

1.4.4 Rules of Procedure of the Ontario Securities Commission

NOTICE OF THE OFFICE OF THE SECRETARY TO THE COMMISSION

ADOPTION OF NEW RULES OF PROCEDURE ONTARIO SECURITIES COMMISSION

Adoption of new procedural rules applicable to all hearings before the Ontario Securities Commission

On February 18, 2009, the Ontario Securities Commission (Commission) approved and adopted new *Rules of Procedure of the Ontario Securities Commission* (Rules). The current *Rules of Practice* (1997), 20 O.S.C.B. 1947 (*Rules of Practice*) are repealed in their entirety and replaced by the new Rules which are effective on April 1, 2009.

Public comments and the approval process

In May 2007 [(2007) 30 O.S.C.B. 4339], the Commission published a request for comment on proposed new draft rules of procedure. Written submissions were received in response to the request for comment and the Office of the Secretary also held a series of consultative meetings with interested counsel throughout 2007 to discuss the proposed draft rules. Following the close of the comment period and the consultations, the Adjudicative Committee of the Commission considered all of the comments received both in writing and during the consultative process. The Committee thoroughly considered a number of issues arising from the comments through 2008 and ultimately recommended to the Commission that it approve and adopt the proposed draft rules with a number of significant changes made in response to specific comments received. Copies of all of the comment letters are available on the Commission's website and a summary of the comments and the Commission's response to them is provided in Appendix "A" to this Notice.

The Commission wishes to thank those who provided written comments and participated in the consultations with the Office of the Secretary. Public participation is essential to the enactment of procedural rules that are appropriate, fair and effective.

The *Rules of Procedure* were adopted by the Commission under the authority of section 25.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (SPPA).

Application of the Rules

The Rules apply to all proceedings before the Commission where the Commission is required under the *Securities Act*, R.S.O. 1990, c. S.5 (Act), the *Commodity Futures Act*, R.S.O. 1990, c. C.20 or otherwise by law to hold a hearing or to afford to the parties to the proceeding an opportunity for a hearing before making a decision. **The new Rules apply to all proceedings before the Commission commenced on or after April 1, 2009.** The Commission's *Rules of Practice* will, however, continue to apply to all proceedings commenced on or prior to March 31, 2009.

Purpose and substance of the new Rules

The Commission's goal is to ensure that its adjudicative proceedings are more transparent and accessible. The Rules, therefore, are designed to ensure the fair and efficient resolution of proceedings before the Commission in the most expeditious and cost-effective manner by providing parties with more complete and easily accessible guidance on the procedures required for the conduct of Commission proceedings.

The Rules are now more comprehensive than were the former *Rules of Practice* and identify all of the procedures required in the course of all proceedings before the Commission. The Rules are also now organized according to the chronological order of procedural steps normally taken in most proceedings. It is hoped, therefore, that the new Rules, both in their organization and comprehensiveness, will provide all stakeholders, including self-represented parties and those unfamiliar with adjudicative proceedings generally, with clearer and simpler guidelines on proceedings before the Commission.

The new Rules improve the accessibility and transparency of Commission proceedings by providing clearer guidance on key procedural issues such as:

- who constitutes a "party" to a proceeding and what they are entitled to by way of notice and service;
- how to file a request for leave to intervene in a proceeding;
- what types of applications for a hearing may be filed with the Commission and what procedures to follow for each type of application;

- how to bring motions, what materials are required to be filed in support of the motion and the time limits for filing motion materials;
- what disclosure is required by parties, the time limits for that disclosure and the procedures to follow for calling witnesses including expert witnesses and requesting subpoenas;
- what access the public has to hearings, including access to documents used at the hearing and how hearing documents may be sealed;
- how to request an adjournment of a proceeding either on consent or where there is an objection to the adjournment by another party;
- how to initiate proceedings, including filing and serving documents, for a hearing in connection with a take-over bid or an issuer bid; and
- what is required of Commission Staff in making a request for costs to enable parties to test the validity of the costs and prepare a response.

Implementation of the Rules and future consultation

The Commission, through the Office of the Secretary, will be actively monitoring the implementation of the Rules over the coming year and will be seeking further guidance on the Rules through continued consultation with stakeholders and, where appropriate, by further requests for public comment on proposed Rule changes. It is anticipated that the Commission will undertake a further review of the Rules in early 2010.

