

Annex E

This Annex sets out proposed National Policy 12-202 Revocations of Non-Passport Cease Trade Orders that would replace NP 12-202 Revocation of a Compliance-Related Cease Trade Order.

Proposed National Policy 12-202 Revocations of Non-Passport Cease Trade Orders

PART 1 INTRODUCTION

Scope of this policy

1. This policy¹ provides guidance for issuers applying for the revocation of a CTO (as defined below) for a continuous disclosure default that was not issued under the passport system (passport). These CTOs include all of the following:
 - (a) a CTO issued in respect of a failure-to-file deficiency that is not included in the definition of a specified default, as defined in Multilateral Instrument 11-102 *Passport System*²;
 - (b) a CTO issued where a reporting issuer has made a required filing but the required filing is deficient in terms of content (a content deficiency)³;
 - (c) a management cease trade order as defined in National Policy 12-203 *Management Cease Trade Orders*;
 - (d) a CTO issued in respect of an OTC reporting issuer as defined in Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-The-Counter Markets* (Multilateral Instrument 51-105 is not applicable in Ontario);
 - (e) a CTO issued in respect of an issuer that is only a reporting issuer in one jurisdiction;

¹ National Policy 12-202 *Revocation of a Compliance-Related Cease Trade Order* has been withdrawn and replaced by this policy, National Policy 12-202 *Revocations of Non-Passport Cease Trade Orders*. This replacement policy, that includes a title change, reflects that the processes surrounding the full or partial revocation (including variation) of cease trade orders issued under passport have been moved to National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations under Passport*.

² The definition of “specified default” does not include certain failure-to-file deficiencies described in section 1 of CSA Notice 51-322 *Reporting Issuer Defaults*, such as a failure-to-file a material change report, or a failure-to-file technical disclosure or other reports required by National Instrument 43-101 *Standards of Disclosure for Mineral Projects* or National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities*. We have omitted these items from the definition because these filings will generally be non-periodic in nature and in some cases it may be unclear whether a filing requirement has been triggered.

³ Examples of content deficiencies are set out in section 2 of CSA Notice 51-322 *Reporting Issuer Defaults*.

- (f) a CTO issued prior to the effective date of National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations under Passport*.

This policy describes what the issuer should file, the general type of review that the Canadian Securities Administrators (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. It also applies, where the context permits, to a securityholder or other party applying for a revocation order.

PART 2 DEFINITIONS AND INTERPRETATION

Definitions

2. In this policy:

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

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

“CTO” or “cease trade order” means a cease trade order as defined in National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations under Passport*;

“MD&A” has the same meaning as in National Instrument 51-102 *Continuous Disclosure Obligations*;

“MRFP” means a management report of fund performance as defined in National Instrument 81-106 *Investment Fund Continuous Disclosure*;

“partial revocation order” has the same meaning as in National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations under Passport*;

“SEDAR” means System for Electronic Document Analysis Retrieval;

“SEDI” means System for Electronic Disclosure by Insiders.

Further definitions

3. Terms used in this policy that are defined in Multilateral Instrument 11-102 *Passport System* or National Instrument 14-101 *Definitions* have the same meaning as in those instruments.

Interpretation

4. (1) In certain jurisdictions, the CSA regulator may issue a CTO that prohibits trading in, and the acquisition or purchase of, securities of a reporting issuer. In these jurisdictions, references in this policy to a “trade” refer to a trade in, purchase of, or acquisition of securities of the reporting issuer, as applicable.
- (2) In Québec, “trade” is not defined in the *Securities Act* (Québec). This policy covers all securities transactions that may be the object of an order provided for in paragraph 3 of section 265 of the *Securities Act* (Québec).

PART 3

REVOCACTION QUALIFICATION CRITERIA AND CONSIDERATIONS

DIVISION 1 FULL REVOCATION

Filing outstanding continuous disclosure for a full revocation

5. (1) We will generally not exercise our discretion to grant a full revocation order, subject to sections 6 and 7, unless the issuer has filed all of its outstanding continuous disclosure.
- (2) Most of the continuous disclosure requirements are in the following rules or regulations:
 - (a) National Instrument 51-102 *Continuous Disclosure Obligations*;
 - (b) National 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 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets*;
 - (g) National Instrument 52-110 *Audit Committees*;
 - (h) National Instrument 58-101 *Disclosure of Corporate Governance Practices*.

