6.1.2 Proposed NP 12-202 Revocation of a Compliance-related Cease Trade Order

REQUEST FOR COMMENT

PROPOSED NATIONAL POLICY 12-202
REVOCATION OF A COMPLIANCE-RELATED CEASE TRADE ORDER

Introduction

We, the Canadian Securities Administrators (CSA), are publishing for comment proposed National Policy 12-202 *Revocation of a Compliance-related Cease Trade Order* (the Policy). The Policy describes how the regulators will generally exercise their discretion when deciding whether to revoke a cease trade order prohibiting trading in the securities of an issuer for failure to comply with continuous disclosure requirements. The Policy applies to cease trade orders imposed against an issuer as well as management cease trade orders as described in CSA Staff Notice 57-301 *Failing to File Financial Statements on Time - Management Cease Trade Orders*.

Substance and Purpose

The Policy

- harmonizes and streamlines review procedures among the CSA;
- provides guidance for issuers subject to a cease trade order;
- explains factors the regulators will consider when evaluating an application for a partial or full revocation of a cease trade order.

Summary of the Policy

The Policy provides guidance for issuers subject to a cease trade order (including management cease trade orders) imposed for failure to comply with continuous disclosure requirements. The Policy explains how an issuer should apply for a partial or full revocation of a cease trade order. It explains the factors the regulators will consider when assessing an application.

The Policy indicates that an issuer must generally file all outstanding continuous disclosure materials and pay all outstanding fees before the regulators will revoke a cease trade order.

The Policy also discusses other circumstances and terms on which the regulators might grant a partial or full revocation.

Unpublished materials

In developing the Policy, we have not relied on any significant unpublished study, report, decision or other written materials.

Request for Comments

We welcome your comments on the proposed Policy.

Please submit your comments in writing on or before March 6, 2007. If you are not sending your comments by email, a diskette containing the submissions (in Windows format, Word) should also be forwarded.

Address your submissions to the CSA member commissions, as follows:

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

Deliver your comments only to the addresses that follow. Your comments will be forwarded to the other CSA member jurisdictions.

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We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period.

Questions

Please refer your questions to any of:

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January 5, 2007

NATIONAL POLICY 12-202
REVOCATION OF A COMPLIANCE-RELATED CEASE TRADE ORDER

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Part 1 Introduction

This policy provides guidance for issuers that are subject to a CTO, including a management cease trade order described in CSA Staff Notice 57-301 *Failure to File Financial Statements on Time – Management Cease Trade Orders*, issued as a result of failing to comply with continuous disclosure requirements.

This policy explains what an issuer should do to apply for a partial or full revocation of a CTO. It describes what the issuer should file, the general type of review that the securities regulatory authorities (or "we") will perform, and explains some of the factors that we will consider when determining whether to grant a full or partial revocation of the CTO.

Although this policy provides guidance to issuers applying for a revocation order, the policy also applies, where the context permits, to a securityholder or other party applying for a revocation order.

Part 2 Definitions

In this policy:

"annual meeting requirement" means the requirement in applicable corporate legislation or equivalent non-corporate requirements to hold an annual meeting of securityholders;

"application" means an application for a partial or full revocation of a CTO submitted to the applicable jurisdictions (see Appendix A for section references); if the CTO has been in effect for 90 days or less in British Columbia, the filing of the required continuous disclosure documents constitutes the application;

"CTO" means a cease trade order issued against an issuer or its management prohibiting trading in the securities of the issuer as a result of a failure to comply with continuous disclosure requirements;

"MD&A" means management's discussion and analysis as defined in National Instrument 51-102 *Continuous Disclosure Obligations*;

"MI 52-109" means Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*;

"MRFP" means management's report on fund performance as defined in National Instrument 81-106 *Investment Fund Continuous Disclosure*; and

"partial revocation order" means an order that permits one or more issuers or individuals to conduct specific trades (distribution in Quebec) when a CTO is in effect.

Terms defined in National Instrument 14-101 *Definitions* have the same meaning in this policy.

Part 3 Qualification and Criteria for Revocation

3.1 Full revocations

(1) Filing requirements

Generally, we will not exercise our discretion to grant a full revocation order unless the issuer has filed all its outstanding continuous disclosure documents. The most common filing deficiencies relate to disclosure documents required under:

(a) National Instrument 51-102 *Continuous Disclosure Obligations*;

(b) Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*;

(c) National Instrument 81-106 *Investment Fund Continuous Disclosure*;

(d) National Instrument 43-101 *Standards of Disclosure for Mineral Projects*;

(e) National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities*;

(f) Multilateral Instrument 52-110 *Audit Committees* or BC Instrument 52-509 *Audit Committees*; and

(g) National Instrument 58-101 *Disclosure of Corporate Governance Practices*.