However, prior to that review, the Commission will publish concept proposals with respect to two of the current Rules: Rule 6 dealing with pre-hearing conferences, and Rule 12 dealing with hearings to consider settlement agreements. The Commission will consult with stakeholders on the concept proposals and, if amendments to the Rules are required to give effect to the final proposals developed after that consultation, the Commission will publish the proposed rule amendments for comment prior to their adoption.

As part of the monitoring of their implementation and for the continued improvement and development in the Rules, the Office of the Secretary encourages stakeholders to inform the Commission of their experience with the Rules over the coming year by contacting:

Josée Turcotte
Deputy Secretary and Independent Adjudicative Counsel
Office of the Secretary
E-mail: jturcotte@osc.gov.on.ca

Publication of the Rules

The *Rules of Procedure* are published in chapter 5 of this issue of the *OSC Bulletin* and are available on the Commission's website.

Questions regarding the application of the Rules with respect to specific proceedings before the Commission should be referred to:

Daisy Aranha
Registrar
Office of the Secretary
Ontario Securities Commission
20 Queen Street West, 17th Floor, Box 55
Toronto, Ontario M5H 3S8
Phone number: (416) 595-8916
E-mail: daranha@osc.gov.on.ca

APPENDIX "A"

Rule Number in Draft for Comment	Rule Number in Final Version	Summary of Comments	Commission's Response
1.6.1(1) Service of Originating Documents	1.5.1(1)	<p>Comment 1: Service of originating documents should be solely by personal delivery to the party, subject to the consent of a party's counsel or agent to accept such service; or by any other means authorized or permitted by the Panel. The methods of service listed are appropriate for service of other types of documents.</p> <p>Comment 2: The Commission's jurisdiction for service of originating documents is derived from subsection 6(1) of the <i>Statutory Powers Procedure Act</i> (SPPA), which provides that the parties to a proceeding shall be given reasonable notice of the hearing by the tribunal. The various methods of service provided for in this Rule are in accordance with subsection 6(1) of the SPPA and are consistent with part 2.3 of the Society of Ontario Adjudicators and Regulators (SOAR) Model Rules.</p>	<p>The Rule, as adopted, is consistent with the position put forth in comment 2.</p> <p>Comment 1 might arise from familiarity with Rule 16 of the <i>Rules of Civil Procedure</i> which provides that an "originating process" must be served personally, with limited exceptions, while other documents may be served personally or by alternative means.</p> <p>The SPPA is silent on the question of service. Subsection 6(1) of the SPPA merely provides that an administrative tribunal must provide "reasonable notice" of the originating process. In addition, unlike the <i>Rules of Civil Procedure</i>, section 24 of the SPPA goes further in authorizing an administrative tribunal to "issue a notice by way of public advertisement or otherwise as the tribunal may direct" under certain circumstances where personal or substituted service may be impossible or impractical. The "notice" referred to in the SPPA is the notice of originating process, i.e. the Notice of Hearing.</p>
1.6.1(1)(h) Alternative Service	1.5.1(1)(h)	<p>It is questionable whether it is appropriate to give the Secretary the power to direct alternative means of service without any direction from the Panel, contemplated by sub-paragraph (h).</p>	<p>The Rule has been amended accordingly.</p>
1.8 Appearance and Representation	1.7	<p>The Rules should have a provision similar to subsection 50(3) of the <i>Provincial Offences Act</i>. It is recommended that there be a provision in the Rules which expressly confers the discretion on the Panel to bar a person from acting as an agent in a Commission proceeding when that person is not a lawyer and if the Panel finds that they are not competent.</p>	<p>The Commission does not agree.</p> <p>Many parties who appear before the Commission are represented by an agent without legal or other expertise. Subsection 23(3) of the SPPA does not provide authority for a tribunal to exclude a representative who is licensed under the <i>Law Society Act</i>. However, Panels have power to control the process and to intervene as necessary to ensure the proper conduct of the proceeding, including the conduct of counsel or agents.</p>
1.8.4 Withdrawal by Counsel or Agent	1.7.4	<p>Comment 1: This Rule should be eliminated, as the <i>Rules of Professional Conduct</i> already govern the circumstances of counsel withdrawing from representation of a client.</p> <p>Comment 2: This Rule is required to provide clear procedural direction for the</p>	<p>The Rule, as adopted, is consistent with the position put forth in comment 2.</p> <p>The Commission's concerns go beyond those addressed in the <i>Rules of Professional Conduct</i>. The Commission notes that, for example, Rule 15.04 of the <i>Rules of Civil Procedure</i> has similar</p>

