

Securities regulators propose amendments to create permanent Canadian WKSIs regime

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On September 21, 2023 the Canadian Securities Administrators (CSA) published for comment [proposed amendments](#) to National Instrument 44-102 *Shelf Distributions*, and related consequential amendments to certain rules and policies, to permanently implement an expedited base shelf prospectus regime for “well-known seasoned issuers” (WKSIs) in Canada, making it faster and more efficient for these issuers to raise capital. The comment period expires on December 20, 2023.

What you need to know

- The proposed amendments would permit WKSIs-eligible issuers to:
 - File a final base shelf prospectus, and be immediately deemed to have received a receipt for that prospectus, without first filing a preliminary base shelf prospectus or undergoing any regulatory review;
 - Omit certain disclosure from the base shelf prospectus (e.g., the aggregate dollar amount of securities that may be raised under the base shelf prospectus); and
 - Allow for the base shelf prospectus to remain in effect for a period of 37 months from the date the base shelf prospectus was filed (subject to annual eligibility reassessments by the issuer).
- To qualify as a WKSIs, an issuer must have outstanding listed equity securities (excluding securities held by affiliates and reporting insiders) with a market value of at least \$500 million or at least \$1 billion aggregate amount of non-convertible debt securities distributed under a prospectus in primary offerings for cash in the last three years.
- The WKSIs regime contemplated under the proposed amendments is substantially similar to the temporary WKSIs regime implemented by the CSA in December 2021 under various local blanket orders¹; however, there are a number of key differences, as described below.
- The proposed amendments aim to reduce costs and unnecessary regulatory burden for issuers that are well-known reporting issuers, have a strong market following, a complete public disclosure record and sufficient public equity or debt.

- The proposed amendments will also create closer alignment with the United States, where an established WKSJ regime already exists, which will allow multijurisdictional disclosure system (MJDS) issuers that meet the Canadian WKSJ eligibility criteria to more efficiently conduct cross-border offerings.

Background to the proposed amendments

In response to stakeholder feedback that included a recommendation for the CSA to implement a “Canadian version” of the WKSJ regime that exists in the United States, in December 2021 the CSA adopted a Canadian WKSJ regime on a temporary pilot basis through a series of interim orders that were substantially harmonized across the country (the Blanket Orders).

Since the Blanket Orders came into effect, the CSA has continued to evaluate the appropriateness of the eligibility criteria and certain other conditions, consider stakeholder feedback and determine how to best implement a more permanent Canadian WKSJ regime through rule amendments. The Blanket Orders remain in effect and will be replaced by the proposed amendments, if adopted.

The proposed amendments

The proposed amendments define a WKSJ as an issuer that either has outstanding listed equity securities (excluding securities held by affiliates and reporting insiders) with a market value of at least \$500 million or at least \$1 billion aggregate amount of non-convertible debt securities distributed under a prospectus in primary offerings for cash in the last three years. To be eligible, an issuer must be, and have been, a reporting issuer in at least one Canadian jurisdiction for the preceding three years and must meet the definition of a WKSJ as of a date within 60 days preceding the date it files the WKSJ base shelf prospectus.

Issuers with mining operations must meet additional financial criteria—they 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 issuer’s three most recently completed financial years.

In addition to the criteria described above, under the proposed amendments, an issuer must satisfy several other requirements to file a WKSJ base shelf prospectus, including requirements related to short-form prospectus eligibility, and being current with respect to all periodic and timely disclosure documents.

Under the proposed amendments, a WKSJ base shelf prospectus would become immediately effective upon filing and would generally remain in effect for 37 months from the date of filing. Issuers would, however, be required to publicly reconfirm their WKSJ-eligibility status on an annual basis in order to continue using their WKSJ base shelf prospectus.

An issuer whose operations have ceased or whose principal assets are cash, cash equivalents or its exchange listing (e.g., a capital pool company, a special purpose acquisition company or a growth acquisition corporation), an issuer with outstanding asset-backed securities and/or an issuer that has been bankrupt, subject to penalties or sanctions under securities legislation, or subject to a cease-trade order, are ineligible to file a WKSJ base shelf prospectus.

