

The logo for the Ontario Securities Commission (OSC) consists of the letters "OSC" in white, bold, sans-serif font, centered within a dark teal square.

ONTARIO
SECURITIES
COMMISSION

OSC Staff Notice 15-707

Enforcement Branch

Enforcement Investigation Guidance

July 22, 2021



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1. Purpose of this Guidance

The purpose of this Guidance is to provide enhanced transparency around enforcement processes and practices, and assist individuals and companies (and their counsel, if applicable) in responding to and participating in initial assessments and investigations¹ conducted by the Staff of the Enforcement Branch of the Ontario Securities Commission (the “Commission”).

This Guidance applies to all participants in Staff’s investigations, including both represented and self-represented individuals and companies (i.e., those with legal counsel and those without). It also applies to Staff’s assessments as outlined below. Please note that while Staff make every effort to be consistent in their practices, the specific circumstances of a matter may require deviation from this Guidance.

2. Overview: Enforcement Investigations

a) Information Gathering in Staff’s Investigations

Staff routinely gather information (including documents and testimony through examinations) from persons and companies to help us in our investigative work. Persons and companies may voluntarily provide this information, or may do so in response to one of Staff’s fact gathering tools, such as a summons under section 13 of the *Securities Act* (Ontario) (the “OSA”) or a direction under section 19 of the OSA. Staff may contact any persons or companies who may have information that might assist with Staff’s investigation, not only persons or companies who may be under investigation. Persons or companies contacted by Staff are those who Staff believe can provide us with information that can assist with our investigation.

b) Commencement of an Investigation

The Enforcement Branch seeks to make the best use of its investigative and litigation resources by focusing on impactful cases that protect investors and foster the integrity of the capital markets. Typically, Enforcement inquiries and analysis into potential misconduct begin as follows:

- Incoming tips, complaints, referrals, and inquiries that raise enforcement concerns, as well as matters that are identified by Enforcement Staff, go through the Case Assessment Team.
- Case assessment Staff make inquiries and conduct analysis to identify cases that involve possible Ontario securities law violations and/or conduct contrary to the public interest and that meet internal criteria informed by the Commission’s Statement of Priorities.

¹ This Guidance does not apply to investigations being conducted by Staff of the quasi-criminal serious offences team of the Enforcement Branch.

- Cases not meeting the above requirements may be closed, referred to other regulators or agencies, or transferred for disruption or alternative enforcement measures such as a warning letter.
- Cases meeting the above requirements may be recommended, by Staff of the Case Assessment Team, for further investigation to Enforcement Branch management.
 - If the recommendation is accepted by Enforcement Branch management, then an investigative team is assigned to investigate the matter.
 - Following an investigation, based on evidence gathered and in consideration of various public interest factors, Staff may commence regulatory proceedings against the persons or companies involved, close the file, or pursue other public interest measures.
 - See section 12 of this Guidance for further detail. For more information about Enforcement proceedings, see the [Guide to OSC Tribunal Proceedings](#) on the Commission’s website.

c) Process and Length of Investigations

Enforcement investigations differ considerably from civil proceedings. At the commencement of Enforcement investigations, Staff have little or limited information about a matter. In the course of the assessment or investigation, Staff obtain evidence by examining witnesses and reviewing documents and, in doing so, obtain the information necessary to make an informed decision about how to proceed.

The length of Enforcement investigations and assessments vary depending on complexity and volume of data (though assessments are more limited and generally much shorter than investigations).

d) Cooperation with Staff

Cooperation with Staff is critical for facilitating timely, efficient, and thorough investigations. Delays impact Staff’s ability to conduct efficient assessments and investigations and to make a timely decision regarding whether to proceed with regulatory action. Staff expect all persons and companies involved in Enforcement assessments and investigations to cooperate fully, and may give credit for cooperation as applicable and appropriate and in accordance with [OSC Staff Notice 15-702: Revised Credit for Cooperation Program \(the “Credit for Cooperation Notice”\)](#). Among other things, the Credit for Cooperation Notice provides guidance on “what is not viewed as cooperation” and “examples of credit for cooperation”.

