

## Chapter 13

# SRO Notices and Disciplinary Proceedings

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### 13.1.1 RS Market Integrity Notice – Notice of Amendment Approval – Provisions Respecting Practice and Procedure

January 14, 2005

No. 2005-002

#### NOTICE OF AMENDMENT APPROVAL

#### PRACTICE AND PROCEDURE

#### Summary

Effective January 14, 2005, the Alberta Securities Commission, British Columbia Securities Commission, Manitoba Securities Commission, Ontario Securities Commission and, in Quebec, the Autorité des marchés financiers (the “Recognizing Regulators”) approved a series of amendments to the Policies to the Universal Market Integrity Rules (“UMIR”) respecting the practice and procedure to be followed in a disciplinary proceeding. These amendments are generally of an administrative, editorial or technical nature.

#### Summary of Revisions to the Original Proposal

Based on comments received in response to the Request for Comment contained in Market Integrity Notice 2004-013 issued on April 30, 2004 and based on comments received from the Recognizing Regulators, RS revised the text of the amendments to:

- clarify that section 8.1 deals with procedural aspects of disclosure rather than establishing or affecting the substance of the disclosure to be made by any party;
- clarify that the disclosure of material related to the approval of a Settlement Agreement by a Hearing Panel in Quebec under section 9.7 is subject to any order limiting public access to the hearing or the publication of information or documents;
- provide that the Chair of a Hearing Panel must be “independent” and may not be a current or former director, officer, partner or employee of a Participant or Access Person; and
- make a number of minor editorial change to the drafting of the provisions.

#### Summary of the Amendments

Policy 10.8 of UMIR sets out the practice and procedure to be followed in connection with enforcement proceedings. The material changes to each of the sections as a result of the amendments are summarized as follows:

#### 1. Section 1.1 – Definitions

Under Policy 10.8, the Secretary has a number of obligations including:

- (a) the selection of the members of Hearing Panels from the members of the Hearing Committee (the members of the Hearing Committee having been nominated by the marketplaces and appointed by the independent members of the Board of Directors of RS);
- (b) receipt of requests to have hearing conducted in the French language;
- (c) receipt of documents required to be filed with the Hearing Panels pursuant to the Policy;
- (d) receipt of material filed with the Hearing Panels relating to a Notice of Motion; and
- (e) providing notice of pre-hearing conferences to the parties and to other persons as directed by the Hearing Panels.

In addition to the duties specifically enumerated in Policy 10.8, the Secretary conducts a variety of administrative tasks on behalf of Hearing Panels including the co-ordination of the delivery of notices, providing for communications with parties on behalf of Hearing Panels and other similar tasks.

Prior to the amendments, the term "Secretary" was defined as "the Secretary of the Market Regulator or other officer or employee of the Market Regulator designated by the Board to perform the functions of the Secretary for the purposes of this Policy". That wording required the Secretary to carry out a variety of tasks, many of which are administrative in nature. The change in the definition allows the Secretary to delegate certain responsibilities of the Secretary to RS staff. This change will provide operational efficiency, allowing for the delegation of tasks by the Secretary to appropriate administrative or other personnel. The amendment permits an officer or employee designated in writing from time to time by the Secretary to perform such of the functions of the Secretary for the purposes of Policy 10.8 pursuant to the UMIR as may be specified in the designation by the Secretary.

**2. Section 3.2 – Contents of Offer of Settlement**

Prior to the amendment, section 3.2 specified that an Offer of Settlement must contain, among other items, a specification of the penalties or remedies to be imposed by the Market Regulator pursuant to Rule 10.4 and the assessment of any expenses to be made pursuant to Rule 10.5. These cross-references did not refer to correct rules in the version of UMIR that was approved by the Recognizing Regulators on the recognition of RS as a self-regulatory organization. The amendment made an editorial correction by referring to "Rule 10.5" and "Rule 10.7" respectively.