Rule Number in Draft for Comment	Rule Number in Final Version	Summary of Comments	Commission's Response
		<p>withdrawal of counsel, particularly in circumstances where it would result in an unrepresented respondent and/or if withdrawal of counsel occurs on the eve of a hearing.</p>	<p>provisions requiring notification of and leave from the courts on the withdrawal of counsel of record.</p>
<p>1.9.1 Motion for Leave to Intervene</p>	<p>1.8.1</p>	<p>Comment 1: The opportunity under the Rules to seek leave to intervene in a proceeding should not be limited to applications relating to take-over bids, issuer bids and mergers and acquisitions transactions, but should apply to all proceedings before the Commission.</p> <p>Comment 2: The opportunity to intervene should not be expanded beyond take-over bids and similar proceedings. It is recommended that caution and restraint be taken such that proceedings are not unduly complicated and lengthened, and respondents are not prejudiced. In contrast to take-over type hearings, there is no place in discipline type proceedings for separate representation of private interests. Rule 13 of the <i>Rules of Civil Procedure</i> may provide guidance.</p> <p>Comment 3: The ability of a person to apply for leave to intervene should not be limited to take-over bid/issuer bid proceedings and mergers and acquisitions transactions. The Rules should not limit applications for interventions. Decisions regarding interventions should be made by Commission Panels in the context of specific proceedings on the basis of the factors listed in the Rules. For example, in <i>Re Albino</i> (1991), 14 O.S.C.B. 365 an applicant sought intervenor status and was refused this status, nonetheless, this decision should not preclude a Panel in another proceeding, including a disciplinary proceeding from granting intervenor status. Subsection 127(3.1) of the Act implicitly recognizes that intervenor status can be granted in a disciplinary hearing.</p>	<p>The Rule, as adopted, is consistent with the position put forth in comments 1 and 3.</p>
<p>1.9.1(2) Motion for Leave to Intervene</p>	<p>1.8.1(2)</p>	<p>The Rules should state that in an application to intervene, the applicant should set out the extent to which they seek to intervene, i.e. whether full standing is sought or only limited standing to make submissions.</p>	<p>The Rule has been amended accordingly.</p>

Rule Number in Draft for Comment	Rule Number in Final Version	Summary of Comments	Commission's Response
2.4(2) Commencement of Proceedings	2.4(2)	<p>Comment 1: The Rules should confer the discretion to decline to issue a Notice of Hearing where the application pursuant to sections 104 and/or 127 is believed to be frivolous (e.g. frivolous take-over bid applications).</p> <p>Comment 2: The Secretary should not decline to issue a Notice of Hearing pursuant to this Rule if the Manager of Take-Over Bids does not recommend that a hearing be held.</p>	The Rule, as adopted, is consistent with the position put forth in comment 2. See Rule 16.2.
3.7(2)(b) Affidavits	3.7(2)	<p>Comment 1: It is recommended that the Rules be modified to expressly require that where a party files an affidavit in support of a motion, that the party opposite make the affiant available to be cross-examined prior to the hearing, or in the alternative, that the party seeking to cross-examine can apply to the Panel to conduct that cross-examination before the Panel.</p> <p>Comment 2: The provision is unclear as to whether it limits the right to cross-examine, in which case, it is found objectionable. The right to cross-examine at first instance should be unfettered, subject to a party having the right to apply to the Panel for an order limiting or precluding such cross-examination.</p>	The Rule has been amended accordingly.
4 Disclosure	4	<p>Comment 1: This Rule should provide greater clarity as to the scope of the Commission's jurisdiction to order production of documents from non-parties. The production of documents from non-parties is of particular interest in the context of proceedings under sections 104 and/or 127 of the Act in connection with a take-over bid or issuer bid. The Commission has ordered non-parties to produce and disclose documents in the past. This was done on consent and occurred in <i>Re Sears</i>, by Order dated July 6, 2006, whereby non-parties "Desjardins and Mayers agreed to disclose and produce certain documents and information".</p> <p>Comment 2: The Commission does not have jurisdiction to order disclosure from non-parties absent the issuance of a summons pursuant to section 12 of the SPPA. The decision in <i>Sears Canada</i> was in the context of a take-over bid and the order for disclosure dated July 6, 2006</p>	The Rule, as adopted, is consistent with the position put forth in comment 2.

