

CSA Notice and Request for Comment Proposed Amendments to Multilateral Instrument 11-102 *Passport System*

April 16, 2015

Introduction

The Canadian Securities Administrators (the CSA or we), except for the Ontario Securities Commission (the OSC), are publishing for a 60 day comment period proposed amendments to Multilateral Instrument 11-102 *Passport System* (MI 11-102 or the Instrument). The purpose of these proposed amendments is to expand the passport system to two new areas: applications to cease to be a reporting issuer and the issuance and revocation (including a variation) of failure-to-file cease trade orders.

The CSA, except for the OSC, are also publishing for comment proposed changes to Companion Policy 11-102CP *Passport System* (CP 11-102).

The CSA, including the OSC, are publishing for comment the following two new policies:

- National Policy 11-206 *Process for Cease to be a Reporting Issuer Applications* (NP 11-206); and
- National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations under Passport* (NP 11-207).

We are also publishing for comment the following two replacement policies:

- National Policy 12-202 *Revocation of a Compliance-Related Cease Trade Order* is withdrawn and replaced by National Policy 12-202 *Revocations of Non-Passport Cease Trade Orders* (Replacement NP 12-202); and
- National Policy 12-203 *Cease Trade Orders for Continuous Disclosure Defaults* is withdrawn and replaced by National Policy 12-203 *Management Cease Trade Orders* (Replacement NP 12-203).

The proposed amendments to MI 11-102, the proposed changes to CP 11-102, the two new policies and the two replacement policies are collectively referred to as the Proposed Materials.

The text of the Proposed Materials is published with this notice and is also available, as applicable, on the websites of CSA jurisdictions, including:

www.lautorite.qc.ca
www.albertasecurities.com
www.bcsc.bc.ca
<http://nssc.novascotia.ca/>
www.fcmb.ca

www.osc.gov.on.ca
www.fcaa.gov.sk.ca
www.msc.gov.mb.ca

Substance and Purpose

The purpose of the Proposed Materials is to expand the passport system to cover the following two areas:

- *Applications to cease to be a reporting issuer.* Currently, these applications are filed with and reviewed by each provincial or territorial securities regulator by following the coordinated review system provided in National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions*. By bringing the process surrounding these applications into passport, an issuer will generally be able to deal only with its principal regulator to obtain an order to cease to be a reporting issuer in all Canadian jurisdictions where it has this status.
- *Failure-to-file cease trade orders.* When a reporting issuer is in default of certain types of continuous disclosure requirements under securities legislation (specified requirement), regulators may issue a cease trade order (failure-to-file cease trade order). Currently, there is no formal coordinated process across Canadian jurisdictions for when other regulators will reciprocate the order first issued against the securities of the defaulting reporting issuer. By bringing this category of cease trade orders into passport, this initial failure-to-file cease trade order will generally result in the same prohibition or restriction in other passport jurisdictions where the issuer is a reporting issuer. It will also enable a reporting issuer to generally deal only with the regulator that issued the failure-to-file cease trade order to obtain a revocation or variation of this order that has the same result in multiple jurisdictions.

Background

On September 30, 2004, the ministers responsible for securities regulation in all provinces and territories in Canada, except Ontario, signed a memorandum of understanding under which they agreed to implement a passport system in certain areas of securities regulation.

On March 17, 2008, MI 11-102 came into force in all jurisdictions, except Ontario, in the areas of prospectuses and discretionary exemptions. Amendments to MI 11-102 were implemented on September 28, 2009 to give effect to the passport system in the area of registration and, on April 20, 2012, to permit the use of the passport system for designation applications by credit rating organizations that wish to have their credit ratings eligible for use in Canadian securities legislation.

Under the passport system, market participants can generally gain access to markets across Canada by dealing only with their principal regulator and complying with harmonized legislative provisions. Since the Ontario government has not adopted MI 11-102, streamlined interfaces

have been developed to ensure that the passport system is as effective as possible for all market participants.

