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Comments on Proposed OSC Policy 11-602: Guidelines on the Application of the Prohibition against Orders of General Application to Exemption Applications

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Comments on Proposed OSC Policy 11-602: Guidelines on the Application of the Prohibition against Orders of General Application to Exemption Applications

I. Introduction

The Ontario *Securities Act* (the "Act") prohibits the Ontario Securities Commission (the "Commission") from making any order or ruling "of general application".[1] This prohibition was included in amendments to the Act that in 1994 gave the Commission authority to make rules. Its purpose was to ensure that the Commission follows the statutory rulemaking procedure when granting general exemptions, rather than granting them by adopting blanket orders or rulings (together, "blanket orders"). As blanket orders are effectively rules, the Act precludes the Commission from making them without complying with the notice and comment procedure required for rule-making.

The Commission has long chafed at the limits imposed by this prohibition on its ability to use orders and rulings for regulatory purposes. *Proposed Commission Policy 11-602: Guidelines on the Application of the Prohibition against Orders of General Application to Applications to the OSC for Exemptive Relief* (the "Proposed Policy") is its latest attempt to limit the prohibition's effect, as the proposed guidelines would enable it to adopt blanket orders in circumstances in which it considers the rule-making process too burdensome. These comments respond to the request for comments on the Proposed Policy.[2]

II. History of the Prohibition

The history of the prohibition in section 143.11 provides the background necessary for a consideration of the Proposed Policy. In the years preceding 1994, the Commission attempted to regulate the securities market in Ontario by imposing obligations on market participants through policy statements, blanket orders, and other regulatory instruments.[3] It used blanket orders to give effect to regulatory requirements adopted in policies by granting exemptions subject to conditions that required compliance with a policy's terms; it also used blanket orders as independent rule-making vehicles.[4] These practices were challenged by the *Ainsley* decision of the Ontario Court of Justice (General Division) in 1993, which held a policy adopted by the Commission to regulate the sales practices of securities dealers to be invalid.[5]

As a result of the *Ainsley* decision, the Government of Ontario and the Commission appointed a task force (the "Task Force") to review and make recommendations on the legislative framework for the development of securities policy in Ontario, focusing on the Commission's policy-making role. The Task Force initially published an interim report

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[1] *Securities Act*, R.S.O. 1990, c. S.5, s. 143.11, as amended.

[2] Request for Comments: Proposed OSC Policy 11-602, (2013) 36 O.S.C.B. 3667 (April 4). The comment period ended on June 5, 2013. Staff of the Commission have agreed to the submission of these comments, despite their lateness.

[3] The Commission's unauthorized rule-making activities during this period are described in Anisman, "Regulation Without Authority: The Ontario Securities Commission," 7 C.J.A.L.P. 195 (1994) at 206-39.

[4] The use of blanket orders is described *ibid*. at 214-19.

[5] See *Ainsley Financial Corp. v. Ontario (Securities Commission)*, (1993) 14 O.R. (3d) 280 (Gen. Div.), affirmed (1994) 21 O.R. (3d) 104 (C.A.).

recommending that the Commission be given legislative authority to make rules and blanket orders.[6] In response to submissions that blanket orders are rules that should be subject to the procedure required for rule-making,[7] the Task Force recommended in its final report (the "Task Force Report") that orders of general application be treated as rules and that blanket orders be prohibited.[8] It concluded that orders "should be limited to individual cases", explaining that in light of its recommended rule-making process, there was no need for blanket orders and their continued use "would subvert the notice and comment scheme applicable to rule-making and would result in continued regulatory clutter and confusion."[9] The Task Force's draft prohibition would have precluded the Commission from making any order or ruling of general application that applied "to a class or category of persons, companies, trades, securities or other matters or things, except by means of a rule."[10] Its recommendations were enacted by the Ontario Legislature as amendments to the Act in 1994.[11] The prohibition against blanket orders is contained in section 143.11 of the Act.[12]

In 2003, the Five Year Review Committee (the "Review Committee") recommended, on grounds of efficiency, that the Act be amended "to allow the Commission to issue blanket rulings and orders that provide exemptive relief only."[13] The Review Committee, stating that blanket orders complement the rule-making process, had initially recommended that blanket orders be time limited so that the Commission would be required to replace them with rules within three years,[14] but deleted this requirement in its Final Report in response to comments that it would create unnecessary inefficiencies and because of concerns that rule-making might take longer than the sunset period and the desirability of harmonization with other provincial rule-making regimes.[15] Its recommendation was rejected by the Ontario Legislature in light of the fact that blanket orders do not provide members of the public with an opportunity to comment on proposed blanket exemptions.[16] The Proposed Policy must be viewed against this legislative background.