3. Fundamental Principles

Enforcement assessments and investigations are governed by principles of administrative law, as set out below. This Guidance is based on the following fundamental principles:

1. Staff will conduct all assessments and investigations fairly and efficiently.
2. In every assessment and investigation, Staff will act with:
 - a. Integrity: acting ethically in every aspect of their work.
 - b. Fairness: everyone subject to the Enforcement process will receive fair and respectful treatment.
 - c. Impartiality: Staff will not pre-judge the outcome of assessments or investigations and will only come to a conclusion once they have an understanding of the facts.
 - d. Respect: Staff will bring and conduct proceedings in a way that respects the principles of natural justice and timeliness in the adjudication process.
 - e. Evidence-based decision-making: Staff will only bring regulatory proceedings where there is evidence that supports an order in the public interest. Where no such evidence is uncovered in the investigation, Staff will discontinue the investigation.

4. Considerations and Best Practices in Enforcement Investigations

The following considerations and best practices contribute to fair and efficient assessments and investigations:

1. Timely Enforcement assessments and investigations are both in the public interest and in the interest of persons and companies directly impacted by Staff's investigation.
2. Staff will consider both the interests of transparency and consistency in the investigative process and the need to preserve the integrity of Enforcement assessments and investigations.
3. Persons and companies are encouraged to cooperate with Staff in Enforcement assessments and investigations. Cooperation often results in more efficient and less costly assessments and investigations.
4. Staff and persons and companies are encouraged to have frequent and open communication throughout the course of an assessment or investigation. Prompt and clear communication with Staff reduces delay and increases efficiency in Staff's assessment or investigation.

5. Flexible and practical escalation procedures should be used to address questions or concerns relating to Staff's assessment or investigation. Such processes provide an opportunity to balance interests, cost efficiency and cooperation.
6. The protection of privileged information is critical for both Staff and persons and companies affected by Staff's assessment or investigation. However, privilege reviews are expected to be conducted in a timely manner, and assertions of privilege are expected to include sufficient detail about the nature and scope of the privilege claim.
7. Court proceedings are often time-consuming, costly and may serve to exacerbate disagreements or conflicts. Accordingly, Staff will initiate court proceedings where all other reasonable options have been carefully considered and executive approval has been obtained.

5. Investigative Powers under the *Securities Act* (Ontario) and the *Commodity Futures Act* (Ontario)

Subsections 11(1) of the OSA and 7(1)(a) of the *Commodity Futures Act* (Ontario) (the "CFA") allow the Commission to make an order ("investigation order") appointing one or more people to investigate a matter. In addition, subsection 11(3) of the OSA and subsection 7(3) of the CFA provide Staff with a broad authority to investigate and inquire into the matters set out in the investigation order. The investigation order describes the matter to be investigated. It also lists people appointed to investigate the matter, which includes Staff from the Enforcement Branch and, in some cases, Staff from other branches of the Commission and/or individuals from outside the Commission (for example, staff from other interested regulators). Staff will obtain investigation orders during an assessment where regarded as necessary for the assessment. If such a matter is subsequently approved for an investigation, the same order will often be used by the assigned investigation team.

Any of the people listed in the investigation order have the power under subsections 13(1) of the OSA and 9(1) of the CFA to summon and compel the attendance of any person to testify under oath, and to summon and compel any person or company to produce to Staff documents and other things in their possession or control.

6. Voluntary Examinations and Production of Documents

Documents may be produced, and examinations may be conducted, on a voluntary basis.

In respect of assessments, Staff typically try to obtain information and documents relevant to the assessment stage on a voluntary basis. All persons and companies from whom information and documents are requested are encouraged to fully cooperate with Staff from the outset and to provide requested information and documents as soon as possible so that assessments can be completed in a timely way. If they cannot provide any requested information or documents within the time frame sought, they should promptly contact the Staff who requested the information or documents so that any issues can be discussed.