The ministers responsible for securities regulation asked the CSA to identify further enhancements to Canada's current securities regulatory system. Expansion of the passport system to cover applications to cease to be a reporting issuer and the issuance and revocation (including a variation) of failure-to-file cease trade orders are two of these enhancements.

Summary of the Proposed Materials

Amendments to MI 11-102

We propose to add the following two parts to MI 11-102:

- Part 4C - *Application to cease to be a reporting issuer*

This part would allow a reporting issuer to apply only to its principal regulator to cease to be a reporting issuer in all jurisdictions where it has this status. The principal regulator's order would be deemed to automatically have the same result in the notified passport jurisdictions. Under the Instrument, the principal regulator for the purposes of this application would usually be the regulator of the jurisdiction where the reporting issuer's head office is located.

- Part 4D – *Failure-to-file cease trade orders*

This part would allow the passport system to be used to more efficiently issue failure-to-file cease trade orders that have effect in more than one Canadian jurisdiction. If an issuer is a reporting issuer in a local jurisdiction and a securities regulatory authority or regulator in another jurisdiction in Canada issues a failure-to-file cease trade order in respect of the reporting issuer's securities, a person or company must not trade in or purchase a security of the issuer in the local jurisdiction, except in accordance with the same conditions that are contained in the order, if any, for so long as the failure-to-file cease trade order remains in effect.

In most cases, the securities regulatory authority or regulator that will issue a failure-to-file cease trade order will be the reporting issuer's principal regulator, that is, the one selected by the issuer at the time that it becomes a reporting issuer and that it identified on its SEDAR profile.

This part would also allow a reporting issuer to deal only with the securities regulatory authority or regulator that issued the failure-to-file cease trade order to obtain a revocation (including a variation) of the order that has the same result in more than one Canadian jurisdiction.

Although the OSC has not adopted MI 11-102 and will not be adopting the proposed amendments to this Instrument, it can be a principal regulator under Part 4C and the regulator

that issues a failure-to-file cease trade order referred to under Part 4D of the Instrument, thereby allowing the OSC's orders to have the same result in passport jurisdictions through the application of these new parts of MI 11-102.

New policies NP 11-206 and NP 11-207

As with the other areas of passport already in place, the CSA developed two proposed interface policies, NP 11-206 and NP 11-207, to make the securities regulatory system as efficient and effective as possible for all reporting issuers that wish to obtain an order to cease to be a reporting issuer, or an order to revoke (including vary) a failure-to-file cease trade order, in both passport jurisdictions and Ontario. NP 11-207 also allows for a more efficient and streamlined issuance of failure-to-file cease trade orders that have effect in passport jurisdictions and Ontario. The OSC has participated in developing these new interface policies.

NP 11-206

We propose to implement a new process for the filing and review of an application by a filer for an order that an issuer has ceased to be a reporting issuer in all jurisdictions of Canada in which it is a reporting issuer. Under NP 11-206, an issuer may only apply to cease to be a reporting issuer in all of the jurisdictions in which it has this status.

NP 11-206 would work in tandem with Part 4C of MI 11-102. It provides for both passport and dual applications to obtain an order to cease to be a reporting issuer in all Canadian jurisdictions where an issuer has reporting issuer status.

- *Passport application:*
 - (i) If the principal regulator is a passport regulator and the issuer is not a reporting issuer in Ontario, the filer files the application with, and pays fees to, the principal regulator. Only the principal regulator reviews the application. The principal regulator's order is deemed to automatically have the same result in the notified passport jurisdictions.
 - (ii) If the principal regulator is the OSC and the filer also seeks an order to cease to be a reporting issuer in a passport jurisdiction, the filer files the application with, and pays fees to, the OSC. Only the OSC reviews the application. The OSC's order is deemed to automatically have the same result in the notified passport jurisdictions.

