



December 19, 2023

VIA EMAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Service NL
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Nunavut

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Dear Sirs/Mesdames:

Re: Canadian Securities Administrators (“CSA”) Notice and Request for Comment Proposed Amendments to National Instrument 44-102 *Shelf Distributions* Relating to Well-known Seasoned Issuers (the “Proposed Amendments”)

TSX Inc. (“**TSX**”) and TSX Venture Exchange Inc. (“**TSXV**”) (together, the “**Exchanges**” or “**we**”) welcome the opportunity to comment on the Proposed Amendments, published on September 21, 2023. Capitalized terms used herein and not specifically defined have the meaning given to them in the Request for Comment regarding the Proposed Amendments (“**Request for Comment**”).

The Exchanges, part of TMX Group Limited, serve a central role in the Canadian capital markets as well as a destination for international capital. TSX is a globally recognized stock exchange listing growth-oriented, strong performing companies and TSXV is Canada’s leading capital formation platform for growth-stage companies. The Exchanges are focused on facilitating the growth and efficiency of the Canadian capital markets, supporting and promoting innovation, capital formation, good governance, and advancing investor protection.

I. Introduction

The Proposed Amendments would introduce an expedited shelf prospectus regime for well-known seasoned issuers (“**WKSIs**”) in Canada by codifying the temporary exemptions published on December 6, 2021 (the “**WKSI Framework**”). The temporary exemptions for WKSIs from certain base shelf prospectus requirements were issued under harmonized CSA-wide local blanket orders (the “**Blanket Orders**”). The CSA, in codifying the WKSI Framework, is proposing several amendments to the structure established under the Blanket Orders.

The CSA explains in the Request for Comment that the Proposed Amendments are intended to reduce unnecessary regulatory burdens for well-known reporting issuers that have a strong market following, a complete public disclosure record and sufficient public equity to foster capital formation by such issuers, and to facilitate cross-border offerings by more closely aligning the timing of Canadian prospectus filings with those applicable in the United States.

The Proposed Amendments would achieve this goal by establishing an expedited shelf prospectus regime for WKSIs, permitting such qualifying issuers to file a final base shelf prospectus that omits certain disclosure (such as dollar amount of securities that may be raised under the prospectus) for an effective period of 37 months. The Proposed Amendments also would enable some jurisdictions to adopt specific fees for WKSI base shelf prospectus filings, would deem a receipt to be issued by a jurisdiction upon filing a compliant base shelf prospectus in that jurisdiction, and would introduce an annual confirmation requirement.

II. The Proposed Amendments Are Welcomed As A Burden Reduction Measure, But Could be More Effective in Facilitating Cross-Border Offerings

We support the Proposed Amendments as an important step in achieving the goals outlined by the CSA of reducing unnecessary regulatory burdens. We applaud the CSA both for initially publishing the Blanket Orders and for its decision to codify a Canadian WKSI regime. The Proposed Amendments also achieve the CSA’s goal of more closely aligning the timing of

Canadian prospectus filings with those applicable in the United States. However, in order for the CSA fully to achieve its goal of better facilitating cross-border offerings, additional steps to align the Canadian WKSI framework with the U.S. framework are necessary. Bringing the two frameworks into closer alignment is necessary to permit dual-listed issuers to take full advantage of the multijurisdictional disclosure system (“MJDS”).

A. Reducing Regulatory Burden

As the Request for Comment notes, the significant costs of full regulatory review of base shelf prospectuses likely outweigh the benefits for mature issuers with a well-established continuous disclosure record. For such issuers, regulatory review is unlikely to identify substantive deficiencies that require regulatory intervention. The Proposed Amendments eliminate the costs and potential delays associated with this regulatory review for issuers that are already well-known and followed by market analysts. Furthermore, exempting WKSIs from the requirement to state an aggregate dollar value in its base shelf prospectus will result in cost savings to WKSIs by avoiding the need to amend or refile these prospectuses during the 37 month period following deemed receipt. There are approximately 351 issuers listed on TSX with a market capitalization of at least \$500M¹, representing approximately 22% of all TSX-listed issuers. The CSA’s Proposed Amendments will make it more cost-effective for such issuers to raise capital in the Canadian market, a compelling reduction in the regulatory burden for a significant portion of Canadian issuers.

Under the Proposed Amendments, issuers that have a mineral project, must disclose: (i) gross revenue, derived from mining operations, of at least \$55 million for the issuer’s most recently completed financial year; and (ii) gross revenue, derived from mining operations, of at least \$165 million in the aggregate for the issuer’s three most recently completed financial years. Given that the premise of the WKSI Framework is to rely on an issuer’s disclosure record, we query why a quantitative financial requirement is required. We acknowledge that this requirement is carried over from the Blanket Orders, however the additional requirement for mining issuers appears to place an unfair burden on issuers with specific operations that is not required of other issuers. The inclusion of specific financial tests for only one industry sector seems incongruous with the rest of the proposed regime and the CSA’s stated goal of burden reduction.

