

CSA Proposes Amendments to Base Shelf Prospectus Rules to Create a Permanent Canadian WKSII Regime

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On September 21, 2023, the Canadian Securities Administrators (CSA) published a notice and request for public comment (the CSA Notice) announcing proposed amendments (the Proposed Amendments) to National Instrument 44-102 – *Shelf Distributions* (NI 44-102). The Proposed Amendments are intended to build upon the local blanket orders that are currently in effect (the Blanket Orders) to implement a permanent expedited shelf prospectus regime for well-known seasoned issuers (WKSIs) in Canada. The Proposed Amendments are intended to reduce the regulatory burdens and foster capital-raising by WKSIs in Canadian public markets.

The 90-day public comment period for the Proposed Amendments expires on December 20, 2023.

Background

NI 44-102 permits qualified public issuers to file a base shelf prospectus that omits certain "shelf information" if not known on the date the base shelf prospectus is filed, which information would otherwise be required in a short form or long form prospectus. "Shelf information" includes information such as the variable terms of the securities that may be distributed under the base shelf prospectus, the dollar amount, size and other specific terms of each tranche of securities that is not known and cannot be determined at the time of filing the base shelf prospectus. Currently, under NI 44-102, all issuers must file a preliminary base shelf prospectus that is subject to review by the applicable securities commissions, followed by a final base shelf prospectus. Any "shelf information" that has been omitted from the final base shelf prospectus must then be included in a prospectus supplement at the time of the offering, which supplement is not subject to further regulatory review.

In early 2018, the CSA began researching potential alternative offering models, including a Canadian WKSII regime. In January 2022, through the Blanket Orders, the CSA implemented a WKSII regime across multiple Canadian jurisdictions by removing the requirements for WKSIs to file a preliminary base shelf prospectus and allowing eligible WKSIs to move straight to filing and obtaining a receipt for a final base shelf prospectus on an accelerated basis.

Since implementing the Blanket Orders in 2022, the CSA has evaluated the use of the Blanket Orders and has considered feedback from various stakeholders in drafting the Proposed Amendments. Similar to the

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Blanket Orders, the goal of the Proposed Amendments is to reduce unnecessary regulatory hurdles for WKSIs that have a strong market following, a complete public disclosure record and sufficient public equity. The Proposed Amendments would provide WKSIs with greater flexibility in structuring base shelf prospectus offerings and improved certainty regarding transaction timing in cross-border offerings, allowing eligible issuers to raise capital more easily and increasing market efficiency.

At this time, the Blanket Orders continue to be in effect; however, they would be replaced by the Proposed Amendments if adopted by the CSA.

Summary of Proposed Amendments

The Proposed Amendments are intended to curb regulatory burdens for issuers that have a strong market following. Eligible issuers that satisfy the WKSI qualification criteria and certain conditions would be able to:

- (i) file a final base shelf prospectus and be deemed to receive a receipt for that prospectus upon filing in every jurisdiction in which such prospectus is filed without first filing a preliminary base shelf prospectus or undergoing (at least generally) any regulatory review;
- (ii) omit certain disclosure from the base shelf prospectus; and
- (iii) benefit from a deemed receipt that will be effective for 37 months from the date of its deemed issuance, subject to annual confirmation of continued WKSI eligibility.

To be considered an eligible WKSI under the Proposed Amendments, an issuer must meet the following criteria:

- (i) on at least one day during the preceding 60 days, the issuer had:
 - (a) qualifying public equity of at least \$500 million, or
 - (b) qualifying public debt of at least \$1 billion;
- (ii) the issuer is currently and has been a reporting issuer in a Canadian jurisdiction for the preceding three years;
- (iii) the issuer is qualified to file a short form prospectus under applicable Canadian securities laws; and
- (iv) the issuer has no outstanding asset-backed securities.

The Proposed Amendments also include certain eligibility restrictions regarding bankruptcy, penalties, sanctions and cease-trade orders that will further restrict certain issuers from relying on the proposed WKSI regime.

Issuers with mining operations seeking to take advantage of the WKSI regime must meet additional criteria, including gross revenue derived from mining operations of at least \$55 million for the issuer's most recently

completed financial year and gross revenue derived from mining operations of at least \$165 million in the aggregate for the issuer's three most recently completed financial years.

WKSIs will be required to reassess their ability to use the WKSI regime annually and will need to include a statement confirming their continued qualification either in their Annual Information Form or by filing an amendment to the WKSI base shelf prospectus indicating their continued WKSI status. Under the Proposed Amendments, an issuer will also be required to publicly announce if it no longer qualifies as a WKSI, in which case it will also need to withdraw its WKSI base shelf prospectus.

A full list of the Proposed Amendments can be found in the CSA Notice.

Key Differences between the Blanket Orders and the Proposed Amendments

While the Blanket Orders and the Proposed Amendments are consistent in their efforts to reduce regulatory burdens for WKSIs, there are several notable differences between the Blanket Orders and the Proposed Amendments.

The following is a list of certain differences between the eligibility requirements under the Blanket Orders and the Proposed Amendments:

- *Public Equity Calculation:* The Proposed Amendments include a higher threshold for calculating the public equity required by an issuer to qualify as a WKSI.
- *Reporting Issuer Requirement:* The Proposed Amendments require a WKSI to have been a reporting issuer in at least one jurisdiction in Canada for the previous three years, as opposed to 12 months under the Blanket Orders.
- *Public Disclosure Records:* The Proposed Amendments expand the requirement for an issuer to have filed all periodic and timely disclosure to more closely align with the basic qualification criteria set out in NI 44-101.
- *Penalties and Sanctions:* Both the Proposed Amendments and the Blanket Orders restrict eligibility for issuers that have been the subject of penalties or sanctions, however the Proposed Amendments include additional details regarding the specific types of penalties and sanctions that would preclude an issuer from filing a WKSI base shelf prospectus.
- *Exempt Relief Applications:* Exempt relief applications are not accepted under the Blanket Orders; however they will be considered under the Proposed Amendments allowing for a more fact-specific assessment of WKSI eligibility.

In addition, set out below is a list of certain differences between the filing and disclosure requirements under

the Blanket Orders and the Proposed Amendments:

- *Filing Process*: The process for filing and announcing the issuers reliance on the WKSII regime will be more streamlined under the Proposed Amendments.
- *Receipt Mechanism*: The accelerated receipt mechanism under the Blanket Orders will be replaced with a deemed receipt under the Proposed Amendments, providing increased certainty regarding transaction timing.
- *Prospectus Amendments*: The Proposed Amendments include more comprehensive requirements regarding any amendments required to a WKSII base shelf prospectus.
- *Confirmation of Eligibility*: The Proposed Amendments introduce requirements regarding an issuer's annual confirmation of its WKSII eligibility.
- *Period of Effectiveness*: The Proposed Amendments extend the period of receipt effectiveness to the earlier of: (i) 37 months from the date of its deemed issuance; (ii) the annual filing date unless the issuer continues to be an eligible WKSII and has complied with the annual confirmation provisions; and (iii) the relevant lapse date prescribed in NI 44-102 (which, in turn, depends on how the issuer qualifies to be short form eligible).

For a full list of the differences between the Blanket Orders and the Proposed Amendments, please refer to the CSA Notice.

Comments

As noted above, the CSA is soliciting comments on the Proposed Amendments for a 90-day period, which expires on December 20, 2023. During this period, there will be local outreach to various stakeholders to solicit feedback on the proposals and encourage written comments. The CSA welcomes both general comments and comments on specific questions, as further detailed in the CSA Notice.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.