

Tougher enforcement measures overdue

Other countries sometimes move more quickly against Canadian perpetrators

MANY CANADIANS HAVE CONCLUDED that our regulatory system has fallen short of the standard for enforcement of securities violations necessary to punish perpetrators and deter future malfeasance.

Recent studies have focused on this enforcement problem in Canadian markets. The 2006 report of the Allen Task Force for Securities Modernization confirmed the failings of Canadian securities enforcement. Industry and public opinion are unanimous that Ottawa has not met its responsibilities for enforcing criminal statutes. Nick Le Pan, former superintendent of the **Office of the Superintendent of Financial Institutions**, enumerated the reasons for the failure of the RCMP's Integrated Market Enforcement Teams of police and regulators to invigorate federal enforcement. Failure to provide sufficient expertise and resources to engage in adequate co-ordination with various authorities and to initiate effective investigations and bring legal action have been cited as factors.

Whatever the causes, all too often allegations of criminal wrongdoing are followed by protracted and seemingly inconclusive investigations and, on occasion, foreign jurisdictions react more quickly than their Canadian counterparts to take on international cases that involve Canadian perpetrators. We need remedies for these problems.

It is surprising that provincial governments have not stepped into the breach more often to deal with white-collar crimes. As provincial securities acts prohibit fraud

GUEST COLUMN
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and market manipulation, the securities commissions can bring "quasi-criminal" charges that carry large fines and jail terms or can refer matters to provincial attorneys general for such prosecution. Indeed, recent high-profile criminal cases have been investigated at the provincial level by securities commissions. The provincial authorities have, however, generally been cautious in taking on such cases. There may be various reasons to explain this caution, including a lack of effective federal and provincial co-ordination in prosecution and inadequate resources at the provincial level.

The provincial commissions focus most of their efforts on regulatory enforcement of securities laws, notably failure to file a prospectus, misrepresentations and unfair dealing with clients. In general, the regulators have done a good job on local enforcement.

However, the evolution of a seamless national market has meant that fraudulent distributions usually have a national and inter-jurisdictional dimension. These national cases are investigated and prosecuted by individual provinces, often resulting in multiple investigations and orders. This increases costs and may create gaps in enforcement. The inter-jurisdictional nature of these schemes demands that the provinces work together to ensure that the costs of prosecution are minimized and Canadians,

no matter where they reside, are protected.

Several studies have advocated greater co-operation and information sharing among provincial regulators, and more co-ordination with criminal agencies. While provincial regulators appear to have made progress in co-ordinating inter-jurisdictional cases, the co-operative practices have not been identified and no systematic analysis has demonstrated improvement. A single, common regulator could achieve synergies in inter-jurisdictional enforcement cases and increased co-operation between regulators and criminal enforcement authorities.

The provinces and their commissions have shown that they can work together to improve securities enforcement. Further progress, such as published protocols for information sharing and for co-ordinating investigations, orders and sanctioning among provincial authorities, is needed. Extending the passport system to enforcement matters suggests a mechanism to generate efficient inter-jurisdictional cases. However, the passport may not work effectively for enforcement. Although commissions could delegate investigation and enforcement to a designated lead jurisdiction, the co-operation of other regulators would likely be necessary for investigations in their jurisdictions.

Nevertheless, a further refinement of the passport system can be implemented, namely, extending its application to include self-regulatory organization oversight and delegating responsibility for the annual audit of each SRO to a single jurisdiction that could oversee

a **Canadian Securities Administrators** audit team responsible for the SRO review. It would subject each SRO to one, instead of multiple, annual audits. Second, it would oblige the overseeing jurisdiction to assess the efficacy of the SRO's operations on a nation-wide basis, as well as through a regional prism. This approach would give SROs greater flexibility to streamline operations.

The provincial regulators should also encourage their governments to make amendments to their securities acts, enabling the SROs to enforce actions against former registrants in most provinces. The recent *Taub* decision of the Ontario Divisional Court illustrates the unfairness inherent in the system, under which former registrants in some jurisdictions may escape SRO discipline.

The perception that enforcement is woefully weak in Canada undermines investor confidence. The federal government needs to remedy the failure to enforce white collar crime under the Criminal Code. Provincial governments and their regulators can take complementary steps, enforcing criminal statutes under their securities acts and improving inter-jurisdictional enforcement.

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