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**Companion Policy 44-102CP
to National Instrument 44-102
*Shelf Distributions***

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**Companion Policy 44-102CP
to National Instrument 44-102
*Shelf Distributions***

PART 1 GENERAL

1.1 Relationship of the National Instrument to Securities Legislation

- (1) Issuers are reminded that the rules and procedures contained in NI 44-102 for distributions made under the shelf procedures should be read in conjunction with other provisions of securities legislation in each jurisdiction in which a distribution is being made.
- (2) A distribution under a short form prospectus using the shelf procedures is subject to all the requirements of National Instrument 44-101 *Short Form Prospectus Distributions*, some of the requirements of National Instrument 41-101 *General Prospectus Requirements*, and other provisions of securities legislation, as supplemented or varied by NI 44-102 and the implementing law of the jurisdiction. Reference is made to section 1.5 of the Companion Policy to NI 44-101 for a discussion of the relationship between NI 44-101 and NI 44-102, and to subsection 1.2(5) of the Companion Policy to NI 41-101 for a discussion of the relationship among NI 41-101, NI 44-101 and NI 44-102.

1.1.1 Electronic transmission

National Instrument 13-103 *System for Electronic Data Analysis and Retrieval + (SEDAR+)* prescribes that each document that is required or permitted to be provided to a securities regulatory authority or regulator must be transmitted to the securities regulatory authority or regulator electronically through the System for Electronic Data Analysis and Retrieval + (SEDAR+).

The reference to a document includes any report, form, application, information, material and notice, as well as a copy thereof, and applies to documents that are required or permitted to be filed or deposited with, or delivered, furnished, sent, provided, submitted or otherwise transmitted to, a securities regulatory authority or regulator.

To reflect the phased implementation of SEDAR+, the Appendix of National Instrument 13-103 *System for Electronic Data Analysis and Retrieval + (SEDAR+)* sets out securities legislation under which documents are excluded from being filed or delivered in SEDAR+.

National Instrument 13-103 *System for Electronic Data Analysis and Retrieval + (SEDAR+)* should be consulted when providing any document to a securities regulatory authority or regulator under NI 44-102 and this policy.

1.2 **Liability**

- (1) The securities regulatory authorities are of the view that an issuer's prospectus certificate contained in an amendment to a base shelf prospectus filed under the shelf procedures supersedes and replaces the issuer's certificate contained in the base shelf prospectus. Accordingly, an officer who signed the later dated certificate and the directors at the time the amendment was filed would be subject to statutory civil liability to purchasers of securities under the amended base shelf prospectus.
- (2) The securities regulatory authorities are of the view that an issuer's prospectus certificate contained in a shelf prospectus supplement filed under the shelf procedures supersedes and replaces the issuer's certificate contained in the base shelf prospectus for purposes of the distribution of securities under the shelf prospectus supplement. Accordingly, an officer who signed the later dated certificate and the directors at the time the supplement was filed would be subject to statutory civil liability to purchasers of securities under the shelf prospectus supplement.

1.3 **Marketing before the Filing of a Shelf Prospectus Supplement** - After a receipt has been issued for a base shelf prospectus, we do not have the same regulatory concerns about "marketing" before the filing of a shelf prospectus supplement as we do about "pre-marketing" before the filing of a short form prospectus or a long form prospectus (see section 6.4 of Companion Policy 41-101CP).

A preliminary form of shelf prospectus supplement describing a tranche of securities to be offered under the shelf procedures (a draw-down) may be used in marketing the securities before the public offering price is determined. Issuers are reminded that the ability to use a preliminary form of shelf prospectus supplement in this manner for a distribution of equity securities under an unallocated base shelf prospectus is subject to the requirement in section 3.2 of National Instrument 44-102 to issue a news release once the issuer or selling securityholder has formed a reasonable expectation that the distribution will proceed.

Issuers should also consider whether the decision to pursue a draw-down under an allocated base shelf prospectus is a material change under

applicable securities legislation. If the decision is a material change, the news release and material change report requirements in Part 7 of NI 51-102 and other securities legislation apply.

In order to address selective disclosure concerns, an issuer will generally file any preliminary form of shelf prospectus supplement on SEDAR+ and ask their principal regulator to make it public. However, staff of securities regulatory authorities will not be “pre-clearing” any preliminary form of shelf prospectus supplement (unless the issuer is filing a draft supplement pursuant to an undertaking previously given to securities regulatory authorities).

If an issuer does not issue a news release about a potential draw-down under a base shelf prospectus, then the relevant investment dealers should consider measures to ensure compliance with applicable securities laws relating to selective disclosure, insider trading and trading by “tippees” (these laws are summarized in sections 3.1 and 3.2 of National Policy 51-201 *Disclosure Standards*) before circulating a preliminary form of shelf prospectus supplement to investors.

Issuers and investment dealers should also refer to the guidance on marketing activities in Part 6 of the Companion Policy to NI 41-101. While NI 44-102 has provisions on marketing after a receipt for a final base shelf prospectus, NI 41-101 has general provisions that apply to marketing during the waiting period.

