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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

c/o

The Secretary
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Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Email: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

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

We commend the Canadian Securities Administrators ("**CSA**") on its initiative to streamline the prospectus regime by introducing an automatic shelf prospectus regime for well-known seasoned issuers ("**WKSIs**") through the amendments (the "**Proposed Amendments**") set out in CSA Notice and Request for Comment – Proposed Amendments to National Instrument 44-102 *Shelf Distributions* Relating to Well-known Seasoned Issuers (the "**CSA Notice**").

As the first law firm to recommend that the CSA consider adopting a WKSI regime, Davies continues to be an ardent advocate for this initiative[1]. As we noted in our initial recommendation, and have re-

[1] See our comment letter dated July 28, 2017 in response to CSA Consultation Paper *51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*. To our knowledge, Davies and the

iterated in our subsequent comment letters, the 'well-known' nature of eligible issuers and their reporting record should provide comfort that an automatic shelf prospectus will not meaningfully diminish the investor protection that would otherwise be afforded from the traditional regulatory review of a shelf prospectus as there should be a sufficient level of confidence in such issuers' continuous reporting resulting from their wide following by the financial community and the associated scrutiny of their reporting.

However, we believe that there are several elements of the Proposed Amendments that needlessly limit access to the proposed WKSI regime, add unnecessary burden or are otherwise inappropriate. In weighing what are appropriate limitations and burdens, the CSA should consider the limited nature of the accommodation being provided to WKSIs, the rationale for affording WKSIs this accommodation and the overriding investor protection objective of the prospectus requirement. While there are certain ancillary accommodations involved, from an investor protection standpoint the primary accommodation is foregoing the securities regulators' review of the base shelf prospectus which would have otherwise been performed over the two to three business days following filing. In our experience (and as confirmed in the CSA Notice), this review is unlikely to identify substantive deficiencies with a base shelf prospectus of a WKSI that would require regulatory intervention. Moreover, the absence of regulatory review to clear a WKSI base shelf prospectus does not in any way diminish the diligence that will be performed in connection with an offering qualified by that prospectus – the underwriters for any such offering will still conduct the same diligence as they would if the offering was qualified by a prospectus reviewed by Canadian securities regulators.

Bearing the above in mind, and to allow the proposed WKSI regime to work as intended, it is crucial that the CSA scale back the "**sanctions condition**" set out in clause (d) of the "eligible issuer" definition so that it is limited to sanctions that are relevant for the protection of Canadian investors. Our detailed comments in respect of the sanctions condition are included in our response to question #3 from the CSA. The balance of our comments are split between our responses to the other specific questions raised by the CSA and our additional comments that follow those responses. We believe that our recommendations will remedy the unanticipated effects of certain provisions of the Proposed Amendments, resolve the residual practical challenges for qualifying reporting issuers and enhance the overall efficiency of the Canadian capital markets.

Capitalized terms used and not otherwise defined in this letter have the meaning set out in the CSA Notice. Our references to the "**U.S. WKSI regime**" are to the expedited shelf registration regime for well-known seasoned issuers under U.S. securities legislation initially adopted under Securities Act Release No. 8591 (the "**U.S. WKSI Adopting Release**").

Investment Industry Association of Canada were the only commenters that recommended the CSA institute a WKSI regime in response to that consultation paper.

I. CSA's 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?

As noted above, and in our response to the CSA's question #3 below, the inappropriate scope of the sanctions condition set out in clause (d) of the definition of "eligible issuer" is the most critical issue with the Proposed Amendments. However, we also have concerns with some of the criteria proposed for a "well-known seasoned issuer." We have set out these additional concerns below together with our proposed changes to (1) ensure that these criteria are not so restrictive as to unnecessarily exclude certain issuers that should be afforded WKSI status and (2) reduce unnecessary regulatory burden for issuers that use the WKSI regime.

(a) *Qualifying public equity measure*

From our discussions with Canadian dealers, we understand that Canadian reporting issuers with a public float that exceeds the proposed $500 million threshold have a strong market following with equity analysts and institutional investors. As a result, the dollar amount proposed for this threshold seems appropriate.

However, to be more reflective of a public float measure that indicates a sufficient market following, we suggest an amendment to the manner in which "qualifying public equity" is calculated. In our view, it is not appropriate to exclude all reporting insiders from the "qualifying public equity" measure used in clause (a) of the definition of "well-known seasoned issuer." Specifically, it seems arbitrary to exclude shareholders from the calculation merely because they own more than 10% of the voting shares. While one might reasonably assume that a control person is unlikely to regularly trade in and out of its control position, it is unclear why one would assume the same of 10% shareholders. It would not be unusual for a position held by a group of ETFs or mutual funds or a Canadian pension fund to exceed 10% of the outstanding voting shares of Canadian public company at a point in time. Notably, the corresponding public float measure used to determine eligibility under the U.S. WKSI regime only excludes "affiliates" within the meaning of U.S. federal securities legislation.[2] Accordingly, we suggest that only securities owned by "control persons" (as defined in Canadian securities legislation) be excluded when calculating an issuer's "qualifying public equity." Alternatively, if the CSA has evidence that certain types of 10% shareholders would be excluded by equity analysts or institutional investors in determining whether a reporting issuer is sufficiently large (by public float) to follow, "qualifying public equity" should still count securities that are owned by other 10% shareholders (who are counted by analysts or investors in making that determination). For example, "qualifying public equity" could be calculated by excluding shares held by a reporting insider *other than* "eligible institutional investors"

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[2] The term "affiliate" is defined in Rule 405 promulgated under the United States *Securities Act of 1933* as "a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified "

who use, or are qualified to use, the alternative monthly reporting system under National Instrument 62-103 – *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* ("**NI 62-103**").

