

Ontario Securities Commission

National Policy 12-203

Unofficial consolidation current to 2016-06-23.

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**NATIONAL POLICY 12-203
MANAGEMENT CEASE TRADE ORDERS**

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PART 1 INTRODUCTION

Scope of this policy

1. This policy¹ provides guidance to issuers, investors and other market participants as to when the Canadian Securities Administrators (CSA or we) will consider responding to a specified default by issuing a management cease trade order (or MCTO). It explains what we mean by the term MCTO and why we issue MCTOs, addresses what other actions we will ordinarily take when issuing an MCTO, and identifies what we expect from defaulting reporting issuers in these circumstances.

The definition of "specified default" does not include certain defaults described in CSA Notice 51-322 *Reporting Issuer Defaults*, such as a failure to file a material change report, or a failure to file technical disclosure or other reports required by National Instrument 43-101 *Standards of Disclosure for Mineral Projects* or National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities*.

We have omitted these items from the definition because these filings will generally be non-periodic in nature, and in some cases it may be unclear whether the issuer has triggered a filing requirement. However, a CSA regulator may apply this policy statement if a reporting issuer is in default of a continuous disclosure requirement that is not included in the definition of specified default. Similarly, a CSA regulator may apply this policy statement if a reporting issuer has made a required filing but the required filing is deficient in terms of content.

The guidance in this policy is general in nature. Each CSA regulator will decide how to respond to a specified default, including whether to issue an MCTO on a case-by-case basis after considering all relevant facts and circumstances.

PART 2 DEFINITIONS AND INTERPRETATION

Definitions

2. In this policy:

"alternative information guidelines" means the guidelines relating to a default announcement and default status report described in sections 9 and 10;

"cease trade order" has the same meaning as in National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations in Multiple Jurisdictions*;

"CSA regulator" means a securities regulatory authority or a regulator, as applicable;

"default announcement" means a news release and material change report as described in section 9;

"default status report" means a report as described in section 10;

"failure-to-file cease trade order" has the same meaning as in Multilateral Instrument 11-103 *Failure-to-File Cease Trade Orders in Multiple Jurisdictions*;

¹ National Policy 12-203 *Cease Trade Orders for Continuous Disclosure Defaults* has been withdrawn and replaced by this policy, National Policy 12-203 *Management Cease Trade Orders*. This replacement policy, which includes a title change, reflects the fact that the process surrounding the issuance of failure-to-file cease trade orders has been moved to National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations in Multiple Jurisdictions*.

"management cease trade order" (or "MCTO") has the same meaning as in Multilateral Instrument 11-103 *Failure-to-File Cease Trade Orders in Multiple Jurisdictions*;

"principal regulator" has the same meaning as in National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations in Multiple Jurisdictions*;

"specified default" has the same meaning as in Multilateral Instrument 11-103 *Failure-to-File Cease Trade Orders in Multiple Jurisdictions*;

"specified requirement" means the requirement to file within the time period prescribed by securities legislation one or more of the following:

- (a) annual financial statements;
- (b) an interim financial report;
- (c) annual or interim MD&A or annual or interim MRFP;
- (d) an annual information form;
- (e) a certification of filings under National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*;

"SEDAR" means System for Electronic Document Analysis and Retrieval.

Further definitions

3. Terms used in this policy that are defined in Multilateral Instrument 11-103 *Failure-to-File Cease Trade Orders in Multiple Jurisdictions* or National Instrument 14-101 *Definitions* have the same meaning as in those instruments.

Interpretation

4. In certain jurisdictions, the CSA regulator may issue cease trade orders and MCTOs that prohibit trading in, and the purchase or acquisition of, securities of a reporting issuer. In these jurisdictions, references in this policy to a "trade" refer to a trade in, acquisition of, or purchase of securities of the reporting issuer, as applicable.

