

# Chapter 5

## Rules and Policies

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### 5.1.1 OSC Policy 51-601 Reporting Issuer Defaults

#### ONTARIO SECURITIES COMMISSION POLICY 51-601 REPORTING ISSUER DEFAULTS

##### PART 1 – PURPOSE

##### 1.1 Purpose of this Policy

- (1) In certain circumstances, prospective purchasers and sellers of securities need to determine whether a reporting issuer is in default of any requirement of the Act or the regulations. Subsection 72(8) of the Act provides that these interested parties may apply to the Commission for a certificate stating whether an issuer is a reporting issuer and, if so, whether the reporting issuer is not in default. For determining whether a reporting issuer is in default, subsection 72(9) provides that an interested party may also rely on a list of defaulting reporting issuers that is maintained by the Commission.
- (2) This Policy describes the Commission's list of reporting issuers, indicates how the Commission determines whether a reporting issuer is in default, and tells interested parties how to obtain a certificate of no default.

##### PART 2 – LIST OF REPORTING ISSUERS

**2.1 General** – The Commission maintains a list of Ontario reporting issuers that identifies those reporting issuers that are in default. The list is available for public inspection at the Commission's offices during normal business hours and is on the Commission's website at [www.osc.gov.on.ca/PublicCompanies/Issuers/is\\_index.jsp](http://www.osc.gov.on.ca/PublicCompanies/Issuers/is_index.jsp).

**2.2 Completeness of the List** – Given the breadth of the definition of "reporting issuer", the Commission does not represent that this is a complete list of Ontario reporting issuers. For example, there may be corporations subject to the *Business Corporations Act* that have offered securities to the public within the meaning of that statute but have not filed material with the Commission. They would fall within the definition of "reporting issuer", but would not be on the list. Also, since the Commission does not continuously review the corporate status of issuers, corporations that have been dissolved may still be on the list.

**2.3 Categories of Default** – If a reporting issuer is in default, beside the issuer's name on the reporting issuer list will appear the words "In default" and one or more letters indicating the nature of the default. These categories of default occasionally change to reflect amendments to the Act or regulations. At the issue date of this policy, the categories are as follows:

- (a) a failure to file annual financial statements within the time periods prescribed by section 77 of the Act and National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102) and National Instrument 81-106 *Investment Fund Continuous Disclosure* (NI 81-106);
- (b) a failure to file interim financial statements within the time periods prescribed by section 78 of the Act and NI 51-102 and NI 81-106;
- (c) a failure to file an annual or interim MD&A required by NI 51-102 or an annual or interim management report of fund performance (MRFP) required by NI 81-106;
- (d) a failure to file an AIF required by NI 51-102 and NI 81-106;
- (e) a failure to file a certification of annual or interim filings required by Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*;
- (f) a failure to file required proxy materials or a required information circular or report in lieu thereof;
- (g) a failure to pay a fee required by the Act or the regulations;
- (h) a continuous disclosure document, though filed on time, is deficient in one or more of the following areas:

- (i) financial statements of the issuer, or the auditors' report accompanying the financial statements, do not comply with the requirements of NI 51-102, NI 81-106 or National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency*;
  - (ii) the issuer has acknowledged that its financial statements, or the auditors' report accompanying the financial statements, may no longer be relied upon;
  - (iii) the issuer's AIF, MD&A, MRFP, information circular, or business acquisition reports do not contain information for each of the content items required by NI 51-102 or NI 81-106; or
  - (iv) some other deficiency in the financial statements or in the issuer's continuous disclosure record is so significant as to constitute default;
- (i) a failure to file an issuer profile supplement required by National Instrument 55-102 *System for Electronic Disclosure by Insiders*;
  - (j) a failure to file material change reports required under section 75 of the Act, NI 51-102 or NI 81-106;
  - (k) a failure to update the Commission as required under subsection 75(4) of the Act, NI 51-102 or NI 81-106 after filing a confidential report of a material change;
  - (l) a failure to file a business acquisition report required by NI 51-102 or NI 81-106;
  - (m) a failure to file a report on reserves data and other oil and gas information as required by National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities* or a technical report as required by National Instrument 43-101 *Standards of Disclosure for Mineral Projects*;
  - (z) default for any other reason.

### **PART 3 – DETERMINING WHETHER A REPORTING ISSUER IS IN DEFAULT**

**3.1 The Test** – The Commission will generally not consider a reporting issuer to be in default unless it is in default of a significant requirement of the Act or the regulations. While the categories set out in section 2.3 identify a number of significant requirements, they are not an exhaustive description of the circumstances in which a reporting issuer may be considered to be in default. If the relevant facts come to the attention of staff, a reporting issuer may be considered to be in default if it has clearly failed to comply with any significant requirement of the Act or regulations.

