



BC Notice 2007/27

BCSC Governance of Enforcement Settlement Agreements

Introduction

The board of the British Columbia Securities Commission proposes to make a change to its governance practices as they relate to enforcement settlements entered into by the executive director.

Beginning October 1, 2007, a board settlement committee will approve the parameters within which the executive director is authorized to settle each matter. This change affects only the means by which the board authorizes the executive director to settle. The executive director and enforcement staff will continue to negotiate settlements with parties in the same way they do today.

Proposed new system

Background

Currently, the executive director has the authority to settle any enforcement matter on behalf of the commission, unless the hearing of the matter has begun. If the hearing has begun, the parties must submit the settlement to the panel hearing the matter for its approval.

Although the executive director generally consults with the commission chair before completing a novel or significant settlement, there is currently no board level approval required for individual settlements.

The board currently oversees the settlement process by reviewing completed settlements monthly. If a review identifies a policy matter the board thinks the executive director ought to consider in future settlements, the chair communicates that to the executive director.

The board has concluded that, because settlements are highly visible and a significant part of the commission's enforcement regime, the commission should change its system of oversight. Instead of after-the-fact reviews, the board proposes to oversee settlements through commissioner-level pre-approval.

The board developed and considered various alternatives to achieve this result. Commission staff, and external litigation counsel who are experienced with the commission's current settlement process, commented on the alternatives.

In assessing the alternatives, the board decided that any new system should

- have benefits that significantly improve governance
- preserve the ability to include creative and flexible terms in settlements
- not impose costs (in money or time) that exceed the benefits it adds
- not create unintended consequences (for example, disincentives to settle)

Details

The board proposes to adopt a system in which the executive director would bring the matter proposed for settlement to a board settlement committee. Settlement committees, which would generally consist of two or three commissioners, would be established on an *ad hoc* basis. Appointments to settlement committees would rotate among commissioners.

The proposed system is a governance, not an adjudicative, process: the commissioners would be acting as a committee of the board, not as a hearing panel. The committee would review the proposed settlement with staff and the executive director and would authorize the executive director to proceed with the settlement within certain parameters. Committee members could ask any questions they think are relevant.

Once the committee approved the parameters for settlement, the executive director and commission staff would complete the settlement in the usual way. If there were a change in the circumstances considered by the committee suggesting that the approved parameters are no longer appropriate, the committee would reconvene to consider a change in the parameters.

Commissioners sitting on settlement committees would not discuss the matter with any commissioner not on the same committee. If the settlement fails, the commissioners on the committee would, without the consent of the parties, be disqualified from sitting on a hearing on the matter.

The new system would apply to all enforcement settlements, whether or not a hearing on the matter has begun.

Assessment

In the board's opinion, the proposed system would allow effective, before-the-fact oversight and approval of settlements by the commission, preserve the ability to include flexible and creative terms in settlements, and be easy to implement. It also carries a low risk of unintended consequences. Any incremental cost and delay for staff would be minimal. For respondents, it would be negligible.

The proposed system would therefore provide sound governance over the settlement process while preserving most of the advantages of current system.

Other alternatives

The only other system that the board seriously considered was a review of each settlement by a commission adjudicative hearing panel. In this system, the executive director and the other parties would reach a settlement just as they do today, except that before the settlement became effective, a commission panel would have to approve it. A panel would review each settlement, decide whether to accept or reject it, and, if it approved the settlement, make any orders necessary to implement it.

In the board's opinion, the proposed committee pre-approval system would do a better job of achieving the board's governance objectives while imposing less cost and delay on the parties than this alternative.

Effective date

Subject to considering the comments we receive, the board intends to implement the new system for settlement discussions beginning on or after October 1, 2007.

Comments

You can deliver comments in hard copy, by fax or e-mail by September 14, 2007 to:

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August 22, 2007

Douglas M. Hyndman
Chair

This Notice refers to other documents. These documents can be found at the B.C. Securities Commission public website at www.bcsc.bc.ca in the section Securities Law & Policy: Policies & Instruments.