Submission on Proposed Amendments to National Instrument 44-102 Shelf Distributions Relating to Well-known Seasoned Issuers

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Submission to the Canadian Securities Administrators (CSA)

ASSOCIATION DES BANQUIERS CANADIENS
CANADIAN BANKERS ASSOCIATION

General Comments

The Canadian Bankers Association (**CBA**)[1] appreciates the opportunity to provide input on the proposed amendments to National Instrument (NI) 44-102 Shelf Distributions Relating to Well-known Seasoned Issuers (**WKSIs**) (the **Proposal**).

The creation of a permanent WKSI regime for Canada would be a very positive development in line with previous CSA initiatives aimed at enhancing capital markets efficiency and fostering capital formation. The Proposal would significantly reduce unnecessary burden on issuers without impacting the quality of disclosure provided to investors and better align the Canadian prospectus filing regime with that of the United States (**U.S.**), facilitating cross-border offerings.

For these reasons, subject to our specific comments below, our members are supportive of the Proposal and commend the CSA for considering a permanent WKSI regime that will help expedite access to capital in Canada.

Prior to responding to the specific questions noted in the Proposal, we would like to stress the importance of ensuring that, under any WKSI regime, the special accommodations for Canadian issuers currently available under the multijurisdictional disclosure system (**MJDS**) are not jeopardized and that current issuance programs and platforms available to issuers are not impacted.

Specific CSA Questions

1. **Do you agree with the WKSI qualification criteria proposed in the definition of "well-known seasoned issuer"? If not, please identify the requirements that could be eliminated or modified to improve the criteria. For example, are the proposed qualifying public equity and qualifying public debt thresholds appropriate?**

[1] The Canadian Bankers Association is the voice of more than 60 domestic and foreign banks that help drive Canada's economic growth and prosperity. The CBA advocates for public policies that contribute to a sound, thriving banking system to ensure Canadians can succeed in their financial goals.

Asset-Backed Securities

While we are supportive of many of the qualification criteria in the proposed WKSI definition, a number of the elements do raise concerns for our members. Aside from the proposed 3-year seasoning period, which we will address in response to Question 2 below, paragraph (e) of the proposed WKSI definition, which requires that "the issuer has no outstanding asset-backed securities" (**ABS**), is problematic. We note that the scope of ABS this would apply to is not specified and the underlying policy rationale has not been articulated. In our view, this proposed restriction regarding ABS should be removed from the WKSI definition.

In the alternative, assuming a clear policy rationale is articulated, and this restriction is retained, we would urge the CSA to clarify the scope of this provision so that it applies only where ABS are being issued to investors under a Canadian prospectus. For example, in the case of a bank seeking to qualify as a WKSI, the restriction against ABS would apply only where the bank itself is issuing ABS or asset-backed commercial paper (**ABCP**) to investors under a Canadian prospectus and not under any form of private placement offering documentation. Special purpose vehicles (**SPVs**) that are being consolidated onto the bank's balance sheet and issuing ABS or ABCP to investors should not disqualify the bank from being a WKSI.

Loss of WKSI Status

We note that under the Proposal, if an issuer no longer qualifies as a WKSI, the issuer would be required to publicly announce (via press release) that it would not distribute securities under a prospectus supplement to the WKSI base shelf prospectus and withdraw the WKSI base shelf prospectus.

The practical and policy benefit of the issuance of such a press release, over simply stopping the distribution under the WKSI base shelf prospectus and rolling into the general regime or stopping the distribution all together, is not clear. The withdrawal of the WKSI base shelf prospectus can happen for technical reasons (e.g., the float decreased below the threshold), and such a press release will likely attract market attention and may negatively impact the share price of the issuer. Such an outcome would not serve the regulatory objectives of the Proposal

and would lead to unintended negative consequences for the issuer. Therefore, we suggest reconsidering this requirement.

