IIAC ACCVM
Investment Industry Association of Canada Association canadienne du commerce des valeurs mobilières

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BY ELECTRONIC MAIL

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Dear Sirs and Mesdames:

RE: CSA NOTICE AND REQUEST FOR COMMENT – PROPOSED AMENDMENTS TO NATIONAL INSTRUMENT 44-102 SHELF DISTRIBUTIONS RELATING TO WELL-KNOWN SEASONED ISSUERS (THE "PROPOSED AMENDMENTS")

The Investment Industry Association of Canada (the "IIAC") is the national association representing investment firms that provide products and services to retail and institutional investors in Canada.[1]

[1] For more information visit, https://iiac-accvm.ca/

We appreciate the opportunity to comment on the Proposed Amendments.

EXECUTIVE SUMMARY:

The IIAC and its members are supportive of the Canadian Securities' Administrators (CSA) initiative to streamline the prospectus regime by introducing an automatic shelf prospectus for well-known, seasoned issuers ("WKSI") but recommend:

- Scaling back the "sanctions condition" so as not to disqualify otherwise deserving issuers.
- The definition of 'qualifying public entity' be revised so that only control persons are excluded.
- A 12-month reporting history as sufficient.
- No additional eligibility criteria be used.

Disqualification Due to Unrelated Penalties and Sanctions is Inappropriate

We strongly recommend scaling back the "**sanctions condition**" set out in clause (d) of the "eligible issuer" definition so that it is limited to penalties and sanctions that are relevant for the protection of Canadian investors. As currently drafted, the sanctions condition unnecessarily disqualifies otherwise deserving issuers from using the WKSI regime as it includes types of claims that have no bearing on whether a Canadian investor is afforded sufficient disclosure to make an informed investment decision. An issuer could lose eligibility for a number of unintended situations due to the broad scope of this sanctions condition, including for arbitrary or entirely administrative and minimal penalties or sanctions, without any corresponding investor protection benefit.

The CSA should be tailoring the sanctions condition to narrowly address those circumstances where an issuer's action (or inaction) fails to satisfy the core principle of the prospectus requirement, providing quality disclosure. As currently drafted, the sanctions condition is not tailored to suit this purpose in many ways, including by scoping in claims with respect to activities that contravene (1) foreign laws and (2) laws that are not securities laws.

Even if the sanctions condition was properly limited to relevant Canadian securities legislation, it fails to focus on what matters from a prospectus requirement perspective – the sufficiency of an issuer's disclosure for a person to make an investment decision regarding that issuer's securities. In our view, sanctions conditions should be limited to circumstances where the relevant claim is based on a misrepresentation (as defined in securities legislation) contained in the issuer's prospectus or other public disclosure. Disqualification should not be used to punish prior bad actions that do not bear on the sufficiency of an issuer's disclosure or otherwise contravene the prospectus requirement in a material way. The broad scope of the sanctions condition also raises several practical issues. Key among these issues is that it may be impractical for a large issuer to assess its eligibility due to the absence of any materiality threshold in the sanctions condition as drafted. Limiting the sanctions condition to claims based on a misrepresentation (as defined in securities legislation) – as we've proposed above – imposes an appropriate materiality threshold. In addition, deference to foreign courts and regulators in this context may result in issuers with global operations being disqualified based on foreign decisions that are without merit, inappropriate or unsubstantiated.

In addition, we recommend that the CSA include a provision that the underwriters for a distribution that is qualified by a filed WKSI base shelf will be deemed to have satisfied the prospectus requirement, notwithstanding the issuer is later determined to have not been an "eligible issuer," provided the underwriters have a reasonable belief that the issuer was an "eligible issuer" at the relevant times. For that provision, a belief should be reasonable if based on the qualification certificate filed by the issuer with the WKSI base shelf prospectus, an issuer's statement in its AIF or WKSI base shelf prospectus (including any amendment) that confirms the issuer is eligible or related issuer representations made to the underwriters. It would be impossible for an underwriter to independently confirm all the criteria for WKSI eligibility, particularly the sanctions condition (even if properly tailored as discussed above).

Qualifying Public Equity Measure

Canadian reporting issuers with a public float that exceeds the proposed $500 million threshold have a strong market following with equity analysts and institutional investors. As a result, the dollar amount proposed for this threshold seems appropriate. However, to be more reflective of a public float measure that informs whether an issuer has a sufficient market following, we suggest that "qualifying public equity" be revised so that only securities owned by control persons are excluded. We believe excluding shareholders from the calculation is inappropriate because they own more than 10% of the voting shares.

Required Reporting History Is Too Long

The requirement that a "well-known seasoned issuer" have a Canadian reporting history of at least three years is too long. We believe a 12-month reporting history is sufficient for a Canadian reporting issuer to be sufficiently "well-known" and "seasoned" to use the WKSI shelf regime.

In the CSA Staff Notice adopting the existing WKSI Orders, CSA staff noted those orders were intended to reduce regulatory burden for "issuers that are well-known reporting issuers, have a strong market following, complete public disclosure record and sufficient public float." We assume these same hallmarks of a qualifying issuer informed who would be a WKSI for purposes of the Proposed Amendments. In the Proposed Amendments, there is no evidence to demonstrate that an issuer that meets the qualifying public equity or debt thresholds would have reporting that is not "complete" merely because it has been reporting for less than 36 months. Nor is there any evidence to demonstrate that an issuer with less than 36 months of reporting will not have a strong market following.
A more general statement of the type included under "Qualifying Public Equity Measure" above could be included here to support the argument that 12 months of reporting is sufficient for an issuer with the prescribed public float to have a strong market following.

No Other Eligibility Criteria

No additional eligibility criteria should be used to confirm qualification for the WKSI regime. As noted above, the eligibility criteria in the Proposed Amendments are already too restrictive.

Thank you for the opportunity to share our views. Sincerely,

Investment Industry Association of Canada

Per: Sam Uddin, Managing Director