

December 20, 2023

**By 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

**Re: Proposed amendments to National Instrument 44-102 *Shelf Distributions* relating to Well-known Seasoned Issuers**

Dear staff:

**Introduction**

We are writing in response to your request for comment dated September 21, 2023 regarding:

- the proposed amendments to National Instrument 44-102 *Shelf Distributions* (NI 44-102) relating to Well-Known Seasoned Issuers (WKSIs);
- proposed changes to Companion Policy 44-102CP *Shelf Distributions* (44-102CP); and
- related changes to existing rules and policies (collectively, the Proposed Amendments).

These comments are provided by the partners and counsel of Torys LLP who are signatories below, in their personal capacities, and not on behalf of the firm or any of its clients.

We appreciate the efforts of the Canadian Securities Administrators (CSA) to reduce costs and unnecessary regulatory burdens that reporting issuers face when filing a base shelf prospectus and promote an expedited shelf prospectus regime for issuers that are well-known reporting issuers, have a strong market following, a complete public disclosure record and sufficient public equity or debt. We expect that the Proposed Amendments will be a welcome development for the Canadian capital markets as they will provide eligible issuers with more flexibility in structuring base shelf prospectus offerings; provide improved certainty regarding transaction timing; streamline the disclosure requirements for base shelf prospectuses; and reduce costs and unnecessary regulatory burden for seasoned issuers and investment dealers. The CSA may wish to consider the following to further enhance the benefits of the Proposed Amendments and foster capital formation in Canadian public markets.

## **1. Definition of well-known seasoned issuer**

*Permit credit support issuers to qualify as WKSIs if their parent credit supporter is a WKSI*

The Proposed Amendments define a WKSI as an issuer that either has outstanding listed equity securities with a market value of at least C\$500 million or at least C\$1 billion aggregate amount of non-convertible debt securities distributed under a prospectus in primary offerings for cash in the last three years. Although the thresholds are similar to the WKSI regime in the United States, which is available to issuers with, among other things, a worldwide market value of its outstanding voting and non-voting common equity of at least US\$700 million, credit support issuers that have not issued \$1 billion in non-equity securities under a prospectus are currently ineligible under the class orders (the Blanket Orders) that implemented a Canadian WKSI regime on a pilot basis and would also be ineligible under the Proposed Amendments.

Sections 2.4 and 2.5 of National Instrument 44-101 – *Short Form Prospectus Distributions* (44-101) provide that a credit support issuer is qualified to file a short form prospectus if the credit supporter satisfies the criteria in s. 2.2 (i.e., if the credit supporter is qualified to file a short form prospectus). We recommend that the criteria for WKSI-eligible issuers be aligned with the approach taken in NI 44-101 in respect of credit supporters, such that a credit support issuer would be considered a WKSI so long as their parent credit supporter is a WKSI. Otherwise, there will be many credit support issuers that will be unable to access the WKSI regime notwithstanding that their parent credit supporter is a WKSI. Since these issuers often file joint base shelf prospectuses, denying access to the WKSI regime to the credit support issuer will create inefficiency by effectively preventing parent credit supporters from relying on the WKSI exemption unless they file a separate, traditional base shelf prospectus for any affected credit support issuers. This is in contrast to the U.S. WKSI regime which provides that a majority-owned subsidiary of a WKSI will be a WKSI if the securities are non-convertible securities, other than common equity, and the parent is a WKSI and fully and unconditionally guarantees the securities to be issued by the subsidiary.

*Expand definitions of qualifying public equity and qualifying public debt*

The definition of qualifying public equity refers to equity securities. If an issuer obtains relief from the short form eligibility requirements contained in paragraph 2.2(e) of NI 44-101 with respect to equity securities so that (for example) their exchangeable shares are treated as equity securities for purposes of the short form eligibility requirements, we recommend that the WKSI definition be interpreted in a consistent manner such that the exchangeable shares are treated as equity securities for the purpose of the WKSI rules.

The definition of qualifying public debt refers only to non-convertible debt securities. It is not clear to us why convertible securities have been excluded, or if this was meant to solely capture securities that are not convertible into equity securities. Also, whereas the Blanket Orders left open the possibility that an issuer could qualify as a WKSI on the basis that it had distributed the requisite amount of preferred shares (the Blanket Orders refer to C\$1 billion of non-convertible securities, other than equity securities), the Proposed Amendments refer only to debt securities. We are uncertain as to whether this was an intentional change but as a result of this language, preferred share credit support issuers will be ineligible under the Proposed Amendments. The requirement in the Blanket Orders that the securities be non-convertible would also prevent some preferred share issuers that only issue rate reset preferred shares from ever becoming eligible. Absent a compelling policy reason to exclude convertible debt securities and preferred shares, we would suggest that they be included in the WKSI eligibility criteria. In the alternative, if convertible securities are excluded, we would suggest that the final rule allow for rate reset preferred shares and other debt/preferred securities that are not convertible into equity of the issuer to count towards the C\$1 billion threshold.

*Extend WKSI eligibility to issuers that are permitted to file a short form prospectus pursuant to an exemptive relief order*

Under the Proposed Amendments, an issuer must satisfy several other requirements to file a WKSI base shelf prospectus, including requirements related to short form prospectus eligibility. An issuer relying on exemptive relief to be qualified to file a short form prospectus will not be eligible to file a WKSI base shelf

prospectus because it will not meet the condition in part (c) of the definition of eligible issuer, which provides that the issuer must be qualified to file a short form prospectus under s. 2.2-2.5 of NI 44-101. While this interpretation may have helped keep things simple during the pilot project, we are of the view that an issuer that has obtained exemptive relief permitting it to be qualified to file a short form prospectus effectively satisfies this requirement and should also be able to file a WKSI base shelf prospectus.