PART 2 SHELF PROCEDURES

2.1 Shelf Qualification

- (1) The principle guiding the qualification provisions of NI 44-102 is that any distribution under a short form prospectus, other than rights offerings, may be effected using the shelf procedures.
- (2) A distribution using the shelf procedures is necessarily a distribution under a short form prospectus. Therefore, issuers must be qualified to file a prospectus in the form of a short form prospectus under NI 44-101 and must satisfy the additional qualification criteria under Part 2 of NI 44-102.

2.2 Period of Receipt Effectiveness

- (1) NI 44-102 provides that a receipt for a base shelf prospectus is effective until the earliest of the following three events: (i) the date 25 months from the date of the issuance of a receipt for the base shelf

prospectus, (ii) the time immediately before selling the securities, if certain prescribed conditions relating to the issuer's qualification to file a prospectus in the form of a short form prospectus are not satisfied, and (iii) in Ontario, the lapse date of the receipt prescribed by securities legislation, if no relief has been granted to the issuer through a blanket ruling or upon application by the issuer. This receipt expiry mechanism is designed to impose a limit of, essentially, two years on shelf distributions under the same base shelf prospectus and to prevent distributions of securities under a base shelf prospectus if the issuer would no longer be qualified under NI 44-101.

- (2) The securities legislation in some jurisdictions provides that a prospectus receipt does not continue to be effective for more than one year absent relief granted by the securities regulatory authority in that jurisdiction. Some of these jurisdictions have provided blanket relief for receipts issued for base shelf prospectuses.

2.3 Unallocated Shelf

- (1) Section 3.1 of NI 44-102 provides that a base shelf prospectus may pertain to different types of securities. This allows a base shelf prospectus to be used to distribute any combination of debt securities, preferred shares, derivatives, asset-backed securities and equity securities, for which the issuer is eligible to participate in the short form prospectus distributions system.
- (2) In the case of an unallocated base shelf prospectus, section 3.2 of NI 44-102 requires an issuer or a selling securityholder to issue a news release immediately upon having formed a reasonable expectation that a distribution of equity securities under the unallocated shelf prospectus will proceed. An issuer or selling securityholder will generally only have formed such a reasonable expectation upon having discussions with an underwriter concerning the distribution of some specificity and certainty.

2.4 Distributions of Novel Derivatives and Asset-Backed Securities using the Shelf Procedures

- (1) The securities regulatory authorities recognize the utility of the shelf procedures for distributions of derivatives and asset-backed securities in order to permit tranches of these products to be priced and distributed expeditiously to take advantage of market opportunities, without the need for regulatory approval.

- (2) However, the securities regulatory authorities are also aware of the complexities that may be associated with distributions of specified derivatives and asset-backed securities. All material attributes of the products, and the risks associated with them, should be disclosed in either the base shelf prospectus or the shelf prospectus supplement. The securities regulatory authorities also want to ensure that prospectus investors of such products are entitled to the appropriate rights at the time of their investment as contemplated by applicable securities laws. Reference is made to section 4.8 of Companion Policy NI 44-101CP for a discussion of these issues. The securities regulatory authorities have attempted to balance these objectives in formulating NI 44-102.
- (3) The requirements relating to the clearance of distributions of derivatives or asset-backed securities make a distinction between “novel” and “non-novel” products. If a base shelf prospectus pertains to specified derivatives or asset-backed securities, the issuer or selling securityholder, as the case may be, must file an undertaking under section 4.1 of NI 44-102 with its base shelf prospectus. This includes any circumstances where a base shelf prospectus, including, if applicable, an unallocated shelf prospectus, may be used together with a prospectus supplement to qualify novel products. The undertaking must state that the issuer or the selling securityholder, as the case may be, will not distribute under the base shelf prospectus specified derivatives or asset-backed securities that at the time of distribution are novel without pre-clearing the disclosure in shelf prospectus supplements with the regulator.
- (4) The term “novel” has a different meaning depending on whether it pertains to specified derivatives or asset-backed securities. In the case of asset-backed securities, the term is intended to apply to a distribution of asset-backed securities that is structured in a manner that differs materially from the manner in which any public distribution that has previously taken place in a jurisdiction was structured. In the case of specified derivatives, an issuer or selling securityholder must pre-clear any distribution of derivative securities that are of a type that have not previously been distributed to the public by the issuer.
- (5) The securities regulatory authorities are of the view that the definition of the term “novel” should be read relatively restrictively. A security would not be novel merely because a new underlying interest was used. For example, where the underlying interest is a market index, the use of a different market index would not be considered “novel”, provided that information about the index

methodology, the constituents that make up the index, as well as the daily index level, are available to the public. However, in circumstances where an issuer or its advisor is uncertain if a product is novel, the securities regulatory authorities encourage the issuer to either treat products as novel or to seek input from staff prior to filing a base shelf prospectus or prospectus supplement, as the case may be.