In addition, for determining the number of securities to be excluded in calculating its "qualifying public equity", a reliance provision should be included within the Proposed Amendments to allow an issuer to rely on the beneficial ownership of relevant persons included in their current insider or early warning reporting.[3]

(b) *Required reporting history*

The requirement in clause (b) that a "well-known seasoned issuer" have a Canadian reporting history (the "**Canadian reporting history requirement**") of at least three years is too long. For the reasons noted in our response to the CSA's question #2 below, we believe a 12-month reporting history is sufficient for a Canadian reporting issuer to be sufficiently "well-known" and "seasoned" to use the WKSI shelf regime.

In addition, and regardless of the length of seasoning period that is used for the Canadian reporting history requirement, the Proposed Amendments should allow a successor issuer (as defined in National Instrument 44-101 – *Short Form Prospectus Distributions* ("**NI 44-101**")) to satisfy that requirement by counting the reporting history of its predecessor entities together with its own reporting history.

Similarly, given the recognition in Canadian securities legislation as to adequacy of U.S. reporting for Canadian reporting purposes and the corresponding (and potentially broader) market following enjoyed by U.S. public companies with a large public float, the CSA should consider whether to account for prior U.S. reporting by an issuer (or a predecessor issuer) in the requirements for eligibility for the Canadian WKSI regime. For example, if a Canadian reporting issuer acquires a U.S. reporting issuer that (immediately prior to the acquisition) satisfied the eligibility and other criteria of a WKSI under the U.S. WKSI regime, and would otherwise meet all criteria for a WKSI in Canada (other than the Canadian reporting history requirement), we think the acquiror should be deemed a WKSI for Canadian WKSI regime purposes.

(c) *Mineral project requirement*

The additional revenue requirements in clause (d) of the "well-known seasoned issuer" definition for any issuer "that has a mineral project" may inadvertently disqualify large and well-known seasoned issuers whose predominant business is not mining but that have a minority or *de minimis* ownership interest in one or more mineral projects (which, given the change in language from the Blanket Orders, would now include an issuer holding a single mining royalty). The threshold in the current proposal – the issuer having a mineral project – does not even require the mineral project to be material to the issuer. However, we believe that the appropriate threshold in this context should go beyond an issuer

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[3] This would be analogous to the provision in section 2.1 of NI 62-103 that allows a person to rely on an issuer's publicly reported outstanding shares for purposes of early warning reporting.

merely having a material mineral project, but should cover only issuers whose primary focus is mining activities. We submit that there is no reason to extend these requirements beyond issuers that are primarily in the mining industry. If, as we suspect, the rationale behind the additional revenue requirements (though the CSA Notice is silent on the point) is to address the expense profile and inherently speculative nature of pre-production and early stage mining projects, the requirements should be applicable to only those issuers that are fully exposed to those risks. A more targeted version of such a limitation would draw upon the concept of an issuer's "primary business" that is used in Item 32 of Form 41-101F1 *Information Required in a Prospectus* (and, for which extensive commentary is provided in Part 5 of Companion Policy 41-101CP to National Instrument 41-101 *General Prospectus Requirements*). Accordingly, we suggest that the introduction in clause (d) of the definition be changed to read "for an issuer whose primary business is one or more of exploration, development or mining of mineral projects, the issuer's most recent audited annual financial statements disclose…."

Additionally, we think that any revised formulation should be careful not to use the term "mineral project" in an expansive manner, as the extended definition of that term in National Instrument 43-101 *Standards of Disclosure for Mineral Projects* is too broad for the purposes of the additional revenue requirement. Using such a formulation, the additional revenue requirement would apply to any issuer that holds a royalty. However, the revenue and expense profile for royalty issuers is fundamentally different than for other mining issuers, as royalty issuers do not generally have the significant capital and operating expenses that are common in the mining industry. While we do not believe that a revenue requirement should be imposed in respect of holders of royalty interests, if the CSA determines to do so, the revenue thresholds for such issuers should be scaled back to recognize that royalty issuers without other interests in mineral projects do not generally have the significant ongoing capital and operating expenses that are typical for operating mining companies.

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 believe a three-year seasoning period is longer than is required for a Canadian reporting issuer to be sufficiently "well-known" and "seasoned" to use the WKSI shelf regime; a 12-month reporting history should be sufficient.

In CSA Staff Notice 44-306, CSA staff noted the WKSI Orders were intended to reduce regulatory burden for "issuers that are well-known reporting issuers, have a strong market following, complete public disclosure record and sufficient public float." That notice later refers to these eligible issuers as "large, established reporting issuers that have strong market following and up-to-date disclosure records." However, there is no specific CSA commentary (in either the WKSI Orders or the CSA Notice) on how a longer reporting history (beyond 12 months) better satisfies these hallmarks of an issuer that should qualify to use the WKSI regime.

To our mind, there is no compelling argument that an issuer that meets the qualifying public equity or debt thresholds would have reporting that is not "complete" or "up to date" merely because it has been reporting less than 36 months. Notably, such issuers must establish and maintain disclosure controls and procedures and internal control over financial reporting from the time they become a reporting issuer and perform an annual evaluation of those controls (as required by National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*). Nor is there a compelling argument that an issuer with less than 36 months of reporting will not have a strong market following. No evidence is provided by the CSA that a history of reporting beyond an initial 12 month reporting cycle is correlated to a stronger market following. Notably, the U.S. WKSI regime looks only to the issuer's public float (not the length of its reporting history) to establish whether an issuer has a market following sufficient for U.S. WKSI eligibility[4].