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[6] See *Responsibility and Responsiveness: Interim Report of the Ontario Task Force on Securities Regulation* (February 1994) (R. Daniels, Chair) at 22-23, reproduced in (1994) 17 O.S.C.B. 914 (February 25) at 922-23.
[7] See Anisman, "Regulatory Governance and the OSC," 6 *Fairvest Corporate Governance Review* 7 (February/March 1994) at 16-17 (Letter to Task Force, April 4, 1994).
[8] See *Responsibility and Responsiveness: Final Report of the Ontario Task Force on Securities Regulation* (June 1994) (R. Daniels, Chair) at 21-23, reproduced in (1994) 17 O.S.C.B. 3208 at 3222-23.
[9] *Ibid*., Report, at I-34-35, 17 O.S.C.B. at 3256.
[10] *Ibid*., Proposed Amendments, s. 143(4), Report at I-34, 17 O.S.C.B. at 3256. The Task Force Report's recommendations are discussed in Anisman, "Legitimating Lawmaking by the Ontario Securities Commission: Comments on the Final Report of the Ontario Task Force on Securities Regulation," in *Securities Regulation: Issues and Perspectives – Queen's Annual Business Law Symposium*, *1994* 1 (1995).
[11] The 1994 amendments are discussed in Anisman, "Authorizing Regulation: The Securities Amendment Act, 1994," in P. Anisman and R.F. Reid, eds., *Administrative Law: Issues and Practice* 49 (1995).
[12] Other provinces followed Ontario in conferring rule-making authority on their securities commissions, but did not adopt the prohibition against blanket orders.
[13] *Five-Year Review Committee Final Report: Reviewing the Securities Act (Ontario)* (March 21, 2003) (P. Crawford, Chair) at 85.
[14] See *Five Year Review Committee Draft Report: Reviewing the Securities Act (Ontario)* (May 29, 2002) (P. Crawford, Chair) at 50-51.
[15] *Five Year Review Committee Final Report*, note 13 above, at 84-85.
[16] See Standing Committee on Finance and Economic Affairs, Legislative Assembly of Ontario, *Report on the Five Year Review of the Securities Act* (October 2004) at 15-16 (recommending that the Commission "should not be given power to issue blanket rulings and orders").

III. Impetus for the Proposed Policy: Wrapper Exemption

The Proposed Policy appears to have resulted from an exemption application seeking relief that would permit underwriters and their affiliates to sell foreign securities to institutional investors in Canada in private placements, without having to add a "wrapper" to a U.S. offering document to bring it into compliance with the requirements applicable to offering memorandums under Canadian securities laws. A few weeks after publication of the request for comments on the Proposed Policy, an exemption order (the "Wrapper Order") was granted to the seventeen underwriter-applicants and their affiliates.[17] The Wrapper Order was time limited; it shall terminate no later than three years after its effective date or on an earlier date when amendments to securities laws in each jurisdiction of Canada become effective. Its effective date was June 22, 2013, sixty days after it was granted, which permitted other underwriters engaging in transactions of the same nature to obtain identical exemptions for themselves and their affiliates.[18]

The headnotes for the decisions published by the Commission refer to two additional orders made by the Director on the same dates (together with the Wrapper Order, the "wrapper exemptions"). The first was a letter granting the applicants and their affiliates permission under subsection 38(3) of the Act and similar provisions in other provinces to represent that an application to list securities offered in an exempted offering under the Wrapper Order has been made to an exchange; the second was a letter confirming that an applicant and its affiliates need not disclose in a report filed with the Commission (Form 45-106F1) for a sale to an institutional purchaser under the Wrapper Order that it has complied with notification requirements with respect to the collection and use of personal information. These decisions also contain a sunset provision providing that the exemptions shall terminate on the earlier of three years after their effective date or the date that amendments to the relevant requirements that provide the same relief become effective. As of the date of this comment, neither of these decisions of the Director has been published in the Commission's Bulletin or on its website.[19]