- (6) If the product is not novel, then the shelf prospectus supplements concerning the product need not be reviewed by the securities regulatory authorities. The securities regulatory authorities are of the view that the disclosure in shelf prospectus supplements in such circumstances should be no less comprehensive than the disclosure that has previously been reviewed by a securities regulatory authority in a jurisdiction. The securities regulatory authorities also believe that the rights provided to investors in such products should be no less comprehensive than the rights provided in offerings previously reviewed by a securities regulatory authority in a jurisdiction.
- (7) The securities regulatory authorities have a particular interest in reviewing novel specified derivatives that are functionally similar to investment fund products. These products have generally taken the form of linked notes issued under a medium term note program. These derivatives provide returns that are similar to investment fund products but are not necessarily subject to the investment funds regulatory regime. As a result, the securities regulatory authorities will review such offerings while keeping investment fund conflicts and disclosure concerns in mind.
- (8) In circumstances where it is apparent to the issuer or selling securityholder that a specified derivative that is subject to the pre-clearance process is similar to a specified derivative that has already been subject to the pre-clearance process, the issuer or selling securityholder is encouraged, for the purpose of expediting the pre-clearance process, to file along with the shelf prospectus supplement a blackline to the relevant precedent shelf prospectus supplement. The issuer or selling securityholder is also encouraged to provide a cover letter setting out the material attributes of the specified derivative that differ from the securities offered under the precedent shelf prospectus.

2.5

Information that may be Omitted from a Base Shelf Prospectus

- (1) Paragraph 1 of section 5.6 of NI 44-102 provides that a base shelf prospectus may omit the variable terms, if not known, of the securities that may be distributed under it. The types of variable

information that may be omitted from the base shelf prospectus include

- (a) the designation of the tranche;
- (b) maturities;
- (c) denominations;
- (d) interest or dividend provisions;
- (e) purchase, redemption and retraction provisions;
- (f) conversion or exchange provisions;
- (g) the terms for extension or early repayment;
- (h) the currencies in which the securities are issued or payable;
- (i) sinking fund provisions; and
- (j) any special covenants or other terms applicable to the securities of the tranche.

(2) Paragraph 3 of section 5.6 of NI 44-102 provides that a base shelf prospectus may omit information, if not known, relating to the variable terms of the plans of distribution for the securities that may be distributed under the base shelf prospectus. These variable terms may include

- (a) if the shelf prospectus sets forth alternative methods of distribution, the method that will be applicable to each tranche of securities distributed under the shelf prospectus; and
- (b) for each tranche of securities distributed under the shelf prospectus, the specific terms not included in the description of the applicable method of distribution in the shelf prospectus, including, if applicable
 - (i) the names of any underwriters, and
 - (ii) the distribution spread and underwriting fees, discounts and commissions.

- (3) Paragraph 7 of section 5.6 of NI 44-102 provides that a base shelf prospectus may omit other information, if not known, that pertains only to a specific distribution of securities under the base shelf prospectus. This information may include
 - (a) the public offering price;
 - (b) delivery dates;
 - (c) legal opinions regarding the eligibility for investment of the securities and tax matters;
 - (d) statements regarding listing of the securities;
 - (e) actual amount of proceeds on the distribution; and
 - (f) information about the use of proceeds.

2.6

Shelf Prospectus Supplements

- (1) The ability to file a shelf prospectus supplement does not prevent the filing of a shelf prospectus amendment to supply some or all of the information that is permitted to be included in a prospectus supplement.
- (2) Under subsection 6.3(2) of NI 44-102, the shelf prospectus supplements used in a distribution must contain all omitted shelf information as well as all information necessary for the base shelf prospectus to comply with the disclosure requirements for a short form prospectus. For example, if the securities being distributed using the shelf procedures are rated, that rating must be disclosed in a shelf prospectus supplement because NI 44-101 requires all ratings, including provisional ratings, received from one or more designated rating organizations or their DRO affiliates for the securities to be distributed and continuing in effect, to be disclosed in a short form prospectus.
- (3) Section 6.7 of NI 44-102 provides that, subject to Part 6A, all shelf prospectus supplements pertaining to the securities being distributed under a base shelf prospectus shall be sent by prepaid mail or delivered to purchasers of the securities concurrently with the base shelf prospectus. A shelf prospectus supplement may take the form of a “sticker”, a “wrap-around” or a one or more page supplement to a base shelf prospectus.