Rule Number in Draft for Comment	Rule Number in Final Version	Summary of Comments	Commission's Response
		<p>reflects that the non-parties agreed to disclose and produce the documents and information sought. Moreover, the non-parties had brought motions for standing which were granted by order dated June 20, 2006. It is recommended that the <i>Sears Canada</i> production order not be viewed as a precedent for third party disclosure orders in an enforcement proceeding.</p>	
<p>4.2 Disclosure</p>	<p>4.2</p>	<p>Comment 1: It is recommended that the Rules not limit disclosure obligations to “any stage of the proceeding”, thereby requiring a “proceeding” to have commenced. Staff disclosure should be required at the early stage of Staff’s completion of the investigation, at the point where an “Enforcement Letter” is provided to persons under investigation, and potential respondents are given the opportunity to submit, on a with prejudice basis, information and documentation with a view to Staff reversing its position to commence a proceeding. The disclosure should be tailored to the individual affected by providing Rule 4.4 disclosure, but not the more fulsome disclosure requirements set out in Rules 4.5 and 4.6. Staff’s disclosure obligations should be subject to disclosure restrictions contained in section 17 of the Act and any other restrictions at law, but Staff should be required to seek the consent of any person or entity to disclosure in such circumstances.</p> <p>Comment 2: Staff disclosure should not be required at an earlier stage. The “Enforcement Notice” process is a voluntary process engaged in by Staff where a person is provided with notice of the general nature of the concerns that Staff have arising from an investigation and consideration of a matter. It is not a hearing. If proceedings are commenced, respondents are entitled to complete disclosure of all relevant documents. Staff’s disclosure obligation is not triggered at the investigative stage, but rather, at the time a proceeding is commenced.</p>	<p>The Rule, as adopted, is consistent with the position put forth in comment 2. The Rules apply only to adjudicative proceedings before the Commission.</p>

Rule Number in Draft for Comment	Rule Number in Final Version	Summary of Comments	Commission's Response
4.3 Disclosure of Documents or Things	4.3	A respondent to an enforcement proceeding should not be obliged to make such disclosure at any point in time prior to being called upon to present their defence. Requiring the respondent to make disclosure to Staff in an enforcement proceeding will unfairly compromise how a respondent may wish to respond to the case presented by Staff, including the respondent's right to choose whether to call evidence.	The Rule, as adopted, carries forward the provisions of Rule 3.3 of the <i>Rules of Practice</i> in this respect.
4.4 and 4.5 Disclosure, Witness Lists and Witness Summaries where Section 8 of the SPPA Applies	4.4 and 4.5	<p>Comment 1: Where proceedings engage section 8 of the SPPA and Rule 4 disclosure obligations, the provision of a witness list and the provision of witness summaries ought not to be reciprocal. Given Staff's powers to investigate, the onus of proof on Staff, the fact that Staff is making the allegations against the respondents, and the severe consequences resulting from adverse findings, the rules of disclosure should not approximate those of a civil proceeding. It is recommended that Staff's disclosure obligations in such instances approximate the Crown's <i>Stinchcombe</i> disclosure obligations.</p> <p>Comment 2: Disclosure obligations ought to be reciprocal in proceedings engaging section 8 of the SPPA. Sections 5.4(1)(a) and (c) of the SPPA expressly contemplate the exchange of witness statements. Further, a Commission Rule regarding the reciprocal exchange of documents is consistent both with the SPPA and the principles of both fairness and efficiency in the context of an administrative proceeding.</p>	The Rules, as adopted, carry forward the provisions of Rules 3.4 and 3.5 of the <i>Rules of Practice</i> in this respect.
4.5(2) Witness Summaries	4.5(2)	The requirement in this Rule that parties provide a summary of the evidence a witness is expected to give should be triggered 10 days before the commencement of the hearing, rather than at least 10 days before a witness is to testify. This is consistent with the requirement in Rule 4.5(1).	The Rule has been amended accordingly.
4.5(2) and (5) Witness Summaries	4.5(2) and (5)	Comment 1: It is not clear from the Rules whether it is contemplated that where the party has disclosed a transcript or similar record (e.g. "will say") of a proposed witness that a summary will still be required to be disclosed. It is recommended that a summary be required only where the material matters to which the witness is to	The Rule has been amended accordingly.

