

Companion Policy 44-102CP
To
National Instrument 44-102
Shelf Distributions

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PART 1 GENERAL

1.1 Relationship of the National Instrument to Securities Legislation

- (1) Issuers are reminded that the rules and procedures contained in National Instrument 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.

1.2 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 Draft Supplements** - A preliminary form of shelf prospectus supplement describing a tranche of securities 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 contained in section 3.2 of NI 44-102 to issue a news release once the issuer or the selling securityholder has formed a reasonable expectation that the distribution will proceed.

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.
- (3) [Rescinded]

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 approved rating organizations 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 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. 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** - 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.

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.

[Amended March 17, 2008]