Although the Wrapper Orders and separate Director's decisions apply only to the applicants and their identified affiliates, they grant exemptions for a class of unidentified, possible future transactions. As a result, each of them is in effect a decision of general application.[20] It might be argued that the Wrapper Orders are not of general application because

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[17] See *In the Matter of Barclays Capital Inc.,* (2013) 36 O.S.C.B. 4429 (April 25). The order (the "Wrapper Order") granted exemptions from disclosure requirements under National Instrument 33-105: Underwriting Conflicts and under local rules relating to offering memorandums in Ontario and three other provinces, if specified conditions that effectively impose an alternate regulatory regime are satisfied.

[18] See *In the Matter of BMO Nesbitt Burns Inc.,* (2013) 36 O.S.C.B. 6700 (July 4); *In the Matter of Wells Fargo Securities,* LLC, (2013) 36 O.S.C.B. 6710 (July 4); *In the Matter of Credit Suisse Securities (USA) LLC,* (2013) 36 O.S.C.B. 6718 (July 4); see also *In the Matter of BNP Paribas Securities Corp. (*OSC June 21, 2013) (together with the Wrapper Order, the "Wrapper Orders"). All four orders were dated June 21, 2013. As of the date of this comment, the *BNP Paribas* order has not been published in the OSC Bulletin or on the Commission's website.

[19] Copies of the decision relating to applications to list securities have been posted on the websites of other commissions; see, e.g., *Barclays Capital Inc.: Decision Pursuant to the Securities Act, 1988, s. 44(3)*, Approval Letter, April 23, 2013 (Saskatchewan FCAA). The identical letters granted on the subsequent applications may also be found on the Saskatchewan FCAA website.

[20] The provision in the Task Force Report referred to orders or rulings that apply "to a class or category of persons, companies, trades, securities, or other matters or things"; see Task Force Report, note 10 above.

they were granted to specific applicants[21] and that the exemptions from subsection 38(3) to permit disclosure of listing applications are not covered by the prohibition because they are not "orders" or "rulings", but only permissions granted by the Director.[22] Even if such technical arguments were correct, the purpose and effect of the Wrapper Orders, the permissions, and the confirmation letters, individually and together, is to grant a blanket exemption for all transactions of the type identified and is inconsistent with the Act's rule-making requirements and the purpose of the prohibition in section 143.11. The initial Wrapper Order and accompanying decisions were made without prior publication or a request for comments, that is, without the openness, disclosure and consultation required for Commission rule-making, and the permission and confirmation letters have not been published by the Commission.

This conclusion is reinforced by the Commission's publication, two days after the Barclays Wrapper Order was granted, of proposed amendments to extend the exemptions under two of the relevant rules, with respect to Ontario alone, to all market participants and transactions that satisfy the terms of the exemption orders.[23] The notice relating to the proposed amendments refers to the sunset clause contained in the Wrapper Order and accompanying exemptions and states expressly that the proposed rule amendments are to replace them and "place all market participants in a similar position."[24] The Wrapper Order and the two accompanying decisions hark back to the Commission's pre-statutory rule-making practice of attempting to accomplish regulatory goals without adequate regard to its jurisdictional limitations.[25]

IV. Proposed OSC Policy 11-602

Like the Review Committee, the Proposed Policy addresses the prohibition against blanket orders only with respect to exemptions, emphasizing a need for timely responses to market developments or the needs of a market participant that must be addressed generally,

