Chapter 5

Rules and Policies

5.1.1 NP 12-203 Cease Trade Orders for Continuous Disclosure Defaults

NOTICE OF NATIONAL POLICY 12-203
CEASE TRADE ORDERS
FOR CONTINUOUS DISCLOSURE DEFAULTS

Introduction

The Canadian Securities Administrators (CSA regulators or we), have adopted National Policy 12-203 *Cease Trade Orders for Continuous Disclosure Defaults* (the Policy). The Policy provides guidance to reporting issuers, investors and market participants as to how we will generally respond to certain types of continuous disclosure defaults.

Background

On March 28, 2008, we published a proposed version of the Policy for comment. During the comment period, which ended on May 27, 2008, we received four comment letters. We thank the commenters for their submissions.

We have considered the comments and are publishing a summary of comments and responses as Appendix A to this notice. The summary includes the names of the commenters, a summary of their comments and our response. After considering the comments, we have made a number of minor changes to the version of the Policy that we published for comment. However, as these changes are not material, we are not republishing the Policy for a further comment period.

Substance and Purpose

The Policy

- modernizes, harmonizes and streamlines our existing practices relating to cease trade orders (CTOs) including general CTOs and management cease trade orders (MCTOs);
- provides guidance for issuers as to the circumstances in which the CSA regulators will issue a general CTO or an MCTO;
- explains factors the CSA regulators will consider when evaluating an application for an MCTO; and
- describes what other actions issuers need to undertake if we issue an MCTO.

The Policy replaces:

- CSA Staff Notice 57-301 – *Failing to File Financial Statements on Time – Management Cease Trade Orders*;
- CSA Staff Notice 57-303 – *Frequently Asked Questions Regarding Management Cease Trade Orders Issued as a Consequence of a Failure to File Financial Statements;* and
- Ontario Securities Commission Policy 57-603 – *Defaults by Reporting Issuers in Complying with Financial Statement Filing Requirements*.

These instruments have been rescinded with the adoption of the Policy.

Summary of the Policy

The Policy provides guidance as to how the CSA regulators will ordinarily respond to a specified default (as defined in part 2 of the Policy) by a reporting issuer. This response will usually be the issuer's principal regulator issuing either a general CTO or an MCTO.

The Policy describes the criteria the CSA regulators will apply when assessing whether to issue a general CTO or an MCTO and outlines what an issuer needs to include in its application for an MCTO. The Policy also describes what information an issuer must file during the period of an MCTO to support informed trading.

The Policy recommends that issuers monitor trading by management and other insiders during the period of default and reminds insiders of their trading prohibitions under securities legislation. Finally, the Policy discusses the effect of a CTO issued by a CSA regulator in one jurisdiction on trading in another jurisdiction.

Unpublished materials

In developing the Policy, we have not relied on any significant unpublished study, report, decision or other written materials.

Questions

Please refer your questions to any of:

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Appendix A
Summary of Comments
List of commenters

Commenter	Signatory	Date of Comment Letter
Market Regulation Services Inc.	Felix Mazer Policy Counsel Market Policy and General Counsel's Office	May 15, 2008
Ontario Bar Association Business Law Section Securities Law Subcommittee	Greg Goulin President Ontario Bar Association Paul J. Stoyan Chair, Business Law Section Ontario Bar Association	May 28, 2008
Research Capital	Vanessa M. Gardiner Director, Senior Vice-President and Chief Compliance Officer	April 15, 2008
Securities Transfer Association of Canada	William Speirs President	May 22, 2008

Copies of the original comment letters are available for review at the following websites:

