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Without Prejudice
By E-mail

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
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 Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Nunavut

The Secretary
Ontario Securities Commission
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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 submit the following comments in response to the request for feedback (the "**Request**") on the proposed amendments to National Instrument 44-102 *Shelf Distributions* ("**NI 44-102**") relating to well-known seasoned issuers ("**WKSIs**") as well as consequential amendments to other rules and policies (collectively, the "**Proposed Amendments**"). We have organized our comments with reference to the consultation questions posed in the Request. We have also included our general comments with respect to the Proposed Amendments, and more specific comments with respect to certain sections of the Proposed Amendments, where such comments do not correspond with a particular consultation question.

Thank you for the opportunity to provide feedback on the Proposed Amendments. This letter represents the comments of certain individual members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

A. GENERAL COMMENTS

We are supportive of the Canadian Securities Administrators' ("**CSA's**") initiatives that are designed to foster capital formation by reducing cost and unnecessary regulatory burden for issuers and investment dealers. The WKSI pilot program that was implemented through local blanket orders that are substantively harmonized across the country (the "**Blanket Orders**") has assisted large, well-established

issuers that have a strong market following and an up-to-date public disclosure record in accessing the capital markets on an expedited basis by allowing them to file a final base shelf prospectus and obtain a receipt without first filing a preliminary base shelf prospectus. Since the Blanket Orders came into effect on January 4, 2022, many issuers have taken advantage of the pilot program, and the creation of a permanent Canadian WKSI regime would be a very positive development.

While the temporary WKSI framework has greatly reduced timing delays associated with filing a base shelf prospectus, the Proposed Amendments will provide issuers and dealers with even more certainty regarding transaction timing and reduce risks associated with rapidly changing market conditions. We believe, however, that greater care should be taken to provide for certain and easily verifiable eligibility criteria and to align the Canadian securities rules more closely with those in the United States, as this will better facilitate cross-border offerings and prove beneficial for dual-listed issuers as well as for other Canadian issuers that are listed in Canada and use the multijurisdictional disclosure system ("**MJDS**") in the United States.

B. REQUEST FOR COMMENTS

The following represents our comments in response to the specific questions posed in the Request.

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?**

   Qualifying Public Equity

   The Proposed Amendments introduce the definition "qualifying public equity", which replaces the concept of "public float" that is used in the Blanket Orders. When calculating the "public float", an issuer is required to exclude securities that are held by persons or companies that are affiliated parties of the issuer, while the calculation of "qualifying public equity" requires that an issuer exclude listed equity securities that are held by affiliates and reporting insiders of the issuer.

   While we understand that the CSA view the new calculation as a better approximation of an issuer's public equity, we respectfully submit that the securities held by certain categories of insiders that are included in the definition of "reporting insider" should not be excluded when calculating an issuer's qualifying public equity. In particular, we believe that the securities that are held by: (i) a significant shareholder; (ii) the CEO, CFO or COO of a significant shareholder; (iii) a director of a significant shareholder; and (iv) a significant shareholder based on post-conversion beneficial ownership and the CEO, CFO, COO and every director of the significant shareholder based on post-conversion beneficial ownership, should be included when calculating an issuer's qualifying public equity. Not all significant shareholders receive or have access to information as to material facts or material changes concerning a reporting issuer before such information is generally disclosed. In addition, a significant shareholder's interests may not align with, and may in fact be adverse to, the interests of the board and management of the issuer. Given the numerous exemptions under the insider reporting regime, it is also unclear how issuers would be expected to access and compile reporting insider holdings with sufficient clarity. We note that the Toronto Stock Exchange mandates similar compilations of insider data in the context of normal course issuer bids, which frequently lead to pre-filing consultations and case-by-case accommodations that should be avoided in a WKSI context.

   We also note that under the U.S. WKSI regime, the eligibility criteria require a calculation of the market value of an issuer's outstanding common equity held by non-affiliates, which is similar to the existing formula contained in the Blanket Orders.

As a result, we recommend that the CSA consider either reverting to the "public float" definition in the Blanket Orders or revising the definition of "qualifying public equity" to provide that the securities holdings of significant shareholders and their directors and officers will be included in the calculation.

