

Canadian securities regulators propose permanent WKSI program

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On September 21, 2023, the Canadian Securities Administrators (the CSA) announced proposed amendments to National Instrument 44-102 Shelf Distributions and other securities law instruments (the Proposed Amendments) which, if adopted, would implement a permanent expedited shelf prospectus regime for "well-known seasoned issuers" (WKSI). The Proposed Amendments build upon a WKSI pilot program (the Pilot Program) launched on January 4, 2022 that is designed to reduce the regulatory burden for well-known issuers with established public reporting records in the Canadian capital markets. The Pilot Program has enjoyed widespread adoption by eligible issuers since its introduction, and the Proposed Amendments, if adopted, will help promote transaction certainty and even more closely align the Canadian WKSI regime with that of the United States.

What is the Pilot Program?

The Pilot Program, which was implemented through temporary local blanket exemption orders in each of the provinces and territories of Canada, allows issuers that meet the WKSI qualifications and satisfy certain conditions set out in the orders to file a final base shelf prospectus and obtain a receipt for that prospectus on an accelerated basis without first filing a preliminary base shelf prospectus. An issuer that meets the WKSI qualifications and conditions may also 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 start of the Pilot Program, more issuers have taken advantage of the ability to omit some or all of this information, particularly the number and aggregate dollar amount of securities qualified under the base shelf prospectus.

To qualify as a WKSI under the Pilot Program, an issuer must, within 60 days preceding the date the issuer files its base shelf prospectus, either:

- Have outstanding listed equity securities that have a public float of \$500 million (i.e., excluding the value of securities held by persons or companies that are affiliated parties of the issuer), or
- Have distributed at least \$1 billion aggregate amount of non-convertible securities, other

than equity securities, under a prospectus in primary offerings for cash in the last three years.

In addition, in order to rely on the Pilot Program, an issuer must, among other requirements, have been a reporting issuer in at least one jurisdiction of Canada for 12 months and have filed all periodic and timely disclosure documents that it is required to have filed in each jurisdiction in which it is a reporting issuer.

How do the Proposed Amendments differ from the Pilot Program?

The Proposed Amendments are generally consistent with the WKSI regime under the Pilot Program, but there are several key differences:

- **Prospectus is effective upon filing:** Under the Proposed Amendments, no receipt will be required to be issued by the issuer's principal regulator for a WKSI base shelf prospectus; instead, a receipt will be deemed to be issued upon filing the prospectus. In contrast, a receipt is required to be issued by the principal regulator for a WKSI base shelf prospectus under the Pilot Program before it can be used. This change would bring the Canadian WKSI regime in line with the U.S. WKSI regime, under which a registration statement filed under the U.S. WKSI rules becomes automatically effective on filing. The Proposed Amendments would provide issuers and underwriters with transaction timing certainty, as they would not need to wait for a receipt to be issued before launching and pricing an offering.
- **Three-year seasoning period:** Under the Proposed Amendments, an issuer that files a WKSI base shelf prospectus must have been a reporting issuer in at least one jurisdiction in Canada for the previous three years, compared to 12 months under the Pilot Program.
- **Extended term:** A WKSI base shelf prospectus will be effective for up to 37 months from the date the deemed receipt is issued under the Proposed Amendments, subject to compliance with certain requirements. In contrast, a WKSI base shelf prospectus filed under the Pilot Program is only effective for the 25-month period following the date of the receipt.
- **Annual confirmation:** The Proposed Amendments require an issuer that has filed a WKSI base shelf prospectus to annually (within 60 days before the date on which the issuer's audited annual financial statements are required to be filed) confirm it remains a WKSI and eligible to use the WKSI regime. Such confirmation must appear in the issuer's annual information form or in an amendment to the WKSI base shelf prospectus. If an issuer that has filed a WKSI base shelf prospectus ceases to be eligible, it must announce that it will not distribute securities under a prospectus supplement and withdraw the WKSI base shelf prospectus. During periods of market volatility, issuers may find themselves no longer qualified as a WKSI during the prescribed measurement period because of changes in share price, and therefore may be required to file a traditional base shelf prospectus as a result of ceasing to qualify as a WKSI.
- **Amendments permitted:** The Proposed Amendments expressly provide for amendments

to a WKSI base shelf prospectus without issuance of a receipt by the issuer's principal regulator, unlike the Pilot Program, which is silent on such amendments and has left uncertainty as to whether an amendment is subject to regulatory review and requires a receipt, notwithstanding that the WKSI base shelf prospectus does not. As is the case with initial WKSI base shelf prospectus filings, under the Proposed Amendments, a receipt for amendments will be deemed to have been issued, provided that specified conditions are met.

