

**May 4, 2018**

**Introduction**

The Alberta Securities Commission (**ASC**) is adopting changes (**Changes**) to ASC Policy 15-601 *Credit for Exemplary Cooperation in Enforcement Matters* (**Policy 15-601**).

The Changes are reflected in the blacklined version of Policy 15-601 in Annex A of this notice and will also be available on the ASC website, [www.albertasecurities.com](http://www.albertasecurities.com).

The Changes principally reflect the inclusion of a provision for no-contest settlement agreements in certain very limited circumstances.

**Background and Substance**

The inclusion of a provision to consider no-contest settlement agreements as a form of credit in Policy 15-601 is part of an effort to expand the ASC Enforcement toolbox. No-contest settlement agreements may be considered when respondents have self-reported, are fully cooperating with the ASC and are taking financial responsibility for their actions. A no-contest settlement agreement will not be considered if the ASC has reason to believe that a respondent has engaged in abusive or fraudulent misconduct, or if it is in the public interest to proceed with a quasi-criminal or criminal investigation.

**Questions**

Please direct questions regarding this Policy to:

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## Annex A

This Annex sets out a blackline showing the changes to ASC Policy 15-601

### ALBERTA SECURITIES COMMISSION POLICY 15-601

#### *CREDIT FOR EXEMPLARY COOPERATION IN ENFORCEMENT MATTERS*

#### **Application**

This policy does not apply to any matter that results in quasi-criminal or criminal proceedings.

#### **Interpretation**

**1. In this Policy**

“Act” means the *Securities Act* (Alberta);

“ASC” or “Commission” means the Alberta Securities Commission;

“ASC Hearing Panel” means a panel of members of the Commission designated under section 23 of the Act;

“Corrective Action” means Voluntary and timely conduct aimed at reducing harm done to participants in the Alberta capital market and preventing future breaches of Alberta securities laws;

“Credit” may include any of the actions enumerated in section 12 of this Policy;

“Exemplary Cooperation” includes the actions enumerated in section 6 of this Policy;

“No-Contest Settlement Agreement” means an agreement made in accordance with section 14 of this Policy;

“Restitution” means compensation to anyone affected by your misconduct;

“Self-report” means voluntarily reporting yourself for your own possible securities misconduct or breach of Alberta securities laws, including reporting any of your conduct that may be harmful to the Alberta capital market or contrary to the public interest;

“Voluntary” means something not required by law.

**2. Terms that are defined in the Act have the same meaning in this Policy, unless otherwise defined above.**

#### **Purpose**

**3. This Policy explains the benefits of cooperating with ASC staff and the factors ASC staff consider when determining whether that cooperation earns Credit in enforcement matters.**

4. ASC staff may give Credit for Exemplary Cooperation that goes beyond doing what you must already do under Alberta securities laws. This Exemplary Cooperation may encourage ASC staff to consider:
  - (a) reducing the amount or duration of sanctions proposed in an administrative enforcement proceeding;
  - (b) [entering into a No-Contest Settlement Agreement \(in very limited circumstances\)](#);  
or
  - (c) ~~(b)~~ recommending or agreeing to take no enforcement action based on the facts known (in very limited circumstances).
5. This Policy is for
  - (a) persons or companies who may have knowledge of, or are involved in, misconduct relating to the Alberta capital market and its participants,
  - (b) persons or companies who are being investigated by the ASC, or
  - (c) persons or companies who are the subject of ASC enforcement actions.

#### **What the ASC expects**

6. To earn Credit for Exemplary Cooperation, you should do the following, as applicable to the matter you are reporting:
  - (a) Self-report if you think you may have done something illegal or harmful to Alberta investors;
  - (b) promptly give complete information, including all documents and records, to the ASC or any other regulator or law enforcement agency;
  - (c) fully cooperate with ASC staff's requests for assistance or information, including prompt and complete responses to production orders, summonses, or other lawful requests and demands made by ASC staff;
  - (d) fully investigate the matter (if applicable), in addition to reporting it to the ASC;
  - (e) collect, preserve, and disclose all relevant documents and information in your possession or control;
  - (f) give ASC staff any reports prepared by experts or professionals that you or your legal counsel obtained, that are not subject to legal privilege;
  - (g) request that your employees, officers and directors (if applicable) provide evidence to ASC staff, make these individuals available for interviews and

provide the relevant documents to support the evidence they give in those interviews;

- (h) promptly investigate any failure of a system of internal controls and compliance, take Corrective Action, and implement new systems of control and compliance, as appropriate;
- (i) fully investigate any conduct by an employee, officer or director that may have breached Alberta securities laws or may be contrary to the public interest and, independently of whatever action a regulator or law enforcement agency may take, take Corrective Action;
- (j) ~~provide lawful, appropriate compensation (unless financially unable to do so) to anyone who has been financially harmed by the misconduct or failure of internal controls; and~~ make Restitution;
- (k) disgorge, in a manner and amount satisfactory to ASC staff, any amounts obtained or payments or losses avoided as a result of the misconduct; and
- (l) ~~(k)~~ make best efforts to locate and obtain any relevant documents, records or other information that you know are held overseas or in a foreign jurisdiction, and, at the very least, provide ASC staff with information of the location and contents of those documents, records or information.