Because the policy rationale for the proposed Canadian WKSI regime is closely aligned with that of the U.S. WKSI regime, we believe the SEC's approach to the minimum seasoning period under the U.S. WKSI regime should be instructive. Under the U.S. WKSI regime, the SEC has determined an issuer is sufficiently "seasoned" if it has a reporting history that qualifies for use of a short-form registration statement. Twelve months of reporting has been sufficient for the U.S. WKSI regime since it was adopted in 2005[5]. Notably, the determining factor for U.S. WKSI eligibility is that the issuer be "well-known"; it is not a function of the issuer's 'seasoning'.[6] Consistent with the Canadian WKSI Regime, the U.S. WKSI Adopting Release refers to issuers that are followed by "sophisticated institutional and retail investors, members of the financial press, and numerous sell-side and buy-side analysts that actively seek new information on a continual basis." To justify those issuers' qualification for the U.S. WKSI regime, the SEC notes in the U.S. WKSI Adopting Release that "large seasoned public issuers tend to have more regular dialogue with investors and market participants through the press and other media" and refers the resulting scrutiny of these issuers' disclosure "by investors, the financial press, analysts and others who evaluate disclosure when it is made."

As noted earlier, the primary accommodation under the WKSI regime is foregoing the securities regulators' review of the base shelf prospectus. Given the limited utility of this review for a base shelf prospectus of a WKSI, and for all the other reasons noted above, we see no compelling reason to require more than 12 months of reporting history from an issuer that would otherwise qualify as a WKSI. If the CSA is concerned that a Canadian securities regulator will not have had an opportunity to conduct any review (whether prospectus-related or a continuous disclosure review) of an issuer's disclosure within 36 months from the date that issuer became a reporting issuer, we suggest limiting

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[4] In the U.S. WKSI Adopting Release, the SEC states "we believe that non-affiliate equity market capitalization, or 'public float', of a reporting issuer can be used as a proxy for whether the issuer has a demonstrated market following."

[5] In 1992, the SEC reduced the reporting history required for short-form registration eligibility from 36 months to 12 months.

[6] In the SEC Adopting Release, the SEC notes that "As a result of the active participation of these issuers in the markets and, among other things, the wide following of these issuers ….., we believe that it is appropriate to provide communications and registration flexibilities to these well-known seasoned issuers beyond that provided to other issuers, <u>including other seasoned issuers</u>."

the longer 36 month reporting history requirement to that subset of issuers and allow all other issuers (*e.g.*, those issuers who had their IPO prospectus reviewed) to qualify after 12 months of reporting.

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?

As both a principled and practical matter, it is necessary to scale back the "**sanctions condition**" set out in clause (d) of the "eligible issuer" definition so that it is limited to orders, judgments, decrees, penalties and sanctions (we generally refer to these as "sanctions" in this letter) that are relevant to the protection of Canadian investors. As currently drafted, the sanctions condition unnecessarily disqualifies otherwise deserving issuers from using the WKSI regime by requiring that the issuer not have been the subject of sanctions or a settlement for many types of claims that have no connection to the animating principle of the prospectus requirement (*i.e.*, the protection of Canadian investors by ensuring there is sufficient disclosure for them to make an informed investment decision). An issuer could lose eligibility in numerous types of unintended and potentially absurd situations due to the broad scope of this sanctions condition, including cases where the underlying claim is arbitrary or the sanction is entirely administrative and minimal, without any corresponding investor protection benefit.

The CSA should tailor the sanctions condition to narrowly address those circumstances where an issuer's action (or inaction) results in a failure to satisfy the animating principle of the prospectus requirement. Sanctions in respect of an issuer's behaviour that have no connection to the sufficiency of an issuer's disclosure do not achieve the objective of the prospectus requirement; accordingly, they should not affect whether an issuer should be eligible to use the streamlining accommodations that the WKSI regime provides. Nor would disqualification by virtue of unrelated issuer behaviour be expected to be an effective deterrent against future poor behaviour as that disqualifying activity is likely to be perpetrated by an individual in a different business line or function that would not be aware that it affects the issuer's WKSI eligibility (and, even if aware, that individual may be entirely indifferent). In any event, whether the condition would have any deterrence effect is moot as the CSA should not be using the sanctions condition to police activities that are unrelated to the prospectus requirement.

In addition to its broad scope being inappropriate in principle, there are a number of practical issues that will arise if the CSA fails to scale back the sanctions condition. Key among these is that it will be impractical for a large issuer to assess its eligibility due to the absence of any materiality threshold (as disclosure controls and procedures are not designed to identify immaterial claims that are not required to be disclosed in an issuer's continuous disclosure). In addition, deference to foreign courts and regulators in this context may result in issuers with global operations being disqualified on the basis of foreign decisions that are politically motivated or otherwise without merit, inappropriate or unsubstantiated. Even if the CSA is prepared to institute a relief process similar to the waiver process used in the U.S. WKSI regime (which provides relief for ineligible issuers where there is no good reason for them to have been disqualified), a 'catch and release' approach to the sanctions condition would still impose a significant burden (on issuers who are forced to go through the relief process and on staff who are required to assess and provide the relief) with no corresponding benefit to Canadian investors.

Further details as to the above issues, and our proposed solutions, are set out below.

