



Document Type: Local Policy
Document N° : 51-601
Subject: Reporting Issuer Defaults
Amendments:
Published Date: September 13, 2004
Effective Date: July 21, 2004

The New Brunswick Securities Commission, being of the opinion that it is advisable and facilitates the exercise of the powers and the performance of its duties issues New Brunswick Local Policy 51-601 *Policy on Reporting Issuer Defaults*.

DATED at Saint John, New Brunswick this 21st day of July, 2004.

Donne W. Smith
Chair

TABLE OF CONTENTS

PART 1: GENERAL

1.1 Rational for Certificate of No Default and List of Defaulting Reporting Issuers

PART 2: DETERMINATION IF AN ISSUER IS A REPORTING ISSER

2.1 Inquires on Reporting Issuer Status

PART 3: DETERMINATION IF A REPORTING ISSUER IS IN DEFAULT

3.1 List of Defaulting Reporting Issuers
3.2 Minor Non-Compliance does not Constitute Default
3.3 Guidelines as to When Non-Compliance Constitutes Default
3.4 Ability to Cure an Existing Default
3.5 Filing Considerations

PART 4: AVAILABILITY AND FORM OF CERTIFICATE OF NO DEFAULT

4.1 Who May Request a Certificate of No Default
4.2 Issuance of Certificates
4.3 Form of Certificate of No Default

PART 5: EFFECTIVE DATE

5.1 Effective date

PART 6: FORM OF CERTIFICATE OF NO DEFAULT UNDER SUBSECTION 97(1) OF THE ACT

6.1 Form of Certificate of No Default

Schedule A

PART 1 GENERAL

1.1 Rational for Certificate of No Default and List of Defaulting Reporting Issuers

1.1.1. In certain circumstances, holders of securities purchased under certain exemptions from the prospectus requirements cannot resell the securities without a prospectus, except under another exemption, unless, among other things, the issuer of the securities is not in default of any requirement of the New Brunswick *Securities Act* (the “Act”) or the regulations.

1.1.2. For the purpose of determining whether a reporting issuer is not in default of any requirement of the Act or the regulations, a seller is entitled to apply to the New Brunswick Securities Commission (the “Commission”) for, and rely on, a certificate of no default issued for this purpose. The seller is also entitled to rely on a list of defaulting reporting issuers maintained by the Commission for public inspection.¹

1.1.3. A determination that a reporting issuer is in default carries numerous possible consequences in addition to those describe in subsection (1), affecting, but not limited to such matters as the imposition of cease trade orders and the inability to file a short form prospectus.

1.1.4. The Commission is consequently aware that many interested parties other than prospective sellers of securities, including prospective purchasers of an issuer’s securities, rely on certificates and the list of defaulting reporting issuers. This Policy is intended to inform all interested parties of the guidelines followed and factors considered by the Commission in determining if a reporting issuer is in default, and to provide information as to the procedure for obtaining a certificate of no default.

PART 2 DETERMINATION IF AN ISSUER IS A REPORTING ISSUER

2.1 Inquiries on Reporting Issuer Status

2.1.1. The Commission will respond to oral inquiries as to whether an issuer is a reporting issuer but oral responses should not be relied upon. An interested party should obtain a certificate of no default under subsection 97(1) of the Act if the interested party wants a definitive statement as to whether an issuer is a reporting issuer.

PART 3 DETERMINATION IF A REPORTING ISSUER IS IN DEFAULT

3.1 List of Defaulting Reporting Issuers

3.1.1. In responding to inquiries as to whether a reporting issuer is in default, the Commission relies primarily upon the list of defaulting reporting issuers that it maintains under subsection 97(2) of the Act and internal reviews conducted by staff.

3.1.2. The list of defaulting reporting issuers is available on the Commission’s Web site.

3.1.3. The list of defaulting reporting issuers is also available for public inspection in the offices of the Commission during normal business hours.

¹ Subsections 97(1), 97(2), 97(3) of the Act.

