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Procedure

Document N°

Release N°
001

Title:

Opportunity to be Heard before a Regulator

Effective Date:
2023

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PURPOSE

The purpose of this document is to set out the procedure that staff, Regulators and any person participating in an opportunity to be heard will follow.

SCOPE

This procedure applies to all Regulators, staff of the Commission and all persons who have the right to an opportunity to be heard by the Regulator under any of the following pieces of legislation:

- *Collection and Debt Settlement Services Act*, RSNB 2011, c.126
- *Cost of Credit Disclosure and Payday Loans Act*, SNB 2002, c. C-28.3
- *Credit Reporting Services Act*, SNB 2017, c. 27
- *Direct Sellers Act*, RSNB 2011, c.141
- *Insurance Act*, RSNB 1973, c. I-12
- *Loan and Trust Companies Act*, SNB 1987, c. L-11.2
- *Mortgage Brokers Act*, SNB 2014, c.41
- *Pre-arranged Funeral Services Act*, RSNB 2012, c.109
- *Real Estate Agents Act*, RSNB 2011, c.215
- *Securities Act*, SNB 2004, c. S-5.5

PRINCIPLES

All opportunities to be heard will be conducted in alignment with the following principles:

- Transparency - FCNB will be open and transparent about the procedure and decision-making process associated with an opportunity to be heard.
- Procedural Fairness – FCNB will abide by the principles of procedural fairness in all aspects of an opportunity to be heard

DEFINITIONS

“Applicant” means an individual or entity who has a right to an opportunity to be heard under an Act of *Financial and Consumer Services legislation*.

“Licence Holder” means a registrant, licensee, or licence holder.

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PROCEDURE

Summary

This procedure is intended to ensure that opportunities to be heard are handled by Regulators fairly, uniformly and in a way that is not unnecessarily formal. The opportunity to be heard is meant to provide the applicant an opportunity to understand and respond to staff recommendations and to provide any additional relevant information.

An opportunity to be heard before the regulator is a statutory right available to those impacted by certain recommendations of FCNB staff. The applicant can:

- have an opportunity to be heard conducted in writing, virtually or in person.
- be heard in either official language.
- be represented by a lawyer or an agent, but is not required to do so.

If the applicant chooses to be represented by a lawyer or an agent, staff will include the lawyer or agent on all written communication with the applicant and will encourage the applicant to include their lawyer or agent in all communication.

Depending on the circumstances, Regulators may extend any period set out in this procedure. If the applicant wishes to request a time extension, they should make the request in writing to the Regulator and include the reason(s) for requesting the extension.

Following the opportunity to be heard, the Regulator will send a written decision on the matter to the applicant. If decisions are to be shared with another regulatory body (for example, the New Brunswick Real Estate Association, for applicants under the *Real Estate Agents Act*), the Regulator will advise the applicant during the opportunity to be heard process. FCNB will also provide the written decision to any applicable third parties where appropriate.

When the applicant has a right of appeal through the formal hearing process under the *Financial and Consumer Services Commission Act*, the Regulator must advise the applicant of this right and the associated process and timelines along with the written decision.

Staff's Notice to Applicant

If staff make a recommendation about an applicant that is subject to the right for an opportunity to be heard, staff must send a letter to the applicant giving notice of the recommendation and of their right to an opportunity to be heard.

The following information must be provided by staff to the applicant prior to the opportunity to be heard:

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- Details of the recommendation from staff, including the authority (Act and section reference)
- The basis for the recommendation
- Full disclosure of all the documents and information, and the source of the information (where possible), that staff have used to form the recommendation. This includes:
 - All information and documents that staff relied upon in making its recommendation to the Regulator
 - Other relevant information and documents received by staff or the Regulator while reviewing the application or matter in question
- Notification that the applicant may bring counsel
- Offer that the applicant may be heard in either official language
- Notice to the applicant that the purpose of the opportunity to be heard is to inform the applicant about the recommendation, allow the applicant to submit further information or argument in response to the recommendation, and provide any further information that the applicant may have that would assist the Regulator in making a decision
- Notice to the applicant that the Regulator will make a decision following the opportunity to be heard
- Notice to the applicant that if they do not respond to the notice of the recommendation within the specified period (recommended period is 10 to 14 days, depending on the circumstances), then the Regulator will be issuing their decision without further notice
- Notice to the applicant that they can make written submissions instead of an in-person hearing, or that they can appear via virtual hearing with the Regulator unless the Regulator decides that an in-person hearing is required

After the applicant has received written notice of the recommendation with an offer for an opportunity to be heard, the applicant will be subsequently notified should new information come to light that the Regulator will use in making their decision. The Regulator must offer to provide this information to the applicant within a reasonable time prior to the opportunity to be heard.

Applicant's Response

Once the applicant has received notice of staff's recommendation, they must inform staff that they will exercise their right to be heard by the Regulator within the specified period provided in the notice, or such extended period as agreed by the Regulator. They must also indicate their choice of hearing format (see below).

They will then receive from staff written confirmation of the applicant's request to be heard and a further offer of disclosure of the information that is being relied on by staff and the Regulator.

If the applicant does not respond within the period specified in the notice and no extension of the period has been granted, the Regulator may proceed to make a decision.

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Hearing Format

The opportunity to be heard can be done in writing or as an oral hearing. The applicant must indicate their preference to staff whether they want to proceed in writing or by oral hearing. The Regulator will determine the format of the hearing based on the circumstances and the Applicant's preference.

a) Exchange of Written Submissions

If the opportunity to be heard is to be conducted by exchange of written submissions, parties must follow the process below:

Staff must provide the applicant and the Regulator with a written submission setting out the facts and analysis supporting staff's recommendation. Staff's submission must be delivered to the applicant and the Regulator within 10 business days after staff receives notice that the applicant wishes to exercise their right to be heard.

The applicant must then provide the Regulator and staff with a written response to staff's submissions. The applicant's response must be delivered within 10 business days after receiving staff's submission.

In most cases, there will only be one exchange of written submissions and responses so that the Regulator is able to render a decision without unnecessary delay. Additional exchanges may be allowed at the discretion of the Regulator.

The Regulator will make a decision concerning staff's recommendation after delivery of the final submissions of the applicant and staff. If the applicant fails to meet the deadline for delivery of written submissions, the Regulator may make a decision concerning staff's recommendation without further notice or delay.

b) Conduct of Oral Hearing

If an oral hearing is to be held, staff will work with the applicant to schedule a mutually agreeable date for the opportunity to be heard. The opportunity to be heard will be typically conducted in an informal manner. In most instances, the hearing will not follow formal rules of evidence and a court reporter will not be present.

Witnesses may be called, examined and cross-examined with the consent of the Regulator. Although the proceedings are conducted in an informal manner, the applicant and any witnesses may be required to give evidence under oath or affirmation.

If the applicant provides further documentation to the Regulator during the meeting, the Regulator is to make note of the information and confirm after the meeting what information was provided.

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c) Virtual Hearing

The Respondent may request that their Opportunity to be Heard be conducted via virtual hearing. This request must be made no later than 10 days prior to the hearing. The Director will grant this request if it was made in good faith and the Director is of the opinion that holding the hearing virtually would not inhibit the decision-making process.

If a virtual hearing is to be held, staff will work with the applicant to schedule a mutually agreeable date for the opportunity to be heard. The opportunity to be heard will typically be conducted in an informal manner. In most instances, the hearing will not follow formal rules of evidence and a court reporter will not be present.

The following rules apply to video hearings:

- The applicant must provide their own technology for the hearing and must attend from a quiet place.
- The Applicant's face must be clearly visible.
- The applicant must have both audio and video capabilities and the video feed must remain on throughout the hearing.
- The applicant is not permitted to record any portion of the hearing.
- The Regulator may adjourn the proceeding at any time if it determines that the video format is not adequate or is prejudicial to any party or to the integrity of the proceeding.

Guidance on the technical requirements of a virtual hearing can be found here [\[link when available\]](#).

If the applicant provides further documentation to the Regulator during the meeting, the Regulator is to make note of the information and confirm after the meeting what information was provided. Any information provided after the meeting may or may not be considered at the Regulators discretion.

Recordings

Opportunities to be heard are generally not recorded, and personal recording devices are not permitted. Certain instances may warrant recording; factors that could warrant recording and transcription services include but are not limited to:

- the scope of the matter under review
- the request of an affected party
- the complexity of the issues under review
- the complexity or nature of the evidence, or
- any other reason that the Regulator determines would warrant a recording of the proceeding.

Any recording or transcription services will be conducted by a neutral third party, at the expense of FCNB. The determination whether recording/transcription is at the sole discretion of the Regulator.

Regulator's Written Decision

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After an opportunity to be heard has been provided to an applicant, the Regulator can then issue their decision on the matter. Written reasons will be provided to the applicant.

Written reasons should include particulars of:

- The nature of the decision, with appropriate reference to statutory provisions
- A summary of the information considered
- A summary of the opportunity to be heard process and the applicant’s participation at the hearing
- The applicant’s rights of appeal under the *Financial and Consumer Services Commission Act*.

A written decision will be provided as soon as reasonably possible. The Director may communicate their decision to the applicant prior to providing a written decision.

Privacy

FCNB is subject to the *Right to Information and Protection of Privacy Act (RTIPPA)* and the OTBH is subject to the Open Court Principle. Regulators will review each case to determine their unique merits and determine whether the hearing will be open to the public or not. To uphold privacy principles, published decisions may be anonymized or redacted to comply with RTIPPA.

RESPONSIBILITY

This procedure shall be administered by the Vice-President of Regulatory Operations.

AUTHORITY

Financial and Consumer Services Legislation

APPROVAL DATE

2023