[21] The Review Committee repeated the Task Force's description of blanket orders, and went on to add that they apply to "anyone who fits the terms of the order and obviate the need for a particular capital-market participant to seek a separate ruling or order from the Commission on an ad-hoc basis"; *Five Year Review Committee Final Report*, note 13 above, at 83.
[22] The obligation in subsection 38(3) to obtain the written permission of the Director to make a statement concerning an application to list securities to be sold is aimed at specific statements and requires written permission of the Director with respect to specific offerings. In other words, permission involves an adjudicative-type decision and the provision does not authorize blanket permissions as granted in the exemption orders.
[23] See Notice and Request for Comment: Proposed Amendments to Ontario Securities Commission Rule 45-501 *Ontario Prospectus and Registration Exemptions* and Proposed Amendments to National Instrument 45-106 *Prospectus and Registration Exemptions*, (2013) 36 O.S.C.B. 4465 (April 25). The Commission has not proposed an amendment to National Instrument 33-105: Underwriting Conflicts, but the Notice states that it is in the process of considering such an amendment along with other members of the CSA; *ibid*. at 4466.
[24] *Ibid*. at 4468.
[25] It is worth noting that in 1993, on an application by "certain registrants", the Commission made a blanket ruling exempting similar sales of foreign securities in exempt transactions in Ontario from the then-existing obligation to provide a contractual right of action against the issuer; see Blanket Ruling - Regulation 1015, R.R.O. 1990, as amended and Certain International Offerings by Private Placement in Ontario, (1993) 16 O.S.C.B. 5931 (December 3). One commentator expressed doubt that this blanket ruling was within the Commission's jurisdiction; see Anisman, Regulation Without Authority, note 3 above, at 219. This blanket ruling was also accompanied by a "blanket permission" like that granted by the Director on April 23, 2013 with respect to statements concerning applications to list or quote the securities offered; see Blanket Permission - International Offering Made By Way of Private Placement in Ontario – ss. 38(3), (1993) 16 O.S.C.B. 5938 (December 3).

rather than by individual applications. The focus on timeliness suggests an urgency in dealing with issues that cannot be met through the rule-making process, which requires notice of a proposed rule, a comment period of at least 90 days, the adoption of a final rule, and its submission for ministerial approval, resulting in a further delay of up to 75 days, a total of approximately six months before the rule can become effective. The Proposed Policy also refers to the fact that exemptions may provide the Commission with experience concerning the application of Ontario securities laws and market developments that may lead it to consider adopting a rule to address them.[26]

The Wrapper Order and related decisions do not demonstrate these goals. This exemption was not a timely response to an urgent problem. It was granted nearly two years after the application was brought forward.[27] During this period, the Commission appears to have discussed the exemption application with some market participants, presumably institutional investors.[28] It appears, therefore, that the Commission took as much (or more) time as would be required to adopt a rule following the statutory notice and comment process, with comment invited from all members of the public, rather than a selected group of investors as appears to have occurred here. Proposed rule amendments could, and should, have provided the wrapper exemptions.

Nor does a single order and the private process relating to it provide the cumulative experience that would be expected to result from exemption applications leading to the formulation and adoption of a rule based on the Commission's experience with market developments.[29] The Wrapper Order was not an exemption that had become "routine".[30]

The Proposed Policy, published almost three weeks before the Wrapper Order and accompanying decisions were made, appears to be a response to the process that led to these exemptions. Although it recognizes the prohibition against blanket orders in section 143.11 and its purposes, the Proposed Policy appears to be an attempt to justify the Commission's failure to observe them and proposes guidelines that would permit it to continue to do so.

In its first paragraph, the Proposed Policy defines orders of general application as "prohibited blanket orders". The use of this defined term suggests that there may be blanket orders that are not prohibited. This is not the case. All blanket orders are prohibited by section 143.11. The only relevant question with respect to the Commission's jurisdiction to make exemptive orders and rulings is whether the order or ruling under consideration is of general application. If it is of general application, the Commission lacks authority to make it, plain and simple.

Although the Proposed Policy recognizes that this is the case, the approach to determining when an order or ruling is prohibited does not reflect this recognition. The

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[26] See 36 O.S.C.B. at 3669 (exemptions are "tools" used by the Commission "to provide targeted and responsive securities regulation").
[27] See Olasker, Upshall and Spadaro, "Canada: CSA Grants Wrapper Relief," April 26, 2013 (Davies Ward Phillips & Vineberg LLP), p. 1. The Davies Ward firm was co-counsel on the application for the wrapper exemptions.
[28] *Ibid.*
[29] The Proposed Policy itself states that such exemptions typically precede new or amended regulatory requirements; 36 O.S.C.B. at 3669.
[30] *Ibid.*

Commission's authority to make an order does not depend on whether consideration of "the Commission's regulatory response to the requested relief would be better informed by the public comment process for rule-making", as the Proposed Policy states.[31] The Act provides for circumstances in which the statutory notice and comment procedure is not required; these include a proposed rule that grants an exemption or removes a restriction and is not likely to have a substantial effect on the interests of persons other than those who benefit under it, an amendment that does not materially change an existing rule, and a rule that is urgently required to protect investors or market integrity.[32] The Act, itself, thus determines when the public rule-making process is necessary. It does not leave it to the Commission to do so on the basis of its own conclusion that the statutory notice and comment process would not better inform it.[33] If a proposed order is of general application, the Commission must follow the rule-making process.