Rule Number in Draft for Comment	Rule Number in Final Version	Summary of Comments	Commission's Response
		<p>testify have not otherwise been disclosed (e.g. in a transcript or will say).</p> <p>Comment 2: It is not necessary to provide witness summaries in circumstances where the material matters to which the witness is to testify have already been disclosed in a transcript or will say unless other material testimony, not contained in prior documents, is intended.</p>	
4.6(1) Expert Witness	4.6(1)	<p>In terms of advance notice of an expert witness's testimony, Staff should be required to advise of the intent to call an expert and/or to file an expert report/affidavit as soon as possible, but in any event not later than 90 days prior to the commencement of the hearing. On the other hand, the requirement of a respondent to advise of the intent to call an expert and/or to file an expert report/affidavit should be no later than 30 days prior to the calling of a witness to testify or the filing of such report/affidavit. The time for delivery of any responding expert report/affidavit from Staff should be no later than 10 days prior to the testimony of the responding expert witness. It is also recommended that the right to cross-examine an expert on his/her evidence, expert report/affidavit should be as of right.</p>	<p>The Rule carries forward the provisions of Rule 4.6 of the <i>Rules of Practice</i> in imposing identical requirements on Staff and respondents. The timelines in the Rules have been amended. See also Rule 1.6(2).</p>
4.6(2) Provision of an Expert's Affidavit or an Expert's Report	4.6(2)	<p>Comment 1: The requirement of a party who intends to introduce evidence of an expert witness at the hearing to deliver an affidavit of that expert witness should be deleted. It should be replaced instead with an option for the party to either deliver and file an expert report and produce the expert to testify at the hearing, or deliver and file an affidavit that can be cross-examined upon prior to or at the hearing, at the option of the cross-examining party(ies).</p> <p>Comment 2: A party who intends to introduce evidence of an expert witness at the hearing should be required to serve an expert report, not an affidavit. This is consistent with other rules, such as subsection 5.4(1)(c) of the SPPA and Rule 53.03(1) of the <i>Rules of Civil Procedure</i> and other tribunals, as reflected in part 5.7 of the SOAR Model Rules.</p>	<p>The Rule has been amended accordingly.</p>
6.2(d) Issues at a Pre-Hearing	6.2(e)(ii)	<p>Comment 1: It is recommended that either the consent of the parties be required before the pre-hearing Panel may make an order</p>	<p>The Commission has adopted the position articulated in comment 2. The Rule has been amended accordingly.</p>

Rule Number in Draft for Comment	Rule Number in Final Version	Summary of Comments	Commission's Response
Conference		<p>respecting disclosure, or that the Rules expressly confer on the hearing Panel the right to make an order "otherwise" in the context of a disclosure order made by the pre-hearing Panel. It is alternatively recommended that disclosure disputes be heard by the Hearing Panel in the same manner as other pre-hearing motions, and not at a pre-hearing conference.</p> <p>Comment 2: Disclosure motions ought to be heard by a Panel rather than by a pre-hearing Panel, unless the consent of all parties is obtained.</p>	
6.2(f) Issues at a Pre-Hearing Conference	6.2(e)(iii)	<p>Comment 1: The scope of pre-hearing conferences should be expanded to include the concept of a settlement conference, which should be conducted by a Commissioner who will not be a member of the Hearing Panel. As the majority of enforcement proceedings settle at some stage during their proceedings, it is also recommended that the facilities and expertise of the Commission be utilized to promote and effectuate settlements at an early stage.</p> <p>Comment 2: It is recommended that issues of settlement should only be dealt with by pre-hearing Commissioners with the consent of all the parties.</p>	The Rule, as adopted, is consistent with the position put forth in comment 2.
6.5 Electronic Pre-Hearing Conferences	6.5	The reference to "electronically" should be changed to "by way of an electronic hearing", as "electronic hearing" is a defined term, and "electronically" is not.	The Rule has been amended accordingly.
8.1 <i>In Camera</i> Hearings	8.2	The right of a party to apply for an <i>in camera</i> hearing should be made explicit.	Rule 8.2 has been added to clarify the procedure for an application by a party to have all or part of the hearing held <i>in camera</i> .
10.2 Electronic Hearings	10.2	The reference to "electronically" should be changed to "by way of an electronic hearing", as "electronic hearing" is a defined term, but "electronically" is not.	The Rule has been amended accordingly.
12 Settlement Agreements	12	The following subsections from the current Practice Guideline on Settlement Procedures have been omitted in the proposed Rules; however, they have provided flexibility and guidance in the past	The Practice Guidelines have been removed from the Rules, as adopted, in order to clarify that Practice Guidelines are not Rules and to avoid any confusion about their status.

