

Ontario Securities Commission Notice 11-722
-- Recommendations of the Committee on Staff Communications

The Ontario Securities Commission recently struck a Committee on Staff Communications (the "Committee") to provide recommendations to senior management of the Commission and to the Commission itself regarding the procedures for and content of communications from OSC staff to the public. The recommendations of the Committee were accepted by the Commission on July 25, 1995 and are effective immediately.

Background

The practice concerning the involvement of the Commission in staff communications has been varied. In light of the Securities Amendment Act, 1994 ("Bill 190"), the Commission created the Committee in order to determine the appropriate procedure and the respective roles of staff and the Commission on staff communications. The members of the Committee were Jack Geller, Morley Carscallen, John Stransman (of Stikeman, Elliott), Patricia O'Malley (of KPMG Peat Marwick Thorne), Brenda Eprile, Susan Wolburgh Jenah, Rande Pavalow and Craig Wright.

The content of staff communications may involve (i) factors which relate to the exercise of a discretion by staff, (ii) the manner in which the Securities Act (the "Act"), the regulations, rules or policies are interpreted by staff, or (iii) the practices generally followed by staff in the performance of its responsibilities. The publication of staff communications in a timely manner is critical to the goals of transparency and efficiency. It is essential that staff views be published so that the public is aware of such views. It is also important, however, that staff have the benefit of the Commission's input and knowledge of the Commission's concerns, if any, and that the Commission be kept informed of staff's views and the reasons supporting such views.

Summary of Recommendations

The recommendations of the Committee, as accepted by the Commission, are summarized below:

(i) *At What Point in the Process Should the Commission be Involved in a Staff Communication?*

Neither the Commission nor individual Commissioners should be involved in a proposed staff communication until a consensus on the issues has been reached at the staff level, unless staff wishes to discuss a proposed communication with Commissioners who have indicated a view on the issue or who have extensive experience with respect to the issue.

(ii) - *Impact of Bill 190: Commission Policy versus Staff Notice*

The procedural difference which flows from an instrument being designated as a policy rather than a staff notice is clear: policies must be published for comment, whereas staff notices can be published immediately without any notice and comment requirement. However, often it is difficult to distinguish between those instruments which should be characterized as staff notices and those instruments which should be characterized as Commission policy. The definition of "policy" in subsection 143.8(1) of the Act is extremely broad and arguably could apply to all instruments which are not rules, but it is clear that there is and should be room for communications which are less than Commission policy but still warrant publication. The Ontario Task Force on Securities Regulation recognized the importance of these less formal instruments in providing valuable information to the public and endorsed the "frequent articulation of actual practices" of staff.

There are many factors which should be taken into account in determining whether a particular instrument is a staff notice or a policy. The Commission has adopted the following criteria which are subject to change over time. These criteria are not necessarily comprehensive or determinative. Many are quite subjective.

- If staff's views on a particular issue have "crystallized", the instrument is more likely to be a policy; if the views are still being formed and developed by staff (even though there may be a consensus at the staff level), then the instrument is more likely to be a staff notice. Part of the rationale for this criterion is that an uncrystallized view is likely to change or to be further developed and so the flexibility of a staff notice is more appropriate. In this regard, staff notices may describe staff views on one or more historical events (and therefore be based on a specific set of facts). These staff views may change and "crystallize" as staff deals with different factual circumstances. Policies, on the other hand, tend to be more future-oriented in the sense that they may be based on a broader range of factual circumstances or be without an historical "anchor".
- If the issue addressed by the instrument occurs frequently and has a broad impact on market participants, the instrument is more likely to be a policy than a staff notice. Statements which have a frequent and broad impact on market participants should be subjected to a comment period. Similarly, if a communication is permissive rather than restrictive, it is more likely to be a notice than a policy since there is perhaps less need for a comment period. (However, the converse of this criterion is not necessarily true; -- a statement that is restrictive would not necessarily be a policy).
- Items which are primarily of an administrative or procedural nature are more likely to be notices rather than policies.
- If the Commission has been extensively involved in an instrument and subscribes to its content, the instrument is more likely to be a policy. On the other hand, if the Commission has had limited involvement and/or there has been no effort to seek consensus among Commissioners, the instrument should probably be a staff notice.