- *Dual application:*

If the principal regulator is a passport regulator and the issuer is also a reporting issuer in Ontario, the filer files the application with, and pays fees to, the principal regulator and the OSC. The principal regulator reviews the application and the OSC, as a non-principal regulator, coordinates its review with the principal regulator. The principal regulator's order is deemed to automatically have the same result in the notified passport jurisdictions and evidences the decision of the OSC.

In the case of an issuer that is only a reporting issuer in one jurisdiction, it should apply for a local order to cease to be a reporting issuer in that jurisdiction. Although the application would be treated as a local application rather than as an application under NP 11-206, the regulator in the jurisdiction would generally apply the principles set out in NP 11-206 to that application.

NP 11-206 sets out three types of application procedures, with specific conditions to be met, by which a filer can seek an order to cease to be a reporting issuer in all Canadian jurisdictions where it has this status: the simplified procedure, the modified procedure and a procedure for other applications that do not meet the criteria of the first two categories. If NP 11-206 is adopted, CSA Staff Notice 12-307 *Applications for a decision that an issuer is not a reporting issuer*, which currently sets out the simplified procedure and the modified approach, would be withdrawn.

NP 11-207

NP 11-207 has two main objectives.

First, it provides guidance to issuers, investors and other market participants regarding how the CSA will generally respond to certain types of continuous disclosure defaults (specified defaults as defined in NP 11-207) by a reporting issuer by issuing failure-to-file cease trade orders. The guidance set out in NP 11-207 largely reflects what is currently in NP 12-203 *Cease Trade Orders for Continuous Disclosure Defaults*.

Second, NP 11-207 sets out new processes under passport for the issuance and the full or partial revocation (including a variation) of a failure-to-file cease trade order that have the same result in more than one Canadian jurisdiction. It would apply to a reporting issuer and, where the context permits, to a securityholder or other party seeking a revocation order. NP 11-207 also provides an interface with Ontario for the issuance and revocation (including a variation) of a failure-to-file cease trade order against the securities of an issuer whose principal regulator is in a passport jurisdiction. In NP 11-207, we refer to the securities regulatory authority or regulator that issues the failure-to-file cease trade order as the principal regulator.

NP 11-207 would work in tandem with Part 4D of MI 11-102 as detailed below.

Issuance of a failure-to-file cease trade order

NP 11-207 provides for passport and dual failure-to-file cease trade orders.

- *Passport failure-to-file cease trade order:*

There are two types of passport failure-to-file cease trade orders:

- (i) where the issuer is not a reporting issuer in Ontario, a failure-to-file cease trade order issued in respect of this issuer by a passport regulator;

(ii) where the issuer is a reporting issuer in Ontario and the OSC is the issuer's principal regulator, a failure-to-file cease trade order issued in respect of this issuer by the OSC.

Once a securities regulatory authority or regulator (referred to as the principal regulator in NP 11-207) issues a passport failure-to-file cease trade order, the effect under Part 4D of MI 11-102 in each passport jurisdiction where the issuer is a reporting issuer is that a person or company must not trade in or purchase a security of the issuer, except in accordance with the conditions, if any, contained in the order. The conditions of a failure-to-file cease trade order may include a variation or partial revocation.

- *Dual failure-to-file cease trade order:*

A dual failure-to-file cease trade order is a failure-to-file cease trade order issued in respect of an issuer by a securities regulatory authority or regulator (its principal regulator under NP 11-207), where the principal regulator is a passport regulator, the issuer is a reporting issuer in Ontario and the OSC, as a non-principal regulator, confirms that it is opting into the failure-to-file cease trade order.

Once the principal regulator issues a failure-to-file cease trade order, the effect under Part 4D of MI 11-102, in each passport jurisdiction where the issuer is a reporting issuer, is that a person or company must not trade in or purchase a security of the issuer, except in accordance with the same conditions, if any, as contained in the order. The conditions of a failure-to-file cease trade order may include a variation or partial revocation. The order of the principal regulator also evidences the OSC's decision. As a result, trading in or purchasing the securities that are subject to this order are also prohibited or restricted in Ontario.

