements

NOTICE AND GUIDELINES FOR EXECUTIVE DIRECTOR'S SETTLEMENTS

On March 21, 2008 the Commission published, for a 60 day comment period, its proposed guidelines for the approval by the Executive Director of settlements of enforcement matters ("Executive Director's settlements") prior to the issue of a notice of hearing. The proposed guidelines appeared in (2008) 31 OSCB at pages 3311 to 3315.

The proposed guidelines reflect the Commission's policy approach to oversight of enforcement matters – in this case, early settlement of matters through Executive Director's settlements. Executive Director's settlements provide an opportunity for early resolution of matters before the formal commencement of proceedings. These guidelines are not rules and are not intended to affect the legal rights or obligations of any person.

The Commission received two comment letters through the formal comment process. These comments were posted on the Commission's website together with the proposed guidelines. The Commission also received some comments as a result of its informal consultations.

All commenters were supportive of the proposed guidelines and offered very constructive comments and suggestions. The Commission thanks the commenters for taking the time to provide these comments and suggestions. Some of the commenters suggested that the guidelines do not go far enough in certain aspects. At this time, the Commission is not prepared to extend its guidance beyond that set out in the guidelines being published with this Notice. However, some of the matters raised by the commenters may be considered at a later time, as part of an ongoing review of the Commission's overall approach to the settlement process.

The Commission has prepared a brief summary of the written comments received, together with its responses to the significant issues and concerns brought to the Commission's attention during the comment period. The summary of comments and the Commission responses follow this Notice as Schedule A.

As a result of the comments received, the Commission has made some changes to the proposed guidelines in order to provide clarification. Those changes are not material. The final guidelines are set out at Schedule B. The guidelines are effective immediately.

SCHEDULE A

**Guidelines for Executive Director’s Settlements
Summary of Comments and Responses**

Summarized Comment	Response
<p>1. Supportive of the proposed guidelines, particularly with regard to accountability and transparency aspects.</p>	<p>General response:</p> <p>The Commission appreciates the views and suggestions communicated by those who provided comments on the proposed guidelines and thanks the commenters for taking the time.</p> <p>The comments we received have been helpful in expanding the Commission’s understanding of perceptions of Executive Director’s settlements and the settlement process generally. These comments will assist the Commission in connection with future developments in this area.</p>
<p>2. Consider adding to the introductory language that cites the purposes of the Securities Act, a reference to Section 2.1, which outlines “fundamental principles” that have been incorporated into the legislation and to which the Commission is to have regard. In particular, principle 3 and principle 6 (costs and restrictions should be proportionate to the significance of the regulatory objectives) would seem to be particularly relevant.</p>	<p>2. Response: In the Commission’s view, it is not necessary to include a reference to these principles in the guidelines because the guidance in the Act is applicable to the Executive Director’s exercise of discretion.</p>
<p>3. The last sentence of the second paragraph seems to suggest that settlement at an early stage may somehow be inconsistent with openness, transparency, fairness, timeliness or efficiency. However, this is not necessarily correct, as the third paragraph of the guidelines would suggest in its articulation of the rationale for Executive Director’s settlements. Consider removing or modifying that sentence.</p>	<p>3. Response: The Commission agrees with this comment. We have removed the word “however” from the last sentence, to clarify our intention.</p>
<p>4. The Executive Director should also be permitted to approve settlements after proceedings have been commenced if the Executive Director concludes that this would be in the public interest. This flexibility would allow for fair results in circumstances where the conduct is not sufficiently serious to warrant an order under section 127. Approval by a panel of commissioners should be mandatory only when the sanction that the Executive Director considers appropriate in the public interest must be imposed by the Commission in an order made under section 127 of the Act.</p>	<p>4. Response: The Commission believes that the parameters outlined in the proposed guidelines are reasonable, and permit sufficient flexibility, in the circumstances. At this time, the Commission is of the view that, once the allegations have been made public, any resolution of these should be determined or approved by the Commission.</p>
<p>5. There is substantial overlap between the criteria to be applied to “Nature of matters that can be resolved” and “Factors to be considered in approving an Executive Director’s settlement”, and in application they are likely to be largely indistinguishable.</p>	<p>5. Response: The Commission acknowledges that there may be some overlap between these points, but is of the view that any overlap is helpful to clarify the purpose of and intent behind Executive Director’s settlements. However, in order to clarify the intention regarding the nature of matters</p>

