

Corporate Securities Law

November 1, 2004

Ontario Securities Commission Publishes Guidelines For Disclosure Of Investigations

For the first time, the Ontario Securities Commission has made public the guidelines that its Staff use when deciding if it is appropriate to disclose an ongoing investigation by the Enforcement Branch. Publication of the guidelines is intended to enhance the transparency of OSC processes and may reduce the apparent market confusion as to when disclosure of an investigation is likely to be made by the OSC.

Background

In the ordinary course, Staff of the OSC do not publicly disclose the existence of an investigation or details regarding an investigation in order to avoid potential prejudice to the investigation and to those who are under investigation. The guidelines outline the circumstances where the OSC considers that the value in disclosing an investigation outweighs any risk associated with the disclosure. In these cases, public confirmation of the existence or nature of an investigation is thought to provide investors with information that may be useful in assessing the risks of certain investments.

General Rule

In most situations, there will be no public disclosure by OSC Staff of information about an ongoing or a closed investigation.

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. 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. The situations for disclosure include:

- 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.
- Where criminal law authorities are investigating a market participant for possible criminal misconduct at the same time as a related OSC investigation is underway, disclosure of the OSC investigation may be appropriate to assist investors in making informed investment decisions.
- When an 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 require public confirmation that the matter is under regulatory consideration.
- Where it has been disclosed that another regulatory or law enforcement agency has an investigation related to the market participant, the OSC investigation on the same or similar issues may also be disclosed.
- In addition to the above exceptions, where a market participant has disclosed an OSC investigation, the OSC Staff may confirm the investigation. Where a market participant has disclosed the fact and/or nature of an investigation by the OSC and what has been disclosed is considered misleading or inaccurate, OSC Staff may disclose accurate information about the investigation. Also, if a market participant has publicly denied the existence of an investigation, disclosure by OSC Staff may be appropriate to correct the public record.

Goodmans^{LLP} Update

No Proceedings

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.

Please contact a member of the Goodmans securities team to discuss any questions you may have with respect to the OSC disclosure guidelines.

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