Staff typically request that persons and companies contacted by Staff keep confidential any communications or documents exchanged in the assessment process.

7. Information Obtained Pursuant to a Summons is Confidential

Any information obtained pursuant to a summons, including testimony, transcripts and records, is confidential and for the exclusive use of the Commission, including Staff, and any other regulator specified in the investigation order. Summons recipients are prohibited from disclosing the information about Staff's investigation (except to their counsel, insurer or insurance broker, as applicable) that is set out in subsections 16(1) of the OSA and 12(1) of the CFA. If summons recipients have questions about the confidentiality of Staff's investigation, they are encouraged to consult counsel.

Confidentiality protects the integrity of the assessment or investigation. It also protects subjects of an investigation from potential reputational harm.

Occasionally, a summons recipient may need to obtain information from others to fully respond to a summons. In those circumstances, summons recipients are encouraged to consult counsel and ensure compliance with the non-disclosure requirements set out in subsections 16(1) of the OSA and 12(1) of the CFA.

The Commission may authorize disclosure of information associated with the summons under section 17 of the OSA or section 13 of the CFA at the request of Staff or another party (such as a summons recipient or their counsel). To obtain this authorization, an application must be made to the Secretary's Office of the Commission in accordance with section 12 *Application for Authorization to Disclose Information* of the [OSC Rules of Procedure and Forms](#). A template for this application is included as Appendix C to the [OSC Rules of Procedure and Forms](#) and is also available as a fillable form on the Commission's website (www.osc.ca).

8. Responding to a Summons and Attending for an Examination

When an Enforcement summons is sent, it will include a covering letter. Together, these documents will provide information about documents to be produced and the date of a compelled examination, if any. In some cases, the covering letter may also include a brief description about the subject matter of the examination.

a) Summons Questionnaire

The summons covering letter may also canvass an examinee's interest in answering a list of questions (a "questionnaire") in writing prior to an examination. This will only be done where Staff consider it appropriate, and to facilitate more efficient examinations. Responses to the questionnaire are optional.

Any questions included in the questionnaire will be tailored to the particular assessment or investigation and examinee. Accordingly, the questions in the questionnaire will vary. Any questions in the questionnaire will be aimed at reducing the number of issues raised at the examination and improving the efficiency of the examination. Any responses to the questionnaire will be treated by Staff as responses to the summons and will be marked as an exhibit during the examination.

If no responses are provided to the questionnaire, these questions will be canvassed in the examination.

b) Advance Disclosure of Examination Exhibits

In appropriate circumstances, and in Staff's sole discretion, Staff may provide examinees or their counsel with access to certain documents in advance of an examination where Staff believe that doing so will help refresh the examinee's memory or otherwise improve the efficiency of the examination. Staff will always weigh the goal of facilitating efficient and expedient examinations against the need to protect the integrity of an assessment or investigation.

If documents are provided, Staff will endeavour to provide these documents within a reasonable time prior to the examination. Staff will consider, among other things, the size, nature and number of documents. If examinees or their counsel have difficulty accessing the documents, the examinee or their counsel are encouraged to contact Staff promptly to discuss the issue and its potential resolution.

Staff expect that examinees and their counsel will keep confidential any documents shared in advance of the examination. If referenced in the examination, these documents will be marked as exhibits.

Advance disclosure of documents will not be made in every case.

c) Summonses, Examinations and Adjournments

Staff expect responses to summonses to be provided by the deadline(s) set out in the summons. Staff also expect individuals to attend for compelled examinations, and answer questions, as required by the summons.

In most cases, Staff will contact a summons recipient (or their counsel, if known) prior to serving a summons to:

- i. advise them of Staff's intention to serve them with a summons;
- ii. provide notice about the types of records that will be requested in the summons; and
- iii. provide notice of the proposed examination date, if any.

If counsel is retained at that time, Staff may also discuss potential approaches for an efficient production process.

