

CSA STAFF NOTICE 57-301

Failing to File Financial Statements on Time -- Management Cease Trade Orders

Purpose

This notice describes the circumstances we will consider in granting a company's request for a "management" cease trade order (CTO) to be issued where the company is unable to file its financial statements on time. A management CTO is part of a voluntary process where specific insiders and management are subject to a CTO instead of the company. Under this system other investors are permitted to continue trading the company's securities while a management CTO is in effect. The notice also describes the information we require from a company at the time it submits a request for a management CTO and the process we will follow in considering the company's request.

Background

Until recently regulatory authorities in Canada would issue an "issuer" CTO¹ against a reporting issuer (the company) that failed to file its financial statements on time. On April 17, 2001 the Ontario Securities Commission (the OSC) introduced the concept of management CTOs with its introduction of OSC Policy 57-603: "Defaults by Reporting Issuers in Complying with Financial Statement Filing Requirements". OSC staff have encouraged qualified companies to follow the policy. As a result, a number of companies have been granted management CTOs.

There are several benefits to investors associated with the OSC model. The Canadian Securities Administrators asked us to design and implement a similar system throughout Canada. This notice is our response to that request.

Management Cease-Trade Orders

An issuer CTO is an appropriate response to financial statement filing defaults that are not likely to be rectified within a relatively short time period, and where the circumstances leading to the default are likely to continue. These circumstances include companies that no longer have an active business, are insolvent, or who have lost a majority of their board of directors.

¹ An issuer CTO prohibits trading in the securities of the company.

Where financial statements not filed on time are expected to be filed relatively quickly, and the default is not expected to be recurring, a management CTO may be an appropriate response to the default.

Companies fitting the following profile are considered eligible for a management CTO:

- the financial statements and related audit reports, if any, will be filed within a relatively short time period (generally a maximum of two months);
- a majority of the company's board of directors is in place;
- the company is generating revenue from its principal business or, if it is in the development stage, the company is actively pursuing the development of its products or properties;
- the company's securities are listed on a Canadian stock exchange and there is an active, liquid market for those securities;
- the company is not on the defaulting reporting issuer list of any commission for any reason other than the failure to file the financial statements.

We will consider a company's history of complying with its reporting obligations including, in particular, the filing of its financial statements on time during the past year, in deciding whether the company's request for a management CTO should be granted.

Request

If a company fits the profile set out above it should contact its principal regulator² at least two weeks before the financial statements are due to be filed and request *in writing* that the company be subject to a management CTO rather than an issuer CTO. The reasons for this request should be set out in a cover letter, including a description of how the company fits each of the items in the profile above.

The following information is required to support the request:

- a proposed Notice of Default (see Appendix A);

² This will generally be the securities regulator (staff of the commission) of the province or territory in which the company's head office is located, unless a different principal regulator has been chosen for the purposes of National Policy 43-201.

- an affidavit listing the names and positions / titles (if any) of each person that has been a director or officer of the company at any time since the company's most recent financial statements were filed in accordance with a filing requirement. Identify any insider who had, or may have had, access to any material fact or material change with respect to the company that has not been generally disclosed subsequent to the date of the financial statements that were filed. If any of these insiders owns securities of the issuer indirectly, identify the entity that holds the securities on behalf of the insider;
- the current address, telephone number and fax number of each person, company or trust referred to above; and
- an undertaking to provide details of any changes to this information the company becomes aware of during the period of default.

Copies of the submission should be sent to the regulators of all jurisdictions in which the company is reporting.

If the company's request is granted the Notice of Default and all subsequent Default Status Reports must be filed on SEDAR and disseminated in the usual manner for a press release and material change report.

A company that fails to file its financial statements on time will be in default in all jurisdictions in which it is a reporting issuer. We will attempt to coordinate the nature of the CTOs (issuer or management) between jurisdictions. Non-principal regulators will normally follow the lead of the company's principal regulator, including its decision not to issue an issuer CTO. However each jurisdiction retains the right to impose an issuer CTO where they believe such action is necessary and there is no guarantee that a securities commission or regulator will agree with our recommendation that a management CTO be granted.

Not all securities regulators have the ability to issue a management CTO. In the interest of regulatory harmonization they will, however, normally honour a management CTO imposed by a company's principal regulator.

If a company does not file its financial statements within two months of the Notice of Default the company will generally be subject to an issuer CTO without further notice. An issuer CTO may also be issued if the Notice of Default is materially deficient or if the company fails to file its Default Status Reports on time.

Even if a company that has not filed its financial statements on time has not requested a management CTO, we may issue a management CTO rather than an issuer CTO if we believe that is appropriate. In that case we will name in the CTO the individuals we believe may have access to material undisclosed information. The company and the individuals may request changes to the list of individuals named in the CTO. We will consider the information they provide to determine whether there should be any changes to the list.

Enforcement

Meeting its continuous disclosure reporting obligations is a fundamental responsibility of every public company. While we will consider a company's request that a management CTO be granted we may pursue enforcement action against the company or its management if the circumstances warrant it.

Contacts

For further information, please contact:

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Appendix A
Notice of Default

A Notice of Default must:

1. identify the reporting period(s) the company is not able to file financial statements on time for;
2. disclose the reason(s) for the default;
3. disclose when the company expects to file the financial statements ;
4. disclose the date that is two months after the filing deadline and state that the securities commissions or regulators may impose an issuer cease trade order (CTO) if the financial statements are not filed by that time. Disclose that an issuer CTO may be imposed sooner if the company fails to file its Default Status Reports on time;
5. confirm the company intends to satisfy the provisions of Appendix B as long as it remains in default of the financial statement filing requirement;
6. disclose particulars of any insolvency proceeding the company is subject to, including the nature and timing of information that is required to be provided to creditors. Confirm that the company will file material change reports containing the same information it provides to creditors at the same time the information is provided to creditors throughout the period in which it is in default; and
7. disclose any other material information concerning the affairs of the company that has not been generally disclosed.

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Appendix B
Default Status Reports

During the period of default, a company must issue a Default Status Report on a bi-weekly basis disclosing:

1. any material change in the information contained in the Notice of Default;
2. details of any failure by the company to fulfill its stated intentions in its Notice of Default or any Default Status Report, for example if the company did not file its financial statements by the date it gave in the Notice of Default;
3. any actual or anticipated default of a financial statement filing requirement subsequent to that disclosed in the Notice of Default; and
4. 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 1 - 4 this fact must be disclosed in a Default Status Report.

Default Status Reports must be prepared, authorized, filed and disseminated in the same manner as the company's Notice of Default.