In addition, under the U.S. WKSI regime, it is our understanding that the Securities and Exchange Commission (**SEC**) has published procedures by which an issuer who expects to lose its WKSI status may continue to use its automatic shelf registration statement while it converts such registration statement to a non-automatic shelf registration statement.[2] We would suggest that a similar procedure be implemented under the Canadian regime where a reporting issuer anticipates losing its WKSI status.

2. Under the Blanket Orders, an issuer does not qualify to file a WKSI base shelf prospectus unless it has been a reporting issuer in at least one jurisdiction of Canada for at least 12 months immediately preceding the date of the WKSI base shelf prospectus. We are concerned that an issuer that has been a reporting issuer for only 12 months may not have a sufficient continuous disclosure record to justify participation in the WSKI regime. To address this concern, we propose extending the length of this seasoning period to three years. Is a three-year seasoning period appropriate? Should we consider a reduced seasoning period? If so, what is an appropriate seasoning period and why?

We would strongly urge the CSA to retain the 12-month seasoning period established under the Blanket Orders for the following reasons:

- **Investor Protection:** In our members' experience, newly listed issuers accumulate sufficient public disclosure over 12 months for investors to make an educated investment decision. Moreover, the float volume requirement itself implies that a significant amount of disclosure has already occurred. We also note that the current regime in Canada requires only a 12-month reporting history and has been in place since January 2022, with no demonstrated negative impact to either investors or the integrity of capital markets, with at least 79 issuers having filed a WSKI base shelf prospectus to date.[3] In our experience, newly-created public companies are the issuers that most rely on financing markets in the first 12 months post-IPO, and the regulatory/investor risk is

[2] SEC.gov | Securities Act Rules Compliance and Disclosure Interpretations – see steps outlined by the SEC in response to Question 198.06.
[3] See Annex D of the CSA Notice that accompanies the Proposal.

lower for a company that has recently gone through a typically robust IPO prospectus review.

- **Alignment with U.S. WKSI Regime:** One of the objectives of the Proposal is to align more closely with the timing of the U.S. WKSI regime and better facilitate cross-border offerings. In accordance with this objective, we note that the U.S. WKSI regime, which has been in place since 2005, is subject to only a 12-month seasoning period.

- **Capital Formation:** The lengthening of the seasoning period to three years may reduce the number of eligible issuers that can utilize the WKSI framework thereby limiting the potential capital formation benefits of the WKSI regime.

3. Do you agree with the eligibility criteria proposed in the definition of "eligible issuer"? If not, please identify the requirements that could be eliminated or modified to improve the criteria. In particular, do you agree with the requirements relating to (i) penalties and sanctions and (ii) outstanding asset-backed securities?

(i) Penalties and Sanctions

Paragraph (d) of the proposed definition of “eligible issuer” establishes the following eligibility criteria:

d) during the preceding 3 years, neither the issuer, nor any of its subsidiaries, has been the subject of an order, judgment, decree, sanction or administrative penalty imposed by, or has entered into a settlement agreement with or approved by, a court in Canada or a foreign jurisdiction, or a securities regulatory authority or a similar authority in a foreign jurisdiction, related to a claim based in whole or in part on fraud, theft, deceit, misrepresentation, conspiracy, insider trading, unregistered activity or illegal distribution.

In our view, without adding a materiality qualifier to this paragraph, many large issuers would have difficulty satisfying this criterion. By virtue of their size and complexity, such issuers would likely be the subject of one or more of the above-listed penalties and sanctions in the ordinary course of business.

Most of these issuers would, from time to time, be party to legal proceedings in the ordinary course and may enter settlement agreements with regulators, even when the sanction is minor and/or completely unrelated to equity issuance. Such issuers would be automatically disqualified from utilizing the WKSI regime. Disqualification in such circumstances would not be proportionate to the significance of the capital formation objectives sought through the Proposal.

