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May 23, 2018

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VIA E-MAIL

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Re: Comments – Enforcement Alternative Forms of Disciplinary Action
Your reference: 18-0045

Sir,

This is further to your Request for Comment regarding the "*Enforcement Alternative Forms of Disciplinary Action*" of February 22, 2018.

Please find below comments from our Securities Litigation and Capital Markets Groups.

1. Minor Contravention Program

We fully support the idea of a special program to deal with minor contraventions.

Proportionality is a procedural guiding principle that warrants the adoption and implementation of this program.

As the Supreme Court of Canada stated in *Marcotte* v. *Longueuil (City)*, 2009 SCC 43 (par. 43):

> "*The principle of proportionality set out in art. 4.2 C.C.P. is not entirely new. To be considered proper, a proceeding must be consistent with it (see Y.-M. Morissette, "Gestion d'instance, proportionnalité et preuve civile: état provisoire des questions" (2009), 50 C. de D. 381). Moreover,* ***the requirement of proportionality in the conduct of proceedings reflects the nature of the civil justice system, which, while frequently called on to settle private disputes, discharges state functions and constitutes a public service****. This principle means that litigation must be consistent with the principles of good faith and of balance between litigants and must not result in an abuse of the public service provided by the institutions of the civil justice system. There are of course special rules for the most diverse aspects of civil procedure. The application of these rules will often make it possible to avoid having recourse to the principle of proportionality. However, care must be taken not to deny this principle, from*

the outset, any value as a source of the courts' power to intervene in case management. " (We underline)

This said, we caution that the program should not replace or render obsolete the use of the Cautionary Letter.

In this regard, your Request for Comment states at page 3 that "*The deterrent effect of a Cautionary Letter is minimal and it does not materially enhance confidence in IIROC's enforcement efforts*".

With all due respect, we disagree with that statement. Our experience in representing members in the course of investigations and negotiations with the IIROC Staff is different. We generally find that experiencing the document productions, interviews and settlement discussions with the Staff is, in itself, a powerful revelation for the member involved of the importance of the regulatory framework and the gravity of the sanctions that may result from even minor negligence or simple carelessness.

In that context, we submit that the combination of that process and the Cautionary Letter do have a strong deterrent effect on the members and, to the contrary, do not affect the confidence of the public in IIROC's enforcement efforts.[1]

While having this effect, the Cautionary Letter also allows the members to avoid the disastrous consequences of a public prosecution and potential finding of liability.

However, to improve the efficiency of the proposed program, we suggest the following amendments:

A. The MCP Notice should be presented in draft form to allow for a quick negotiation of its terms. Our experience is that the wording of the offence and the description of the related facts is greatly helped by the negotiation process between the Staff and the member's attorneys. The description becomes more accurate and precise; the offence is more clearly defined.

B. The sanction should not be fixed. We believe that it would impair the ability of the parties to negotiate the terms of the MCP Notice and its acceptance.

C. The confidentiality of the matters resolved by way of MCP Notice should be reinforced. Members will be less interested to accept a proposed MCP Notice if there is a risk that it will be disclosed, for example, in civil proceedings against them.

   Adequate language in the program to qualify the MCP Notice acceptance as a private settlement of a potential litigation would immune the MCP Notice from disclosure in civil proceedings and other types of recourses. We refer you to the remarks of the Supreme Court of Canada in *Sable Offshore Energy* v. *Ameron*

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[1] In fact, warning letters similar to the Cautionary Letter are commonly used by other regulators and professional organizations. They are accepted as an efficient alternative to formal enforcement.

International, [2013] 2 S.C.R. 623 and *Union Carbide Canada Inc.* v. *Bombardier Inc.*, [2014] 1 S.C.R. 800.

2. Early Resolution Offers

We also support this other proposed program. Substantial resources are invested by members to respond to an investigation. If members were able to quickly resolve the issue without making such investments in time and money, we anticipate that they would seriously consider the option of an early resolution process. However, to increase attraction, we suggest that the monetary sanctions should be significantly reduced in consideration of an early resolution deal. For example, a 50% reduction of the penalties generally applicable to a similar offense would provide additional incentive to settle.

Also, we suggest that the confidentiality reinforcements we have proposed for the Minor Contravention Program be considered.

We thank you for this opportunity to comment the proposals and remain,

Yours truly,

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