- www.osc.gov.on.ca

Summary of comments

	Summary of comment	CSA response
A. General comments		
Adoption of a national policy relating to cease trade orders for continuous disclosure defaults	One commenter was generally supportive of the proposed adoption of a consistent national policy with respect to cease trade orders for continuous disclosure defaults. One commenter was generally in support of the policy and agreed that CTOs should be issued using mutual reliance principles. The commenter believed this will go a long way to harmonizing the treatment and administration of CTOs. This commenter also liked the concept of MCTOs which places responsibility and accountability on the management of an issuer while allowing investors to continue to trade. The other commenters did not express a view.	We thank the commenters for their support.
Concerns with the CTO database administered by the CSA	One commenter, although generally supportive of the policy, expressed concern with the ability of the investment dealer community to play its customary gatekeeper role given certain perceived deficiencies with the existing CSA database for CTOs. The commenter noted that the database lacks fields for certain information contained in certain CTOs including the names of persons restricted by the CTO, in the case of an MCTO. The commenter further noted that dealers are generally unable to block certain trading for issuers and individuals subject to CTOs, particularly where the issuer also trades on a foreign market, such as the U.S. OTC Bulletin Board market. The commenter also raised concerns relating to the integrity of the information in the CTO database. These concerns include the following: • In the CTO database, CUSIP numbers are not provided for all issuers. • CTO database names are not normalized, consistent or accurate. • Concerns relating to the manner in which information relating to MCTOs is entered into the database. The commenter provided some suggestions as to how the entering of this information into the database could be improved.	We have not made any changes to the policy in response to this comment as the comment is primarily focused on concerns with the CSA CTO database rather than the policy. However, CSA staff will consult with the commenter and other representatives of the dealer community to consider improvements to the CSA CTO database.

B. Specific comments		
Section 3.2 Why do we issue cease trade orders in response to a specified default?	One commenter requested that the Commissions consider implementing a system to allow investors who had purchased securities prior to the imposition of the CTO to register securities during the period the cease trade is in effect. The commenter noted that, at this time, these transactions are rejected by the transfer agents to ensure there is no possibility of their contravening the CTO. This situation comes up often when requests for transfer come in via the mail from locations outside the city in which the issuer's transfer agent is located. In these situations the seller has obtained payment and remains the "registered" holder while the purchaser is not able to register the securities in their name until the CTO is lifted. The other consideration is for investors to register securities prior to the record or effective date for an upcoming corporate event, assuming the CTO would not prevent the event or transaction from taking place. For example, a purchaser who is not able to register the securities may be left with having to claim their entitlement from the seller on an event such as a stock split. The commenter noted that some time ago securities legislation provided a mechanism whereby a transfer could be presented with an affidavit from the transferee/broker/beneficial owner; provided it was complete and properly executed, it would allow the transfer agent to process the transfer during the CTO. The commenter attached copies of these forms to this comment letter for information purposes.	We have not made any changes to the policy in response to this comment. Where a *bone fide* sale has occurred (i.e., beneficial ownership has passed from the investor to a subsequent purchaser) prior to the imposition of a CTO, but the transfer has not been registered by the time of the imposition of a CTO, we believe it is acceptable for the transfer agent to proceed to register the transfer. We would generally not consider the act of a transfer agent processing a transfer request, made in good faith and not as part of a plan or scheme to evade requirements of securities legislation, as constituting a trade prohibited by the CTO, where there was reasonable evidence (such as a sworn affidavit) to support the conclusion that the trade had in fact occurred prior to the date of imposition of the CTO. However, the securities that are the subject of the transfer request may remain subject to the CTO depending on the terms of the CTO.
Section 4.2 Contents of application (Expectation that the application should be filed at least two weeks in advance of the filing deadline)	One commenter expressed concern that the issuance of a general CTO in response to a specified default – unless the issuer applies in writing for 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. The commenter believed that this aspect of proposed NP 12-203 would make the proposed application process under the policy substantially more onerous for issuers than under the current process described in OSC Policy 57-603 and in CSA Staff Notice 57-301. The commenter believed that, under the current regime, a general CTO would only be triggered by a continuing default, following the imposition of an MCTO.	The application process described in Part 4 of proposed NP 12-203 is generally similar to the current process described in OSC Policy 57-603 and in CSA Staff Notice 57-301. In particular, both Part 3 of OSC Policy 57-603 and CSA Staff Notice 57-301 currently provide that an eligible issuer should contact its principal regulator at least two weeks before the filing deadline and request that an MCTO be issued rather than a general CTO. They also describe the necessary supporting materials that should be included with the request, including an affidavit identifying the persons to be named in the MCTO. Accordingly, we do not believe the application process described in proposed

