

Chapter 6

Request for Comments

6.1.1 Proposed OSC Policy 11-602 Guidelines on the Application of the Prohibition Against Orders of General Application to Applications to the OSC for Exemptive Relief

REQUEST FOR COMMENTS PROPOSED OSC POLICY 11-602 GUIDELINES ON THE APPLICATION OF THE PROHIBITION AGAINST ORDERS OF GENERAL APPLICATION TO APPLICATIONS TO THE OSC FOR EXEMPTIVE RELIEF

April 4, 2013

Introduction

The Commission is seeking comments on its proposed guidelines relating to how the Commission applies the prohibition in section 143.11 of the *Securities Act* on the making of orders of general application (referred to in the guidelines as “prohibited blanket orders”) to exemption applications. The Commission is publishing the proposed guidelines for a 60-day comment period. Following the comment period and after taking into consideration any comments received, the Commission will publish the guidelines in final form.

Background

Section 143.11 provides that “The Commission shall not make any orders or rulings of general application.” Other members of the Canadian Securities Administrators (CSA) are not subject to a similar statutory prohibition on making orders of general application.

The Commission recognizes that there is a need to address developments in the capital markets on a timely basis. Orders for exemptive relief are tools which the Commission and Director use to provide targeted and responsive securities regulation. While Commission staff work to harmonize our regulatory response to exemption applications across the CSA, we are challenged in our efforts to respond to applicants’ requests for exemptive relief where, if granted, they would constitute prohibited blanket orders. The exemptive relief process is not a substitute for the exercise by the Commission of its authority to make rules under section 143(1) of the Act, which is subject to a notice and comment process and to ministerial approval. Rather, exemption applications and orders for exemptive relief help to inform the Commission’s rulemaking priorities.

Purpose and Summary of the Proposed Guidelines

The Commission’s interpretation of the prohibition on blanket orders includes consideration of the appropriate use of exemptive relief orders and an approach to their issuance which respects the statutory prohibition in section 143.11 and the principles of transparency and accountability of the rule-making process.

The purpose of the guidelines is to set forth the Commission’s policy under section 143.8 of the Act on the application of section 143.11 to applications for exemptive relief and the various factors that the Commission or Director will generally consider in determining whether an order sought constitutes a prohibited blanket order. The guidelines are intended to make the application of section 143.11 of the Act by the Commission or the Director more transparent and to assist applicants in proposing appropriate parameters around the scope of the relief they request in exemption applications to the Commission and Director.

Unpublished Materials

The Commission has not relied upon any significant unpublished study, report, decision or other written materials in putting forward the Proposed Guidelines.

Comments

The Commission invites interested parties to submit their comments on the proposed guidelines in writing. Persons submitting comments should be aware that written comments will be made public and will be published on the Commission’s website unless confidentiality is requested. If you request confidentiality, the Commission will not place your comments in the public file, but may be required to make your comments available pursuant to a request made under freedom of information legislation.

Request for Comments

You must provide your comments in writing by June 5, 2013. If you are not sending your comments by email, you should also send an electronic file containing the submissions (in Windows format, Microsoft Word).

Please send your comments to the following address:

The Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
Email: comments@osc.gov.on.ca

Questions

Please refer your questions to:

Victoria L. Carrier
Senior Legal Counsel, General Counsel's Office
(416) 593 8329
vcarrier@osc.gov.on.ca

Text of the proposed guidelines

The text of the proposed guidelines follows.

ONTARIO SECURITIES COMMISSION POLICY 11-602
Guidelines on the Application of
the Prohibition against Orders of General Application to
Applications to the OSC for Exemptive Relief

1. Purpose

The Commission and Director have authority to issue orders and rulings (often referred to in these guidelines as “exemptive relief orders”) that exempt market participants and others from regulatory requirements under the *Securities Act* (Ontario) and the rules. Section 143.11 of the Act prohibits the Commission from making an order or ruling of general application (often referred to in these guidelines as a “prohibited blanket order”). Other members of the Canadian Securities Administrators (CSA) are not subject to a similar statutory prohibition on making orders of general application.

The purpose of these guidelines is to set forth the Commission’s policy under section 143.8 of the Act on the application of section 143.11 to applications for exemptive relief and the various factors that the Commission or Director will generally consider in determining whether an order sought constitutes a prohibited blanket order. These guidelines are intended to make the application of section 143.11 of the Act by the Commission or the Director more transparent and to assist applicants in proposing appropriate parameters around the scope of the relief they request in exemption applications to the Commission and Director.

