

1.1.3 OSC Staff Notice 15-703, Guidelines for Staff Disclosure of Investigations

**ONTARIO SECURITIES COMMISSION STAFF NOTICE
15-703**

**GUIDELINES FOR STAFF DISCLOSURE
OF INVESTIGATIONS**

1. Purpose

The purpose of this Staff Notice is to inform the public of the guidelines used to determine whether investigations ought to be disclosed by OSC Staff.

2. Background

In the ordinary course, OSC Staff do not publicly disclose the existence of an investigation or details regarding an investigation. Some investigations may be compromised if disclosure is made before the Enforcement Branch has an opportunity to carry out its work. Confidentiality of the investigation minimizes this risk. In addition, confidentiality minimizes potential harm to the reputations of those to whom the investigation relates if no proceedings are taken.

However, public confirmation of the existence or nature of an investigation will provide investors with information that may be useful in assessing the risks of certain investments. Such confirmation may also serve to foster confidence in the capital markets by affirming that enforcement action is being taken in relation to potential breaches of the *Securities Act* or conduct contrary to the public interest. Therefore, there are cases where the value in disclosing the existence of an investigation will outweigh any risks associated with disclosure.

3. Definitions

Among the various branches at the OSC, a variety of reviews and investigations take place. For example, reviews are conducted from a compliance perspective and from a continuous disclosure perspective. This Guideline does not apply to such reviews.

For the purpose of this Guideline, "investigations" to be disclosed shall refer to investigations conducted by the Enforcement Branch. When Enforcement Staff are consulted or participate in reviews by other branches, this Guideline shall not apply until such time as the matter has reached a stage where Enforcement Staff have primary carriage of the matter. All matters in Enforcement, including those which start at the Case Assessment or Surveillance units, are considered to be investigations, whether or not a section 11 Investigation Order has been made.

4. Disclosure Obligations

Nothing in this Guideline should be construed to restrict or minimize an issuer's obligation to disclose information in accordance with securities law or relevant exchange requirements.

5. General Rule

In most circumstances, there will be no public disclosure by OSC Staff of information about an on-going or a closed investigation. This approach is based primarily on the following factors:

- Potential prejudice to the investigation;
- Potential prejudice to those who are under investigation;
- Confidentiality restrictions imposed by section 16 of the Securities Act.

6. Exceptions

In certain circumstances, OSC Staff may notify the market participant that the existence and nature of an investigation by the OSC ought to be disclosed. Subject to exceptional circumstances as referenced in paragraph 7, the market participant will be given an opportunity to disclose the existence and nature of the investigation, failing which OSC Staff may choose to do so. The circumstances include:

- (i) Investor protection outweighs factors favouring non-disclosure. This may occur where there appears to be credible evidence, for example, of fraudulent behaviour such as an ongoing scam, and where non-disclosure would result in losses to investors. Investor protection may also be engaged where information gathered about a market participant during an investigation reaches a level where lack of disclosure of the investigation may be prejudicial to investors.
- (ii) Where criminal law authorities are investigating a market participant for possible criminal misconduct at the same time as a related OSC investigation, disclosure of the OSC investigation may be appropriate to assist investors in making informed investment decisions.
- (iii) The investigation relates to conduct or issues which are substantially in the public domain and there are credible allegations which engage the enforcement jurisdiction of the OSC. Confidence in the capital markets may be

harmful by failure to confirm that the matter is under regulatory consideration.

- (iv) Where it has been disclosed that another regulator or law enforcement agency has an investigation related to the market participant, then an OSC investigation on the same or similar issues may also be disclosed.
- (v) In addition to the above, where a market participant has disclosed an OSC investigation, OSC Staff may confirm the investigation. Secondly, where a market participant has disclosed the fact and/or nature of an investigation by the OSC and what has been disclosed is misleading or inaccurate, OSC Staff may disclose accurate information about the investigation. Similarly, if the market participant has publicly denied the existence of an investigation, disclosure by OSC Staff may be appropriate to correct the public record.

7. Opportunity for the Market Participant to Disclose

Absent exceptional circumstances, the market participant will be given an opportunity to make an announcement about the investigation before OSC Staff take any steps to disclose the investigation.

8. Application of s. 16 of the Act

Disclosure must not be made which will contravene the provisions of section 16 of the Act. Section 16 provides as follows:

Non-disclosure

- 16. (1)** Except in accordance with section 17, no person or company shall disclose at any time, except to his, her or its counsel,
 - (a) the nature or content of an order under section 11 or 12; or
 - (b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13. 1994, c. 11, s. 358.

In most circumstances, the fact of an order under section 11 or 12 does not prohibit an issuer or OSC Staff from disclosing the existence of an investigation.

9. Notice if No Proceedings Are Taken

At the completion of an investigation which has been publicly disclosed, if no proceedings are to be taken, OSC Staff will notify the market participant and other relevant parties of this fact.