

CSA Notice and Request for Comment

Proposed Amendments to National Instrument 44-102 *Shelf Distributions* and Change to Companion Policy 44-102CP *Shelf Distributions* relating to At-the-Market Distributions

May 9, 2019

Introduction

The Canadian Securities Administrators (CSA or we) are publishing, for a 90-day comment period, proposed amendments to National Instrument 44-102 *Shelf Distributions* (NI 44-102) and a proposed change to Companion Policy 44-102CP *Shelf Distributions* (44-102CP). We are proposing amendments to Part 9 of NI 44-102 (the **Proposed Amendments**) to replace relief that has historically been required by issuers conducting at-the-market (ATM) distributions of equity securities.

This notice contains the following annexes:

- Annex A – Proposed Amendments to NI 44-102
- Annex B – Proposed Change to Companion Policy 44-102CP
- Annex C – Local Matters

This notice will also be available on the following website of CSA jurisdictions:

www.bcsc.bc.ca
www.albertasecurities.com
www.fcaa.gov.sk.ca
www.mbsecurities.ca
www.osc.gov.on.ca
www.lautorite.qc.ca
www.fcnb.ca
nssc.novascotia.ca

Substance and Purpose

Part 9 of NI 44-102 contemplates the distribution of equity securities by way of an ATM distribution using the shelf procedures. Part 9 of NI 44-102 does not currently provide an exemption for the prospectus delivery requirement. Because of the nature of ATM distributions, issuers are required to request exemptive relief (**ATM Orders**) from certain prospectus-related requirements if they wish to conduct ATM distributions in Canada. The Proposed Amendments

are aimed at reducing the regulatory burden for issuers who wish to conduct ATM distributions, without compromising investor protection. The Proposed Amendments adopt the terms found in ATM Orders, so that issuers would not have to apply for exemptive relief to conduct ATM distributions.

Background

The Proposed Amendments are informed by comment letters received respecting ATM distributions in response to CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers* as summarized in CSA Staff Notice 51-353 *Update on CSA Consultation Paper 51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*.

NI 44-102 was adopted in 2000. The requirements of Part 9, together with the conditions that appear in ATM Orders (collectively, the **ATM Requirements**) form the regulatory framework for ATM distributions in Canada. The ATM Requirements were derived in part from rules previously adopted by the U.S. Securities and Exchange Commission (**SEC**), where ATM distributions have been conducted since the early 1980s.

ATM distributions in Canada are not as common as they are in the U.S. market. Industry participants have observed that the lack of ATM distributions in Canada may be due to restrictions and obligations imposed by the ATM Requirements. In particular, we understand that certain requirements originally applicable to U.S. ATM distributions, and upon which some of the ATM Requirements were based, have since been relaxed or abandoned by the SEC.

Summary of the Proposed Amendments

The Proposed Amendments include:

- An exemption for the underwriter from the requirement to deliver a prospectus to purchasers in a distribution of securities;
- An exemption for the issuer and underwriter from certain of the prospectus form requirements, including a relaxation of the form of statement of rights.

The Proposed Amendments contain several requirements for issuers and underwriters conducting ATM distributions taken from the ATM Orders. Additionally, the Proposed Amendments contain a requirement that an issuer must disclose on the cover page of its base shelf prospectus that it may qualify an ATM distribution.

The Proposed Amendments contemplate two different approaches (labelled as Option 1 and Option 2 in Annex A) to conducting ATM distributions. Once the CSA has reviewed the comments received with respect to Options 1 and 2, the CSA will select one of these two options to include in the amendments to Part 9 of NI 44-102.

Option 1: Limit ATMs to circumstances in which liquidity would be expected

The first approach allows an issuer to distribute securities under an ATM prospectus, as that term is defined in the Proposed Amendments, only if (i) the aggregate number of securities of the class distributed on one or more ATM exchanges under the ATM prospectus on any trading day does not exceed 25% of the trading volume of that class on all marketplaces on that day (the **25% Daily Cap**) or (ii) the securities are “highly liquid securities”, as defined in the Proposed Amendments.

The 25% Daily Cap is a requirement that has been typically imposed in the ATM Orders. Its purpose was to reduce the risk that an ATM distribution would have a material impact on the price of the securities being distributed. This risk is also reduced where an ATM distribution only involves the issuance of “highly liquid securities.”

As with certain of the ATM Orders under the Proposed Amendments, issuers distributing highly liquid securities would not be required to file a monthly report disclosing certain information about the ATM distribution, provided that the same disclosure is made on a quarterly basis.

Under Option 1, issuers that do not have highly liquid securities will be subject to the 25% Daily Cap. The benefits of the exemptions in the Proposed Amendments to such issuers may be limited if the daily trading volume of their securities is low. We acknowledge that such issuers are more likely to be small to mid-size issuers.

Option 2: No liquidity requirements

The second approach is to impose neither the 25% Daily Cap nor the “highly liquid securities” requirement. Arguably, issuers are already incentivized not to conduct ATM distributions that will have a material impact on the market price of their securities. Additionally, an investment dealer must be involved to facilitate the ATM distribution onto the marketplace. The investment dealer, who is expected to have the experience and expertise in managing orders to limit negative impact on market integrity, is also prohibited from engaging in conduct that may disrupt a fair and orderly market.

Removal of 10% Aggregate Cap

Currently, section 9.1 of NI 44-102 provides that the market value of equity securities distributed under a single ATM distribution prospectus supplement may not exceed 10% of the aggregate market value of the issuer’s outstanding equity securities of the same class (the **10% Aggregate Cap**). We understand that the 10% Aggregate Cap has been an impediment to the establishment of ATM distributions in Canada and, accordingly, the Proposed Amendments remove it. Its removal does not adversely affect investor protection because the dilution concerns underlying the 10% Aggregate Cap are addressed by other factors, including existing prospectus and continuous disclosure requirements and the requirement to engage an underwriter in the ATM distribution.

Removal of Instalment Receipts

Part 9 of NI 44-102 currently permits issuers to use ATM Distributions to issue instalment receipts convertible into equity securities. However, there does not appear to be a market demand for ATM distributions of instalment receipts in Canada. As a result, the Proposed Amendments do not contemplate instalment receipts.

The proposed changes to 44-102CP correspond to the Proposed Amendments.

Request for Comments

We welcome comments on the Proposed Amendments. In particular, we would like to receive feedback on the following questions:

General Questions

1. Is a “highly liquid securities” test or the 25% Daily Cap necessary to reduce the impact on the market price of an issuer’s securities? Please explain.
2. The Proposed Amendments only permit distributions of equity securities. Should the issuance of debt securities under an ATM distribution be permitted? If yes, please explain the market need and suggest appropriate exemptions and conditions.

Non-redeemable investment funds (NRIFs) and exchange-traded mutual funds (ETFs)

The Proposed Amendments would permit ATM distributions by NRIFs or by ETFs that are not in continuous distribution (**ETFNCDs**). The Proposed Amendments do not remove the ETF Facts delivery requirement that applies to dealers transacting in securities of ETFs in continuous distribution. We have not otherwise added any conditions particular to NRIFs or ETFNCDs. NRIFs and ETFNCDs are already or will be subject to some operational requirements under National Instrument 81-102 *Investment Funds* that they must comply with on an on-going basis such as the requirements to not issue new securities at a price less than the fund’s net asset value per security or to not invest in illiquid assets making more than 20% of their net asset value.

3. Do you think that permitting NRIFs and ETFNCDs to conduct ATM distributions is warranted, based on differences in their distribution model and investor base compared to ETFs in continuous distribution?
4. If the CSA permits NRIFs and ETFNCDs to use ATM distributions, what additional conditions, if any, should apply?
5. Net asset value (**NAV**) is calculated daily, if using specified derivatives or selling short, or, otherwise, weekly. How frequently should the NAV be calculated with respect to ATM distributions?
6. Under new restrictions that came into force on January 3, 2019, NRIFs are generally limited to having 25% of assets in illiquid assets. However, illiquid assets are difficult to value. We have concerns that the NAV in some cases may be “stale” and may not reflect the economic value of the underlying assets. Should we restrict NRIFs with significant illiquid assets from conducting ATM distributions? What should the threshold be?

Please submit your comments in writing on or before August 7, 2019.

Address your submission to all of the CSA as follows:

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)
 Department of Justice and Public Safety, Prince Edward Island
 Nova Scotia Securities Commission
 Superintendent of Securities, Newfoundland and Labrador
 Superintendent of Securities, Northwest Territories
 Superintendent of Securities, Yukon
 Superintendent of Securities, Nunavut

Deliver your comments only to the addresses listed below. Your comments will be distributed to the other participating CSA jurisdictions.

The Secretary
 Ontario Securities Commission
 20 Queen Street West
 22nd Floor
 Toronto, Ontario
 M5H 3S8
 Fax: 416-593-2318
comments@osc.gov.on.ca

Me Anne-Marie Beaudoin
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consultation-en-cours@lautorite.qc.ca

Comments Received will be Publicly Available

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period. Please note that comments received will be made publicly available and posted on websites of the Alberta Securities Commission at www.albertasecurities.com, the Ontario Securities Commission at www.osc.gov.on.ca and the Autorité des marchés financiers at www.lautorite.qc.ca, and may be posted on the websites of certain other securities regulatory authorities. You should not include

personal information directly in the comments to be published. It is important that you state on whose behalf you are making the submission.

Questions

Please refer your questions to any of the following:

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ANNEX A

PROPOSED AMENDMENTS TO

NATIONAL INSTRUMENT 44-102 *SHELF DISTRIBUTIONS*

1. *National Instrument 44-102 Shelf Distributions is amended by this Instrument.*
2. *Part 9 is replaced with the following:*

PART 9 – AT-THE-MARKET DISTRIBUTIONS OF EQUITY SECURITIES UNDER SHELF**9.1 Definitions**

In this Part

“ATM exchange” means

- (a) a short form eligible exchange, or
- (b) a marketplace outside of Canada;

“ATM prospectus” means

- (a) a short form prospectus that is a base shelf prospectus for an at-the-market distribution,
- (b) a shelf prospectus supplement to a base shelf prospectus referred to in paragraph (a), and
- (c) a shelf prospectus supplement establishing an at-the-market distribution;

“highly-liquid security” means, in relation to an at-the-market distribution, a listed security or quoted security that:

- (a) has traded, in total, on one or more marketplaces, as reported on a consolidated market display during a 60-day period ending not earlier than 10 days prior to the distribution:
 - (i) an average of at least 100 times per trading day, and
 - (ii) with an average trading value of at least \$1,000,000 per trading day; or

- (b) at the time of the distribution is subject to Regulation M under the 1934 Act and is considered to be an "actively-traded security" under that regulation.

"investment dealer" has the meaning ascribed to it in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

"marketplace" has the meaning ascribed to it in National Instrument 21-101 *Marketplace Operation*.

9.2 Provisions not applicable to at-the-market distributions

- (1) The following provisions do not apply to an issuer distributing a security under an ATM prospectus:
 - (a) section 7.2 of NI 41-101;
 - (b) Item 20 of Form 44-101F1;
 - (c) item 8 of section 5.5 of this Instrument.
- (2) The following provisions do not apply to an investment dealer acting as an underwriter in connection with the distribution of a security under an ATM prospectus:
 - (a) section 6.7 or a similar provision under securities legislation;
 - (b) item 8 of section 5.5 of this Instrument.

