Good news for WKSIs: CSA proposes codification of expedited shelf prospectus filings

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Codification of the expedited shelf prospectus regime for well-known seasoned issuers (WKSIs) in Canada has been proposed by the Canadian Securities Administrators (CSA) following the temporary trial of a WKSI offering model that was implemented through local blanket orders in December 2021.

Takeaways

- The CSA has published for comment proposed amendments (Proposed Amendments) to National Instrument 44-102 *Shelf Offerings* (NI 44-102) that will, among other things, permit WKSIs to **avoid filing a preliminary** base shelf prospectus.
- Issuers who qualify as WKSIs would only be required to file a **final base shelf prospectus** which would generally be deemed to be **effective for a period of 37 months**.
- WKSIs would be required to **reassess their qualification** on an **annual basis** and would be subject to an annual confirmation requirement.
- Comments on the Proposed Amendments are being accepted until **December 20, 2023**, meaning it is unlikely the Proposed Amendments will come into effect prior to mid-2024 at the earliest.

Background

As we had previously discussed, in December 2021, the CSA implemented, by way of local blanket orders (Blanket Orders), temporary exemptions for issuers who qualify as WKSIs from the requirement to file a preliminary base shelf prospectus. The Blanket Orders also permit an eligible WSKI issuer to omit certain information from its base shelf prospectus, including the number and aggregate dollar amount of securities qualified under the base shelf prospectus, the plan of distribution, and a description of the securities being qualified for distribution other than as necessary to identify the types of securities qualified. Since the Blanket Orders were introduced, the large majority of WKSI issuers have taken advantage of the ability to omit some or all of this information, especially the number and aggregate dollar amount of securities qualified under the

base shelf prospectus. The Proposed Amendments do not seek to change this flexibility.

The Proposed Amendments do, however, seek to both refine and extend the exemptions in the Blanket Orders on a permanent basis. In the CSA's view, it is unlikely that the review of a WKSI's base shelf prospectus would raise substantive deficiencies that require regulatory intervention. The Proposed Amendments will also better align the Canadian prospectus filing regime with that of the United States, facilitating cross-border offerings.

What is a WKSI?

Under the Proposed Amendments, to qualify as a WKSI, an issuer must satisfy all of the following conditions:

- The issuer had qualifying public equity of at least $500 million or qualifying public debt of at least $1 billion on at least one day in the preceding 60 days;
- The issuer is and has been a reporting issuer in Canada for the preceding three years;
- The issuer is qualified to file a short form prospectus under NI 44-102;
- The issuer has no outstanding asset-backed securities; and
- If the issuer has a mineral project, the issuer's most recent audited annual financial statements disclose gross revenue from mining operations of at least $55 million in the last year and at least $165 million in aggregate for the three most recently completed financial years.

In addition to qualifying as a WKSI, issuers must not be investment funds and must also be considered "eligible issuers" in order to file a WKSI base shelf prospectus under the Proposed Amendments. To be eligible, WKSIs must satisfy the following conditions:

- All periodic and timely disclosure documents required under securities laws, an order from the regulator or an undertaking given by the issuer to a regulator must have been filed by the issuer.
- In the preceding three years:
    - The issuer and any parties with which it completed a restructuring transaction must have been an operating business with assets other than cash, cash equivalents or an exchange listing;
    - The issuer was not bankrupt or subject to any bankruptcy or insolvency proceedings;
    - The issuer and its subsidiaries have not been the subject of any order, judgement or the like related to a claim based on fraud, theft, deceit, misrepresentation, conspiracy, insider trading, unregistered activity or illegal distribution; and
    - The issuer has not been subject to a cease trade order or suspension of trading in Canada or the United States.