Key differences between the Blanket Orders and the proposed amendments

The principal differences between the current Blanket Orders and the proposed amendments include:

- **WKSI eligibility** – Under the Blanket Orders, WKSI eligibility is determined, in part, based on the issuer’s “public float” being at least \$500 million (which, as defined, only excludes securities held by affiliates). Under the proposed amendments, the definition is narrowed to also exclude securities held by reporting insiders of the issuer. In addition, when determining whether this condition has been satisfied, the proposed amendments require using the 20-day simple average closing price of the issuer’s securities, as opposed to the use of a single closing price on any day during the prior 60-day period.
- **Seasoning period** – Whereas the Blanket Orders require the issuer to have been a reporting issuer for the preceding 12 months, the proposed amendments require the issuer to have been a reporting issuer for the preceding three years.
- **Deemed receipt** – The Blanket Orders require securities regulators to issue a receipt before a WKSI base shelf prospectus becomes effective. Under the proposed amendments, however, no receipt would be issued. Instead, a receipt is “deemed” to have been issued by the applicable securities regulators upon filing of a WKSI base shelf prospectus and the WKSI base shelf prospectus becomes immediately effective upon filing. This deemed receipt mechanism is designed to provide increased certainty with respect to transaction timing, as issuers will be able to launch a public securities offering immediately upon filing a WKSI base shelf prospectus.
- **Shelf effectiveness** – Under the Blanket Orders, a WKSI base shelf prospectus generally remains effective for 25 months from the date of receipt for the WKSI base shelf prospectus, consistent with the existing non-WKSI regime. Under the proposed amendments, a WKSI base shelf prospectus would generally remain in effect for 37 months from the date of filing, subject to annual confirmation of WKSI eligibility by the issuer (as described below).
- **Annual confirmation** – Under the proposed amendments, an issuer that has filed a WKSI base shelf prospectus would be required to confirm its eligibility annually (the confirmation must be performed within 60 days before the date on which the issuer’s audited financial statements are required to be filed). The issuer must then signal to the market that it remains WKSI eligible through either a confirmatory statement in its annual information form (AIF) or by filing an amendment to its WKSI base shelf prospectus. An issuer that is no longer WKSI-eligible or fails to complete the annual confirmation would be required to withdraw (and cease utilizing) its WKSI base shelf prospectus and issue a news release. No such annual confirmation requirements exist under the Blanket Orders. This change is designed to more closely align the Canadian WKSI regime with the U.S. WKSI regime.

Implications

We expect that the proposed amendments will be a welcome development for the Canadian capital markets as they will provide eligible issuers with more flexibility in structuring base shelf prospectus offerings; provide improved certainty regarding transaction timing; streamline the disclosure requirements for base shelf prospectuses; and reduce costs and unnecessary regulatory burden for seasoned issuers and investment dealers.

Conversely, the WKSI eligibility requirements under the proposed amendments are more stringent than under the Blanket Orders and will take into account certain settlement agreements and regulatory proceedings outside of Canada, in addition to annual re-qualification confirmations. As such, it will be critical under the proposed amendments for issuers to ensure their continued eligibility to distribute securities under their WKSI base shelf prospectuses filed under the proposed amendments. We question whether this change from the approach taken in the Blanket Orders is necessary for matters that do not go to an issuer’s fundamental stability or creditworthiness, and thereby disqualify the issuer from maintaining its WKSI eligibility status after a base shelf prospectus has been filed—particularly in light of the damaging non-compliance consequences that could ensue.

From a cross-border perspective, the proposed amendments will more closely align the Canadian securities regulatory rules with those in the United States, where an established WKSI regime already exists. Canadian issuers filing with the SEC under the MJDS, however, would be subject to only the Canadian WKSI regime, as described above. This would permit MJDS issuers to conduct a public offering as a shelf takedown in both the United States and Canada

following the filing of the Canadian WKSJ base shelf prospectus and the corresponding MJDS registration statement. This alignment is expected to allow MJDS issuers that meet the WKSJ eligibility criteria in Canada to conduct cross-border offerings more efficiently.

FOOTNOTES

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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