	The commenter indicated that they do not believe that it is typically the case 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 commenter stated that, in their 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). The commenter believed 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 these concerns with the two-week advance application requirement, the commenter suggested 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	NP 12-203 would represent a substantial change from current practice or result in a greater incidence of general CTOs. In addition, it is not currently the general practice of the CSA to a) issue a cease trade order only after "a continuing default" or b) issue a general CTO only following the imposition of an MCTO. Regulators may issue general CTOs immediately following a default. We have considered the comment relating to situations in which an issuer will be unable to determine whether it can comply with a specified requirement at least two weeks before its due date. We acknowledge that there will be situations where an issuer, notwithstanding the exercise of reasonable diligence, will be unable to determine whether it can comply with a specified requirement at least two weeks before its due date. Accordingly, we have amended the policy to reflect the commenter's concern. However, we believe that, in most cases, an issuer exercising reasonable diligence should be able to make this determination at least two weeks in advance of the deadline. The Canadian securities regulators will consider all relevant facts and circumstances in considering applications under the policy. If it is the case that an issuer could not, notwithstanding the exercise of reasonable diligence, make this determination at least two weeks before its due date, the issuer should include a brief explanation of the reasons for the delayed filing in its application.

	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. The commenter believed that 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.	
Part 6 – Effect of a CTO issued by a regulator in one jurisdiction on trading in another jurisdiction (Interaction with the RS Universal Market Integrity Rules (UMIR))	One commenter RS explained its role as a regulation services provider, including its role in administering and enforcing trading rules for the marketplaces it regulates. The commenter noted that, under its trading rules, if a Commission issues a general CTO, no order for the purchase or sale of a security may be executed on a marketplace or over-the-counter market governed by its trading rules. However, the trading rules do not recognize the concept of an MCTO and RS would not impose a regulatory halt in connection with an MCTO. RS further noted that, under its rules, any order entered on a marketplace must contain a marker that identifies the order as being entered on behalf of an insider. However, RS does not have the capacity to further distil trading by insiders named in an MCTO as opposed to insiders generally. RS expressed concern that the current text of Part 6 may provide a misleading description of the effect of a CTO with respect to the ability to trade in a security that is listed or quoted on a marketplace governed by its trading rules. RS suggested that language be added to make it clear that certain market participants may be subject to restrictions imposed by self-regulatory organizations including any exchange of which they are a member or a QTRS of which they are a user. RS further explained its process for imposing a regulatory halt as a result of the imposition of a general CTO. If a Commission issues a CTO with respect to an issuer whose securities are traded on a marketplace, RS imposes a regulatory halt on trading of those securities on all marketplaces for which RS serves as the regulation services provider. Such action is taken whether or not that commission that issued the CTO is the PR of the issuer. Once a regulatory halt has been imposed, no person	We thank the commenter for the comment and believe this provides a useful summary of the operation of the commenter's trading rules and the interaction of these rules with the CTO regime described in NP 12-203. We have revised Part 6 of proposed NP 12-203 in consultation with RS to clarify certain aspects of the policy that the commenter believed were unclear. CSA staff will continue to consult with RS to address any ongoing concerns.

	subject to UMIR may trade those securities on a marketplace, over-the-counter or on a foreign organized regulated market. Notwithstanding that the PR or another securities commission rescinds its CTO, the regulatory halt imposed by RS on all marketplaces for which RS serves as the regulation services provider will continue until all CTOs have been rescinded. RS noted that Part 6 of the Policy essentially provides a "yellow light" warning when conducting a trade off-marketplace or on a foreign organized regulated market in a security that is subject to a CTO. RS wished to emphasize that, in fact, its trading rules preclude such trading in many circumstances and was concerned that the cautionary nature of this Part of the Policy may be interpreted as providing an "over-ride" of the prohibitions imposed by its trading rules.	
Sample Form of Consent Appendix C	One commenter noted that 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. The commenter presumed that the objective of this provision was 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. The commenter felt that, while that objective had merit, the provision was overly restrictive and inconsistent with the principles set out in National Policy 51-201 *Disclosure Standards* ("NP 51-201"). 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". 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, a two business day holding period was unnecessary, as well as being unfairly restrictive for persons with no involvement in a particular default nor knowledge of material undisclosed information.	In certain jurisdictions, the current form of MCTO generally prohibits all trading in and all acquisitions of securities of the issuer until two business days following the receipt of all filings the issuer is required to make under applicable securities legislation. The reference to "two business days" in item 9 of the sample form of consent is intended to be consistent with this form. We generally agree with the commenter's description of the objective of this provision and the appropriate analysis for determining when material information may be considered to have been "generally disclosed". As part of an implementation strategy, CSA staff intend to review the forms of CTO and MCTO that are currently in use to determine whether they can be further harmonized. To the extent the current form of order is modified, we will accept corresponding modifications to the form of consent. We will also consider requests for a modification of this language on a case-by-case basis where the issuer is able to demonstrate that it is reasonable to consider information has been generally disclosed within a shorter time frame.