#### **3.2 The Process**

(1) Staff will notify a reporting issuer before placing the issuer on the list of defaulting reporting issuers for any reason. If an issuer receives this notice from staff, it may either remedy the default within the time specified by staff or provide information to staff to demonstrate that it is not in default. If an issuer remedies the default or satisfies staff that it is not in default, staff will take no further action and will consider the matter closed. If an issuer agrees with staff that it is in default, or does not provide such further information, the issuer will be placed on the list of defaulting reporting issuers.

(2) If an issuer and staff disagree about whether the issuer is in default, the issuer will generally not be included on the list of defaulting reporting issuers at that time. Staff may seek an order from the Commission under paragraph 127(1)5 that the issuer's continuous disclosure record be amended in whatever manner is necessary to address the issues identified. At the same time, staff may seek any other orders from the Commission under subsection 127(1) that it considers appropriate. Subsection 127(4) of the Act provides that the Commission will not make any such orders without a hearing.

(3) OSC Policy 57-603 *Defaults by Reporting Issuers in Complying with Financial Statement Filing Requirements* describes the Commission's approach toward issuing cease trade orders in response to certain defaults by reporting issuers.

**3.3 Curing a Default** – A reporting issuer will no longer be identified as being in default once it has cured the default by filing the required document, correcting the deficiency in its continuous disclosure record or remitting the applicable fee.

#### **3.4 Filing Considerations**

- (1) An issuer may become a defaulting reporting issuer if it does not file a document when it is due.
- (2) National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)* (NI 13-101) provides that a document filed through SEDAR is filed on the day that the transmission of the document is completed, so long as it is

completed by 5:00 p.m. A temporary hardship exemption is available under NI 13-101 to an issuer that encounters unanticipated technical difficulties when attempting to file through SEDAR.

- (3) A document that is not filed through SEDAR is filed when the Commission receives it, not when the issuer sends it. A reporting issuer that relies on the postal system may become a defaulting reporting issuer if the mail is delayed or the document is lost in the mail. A reporting issuer that sends a document to the Commission by facsimile should retain the facsimile verification as evidence that the Commission received the document.

#### PART 4 – CERTIFICATE OF NO DEFAULT

**4.1 Reliance on the List** – A certificate of no default states whether an issuer is a reporting issuer and, if so, whether it is identified on the list as being in default. The Commission relies primarily on the list of reporting issuers and Commission staff's internal reviews to determine whether an issuer is a reporting issuer.

**4.2 Who May Request a Certificate** – It is the practice of the Commission to provide a certificate of no default to any interested party.

**4.3 Issuance of Certificates** – The Commission recommends making a request for a certificate of no default at least two business days before the desired date of issuance.

**4.4 Form of Certificate** – The standard form of the certificate issued under subsection 72(8) of the Act is set out in section 5.1. The Commission may issue a modified form if it is of the view that it is necessary to do so.

#### PART 5 – FORM OF CERTIFICATE OF NO DEFAULT

##### 5.1 Form of Certificate

ONTARIO SECURITIES COMMISSION CERTIFICATE UNDER SUBSECTION 72(8) OF THE  
SECURITIES ACT

NAME OF ISSUER:

1. The above-named issuer is/is not (inapplicable provision is deleted) included in a list of issuers known to the Commission to be reporting issuers.

2. (APPLICABLE ONLY IF THE ISSUER IS INCLUDED IN THE LIST OF REPORTING ISSUERS INDICATED IN PARAGRAPH 1.)

The above-named reporting issuer is/is not (inapplicable provision is deleted) included in a list of defaulting reporting issuers maintained by the Commission under subsection 72(9) of the *Securities Act*.

A reader of this certificate is encouraged to consult Ontario Securities Commission Policy 51-601 *Reporting Issuer Defaults*, which contains guidelines and other information relevant to the issuance of this certificate.

This certificate relates only to compliance with certain provisions of the *Securities Act* and the regulations. It has no bearing on compliance with other laws or on the financial or other position of the issuer.

While the Commission uses reasonable efforts to ensure the accuracy of this certificate, it disclaims any responsibility for any claims, demands, actions, suits, losses, costs, damages, expenses and liabilities consequent upon any inaccuracy in this certificate.

[Date]

ONTARIO SECURITIES COMMISSION

(Signature)

Name

Title