In Québec, "trade" is not defined in the *Securities Act* (Québec). This policy covers any activity in respect of a transaction of securities that may be the object of an order issued under paragraph 3 of section 265 of the *Securities Act* (Québec), other than cease trade orders that fall within the definition of failure-to-file cease trade order in Multilateral Instrument 11-103 *Failure-to-File Cease Trade Orders in Multiple Jurisdictions*.

PART 3 ISSUANCE AND REVOCATION OF A MANAGEMENT CEASE TRADE ORDER

Possible regulatory responses to a specified default

5. In the jurisdictions where the issuer is a reporting issuer, the CSA regulators will generally respond to a specified default by noting the issuer in default on their default lists. For more information about the CSA default lists, refer to CSA Notice 51-322 *Reporting Issuer Defaults*.

The CSA regulators will then generally respond to a specified default in one of two ways:

- (a) by issuing a failure-to-file cease trade order;
- (b) if an issuer applies under section 8, and demonstrates that it is able to comply with this policy, by issuing an MCTO.

For more information about failure-to-file cease trade orders refer to National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations in Multiple Jurisdictions*.

If the outstanding filing is expected to be filed relatively quickly, the default is not expected to be recurring and the issuer meets the eligibility criteria outlined in section 6, an MCTO may be an appropriate response to the default.

If the issuer's principal regulator decides that an MCTO is appropriate, it will generally issue an MCTO that restricts the trading of the issuer's chief executive officer and chief financial officer. At the discretion of the principal regulator, it will similarly decide whether to extend it to the issuer's directors or other persons or companies. Since MCTOs are not covered by Multilateral Instrument 11-103 *Failure-to-File Cease Trade Orders in Multiple Jurisdictions*, the non-principal regulators in the jurisdictions in which the issuer is a reporting issuer will generally issue MCTOs in respect of persons or companies named in the principal regulator's MCTO that reside in their jurisdiction.²

Eligibility criteria

6. We will consider granting an MCTO if the issuer satisfies all of the following criteria:
- (a) the outstanding filings are expected to be filed as soon as they are available and within a reasonable period. In most cases, we expect this to be within 2 months. However, in exceptional circumstances, as determined by the principal regulator, we may permit an issuer to take longer than 2 months to remedy the default;
 - (b) 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;
 - (c) the issuer has the necessary financial and human resources, including a reasonable number of directors and officers in place, to remedy the default in a timely and effective manner and complies with all other continuous disclosure requirements (other than requirements reasonably linked to the specified default) for the duration of the default;
 - (d) 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;
 - (e) 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).

We will also consider an issuer's history of complying with its continuous disclosure obligations when evaluating the issuer's request for an MCTO. A reporting issuer subject to insolvency proceedings should also refer to section 14 for additional considerations.

² Management cease trade orders will be automatically reciprocated in jurisdictions that have a statutory reciprocal order provision as this term is defined in section 3 of National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations in Multiple Jurisdictions*. This automatic reciprocation will occur in these jurisdictions even where the issuer is not a reporting issuer.

Application timing

7. If an issuer satisfies the eligibility criteria set out above, it should contact its principal regulator at least 2 weeks before the due date for the required filings and apply in writing for an MCTO instead of a having a cease trade order issued against the issuer.

We believe that, in most cases, an issuer exercising reasonable diligence should be able to determine whether it can comply with a specified requirement at least 2 weeks in advance of the deadline. We acknowledge, however, that there will be rare situations where an issuer, notwithstanding the exercise of reasonable diligence, will be unable make this determination at least 2 weeks before the due date. In these rare cases, the issuer should include a brief explanation of the reasons for the delayed filing in its application.

We will generally not consider an application for an MCTO that is submitted after a filing deadline.

Application contents

8. An issuer that wishes to apply for an MCTO under this policy should apply to the issuer's principal regulator and send a copy of the application to each CSA regulator in the other jurisdictions in which the issuer is a reporting issuer.