Scope of laws covered by sanctions condition is too broad

The sanctions condition fails to be tailored to suit its purpose in several respects, including by unnecessarily scoping in claims with respect to activities that contravene (1) foreign laws, (2) laws that are not securities laws or (3) securities laws that address activities unrelated to the requirement that securities be distributed by way of a prospectus (*i.e.*, the prospectus requirement). The Canadian prospectus requirement (including any exemptions therefrom) should not be used to police or enforce (1) any foreign laws or (2) any Canadian laws that are not securities laws. In each case, we believe this would be outside the purpose of the Canadian prospectus requirement. Further, the Canadian prospectus requirement (including any exemptions therefrom) should not be used, either directly or indirectly, to police or enforce Canadian securities laws that were not implemented to support the prospectus requirement but are instead intended to regulate other activities or concerns in the Canadian capital markets. The Canadian securities regulators should address those other activities and concerns through the mechanisms and remedies already included in securities legislation specifically for that purpose.

Focus of sanctions condition is also too broad

Even if the sanctions condition were properly limited to applicable laws (*i.e.*, Canadian securities legislation relevant to the prospectus requirement), it fails to focus on what matters from a prospectus requirement perspective – the sufficiency of an issuer's disclosure for a person to make an informed investment decision in respect of that issuer's securities. In our view, the sanctions condition should be limited to circumstances where the relevant claim is based (in whole or in part) on a "misrepresentation" (as defined in Canadian securities legislation) contained in the issuer's prospectus or continuous or other public disclosure. Disqualification should not be used to punish prior bad actions that do not bear on the sufficiency of an issuer's disclosure or otherwise contravene the prospectus requirement in a material way. Punishment for unrelated bad actions is appropriately achieved through other remedies applicable to the action in question (including through public interest jurisdiction). Punishment should be directed at the conduct in question and with the purpose of deterring that conduct. That said, we understand if the CSA wishes to premise eligibility for the WKSI regime on the absence of any sanction in respect of an illegal distribution by an issuer (or any of its subsidiaries).

Types of sanctions and settlement agreements covered by sanctions condition are too broad

Even if the sanctions condition were property limited to applicable laws relating to the sufficiency of an issuer's disclosure, the needlessly broad references to an "order", a "sanction or administrative penalty" and a "settlement agreement" of any type in the current proposal for this condition will result in certain otherwise deserving issuers being ineligible to use the WKSI regime.

To align the sanctions condition with the rationale that underlies the WKSI regime, the types of orders, sanctions and administrative penalties issued by a securities regulatory authority that are captured by the sanctions condition should be limited to a "prescribed" set where a securities regulatory authority

has determined that a securities legislation violation of the type listed in the sanctions condition (*e.g.*, a misrepresentation, fraud or illegal distribution) has occurred.

Similarly, the reference in the sanctions condition to "a settlement agreement with or approved by a court in Canada or a securities regulatory authority" should be limited to a smaller set of "prescribed settlement agreements", where (1) the action being settled was initiated by a securities regulatory authority (not a third party plaintiff) or (2) the issuer has admitted in the settlement agreement to a securities legislation violation of the type listed in the sanctions condition (*e.g.*, a misrepresentation, fraud or illegal distribution). Failure to narrow the types of settlement agreements included in the sanctions condition will render certain issuers (that otherwise deserve to use the WKSI regime) ineligible for no principled reason as senior Canadian issuers are routinely subject to frivolous, nuisance or opportunistic class actions. In order to avoid the associated waste of resources that would follow from disputing the claim in court, these issuers will often terminate the action through a settlement agreement with the plaintiff in which the issuer agrees to minor fiscal payments with no admission of wrongdoing by the issuer. As a result of the procedural requirements relating to class action lawsuits, terminating the action prior to a full scale trial will always require that the settlement agreement be approved by the court, regardless of the merits of the underlying action.

Approach under the U.S. WKSI regime

Given the U.S. WKSI regime has been in effect for almost 20 years, and the large volume of issuers who have availed themselves of that regime during that period, it is instructive to look at how sanctions factor into the U.S. WKSI eligibility criteria and the SEC's experience in granting waivers of ineligible issuer status.

The eligibility condition under the U.S. WKSI regime that best corresponds with the proposed sanctions condition refers narrowly to violations of the anti-fraud provisions of the federal securities laws; *i.e.*, those U.S. securities laws that prohibit a prospectus or other disclosure document from containing an untrue statement of a material fact or omitting a material fact or engaging in any fraud or deceit in connection with a purchase or sale of a security. It does not scope in violations of foreign laws. As noted in the U.S. WKSI Adopting Release, the focus of this condition was intentionally narrowed in response to comments received (and accepted) by the SEC that "the disqualifying violations [based on securities law violations or settlements of alleged violations] were too broad and should be limited to violations of the anti-fraud provisions, not any provision of the federal securities laws."

The U.S. WKSI regime does have other criteria for eligibility, most of which are appropriately addressed in the proposed eligibility criteria set out in the Proposed Amendments. However, one of the criteria for U.S. WKSI eligibility that should <u>not</u> be adopted in the Canadian WKSI regime is the requirement that an issuer (or any entity that at the time was its subsidiary) not be convicted of a felony or misdemeanour within the past three years in respect of certain enumerated provisions that relate to theft, extortion, forgery and other bad actions (the "**bad actor condition**"). It is important to note that this bad actor condition was not added to address a specific policy objective of the U.S. WKSI regime. It was added as a holdover from a historical determination by U.S. Congress to not extend the safe harbour for forward-looking statements to, among others, issuers previously convicted of the specified felonies and misdemeanors. There are other examples in U.S. securities legislation where "bad actors"

are disqualified from relying on certain accommodations, including certain commonly used private placement exemptions. Due only to this legislative history, the SEC concluded that "bad actor" issuers should also be ineligible for the U.S. WKSI regime. Canadian securities legislation has no equivalent legislative history and, as previously noted, no purpose of Canadian securities legislation is served by policing these types of bad actions. Accordingly, there is no reason to follow the SEC's approach of including a bad actor condition for eligibility for the Canadian WKSI regime.

Despite the U.S. WKSI regime having a more tailored approach to disqualification than the Proposed Amendments, we understand that the SEC still receives a substantial number of waiver requests from ineligible issuers. Many of these waiver requests are to deal with disqualification resulting from the U.S. WKSI regime's "bad actor condition." While most requested waivers are granted, there is a substantial amount of work required to be done by SEC staff for the underlying analysis. In March 2015, Mary Jo White (the then Chair of the SEC) noted that those waivers were often justified because the misconduct triggering the disqualification is "wholly unrelated to the activities that would be the subject of the disqualification" and that "waivers were never intended to be, and we should not use them as, an additional enforcement tool designed to address misconduct or as an unjustified mechanism for deterring misconduct."[7] Ultimately, it seems a significant amount of time and resources are spent by the SEC and the relevant U.S. issuers on this waiver process which would have been avoided (without any consequence to investor protection) if the U.S. WKSI regime had not included a bad actor condition to eligibility.

Ineligibility due to action of acquired subsidiary

An issuer should not be disqualified by actions of a subsidiary that arose at a time prior to it being a subsidiary of the issuer. Provision was added into the U.S. WKSI Adopting Release to address comments on this point.

Our proposed revisions to the sanctions condition

To appropriately narrow the focus of the sanctions condition to match its purpose and address the other issues noted above, we suggest the CSA replace the current sanctions condition with text to the following effect:

> "(d) during the preceding 3 years, neither the issuer, nor any of its subsidiaries, has been the subject of an order, judgment or decree issued by a Canadian court[8] or a prescribed[9] order, sanction or administrative penalty imposed by a securities regulatory authority, or has entered

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[7] Mary Jo White, Chair, Sec. & Exchange Comm'n, Understanding Disqualifications, Exemptions and Waivers Under the Federal Securities Laws, Remarks at the Corporate Counsel Institute, Georgetown University in Washington, D.C. (March 12, 2015), available at http:// www.sec.gov/news/speech/031215-spch-cmjw.html.

[8] "Canadian court" to be defined as a court of competent jurisdiction in Canada.

[9] See our comment above under "— Types of sanctions and settlement agreements covered by sanctions condition are too broad" for details as to the types of orders, sanctions and administrative penalties that should be a "prescribed order, sanction or administrative penalty" for this purpose.

into a prescribed[10] settlement agreement with a securities regulatory authority or that was approved by a Canadian court[11], in each case that is in respect of a claim (i) that such issuer (or subsidiary, as applicable) has violated a provision of securities legislation[12] and (ii) that is based in whole or in part on (a) a misrepresentation (as defined in securities legislation) contained in any "document[13]", (b) a fraud committed by such issuer (or subsidiary, as applicable) in preparing its financial statements or any other "document" of the issuer; or (c) an illegal distribution by such issuer (or subsidiary, as applicable)[14]; provided that, in the case of a subsidiary, it was a subsidiary of the issuer at the time[15] of such misrepresentation, fraud or illegal distribution, as applicable."

Note that the proposed text above does not include activities that violate securities law requirements that are unrelated to the prospectus requirement and are intended to regulate other activities or concerns in the Canadian capital markets. As a result, our proposed text does not refer to "unregistered activity" as this is appropriately addressed by the registration requirements of securities legislation. On the same basis, our proposed text does not refer to "insider trading."

WKSI ineligibility relief process

Even if the conditions to eligibility are appropriately tailored in the manner that we have suggested above, we recommend that the CSA also institute a standardized process with transparent and achievable conditions that will allow for routine and expedited relief from disqualification (reinstating WKSI eligibility) in circumstances where the disqualification was a result of conduct that (1) did not affect the sufficiency of the issuer's disclosure or its ability to produce reliable disclosure, in each case, in any material respect, (2) has been remedied such that the issuer's disclosure will be reliable going forward or (3) was remedied within a short period (e.g., 30-60 days) following the applicable sanction or settlement agreement.

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10 See our comment above under "— Types of sanctions and settlement agreements covered by sanctions condition are too broad" for details as to the types of settlement agreements that should be a "prescribed settlement agreement" for this purpose.

11 The term ""securities regulatory authority" is as defined in NI 14-101 *Definitions* (*i.e.*, Canadian securities regulators) consistent with the penalties and sanctions condition for eligibility in the current Blanket Orders. Sanctions of foreign courts and foreign securities regulators should not be included for the reasons noted earlier.

12 The term "securities legislation" is as defined in NI 14-101 *Definitions* (*i.e.*, Canadian securities legislation) consistent with the penalties and sanctions condition for eligibility in the current Blanket Orders. For reasons as to why the sanctions condition should be limited to Canadian securities laws, see our comment above under "— Scope of laws covered by sanctions condition is too broad."

13 The term "document" means (1) any continuous disclosure documents or prospectus filed by such issuer or its subsidiary with a securities regulatory authority and (2) any other disclosure document that is made available to the public, in each case, by such issuer (or subsidiary, as applicable).

14 For reasons as to why the sanctions condition should be limited to these types of claims, see our comment above under "— Focus of sanctions condition is also too broad."

15 See our comment above under "— Ineligibility due to action of acquired subsidiary."

Saving Provision

In addition, we recommend that the CSA include a saving provision clarifying that the underwriters and other participants in a distribution (other than the issuer) that is qualified by a WKSI base shelf prospectus will be deemed to have satisfied the prospectus requirement (by virtue of the filing of such WKSI base shelf prospectus) provided they had a reasonable belief that the issuer was an "eligible issuer" at the relevant time. For that provision, a belief should be reasonable if based on the qualification certificate filed by the issuer with the WKSI base shelf prospectus, an issuer's statement in its AIF or WKSI base shelf prospectus (including any amendment) that confirms the issuer is eligible or related representations made by the issuer to the underwriters or other distribution participants. It would be impossible for an underwriter or selling security holder to independently confirm all of the criteria for WKSI eligibility, particularly the sanctions condition (even if properly tailored as discussed above). A provision was added into the U.S. WKSI Adopting Release to address comments that the SEC received on this point.

Depending on the scope of the claims captured by the sanctions condition in the final amendments, it may also be appropriate to deem the issuer to have satisfied the prospectus requirement where the issuer had, after reasonable investigation, reasonable grounds to believe and did believe it was an "eligible issuer" at the relevant time.

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, this exception should be included. An equivalent exception should apply to all other items that disqualify an issuer from being an "eligible issuer" to the extent they are capable of being remedied, including the sanctions condition discussed above.

In addition, we recommend that the CSA institute a standardized process with transparent and achievable conditions that will allow for routine and expedited relief from disqualification as detailed in our response to question #3 above.

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

No. As we have noted in our earlier responses, we believe the eligibility criteria are already overly restrictive.

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 agree with this requirement and, accordingly, recommend that section 9B.4(3) of the Proposed Amendments be removed in the final amendments. The purpose, if any, served by requiring personal information forms ("**PIFs**") in the context of the WKSI regime is unclear and, in any event, the burden of providing those PIFs would far outweigh their benefit, if any.

We have previously advocated for the removal of the obligation to file PIFs as they are an unnecessary burden that can delay a prospectus filing. This is particularly true of follow-on offerings by WKSIs. There is no reason to think that executive officers and directors of a WKSI would not be reputable and qualified, or that a WKSI's continuous disclosure in respect of its executive officers and directors[16] would not be the subject of scrutiny by the investment community. Even if there were a marginal benefit from securities regulators independently confirming (by way of a PIF) in rare cases, that benefit is significantly outweighed by the expense and the administrative burden on the issuer of collecting PIFs from individuals, some of whom may not be available on short notice. The administrative burden on the regulator in reviewing and clearing PIFs is also a drag on capital market efficiency.

To the extent the CSA maintains a requirement that an issuer must file a new PIF, or confirm the relevant information in an unexpired PIF, in order to qualify a base shelf or short form prospectus, we recommend the CSA institute an alternative process that allows reporting issuers to clear PIFs in advance and to obtain the necessary confirmation on an annual basis (*e.g.*, in connection with verifying the corresponding information in the issuer's management information circular or AIF) in lieu of requiring the filing to be made with (or confirmation to occur within a prescribed time frame) of any prospectus filing. This would provide a level of predictability to the issuers' directors and executive officers, thereby relieving some of the challenges of collecting or confirming PIFs on short notice. In addition, we recommend that the CSA extend the period for which a PIF is valid to at least five years. While we believe this extended PIF validity should apply to all short-form eligible issuers, it should at least apply to WKSIs.

[16] Notably, an AIF must disclose orders and bankruptcies associated with the issuer's directors and executive officers of the type addressed in the PIF form. An AIF must also disclose penalties or sanctions against directors or executive officers "that would likely be considered important to a reasonable investor in making an investment decision." While PIFs require directors and executive officers to provide information with respect to a potentially broader group of offences and proceedings, this information should not be required from a prospectus requirement perspective to the extent it is not important for an investment decision.

II. Additional Comments

In addition to the above, we also have the following comments on the Proposed Amendments.

7. Section 9B.4 – Fees payable on filing WKSI base shelf prospectus

We recommend that section 9B.4(4) of the Proposed Amendments be removed in the final amendments. In our view, no fees should be payable with the filing of a WKSI base shelf prospectus as no review is performed by the relevant securities regulatory authorities in connection with that prospectus. Consistent with the U.S. WKSI regime, all fees in connection with a WKSI base shelf prospectus should be required only at the time of the offering (*i.e.*, 'pay as you go'). Having to scramble to pay a fee concurrently with the filing – regardless of the size of that fee – is an unnecessary administrative burden and potential grounds for technical disqualification of the filing, which could defeat the intended benefit of providing the issuer with greater agility to respond to market opportunity.

If section 9B.4(4) of the Proposed Amendments is retained in the final amendments, provision should be incorporated into the final version to (1) allow for this fee to be paid within a reasonable time frame following the filing (*e.g.*, 4 business days)[17] and (2) clarify that the validity of the WKSI base shelf prospectus (and deemed receipt) is in no way affected in the event of a late payment. It would be an untenable situation for offering participants to have been found to have engaged in an illegal distribution after the fact merely by virtue of late payment of an administrative fee. In addition, as a technical matter this should refer to a "preliminary base shelf prospectus" not a "preliminary short form prospectus."

8. Section 9B.5 – U.S. Multijurisdictional Disclosure System (MJDS) considerations

We strongly support the proposal to make the receipt mechanism for a WKSI base shelf prospectus automatic (by virtue of it being deemed). We agree this will be a significant improvement to the accelerated receipt mechanism provided for by the Blanket Orders as certainty in respect of transaction timing is critical for executing an offering that is to be made concurrently with the WKSI base shelf prospectus filing.

However, if actual evidence of a receipt is not available, one technical issue could arise under the U.S. MJDS where a Canadian issuer files a base shelf prospectus that is to register/qualify a distribution of securities only in the United States ("**southbound-only shelf**") as contemplated by subsection 4.2(2) of Companion Policy 71-10CP. In those circumstances, an issuer would file the base shelf prospectus with the applicable Canadian securities regulator and file a corresponding registration statement on Form F-10 with the SEC (the "**F-10 registration statement**"). To make an F-10 registration statement for a southbound-only shelf effective sooner than the seventh calendar day after which it was filed, the SEC must receive written notification (either from the issuer or the Canadian securities regulator) of the issuance of the receipt (or notification of clearance, as applicable) for the base shelf prospectus by the

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[17] In response to commenters' concerns in respect of the U.S. WKSI regime, the SEC provided a cure provision that allows an issuer to pay a filing fee after its original payment due date if it made a good faith effort to pay timely and then paid the fee within four business days of the original fee due date. See the U.S. WKSI Adopting Release.

Canadian securities regulator. This is typically achieved by filing with the SEC a request for acceleration together with a copy of the receipt (or notification of clearance, as applicable) issued for the base shelf prospectus. Accordingly, to permit the WKSI regime to be as close as possible to automatic for a southbound-only shelf, we recommend that the CSA institute an automated process where evidence of the deemed receipt for a WKSI base shelf prospectus will be issued by the relevant securities regulator, either automatically upon filing or upon request. For clarity, notwithstanding the time at which that evidence (if any) is issued, the receipt for the WKSI base shelf prospectus should always be deemed to have been issued at the time that prospectus was filed.

On a related note, provision should be added to the Proposed Amendments to allow for the WKSI regime to apply (with appropriate modification) to circumstances where the F-10 registration statement for a southbound-only shelf of a WKSI is filed with a Canadian securities regulator (in lieu of a base shelf prospectus) in order to obtain a notification of clearance as contemplated by section 4.3 of Companion Policy 71-10CP. In those circumstances, a WKSI should be entitled to the same accommodations as it would if it were instead filing a WKSI base shelf prospectus with the Canadian securities regulator. As a policy matter, there is no reason for the Canadian securities regulator to review the F-10 registration statement or to require any of the filings, deliveries or disclosure associated with a non-WKSI base shelf prospectus.

9. Section 9B.6 – Provisions addressing continued effectiveness of WKSI base shelf prospectus

For the reasons noted below, we propose revising 9B.6(1) to the following effect:

> "(1) **On or** within **the 90**~~60~~ days preceding the annual filing date in each financial year of an issuer following the **financial year in which the issuer filed** ~~filing by the issuer of~~ a WKSI base shelf prospectus **(the "annual reconfirmation period")** ~~and until~~ **that is prior to** the date, under subsection (2), on which the issuer is no longer permitted to distribute a security under the WKSI base shelf prospectus, the issuer shall (a) include a statement in its AIF for the financial year ended immediately before the annual filing date, or in an amendment to the WKSI base shelf prospectus, ~~that explains~~ **substantially to the effect** that the issuer ~~is~~ **remains** eligible **under applicable securities legislation** to ~~file~~ **distribute securities under that** ~~a~~ WKSI base shelf prospectus, if the issuer satisfies the conditions under **clauses (a), (b) and (c) of** subsection 9B.2(1) **as of the date on which such statement is made (which may be any day within the annual reconfirmation period)**; or (b) withdraw the WKSI base shelf prospectus ~~and issue a news release announcing the issuer will not distribute securities under a prospectus supplement to the WKSI base shelf prospectus~~."

Corresponding amendments to the Proposed Amendments should also be made to reflect that the "annual test period" (as defined above) begins 90, not 60, days prior to the annual test period.

(a) Requirements associated with a withdrawal of WKSI base shelf prospectus

We recommend removing the requirement that a news release be issued on a withdrawal of a WKSI base shelf prospectus (a "**withdrawal news release**") from subsection 9B.6(1)(b). Ultimately,

withdrawing the WKSI base shelf prospectus should be sufficient. The withdrawal news release seems to be just an administrative burden as it is unclear what investor protection or other relevant regulatory purpose is served by it. If the objective of the withdrawal news release is to provide the market with timely disclosure, this should not be addressed through securities legislation governing distribution requirements – a timely disclosure obligation already exists under National Instrument 51-102 *Continuous Disclosure Obligations* ("**NI 51-102**") and associated securities legislation if the basis for losing WKSI status was a material change. In addition, the absence of a WKSI base shelf prospectus does not in itself prevent an issuer from quickly proceeding with an offering, including a public offering by way of the bought deal exemption. Accordingly, a withdrawal new release may mislead the market by giving an impression that the issuer will not be issuing securities in the near term or until it has again filed a WKSI base shelf prospectus. At a minimum, a withdrawal new release is unnecessarily disruptive and may lead to unwarranted speculation as to the reason for the withdrawal. This is all the more concerning if, as previously discussed, the ineligibility is triggered by the operation of an arbitrary or otherwise immaterial claim that is irrelevant to an investment decision.

Additionally, we note there is no formal process for the withdrawal of a prospectus under current securities legislation. Accordingly, if the WKSI regime is to impose a positive obligation for such a withdrawal, we recommend that the CSA establish a corresponding process for such withdrawal. In addition, clarifying language should be included to the effect that such a withdrawal does not affect any of the rights/obligations/liabilities of the issuer, underwriters or purchasers under distributions under the WKSI base shelf prospectus that were effected prior to such withdrawal.