Key Changes from the Blanket Orders

Similar to the Blanket Orders, the Proposed Amendments would exempt issuers who qualify as WKSIs from the requirement to file and obtain a receipt for a preliminary base

shelf prospectus. WKSIs would only have to file a final base shelf prospectus and would thereafter be deemed to have obtained a receipt in all jurisdictions where the prospectus was filed. Those familiar with the Blanket Orders will note a number of updates in the Proposed Amendments:

- **Public Float vs. Qualifying Public Equity**. To qualify as a WKSI under the Proposed Amendments, issuers will have to either satisfy a "qualifying public equity" threshold of $500 million or a "qualifying public debt" threshold of at least $1 billion, in each case, in the last 60 days. With respect to the "qualifying public equity" test, this means that issuers will have to have an aggregate market value of $500 million excluding securities held by affiliates and reporting insiders of the issuer. The calculation is to be made based on the 20-day average trading price of the securities at a point in the last 60 days. Under the Blanket Orders, issuers must have satisfied a minimum "public float" threshold which was calculated based on a closing price of the issuer's securities at a point in the last 60 days and only excluded affiliates.
- **Reporting Issuer Status.** The Proposed Amendments will require that an issuer have been a reporting issuer in at least one jurisdiction of Canada for three years preceding the filing of the WKSI prospectus. The Blanket Orders only required reporting issuer status for one year.
- **Deemed Receipt.** Under the Proposed Amendments, no receipt would be issued for a WKSI base shelf prospectus. Rather, a receipt is deemed to have been issued. Under the Blanket Orders, WKSIs still had to obtain a receipt but there was an accelerated mechanism for the issuance thereof. This proposed change would better align the Canadian WKSI regime with the U.S. WKSI regime where a registration statement filed under the U.S. WKSI rules becomes automatically effective on filing. This change would also obviate the need to wait for a receipt to be issued before launching and pricing an offering - giving issuers and underwriters greater timing certainty for new transactions.
- **Annual Confirmation.** WKSIs will have to annually confirm their eligibility as a WKSI under the Proposed Amendments. Confirmation will be required within 60 days before the date on which the WKSI's audited annual financial statements are required to be filed and a statement to the effect that the issuer continues to be a WKSI must be included in the WKSI's annual information form or in an amendment to its base shelf prospectus. If an issuer is no longer an eligible WKSI, the issuer must publicly announce that it will not distribute securities under its base shelf prospectus and such prospectus must be withdrawn. This proposed change, if brought into effect in its current form, could be the most problematic for issuers during periods of market volatility where a decline in share price in the period approaching an annual confirmation could result in a WSKI losing its eligibility under the program and therefore being required to file a traditional preliminary base shelf prospectus subject to regulatory review and scrutiny before it may go final. The Blanket Orders did not require WKSIs to reconfirm their status on a periodic basis. We note that this proposed change also deviates from the U.S. WKSI regime which permits issuers to continue to use their WKSI registration statement pending the effectiveness of a post-effective amendment thereto to convert that registration statement into a non-WKSI registration statement.
- **Extended Period of Effectiveness.** WKSI base shelf prospectuses will be deemed effective until the earlier of (i) 37 months from the filing date of the prospectus, (ii) the annual filing date unless the issuer continues to be an eligible

WKSI and has complied with the annual confirmation requirements, and (iii) the relevant lapse date in NI 44-102.

- **Amendments.** The Proposed Amendments address a WKSI's ability to amend its base shelf Prospectus without being required to obtain a receipt from the issuer's principal regulator whereas the Blanket Orders do not. Under the Proposed Amendments, a receipt for amendments will be deemed to have been issued, provided that specified conditions are met.

Next Steps

The CSA are accepting comments on the Proposed Amendments until December 20, 2023, meaning it is unlikely they will come into effect prior to mid-2024 at the earliest. Until such time, issuers that satisfy the existing WKSI eligibility criteria under the Blanket Orders may continue to rely on those exemptions to avoid the filing of a preliminary base shelf prospectus in order to obtain a receipt for a final base shelf prospectus. For further information, please see CSA Notice and Request for Comment – Proposed Amendments to National Instrument 44-102 *Shelf Distributions* Relating to Well-known Seasoned Issuers (September 21, 2023).

By

Nav Dhaliwal, Kent Kufeldt, Laura Levine, Cameron A. MacDonald, Graeme Martindale, Salvador Pimentel

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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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