In its application, the issuer should

- (a) identify the specified default, the reasons for the default and the anticipated duration of the default,
- (b) explain how the issuer satisfies each of the eligibility criteria described in section 6,
- (c) set out a detailed remediation plan that explains how the issuer proposes to remedy the default and includes a realistic timetable for remedying the default,
- (d) include consents signed by the chief executive officer and the chief financial officer (or equivalent) to the issuance of an MCTO (see Appendix A),
- (e) include a copy of the proposed or actual default announcement,
- (f) confirm that the issuer will comply with the alternative information guidelines,
- (g) include a copy of the issuer undertaking described in section 13, and
- (h) briefly describe the issuer's blackout policies and other policies and procedures relating to insider trading.

Alternative Information Guidelines – Default Announcement

9. If a reporting issuer determines that it will not comply, or subsequently determines that it has not complied, with a specified requirement, this will often represent a material change that the issuer should immediately communicate to the securities marketplace by way of a news release and material change report in accordance with part 7 of National Instrument 51-102 *Continuous Disclosure Obligations*. In determining whether a failure to comply with a specified requirement is a material change, the issuer should consider both the events leading to the failure and the failure itself.

If neither the circumstances leading to the default, nor the default, represent a material change, the issuer should nevertheless consider whether the circumstances involve important information that should be immediately communicated to the marketplace by way of news release.

The CSA regulators will generally not exercise their discretion to issue an MCTO unless the issuer issues and files a default announcement containing the information set out below. If the default involves a material change, the material change report may contain this information, in which case a separate default announcement is not necessary. The default announcement should be authorized by the chief executive officer or the chief financial officer (or equivalent) of the reporting issuer, approved by the board or audit committee and prepared and filed with the CSA regulators on SEDAR in the same manner as a news release and material change report referred to in part 7 of National Instrument 51-102 *Continuous Disclosure Obligations*. An issuer will usually be able to determine that it will not comply with a specified requirement at least 2 weeks before the due date and, as soon as it makes this determination, should issue the default announcement.

The default announcement should

- (a) identify the relevant specified requirement and the (anticipated) default,
- (b) disclose in detail the reason(s) for the (anticipated) default,
- (c) disclose the plans of the reporting issuer to remedy the default, including the date it anticipates remedying the default,
- (d) confirm that the reporting issuer intends to satisfy the provisions of the alternative information guidelines so long as it remains in default of a specified requirement,
- (e) disclose relevant particulars of any insolvency proceeding to which the reporting issuer is subject, including the nature and timing of information that is required to be provided to creditors, and confirm that the reporting issuer intends to file with the CSA regulators throughout the period in which it is in default, the same information it provides to its creditors when the information is provided to the creditors and in the same manner as it would file a material change report under part 7 of National Instrument 51-102 *Continuous Disclosure Obligations*, and
- (f) subject to section 11, disclose any other material information concerning the affairs of the reporting issuer that has not been generally disclosed.

A default announcement is not needed if the issuer is in default of a previous specified requirement, has followed the provisions of this section regarding a default announcement of that earlier default and is complying with the provisions of section 10 regarding default status reports.

Alternative Information Guidelines — Default Status Reports

10. After the default announcement, and during the period of the MCTO, the CSA regulators will generally exercise their discretion to issue a cease trade order unless the defaulting reporting issuer issues bi-weekly default status reports, in the form of news releases, containing the following information:

- (a) any changes to the information contained in the default announcement or subsequent default status reports that would reasonably be expected to be material to an investor, including a description of all actions taken to remedy the default and the status of any investigations into any events which may have contributed to the default;
- (b) particulars of any failure by the defaulting reporting issuer in fulfilling its stated intentions with respect to satisfying the provisions of the alternative information guidelines;
- (c) information regarding any (anticipated) specified default subsequent to the default which is the subject of the default announcement;

- (d) subject to section 11, any other material information concerning the affairs of the reporting issuer that has not been generally disclosed.

Where there are no changes otherwise required to be disclosed in items (a) to (d), this fact should be disclosed in a default status report.