B. Facilitating Cross-Border Offerings

As of November 30, 2023, there were 181 TSX issuers dual listed in the US. We commend the CSA for its goal of facilitating cross-border offerings. In particular, the proposed change from the Blanket Orders to allow for a deemed receipt will provide Canadian issuers and underwriters the same degree of certainty regarding execution of an offering in Canada as provided to WKSI-eligible issuers in the US. This will also allow WKSIs to take advantage of favourable

¹ As of November 30, 2023. Market capitalization is intended to be an indicator of companies with the highest level of analyst coverage, institutional ownership and trading volume. Although market capitalization is not a direct representation of public float, it is an appropriate proxy.

market conditions or narrow market openings and allows for more flexibility in execution of cross-border offerings, by eliminating the possibility of delay resulting from CSA staff review prior to receipt. This amendment will reduce burdens on dual listed issuers and encourage future cross-border offerings.

However, the CSA's goal of facilitating cross-border offerings would be furthered by maintaining the currently aligned seasoning period, permitting premarketing activities and including transition provisions in the proposed annual certification process for WKSI issuers that subsequently become ineligible for the WKSI Framework.

1. *Seasoning Period*

By proposing to lengthen the current seasoning period beyond 12 months, the Proposed Amendments would move the US and Canadian frameworks out of their current alignment in this important qualifying criterion. A US issuer, to qualify as a WKSI, must have filed timely periodic reports for 12 months. This is the same requirement provided under the Blanket Orders. However, the Proposed Amendments would introduce a conflict between the two frameworks by lengthening the disclosure requirement from 12 to 37 months. It would do so under the rationale that increasing the seasoning period would address the concern that issuers reporting for only 12 months may not have a sufficient continuous disclosure record, market following or history of participation in the capital markets to be considered as a WKSI. However, the Blanket Orders currently only require 12 months' disclosure as a reporting issuer. And, the CSA currently only requires 12 months' disclosure for an issuer to become short form eligible.² The CSA has not pointed to any findings that the current 12 month requirement under either provision has been abused or caused harm. The US has also only required a 12 month reporting history for as part of its WKSI eligibility criteria since the introduction of the US WKSI rules in 2005³. There is no basis for creating a conflict in the 12 month eligibility requirement either within the overall CSA issuer framework or between the US and Canadian WKSI Frameworks. Such a result would be contrary to one of the CSA's stated goals of facilitating cross-border offerings.

2. *Pre-marketing Activities*

WKSI-eligible issuers in the US are permitted to engage in offers of securities prior to filing their WKSI registration statement⁴. However, Canadian WKSI-eligible issuers apparently are

² Pursuant to section 2.2 of National Instrument 44-101 *Short Form Prospectus Distributions*.

³ Under MJDS, even certain non-WKSI eligible Canadian issuers with a 12 month reporting history are able to file automatically effective registration statements on Form F-10.

⁴ See Section III.D.2.B of [Securities Offering Reform](#), Securities Act Release No. 8591 (August 3, 2005)[70 FR 44721], at page 77.

estopped from doing so under interpretations of current CSA provisions.⁵ We suggest that the CSA consider whether this disparity can be addressed to put Canadian cross-border issuers on an equal footing. There does not appear to be a discernible policy basis for denying WKSI issuers the ability to rely on the bought deal exemption for pre-marketing in conjunction with filing a WKSI base shelf prospectus and prospectus supplement.

3. *Annual Confirmation*

The Proposed Amendments introduce an annual confirmation of WKSI eligibility. This is a reasonable addition to the framework established by the Blanket Orders which we support. However, unlike the US framework, which permits an issuer to continue to use its former WKSI status pending the effectiveness of a post-effective amendment to convert that registration statement into a non-WKSI registration statement, the Proposed Amendments do not provide for a transitional period.

Under the Proposed Amendments, if an issuer is no longer an eligible WKSI, the issuer must withdraw the WKSI base shelf prospectus and publicly announce that it will not distribute securities under a prospectus supplement to the WKSI base shelf prospectus. The result would be that issuers that lose their WKSI status would no longer be able to sell securities under the related base shelf prospectus until a new, traditional, preliminary base shelf prospectus is filed and subjected to routine regulatory review. This approach potentially would have adverse consequences for investors, the issuer, and the market generally, particularly if the reason that the WKSI lost eligibility was due to market volatility. We urge the CSA to include a transition period under the annual confirmation process.

⁵ Under the Proposed Amendments, subsection 2.10(7) of Companion Policy 44-101CP *Shelf Distributions* states that since advertising or marketing activities undertaken in connection with a prospectus prior to the issuance of a receipt for the preliminary prospectus are prohibited under securities legislation, any advertising or marketing activities undertaken in connection with a WKSI base shelf prospectus prior to the deemed issuance of a receipt for the WKSI base shelf prospectus are prohibited, since, under the WKSI Framework, a WKSI is exempt from the requirement to file a preliminary prospectus. This subsection also states that an issuer who is filing a WKSI base shelf prospectus would also be unable to rely on the bought deal exemption for pre-marketing provided in Part 7 of NI 44-101, as a preliminary prospectus is required to be filed to comply with such exemption.

III. Conclusion

We appreciate your consideration of our comments and we would be happy to discuss these at greater length with the appropriate representatives. Please do not hesitate to contact us if you have any questions regarding our comments.

Yours very truly,

'Loui Anastasopoulos'

Loui Anastasopoulos
Chief Executive Officer, Toronto Stock Exchange
and Global Head, Capital Formation