

Chapter 6

Request for Comments

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



Canadian Securities
Administrators

Autorités canadiennes
en valeurs mobilières

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

Request for Comments

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
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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.”;
 - (l) 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 ONTARIO SECURITIES COMMISSION

Introduction

The CSA are proposing the following changes:

- proposed amendments to National Instrument 44-102 *Shelf Distributions*, and
- a proposed change to Companion Policy 44-102CP *Shelf Distributions*.¹

Please refer to the main body of the CSA notice in which this Annex is included.

Description of Anticipated Costs and Benefits of Proposed NI 44-102 Amendments.

1. Overview

As stated in the Notice, the Proposed Amendments have been informed by comments received in response to CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers (CSA Consultation Paper 51-404)*. The Proposed Amendments aim to replace relief that has been required by issuers conducting ATM distributions of equity securities and liberalize the current ATM distribution regime in Canada.

The Proposed Amendments will reduce the regulatory burden for issuers and agents who wish to conduct ATM distributions, as these stakeholders will no longer have to incur costs associated with obtaining relief, such as application and legal fees, estimated to be approximately \$15,000 per application. The speed at which issuers and agents will be able to conduct ATM distributions will also be improved as such distributions will be readily available to market participants who qualify to distribute ATM securities under the Proposed Amendments.

In addition, the Proposed Amendments are expected to increase the number of ATM distributions conducted in Canada, which will in turn benefit Canadian exchanges and certain Canadian investment dealers.

Investor protection is not expected to be compromised, as the relevant investor protection conditions currently found in the exemptive relief orders have been incorporated into the Proposed Amendments.

We are of the view that the regulatory costs associated with the Proposed Amendments are minimal and are outweighed by the benefits of the Proposed Amendments to stakeholders.

2. Affected Stakeholders

2.1 *Reporting Issuers*

Reporting issuers will benefit from the Proposed Amendments as they will no longer have to incur legal and regulatory expenses associated with applications for exemptive relief. ATM distributions will also be readily available to qualifying issuers, thereby eliminating the time delay associated with the application process.

2.2 *Investment Dealers*

Investment Dealers will also benefit from the Proposed Amendments in the same manner as reporting issuers. Under the existing regime, investment dealers without a U.S. affiliate are also at a competitive disadvantage because issuers that are cross-listed may elect to issue securities by way of an ATM distribution in the U.S. only, due to the complexity of the Canadian ATM model. By removing the costs and time delays associated with the Canadian regime, the Proposed Amendments are expected to encourage ATM distributions in Canada which would result in an additional benefit for certain investment dealers.

2.3 *Exchanges*

The Canadian exchanges, namely the TSX, TSXV, CSE and Neo/Aequitas will also benefit from the Proposed Amendments. Much as with the investment dealers noted at section 2.2, Canadian exchanges are at a disadvantage to their U.S. counterparts with respect to ATM distributions. Cross-listed issuers often decide to conduct ATM distributions solely over a U.S. exchange in

¹ The proposed change provides guidance in the application of the Proposed Amendments.

order to avoid the costs and delays associated with the existing regime in Canada. The Proposed Amendments are expected to encourage ATM distributions in Canada, which could result in an increase in revenue for Canadian exchanges.

3. Non-Affected Stakeholders

3.1 *Investors*

The impact of the Proposed Amendments on investors (both institutional and retail), has also been considered. We note that the Proposed Amendments have been informed by stakeholder comments received as a result of CSA Consultation Paper 51-404, including from investor advocacy groups. The Proposed Amendments also include relevant conditions from the ATM exemptive relief orders aimed at protecting investors. We are of the view that institutional and retail investors will be neither negatively nor positively affected by the Proposed Amendments considering that no substantive changes have been made to the investor protection conditions included in historical relief orders.