NATIONAL POLICY 12-203
CEASE TRADE ORDERS
FOR CONTINUOUS DISCLOSURE DEFAULTS

Part 1 – Introduction

1.1 What is the purpose of the policy?

This policy provides guidance to issuers, investors and other market participants as to how the Canadian Securities Administrators (CSA or we) will generally respond to certain types of serious continuous disclosure defaults (referred to as specified defaults in this policy) by a reporting issuer.

The policy provides guidance on the following questions:

1. When will a CSA securities regulatory authority or regulator (a CSA regulator) respond to a specified default by issuing a cease trade order (CTO)? What do we mean by the term "CTO"? Why do we issue CTOs?

2. When will a CSA regulator respond to a specified default by issuing a management cease trade order (MCTO)? What do we mean by the term "MCTO"? Why do we issue MCTOs?

3. If a CSA regulator issues an MCTO, what other actions will we ordinarily take in these circumstances? What do we expect from defaulting reporting issuers in these circumstances?

The guidance in this policy represents general guidance only. Each CSA regulator will decide how to respond to a specified default, including whether to issue a CTO (and if so, whether to issue a general CTO or an MCTO), on a case-by-case basis after considering all relevant facts and circumstances.

1.2 What is the scope of the policy?

(a) Application

This policy describes how the CSA regulators will ordinarily respond to a specified default by a reporting issuer. The term "specified default" is defined in part 2 of this policy and is based on the harmonized list of deficiencies developed by the CSA and described in CSA Notice 51-322 *Reporting Issuer Defaults* (CSA Notice 51-322). This notice describes the list of deficiencies that will generally result in a reporting issuer being noted in default of the securities laws of a particular jurisdiction.

The definition of "specified default" does not include certain defaults described in CSA Notice 51-322, 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* (NI 43-101) or National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities* (NI 51-101).

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 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 if a reporting issuer has made a required filing but the required filing is deficient in terms of content (a content deficiency). Examples of content deficiencies are set out in section 2 of CSA Notice 51-322.

(b) Mutual reliance principles

In deciding how to respond to a specified default, the CSA regulators will generally follow principles of mutual reliance. The issuer's principal regulator (PR) will normally be the one to decide whether to issue a CTO. The determination as to which regulator will act as PR will be based upon the principles set out in part 3 of National Policy 11-203 *Process for exemptive relief applications in multiple jurisdictions* (NP 11-203). This means that the PR will usually be the regulator in the jurisdiction where the reporting issuer's head office is located.

An issuer that wishes to apply for an MCTO under this policy must apply in the issuer's PR jurisdiction and send a copy of the application to the non-principal regulators in each other jurisdiction in which it is a reporting issuer. The issuer's PR will determine whether to issue a general CTO or an MCTO and, in the case of the latter, the appropriate scope of the MCTO. Non-principal regulators will ordinarily make the same decision as the PR on these questions. However, each regulator may still impose a general CTO if it believes it is appropriate.

(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,*
- Item 16 of Form 44-101F1 *Short Form Prospectus*,
- Subsection 10.2(1) of Form 51-102F2 *Annual Information Form*, and
- Subsection 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.

