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December 15, 2023

**VIA E-MAIL**

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

The Secretary  
Ontario Securities Commission  
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**RE: Notice and Request for Comment on Proposed Amendments to National Instrument 44-102 Shelf Distributions, Companion Policy 44-102 and Related Proposed Amendments and Changes Relating to Well-Known Seasoned Issuers**

Dear Sirs/Mesdames:

This letter is being submitted in response to the Notice and Request for Comment dated September 21, 2023 (the “**Notice and Request**”) by the Canadian Securities Administrators (the “**CSA**”) on the proposed amendments to National Instrument 44-102 – *Shelf Distributions* relating to Well-Known Seasoned Issuers (“**WКСI**”), the proposed changes to Companion Policy 44-102 – *Shelf Distributions* and the related proposed consequential amendments or changes to various other instruments and companion policies of the CSA (collectively, the “**Proposed Amendments and Changes**”).

Specifically, we have comments in response to question 3 in the CSA Notice and Request. These comments are those of the writers noted below and do not necessarily reflect the views of our clients or of others in our Firm.

#### Definition of “eligible issuer”

The proposed expedited shelf prospectus regime for WKSIs in Canada is welcome, and we thank the CSA for their consideration of our comments to the Proposed Amendments and Changes in this regard.

With respect to the definition of “eligible issuer” in the Proposed Amendments and Changes, particularly in 9B.1(1)(d) of National Instrument 44-102, we suggest that the expanded definition – which disqualifies an issuer from being WKSI base shelf eligible if the issuer or any of its subsidiaries in the preceding 3 years “has entered into a settlement agreement with or approved by, a court in Canada or a foreign jurisdiction, or a securities regulatory authority or a 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” – may unintentionally exclude issuers who choose to enter into settlement agreements but have not been found to be, or admitted to being, at fault with respect to any of the listed activities.

For example, an issuer or its subsidiaries may occasionally be party to civil lawsuits or regulatory proceedings where allegations of fraud, theft, deceit, misrepresentation, conspiracy, insider trading, unregistered activity or illegal distribution are alleged as a part of a claim. For issuers of the size and nature that would qualify as a WKSI “eligible issuer”, it is common to settle claims even if the issuer does not admit, and/or is not found to be, at fault. The currently proposed wording of the definition of “eligible issuer” would inappropriately cause an issuer to lose “eligible issuer” status if the issuer enters into a settlement agreement with or approved by a court or securities regulatory authority in order to conclude the action, but is not found to be at fault and does not admit to any allegations of fraud, theft, deceit, misrepresentation, conspiracy, insider trading, unregistered activity or illegal distribution. Based on the current proposed definition of “eligible issuer”, an issuer who in any capacity enters into any settlement agreement “in whole or in part” related to fraud, theft, deceit, misrepresentation, conspiracy, insider trading, unregistered activity or illegal distribution would be barred from being WKSI eligible even if the issuer did not engage in any of these acts.

The current U.S. WKSI regime provides what we believe is a more appropriate approach than the Proposed Amendments and Changes to determining whether an issuer is WKSI eligible in the circumstances discussed above. Rule 405 under the Securities Act of 1933, as amended, states that an issuer is ineligible if, among other things, in the past three years, the issuer or its subsidiaries was expressly convicted of any felony or misdemeanor under Section 15(b)(4)(B) of the *Securities Exchange Act of 1934* (ie. fraud, bribery, perjury or embezzlement) or if it or any of its subsidiaries is the “subject of any judicial or administrative decree or order arising out of a governmental action” that is a cease-and-desist or similar order relating to violations of the anti-fraud provisions of the U.S. federal securities laws or determines that the person violated such anti-fraud provisions. In other words, a court-approved settlement of a civil claim that was based on one or more of the prohibited actions – where the issuer does not admit fault – would not result in the issuer becoming an ineligible issuer under the U.S. WKSI regime.

With that in mind, we submit that the definition of “eligible issuer” in the Proposed Amendments and Changes should be revised to only refer to settlement agreements where there is an admission of fault by the issuer or conviction of fraud, theft, deceit, misrepresentation, conspiracy, insider trading, unregistered activity or illegal distribution. Making these revisions would avoid restricting WKSI market access for issuers who would otherwise inappropriately be excluded by the current wording of the definition.

If you have any questions concerning these comments, please contact Tim Andison [REDACTED], Kathleen Keilty [REDACTED], Eric Moncik [REDACTED] or Jessica Zhang [REDACTED].

Sincerely,

(signed) “*Tim Andison*”

(signed) “*Kathleen Keilty*”

(signed) “*Eric Moncik*”

(signed) “*Jessica Zhang*”