Rule Number in Draft for Comment	Rule Number in Final Version	Summary of Comments	Commission's Response
		<p>where the consent of all parties has been obtained: subsection 5(2) of the current Practice Guideline, which allows the consideration of a proposed settlement agreement by the Hearing Panel; subsection 5(4) of the current Practice Guideline, which sets out the Settlement Panel's complete discretion in approving or not approving a settlement; and, subsection 6(2) of the current Practice Guideline, which allows the same Settlement Panel to consider a subsequent proposed settlement.</p>	
<p>12.1(1)(a) Settlement Agreements</p>	<p>12.1(2)</p>	<p>Comment 1: Where a settlement agreement contains a statement of admitted facts and/or liability, the "facts" section of such an agreement should be explicitly agreed to or "admitted" by Staff, as well as by the respondent. Such facts should explicitly include mitigating and explanatory facts that serve to explain and support any admitted regulatory liability and sanction in light of the allegations set out in the Statement of Allegations and Notice of Hearing, rather than continuing Staff's current practice of only agreeing to the inclusion of such information in the "respondent's position" section of the settlement documents or to be stated to the Hearing Panel in oral submissions. The respondent should have the right to require the inclusion of a statement that Staff and the respondent agree that any admissions are made only for the purpose of settlement of this proceeding.</p> <p>Comment 2: There is no recognition in this Rule that settlement agreements are not required to contain admissions of fact. Using the same language as the current provision 4(1)(a) of Practice Guideline 7, Rule 12(1)(a) requires "a full and accurate statement of the relevant facts as admitted by the respondent." It is appropriate for Respondents to make admissions of fact, but not for Staff to make such admissions in the context of a settlement proceeding. Often, the Respondent's Position portion of settlements is incapable of being verified and so Staff cannot be required to admit to "positional" statements.</p>	<p>The Rules do not, nor should they, speak to whether a settlement agreement includes admissions by either party. Rule 12.1 has been amended accordingly.</p>
<p>12.4(3) Settlement Agreements</p>	<p>12.4(3)</p>	<p>Comment 1: It is recommended that the Rule be modified to expressly permit the Hearing Panel which rejected a settlement agreement to sit as the Hearing Panel to consider any revised settlement agreement</p>	<p>The Rule, as adopted, applies only to the hearing on the merits and appropriately does not preclude a Panel that has heard and rejected a settlement from considering a revised settlement.</p>

Rule Number in Draft for Comment	Rule Number in Final Version	Summary of Comments	Commission's Response
		<p>which may be entered into by Staff and the respondent.</p> <p>Comment 2: It is recommended that a Hearing Panel which rejects a settlement agreement should be permitted to sit on a subsequent proposed settlement hearing if there is consent of all the parties.</p>	
<p>14.3 Review of a Decision of the Director, a Stock Exchange, a Self-Regulatory Organization or a Clearing Agency</p>	<p>14.3(1), (2) and (4)</p>	<p>Comment 1: A record does not exist for all decisions that are subject to review because not all decisions are the result of a hearing. Therefore, this Rule should only apply if a record exists of the subject proceedings to be reviewed.</p> <p>Comment 2: It is Staff's view that for most decisions that are subject to review, a record should exist and should be put before the Commission as set out in this proposed Rule. In unusual circumstances where no record is available, it is recommended that counsel advise the Commission.</p>	<p>Rule 14.3 has been amended. The Rule, as adopted, is consistent with the position put forth in comment 2.</p>
<p>14.3 Review of a Decision of the Director, a Stock Exchange, a Self-Regulatory Organization or a Clearing Agency</p>	<p>14.4(6) and (7)</p>	<p>A provision should be made to allow a respondent in a review application to serve and file a responding record if the applicant has filed an inadequate or incomplete record. This problem has arisen before and a responding record was required. For example, in disciplinary proceedings before the Ontario District Council of the IDA, a respondent is required to file a document called a "response" in which he or she indicates which allegations in the Notice of Hearing he/she is admitting or denying. Filing a responding record will assist the Panel to better understand which issues are contentious in the proceeding.</p>	<p>Rule 14.4 has been amended to reflect that a responding and reply record may be filed.</p>
<p>14.3(d) Review of a Decision of the Director, a Stock Exchange, a Self-Regulatory Organization or a Clearing Agency</p>	<p>14.3(2)(e) and (3)</p>	<p>The Application Record should not be limited to documents that were "filed" in the proceeding. The proposed Rule allows for documentary evidence to be part of the record if it was "filed" in the proceeding. In circumstances where a document was ruled to be inadmissible (at the SRO level) and was accordingly not filed in the proceeding, such a document technically could not be part of the record. However, if the admissibility of the document itself is at issue in the review application, it should be put before the Commission. Language similar to Rule 61.10(1)(i) of the <i>Rules of Civil Procedure</i> may be sufficient to remedy this problem, i.e. the record shall include "a</p>	<p>Rule 14.3(2)(e) has been added to provide greater clarity. In addition, see Rule 14.9(2).</p>