Process for a full or partial revocation (including a variation) of a failure-to-file cease trade order

NP 11-207 also sets out the review process and the criteria that the principal regulator would take into account when determining whether to issue a full or partial revocation (including a variation) of a failure-to-file cease trade order.

In the case of a failure-to-file cease trade order that has been in effect for 90 days or less, the filing of the required continuous disclosure document(s) initiates the review process by the principal regulator for the full revocation of the failure-to-file cease trade order. An issuer is not required to make an application, but is expected to meet the applicable revocation criteria set out in NP 11-207.

An issuer seeking a full revocation of a failure-to-file cease trade order that has been in effect for more than 90 days files an application and is expected to meet the applicable revocation criteria set out in NP 11-207. An issuer or other party seeking the partial revocation of a failure-to-file cease trade order also applies under the policy.

NP 11-207 provides for both passport and dual applications for revocation.

- *Passport application:*

- (i) If the principal regulator is a passport regulator and the issuer is not a reporting issuer in Ontario, the filer files the application with, and pays fees where applicable, to the principal regulator. Only the principal regulator reviews the application.
- (ii) If the principal regulator is the OSC and the issuer is also a reporting issuer in a passport jurisdiction, the filer files the application with, and pays fees to, the OSC. Only the OSC reviews the application.

- *Dual application:*

If the principal regulator is a passport regulator and the issuer is also a reporting issuer in Ontario, the filer files the application with, and pays fees where applicable, to the principal regulator and the OSC. The principal regulator reviews the application and the OSC, as a non-principal regulator, coordinates its review with the principal regulator.

Effect of revocation under passport

- *Revocation of a passport failure-to-file cease trade order*

Under Part 4D of MI 11-102, a securities regulatory authority or regulator's (referred to as the principal regulator under NP 11-207) revocation order (including a variation order) has the effect of removing or limiting the prohibition or restriction on trading or purchasing in each passport jurisdiction where the issuer is a reporting issuer to the same extent as in the jurisdiction of the principal regulator.

- *Revocation of dual failure-to-file cease trade order*

Under Part 4D of MI 11-102, a securities regulatory authority or regulator's (referred to as the principal regulator under NP 11-207) revocation order (including a variation order) has the effect of removing or limiting the prohibition or restriction on trading or purchasing in each passport jurisdiction where the issuer is a reporting issuer to the same extent as in the jurisdiction of the principal regulator. If the OSC has opted into the revocation order, the prohibition or restriction on trading in Ontario is removed or is limited to the same extent as in the jurisdiction of the principal regulator. The order of the securities regulatory authority or regulator also evidences the OSC's decision.

Consequential Amendments

National Policy Changes

We are proposing changes to CP 11-102 to reflect Parts 4C and 4D of MI 11-102. These changes are designed to provide a bridge between these new parts of MI 11-102 and the new interface

policies, NP 11-206 and NP 11-207, which set out the detailed processes for obtaining the orders that are the object of the proposed passport expansion.

We are also proposing to withdraw NP 12-202 *Revocation of a Compliance-Related Cease Trade Order* and NP 12-203 *Cease Trade Orders for Continuous Disclosure Defaults* and replace them with Replacement NP 12-202 and Replacement NP 12-203. These replacement policies, that include title changes, are being proposed to reflect that the processes surrounding the issuance and the full or partial revocation (including variation) of failure-to-file cease trade orders for specified defaults would be moved to NP 11-207. Replacement NP 12-203 would continue to provide guidance on, as well as set out the processes for, the issuance of management cease trade orders. Replacement NP 12-202 would continue to set out the processes surrounding full or partial revocations (including variations) of all categories of continuous disclosure compliance-related cease trade orders, other than those failure-to-file cease trade orders that would be dealt with under passport.

