

1.1.2 OSC Staff Notice 15-706: Update to OSC Staff Notice 15-704 on Proposed Enforcement Initiatives

OSC STAFF NOTICE 15-706

UPDATE TO OSC STAFF NOTICE 15-704 ON PROPOSED ENFORCEMENT INITIATIVES

In advance of the Enforcement Policy Hearing (the "Policy Hearing") on June 17, 2013, staff (or "we") of the Ontario Securities Commission ("OSC") are providing a brief update on the activities undertaken since OSC Staff Notice 15-704 *Request for Comments on Proposed Enforcement Initiatives* was published on October 21, 2011 (the "Notice"). The four proposed enforcement initiatives set out in the Notice include No-Enforcement Action Agreements, No-Contest Settlements, a Clarified Process for Self-Reporting and Enhanced Public Disclosure of Credit Granted for Cooperation.

We have reviewed the public comments filed with the OSC and thank the many commenters who provided submissions. The comments have been very informative and helpful as staff further consider the proposed enforcement initiatives. We acknowledge that various stakeholders have different points of view on our proposed initiatives and look forward to further submissions from the presenters who will be participating in the upcoming Policy Hearing.

In addition, we have also been actively monitoring developments in the United States, where the use of "*neither admit nor deny settlements*" by the Securities and Exchange Commission (and other federal regulators) have recently been the subject of judicial consideration, legislative inquiry and media comment. In view of the possible effect of these developments on the consideration of staff's proposed "no-contest settlement program", we commissioned a research paper to review and analyze recent U.S. developments. As part of this update, we attach a copy of the paper, "*No-Contest Settlements and the SEC's Recent Experience: Implications for Ontario*," authored by Philip Anisman.

At the Policy Hearing, Tom Atkinson, Director of Enforcement, will be providing submissions in support of the four proposed enforcement initiatives. Staff remain committed to these initiatives as a way to increase Enforcement's effectiveness in protecting the public interest. These initiatives will allow us to resolve enforcement matters more quickly and issue more protective orders earlier, which would benefit both investors and the capital markets.

Clarification of Eligibility for No-Contest Settlements

In response to the many public comments made about the no-contest settlement program, we would like to clarify, in advance of the hearing, staff's position on the limited circumstances for which this type of settlement agreement would be considered.

First, a no-contest settlement agreement would not be made available to a proposed respondent where the person has engaged in egregious, fraudulent or criminal conduct, or where the person's misconduct has resulted in investor harm which remains unaddressed.

Second, in proposing a no-contest settlement, staff would have to determine a proposed respondent's eligibility for this type of agreement by assessing the following factors:

- the extent to which the proposed respondent provided prompt, detailed and candid cooperation during staff's investigation;
- the degree and timeliness of self-reporting undertaken by the proposed respondent in light of the circumstances of the misconduct;
- the remedial steps taken by the proposed respondent in addressing the misconduct (for example, compensation to investors and/or enhancements to the firm's internal control environment);
- whether the proposed respondent disgorged the amounts obtained or losses avoided.

Lastly, in order to address concerns raised by some commenters, staff now propose that eligibility to participate in a no-contest settlement will not be prohibited by the fact that a person may have previously been the subject of enforcement activity by the OSC or any other agency.