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December 20, 2023

VIA EMAIL

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

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Email: comments@osc.gov.on.ca

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Dear Sirs/Mesdames,

Re: Canadian Securities Administrators ("CSA") Notice and Request for Comment – Proposed Amendments to National Instrument 44-102 Shelf Distributions ("NI-44-102") Relating to Well-known Seasoned Issuers ("WKSIs")

We are writing in response to the invitation in the CSA Notice and Request for Comment to provide our perspective on the proposed changes to NI 44-102, Companion Policy 44-

102CP to NI 44-102 ("**44-102CP**"), National Policy 11-202 *Process for Prospectus Review in Multiple Jurisdictions* and local securities laws relating to WKSIs (collectively, the "**Proposed Amendments**").

We fully support the permanent establishment of a Canadian WKSI regime and the CSA's move to implement an automatic effectiveness regime akin to that in the United States. We believe the Proposed Amendments represent an important step forward in fostering efficiency in Canada's capital markets while still protecting investors. While we support the efforts of the CSA in making the Proposed Amendments, we also believe that certain aspects of the Proposed Amendments, including departures from the harmonized CSA-wide local blanket orders (the "**Blanket Orders**"), are restrictive and would unnecessarily limit the availability of the Canadian WKSI regime.

In our comment letter, we first respond to the specific questions raised in the CSA Notice and Request for Comment and then provide a number of additional comments.

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?

We urge the CSA to reconsider certain elements of the WKSI qualification criteria, namely: (i) the required duration of the reporting issuer's public reporting history (discussed in 2. further below), (ii) the requirement for issuers that have mineral projects to have first disclosed having met specified gross revenue thresholds in their most recent audited annual financial statements and (iii) the proposed approach to calculating "qualifying public equity".

Mineral Projects

We question the need for having incremental hurdles for mineral project issuers to participate in the WKSI framework and do not believe there is a clear policy basis for distinguishing mining issuers from issuers in other industries for purposes of accessing the WKSI system. We suggest that the CSA reconsider the benefits of this incremental requirement as compared to its potential detriment to mining issuers.

If the CSA does determine to retain an additional gross revenue test for mining issuers, we submit that the test should be revised to remove the requirement that those revenues be shown in audited annual financial statements. Such a hurdle could delay a mining issuer's access to the WKSI framework by more than a year after it has achieved the gross revenue threshold. Instead, we suggest that achievement of the relevant gross revenue threshold should be based on revenues disclosed in either the mining issuer's most recent interim

financial statements or its most recent audited annual financial statements. If an issuer with mineral projects has an accelerated scale-up of production within its fiscal year so that it meets the gross revenue threshold during that fiscal year based on its interim financial statements, we believe that the issuer should not have to wait until it files its audited financial statements following the end of the fiscal year to be able to access the WKSI regime.

Qualifying Public Equity

We believe that the exclusion of equity held by reporting insiders (as defined in National Instrument 55-104 – *Insider Reporting Requirements and Exemptions* ("**NI 55-104**")) from the definition of "qualifying public equity" is too broad. NI 55-104 deems a "significant shareholder" (being a person or company that has beneficial ownership of, or control or direction over, whether direct or indirect, or a combination of beneficial ownership of, and control or direction over, whether direct or indirect, securities of an issuer carrying more than 10% of the voting rights attached to all the issuer's outstanding voting securities) to be a reporting insider. Instead, we submit that the CSA should consider excluding equity held by "control persons", which would result in the exclusion of equity held by holders of more than 20% of a reporting issuer's outstanding voting securities. We believe that the 20% exclusion threshold is more appropriate given the significant role played by institutional investors in the Canadian capital markets who have substantial equity holdings but do not seek to exercise control over issuers.

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?

We believe that a three-year seasoning period is unnecessary and runs contrary to the stated purpose of facilitating access to capital formation for companies that have a sufficient disclosure track record not to require regulatory review of a shelf prospectus. Issuers that have been through the rigours of the Canadian IPO process (including the related securities regulatory review) should be able to access the WKSI regime after having provided the market with continuous disclosure for a full one-year period. Since the introduction of the U.S. WKSI regime in 2005, the seasoning period for a U.S. WKSI has been 12 months of public company reporting and we submit that if that reporting timeframe was shown to be

insufficient to establish the requisite track record of disclosure reliability, the U.S. Securities and Exchange Commission would have since lengthened it. In addition, we are not aware of any issues flowing from the 12-month reporting eligibility criteria under the Blanket Orders that would militate in favour of switching to a much longer three-year seasoning period.

