



# An undiplomatic guide to the emerging markets guide

**T**o outsiders (like me), the world of diplomacy is impossibly complicated. It's difficult enough to get agreement on a point. The complexities expand logarithmically when you factor in the need to resolve the structure, optics, communication, and other facets of the agreement.

Take the example of a simple decision, perhaps chosen in the name of achieving progress — an agreement that the meeting room will have a blue tablecloth. The complexities abound. Who communicates the agreement first, or is it communicated jointly? How strongly should the fondness for blue linen be expressed? Does a block-buster decision like that create unrealistic expectations?

Care should be exercised to avoid this kind of overthinking in response to the recent publication by the Ontario Securities Commission of a guide for companies operating in emerging markets. The guide is the latest step in a series of actions taken by the regulator focusing on emerging market issuers, and in particular on the performance of their gatekeepers (such as directors, officers, underwriters, and auditors) in the wake of well-reported issues with some international companies that have distributed securities in Canadian markets. The stated purpose of the guide is to provide direction to officers and directors of emerging market issuers on eight risk areas.

The risk areas themselves are predictable and, presumably, not controversial. That emerging markets issuers have a particular need to focus on matters such as understanding their foreign business markets, cultural and language issues, internal controls in those markets, and disclosures relating to these risks, for example, is not surprising.

Reaction to regulatory guidance of this nature, however, can become like an exercise in diplomacy. To some, the guide — and the initiative more generally — goes too far. Frauds, and in less extreme cases structural and other issues that result in bad outcomes for issuers, are often fantastically clear with the benefit of hindsight; however, in the thick of the tumult of a public offering of securities, visibility is far less clear. Often the structures proposed are well-established and widely-used, and there are clean bills of health from experts. Further, the steps taken by the gatekeepers seem to be the best that can be reasonably done. This is what makes the exercise, and the regulatory focus, hindsight-oriented. Few, if any, of the sensational business failures of the last decade had anything to do with emerging markets issuers. Now, after a few high-profile failures, the issues with emerging markets companies seem clear. The concern is that although the guide expresses its perspectives in very general terms, in any future maelstrom experienced by an emerging markets issuer, the general principles of the guide may be cited in a way that implies gatekeepers should have enjoyed hindsight beforehand.

For others, the guide will not go far enough. As mentioned, it includes only general recommendations as to how the key risks should be addressed. It does not prescribe requirements with any specificity so gatekeepers can follow detailed prescriptive rules outlining what they should do (and equally what they need not do). The concern for this constituency is, although the guide does not (and does not purport to) change

the law, it is a powerful document that outlines how the regulators will interpret and apply the law without giving any precise guidance.

Obviously I am a gatekeeper (that term seemed much cooler when Sigourney Weaver was the Gate Keeper in *Ghostbusters* than when applied to fiduciaries and professional advisers, but I am still okay with it) and not a diplomat (also, in full disclosure, I happen to like blue tablecloths for virtually any occasion, and cannot, though I have tried, truly accept people who don't). In my simplistic diplomatic view — the truth is in the middle. A guide like the one recently published cannot provide a precise roadmap to emerging market issuers — or their directors, officers, or advisers — given the uniqueness of every fact pattern. Conversely, provided the general principles in the guide do not elevate the standard of normal diligence to a standard of impossible perfection, the high-level guidance can be very helpful.

Maybe I am underthinking the issue. Even if so, it is not clear that is worse than overthinking, and in the end it is a big timesaver. Not that a bit of overthinking is problematic. Really, it is hard to know when to stop. And what is it that motivates criticism of overthinking anyways — is it fear, or jealousy, or what? Anyway, I don't think that I overthink, do you think that I do? Take your time, think about it. Just so long as we all agree to take the emerging markets guide for what it is. ■

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You can read the OSC's guide at [tinyurl.com/OSCGuide](http://tinyurl.com/OSCGuide).