The three key factors identified in the Proposed Policy as forming the basis of the Commission's analysis also go beyond the general application standard in section 143.11. The identified factors are the scope of a proposed order, its impact, and its permanence. While all of these factors may be relevant to a determination of whether a specific order is of general application, the manner in which the Proposed Policy discusses their application suggests that some blanket orders may not be prohibited. This is inconsistent with section 143.11.

(a) Scope of a Proposed Order

The Proposed Policy correctly emphasizes the breadth of requested relief when explaining the Commission's proposed approach to determining the scope of a proposed order, but its discussion of the factors relevant to this determination suggests that an order that exempts a class of market participants or a class of transactions from regulatory requirements may not be treated as prohibited. It says, for example, that an order that applies to a class of market participants or transactions "that are not identified, known or ascertainable at the time the order is made," is "*more likely* to be viewed as a prohibited blanket order."[34] This suggests that the Commission might treat an order that would exempt an unidentified, unknown and unascertainable class of transactions as other than an order of general application. To do so would be inconsistent with the intention of the Task Force and the prohibition in section 143.11.[35]

The recent wrapper exemptions provide a useful example. Although the applicants and their affiliates are identified in each of the orders, the transactions for which relief is granted are not. Rather, the Wrapper Order and related decisions exempt a general class of securities distributions from four regulatory requirements, subject to conditions that, in effect, create a separate regulatory regime for them. The fact that the exemption was stated to take effect sixty days after it was granted suggests that the Commission viewed the exemption as giving an unfair advantage to the applicants which could be overcome by permitting other market participants in the same position to obtain the same relief with respect to the class of transactions. This alone

[31] *Ibid*., 36 O.S.C.B. at 3670.
[32] Act, s. 143.2(5)(b)-(d).
[33] 36 O.S.C.B. at 3670.
[34] *Ibid*. (italics added).
[35] Even where all the persons who will be subject to a proposed instrument are identified, the instrument may be a rule of general application; see, e.g., the exemption from the notice and comment process for such rules in Act, s. 143.2(5)(a).

demonstrates the generality of the exemption's purpose. The implication in the discussion of how the Commission views the scope of a proposed order, especially when read in light of the wrapper exemptions that informed it, indicates that the approach in the Proposed Policy is too broad.

The Proposed Policy identifies two "related indicia" of a "prohibited blanket order," namely, whether the market participants or transactions to which the exemption applies change over time and the applicability of the exemption to a substantial proportion of market participants or transactions that are subject to the relevant regulatory requirements. This example is particularly troublesome in view of the wrapper exemptions that prompted the Proposed Policy. As stated above, the exemptions were prospective; they came into effect sixty days after the date on which they were made. One commentator has suggested that this approach was intended to permit other similarly situated market participants to apply and obtain the benefit of these exemptions.[36] This reinforces the inference that the wrapper exemptions were intended to apply to all or most market participants who engage in the types of offering to which they apply. In view of this treatment, the indicia in the Proposed Policy reinforce concerns that it will permit orders that are intended to be of general application.

(b) Impact of a Proposed Order

While it is true that "material exemptions … which have significant policy implications for capital markets are generally more appropriately addressed through the rule-making process," as the Proposed Policy states,[37] the significance of an exemption's policy implications is not relevant to a determination of whether it applies generally. Nor are the factors identified in the Proposed Policy with respect to the intended impact of a proposed order as indicating that the order is less likely to be treated by the Commission as prohibited. The intention to accomplish one or more of the listed goals is not indicative of whether an order is of general application, especially as the listed goals do not address this issue. For example, the fact that a requirement is technical or procedural and "does not serve a compelling regulatory purpose" may provide a basis for proposing a rule or granting an exemption to an individual applicant in specific circumstances, but it does not address whether the relief sought would be of general application.