(2) Exceptions to interim filing requirements

In exercising our discretion to revoke a CTO, we may not require the issuer to file certain outstanding interim financial statements, interim MD&A, interim certificates or interim MRFP, if the issuer has filed:

(a) all outstanding audited annual financial statements, annual MD&A, annual certificates and annual MRFP required to be filed under applicable securities legislation;

(b) all outstanding annual information forms, information circulars and material change reports required to be filed under applicable securities legislation; and

(c) all outstanding interim financial statements (which include the applicable comparatives from the prior fiscal year), interim MD&A, interim certificates and interim MRFP for all interim periods in the current fiscal year required to be filed under applicable securities legislation.

(3) Exceptions to annual filing requirements

In certain cases, an issuer seeking a revocation order may consider that the length of time that has elapsed since the date of the CTO may make the preparation and filing of all outstanding disclosure difficult, or of limited use to investors. This may particularly apply to disclosure for older periods, or periods prior to a significant change in the issuer's business. An issuer seeking a revocation order in these circumstances should make detailed submissions explaining its position. In appropriate cases, we will consider whether the filing of certain outstanding disclosure might not be necessary as a precondition of a revocation order. The factors we may consider include:

(a) age of information to be contained in the filing – information from older periods may be less relevant than information from more recent periods;

(b) access to records – lack of access to records may hinder compliance with some filing requirements;

(c) activity during the period – if an issuer was inactive or changed its business during a certain period, disclosure of information from or prior to this period may be less relevant;

(d) length of time the CTO has been in effect;

(e) changes to issuer's management; and

(f) whether the historical disclosure relates to significant transactions or litigation.

However, we generally consider that disclosure for periods within the most recent three financial years of the issuer is useful information for investors. We generally do not consider the time and cost required to prepare disclosure to be a compelling factor in our determination of the disclosure to be provided in connection with an application to revoke a CTO.

(4) Outstanding fees

Before we will issue a revocation order, the issuer must pay all outstanding fees to each relevant jurisdiction. Outstanding fees generally include, where applicable, all activity and participation fees, and late filing fees.

Depending on how long the CTO has been in effect, and whether the issuer filed its continuous disclosure documents in a timely manner while it was cease-traded, the amount of outstanding fees can be considerable. Before submitting an application, issuers should contact the relevant regulators to confirm the fees that will be payable.

(5) Annual meeting

An issuer that applies for the revocation of a CTO should ensure that it has complied with the annual meeting requirement.

If the issuer has not complied with the annual meeting requirement, we will generally not exercise our discretion to issue a revocation order unless the issuer provides an undertaking to the relevant securities regulatory authorities to hold the annual meeting within three months after the CTO is revoked.

(6) Recurring CTOs

An issuer that has been subject to another CTO within the 12-month period before the date of the current CTO should provide a detailed explanation in its application of the reasons for the repeated defaults.

In addition, we may request that the issuer provide an action plan that includes specific policies and procedures that the issuer will follow to ensure compliance with continuous disclosure requirements.

(7) News release

When a revocation order is issued, if the revocation of the CTO is a "material change", the issuer is required by securities legislation to issue and file a news release and material change report. If the revocation of the CTO is not a material change, the issuer should consider issuing a news release that announces the revocation of the CTO and outlines the issuer's future plans.

If the issuer has ceased to carry on an active business, or its business purpose has been exhausted or abandoned, the news release should disclose this. The news release should also describe the issuer's immediate future plans or state that the issuer has no immediate future plans.

3.2 Partial revocations

(1) Permitted transactions

We will consider granting partial revocation orders to permit certain transactions involving trades (distribution in Quebec) in securities of the issuer, such as private placements or share-for-debt transactions, to allow the issuer to recapitalize or to raise sufficient funds to prepare and file outstanding continuous disclosure documents. We will generally not exercise our discretion to grant a partial revocation order unless the issuer intends to subsequently apply for a full revocation order and reasonably anticipates having sufficient resources after the proposed transaction to bring its continuous disclosure and fees up to date.

Other circumstances may arise that warrant a partial revocation order. For example, we will generally grant a partial revocation order to permit a securityholder to sell securities for a nominal amount solely to establish a tax loss. Potential applicants should consult their legal counsel to determine whether it is appropriate to apply for a partial revocation order in such cases.

Issuers may wish to consult their legal counsel to determine whether a particular transaction constitutes a trade (distribution in Quebec). For example, a disposition of securities by way of a bona fide gift, made in good faith and not as part of a plan or scheme to evade requirements of securities legislation, would generally not be considered a "trade" (distribution in Quebec) under provincial and territorial securities legislation. As such, a partial revocation order would not be typically required in these circumstances. However, after the gift, the securities may remain subject to the CTO depending on the terms of the CTO.