**3. Section 4.2 – Contents of Notice of Hearing**

In the ordinary course, a person subject to a disciplinary hearing is entitled to an oral hearing before a Hearing Panel. If the Market Regulator proposes to hold a hearing as an electronic hearing or a written hearing, the Notice of Hearing must contain a statement indicating that the party notified may object to the hearing being held as an electronic or a written hearing and setting out the procedure to be followed to pursue the objection. The amendment merely clarifies that a Notice of Hearing does not need to contain a statement regarding an objection to the form of the hearing if the hearing will be an oral hearing.

**4. Section 8.1 – Procedure for Compliance with Disclosure Obligations**

Prior to the amendment, section 8.1 provided that each party shall, as soon as practicable after service of the Notice of Hearing, and in any case no later than 10 days before the commencement of the hearing:

- deliver to every other party copies of all documents that the party intends to refer to or tender as evidence at the hearing; and
- make available for inspection by every other party anything other than a document that the party intends to refer to or tender as evidence at the hearing.

The section was intended to ensure that, with respect to anything that would be referred to or tendered as evidence at a hearing, all parties received a copy of all documents and had the opportunity to inspect anything which was not a document. The amendment clarifies this interpretation.

The heading of the section was changed to "Procedure for Compliance with Disclosure Obligations" from "Requirement to Disclose" to confirm that the section dealt with procedural aspects of disclosure rather than determining the disclosure that had to be made by each party. In particular, subsection (3) was added to confirm that the procedural provisions did not affect the obligation to disclose as required by common law or other applicable law.

**5. Section 9.4 – Failure to Reply, Attend or Participate**

The amendment to section 9.4 clarifies that a Hearing Panel may proceed on the facts alleged or the conclusions drawn by the Market Regulator as set out in a Statement of Allegations if the person against whom the Statement of Allegations is delivered fails to respond or appear. Previously, the provision provides that the Hearing Panel may accept such facts "if permitted by law". As RS is not subject to the *Statutory Powers Procedures Act* (Ontario) or comparable legislation in other jurisdictions which would permit a tribunal to rely on the facts, the provision has been amended to explicitly provide that a Hearing Panel may rely on the facts unless otherwise precluded by law.

The amendment to section 9.4 also corrects a minor drafting problem by deleting the term "defendant" from a heading. The term "defendant" is not used in UMIR.

**6. Section 9.7 – Public Access to Hearing**

Section 9.7 provides for “public access” to hearings conducted by RS before a Hearing Panel. In the case of an oral hearing, the hearing shall be open to the public. The public is given reasonable access to documents submitted for a written hearing at the office of RS during ordinary business hours. In the case of an electronic hearing, the public shall have reasonable access to the proceedings. Unless otherwise provided by the Hearing Panel or the terms of a specific Rule or Policy, the public will have access to a hearing that will consider:

- approval or rejection of a Settlement Agreement entered into between RS and any person with respect to a violation of UMIR;
- a disciplinary matter undertaken pursuant to a Notice of Hearing issued by RS as against any person alleged not to have complied with a requirement of UMIR; and
- any procedural applications or motions in relation to a disciplinary proceeding.

Public access to a hearing may be denied if:

- a specific Rule or Policy provides that a hearing be conducted in the absence of the public;
- the Hearing Panel determines that the exclusion of the public from an oral or electronic hearing is necessary for the maintenance of order at the hearing; or
- the Hearing Panel determines that intimate financial or personal matters may be disclosed at the hearing and that the desirability of avoiding disclosure of such personal matters outweighs the desirability of public access to the hearing.

For a hearing in Quebec, the Hearing Panel, on its own initiative or at the request of a party, may order the hearing be held in camera or ban the publication or release of any information or documents it indicates in the interest of morality or public order.

If a Hearing Panel determines that a settlement hearing may be conducted in the absence of the public, the amendment provides that:

- if the settlement agreement is approved by the Hearing Panel, all documents and transcripts of the hearing will be made public; and
- if the settlement agreement is rejected by the Hearing Panel, the material will not be made public and there will not be any prejudice to the case of either the Market Regulator or the party subject to the disciplinary proceeding.