This is also so with respect to the "unintended application or consequences of a requirement" and duplicative requirements. The Director's unpublished letter exempting all of the applicants and their affiliates from the requirement in Form 45-106F1 with respect to institutional investors provides an example of the need for an analysis in the context of each application. An application by a registrant or group of registrants for this exemption alone might be viewed as not of general application. When it is combined with the Wrapper Order and the general permission granted by the Director, it must be treated as part of an exemption of general application.

The third example of a blanket order that is "less likely to be viewed by the Commission or Director as prohibited" is an order that is intended "to facilitate the transition to a

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[36] See Lando, "Canadian Securities Regulators Grant Exemptions from Wrapper Requirements", April 30, 2013 (Osler). This appears to have occurred; see note 18 above.
[37] 36 O.S.C.B. at 3670.

new or amended rule".[38] Transitional provisions should be addressed when a rule is adopted. One would expect those who comment on a proposed rule that requires transitional provisions to focus on the potential impact of the rule and the effectiveness of its transitional provisions. An order that provides transitional relief with respect to a class of market participants, transactions or documents would necessarily be of general application. The inclusion of this factor as relevant to a determination of a proposed order's availability is reminiscent of the Commission's practice prior to 1994 of granting transitional exemptions from new regulatory requirements by adopting unauthorized blanket orders.[39] This is the type of order the Task Force said should not be made and section 143.11 prohibits.

The fourth example of a permissible blanket order is one intended to address an event or change in non-securities law requirements, such as an accounting standard, that affects the application of securities rules "in an unanticipated way."[40] This example, too, avoids consideration of whether the order would be of general application. As part of its ordinary regulatory activities, the Commission should be monitoring proposed changes to "outside" rules that are relevant to Ontario securities law. If such changes are likely to have an impact on the application of securities laws, the Commission should address them with the outside body so that the Commission can engage in coordinated rule-making to address any such changes. The Commission should not allow a change in an "outside" requirement to take it by surprise.

If this occurs, despite the Commission's best efforts, it can be addressed under the rule-making process in the Act. Subsection 143.2(5)(d) exempts a proposed rule from the notice and comment requirements if the Commission believes there is both an urgent need for the proposed rule and a substantial risk of material harm to investors or the integrity of the capital markets, without it. But the Act creates checks on the Commission's ability to use this exemption. Before making such a rule, the Commission must obtain the Minister's approval to do so without following the notice and comment procedure, must publish the rule, and must disclose the nature of the urgency and the risk that led to its adoption. Although the rule comes into force immediately, it is automatically revoked 275 days later.[41] These constraints in the context of an urgent need to prevent significant harm to investors or market integrity demonstrate the importance of the notice and comment requirements and ministerial review of rules to the Act's rule-making process. In short, an "outside" event of the type described in the Proposed Policy does not provide a basis for making a blanket order, without compliance with the Act's mandated rule-making process.

The same analysis applies to the final example concerning impact, namely, an order intended "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."[42] This is analogous to a blanket order that grants transitional relief from a new rule that has inadequate transitional provisions.

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[38] *Ibid.* at 3670 (para. (c)).

[39] See, e.g., Notice - Disclosure of Executive Compensation, (1993) 16 O.S.C.B. 5886 (December 3); *In the Matter of Ontario Regulation 638/93 and the Disclosure of Executive Compensation: Blanket Order,* 16 O.S.C.B. 5913. The blanket order was accompanied by a blanket permission made by the Director; see *Blanket Permission – Section 81 of Reg.*, 16 O.S.C.B. 5914.

[40] 36 O.S.C.B. at 3670 (para. (d)).

[41] See Act, ss. 143.2(5)(d) and (6), 143.3(2) and 143.4(5) and (6). This exemption is discussed in Anisman, Authorizing Regulation, note 11 above, at 65-66.

[42] 36 O.S.C.B. at 3670 (para. (e)).

It is also not clear why a blanket order should be required to address the fact that specific requirements of an existing rule become out-of-date. Such developments usually occur over time. The Commission would usually become aware of them from monitoring market developments or through individual applications for exemptions with respect to specific transactions or documents. In the ordinary course of its regulatory activities, the Commission should deal with such matters through the rule-making process. It should not be necessary to adopt blanket rulings. In any event, the type of order contemplated in the Proposed Policy would necessarily be of general application.

