



## Adoption of National Policy on Cease Trade Orders for Continuous Disclosure Defaults

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Effective September 1, 2008, the Canadian Securities Administrators have adopted National Policy 12-203 - *Cease Trade Orders for Continuous Disclosure Defaults*. The policy is intended to modernize, harmonize and streamline existing practices relating to cease trade orders, including general cease trade orders (GCTOs) and management cease trade orders (MCTOs), provides guidance as to how regulators will respond to late or deficient continuous disclosure filings and outlines the criteria regulators will use in deciding whether to issue an MCTO, which prohibits trading only by specified individuals, or a GCTO prohibiting all trading in the issuer's securities.

### Scope of the Policy

The policy describes how securities regulators will ordinarily respond to the failure of a reporting issuer to comply with applicable requirements to file annual or interim financial statements, annual or interim management's discussion and analysis (MD&A), annual or interim management reports of fund performance (MRFP), annual information forms (AIF), or certifications under Multilateral Instrument 52-109 - *Certification of Disclosure in Issuers' Annual and Interim Filings*.

### Criteria for Imposing a GCTO or an MCTO

A GCTO will usually be imposed on an issuer if the continuous disclosure default is unlikely to be rectified quickly and the circumstances that gave rise to the default are likely to continue. These circumstances include issuers that no longer have an

active business, are insolvent or have lost a majority of their board of directors.

An MCTO may be imposed where the outstanding filing is expected to be filed relatively quickly, and the default is not expected to be recurring. Pursuant to the policy, issuers satisfying all of the following criteria are usually to be eligible for an MCTO:

- The outstanding filings will be filed as soon as they are available and within a reasonable period (in most cases, within two months).
- The issuer is generating revenue from its principal business or, if it is in the development stage, the issuer is actively pursuing the development of its products or properties.
- The issuer has the necessary financial and human resources, including a reasonable number of directors and officers in place, to address the default in a timely and effective manner and comply with all other continuous disclosure requirements (other than requirements reasonably linked to the specified default) for the duration of the default.
- The issuer's securities are listed on a Canadian stock exchange and there is an active, liquid market for those securities. Thinly traded issuers will generally not be considered eligible for an MCTO.
- The issuer is not on the defaulting reporting issuer list in any CSA jurisdiction for any reason other than the failure to comply with the specified requirement (and any other

requirement that is reasonably linked to the specified requirement).

### **Applying for an MCTO**

An issuer satisfying the foregoing factors is to contact its principal regulator at least two weeks before the due date for a required filing and must apply in writing for an MCTO (instead of a GCTO). If meeting the two-week deadline is not possible, notwithstanding the exercise of reasonable due diligence, the issuer is to include a brief explanation of the reasons for the delayed filing in its MCTO application.

The issuer's MCTO application should explain the reasons for the continuous disclosure default and its expected duration, explain how the issuer satisfies the eligibility criteria for an MCTO instead of a GCTO, set out a detailed remediation plan that explains how the issuer proposes to remedy the default (with a realistic timetable), briefly describe the issuer's blackout policies and other policies and procedures relating to insider trading, provide consents from the parties subject to the MCTO, including their acknowledgment that they will be prohibited from trading until two full business days after the continuous disclosure default is rectified, and is to include a copy of the issuer's proposed or actual "default announcement".

### **Communication with the Marketplace**

The policy provides that the regulators will generally not exercise their discretion to issue an MCTO unless the issuer issues and files a "default announcement" as soon as it determines that it will not comply, or subsequently determines that it has not complied, with a continuous disclosure requirement. The regulators expect that an issuer will usually be able to determine that it will not comply with a specified requirement at least two weeks before its due date. The default announcement (which must, among other things, identify the default, disclose the reason(s) for the

default and disclose the current plans of the issuer to remedy the default) may be contained in a material change report if the default represents or is related to a material change.

After the default announcement and during the period of the MCTO, the defaulting reporting issuer is to issue bi-weekly "default status reports", in the form of news releases. The default status reports are to disclose, among other things, any material changes to the information contained in the default announcement and the status of any investigations into any events which may have contributed to the default. Where there are no changes otherwise required to be disclosed, this fact is to be disclosed in a default status report. If a CSA regulator issues a GCTO against an issuer at any time, default status reports are no longer necessary.

Similar to the procedures in National Instrument 51-102 – *Continuous Disclosure Obligations* (NI 51-102), an issuer may omit confidential material information from a default status announcement or default status report if, in the opinion of the issuer, and if that opinion is arrived at in a reasonable manner, disclosure of the applicable material information would be unduly detrimental to the interests of the issuer.

### **Information respecting defaulting reporting issuers subject to insolvency proceedings**

The policy indicates that where a defaulting reporting issuer is insolvent and under Court protection, the CSA will generally note the issuer in default but take no other action until the relevant stay is lifted, provided the issuer complies with its obligations regarding the filing of default status reports.

Pursuant to section 4.8 of the policy, if a defaulting issuer is the subject of insolvency proceedings but not under court protection,

the CSA will consider an application for an MCTO where:

- (a) the issuer retains title to its assets,
- (b) the issuer's directors and officers continue to manage the affairs of the issuer, and
- (c) the issuer
  - (i) files a default announcement,
  - (ii) files default status reports,
  - (iii) files a report disclosing the information it provides to its creditors simultaneously with delivery to its creditors and in the same manner as a report of a material change referred to in part 7 of NI 51-102; and
  - (iv) otherwise complies with the policy.

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### **Default Correction Notice**

Once the specified default is remedied, the policy provides that the issuer is to consider communicating that information to the securities marketplace in the same manner as that specified in the policy for a default announcement.

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