The amendment facilitates the settlement process by keeping all documents and transcripts of a settlement hearing confidential if the Hearing Panel rejects the Settlement Agreement. If the Settlement Agreement is rejected the disciplinary matter will be determined by a new Hearing Panel and the material presented at that hearing will be made public subject to the exceptions enumerated in section 9.7. The approach introduced by the amendment parallels the procedure used by the Ontario Securities Commission in the event that a Settlement Agreement is rejected by a panel.

The amendment also clarifies that the disclosure of material related to the approval of a Settlement Agreement by a Hearing Panel in Quebec under section 9.7 is subject to any order limiting public access to the hearing or the publication of information or documents.

**7. Section 10.2 – Selection of Hearing Panel**

Prior to the amendment, section 10.2 provided that the Secretary would select a Hearing Panel upon the issuance of a Notice of Hearing. The amendment clarified that the Secretary shall also appoint a Hearing Panel upon acceptance of an Offer of Settlement by the person on whom the Market Regulator has served an Offer of Settlement. Under Part 3 of Policy 10.8, a Hearing Panel must convene to either approve or reject any Settlement Agreement that has been entered into by a Market Regulator. The Settlement Agreement created by the acceptance of the Offer of Settlement is subject to the approval or rejection of the Settlement Agreement by a Hearing Panel.

The amendment also provides that the Chair of a Hearing Panel must be “independent” and may not be a current or former director, officer, partner or employee of a Participant or an Access Person.

**8. Section 10.3 – Quorum Provisions**

Prior to the amendments, Policy 10.8 did not contain a specific provision on the ability of a Hearing Panel to continue hearings or deliberations if one or more of the Hearing Panel members is unable to continue to serve. The amendment clarifies that decisions of a Hearing Panel may be made by a majority of the members of the panel and that a Hearing Panel may continue to consider a matter if one of the three members is unable to continue serving. The amendment provides that a single member of a Hearing Panel may continue to consider a matter with the consent of all parties. These procedures insure that cases may be considered in a timely manner even though one or more members of a Hearing Panel become incapacitated or are otherwise unable to continue to serve on the Hearing Panel.

**Text of the Amendment**

The text of the amendments to the Policies respecting practice and procedure that are effective as of January 14, 2005 is set out in Appendix "A".

**Responses to the Request for Comments**

RS received two comment letters in response to the Request for Comments on the proposed amendments set out in Market Integrity Notice 2004-013. The comments and the response of RS are summarized in Appendix "B". Appendix "B" also contains the text of the relevant provisions of the Policies as they read following the adoption of the amendments. This text has been marked to indicate changes from the original proposal set out in Market Integrity Notice 2004-013.

**Questions**

Questions concerning this notice may be directed to:

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**Appendix "A"**

**Universal Market Integrity Rules**

**Amendments to the Policies**

**Related to Practice and Procedure**

The Policies to the Universal Market Integrity Rules are amended by amending Policy 10.8 as follows:

1. Section 1.1 of Policy 10.8 is amended by deleting the definition of "Secretary" and substituting the following:

**"Secretary"** means the Secretary of the Market Regulator or other officer, employee or agent of the Market Regulator designated in writing from time to time by the Secretary to perform such of the functions of the Secretary for the purposes of this Policy as may be specified in the designation by the Secretary.
2. Clause 2.2(b) is amended by deleting the second reference to the word "be" and substituting "by".
3. Clause 3.2(e) is amended by deleting references to "Rule 10.4" and "Rule 10.5" and substituting references to "Rule 10.5" and "Rule 10.7" respectively.
4. Clause 4.2(e) is amended by inserting at the start of that clause the phrase "if the Notice of Hearing specifies that the hearing is to be an electronic or a written hearing,".
5. Section 8.1 is amended by:
  - (a) deleting "Requirement to Disclose" as the heading of the section and substituting "Procedure for Compliance with Disclosure Obligations";
  - (b) deleting clause 8.1(1)(b) and substituting the following:
    - (b) make available for inspection by every other party any other things that the party intends to refer to or tender as evidence at the hearing but not including any document a copy of which was delivered to every other party in accordance with clause (a).
  - (c) adding the following as subsection (3):
    - (3) **Disclosure Obligation** – Nothing in this section shall affect the obligation of the Market Regulator or any other party to disclose any document or other thing that may be required under common law or other applicable law.
6. Section 9.4 is deleted and the following substituted
  - 9.4 Failure to Reply, Attend or Participate**
  - If a person served with a Notice of Hearing fails to:
    - (a) in the case of an oral hearing, serve a Reply in accordance with section 9.1;
    - (b) in the case of a written hearing, serve a Response in accordance with section 9.2;  
or
    - (c) attend or participate at the hearing specified in the Notice of Hearing,

the Market Regulator may proceed with the hearing on the matter on the date and at the time and place set out in the Notice of Hearing without further notice to and in the absence of the person, and the Hearing Panel may, unless precluded by law, proceed on the facts alleged or the conclusions drawn by the Market Regulator in the Statement of Allegations and the Hearing Panel may impose any one or more of the penalties or remedies authorized by the Rules and assess expenses as authorized by the Rules.
7. Section 9.7 is amended by adding the following as subsections (4) and (5):

- (4) If a Hearing Panel decides that a hearing to consider a Settlement Agreement shall be conducted in the absence of the public in the case of an oral or electronic hearing or without access to the documents submitted in the case of a written hearing;
    - (a) any record or transcript of the hearing or any document or other thing tendered at the hearing shall be made available to the public if the Hearing Panel approves the Settlement Agreement; and
    - (b) any record or transcript of the hearing and any document or other thing tendered at the hearing shall not be made available to the public if the Hearing Panel rejects the Settlement Agreement.
  - (5) Despite subsection (4), if a Hearing Panel in Quebec approves a Settlement Agreement, any record or transcript of the hearing or any document or other thing tendered at the hearing shall not be made available to the public if the hearing is subject to an order that the hearing be held in camera or a ban on the publication or release of any information or documents except to the extent that such order is varied or vacated.
8. Subsection 10.2(1) is amended by:
- (a) inserting after the phrase “Notice of Hearing” the phrase “or upon the acceptance of an Offer of Settlement”; and
  - (b) inserting in clause (a) after the word “jurisdiction” the phrase “and who is not a current or former director, officer, partner or employee of a Participant or an Access Person”.
9. Part 10 is amended by adding the following as section 10.3:

**10.3 Quorum Provisions**

- (1) Subject to subsection 10.2(2), if a member of a Hearing Panel becomes incapacitated or is otherwise unable to serve on a Hearing Panel for whatever reason, the remaining member or members of the Hearing Panel may continue to deal with any matter and may make any order or decision that a Hearing Panel may make in accordance with the Rules and Policies provided that if the Hearing Panel is comprised of a single member the Hearing Panel may only continue to deal with any matter with the consent of all parties.
- (2) Any order or decision of a Hearing Panel may be made by a majority of the members of the Hearing Panel and in the event that the Hearing Panel is comprised of two members the order or decision shall be unanimous.

## Appendix "B"

## Universal Market Integrity Rules

Comments Received on Proposed Amendments  
Respecting Practice and Procedure

On April 30, 2004, RS issued Market Integrity Notice 2004-013 requesting comments on proposed amendments to the Policies under UMIR respecting the practice and procedure to be followed in a disciplinary proceeding. In response to that Market Integrity Notice, RS received comments from the following persons:

BMO Nesbitt Burns Inc. ("BMO")  
Scotia Capital Inc. ("Scotia")

The following table presents a summary of the comments received together with the response of RS to those comments. Column 1 of the table also indicates the revisions to the amendments as published on April 30, 2004 that are proposed by RS in response to the comments and the applicable securities regulatory authorities.