3.1.4. The list of defaulting reporting issuers is categorized to indicate separately those reporting issuers that are in default:

- a) because of a failure to file financial statements within the time periods required by section 90 of the Act;
- b) because of a failure to file a required AIF or MD&A;
- c) because of a failure to file required proxy materials or a required information circular or report in lieu thereof;
- d) because of a failure to pay a fee required by the Act or the regulations;
- e) because, even though continuous disclosure documents have been filed within any prescribed time period, they are deficient in one or more of the respects set out in subsection 3.3.2(d);
- f) because of a failure to file an issuer profile supplement in National Instrument 55-102 *System for Electronic Disclosure by Insiders*;
- g) because of a failure to file certificates required under National Instrument 51-102 *Continuous Disclosure Obligations*; or
- h) for any other reason.

3.1.5. The Commission will provide oral confirmation as to whether a reporting issuer is in default based upon the appearance of its name on the list, but oral responses should not be relied upon. An interested party should obtain a certificate of no default if the interested party wants a definitive statement as to whether the Commission's records indicate that a reporting issuer is or is not in default.

3.2 Minor Non-compliance does not Constitute Default

3.2.1. Given that the Act and the regulations contain a large number of requirements applicable to reporting issuers, it is impossible for the Commission to know at any time if there is some minor requirement of the Act or regulations that has been contravened by a reporting issuer.

3.2.2. A reporting issuer will generally not be considered to be in default unless the reporting issuer is in default of a significant requirement of the Act or the regulations, determined in part with reference to the guidelines set out in subsection 3.3.2.

3.3 Guidelines as to When Non-compliance Constitutes Default

3.3.1. For the purpose of subsection 3.2.2, the Commission is of the view that the significant requirements of the Act and the regulations include the continuous and timely disclosure requirements of the Act and the regulations. The resale restrictions associated with some distributions made in reliance on certain exemptions from the prospectus requirements are

premised on the assumption that, since the issuer is a reporting issuer, compliance by it with the continuous and timely disclosure requirements will ensure that current information about the issuer is always available in the marketplace.

3.3.2. The following are some of the guidelines used to determine if an issuer is in default under the continuous and timely disclosure requirements of the Act and the regulations for the purposes of maintaining the list of defaulting reporting issuers under subsection 97(2) of the Act and the issuance of certificates, if in each case the relevant facts come to the attention of staff:

- a) A reporting issuer that has not filed all required material change reports under subsection 89(1) of the Act will be considered to be in default.
- b) A reporting issuer that has filed a confidential report of a material change under subsection 89(2) of the Act but does not comply with the obligations to update the Commission under subsection 89(3) of the Act will be considered to be in default.
- c) A reporting issuer that has not filed financial statements within the time periods required by section 90 of the Act will be considered to be in default.
- d) Even though financial statements or other continuous disclosure documents have been filed within any required time periods, a reporting issuer will be considered to be in default if:
 - i. the financial statements omit a required statement, are not prepared on a comparative basis, omit an auditor's report, or are not prepared in accordance with National Instrument 51-102 *Continuous Disclosure Obligations*;
 - ii. the auditor's report accompanying the financial statements does not comply with the requirements of generally accepted auditing standards, National Instrument 51-102, or National Instrument 52-104 *Basis of Accounting, Auditing and Reporting* once in force, or until such time as National Instrument 52-104 is in force, is materially inconsistent with the guidelines of National Policy Statement 50 *Reservations In An Auditor's Report*; or
 - iii. it is determined that some other deficiency in the financial statements or in the issuer's continuous disclosure record is so significant as to constitute default.
- e) Subject to compliance with section 94 of the Act, a reporting issuer that has not filed an information circular required by subsection 93(1) of the Act forthwith after it is sent to security holders or an annual report required by subsection 93(2) within 140 days after the end of the issuer's last financial year will be considered to be in default.
- f) A reporting issuer that has not filed a required AIF or MD&A in accordance with National Instrument 51-102 will be considered to be in default.
- g) A reporting issuer that has not filed a business acquisition report in accordance with National Instrument 51-102 after completing a significant acquisition will be considered to be in default.

- h) A reporting issuer that has not paid a fee required by the Act or the regulations will be considered to be in default.

3.3.3. The guidelines described in subsection 3.3.2 do not represent an exhaustive description of the circumstances in which a reporting issuer may be considered to be in default. A reporting issuer may be considered to be in default for a clear failure to comply with a significant requirement of the Act or regulations, whether or not specifically described in subsection 3.3.2.