To keep the market continuously informed of any developments during the period of default, the issuer should issue default status reports every 2 weeks following the default announcement. If a CSA regulator, at any time, issues a cease trade order against an issuer, default status reports will no longer be necessary.

Every default status report should be prepared, authorized, filed and communicated to the securities marketplace in the same manner as that specified in section 9 for a default announcement.

Confidential material information

11. The alternative information guidelines in this policy supplement the material change reporting requirements in National Instrument 51-102 *Continuous Disclosure Obligations* and should be interpreted in a similar manner. Similar to the procedures in that instrument, an issuer may omit confidential material information from default status announcement or default status reports 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 reporting issuer.

Compliance with other continuous disclosure requirements

12. The alternative disclosure described in sections 9 and 10 supplements the issuer's disclosure record during the period of default. It does not provide an alternative to the continuous disclosure requirements under Canadian securities legislation.

If a reporting issuer is in default of a specified requirement, the issuer must still comply with all other applicable continuous disclosure requirements, other than requirements reasonably linked to the specified requirement in question. For example, an issuer that has not filed its financial statements on time will also be unable to comply with the requirement to file management's discussion and analysis under National Instrument 51-102 *Continuous Disclosure Obligations*. However, failure to comply with a requirement to file audited financial statements in accordance with the requirements of part 4 of National Instrument 51-102 *Continuous Disclosure Obligations* does not excuse compliance with other requirements of that instrument such as the requirement to file an Annual Information Form in accordance with part 6 or material change reports in accordance with part 7.

Issuer undertaking to cease certain trading activities

13. The reporting issuer should include with the application an undertaking that, for so long as the issuer is in default of the specified requirement in question, the issuer will not, directly or indirectly, issue securities to or acquire securities from an insider or employee of the issuer except in accordance with legally binding obligations to do so existing as of the date of the specified default. The issuer should address the undertaking to the CSA regulator of each jurisdiction in which the issuer is a reporting issuer.

Reporting issuers subject to insolvency proceedings

14. If a reporting issuer is the subject of insolvency proceedings, we will consider an application for an MCTO if in addition to complying with all applicable sections of this policy, including the eligibility criteria in section 6,

- (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 agrees to file a report disclosing the information it provides to its creditors
 - (i) simultaneously with delivery to its creditors, and
 - (ii) in the same manner as a report of a material change referred to in part 7 of National Instrument 51-102 *Continuous Disclosure Obligations*.

If the issuer chooses to file the information provided to creditors with a material change report, then, for the purposes of filing on SEDAR, this should be contained in the same electronic document as the material change report.

Financial information in default announcements and default status reports

15. Any unaudited financial information that is communicated to the marketplace should, except in certain circumstances involving insolvency, be directly derived from financial statements prepared and presented in accordance with generally accepted accounting principles. In default announcements and default status reports, this information should be accompanied by cautionary language that the information has been prepared by management of the defaulting reporting issuer and is unaudited.

Default correction announcement

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

Revocation of a management cease trade order

17. Some MCTOs will include a provision which describes when the MCTO will automatically expire.

The process for revoking an MCTO that does not automatically expire by its terms is described in National Policy 12-202 *Revocations of Certain Cease Trade Orders*.

PART 4 OTHER CONSIDERATIONS

Trading by management and other insiders during the period of default

18. Certain guidelines regarding trading by management and other insiders during the period of default are set out in section 9 of National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations in Multiple Jurisdictions*.

No penalty or sanction for disclosure purposes

19. The CSA regulators do not consider MCTOs issued under this policy to be a "penalty" or "sanction" for the purposes of disclosure obligations in Canadian securities legislation relating to penalties or sanctions. They are not issued as part of an enforcement process and the CSA regulators do not intend them to suggest a finding of fault or wrongdoing on the part of any individual named in the MCTO. For example, a defaulting issuer's board of directors might invite an individual to serve as an officer or director of the issuer to assist the issuer in remedying its default. The individual might have no prior involvement with the defaulting reporting issuer. The fact that the principal regulator may subsequently name the individual in an MCTO does not mean the individual had any responsibility for the default, which occurred before the individual joined the issuer.

