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Barristers & Solicitors

LEGAL CURRENCY

A Client Communication

Amendments to At-The-Market Offering Regulatory Framework

On June 4, 2020, the Canadian Securities Administrators ("**CSA**") published final amendments (the "**Amendments**") to National Instrument 44-102 *Shelf Distributions* and its companion policy (collectively, "**NI 44-102**") that streamline at-the-market distributions ("**ATM Offerings**") in Canada, and are designed to reduce regulatory burdens for issuers, exchanges and investment dealers. The Amendments, which will become effective on August 31, 2020, will allow ATM Offerings in Canada to proceed without the existing need for an exemptive relief order from Canadian securities regulators.

I. BACKGROUND

A. "At-The-Market" Equity Offerings and its Advantages and Disadvantages

In Canada, ATM Offerings allow an issuer to conduct at-the-market offerings from time to time using a shelf prospectus to, or through, a registered dealer, who then sells into the trading market at prevailing market prices on the issuer's behalf pursuant to a distribution agreement. After legislative changes in the U.S. in 2008, the use of ATM Offerings in the U.S. has increased dramatically, while use of such offerings in Canada has thus far been comparatively less.

In establishing an ATM Offering, the issuer sets a maximum number of securities to be issued, and then determines on an ongoing basis, and at its option, how many securities to issue and sell by setting the specific minimum price, quantity of securities and sales timing. This level of control provides the issuer with a fair amount of flexibility in selling their equity securities and allows the issuer to match its capital structure to its ongoing needs.

Furthermore, ATM Offerings allow the issuer to sell its securities on shorter notice and at lower cost as compared to traditional methods, thus providing issuers with timely access to the public equity market. ATM Offerings also have a smaller market impact compared to traditional follow-on offerings, as the issuer can raise capital by selling newly issued shares directly into the trading market, without having to market and announce the offering. Thus, shares are able to "dribble" into the market, without impacting the issuer's stock price.

ATM Offerings also require relatively little management involvement and marketing efforts. For example, ATM Offerings require no "road shows" and involve only limited prospectus preparation and delivery requirements. Accordingly, distribution costs for ATM Offerings are also typically less than for traditional prospectus offerings.

Despite its advantages, ATM Offerings tend to be substantially smaller than traditional follow-on offerings, and therefore, may not be as useful to issuers seeking to raise a relatively large amount of capital. Furthermore, the price of ATM Offerings depends on market pricing, and as a result, the cost of raising capital may fluctuate as the market fluctuates. Although ATM Offerings allow issuers to "dribble" shares into the market on short notice, it is still a form of prospectus offering, and thus is not as stealthy as private placements, which are typically announced only after pricing.

Because of their "dribble out" nature, issuers should review volume and liquidity of their traded securities in evaluating an ATM Offering.

B. Canada's ATM Offering Regime (prior to Amendments)

Generally, securities to be issued in an ATM Offering are first required to be qualified for distribution under a base shelf prospectus and a prospectus supplement. Furthermore, prior to the Amendments, in order to implement an ATM Offering distribution program, the issuer and its registered dealer were required to obtain discretionary exemptive relief from Canadian securities regulators: (i) from the requirement to physically deliver a prospectus to purchasers in the ATM Offering; (ii) to state that the right of purchasers to withdraw from the purchase during the two business days after the delivery of the prospectus does not apply to an ATM Offering; and (iii) to state that the right of action against a dealer for non-delivery of the ATM Offering prospectus does not apply. Additionally, NI 44-102 limited the market value of securities issuable in a single ATM Offering prospectus supplement to 10% of the aggregate market value of the offered class of securities as at the last trading day of the month before the month in which the first trade under the ATM Offering is made (the "**10% Aggregate Cap**").

In addition, the exemptive relief orders typically imposed certain conditions on ATM Offerings, including:

(a) a cap on the number of shares that may be sold on the Toronto Stock Exchange (the "**TSX**") or any other Canadian marketplace on any trading day of 25% of daily trading volume (the "**25% Daily Sales Cap**"); and

(b) a requirement that certain issuers file on SEDAR, for any month during which shares are sold on a Canadian marketplace under the ATM Offering program, a report disclosing the number and average price of shares distributed over the month, as well as total gross proceeds, commission and net proceeds, within seven calendar days after the end of the month (the "**Monthly Reporting Requirement**").

II. <u>THE AMENDMENTS</u>

A. <u>Codifying Exemptive Relief Requirements</u>

Generally speaking, the Amendments codify the terms typically found in ATM exemptive relief orders, and are intended to eliminate the need for issuers and underwriters to apply for exemptive relief from applicable securities commissions.

Pursuant to the Amendments, an ATM prospectus will be required to state that purchasers of equity securities distributed under an ATM Offering do not have a right to withdraw from an agreement to purchase such securities and have no remedies of rescission or damages for no-delivery of the associated prospectus. However, remedies against an issuer or underwriter respecting a misrepresentation in the ATM prospectus or associated documents will remain unaffected by non-delivery of the prospectus.

