

Canadian Securities Administrators Staff Notice 57-303

Frequently asked questions regarding Management Cease Trade Orders issued as a consequence of a failure to file financial statements

Purpose

We, the staff of the Canadian Securities Administrators (the CSA), have recently received a number of questions in relation to “management” cease trade orders that may be issued as a consequence of the failure by a reporting issuer to file financial statements in a timely manner. We have compiled a list of the most frequently asked questions (the FAQs) and have set out our responses to such questions below.

This notice is dated April 29, 2005. We may from time to time reissue this notice to reflect additional frequently asked questions or concerns.

In addition, we are presently reviewing a number of issues relating to the application of CSA Staff Notice 57-301 (described below) and may publish additional guidance in relation to this notice in the future.

Background

Where a reporting issuer fails to file financial statements in a timely manner, the Canadian securities regulatory authorities may in certain circumstances issue a “management” cease trade order (an MCTO) instead of a conventional cease trade order (an issuer CTO or CTO).

An MCTO is part of a voluntary process whereby specific insiders and management of a reporting issuer are subject to a cease trade order that prohibits them from trading in securities of the defaulting reporting issuer. In contrast, an issuer CTO generally provides that *no person* may trade in securities of the defaulting reporting issuer. Accordingly, under the MCTO system, investors who are not members of the specified management and insider group are permitted to continue trading the issuer’s securities while the MCTO is in effect.

The circumstances in which an MCTO may be issued as an alternative to an issuer CTO as a result of an issuer’s failure to file financial statements are more fully described in the following materials:

- CSA Staff Notice 57-301 *Failing to File Financial Statements on Time – Management Cease Trade Orders* (CSA Staff Notice 57-301), and

- OSC Policy 57-603 *Defaults by Reporting Issuers in Complying with Financial Statement Filing Requirements* (OSC Policy 57-603).

These materials are available on the web sites of the applicable securities regulatory authorities.

Not all securities regulators have the ability to issue an MCTO. In the interest of regulatory harmonization, however, they will normally refrain from issuing an issuer CTO for so long as an MCTO imposed by an issuer's principal regulator remains outstanding.

In certain circumstances, the Canadian securities regulatory authorities may issue an MCTO for reasons other than a failure to file financial statements in a timely manner. For example, as described in CSA Multilateral Staff Notice 57-302 - *Failure to File Certificates Under Multilateral Instrument 52-109 - Certification of Disclosure in Issuers' Annual and Interim Filings*, certain members of the CSA may issue an MCTO against the chief executive officer or chief financial officer of a reporting issuer as a consequence of a failure to file a certificate required by Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*. The FAQs in this notice are not intended to apply to MCTOs issued under MI 52-109.

The following FAQs are representative of the types of questions that we have received since the publication of OSC Policy 57-603 and CSA Staff Notice 57-301.

Frequently Asked Questions:

Q1. I am a director of a company, ABC Co., which has failed to file financial statements by the required deadline and have been named in a management cease trade order issued against management and insiders of ABC Co. I am also a director of another company, XYZ Co., which is in the process of preparing its annual information form (AIF). Is XYZ Co. required to include disclosure relating to my MCTO in its AIF? If XYZ Co. wishes to make an offering under prospectus, is it required to include disclosure relating to my MCTO in its prospectus?

A1. Yes. XYZ Co. will generally be required to include disclosure relating to the MCTO in its AIF, information circular and prospectus, if the MCTO is outstanding for more than 30 consecutive days. Under Canadian securities law, an AIF, information circular and prospectus are generally required to be prepared in accordance with a prescribed form. Each of these forms contains provisions that require certain disclosure relating to the directors and officers of the issuer filing the form. Included within this disclosure is a requirement that the issuer disclose whether any of its directors or officers are, or within the last 10 years have been, directors or officers of *any other* issuer that was the subject of a cease trade order or similar order.

The specific line item requirements relating to cease trade orders are as follows:

- Section 16.2 of Form 41-501F1 *Information Required in a Prospectus*,
- Section 8.2 of Form 44-101F1 *AIF*,
- Subsection 10.2(1) of Form 51-102F2 *Annual Information Form*,
- Subsection 7.2 of Form 51-102F5 *Information Circular*, and
- Section 16.2 of Schedule 1 to Policy Statement Q-28 *General Prospectus Requirements*.

Staff take the view that the above disclosure requirements apply to both issuer CTOs and MCTOs issued under CSA Staff Notice 57-301 and OSC Policy 57-603.

Where an issuer is required to include disclosure relating to an MCTO in a public filing, the issuer may supplement the disclosure with additional information explaining the circumstances of the MCTO.

Staff may be prepared to recommend exemptive relief from the disclosure requirements resulting from the issuance of an MCTO in certain limited circumstances. For example, where a director or officer is elected or appointed to an issuer after the issuer has come to be in default of its financial statement filing requirements, and the director or officer did not otherwise have any involvement in the circumstances that led to the issuer being in default, staff may be prepared to recommend an exemption from the MCTO disclosure requirements for such officers and directors. We recognize that an issuer that is in default may seek to attract new officers and directors as part of its plan to remedy the default. We also recognize that the disclosure requirements that are triggered by the issuance of an MCTO may, in certain circumstances, have a negative impact on the ability of issuers that are in default to attract new directors and officers. Accordingly, in these circumstances staff may be prepared to recommend relief.

Q2 I am an employee of a company, ABC Co., that has failed to file financial statements by the required deadline. A management cease trade order has been issued against management and insiders of ABC Co. I have been named as a respondent in the order but believe that this is a mistake. Although my job title is that of “vice-president”, I would characterize my job more as a middle management position rather than a senior executive position. What can I do?

A2 As described in CSA Staff Notice 57-301 and OSC Policy 57-603, where a reporting issuer determines that it will not comply (or subsequently determines that it has not complied) with a financial statement filing requirement, the reporting issuer may request that the securities regulatory authorities issue an MCTO in lieu of an issuer CTO. Generally, the issuer will be required to provide an affidavit with this request listing the

names and positions / titles (if any) of each person who comes within the definition of “defaulting management and other insiders”.

The term “defaulting management and other insiders” refers to persons who

- have been directors, officers or insiders of the defaulting reporting issuer at any time since the end of the period covered by the last financial statements of the defaulting reporting issuer that were filed in accordance with a financial statement filing requirement; and
- during that time have had, or may have had, access to any material fact or material change with respect to the defaulting reporting issuer that has not been generally disclosed.

We recognize that a person may be included in the list submitted by the issuer in error or that a person named in the list may reasonably disagree with the determination made by the issuer. Where it appears that a person has been named in an order by mistake or can otherwise demonstrate that they do not come within the terms of the definition, staff will generally be prepared to recommend that the order be varied. Accordingly, if you have a concern in this regard, please contact staff to discuss the circumstances of your situation.

Q3 I am the president of a company that has failed to file financial statements by the required deadline and have been named in a management cease trade order issued against management and insiders of the company. The company filed its first biweekly default status report two weeks ago. If there have not been any changes to the information contained in this report since it was filed, do we still have to file another biweekly default status report?

A3 Yes. As described in s. 3.2 of OSC Policy 57-603, even where there has been no change in the information contained in the most recently filed default status report, the fact that there has been no such change should be communicated in a new default status report.

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