Shorter offering timelines and reduced deal risk: CSA introduce new blanket orders

December 22, 2021

On December 6, 2021, the Canadian Securities Administrators (CSA) published temporary exemptions from certain base shelf prospectus requirements for qualifying well-known seasoned issuers (WKSIs). The CSA has implemented the relief through local blanket orders that are substantively harmonized across the country and are set to come into effect on January 4, 2022 (collectively, the Blanket Orders).

The Blanket Orders were implemented by the CSA in response to feedback that certain prospectus requirements in the base shelf context create unnecessary regulatory burden for large, established reporting issuers that have a strong market following and up-to-date disclosure records. The feedback recommended enhancing the current prospectus system by amending the base shelf prospectus regime to implement a Canadian WKSI regime, as base shelf prospectuses filed by these types of issuers are less likely to result in a significant number of substantive deficiency comments.

The Blanket Orders will be issued on a trial basis, and the CSA will consider how best to adopt the procedures set out in the Blanket Orders through future rule amendments. The Blanket Orders are intended to remain in place for up to 18 months. The CSA will use this time to determine if these procedures should be adopted through rule amendments and how best to adopt these procedures. During this time there will be an opportunity to identify appropriate eligibility criteria, public interest and operational concerns.

The exemptions

The Blanket Orders will substantially reduce the length of time to complete shelf offerings by permitting issuers that satisfy the conditions of the Blanket Orders to file a final base shelf prospectus as the first step in a shelf offering instead of requiring a preliminary shelf base prospectus to be filed. Importantly, this will allow qualifying WKSIs who have not already obtained a final receipt for a base shelf prospectus to forgo the comment process all together.

In addition to eliminating the need to file, obtain a receipt and undergo the comment process for a preliminary base shelf prospectus, the Blanket Orders also simplify the

form of the base shelf prospectus itself. The Blanket Orders exempt an issuer that meets the WKSI qualifications and certain other conditions from the requirements to:

- state the aggregate dollar amount of securities that may be raised under the base shelf prospectus;
- include the number of securities qualified for distribution;
- include a plan of distribution;
- describe the securities being distributed, other than as necessary to identify the types of securities qualified for distribution under the base shelf prospectus; and
- describe any selling security holders.

Exemption qualifications

In order to qualify as a WKSI for the purposes of the Blanket Orders an issuer must either have:

I. outstanding listed equity securities that have a public float of $500 million; or
II. at least an aggregate of $1 billion of non-convertible securities, other than equity securities, distributed under a prospectus in primary offerings for cash, not exchange, in the last three years.

In addition, the issuer:

I. must also have qualified as a WKSI as of a date within 60 days preceding the date the issuer files the base shelf prospectus;
II. is, and has been, a reporting issuer in at least one Canadian jurisdiction for at least 12 months; and
III. is eligible to file a short form prospectus under National Instrument 44-101 Short Form Prospectus Distributions.

Moreover, the issuer cannot be an “ineligible issuer”. An issuer will be an ineligible issuer if any of the following apply:

- the issuer has not filed with the securities regulator or securities regulatory authority in each jurisdiction in which it is a reporting issuer all periodic and timely disclosure documents that it is required to have filed in that jurisdiction;
- the issuer is or, in the past three years the issuer or any of its predecessors was,
  - an issuer whose operations have ceased; or
  - an issuer whose principal asset is cash, cash equivalents, or its exchange listing, including a capital pool company, a special purpose acquisition company, or a growth acquisition corporation or any similar entity.
- an issuer that has in the past three years become bankrupt, made a proposal under any bankruptcy or insolvency legislation or was subject to or instituted any proceedings, arrangement or compromise with creditors or had a receiver, receiver manager or trustee appointed to hold its assets;
- an issuer that was, or any entity that at the time was a subsidiary of the issuer that was, the subject of any penalties or sanctions, including restrictions on the use by the issuer of any type of prospectus, or exemption, imposed by a court relating to securities legislation or by a securities regulatory authority within the past three years;

- an issuer that has been the subject of any cease trade order in any Canadian jurisdiction or any suspension of trading under section 12(k) of the Securities Exchange Act of 1934 within the past three years;
- the issuer is an investment fund; or
- the issuer has outstanding asset-backed securities.

Issuers with "mining operations" must satisfy additional financial tests. Such issuers must have gross revenue derived from mining operations of at least $55 million for the most recently completed financial year and gross revenue derived from mining operations of at least $165 million in the aggregate for the three most recently completed financial years. The issuer must also file any technical reports required under National Instrument 43-101 – *Standards for Disclosure for Mineral Project*s. While the Blanket Orders use the term "mining operations," no additional guidance has been provided at this time with respect to the scope of these requirements and what types of issuers in the mining sector may or may not be included.

Finally, an issuer must make certain disclosures in the prospectus as to its status as a WKSI and that it is relying on the exemption. A letter of an executive officer or director of the issuer must also accompany the filing of the base shelf prospectus and be dated the same date as the base shelf prospectus. The letter must confirm the issuer's reliance on the exemption, specify the qualification criteria that the issuer is relying upon and confirm that such criteria has been met by the issuer.

Shorter offering timelines and reduced deal risk

Ultimately, the Blanket Orders will allow qualifying WKSIs to conduct shelf prospectus offerings on an expedited basis effectively leading to a reduction in potential deal risk for these types of issuers. For current shelf offerings all issuers are required to file a preliminary base shelf prospectus to their principal regulator for comment prior to being able to file and obtain a receipt for a final base shelf prospectus. While the comment period is typically limited to a three business day period, the scope of any potential comments can be unpredictable and lead to delays in prospectus filings.

The Blanket Orders will significantly increase the speed at which shelf offerings are able to be conducted by qualifying WKSIs by allowing these issuers to avoid the comment process altogether. The Blanket Orders will, in most cases, allow qualifying WKSIs to file a final base shelf prospectus and obtain a receipt on the same business day. Once a receipt for the base shelf prospectus is obtained, issuers can then draw down from the base shelf by filing a prospectus supplement, which contains the variable terms of the securities that are not known and cannot be ascertained at the time of filing of the base shelf prospectus. Since prospectus supplements are not generally subject to regulatory review, the Blanket Orders will allow draw downs to be completed without having to undergo a comment period which will significantly minimize related potential deal risks for both qualifying WKSI's and underwriters alike.

Additional considerations

Given that the Blanket Orders have the potential to significantly reduce the time between the filing of a base shelf prospectus and the closing of a shelf draw down, it is important that issuers intending to rely on the Blanket Orders work with their advisors,

as well as any agents or underwriters, well in advance of any offering to formulate a plan to take advantage of the accelerated timelines. For example, the reduced timelines will necessitate the need to formulate a plan to deal with standard deliverables that typically take some time to complete, such as due diligence, underwriting or agency agreements, comfort letters and any required legal opinions.

Issuers looking to avail themselves of the exemptions contained in the Blanket Orders should also ensure that they are short form eligible and meet the general requirements for shelf distributions as set out in National Instrument 44-102 – Shelf Distributions.

Our Capital Markets team will work with issuers, agents and underwriters contemplating conducting a shelf offering using the exemptions set out in the Blanket Orders. For further information on how the Blanket Orders may affect your business, contact any of the authors or key contacts listed below.

By

Graeme Martindale, Kent Kufeldt, Salvador Pimentel, Connor MacLeod

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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