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May 28, 2008

By Email

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Autorité des marchés financiers
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Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Saskatchewan Financial Services Commission

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Dear Sirs/Mesdames:

Re: Proposed National Policy 12-203 *Cease Trade Orders for Continuous Disclosure Defaults* – Request for Comment

This submission is made by the Business Law Section of the Ontario Bar Association (OBA) in response to the request for comment published March 28, 2008 by the Canadian Securities Administrators (CSA) regarding proposed National Policy 12-203 *Cease Trade Orders for Continuous Disclosure Defaults* ("NP 12-203"). This letter was prepared by members of the Securities Law Subcommittee of the OBA Business Law Section.

We are generally supportive of the proposed adoption of a consistent national policy with respect to cease trade orders for continuous disclosure defaults, and our comments are limited to two of its provisions. First, we are concerned that the issuance of a general cease trade order (a "general CTO") in response to a specified default – unless the issuer applies in writing for a management cease trade order (an "MCTO") at least two weeks

before a potential default – will result in an increased administrative burden for issuers and regulators and increased market disruptions from the greater incidence of general CTOs. We question whether the severe consequence of a general CTO is warranted as an initial response to a default. We submit that investors' interests have been adequately protected under the current regime, where a general CTO would only be triggered by a continuing default, following the imposition of an MCTO. Second, we question the necessity of item #9 in the sample form of consent, which would prohibit an individual from trading in or acquiring an issuer's securities until two full business days after the required filings are made or until further order of the principal regulator.

Two-week advance MCTO application

If adopted, this aspect of proposed NP 12-203 would be substantially more onerous for issuers than the corresponding provisions of OSC Policy 57-603 and CSA Staff Notice 57-301, which together provide that:

- An MCTO is generally issued as a consequence of a default, with the regulators considering issuing a general CTO if the issuer fails to satisfy the alternative information guidelines or the default continues for more than two months, and

- Issuers should contact their principal regulator at least two weeks before a potential default to request an MCTO instead of a general CTO, but even if such a request is not made, the regulators may issue an MCTO instead of a CTO if they believe it is appropriate.

We do not believe that it is typically the case that, as stated in proposed NP 12-203, 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". On the contrary, in our experience it is sometimes very difficult for an issuer to know even days in advance of a filing due date that a default will occur. Often, a failure to file on time is caused by the late identification of a problem with the issuer's financial statements or other disclosure, or by delays in the completion of the audit process, the resolution of which requires input from third parties (including the issuer's auditors and counsel). In addition, issues may be identified closer to filing deadlines where auditors are engaged to review an issuer's interim financial statements – an increasingly common practice for Canadian reporting issuers (in comparison to the annual audit process, an issuer will typically have less advance contact with its auditor in the course of preparing the interim financial statements). This risk of last-minute difficulties may also be compounded in 2009 by the implementation of the proposed new certification and disclosure requirements pertaining to internal control over financial reporting under National Instrument 52-109.

We believe that the proposed NP 12-203 framework may lead issuers to file "precautionary" applications to avoid triggering a general CTO if there is any possibility of a delay in completing required filings. Such applications would result in a significant administrative burden for issuers and securities regulators. In particular, requiring issuers

to have prepared a detailed remediation plan for inclusion in the MCTO application two weeks before a potential default may be problematic – given that, during this same period, management will no doubt be very busy trying to resolve outstanding issues in the hope of avoiding a default in the first place. Issuers may also face challenging disclosure issues in making such "precautionary" applications, in determining whether the making of such an application is a material fact requiring a press release. Such a release may be premature, if the application is being filed out of an abundance of caution – but could result in increased trading activity and a significant effect on the market price or value of the issuer's securities in anticipation of a default that never comes to pass.

In light of our concerns with the two-week advance application requirement, we suggest the following changes to proposed NP 12-203:

- Issuers should be required to notify the regulators and issue a default announcement immediately upon management having a reasonable expectation that a filing deadline will not be met, but in any case no later than the due date of the filing;

- Upon a specified default, an MCTO should generally be issued for a two-week period, after which it would automatically be converted into a general CTO unless the issuer files an application to maintain the MCTO; and

- The application to maintain the MCTO would contain the same information currently proposed in NP 12-203 for MCTO applications.

We believe providing issuers with a short grace period to prepare the MCTO application and remediation plan after a default occurs and before a general CTO is issued represents an appropriate balance between the competing objectives of maintaining liquidity and preventing trading in issuers' securities without sufficient secondary market disclosure. OSC Policy 57-603 rightly acknowledges the importance of maintaining liquidity in the secondary markets (if possible) for a modest time period following a default. We do not believe that investors, issuers or the capital markets will benefit from the more stringent approach proposed in NP 12-203.

Trading blackout for two business days after filings are made

Item #9 in the proposed sample form of consent would prohibit individuals from trading in or acquiring an issuer's securities until two full business days after the required filings are made or until further order of the principal regulator. We presume that the objective of this provision is to provide sufficient time for capital markets participants to review and react to new material information that may be disclosed in filings made to remedy a default before trading by insiders is permitted. While that objective has merit, we nonetheless believe that the provision is overly restrictive and inconsistent with the principles set out in National Policy 51-201 *Disclosure Standards* ("NP 51-201").

We are not aware of any provision in securities legislation, rules or policies that imposes a defined waiting period to permit the absorption of information by the market before

insiders are permitted to trade. NP 51-201 encourages issuers to adopt a case-by-case approach to determining when material information may be considered to have been "generally disclosed" – and any insider or other employee of an issuer subject to an MCTO or general CTO would presumably be subject to the respective issuers' policies that govern trading following the dissemination of material information. In the case of an MCTO being lifted, any new material information will be publicly filed on SEDAR and capital markets participants would have been made aware of its upcoming release through the issuer's bi-weekly updates. In these circumstances, where information is being broadly disseminated to a ready and waiting market, and given today's speed of information transmission through electronic means, we believe a two business day holding period is unnecessary, as well as being unfairly restrictive for persons with no involvement in a particular default nor knowledge of material undisclosed information.

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We appreciate this opportunity to comment on the proposed NP 12-203. If you have any questions, please direct them to Glen Johnston (416-865-8146, grjohnson@torys.com) or Richard Lococo (416-926-6620, richard_lococo@manulife.com).

Yours truly,

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