(b) Annual filing date requirements to maintain effectiveness

In order to maintain the effectiveness of the deemed receipt for a previously filed WKSI base shelf prospectus, section 9B.6 of the Proposed Amendments requires the issuer to include a statement confirming WKSI eligibility in its AIF or in an amendment to the WKSI base shelf prospectus (the "**annual eligibility statement**") within 60 days preceding the annual filing date of the issuer's financial year (the "**annual reconfirmation period**"). We suggest extending this annual reconfirmation period to 90 days preceding the annual filing date to be consistent with the filing deadline for an AIF under NI 51-102[18]. This will allow an issuer to include the statement in an AIF filed within the first 30 days following the end of its financial year[19]. Although uncommon to file an AIF that early, an issuer may wish to do this in certain circumstances, including circumstances in which it intends to make an offering under its WKSI base shelf prospectus. While an issuer could instead file an amendment, this is an impractical and inefficient alternative where that amendment is being used solely to confirm an issuer's continuing WKSI eligibility. While the amendment may be brief, the filing still involves time and money, including for the review that must be conducted by an issuer's auditors in order to provide their consent.

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[18] Note that extending this annual reconfirmation period does not require any change to the 60 day period used to determine whether the issuer has the requisite qualifying public equity or qualifying public debt, as applicable.

[19] Alternatively, if an issuer distributes securities under its WKSI base shelf prospectus within the first 30 days following the end of its financial year (and, at that point, has yet to file its AIF), provision could be made to allow the issuer to satisfy the requirement to confirm its WKSI eligibility by including the annual eligibility statement in the news release announcing that offering.

Moreover, it will be more efficient for an issuer to confirm its eligibility concurrently with its annual disclosure procedures.

Certain technical changes to the subsection 9B.6(1) are also necessary to make it work as intended. While a number of clarifying edits should be made, the key issue with the current drafting is that an issuer must satisfy the "conditions under subsection 9B.2(1)" in order to make the annual eligibility statement. The intent of this provision is to re-test an issuer's continuing eligibility to file a WKSI base shelf prospectus in each year that it is effective after the prospectus is filed. In other words, on a single day within the relevant annual reconfirmation period, the issuer must confirm it is a WKSI and an eligible issuer (and not be an investment fund). However, 9B.2(1) tests eligibility "as of the date of the filing of the [WKSI base shelf] prospectus." In addition, the "well-known seasoned issuer" definition refers to a "preceding 60 days", so it is important to be clear that WKSI status or reconfirmation, as applicable, is as of a particular date.

10. Inability to satisfy bought deal exemption with WKSI base shelf filing

Section 2.10(7) of the Companion Policy to the Proposed Amendments notes that pre-marketing pursuant to the bought deal exemption would be prohibited for an offering qualified by a WKSI base shelf prospectus because a preliminary prospectus must be filed for that exemption (and there is no preliminary prospectus filed in connection with qualifying a WKSI base shelf prospectus). This outcome appears to be the result of a technicality rather than a deliberate policy-driven choice. There is no policy based reason to not allow the filing of a WKSI base shelf to satisfy the preliminary prospectus filing requirement for the bought deal exemption. Notably, the WKSI regime is premised on the sufficiency of a WKSI's existing continuous disclosure. As such, we recommend adding corresponding amendments to NI 44-101 along with the Proposed Amendments to allow for the filing of a WKSI base shelf prospectus (in lieu of a preliminary short form prospectus) within two business days[20] and, in those circumstances, requiring delivery of that WKSI base shelf prospectus and corresponding prospectus supplement (in lieu of a preliminary short form prospectus) to each person who expressed an interest (in response to the pre-filing solicitation) following the filing of that prospectus supplement.

On a related note, the introduction to section 9B.3(1) of the Proposed Amendments should be expanded to clarify that an issuer is exempt from both of the preliminary prospectus related requirements of the prospectus requirement; *i.e.*, the requirement to file a preliminary prospectus (which is covered) and the requirement that the relevant securities regulatory authority has issued a receipt for the filed preliminary prospectus (which is not covered).

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[20] While this could provide that the shelf may be filed within the prescribed four business days, section 6.4(2)(a) of NI 44-102 requires that a prospectus supplement for the offered securities be filed within two business days after their offering price is determined. Accordingly, absent an amendment to that requirement of NI 44-102, the base shelf prospectus would also need to be filed within that two-business day time frame (in advance of the prospectus supplement).

11. Eligibility of subsidiary of WKSI

Consistent with the alternative criteria for short form eligibility in 2.4 of NI 44-101, and consistent with the U.S. WKSI regime, we recommend including a provision that allows a subsidiary of a reporting issuer that is a WKSI to file a WKSI base shelf prospectus for non-convertible debt or preferred shares for which that parent WKSI has provided full and unconditional credit support without regard to whether that subsidiary has "qualifying public debt." Where such credit support is provided, it is the parent WKSI's disclosure and status that is relevant, not the subsidiary's disclosure, in determining eligibility for the WKSI regime.

12. Additional correcting and clarifying edits

The following are excerpts from sections of the Proposed Amendments with proposed revisions to address certain technical errors and ambiguities in the current drafting:

> "annual filing date" means the date **by** ~~on~~ which an issuer is required to file its audited annual financial statements under NI 51-102 or National Instrument 71-102 Continuous Disclosure and Other Exemptions Relating to Foreign Issuers, as applicable. **[This definition is in subsection 9B.1(1)]**
>
> "A receipt for a WKSI base shelf prospectus is deemed to be issued if, at the time of filing of the WKSI base shelf prospectus, the issuer has… (b) filed or delivered, as the case may be, all documents required to be filed or delivered in connection with the filing of a base shelf prospectus **pursuant to Part 7 of this Instrument**" **[This clause (b) is in subsection 9B.5(1)]**
>
> "(3) An issuer that is required to withdraw a WKSI base shelf prospectus under paragraph (1)(b) shall not distribute a security under that prospectus **after the date of such withdrawal**." **[This subsection (3) is in section 9B.6]**

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The following lawyers at our firm participated in the preparation of this comment letter.

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Yours very truly,

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