

Chapter 5

Rules and Policies

5.1.1 Notice of Amendment to OSC Policy 51-601 Reporting Issuer Defaults

NOTICE OF AMENDMENT TO ONTARIO SECURITIES COMMISSION POLICY 51-601 REPORTING ISSUER DEFAULTS

Introduction

The Commission has, under Section 143.8 of the *Securities Act* (Ontario) (the Act), amended Policy 51-601 *Reporting Issuer Defaults*. The amended version of the policy (the Amended Policy) is effective on December 20, 2006 and replaces the version of Policy 51-601 that became effective on May 17, 2005.

Substance and Purpose of the Policy

The Amended Policy outlines the factors considered by the Commission in determining if a reporting issuer is in default under the Act.

The Commission does not consider any of the changes to the existing policy to be material and has therefore not published the changes for comment.

Summary of Changes to the Current Version of Policy 51-601

The Amended Policy reflects the categories of default that have been harmonized across the CSA pursuant to CSA Notice 51-322 – *Reporting Issuer Defaults* which can be found on the Commission's website. The categories also reflect new requirements of the Act or regulations that have become effective since May 2005. In particular:

- National Instrument 58-101 *Disclosure of Corporate Governance Practices* and Multilateral Instrument 52-110 *Audit Committees* introduced new continuous disclosure requirements; and
- there is a new requirement under Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* to include in issuers' MD&A disclosure of their conclusions relating to the effectiveness of their disclosure controls and procedures.

The Amended Policy also includes failure to file a news release required by securities legislation as a category of default.

Issuers may be in default when they do not comply with any of these requirements.

The Amended Policy also reflects recent amendments to the Act which removed provisions relating to certificates of no default. These provisions were repealed effective December 20, 2006. Accordingly, the Commission no longer issues certificates of no default. Market participants should instead look to the list of defaulting reporting issuers maintained by the Commission on its website to determine if a reporting issuer has been noted in default of any requirement of the Act or the regulations.

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

PART 1 – PURPOSE

1.1 Purpose of this Policy

This Policy describes the Commission's list of reporting issuers, outlines the key deficiencies resulting in an issuer being noted in default and indicates how the Commission determines whether a reporting issuer is in default of any requirement of the Act or the regulations.

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.

2.2 Completeness of the List

- (1) 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) The absence of a default notation on the list of reporting issuers does not necessarily mean that the reporting issuer is in full compliance with all of its obligations under the Act or the regulations. There may be situations where an issuer is in default of a continuous disclosure requirement but the default is not reflected in the list.

These situations may arise for the following reasons. First, the list will not reflect undetected deficiencies. For example, if an issuer fails to make a required filing relating to a non-periodic event, such as a material change report or a business acquisition report, this deficiency may not be immediately apparent to staff responsible for maintaining the list. Secondly, a deficiency may be detected, but the issuer may disagree with staff as to whether the issuer is in default. As described in subsection 3.2(2) below, if the issuer and staff disagree about whether the issuer is in default, the issuer will generally not be noted in default pending a determination of the issue by the Commission. Thirdly, where an issuer has been noted in default, the default notation may subsequently be removed if it is determined that the default has ceased to be material. For example, an issuer may be noted in default for failing to file interim financial statements and related MD&A, and then remain in default for an extended period of time. In these circumstances, the Commission may be prepared to remove the default notation, and revoke a cease trade order if one has been issued, where the Commission is satisfied that the issuer has substantially brought its filings up to date. The Commission will generally consider this to be the case where the issuer files audited annual financial statements and related MD&A for the three most recently completed financial years and interim financial statements and related MD&A for the current financial year. In these circumstances, the Commission may, depending upon its review of all relevant factors, accept that the issuer should no longer be considered in default of a current material continuous disclosure requirement and remove the default notation. As a technical matter, the issuer remains in default of those filing requirements that have not been met.

Market participants should consider these limitations and make their own investigations as appropriate before relying 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 key continuous disclosure deficiencies resulting in default are those listed in Appendix A.

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 material requirement of the Act or the regulations. While the categories set out in Appendix A identify a number of material requirements, they are not an exhaustive description of the circumstances in which a reporting issuer may be considered to be in default.

3.2 The Process

- (1) Subject to subsection (2), staff will notify a reporting issuer when noting an the issuer in default. If an issuer is notified by 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 within the time period specified by staff or satisfies staff that it is not in default, staff will remove the default notation.
- (2) If staff is of the view that a reporting issuer is in default based on a content deficiency in the issuer's continuous disclosure record, staff will notify the issuer before noting the issuer in default. If the issuer and staff disagree about whether the issuer is in default, the issuer will generally not be noted in default 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 the Commission 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 Removal of Default Notation – A reporting issuer will no longer be identified as being in default once it has remedied the default by filing the required document, correcting the deficiency in its continuous disclosure record, remitting the applicable fee or otherwise demonstrating that it is not in default.

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

Intentionally deleted

PART 5 – FORM OF CERTIFICATE OF NO DEFAULT

Intentionally deleted

APPENDIX A

Key Deficiencies Resulting in Default

- 1. Failure to file the following continuous disclosure prescribed by Ontario securities laws:**
 - (a) annual financial statements;
 - (b) interim financial statements;
 - (c) annual or interim management's discussion and analysis (MD&A) or annual or interim management report of fund performance (MRFP);
 - (d) annual information form (AIF);
 - (e) certification of annual or interim filings under Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (MI 52-109);
 - (f) proxy materials or a required information circular;
 - (g) issuer profile supplement on the System for Electronic Disclosure By Insiders (SEDI);
 - (h) material change report;
 - (i) written update as required after filing a confidential report of a material change;
 - (j) business acquisition report;
 - (k) annual oil and gas disclosure prescribed by National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities* (NI 51-101) or technical reports for a mineral project required under National Instrument 43-101 *Standards of Disclosure for Mineral Projects* (NI 43-101);
 - (l) mandatory news release;
 - (m) corporate governance disclosure as required by National Instrument 58-101 *Disclosure of Corporate Governance Practices*;
 - (n) audit committee disclosure as required by Multilateral Instrument 52-110 *Audit Committees* or BC Instrument 52-509 *Audit Committees*; or
 - (o) disclosure in an issuer's MD&A relating to disclosure controls and procedures and their effectiveness that is referred to in a certificate filed under MI 52-109.

- 2. Continuous disclosure that is deficient because:**
 - (a) financial statements of the reporting issuer, or the auditor's report accompanying the financial statements, do not comply with the requirements of National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102), National Instrument 81-106 *Investment Fund Continuous Disclosure* (NI 81-106) or National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency*;
 - (b) the reporting issuer has acknowledged that its financial statements, or the auditor's report accompanying the financial statements, may no longer be relied upon;
 - (c) the reporting 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
 - (d) the reporting issuer's technical disclosure or other reports do not comply with the disclosure requirements of NI 43-101 or NI 51-101.

- 3. Failure to pay a fee required by Ontario securities laws.**

- 4. Failure to comply with any other requirement related to continuous disclosure.**