

Using the ATM to Avoid the Teller - The CSA Approves Amendments to Streamline ATM Offerings

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The Canadian Securities Administrators (“CSA”) have approved amendments (the “Amendments”) to National Instrument 44-102 - *Shelf Distributions* (“NI 44-102”) and Companion Policy 44-102CP *Shelf Distributions relating to At-the-Market Distributions* that eliminate the requirement for reporting issuers to seek exemptive relief in order to conduct an at-the-market offering (“ATM offerings”).¹ Coming into effect on August 31, 2020, the Amendments also revise certain regulatory requirements and distribution limitations that had previously narrowed the use of ATM offerings in Canada.

The key provisions addressed by the Amendments are as follows:

(i) Issuers will no longer be required to seek exemptive relief in order to proceed with an ATM offering. While such relief was typically granted as a matter of course, the process of seeking exemptive relief resulted in additional time and costs for the issuer.

(ii) The aggregate size and value of an ATM offering will no longer be capped at 10% of the aggregate market value of the issuer’s securities subject to the ATM offering, which value was previously calculated as at the last trading day of the month prior to the month during which the first distribution under the ATM offering was completed.

(iii) Distributions under an ATM offering will no longer be capped at 25% of the total daily trading volume of the issuer’s securities subject to the ATM offering on a particular trading day.

(iv) The Amendments have introduced the ability for an issuer in distribution under an ATM offering to issue a “designated news release” in order to incorporate material facts that have materialized after the filing of the ATM offering prospectus supplement into such supplement instead of requiring the issuer to file a new supplement or amended prospectus.

ATM Offerings

ATM offerings are a form of shelf-based prospectus offering where an issuer incrementally distributes securities at prevailing market prices. Under an ATM offering, publicly traded companies, non-redeemable investment funds and exchange-traded mutual funds that are not in continuous distribution distribute new securities with varying prices over an extended period of time. ATM offerings differ from most underwritten offerings where a fixed number of securities are sold at a set price at one time and are predominantly used by issuers with significant trading volume and that may not urgently require a fixed amount of capital at a particular point in time. The flexibility associated with ATM offerings enables issuers to tailor their distribution practices based on current capital needs and more easily adjust to the state of the market by gaining quick access to capital. These offerings can also be cost effective, as underwriter or agent fees are often lower than under more traditional public offerings and marketing fees are typically avoided. In addition, securities issued under an ATM offering are not sold at a discount to market, thereby generating additional proceeds to the issuer and potentiality limiting dilution. Despite the apparent attractiveness of ATM offerings, these offerings have been infrequently relied upon in Canada for raising capital. NI 44-102, the regulatory framework for ATM offerings, was introduced in 2000, but since 2018 there have been less than 130 ATM offerings on either the TSX or TSX-V.²

The Amendments

The costly and time-consuming process of obtaining exemptive relief, and the conditions typically imposed as part of such relief, in connection with conducting an ATM offering was a key consideration in drafting the Amendments. The Amendments seek to reduce undue regulatory burden without compromising investor protection or the efficiency of the capital markets.

Codified Exemptions and Requirements

To facilitate and streamline the use of ATM offerings, issuers will no longer be required to apply to Canadian securities regulators for relief from certain prospectus requirements. Issuers relying on the Amendments must comply with the new requirement to include a note on the cover page of its base shelf prospectus stating that such base shelf prospectus may qualify a future ATM offering. An issuer may also file a “designated news release” containing material facts relating to the issuer in lieu of filing a prospectus supplement or amended prospectus once a supplement qualifying an ATM offering has been filed. A designated news release must be clearly identified as such a news release when filed and the prospectus supplement must make it clear that any designated news release will be deemed to be incorporated by reference into the prospectus when filed.

No Distribution Limitations or Liquidity Requirements

The Amendments will not impose a daily or aggregate cap on the trading volume of a class of securities distributed under an ATM offering. Prior to the Amendments, the value of the securities distributed under an ATM offering could not exceed 10% of the aggregate market value of the issuer’s outstanding securities of the same class. In addition, prior to the Amendments unless considered “highly liquid securities,” the aggregate number of securities sold under an ATM offering could previously not exceed 25% of the trading volume on all marketplaces on that day of the securities in question. While these caps were intended to reduce the risk for a material impact on the price of the securities of the same class currently outstanding, the CSA found them unnecessary as underwriters or agents involved with ATM offerings are already incentivized to preserve a fair and orderly market and are expected to conduct themselves so as to limit any negative impact on market integrity.

Looking Forward and Anticipated Impact

ATM offerings are an appealing and innovative model to access capital. While regulatory burdens and limitations may have limited their use in Canadian markets to date, the Amendments seek to reduce key impediments to their use, while preserving investor protection through existing control measures such as continuous disclosure requirements.

The Amendments have also been extended to apply to all non-redeemable investment funds and exchange-traded mutual funds that are not in continuous distribution, as well as exchange-traded mutual funds that are in continuous distribution. Furthermore, if an issuer has an outstanding base shelf prospectus that was filed prior to August 31, 2020, it will still be able to rely on the Amendments and will not have to re-file its base shelf prospectus to comply with the new cover page disclosure requirements.

The simplified process and relaxed limitations are a welcome change and are more consistent with the rules of the U.S. Securities and Exchange Commission. With the obstacle of exemptive relief removed, issuers will likely be further incentivized to explore the benefits of ATM offerings, which we expect to result in more frequent use of such offerings by Canadian listed issuers.

¹ CSA Notice of Amendments to National Instrument 44-102 *Shelf Distributions* and Change to Companion Policy 44-102CP *Shelf Distributions relating to At-the-Market Distributions*, June 4 2020.

² Based on search results from Certent DisclosureNet as of June 15, 2020.

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