9.3 Requirements for issuers and underwriters conducting at-the-market distributions

- (1) An issuer may distribute a security under an ATM prospectus as part of an at-the-market distribution if all of the following apply:

[OPTION 1 – LIQUIDITY TEST:

- (a) either:
 - (i) the security being distributed is a highly-liquid security, or
 - (ii) the aggregate number of securities of the class distributed on all ATM exchanges under the ATM prospectus on the day of the distribution does not exceed 25% of the trading volume of that class on all marketplaces on that day;]

[OPTION 2 – NO LIQUIDITY TEST: paragraph (a) will not be adopted]

- (b) the security being distributed is an equity security;
- (c) the security is distributed through an investment dealer acting as an underwriter in connection with the distribution;
- (d) with respect to any agreement with an investment dealer referred to in paragraph (c) to distribute the security, the issuer
 - (i) has issued and filed a news release
 - (A) announcing that the issuer has entered into the agreement,
 - (B) indicating that an ATM prospectus has been filed, or will be filed, on SEDAR, and
 - (C) specifying where and how a purchaser of a security under the at-the-market distribution may obtain a copy of the agreement and the ATM prospectus; and
 - (ii) has filed a copy of the agreement on SEDAR;
- (e) the ATM prospectus discloses the material terms of any agreement referred to in paragraph (d);
- (f) the issuer distributes the security through an ATM exchange;
- (g) the issuer has disclosed the distribution if it constitutes a material fact or material change;
- (h) the cover page of the base shelf prospectus states that it may qualify an at-the-market distribution;
- (i) the ATM prospectus states in substantially the following words:

“Securities legislation in some provinces [and territories] of Canada provides purchasers of securities with the right to withdraw from an agreement to purchase securities and with remedies for rescission or, in some jurisdictions, revisions of the price, or damages if the prospectus, prospectus supplements relating to securities purchased by a purchaser and any amendment are not delivered to the purchaser, provided that the remedies are exercised by the purchaser within the time limit prescribed by securities legislation. However, purchasers of [describe securities] distributed under an at-the-market

distribution by [name of issuer] do not have the right to withdraw from an agreement to purchase the [describe securities] and do not have remedies of rescission or, in some jurisdictions, revisions of the price, or damages for non-delivery of the prospectus supplement, the accompanying prospectus and any amendment thereto relating to [describe securities] purchased by such purchaser because the prospectus supplement, the accompanying prospectus and any amendment thereto relating to the [describe securities] purchased by such purchaser will not be delivered, as permitted under Part 9 of National Instrument 44-102 Shelf Distributions.

Securities legislation in some provinces [and territories] of Canada further provides purchasers with remedies for rescission or, in some jurisdictions, revisions of the price or damages if the prospectus, prospectus supplements relating to securities purchased by a purchaser and any amendment contains a misrepresentation. Those remedies must be exercised by the purchaser within the time limit prescribed by securities legislation. Any remedies under securities legislation that a purchaser of [describe securities] distributed under an at-the-market distribution by [name of issuer] may have against [name of issuer] or its agents for rescission or, in some jurisdictions, revisions of the price, or damages if the prospectus supplement, the accompanying prospectus and any amendment thereto relating to securities purchased by a purchaser and any amendment contain a misrepresentation will remain unaffected by the non-delivery of the prospectus referred to above.

A purchaser should refer to any applicable securities legislation for the particulars of these rights and should consult a legal adviser.”;

- (j) if there has been any previous statement of a purchaser's rights contained in a previous version of the ATM prospectus, the issuer discloses in the ATM prospectus that, solely with regards to the at-the-market distribution, the statement of rights required to be included in the ATM prospectus under paragraph (i) supersedes and replaces the previous statement;
- (k) the ATM prospectus states:

“No underwriter of the at-the-market distribution, nor any person or company acting jointly or in concert with an underwriter, may enter into any transaction that is intended to stabilize or maintain the market price of the securities or securities of the same class as the securities distributed under the ATM prospectus, including

selling an aggregate number or principal amount of securities that would result in the underwriter creating an over-allocation position in the securities.”;

- (1) the ATM prospectus includes the certificates required under Part 5 of NI 41-101 or other securities legislation in the form required under section 9.5 or 9.6 of this Instrument, as applicable.
- (2) An underwriter of an at-the-market distribution, or a person or company acting jointly or in concert with the underwriter, must not enter into any transaction that is intended to stabilize or maintain the market price of the same class of securities distributed under the at-the-market distribution, including for greater certainty, trading a security that would result in the underwriter creating an over-allocation position in that class of securities.

9.4 Reporting

- (1) Subject to subsection (2), for each month during which the issuer distributes securities under an ATM prospectus, the issuer, within 7 days after the end of the month, files a report on SEDAR, disclosing
 - (a) the number and average price of the securities distributed under the ATM prospectus, and
 - (b) the aggregate gross and net proceeds raised, and the aggregate commissions paid or payable, under the ATM prospectus to date.
- (2) If each security distributed under an ATM prospectus is a highly-liquid security at the time of the at-the-market distribution, subsection (1) does not apply to the distribution if, in its annual financial statements, interim financial reports, and management discussion and analysis filed on SEDAR, for the year and period immediately following the distribution, the issuer discloses
 - (a) the number and average price of the securities distributed under the ATM prospectus, and
 - (b) the aggregate gross and net proceeds raised, and the aggregate commissions paid or payable, under the ATM prospectus to date.

9.5 Form of certificates – base shelf prospectus establishing an at-the-market distribution

- (1) If a base shelf prospectus establishes an at-the-market distribution, the issuer certificate form required under paragraph 9.3(1)(l) must state the following:

“This short form prospectus, together with the documents incorporated in this prospectus by reference, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by this prospectus and the supplement(s) as required by the securities legislation of [insert name of each jurisdiction in which qualified]. “

- (2) If a base shelf prospectus establishes an at-the-market distribution, the underwriter certificate form required under paragraph 9.3 (1) (l) must state the following:

“To the best of our knowledge, information and belief, this short form prospectus, together with the documents incorporated in this prospectus by reference, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by this prospectus and the supplement(s) as required by the securities legislation of [insert name of each jurisdiction in which qualified].”

- (3) For an amendment to a base shelf prospectus that includes the form of certificates required under subsections (1) and (2), if the amendment does not restate the base shelf prospectus,

- (a) the issuer certificate form must state the following:

“The short form prospectus dated [insert date] as amended by this amendment, together with the documents incorporated in this prospectus by reference, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by this prospectus and the supplement(s) as required by the securities legislation of [insert name of each jurisdiction in which qualified]. “

- (b) the underwriter certificate form must state the following:

“To the best of our knowledge, information and belief, the short form prospectus dated [insert date] as amended by this amendment,

together with the documents incorporated in this prospectus by reference, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by this prospectus and the supplement(s) as required by the securities legislation of [insert name of each jurisdiction in which qualified].”

- (4) For an amended and restated base shelf prospectus in respect of a base shelf prospectus that includes the certificates required under subsections (1) and (2),
 - (a) the issuer certificate form must state the following:

“This amended and restated short form prospectus, together with the documents incorporated in this prospectus by reference, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by this prospectus and the supplement(s) as required by the securities legislation of [insert name of each jurisdiction in which qualified]. “
 - (b) the underwriter certificate form must state the following:

“To the best of our knowledge, information and belief, this amended and restated short form prospectus, together with the documents incorporated in this prospectus by reference, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by this prospectus and the supplement(s) as required by the securities legislation of [insert name of each jurisdiction in which qualified].”

9.6 Form of certificates – shelf prospectus supplement establishing an at-the-market distribution

- (1) If the form of certificate required under subsection 9.5(1) was not included in the corresponding base shelf prospectus, the issuer certificate form required under paragraph 9.3(1)(l) must, in a shelf prospectus supplement that establishes an at-the-market distribution, state the following:

“The short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement(s) as required by the securities legislation of [insert name of jurisdiction in which qualified].”

- (2) If the form of certificate required under subsection 9.5(2) was not included in the corresponding base shelf prospectus, the underwriter certificate form required under paragraph 9.3(1)(l) must, in a shelf prospectus supplement that establishes an at-the-market distribution, state the following:

“To the best of our knowledge, information and belief, the short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement(s) as required by the securities legislation of [insert name of jurisdiction in which qualified].”

- (3) For an amendment to a shelf prospectus supplement in respect of a shelf prospectus supplement that includes the certificates required under subsections (1) and (2), if the amendment does not restate the shelf prospectus supplement,

- (a) the issuer certificate form must state the following:

“The short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing as it amends the shelf prospectus supplement dated [insert date], will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement(s) as required by the securities legislation of [insert name of jurisdiction in which qualified].”

- (b) the underwriter certificate form must state the following:

“To the best of our knowledge, information and belief, the short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing as it amends the shelf prospectus supplement dated [insert date], will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement(s) as required by the securities legislation of [insert name of jurisdiction in which qualified].”

- (4) For an amended and restated shelf prospectus supplement in respect of a shelf prospectus supplement that includes the certificates required under subsections (1) and (2),
 - (a) the issuer certificate form must state the following:

“The short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement(s) as required by the securities legislation of [insert name of jurisdiction in which qualified].”
 - (b) the underwriter certificate form must state the following:

“To the best of our knowledge, information and belief, the short form prospectus, together with the documents incorporated in the prospectus by reference, as supplemented by the foregoing, will, as of the date of a particular distribution of securities under the prospectus, constitute full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and the supplement(s) as required by the securities legislation of [insert name of jurisdiction in which qualified].”
3. These amendments come into force on ●.

ANNEX B

PROPOSED CHANGES TO

**COMPANION POLICY 44-102CP TO NATIONAL INSTRUMENT 44-102
SHELF DISTRIBUTIONS**

1. *Companion Policy 44-102CP to National Instrument 44-102 Shelf Distributions is changed by this Document.*
2. *The following Part is added:*

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 Definition of highly-liquid security

It is the issuer's responsibility to determine if a security is a highly-liquid security. The definition of "highly-liquid security" is intended to be identical in substance to the one found in IIROC's Universal Market Integrity Rules (UMIR) except that, in relation to an at-the-market distribution, the determination is made at the time of each at-the-market distribution. The definition includes the expression "consolidated market display", which is also defined in UMIR. To assist an issuer in making such a determination, IIROC maintains a list of highly-liquid securities. The definition of "consolidated market display" and the list of highly-liquid securities prepared by IIROC are available on IIROC's website at www.iiroc.ca.

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

- (1) Paragraph 9.3(1)(h) 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 additional review respecting sufficiency of proceeds, an issuer's business or a recent reverse take-over 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.

5.4 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)(g) 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 IROC rules and standards of conduct.

5.5 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.

5.6 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 news release filed on SEDAR. An ATM prospectus should provide that any such designated news release will be deemed to be incorporated by reference into the ATM prospectus.

5.7 Prospectus Certificates

The certificates required to be filed under paragraph 9.3(1)(l) of NI 44-102 in the form 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.

5.8 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 purchasers under an at-the-market distribution can be located in any jurisdiction of Canada.

3. These changes become effective on ●.

ANNEX C

LOCAL MATTERS

There are no local matters for Alberta to consider at this time.



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August 7, 2019

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
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

c/o

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RE: CSA Proposed Amendments to National Instrument 44-102 - *Shelf Distributions* and Changes to Companion Policy 44-102CP - *Shelf Distributions* relating to At-the-Market Distributions

Ladies and Gentlemen:

We appreciate the opportunity to submit the below comments to the Canadian Securities Administrators (the "**CSA**") on the proposed amendments to National Instrument 44-102 - *Shelf Distributions* ("**NI 44-102**") and the accompanying Companion Policy 44-102CP – *Shelf Distributions* ("**44-102CP**") (collectively, the "**Proposed Amendments**"), the stated purpose of which is to replace the ATM Orders that have historically been required for issuers and their agents to conduct at-the-market ("**ATM**") distributions of equity securities (the "**Discretionary Relief Regime**"). Our comments appear directly underneath the applicable headings. Capitalized terms used but not defined in this letter have the

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meanings given them in the CSA Notice and Request for Comment in respect of the Proposed Amendments, dated May 9, 2019.

25% Daily Cap: Option 1 or Option 2?

Our view is that Option 2 is the preferable alternative. Under Option 2 there would be no 25% Daily Cap, irrespective of whether the subject securities meet the “highly liquid” test. Option 2 is consistent with what we understand is the approach in the U.S. under the rules of the Securities and Exchange Commission (“SEC”). That approach is underpinned by the premise that market dynamics will sufficiently incentivize an issuer to conduct ATM distributions in a way that does not materially impact the trading price of its equity. Further, as the CSA points out in the proposed companion policy guidance in 44-102CP, IIROC’s rules provide an incremental layer of protection, since investment dealers are generally prohibited under IIROC rules from trading in a manner that would disrupt fair and orderly markets.