At a minimum, the criteria should apply to the issuer only and not to any of its subsidiaries, particularly immaterial ones[4], and include a materiality qualifier supported by examples of the type of penalty or sanction that would be captured by this definition. Examples could be developed based on a review of material proceedings typically disclosed in Questions 8 – Proceedings and 9 – Civil Proceedings in the Personal Information Forms (**PIF**s) of large public issuers. A materiality qualifier provides context of a particular penalty or sanction since many large public issuers are subject to numerous regulatory authorities around the world and fees, administrative penalties and sanctions may be categorized differently by each regulator depending on the jurisdiction.

Lastly, we note that discretionary exemptive relief has been added to the proposed regime, reflected in the proposed changes to Companion Policy 44-102CP. It would be helpful to provide specific examples of how this relief might be applied in relation to failure to meet specified elements of the eligibility criteria. This would be similar to the equivalent U.S. eligibility provisions. For example, the U.S. definition of ineligible issuer provides the following: [5]

> Regarding Insolvency:
> "(B) Ineligibility will terminate under this paragraph (1)(iv) if an issuer has filed an annual report with audited financial statements subsequent to its emergence from that bankruptcy, insolvency, or receivership process;"

[4] The materiality of a subsidiary could be defined in terms of the subsidiary's assets and/or revenue, similar to the concept of "major subsidiary" in National Instrument 55-104[4].
[5] 17 CFR § 230.405 - Definitions of terms. | Electronic Code of Federal Regulations (e-CFR) | US Law | LII / Legal Information Institute (cornell.edu) – See paragraph (iv) of the definition of "ineligible issuer".

Regarding violations of the anti-fraud provisions of the federal securities laws:
"(2) An issuer shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer. Any such determination shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person."

(ii) Asset-Backed Securities

See our response to Question 1 above.

(iii) A 12-month Qualifier for Filing Periodic Disclosure

We note that paragraph (a) of the proposed definition of "eligible issuer", regarding the requirement to file all periodic disclosure documents, does not specify a time period over which this criterion applies. In our view, the phrase "during the preceding 12 months" should be added to the beginning of this paragraph. This would clarify the scope of this provision and align it with the proposed annual confirmation process as well as the U.S. approach.[6]

4. The definition of "eligible issuer" excludes issuers that have been the subject of a cease trade order or order similar to a cease trade order in any Canadian jurisdiction within the previous three years. Should this exclusion contain an exception for issuers that were the subject of a cease trade order or similar order in any Canadian jurisdiction within the previous three years that was revoked within 30 days of its issuance, to align with the disclosure requirements for directors and executive officers in Form 41-101F1 Information Required in a Prospectus, Form 51-102F2 Annual Information Form and Form 51-102F5 Information Circular?

Yes, the exclusion for these orders should contain the exception as described in this question.

5. Are there other eligibility criteria that should disqualify an issuer from the WKSI regime? If so, please explain.

[6] 17 CFR § 230.405 - Definitions of terms. | Electronic Code of Federal Regulations (e-CFR) | US Law | LII / Legal Information Institute (cornell.edu) – See paragraph (i) of the definition of "ineligible issuer".

We do not believe that any additional eligibility criteria are necessary.

6. Under the Proposed Amendments, issuers would be required to deliver personal information forms with the WKSI base shelf prospectus. However, the receipt for the prospectus would be deemed to be issued prior to any review of these personal information forms. Do you agree with requiring issuers to deliver personal information forms with the WKSI base shelf prospectus? If not, please explain.

If one of the Proposal's objectives is to reduce burden on issuers, and PIFs will not be reviewed prior to a deemed receipt being issued, consideration should be given to eliminating the proposed requirement to file PIFs with the WKSI base shelf prospectus. If the proposed requirement is retained, the amendments should clarify the implications of a securities regulator taking issue with one or more of the PIFs and specify that any comments on the PIFs would not invalidate the deemed issuance of a receipt or the ability to issue under the base shelf.

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Thank you for considering our comments on the Proposal. We welcome the opportunity to discuss our comments and answer any questions you may have regarding our submission.