

Schedule H

BC Policy 45-601 *Discretionary Exemptions*

Table of Contents

<u>Part</u>	<u>Title</u>
Part 1	Application
	1 Registration and Prospectus Requirements
	1.1 Scope of Policy
Part 2	Discretionary Orders
	2 Types of Applications
	2.1 Applications under Sections 48 and 76 of the Act
	2.2 Applications in More than One Jurisdiction
	2.3 Submission of Applications
	2.4 Required Elements of the Application
	2.5 Applications by or on Behalf of Issuers
	2.6 Applications by Non-Issuers
	2.7 All Applications
	2.8 Conventions for Drafting Orders or Decisions
	2.9 Filing Fees
	2.10 Procedure For Processing Applications
	2.11 Confidentiality

BC Policy 45-601
Discretionary Exemptions

Introduction

This policy describes how to apply for discretionary orders from the Commission and the Executive Director and discusses some examples of how the Commission and the Executive Director may exercise their discretion in certain circumstances.

Part 1 Application

1 Registration and Prospectus Requirements - The *Securities Act* applies to any trade of a security in British Columbia, whether or not the issuer of the security is a reporting issuer under the Act. Section 34 of the Act prohibits a person from, among other things, trading in a security unless that person is registered. Section 61 of the Act requires the use of a prospectus for any distribution of securities in British Columbia.

Sections 48 and 76 of the Act also give the Commission and the Executive Director the power to issue discretionary orders to exempt trades, intended trades, securities and persons from the registration and prospectus requirements of the Act when it is not prejudicial to the public interest to do so.

Part 2 Discretionary Orders

2 Types of Applications - The procedures described in this Part apply to all applications made to the Commission or the Executive Director for a decision under the following sections of the Act, the Rules and the Business Corporations Act (British Columbia) as well as under National Policy Statements or National Instruments:

Section of the Act

1(1) - paragraph (e) of the definition of “reporting issuer”
3.1
3.2
33
48
60
76
84
88
91
114
119(2)

124(b)
130
169(4)

Section of the Rules

3(8)
137(2)

Section of Business Corporations Act

91(3)
360(3) and (4)

For those sections not referred to above, applicants should refer to the particular section to see if a different application process is specified.

2.1 Applications under Sections 48 and 76 of the Act - If an issuer or other person wishes to trade or distribute securities and cannot use any of the statutory exemptions set out in the Act or Rules, the issuer or other person must either meet the requirements of sections 34 and 61 of the Act, as appropriate, or obtain a discretionary order under sections 48 and 76 of the Act. Where a statutory exemption can be relied on for any part of a proposed transaction, an exemption order for that part of the transaction should not be sought.

The Commission and the Executive Director may only issue discretionary orders under sections 48 and 76 of the Act if they consider that it would not be prejudicial to the public interest to do so.

2.2 Applications in More than One Jurisdiction - Where an application for a discretionary order is made in more than one Canadian jurisdiction, that application should be made simultaneously in the applicable jurisdictions in which relief is required under National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions*.

2.3 Submission of Applications - If an issuer is seeking relief, the application should be addressed to the Director, Corporate Finance. If the application relates to registration, exchanges or marketplaces, it should be addressed to the Director, Capital Markets Regulation. You can submit your application at the BC Securities Commission by:

Internet: www.bcsc.bc.ca

Fax: (604) 899-6506

Courier or Mail: British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, B.C.
V7Y 1L2

Applications should be submitted well in advance of the proposed transaction for which an order or decision is sought as neither the Commission nor the Executive Director will issue orders that have a retroactive effect. Applications must be complete when submitted and should consist of:

- (a) two copies of an application letter setting out the information described in section 2.4 of this Policy, either originally signed by the applicant or, if submitted by the applicant's agent, accompanied by a verification described in section 2.7 of this Policy;
- (b) two copies of all supporting material;
- (c) two copies of the draft order or decision in the form described in section 2.5 of this Policy and, at the applicant's option, a computer disk containing the draft order in Microsoft Word; and
- (d) the applicable filing fee as described in section 2.9 of this Policy.

Follow-up material filed in respect of an application should be addressed to the staff member reviewing the application and should be marked "Follow-up Material". Any revised draft order or waiver submitted as follow-up material should be accompanied by a black-lined copy indicating the amendments made by the applicant.

2.4 Required Elements of the Application - Each application should be divided into sections and include, where relevant, the following information:

2.5 Applications by or on Behalf of Issuers

(a) Summary

- (i) the name of the issuer;
- (ii) the name of the applicant (if different from the issuer);
- (iii) the section of the Act, Rules, Business Corporations Act, National Policy Statement or National Instrument under which the application is made; and

(iv) the nature of the relief sought.

(b) The Issuer

(i) the name of the issuer;

(ii) jurisdiction and date of incorporation, organization or continuation;

(iii) capital structure - authorized and issued capital and debt obligations;

(iv) whether the issuer is a reporting issuer;

(v) whether the issuer is an exchange issuer;

(vi) the name of any exchange or quotation system on which the issuer's securities are listed;

(vii) recent trading price and volume data for any class of securities involved in the application; and

(viii) a statement from the issuer as to whether the issuer, if it is a reporting issuer, is in default of any requirement of the Act, Regulation or Rules and if so, describing the circumstances of the default.

As the Commission and Executive Director will generally not grant orders to an issuer that is in default of a requirement of the Act, Regulation or Rules, the applicant should ensure that the issuer is not in default prior to making an application for discretionary relief.

