Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto ON M5H 4E3
Canada
T 416-367-6000
F 416-367-6749
blg.com

Borden Ladner Gervais

December 20, 2023

DELIVERED BY EMAIL

WITHOUT PREJUDICE

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

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario
M5H 3S8
Fax: 416-593-2318
Email: comment@osc.gov.on.ca

Me Philippe Lebel
Corporate Secretary and Executive Director,
Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: 514-864-8381
Email: consultation-en-cours@lautorite.qc.ca

Dear Sir/Mesdames:

Re: CSA Notice and Request for Comment – Proposed Amendments to National Instrument 44-102 Shelf Distributions Relating to Well-known Seasoned Issuers

We are pleased to provide the following comments in response to the Notice and Request for Comment (the **Notice**) published by the Canadian Securities Administrators (the **CSA**) on September 21, 2023 with respect to proposed amendments (the **Proposed Amendments**) to National Instrument 44-102 *Shelf Distributions* (**NI 44-102**) relating to Well-known Seasoned Issuers (**WKSIs**).

We thank you for the opportunity to comment on the Proposed Amendments. This letter represents the general comments of certain individual members of the Securities and Capital Markets practice group at Borden Ladner Gervais LLP (**BLG**). Our comments are not those of BLG generally or any client of the firm. Our comments are being submitted without prejudice to any position taken or that might be taken in the future by BLG on our own behalf or on behalf of any client.

Where are comments are in response to specific questions posed in the Notice, we have included the text of the question for ease of reference. Capitalized terms used in this letter that are not defined have the meanings attributed to them in the Notice.

Part A – General Comments

We are generally supportive of the Proposed Amendments and the adoption of a permanent WKSI regime in Canada. We are of the view that the reduced regulatory burden that would result from the implementation of the Proposed Amendments would better facilitate capital raising in Canada. We also believe that the Proposed Amendments represent a positive step towards greater alignment with the securities law regime in the United States, better facilitating cross-border distributions.

Part B – Response to 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, as the proposed qualifying public equity and qualifying public debt thresholds appropriate?***

We are generally supportive of the "well-known seasoned issuer" qualification criteria. However, we recommend that the CSA consider clarifying the definition of "qualifying public equity" with respect to the listed equity securities to be excluded. In particular, we note that securities held by reporting insiders of the issuer are to be excluded from the aggregate market value of the listed equity securities. Annex E to the Notice explains that the term "reporting insider" was used because "these individuals will have been previously identified and their holdings are publicly available." While this is generally the case, there are instances where (1) a reporting insider may be exempt from filing insider reports on SEDI (for example, eligible institutional investors pursuant to section 9.1 of National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (**NI 62-103**)), or (2) persons who would be considered reporting insiders fail to comply with their reporting obligations. As a result, it may be challenging for issuers to properly calculate the "qualifying public equity". Given the foregoing, we suggest that the definition be revised as follows:

> *"qualifying public equity" means the aggregate market value of the listed equity securities of an issuer, excluding equity securities held by an affiliate or a reporting insider of the issuer* ***<u>as disclosed on SEDI</u>****, calculated using the simple average of the daily closing price of the securities of a short form eligible exchange for each of the trading days on which there was a daily closing price for the preceding 20 days; [****<u>suggested added language</u>****]*

Alternatively, we suggest including language similar to that included in section 2.1 of NI 62-103 in NI 44-102, as follows:

> *(1) Subject to subsection (2), in determining who an issuer's reporting insiders are and their respective securityholdings for the purpose of determining an issuer's 'qualifying public equity',*

an issuer may rely upon information reported on SEDI in accordance with the reporting requirements of National Instrument 55-104 Insider Reporting Requirements and Exemptions.

(2) Subsection (1) does not apply if the issuer has knowledge both (a) that the information reported on SEDI is inaccurate or has changes, and (b) of the correct information.

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 WKSI 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 are of the view that the three-year seasoning period is too long. First, one of the stated goals of the Proposed Amendments is to better align Canadian securities regulatory rules with those in the United States, where a WKSI regime currently exists so as to better facilitate cross-border offerings and capital formation. Notably, the U.S. WKSI regime only subjects issuers to a 12-month seasoning period. Requiring Canadian issuers to have been reporting issuers for three years before qualifying as WKSIs will not serve to better align Canadian and U.S. rules.