During the preliminary discussion, Staff and the summons recipient (or their counsel) should attempt to generate a record production plan, including the format and deadline(s) for production. Staff will endeavor to be as narrow and focused as possible, while maintaining their objective to seek out information relating to the assessment or investigation.

In Staff's experience, certain records can often be produced quickly and in compatible electronic formats. This is usually the case where records are stored electronically and the summons recipient's systems are set up for efficient production. The deadline for production of these records is usually within two to three weeks of receipt of the summons, though it may be shorter for assessments and simple document requests for investigations. These records may include:

- Brokerage and banking records or statements
- Financial records
- Offering memoranda
- Term sheets
- Advertisements
- Subscription agreements
- Compensation agreements
- Underwriting agreements
- Debt obligations
- Client application forms
- Meeting minutes
- Board presentations

Staff may also summon specific records from specialized entities. For example, Staff may summon the production of telephone records from a telecommunications company. In these circumstances, Staff will provide production deadlines that are consistent with standard production times for that record.

Where there is expected to be a large volume of documents or data, or where identification of responsive documents or data may be challenging, production deadlines will vary depending on the particular circumstances or complexities of the case. The summons recipient (or their counsel) are encouraged to discuss any issues pertaining to the production of these records during their preliminary discussion with Staff or in follow-up discussions, as appropriate. Where necessary, Staff and the summons recipient (or their counsel) may also discuss alternative approaches for production.

Where appropriate, Staff may consider one or more of the following options to address production issues:

- Accept a rolling production of records summoned
- Provide an order of priority for records summoned, with different deadlines for higher and lower priority items
- Consider a different format for production of records
- Eliminate items from the summons
- Extend a deadline for production
- Other potential solutions based on the circumstances of the case

After the summons is served, if issues are identified, the summons recipient or their counsel are encouraged to contact Staff promptly to discuss the issue and its potential resolution. Where appropriate, Staff will make reasonable efforts to resolve the issue directly with the summons recipient or their counsel.

Likewise, if a summons recipient cannot attend for a compelled examination on a date proposed by Staff or set out in the summons, the summons recipient or their counsel are encouraged to promptly discuss this issue with Staff and provide alternative dates within close proximity to the originally scheduled date.

Where appropriate, Staff may adjourn an examination pending Staff's review of documents provided in response to a summons. Staff will advise examinees or their counsel if this is their intention. Unless otherwise stated and arranged, Staff will proceed with an examination as scheduled.

In circumstances where there is no engagement with Staff relating to issues or concerns about records requested in a summons, and where no records have been produced in response to a summons despite Staff providing notice that a summons would be served, it is typically Staff's practice to have the summons recipient attend for the examination as set out in the summons. The summons recipient will be expected to answer questions relating to the records to be produced under the summons, including the reason for the failure to produce those records as set out in the summons.

Please refer to the OSC Staff Notice 15-708 *Enforcement Branch Document Production Guidance* (the “Document Production Guidance”) for information on managing production requests from Staff and Staff’s preferred production methods for records and documents. The Document Production Guidance includes information on managing technical production issues and how to produce documents from an e-discovery support system.

d) No Privileged Information Required to be Produced

No person or company is required to produce any record or testify to anything that is privileged. It is the responsibility of the person or company and/or their counsel to ensure that any material over which they would like to assert privilege is excluded from responses to a summons, direction or any voluntary request for documents. If, after delivering a response to a summons, direction or voluntary request, a person or company or their counsel discovers that records over which they would like to assert privilege were inadvertently produced, the person or company and/or their counsel should notify Staff immediately. Likewise, if in the course of its assessment or investigation Staff forms the view that all or part of a document may be privileged, Staff will notify the person or company or their counsel.

Please consult the Document Production Guidance for further guidance on production-related privilege matters.