Exceptions to interim filing requirements

6. In exercising our discretion to revoke a CTO, we may elect not to require the issuer to file certain outstanding interim financial reports, interim MD&A, interim MRFP, or interim certificates under National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*, subject to section 7, if the issuer has filed all of the following:
- (a) audited annual financial statements, annual MD&A, annual MRFP, and annual certificates, required to be filed under applicable securities legislation;
 - (b) annual information forms, information circulars and material change reports required to be filed under applicable securities legislation;
 - (c) for all interim periods in the current fiscal year, interim financial reports (which include the applicable comparatives from the prior fiscal year), interim MD&A, interim MRFP, and interim certificates, required to be filed under applicable securities legislation.

Exceptions to annual filing requirements

7. 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 makes the preparation and filing of all outstanding disclosure impractical, or of limited use to investors. This may particularly apply to disclosure for periods that ended more than 3 years before the date of the application, 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 may be unnecessary as a pre-condition of a full revocation order. The factors we may consider include one or more of the following:
- (a) the age of information to be contained in the continuous disclosure filing: information from older periods may be less relevant than information from more recent periods;
 - (b) whether there is access to records of the issuer: lack of access to records may hinder compliance with some filing requirements;
 - (c) whether the issuer conducted activity during the period: if an issuer was inactive or changed its business at any time while it was cease-traded, disclosure of information from or prior to this time may be less relevant;
 - (d) the length of time the CTO has been in effect;
 - (e) whether the historical disclosure relates to significant transactions or litigation.

We generally consider that disclosure for periods within the most recent 3 financial years of the issuer provides 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.

Outstanding fees

8. Before a full revocation order is issued, the issuer should pay all outstanding fees to each jurisdiction in which it is a reporting issuer. 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 CSA regulators to confirm the fees that will be payable.

Annual meeting

9. An issuer should ensure that it has complied with the annual meeting requirement. The annual meeting requirement refers to the requirement in applicable corporate legislation or any equivalent non-corporate requirement to hold an annual meeting of securityholders. If the issuer has not complied with the annual meeting requirement, we will generally not exercise our discretion to issue a full revocation order unless the issuer provides an undertaking to the relevant CSA regulator(s) to hold the annual meeting within 3 months after the date on which the CTO is revoked.

Any such undertaking does not relieve the issuer from any obligation it may have regarding an annual meeting requirement.

News release

10. If the issuance of a revocation order or the circumstances giving rise to the issuer seeking the revocation order is a "material change", the issuer is required by Canadian securities legislation to issue and file a news release and material change report. For example, if the issuer has ceased to carry on an active business, or its business purpose has been abandoned, the circumstances giving rise to the issuer seeking the revocation order may be a "material change". If so, the news release and material change report should disclose that the issuer has ceased to carry on an active business or that its business purpose has been abandoned, and should disclose the issuer's future business plans or that the issuer has no future business plans.

Even if there is no material change, the issuer should consider issuing a news release that announces the revocation order.

DIVISION 2 PARTIAL REVOCATIONS

Permitted transactions

- 11.** We will consider granting a partial revocation order to permit certain transactions involving trades in securities of the issuer, such as a private placement to raise sufficient funds to prepare and file outstanding continuous disclosure documents or a shares-for-debt transaction to allow the issuer to recapitalize. 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, or if the issuer is winding up or in the context of insolvency.

Issuers may wish to consult their legal counsel to determine whether a particular transaction constitutes a trade and therefore requires an application for a partial revocation order. For example, in most jurisdictions, 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” under securities legislation in the jurisdictions of Canada. As such, where applicable, a partial revocation order would not typically be required in these circumstances. However, after the gift, the securities will generally remain subject to the CTO.

Acts in furtherance of a trade

- 12.** The definition of trade, where applicable, includes acts in furtherance of a trade. 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, and therefore a breach of the CTO. If securities have been issued in breach of a CTO, we will consider whether enforcement action is appropriate. Issuers should consult their legal counsel whenever there is doubt as to whether a proposed action is an act in furtherance of a trade. We generally expect an issuer to obtain a partial revocation order before carrying out an act in furtherance of a trade. For example, we expect an issuer or other party intending to conduct a trade to obtain a partial revocation order before entering into an agreement to transfer securities and before publicly disclosing an intended transaction in securities.