3.3.4. (a) A reporting issuer will generally be notified in advance of any intention to treat the reporting issuer as being in default of any of the requirements described in subsection 3.3.2 or 3.3.3 and the issuer may request a hearing before the Commission on this matter. If the default is not clear and if a Commission hearing is requested within 10 days of that notification, then the issuer will generally not be included on the list of defaulting issuers pending the Commission hearing.

3.3.4 (b) Subject to paragraph 3.3.4(c), if the default is clear then, even if the issuer requests a Commission hearing, the issuer could be included on the list of defaulting issuers during the period before the hearing.

3.3.4 (c) If a default described in clause 3.3.2(d)(iii) or in subsection 3.3.3 is clear and significant then, even if the issuer requests a Commission hearing, the issuer could be included on the list of defaulting issuers during the period before the Commission hearing. Such a determination would be made by the Executive Director and would be made only after appropriate consideration of all the facts and circumstances. This would include allowing the issuer an opportunity to present its views on the issue in writing and in person and to discuss those views with Staff, and an opportunity to be heard by the Executive Director. When such a determination is made by the Executive Director, written reasons would be provided to the issuer upon which the issuer can seek from the Commission a hearing and review of the Executive Director's decision.

3.4 Ability to Cure an Existing Default

3.4.1 A reporting issuer's name will be removed from the list of defaulting reporting issuers once the default has been cured by the filing of the correct document, the correction of the deficiency in the continuous disclosure record or the remittance of the applicable fee.

3.5 Filing Considerations

3.5.1. National Instrument 13-101 *System for Electronic Document Analysis and Retrieval* (SEDAR) requires, or, in some cases, allows for the electronic transmission of documents to the Commission for filing. The National Instrument provides that a document transmitted electronically using the SEDAR system is filed on the day that the electronic transmission of the document is completed (although in some cases a filing will not trigger time periods under the Act until the next business day if not completed by 5:00 p.m. on the due date).

3.5.2. The SEDAR system allows a filer to determine whether the electronic transmission of the document has been completed and provides the filer with the date and time of the event. Given the nature of the documents required to be filed electronically using SEDAR, if electronic transmission of a filing required to be made using the SEDAR system is not completed when

due and no unanticipated technical difficulties have occurred, the issuer may become a defaulting reporting issuer for purposes of the Act.

3.5.3. In cases where documents need not be transmitted electronically using the SEDAR system, the mailing or sending of a document to the Commission does not in itself constitute compliance with the filing requirements of the Act or the regulations. 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 may become a defaulting reporting issuer if the document is not received. The issuer should retain the facsimile verification as evidence that the facsimile was received by the Commission.

PART 4 AVAILABILITY AND FORM OF CERTIFICATE OF NO DEFAULT

4.1 Who May Request a Certificate of No Default

4.1.1 It is the practice of the Commission to accept a request for a certificate of no default from any interested party.

4.2 Issuance of Certificates

4.2.1 The Commission recommends making a request for a certificate of no default at least two business days before the desired date of issuance, accompanied by a fee of \$50 that must be made in advance of the issuance of a receipt.

4.3 Form of Certificate of No Default

4.3.1. The general form of certificate of no default issued subsection 97(1) of the Act is set out in section 6.1.

4.3.2. The Commission may issue a modified form of the certificate of no default set out in section 6.1 if circumstances require the inclusion of additional qualifications or otherwise do not permit the issuance of the standard form of certificate of no default.

PART 5 EFFECTIVE DATE

5.1 Effective Date

5.1.1 This policy comes into effect July 21, 2004.

**PART 6 FORM OF CERTIFICATE OF NO DEFAULT UNDER SUBSECTION 97(1) OF
THE ACT**

SCHEDULE A

6.1 Form of Certificate of No Default

CERTIFICATE UNDER SUBSECTION 97(1) OF THE SECURITIES ACT (NEW BRUNSWICK)

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 97(2) of the Securities Act (the "Act").

A reader of this Certificate of No Default is encouraged to consult Commission Policy 51-601, which contains guidelines and other information relevant to the issuance of this Certificate.

This Certificate relates only to compliance with certain provisions of the Act and the regulations made under the Act. 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.

DATED at Saint John, New Brunswick this _____ day of _____, 2004.

Executive Director