



Proceedings involving the OSC: *10 Things Every Dealer Should Know*

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Complying with regulatory obligations under securities law is a top priority for exempt market dealers (“EMDs”) across Ontario who want to avoid proceedings involving the Ontario Securities Commission (“OSC” or the “Commission”). WeirFoulds provides cost-effective strategic advice and solutions for EMDs to address regulatory issues as they arise and litigation counsel when needed. This article presents ten essential facts about proceedings involving the OSC that every dealer should know.

➔ 1 It's High Stakes

Proceedings involving the OSC have the potential to devastate the livelihoods of those involved. The mere fact that a registrant has attracted the attention of the OSC can have devastating consequences, regardless of whether the allegations are ultimately found true. An individual found guilty of contraventions of securities law by a provincial court judge, may be sanctioned up to five million dollars and to a term of imprisonment of five years less a day.

➔ 2 There are Multiple Forums for Enforcement Proceedings

The Commission may enforce Ontario securities law through the courts and/or through administrative proceedings. A party may even face concurrent proceedings in multiple forums. The Commission has discretion as to the manner in which it chooses to proceed and will consider factors such as the severity, scope and extent of the violations alleged. It may also consider the immediacy of the concern and the impact of its action on public monies and public trust, when deciding on the appropriate forum and proceeding to initiate.

➔ 3 The Director Grants (and can Remove) Your Registration

Section 27 of Ontario's *Securities Act* (the “Act”) vests a Director of the Commission with the power to register an individual or company provided that the applicant has satisfied various rules and regulations and where evidence is provided to demonstrate sufficient “proficiency, solvency and integrity” of the applicant. Continued compliance with Ontario securities law and good citizenship are necessary for continued registration. Section 28 of the Act provides that the Director “may revoke or suspend the registration of a person or company or impose terms or conditions of registration at any time during the period of registration of the person or company” if it appears to the Director that the person or company is not suitable for registration or that the registration is otherwise objectionable. This standard implies broad jurisdiction – in a recent proceeding, a Director noted extensive and pervasive record keeping issues as sufficient grounds for suspension of a registered dealer.¹

➔ 4 You have the Right to be Heard

Where the Director considers suspending or revoking a registrant's registration (or imposing terms and conditions), section 31 of the Act provides a right to be heard. The manner in which the right to be heard may be exercised can vary from a written submission to an oral hearing, referred to as an “Opportunity to be Heard”. An “Opportunity to Be Heard” takes place before the Director and may include evidence being tendered and witnesses being cross-examined.

5 There are few Procedural Safeguards in an Oral Hearing before the Director

An oral hearing before the Director lacks the procedural safeguards that are offered by court proceedings (under the *Canadian Charter of Rights of Freedoms*, in other legislation and as developed in the common law that protects individuals who are prosecuted before a court of law) or hearings before a panel of Commissioners (under the OSC's *Rules of Practice*).² For example, the rules of procedure for proceedings under section 31 of the Act provide that an appearance before the Director "will generally be an informal proceeding" and at the appearance, "the Director may ask any question and admit any evidence he or she sees fit." A Director's power is vast and a decision of the Director can lead to consequences that are as devastating as those imposed by the Commission or a court.

6 The Commission has broad Powers

Pursuant to section 127 of the Act, the Commission is vested with broad authority to issue orders where conduct is found to be "contrary to the public interest". The scope of the Commission's public interest mandate has been broadly interpreted. The Commission has recently noted that even without the panel finding a technical breach of the rules, it may *still* find that conduct was contrary to the public interest (and subsequent issue orders to sanction the offending party).³

7 Any Response to An Enforcement Notice Can be used Against You

Typically, enforcement proceedings begin with Staff providing a confidential Enforcement Notice which sets out, in general terms, the nature of the allegations and invites a response on a *without prejudice* basis, meaning any submission that is provided to staff may be considered by the Commission in any future proceedings. While in rare cases, submissions made to Staff through the Enforcement Notice process may lead Staff to not take any further steps. In most instances, a public Statement of Allegations will follow which states that a hearing has been commenced and particularizes the allegations.

8 There are a Many Possible Outcomes

Even after a Statement of Allegations has been issued, many of those cases reach settlement. A settlement is reached when OSC Staff and the registrant stipulate to certain facts and agree to ask the Commission to issue certain orders. All remaining matters

proceed to a contested oral hearing which is presided over by at least two members of the Commission. At this hearing, the onus rests with OSC Staff to prove the allegations based on evidence that must be "clear and cogent" which is a less onerous standard than the "beyond reasonable doubt" standard that is required to prove allegations in court.

9 Some Offences are Prosecuted before the Courts

Section 122 of the Act provides for the prosecution of contraventions of securities law by a provincial court judge in the Ontario Court of Justice. The procedures for these prosecutions, in most respects, mimic the manner in which a criminal offence proceeds before the court. The procedural protections that are afforded to a market participant who is subject to a prosecution in provincial court are significantly greater than what is afforded to a Respondent at an enforcement proceeding before the Commission or before a Director at an "Opportunity to be Heard".

10 Get Good Legal Advice – Early and Often

It is imperative for dealers to get good legal advice to ensure ongoing compliance with securities laws. Good communication with legal advisors can mitigate against future proceedings and, in many cases, there are early warning signs that litigation is on the horizon. Red flags may be reflected in a Compliance Review Report, through correspondence from the OSC, or by targeted inquiries made by OSC Staff with you or *with your clients*. In many cases, an early and proactive response may diminish or avoid litigation altogether.

Do you have questions? The lawyers at WeirFoulds LLP understand the needs of EMD's and can help you navigate the challenges that may arise between you and your professional regulator.

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Notes

1. *In the Matter of Staff's Recommendation to Suspend the Registrations of White Capital Corporation and Matthew White*, decision released January 11, 2013.
2. *Rules for the procedure for hearing under s.31 of the Act have been created by the Commission and can be found at http://www.osc.gov.on.ca/en/Dealers_otbh_20111025_procedures.htm*
3. *Re Donald*, (2012), 35 O.S.C.B. 7383