Submission to OSC Policy Hearing on Proposed Enforcement Initiatives
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Introduction

Good morning Vice-Chairs Condon, Robertson and Turner. I'm here today on behalf of OSC Enforcement staff to address the proposed enforcement initiatives that we published for comment in 2011.

I'd like to thank everyone who commented on our proposals. The input we have received has been very helpful to us in furthering these initiatives.

We remain committed to these initiatives. We strongly believe that they will increase the effectiveness of Enforcement in protecting the public interest, and advance the OSC's mandate of investor protection and fair and efficient capital markets.

My remarks today will focus on our proposed no-contest settlement program. This initiative has generated the vast majority of comments.
We did not receive many comments on the other three proposals. Those comments generally supported them as useful tools for enhancing our Enforcement program.

I recognize that the panel has read the 2011 proposal, our update published on June 7th and the research paper we commissioned on developments in the U.S. The author, Philip Anisman, is here in the audience.

Today, I am going to elaborate on how the no-contest settlement program would work.

Enforcement goals

But first I would like to talk about our enforcement goals.

The OSC's enforcement program is designed to meet three goals:

1. Investor protection,
2. Accountability, and
3. Deterrence.

The more quickly and effectively we are able to resolve enforcement matters, the better the outcome for investors and the capital markets.

This means:

- We can issue a higher volume of protective orders earlier.

- We can achieve sanctions closer to the time of the misconduct, which reinforces our deterrence message.

- We can free up staff resources to take more actions, and focus more of our efforts on investigating serious financial crime.

Let me be clear. This is not a free pass for wrongdoers. There are hurdles that must be met, which I will detail in a moment.

And this is not just about numbers. Numbers can give us a proxy for our investor protection efforts. But they're not the whole story.

Our cases are getting increasingly complex. They often involve novel products, multiple markets or cross-border issues, along with multiple respondents. This has significantly impacted the timeliness of our enforcement actions.

Many respondents are concerned about civil liability issues when dealing with us. They continually raise it.

As a result, we now have over 80 cases in litigation. This number has been steadily increasing over the past few years and I believe this trend will continue.

Increased litigation also impacts the Commission hearing panels. As you know, they sat for more than 300 hearing days last year alone.

Our resources are limited. We cannot realistically prosecute and litigate every matter that comes to our attention. We have to deploy our resources as efficiently as possible. And we have to achieve the best outcome for investors and the markets.

We must be open to other ways of resolving enforcement actions. We believe that a no-contest settlement program – again with high hurdles – would be a key tool in helping us resolve matters more quickly and effectively in the public interest.

Example: Five past cases

Let me give you an example. Looking back, we identified five cases where respondents could have been eligible for a no-contest settlement.

These cases reflect – to varying degrees – our criteria of co-operation, self-reporting and remediation by the respondent. They also reflect post-hearing outcomes that we believe could have been negotiated through a no-contest settlement.
In these five cases alone, the investigation and litigation time equated to 19 staff members working full-time for five years.

The possibility of a no-contest settlement could have resulted in an early resolution of these cases. The resource savings could have been redirected to investigate and pursue other matters.

The benefits of no-contest settlements are clear:

- We could reach settlements where the sanctions could be proportionate to the conduct – without going through a lengthy contested hearing.

- We could impose protective orders sooner.

- Harmed investors would be compensated.

Again, this is not a free pass. Respondents would need to meet high hurdles. A public hearing would be held. Respondents would suffer reputational damage, be required to pay penalties and address investor harm.

Clarification of the program

So let me clarify how the program would work.

Criteria
First, we do not intend to resolve all of our cases through a no-contest settlement. This is not a “one-size fits all” approach. As I have mentioned, there are high hurdles.

No-contest settlements would not be available in circumstances involving egregious, fraudulent or criminal conduct, or where the harm suffered by investors is not addressed.

In our recent notice, we listed a number of factors that we would have to evaluate to determine if a no-contest settlement would be appropriate:

- We would have to look at the extent of co-operation and the timeliness of self-reporting by the proposed respondent during the investigation.

- We would need to assess whether remedial steps taken to address the misconduct are sufficient.

- We would want to ensure that the respondent disgorged amounts obtained – or losses avoided – as a result of the misconduct, and where possible, to the benefit of the investors who were harmed by it.
- The settlement of enforcement actions involves the evaluation and balancing of many factors to achieve the best regulatory outcome in the public interest. This is what we do every day.

Lack of admissions

Concerns have been raised around the lack of admissions in no-contest settlement agreements. These mostly relate to the Commission's jurisdiction in approving settlement orders without admissions and the impact no admissions would have on private civil actions.

With respect to the Commission's jurisdiction, section 127 of the Securities Act simply permits orders to be made in the public interest. There is nothing in the letter or spirit of section 127 that limits the ability of the Commission to consider or approve no-contest settlements.

To make an order under section 127(1), the Commission need only be of the opinion that it is in the public interest to approve a settlement agreement entered into by staff and a respondent. Mr. Anisman makes this same point in his research paper. The settlement agreement would include:

- the facts,
- staff's position or declaration that the facts are accurate based on their investigation of that particular matter, and
- a statement that the respondent's conduct contravened the Act and/or engaged in conduct contrary to the public interest.

The agreement would also likely include a statement by the respondent that they neither admit nor deny the accuracy of the facts or the allegations and conclusions set out by staff. It would also include an acknowledgement that they accept the settlement agreement as a basis for resolving the proceeding.

The Commission would also have the submissions of staff and the respondent concerning the facts in the settlement agreement, and the factors that are relevant to consideration of whether to approve the settlement in the public interest.
The Commission would have an opportunity to carefully consider the facts and the terms of the settlement agreement, and ask questions of staff and the respondent to clarify any facts or concerns.

On the basis of these facts and submissions, the Commission would exercise its jurisdiction to approve a no-contest settlement agreement – if it concludes the settlement is in the public interest.
Again, there is no free pass. As I noted earlier, a no-contest settlement would result in reputational damage, protective orders and investor compensation and a public hearing would take place. All of this helps us achieve our enforcement goals.

Now, with respect to civil actions, there are concerns that the lack of admissions would negatively affect the ability of aggrieved investors to seek financial redress through private civil actions.

The civil actions under Part XXIII.1 of the Securities Act are intended to complement public enforcement of securities law violations. However, our responsibility is still to obtain the best regulatory outcome that we can for investors and the market. This must remain our focus.
Compensation for investors is important. We looked at the paper prepared by Siskinds LLP and concluded no-contest settlements would not impede investors from obtaining compensation in class actions.

The paper noted that:

- Class actions rarely use admissions from a Commission settlement.

- Admissions do not increase a respondent's exposure to class actions.

- The potential for these admissions in a securities regulatory settlement is far from a determining factor in counsel’s decision to bring a class action.

Conclusion

In conclusion, Enforcement staff believe that our no-contest settlement program would advance the OSC’s mandate of investor protection and fair and efficient capital markets.

There are no free passes in this program. The hurdles are high, but this gives us another tool we can use to achieve the best regulatory outcome for investors.

This includes issuing more protective orders earlier, seeking compensation for investors, where possible, and sending a strong message of deterrence to those who violate securities laws.

Simply put, this is all about how we can best use our resources to get the maximum result for investors.

Thank you for this opportunity to speak here today. I am happy to answer any questions you may have.