The decision as to whether a communication should be a notice or a policy rests with staff, under the supervision of the Executive Director and the Chair (acting as chief executive officer of the Commission). The Commission has the ability to reverse the decision of staff when the instrument is presented to the Commission and may choose to adopt an instrument as Commission policy, notwithstanding staff's earlier determination that the instrument should be a staff notice.

(iii) Procedures for Bringing Staff Communications to the Commission's Attention

There is considerable merit in bringing the issues addressed in a proposed staff notice before the Commission prior to publication because staff will obtain the views and comments of the Commission and will be informed of any significant disagreements which the Commission may have with respect to the proposed notice. Similarly, the Commission will benefit from being informed of staff's views and the reasoning behind such views. However, to the extent that the Commission becomes involved in drafting the staff notice, the instrument may become Commission policy by virtue of the Commission's involvement. Accordingly, proposed staff notices should be brought to the Commission's attention in concept only. Under this procedure, staff will describe the issue to the Commission and discuss the content of the proposed staff notice, but the text of the staff notice will not be presented to the Commissioners for their comment. In most cases, it will be appropriate for staff to provide the Commissioners with a background memorandum on the issues being addressed in the proposed staff notice in order to facilitate the oral presentation.

Only in exceptional circumstances should a staff notice be published prior to the Commission being informed of the issues. These rare circumstances include emergencies where the publication of the staff view is so urgent that it is not practicable to wait for the next Commission meeting. Even in these circumstances, however, staff should speak to the Chair or a Vice-Chair to inform them of staff's intentions. Minor matters which do not warrant discussion at a full Commission meeting (such as minor administrative matters) need not be presented to Commissioners prior to publication.

(iv) What if Some Commissioners Disagree with Staff's Views?

A staff notice does not require a consensus of the Commission in order to be published. While it is important for staff to know the extent to which any Commissioners disagree with staff on a particular matter, and staff would be wise to take this disagreement into account in deciding whether to proceed with the publication of the notice, it is ultimately staff's decision (under the supervision of the Executive Director and the Chair, acting as chief executive officer of the Commission) whether or not to publish the staff notice in the face of such disagreement. In this regard, it is important to note that staff notices emanate from staff and are not approved (or non-disapproved) by the Commission. Accordingly, views expressed in a staff notice do not necessarily represent the views of the Commission or any individual Commissioners. Commissioners remain free to disagree with and rule against the staff views if and when the matter comes before a panel of Commissioners for a determination.

(v) *Reasonable Apprehension of Bias*

Before presenting an issue to the Commission that will be the subject of a staff notice, staff should consider whether the issue may potentially raise concerns in the mind of a particular market participant (or group of market participants) that the Commission has prejudged their case. Where these situations arise, it may be appropriate for staff to consult with the Chair or a Vice Chair to obtain their views on whether there is a risk of bias. In the limited circumstances where this risk is sufficiently great, it may be necessary to publish the notice without presentation before or discussion at a full Commission meeting. However, given the level of Commission involvement in staff notices, the frequency of these concerns should be rare.

(vi) *Should Advisory Boards be Consulted on Staff Communications?*

In the past, many staff communications have been submitted to the Securities Advisory Committee or the Financial Disclosure Advisory Board prior to publication. The practice of consulting such advisory boards or other interested parties prior to the publication of staff communications has often been extremely helpful and should be continued in circumstances where it is reasonably expected that such bodies would have strong views or particular expertise with respect to the proposed staff communication. The involvement of the advisory boards should not, however, be an automatic procedure but rather should be addressed on a case by case basis.

(vii) *Frequency of Staff Notices*

The views of staff should be published on a much more frequent and timely basis. It is important that any views of staff or decisions made by staff which may have an impact on market participants be communicated to the public. OSC staff should be more aggressive in identifying such issues and publishing notices. While certain notices should be published as soon as they are developed, other less urgent notices should be collected and published together on a periodic basis (such as every 6 months).

Conclusion

It is expected that the implementation of these recommendations will result in better and more consistent procedures for publishing staff communications and in improved communication between staff, the Commission and the public.

March 21, 2003 Recommendations of the Committee on Staff Communications (originally published August 11, 1995 and renumbered via OSC Notice 11-727 on March 21, 2003).