(2) Acts in furtherance of a trade

The definition of trade (distribution in Quebec) includes acts in furtherance of a trade or, in Quebec, in furtherance of a distribution. In any particular case, it is a question of legal interpretation whether a step taken by an issuer or other party is an act in furtherance of a trade (distribution in Quebec), and therefore a breach of the CTO. Issuers should consult their legal counsel whenever there is doubt as to whether a proposed action is an act in furtherance of a trade (distribution in Quebec). An issuer must obtain a partial revocation order before carrying out an act in furtherance of a trade (distribution in Quebec).

(3) Continuing effect of CTO

Following the completion of the trades (distribution in Quebec) permitted by a partial revocation of a CTO against an issuer, all securities of the issuer may remain subject to the CTO until a full revocation is granted, depending on the terms of the CTO.

Part 4 Applications

4.1 Application for a full revocation

An issuer requesting a full revocation order should submit an application, with the application fees, to the securities regulatory authorities in all jurisdictions where the issuer's securities are cease-traded. The application should include the following information:

(a) the jurisdictions where the issuer's securities are cease traded;

(b) details of any revocation applications currently in progress in the other jurisdictions including the name(s) of the regulators' staff (if known) dealing with the application;

(c) copies of any draft material change report or news release as discussed in section 3.1 (7);

(d) confirmation that all continuous disclosure documents have been filed with the relevant securities regulatory authorities or a description of the documents that will be filed;

(e) confirmation that the issuer's SEDAR and SEDI profiles are up-to-date;

(f) a draft revocation order; and

(g) personal information for each current and incoming director, executive officer, insider, control person and promoter of the issuer.

If the promoter is not an individual, the issuer should provide information for each director and executive officer of the promoter.

If the issuer is an investment fund, the issuer should also provide personal information for each director and executive officer of the manager of the investment fund.

The issuer should submit the personal information as set out in Appendix B of National Instrument 44-101 *Short Form Prospectus Distributions*.

All applications for full revocation will result in some level of review of the issuer's continuous disclosure record for compliance. If the CTO has been in effect for more than 90 days, this review will be similar to the full review under the harmonized continuous disclosure review program described in CSA Staff Notice 51-312 *Harmonized Continuous Disclosure Review Program*.

4.2 Application for a partial revocation

(1) General

An issuer requesting a partial revocation order should submit an application, with the application fees, to the securities regulatory authorities in all jurisdictions where the issuer's securities are cease-traded and where the proposed trades (distribution in Quebec) would occur. The application should include the following information:

(a) the jurisdictions where the issuer's securities are cease-traded and where the proposed trades (distribution in Quebec) would occur;

(b) details of any revocation applications currently in progress in the other jurisdictions including the name(s) of the regulators' staff (if known) dealing with the application;

(c) a description of the proposed trades (distribution in Quebec) and their purpose;

(d) a draft partial revocation order that includes:

(i) a condition that the applicant will obtain and provide to the relevant securities regulatory authorities signed and dated acknowledgements from all participants in the proposed transaction, which clearly state that the issuance of a partial revocation order does not guarantee the issuance of a full revocation order in the future; and

(ii) a condition that the applicant will provide a copy of the CTO and partial revocation order to all participants in the proposed transaction;

(e) use of proceeds information as discussed in section 4.2 (2), in the case of a proposed exempt financing;

(f) details of the exemptions the issuer intends to rely on to complete the proposed transactions; and

(g) if the proposed transactions are the result of a decision by a court, a copy of the relevant court order.

(2) Use of Proceeds

If the purpose of a proposed partial revocation of a CTO is to permit an issuer to carry out an exempt financing, the application and the offering document, if any, should disclose:

(a) an estimate, reasonably supported, of the amount the issuer expects to raise from the financing; and

(b) a reasonably detailed explanation of the purpose of the financing and how the issuer plans to use the funds.

The issuer should also provide in the application and any proposed offering document an estimate, reasonably supported, of the total amount the issuer will need to apply for a full revocation order. That amount would include the funds needed to prepare and file the documents required to bring the issuer's continuous disclosure up to date and pay outstanding fees.

Appendix A

Section references for an application under local securities legislation.

British Columbia:
Securities Act: sections 164 and 171.

Alberta:
Securities Act: section 214.

Saskatchewan:
The Securities Act, 1988: subsection 158(4).

Manitoba:
Securities Act: subsection 148(1).

Ontario:
Securities Act: section 144.

Quebec:
Securities Act: section 265.

New Brunswick:
Securities Act: section 206.

Nova Scotia:
Securities Act: section 151.

Prince Edward Island:
Securities Act: section 31.

Newfoundland and Labrador:
Securities Act: section 142.1.

Yukon:
not applicable.

Northwest Territories:
Securities Act: section 43.1.

Nunavut:
Securities Act: section 43.1.