2. Background

The purposes of the Act are set out in Section 1.1 as follows:

- (a) to provide protection to investors from unfair, improper or fraudulent practices; and
- (b) to foster fair and efficient capital markets and confidence in capital markets.

In pursuing the purposes of the Act, the Commission has regard to the fundamental principles provided in Section 2.1, including:

- effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act, and
- business and regulatory costs and other restrictions on the business and investment activities of market participants should be proportionate to the significance of the regulatory objectives sought to be realized.

The Commission recognizes that there is a need to address developments in the capital markets on a timely basis in an effort to satisfy its dual mandate. Orders for exemptive relief are tools which the Commission and Director use to provide targeted and responsive securities regulation. Exemptive relief orders typically address circumstances that reflect the particularized needs of a market participant or the evolution of our capital markets before such market developments are addressed through new or amended regulatory requirements.

The Commission’s previous statutory authority to issue orders and rulings of general application was removed in 1994 under the *Securities Amendment Act*, 1994, which gave the Commission rule-making authority. Section 143.11 was enacted following the Government of Ontario’s determination that there would be little need to continue the Commission’s use of blanket orders once the Commission received rule-making power. It provides that “The Commission shall not make any orders or rulings of general application.”

While Commission staff work to harmonize our regulatory response to exemption applications across the CSA, we are challenged in our efforts to respond to applicants’ requests for exemptive relief where, if granted, they would constitute prohibited blanket orders. The exemptive relief process is not, nor is it intended to be, a substitute for the exercise by the Commission of its authority to make rules under section 143(1) of the Act, which is subject to a notice and comment process and to ministerial approval. Rather, the exemptive relief process compliments and helps to inform the rule-making process and strikes an appropriate balance between targeted, responsive regulation and responsible rulemaking as contemplated by the Act. A market participant may initially bring an application for relief which is ‘novel’, but when the granting of similar relief becomes ‘routine’, the relief will typically be incorporated into the Commission’s regulatory framework through the rule-making process.

The Commission’s interpretation of the prohibition on blanket orders includes consideration of the appropriate use of exemptive relief orders and an approach to their issuance which respects the statutory prohibition in section 143.11 and the principles of transparency and accountability of the rule-making process.

3. Approach and Factors

In determining whether a requested order would constitute a prohibited blanket order, the Commission's considers whether the order is "of general application" and is consistent with our statutory accountability surrounding the rule-making process. In particular, we consider whether the Commission's regulatory response to the requested relief would be better informed by the public comment process for rule-making.

Three key, interrelated factors generally form the basis of our analysis: the scope of the proposed order, its impact, and the permanence of the order. The broader the scope of a proposed order, the more closely we evaluate the order's impact and whether the relief is ongoing or temporary.

Scope of the Proposed Order

We consider the breadth of the requested relief, including the number of applicants or transactions to which the relief applies and whether the order exempts a class of market participants or transactions from regulatory requirements. Where an order applies to a class of market participants or transactions that are not identified, known or ascertainable at the time the order is made, it is more likely to be viewed as a prohibited blanket order.

Related indicia of a prohibited blanket order include:

- whether the market participants or transactions to which the relief applies change over time; and
- the proportion of market participants or transactions benefitting from the relief is large compared to the proportion of market participants and transactions to which the requirements continue to apply.

Impact of the Proposed Order

Material exemptions to securities law requirements which have significant policy implications for capital markets are generally more appropriately addressed through the rule-making process under the Act.

A proposed order is less likely to be viewed by the Commission or Director as a prohibited blanket order if it is intended:

- (a) to relieve the applicants from a technical or procedural requirement that does not serve a compelling regulatory purpose in the circumstances;
- (b) to relieve the applicants from the unintended application or consequences of a requirement or from duplicative requirements;
- (c) to facilitate the transition to a new or amended rule;
- (d) to address an "outside" event or a change to an outside requirement, such as an accounting requirement, that affects the application of securities rules in an unanticipated way, or
- (e) to relieve the impact of an error in any existing rule or an out-of-date rule until the error or out-of-date rule can be addressed through rule-making.

Permanence of the Proposed Order

In some circumstances, a proposed order may be broad in the scope of its relief and have a significant impact, but may provide temporary or transitional relief. Where a proposed order provides time-limited relief, it may suggest that the order addresses the short term needs of the applicants consistent with facilitating the longer term rule-making process.

4. Guidelines

These guidelines reflect the Commission's application of section 143.11 of the Act and are not intended as prescriptive rules.