(d) Regulators may consider other action, including enforcement action

If a reporting issuer is in default of a continuous disclosure requirement, the CSA regulators may also consider taking enforcement action against the reporting issuer, the directors and officers of the reporting issuer, or any other responsible party. Accordingly, nothing in this policy should be interpreted as limiting the discretion of the CSA regulators in responding to such a default through enforcement action.

Part 2 – Definitions and Interpretation

In this policy:

"alternative information guidelines" means the guidelines relating to a default announcement and default status report described in part 4 of this policy;

"cease trade order" and "CTO" mean an order under a provision of Canadian securities legislation, set out in Appendix A, that prohibits trading in securities of a reporting issuer, whether direct or indirect, by the persons or companies identified in the order, for such period as is specified in the order**;**

"default announcement" means a news release and report as described in section 4.3 of this policy;

"default status report" means a news release as described in section 4.4 of this policy;

"management cease trade order" and "MCTO" mean a CTO issued under this policy that prohibits trading in securities of a reporting issuer, whether direct or indirect, by

(a) the chief executive officer (CEO) of the reporting issuer,

(b) the chief financial officer (CFO) of the reporting issuer,

(c) at the discretion of the PR, the members of the board of directors of the reporting issuer or other persons or companies who had, or may have had, access directly or indirectly to any material fact or material change with respect to the reporting issuer that has not been generally disclosed, and

(d) in the case of a reporting issuer that does not have a CEO, CFO and/or a board of directors, individuals who perform similar functions to any of such positions;

"principal regulator" and "PR" mean an issuer's principal regulator as determined in accordance with part 3 of National Policy 11-203 *Process for exemptive relief applications in multiple jurisdictions* (NP 11-203).

"specified default" means a failure by a reporting issuer to comply with a specified requirement; and

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

(a) annual financial statements;

(b) interim financial statements;

(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); or

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

In certain jurisdictions, the CSA regulators may issue cease trade orders and management cease trade orders that prohibit both trading in and acquisitions of securities of a reporting issuer. In these jurisdictions, references in this policy to a "trade" refers to both a trade in or acquisition of securities of the reporting issuer.

In Quebec, "trade" is not defined in the *Securities Act* (QSA). This policy covers all securities transactions that may be the object of an order provided for in paragraph 3 of section 265 of the QSA.

Part 3 – Regulatory responses to a specified default

3.1 Issuance of a general CTO or an MCTO

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

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

- The issuer's PR may issue a CTO.
- Alternatively, if an issuer applies under part 4 of this policy, and demonstrates that it is able to comply with this policy, the issuer's PR may issue an MCTO instead.

The issuer's PR will decide whether to proceed with a CTO (including whether to issue an MCTO) after considering the principles, factors and criteria described in part 4 of this policy and any other facts and circumstances the PR considers relevant. If the issuer's PR decides an MCTO is appropriate, it will similarly decide whether to extend it to the issuer's board of directors or other persons or companies.

If the issuer's PR issues a CTO, the non-principal regulators in the jurisdictions in which the issuer is a reporting issuer will generally issue similar CTOs to ensure the CTO is effective in their jurisdictions. If the issuer's PR issues an MCTO, the non-principal regulators in the jurisdictions in which the issuer is a reporting issuer will generally issue similar MCTOs in respect of persons or companies named in the MCTO who reside in their jurisdiction.

The CSA regulators will generally not grant exemptive relief to a reporting issuer to extend a continuous disclosure filing deadline to enable an issuer to avoid a default. The deadlines relating to the specified requirements represent the CSA's view as to reasonable and appropriate deadlines that should apply to reporting issuers in a consistent manner. While we recognize that issuers may sometimes face difficulties in complying with filing deadlines due to circumstances beyond their control, we do not believe it is appropriate to vary a filing deadline simply to allow an issuer to avoid being in default. The CSA regulators will consider the issuer's circumstances in deciding what action, if any, is appropriate to respond to a default.

If a defaulting reporting issuer is insolvent and is the subject of a stay of proceedings or similar order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, or the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, or similar legislation, the CSA regulators will generally note the issuer in default but take no other action until the relevant stay is lifted, provided the issuer complies with the alternative information guidelines. In situations where this is not the case, or where the default is expected to continue for an extended period, the CSA regulators will determine whether further action is warranted after considering all relevant factors and circumstances.

