

**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 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 and other provisions of securities legislation, as supplemented or varied by National Instrument 44-102 and the implementing law of the jurisdiction. Reference is made to section 1.5 of the Companion Policy to National Instrument 44-101 for a discussion of the relationship between National Instrument 44-101 and National Instrument 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 National Instrument 44-102 to issue a news release once the issuer or the selling security holder 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 National Instrument 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 National Instrument 44-101 and must satisfy the additional qualification criteria under Part 2 of National Instrument 44-102.

2.2 Period of Receipt Effectiveness

- (1) National Instrument 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) 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) the lapse date of the receipt, if any, 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 National Instrument 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. At the time of the coming into force of this Policy New Brunswick has a lapse date provision in its securities legislation and has not provided blanket relief for shelf distributions.
- (3) In New Brunswick issuers must apply for and obtain relief from securities legislation in order for a receipt for a base shelf prospectus to be effective for more than one year. An application for relief may consist of a covering letter accompanying the filing of the preliminary base shelf prospectus or the base shelf prospectus containing the following statement:

“The [issuer] hereby applies for an extension of the lapse date of this base shelf prospectus to 24 months.”

Where application for relief is made, the issuance of a receipt for the base shelf prospectus is evidence of the granting of the relief.

2.3 Unallocated Shelf

- (1) Section 3.1 of National Instrument 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 POP system.
- (2) In the case of an unallocated base shelf prospectus, section 3.2 of National Instrument 44-102 requires an issuer or a selling security holder 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 security holder 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 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. Particularly in the area of distributions of novel specified derivatives and asset-backed securities, the securities regulatory authorities wish to encourage adequate prospectus disclosure, either in the base shelf prospectus or the shelf prospectus supplement, of the attributes of and the risks associated with these products. The securities regulatory authorities have attempted to balance these objectives in formulating National Instrument 44-102.
- (3) The requirements relating to the clearance of issues 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 security holder, as the case may be, must file an undertaking under section 4.1 with its base shelf prospectus. The undertaking must state that the issuer or the selling security holder, 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 securities regulatory authorities are of the view that the definition of the term “novel” should be read relatively restrictively. The term is intended to apply to a distribution of derivatives or 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. A security would not be novel merely because a new underlying interest was used.

- (5) 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.

2.5 Information that may be Omitted from a Base Shelf Prospectus

- (1) Paragraph 1 of section 5.6 of National Instrument 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 National Instrument 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 National Instrument 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. These terms 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 National Instrument 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 National Instrument 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 National Instrument 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.

2.7

Firm Commitment Distributions - Paragraph 5 of section 5.6 of National Instrument 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 National Instrument 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 National Instrument 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 National Instrument 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) Securities legislation in a number of jurisdictions 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) Subsection 5.8(1) of National Instrument 44-102 permits, in limited circumstances, the requirement in Canadian 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 6.5 of Companion Policy 44-101CP. That section provides that the requirement in 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 subsection 5.8(1) of the National Instrument 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 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.

PART 4 PROSPECTUS CERTIFICATES

4.1 Prospectus Certificates

- (1) Appendix A and Appendix B of National Instrument 44-102 provide for two alternate methods of executing 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 by an issuer, credit supporter and underwriter need not be the same. The method elected by an issuer applies to a promoter.
- (2) Method 1 requires that a forward looking prospectus certificate be included in a base shelf prospectus. Doing so allows the use of shelf prospectus supplements that do not contain prospectus certificates. Method 2 requires 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 certificates be included, unless they were already included in the base shelf prospectus.