9. Addressing Concerns Relating to Summons Requests

If a summons recipient or their counsel have questions or concerns relating to Staff’s assessment, investigation, or summons, they are encouraged to contact Staff directly. Staff will make reasonable efforts to address any issues, taking into consideration any sensitivities surrounding confidentiality and integrity of the assessment or investigation. It is expected that most issues can be resolved quickly and without need for escalation.

In exceptional circumstances, where concerns cannot be resolved between Staff and the summons recipient or their counsel, the matter may be brought to the attention of a Manager or Deputy Director of the Enforcement Branch. At that stage, discussions may be held between the Manager or Deputy Director and the summons recipient or their counsel, including in-house counsel.

If the issue cannot be resolved at that stage, the issue may be considered by the Director of the Enforcement Branch. The Director may hold a meeting or have further discussions with the summons recipient or their counsel, including in-house counsel.

Where an issue cannot be resolved within the Enforcement Branch, the summons recipient or their counsel may ask the chief executive officer (“CEO”) of the Commission to assist in resolving the issue. In these circumstances, the summons recipient or their counsel should inform Staff of their intention to make this request of the CEO. Staff will provide the summons recipient or their counsel, as applicable, with contact information to initiate the meeting with the CEO.

10. Failure to Comply with a Summons

Pursuant to section 13 of the OSA and section 9 of the CFA, in circumstances where a person refuses to attend for an examination or to answer Staff’s questions, or where a person or company refuses to produce records requested in a summons,² Staff may initiate contempt proceedings before the Superior Court of Justice. Staff prefer to resolve disputes relating to summonses or examinations directly with the summons recipient or their counsel. Staff will make every reasonable effort to do so without initiating contempt proceedings. However, in circumstances where the production of records, attendance at an examination or responses to questions remain outstanding despite Staff’s efforts to facilitate compliance, Staff will seek approval from the Director of Enforcement, Executive Director and/or CEO of the Commission to initiate contempt proceedings.

11. What to Expect During an Enforcement Examination

An Enforcement examination is a regulatory examination and not a civil examination for discovery. The questions asked in the course of Staff’s examination will be aimed at ascertaining information about issues raised in the investigation order. Unlike in civil examinations for discovery, examinees in Enforcement assessments or investigations are expected to answer all questions (except those refused on the basis of privilege).

If an examinee cannot answer a question during the examination but may have access to information or records that would assist in answering the question, Staff may ask the examinee or the examinee’s counsel for an undertaking to produce the necessary information and provide additional responses or records following the examination. Undertakings and responses to outstanding questions from compelled examinations are expected to be provided in a timely manner. Unlike in civil examinations for discovery, examinees may not take questions under advisement (except on the basis of considering privilege issues). Any information, additional responses or records provided following the examination are still considered part of the information that Staff obtains pursuant to the summons and, accordingly, the confidentiality requirements and protections outlined in section 7 above apply.

Examinees in Enforcement assessments or investigations have a right to have counsel present.

² This refers to records that are within the person or company’s custody or possession or records to which the person has access.

12. What Happens at the Conclusion of Staff's Investigation?

As indicated above, the length of Staff's investigations will vary depending on the complexity and volume of evidence obtained. At Staff's discretion, Staff will inform persons or companies who are the subject of Staff's investigation, or their counsel, when the investigation is nearing completion and will signal Staff's intended next steps. Staff will not generally contact persons or companies who have had limited involvement in the investigation.

At the conclusion of Staff's investigation, Staff may do one of the following:

1. If Staff do not intend to bring regulatory proceedings, deliver a confidential closing letter advising of the conclusion of Staff's investigation. In the closing letter, Staff may:
 - a. Inform the person or company that, based on the information obtained in Staff's investigation, no regulatory action will be brought against them; or
 - b. Inform the person or company that in Staff's view their conduct may not be in the public interest, provide a formal warning that regulatory action may be brought if the same or similar conduct persists, and explain Staff's expectations moving forward.
2. If Staff intend to bring regulatory proceedings, offer to meet with those involved in the investigation (or their counsel) to discuss the findings of the investigation and consider whether there is potential for early settlement, as discussed in greater detail in section 13, below.
3. If Staff intend to bring regulatory proceedings and there does not appear to be a likelihood of early settlement, deliver a confidential Enforcement Notice advising of the conclusion of Staff's investigation and Staff's intention to commence a regulatory proceeding. The Enforcement Notice will include information obtained in Staff's investigation and the basis for bringing a regulatory proceeding. The recipient of an Enforcement Notice will be given a reasonable opportunity, typically three weeks, to respond to the Enforcement Notice before a Statement of Allegations and Notice of Hearing are filed. Once the response period has lapsed and any responses to the Enforcement Notice have been reviewed, Staff may commence a regulatory proceeding by filing a Statement of Allegations and requesting a Notice of Hearing be issued by the Secretary's Office. Once a Statement of Allegations and Notice of Hearing are issued, the regulatory proceeding is commenced. Recipients of an Enforcement Notice should be aware that their responses to the Enforcement Notice are provided on a "with prejudice" basis. In other words, any response made to the Enforcement Notice could be brought to the

attention of the Commission should a regulatory proceeding be commenced in connection with these matters.

13. Enforcement Settlements

Settlement agreements may serve as a form of early resolution. Staff may enter into a settlement agreement with one or more persons or companies involved in Staff's investigation if it is in the public interest to do so. Any settlement agreement must be fair, proportionate and in the public interest.

Settlement agreements may include admissions of fact or, where appropriate, may be no-contest settlements (where facts are neither admitted nor denied), as set out in [OSC Staff Notice 15-702: Revised Credit for Cooperation Program](#).

Settlement agreements must be approved by a panel of the Commission. If approved, the panel will make an order and the settlement agreement is published on the Commission's website. Unless and until the Commission approves a settlement agreement, any settlement discussions are to be kept confidential.

Staff encourage persons and companies to consider engaging in settlement discussions during the investigative stage, before an enforcement notice is delivered. If appropriate, Staff may meet with counsel prior to the delivery of an enforcement notice to share information about the findings in their investigation. Staff may propose terms for settlement and consider whether there is an early indication that the parties wish to resolve the matter at that time.

In most cases, where there is indication that parties wish to settle a matter, it is expected that settlement agreements will be completed within two to three weeks of beginning settlement discussions. This allows the parties a reasonable opportunity to discuss and finalize the terms of settlement without unduly delaying Enforcement proceedings if an agreement cannot be reached.

In most cases, it is expected that an agreement in principle will be reached within one to two weeks of beginning settlement discussions (or, where appropriate, within one to two weeks of Staff's presentation of the findings in the investigation). At this stage, proposed terms and material aspects of the settlement are expected to be agreed upon, including the nature of any admissions to be made. It is expected that the agreement will be drafted and signed within an additional week. In more complex cases, negotiating the agreement and terms can take between two to three weeks, with an additional week to draft and sign the settlement agreement.

Following the finalization of a settlement agreement, it is expected that Staff and the settling parties will move efficiently to a confidential settlement conference, where the parties will present their recommendation to settle and seek the Commission's approval of the settlement agreement. (For more information, see

the [Guide to OSC Tribunal Proceedings](#) on the Commission's website). If the panel indicates it is prepared to approve the proposed settlement agreement, the parties will then proceed to a public settlement hearing. If a Statement of Allegations has not yet been filed with the Commission and a Notice of Hearing has not yet been issued, this will be done at this time. If the settlement is approved by a panel of the Commission at the settlement hearing, the settlement agreement will become public and an order consistent with the settlement agreement will be made. Settling parties are required to comply with the settlement agreement and the terms of the order of the Commission.

Contact Information

If you have questions or comments about this Guidance, please contact:

Johanna Superina
Deputy Director
Enforcement
jsuperina@osc.gov.on.ca
(416) 593-8210

Leigh-Ann Ronen
Senior Legal Counsel, Policy
Enforcement
lrone@osc.gov.on.ca
(416) 204-8954