2.6.1

Expert's Consent – Section 7.2 of NI 44-102 provides that if a document (the "Document") containing an expert's report, valuation, statement or opinion is incorporated by reference into a base shelf prospectus and filed after the filing of the base shelf prospectus, the issuer must file the written consent of the expert in accordance with deadlines that vary with the circumstances. For example, issuers are reminded that separate auditor's consents are required at the filing of the base shelf prospectus and in each subsequent shelf prospectus supplement for each set of audited financial statements incorporated by reference for which a consent was not previously filed. The following is intended to illustrate the required timing for the filing of the expert's consents:

Type of Prospectus Filed	Timing of inclusion of expert's report	Timing of filing of expert's consent
MTN or non-MTN base shelf prospectus	Expert's report included in the base shelf prospectus at the date the base shelf prospectus is filed.	Expert's consent is filed at the date the prospectus is filed.
MTN base shelf prospectus	Expert's report included in a Document, filed after the base shelf prospectus is filed, that is incorporated by reference into the prospectus.	Expert's consent is filed at the date the Document is filed.
Non-MTN base shelf prospectus	Expert's report included in a Document, filed after the base shelf prospectus is filed, that is incorporated by reference into the prospectus.	Expert's consent is filed no later than the date of filing of the next prospectus supplement corresponding to the base shelf prospectus or the date the Document is filed.

2.7

Firm Commitment Distributions - Paragraph 5 of section 5.6 of NI 44-102 provides that a base shelf prospectus for securities to be distributed by one or more underwriters that have agreed to purchase the securities at a specified price may omit the statement that the securities are to be taken up by the underwriters, if at all, on or before a specified date. This paragraph provides an exemption from the requirement of securities legislation that this disclosure be contained in a prospectus. Issuers are reminded that paragraph

1 of subsection 6.3(2) of NI 44-102 requires all information that was omitted from the base shelf prospectus to be included in a shelf prospectus supplement. Therefore, it is necessary to include in a shelf prospectus supplement the disclosure required under securities legislation relating to specific distributions that are being effected on a firm commitment basis.

2.8 Best Efforts Distributions - Paragraph 6 of section 5.6 of NI 44-102 similarly provides that a base shelf prospectus for a distribution of securities underwritten on a best efforts basis for which a minimum amount of funds are required by an issuer may omit disclosure required under securities legislation concerning the maximum length of time for which the distribution can continue and concerning the disposition of subscription funds. Issuers are reminded that paragraph 1 of subsection 6.3(2) of NI 44-102 requires all information that was omitted from the base shelf prospectus to be included in a shelf prospectus supplement. Therefore, it is necessary to include in a shelf prospectus supplement the disclosure required under securities legislation relating to specific distributions that are being effected on a best efforts basis.

2.9 Delivery Obligations – Purchaser’s or Subscriber’s Rights – The securities regulatory authorities are of the view that statutory rights of rescission or withdrawal commence from the time of the purchaser's receipt of all relevant shelf prospectus supplements. It is only at this time that the entire prospectus has been delivered.

Subsections 6A.4(2), 6A.4(3), 6A.4(4), 6A.6(4) and 6A.6(5) of the Instrument set out the period of time within which a purchaser’s or subscriber’s right to withdraw or rescind from, revoke or cancel an agreement to purchase a security or a contract to purchase or a subscription for a security must be exercised when access to a prospectus and any amendment is provided.

For the purposes of section 6A.4 and subsections 6A.6(4) and (5) of the Instrument, securities legislation in a jurisdiction sets out any provisions for who may exercise the right to provide a written notice, whether the notice is required and if so by when and to whom it must be provided, when receipt of the notice is deemed to be provided and who has the onus of proving time to provide a notice has expired.

If a purchaser or subscriber requests an electronic or paper copy of the shelf prospectus supplement, the corresponding base shelf prospectus or any amendment from the issuer or dealer as permitted by subsections 6A.5(4) or 6A.6(3) of the Instrument, the request will not affect the calculation of the period of time during which the purchaser or subscriber may exercise these rights.

- 2.10** **Revocation of Purchase – Alberta** – In Alberta, section 130 of the *Securities Act* (Alberta) provides that an agreement to purchase securities is not binding on the purchaser if the dealer receives notice in writing that the purchaser does not intend to be bound by the agreement to purchase within the timelines set out in the regulations. If access to the shelf prospectus supplement, the corresponding base shelf prospectus or any amendment to the documents is provided in accordance with subsection 6A.5(2) of the Instrument, the applicable timeline is that set forth in section 6A.4(3) of the Instrument. Otherwise, the applicable timeline is that set forth in Alberta Securities Commission Rule 46-503 *Revocation of Purchase*.

PART 2A ACCESS TO SHELF PROSPECTUS SUPPLEMENTS AND BASE SHELF PROSPECTUSES

- 2A.1** **Delivery Obligation** – Securities legislation generally requires a dealer who receives an order to purchase a security offered in a distribution to deliver or send to the purchaser a copy of the prospectus and any amendment. Securities legislation generally requires a dealer who solicits expressions of interest from a prospective purchaser to deliver or send to the prospective purchaser a copy of the preliminary prospectus and any amendment.

Part 6A of the Instrument provides alternative procedures whereby a dealer may provide access to a preliminary prospectus, final prospectus and any amendment. In British Columbia, Québec and New Brunswick, the alternative procedures are structured as an exemption from the delivery obligation, while in all other jurisdictions the alternative is structured as procedures to provide access to the preliminary prospectus, final prospectus and any amendment. The access procedures and the conditions of the exemption are substantially equivalent and both result in providing access to a preliminary prospectus, final prospectus and any amendment.

