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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
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

c/o

The Secretary
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M^e Anne-Marie Beaudoin
Corporate Secretary
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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).

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.

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).

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.

DAVIES

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,

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