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VIA ELECTRONIC MAIL

December 20, 2023

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Financial and Consumer Services Commission
Prince Edward Island Office of the Superintendent of Securities
Nova Scotia Securities Commission
Newfoundland and Labrador Office of the Superintendent of Securities
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Nunavut Office of the Superintendent of Securities

Re: CSA Notice and Request for Comment – Proposed Amendments to National Instrument 44-102 Shelf Distributions Relating to Well-known Seasoned Issuers

Dear Sirs/Mesdames:

Neo Exchange Inc. (operating as "Cboe Canada") appreciates the opportunity to respond to the above-referenced Canadian Securities Administrators' ("CSA") notice and request for comment, which was published on September 21, 2023 (the "Notice").[1]

The Notice proposes certain amendments to create a permanent regulatory framework for the expedited and automatic approval of shelf prospectuses filed by well-known seasoned issuers ("WKSIs") in Canada (the "WKSI Proposal").

Cboe Canada wholeheartedly supports the WKSI Proposal. As an exchange, we constantly strive to bring greater innovation and competition to Canadian capital markets and to increase efficiencies for our clients. Any regulatory reform that streamlines existing procedures and helps achieve cost savings and greater efficiencies for Canadian issuers is one that is fully aligned with Cboe Canada's values; and that is precisely the type of regulatory reform that the

[1] See *CSA Notice and Request for Comment – Proposed Amendments to National Instrument 44-102 Shelf Distributions Relating to Well-known Seasoned Issuers*, available at https://www.osc.ca/sites/default/files/2023-09/csa_20230921_44-102_rfc-shelf-distributions.pdf.

WKSI Proposal represents.

We note that the WKSI Proposal is conceptually similar to a proposal made by the Government of Ontario's Capital Markets Modernization Taskforce as one of the "Key Recommendations" set out in its final report, published in early 2021.[2] Cboe Canada was supportive of that recommendation in 2021, and we are similarly supportive of the WKSI Proposal today.

As regards the specific questions asked by the CSA in the Notice, we have the following responses:

1. **Do you agree with the WKSI qualification criteria proposed in the definition of "well-known seasoned issuer"? If not, please identify the requirements that could be eliminated or modified to improve the criteria. For example, are the proposed qualifying public equity and qualifying public debt thresholds appropriate?**

   In general, we agree with the qualification criteria put forth in the WKSI Proposal. In particular, we are supportive of the proposed primary dollar-amount thresholds, which are consistent with those established in the Blanket Orders (i.e., $500 million equity float or $1 billion in issued debt).[3]

   However, we believe there is a benefit to harmonizing some Canadian securities regulations with those of the United States, particularly when it comes to rules for capital raising by WKSIs. For this reason, we are in favour of reducing the minimum qualification period for WKSIs in the WKSI Proposal from 3 years to 12 months. This is based on the following considerations:

   a) The WKSI regime in the US is based on a 12-month minimum qualification period for issuers, and this regime has been functioning well for almost 6 years now.

   b) The CSA's own WKSI pilot program, achieved through blanket orders adopted by the various CSA jurisdictions in December 2021, also relies on a 12-month qualification period for issuers.

   We believe a 12-month qualification period is sufficient. In our view, extending the qualification period to 3 years would put WKSIs in Canada at a competitive disadvantage

[2] See *Capital Markets Modernization Taskforce Final Report* (January 2021), s. 2.0 ("Key Recommendations"), Recommendation #17 ("Develop a well-known seasoned issuer model"), available at https://files.ontario.ca/books/mof-capital-markets-modernization-taskforce-final-report-en-2021-01-22-v2.pdf.

[3] See, e.g., Ontario Instrument 44-501 – *Exemption from Certain Prospectus Requirements for Well-Known Seasoned Issuers (Interim Class Order)*, available at https://www.osc.ca/en/securities-law/instruments-rules-policies/4/44-501/ontario-instrument-44-501-exemption-certain-prospectus-requirements-wksis.

vis-à-vis their US counterparts, which could in turn lead to less capital formation in Canada over time, as compared to the US. It would also result in fewer opportunities for Canadian investors to participate in cross-border offerings, as WKSIs with only 13 to 35 months of qualifying continuous reporting would qualify for relief in the US, but not in Canada, which would almost certainly result in such WKSIs choosing to issue shares only in the US (and not in Canada) in these circumstances.

In short, any theoretical advantage to be gained by extending the qualification period beyond 12 months is outweighed by the benefits of building on the positive results of the past few years, both in Canada and the US, and the administrative efficiencies to be gained—and the potential competitive disadvantages that can be avoided—for Canadian issuers through the adoption of a harmonized regulatory approach to WKSI capital raising across North America. This is especially true given the risk of regulatory arbitrage, as many growing Canadian companies seek efficient access to capital. In this context, a harmonized approach benefits both issuers and investors, in both Canada and the United States.