In jurisdictions except British Columbia, Alberta, Québec and New Brunswick, under subsection 6A.2(2) of the Instrument, a dealer may satisfy its delivery obligation under securities legislation if access to the shelf prospectus supplement, the corresponding base shelf prospectus, the preliminary base shelf prospectus and any amendment to the documents is provided in accordance with subsection 6A.5(2) or (3) of the Instrument.

In Alberta, under section 6A.3 of the Instrument, a dealer may satisfy its access obligation under securities legislation if access to the documents is provided in accordance with subsection 6A.5(2) or (3) of the Instrument.

In British Columbia and New Brunswick, a dealer is provided with an exemption from the requirement in securities legislation to send a shelf prospectus supplement, the corresponding base shelf prospectus, the preliminary base shelf prospectus and any amendment to the documents if the conditions set out in subsection 6A.6(1) or (2) of the Instrument are met.

In Québec, a dealer is provided with an exemption from the requirement in securities legislation to send a shelf prospectus supplement, the corresponding base shelf prospectus and any amendment to the documents if the conditions set out in subsection 6A.6(1) of the Instrument are met. It is permissible to provide access to the preliminary base shelf prospectus and any amendment if the document has been filed on SEDAR+ and a receipt has been issued and posted on SEDAR+ for the document.

2A.2 News Release – To provide access to a shelf prospectus supplement, the corresponding base shelf prospectus and any amendment under Part 6A of the Instrument, a news release including prescribed information must be issued and filed on SEDAR+ after the supplement and any amendment is filed or within 2 business days before the date the document was filed. The requirements under paragraph 6A.5(2)(c) of the Instrument and the conditions under paragraph 6A.6(1)(c) of the Instrument may be satisfied by including the prescribed information in a news release that contains other information, for example a news release announcing the offering price of the securities or other information with respect to the applicable offering.

2A.3 Structured Notes – Part 6A of the Instrument does not apply to MTN programs and other continuous distributions. The securities regulatory authorities note that MTN programs have routinely been used to distribute structured notes. Structured notes are generally specified derivatives for which the amount payable is determined by reference to the price, value or level of an underlying interest that is unrelated to the operations or securities of the structured note issuer. The securities regulatory authorities expect that structured notes will continue to be distributed under MTN programs or other continuous distributions, as they have been historically, and may have public interest concerns if they are distributed in another manner so that the issuer could rely on the access model permitted in Part 6A.

PART 3 SHELF PROSPECTUS AMENDMENTS

3.1 Shelf Prospectus Amendments

- (1) Part 6 of NI 41-101 or other securities legislation requires that an amendment to a prospectus be filed if a material change occurs after the receipt for the prospectus is obtained but before the completion of the distribution under that prospectus. These requirements apply to base shelf prospectuses.
- (2) Section 5.8 of NI 44-102 permits, in limited circumstances, the requirement in Part 6 of NI 41-101 or other securities legislation to file an amendment to be satisfied by the incorporation by reference of material change reports filed after the base shelf prospectus has been receipted. This is an exception to the general principle set out in section 3.6 of the Companion Policy to NI 44-101. That section provides that the requirement in NI 41-101 or other securities legislation to file an amendment is not satisfied by the incorporation by reference of material change reports filed after the short form prospectus has been receipted. The exception in section 5.8 of the NI 44-102 is limited to periods in which no securities are being distributed under the base shelf prospectus.
- (3) If securities are being distributed under a base shelf prospectus, the general principle referred in subsection (2) applies. The requirement of NI 41-101 or other securities legislation to file an amendment to a prospectus if a material change occurs may be satisfied by filing an amendment which is also a material change report. In these circumstances, the material change report would:
 - (a) state that the base shelf prospectus is amended and supplemented by the contents of the material change report; and
 - (b) contain the certificates required to be contained in an amendment.
- (4) If an issuer wishes to add securities to its base shelf prospectus it may do so prior to issuing all of the securities qualified by the base shelf prospectus by filing an amendment to the base shelf prospectus. This will not extend the life of the base shelf prospectus.

PART 4 PROSPECTUS CERTIFICATES

4.1 Prospectus Certificates

- (1) Appendix A and Appendix B of NI 44-102 provide for two alternate methods of preparing forms of prospectus certificates. Unless a particular method is prescribed, the choice of method may be changed between the date of filing of the preliminary base shelf prospectus and the date of filing of the base shelf prospectus. Furthermore, the method elected need not be the same.
- (2) Method 1 requires that forward-looking forms of prospectus certificates be included in a base shelf prospectus. Doing so allows the use of shelf prospectus supplements that do not contain prospectus certificates as set out in section 6.8 of NI 44-102. Method 2 requires forms of prospectus certificates that speak only to the present to be included in both the base shelf prospectus and each shelf prospectus supplement.
- (3) Method 1 is mandatory for a base shelf prospectus that establishes an MTN program. If an MTN program is established in a shelf prospectus supplement, method 1 is mandatory and prescribes that forward-looking forms of certificates be included, unless they were already included in the base shelf prospectus.