If CSA members have concerns about the quality of certain issuers' continuous disclosure records because, for example, those issuers have not been through a securities regulatory review process for a prospectus, the CSA may wish to consider implementing a two-pronged seasoning period: (i) a 12-month seasoning period if the issuer has previously received a receipt for a final prospectus and (ii) an 18-month seasoning period if the issuer has not previously received a receipt for a final prospectus. The longer 18-month seasoning period applying to issuers that have not previously received a receipt for a final prospectus would allow CSA members the opportunity to conduct a review of at least one full year's worth of continuous disclosure and to address any detected deficiencies in such an issuer's continuous disclosure record before that issuer becomes WKSI eligible. Alternatively, the CSA could impose a requirement that issuers that have become public companies through a reverse takeover or other transaction that did not require filing and clearing a prospectus, must first have had a final prospectus receipted in at least one jurisdiction of Canada before being eligible for access to the WKSI system.

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?

We submit that the CSA should reconsider certain elements of the "eligible issuer" criteria.

- To be an eligible issuer, the Proposed Amendments require an issuer to have filed all periodic and timely disclosure documents that it is required to have filed under securities legislation, an order made by the regulator or securities regulatory authority, or an undertaking given by the issuer to the regulator or securities regulatory authority. In order to help manage the practicality of this assessment, we believe that there should be a look-back period for a set period of time, such as the 12-month period used under the U.S. WKSI regime. Otherwise, we believe that requiring issuers to conduct an indefinite look-back to assess past compliance with all periodic and timely disclosure requirements is unduly onerous and does not focus on the most recent disclosure that forms the basis of investor decision-making.

- The Proposed Amendments would carve-out from the definition of "eligible issuer" an issuer that, within the preceding three years, among other things, was subject to or instituted any proceeding, arrangement or compromise with creditors or was subject to an appointment of a receiver, receiver manager or trustee to hold its assets. We submit that being subject to an involuntary proceeding with creditors should not, by itself, prevent an issuer from being an eligible issuer. Again looking to the U.S. WKSI regime, it may be more equitable to add the proviso that any involuntary procedures brought by creditors that have not been dismissed within 90 days would result in the issuer not being an eligible issuer.

- The Proposed Amendments contemplate that an issuer will not be an eligible issuer based on the issuance of an order, judgment, decree, sanction or administrative penalty imposed by, or entering into a settlement agreement with or approved by, a court in 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. We submit that the scope and jurisdictional reach of this disqualification criteria is too broad. It is conceivable that a foreign jurisdiction may apply one of the enumerated infractions to an issuer without the procedural protections that the issuer would be entitled to in Canada. In addition, we submit that only securities fraud-based infractions should result in a loss of eligible issuer eligibility. For example, unregistered activity or an illegal distribution resulting from technical errors and without the presence of fraud should not automatically result in eligible issuer disqualification. Instead, we propose in all cases that only infractions of securities laws resulting in fraud-based convictions by courts in foreign jurisdictions should result in a loss of eligible issuer status, and then only upon an affirmative finding by a CSA member that such disqualification is in the public interest. We also believe that disqualifying infractions flowing from proceedings in Canada should only apply to securities fraud-based conduct, which we believe is consistent with the U.S. WKSI regime.

- We also submit that the Proposed Amendments should provide for a waiver process whereby an issuer that is disqualified from being an eligible issuer may obtain a waiver from its principal regulator to file a WKSI base shelf prospectus upon a determination by the principal regulator that granting the waiver would not be contrary to the public interest. If a waiver provision is introduced, 44-102CP should

be amended to provide guidance on when a waiver would be granted. This approach would also be consistent with that taken in the United States.[1]

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 acknowledge that an issuer should be held to a high standard with respect to compliance with securities laws in order to have access to the benefits of WKSI status. Part of meeting a high standard of compliance is complying with continuous disclosure requirements, including applicable filing deadlines. We note that having a three-year look-back period for cease trade orders or similar orders could result in an issuer being disqualified from being a WKSI for breaches of securities laws that are of a more technical and curable nature. We presume the rationale for having an exception for a cease trade order or similar order that is revoked within 30 days is to distinguish "serious" from "less serious" situations where a cease trade order is issued when determining eligibility to be a WKSI. We believe this is a reasonable approach to the extent that the CSA stays with a three-year look-back period for cease trade orders. Another alternative would be to have only a 12 month look-back period with no exception for cease trade orders that were revoked within 30 days, on the basis that an issuer's compliance record for the most recent 12-month period should meet a very high standard.

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

We believe that the CSA should disqualify from the WKSI regime issuers who, in the preceding 36 months, filed a prospectus and had a receipt for such prospectus refused by a CSA member. If, however, a receipt was issued to the issuer for a subsequently filed prospectus following the prior refusal, the issuer should not be disqualified from the WKSI regime.

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[1] See, for example: U.S. Securities and Exchange Commission, Division of Corporation Finance, *Revised Statement on Well-Known Seasoned Issuers* (April 24, 2014).