7. If requested, the ASC may issue a summons or production order to any witness before they speak to ASC staff or provide documents to ASC staff, or both. ASC staff will not consider a request or insistence on a summons or production order as a failure to cooperate if the witness is cooperative in scheduling and attending the interviews or providing the documents within a reasonable time. Everyone is expected to be forthright and forthcoming when speaking to ASC staff.
8. Compliance with Alberta securities laws alone is not Exemplary Cooperation and will not earn any Credit.
9. In determining eligibility for Credit, ASC staff will consider whether you have previously received Credit for Exemplary Cooperation in another matter.

#### **No Application to Quasi-Criminal or Criminal Matters**

10. No Credit will be offered or given if it is in the public interest to proceed with a quasi-criminal or criminal investigation against you. The following factors, which are not exhaustive, could give rise to a quasi-criminal or criminal investigation:
  - (a) you have already been sanctioned by another securities regulator or the courts for securities-related conduct,
  - (b) you violated an order of a court or a securities-related ban,

- (c) your conduct includes fraud, or
- (d) the conduct involved a criminal organization.

## Conduct not considered Exemplary Cooperation

### 11. No Credit may be given if you

- (a) fail to promptly and fully report breaches of Alberta securities laws to ASC staff or to another regulator or law enforcement agency when the facts become known to you,
- (b) obstruct ASC staff, or withhold information ~~that should be provided to ASC staff,~~
- (c) intentionally arrange your affairs to hide a breach of Alberta securities laws,
- (d) fail to comply with any undertakings given to ASC staff or to provide information to ASC staff, or both, in a timely fashion,
- (e) knowingly mislead ASC staff, or misrepresent ~~the facts to ASC staff,~~
- (f) destroy or conceal documents, records or information to deliberately avoid giving them to the ASC,
- (g) claim that your misconduct was based on prior legal advice, but refuse to disclose that prior legal advice or waive solicitor-client privilege over that prior legal advice,
- (h) enter into agreements that require someone to conceal information from a regulator or law enforcement agency, or to withdraw any existing complaints to a regulator or law enforcement agency,
- (i) delay executing a settlement agreement until within 60 days of a scheduled hearing,
- (j) encourage others to breach Alberta securities laws,
- (k) continue your inappropriate conduct, or
- (l) as a company, make no attempt to correct significant internal control deficiencies even after you, your management or your directors become aware of the misconduct or deficiencies in internal controls.

## Examples of Credit for Exemplary Cooperation

12. If you have acted in a responsible and cooperative manner during an ASC investigation and have, where appropriate, investigated, Self-reported and taken Corrective Action regarding the matters under investigation, ASC staff may agree to any of the following:

- (a) issue a notice of hearing that acknowledges and gives Credit for your Exemplary Cooperation or narrows the scope of the allegations or both,
- (b) issue a notice of hearing and proceed to hearing on the basis of an agreed statement of facts and a joint recommendation on sanction, reflecting a discounted sanction,
- (c) recommend that all parties resolve the enforcement proceeding with a settlement agreement that recognizes and gives Credit for your Exemplary Cooperation, which may occur only if the settlement agreement is executed no later than 61 days prior to a scheduled hearing,
- (d) enter into a No-Contest Settlement Agreement.
- (e) ~~(d)~~ resolve the matter through alternative means, other than issuing a notice of hearing or entering into a settlement agreement,
- (f) ~~(e)~~ not apply to the courts for a declaration of non-compliance under section 197 of the Act,
- (g) ~~(f)~~ conclude the matter without taking action against you, which will occur only in appropriate and very limited circumstances, or
- (h) ~~(g)~~ reduce the amount of costs ASC staff would ordinarily request in an enforcement proceeding under section 202 of the Act.

13. If you have been less than cooperative to a certain point in the investigation, but later provide ASC staff with Exemplary Cooperation, you may receive only a partial Credit for the delayed Exemplary Cooperation.

#### No-Contest Settlement Agreement

14. In very limited circumstances, and in no instance where it appears to ASC staff you have engaged in abusive or fraudulent misconduct, ASC staff may choose to enter into a No-Contest Settlement Agreement with you. A No-Contest Settlement Agreement will include all of the following:
- (a) a statement of facts and conclusions asserted by ASC staff, which you neither admit nor deny;
  - (b) terms and conditions of settlement, including appropriate sanctions based on your conduct, and your acceptance of those terms;
  - (c) confirmation that you have paid, or undertaken to pay, at the time the No-Contest Settlement Agreement is executed, Restitution, and any other agreed upon monetary settlement or costs.