## **2. Seasoning Period**

In addition to the meeting the qualifying thresholds, to be WKSI-eligible under the Proposed Amendments an issuer must be, and have been, a reporting issuer in at least one Canadian jurisdiction for the preceding 3 years and must meet the definition of a WKSI as of a date within 60 days preceding the date it files the WKSI base shelf prospectus. We were supportive of the shorter 12-month seasoning period set out in the Blanket Orders, with that 12-month seasoning period being consistent with the U.S. WKSI regime.

For the reasons outlined above, we recommend that a credit support issuer not be subject to the requirement that it has been a reporting issuer for the seasoning period – this requirement means that a parent credit supporter cannot add a new credit support issuer to a WKSI base shelf prospectus until it has met the qualifying public debt threshold and (under the Proposed Amendments) been a reporting issuer for at least 3 years. Since they rely on the continuous disclosure record of their parent, credit support issuers should be exempt from the seasoning period requirement if their WKSI-eligible parent meets the seasoning period requirement.

## **3. Definition of eligible issuer**

### *Penalties and sanctions*

The ineligibility criteria under the Proposed Amendments are broader than under the Blanket Orders and will take into account certain settlement agreements and regulatory proceedings outside of Canada. We note that the ineligibility criteria relating to penalties and sanctions also appear to be broader than in the U.S. The CSA may wish to consider whether that is intended and appropriate.

We note that the Proposed Amendments indicate that exemptive relief applications will be considered. We are supportive of allowing for a more fact-specific assessment of WKSI eligibility and note that the Securities and Exchange Commission (SEC) has provided guidance on waivers of ineligible issuer status. Providing similar transparency for the Canadian WKSI framework regarding the circumstances in which the CSA would consider applications for exemptive relief would benefit all stakeholders.

### *Asset-backed securities*

Under the Proposed Amendments, an issuer with outstanding asset-backed securities is ineligible to file a WKSI base shelf prospectus. As many issuers of asset-backed securities (ABS) are special purpose vehicles, and they already benefit from alternative eligibility criteria to access the short form prospectus regime under NI 44-101, we understand the rationale for not permitting the use of a WKSI base shelf prospectus to distribute ABS. We wonder, however, whether the limitation that an issuer cannot have *any* asset-backed securities outstanding is necessary if the other eligibility criteria are satisfied (and the WKSI base shelf prospectus will not be used for ABS distributions). Was it to ensure that ABS would not count toward the debt issuance eligibility criteria and, if so, would a more tailored exclusion of ABS from the criteria be more appropriate?

## **4. Cease trade orders**

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. We agree with the suggestion of including 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 existing disclosure requirements for directors and executive officers.

## **5. Personal information forms**

Since personal information forms (PIFs) will not be reviewed prior to a deemed receipt being issued, we do not agree that PIFs should be required at the time of filing a WKSI base shelf prospectus. It is not clear to us what the benefit would be to requiring PIFs to be filed with WKSI base shelf prospectuses. In general, we believe that regulatory monitoring of PIF filings is better suited to continuous disclosure reviews. We agree with other commenters that if the proposed requirement is retained, it would be helpful if the Proposed Amendments clarify that issues related to PIFs will not invalidate the deemed issuance of a receipt or the ability to issue under the WKSI base shelf prospectus.

## **6. Annual confirmation of WKSI status**

Under the Proposed Amendments, an issuer that has filed a WKSI base shelf prospectus would be required to confirm its eligibility annually. The issuer must then signal to the market that it remains WKSI eligible either through a confirmatory statement in its annual information form (AIF) or by filing an amendment to its WKSI base shelf prospectus. An issuer that is no longer WKSI-eligible or fails to complete the annual confirmation would be required to withdraw (and cease utilizing) its WKSI base shelf prospectus and issue a news release. No such annual confirmation requirements exist under the Blanket Orders. Consequently, it will be critical under the Proposed Amendments for issuers to ensure their continued eligibility to distribute securities under their WKSI base shelf prospectuses filed under the Proposed Amendments. We question whether this change from the approach taken in the Blanket Orders is necessary for matters that do not go to an issuer's fundamental stability or creditworthiness. In addition to disqualifying the issuer from maintaining its WKSI eligibility status after a WKSI base shelf prospectus has been filed, the requirement to issue a news release highlighting this fact could have negative consequences for issuers, including impacting the market perception and share price of affected issuers, which we do not think is the CSA's intention.

We understand the addition of the annual confirmation is designed to align the Canadian WKSI regime more closely with the U.S. WKSI regime. However, under the U.S. WKSI regime, issuers are not required to press release the loss of WKSI status. In addition, the SEC permits an issuer that loses its WKSI status to continue using its WKSI shelf pending the conversion of its WKSI shelf into a non-WKSI shelf. We recommend that the CSA eliminate the requirement to issue a news release for the reasons noted above and that issuers who lose their WKSI status be permitted to continue using their WKSI base shelf prospectus while they are in the process of withdrawing their WKSI base shelf prospectus and filing a new non-WKSI base shelf prospectus.

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We appreciate the opportunity to comment on the Proposed Amendments and would be happy to discuss any of our comments set out above with you by phone or by email.

Yours truly,

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