PART 5 AT-THE-MARKET DISTRIBUTIONS OF EQUITY SECURITIES UNDER SHELF

- 5.1 Purpose** - The purpose of Part 9 of NI 44-102 is to provide exemptions from certain regulatory requirements, subject to conditions, so that issuers and underwriters may distribute securities under an ATM prospectus.

5.2 Disclosure of Intention to Qualify At-the-Market Distribution

- (1) Paragraph 9.3(1)(g) of Part 9 of NI 44-102 requires that an issuer disclose on the cover page of its base shelf prospectus that the prospectus may qualify an at-the-market distribution. An at-the-market distribution cannot be established by shelf prospectus supplement unless the base shelf prospectus has met this requirement. The securities regulatory authorities are of the view that a base shelf prospectus that is intended to qualify an at-the-market distribution may result in further review of certain factors that are considered during the review of a base shelf prospectus, such as the sufficiency of proceeds, an issuer's business or a recent reverse takeover of former shell companies. In connection with this review, the

securities regulatory authorities may consider a number of factors, including

- (a) the number of securities that may be qualified by the base shelf prospectus;
 - (b) the total number of issued and outstanding securities of the same class; and
 - (c) the trading volume of the securities of the same class.
- (2) An issuer should qualify the statements required by paragraphs 2 and 3 of section 5.5 of NI 44-102 in its base shelf prospectus to indicate that delivery is not required where an exemption from the delivery requirements referred to in these provisions is available.

5.3 Material Fact or Material Change

- (1) In determining whether a proposed distribution of securities under an ATM prospectus would constitute a material fact or material change under paragraph 9.3(1)(f) of NI 44-102, the issuer should take into account a number of factors including
- (a) the parameters of the proposed distribution, including the number of securities proposed to be distributed and any price or timing restrictions that the issuer may impose with respect to the proposed distribution;
 - (b) the percentage of the outstanding securities of the same class that the number of securities proposed to be distributed represents;
 - (c) previous, and cumulative, distributions of securities under the ATM prospectus;
 - (d) whether the investment dealer has advised the issuer that the proposed distribution may have a significant impact on the market price of securities of the same class;
 - (e) trading volume and volatility of securities of the same class;
 - (f) recent developments in the business, operations or capital of the issuer; and
 - (g) prevailing market conditions generally.
- (2) The issuer will have an interest in minimizing the market impact of an at-the-market distribution. If a proposed distribution of securities under an ATM prospectus could have a significant impact on the market price of

securities of the same class as the securities proposed to be distributed, the proposed distribution may disrupt a fair and orderly market. The investment dealer selected by the issuer will have experience and expertise in managing orders to limit any negative effect on market integrity. An investment dealer is prohibited from engaging in conduct that may disrupt a fair and orderly market under IIROC rules and standards of conduct.

- 5.4 **Selling Agent** - It is best practice to include language in an ATM prospectus that a purchaser's rights and remedies under applicable securities legislation against the dealer underwriting or acting as an agent for the issuer in an at-the-market distribution will not be affected by that dealer's decision to effect the distribution directly or through a selling agent.
- 5.5 **Designated News Releases** - To ensure an ATM prospectus includes full, true and plain disclosure of all material facts related to the securities distributed under the ATM prospectus, the issuer may file a designated news release rather than filing a prospectus supplement or an amended prospectus. If an issuer disseminates a news release disclosing information that, in the issuer's determination, constitutes a "material fact", the issuer should identify the news release as a "designated news release" for the purposes of the ATM prospectus. This designation should be made on the face page of the version of the filed news release. An ATM prospectus should provide that any such designated news release will be deemed to be incorporated by reference into the ATM prospectus.
- 5.6 **Prospectus Certificates** - The certificates required to be filed under paragraph 9.3(1)(k) of NI 44-102 or other securities legislation in the forms required under sections 9.5 and 9.6 of NI 44-102, as applicable, are forward-looking certificates confirming that the ATM prospectus provides full, true and plain disclosure of all material facts relating to the securities distributed under the ATM prospectus as of the date of each distribution under an ATM prospectus. For promoters of an at-the-market distribution, the certificate of promoter required under Part 5 of NI 41-101 should be in the form required by section 9.5 or 9.6 of NI 44-102, as applicable.
- 5.7 **Filing Jurisdictions** - Issuers are required to file a prospectus in every jurisdiction where a distribution will occur. However, because purchases in an at-the-market distribution are made directly on a securities exchange, it is difficult to determine where a distribution will occur because issuers and dealers are unable to determine where a purchaser is located at the time of the trade. As a result, it is possible that a purchaser under an at-the-market distribution can be located in any jurisdiction of Canada.

- 5.8 Transition Period** - An issuer with an outstanding base shelf prospectus filed prior to August 31, 2020 under which the issuer is qualified to make an at-the-market distribution pursuant to a discretionary relief order, will not be required to re-file the base shelf prospectus to comply with the cover page disclosure in paragraph 9.3(1)(g) of NI 44-102. Any other provisions of Part 9 of NI 44-102 that do not mirror the issuer's discretionary relief order may be addressed in the prospectus supplement.