Summarized Comment	Response
<p>The potential policy implications of a settlement resolution should not be a factor limiting the availability of an Executive Director's settlement. Rather, policy implications should be considered only as a factor in determining whether a specific settlement should be approved by the Executive Director, along with the other factors outlined in the proposed guidelines with respect to the seriousness of the conduct under consideration, the nature of the sanctions that flow from it and the effectiveness of the settlement in achieving the Act's objectives. This approach, if accepted, may result in a limitation on the sanctions available in an Executive Director's settlement that the proposed guidelines would permit.</p> <p>The proposed guidelines would permit an Executive Director's settlement to require a voluntary payment to be made for the benefit of third parties for subsequent allocation by the Commission in its discretion. The Act contemplates, however, that such payments must be made either under a section 127 order that imposes an administrative fine or disgorgement or "to settle enforcement proceedings commenced by the Commission" (Act, s. 3.4). Consideration should be given to whether settlements requiring such payments should have to be approved by a Commission panel.</p> <p>This is not the case with respect to the payment of costs or a payment for the benefit of specific persons who have been harmed by a respondent's conduct. In fact, a respondent's willingness to compensate persons who have been harmed by his or her conduct may be a factor militating against a severe sanction that only the Commission has authority to impose.</p> <p>6. The limitation on consultation with a commissioner other than the Chair appears arbitrary in view of the substantial identity between the factors that the Executive Director should consider when determining whether to approve an Executive Director's settlement and those that are included, in more general terms, as going to the nature of the matters that can be resolved under the proposed guidelines. As the Chair does not sit as a panel member in adjudicative proceedings, consultation with him may be acceptable. But broader consultation runs the risk of involving members of the Commission in the settlement negotiation process in an informal manner. Even though a commissioner who is consulted will not be entitled to participate in any subsequent adjudicative proceeding relating to the same matter, including approval of the settlement, in view of the fact that the criteria necessarily involve the merits of the matter, it is questionable whether such consultation should be permitted to occur on an ex parte basis.</p> <p>7. Supportive of the proposal for a joint memorandum of the Director and settling parties to be submitted to the Executive Director. If the memorandum is not jointly prepared, the</p>	<p>that can be resolved, we have amended paragraph (i). This paragraph now provides that the Executive Director should not approve an Executive Director's settlement where, in his or her opinion, "the matter or settlement raises an important or novel policy issue or could be viewed as a significant precedent, which would reasonably be expected to be addressed by the Commission".</p> <p>The Commission does not agree that settlements under the guidelines that provide for a payment to be made for the benefit of unspecified third parties, for subsequent allocation by the Commission, must be approved by a Commission panel. These do not constitute administrative penalties or disgorgement, but rather, as in the case of the other payments contemplated by the guidelines, are voluntary payments by the settling party, which would be approved by the Executive Director. The subsequent allocation of any payments for the benefit of unspecified third parties would be made by the Commission.</p> <p>6. Response: In order to avoid any concern that a consultation could potentially extend beyond the "scope" of the matter, the Commission has removed the provision for consultation with a commissioner other than the Chair.</p> <p>7. Response: The Commission acknowledges the commenter's concern and notes that the language of the proposed guidelines appears to be sufficient for the</p>

Summarized Comment	Response
<p>settling party should be given an opportunity to review and comment on the staff memorandum, before it is sent to the Executive Director. While this procedure need not be made mandatory, it should be expressly encouraged in the proposed guidelines.</p>	<p>purposes. In particular, the Executive Director may encourage a joint proposal in appropriate cases.</p>
<p>8. Supportive of the proposal for publication of Executive Director's settlements, but questions why the Executive Director needs to be authorized to issue public statements with respect to settlements. As settlements should not be used as a basis for announcing new policies or policy changes, such statements should be treated with caution, in part because a change in policy is a matter for the Commission. The proposed guidelines should, therefore, discourage such statements by the Executive Director and, if they are to be issued, should confine them to the Executive Director's reasons for approving a settlement on a factual basis.</p>	<p>8. Response: In the Commission's view, it is not necessary for the guidelines to specify how or when the Executive Director may exercise his or her discretion in terms of any statements made in connection with the approval of a settlement.</p>
<p>9. The quarterly written reports from the Executive Director to the Commission should be published in the OSC Bulletin. In addition, the guidelines should state that the Commission will consider such reports with a view to monitoring Executive Director's settlements and practices relating to them, that the reports may be referred to the OSC Enforcement Advisory Committee for comment, and that they may provide a basis for amending the guidelines or adopting further guidelines.</p>	<p>9. Response: All Executive Director's settlements will be published following approval. As such, there is no need to publish the Executive Director's report to the Commission.</p>
<p>10. Supportive of the proposed transparency for Executive Director's settlements but the Executive Director should have the discretion not to publish settlements, in particular since there may be certain factual situations in which there could be a compelling argument made for not publishing the settlement.</p>	<p>10. Response: The Commission acknowledges the comment but notes that transparency is an important aspect of these guidelines. As noted in the response to Comment 9, all Executive Director's settlements will be published following approval.</p>
<p>11. It would be best if the guidelines specifically state that it is permissible for the Executive Director to settle without any admission of wrongdoing.</p>	<p>11. Response: The guidelines do not address this issue, nor do they attempt to limit the Executive Director's discretion relating to the substance of any settlement.</p>

SCHEDULE B

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. 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 incurrence 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 Proceeding¹, 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 precedent, which would reasonably be expected to be addressed by the Commission;
- (ii) the alleged conduct is egregious; or
- (iii) the matter or settlement involves or 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:

¹ 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.

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

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 law 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.

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. The Chair does not sit on any panels in any proceedings, including any proceedings 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.

Rules and Policies

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.