We also note that a long-form prospectus, as used in an issuer's initial public offering, will include full, true and plain disclosure of all material facts relating to the securities issued. In the case of a non-offering prospectus, the issuer would have to include all material facts related to all issued securities. As stated in Form 41-101F1, "[t]he objective of the prospectus is to provide information concerning the issuer that an investor needs in order to make an informed investment decision." The long form prospectus is generally required to include three years of historical audited financial statements (subject to limited exceptions that more typically apply to smaller-cap/venture issuers). Coupling a long-form prospectus with a full 12-months of public disclosure should provide investors with sufficient information about an issuer to make an investment decision.

Further, the existing Blanket Orders only require issuers to have been reporting issuers for 12-months in order to qualify as WKSIs. We are not aware of any negative impact this has had on Canadian capital markets that would justify extending this seasoning period by an additional two years.

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 sanction and (ii) outstanding asset-backed securities?***

Certain large issuers in specific industries (for example, banks), particularly those with many subsidiaries, may struggle to satisfy the eligibility requirements given the breadth of the requirements related to penalties and sanctions. We suggest including a materiality qualifier in subsection (d) of the definition of "eligible issuer" of the Proposed Amendments (i.e., material subsidiaries and/or material penalties and sanctions).

We further note that under the U.S. WKSI regime, an issuer, or its subsidiary, must have been convicted of a felony or misdemeanor in order to become ineligible to qualify as a WKSI. The Proposed Amendments (subsection (d) of the definition of "eligible issuer") do not require that the issuer, or its subsidiary, be convicted of any particular wrongdoing but rather that the issuer, or its subsidiary, have entered into a settlement agreement (among other things) related to fraud, theft, deceit, misrepresentation, conspiracy, insider trading, unregistered activity or illegal distribution. This means that an issuer that has entered into a settlement agreement without having been convicted of any wrongdoing or admitting any fault would be precluded for three years from using the WKSI system. We recommend that the CSA consider revising this requirement to clarify that only issuers who have been convicted of some wrongdoing related to capital markets would be precluded from the WKSI system.

The eligibility criteria also require that an issuer has "filed all periodic and timely disclosure documents that it is required to have filed under" securities legislation, an order made by the regulator or securities regulatory authority, and an undertaking given by the issuer to the regulator or securities regulatory authority (subsection (a) of the definition of "eligible issuer"). While we acknowledge that this language mirrors that of section 2.2 of NI 44-101, we suggest including a look-back period (12-months) in this requirement so that issuers do not have to confirm that they have filed all disclosure since becoming reporting issuers. For reference, we understand that the U.S. WKSI regime requires an issuer to have filed all requisite reports and materials during the preceding 12 months.

4. ***The definition of "eligible issuer" excludes issuer 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. We suggest that the CSA revise the definition of "eligible issuer" in the Proposed Amendments to include 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 better align with other instruments and forms. Issuers will already be familiar with this requirement and will often collect this information in annual director and officer questionnaires as part of their existing diligence and disclosure processes.

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

We do not suggest adding any further eligibility criteria. The Proposed Amendments already include significantly more criteria than in the U.S. WKSI regime.

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.

We do not have any concerns with the requirement to deliver personal information forms with the WKSI base shelf prospectus, provided that any subsequent CSA review of such personal information forms will not impact the WKSI issuer's ability to raise capital under the WKSI base shelf prospectus or cause the deemed receipt to be rescinded.

Part C – Additional Comments

1. ***Section 9B.6(1)(b) - News Release Requirement***

We note that the Proposed Amendments would require an issuer to issue a news release announcing that it will not distribute securities under a prospectus supplement to the WKSI base shelf prospectus if the issuer is no longer permitted to do so. We question the utility of this requirement, particularly as (1) should an issuer cease to be an "eligible issuer" (as defined in the Proposed Amendments), the reason for ceasing to be an "eligible issuer" will generally already have been included in the issuer's public disclosure, for example by way of a material change report or in financial statements, (2) an issuer has no obligation to actually raise capital under any base shelf prospectus that has been filed, and (3) the Proposed Amendments require an issuer to confirm in its annual information form that it continues to satisfy the applicable requirements. We would not generally expect an issuer who has filed a base shelf prospectus to indicate to the market that it will not be issuing securities under that base shelf prospectus.

*   *   *   *   *

Thank you for the opportunity to comment on the Proposed Amendments. Please do not hesitate to contact any of the undersigned if you have any questions with respect to our comments above or wish to discuss.

Sincerely,

Laura Levine	**Philippe Tardif**
Partner	Partner
LLevine@blg.com	PTardif@blg.com