Continuing effect of CTO

- 13.** Following the completion of the trades 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

Application for a full revocation

14. (1) All applications for a full revocation will result in some level of review of the issuer's continuous disclosure record for compliance.
- (2) An issuer requesting a full revocation order should submit an application, with the application fees, to the CSA regulator in all jurisdictions where the issuer's securities are cease-traded. The application should include all of 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;
 - (c) copies of any draft material change report or news release as discussed in section 10;
 - (d) confirmation that all continuous disclosure documents have been filed with the relevant CSA regulator 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;
 - (g) a completed personal information form and authorization in the form set out in Appendix A of National Instrument 41-101 *General Prospectus Requirements* or Form 51-105F3A, for issuers subject to Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets*, for each current and incoming director, executive officer and promoter of the issuer;
 - (h) if the issuer has been subject to another CTO within the 12-month period before the date of the current CTO, the issuer should provide a detailed explanation of the reasons for the multiple defaults.
- (3) With respect to paragraph 14(2)(g), if the promoter is not an individual, the issuer should provide the information for each director and executive officer of the promoter. If the issuer is an investment fund, the issuer should also provide the information for each director and executive officer of the manager of the investment fund.

Application for a partial revocation

- 15. (1)** An issuer requesting a partial revocation order should submit an application with the application fees, where applicable, to the CSA regulator in all jurisdictions where the issuer's securities are cease-traded and where the proposed trades would occur. The application should include all of the following information:
- (a) the jurisdictions where the issuer's securities are cease-traded and where the proposed trades would occur;
 - (b) details of any revocation applications currently in progress in the other jurisdictions;
 - (c) a description of the proposed trades and their purpose;
 - (d) a draft partial revocation order that includes a condition that the applicant will
 - (i) obtain, and provide upon request to the relevant CSA regulators, signed and dated acknowledgements from all participants in the proposed trades, which clearly state that the securities of the issuer acquired by the participant will remain subject to the CTO until a full revocation order is granted, the issuance of which is not certain, and
 - (ii) provide a copy of the CTO and partial revocation order to all participants in the proposed trades;
 - (e) if the purpose of the proposed partial revocation is to permit an issuer to raise funds, use of proceeds information as discussed in subsection (2);
 - (f) if applicable, details of the exemptions the issuer intends to rely on to complete the proposed trades;
 - (g) if the proposed trades are the result of a decision by a court, a copy of the relevant court order.
- (2)** If the purpose of a proposed partial revocation of a CTO is to permit an issuer to raise funds, the application and the offering document, if any, should contain all of the following:
- (a) an estimate, reasonably supported, of the amount the issuer expects to raise from the financing;
 - (b) a reasonably detailed explanation of the purpose of the financing and how the issuer plans to use the funds;

- (c) an estimate, reasonably supported, of the total amount the issuer will need in order to apply for a full revocation order, which includes the amount of funds required to prepare and file the documents that are necessary to bring the issuer's continuous disclosure up to date and pay outstanding fees.

Request for confidentiality

- 16. (1) An issuer requesting that a CSA regulator hold an application and supporting materials in confidence during the application review process should provide a substantive reason for the request in its application.
- (2) Any request for confidentiality should explain why the request is reasonable in the circumstances and not prejudicial to the public interest and when any decision granting confidentiality would expire.
- (3) Staff of a CSA regulator is unlikely to recommend that an order be held in confidence after its effective date. However, if an issuer requests that a CSA regulator hold the application, supporting materials, or order in confidence after its effective date, the issuer should describe the request for confidentiality separately in its application, and pay any required fee to the CSA regulator.
- (4) Communications on requests for confidentiality will normally take place by e-mail. If an issuer is concerned with this practice, the issuer may request in the application that all communications take place by telephone.

PART 5 EFFECTIVE DATE

Prior policy

- 17. National Policy 12-202 *Revocation of a Compliance-Related Cease Trade Order* is withdrawn and replaced by this policy.

Effective date

- 18. This new policy comes into effect on ● .

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: subsections 158(3) and (4).

Manitoba:

Securities Act: subsection 148(1).

Ontario:

Securities Act: section 144.

Quebec:

Securities Act: section 265 paragraph 3 and section 318.

New Brunswick:

Securities Act: section 188.2.

Nova Scotia:

Securities Act: section 151.

Prince Edward Island:

Securities Act: sections 15 and 59.

Newfoundland and Labrador:

Securities Act: section 142.1.

Yukon:

Securities Act: sections 15 and 59.

Northwest Territories:

Securities Act: sections 15 and 59.

Nunavut:

Securities Act: sections 15 and 59.