Rule Number in Draft for Comment	Rule Number in Final Version	Summary of Comments	Commission's Response
		copy of any other documents relevant to the hearing of the appeal (application) that are referred to in the appellant's (the requesting party's) factum".	
14.4(1) and (2) Review of a Decision of the Director, a Stock Exchange, a Self-Regulatory Organization or a Clearing Agency	14.4 and 1.1	It should be made clear that Commission Staff is always a "party" in these applications. The issue of whether or not Commission Staff is a "party" in these applications has been previously raised. Although Commission Staff may determine that they do not want to take any position in a particular review application, they should still be served with a copy of the materials served for the application, e.g. the Record.	"Party" is defined in Rule 1.1 to include Staff.
14.4(4) and (5) Review of a Decision of the Director, a Stock Exchange, a Self-Regulatory Organization or a Clearing Agency	14.4(4) and (5)	This Rule allowing review applications to be dismissed for delay is an important improvement to the Rules. There have been problems with some applicants not diligently pursuing their applications.	No response necessary.
14.9 Review of a Decision of the Director, a Stock Exchange, a Self-Regulatory Organization or a Clearing Agency	14.9	More time should be given to exchange statements of fact and law. The timelines in this Rule allowing parties to serve and file their Statement of Fact and Law (SFL) are too tight. It is recommended that the party requesting the application serve and file his/her SFL at least 30 days prior to the hearing and the responding parties serve and file their SFL at least 15 days before the hearing.	The Rule has been amended accordingly.
15.2 Further Decision Pursuant to Subsection 9(6) of the Act or Revocation or Variation of a Decision pursuant to	15.3	The factors to be considered by the Panel in deciding whether to hold an oral hearing versus a written decision should be enumerated.	Rule 15.3, which gives the Panel discretion to grant the application, refuse the application, or hold an oral hearing to consider the application, is consistent with subsection 9(6) and section 144 of the Act.

Rule Number in Draft for Comment	Rule Number in Final Version	Summary of Comments	Commission's Response
Section 144 of the Act			
15.3 Further Decision pursuant to Subsection 9(6) of the Act or Revocation or Variation of a Decision pursuant to Section 144 of the Act Hearing	15.2	The Panel should be required to notify the applicant in advance of its decision not to hold an oral hearing in order to permit the applicant to comply with this Rule if the applicant proposes to introduce new evidence. As the Rule is drafted, a party proposing to introduce new evidence could only do so at the hearing of the application, but would be precluded from doing so if the Panel decided not to hold an oral hearing.	The Rule, as adopted, is consistent with the position put forth in this comment. Rule 15.3 has been moved to become Rule 15.2 to clarify the timing.
16 Take-Over Bid Applications	16	<p>Comment 1: It is possible that on some occasions a take-over bid application may be frivolous and commenced for tactical reasons. It is recommended that a provision be included in the Rules which would enable the Commission to prevent its process from being invoked in take-over matters solely for tactical purposes by the parties. Two suggestions are given: (1) the Secretary should be required to consult with the Manager of Take-Over Bids whether a hearing should be held; and (2) the Commission should have the jurisdiction to review and decide whether to hold an oral hearing to consider the application.</p> <p>Comment 2: Requiring consultation and a recommendation of the Manager of Take-Over Bids to issue a Notice of Hearing, could inappropriately transfer adjudicative power from the Commissioners, and in some circumstances, lead to an apprehension of bias.</p> <p>Comment 3: It is recommended that this Rule be amended to reflect that, under both sections 104 and 127, the Commission is not <i>required</i> to hold a hearing upon the receipt of an application alleging a breach of Part XX or a complaint alleging that an aspect of a take-over bid or issuer bid is contrary to the public interest. It is recommended that the Commission should have the discretion to determine whether a hearing is required to deal with the application or complaint based on initial materials exchanged between the parties. It is recommended that it may not always be</p>	The Rule, as adopted, is consistent with the position put forth in comment 2. See also Rule 16.2 below.