Asset-backed Securities

We would like to understand the policy rationale for excluding an issuer that has outstanding asset-backed securities from qualifying as a WKSI, particularly in circumstances where the WKSI base shelf prospectus will not qualify the distribution of additional asset-backed securities. We recognize that there may be complexities associated with distributions of asset-backed securities, which the CSA have attempted to address when formulating the qualification criteria in section 2.6 of NI 44-102 and by requiring that an issuer provide an undertaking that it will not distribute asset-backed securities that are novel without pre-clearing the disclosure that will be contained in the prospectus supplement with the regulator. It is not, however, readily apparent to us why an issuer that has previously distributed asset-backed securities would be automatically precluded from qualifying as a WKSI.

Three-year Seasoning Period

We also believe that the CSA should reconsider the requirement that an issuer be a reporting issuer in a jurisdiction of Canada for the preceding three years, as discussed in more detail below.

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?**

   While we understand the CSA's concerns that there may be occasional cases in which an issuer that has been a reporting issuer for only 12 months may not have a sufficient continuous disclosure record, we respectfully submit that a three-year seasoning period is too long and that specific concerns would be better addressed through other eligibility criteria. To the extent that an issuer has filed and obtained a receipt for a prospectus, we believe that the 12-month seasoning period should be retained. A prospectus contains or incorporates by reference fulsome disclosure, including financial statements and other material information relating to an issuer's structure, business, securities, governance and risks, which securities regulators have the opportunity to review and comment on prior to issuing a receipt. In these circumstances, 12 months of continuous disclosure filings should establish a satisfactory disclosure record and provide market participants with sufficient information to inform their investment decisions. We note that certain existing instruments modify requirements for issuers that have filed a prospectus (for example, section 2.7 of National Instrument 45-102 *Resale of Securities*).

   Similar to the Blanket Orders, WKSI eligibility in the United States requires an issuer to have a one-year reporting history. Certain amendments to the Blanket Orders have been proposed to align the timing of Canadian prospectus filings more closely with the timing of those in the United States and we strongly encourage the CSA to align the Canadian and U.S. WKSI seasoning periods, as this will better facilitate cross-border offerings.

One objective of the Proposed Amendments is to foster capital formation; however, a longer seasoning period will reduce the number of issuers that may access the WKSI regime. Newer public companies often need to qualify various securities for distribution in their early years, and their inability to take advantage of the WKSI regime may deter such companies from pursuing public offerings in Canada, or may lead dual-listed or Canadian MJDS-eligible issuers to undertake public offerings only in the United States.

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?**

Penalties and Sanctions

Under the Proposed Amendments, an issuer would not be eligible to file a WKSI base shelf prospectus if, during the three years that preceded the date of the shelf prospectus, the issuer or any of its subsidiaries had been the subject of an order, judgment, decree, sanction or administrative penalty imposed by, or had entered into a settlement agreement with or approved by, a court in Canada or a foreign jurisdiction, or a securities regulatory authority or similar authority in a foreign jurisdiction, related to a claim based in whole or in part on fraud, theft, deceit, misrepresentation, conspiracy, insider trading, unregistered activity or illegal distribution.

Under the Blanket Orders, the eligibility assessment is based on penalties and sanctions imposed by a court relating to securities legislation or by a securities regulatory authority. We understand that the CSA have made this change to describe with greater specificity the types of penalties and sanctions that would preclude an issuer from filing a WKSI base shelf prospectus. It appears, however, that the change could also be interpreted to have broadened the scope of penalties, sanctions and settlements to include settlements and other matters to which issuers may be subject in the ordinary course of their business, including many matters that would likely never be raised or discussed by the CSA as part of a customary prospectus review process.

Limit to Securities Legislation or Securities Matters

We have had discussions with issuers that are concerned that the revised eligibility criteria, based on a literal as opposed to purposive interpretation, could render such issuers ineligible or at minimum create uncertainty as to whether they qualify to file a WKSI base shelf prospectus. Certain issuers operating "customer-facing" businesses are from time to time subject to class actions or other proceedings that allege deceit and/or misrepresentation, whether in publicity for goods and services or other customer communications, that are often brought under consumer protection and other similar legislation. Issuers often enter into court-approved settlement agreements in connection with such matters, typically without any admission of the facts.