3.2 Why do we issue cease trade orders in response to a specified default?

Historically, if a reporting issuer has failed to comply with a specified requirement, such as the requirement to file audited annual financial statements, the CSA regulators have generally responded to this default by issuing a CTO.

The CSA regulators have historically taken this action for the following reasons:

- Without adequate continuous disclosure, there may not be sufficient information in the securities marketplace to properly support informed trading decisions regarding securities of the issuer.

- The integrity and fairness, or confidence in the integrity and fairness, of the capital markets, may be compromised if trading in securities of the reporting issuer is permitted to continue during the period of default (when there is heightened potential that some people may have access to information that would normally be reflected in the continuous disclosure document that the reporting issuer is in default of filing).

We acknowledge that a CTO can impose a burden on issuers and investors because

- existing investors are unable to sell their securities, and prospective investors are unable to purchase securities of the issuer, while the CTO remains in effect, and

- issuers are generally unable to access financing while the CTO remains in effect.

Nevertheless, if a reporting issuer is in default of a specified requirement, our overriding concern is generally investor protection. Investors and prospective investors should be able to make an informed investment decision about the securities of the defaulting reporting issuer.

The practice of responding to a specified default with a CTO has a significant positive effect on general compliance. The prospect of a CTO creates a strong incentive for the reporting issuer's management to ensure that the reporting issuer does not go into default. Similarly, the issuance of a CTO once the issuer is in default creates a strong incentive on the part of management to diligently rectify the filing default.

Finally, a CTO represents a rapid, public response by the CSA regulators to a serious continuous disclosure default by a reporting issuer. This sends a message to issuers and investors that filing deadlines are important and that there will be serious consequences for a failure to file, helping to preserve integrity and fairness in the securities marketplace.

Part 4 – Applications for an MCTO as an alternative to a general CTO

4.1 Eligibility criteria

A CTO is an appropriate response to a specified default that is not likely to be rectified within a relatively short time and where the circumstances leading 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.

If the outstanding filing is expected to be filed relatively quickly, and the default is not expected to be recurring, an MCTO may be an appropriate response to the default.

Issuers satisfying all of the following criteria are usually eligible for an MCTO:

- The outstanding filings will be filed as soon as they are available and within a reasonable period. In most cases, we expect this to be within two months. However, in exceptional circumstances, as determined by the PR, we may permit an issuer to take longer than two months to address the default.

- 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).

4.2 Contents of application

If an issuer satisfies the eligibility criteria set out above, it should contact its PR at least two weeks before the due date for the required filings and apply in writing for an MCTO instead of a general CTO against the issuer.

We acknowledge that there will be situations where an issuer, notwithstanding the exercise of reasonable diligence, will be unable to determine whether it can comply with a specified requirement at least two weeks before its due date. However, we believe that, in most cases, an issuer exercising reasonable diligence should be able to make this determination at least two weeks in advance of the deadline.

If an issuer, notwithstanding the exercise of reasonable diligence, is not able to make this determination at least two weeks before its due date, the issuer should include a brief explanation of the reasons for the delayed filing in its application.

In its application, the issuer should

- identify the specified default, the reasons for the default and the anticipated duration of the default;
- explain how the issuer satisfies each of the eligibility criteria described above;
- 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;
- include consents signed by the CEO and the CFO (or equivalent) to the issuance of an MCTO (see Appendix C);
- include a copy of the proposed or actual default announcement (see section 4.3);
- confirm that the issuer will comply with the alternative information guidelines described in sections 4.3 and 4.4 of this policy;
- include a copy of the issuer undertaking described in section 4.7 of this policy; and
- briefly describe the issuer's blackout policies and other policies and procedures relating to insider trading.

The issuer should send copies of the application to the regulators in all jurisdictions in which the issuer is a reporting issuer.

We will consider an issuer's history of complying with its continuous disclosure obligations when evaluating the issuer's request for an MCTO.

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*. 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. 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; 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.