The final “brake” on large, undisclosed issuances of equity under an ATM distribution is that any issuer that proposes to make a large trade under an ATM program is required to consider whether the trade is a “material fact” or “material change” that requires prior disclosure. This is the case under the Discretionary Relief Regime and is reflected in the Proposed Amendments at paragraph 9.3(g) and the related guidance.

However, if the CSA decides to adopt a 25% Daily Cap, we suggest drafting changes.

We note that the 25% Daily Cap calculation that would apply under Option 1 is different from the cap calculation that applies under the Discretionary Relief Regime. Under Option 1, both the numerator and the denominator of the 25% Daily Cap includes trading volume on marketplaces outside Canada, meaning that, for a cross-border ATM distribution program for an inter-listed issuer, the 25% Daily Cap may apply to U.S. and Canadian sales combined. Under the Discretionary Relief Regime, the 25% Daily Cap only applied to sales over Canadian exchanges and marketplaces, and the denominator of the cap calculation only included Canadian trading volume. We prefer the approach under the Discretionary Relief Regime, and would further note that the drafting of the 25% Daily Cap in the Proposed Amendments could create uncertainty regarding whether the 25% Daily Cap applies to U.S. sales by Canadian issuers using “southbound only” ATM distribution programs under MJDS.

Also notable is that the denominator of 25% Daily Cap in Option 1 references “trading volume ... on all marketplaces **on that day**” (emphasis added). Although this is consistent with the Discretionary Relief Regime, we understand that the highlighted language reduces certainty and flexibility with respect to the size of trades that may be executed by dealers during the trading day, and requires ATM traders to rely heavily on market-on-close orders and trading algorithms that monitor volume throughout the day. A potential fix would be to adjust the language so that the denominator of the cap calculation is the prior day’s trading volume or the average volume over some number of trading days prior to the relevant trading day.



Execution on ATM Exchanges

The Proposed Amendments require ATM distributions to be made on an "ATM exchange", a defined term including, in Canada, only the TSX, the TSXV, Aequitas NEO and the Canadian Securities Exchange. This is different from the Discretionary Relief Regime, under which dealers are able to execute ATM sales on any Canadian exchange or marketplace, including alternative trading systems.

We strongly prefer the approach under the Discretionary Relief Regime. It is unclear why the Proposed Amendments would confine Canadian ATM sales to "ATM exchanges". We further note that it is not clear how a requirement to execute on an "ATM exchange" is conceptually consistent with dealers' best execution obligations under National Instrument 23-101 – *Trading Rules* and the IIROC rules.

At a minimum, however, the regulators should clearly explain the policy rationale for limiting ATM sales to "ATM exchanges" **before** adopting this restriction, so that market participants may provide comments on the policy justification for directing ATM liquidity to the major exchanges. And, if this restriction is to be adopted, meaningful companion policy guidance addressing the friction between executing only on ATM exchanges and dealers' best execution obligations should be provided.

10% Aggregate Program Size Cap

The Proposed Amendments do not include the 10% aggregate program size cap that has been included in the ATM Orders. We are supportive of this approach. We understand that, while there was a similar requirement under the SEC's rules, that requirement was eliminated in 2005 as part of the SEC's Securities Offering Reform initiative.

Cover Page Disclosure

The Proposed Amendments would impose a new requirement that the cover page of the base shelf prospectus for an ATM distribution program state that it may qualify an ATM distribution. The companion policy language included in the Proposed Amendments states that "[t]he 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 additional review respecting sufficiency of proceeds, an issuer's business or a recent reverse take-over of former shell companies."

We do not believe this additional requirement is helpful or justified. If there are concerns regarding an issuer's business, liquidity position or a recent reverse take-over, those concerns presumably should be addressed during the shelf review process regardless of whether or not an ATM distribution is contemplated. In addition, certain issuers may be reticent to include the cover page disclosure on their base shelf, thereby preserving the option to implement an ATM program during the life of the shelf, if there is potential that it will result in additional review. Further, the increased prominence of the new language relative to the "non-fixed price offering" language in Item 1.7 of 41-101F1, which is currently required to be included in a base shelf prospectus that may qualify an ATM distribution, may cause issuers to shy away from preserving the option to implement an ATM program due to increased "market overhang" concerns.

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Elimination of Monthly Reporting Requirement

We support the elimination of the monthly reporting requirement for issuers of “highly liquid securities” consistent with the more recent ATM Orders. It may also be worth exploring whether the monthly reporting requirement may be eliminated for all issuers, on the basis that new issuances of securities are required to be reported monthly to the applicable listing exchange.

Designated News Releases

We support the inclusion, in the companion policy guidance, of the “designated news release” mechanism for incorporating material facts into ATM prospectuses.

Potential Transition Issues

The Proposed Amendments are silent on how issuers and agents currently using ATM programs implemented under the Discretionary Relief Regime would be impacted by the Proposed Amendments becoming law. While there are a number of potential approaches to transitioning from the Discretionary Relief Regime to the new rules, in our view the approach that provides the most flexibility to issuers and dealers with “live” ATM programs is to be preferred. The approach we favor is to permit issuers and dealers operating under the Discretionary Relief Regime to, once the new rules are in effect, comply with either the new rules or the terms and conditions of the applicable discretionary relief order, until such time as the applicable discretionary relief order expires. It would also be helpful if the CSA could clarify, either in the new rules or the related companion policy guidance, that issuers that have an existing shelf prospectus on file at the time the Proposed Amendments are implemented, but which is not yet being used for an ATM distribution, may still use the existing shelf (until it expires) to implement an ATM program under the new rules. An issuer should not, for example, be required to file an entirely new shelf prospectus to comply with, e.g., the cover page disclosure requirement (if that aspect of the Proposed Amendments is enacted) to implement an ATM program after the effective date of the Proposed Amendments if it has an unexpired shelf on file that complied with the ATM rules in effect when the shelf was filed.

Location of ATM Distributions

The proposed companion policy guidance raises the issue, inherent in ATM programs, that it is impossible to determine where an ATM distribution occurs where sales are made to anonymous purchasers directly on an exchange or marketplace. The companion policy language suggests, but does not state, that an issuer pursuing an ATM program will need to qualify its base shelf prospectus for an ATM program in all provinces and territories of Canada and pay any applicable fees in all provinces and territories, presumably because an ATM distribution could potentially occur in any province or territory of Canada.



The corollary of this (implicit) position is that French translation would also be required for all documents incorporated by reference in the prospectus for an ATM program unless an exemption from Quebec's translation requirements is obtained.

We are concerned that the additional cost inherent in a requirement to qualify an ATM prospectus in all provinces and territories and, in particular, to undertake French translation of continuous disclosure documents for an ATM prospectus, will significantly reduce the appeal of Canadian ATM distribution programs, and would incentivize Canadian issuers to continue to pursue "U.S. only" ATM distributions under the MJDS. We suggest that the CSA explore possible solutions to this issue, including perhaps the issuance of a blanket order providing relief from the French translation requirement for ATM distributions.

UMIR 7.7 and OSC Rule 48-501 Issues

The existing shelf rules and the Proposed Amendments provide that "[a]n underwriter of an at-the-market distribution, or a person or company acting jointly or in concert with the underwriter, must not enter into any transaction that is intended to stabilize or maintain the market price of the same class of securities distributed under the at-the-market distribution, including for greater certainty, trading a security that would result in the underwriter creating an over-allocation position in that class of securities."

We believe that market participants have been interpreting this provision in a manner that harmonizes the shelf rules with the restrictions in UMIR 7.7 and OSC Rule 48-501, i.e., by taking the view that, if a purchase (e.g., of a "highly liquid security") is permitted by UMIR 7.7 and OSC Rule 48-501, it should not be considered a "transaction that is intended to stabilize or maintain the market price" that would be a breach of the ATM rules. Clarifying guidance on this point in the companion policy would, however, be useful.

We also suggest that the Proposed Amendments codify the relief provided to certain senior issuers¹ to exempt insiders of those issuers from section 2.2(a) of OSC Rule 48-501 in connection with purchases of the issuer's shares while its ATM is operating.

Miscellaneous Drafting Comments

- Section 9.2 of the Proposed Amendments refers to item 8 of Section 5.5 of NI 44-102 in two places. Please consider where there should also be an exemption from, or modification to the language of, item 2 and 3 of Section 5.5 of NI 44-102, which each refer to a requirement to deliver a prospectus supplement. We are aware that certain of the ATM Orders include exemptive relief with respect to these two items.
- In Section 9.3(1)(k) and 9.3(2) of the Proposed Amendments, the prohibition on market stabilization, the drafting has lost the element of "in connection with the distribution". This is currently in 9.1(2) of 44-102 and should be restored.

¹ See, e.g.: https://www.osc.gov.on.ca/en/SecuritiesLaw_ni_20170713_214_transcanada.htm
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- Section 9.4(1)(b) and (2)(b) refer to reporting of proceeds and commissions under the ATM prospectus “to date”. We recommend this be changed to “during the [month][annual or interim period, as applicable]”.
- In Section 9.4(2), we would suggest replacing the words “period immediately following the distribution” with “for the year or interim period, as applicable.”

Use of ATM Distributions by Non-Redeemable Investment Funds (NRIFs) and Exchange-Traded Funds Not in Continuous Distribution (ETFNCDs)

While the Discretionary Relief Regime has, until very recently, been limited to ATM distributions by corporate finance issuers, NRIFs and ETFNCDs should be permitted to conduct ATM distributions. NRIFs and ETFNCDs are distinct from mutual funds and exchange-traded funds in continuous distribution, and function more like corporate finance issuers. NRIFs and ETFNCDs are launched through an initial public offering through registered investment dealers and then trade in the open market through registered investment dealers. Securities of NRIFs and ETFNCDs are not available through members of the Mutual Fund Dealers Association of Canada, and as such are marketed to a smaller subset of investors than a typical mutual fund or exchange-traded fund. NRIFs and ETFNCDs only issue a set number of securities and, although their value is based on the net asset value like a mutual fund, the actual trading price of an NRIF or ETFNCD is affected by supply and demand, allowing it to trade at prices above or below its net asset value.

Permitting ATM distributions for NRIFs and ETFNCDs is warranted because they will provide a means of quickly meeting existing demand in the market for the NRIF's or ETFNCD's securities. The cost of issuance via an ATM distribution is significantly less expensive than a conventional re-opening. In addition, a re-opening is generally priced at a discount to the last trade in the market on the pricing date. As the ATM distribution will be completed in the context of the market, such discount is not required, thereby further reducing the cost.

Further, as an NRIF or ETFNCD is only permitted to sell securities in an ATM distribution if the securities are trading at a premium to net asset value, such sales will always be accretive to the NRIF or ETFNCD and its existing securityholders. By virtue of the lower issuance costs, an NRIF or ETFNCD could accretively issue securities in scenarios where a re-opening may not be practicable, thereby benefitting existing securityholders.

NRIFs and ETFNCDs naturally shrink in asset size without new issuances due to the monthly and annual retraction privileges afforded to securityholders. Over time these retractions will reduce fund size and increase costs to securityholders. ATM issuances can be a cost-effective way for an NRIF or ETFNCD to offset the impact of retraction privileges and preserve the cost structure for remaining securityholders.

Permitting ATM distributions for NRIFs and ETFNCDs is consistent with the treatment of NRIFs and ETFNCDs in the U.S. by the SEC. We understand that the SEC permits NRIFs and ETFNCDs to undertake a shelf registration in reliance on certain SEC no-action relief. If an NRIF or ETFNCD satisfies the requirements of such no-action relief, it is permitted to undertake ATM Distributions, in addition to traditional follow-on offerings, under its shelf prospectus.

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Additional Conditions for ATM Distributions by NRIFs and ETFNCDs

In accordance with paragraph 9.3(2)(a) of National Instrument 81-102 *Investment Funds*, the issue price of a security must not, (a) as far as reasonably practicable, be a price that causes dilution of the net asset value of the NRIF's or ETFNCD's other outstanding securities at the time of issue, and (b) be a price that is less than the most recently calculated net asset value per security. Accordingly, for NRIFs and ETFNCDs to use ATM distributions, the sell notice provided by an NRIF or ETFNCD to the agent(s) in an ATM distribution should indicate that the applicable price minimum for the sale of a security must be a price that is greater than the most recently calculated net asset value per security, as well as the estimated real time calculation of net asset value per security (the "**Estimated Real Time NAVPS**").

The Estimated Real Time NAVPS will be computed by revaluing the most recently calculated and publicly disclosed net asset value per security of the NRIF or ETFNCD by multiplying it by a market factor (such as an index) that the NRIF or ETFNCD believes is highly correlated with changes in the net asset value per security of the NRIF or ETFNCD. The use of Estimated Real Time NAVPS mitigates any risk that an NRIF or ETFNCD is issuing at a price that is dilutive to the existing securityholders.

NAV Calculation for ATM Distributions

With respect to ATM distributions, NAV should continue to be calculated at the same frequency the NRIF or ETFNCD currently calculates NAV. Provided that it is a condition that the applicable price minimum for the sale of a security must be a price that is greater than both the most recently calculated net asset value per security and the Estimated Real Time NAVPS (as discussed above), there is no need to increase the frequency of an NRIF's or ETFNCD's NAV calculation.

As with any other offering by an NRIF or ETFNCD, if the investment fund manager believes that the most recently calculated NAV (or the Estimated Real Time NAVPS) is not reflective of the current net asset value, such that the issuances may be dilutive to current securityholders, it can cease the ATM Distribution.

NRIFs with significant illiquid assets are not restricted from conventional re-openings, the pricing of which is based on the most recently calculated NAV, so we do not see a need to make a distinction for ATM distributions.

If you have any questions regarding this submission, other than the "Use of ATM Distributions by NRIFs and ETFNCDs" section, please contact Tim Phillips at tim.phillips@blakes.com or 416-863-3842, Trevor Rowles at trevor.rowles@blakes.com or 403-260-9750, Brendan Reay at brendan.reay@blakes.com or 416-863-5273 or Nicole Cargill at nicole.cargill@blakes.com or +44-20-7429-3554.

If you have any questions regarding the submissions under the heading "Use of ATM Distributions by NRIFs and ETFNCDs" please contact Stacy McLean at stacy.mclean@blakes.com or 416-863-4325 or Jill Davis at jill.davis@blakes.com or 416-863-3076.

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Yours truly,

(signed) *Nicole Cargill*
(signed) *Jill Davis*
(signed) *Stacy McLean*
(signed) *Tim Phillips*
(signed) *Trevor Rowles*
(signed) *Brendan Reay*



August 2, 2019

BY 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)
Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
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Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

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Dear Sirs/Mesdames:

Re: Proposed Amendments to National Instrument 44-102 *Shelf Distributions* and Change to Companion Policy 44- 102CP *Shelf Distributions* relating to At-the-Market Distributions (the “Proposed Amendments”)

The Canadian Advocacy Council of CFA Societies Canada ¹ (the CAC) appreciates the opportunity to provide the following general comments on the Proposed Amendments.

We understand the purpose of the Proposed Amendments is to replace the exemptive relief that has been required to be obtained by issuers engaged in ATM offerings of equity securities as part of the CSA’s broader regulatory burden reduction

¹ The CAC is an advocacy council for CFA Societies Canada, representing the 12 CFA Institute Member Societies across Canada and over 18,000 Canadian CFA charterholders. The council includes investment professionals across Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. Visit www.cfacanada.org to access the advocacy work of the CAC.

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initiatives. We are broadly supportive of regulatory efforts to reduce burden while maintaining an appropriate level of investor protection. Our comments relate to the proposed options suggested by the CSA for liquidity expectations when issuers distribute securities under an ATM prospectus, as well as disclosure obligations for the use of an ATM offering.

The first option suggested by the Proposed Amendments would limit the aggregate number of securities of the class distributed on any trading day to 25% of the trading volume of that class on all marketplaces on that day (or otherwise qualify as “highly liquid securities”). We understand this requirement is a typical condition of the exemptive relief granted to issuers. The second approach would not include this cap. Currently, there is also a general cap contained in NI 44-102, which provides that the market value of securities distributed under an ATM prospectus supplement may not exceed 10% of the aggregate market value of the issuer’s outstanding securities of the same class (excluding shares held by certain insiders). The Proposed Amendments would remove this cap on the basis that dilution concerns are addressed by other factors such as the involvement of underwriters in the offering.

We are generally supportive of the first option which would incorporate a liquidity requirement, however we would respectfully suggest the few modifications outlined below.

We understand that issuers with larger and well developed capital programs and highly liquid securities have successfully raised money using an ATM offering while finding the Canadian regulations cumbersome. If the intended outcome of an ATM offering is to create quicker and more cost effective access to capital, then a cap may not be required for larger, more experienced companies with an active market following and transparency with respect to the expected use of proceeds. It would be beneficial for companies with securities that are dually listed on a U.S. exchange to have ATM rules that are harmonized, to the extent possible, with those in the United States to reduce unnecessarily complexity. For that reason, we do not believe either a daily cap based on trading volume or the general 10% cap should be placed on dual Canadian/ U.S. listed issuers.

On the other end of the spectrum, timely access to capital is of paramount importance for smaller (venture) cap issuers, especially during their growth phase. In this light, we believe there is some justification to align the daily cap with the percentage of issuance for which a major exchange would require approval as a result of dilution concerns. For these smaller issuers, we think a specific percentage cap would be preferable to excluding securities which meet the “highly liquid securities” definition.

While the underlying intention of the ATM regime is positive, investor protection and awareness measures should be contemplated. We believe issuers have an opportunity to increase awareness of the use of such programs. Although in a different context, when an issuer is engaging in a normal course issuer bid on the TSX (buying back their shares instead of selling them into the market), there are a number of clear limitations on the share buybacks and the disclosure that must be made to the market. For example, an issuer cannot file a notice with the TSX unless it has a present intention to purchase securities, and thus when the NCIB is commenced, the market is made



aware of the issuer's present intentions. The press release must include prescribed information, such as the number of securities the issuer intends to repurchase, and details of any prior purchases over the last year.

We note that in the absence of a timely news release coinciding closer to the start of any share issuances under an ATM offering, investors may not fully appreciate or be able to easily track the timing, magnitude and circumstances in which an issuer would typically utilize the offering. While the issuer would have filed a base shelf prospectus and prospectus supplement (or, potentially, a "designated news release") describing the ATM offering, investors may not be fully aware of the commencement and size of the distribution, and may be required to reconstruct any shares issuances made under an ATM long after the fact. In addition to considering specific additional news release or other public disclosure requirements, we believe that interim financial statements and other disclosure should continue to clearly note in the share tables any securities that were specifically issued under an ATM offering.

Concluding Remarks

We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have and appreciate the time you are taking to consider our points of view. Please feel free to contact us at cac@cfacanada.org on this or any other issue in future.

(Signed) *The Canadian Advocacy Council of
CFA Societies Canada*

**The Canadian Advocacy Council of
CFA Societies Canada**

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August 7, 2019

BY EMAIL

British Columbia Securities Commission
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Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
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DAVIES

Dear Sirs/Mesdames:

CSA Notice and Request for Comment – Proposed Amendments to National Instrument 44-102 *Shelf Distributions* and Change to Companion Policy 44-102CP *Shelf Distributions* relating to At-the-Market Distributions

We are writing in response to CSA Notice and Request for Comment – Proposed Amendments to National Instrument 44-102 *Shelf Distributions* and Change to Companion Policy 44-102CP *Shelf Distributions* relating to At-the-Market Distributions (the “**Proposed Instrument**”).

We commend the CSA for its initiative to codify the exemptive relief pursuant to which at-the-market (“**ATM**”) distributions have occurred in Canada under Part 9 of National Instrument 44-102 *Shelf Distributions* (“**NI 44-102**”). We expect that the adoption of the Proposed Instrument will reduce the regulatory burden in relation to ATM distributions, which would have a favourable impact on access to and should reduce the cost to issuers of accessing Canadian capital markets. The CSA should focus on increasing market certainty in the ATM distribution regime outlined in the Proposed Instrument, and take this opportunity to address certain oversights in the historical exemptive relief granted pursuant to Part 9 of NI 44-102.

Capitalized terms used and not otherwise defined herein have the meaning ascribed thereto in the Proposed Instrument.

Dispense with certain prospectus rights of action

The right to rescission or, in some jurisdictions, revisions of the price of securities purchased pursuant to a prospectus distribution (the “**Rescission Right**”) is contemplated in the second paragraph of paragraph (i) of section 9.3(1) of the Proposed Instrument. While we recognize the salutary benefit of attempting to maintain consistency between the statutory rights of action available to purchasers in ATM distributions and non-ATM distributions, there are substantive reasons why the Rescission Right should not be applicable to purchasers in an ATM distribution.

ATM distribution purchasers are purchasing securities in the secondary market, and have not bargained for the Rescission Right. ATM purchasers do not have any basis on which to conclude or ability to determine that they have purchased securities pursuant to a prospectus distribution for which the Rescission Right is available. As such, the Rescission Right is not a necessary right for these purchasers and may not be readily accessible by such purchasers.

All purchasers of an ATM issuer’s securities are entitled to rely on the secondary market right of action available to security holders pursuant to Canadian securities laws in connection with a misrepresentation in an ATM prospectus.¹ As such, if the Rescission Right and the right of action for damages under the ATM prospectus were no longer available to purchasers in an ATM distribution,

¹ The ATM prospectus is a “core document” for purposes of the secondary market right of action contained in Part XXIII.1 of the *Securities Act* (Ontario).

DAVIES

these purchasers would be in exactly the position they would have expected, having purchased on a short form eligible exchange in Canada, in that they would have an action for damages for secondary market disclosure.

In addition to the fact that purchasers in an ATM distribution will not have bargained for the Rescission Right or the right of action for damages set forth in section 130(1) of the *Securities Act* (Ontario) (the “**Prospectus Rights of Action**”) and are unlikely to be aware of their entitlement to such rights, there is a lack of certainty under Canadian law as to how to delineate the group of market participants who would be entitled to utilize these rights. The uncertainty surrounding the group of potential claimants under the Prospectus Rights of Action is problematic and challenging in the context of an ATM distribution. As agents in the ATM distribution do not know the identity of purchasers during the course of the ATM distribution,² definitively identifying the group entitled to these rights would be impossible. With respect to the Rescission Right in particular, if a court were to determine that the Rescission Right were available to all purchasers of the securities of an issuer during the period of an ATM distribution, or even all such purchasers on individual days on which securities were distributed pursuant to an ATM distribution, this could result in the Rescission Right being extended to purchasers of the issuer’s securities having a total value far in excess of the value of the securities sold in the ATM distribution. This would clearly be the wrong result for the issuer and capital markets generally. The uncertainty of how the Prospectus Rights of Action would be applied in an ATM distribution may be another reason why Canadian issuers have been hesitant to effect ATM distributions in Canada.

Given the challenges with identifying the potential class of purchasers under an ATM prospectus, and the fact that market participants have no expectation of the availability of the Prospectus Rights of Action in connection with their secondary market purchases, the most logical course of action would be to dispense with the rights of purchasers to the Prospectus Rights of Action in connection with an ATM distribution. To clarify this to the market, the Proposed Instrument should be modified to provide that each ATM prospectus disclose that purchasers in an ATM offering will be limited to the right of action for a misrepresentation in secondary market disclosure available under Canadian securities laws.

Provide trade reporting exemption

Section 5.8 of the Companion Policy, as included in the Proposed Instrument, notes that it is difficult to determine where a distribution occurs in an ATM offering, as issuers and dealers are unable to determine where a purchaser is located at the time of the trade. Provisions of the securities laws of British Columbia³ (the “**Local Trade Reporting Requirement**”) require that a report be filed and fees paid based on the value of proceeds raised in such province in a prospectus offering. Given the fact, as noted by the CSA above, that purchasers in an ATM offering cannot be identified by the issuer or agents, it is not possible to comply with the Local Trade Reporting Requirement. The exemptive relief pursuant to which ATM distributions have occurred in Canada have failed to address this regulatory gap.

² See Section 5.8 of the Companion Policy included in the Proposed Instrument.

³ See Item 10(a) of Section 22 of B.C. Reg. 196/97.

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In connection with the Proposed Instrument, we suggest that the securities laws of British Columbia should be amended to clarify that the Local Trade Reporting Requirement does not apply in connection with an ATM distribution.

Dispense with the requirement to describe the material terms of agreement with agents

The Proposed Instrument includes a provision (section 9.3(1)(e)) that purports to require that an ATM prospectus disclose the “material terms of any agreement referred to in paragraph (d)”, which references an agreement with an investment dealer pursuant to which an ATM distribution is effected (the “**Distribution Agreement Disclosure Requirements**”). The equity distribution agreement in question is a modified form of underwriting agreement that is fairly standardized in the Canadian marketplace. The equity distribution agreement is also required pursuant to section 9.3(1)(d) of the Proposed Instrument to be referenced in a news release by the issuer and filed on SEDAR.

There is no reason in connection with an ATM distribution that the issuer should include more detailed disclosure in its prospectus relating to its agreement with the agents than is required by the “Plan of Distribution” disclosure obligations contained in Item 5 of Form 44-101F1 (which apply to the ATM prospectus). The inclusion of the Distribution Agreement Disclosure Requirements in the Proposed Instrument suggests that the CSA views the disclosure obligations in Item 5 of Form 44-101F1 as insufficient in relation to an ATM distribution, but it is unclear why or how the CSA feels these requirements are lacking. In our view, market participants will not benefit from a more detailed description of the equity distribution agreement in the ATM prospectus than is typically included in the plan of distribution in response to Item 5 of Form 44-101F1.

If the CSA maintains this provision in the Proposed Instrument as ultimately adopted, we would appreciate clarification from the CSA of the particular provisions of the equity distribution agreement that it feels warrant enhanced disclosure over and above the disclosure relating to traditional underwriting agreements that is typically included in a prospectus in response to the requirements of Item 5 of Form 44-101F1.

Confirm whether an ATM distribution is a prospectus distribution that gives rise to an “issuer-restricted period” pursuant to OSC Rule 48-501

It would be helpful for the CSA to clarify in the Companion Policy to the Proposed Instrument how the prohibitions on trading by “issuer-restricted persons” during the “issuer-restricted period” contained in OSC Rule 48-501 apply during the course of an ATM distribution. While it is clear pursuant to the provisions of securities law that insiders of an issuer are prohibited from taking actions to manipulate markets,⁴ we would argue that there is no benefit to construing OSC Rule 48-501 in a manner that would prohibit insiders from trading at any time during the 25-month term when an ATM program may be operative.

⁴ See, for instance, Section 126.1 of the *Securities Act* (Ontario).

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The premise of an ATM distribution is that sales can occur at any time that the underlying ATM prospectus contains full, true and plain disclosure of all material facts relating to the offering, which corresponds with the periods during which insiders would generally be permitted to effect trades during the normal course. Uncertainty around the ability of insiders to trade during the course of a 25-month ATM distribution period may contribute to an unwillingness among issuers to engage in a ATM offering. Given: (a) the long period during which an ATM program may be outstanding; (b) the fact that sales under the ATM program only occur when there is full, true and plain disclosure of all material facts relating to an issuer's equity securities; and (c) the fact that insiders are already subject to prohibitions on manipulating markets, our view is that there is no added benefit or rationale for subjecting insiders to a blanket prohibition on trading during the continuance of an ATM distribution.

Given the definitional challenges of attempting to interpret how OSC Rule 48-501 would be applied to an ATM offering, we would welcome a statement from the CSA in the Companion Policy to clarify its view on matters relating to trading by insiders during the continuance of an ATM distribution.

General Questions

1. Is a "highly liquid securities" test or the 25% Daily Cap necessary to reduce the impact on the market price of an issuer's securities? Please explain.

It is our view that there is no need for securities regulators to impose either a "highly liquid securities" test or 25% Daily Cap as part of the Proposed Instrument. Issuers will be required pursuant to the Proposed Instrument to engage an underwriter. Underwriters are well placed and obligated, pursuant to the rules under which they operate, to monitor the markets into which they are selling securities to ensure that the sales into the market are not causing significant alterations in the market. Issuers are similarly invested in ensuring that there are no significant negative impacts on the markets for their securities and will closely monitor markets while sales are being undertaken pursuant to an ATM. Given these factors, we believe that imposing a "highly liquid securities" test or 25% Daily Cap would be extraneous.

2. The Proposed Amendments only permit distributions of equity securities. Should the issuance of debt securities under an ATM distribution be permitted? If yes, please explain the market need and suggest appropriate exemptions and conditions.

We do not expect that debt securities would ever be issued pursuant to an ATM prospectus, and as such, do not think that there is any utility in including the ability to offer debt securities in an ATM Offering. The issuance of debt securities pursuant to an ATM prospectus would involve the reopening of an outstanding set of debt securities, which is not likely to occur given how debt is priced in the market. Given the manner in which interest is calculated under debt instruments, each debt offering would give rise to a new debt instrument, which would obviate the ability to use an ATM prospectus for this purpose. The Medium Term Note program available under Part 8 of NI 44-102 is more suitable for sequential debt offerings and works very well for this purpose.

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The following lawyers at our firm participated in the preparation of this comment letter and may be contacted directly should you have any questions regarding our submissions.

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Yours very truly,

DAVIES WARD PHILLIPS & VINEBERG LLP



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August 7, 2019

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Dear Sir/Madam:

Re: Proposed Amendments to NI 44-102 and 44-102CP *Shelf Distribution* relating to At-the-Market Distributions (the “Proposed Amendments”)

The Investment Industry Association of Canada (the “IIAC” or “Association”) appreciates the opportunity to comment on the Proposed Amendments. The Association is pleased that the CSA has taken this important step in amending the above noted instruments to replace the burdensome and inefficient exemptive relief process for conducting At-the Market (“ATM”) distributions. As discussed further below, we believe that aligning the Canadian framework for ATM distributions with the US ATM model is essential to facilitate efficient usage of this means of financing in Canada.

Under the existing regime, very few ATM offerings are conducted in Canada in part due to the expensive and time-consuming exemptive relief process. By codifying the exemptive relief that has been granted in the past, the Proposed Policy will eliminate the unnecessary costs and delays associated with a Canadian ATM distribution. However, further changes (proposed below) are necessary for the Canadian ATM framework to provide similar efficiencies as the U.S. framework and provide issuers with a cost effective and efficient means of public equity financing in Canada.

Alignment with US ATM Framework

Adopting a Canadian ATM framework that has substantially similar requirements to the US framework is essential to ensure that Canadian issuers do not have an incentive to undertake a U.S.-only ATM. If the U.S. ATM framework is significantly less burdensome than the one adopted in Canada, Canadian issuers may skip the Canadian market altogether and conduct their ATM in the US only. The propensity of issuers to migrate to the less burdensome regime is evident in the statistics for ATM distributions for Canadian reporting issuers since 2010, where only slightly more than a quarter of the 30 ATM offerings conducted by these reporting issuers were undertaken, in whole or in part, in Canada. In contrast, over 80% of these 30 ATM distributions were undertaken, in whole or in part, in the United States.

Proposals for Further Efficiencies

The Proposed Amendments, by codifying the standard exemption from prospectus delivery and associated withdrawal right, recognizes that the expectations of purchasers pursuant to an ATM offering are different from those buying equity new issues. New issue purchasers purchase directly from the issuer or the underwriter, and investor protection is tied to those identifiable sellers. In an ATM offering, the buyer is purchasing on the secondary market, and not purchasing from an identifiable seller. As such, their expectation is consistent with the experience of buying on the secondary market, which does not require investor protections or disclosure that is specific to a primary distribution.

Premised on the above, we propose two further amendments summarized below.

Remove Prospectus Specific Right for Rescission or Damages

The right of action for rescission or damages (referred to in s.9.3 (1)(i) of the Proposed Amendments) for a misrepresentation in a prospectus should not be available to ATM purchasers. This right of action is inconsistent with the method of distribution under an ATM offering as, from the perspective of an ATM purchaser, the purchase is a secondary market trade. Instead, the appropriate remedy for an ATM purchaser is the right of action for damages available for a misrepresentation in the responsible issuer's secondary market disclosure. Notably, a prospectus is listed among the core documents to which secondary market disclosure civil liability provisions apply. It is not necessary for investor protection to layer on an additional right of action. Further, an additional prospectus specific right of action is not workable in the context of an ATM distribution. As it is not possible to identify the specific purchaser of securities in an ATM distribution on the secondary market (as there is no prospectus delivery requirement), it is unclear how a prospectus specific right of action could even be enforced in an ATM distribution context. We are concerned that providing a right of action where it is impossible to distinguish ATM purchasers from other secondary market purchasers may expose issuers and the dealers for their ATM program to prospectus liability for all trades (both ATM and secondary) that occur during the ATM distribution. For the above reasons, we submit that the proposed Canadian ATM framework should be amended (including, as necessary, by amending other applicable securities legislation) to remove ATM purchasers from the category of purchasers that have a right of action for rescission or damages for a misrepresentation in a prospectus.

Remove Translation Requirement

We also propose that ATM prospectuses be exempt from French translation requirements. Section 5.8 of the Proposed Companion Policy suggests that, since ATM distributions are made directly on a securities exchange and it is possible that purchasers under an ATM distribution can be located in any jurisdiction in Canada, a Canadian ATM prospectus must be qualified in all jurisdictions. As this would necessitate filing in Quebec, the French translation requirement would apply. There must be a clear exemption from the translation requirement, or the benefits of the Proposed Policy will be effectively unavailable to most Canadian issuers. In the context of an ATM distribution, a French translation is not necessary for investor protection, as there is no prospectus delivery requirement and the purchaser (who views this as a secondary trade) relies on existing continuous disclosure which is often only provided in English. Generally speaking, the translation requirement adds significant time and expense to the public offering process, and currently deters many Canadian issuers from conducting prospectus offerings in Quebec. In the context of an ATM distribution, translation is even more problematic due to the challenge of finalizing French versions concurrently with the filing of each and every English report. Even for Canadian issuers that do translate their continuous disclosure in the ordinary course, this timing issue poses a substantial challenge that adds unnecessary expense. Requiring the translation of ATM prospectuses ensures a non-level regulatory playing field with the US, and deters the use of ATM offerings in Canada. The translation requirement is the most punitive on smaller, oil and gas, mining and cannabis issuers that would not otherwise be subject to a translation requirement. If the translation requirement is maintained, we anticipate that ATM financings will be underutilized in Canada.

Other Issues with the Proposed ATM Framework

The requirement in Section 9.3(1)(f) to conduct the offering on an “ATM Exchange” is too narrow. Given that not all Canadian marketplaces are included in the definition, we are concerned that this will result in regulatory contradictions with the requirement to transact on all marketplaces under the Order Protection Rule, and best execution standards. There is no principled basis on which to limit ATM distributions to only prescribed Canadian marketplaces, and issuers should be able to conduct the ATM offering where they believe they will obtain the best price and execution.

Responses to Specific Questions

Our responses to the General Questions are as follows:

1. Is a “highly liquid securities” test or the 25% Daily Cap necessary to reduce the impact on the market price of an issuer’s securities? Please explain.

The “highly liquid securities” test or 25% Daily Cap does not exist in the US and, as such, the implementation in Canada would create an inconsistency that may deter the use of the ATM offering process in Canada. We understand that the absence of an equivalent liquidity test in the US has not resulted in market impact problems in that market. In our view, it is not necessary to impose a liquidity

test. The dealer participation condition is sufficient to maintain fair and orderly markets, due to the IIROC rules applicable to dealer conduct.

We believe that permitting this professional discretion is appropriate. It is reasonable to be consistent with the US framework which does not have an equivalent liquidity test, and, to our knowledge, has had smaller issuers conduct ATM offerings successfully.

We are of the view that the provision allowing quarterly, rather than monthly reporting should be applied to Option 2. Given that issuers are required to report on the number of outstanding securities on a monthly basis, this information is available on demand to investors. Notably, if ATM sales were of an amount / sold at a price that would constitute a 'material fact', then securities legislation would require more current disclosure (via material change reporting) of those details in any event. If those details wouldn't constitute a material fact, we query why there is any utility in requiring reporting more current than in an issuer's quarterly reports. If not a material fact then, by definition, those details would not reasonably be expected to have a material effect on the market price or value of the securities.

We also agree with the removal of the 10% aggregate cap. This has been an impediment to ATM distributions in Canada, and investor protection issues are addressed by the requirement in the Proposed Policy to engage an underwriter.

2. The Proposed Amendments only permit distributions of equity securities. Should the issuance of debt securities under an ATM distribution be permitted? If yes, please explain the market need and suggest appropriate exemptions and conditions.

We believe the use of an ATM distribution is less practical with respect to the issuance of debt securities. This is largely owing to the over-the-counter structure of fixed-income markets. Off-exchange instruments often lack mechanisms to provide current and ongoing information with reference to amount issued and market pricing. Issues such as market overhang, daily accrued interest, call-features and convertible bond issues would add further complexities to the ATM process. Given the challenges above, and the capital raising alternatives currently available to debt borrowers, it is not clear what appetite they may have for an ATM distribution.

3. Do you think that permitting NRIFs and ETFNCDs to conduct ATM distributions is warranted, based on differences in their distribution model and investor base compared to ETFs in continuous distribution?

The IIAC does not have a position on this issue.

4. If the CSA permits NRIFs and ETFNCDs to use ATM distributions, what additional conditions, if any, should apply?

The IIAC does not have a position on this issue.

5. Net asset value (NAV) is calculated daily, if using specified derivatives or selling short, or, otherwise, weekly. How frequently should the NAV be calculated with respect to ATM distributions?

ATM distributions should be done at premium to NAV to ensure that the NAV is not diluted, with issuers providing certification to that effect.

6. Under new restrictions that came into force on January 3, 2019, NRIFs are generally limited to having 25% of assets in illiquid assets. However, illiquid assets are difficult to value. We have concerns that the NAV in some cases may be “stale” and may not reflect the economic value of the underlying assets. Should we restrict NRIFs with significant illiquid assets from conducting ATM distributions? What should the threshold be?

The IIAC does not have a position on this issue.

Thank you for considering our comments. If you have any questions, please don't hesitate to contact me.

Yours sincerely,



Susan Copland



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)
 Department of Justice and Public Safety, Prince Edward Island
 Nova Scotia Securities Commission
 Superintendent of Securities, Newfoundland and Labrador
 Superintendent of Securities, Northwest Territories
 Superintendent of Securities, Yukon
 Superintendent of Securities, Nunavut

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PROSPECTORS &
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OF CANADA

August 7, 2019

RE: Proposed Amendments to National Instrument 44-102 *Shelf Distributions* (NI 44-102) and a proposed change to Companion Policy 44-102CP *Shelf Distributions* (44-102CP).

Dear members of the Canadian Securities Administrators (CSA),

The Prospectors & Developers Association of Canada (PDAC) is the leading voice of the mineral exploration and development community that represents over 7,500 members around the world, including significant representation from the nearly 1,200 mineral industry issuers listed on Canadian stock exchanges.

Junior exploration and development companies in the minerals sector require continual injection of capital investment in order to survive, especially given the lack of material revenue and the significant time and cost that go hand-in-hand with the mineral exploration process. As such, PDAC continually works to improve access to capital, while also advocating for regulatory reforms that reduce the various costs associated with raising capital to ensure that Canada remains a top destination for mineral industry financing.

PDAC appreciates the opportunity provided by CSA to submit comments on proposed amendments to National Instrument 44-102 *Shelf Distributions* (**NI 44-102**) and Companion Policy 44-102CP *Shelf Distributions* (**44-102CP**), which aim to improve the practicality of the at-the-market (ATM) financing mechanism in Canada. PDAC has been a vocal supporter of reforms to regulations that govern ATM financing in Canada, and applaud CSA for the current initiative.

Recommendations

- In consideration of the two different approaches outlined by CSA in the request for public comment (*Option 1* and *Option 2*), PDAC recommends that CSA move forward with implementing ***Option 2***, which would place no limitations (i.e. 25% daily cap) on the amount of securities issued at a point in time based on market liquidity.
- In addition, we recommend that CSA consider creating a prospectus exemption for ATM financings with gross proceeds up to **\$3 million** so that the ATM mechanism can be effectively employed by companies with small market capitalizations, daily trading volumes, and that may only require small financings to maintain a viable business.

In the following section PDAC's line of reasoning for both recommendations will be explained.

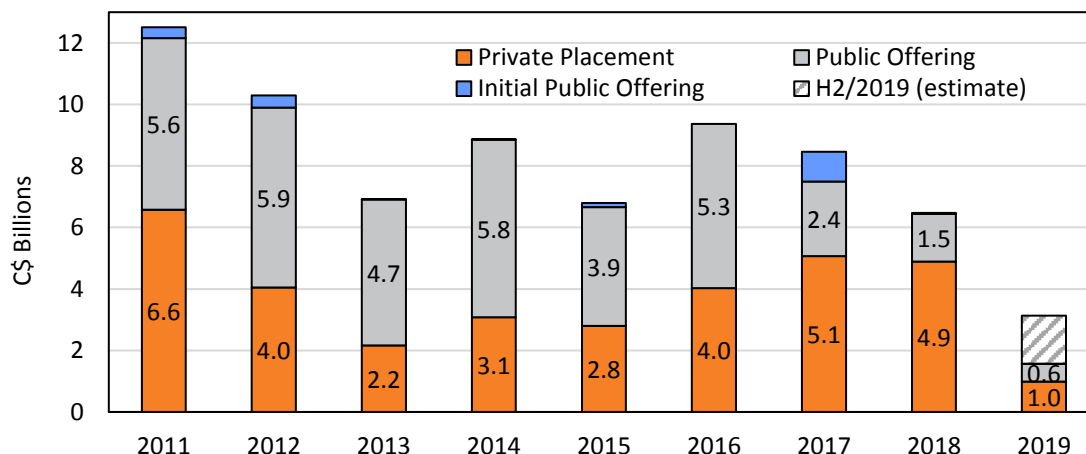
Background

Based on 2019 market data, **over 35% of all issuers** listed on the TSX and TSXV exchanges are mineral industry companies. The vast majority are junior exploration companies, which is reflected in the fact that nearly 80% of these issuers have a market capitalization below \$50 million and over 55% are below \$10 million. Junior explorers are highly dependent on new investment to fund activities and access to capital is becoming increasingly constrained as highlighted by the near 65% year-over-year decline in equity financing for the sector in H1/2019 (see Figure 1 on page 2).



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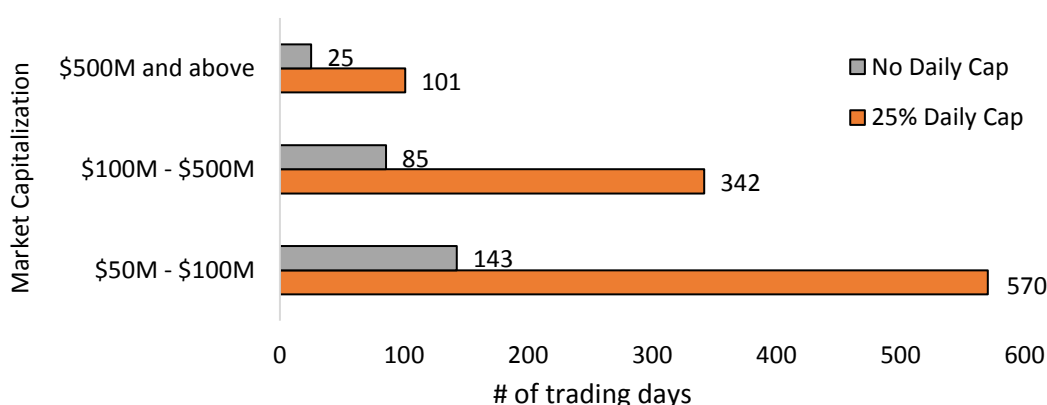
Figure 1: Equity Financing on TSX+TSXV (C\$B)



Another alarming trend from the chart above is the material decline in the proportion of public offerings for mineral industry issuers over the last several years. The trend suggests a narrowing of the investor base for a significant number of Canadian capital market issuers. In this environment, mineral industry companies increasingly rely on lower-cost mechanisms to source new capital, making access to a practical ATM mechanism a notable benefit.

Figure 2 below is based on 2019 data provided by TMX Group with significant outliers removed. It shows how the top ~20% mineral industry companies in terms of market capitalization (>\$50 million) would require, on average, more than 350 trading days to raise a minimum \$5 million or 1% of their respective market capitalizations if the “25% Daily Cap” were in place. This average timeframe would drop to less than 90 trading days if the daily cap were not in place.

Figure 2: Trading Days to Raise \$5M via ATM Financing



It is apparent that the “25% Daily Cap” would render the ATM mechanism unworkable for larger companies in the mineral industry. The time required to generate necessary funds would make financial planning impossible and, therefore, make the ATM mechanism unusable.



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Current continuous disclosure requirements ensure that any material changes to a public issuer are publicly announced and reported within a 10-day period. Given the potential length of time anticipated for a mineral industry issuer to raise just 1% of its market capitalization via an ATM, it is extremely unlikely that material changes could occur during or due to an ATM offering that would not be disclosed in various public documents. As such, there likely would be no increased risk to shareholders if the “25% Daily Cap” were not in place.

A typical mineral exploration program may require expenditures ranging from \$100,000 to \$500,000 per annum at initial stages, and eventually can reach multiple millions of dollars at more advanced-stages. In this context, it is unsurprising that according to TSXV data from 2011 to 2018, over 60% of the mineral industry’s financings reported were below \$1 million.

The average daily value traded for mineral industry issuers with market capitalization below \$50 million has been roughly \$10,000 based on 2019 data. If the “25% Daily Cap” were applied to ATM transactions it would likely take a junior exploration company over 200 trading days on average to complete a \$0.5 million financing and over 400 trading days to raise just \$1 million.

Figure 3: Number of Days to Raise \$500K via ATM Financing

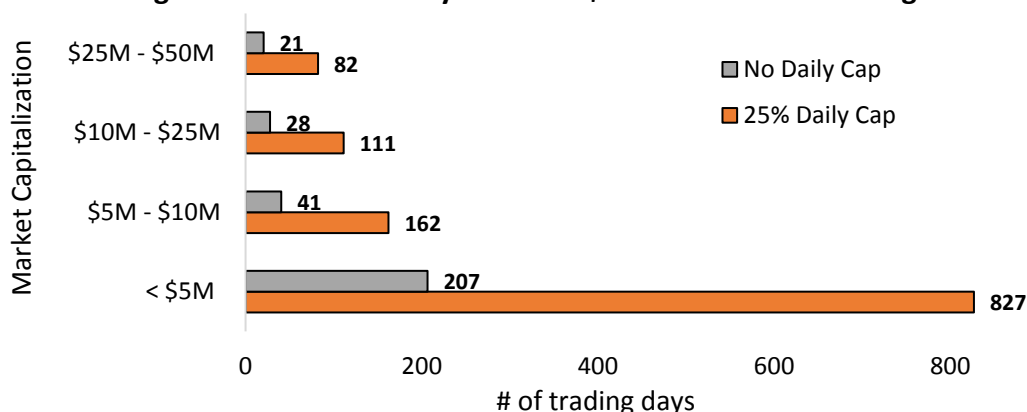


Figure 3 above reflects CSA’s acknowledgement of the limited benefit the exemptions in the Proposed Amendments will provide for small to mid-size issuers. The protracted timelines that may result from applying a “25% Daily Cap” would make the ATM regime impractical for junior mineral exploration companies.

Over the last several years it has become increasingly difficult for junior exploration companies to source new capital, and Flow-through share (FTS) financing has accounted for nearly 80% of the funds invested in mineral exploration in Canada over the last decade. While it’s encouraging to see FTS incentivizing domestic exploration investments, FTS funds must be explicitly used for exploration expenditures and cannot be used to support general corporate costs that sustain a business.

Although the potential timeframe required for a junior explorer to raise \$500,000 even without the “25% Daily Cap” could be significant, the ATM mechanism would be more viable for raising ongoing funds without the daily cap, provided the cost of capital is comparable with other lower-cost mechanisms. In such a case, a junior exploration company could consider using an ATM financing to complement FTS financing to fund both exploration and corporate activities.



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With respect to potential volatility implications of permitting ATM financings without a “25% Daily Cap”, PDAC understands that financial institutions and brokerages operating in Canadian capital markets are bound by regulatory requirements, codes of conduct, and ethics from acting in a manner adverse to their clients’ interests. Issuing shares via an ATM financing in a manner that would have a material adverse impact on a security’s market value would go against such obligations and PDAC views this as an unlikely risk.

ATM as Prospectus Exemption

Many junior exploration companies fund themselves by way of small financings (i.e. < \$1 million). In recent years, the significant increase in private placement financings reflects an overall decline in investment in the mineral sector, but also the need for junior companies to control their financing costs and the resulting aversion to costly public offerings in favour of smaller, private equity raises.

For the amount of funds that a junior company could expect to raise, an ATM offering that is based on filing a shelf prospectus would be prohibitively expensive. The cost of a shelf prospectus can typically range from \$100,000 to \$300,000 depending on aspects such as deal complexity, regions of distribution, translation requirements, etc. This means that the cost of completing the prospectus could exceed 10% of expected gross proceeds for deals up to \$3 million. Such a high cost would make the ATM regime impractical for small financings.

In order for the ATM regime to be practical for junior mineral explorers, a prospectus exemption that allows a company to rely on continuous disclosure would be necessary and PDAC recommends that CSA consider such an exemption in the near future.

We submit that the risk to the public associated with such an exemption would be minimal or even non-existent, given that buyers in an ATM offering are acquiring their shares on the stock market in the same manner as a buyer acquiring shares in the secondary market. Indeed, a buyer in an ATM offering may not necessarily realize that they are acquiring treasury shares rather than previously-issued equity. It is uncontroversial that buyers in the secondary market are able to make their purchasing decisions on the basis of the issuer’s public disclosure record. PDAC is of the view that the risk profile of a purchase in the primary market on an exchange under an ATM offering is identical to that of a purchase in the secondary market on the same exchange.

We thank the CSA for providing PDAC the opportunity to comment on proposed ATM amendments and invite future correspondence regarding the recommendations provided in this letter.

Sincerely,

Lisa McDonald
Executive Director
Prospectors & Developers Association of Canada (PDAC)



Via email: comments@osc.gov.on.ca; consultation-en-cours@lautorite.qc.ca

August 6, 2019

The Secretary
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and

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
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Montréal (Québec) H4Z 1G3

Dear Sirs/Mesdames,

Re: Proposed Amendments to NI 44-102 Relating to At-the-Market Distributions

This comment letter is being submitted by RBC Dominion Securities Inc. on behalf of RBC Capital Markets ("RBC" or "we"). We are writing in response to the Canadian Securities Administrators' ("CSA") Notice and Request for Comment *Proposed Amendments to National Instrument 44-102 Shelf Distributions and Change to Companion Policy 44-102CP Shelf Distributions relating to At-the-Market Distributions* ("Proposed Amendments") published on May 9, 2019 (the "Proposal"). RBC appreciates this opportunity to comment on the Proposal; our comments are below.

General Comments

RBC welcomes the CSA's initiative to make At-the-Market ("ATM") distributions more readily accessible to Canadian issuers. RBC has considerable experience acting as Agent on ATM offerings in Canada that have qualified under the existing exemptive relief process, as well as for U.S. based issuers where the regulatory framework for ATM execution is well defined and the process widely adopted as a tool for raising discretionary, incremental primary equity capital. We have noted an increased interest in ATMs by seasoned Canadian issuers, particularly those also listed on a U.S. exchange.

We view the Proposal as delivering multiple benefits to not only Canadian issuers, but to dealers, investors and other market participants, including:

- Providing a lower cost, flexible and discretionary tool for issuers to access equity capital;
- Providing an opportunity to align the Canadian regulatory framework for ATMs with U.S. regulations and thereby remove the "regulatory arbitrage" incentive for dual-listed Canadian issuers to undertake their ATM programs only on the U.S. markets;
- Allowing issuers and other market participants to capitalize on trading liquidity; and

- Minimizing dilution to existing shareholders by allowing equity capital to be raised at the prevailing market price for the volume of shares offered.

Whereas a conventional equity new issue typically attracts demand from active money managers, an ATM offering allows an issuer to also access the full array of investors (active, passive, algorithmic). Equipping Canadian issuers with a new and flexible tool for raising equity capital assists issuers and brokers in adapting to changes in the market trading and asset management landscape.

The 25% Daily Cap: Option 1 or Option 2

Of the two options advanced by the CSA in the Proposal, RBC prefers Option 2. As noted by the CSA, RBC agrees that “issuers are incentivized not to conduct ATM distributions that will have a material impact on the market price of their securities”, and that any investment dealer serving as the Agent to those issuers “is also prohibited from engaging in conduct that may disrupt a fair and orderly market.” We further agree that a 25% Daily Cap for issuers whose securities are not “highly liquid securities” adds complexity and is unnecessary in light of the foregoing.

One additional potentially negative implication of a 25% Daily Cap is that it could have the effect of limiting an issuer’s ability to respond to reverse inquiries for larger block purchases. While the U.S. market does not have daily ATM limits, the spirit of the rules are such that ATMs are for use in response to legitimate, unsolicited reverse enquiries, but are not intended to be used in place of ordinary, primary follow-on offerings typically undertaken under a supplement to a shelf prospectus. We recommend that, should the CSA select Option 2 and remove the 25% Daily Cap, it remain alert to abuses of the ATM program where a conventional prospectus follow-on would be more appropriate.

Removal of 10% Aggregate Cap

RBC supports the removal of the 10% aggregate cap for a single ATM distribution prospectus supplement. We agree with the CSA’s observations that removal “does not adversely affect investor protection... because the dilution concerns... are addressed by other factors.” We further note that given an ATM distribution is also limited to the duration of its qualifying base shelf prospectus, a 10% aggregate cap could have a varying impact on potential dilution on a newly filed program (with 25 months remaining) in contrast with a supplement filed to a shelf with (for example) only 3 months to expiry. We also understand a 10% aggregation restriction was initially included in a previous iteration of the U.S. ATM regime, but eliminated as it was deemed unnecessary in the protection of investors and markets.

Trading During ATM Distributions

Looking to the U.S. market, RBC understands that (typically) U.S. ATM transactions are conducted by issuers that meet the average daily trading volume exemption under Rules 101 and 102 of Regulation M. We further understand that for U.S. ATM distributions that do not meet this exemption, issuers and Agents would need to determine whether the transaction is a “distribution” subject to Regulation M, and that each “take down” or “dribble out” transaction would require independent analysis on a case-by-case basis. As a result, given such transactions may occur on a daily basis, if each “take down” is subject to Regulation M and no exemption applies, it becomes challenging for Agents to ensure compliance with Regulation M requirements. One consequence is that some broker-dealers attempt to restrict their participation in these programs only to securities that qualify for the actively traded security exemption.

We note the current Proposal does not address similar potential implications of the *Investment Industry Regulatory Organization of Canada* (“IIROC”) *Universal Market Integrity Rules* (“UMIR”) Rule 7.7 or OSC Rule 48-501 – *Trading During Distributions, Formal Bids and Share Exchange Transactions* (“Rule 48-501”). In particular, the Proposal does not address the issue addressed in relief orders obtained by certain senior issuers to exempt insiders of the issuer from section 2.2(a) of Rule 48-501 in connection with purchases of the issuer’s shares while its ATM is operating. RBC encourages the CSA to proactively address any potential issues arising from the application of UMIR 7.7 and OSC Rule 48-501 in connection with the Proposal.

Rescission and Other Rights

ATM offerings can be readily distinguished from conventional equity follow-on offerings in one critical way: typical equity investors purchasing in the secondary market are essentially unaware that they may be buying new issue shares. Fundamentally, we understand this distinction has virtually no impact on general secondary market equity investors trading on-market who make investment decisions on the basis of prevailing market factors. We understand this to be the basis for the well-established exemptive relief process from prospectus delivery requirements and rights of withdrawal provided by Canadian securities regulators.

Following the same rationale, RBC suggests regulators should not allow rights of rescission, revisions of price or damages (“Traditional New Issue Rights”) in connection with an ATM offered equity security, given: (a) purchasers of an ATM offered equity security are virtually identically situated to secondary market purchasers that do not have Traditional New Issue Rights; (b) it is essentially impossible to identify only those purchasers who bought an ATM offered equity security (as opposed to other secondary market purchasers); and (c) it is equally impractical for a limited subset of purchasers buying in the secondary market (namely, purchasers of an ATM offered equity security) to have access to Traditional New Issue Rights whereas other secondary market investors trading on-market and (similarly) making investment decisions with respect to a functionally equivalent security on the basis of prevailing market factors do not.

Given a purchaser of an ATM offered equity security is ordinarily unaware of (and unaffected by) its purchase from an unknown seller through secondary market trading channels potentially being an ATM offered equity security, RBC proposes that such purchasers should not expect, and should not have, Traditional New Issue Rights which would enhance their market position as compared to other similarly situated secondary market purchasers.

Should the CSA express concern with the implications of removing rights of delivery, rights of withdrawal and Traditional New Issue Rights (along with French translation requirements as set out below), consider that investors remain protected by Canada’s statutory secondary market liability regime which helps to ensure that the issuer’s record of continuous disclosure remains reliable. From an Agent’s perspective, ATMs are not “offered” in the sense of a typical equity new issue where an underwriter makes an active and distinct solicitation on behalf of an issuer, but are by design a passive supply of shares on an agency basis at prices in line with the prevailing market, distributed through established market channels. As a matter of market practice, Agents will conduct periodic due diligence, are prohibited from engaging in conduct that may disrupt a fair and orderly market and ATM activity cannot proceed when the issuer is in self-imposed blackout or is in possession of material non-public information.

French Language

Further to the position set out above, while we acknowledge that the *Securities Act* (Québec) contains specific provisions requiring the translation into French of certain offering documents, and the *Charter of the French Language* (Québec) contains certain general provisions that may apply to documents used in connection with an offering of securities in Québec, RBC does not believe regulators should require translation of ATM offering documents (including the prospectus, prospectus supplement and other continuous disclosure) into the French language. Given the time and expense required, we anticipate the translation requirement could serve as a barrier to entry for Canadian issuers’ use of ATMs and undercut various aims of the Proposal related to increased access and efficiency.

Given there is nothing precluding a Canadian investor from purchasing shares in a dual-listed Canadian company through the facilities of a U.S. exchange, there is currently no barrier to such company filing an ATM program in the U.S. market only. Unknowing Canadian purchasers of shares issued under such program, regardless of which province they are resident, would have no access to rights of delivery, withdrawal or Traditional New Issue Rights in these circumstances, and such issuer would not be required to translate into French. RBC believes that Canadian issuers and the Canadian equity marketplace would be better served to reduce incentives for issuers to pursue offshore-only ATM offerings.

Filing Jurisdictions

Section 5.8 of Annex B notes that “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 trade.” As such, “it is possible that purchasers... can be located in any jurisdiction of Canada.” We agree with this observation, but note it is possible that purchaser can also be located in any foreign market where investors have the ability to participate in Canadian secondary equity markets. It does not necessarily follow that simply because a purchaser *could* be located in every province and territory that an issuer *should* be required to be a reporting issuer and/or undertake filings in every province and territory solely to conduct an ATM offering.

As outlined above, the typical purchaser in an ATM distribution has no knowledge or expectation they are participating in a new issue. Given our view that extending various prospectus rights to ATM purchasers is impractical, it should be unnecessary to impose the further disincentive that an issuer expend time and expense to become a reporting issuer and/or undertake filings in every province and territory solely to conduct an ATM offering. We propose, given the trading volumes and significant marketplace oversight and activity that occurs in Ontario, ATM offerings should only be required to be registered in the jurisdiction of the issuer’s principal regulator as well as Ontario, if different.

Removal of Instalment Receipts

RBC supports removal of instalment receipts from the Proposed Amendments.

Issuance of Debt and other Securities under an ATM Distribution

The Proposal seeks input on whether the Proposed Amendments should permit the issuance of debt securities under an ATM distribution. We do not support the use of ATMs for debt securities. In our view, it would be incompatible with how the bond market functions, and could have a negative effect on market transparency and liquidity.