We respectfully submit that the expanded scope of penalties and sanctions is not aligned with the overall purpose of the Canadian WKSI regime, as it could render ineligible large operating companies on the basis of minor matters that relate to interactions with customers, suppliers and other counterparties, as opposed to actual offences or penalties under securities legislation.

If the list of penalties and sanctions is too broad, certain issuers may not adopt the WKSI regime or else file applications for discretionary exemptions, which would eliminate the regulatory efficiency arguments underlying the WKSI framework.

Conspiracy, Insider Trading, Unregistered Activity

We recommend that the CSA omit the reference to "conspiracy", as it does not have a well-understood standalone meaning in the context of securities legislation and could capture matters under anti-trust or other similar legislation (where such term has a standalone and well-defined meaning), which should not be determinative of eligibility under the WKSI regime. Only conspiracies in relation to certain actions that would otherwise be a targeted offence or sanction should be relevant in this context.

We also suggest that "unregistered activity" be removed, as this reference could invite an overly broad application. Issuers with vast operations in Canada and abroad, in regulated industries in particular, may be subject to several registration requirements outside of a securities regulatory context.

The reference to "insider trading" should be clarified to exclude matters that relate to the failure to file an insider report, including the failure to file by the required deadline. In addition, there are several circumstances in which an issuer may enter into an order or be subject to a penalty on the basis of insider trading principally conducted by one of its insiders or employees, and the issuer should not cease to be eligible under the WKSI regime as a result of another person's misconduct.

Material Subsidiaries

We also recommend limiting the application of paragraph (d) of the definition of "eligible issuer" to the issuer only or, alternatively, to the issuer or any material subsidiaries of the issuer, instead of any subsidiary. If the CSA were to introduce the concept of "material subsidiaries", we recommend that the definition be aligned with one of the objective definitions or thresholds in Canadian securities legislation to ensure consistent application (for example, limit to subsidiaries that are required to be disclosed in an issuer's annual information form pursuant to section 3.2 of Form 51-102F2 *Annual Information Form*).

Subsidiaries should also be limited to those which, at the time of the applicable penalty or sanction, were controlled by, and remain controlled by, the issuer. As an example, an issuer should not lose eligibility upon acquiring an entity which was, or had a subsidiary that became, subject to a penalty or sanction before it was controlled by the issuer or after it has been sold.

Exemption from Principal Regulator

As paragraph (d) of the definition of "eligible issuer" does not contain a materiality qualifier, there may be instances in which an issuer is precluded from accessing the WKSI regime on account of minor penalties and sanctions. While exemptive relief applications are permitted under the Proposed Amendments, the CSA could streamline the process to provide that the principal regulator may also exempt an issuer from this requirement outside of the formal application process (for example, as part of enforcement proceedings).

Proposed Approach

We suggest revising the Proposed Amendments to provide that an issuer will be ineligible to file a WKSI base shelf prospectus if the issuer, or any of its material subsidiaries while controlled by the issuer (and still controlled by the issuer), was or has been the subject of an order, sanction or administrative penalty imposed by, or has entered into a settlement agreement with or approved by, a court or securities regulatory authority related to a claim under securities legislation based in whole or in part on fraud, theft, deceit, misrepresentation or illegal distribution of securities, other than a claim that the principal regulator has declared exempt from this requirement. This would

provide sufficient safeguards without penalizing issuers for minor operational matters unrelated to the capital markets.

Restructuring Transactions

We also recommend that paragraph (b) of the definition of "eligible issuer" be amended to remove the reference to "any person or company that completed a restructuring transaction with the issuer." An issuer that meets the definition of "well-known seasoned issuer" and otherwise qualifies as an "eligible issuer" should not be prevented from filing a WKSI base shelf prospectus following the completion of a successful restructuring transaction on account of the prior history of another person or company.