Rule Number in Draft for Comment	Rule Number in Final Version	Summary of Comments	Commission's Response
		<p>necessary to hold a hearing, because in some situations, parties may use the Commission to file a complaint for the purpose of gaining a tactical advantage and this should not be encouraged.</p>	
<p>16.1(2) Take-Over Bid Applications</p>	<p>16.1(2) and 16.3</p>	<p>This Rule should be redrafted to reflect the current practice, as follows: An application should contain a description of the matter and circumstances, together with legal submissions. The response should be in the same form and content.</p>	<p>The Rules, as adopted, are consistent with the position put forth in this comment. See Rules 16.1(2) and 16.3.</p>
<p>16.2 Take-Over Bid Applications</p>	<p>16.2</p>	<p>Comment 1: There is concern with proposed Rule 16.2, which provides that: "Once all of the documents for the application have been filed in accordance with Rule 16.1, the Secretary <i>shall</i> establish the schedule for the filing of a response and a reply and give notice of the time and place for the hearing of the application" [emphasis added]. It is recommended that the Commission should not depart from its current practice regarding filing materials and memoranda of fact and law. The current practice is as follows: the party requesting a hearing files an application or a complaint with the Commission describing the facts on which it relies and the relief it would seek if a hearing was held, together with references to the relevant legal principles and prior Commission decisions. The party against whom relief was sought would then file a responding letter and the initiating party would file a reply letter, if necessary. At that point, the Commission would advise whether a hearing should be held and a schedule would be set for the exchange of affidavits and memoranda of fact and law in advance of the scheduled hearing date. At that time, the Secretary would issue a Notice of Hearing.</p> <p>Comment 2: It should be added that, following the delivery of the application and the response, the Secretary should establish the schedule for the exchange of affidavits and memoranda of fact and law.</p>	<p>The Rule, as adopted, is consistent with the position put forth in comment 2.</p> <p>The Commission does not agree with comment 1. Rule 16.2, as adopted, is consistent with the Commission's practice: neither the Secretary nor Take-Over Bid Staff can act as "gatekeepers" to prevent or limit an applicant's access to the tribunal. In response, a respondent may bring a cross-application pursuant to Rule 16.2 and/or a response pursuant to Rule 16.3.</p>
<p>16.5 Take-Over Bid Applications</p>	<p>16.5 and 1.8</p>	<p>The opportunity to seek leave to intervene in a proceeding should not be limited to Applications relating to take-over bids, issuer bids and mergers and acquisitions transactions, but should apply to all proceedings before the Commission.</p>	<p>Rule 1.8 (Intervenors) has been amended accordingly.</p>

Rule Number in Draft for Comment	Rule Number in Final Version	Summary of Comments	Commission's Response
17.2(2) Decisions and Reasons	17.2(2)	The Secretary should ensure that all decisions of Courts arising from proceedings under the Act, whether at first instance or under appeal, and any applications to which the Commission is a party, are published.	The Office of the Secretary is responsible for the public record of all adjudicative proceedings before the Commission and plays no role in connection with Commission proceedings before the courts.
18 Costs	18	The right to award costs under this Rule and section 127.1 of the Act should be eliminated entirely. The proposed costs regime is unfair and not in accordance with the Rules of Practice of other disciplinary tribunals. Alternatively, the Rule should be amended to provide the Panel with the ability to award costs in favour of the respondent and against Staff of the Commission, in circumstances where a respondent has successfully responded to any portion or all of a Staff proceeding under sections 127, 122 or 26, and suffered the financial burden and irreparable harm to his/her reputation.	Section 127.1 of the Act gives the Commission power to award costs to Staff. Rule 18 merely clarifies the procedure and criteria for doing so.
18.2 Costs	18.2(d)	An additional factor should be included in the list of factors to consider when awarding costs. The Panel should consider the conduct of Staff during the investigation and during the proceeding, and how Staff's conduct contributed to costs of the proceeding.	The Rule has been amended accordingly.