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# Statement of Approach

Compliance with Requests for Information



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# 1. Introduction

This Statement of Approach (SOA) document explains the interpretation and application of section 6.2.6 of Chapter 3: Administration, Supervision, Enforcement of the market rules.<sup>1</sup> Section 6.2.6 obliges market participants to comply with any request for information made by the Independent Electricity System Operator (IESO) under Chapter 3, section 6.2.4.3 related to an investigation of a possible breach of the market rules. Specifically, this SOA explains how a market participant can be compliant with a request for information, including the elements and timing of a proper response. This SOA also explains the potential enforcement outcomes which may arise pursuant to a failure to comply with a request for information from the IESO.

The Ontario market rules give the IESO the authority to undertake such monitoring as it considers necessary to determine whether market participants are complying with the market rules. Within the IESO, this responsibility, as well as the authority to conduct investigations and make determinations related to compliance assessment and enforcement, has been delegated to the Vice-President of the Market Assessment and Compliance Division (MACD).<sup>2</sup>

The IESO's monitoring, investigation, and enforcement functions are contained in Chapter 3, section 6 of the market rules. Chapter 3, section 6.2 concerns MACD's expected investigatory process with respect to most possible breaches of the market rules, including the power to request further information from a market participant during the course of an investigation and the requirement to comply with these requests.

This document provides guidance on what MACD is likely to consider when it determines compliance with this requirement, as well as what market participants should understand MACD's enforcement position is likely to be if they are found in non-compliance with this rule.

The market rules govern the conduct of market participants and the IESO insofar as it pertains to the rules' objectives "to govern the IESO-controlled grid and to establish and govern efficient, competitive and reliable markets for the wholesale sale and purchase of electricity and ancillary services in Ontario." For MACD to fulfill its mandate to ensure conduct is in compliance with these rules, in line with those fundamentally important objectives, it is imperative that it be able to have access to all of the information it needs to make its determinations. Accordingly, the requirement to provide information upon request is of paramount importance.

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<sup>1</sup> This SOA is provided without consideration of specific facts, actions, events, or conduct and does not provide a binding statement as to how MACD will proceed in particular cases. MACD retains discretion to apply the market rules appropriately in the particular circumstances of each case and to amend this SOA as needed. Terms that are not defined in this SOA bear the same meaning as in the market rules or *Electricity Act, 1998*, SO 1998 c 15 Schedule A (the "Electricity Act"), as the case may be. This guidance document does not supersede any findings of the Dispute Resolution Panel, the Ontario Energy Board, the courts, or any other adjudicative body with jurisdiction over the subject matter of this document.

<sup>2</sup> Delegation of Enforcement Authorities letter available upon request to MACD at [macdinbox@ieso.ca](mailto:macdinbox@ieso.ca)

## 2. Chapter 3, Section 6.2.6 and Related Rules

Chapter 3, section 6.2.6 establishes the compliance requirements that are the subject of this SOA:

**6.2.6** A market participant shall comply with any request for information made by the IESO pursuant to section 6.2.4.3.

Related Chapter 3 rules establish processes which precede this requirement. First, a preliminary opportunity is provided for the market participant to submit representations upon receiving a notice of possible breach from MACD:

**6.2.3** If the IESO considers, on its own initiative or upon receipt of written information from any person, that a market participant may have breached or may be breaching the market rules, and that, in the circumstances and if the breach is established, it would be appropriate that a sanction or sanctions be imposed on that market participant, the IESO shall notify the market participant of:

....

**6.2.3.4** the time within which the market participant may make written representation in response to the allegations;

Following this opportunity, the rules allow MACD to ask for more information:

**6.2.4** Following expiry of the time noted in section 6.2.3.4 and after consideration of any representations made by the market participant pursuant to that section, the IESO may:

....

**6.2.4.3** request that the market participant provide further information in relation to the alleged breach;

Under these rules, the IESO can request information in addition to any already provided by the market participant prior to MACD making a determination as to whether the market participant may have breached (or is breaching) the market rules. Market participants are required by the rules to provide the information the IESO requests related to the possible breach. This step is usually critical to MACD's ability to conduct a proper investigation and to make a fully informed determination.

A fuller articulation of the interpretation and application of these rules follows in Section 3.

## 3. Interpretation and Application of the Rules

### 3.1 The Right to Make Initial Written Representations

The market rules allow ample opportunity for market participants to submit written representations before, during and after the conclusion of a MACD investigation.