A "restructuring transaction" in the context of the Proposed Amendments includes any amalgamation, merger, arrangement or reorganization involving the issuer and a person whose operations have ceased, without any regard to materiality. This is overly broad and serves no clear policy purpose. We believe that concerns relating to transactions that result in an issuer becoming a reporting issuer without filing a prospectus can be adequately addressed through the longer seasoning period that is being proposed by the CSA.

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*?**

We agree that there should be an exception for issuers where the cease trade order or similar order was revoked within 30 days of 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*.

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

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

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 respectfully submit that personal information forms ("**PIFs**") should not be required to be delivered with the WKSI base shelf prospectus. The Proposed Amendments aim to reduce regulatory burden for WKSIs, and the submission of PIFs that will not be reviewed in advance of the issuance of a deemed receipt is an unnecessary procedural requirement. We believe that there are more appropriate occasions on which PIFs might be submitted by WKSIs; for example, at the request of a stock exchange. In the alternative, PIFs could be delivered as part of a WKSI's annual confirmation process.

To the extent that the requirement to submit PIFs at the time of filing a WKSI base shelf prospectus is retained, the Proposed Amendments should clarify what will happen if issues arise

during the securities regulators' review of the PIFs following the deemed issuance of a receipt. We assume that issuers would be asked to work with the regulators to seek to address any deficiencies or issues, but that this would not invalidate the receipt or prevent an issuer from issuing securities under its WKSI base shelf prospectus.

C. ADDITIONAL COMMENTS

The following represents our comments in response to other sections of the Proposed Amendments that are not specifically addressed in the Request.

(a) Loss of WKSI Status

The Proposed Amendments provide that an issuer that is no longer permitted to distribute securities under a WKSI base shelf prospectus must withdraw the prospectus and issue a news release announcing that it will not distribute securities under a prospectus supplement to the WKSI base shelf prospectus. We note that this process differs from the rules in the United States, which provide for a transition period in which an issuer is permitted to continue issuing securities under its WKSI registration statement while it converts to a non-WKSI registration statement.

In addition, the U.S. rules do not require an issuer to issue a news release upon loss of WKSI status. The loss of WKSI eligibility in itself should not qualify as material information requiring timely disclosure (although we recognize that the occurrence of certain events, such as bankruptcy or insolvency, may constitute material information and result in an issuer losing its WKSI status). For example, erosion of an issuer's equity market value that results in the loss of its WKSI eligibility should not require a public announcement. The fact is that the WKSI base shelf prospectus will simply cease to be usable in such context. The issuance of a press release announcing that an issuer is no longer eligible to use its WKSI base shelf prospectus does not provide further useful information to the market and could have unintended consequences and attract negative attention that may be unwarranted in light of the event that triggered the requirement. We therefore recommend that the CSA consider revising the Proposed Amendments to reflect an approach that is more similar to the one adopted by the U.S. Securities and Exchange Commission.

(b) Successor Issuers

The Proposed Amendments do not address the ability of a successor issuer to participate in the WKSI regime. We recommend that language be added to ensure that successor issuers that otherwise meet the eligibility criteria are not prevented from filing a WKSI base shelf prospectus.

(c) Multiple Shelf Prospectuses

The Proposed Amendments to the Companion Policy to NI 44-102 provide that if an issuer has an existing base shelf prospectus but would like to file a WKSI base shelf prospectus, the issuer should withdraw the existing base shelf prospectus prior to filing a new WKSI base shelf prospectus. The language implies that it may not be possible for an issuer to have more than one base shelf prospectus in place at any given time. There may be circumstances in which an issuer would prefer to maintain an existing base shelf prospectus while filing a new WKSI base shelf prospectus or file more than one WKSI base shelf prospectus covering different types of securities, transactions or jurisdictions. It is not apparent if any of these scenarios would be permitted under the Proposed Amendments, and we believe it would be helpful if the CSA clarified whether an issuer may have more than one base shelf prospectus in place at a time.

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We once again thank you for the opportunity to provide feedback on the Proposed Amendments. Please do not hesitate to contact any of the undersigned should you wish to discuss any of the foregoing comments in greater detail.

Yours truly,

Tara Law

on my own behalf and on behalf of

Simon A. Romano
Jeff Hershenfield
David Tardif
Jules Dumas-Richard