Text of Provisions Following Adoption of Amendments	Commentator and Summary of Comment	Response to Comment
<p><b>1.1 Definitions</b></p> <p>"<b>Secretary</b>" means the Secretary of the Market Regulator or other officer, employee or agent of the Market Regulator designated in writing from time to time by the Secretary to perform such of the functions of the Secretary for the purposes of this Policy as may be specified in the designation by the Secretary.</p>		
<p><b>2.2 Contents of Statement of Allegations</b></p> <p>A Statement of Allegations must contain:</p> <p>...</p> <p>(b) the facts alleged and intended to be relied upon <u>by</u> <del>be</del> the Market Regulator; and</p> <p>...</p>		
<p><b>3.2 Contents of Offer of Settlement</b></p> <p>An Offer of Settlement must:</p> <p>...</p> <p>(e) specify the penalties or remedies to be imposed by the Market Regulator pursuant to Rule 10.5 and the assessment of any expenses to be made pursuant to Rule 10.7; and</p> <p>...</p>		

Text of Provisions Following Adoption of Amendments	Commentator and Summary of Comment	Response to Comment
<p><b>4.2 Contents of Notice of Hearing</b></p> <p>A Notice of Hearing must contain:</p> <p>...</p> <p>(e) if the Notice of Hearing specifies that the hearing is to be an electronic or a written hearing, a statement that the party notified may object to holding the hearing as an electronic or a written hearing and the procedure to be followed for that purpose;</p> <p>...</p>		
<p><b>8.1 Requirement to Disclose Procedure for Compliance with Disclosure Obligations</b></p> <p>(1) <b>Documents and Other Things</b> – Each party to a hearing shall, as soon as practicable after service of the Notice of Hearing, and in any case no later than 10 days before the day upon which the hearing is scheduled to commence:</p> <p>...</p> <p>(b) make available for inspection by every other party <del>anything</del> <u>any other things</u> that the party intends to refer to or tender as evidence at the hearing but not including any document a copy of which was delivered to every other party in accordance with clause (a).</p> <p>...</p> <p><u>(3) Disclosure Obligation</u> – <u>Nothing in this section shall affect the obligation of the Market Regulator or any other party to disclose any document or other thing that may be required by common law or other applicable law.</u></p>	<p><b>Scotia</b> – Interprets the current provision as requiring that RS “make available for inspection all documents obtained during the course of its investigation, whether or not such documents will form a part of its case against a respondent at a hearing”.</p> <p>The commentator also made reference to NASD Rule 9251(a) which would require the disclosure of all documents “prepared or obtained by staff in connection with the investigation”. The commentator made reference to Rule 10.1 of the IDA regarding the fact that “nothing in this Rule 10 derogates from the Association’s obligation to disclose all materials as required by common-law”.</p> <p>The commentator is concerned that the proposed amendment is not consistent with the principles of fairness and natural justice.</p> <p><b>BMO</b> – Commentator is of the view that the amendment changes the substantive requirements for disclosure and is inconsistent with applicable common law requirements and with the procedure of other regulatory agencies including the IDA. Suggests that the “efficiency of the hearing process is enhanced when</p>	<p>Section 8.1 is a procedural rather than a substantive requirement. Section 8.1 is designed to set out how and when disclosure is to be made by all parties rather than establish what is to be disclosed by RS. The standard for disclosure as applicable to RS in respect of disciplinary hearings in Ontario was set out by the Ontario Superior Court of Justice (Divisional Court) in the decision <i>Taylor Shambleau v. The Ontario Securities Commission and the Toronto Stock Exchange Inc.</i> in January of 2003. In that decision that court held: “The basis of the disclosure requirement is found in the duty of fairness. The question is not whether a particular class of documents must be disclosed or not. Whatever disclosure is necessary to satisfy the duty of fairness must be made.” This standard may in fact vary from jurisdiction to jurisdiction depending upon the administrative law applicable in that jurisdiction (and the standard in Quebec will be based on civil rather than common law). RS made several additional amendments to section 8.1 to confirm that the provision is procedural in nature and that the disclosure standard will be established by applicable law in each province.</p> <p>(See response to Scotia above.)</p>