Prior to an investigation, if MACD has reasons to consider that a market participant may have breached the market rules in a manner that may be sanctionable, MACD must issue a notice pursuant to Chapter 3, section 6.2.3 (hereinafter referred to as a "Notice of Investigation" or "NOI" for the purpose of this document) to the market participant detailing certain prescribed information. Among other things, a NOI indicates the time within which the market participant may make a written response to the notice. The market participant can request a meeting with MACD to discuss the issues identified in the NOI. It is common for this meeting to be scheduled to occur prior to the provision of the written response, although it can occur in either order.

If the market participant requires additional time to submit a written response to the notice, it may request an extension but must provide MACD a clear rationale substantiating the additional time requirement. MACD may, at its discretion, grant such an extension request. After the time has expired for the market participant to make written representations in response to the NOI, and after considering their submission (if any is provided), MACD may make a formal request for further information if it believes that it needs it to better inform its ultimate determination in the matter. Please note that even if an extension is granted for making written representations, requests for information may be issued by MACD after the expiry of the original time period allowed in the NOI. It is imperative that MACD be able to have access to all of the information it needs to make its determinations. Accordingly, the requirement to provide information upon request is of paramount importance.

### 3.2 Requests for Information under Chapter 3, Section 6.2.4.3

In the ordinary course of an investigation, a market participant should anticipate that MACD will request further information after the issuance of a NOI. MACD will determine the appropriate scope of information to be requested and the medium by which it is to be provided, and will communicate with the market participant to clarify the requirements, as needed.

MACD requests for further information related to an investigation of possible breach(es) will be in written form and will typically be styled as a Request for Information (RFI). Because a NOI may be related to a wide variety of potential breaches, the scope of the requested information in an RFI can vary greatly from investigation to investigation and will depend on the evidentiary requirements of the market rule provisions relevant to the matter under review. The information requested in an RFI will usually be limited to traditional business documents, emails and similar records. However, depending on the nature of the investigation, an RFI may seek records of information created or stored in any medium, market and transaction data, and/or written answers to specific questions, often referred to as "interrogatories." In addition, MACD may request that information be provided

through interviews with relevant personnel. In all cases, an RFI will state a date by which the requested information is to be provided to MACD.

Information received through an initial RFI may not be sufficient for MACD to determine whether a breach has occurred or what sanctions may be appropriate. As such, in situations where MACD determines that additional information is required, supplementary RFIs may be issued. This is naturally part of the investigative process as the MACD staff learn more about the facts and the subject matter during the course of its investigation. Supplementary RFIs may be issued at any point after an initial RFI is issued. Parties under investigation may always proactively provide additional information during the course of the investigation, as well.

### 3.3 Compliance with Chapter 3, Section 6.2.6 is Mandatory

When MACD issues an RFI, compliance with its terms is mandatory. First and foremost, Chapter 3, section 6.2.6 expressly provides that the market participant “shall comply” with the request.

Moreover, Chapter 1, section 6.3.1, requires a market participant to comply with, observe and perform any duties and obligations imposed upon them by the market rules. Chapter 3, section 6.2.6 clarifies the market participant’s obligation to provide any further information requested by MACD in accordance with the provisions of section 6.2.4.3. In addition, these obligations, like all others in the market rules, are a condition of operation in the IESO-administered markets, as reflected in each market participant’s executed participation agreement.

### 3.4 Compliance Must Be Complete and Timely

In order to comply with section 6.2.6 a market participant must: i) provide all of the requested information in its possession, custody, or control and ii) provide all of the requested information by the date(s) specified by MACD in the RFI. Providing all information includes facilitating any requested interviews with relevant personnel who then provide full and complete responses to all questions.

An RFI applies to information that is in the possession of the market participant and to information that is in the possession of another party (such as a subsidiary or other affiliate) that the market participant can require to provide MACD with the requested information. Interviews with personnel of such other parties must also be arranged, if requested.

RFIs will also have a timeliness component. Reinforcing the obligation stipulated in section 6.2.6, Chapter 1, section 11.1.1 requires that the information be provided in a reasonable amount of time. MACD will assess on a case-by-case basis what a reasonable amount of time would be for a particular market participant to fully comply with the RFI. In doing so, MACD will take into account a range of factors including the:

- Nature of the RFI (e.g., deposition, interrogatories, production of records);
- Scope of the RFI (period of review and anticipated volume of information);
- Perceived complexity of the requested information;
- Historic precedents for compliance with similar RFIs;
- Nature of the potential breach;

- Potential impact of unremedied conduct on the IESO-controlled grid and IESO-administered markets; and
- Perceived ability of the market participant to comply with an RFI, considering the type of records requested, history of compliance, company size, and current financial situation.

