

## Proposed Changes to National Policy 12-203

### The following are proposed changes to National Policy 12-203 *Cease Trade Orders for Continuous Disclosure Defaults*

#### 1. Proposed changes to subsection 1.2 (c)

1.2 What is the scope of the policy? —

(c) MCTOs issued under this policy are not a "penalty" or "sanction" for disclosure purposes — 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 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 PR 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:

- Section 16.2 of Form 41-101F1 *Information Required in a Prospectus*,
- **Section 16.1 of Form 41-101F4 *Information Required in a Venture Issuer Prospectus***,
- Item 16 of Form 44-101F1 *Short Form Prospectus*,
- Subsection 10.2(1) of Form 51-102F2 *Annual Information Form*, and
- **Subsection 29(3) of Form 51-103F1 *Annual and Mid-Year Reports***,
- Subsection 7.2 of Form 51-102F5 **Information Circular**, and
- **Subsection 14(1) of Form 51-103F4 *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.

#### 2. Proposed changes to the definition of "specified requirement" in section Part 2

"specified requirement" means the requirement to file within the time period prescribed by securities legislation

- (a) annual financial statements;

(b) an interim financial report;

(c) annual or interim management's discussion and analysis (MD&A) or annual or interim management report of fund performance (MRFP);

(d) annual information form (AIF);

**(d.1) annual report,**

**(d.2) mid-year report,** or

(e) certification of filings under National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*.

### 3. **Proposed changes to section 4.3**

4.3 Alternative information guidelines — Default Announcement — 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 NI 51-102 *Continuous Disclosure Obligations* **(NI 51-102) or part 6 of NI 51-103 Ongoing Governance and Disclosure Requirements for Venture Issuers (NI 51-103), as applicable**. 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 the circumstances leading to the default, or the default, do not 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 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 CEO or the CFO (or equivalent) of the reporting issuer, be approved by the board or audit committee and be 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 NI 51-102-~~102~~**102 or part 6 of NI 51-103, as applicable**. 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 and, as soon as it makes this determination, should issue the default announcement.

The default announcement should:

- (i) identify the relevant specified requirement and the (anticipated) default;
- (ii) disclose in detail the reason(s) for the (anticipated) default;
- (iii) disclose the current plans of the reporting issuer to remedy the default, including the date it anticipates remedying the default;
- (iv) 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;
- (v) 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 NI 51-102 or part 6 of NI 51-103, as applicable; and
- (vi) subject to section 4.5 of this policy, 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 section 4.3 regarding a default announcement of that earlier default and is complying with the provisions of section 4.4 regarding default status reports.

#### **4. Proposed changes to section 4.5**

4.5 Confidential material information — The alternative information guidelines in this policy supplement the material change reporting requirements in NI 51-102 and NI 51-103 and should be interpreted in a similar manner. Similar to the procedures in NI ~~51-102, 102 and 51-103~~, 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.

#### **5. Proposed changes to section 4.6**

4.6 Compliance with other continuous disclosure requirements — The alternative disclosure described in sections 4.3 and 4.4 of this policy supplement 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 NI 51-102. However, failure to comply with a requirement to file audited financial statements in accordance with the requirements of part 4 of NI 51-102 does not excuse compliance with other requirements of NI 51-102 such as the requirement to file an Annual Information Form in accordance with part 6 of NI 51-102 or material change reports in accordance with part 7 of NI 51-102. **The same holds true for venture issuers subject to the requirements in NI 51-103; if a venture issuer is in default of a specified requirement, it must still comply with all other continuous disclosure requirements.**

6. **Proposed changes to sections 4 and 5 of Appendix C -Sample Form of Consent**

4. The Issuer [*is*] [*is not*] [*delete as applicable*] a "venture issuer" as defined in National Instrument 51-102 ~~*Continuous*~~ **103 Ongoing Governance and Disclosure Obligations Requirements for Venture Issuers** (NI 51-102**103**). 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. **annual report, as required by section 7 of NI 51-103;***

***b.** audited annual financial statements for the year ended December 31, 2007, as required by Part 4 of NI 51-102;*

***bc.** management's discussion and analysis (MD&A) relating to the audited annual financial statements, as required by Part 5 of NI 51-102; and*

***ed.** 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).*