(c) Permanence of a Proposed Order

The Proposed Policy states that an order that provides "time-limited relief" may address "short term needs of the applicants consistent with facilitating the longer term rule-making process."[43] This statement follows a sentence that suggests that even an order that is broad in the scope of its relief and has a significant impact may not be prohibited because it "may provide temporary or transitional relief." Once again, these characteristics do not address whether an order is of general application and they would not make an order that is of general application permissible.[44] The Review Committee's initial proposal was premised on the same conclusion; in its draft report, the legislative authority it recommended the Commission be given to make exemptive blanket orders was to be used only as an interim measure.[45]

V. National Regulation

The proposed policy refers to the fact that other members of the Canadian Securities Administrators ("CSA") are not subject to a statutory prohibition against blanket orders. This, too, was referred to by the Review Committee when it made the recommendation, rejected by the Standing Committee, that the Commission be granted such authority. The CSA's goals involve a balance between attempting to regulate a national market through coordination and cooperation, while retaining the ability of each regulator to implement its own policy where it considers it necessary or advisable to do so. The accountability mechanisms enacted by the Ontario Legislature with respect to rule-making, namely, openness, an opportunity for comment and ministerial approval must govern the Commission's activities. The fact that other Canadian securities regulators are not subject to the accountability constraints that the Ontario Legislature has imposed on the Commission is not relevant to whether an order is of general application.

The national context may, however, help to explain the two-year period taken to obtain the wrapper exemptions. In view of the history and the apparent merits of the application, an exemption of this nature should not have taken two years to obtain. It is reasonable to infer that the lengthy period resulted from the need to obtain the exemption throughout the country, in light of the fact that it grants relief from national instruments and the limitations on the Commission's authority to grant an exemption by making a blanket order.

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[43] 36 O.S.C.B. at 3670.
[44] Transitional relief, for example, is almost always expected to be time limited.
[45] See *Five Year Review Committee Draft Report*, note 14 above.

The Wrapper Order was granted by all members of the CSA through an exemption order made by the Commission under the passport system, with the Director's permission being granted as a multilateral permission applicable in all provinces with the relevant prohibition, and the "confirmation" with respect to Form 45-106F1 only in Ontario.[46] The proposed rule amendments that would implement aspects of the wrapper exemption, however, would apply only in Ontario and only to part of the Wrapper Order.[47] In view of the fact that the alternative regulatory regime created by the wrapper exemptions would most effectively have been accomplished by rule amendments applicable throughout Canada, this dichotomy suggests that the delay in obtaining the exemptions may have resulted, at least in part, from the CSA process necessary to obtain a national resolution of this issue. If this is correct, it may provide another example of the need for a national regulator. That need, however, is not relevant to the legitimacy of the Proposed Policy.

VI. Conclusion

When considering the application of section 143.11 to a proposed order or ruling, only one question matters, namely, whether the order or ruling would be of general application. Under the Act, exemption orders are intended to relieve specific applicants from specific requirements with respect to specific transactions or documents. Exemptions that apply to a class of market participants, transactions, documents or other requirements, the specific application of which cannot be identified at the time the order is made, should be treated as subject to section 143.11. If there is ambiguity with respect to this question, even if the regulatory goals are considered by the Commission and its staff to be desirable, the Commission should follow the rule-making process mandated by the Act in order to comply with the principles that animate the Act's rule-making system.[48]

The thrust of the guidelines in the Proposed Policy is to permit the Commission to adopt blanket orders and rulings, applying the criteria identified in the Proposed Policy. But these criteria do not address the question of whether an order would be of general application. As outlined above, most of them would permit such orders to be made. As a result, adoption of the Proposed Policy would be inconsistent with the prohibition in section 143.11. The Proposed Policy should not be adopted.

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[46] The permission relating to representations concerning listing applications applies in all provinces except British Columbia, as the British Columbia *Securities Act*, s. 50(3), does not prohibit such representations.
[47] They would not apply to the exemptions from National Instrument 33-105: Underwriter Conflicts; see note 23 above.
[48] *Cf. In the Matter of Biovail Corp.,* (2010) 33 O.S.C.B. 8914 (October 8), para. 382.