### 3.5 Requests to Delay Responses to RFIs

Upon receiving an RFI, if a market participant anticipates that it cannot provide all of the requested information before the due date, the market participant should as soon as reasonably possible respond to MACD in writing, providing the following:

- The reason(s) why they are unable to comply before the due date, along with any supporting documentation;
- The specific elements of the RFI which they do not expect to provide within the allowed time;
- The steps they are taking to fully comply as soon as reasonably possible; and
- A reasonable alternative time for achieving full compliance with the RFI.

MACD will review such requests, and may decide to grant time extensions based on an assessment of the reasonableness of the rationale, supporting records, and alternative time proposed. It will also usually entertain or propose alternative options such as providing tranches of responses based on the complexity and volume of requested information. If requesting a staged response such as this, the market participant should provide details of which questions they will need to delay, why they need to delay, and how long they propose to take to provide responses past the original due date.

Generally, MACD will accommodate reasonable requests for extension and will agree to discussions to clarify the information requests. However, participants should be informed of the following MACD positions related to compliance and extension determinations:

- The closer an extension request is to the original response deadline, the less likely MACD will be to grant it;
- MACD will not entertain delays related to disagreements over the relevancy or scope of the questions, or delays based on a participant asserting that it has higher priorities than responding to the request;
- Outright refusals to respond will be considered by MACD to be breaches of the highest severity. Corresponding sanctions will be imposed.

### 3.6 Satisfactory Records Search Methods

A market participant must conduct a satisfactory search for the information which is the subject of an RFI. This can include such actions as identifying the relevant custodians within the company of the requested records, developing and using appropriate search terms, the use of technology-assisted review programs and, if required, interviewing relevant staff and documenting their statements. Accompanying a market participant's response to MACD should be a document signed by a management-level person or company legal resource certifying that the information provided is, to the best of their knowledge, complete.

It should be anticipated that MACD will request information as to which methodology is used to provide responses. Failure to follow these standard practices may lead to concerns that the responses are not complete or sufficient to meet the section 6.2.6 obligation. MACD will assist any participants which have questions as to the appropriate search methodology to follow in any particular circumstance.

### 3.7 Assertions of Legal Privilege

MACD recognizes that a market participant may assert that information is protected by a legally recognized privilege. If so, the market participant must establish a satisfactory factual basis supporting that assertion by providing a privilege log consisting of an itemized list of documents and/or information over which privilege is claimed and the basis for each claim of privilege. MACD does not consider unsubstantiated or blanket claims of privilege over information (e.g., merely by document type or subject matter) to be proper claims of privilege and will consider the failure to provide the information sought as relevant to the consideration of whether a breach of Chapter 3, section 6.2.6 may have occurred.

In respect of its policy concerning search methodologies and privilege claims, MACD is guided by common practice in civil litigation and regulatory enforcement settings such as that which characterizes market rule enforcement. Accordingly, consistent with such common practice, if there is a disagreement between the market participant and MACD about the validity of a privilege claim, MACD may seek adjudication by a neutral third party agreeable to both parties.

### 3.8 Compliance and Sanctions

Because market participants are required by section 6.2.6 to provide MACD with further information requested under section 6.2.4.3, a failure to do so may result in MACD launching a separate investigation into this aspect.

If the market participant does not produce the information requested by MACD, MACD may determine a breach of this rule, and issue sanctions, completely aside from the matter it was originally investigating. These sanctions could include an order directing the market participant to comply with the market rules, the imposition of additional or more stringent reporting requirements, and/or financial penalties.

This underscores the important function of the mandatory RFI created by sections 6.2.4.3 and 6.2.6. Without all of the pertinent information MACD requires to determine whether a market participant is breaching (or has breached) a market rule, MACD's ability to discharge its responsibilities to enable and enforce market rule compliance may be impaired. Its responsibilities to uphold compliance with the market rules on behalf of Ontario electricity ratepayers and market participants require it to rely upon these fundamental levers of oversight and enforcement.



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**Independent Electricity  
System Operator**

1600-120 Adelaide Street West  
Toronto, Ontario M5H 1T1

Phone: 905.403.6900

Toll-free: 1.888.448.7777

E-mail: [customer\\_relations@ieso.ca](mailto:customer_relations@ieso.ca)

**ieso.ca**

 [@IESO\\_Tweets](https://twitter.com/IESO_Tweets)

 [facebook.com/OntarioIESO](https://facebook.com/OntarioIESO)

 [linkedin.com/company/IESO](https://linkedin.com/company/IESO)