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.**

We agree that an issuer should be required to deliver personal information forms or a confirmation of valid personal information forms currently on file when the issuer files its WKSI base shelf prospectus, consistent with the requirements for a non-WKSI base shelf prospectus. Following the deemed issuance of a receipt for a WKSI base shelf prospectus, should a CSA member determine that a personal information form was deficient or creates concerns, we believe the appropriate approach would be for the CSA member to contact the issuer and request an undertaking from the issuer either to not issue securities under the WKSI base shelf prospectus until the identified deficiency or concern has been resolved or to cause the affected director or officer to resign if the relevant background checks identify a matter of significant concern (consistent with practice in respect of short form prospectus reviews).

Other Comments

(a) Thirty-seven-month effectiveness

We support the extension of the effectiveness period for a WKSI base shelf prospectus in the Proposed Amendments from 25 months to 37, which aligns with the three-year effectiveness of a WKSI registration statement under the U.S. WKSI regime and will help certain cross-border issuers synchronize the timing of their WKSI base shelf prospectus filings under both the Proposed Amendments and the U.S. WKSI regime.

(b) Certification timeline

Section 9B.6(1)(a) of the Proposed Amendments provides:

> Within 60 days preceding the annual filing date in each financial year of an issuer following the filing by the issuer of a WKSI base shelf prospectus and until the date, under subsection (2), on which the issuer is no longer permitted to distribute a security under the WKSI base shelf prospectus, the issuer shall (a) include a statement in its AIF for the financial year ended immediately before the annual filing date, or in an amendment to the WKSI base shelf prospectus, that explains that the issuer is eligible to file a WKSI base shelf prospectus, if the issuer satisfies the conditions under subsection 9B.2(1)[.]

We submit that the reference to "within 60 days preceding the annual filing date" should be replaced with "No later than the time an issuer's annual information form is required to be filed pursuant to section 6.1 of National Instrument 51-102 – *Continuous Disclosure Obligation[…]*". This change would allow an issuer to comply with the Proposed Amendment's annual certification requirement if it opts to file its annual information form during the first 30 days following the end of its previous fiscal year.

(c) Conversion of WKSI base shelf prospectus upon loss of WKSI status

The U.S. WKSI regime permits a registrant that loses its WKSI status, subject to certain prescribed procedures, to continue to use the related WKSI registration statement pending effectiveness of a post-effective amendment thereto to convert that WKSI registration statement into a non-WKSI registration statement. Under the Proposed Amendments, issuers that lose their WKSI status would be precluded from further sales under their WKSI base shelf prospectus until a new non-WKSI base shelf prospectus has been filed and receipted. We believe that it will frequently be the case that an issuer's loss of WKSI status will be attributable to general broad-based market share price declines and will bear no connection to the quality of the affected issuer's disclosure. We submit that shutting issuers that are transitioning from WKSI to non-WKSI status out of the capital markets until they have filed and cleared a non-WKSI base shelf prospectus would not serve the public interest. We submit that if the loss of WKSI status is due to an issuer no longer meeting the qualifying public equity threshold, and the issuer has filed a non-WKSI base shelf prospectus that is pending review by its principal regulator at the time WKSI status has been lost, the issuer should continue to be able to distribute securities under its WKSI base shelf prospectus before its non-WKSI final base shelf prospectus has been receipted for a period of up to 15 calendar days following the annual filing date on which the issuer ceased to qualify as a WKSI. We believe that a 15-day transition grace period should be sufficient in most cases for an issuer to obtain a receipt for a new non-WKSI final base shelf prospectus.

(d) Bought deal exemption

The Proposed Amendments provide that prior to filing a WKSI base shelf prospectus, an issuer would be unable to rely on the bought deal exemption for pre-marketing provided in Part 7 of NI 44-101. We believe this prohibition is unnecessary from a policy and investor protection perspective and puts seasoned issuers filing a WKSI shelf prospectus at an unfair disadvantage. In contrast to the Proposed Amendments, the U.S. WKSI regime permits WKSI-eligible registrants to engage in offers of securities prior to filing their WKSI registration statement.

We submit that the Proposed Amendments should permit an issuer to rely on the bought deal exemption for pre-marketing for an offering to be conducted pursuant to a to-be-filed

WKSI base shelf prospectus so long as such issuer: (a) has entered into a bought deal agreement, (b) issues and files a news release announcing the agreement, (c) files a WKSI base shelf prospectus and prospectus supplement qualifying the distribution of the securities within two business days of entering into the bought deal agreement, and (d) upon issuance of the deemed receipt, causes a copy of the WKSI base shelf prospectus and the prospectus supplement to be sent to each person or company that, in response to the solicitation, expressed an interest in acquiring the securities.

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We are pleased to have had an opportunity to provide you with our comments. If you have any questions regarding our comments or wish to discuss them with us, please contact Rosalind Hunter [redacted], Jason Comerford [redacted] or Wesley Cohen [redacted].

Yours very truly,

"Osler, Hoskin & Harcourt LLP"

cc: Desmond Lee, *Osler, Hoskin & Harcourt LLP*
James Brown, *Osler, Hoskin & Harcourt LLP*