4.4 Alternative information guidelines – Default Status Reports

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

(i) any material changes to the information contained in the default announcement or subsequent default status reports, 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;

(ii) 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;

(iii) information regarding any (anticipated) specified default subsequent to the default which is the subject of the default announcement; and

(iv) subject to section 4.5 of this policy, 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 (i) to (iv), 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 two weeks following the default announcement. If a CSA regulator, at any time, issues a general CTO 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 4.3 for a default announcement.

4.5 Confidential material information

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

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.

4.7 Issuer undertaking to cease certain trading activities

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 continuous disclosure default. The issuer should address the undertaking to the securities regulatory authorities of each jurisdiction in which the issuer is a reporting issuer.

4.8 Information respecting defaulting reporting issuers subject to insolvency proceedings

As explained in section 3.1, if 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 the alternative information guidelines.

If a defaulting reporting issuer is the subject of insolvency proceedings but not under court protection, we will consider an application for an MCTO in cases 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 this policy.

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

4.9 Financial information in default announcements and default status reports

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.

4.10 Default correction announcement

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.

Part 5 – Trading by management and other insiders during the period of default

Issuers in default of a specified requirement should closely monitor and generally restrict trading by management and other insiders due to the increased risk that such persons may have access to material undisclosed information. Such information may include information that would otherwise have been reflected in the continuous disclosure filing that is the subject of the default, information about any investigation into the events that may have led to the default, and information about the status of remediation activities.

We remind management and other insiders that they should carefully consider the insider trading prohibitions under securities legislation before entering into any transaction involving securities of the issuer in default.

The CSA have articulated in National Policy 51-201 *Disclosure Standards* detailed best practices for issuers for disclosure and information containment and have provided an interpretation of insider trading laws. Issuers should adopt written disclosure policies to assist directors, officers and employees and other representatives in discharging timely disclosure obligations. Written disclosure policies should also provide guidance on how to maintain the confidentiality of corporate information and to prevent improper trading on inside information. Adopting the CSA best practices may assist issuers to take all reasonable steps to preserve the confidentiality of non-public information.

We also remind issuers and other market participants that an officer or other insider of a reporting issuer in default will generally be unable to sell securities acquired from the issuer on an exempt basis because of the resale restrictions in section 2.5(2)(7) and s. 2.6(3)(5) of National Instrument 45-102 *Resale of Securities*.

Part 6 – Effect of a CTO issued by a regulator in one jurisdiction on trading in another jurisdiction

Presently, all marketplaces (including exchanges, alternative trading systems and quotation and trade reporting systems) in Canada have retained Investment Industry Regulatory Organization of Canada (IIROC) as their regulation services provider. Under the Universal Market Integrity Rules (UMIR), which have been adopted by IIROC, if a securities commission issues a CTO with respect to an issuer whose securities are traded on a marketplace, IIROC imposes a regulatory halt on trading of those securities on all marketplaces for which IIROC acts as the regulation services provider. Such halt is taken whether or not the CSA regulator that issued the CTO is the PR of the issuer and once the halt is imposed by IIROC, no person subject to UMIR may trade those securities on any marketplace in Canada, over-the-counter or on a foreign organized regulated market. Therefore, the remainder of the guidance in this part deals with market participants who are not otherwise subject to the jurisdiction of IIROC.

Market participants should be cautious about trading in a security in one jurisdiction if a CSA regulator in another jurisdiction has issued a CTO. In most cases, if an issuer's PR issued a CTO in response to a failure by the issuer to comply with a material continuous disclosure requirement, the non-principal regulator will issue a reciprocal CTO on similar terms and conditions.

Continuous disclosure obligations reflect the minimum requirements we feel are necessary to generate sufficient public disclosure to permit investors to make informed investment decisions. The issuance of a CTO by the issuer's PR will generally mean that an issuer has not met the required standard and that there is a significant risk of harm to investors if trading is allowed to continue. Accordingly, market participants should carefully consider the existence of the material continuous disclosure default, and the determination of the issuer's PR, before effecting a trade in a non-principal regulator jurisdiction. Although a trade in one jurisdiction may not violate a CTO in another jurisdiction, the trading activity may still be contrary to the public interest and therefore subject to enforcement or other administrative proceedings.

