

WHAT DOES THIS LETTER FROM THE ONTARIO SECURITIES COMMISSION MEAN?

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A company contacted by the Enforcement Branch of the Ontario Securities Commission (“**Commission**”) is often unfamiliar with the context of the document that it has received. This article is intended to provide companies with additional visibility and understanding about their interactions with Enforcement Staff (“**Staff**”) of the Commission.

A Request for Information

The first letter that a company may receive in an enforcement investigation is a request for information from Staff. These letters often contain an introductory paragraph, followed by a list of requested information or documents. This particular form of request does not purport to be delivered pursuant to an enforcement order made by the Commission. While it may be marked as confidential, the company is not typically warned of potential consequences from disclosure that may arise if the request is disclosed. It also does not have the words “enforcement notice” in the subject.

Companies should give significant consideration as to their response to this initial request for information. Although the request is from Staff of the Commission, such enquiries are not treated as “compelled” at law. As a result, information provided by a company in response to a letter of this nature is considered “voluntary” at law. Information provided voluntarily is more likely to be subject to disclosure to third parties under the *Freedom of Information and Protection of Privacy Act*. It is also likely to be admissible against the company in subsequent proceedings.

On the other hand, Staff and the Commission are both likely to view cooperation in providing the requested information as favourable conduct and this could ameliorate the penalties contained in an eventual settlement.

Some factors that may influence what a company does in response to a request for information may include: the company’s jurisdiction; whether it believes that it is the target of Staff’s investigation; whether it believes that it has breached Ontario securities law; whether it would resist eventual enforcement steps; whether the information requested by Staff concerns third parties; and whether the company intends to settle any eventual

action taken against it.

A Summons

This form of document will typically arrive to a company stamped as confidential and make reference to an order obtained from the Commission providing for an investigation. The company will normally be cautioned that disclosure of the summons is contrary to the *Securities Act* (Ontario) (the “**Ontario Act**”). The summons will likely seek an examination on a particular date. The timeline set for a witness to appear in response to a summons is typically narrow, although virtually always subject to a brief extension, depending on what other steps Staff is taking in the investigation.

If a company has operations within Ontario, the decision to comply with the summons is not controversial. Staff has broad authority under the Ontario Act to seek information and compel production of records. In most instances, a representative of a company will want to consult with counsel about preparing to give evidence.

A company’s provision of evidence under oath in response to a summons is considered to be “compelled” at law. Although companies may not appreciate being forced to participate in a process in which they may (or may not) be the target, at least that evidence can be afforded protections which evidence given voluntarily does not receive. For this reason, some counsel will insist on a company’s evidence being compelled prior to the provision of any information and do not favour responding to voluntary requests.

Enforcement Notice

A company will usually have received at least a voluntary request for information prior to receipt of an enforcement notice. This document usually comes in the form of a letter with the subject “enforcement notice”. In substance, the enforcement notice will usually outline facts against the company which Staff intend to rely on in an enforcement proceeding. These facts may not include facts favourable to a company, even if Staff are aware of such facts. This document is usually delivered close to the time at which Staff are considering commencing enforcement proceedings against a company.

The enforcement notice expressly provides an opportunity to deliver both a “without prejudice” (settlement-focused and “off-the-record”) and “with prejudice” response.

Statement of Allegations and Notice of Hearing

A Statement of Allegations and Notice of Hearing are used to commence proceedings against a company. It would be surprising if these were the first documents received by a company. The Statement of Allegations is the public document that discloses Commission Staff’s allegations made against a company. The first hearing specified in the Notice of Hearing will typically be used to set the dates for subsequent steps of the

proceedings in accordance with the Commission's Rules of Procedure and Forms and the Practice Guideline.

Self-Reporting

A company concerned that it has breached securities law may wish to provide information to the Commission without being prompted by the Commission. There are two predominant ways by which a company may self-report information to the Commission: a whistleblower complaint or by contacting the Commission in an attributed way. The possible advantages for companies taking these approaches include avoiding enforcement action, minimizing the penalties incurred as a result of an enforcement action or reaching a form of settlement with the Commission which may not otherwise be available.

Conclusion

Our firm's review of contested enforcement decisions over the last few years discloses that, in contested matters, the Commission has agreed with Staff of the Commission over respondents in all but two or three decisions.^[1] In this context, it is important for companies to evaluate their exposure early and take steps to minimize the consequences of a possible enforcement action. The above information should assist companies striving to evaluate the appropriate response to outreach they have received from the Commission.

McMillan LLP has advised on, settled or contested enforcement matters involving allegations related to many provisions of the Ontario Act, including but not limited to sections 25, 53, 122 and 126.1. We have acted for companies, directors and officers subject to enforcement action by the Ontario Securities Commission on diverse subject matter ranging from cryptocurrency to real property. We have also advised on self-reporting procedures and consequences thereof.

by Adam Chisholm

[1] Analysis performed for Commission decisions regarding enforcement matters for the period December 1, 2015 to December 8, 2018.[ps2id id="1" target=""]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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