The Canadian bond market is structured on a “market maker” system, in contrast with the Canadian equity market which utilizes an “on exchange” structure. There are a number of ramifications and implications of this important difference when considering ATM distributions. Trading liquidity in any particular issuer’s Canadian debt instruments is fragmented across a number of different maturity dates, as well as sometimes across a large number of individual bond series, each one of which can be quite illiquid independently.

Bond market participants trade based on certain expectations, one of which is that the amount of principal outstanding is known and fixed, barring a formal re-opening of the offering done in a manner consistent with the original issuance. If market expectations were altered such that an issuer could access an issuance of any or all of its bonds at any time, even in modest amounts, traders could be uncertain of such total outstanding amount and therefore be discouraged from showing aggressive bids. Over time and to varying degrees issue-by-issue, this could lead to “no bid, only offered” trading conditions, which would be a negative result for all bond market stakeholders: issuers, investors, market makers and dealers.

We note that issuers who use the private placement route for debt (a significant and growing percentage of issuances) currently have the ability to undertake “ATM-like” continuous issuances under existing market and prospectus exceptions. However, we do not observe issuers pursuing this approach, which we expect is largely out of concern for their bonds gapping wider and becoming less liquid (as per above).

To summarize our perspectives on the issuance of debt securities under an ATM distribution and to underscore our view that ATMs are not appropriate for Canadian fixed income markets, RBC does not believe that:

- There is meaningful issuer demand for this accommodation;

- ATM distributions of debt securities by issuers would be well received by retail and institutional investors; or
- Such accommodation suits the different market structure of the bond market (as compared to the equity market).

While the commentary above focuses on the unlisted bond market, RBC does not believe that the Proposed Amendments should permit an ATM issuance of listed fixed income securities or equity linked instruments (such as preferred shares or convertible debentures) either. As such instruments are also traded based on the expectation that the amount of principal outstanding is known and fixed, we expect a similar rationale to the above would be applicable.

Non-redeemable Investment Funds and Exchange-Traded Mutual Funds

The Proposal seeks input with regard to non-redeemable investment funds (NRIFs) and exchange traded funds (ETFs) that are not in continuous distribution (ETFNCDs). RBC believes it is reasonable to permit NRIFs and ETFNCDs to conduct ATM distributions, provided that new units are issued for net proceeds of not less than the then current net asset value per unit and units do not trade at an excessive premium to net asset value. By increasing the number of units outstanding of a given fund, overall liquidity (as measured by trading volumes) may be increased, and fixed costs of the fund may be allocated over a greater number of units thereby lowering the per unit management expense ratio.

Consistent with National Instrument 81-102 – *Investment Funds*, we expect NRIFs and ETFNCDs would be prohibited from issuing units under an ATM for less than the fund's net asset value per unit. Given the restriction against issuing securities on a dilutive basis, any such funds wishing to conduct an ATM distribution should be required to calculate and post net asset value daily. RBC believes NRIFs with significant illiquid assets should be restricted from conducting ATM distributions, and that a threshold of 20% or 25% would be appropriate.

Execution on an ATM Exchange

We note that the Proposed Amendments would require ATM distributions to take place on an "ATM Exchange" as defined in the proposed amended National Instrument 44-102 – *Shelf Distributions*, s.9.1. The proposed definition would seem to limit execution in Canada to the TSX, TSX Venture, Aequitas NEO and the Canadian Securities Exchange, and notably not allow execution on any of the alternative trading systems ("ATs") established under the regulatory framework set out in National Instrument 21-101 - *Marketplace Operation* and National Instrument 23-101 - *Trading Rules*.

As the CSA is aware, Canadian brokers are required by Rule 3300 of the IROC *Dealer Member Rules* to establish, maintain and ensure compliance with written policies and procedures that are reasonably designed to achieve best execution when acting for a client. Restricting ATM distributions to "ATM Exchanges" as currently defined may have the following negative consequences:

- Potentially foregoing certain best execution factors (price, speed of execution, certainty of execution and overall cost of transaction);
- Unintentional avoidance of trades by passive money managers, demand from algorithmic trading, or trading platforms that generally operate in a venue-agnostic manner; and
- By-passing ETF volumes which often trade on ATs.

RBC understands that under U.S. ATM rules, execution can occur on all markets (including exchanges, ATs and U.S. dark pools). Substantial deviation from U.S. practices in this regard could add a further disincentive for issuers to undertake ATMs in Canada.

We also note that limiting ATM execution to the major Canadian exchanges is a marked departure from the approach under recent CSA exemption orders, and that this significant proposed change to the ATM regime is not discussed in the notice for the Proposed Amendments or in the proposed Companion Policy, and so the reasoning behind the change is not clear.

Cover Page Disclosure of Intention to Qualify ATM Distribution

RBC supports the proposed disclosure on the cover page of a base shelf prospectus where an issuer intends to qualify an ATM distribution.

Designated News Releases

RBC agrees with the proposed “designated news release” approach summarized in 5.6 of Annex B.

Elimination of Monthly Reporting Requirement

RBC does not believe a monthly reporting requirement to be of added value regardless of whether the CSA pursues Option 1 or Option 2 (i.e. regardless of whether the securities of the issuer are “highly liquid”). Relief from this requirement is already regularly provided in recent CSA exemption orders on the basis that issuers provide full disclosure in their quarterly financial statements as to the pace and activity of their programs. Further, issuers have ongoing reporting requirements to their listing exchange which allows issuers to monitor both increases and decreases to their share counts. RBC does not view monthly reporting as adding incremental value to the investment decision of a secondary market purchaser. Consistent with positions taken above, given U.S. ATM rules do not require monthly disclosure, it is unclear what benefit would be obtained by CSA’s imposition of this requirement.

Use of ATMs for Registered Secondary Offerings

While the Proposed Amendments appear to contemplate the use of ATM offerings by issuers only (i.e. for *primary offerings*), we understand that some market participants have questioned whether the use of ATM offerings should also be available to selling shareholders, such as “control persons”, for registered *secondary offerings*. RBC believes the resale avenues currently available to selling shareholders, whether by prospectus or by applicable prospectus exemption such as private placement or pursuant to Section 2.8 of National Instrument 45-102 – *Resale of Securities* are sufficient, and that any ATM framework need only apply to issuers in connection with a primary offering.

Conclusion

We appreciate the opportunity to provide comments and welcome the opportunity to discuss the foregoing with you in further detail. If you have any questions or require further information, please do not hesitate to contact the undersigned.

“Nitin Babbar”

Nitin Babbar
Managing Director and Head of Canadian Equity Capital Markets

Cc:
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, Government of Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Provincial Government of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Department of Justice, Government of Nunavut



August 13, 2019

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)
 Department of Justice and Public Safety, Prince Edward Island
 Nova Scotia Securities Commission
 Superintendent of Securities, Newfoundland and Labrador
 Superintendent of Securities, Northwest Territories
 Superintendent of Securities, Yukon
 Superintendent of Securities, Nunavut

The Secretary
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Me Anne-Marie Beaudoin/
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Dear Sirs/Mesdames,

Re: CSA Notice and Request for Comment – Proposed Amendments to National Instrument 44-102 *Shelf Distributions* and Change to Companion Policy 44-102CP *Shelf Distributions* relating to At-the-Market Distributions

Toronto Stock Exchange (the “**Exchange**”, “**TSX**” or “**we**”) welcomes the opportunity to provide comments on the Canadian Securities Administrators’ (the “**CSA**”) proposed amendments to National Instrument 44-102 *Shelf Distributions* and changes to Companion Policy 44-102CP *Shelf Distributions* related to at-the-market (“**ATM**”) distributions (the “**Proposed Amendments**”). The Exchange strongly supports the CSA’s efforts to further streamline the process for ATM distributions by reporting issuers. We believe that the Proposed Amendments balance the need to reduce the regulatory burden for issuers who wish to conduct ATM distributions, without compromising investor protection.

Toronto Stock Exchange

The Exchange is part of TMX Group Limited, a company that is strongly focused on supporting and promoting capital formation, innovation, good governance and financial markets in Canada and globally through its world class exchanges, including TSX and TSX Venture Exchange (“TSXV”) for equities, and Montreal Exchange for financial derivatives. TSX is a globally recognized, robust stock exchange that lists growth-oriented companies with strong performance track records and is a top-ranked destination for global capital. TSXV is Canada’s leading global capital formation platform for growth stage companies looking to access public venture capital to facilitate their growth, and is an important part of Canada’s vibrant and unique capital markets continuum.

TSX Supports the Proposed Amendments

We strongly support the CSA’s efforts to streamline the process for ATM distributions by codifying the exemptive relief typically granted by the CSA for these distributions. In particular, we support an exemption for the underwriter from the requirement to deliver a prospectus to purchasers of securities in an ATM distribution and an exemption for the issuer and underwriter from certain of the prospectus form requirements, including a relaxation of the form of statement of rights. Our understanding is that this exemptive relief has been granted by the CSA as a matter of course in connection with ATM distributions. Therefore, codifying these exemptions will eliminate the expense issuers incur to prepare exemptive relief applications, which will meaningfully reduce the regulatory burden on issuers.

We note that ATM distributions are not as common in Canada as they are in the U.S. Feedback from our stakeholders indicates that issuers have the perception that ATM distributions are more complicated to undertake in Canada, which leads many interlisted issuers to pursue an ATM distribution only in the U.S. Therefore we believe it is important for the CSA to align rules regarding ATM distributions with those in the U.S. due to the interplay between the Canadian and U.S. capital markets and to foster capital formation activity in Canada. Therefore, we support the CSA’s proposal to remove the restriction that the market value of equity securities distributed under a single ATM distribution prospectus supplement may not exceed 10% of the aggregate market value of the issuer’s outstanding equity securities of the same class. We believe that the removal of this cap will create more alignment between the U.S. and Canadian rules regarding ATM distributions.

TSX Supports Removal of Liquidity Requirements

The Exchange supports the CSA proposal to not impose any liquidity requirements in order for an issuer to conduct an ATM distribution. Based on feedback from our stakeholders, our understanding is that limiting the aggregate number of securities distributed under an ATM distribution on any day to 25% of the trading volume of the securities on all marketplaces on that day is a meaningful impediment to issuers pursuing ATM distributions in Canada. Our understanding is that neither this 25% daily cap nor a “highly liquid securities” test apply to ATM distributions in the U.S. Therefore, the 25% daily cap contributes to the perception that ATM distributions are more complicated to conduct in Canada, which leads issuers to pursue an ATM distribution only in the U.S. and bypass Canada. The Exchange believes that aligning Canada’s rules in this regard with the U.S. rules will address this perception and will increase the availability of ATM distributions to Canadian investors.

The Exchange believes that removing the 25% daily cap will not result in ATM distributions having a material impact on the price of the securities being distributed. As the CSA notes, issuers are already incentivized not to conduct ATM distributions that will have a material impact on the market price of their securities. Similarly, investment dealers are involved in facilitating ATM distributions onto a marketplace. Investment dealers have their own regulatory requirements to not engage in conduct that may disrupt a fair and orderly market, and have expertise in managing orders to limit the negative impact of an ATM distribution on market price. Based on feedback from our stakeholders, the Exchange understands that due to this market discipline, ATM distributions do not typically have a material impact on the price of securities in the U.S., and we expect that the result would be similar in Canada.

TSX Guidance regarding ATM Distributions

Finally, we note that ATM distributions, as distributions of a listed class of securities, require TSX approval according to the TSX Company Manual. TSX expects that ATM distributions will become more common in Canada as a result of the Proposed Amendments. Therefore, TSX is considering issuing guidance to the market in the form of a staff notice regarding how TSX rules apply to ATM distributions in order to offer clarity to the market and help streamline the process for TSX approval of such distributions. TSX believes this will support the CSA's initiative to reduce the regulatory burden associated with ATM distributions in Canada.

The Exchange appreciates the opportunity to provide comments with respect to the CSA's Proposed Amendments regarding ATM distributions. We look forward to continuing a dialogue with the CSA on this issue. We appreciate your consideration of our comments and suggestions, and we would be happy to discuss these at greater length with the appropriate CSA representatives. Please do not hesitate to contact us if you have any questions regarding our comments.

Respectfully submitted,

"Loui Anastasopoulos"

Loui Anastasopoulos
President, Capital Formation & TSX Trust