- **Calculation of public float:** While the public equity threshold to be a WKSI issuer remains unchanged at \$500 million under the Proposed Amendments, there are changes to the method of its calculation. The Proposed Amendments calculate the public equity threshold using the aggregate market value of the issuer's listed securities (excluding securities held by affiliates and reporting insiders of the issuer), using the simple average of the daily closing price of the securities on the applicable stock exchange for the previous 20 trading days. In contrast, the equity threshold under the Pilot Program is based on the aggregate market value of securities held by non-affiliates using the price at which the securities were last sold in the principal market as of a date within 60 days preceding the filing of a WKSI base shelf prospectus.
- **Issuer ineligibility:** In addition to the WKSI eligibility criteria under the Pilot Program, the Proposed Amendments prohibit an issuer from filing a WKSI base shelf prospectus (or continuing to use a previously-filed WKSI base shelf at the time of annual confirmation) if it or any of its subsidiaries within the preceding three years has been the subject of a decision by, or has entered into a settlement agreement with or approved by, a court or a securities regulatory authority in Canada or abroad related to a claim based on fraud, theft, deceit, misrepresentation, conspiracy, insider trading, unregistered activity or illegal distribution.

Comparison to the U.S. WKSI Regime

While the Proposed Amendments would permanently establish a Canadian WKSI regime that closely aligns with the U.S. WKSI regime created in 2005, there are some notable differences:

- WKSI eligibility under the Proposed Amendments can be established based on a public float of \$500 million, whereas the public float requirement under the U.S. regime is US\$700 million.
- WKSI eligibility in the U.S. requires just a one-year reporting history, whereas the Proposed Amendments would require a three-year reporting history.
- WKSI-eligible issuers in the U.S. are permitted to engage in offers of securities prior to filing their WKSI registration statement, whereas advertising or marketing activities may only be made under the Proposed Amendments after the WKSI base shelf prospectus has been filed.
- Upon a loss of WKSI status in the U.S., subject to certain prescribed procedures, the SEC permits an issuer's continued use of the related WKSI registration statement pending the effectiveness of a post-effective amendment thereto to convert that registration statement

into a non-WKSI registration statement. Under the Proposed Amendments, issuers losing WKSI status would be precluded from further sales under the related base shelf prospectus until a new non-WKSI base shelf prospectus is filed.

The Path Forward

The CSA is seeking feedback on the Proposed Amendments. In particular, the CSA is seeking comments on:

- The qualification criteria in the definition of WKSI, including the appropriateness of the proposed qualifying public equity and qualifying public debt thresholds.
- The three-year seasoning period prior to an issuer being eligible to file a WKSI base shelf prospectus.
- The requirement that a WKSI be an “eligible issuer” and the related criteria, including requirements relating to penalties and sanctions, outstanding asset-backed securities, and exceptions to the requirement that an “eligible issuer” not have been the subject of a cease trade order or similar order within the previous three years.
- Whether there are other eligibility criteria that should disqualify an issuer from the WKSI regime.
- Potential issues arising from the deemed issuance of a receipt for a WKSI base shelf prospectus prior to the review of an issuer’s personal information forms which are to be submitted with such prospectus.

Interested parties are invited to submit their comments by December 20, 2023.

We expect that any amendments to implement a permanent WKSI regime will not be in effect prior to mid-2024 at the earliest. In the interim period, issuers that meet the WKSI requirements will still need to rely on the Pilot Program to obtain a receipt for a base shelf prospectus on an accelerated basis without first filing a preliminary base shelf prospectus.

For further details, please see CSA’s [Notice and Request for Comment \[PDF\]](#).