(c) Applicant Applying on Behalf of the Issuer - If the applicant is a person applying on behalf of the issuer, include those items in paragraph (b) that are relevant to the applicant and explain the applicant's relationship to the issuer.

2.6 Applications by Non-Issuers - Applications by non-issuers, such as an application by a registrant for an exemption order under section 48 of the Act, should include information similar to that itemized in sections 2.5 (a), (b) and (c) above, that is relevant to the application.

2.7 All Applications

(a) Order or Decision Sought - Applications should clearly set out all relevant information and arguments in support of the request for the order or decision. The submission should clearly describe how the relief sought would fall within the spirit and intent of the securities and corporate legislation. The information and argument should include:

- (i) the facts on which the application is based;
- (ii) the reasons for making the application; and
- (iii) other relevant considerations including:
 - case law;
 - prior decisions of the Commission or Executive Director in similar circumstances;
 - parallels between existing statutory exemptions and the discretionary exemption sought;
 - related decisions of other regulatory agencies;
 - similar applications pending in other jurisdictions; and
 - supporting documents (these may be included as schedules or exhibits to the application, and references in the application may be made to them).

(b) Verification - Each application must be signed by the party submitting it and must contain a statement certifying the truth of the facts it contains. If the application is made by an agent for the applicant and not signed by the applicant, this certification may be omitted if the application is accompanied by a separate written statement signed by the applicant authorizing the agent to prepare and file the application and confirming the truth of the facts contained in the application. Sample language might include:

“We authorize _____ to make and file the attached application and confirm the truth of the facts contained in it.

Dated on _____, 20__.

Authorized Officer”

2.8 Conventions for Drafting Orders or Decisions - Applicants should refer to the Commission Documents Database (under Decisions and Orders) on the Commission’s website at bcsc.bc.ca. for examples of orders or decisions that the Commission and the Executive Director have granted. Draft orders or decisions should not be submitted in the format used by other jurisdictions. The use of formats other than British Columbia’s will result in unnecessary delays as the applicant will be asked to resubmit the draft order before the application is assigned to an analyst for review.

(a) Headings

- (i) Every draft order should have a heading that:
- (ii) refers to the Act, Rules, Business Corporations Act, Local Policy, National Policy Statement or National Instrument under which the order or decision is requested; and
- (iii) sets out the name of the issuer, if applicable, and the name of any party seeking the order or decision.

The draft order should also have a subheading that refers to the section of the Act, Rules, Business Corporations Act, Local Policy, National Policy Statement or National Instrument under which the order or decision is requested.

(b) Recitals - The first recital should state the name of the applicant, whether the application is being made to the Commission or the Executive Director, the section of the legislation or policy under which the order or decision is requested, and the specific requirements from which the applicant is seeking relief.

Subsequent recitals should set out the relevant facts and provide the background information necessary to show what transactions are contemplated and why the order or decision sought should be granted. These recitals, in the form of representations by the applicant, should also demonstrate that the applicant falls within the spirit and intent of the securities or corporate legislation and that the granting of the order or decision would not be prejudicial to the public interest.

The last recital should confirm that the specific requirements of the legislation or policy have been satisfied. For example, the last recital for orders under section 76 of the Act should read:

“The Executive Director considers that to do so would not be prejudicial to the public interest;”

Operative Part of the Order or Decision - The operative part of the order or decision should reflect the discretionary power granted to the Commission or the Executive Director under the section authorizing the relief sought.

In most cases, conditions, such as filing requirements and resale restrictions, that would have applied had the applicant been able to rely on a parallel statutory exemption will be incorporated as part of the order or decision. If the applicant feels that certain conditions are inappropriate in the particular circumstances of the case, reasons should be given in the application.

2.9 Filing Fees - Each application must be accompanied by the filing fee prescribed in section 22 of the Regulation. Applications will not be assigned for review until the fee is received. Fees should be paid by cheque payable to the “British Columbia Securities Commission”.

Due to resource limitations and the large number of expedited applications which are received, applicants who seek expedited review should provide evidence that immediate attention to the application is necessary and reasonable under the circumstances. If staff are unable to begin their review of the application promptly, staff will advise the applicant that the application will be dealt with in the normal course.

2.10 Procedure For Processing Applications - On receipt of a complete application, a member of the Commission’s staff will be assigned to review the application and recommend disposition. The staff member may contact the applicant if further information or clarification is required. Where the applicant does not provide this information or clarification within a reasonable period of time, the Commission or Executive Director, on its or his own motion or on the recommendation of the staff member, may decide to treat the application as abandoned.

2.11 Confidentiality - Orders and decisions are, as a matter of course, filed in public files and published on the Commission’s website (bcsc.bc.ca). Materials filed in support of applications (including denied or withdrawn applications) may be accessible to the public under the *Freedom of Information and Protection of Privacy Act*, S.B.C. 1992, c.61.

Applicants who wish to maintain confidential treatment of an order, a decision or materials filed in support of an application must make a separate submission to the Commission seeking confidentiality under section 169(4) of the Act. The Commission will not grant an application for confidential treatment of material under section 169(4) unless it considers that the material discloses intimate financial, personal or other information, and the desirability of avoiding disclosure of the information in the interests of any affected person outweighs the desirability of adhering to the principle of public disclosure.

Where the Commission accedes to a request for confidentiality, the material will not be published or placed in the public file. However, the Commission may still be obliged to make materials available to the public should an application be made under the Freedom of Information and Protection of Privacy Act.

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