PART 9B DISTRIBUTIONS UNDER WELL-KNOWN SEASONED ISSUER BASE SHELF PROSPECTUSES

9B.1 Meaning of WKSI base shelf prospectus

The term WKSI base shelf prospectus is a defined term used for ease of reference. A WKSI base shelf prospectus is a final base shelf prospectus that has been varied in accordance with Part 9B of NI 44-102. Accordingly, any reference to a “prospectus”, a “final prospectus”, a “final short form prospectus” or a “final base shelf prospectus” in securities legislation includes a WKSI base shelf prospectus.

For greater certainty, any reference to a “final receipt” includes a receipt deemed to be issued under section 9B.5 of NI 44-102.

9B.2 Deemed receipt

No securities regulatory authority or regulator will issue a receipt for a WKSI base shelf prospectus or an amendment to a WKSI base shelf prospectus filed under Part 9B of NI 44-102. If the requirements in section 9B.5 of NI 44-102 are met, a receipt for a WKSI base shelf prospectus will be deemed to be issued on the date that the WKSI base shelf prospectus is filed. No prior review of the WKSI base shelf prospectus is conducted by any securities regulatory authority or regulator for a deemed receipt.

For the avoidance of doubt, the requirement in paragraph 9B.5(1)(b) to file or deliver all documents required to be filed or delivered in connection with the filing of a base shelf prospectus includes the documents required to be filed or delivered in connection with a short form prospectus by NI 44-101, except as modified by Part 7 of NI 44-102.

9B.3 Non-application of the passport system and multiple jurisdictions prospectus review process

Part 9B of NI 44-102 provides an alternative filing option for well-known seasoned issuers that is independent of the passport system and the procedures described in National Policy 11-202 *Process for Prospectus Reviews in Multiple Jurisdictions*. A receipt for a WKSI base shelf prospectus is deemed to be issued in every jurisdiction in which the prospectus is filed so the application of the

passport system is not necessary. Further, an issuer that files a WKSII base shelf prospectus would not meet the conditions to use the passport system as it does not file a preliminary prospectus and would not indicate that it is relying on Multilateral Instrument 11-102 *Passport System*.

9B.4 Amendments

A receipt deemed to be issued for an amendment to a WKSII base shelf prospectus under subsection 9B.5(2) of NI 44-102 will not extend the period of effectiveness of the deemed receipt of the WKSII base shelf prospectus.

9B.5 Annual confirmation

An issuer that files a WKSII base shelf prospectus on or before its financial year-end will be required to confirm its eligibility as a well-known seasoned issuer on or before the annual filing date of each year following the filing of the WKSII base shelf prospectus. For example, an issuer with a June 30, 2025, financial year end that files a WKSII base shelf prospectus on June 30, 2025 would be required to confirm its eligibility as a well-known seasoned issuer on the annual filing date of that year (September 29, 2025) or in the 60 days preceding the annual filing date of that year. However, if that issuer instead files a WKSII base shelf prospectus on July 1, 2025 it would be required to confirm its eligibility on the annual filing date of the following year (September XX, 2026) or in the 60 days preceding the annual filing date of the following year.

9B.6 Exemptive relief in connection with WKSII base shelf prospectuses

Requests for exemptive relief require staff review and consideration. A receipt deemed to be issued pursuant to section 9B.5 of NI 44-102 will not evidence the granting of an exemption as WKSII base shelf prospectuses are not subject to staff review prior to the deemed issuance of a receipt and no receipt is actually issued.

The granting of an exemption from the provisions of securities legislation sought in connection with the filing of a WKSII base shelf prospectus or an amendment to a WKSII base shelf prospectus may only be evidenced by a decision to that effect, issued following a formal application for exemptive relief, by the regulator or, in Québec, the securities regulatory authority to the person that sought the exemption. Accordingly, requests for relief from any requirements included in Part 9B of NI 44-102 must be filed, and exemptive relief must be granted, in advance of the filing of a WKSII base shelf prospectus.

Pursuant to Part 11 of NI 44-102, an application for an exemption from the requirements in NI 44-102 shall include a letter explaining why consideration should be given to the granting of the exemption. In respect of applications for relief from the conditions included in the definition of “eligible issuer”, the letter should explain why relief from the eligibility requirements would not be

prejudicial to the public interest or raise investor protection concerns. Staff will consider numerous factors when determining whether relief from eligibility criteria would be appropriate, including the following:

- the nature of the conduct resulting in ineligibility,
- who was responsible for the conduct resulting in ineligibility,
- the duration of the conduct resulting in ineligibility,
- the effects of the conduct resulting in ineligibility, for example the number of investors affected or the amount of any damages or compensation paid to affected investors,
- the issuer's history of compliance with securities laws,
- remedial steps taken to address the conduct resulting in ineligibility including any steps taken to prevent reoccurrence of conduct similar to the conduct resulting in ineligibility,
- disclosure of the conduct resulting in ineligibility.