4. Description of Anticipated Costs and Benefits of the Proposed Revisions

There are currently approximately 2,629 listed issuers in Canada² of which 261 issuers are cross-listed on a U.S. exchange.³

At the end of 2017 there were approximately 3,600 publicly listed companies in the U.S.⁴ and for year ended December 31, 2017, approximately 290 ATM distributions were announced. Considering that only 3 ATM distributions were announced in Canada in 2017, it appears that a larger proportion of U.S. listed issuers make use of ATM distributions than Canadian issuers.

Stakeholders have informed the CSA that Canadian reporting issuers are at a competitive disadvantage to their counterparts in the U.S. under the existing ATM distribution framework.⁵ Stakeholders have also indicated that cross-listed issuers have incentive to pursue financing by way of a U.S. only ATM offering.⁶

Since 2010, 24 Canadian reporting issuers have conducted 30 ATM distributions and committed to raising approximately \$2.76 billion in capital. This is compared to approximately 1435 distributions announced by 885 issuers in the U.S. with a total commitment amount of \$245 billion during the same period.

Of the 30 ATM distributions by Canadian issuers, 5 were in Canada only, 3 were conducted in both Canada and the U.S. and 22 were conducted in the U.S. only. A chart detailing the commitment amounts in each jurisdiction can be found at Figure 1.

Figure 1.

ATM Distributions by Canadian Reporting Issuers since 2010		
Jurisdiction	Total number of ATMs	Total Commitments
Canada	5	\$1.33 billion
Cross-Border	3	\$610 million
U.S.	22	\$822 million
Total	30	\$2.76 billion

A significant number of cross-listed issuers appear to have conducted ATM distributions exclusively in the U.S. since 2010 and these distributions represent approximately one-third of total commitments under such distributions during the same period.

We further note that the OSC has granted approximately 32 applications for exemptive relief for ATM distributions since 2010. The difference between the number of decisions granted and the number of issuers that have offered securities under an ATM distribution can be accounted for by the fact that, under the current regime, issuers and investment dealers must obtain relief if (i)

² This figure is based on (i) 804 TSX (excluding exchange-traded funds and closed-end funds) and 1,707 TSXV listed issuers as of December 31, 2018; (ii) 112 CSE listed issuers as of December 21, 2018 and (iii) 6 NEO Aequitas listed issuers as of December 21, 2018. Please see the December 2018 MiG Report and related MiG Lists for further information regarding TSX and TSXV issuers <https://www.tsx.com/listings/current-market-statistics> consulted on January 15, 2019.

³ This figure includes issuers listed on Nasdaq, NYSE, NYSE Markets, and the OTC Markets.

⁴ Bloomberg Editorial Board, "Where Have All the Public Companies Gone?", Bloomberg Opinion, April 9, 2018 <https://www.bloomberg.com/opinion/articles/2018-04-09/where-have-all-the-u-s-public-companies-gone> consulted on January 11, 2019.

⁵ CSA Staff Notice 51-353 p. 13.

⁶ CSA Staff Notice 51-353 p. 13. Please also see Comerford, Jason; Lando, Rob; and Chai, Jie, "At-the-market (ATM) offerings using the Multijurisdictional Disclosure System (MJDS): How the MJDS can turn your U.S. listing into an automated teller machine (the other kind of ATM)" dated April 30, 2018. <https://www.osler.com/en/resources/cross-border/2018/at-the-market-atm-offerings-using-the-multijurisdictional-disclosure-system-mjds> consulted on January 7, 2019.

an issuer anticipates distributing securities by way of an ATM and (ii) prior to the two parties entering into an equity distribution agreement. If an issuer does not end up conducting an ATM distribution or if the two parties do not enter into an equity distribution agreement, then the relief will not be used.

Direct Effects

We have estimated that it takes on average, approximately 16 hours to process a routine application for ATM relief. Based on this figure, we have assumed that external legal counsel may require approximately 32 hours for this type of application. Typically, a lawyer with approximately 2 to 5 years' experience would represent an issuer on an ATM application and the national average hourly rate for a lawyer with this level of experience is \$251.40.⁷ Based on these assumptions, the total amount in legal fees per ATM application is approximately \$8,000.