Other provisions that are typically found in ATM exemptive relief orders have also been codified under the Amendments, including:

(i) the ATM Offering must be made through an investment dealer acting as an underwriter in connection with the ATM Offering;

(ii) the issuer must issue and file a news release announcing that it has entered into an equity distribution agreement with the investment dealer, that an ATM prospectus has been, or will be, filed, and specifying where and how a purchaser of a security under the ATM Offering may obtain copies of the distribution agreement and the ATM prospectus;

(iii) the issuer must file a copy of the distribution agreement;

(iv) the issuer must disclose the ATM Offering if it constitutes a material fact or material change in respect of the issuer; and

(v) an underwriter of an ATM Offering must not enter into transactions intended to stabilize or maintain market prices, including any transaction that would result in an over-allocation position in the securities.

B. <u>Removal of the 10% Aggregate Cap</u>

The CSA recognized that the 10% Aggregate Cap was an impediment to the establishment of ATM Offerings in Canada. As a result, the Amendments eliminate the 10% Aggregate Cap, on the basis that the dilution concerns underlying the 10% Aggregate Cap are addressed via other mechanisms.

C. <u>Removal of the Daily Sales Cap</u>

The Amendments eliminate the 25% Daily Sales Cap typically required previously, on the basis that these liquidity requirements are not necessary since issuers are already incentivized not to conduct ATM Offerings that will materially impact the market price as it would result in a negative effect on share price due to dilution.

D. Elimination of Monthly Reporting Requirement

The Amendments eliminate the Monthly Reporting Requirement, provided that the issuer, 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, discloses: (i) the number and average price of the securities distributed under the ATM prospectus, and (ii) the aggregate gross and net proceeds raised, and the aggregate commissions paid or payable, under the ATM prospectus during the annual or interim period. If not included in its continuous disclosure documents, such information must be disclosed in a separate report within 60 days after the end of the interim period or 120 days after the end of the annual period.

E. Removal of Instalment Receipts

Under the current NI 44-102 rules, instalment receipts convertible into equity securities are eligible securities for an ATM Offering in certain circumstances. The Amendments eliminate this option, as there is no market demand for such issuances.

F. Cover Page Disclosure

The Amendments impose a new requirement that the cover page of the base shelf prospectus for an ATM Offering program state that it may qualify an ATM distribution.

G. Closed-End Funds & ETFs

The Amendments permit ATM Offerings by closed-end funds and ETFs that are not in continuous distribution and would not impose any additional requirements on such funds beyond what is already required under National Instrument 81-102 *Investment Funds* ("**NI 81-102**"). Furthermore, all mutual funds that are traded on an exchange that are in continuous distribution, and therefore meets the definition of an "ETF" in National Instrument 41-101 *General Prospectus Requirements* may also rely on the Amendments, and would be required to comply with all requirements applicable to the ETF. A mutual fund that is traded on an exchange that frequently makes ATM distributions would be considered to be in continuous distribution, and must therefore also comply with all ETF requirements.

Investment funds conducting ATM Offerings must include a statement in the prospectus that any ATM Offerings will be conducted in accordance with Section 9.3(2)(a) of NI 81-102.

H. Designated News Releases

The Amendments to the companion policy to NI 44-102 permit an issuer that disseminates a news release disclosing information constituting a "material fact" to identify such news release as a "designated news release" that will be deemed to be incorporated by reference into the ATM prospectus. This allows an issuer to ensure that an ATM prospectus includes full, true and plain disclosure of all material facts without having to file an additional prospectus supplement or amended prospectus.

I. Certificates

The Amendments include certificates from an issuer and the selling agent that are required to be included in the base shelf prospectus and prospectus supplements, and are to be in a form as required by Sections 9.5 and 9.6 of NI 44-102. These certificates are forward looking, and confirm that the ATM prospectus provides full, true and plain disclosure of all material facts relating to the securities distributed under the ATM Offering.

J. Transition Period

For issuers who have an outstanding base shelf prospectus filed prior to August 31, 2020, and under which the issuer has an exemptive relief order, such issuer will not be required to re-file the base shelf prospectus. Any discrepancies between the exemptive relief order and the Amendments can be addressed in the issuer's prospectus supplement.

III. IMPLICATIONS

The Amendments reduce the regulatory burden on issuers by removing the need for issuers to apply for exemptive relief to conduct ATM Offerings and gives issuers a faster and more cost-effective way to raise capital. The removal of the 10% Aggregate Cap and the 25% Daily Cap further reduces impediments to the use of ATM Offerings. As a result of the foregoing, the frequency of ATM Offerings conducted in Canada may increase as issuers may look to take advantage of the increased flexibility and reduced costs.

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