Text of Provisions Following Adoption of Amendments	Commentator and Summary of Comment	Response to Comment
	disclosure obligations are clearly set out in the Rules of Practice. This eliminates the need to bring procedural motions at the outset of a hearing.”	
<p><b>9.4 Failure to Reply, Attend or Participate</b></p> <p>If a person served with a Notice of Hearing fails to:</p> <p>(d) in the case of an oral hearing, serve a Reply in accordance with section 9.1;</p> <p>(e) in the case of a written hearing, serve a Response in accordance with section 9.2; or</p> <p>(f) attend or participate at the hearing specified in the Notice of Hearing,</p> <p>the Market Regulator may proceed with the hearing on the matter on the date and at the time and place set out in the Notice of Hearing without further notice to and in the absence of the person, and the Hearing Panel may, unless precluded by law, <u>proceed on</u> <del>accept</del> the facts alleged or the conclusions drawn by the Market Regulator in the Statement of Allegations <del>as having been proven by the Market Regulator</del> and the Hearing Panel may impose any one or more of the penalties or remedies authorized by the Rules and assess expenses as authorized by the Rules.</p>		
<p><b>9.7 Public Access to Hearing</b></p> <p>(4) If a Hearing Panel decides that a hearing to consider a Settlement Agreement shall be conducted in the absence of the public in the case of an oral or electronic hearing or without access to the documents submitted in the case of a written hearing;</p>		

Text of Provisions Following Adoption of Amendments	Commentator and Summary of Comment	Response to Comment
<p>(a) any record or transcript of the hearing or any document or other thing tendered at the hearing shall be made available to the public if the Hearing Panel approves the Settlement Agreement; and</p> <p>(b) any record or transcript of the hearing and any document or other thing tendered at the hearing shall not be made available to the public if the Hearing Panel rejects the Settlement Agreement.</p> <p><u>(5) Despite subsection (4), if a Hearing Panel in Quebec approves a Settlement Agreement, any record or transcript of the hearing or any document or other thing tendered at the hearing shall not be made available to the public if the hearing is subject to an order that the hearing be held in camera or a ban on the publication or release of any information or documents except to the extent that such order is varied or vacated.</u></p>		
<p><b>10.2 Selection of Hearing Panel</b></p> <p>(1) Upon the issuance of a Notice of Hearing or upon the acceptance of an Offer of Settlement, the Secretary shall select a Hearing Panel from the members of the Hearing Committee for the jurisdiction in which the hearing will be held comprised of:</p> <p>(a) one member of the Hearing Committee who is or was a member of the Law Society for that jurisdiction <u>and who is not a current or former director, officer, partner or employee of a Participant or an Access</u></p>		

Text of Provisions Following Adoption of Amendments	Commentator and Summary of Comment	Response to Comment
<p><u>Person</u> and this person shall act as chair of the Hearing Panel; and</p> <p>(b) two members of the Hearing Committee, at least one of whom shall be a current or former director, officer, partner or employee of a Participant or an Access Person</p>		
<p><b>10.3 Quorum Provisions</b></p> <p>(1) Subject to subsection 10.2(2), if a member of a Hearing Panel becomes incapacitated or is otherwise unable to serve on a Hearing Panel for whatever reason, the remaining member or members of the Hearing Panel may continue to deal with any matter and may make any order or decision that a Hearing Panel may make in accordance with the Rules and Policies provided that if the Hearing Panel is comprised of a single member the Hearing Panel may only continue to deal with any matter with the consent of all parties.</p> <p>(2) Any order or decision of a Hearing Panel may be made by a majority of the members of the Hearing Panel and in the event that the Hearing Panel is comprised of two members the order or decision shall be unanimous.</p>		