In addition to the fees incurred to retain counsel, filers must also pay a \$7,000 application fee to the OSC in accordance with Appendix C of OSC Rule 13-502 *Fees*. Accordingly, an issuer and investment dealer that wish to distribute securities by way of an ATM will incur a total cost of approximately \$15,000 per relief application.

The above-noted cost does not include any cost associated with time spent by an issuer's and an investment dealer's management. We note that management is typically involved in the review and approval of a relief application and the associated cost will vary based on an executive's salary and prior experience with ATM applications. This time should be considered in the overall cost of the relief.

We note that under the current regime, an ATM order is valid only for the duration of a base shelf prospectus which, pursuant to NI 44-102, is 25 months. Consequently, the cost noted above may represent a recurring expense for market participants.

The Proposed Amendments will eliminate the above-noted costs completely resulting in an immediate benefit to issuers and investment dealers.

Indirect Effects

Part of the complexity inherent in the existing Canadian ATM distributions model can be attributed to the time required to obtain relief.⁸ Accordingly, another benefit that will result from the Proposed Amendments, but which is less easily quantified, is the speed within which an issuer will be able to bring an ATM offering to market. Again, staff requires approximately 16 hours to process a routine ATM application. This time is typically spread out over the course of several weeks and involves multiple steps including, but not limited to: (i) reviewing an application; (ii) issuing comments to filing counsel, (iii) resolving outstanding issues; (iv) drafting recommendations and (v) securing time with Commission panel members responsible for granting the relief. The OSC service standard for routine applications is 40 business days⁹ and it is not uncommon for the review process to take this amount of time. Under the Proposed Amendments, issuers will no longer be subject to application processing times as ATM distributions will be readily available to market participants who qualify under the Proposed Amendments. This will allow issuers to raise capital more quickly and efficiently than under the existing framework.

Considering that there are approximately 524 Canadian issuers with highly-liquid securities,¹⁰ we are of the view that approximately 20% of reporting issuers in Canada could benefit from the Proposed Amendments, if Option 1 is implemented. 100% of issuers could benefit from the Proposed Amendments if Option 2 is implemented. However, the actual use of ATM distributions will depend on market conditions and the capital needs of individual qualifying firms.

Rule-making authority

In Ontario, the following provisions of the *Securities Act* (the Act) provide the Commission with authority to make the Proposed Amendments:

- Subparagraphs 16 (iii) and (ix) of subsection 143(1) of the Act authorize the Commission to make rules in respect of, or varying the Act to facilitate, expedite or regulate in respect of, the distribution of securities, including by establishing:

⁷ Bruineman, Marg. "The right price: Canadian Lawyer's 2018 Legal Fees Survey shows some bright spots for law firms despite a highly competitive market" Canadian Lawyer, April 2018
https://www.canadianlawyermag.com/staticcontent/AttachedDocs/CL_Apr_18_LegalFeesSurvey.pdf consulted on January 7, 2019.

⁸ *Ibid* note 5.

⁹ Please see the OSC's service commitment for more information: http://www.osc.gov.on.ca/en/About_service-standards_index.htm consulted on January 7, 2019.

¹⁰ Please see IIROC's list of highly-liquid securities <http://www.iroc.ca/industry/rulebook/Pages/Highly-Liquid-Stocks.aspx> consulted on January 7, 2019.

Request for Comments

- requirements in respect of distributions of securities on a continuous or delayed basis, and
- provisions for varying withdrawal rights
- Paragraph 53 of subsection 143(1) of the Act authorizes the Commission to make rules providing for exemptions from or varying the requirements of section 71.

Alternatives Considered

An alternative considered was to maintain the *status quo*, which requires issuers to obtain exemptive relief prior to issuing securities by way of an ATM distribution. For the reasons stated in the cost-benefit analysis above, we are of the view that the *status quo* imposes an undue regulatory burden on market participants and the benefit of adopting the Proposed Amendments outweighs any associated regulatory cost.

Reliance on Unpublished Studies

In developing the Proposed Amendments, we are not relying on any significant unpublished study, report or other written material.