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August 6, 2019

The Secretary  
Ontario Securities Commission  
20 Queen Street West, 22nd Floor  
Toronto, Ontario M5H 3S8

and

Me Anne-Marie Beaudoin  
Corporate Secretary  
Autorité des marchés financiers  
800, rue du Square Victoria, 4e étage  
C.P. 246, Place Victoria  
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

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Superintendent of Securities, Government of Prince Edward Island  
Nova Scotia Securities Commission  
Superintendent of Securities, Provincial Government of Newfoundland and Labrador  
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