

A MILLION REASONS - NEXTBLOCK OSC SETTLEMENT AGREEMENT HIGHLIGHTS RISKS OF USING MARKETING PRESENTATIONS TO SOLICIT INVESTMENTS

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A recent Ontario Securities Commission (“**OSC**”) settlement agreement with NextBlock Global Limited (“**NextBlock**”) and Alex Tapscott (“**Tapscott**”) highlights the risk associated with issuers providing investor presentation slide decks or other marketing documents to prospective investors.

On May 14, 2019, the OSC approved a settlement agreement with NextBlock and Tapscott, who admitted to contravening Ontario securities laws by making misleading statements in slide decks provided to prospective investors. NextBlock agreed to pay an administrative penalty of \$700,000 plus \$100,000 towards the costs of OSC’s Staff investigation and Tapscott agreed to pay an administrative penalty of \$300,000, to publish an open letter about the consequences of his misconduct and to perform community service by delivering ethics presentations to students at business schools.^[1]

NextBlock is an Ontario corporation that was formed in 2017 to carry on the business of investing in blockchain companies and digital assets. Tapscott was a co-founder and acted as a director and Chief Executive Officer of NextBlock.

In July 2017, NextBlock provided slide deck presentations that described its business and affairs to over 100 prospective investors. Using the slide decks to solicit investments, NextBlock raised approximately \$20 million from 113 accredited investors through a private placement.

The slide decks were considered to be “offering memoranda” under Ontario securities laws. The term “offering memorandum” is generally defined in the *Securities Act* (Ontario) (the “**Ontario Act**”) as any document purporting to describe the business or affairs of the issuer that has been prepared primarily for delivery to and review by a prospective purchaser so as to assist the prospective purchaser in making an investment decision.^[2] Ontario securities law provides statutory rights of action in favour of investors to sue for rescission or damages^[3] in the event that an offering memorandum contains a misrepresentation. A “misrepresentation” is defined in the Ontario Act as (i) an untrue statement of a material fact or (ii) an omission of a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the

circumstances in which it was made.^[4]

The slide decks in question listed prominent individuals in the blockchain community as NextBlock's advisors, although four of these individuals had not agreed to act as NextBlock's advisors or to be named in the slide decks. By including the names of these individuals in the slide decks, NextBlock made misleading and untrue statements in its offering memoranda in contravention of section 122(1)(b) of the Ontario Act.

The settlement agreement noted that the penalties in this case were mitigated because NextBlock and Tapscott responded within a few days after the misrepresentation came to light, abandoning a second private placement offering and initiating wind-up proceedings. NextBlock also returned investors' initial investments along with profits of approximately \$28 million, representing a 140% return-on-investment. The settlement agreement further notes the fact that Tapscott decided to decline approximately \$3 million in carried interest payments on NextBlock's profits that he was entitled to in connection with the amounts distributed to investors.

If NextBlock had not earned a profit for investors, its liability could have been significantly higher if investors had sued utilizing their statutory rights of action. These damages would have been in addition to the administrative penalties paid to the OSC. The OSC also has broad remedial powers under section 127 of the Ontario Act to make orders in the public interest in response to persons or companies that make misleading representations or omissions in offering memoranda.

The provision of marketing slide decks, investor presentations and other marketing materials to potential investors has long been seen as a potential issue in Ontario and other Canadian provinces due to the risk that these materials could be considered to be an offering memorandum under applicable securities laws and thereby give rise to potential liability in the event that the materials contained a misrepresentation. The NextBlock/Tapscott settlement provides a clear message to market participants that securities regulators consider misrepresentations in marketing materials to be equally important and will seek to impose regulatory penalties, even in the absence of investor losses.

In general, issuers should refrain from providing printed or digital copies of investor presentations and similar marketing materials to prospective investors. If investor presentations or marketing materials are to be provided to prospective investors, they should first be carefully discussed and reviewed with legal counsel to ensure that they comply with applicable securities laws.

by Michael Burns and Zachery Janes, Summer Law Student

[1] [In the Matter of NextBlock Global Limited and Alex Tapscott \(01 April 2019\)](#), File No: 2019-9, online: Ontario Securities Commission.

[2] *Securities Act*, RSO 1990, c S5, s 1(1).

[3] *Securities Act*, RSO 1990, c S5, s 130.1.

[4] *Securities Act*, RSO 1990, c S5, s 1(1).

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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