However, issuers are required to disclose MCTOs issued under this policy in accordance with the following disclosure requirements:

- (a) Section 16.2 of Form 41-101F1 *Information Required in a Prospectus*;
- (b) Item 16 of Form 44-101F1 *Short Form Prospectus*;
- (c) Subsection 10.2(1) of Form 51-102F2 *Annual Information Form*;
- (d) Item 7.2 of Form 51-102F5 *Information Circular*.

If an issuer is required to include disclosure of an MCTO in a public filing, the issuer may supplement the disclosure with additional information explaining the circumstances of the MCTO.

PART 5 EFFECTIVE DATE

20. National Policy 12-203 *Cease Trade Orders for Continuous Disclosure Defaults* is withdrawn and replaced by this policy.

21. This policy comes into effect on June 23, 2016.

APPENDIX A
SAMPLE FORM OF CONSENT

Consent

To: *[Name of Issuer's Principal Regulator]*, as principal regulator (the Regulator),

And to: *[Name(s) of other Regulator(s) in whose jurisdiction(s) the Issuer is a reporting issuer (collectively with the principal regulator, the Regulators)]*

Re: Consent to issuance of management cease trade order

I, *[name of individual providing the consent]* hereby confirm as follows:

1. I am the *[name of position with the Issuer, e.g., the chief executive officer or chief financial officer]* of *[name of Issuer]* (the Issuer).
2. The Issuer is a *[nature of entity, e.g., a corporation incorporated under the Canada Business Corporations Act]* with a head office located in *[province or territory]*.
3. The Issuer is a reporting issuer in *[identify all jurisdictions in which the issuer is a reporting issuer]*. The Issuer's principal regulator, as determined in accordance with section 13 of National Policy 11-207 *Failure-to-File Cease Trade Orders in Multiple Jurisdictions* is *[name of principal regulator]*.
4. The Issuer *[is] [is not] [delete as applicable]* a "venture issuer" as defined in National Instrument 51-102 *Continuous Disclosure Obligations*. The Issuer has a financial year ending *[state the issuer's year end, e.g., December 31]*.
5. On or about *[identify the deadline for filing]* (the filing deadline), the Issuer will be required to file *[briefly describe the required filings, e.g.,*
 - a. *audited annual financial statements for the year ended December 31, 2014, as required by Part 4 of National Instrument 51-102 Continuous Disclosure Obligations;*
 - b. *management's discussion and analysis (MD&A) relating to the audited annual financial statements, as required by Part 5 of National Instrument 51-102 Continuous Disclosure Obligations; and*
 - c. *CEO and CFO certificates relating to the audited annual financial statements, as required by National Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings (collectively, the required filings)]*.
6. The Issuer has determined that it may not be able to make the required filings by the filing deadline. The Issuer wishes to apply to the Regulators] for a management cease trade order (an MCTO) as an alternative to a general cease trade order in accordance with National Policy 12-203 *Management Cease Trade Orders*.
7. I am providing this consent in support of the Issuer's application for an MCTO in accordance with section 8 of National Policy 12-203 *Management Cease Trade Orders*.
8. I hereby consent to the issuance of an MCTO against me by the Issuer's principal regulator under the applicable statutory authority listed in Annex A to National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations in Multiple Jurisdictions*.
9. Specifically, I understand that the MCTO will prohibit me from trading in or acquiring securities of the Issuer, directly or indirectly, until two full business days following the receipt by the principal regulator of all filings the Issuer is required to make under the securities legislation of the principal regulator or until further Order of the principal regulator.

10. I hereby further consent to the issuance of any substantially similar MCTO that another regulator may consider necessary to issue by reason of the default described above.

DATED this _____ day of [DATE]

by: _____

Name:

Title:

Amended •