Staff may consider factors other than those listed above when reviewing an exemptive relief application. A decision to recommend relief will be made on a case-by-case basis and will depend upon the facts known at the time. It is the responsibility of the applicant to demonstrate that the conduct that resulted in the issuer not satisfying the definition of "eligible issuer" should not result in the issuer being ineligible to file a WKSJ base shelf prospectus.

If relief is granted from the criteria set out in the definition of "eligible issuer", such relief will only be in respect of specific conduct resulting in ineligibility at the time of the application. Relief will not be granted on a prospective basis for any future conduct resulting in ineligibility. Staff note relief granted from the definition of "eligible issuer" may also be time-limited.

9B.7 Penalties and Sanctions

For the purposes of the definition of "eligible issuer", a late filing fee, such as a filing fee that applies to the late filing of an insider report, is not a "penalty or sanction".

9B.8 Pre-marketing in connection with a WKSJ base shelf prospectus

In general, any advertising or marketing activities undertaken in connection with a prospectus prior to the issuance of a receipt for the preliminary prospectus are prohibited under securities legislation by virtue of the prospectus requirement. As an issuer filing a WKSJ base shelf prospectus is exempt from the requirement to file a preliminary prospectus, any advertising or marketing activities undertaken in connection with a WKSJ base shelf prospectus prior to the deemed issuance of a receipt for the WKSJ base shelf prospectus are prohibited.

An issuer who is filing a WKSII base shelf prospectus would also be unable to rely on the bought deal exemption for pre-marketing provided in Part 7 of NI 44-101 as a preliminary prospectus is required to be filed to comply with such exemption.

9B.9 Existing preliminary short form prospectus or existing base shelf prospectus

Issuers cannot amend an existing preliminary short form prospectus or an existing base shelf prospectus to convert the same into a WKSII base shelf prospectus. If an issuer has an existing preliminary short form prospectus or an existing base shelf prospectus and would like to file a WKSII base shelf prospectus, the issuer should, as a first step, withdraw the existing preliminary short form prospectus or the existing base shelf prospectus.

Issuers who withdraw a preliminary short form prospectus are ineligible to file a WKSII base shelf prospectus for the 90 days following such withdrawal. If an issuer wishes to file a WKSII base shelf prospectus within 90 days of such withdrawal, the issuer must file an application for exemptive relief from the eligibility criteria.

9B.10 Issuers reporting in a foreign currency

The definition of “well-known seasoned issuer” requires that issuers, on at least one day during the preceding 60 days of the date of filing of the WKSII base shelf prospectus, have either qualifying public equity of at least \$500 000 000 or qualifying public debt of at least \$1 000 000 000. Issuers calculating qualifying public equity or qualifying public debt and who report in a foreign currency should use the exchange rate on the day they are performing the relevant calculations to convert the figure into Canadian dollars.

The definition of “well-known seasoned issuer” requires that issuers with a mineral project satisfy certain gross revenue thresholds as disclosed in their most recent audited annual financial statements. For the purposes of confirming that an issuer satisfies the required thresholds, issuers who report in a foreign currency should use the annual average exchange rate corresponding to the relevant financial year to convert the disclosed gross revenue into Canadian dollars.

9B.11 Calculation of “Qualifying Public Debt”

Large issuers frequently conduct exchange offers for outstanding debt securities whereby new debt is issued in exchange for the outstanding debt securities. Since these exchange offers are not for cash they should be excluded from the calculation of “qualifying public debt”.

9B.12 Certain Offerings by Canadian Issuers under the U.S. Multijurisdictional Disclosure System

Part 4 of 71-101CP *The Multijurisdictional Disclosure System (71-101CP)* sets out the process for certain offerings by Canadian issuers distributing securities in the United States under the United States multijurisdictional disclosure system (the **71-101CP procedures**).

Under the 71-101CP procedures, an issuer filing a prospectus or a registration statement qualifying securities offered and sold in the United States, may receive from the securities regulatory authority or regulator a receipt for the prospectus or a notification of clearance for the registration statement.

As described in section 9B.2 of this companion policy, no securities regulatory authority or regulator will issue a receipt for a WCSI base shelf prospectus or an amendment to a WCSI base shelf prospectus filed under Part 9B of NI 44-102. To the extent that a receipt deemed to be issued for the WCSI base shelf prospectus fails to satisfy the applicable requirements of the SEC, all jurisdictions that act as principal regulator pursuant to National Policy 11-202 *Process for Prospectus Reviews in Multiple Jurisdictions* are prepared to issue a notification of clearance, as contemplated by the 71-101CP procedures, on request. As part of the 71-101CP procedures, comments may be raised by staff that require amendments to the WCSI base shelf prospectus.

To avoid timing complications from staff review we encourage issuers to contact staff of their principal regulator in advance to discuss their filing and use the confidential prospectus pre-filing process.