## No enforcement action agreements

**15.** ~~14.~~ In very limited circumstances, ASC staff may choose not to take any enforcement action against you and, instead, enter into an agreement with you based on the facts currently known to ASC staff. ASC staff's decision to do this will be based on each of the following considerations:

- (a) your Self-reporting, Exemplary Cooperation with ASC staff, and Corrective Action;
- (b) your misconduct was minor, and an inadvertent, technical or isolated breach of Alberta securities laws;
- (c) you caused no harm or only a minor degree of harm to investors through your misconduct, and you took Corrective Action to reduce that harm or prevent further harm;
- (d) your misconduct has stopped, and you have given an undertaking to refrain from engaging in any further misconduct in the Alberta capital market in the future;
- (e) you paid the full amount of funds deemed by ASC staff to be appropriate in the circumstances, including Restitution to investors and the costs of the ASC investigation;
- (f) the deterrent effect on your future conduct, as well as on other participants in the Alberta capital market; and
- (g) in circumstances involving misconduct by more than one person or company, you cooperated with ASC staff in their investigation of those other persons or companies involved in the misconduct, as well as in any administrative proceedings against those other persons or companies.

## Procedure for Self-reporting and cooperation

**16.** ~~15.~~ To Self-report or offer cooperation, or both, you must do the following:

- (a) you should directly contact ASC staff, or have your lawyer contact ASC staff;
- (b) you must disclose all information about your conduct and the circumstances so ASC staff may evaluate the information and consider any possible Credit for your Exemplary Cooperation;
- (c) you must forward all relevant documentation to ASC staff; and
- (d) you must attend an interview with ASC staff to provide further information and respond to questions.



17. ~~16.~~ Alternatively, your lawyer may contact ASC staff to discuss your conduct and advise that you wish to cooperate with ASC staff in an investigation of your conduct, or the conduct of other persons or companies, or both.

18. ~~17.~~ At the discretion of ASC staff, your interview may be conducted on the basis that your statements during the interview will not be used against you in subsequent ASC enforcement proceedings. However, ASC staff may use your statements and any evidence you provided during the interview, for other purposes including:

- (a) discovering additional evidence,
- (b) impeaching your future testimony if you make other statements that are inconsistent,
- (c) prosecuting you for perjury, obstructing justice or the giving of contradictory evidence, or
- ~~(d)~~ sharing the information with any other regulator or law enforcement agency.

## Content of settlement agreements and agreed statements of facts

**19.** ~~18.~~ Where ASC staff determine that an agreed statement of facts or settlement agreement and undertaking are appropriate, you must agree to a full and frank statement of facts or a settlement agreement that includes:

- (a) the background facts necessary for the ASC Hearing Panel to understand the circumstances of the admitted contraventions of Alberta securities laws or conduct contrary to the public interest;
- (b) the facts necessary to establish the requisite legal and factual elements of the admitted contraventions of Alberta securities laws or conduct contrary to the public interest;
- (c) the identification of other persons or companies involved in the misconduct; and
- (d) only substantiated mitigating facts or circumstances.

**20.** ~~19.~~ An ASC Hearing Panel is not obligated to accept agreed statements of facts or joint submissions on sanction submitted for their consideration. ASC Hearing Panels will always consider whether any proposed sanctions fall within a range that is reasonable in all of the circumstances and consistent with the ASC's public interest mandate. The Executive Director is not obligated to approve a settlement agreement and undertaking as recommended by ASC staff.

## Disclosure of Credit granted for Exemplary Cooperation

**21.** ~~20.~~ To encourage other market participants to Self-report and offer Exemplary Cooperation with ASC staff, and to assist anyone considering Self-reporting or cooperating with ASC staff, the ASC may disclose or publicize examples of Credit that have been granted for Exemplary Cooperation. This enhanced transparency may include

- (a) ensuring that ASC Hearing Panels, when considering sanctions, are informed about any Exemplary Cooperation, and the corresponding Credit recommended by ASC staff;
- (b) ensuring that settlement agreements or related news releases, or both, mention any Credit that may have been granted for Exemplary Cooperation; and
- (c) periodic reporting, on a generic basis, describing circumstances in which ASC staff have determined not to initiate an enforcement action against persons or companies, and the particulars of any agreements not to take enforcement action.

## Contact us

For more information about this Policy, please contact Cynthia Campbell, Director, Enforcement at:

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Or visit our website at [www.albertasecurities.com](http://www.albertasecurities.com).