Local Statutory Amendments

Applications to cease to be a reporting issuer

To bring applications to cease to be a reporting issuer into passport, several jurisdictions will be proposing amendments to their respective securities legislation to obtain a specific rule-making power that will enable the adoption of Part 4C of MI 11-102.

Failure-to-file cease trade orders

To bring failure-to-file cease trade orders into passport, Québec will be proposing an amendment to its securities legislation that would allow for the issuance of this type of cease trade order without first giving a right to be heard. The provision sought would be similar to those that already exist in the other jurisdictions, except Ontario. This statutory amendment would have to be obtained in Québec before new Part 4D of MI 11-102, related changes to CP 11-102 and NP 11-207 could come into effect in this jurisdiction.

Ontario will also be seeking and would require a similar amendment to its statute before NP 11-207 could come into effect in this jurisdiction.

On December 17, 2014, Bill 5, *Securities Amendment Act 2014* amending the *Securities Act* (Alberta) was passed by the Legislature in Alberta. Although passed, section 34 has not yet been proclaimed. On proclamation, new section 198.1 will be effective. Subsection 198.1(3) provides that an order of a securities regulatory authority in Canada imposing sanctions, conditions, restrictions or requirements on a person or company takes effect in Alberta subject to certain conditions. New section 198.1, if proclaimed, could provide an alternative method to the passport system with respect to cease trade orders in Alberta that would lead to the same result.

Local Matters

In addition to the amendments set out under “Local Statutory Amendments” above, Annex G to this notice is being published in any local jurisdiction that is making related changes to local securities laws, including local notices or other policy instruments in that jurisdiction. It also includes any additional information that is relevant to that jurisdiction only.

Request for Comments

We welcome your comments on the Proposed Materials and also invite comments on the following specific questions:

Questions relating to failure-to-file cease trade orders

Under proposed Part 4D of MI 11-102, a securities regulatory authority or regulator’s failure-to-file cease trade order will generally result in the same prohibition or restriction in other passport jurisdictions where the issuer is a reporting issuer. For investor protection purposes, we are considering extending this effect to any passport jurisdiction regardless of whether or not the issuer is reporting in that jurisdiction. In this context, responses to these two questions would be helpful:

1. Currently, to what extent and in what circumstances does trading occur in jurisdictions where an issuer is not a reporting issuer when it has been cease-traded in one or more jurisdictions in which it is a reporting issuer?
2. Does the application of a trading prohibition or restriction in a jurisdiction where the issuer is not a reporting issuer give rise to any concerns?

Please submit your comments in writing on or before **June 15 , 2015**. If you are not sending your comments by email, please send a CD containing the submissions (in Microsoft Word format).

Address your submission to all of the CSA as follows:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Deliver your comments **only** to the addresses below. Your comments will be distributed to the other participating CSA jurisdictions.

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All comments will be posted on the the Autorité des marchés financiers website at www.lautorite.qc.ca and on Alberta Securities Commission website at www.albertasecurities.com.

Please note that 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. In this context, you should be aware that some information which is personal to you, such as your e-mail and address, may appear in the websites. It is important that you state on whose behalf you are making the submission.

Contents of Annexes

The following annexes form part of this CSA Notice:

- (a) Annex A, proposed amendments to Multilateral Instrument 11-102 *Passport System*;
- (b) Annex B, proposed changes to Companion Policy 11-102CP *Passport System*;
- (c) Annex C, National Policy 11-206 *Process for Cease to be a Reporting Issuer Applications*;
- (d) Annex D, National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations Under Passport*;
- (e) Annex E, National Policy 12-202 *Revocations of Non-Passport Cease Trade Orders*;
- (f) Annex F, National Policy 12-203 *Management Cease Trade Orders*;
- (g) Annex G, Local matters.

Questions

Please refer your questions to any of the following:

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