2. **Under the Blanket Orders, an issuer does not qualify to file a WKSI base shelf prospectus unless it has been a reporting issuer in at least one jurisdiction of Canada for at least 12 months immediately preceding the date of the WKSI base shelf prospectus. We are concerned that an issuer that has been a reporting issuer for only 12 months may not have a sufficient continuous disclosure record to justify participation in the WSKI regime. To address this concern, we propose extending the length of this seasoning period to three years. Is a three-year seasoning period appropriate? Should we consider a reduced seasoning period? If so, what is an appropriate seasoning period and why?**

Please see our response to question 1 above.

3. **Do you agree with the eligibility criteria proposed in the definition of "eligible issuer"? If not, please identify the requirements that could be eliminated or modified to improve the criteria. In particular, do you agree with the requirements relating to (i) penalties and sanctions and (ii) outstanding asset-backed securities?**

Yes, we believe that the eligibility criteria set out in the definition of "eligible issuer" are appropriate. They establish an objective and reasonable standard for reliability and trustworthiness of an issuer and its principals, which is necessary to justify the expedited and automatic approval that the new framework would provide to issuers that qualify.

4. **The definition of "eligible issuer" excludes issuers that have been the subject of a cease trade order or order similar to a cease trade order in any Canadian jurisdiction within the previous three years. Should this exclusion contain an exception for issuers that were the subject of a cease trade order or similar order**

in any Canadian jurisdiction within the previous three years that was revoked within 30 days of its issuance, to align with the disclosure requirements for directors and executive officers in Form 41-101F1 Information Required in a Prospectus, Form 51-102F2 Annual Information Form and Form 51-102F5 Information Circular?

We believe that a strict disqualification for all WKSIs that were the subject of a cease trade order ("CTO") is too draconian. We agree that some exceptions, including in particular, an exception for the scenario of a CTO being revoked within 30 days of its issuance, should be built into the regulation. For example, a WKSI might be struggling, for reasons beyond its control, to get an audit report filed by the applicable deadline; in that case, the WKSI should not be punished by being disqualified from the expedited shelf prospectus process altogether, as the CTO may have been the result of the action (or inaction) of a third party. On the other hand, repeated failures by the WKSI to meet the same deadline year after year could be sufficient grounds for disqualification, at least until the conduct is brought into compliance (e.g., the following year). As an exchange, we monitor our issuers' behaviour (e.g., compliant disclosure track record, ability to correct non-compliance in a timely manner, etc.) to determine whether the issuer can remain a listed issuer; a similar principle could apply to eligibility for the WKSI shelf prospectus regime.

5. **Are there other eligibility criteria that should disqualify an issuer from the WKSI regime? If so, please explain.**

One additional criterion that we would encourage the CSA to consider for incorporation into the regulation would be the WKSI's good standing with its listing exchange. For example, a disqualification from the WKSI shelf prospectus regime could be imposed if an issuer were found to be deficient in a compliance review by its listing exchange, if it failed to pay applicable fees for an extended period of time (e.g., more than 30 days), or if any other material breach of an exchange (listing) rule were to arise.

6. **Under the Proposed Amendments, issuers would be required to deliver personal information forms with the WKSI base shelf prospectus. However, the receipt for the prospectus would be deemed to be issued prior to any review of these personal information forms. Do you agree with requiring issuers to deliver personal information forms with the WKSI base shelf prospectus? If not, please explain.**

Personal information forms have become a standard investor-protection tool under existing Canadian securities laws and regulations. We agree with the CSA's view, as stated in the Notice, that "the review of base shelf prospectuses filed by WKSIs are unlikely to identify substantive deficiencies that require regulatory intervention." Nevertheless, requiring the filing of personal information forms provides a safeguard; in the unlikely event that (a) a WKSI failed to deliver one or more required personal information forms or

(b) one or more of the personal information forms revealed a red flag or actual wrongdoing, the CSA would be in a stronger position to take enforcement action and/or to seek injunctive relief against the issuer or its principals, as appropriate.

That being said, to avoid duplication and regulatory burden, we would encourage the CSA to formally recognize in the regulation that a WKSI is entitled to rely on a personal information form filed within the same year with any recognized exchange (in accordance with that exchange's rules) as sufficient to comply with the personal information form requirement of the WKSI regulation—in other words, without the need to fill out a set of substantively similar forms which would then be separately filed with the WKSI's provincial securities regulator (for the purposes of the WKSI regulation alone).

Cboe Canada appreciates the opportunity to share its views on the WKSI Proposal and welcomes the opportunity to discuss these comments further.

Sincerely,

[redacted]

Joacim Wiklander
Interim President & Chief Executive Officer
Neo Exchange Inc.
[redacted]