If a market participant intends to execute a trade in securities of a cease-traded issuer on an exchange or marketplace outside of Canada, the market participant should carefully consider whether the trade may nevertheless be considered to be or include a trade within one or more jurisdictions in Canada where a CTO is in effect. For example, a transaction may be a trade in another jurisdiction if "acts in furtherance of the trade" occur within that jurisdiction. A transaction may also be a trade in another jurisdiction if there are connecting factors or other facts and circumstances that indicate that the securities may not "come to rest" outside Canada but may be resold to investors in a jurisdiction where a CTO is in effect.

Part 7 – Effective date

This policy comes into force on September 1, 2008.

Appendix A
Statutory Provisions for Cease Trade Orders

Jurisdiction	Legislative reference
British Columbia	Sections 161 and 164 of the *Securities Act* (British Columbia)
Alberta	Sections 33.1 and 198 of the *Securities Act* (Alberta)
Saskatchewan	Section 134.1 of *The Securities Act, 1988*
Manitoba	Sections 147.1 and 148 of the *Securities Act* (Manitoba)
Ontario	Section 127 of the *Securities Act* (Ontario)
Quebec	Section 265 of the *Securities Act* (Quebec)
Newfoundland and Labrador	Section 127(1) of the Securities Act (Newfoundland and Labrador)
Nova Scotia	Section 134 of the *Securities Act* (Nova Scotia)
New Brunswick	Section 188.2 of the *Securities Act* (New Brunswick)

Appendix B
Lists of defaulting reporting issuers

Certain securities regulatory authorities maintain lists that identify those reporting issuers that have been noted in default in the relevant jurisdiction. The lists identify the name of the reporting issuer, and the nature and description of the default. The lists, together with the harmonized categories of default and nomenclature used to identify each category, can be found on the following websites:

www.bcsc.bc.ca

www.albertasecurities.com

www.sfsc.gov.sk.ca

www.msc.gov.mb.ca

www.osc.gov.on.ca

www.lautorite.qc.ca

www.nbsc-cvmnb.ca

www.gov.ns.ca/nssc

Certain securities regulatory authorities have also published policies or notices containing information relating to defaults by reporting issuers. These local polices or notices are:

Alberta:	Alberta Securities Commission Policy 51-601 – *Reporting Issuers List*
Saskatchewan:	Saskatchewan Policy Statement 51-601 – *Reporting Issuers in Default*
Manitoba:	Manitoba Securities Commission Local Policy 51-601 – *Reporting Issuers List*
Ontario:	Ontario Securities Commission Policy 51-601 – *Reporting Issuer Defaults*
Quebec:	AMF Notice on Reporting Issuer Defaults
New Brunswick:	New Brunswick Securities Commission Policy 51-601 – *Reporting Issuers List*
Nova Scotia	Nova Scotia Securities Commission Policy 51-601 – *Reporting Issuers List*

Appendix C
Sample Form of Consent

CONSENT

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

And to: [*Name(s) of other CSA regulator(s) in whose jurisdiction(s) the Issuer is a reporting issuer*] (collectively with the principal regulator, the CSA 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 part 3 of National Policy 11-203 *Process for exemptive relief applications in multiple jurisdictions* (NP 11-203) 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* (NI 51-102). 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, 2007, as required by Part 4 of NI 51-102;*

   b. *management's discussion and analysis (MD&A) relating to the audited annual financial statements, as required by Part 5 of NI 51-102; 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 CSA 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 *Cease Trade Orders for Continuous Disclosure Defaults* (NP 12-203).

7. I am providing this consent in support of the Issuer's application for an MCTO in accordance with Part 4 of NP 12-203.

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 Appendix A to NP 12-203.

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 CSA regulator may consider necessary to issue by reason of the default described above.

11. I hereby waive any requirement of a hearing, as may be provided for under the applicable statutory authority listed in Appendix A to NP 12-203, and any corresponding notice of hearing, in respect of the issuance of the MCTO.

DATED this day of [DATE]

by : _____
Name:
Title: